Environmental Law Compliance

Proposition 65's Big Comeback in California

By Rosemary K. Carson and Bernadette M. Stafford

Even minimal emissions from common construction materials can trigger the Act's application.

Environmental consciousness is affecting every industry in the nation, and construction is no exception. Perhaps the spur is worldwide concern over global warming and sources of energy. Perhaps the motivation is personal unease over children playing with toxic toys or sleeping in toxic cribs. Whatever the reason for its surging popularity, "going green" is a hot topic for companies in the construction business in California.

The green movement has also piqued the interests of California's Prop. 65 vigilantes, as evident in the recent upsurge of "Notices of Intent to Sue" for failure to comply with Prop. 65 (hereafter referred to as "notice"). From late March to May 2008, five citizen enforcers served the bulk of the 109 notices received by the California attorney general, addressing practices of a variety of contractors, including hand tool, paint and cement companies. The heightened activity compelled the California chapter of the Associated General Contractors to alert its membership to the rise in notices and the need to comprehensively review the Prop. 65 requirements. To avoid scrutiny by public prosecutors, consumer advocacy groups, and private citizens, it is imperative that any corporation performing construction within the state of California internally verify strict compliance with Prop. 65.

Background

In November of 1986, California voters overwhelmingly approved Prop. 65, drafted to address concerns about exposure to toxic chemicals. Also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, Prop. 65 requires the state, through the Office of Environmental Health Hazard Assessment (OEHHA), to publish a list of chemicals known to cause cancer, birth defects, or other reproductive harm. The list, updated yearly by OEHHA, currently contains approximately 800 chemicals, including auto exhaust, common construction materials, secondhand smoke and believe it or not—testosterone.

Prop. 65 is applicable to a company with 10 or more employees that operates or sells products in California, and it requires a company to issue a "clear and reasonable" warning before knowingly and intentionally exposing anyone to a listed chemical. The

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warning can be issued in a variety of ways, such as labeling a listed chemical, posting signs at a worksite, or publishing notices in a newspaper. Once OEHHA lists a chemical, a business has 12 months to comply with the warning requirements. In addition, a company is prohibited from knowingly discharging a listed chemical into a drinking water source. A business has 20 months to comply with the water discharge prohibition once a chemical is added to the list. Not surprisingly, government entities are exempt from these requirements.

By law, a warning must be given for a listed chemical unless the business demonstrates that exposure to it poses "no significant risk level" (NSRL) of cancer or "no observable effect level" (NOEL) of birth defects or reproductive harm. NSRL is the level of exposure to the listed chemical every day for 70 years that would result in no more than a 1/100,000 chance of developing cancer for an exposed person. NOEL is the level of exposure determined to not cause harm to humans or laboratory animals divided by 1,000. If a business exceeds 1/1000 of the NOEL, it must post a Prop. 65 warning notice.

OEHHA has also developed a list with specific dosage levels—safe harbor levels—for each chemical, to assist a business in determining whether a warning is necessary, or discharge of a chemical into a drinking water source is prohibited. A business has safe harbor from Prop. 65 requirements if exposure to a chemical occurs at or below its OEHHA level. A business may, however, choose to provide a warning simply based on its knowledge about a listed chemical's presence without evaluating the exposure level.

Construction Industry

Prop. 65's regulations are especially relevant in the construction industry, where even minimal emissions of a toxic airborne or "environmental exposure" during construction activities can trigger the warning requirements. Environmental exposure encompasses contact with ambient air, indoor air, drinking water, standing water, running water, soil, vegetation, or manmade or natural substances, either through inhalation, ingestion, skin contact or otherwise. Cal. Code of Regs., tit. 22, 12601 (2008). The term "expose" has also been broadly defined to include "all anticipated means of bringing individuals into contact with chemicals." *Consumer Cause, Inc. v. Weider Nutrition Int'l, Inc.*, 92 Cal. App. 4th 363, 368 (2001).

Contractors should post conspicuous clear and reasonable warning signs in the workplace in areas where employees and the general public can be exposed to a listed chemical. The typical warning language reads: "WARNING: This area contains a chemical known to the State of California to cause birth defects or other reproductive harm." Contractors should also maintain a current list of Prop. 65 chemicals, which can be found, with their corresponding safe harbor levels at http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Enforcement

California's attorney general is charged with enforcing Prop. 65, but district or city attorneys can enforce it as well. A citizen or organization can bring a Prop. 65 suit in the general public's behalf, provided the citizen or organization initially files the proper 60-day notice with the alleged violator, the attorney general, and the district attorney, city attorney, or prosecutor in whose jurisdiction the alleged violation occurred. If the notice alleges a failure to warn, the citizen or organization must also include a certificate of merit indicating (1) the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise, (2) the expert has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and (3) the expert believes there is a reasonable and meritorious case for private action. Factual information supporting the certificate of merit should be attached to the notice submitted to the attorney general; although, pursuant to California Health & Safety Code 25249.7(h)(1), this information is not discoverable.

A citizen or organization can proceed with a lawsuit if the government chooses not to bring suit 60 days after notice to the company. A public or private Prop. 65 prosecutor is entitled to 25 percent of all civil and criminal penalties awarded against the defendant. This may be a hefty sum, given that penalties for violating Prop. 65 can be as high as $2,500 per violation per day. A California Unfair Competition Law violation may piggyback on a Prop. 65 claim, which also provides for $2,500 per violation if the action is brought by a public prosecutor. Cal. Bus. & Prof. Code §17206(a). A plaintiff can attempt to recoup attorney's fees under California Code of Civil Procedure section 1021.5 if the suit is successful.

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To top that, some plaintiffs have set up shell charitable organizations to receive settlement "donations." Others have issued press releases in which they describe their heroic efforts to protect Californians from bad chemicals and request donations from unwary patrons for future litigation. Unfortunately, economic incentives have sometimes overshadowed legitimate environmental concerns or injuries.

The most telling case highlighting monetary motivation behind some Prop. 65 suits is *Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185 (2006). A plaintiff watchdog organization sent two sets of notices to more than 170 apartment owners. The first set of notices claimed that the owners violated Prop. 65 because (1) the apartment parking lots exposed tenants and visitors to gasoline exhaust without a warning, and (2) each apartment did not universally prohibit smoking on the premises, thus exposing tenants and visitors to secondhand smoke without a warning. The second set of notices incorporated the initial allegations, but added alleged exposures to Prop. 65 chemicals contained, *inter alia*, in the apartment roofing, furniture foam, heating system gas, paint, pens, carbonless copy paper and toner, crayons, ceramic glazes, garden pes-

ticides, light wires and brass door knockers. The second notice totaled 21 pages of single-spaced type and, in the court's words, made each apartment "*indistinguishable from every other building in the state*." *Id.* at 1189 (emphasis original).

On review of the settlement agreement, the appellate court had a heyday, issuing a scouring yet entertaining opinion that seemed to finally vocalize what many had been thinking about the case:

> Dried paint. Furniture. Parking lots. Wiring. Really…. It's just pulling a list off the internet of products that are already covered by Prop. 65 warnings and saying—well, at least some of these products might be carried into an apartment, and since we don't see a Prop. 65 warning in the lobby, we get to collect attorney fees…. If all the notice conveys is that—well, it's a building with paint, furniture and a parking lot—or if the notice is so much shot-gun boilerplate of every carcinogenic molecule currently known—then meaningful review is impossible.

Id. at 1211–12. The court described a Prop. 65 bounty-hunter action as so "absurdly easy" that the attorney's fees paid by defendants to avoid litigation are "objectively unconscionable." *Id.* at 1217. Rather than the half-million dollars the plaintiffs requested in attorney's fees, the court opined that the bounty hunters' "legal work merited an award closer to a dollar ninety-eight." *Id.* at 1219. The court rejected the settlement, reversed the entry of judgment, and ordered the case dismissed.

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Responding to a Notice to Sue under Prop. 65

If a company receives a notice, it should initially verify that the notice meets Prop. 65 requirements. Cases have been dismissed due to inadequacy of notice. *See Consumer Def. Group v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185 (2006) (holding plaintiff's presuit notices provided to attorney general and trade group were inadequate because almost all allegations were so broad as to apply to every single building in California); *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738 (2001) (finding consumer group's notices to appropriate prosecutors and agencies were inadequate due to lack of specificity as to what constituted violations; thus, citizen enforcement suits could not be maintained). Notice recipients should then review internal compliance records and examine the claims for possible defenses. A good faith effort should be made to comply with Prop. 65 standards during the investigatory period because in assessing a penalty, the judge will review a notice recipient's action after notice is received.

Several defenses exist to Prop. 65 violation claims. A company can attempt to absolve itself by proving discharge was not knowing and intentional. Proof that discharge was negligent or accidental could negate a knowing and intentional allegation. Demonstrating good faith efforts to comply with Prop. 65 by testing the air or consulting an environmental expert further undermine a knowing and intentional violation. A company could also attempt to prove scientifically that the claimant's exposure to the listed chemical posed an NSRL of cancer or an NOEL of birth defects or reproductive harm. *See Consumer Advocacy Group, Inc. v. Kintetsu Enters. of Am.*, 141 Cal. App. 4th 46, 59 (2006) (finding no judicial controversy as to chemicals parties agreed fell within "no significant risk level" provided under Prop. 65); *see also Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454, 477 (2001) (reversing summary judgment for defendant dental office where dental office did not show by scientific evidence that small amount of mercury in dental amalgam was 1,000 below no observable effect level). This latter approach, however, may involve complicated and costly scientific expertise. *See Consumer Def. Group v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1215 (2006) ("[I]n a case of a negligible, even microscopic 'exposure' (say, to lead in non-friable dried paint), it may take a full scale scientific study to establish the amount of the carcinogen is so low that there is no need for a warning under Health and Safety Code section 25249.10.").

Alleged violators failing to adequately defend themselves against Prop. 65 claims can be enjoined, penalized up to $2,500 per day or more for an Unfair Competition Law violation per violation, and forced to pay attorney's fees. In 2007 alone, Prop. 65 violators paid $2,337,500 in penalties, and they paid $6,740,865 in attorney's fees and costs.

Courts assessing a Prop. 65 penalty consider the following factors: (1) the nature, number and severity of the violations, (2) the economic effect of the penalty on the violator, (3) whether and when the violator took good faith measures to comply with Prop. 65, (4) the willfulness of the violator's misconduct, (5) the deterrent effect that penalty imposition would have on both the violator and the regulated community as a whole, and (6) any other factor that justice may require. Cal. Health & Safety Code §25249.7(b)(2)(A)–(G).

If the company settles with the complainant, California Health and Safety Code Section 25249.7(f)(4) requires the plaintiff to submit the settlement to the court for approval upon noticed motion. The court must make specific findings that (1) warnings required by the settlement comply with Prop. 65; (2) the attorney's fee award is reasonable under California law; and (3) the penalty amount is reasonable based on the criteria for assessing it. The burden is on the plaintiff to produce evidence sufficient to sustain each required finding. Before the court approves the settlement or a judgment is entered, the attorney general's office has the opportunity to object for the record or to work with the parties to resolve issues it deems significant. The attorney general's office can request that resolutions be incorporated into the final determination.

Conclusion

While its benefits to the California environment have been worthwhile, Prop. 65 has its share of snares. As emphasized by the *Consumer Defense* court, its provisions "make the instigation of Prop. 65 litigation easy—and almost absurdly easy." 137 Cal. App. 4th at 1215. The best and most cost-efficient way to avoid these snares is to take preventive measures. FD