of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the helicopter to a location where the requirements of this AD can be accomplished.

Issued in Fort Worth, Texas, on September 4, 1996.

Eric Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 96–23441 Filed 9–12–96; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

Supplement to California State Plan; Request for Public Comment

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Request for public comment: California State Standard on Hazard Communication Incorporating Proposition 65.

SUMMARY: This document invites public comment on a supplement to the California occupational safety and health plan. The supplement, submitted on January 30, 1986, with amendments submitted on November 22, 1986 and January 30, 1992, concerns the State's adoption of a hazard communication standard, which incorporates provisions of the Safe Drinking Water and Toxic Enforcement Act, also called Proposition 65. California also submitted clarifications concerning the standard and its enforcement on February 16 and February 28, 1996. The State's standard is substantively different in both its content and supplemental method of enforcement from the Federal Occupational Safety and Health Administration (OSHA) standard found at 29 CFR 1910.1200. Where a State standard adopted pursuant to an OSHA-approved State plan differs significantly from a comparable Federal standard, the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (the Act) requires that the State standard must be ''at least as effective'' as the Federal standard. In addition, if the standard is applicable to a product distributed or used in interstate commerce, it must be required by compelling local conditions and not pose any undue burden on interstate commerce. OSHA, therefore, seeks public comment on whether the California hazard communication standard meets the above requirements.

DATES: Written comments should be submitted by November 12, 1996.

ADDRESSES: Written comments should be submitted to Docket T–032, Docket Office, Room N–2625, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N3700, Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Ann Cyr, Acting Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone: (202) 219–8148.

A. Background

The Act generally preempts any State occupational safety and health standard that addresses an issue covered by an OSHA standard, unless a State plan has been submitted and approved. (See *Gade, Director, Illinois Environmental Protection Agency* v. *National Solid Wastes Management Association*, No. 90–1676 (June 18, 1992).) Once a State plan is approved, the bar of preemption is removed and the State is then able to adopt and enforce standards under its own legislative and administrative authority. Therefore, any State standard or policy promulgated under an approved State plan becomes enforceable upon State promulgation. Newly adopted State standards must be submitted for OSHA review and approval under procedures set forth in 29 CFR Part 1953, but are enforceable by the State prior to Federal review and approval. (*See Florida Citrus Packers, et. al.* v. *State of California, Department of Industrial Relations, Division of Occupational Safety and Health et al*, No. C–81–4218 (July 26, 1982).)

On May 1, 1973, a document was published in the Federal Register (38 FR 10717) of the approval of the California State plan and the adoption of Subpart CC to Part 1952 containing the decision.

The requirements for adoption and enforcement of safety and health standards by a State with a State plan approved under section 18(b) of the Act are set forth in section 18(c)(2) of the Act and in 29 CFR 1902.29, 1952.7, 1953.21, 1953.22 and 1953.23. OSHA regulations require that States respond to the adoption of new or revised permanent Federal standards by State promulgation of comparable standards within six months of OSHA publication in the Federal Register.

Section 18(c)(2) of the Act provides that if State standards which are not identical to Federal standards are applicable to products which are distributed or used in interstate commerce, such standards, in addition to being at least as effective as the comparable Federal standards, must be required by compelling local conditions and must not unduly burden interstate commerce. (This latter requirement is commonly referred to as the ''product clause.'') OSHA's policy (as contained in OSHA Instruction STP 2–1.117) is to make a preliminary determination as to whether the standard is at least as effective as the Federal standard, and then rely on public comment as the basis for its decision on the product clause issue.

B. Description of the Supplement

Original Hazard Communication Standard

On September 10, 1980, the Governor of California signed the Hazardous Information and Training Act (California Labor Code, sections 6360 through 6399). This Act provided that the Director of Industrial Relations establish a list of hazardous substances and issue a standard setting forth employers' duties toward their employees under that Act. The standard, General Industry Safety Order 5194, was adopted by the State in 1981. Both the Director's initial list and the standard became effective on February 21, 1983. Subsequently, Federal OSHA promulgated a hazard communication standard (29 CFR 1910.1200) in November 1983. The State amended its law in 1985, and, after a period for public review and comment, the California Standards Board adopted a revised standard for hazard communication comparable to the Federal standard on October 24, 1985. The standard became effective on November 22, 1985. By letter dated January 30, 1986, with attachments, from Dorothy H. Fowler, Assistant Program Manager, to then Regional Administrator, Russell B. Swanson, the State submitted the standard (8 CCR section 5194) and incorporated the standard as part of its occupational safety and health plan.

The State hazard communication standard differs from the Federal standard in several respects. The State standard requires that each Material Safety Data Sheet contain certain information including Chemical Abstracts Service (CAS) name and a description in lay terms of the specific potential health risks posed by the hazardous substance. These two State requirements are not included in the Federal standard. However, in a memorandum from John Howard, Chief,

Division of Occupational Safety and Health, enclosed with a letter of February 28, 1996, from John MacLeod, Executive Officer of the California Occupational Safety and Health Standards Board to Regional Administrator Frank Strasheim, the State notes that section 6392 of the California Labor Code provides that provision of a Federal material safety data sheet or equivalent shall constitute prima facie proof of compliance with the standard. The memorandum states, ''Thus, a manufacturer who supplies a MSDS which is accurate and fully complies with the federal OSHA regulation is in compliance in California.''

While the Federal standard allows for release of trade secret information to health professionals, the California standard allows access to such information to safety professional as well. The State argues that this provision is more protective of worker safety, since many safety and health programs are managed by safety professionals who have both safety and health expertise.

Finally, the State standard does not include many of the exemptions and exceptions added to the Federal standard in 1994.

Proposition 65

Subsequently, on January 30, 1992, in a letter from John Howard, Chief, California Division of Occupational Safety and Health, to Regional Administrator Frank Strasheim, the State submitted changes to its hazard communication standard by incorporating provisions found in the State's Safe Drinking Water and Toxic Enforcement Act (Proposition 65). This Act was passed by referendum of the voters of California in 1986. The Safe Drinking Water and Toxic Enforcement Act (California Health and Safety Code sections 25249.5 through 25249.13) and implementing regulations issued by the Office of Environmental Health Hazard Assessment in the California Environmental Protection Agency (22 California Code of Regulations 12601) require that any business with ten or more employees which exposes an individual to a chemical known to the State to cause cancer or reproductive toxicity must provide the individual with a clear and reasonable warning. The regulations provide that the warning may be given through the label of a product or a sign in the workplace and give sample language for the warning. For labels, the warnings which are deemed to meet the requirements of Proposition 65 are: ''WARNING: This product contains a chemical known to the State of California to cause cancer,'' or ''WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.'' For signs, the language deemed to meet the requirements is: ''WARNING: This area contains a chemical known to the State of California to cause cancer,'' or ''WARNING: This area contains a chemical known to the State of California to cause birth defects or other reproductive harm.'' In accordance with Proposition 65, the State annually publishes a list of chemicals known to cause cancer or reproductive toxicity (22 CCR Section 12000).

The provisions of Proposition 65 relating to occupational exposure were incorporated into the California Hazard Communication standard after a January 23, 1991, court order which required the California Standards Board to amend the State's Hazard Communication standard to incorporate the warning protections of Proposition 65. (See *California Labor Federal, AFL–CIO* v. *California Occupational Safety and Health Standards Board*.) (Absent adoption of these additional requirements as occupational safety and health standards under the OSHA-approved California State plan, the Proposition 65 requirements would be preempted as they apply in the workplace.) These changes were adopted on an emergency basis on May 16, 1991, and became effective on May 31, 1991. The permanent standard became effective on December 17, 1991.

Enforcement of Proposition 65

Proposition 65 is enforceable with regard to occupational hazards through the usual California State plan system of citations and proposed penalties which has been determined to be at least as effective as Federal OSHA enforcement. Proposition 65 as incorporated into the State plan provides for the supplemental enforcement mechanism of judicial enforcement procedures including civil lawsuits filed by the Attorney General, district attorneys, city attorneys or city prosecutors. In addition, a private right of action may be brought by any ''person'' in the public interest against any ''person'' for knowingly and intentionally exposing any individual to a chemical known to the State to cause cancer or reproductive toxicity without first giving clear and reasonable warning. The person bringing the action must first give notice to the Attorney General and appropriate local prosecutors, and may proceed if those officials do not bring an action in court within sixty days. In such actions, the burden of proof is on the defendant to demonstrate that the exposure to the listed chemical ''poses no significant risk assuming lifetime exposure at the level in question for substances known to the State to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand times the level in question for substances known to the State to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical. '' (California Health and Safety Code, Section 25249.10(c).)

The law provides for penalties of up to $2500 per day, per violation. The plaintiff may obtain up to 25% of penalties levied against a company found in violation of Proposition 65 for failing to warn the public and/or employees. Numerous such ''bounty hunter'' actions with regard to occupational exposures have been brought in California courts, and many have been settled on varying bases prior to trial.

Other Hazard Communication Provisions

For exposures subject to the remainder of the hazard communication standard, the employer must provide specific information about the chemicals to which employees may be exposed, including, among other things, the identity of the hazardous chemical, potential health risks including signs and symptoms of exposure, precautions for safe handling and use of the chemical, any generally applicable control measures, such as engineering controls, work practices or personal protective equipment, and emergency and first-aid procedures. The provisions of the hazard communication standard apart from Proposition 65 are enforced solely by the Division of Occupational Safety and Health under approved procedures similar to those of Federal OSHA. These include on-site inspections by Division personnel, including the right of employees to be involved in the inspections, citations and proposal of penalties for violations, and opportunity for appeal of citations and penalties. (Proposition 65 is also enforceable by DOSH through this mechanism, but, to date, this authority has not been exercised.)

Public Interest

On April 18, 1995, McKenna and Cuneo, a law firm representing a coalition of chemical manufacturers, filed a petition with OSHA requesting that the California hazard communication standard with its

incorporation of Proposition 65 be rejected as being unduly burdensome on interstate commerce in both its provisions and enforcement mechanism. The Chemical Manufacturers Association and several employers have filed letters in support of the McKenna and Cuneo request, citing difficulties experienced by its members with both the alternative enforcement scheme and the impact on interstate commerce. Other parties have expressed concern to OSHA about the continued enforceability of the private right of action provisions of Proposition 65 in the workplace during the pendency of the OSHA review process. In addition, the Environmental Defense Fund has written asking OSHA to reject the McKenna and Cuneo position and accept the California Hazard Communication standard as it is currently being applied in occupational settings. All of these letters are included in Docket T–032 for this proceeding and are available for public inspection.

C. Issues for Determination

The California Hazard Communication standard is now under review by the Assistant Secretary to determine whether it meets the requirements of section 18(c)(2) of the Act and 29 CFR Parts 1902 and 1953. While Proposition 65 includes provisions relating to public health as well as occupational safety and health, OSHA's review of the law is limited to its occupational aspects as incorporated into the State hazard communication standard. Public comment is being sought by OSHA on the following issues.

1. ''At least as effective'' requirement. The provisions of the California hazard communication standard, other than those incorporating Proposition 65, have been preliminarily determined to be at least as effective as the Federal hazard communication standard (29 CFR 1910.1200). The incorporation of Proposition 65 imposes requirements which go beyond those contained in the Federal standard; therefore, it may be viewed as more effective than the Federal standard. However, the issue has been raised that the different warnings required by Proposition 65 for exposures not otherwise covered by the hazard communication standard make the standard less effective by engendering confusion and failing to give employees information about the chemicals to which they may be exposed and ways to mitigate exposure. In addition, questions have been raised about the effectiveness of occupational safety and health standards being enforced by local attorneys and private parties in addition to the State designee. Therefore, public comment on the effectiveness of the standard as well as the supplemental enforcement mechanism provided for in Proposition 65 is solicited for OSHA's consideration in its final decision on whether or not to approve this California standard.

2. Product clause requirement. OSHA is also seeking through this notice public comment as to whether the California standard:

(a) Is applicable to products which are distributed or used in interstate commerce;

(b) If so, whether it is required by compelling local conditions; and

(c) Unduly burdens interstate commerce.

As noted above, OSHA has already received comments on the California hazard communication standard, and Proposition 65 in particular, from several individual employers and employer groups. These parties have raised several issues concerning the product clause. Under Proposition 65, warnings are required for different substances than those covered by the Federal hazard communication standard, and for different levels of exposure or different health effects for some substances which are covered by the Federal standard. In addition, the State has acknowledged that the provision of information on the Material Safety Data Sheets required by the hazard communication standard may not always be accepted as compliance with Proposition 65. Therefore, some commenters have asserted that manufacturers may need to have products labeled as carcinogens or reproductive toxins in California but not in other States, and must include specific language not required for products destined for other States, thus creating a burden on interstate commerce.

The issue has also been raised that enforcement by private parties may create a burden on interstate commerce by subjecting out-of-State employers and suppliers to inconsistent requirements depending on the circumstances of individual lawsuits and the settlements or decision rendered thereon.

The State addressed both effectiveness and product clause issues in a letter dated February 16, 1996 from John Howard, Chief, Division of Occupational Safety and Health, to OSHA Regional Administrator Frank Strasheim (included in Docket T–032). The State argues that the additional enforcement mechanisms merely supplement the administrative enforcement of the standard by Cal/OSHA and therefore do not detract from its effectiveness. In addition, the State notes that supplemental enforcement is a feature of several Federal laws, including Solid Waste Disposal Act (Pub. L. 98–616) and the Federal Water Pollution Control Act (Pub. L. 92–500).

The State asserts that this standard does not fall within the product clause because it does not require machinery or equipment to be custom-built. The letter cites the Congressional history of section 18(c)(2) of the Act to demonstrate that the discussion focused on avoiding the need for manufacturers to design machinery differently to meet requirements in different States (116 Congressional Record 38381 et seq.). In addition, according to the State's position, the standard does not unduly burden interstate commerce because compliance may be achieved by workplace postings which need not travel in interstate commerce. Finally, the State maintains that the standard is justified by compelling local conditions because the voters of California, in passing Proposition 65, determined that there is a pressing need for additional protection from exposure to toxic chemicals, beyond that provided by the existing Federal hazard communication standard.

D. Public Participation

Interested persons are invited to submit written data, views and arguments with respect to the issues described above. These comments must be received on or before October 15, 1996, and be submitted in quadruplicate to Docket T–032, Docket Office, Room N–2625, U.S. Department of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, DC 20210. Comments under 10 pages long may be sent by telefax to the Docket Office at 202–219–55046 but must be followed by a mailed submission in quadruplicate. Written submissions must clearly identify the issues which are addressed and the position taken with respect to each issue. The State will be given an opportunity to respond to the public comments. Interested persons may request an informal hearing concerning OSHA's consideration of the plan change. Such requests also must be received on or before October 15, 1996, and should be submitted in quadruplicate to the Docket Office, Docket T–032, at the address noted above. The Assistant Secretary will decide within 30 days of the last day for filing written comments and requests for a hearing and opportunity for State response whether substantial issues

have been raised which warrant public discussion, and, if so, will publish notice of the time and place of an informal hearing.

The Assistant Secretary will consider all relevant comments, arguments, and requests submitted concerning these standards, including the record of any hearing held, and will publish notice of the decision approving or disapproving them.

E. Location of Supplement for Inspection and Copying

A copy of the California Hazard Communication standard may be inspected and copied during normal business hours at the following locations: Docket Office (Docket T–032), Room N–2625, U.S. Department of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, DC 20210; Office of the Regional Administrator, Occupational Safety and Health Administration, 71 Stevenson Street, Suite 415, San Francisco, CA 94105; California Division of Occupational Safety and Health, Department of Industrial Relations, 45 Fremont Street, Room 1200, San Francisco, CA 94105.

Authority: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR part 1902, Secretary of Labor's Order No. 1–90 (55 FR 9033).

Signed this 6th day of September, 1996 in Washington, D.C.

Joseph A. Dear,

Assistant Secretary.

[FR Doc. 96–23458 Filed 9–12–96; 8:45 am]

BILLING CODE 4510–26–P

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29 CFR Part 1952

[Docket No. T–031]

North Carolina State Plan; Eligibility for Final Approval Determination; Proposal To Grant an Affirmative Final Approval Determination; Comment Period and Opportunity To Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Proposed final State plan approval; request for written comments; notice of opportunity to request informal public hearing.

SUMMARY: This document gives notice of the eligibility of the North Carolina State occupational safety and health plan, as administered by the North Carolina Department of Labor, for determination under section 18(e) of the Occupational Safety and Health Act of 1970 as to whether final approval of the State plan should be granted.

If an affirmative determination under section 18(e) is made, Federal standards and enforcement authority will no longer apply to issues covered by the North Carolina plan. This notice announces that OSHA is soliciting written public comment regarding whether or not final State plan approval should be granted, and offers an opportunity to interested persons to request an informal public hearing on the question of final State plan approval.

DATES: Written comments or requests for a hearing should must be received by October 15, 1996.

ADDRESSES: Written comments or requests for a hearing should be submitted, in quadruplicate, to the Docket Officer, Docket No. T–031, U.S. Department of Labor, Room N2625 200 Constitution Avenue NW, Washington. DC 20210, (202) 219–7894.

FOR FURTHER INFORMATION CONTACT: Anne Cyr, Acting Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3637, 200 Constitution Avenue NW, Washington, DC 20210, (202) 219–8148.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq , (the ''Act'') provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining Federal approval of a State plan. Procedures for State Plan submission and approval are set forth in regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria set forth in section 18(c) of the Act and 29 CFR 1902.3 and .4, finds that the plan provides or will provide for State standards and enforcement which are at least as effective as Federal standards and enforcement, ''initial approval'' is granted. A State may commence operations under its plan after this determination is made, but the Assistant Secretary retains discretionary Federal enforcement authority during the initial approval period as provided by section 18(e) of the Act. A State plan may receive initial approval even though, upon submission, it does not fully meet the criteria set forth in §§ 1902.3 and 1902.4 if it includes satisfactory assurances by the State that it will take the necessary ''developmental steps'' to meet the criteria within a three-year period (29 CFR 1902.2(b)). The Assistant Secretary publishes a ''certification of completion of developmental steps'' when all of a State's developmental commitments have been satisfactorily met (29 CFR 1902.34).

When a State plan that has been granted initial approval is developed sufficiently to warrant a suspension of concurrent Federal enforcement activity, it becomes eligible to enter into an ''operational status agreement'' with OSHA (29 CFR 1954.3(f)). A State must have enacted its enabling legislation, promulgated State standards, achieved an adequate level of qualified personnel, and established a system for review of contested enforcement actions. Under these voluntary agreements, concurrent Federal enforcement will not be initiated with regard to Federal occupational safety and health standards in those issues covered by the State plan, where the State program is providing an acceptable level of protection.

Following the initial approval of a complete plan, or the certification of a developmental plan, the Assistant Secretary must monitor and evaluate actual operations under the plan for a period of at least one year to determine, on the basis of actual operations under the plan, whether the criteria set forth in section 18(c) of the Act and 29 CFR 1902.37 are being applied.

An affirmative determination under section 18(e) of the Act (usually referred to as ''final approval'' of the State plan) results in the relinquishment of authority for Federal concurrent enforcement jurisdiction in the State with respect to occupational safety and health issues covered by the plan (29 U.S.C. 667(e)). Procedures for section 18(e) determinations are found at 29 CFR Part 1902, Subpart D. In general, in order to be granted final approval, actual performance by the State must be ''at least as effective'' overall as the Federal OSHA program in all areas covered under the State plan.

An additional requirement for final approval consideration is that a State must meet the compliance staffing levels, or benchmarks, for safety inspectors and industrial hygienists established by OSHA for that State. This requirement stems from a 1978 Court Order by the U.S. District Court for the District of Columbia (*AFL–CIO* v. *Marshall,* C.A. No. 74–406), pursuant to a U.S. Court of Appeals decision, that directed the Assistant Secretary to calculate for each state plan State the number of enforcement personnel needed to assure a ''fully effective'' enforcement program.