statistical purposes only. To the full extent permitted by law, BLS will hold the information in confidence and will not disclose it without the written consent of respondents.

Type of Review: New Collection.
Agency: Bureau of Labor Statistics.
Title: Research on the Feasibility of Collecting Occupational Wage Data by Union Status.

Activity form(s)	Total number of respondents	Affected public	Frequency	Total annual response	Average time per response	Est. total burden hours
Case Study	2,500	Business and other for profit	Once FY98	1,725	10 minutes	288
Survey Form Test BLS–2877 715–EZ; BLS–2877 715 Test1; BLS–2877 715 Test2.	9,000	Business and other for profit	Once FY99	7,000	1 hour	7,000
RAS BLS–2877 715–RAS	2,500	Business and other for profit; Not for profit inst.	Once FY98/ FY99.	2,250	30 minutes	1,125
Totals	14,000			10,975		8,413
Two year average	7,000			5,488		4,207

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the ICR; they also will become a matter of public record.

Signed at Washington, DC, this 3rd day of June, 1997.

W. Stuart Rust, Jr.,

Acting Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 97–14816 Filed 6–5–97; 8:45 am]

BILLING CODE 4510–24–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Supplement to California State Plan; Approval

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Approval; California State Standard on Hazard Communication Incorporating Proposition 65.

SUMMARY: This notice approves, subject to certain conditions, the California Hazard Communication Standard, including its incorporation of the occupational applications of the California Safe Drinking Water and Toxic Enforcement Act (Proposition 65). Where a State standard adopted pursuant to an OSHA-approved State plan differs substantially from a comparable Federal standard, the Occupational Safety and Health Act of 1970 (the OSH Act) requires that the State standard be ''at least as effective'' in providing safe and healthful places of employment. 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 an undue burden on commerce.

After consideration of public comments and review of the record, OSHA is approving the California standard, with the following conditions, which are applicable to all enforcement actions brought under the authority of the State plan, whether by California agencies or private plaintiffs:

(1) Employers covered by Proposition 65 may comply with the occupational requirements of that law by complying with the OSHA or Cal/OSHA Hazard Communication provisions, as explicitly provided in the State's regulations.

(2) The designated State agency, Cal/OSHA, is responsible for assuring that enforcement of its general Hazard Communication Standard and Proposition 65 results in ''at least as effective'' worker protection; the agency must take appropriate action to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is Federally approved.

(3) The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.

These conditions are based on OSHA's understanding of the State's regulations and on general State plan law. Finally, Proposition 65 also is applicable to non-occupational (i.e. consumer and environmental) exposures. OSHA has no authority to address Proposition 65's non-occupational applications; consequently, they are not at issue in this decision and will be unaffected by it.

EFFECTIVE DATE: June 6, 1997.

FOR FURTHER INFORMATION CONTACT: Bonnie Friedman, 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.

SUPPLEMENTARY INFORMATION:

Contents of OSHA'S Decision

References to the record are made in the text of this decision. The docket number in this case is T–032. References to exhibits in the docket appear as ''Ex. _____.'' Exhibit 18 contains all of the public comments filed. Each individual comment has been assigned a number and this notice will refer to individual comments by these numbers—''Ex. 18–_____.''

I. Background

A. Pertinent Legal Authority

The Occupational Safety and Health 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* v. *National Solid Wastes Management Association,* 505 U.S. 88 (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. As a consequence, 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 subsequent approval under procedures set forth in 29 CFR Part 1953 and OSHA Directive STP 2–1.117, but are enforceable by the State prior to Federal review and approval. See *Florida Citrus Packers* v. *California,* 549 F. Supp. 213 (N.D. Cal. 1982); *Chemical Manufacturers Association* v. *California Health and Welfare Agency,* No. CIV. S–88–1615 LKK (E. D. Cal. 1994). On May 1, 1973, OSHA published its initial approval of the California State plan in the **Federal Register**. 38 FR 10717, 29 CFR Part 1952, Subpart K.

The requirements for adoption and enforcement of safety and health standards by a State with an approved State plan are set forth in Section 18(c) of the OSH Act and in 29 CFR Parts 1902, 1952 and 1953. OSHA regulations require States to respond to the adoption of new or revised permanent Federal standards by promulgating comparable standards. As explained in more detail in section B, OSHA adopted a hazard communication standard in November 1983. California adopted its own hazard communication standard in 1981 and revised it, in response to the Federal standard, in November 1985. California submitted its Hazard Communication Standard to OSHA for approval on January 30, 1986. On January 30, 1992, the State submitted changes to this standard by incorporating relevant provisions of the Safe Drinking Water and Toxic Enforcement Act (Proposition 65). *See* California Health and Welfare Code §§ 25249.5-25249.13.

Under Section 18(c) of the Act and OSHA's regulations, State plans and plan changes must meet certain criteria before they are approved. The principal criteria are:

- The State must designate a State agency or agencies which is responsible for administering the plan throughout the State. 29 U.S.C. § 667(c)(1).
- If a State standard is not identical to Federal standards, the State standard (and its enforcement) must be at least as effective as the comparable Federal standard. Moreover, if a non-identical State standard is applicable to products distributed or used in interstate commerce, it 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.'') 29 U.S.C. § 667(c)(2).
- The State must provide for a right of entry and inspection of all workplaces which is at least as effective as that provided in section 8 of the Act and must prohibit advance notice of inspections. 29 U.S.C. § 667(c)(3).
- The responsible State agency or agencies must have ''the legal authority and qualified personnel necessary for the enforcement of such standards and adequate funding.'' 29 U.S.C. § 667(c)(4)–(5).
- To the extent the State's constitutional law permits, it must establish a comprehensive occupational safety and health program for employees of public agencies of the State and its political subdivisions which is at least as effective as the standards contained in an approved plan. 29 CFR § 1952.11.

In enacting the State plan system, Congress' intention was to encourage the States ''to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws.'' 29 U.S.C. § 651(b)(11); 29 CFR § 1902.1. Consistent with this Congressional declaration, OSHA has interpreted the OSH Act to recognize that States with approved State plans retain broad power to fashion State standards. As President Reagan noted in Executive Order 12612 (October 26, 1987), ''[t]he nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.'' Section 18 of the OSH Act reflects this ''search for enlightened public policy'' not by delegating Federal authority to the States but by removing the bar of preemption through plan approval and, thus, allowing States to administer their own workers' protection laws so long as they meet the floor established by the Federal OSHA program.

B. Description of the California State Plan Supplement

1. Federal and State Hazard Communication Standards

On September 10, 1980, the Governor of California signed the Hazardous Information and Training Act. California Labor Code, §§ 6360–6399. This Act instructed the Director of Industrial Relations, the State's designee responsible for operation of the OSHA-approved State plan (known as Cal/OSHA) to establish a list of hazardous substances and to issue a standard setting forth employers' duties toward their employees under that Act. The standard, General Industry Safety Order 5194 (8 CCR § 5194), was adopted by the State in 1981. Both the Director's initial list and the standard became effective on February 21, 1983.

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 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 and incorporated the standard as part of its occupational safety and health plan.

In addition to the supplemental provisions of Proposition 65, the State Hazard Communication Standard differs from the Federal standard in a few minor respects:

(1) The State standard requires that each Material Safety Data Sheet contain certain information including Chemical Abstracts Service (CAS) name (unless its disclosure could reveal a trade secret),

while the Federal standard does not require inclusion of the CAS;

(2) The State standard specifically requires a description in lay terms of the particular potential health risks posed by the hazardous substance, while the Federal standard more broadly requires ''appropriate'' hazard warnings;

(3) While the Federal standard allows for release of trade secret information to health professionals who enter into confidentiality agreements, the California standard allows access to such information to safety professionals as well; and

(4) The State standard does not include some of the exemptions and exceptions added to the Federal standard in 1994.

See Section II.B.4.

Cal/OSHA enforces the California Hazard Communication Standard, like its other standards, under approved procedures similar to those of Federal OSHA. Safety and health inspectors from the Division of Occupational Safety and Health conduct on-site inspections in response to complaints of workplace hazards or when the establishment is selected for a programmed inspection based on objective criteria, etc. Employer and employee representatives may accompany the inspector. If violations are noted, a citation and proposed penalties are issued to the employer, who has the right of appeal to the California Occupational Safety and Health Appeals Board and thereafter to the courts.

2. Proposition 65

In a 1986 referendum, voters of the State of California adopted Proposition 65, the ''Safe Drinking Water and Toxic Enforcement Act.'' Proposition 65 and implementing regulations require any business with ten or more employees that ''knowingly and intentionally'' exposes an individual to a chemical known to the State to cause cancer or reproductive toxicity to provide the individual with a ''clear and reasonable'' warning. California Health and Safety Code sections 25249.5 through 25249.13; 22 CCR §§ 12000 *et seq*. In accordance with Proposition 65, the State annually publishes a list of chemicals known to cause cancer or reproductive toxicity. 22 CCR § 12000. Proposition 65 applies broadly to all exposures to listed chemicals; consequently, the law has consumer and environmental applications, as well as the occupational exposures relevant here. Under the Office of Environmental Health Hazard Assessment (OEHHA) regulations, a ''consumer product'' exposure is ''an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.'' 22 CCR § 12601(b). An ''occupational exposure'' is ''an exposure, in the workplace of the employer causing the exposure, to any employee.'' 22 CCR § 12601(c). ''Environmental exposures'' include exposures resulting from contact with environmental media such as air, water, soil, vegetation, or natural or artificial substances. 22 CCR § 12601(d). OSHA has no authority to address Proposition 65's consumer and environmental applications; consequently, they are not at issue in this decision and will be unaffected by it.

Proposition 65 was passed by referendum of the voters of California in 1986. On January 23, 1991, the California Court of Appeal ordered the California Occupational Safety and Health Standards Board to amend the State's Hazard Communication standard to incorporate the occupational warning protections of Proposition 65. See *California Labor Federation, AFL–CIO* v. *California Occupational Safety and Health Standards Board*, 221 Cal. App. 3d 1547 (1990).[1] These changes were adopted on an emergency basis on May 16, 1991, and became effective on May 31, 1991. A permanent standard became effective on December 17, 1991. On January 30, 1992, the State submitted amendments to its Hazard Communication Standard, adapting both the substantive requirements and enforcement mechanism of Proposition 65 and OEHHA's implementing regulations, for application to the workplace. Ex. 4.

Two State agencies have been authorized to issue regulations interpreting and implementing Proposition 65's occupational aspects. As discussed in greater detail in Section III.B.2, Cal/OSHA and OEHHA regulations governing occupational exposures provide three alternative methods of complying with Proposition 65:

(1) Warnings may be given through the label of a product;

(2) Warnings may be given via a workplace sign; or

(3) The general California or Federal Hazard Communication Standard may be followed.

See 8 CCR §§ 5194(b)(6) (B)–(C) and 22 CCR § 12601(c). Compliance with Section 12601(c)—which allows use of California or Federal hazard communication methods—is a defense to supplemental enforcement actions brought under Proposition 65. 8 CCR § 5194(b)(6)(E). The regulations also provide sample language for the label and sign warnings.[2] The sample label and sign language, however, represents a ''safe harbor'' method of providing Proposition 65 warnings. Again, compliance with either the Federal or general State hazard communication procedures constitutes compliance with Proposition 65 and is a defense to any enforcement action. 8 CCR § 5194(b)(6) (B), (C), (E); 22 CCR § 12601(c)(1)(C).

The Proposition 65 requirements of the California standard are enforceable with regard to occupational hazards through the usual California State plan system of inspections, citations and proposed penalties which has been determined to be at least as effective as Federal OSHA enforcement. 38 FR 10717 (May 1, 1973). The Cal/OSHA enforcement directive on hazard communication (Policy and Procedure C–43) provides that a covered employer may comply with the incorporated Proposition 65 requirements by including the substance in the employer's Hazard Communication Program. In addition, the Cal/OSHA standard incorporates the enforcement mechanism of Proposition 65, which provides for supplemental judicial enforcement by allowing the State Attorney General, district attorneys, city attorneys, city prosecutors, or ''any person in the public interest'' to file civil lawsuits against alleged violators. Private plaintiffs bringing actions 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.

Proposition 65 provides for penalties of up to $2500 per day, per violation. A

[1] In 1988, the Chemical Manufacturers Association (and other plaintiffs) challenged the applicability of Proposition 65 in the workplace, arguing that the law was preempted because it was not a part of the approved State plan. In 1994, the U.S. District Court for the Eastern District of California ruled that the plaintiffs, as a result of the State's incorporation of Proposition 65 into the State plan, did not have standing to pursue their action and that the issues were not ripe for review. *Chemical Manufacturers Association* v. *California Health and Welfare Agency*, slip op. at 15–25.

[2] 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.''

private plaintiff may obtain up to 25% of penalties levied against a company found in violation of Proposition 65 for failing to provide required warnings. Private actions with regard to occupational exposures have been brought in California courts, and many more have been settled on varying bases prior to trial or prior to initiation of formal court action.

3. OSHA Review and Public Comment

On April 18, 1995, the Coalition of Manufacturers for the Responsible Administration of Proposition 65 (the Coalition), filed a petition with OSHA requesting that the Plan change submitting the California Hazard Communication Standard with its incorporation of Proposition 65 be rejected. Ex. 8. The Coalition argued that the substantive and enforcement aspects of Proposition 65 unduly burden interstate commerce. Various parties wrote to OSHA to express support for, or opposition to, the Coalition's petition. Exs. 9–16. Other parties 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.

On September 13, 1996, OSHA requested public comment (61 FR 48443) as to whether to approve the California Hazard Communication Standard incorporating Proposition 65 pursuant to 29 CFR parts 1902 and 1953. OSHA had preliminarily determined that the California plan change was at least as effective as the Federal standard and was applicable to products used or distributed in interstate commerce. OSHA sought comment on these determinations as well as the ''product clause'' requirements for standards which differ from the relevant Federal standard—i.e. whether the State standard is required by compelling local conditions or poses any undue burden on interstate commerce. (As discussed in Section II.B, in its Directive STP 2–1.117 governing the review of different State standards, OSHA specifically stated that public comment would constitute its initial means of assessing the product clause implications of a State standard and that absent record evidence to the contrary a State standard would be presumed to meet the test.)

Following OSHA's September 13, 1996 request for comment on the proposed standard, 207 commentors submitted statements. Many of the commentors opposing the standard are companies which have experienced, or fear experiencing, private enforcement lawsuits under Proposition 65. In a number of these cases, the commentor did not make it clear whether the company involved had been sued under Proposition 65's occupational, consumer or environmental applications. *E.g.*, Ex. 18–2, 18–23, 18–127, 18–130, 18–133. As noted previously, OSHA's decision can have no effect upon enforcement actions alleging consumer or environmental exposures.

II. Summary and Explanation of Legal Issues

The comments filed with OSHA presented a variety of issues, each of which will be discussed below. Section III of this notice discusses the more specific provisions of the California standard in light of the requirements of Section 18 of the OSH Act, particularly the product clause. In this Section, however, OSHA will discuss several general legal questions at issue here.

Some commentors have raised issues involving application of the OSH Act's ''product clause'' to the Proposition 65 elements of the California standard. First, several commentors have questioned whether OSHA should apply the product clause to Proposition 65's substantive requirements and enforcement methods. See Section II.A. Second, OSHA provides an overview of the product clause and outlines the principles OSHA will apply in analyzing product clause issues. See Section II.B. Third, OSHA historically has treated State standards as presumptively compliant with the product clause. OSHA Instruction STP 2–1.117 (August 31, 1984); *see, e.g.*, 62 FR 3312 (January 22, 1997) (approval of Washington State standard amendments for acrylonitrile, 1,2-dibromo-3-chloropropane, and confined space). A few commentors maintain that California must bear the burden of proof on this issue under the Administrative Procedure Act (APA). See Section II.C. Section II.D discusses a jurisdictional issue: whether California may, under the auspices of its OSHA-approved State plan, apply its standard to out-of-state manufacturers. Some commentors argue that Proposition 65's supplemental enforcement mechanism violates Section 18's requirement that a ''designated State agency'' bear responsibility for administering a State plan. See Section II.E. Finally, Section II.F addresses Proposition 65's exemption for public sector employers.

A. Applicability of Product Clause to Proposition 65 Requirements

Cal/OSHA, writing on behalf of itself, the State Attorney General, and OEHHA, maintains that the product clause does not apply to the substantive requirements imposed by Proposition 65. Ex. 6; see also Exs. 18–61, 18–62, 18–111, 18–155. Some commentors (e.g. Ex. 18–155) also have argued that, even assuming the product clause applies to the substantive provisions of Proposition 65, it does not apply to the law's supplemental enforcement provisions.[3] Because OSHA finds that Proposition 65's supplemental enforcement provisions do not violate the product clause (see Section III.B.5, below), it is not necessary for OSHA to decide whether State enforcement may, in some cases, be subject to the product clause. Accordingly, the remainder of this section will address only Cal/OSHA's argument about the product clause's applicability to Proposition 65's substantive provisions.

Ex. 18–155, page 9.

Relying upon statements made in Congressional debate leading to enactment of the OSH Act in 1970, California argues that the product clause was intended only ''to limit states from imposing different product design standards for the safety of products,'' specifically machinery products. Ex. 6, pages 21–22. In contrast,

> Far from requiring changes to equipment or products moving in interstate commerce, Proposition 65's warning requirement only requires that warnings be given somehow. They need not be given by a product label, or even through the [Hazard Communication Standard]. Compliance may be obtained where the employer posts an appropriate sign meeting all of the requirements set forth in 22 CCR § 12601(c). This could be accomplished without making any change to the MSDS, and results in complete compliance with Proposition 65.

Ex. 6, pages 21–22. Other supporters of the proposed standard argue, more generally, that the product clause does not apply to warning requirements because warnings (*e.g.* labels, signs, material safety data sheets, training) do not affect product design. *E.g.* Exs. 18–61, 18–62.

As other commentors (*e.g.* Exs. 18–58, 18–148, 18–153, 18–154, 18–156) point out, however, in its Hazard Communication Standard rulemakings,

[3] This argument rests upon the language of Section 18(c)(2):

> [T]he text of the Occupational Safety and Health Act is clear that the product clause and its two-part test do not even apply to enforcement. Rather, § 667(c)(2) requires ''standards (and the[ir] enforcement)'' to be at least as effective as Federal standards, but the product clause applies only to ''standards,'' and makes no mention of enforcement. Thus, OSHA need only consider whether the enforcement of California's HCS and Prop 65 is ''at least as effective'' as Federal OSHA, and OSHA need not concern itself with whether the private right of action in any way burdens interstate commerce.

OSHA determined that the product clause is applicable to substantive State hazard communication requirements ''[b]ecause the Hazard Communication Standard is 'applicable to products' in the sense that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets[.]'' 48 FR 53280, 53323 (November 25, 1983). Similarly, in its decision approving California's ethylene dibromide standard, OSHA found the product clause applicable because ''the standard establishes conditions and procedures which restrict the 'manufacture, reaction, packaging, repackaging, storage, transportation, sale, handling and use' of the chemical product, ethylene dibromide (EDB), as well as the handling and exposures which may result after EDB has been applied as a fumigant to fruit products.'' 48 FR 8610, 8611 (March 1, 1983).

OSHA continues to believe that the product clause applies to substantive State hazard communication requirements. As several commentors note (*e.g.* Exs. 18–41, 18–153), Section 18(c) is phrased broadly. On its face, the statute says simply that the product clause applies to all standards which are ''applicable to products which are distributed or used in interstate commerce[.]'' 29 U.S.C. § 667(c)(2). It is undisputed that the California standard may, in certain circumstances, apply to products ''distributed or used in interstate commerce'' because California employers may receive goods from out-of-state suppliers. Thus, the standard comes within the plain language of Section 18(c). OSHA's current interpretation of the product clause is most consistent with this statutory language. *See generally* Sutherland Statutory Construction, §§ 45.02, 46.01 (4th ed. 1984).[4]

B. Overview: OSHA Review of State Standards Under the Product Clause

OSHA's decision on the approvability of the California standard involves the relationship between the State police power to regulate health and safety and the Federal power to regulate commerce. Throughout the history of the United States, the States and localities traditionally have used their police powers to protect the health and safety of their citizens. *Medtronic* v. *Lohr, Inc.*, _____ U.S. _____, 116 S. Ct. 2240, 2245 (1996). At the same time, the Commerce Clause of the U.S. Constitution provides that ''Congress shall have power * * * to regulate commerce with foreign nations, and among the several states[.]'' Article I, section 8.

In the absence of a Federal statute specifically addressing the issue, the Federal courts have interpreted the Commerce Clause to limit, implicitly, the power of the States to regulate interstate commerce. Under this ''dormant commerce clause,'' the courts have ''distinguished between State statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions.'' *Maine* v. *Taylor,* 477 U.S. 131, 138 (1986). As the Court stated in *Taylor,* ''[t]he limitation imposed by the Commerce Clause on State regulatory power 'is by no means absolute,' and 'the States retain authority under their general police powers to regulate matters of ''legitimate local concern,'' even though interstate commerce may be affected.'.'' *Id., citing Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 36 (1980); *see also Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U.S. 573, 579 (1986); *Kleenwell Biohazard Waste* v. *Nelson,* 48 F.2d 391, 398 (9th Cir.), *cert denied* 115 S. Ct. 2580 (1995) (footnote omitted). In reviewing State legislation under the dormant commerce clause, courts consider both the nature and importance of the local interest and any burden on commerce. The case law recognizes that a State has an important stake in promoting the health of its citizens through measures that do not discriminate against or impermissibly restrict interstate commerce. *Id.; see also Taylor,* 477 U.S. 131.

In the OSH Act, Congress has enacted a statute, and the preemptive effect of that statute turns on Congressional intent. *See generally Medtronic; Gade,* 505 U.S. 88. The language of the product clause must be read against the backdrop of longstanding judicial deference to State sovereignty in the area of health protection. *Medtronic,* 116 S. Ct. at 2250. In *Gade,* the Court held that the OSH Act preempts States without State plans from enforcing occupational safety and health standards on issues addressed by Federal standard; laws of general applicability are not preempted. 505 U.S. at 97, 107–108.

As discussed in Section I.A, Section 18 of the OSH Act removes the bar of Federal preemption for approved State plans, restoring to the States the police power to protect occupational safety and health, provided that the requirements of Section 18 are met. See also *Gade,* 505 U.S. at 102 (describing Section 18 as giving ''States the option of pre-empting Federal regulations by developing their own occupational safety and health programs'').

The ability of the States to devise and develop occupational safety or health approaches is limited by the requirements of Section 18(c), including the product clause, which requires that State standards applicable to products not unduly burden interstate commerce, and that they be justified by ''compelling local conditions.'' At the same time, however, Section 18 specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The Act's drafters clearly envisioned the ''at least as effective'' requirement as providing a floor, not a ceiling, for future worker protections efforts by State plan States. *See* Senate Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970* at 297, 1035 (92d Congress, 1st Session, June 1971) (*Legislative History*). Thus, State standards must pass the ''product clause'' test, but the States also are free to devise not only more stringent substantive standards but also supplementary enforcement procedures. *See Legislative History* at 1035 (OSH act does ''not envision a complete takeover of the field by the Federal government''; OSHA's responsibility is ''merely to see to it that certain minimum requirements were met and that beyond those the health and safety of most workers would be left to [the] states''). The flexibility granted the States under Section 18 also is in keeping with Congress' stated purpose of ''encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws' and its intent to allow the States ''to conduct experimental and demonstration projects in connection therewith[.]'' 29 USC § 651(b)(11).

The OSH Act's product clause reflects in substantial part terminology and principles developed by the Federal courts in applying the dormant aspects of the Commerce Clause. Notwithstanding the limits of the dormant commerce clause, Congress may grant to the States greater powers to regulate commerce than they otherwise would possess. *Maine* v. *Taylor,* 477 U.S. at 138–39; *citing Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U.S. 761, 769 (1945); *see also Florida Citrus Packers* v. *California,* 549 F. Supp. at 215. In *Citrus Packers,*

[4] As discussed in Section II.B, however, the legislative history of the product clause is a helpful aid in understanding the somewhat ambiguous structure of the product clause ''test,'' which requires an examination of compelling local conditions and the extent of any burden on commerce.

the court found that Section 18 of the OSH Act represents ''a broad grant of regulatory power to the states'' and, thus, ''an attack based upon unduly burdening commerce is limited to those situations where the product standard applies.'' 549 F. Supp. at 216. The similarity in language between Section 18(c)(2) and dormant commerce clause principles, then, suggests that a principal function of the product clause is to ensure that Section 18 is not read as a grant of power to violate normal Commerce Clause restrictions.

Thus, OSHA agrees with those commentors (*e.g.*, Exs. 18–40, 18–160, 18–163, 18–164, 18–167, 18–174) who have argued that dormant commerce clause case law is relevant to analysis of issues under the product clause. That said, however, OSHA concludes that Congress authorized the agency to give somewhat more strict review under Section 18(c)(2) to State standards that address issues covered by a Federal standard than a court would give under the dormant commerce clause. This conclusion is supported by the limited legislative history of the product clause and the different structural positions presented. In dormant commerce clause cases, courts are considering State attempts to promote health and safety or other local interests in the absence of Federal regulation. Under Section 18(c)(2), on the other hand, the Federal standard provides a uniform floor of protection.

Although there is no committee report explaining the language, the limited Congressional floor discussion concerning the product clause focused on possible State design requirements for machinery products and the possible economic waste resulting from non-uniform State requirements. *See, e.g., Legislative History* at 500–501, 1042 (statements of Representative Railsback and Senator Saxbe). Absent some indication of protectionist discrimination, it is doubtful that a court would reject a State safety requirement because it led to ''economic waste.'' *See, e.g., South Carolina State Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177 (1938) (upholding State regulation of weight and width of trucks); *compare Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (rejecting similar statute where majority of justices found that the State statute either created a disproportionate burden for out-of-state interests or was protectionist in intent); *National Paint & Coatings Ass'n* v. *City of Chicago*, 45 F.3d 1124, (7th Cir. 1995) (sustaining city ban on spray paint, despite possibility that it was ''economic folly''). The examples considered by Congress suggest that it envisioned OSHA's disapproval of State standards under some circumstances in which the courts would uphold a State law against a dormant commerce clause challenge.

At the same time, the Congressional intent to allow States the flexibility to develop their own occupational safety and health plans, with the Federal standards as a ''floor'' rather than a ''ceiling,'' must be kept in mind. OSHA's interpretation of the product clause should be ''consistent with both federalism concerns and the historic primacy of State regulation of matters of health and safety,'' *see Medtronic*, 116 S. Ct. at 2250, and with Congress' use of terminology which harkens back to dormant commerce clause principles.

Accordingly, in analyzing differences between Federal and State standards under the product clause, OSHA will first determine whether the State standard is required by compelling local conditions. Consistent with the State historic power to regulate health and safety, a State standard that advances the health and safety of the State's workforce meets this test, provided that the standard does not promote or result in economic protectionism. As discussed in the next section, OSHA will accept the State's determination on this point, in the absence of evidence to the contrary. Thus, OSHA will not simply defer to the State's determination, but will consider ''rebuttal'' evidence and arguments. In addition, even if a State standard is required by compelling local conditions, OSHA must determine whether the standard imposes an undue burden upon commerce. The burden of establishing an undue burden will be upon the opponents of a State standard (see also Section D); OSHA will consider any alleged burdens in light of the importance of the State interest involved.

OSHA will consider the specific ''compelling local conditions'' underlying the California standard in Section III.A. Here, however, OSHA notes that many commentors opposing the standard interpret the phrase ''compelling local conditions'' to be limited to interests which are ''unique'' to California.[5] *E.g.* Exs. 18–41, 18–58. OSHA disagrees. Conditions unique to a given State are a sufficient, but not a necessary, basis for a finding of compelling local conditions. Although its focus in past State plan supplement decisions has been on the conditions prevailing in the State involved [*see, e.g.*, 48 FR 8610 (decision approving California ethylene dibromide standard)], OSHA has never said that a State must establish that the conditions of concern to the State's lawmakers are not prevalent in any other State as well. Such an interpretation would be inconsistent with the plain meaning of ''compelling''; more than one State may have a compelling interest in regulating particular safety issues. Simply put, ''compelling local conditions'' are compelling conditions which exist locally.

Requiring a State to establish unique local conditions also would be inconsistent with the courts' treatment of this issue under the dormant commerce clause. Under the dormant commerce clause, courts look for ''local'' conditions which may be, but frequently are not, unique to the State involved. *E.g. Maine* v. *Taylor*, 477 U.S. 131 (upholding discriminatory Maine statute banning importation of baitfish); *Kleenwell Biohazard* Waste, 48 F.3d at 396 (upholding State concern with ensuring safe disposal of solid waste).

C. Burden of Proof

A few commentors assert that California should bear the burden of proving that its proposed standard is at least as effective as the Federal standard and does not violate the product clause. *E.g.* Ex. 18–160[6] at pages 2–4 and 18–174 at pages 4–5. This argument relies upon Section 556(d) of the Administrative Procedure Act (APA), 5 USC § 556(d), and the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994). California, in response, argues that Section 556(d) is not applicable to these proceedings because no formal hearing is involved. Ex. 22. The AFL-CIO (Ex. 18–155) points out that the applicable OSHA Instruction, STP 2–1.117 (August 31, 1984) effectively places the burden of proof upon opponents of a State standard for purposes of the effectiveness and product clause tests:

> In the absence of record evidence to the contrary (including evidence developed by or submitted to OSHA during its review of the standard), the State standard shall be presumed to be 'at least as effective' as the Federal standard and shall be presumed to be in compliance with the product clause test of section 18(c)(2) of the Act.

[5] Industry commentors also have maintained that Proposition 65's exemption for public sector and some small employers demonstrates that there is no compelling need for the law. OSHA discusses this argument in Section II.A.2.

[6] Shell Oil and Elf Atochem further assert that California must meet its burden of proof by ''more than a mere preponderance of the evidence.'' Ex. 18–160, pages 7–8. The burden of proof under the APA is preponderance of the evidence. *Greenwich Collieries*, 114 S. Ct. at 2257; *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981). OSHA has not changed that test by regulation or policy.

STP 2–1.117, page 2.

Initially, OSHA notes its agreement with California that Section 556(d) of the APA does not apply to this decision to approve the State standard. Section 556(d) applies only ''to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.'' This decision involves no hearing, and Sections 553 and 554 do not apply. Section 553 applies only to rulemakings. This decision is not a rulemaking, but rather an ''order'' within the nomenclature of the APA. The decision is a final disposition in an agency process respecting the ''grant'' or ''conditioning'' of an agency ''approval'' or ''other form of permission.'' 5 U.S.C. §§ 551 (6)–(9).

Section 554 does not apply because that section applies only to adjudications ''required by statute to be determined on the record after opportunity for agency hearing.'' The OSH Act requires ''due notice and opportunity for a hearing'' before OSHA *rejects* a State plan or plan modification, but requires no hearing before OSHA approves a plan or modification. 29 USC § 667(d). The statutory language quoted above regarding plan rejection proceedings may be insufficient, by itself, to trigger application of Section 554 or 556. *See Chemical Waste Management* v. *EPA*, 873 F.2d 1477, 1480–82 (D.C. Cir. 1989); *U.S. Lines* v. *FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978). OSHA, however, has by regulation made Section 556 applicable to rejection proceedings. 29 CFR §§ 1902.17–18, 1953.41(d)(2). The regulations expressly authorize, on the other hand, a decision to approve a State plan or modification without a formal hearing. 29 CFR §§ 1902.11, 1902.13. It is therefore abundantly clear that Section 556(d) does not apply here.

The formal distinction between the process for approving or rejecting a State standard under an approved State plan reflects the real difference between these decisions under the framework of Section 18 and the Federal system. A modification to an approved State plan takes effect prior to and pending OSHA review of the modification. A decision to reject the modification works an abrupt change in the status quo and overrides the determination of a sovereign State. A decision to approve, on the other hand, leaves the status quo and the State's determination unchanged. In effect the decision is not to institute the formal trial-type proceedings required for rejection.

OSHA's historic placement of the burden of proof upon parties opposing a State standard is consistent with Section 18(c)(2), the applicable regulations, the APA, and the case law. As was discussed in the preceding section, the product clause reflects in substantial part dormant commerce clause case law. Under that case law, the burden of persuasion rests upon the party claiming that a State regulation violates the dormant commerce clause (unless there is evidence of protectionist discrimination by the State). *Pacific Northwest Venison Producers* v. *Smitch*, 20 F.3d 1008, 1012 (9th Cir.), *cert denied* _____ U.S. _____, 115 S. Ct. 297 (1994), *citing Northwest Central Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493, 525–26 (1989); *Maine* v. *Taylor*, 477 U.S. at 138; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

In addition, under the dormant commerce clause, the judgments of State lawmakers about the necessity or wisdom of non-discriminatory laws are entitled to considerable, and perhaps total, deference from the courts: if a State articulates a legitimate, non-discriminatory local interest to support an enacted law, ''courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.' '' *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 92 (1987), *citing* Justice Brennan's concurring opinion in Kassel, 450 U.S. at 679; *Pacific Northwest Venison Producers*, 20 F.3d at 1012.

Because of the similarities between dormant commerce clause principles and the product clause, OSHA believes it is appropriate to apply the same burdens of proof and persuasion as are applied under the dormant commerce clause. Nevertheless, because OSHA also concludes that Congress intended State standards to be subject to somewhat greater scrutiny than they might receive by the courts applying the dormant commerce clause (see Section II.B, above), OSHA will not defer to a State's legislative judgment regarding local conditions to the extent a court might. The agency will presume that a State standard meets the requirements of Section 18(c)(2), but that presumption may be rebutted with appropriate evidence.

This overall approach is in harmony with the idea that Congress, by enacting the product clause, intended to recognize that States adopting State plans retain broad regulatory power over workplace safety and health, but not to allow the States to engage in regulation which otherwise would violate the dormant commerce clause. Imposing the burden of persuasion upon parties opposing a State regulation also is consistent with the basic nature of the ''defense'' available under the dormant commerce clause or product clause; these are affirmative defenses. *See, e.g., NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25 (1937) (treating constitutional challenge to National Labor Relations Act as affirmative defense). Under the APA, the party presenting an affirmative defense bears the burden of persuasion. *Greenwich Collieries*, 114 S. Ct. at 2257–58; *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

In keeping with the principles applied under the dormant commerce clause and the nature of the product clause ''defense,'' parties opposing a State standard should bear the burden of proving violations of Section 18(c)(2), unless there is evidence that the standard is linked to economic protectionism. Here, there is no evidence that the voters of California were motivated by economic protectionism in passing Proposition 65.[7] The law, as enacted, applies with equal force to in-state and out-of-state businesses. In addition, although several commentors rely upon dormant commerce clause case law involving discriminatory statutes (*e.g.*, Exs. 18–40, 18–160), they presented no evidence suggesting the statute is discriminatory. See also Ex. 22 (Attachment B, description of ballot initiative). Opponents of the California standard, therefore, bear the burden of proving that it does not satisfy Section 18(c)(2).

D. Application of the California Standard to Out-of-State Manufacturers and Distributors

Several commentors raised the issue of whether supplemental enforcement of Proposition 65 against out-of-state manufacturers and distributors[8] is in accordance with Federal and State requirements. Section 18(b) of the Act provides that ''[a]ny State which * * * desires to assume responsibility for development and enforcement therein of occupational safety and health standards * * * shall submit a State plan[.]'' Section 18(c)(1) of the Act and 29 CFR § 1902.3(b) require that a State plan designate the agency or agencies responsible for administering the plan throughout the State.

[7] As discussed in Section II.D, Proposition 65 as incorporated into the State plan can apply only to California employers. When determining whether the statute was motivated by economic protectionism, however, it is appropriate to examine the intent behind the statute as a whole, not simply its occupational applications. The remaining discussion in this section, therefore, should be understood in this light.

[8] Whenever this decision uses the word ''manufacturers'' or ''vendors,'' it is intended to include distributors.

To date, Cal/OSHA itself has not enforced its Hazard Communication Standard, including Proposition 65, against out-of-state vendors. However, private parties have instituted enforcement actions against out-of-state manufacturers in their role as vendors of products to which employees of other employers are exposed in California.

Several commentors cite statements by various California officials which appear to indicate that Proposition 65 as incorporated into the State plan may not be enforced against out-of-state vendors. Exs. 18–153, 18–154, 18–162, 18–174. While Proposition 65 itself applies to any ''business'' exposing an individual to a hazardous substance, the regulation incorporating Proposition 65 into California's Hazard Communication Standard states that an ''employer which is a person in the course of doing business . . . is subject to [Proposition 65].'' 8 CCR § 5194(b)(6)(A). The Initial Statement of Reasons issued by the Cal/OSHA Standards Board in adopting Proposition 65 said that the purpose of the incorporation was so ''employers in California who come within the scope of Proposition 65 will be prohibited from knowingly and intentionally exposing their employees[.]'' Ex. 18–156.

In addition, some commentors cite an October 1, 1992 letter from Steve Jablonsky, Executive Officer of the Cal/OSHA Standards Board, to OSHA, which states that employers need not rely on suppliers in order to comply with Proposition 65 as incorporated into the State plan. Mr. Jablonsky stated that employers could comply with Proposition 65 in various ways, including compliance with the general hazard communication provisions and posting of signs in the workplace. Exs. 18–156, 18–162, 18–174. Similarly, a February 16, 1996 letter from John Howard, Chief, Division of Occupational Safety and Health, to OSHA indicated that there should be no effect on out-of-state employers because signs in the workplace, which are the responsibility of the California employer of the exposed employees, would be sufficient warnings. Ex. 6. In addition, in October 1992, when moving to dismiss *Chemical Manufacturers Association, et al.* v. *California Health and Welfare Agency,* the California Attorney General noted that Proposition 65 does not place any burdens on out-of-state suppliers. Ex. 18–174.

Commentors claim that private enforcement appears to place full responsibility for warning California employees upon out-of-state manufacturers and that application of the standard against out-of-state manufacturers is inconsistent with California's past statements on this subject. Exs. 18–81, 18–153, 18–154, 18–162. Organization Resource Counselors maintains that product manufacturers who distribute signs for workplace postings are sued despite providing the signs. Ex. 18–150. Others note that the California Attorney General argued, in *Industrial Truck Association, Inc.* v. *Henry,* that the State standard authorizes enforcement of Proposition 65 against out-of-state manufacturers who supply their products to California employers. Exs. 18–153, 18–154, 18–162, 18–174.

Some commentors assert that Proposition 65 as incorporated into the State standard should not be enforced against out-of-state manufacturers because a State plan by definition can only be enforced against in-State employers. Shell Oil Company and Elf Atochem North America maintain that a State plan cannot reach beyond its own borders to bring enforcement actions against employers for conduct that occurred in workplaces in other States covered by their own State programs or Federal OSHA. Ex. 18–160. Melvin B. Young notes that this is the only part of any State plan which provides for enforcement against businesses outside of the State. Ex. 18–142.

California's response relies upon the fact that Federal OSHA also imposes duties on manufacturers and that the courts have upheld such requirements. Ex. 22. *See General Carbon Company* v. *Occupational Safety and Health Review Commission,* 860 F.2d 479 (D.C. Cir. 1988). Others who support enforcement of the standards against out-of-state employers maintain that manufacturers are in the best position to assess the hazards and effectively communicate them. In these commentors' views, if manufacturers are not held responsible for exposures to their products, the burden will fall on tens of thousands of California employers. *E.g.,* Ex. 18–167.

OSHA finds that under its requirements governing State plans, a State plan may only enforce its standards within its borders. This conclusion is based upon the language of Section 18 of the OSH Act. Section 18(b) provides that a State may ''assume responsibility for development and enforcement *therein* of occupational safety and health standards'' (emphasis added). 29 U.S.C. § 667(b). Similarly, Section 18(c)(1)'s requirement for a designated State agency assigns responsibility to that agency for enforcing the State plan ''throughout the State[.]'' 29 U.S.C. § 667(c)(1); *see also* 29 CFR § 1902.3(b). Clearly, although Congress provided broad powers to the States under Section 18, these powers did not extend to enforcing State laws outside of the State's boundaries.

OSHA's conclusion on this point also is consistent with the practical aspects of the State plan system. No other State plans enforce their occupational safety and health standards against employers who do not have workplaces in the State. Some States have adopted standards which differ from Federal standards and which indirectly affect (but do not regulate) out-of-state manufacturers, and these standards have been reviewed and approved under the product clause requirements of Section 18(c)(2) of the Act. *See, e.g.,* 51 FR 17684 (approval of Arizona's short-handled hoe standard); see also OSHA Directive STP 2–1.117. However, in these cases, the State does not take action against out-of-state manufacturers but against those in-state employers who use the affected product. Although, as noted in California's response, the Federal and other State-plan Hazard Communication Standards do impose responsibilities on manufacturers, State plans do not issue citations against out-of-state manufacturers for incomplete or inaccurate Material Safety Data Sheets (MSDS) used by in-state employers. Rather, the State would refer the matter to the Federal Area Office or other State plan in whose jurisdiction the manufacturer operates. Similarly, if Federal OSHA finds during an inspection that an MSDS used by an employer is incomplete or inaccurate and the manufacturer or supplier is located in a State with an approved State plan, OSHA would refer the matter to the State plan. OSHA Instruction CPL 2–2.38C, page 18 (October 22, 1990).

Out-of-state chemical manufacturers and distributors are subject to the Federal Hazard Communication Standard, or to the State plan standard for the State in which they are located. Allowing application of the California standard out-of-state would mean that out-of-state manufacturers are subject to duplicative regulation. As the Supreme Court noted in *Gade,* ''the OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation[.]'' 505 U.S. at 100.

Based upon the information in the record, it is unclear to OSHA whether the State, by its incorporation of Proposition 65 into the State plan, intended to apply Proposition 65 to out-of-state employers in their role as vendors. On the one hand, a facial understanding of the regulatory language suggests, as some commentors argue, that the State standard applies only to ''employers'' who expose their own ''employees,'' in the employer's

own workplace, to Proposition 65 chemicals. 8 CCR § 5194(b), 22 CCR § 12601(c). On the other hand, some statements from California agencies, especially the Attorney General's statements in the *Industrial Truck Association* case, appear to endorse the idea of out-of-state application of the State plan.

Whatever the truth may be about the State's intentions here, the OSH Act does not permit out-of-state enforcement of a State's laws under the auspices of an approved State plan. Therefore, Proposition 65 as incorporated into the State plan may only be enforced against in-State employers. The State may, of course, apply its laws to all workplaces within California, including those maintained by manufacturers or distributors incorporated in other States; in that situation, the ''out-of-state'' business also would be an ''in-state'' employer. Additionally, OSHA is addressing only the State's authority under the State plan. This decision leaves open the possibility that the State may have other legal authority under which it can apply Proposition 65 to out-of-state businesses. OSHA has no authority to resolve that question. Most important, as OSHA has noted previously, Proposition 65 applies to consumer and environmental exposures. This decision does not affect actions brought under these aspects of the law.

E. Designated State Agency

Several commentors addressed the issue of whether Proposition 65's provision for supplemental enforcement violates the OSH Act's criteria for a designated State agency. Section 18(c)(1) of the OSH Act and regulations at 29 CFR § 1902.3(b) require that a plan designate a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State. Although Section 1902.3(b)(3) allows an agency to delegate its authority through an interagency agreement, the State designee must retain legal authority to assure that standards and enforcement provided by the second agency meet Federal effectiveness criteria.

Commentors raised two issues regarding the relation of Proposition 65 to these criteria. The first issue involves the diversity of agencies involved in the enforcement of Proposition 65, including the OEHHA, the State Attorney General and local prosecutors. The Proposition 65 regulations which were incorporated into the California Hazard Communication Standard were originally promulgated by OEHHA. The State Attorney General has interpreted Proposition 65 when representing the State in lawsuits in filed against it. The Attorney General and District Attorneys may also initiate enforcement actions under Proposition 65. Some commentors contend that because these agencies may take action independently of Cal/OSHA, their role does not meet the criteria in Section 18(c)(1) of the Act and 29 CFR § 1902.3(b). Exs. 18–41, 18–88, 18–127, 18–156, 18–164, 18–174, 18–191, 18–201.

Some commentors allege that these agencies have not issued appropriate guidance to employers on complying with Proposition 65. For example, Ashland Chemical Company comments that it sought confirmation from the Attorney General that its warnings were acceptable under Proposition 65 and did not receive a reply. Ex. 18–191. Commentors have also pointed out that California agencies have issued conflicting interpretations about Proposition 65 in its workplace application. The Coalition notes that an October 1, 1992 letter from Steve Jablonsky, Executive Officer of the Cal/OSHA Standards Board, to OSHA states that employers need not rely on suppliers in order to comply with Proposition 65 as incorporated into the State plan. However, the Attorney General argued in *Industrial Truck Association, Inc.* v. *Henry* that Proposition 65 does apply to out-of-state manufacturers who supply their products to California employers. Ex. 18–174.

Some commentors also maintain that the private right of action authorized by Proposition 65 as included in the California Hazard Communication Standard violates the requirement for a designated agency because the designee does not retain authority over private enforcement actions. Exs. 18–81, 18–96, 18–121, 18–144, 18–147, 18–150, 18–160, 18–164, 18–169, 18–173, 18–174, 18–191, 18–201, 18–204. These commentors assert that the negotiation of settlements between plaintiffs and employers results in different requirements for different employers, so that employers cannot be aware in advance of the requirements placed upon them. According to these comments, no California agency has, or is willing to exercise, an oversight role of private litigation which would provide consistent and coherent interpretations. Some commentors also claim that the absence of a private right of action under the Federal OSH Act indicates that Congress did not favor occupational safety and health enforcement by private parties. Therefore, according to these commentors, OSHA should not approve a private right of action in a State plan.

Other commentors maintain that nothing in the OSH Act precludes a State from allowing private rights of enforcement under a State plan, and as long as the basic plan meets the criteria for a designated agency, any additional enforcement would only increase effectiveness. Exs. 18–155, 18–168.

In response to the comments, the State of California (Ex. 22) notes that Cal/OSHA remains responsible for the administration and enforcement of standards set forth in the plan. OEHHA does not have authority to make changes to the State plan; any change in the Proposition 65 regulations would have to be adopted by the Standards Board. On the issue of private litigation, the State asserts that since private enforcement only applies to Proposition 65, the standard remains as effective as the Federal. Cal/OSHA also points out that courts have the authority to stay litigation of some Proposition 65 occupational exposure claims, pending resolution by Cal/OSHA of issues within its expertise. This has been done in *As You Sow* v. *Turco Products*. The State contends that Cal/OSHA should not be held responsible for suits of private parties or settlements reached without court involvement.

OSHA finds that neither a distribution of functions among agencies nor private rights of action are prohibited under State plan provisions. OSHA has approved a provision for court prosecution of occupational safety and health cases by local prosecutors under the Virginia State plan (see 41 FR 42655; September 28, 1976). Although the Federal Occupational Safety and Health Act does not authorize private enforcement, OSHA State plans do not operate under a delegation of Federal authority but under a system which allows them to enact and enforce their own laws and standards under State authority. Therefore, nothing in the Act prevents States with approved plans from legislating such a supplemental private right of action in their own programs. In fact, other State plans include OSHA-approved provisions for private rights of action in cases of alleged discrimination against employees for exercising their rights under the plans.

In the case of Proposition 65, private enforcement is supplemental to, not a substitute for, enforcement by Cal/OSHA. Private enforcement, therefore, should not detract from Cal/OSHA's responsibilities to enforce State standards. In addition, OSHA notes that California is required under Proposition 97 to ''take all steps necessary to prevent withdrawal of approval for the

State plan by the Federal government.'' California Labor Code § 50.7(d).

However, under the Act and OSHA regulations, the designated agency must retain overall authority for administration of all aspects of the State plan. State designees are required to take appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in their enforcement programs resulting from adverse administrative or judicial determinations. See 29 CFR § 1902.37(b)(14).) Therefore, OSHA expects Cal/OSHA to ensure that enforcement of the standard remains at least as effective as the Federal Hazard Communication Standard and consistent with the conditions under which the standard is Federally approved by taking appropriate action when necessary to address adverse court decisions in private party suits, Cal/OSHA enforcement actions or State Attorney General or local prosecutors' actions. Failure to pursue necessary remedies would result in OSHA's reconsideration of its approval of the standard.

F. Exemption for Public Sector Employers

Section 18(c)(6) of the Act and regulations at 29 CFR § 1902.3(l) require that a State plan must, to the extent permitted by its constitutional law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which is as effective as the standards contained in the plan.

The Coalition asserts that the exemption of public sector agencies from providing Proposition 65 warnings violates this criterion. Ex. 18–174. In its response, the State of California maintains that since State and local government employees are covered by the other hazard communication provisions, their lack of coverage under the supplemental provisions should not pose a problem. The State also notes that government employees would receive warnings from other businesses which supply products to public agencies. In addition, the State contends that because government officials are accountable to the public in other ways, it is not necessary for them to be subject to the requirements of Proposition 65 as well. Ex. 22.

The basic warning requirements of the Hazard Communication Standard and Cal/OSHA's enforcement of the standard do apply to public sector employers. As discussed below, the chemicals covered by, and the warning requirements of, Proposition 65 do not differ significantly from, and thus are not significantly more protective than, California's other hazard communication requirements. Moreover, because compliance with Proposition 65 can be achieved via use of the measures provided in the Cal/OSHA or Federal Hazard Communication Standard (see Section III.B.2), public sector employers will, in fact, be in compliance with Proposition 65 for all substances covered by the general California standard if they comply with the general standard. As a practical matter, this means that public sector employers will only be exempt from Proposition 65 warning requirements relating to a few substances (*e.g.* aflatoxins, discussed in Section III.B.3, below). Therefore, OSHA finds that California's protection of these employees is as effective as its protection of private sector employees, meeting the criterion in section 18(c)(6) of the Act.

OSHA has never required States to use the same enforcement methods in the public sector as they do in the private sector. Nevada, among other States, imposes penalties upon public sector employers only for serious violations. 46 FR 42843 (August 25, 1981). California itself does not have financial penalties for public sector employers. See California Labor Code § 6434. OSHA also has approved other State plans which lack public sector penalties. *E.g.* 44 FR 44 28327 (May 15, 1979) (Maryland). Therefore, OSHA finds that the exemption of public agencies from suits under Proposition 65 is not in violation of OSHA requirements for public sector programs, particularly as public sector employers are subject to enforcement actions by Cal/OSHA for non-compliance with the general State Hazard Communication Standard. In addition, Federal requirements which would force a State to submit to private suit raise issues under the Eleventh Amendment. *See Seminole Tribe of Florida* v. *Florida,* 116 S. Ct 1114 (1996).

III. Summary and Explanation of Remaining Issues Under Section 18

In this Section, OSHA will analyze the remaining issues, which involve combined legal and factual questions arising under the various provisions of Section 18(c)(2). Initially, OSHA notes that although many comments assume significant differences between the substantive provisions of Proposition 65 and the Federal standard, OSHA's detailed analysis of the California regulations and the record discloses that most of these alleged differences do not, in fact, exist. With a few exceptions, Proposition 65 and the Federal standard cover the same chemicals and the same concentrations of chemicals. See Section III.B.3.

Whenever chemicals are covered by both Proposition 65 and the Federal standard, they will be covered by the general State standard. In that situation, employers must comply with the State standard's general (i.e. non-Proposition 65) hazard communication requirements, which are virtually identical to the Federal standard's requirements. In those relatively few cases where a chemical is not covered by Federal or State hazard communication requirements, businesses can comply with Proposition 65's occupational aspects by applying Federal hazard communication methods to those chemicals. Consequently, Proposition 65, in practice, should impose only minor additional requirements. See Section III.B.3.

Procedurally, there are several differences between the Federal and State standards. Most obviously, the State standard provides for supplemental enforcement by private parties; the Federal standard does not. OSHA concludes, however, that these procedural differences do not require rejection of the California standard. See Section III.B.5.

Accordingly, and as set forth below, OSHA is approving the California standard, including Proposition 65. This approval, though, is contingent upon OSHA's understanding of Proposition 65's compliance provisions and the conclusion that the State cannot apply Proposition 65 to out-of-state businesses under the auspices of the State plan. OSHA also expects Cal/OSHA to exercise its role as the designated State agency to ensure that Proposition 65's enforcement comports with these understandings and does not result in a less effective standard.

A. Compelling Local Conditions

1. Overview

As outlined in Section II.B, OSHA's analysis under the product clause first requires it to consider whether ''compelling local conditions'' support the California standard. OSHA finds that the State plan requirements presently under review, including the general California Hazard Communication Standard and the occupational aspects of Proposition 65, are justified by compelling local health and safety concerns.

When Proposition 65 was adopted by the voters of the State of California in 1986, the law's public-health objectives

were succinctly set forth in the ballot initiative and in the law's preamble, which found that the ''lives of innocent people are being jeopardized'' by the lack of information about toxins; that ''hazardous chemicals pose a serious threat to their well-being;'' and that conventional enforcement efforts by public agencies ''have failed to provide them with adequate protection.'' Ex. 22, Attachment B.

''Right to know'' laws like Proposition 65 promote the general public's knowledge about safety and health issues. By ensuring that people have information about hazards and risks associated with chemicals, these laws allow workers and other persons to protect themselves against hazardous exposures and resulting illnesses. Right-to-know laws also encourage the market to reformulate hazardous products to reduce or eliminate the risks associated with a product's use. Absent access to relevant information about chemical hazards and risks, workers cannot protect themselves or the public at large from potentially devastating exposures.

Access by workers and their representatives to information about toxic substances in the workplace is an issue recognized by OSHA, by Congress, and generally by the occupational safety and health community as a central element in any effort to provide for safe and healthful workplaces throughout the nation. Congress included in OSHA's standard-setting authority an explicit requirement to ''prescribe the use of labels or other appropriate forms of warning'' for the protection of workers from the hazards of chemicals in their workplaces. 29 U.S.C. § 655(b)(7). In promulgating the Federal HCS in 1983, OSHA extensively reviewed available statistics and documented an unacceptably high incidence of chemically-related illnesses and injuries. 48 FR 53282 (1983). OSHA also found—with substantial support not only from workers, other government agencies and public interest groups, but from many industry members and trade associations—that implementation of appropriate hazard communication in the nation's workplaces ''would serve to decrease the number of such incidents by providing employees with the information they need to help protect themselves, and ensure that their employers are providing them with the proper protection.'' *Id.* The crucial importance of hazard communication was well-recognized in OSHA's 1989 Safety and Health Program Management Guidelines, which provide that one of the cornerstones of effective protection of worker safety and health is ensuring that workers have adequate information to protect themselves and others:

> The commitment and cooperation of employees in preventing and controlling exposure to hazards is critical, not only for their own safety and health but for that of others as well. That commitment and cooperation depends on their understanding what hazards they may be exposed to, why the hazards pose a threat, and how they can protect themselves and others from the hazards.

See 59 FR 3904.

Right-to-know laws also enhance the ability of the public and individuals to ensure that their government (Federal, State or local) acts appropriately to protect their interests. Committee on Risk Perception and Communication, National Research Council,[9] *Improving Risk Communication* 111 (National Academy Press, 1989) (''[a] central premise of democratic government—the existence of an informed electorate—implies a free flow of information''). By enacting Proposition 65, the voters sought to exercise their right and responsibility to oversee the functioning of their government. Thus, the principles which led California voters to enact Proposition 65 in 1986—the perceived threat to the ''lives of innocent people'' and their well-being, the lack of information about hazardous chemicals, and the failure of ''conventional enforcement efforts by public agencies'' (Ex. 22, Attachment B)—are widely known and accepted.

One factor OSHA has historically considered in determining whether a State's interest is a compelling one is the extent to which the industrial hazard sought to be addressed is prevalent within the State. Here, the standard at issue relates not to a particular trade but to the hazard posed by toxic chemicals used throughout industry. Although the commentors raise some arguments against a finding of compelling local conditions (see discussion in Section III.A.2 and discussion below), none question the State's interest in hazard communication or the extent of hazardous exposures in California. Moreover, it is obvious that California, with an economy larger than that of most of the world's nations, has within its jurisdiction a significant portion of the toxic exposures occurring daily in the United States. *See also* 48 FR 8610 (decision approving California ethylene dibromide standard and noting extent of relevant exposure within State). The number of out-of-state businesses responding to OSHA's request for comments, and the volume of chemical shipments to California suggested in their submissions, also attest to the number of occupational chemical exposures likely to occur within the State.

California's interest in protecting the public's ''right to know'' is particularly compelling here because it is acting not only to protect the general public health and safety, but to protect the rights of individual citizens to make informed decisions about matters affecting their own health and welfare. Just as a patient has the right to consent to, or refuse, medical treatment, *see Cruzan* v. *Director, Missouri Dep't of Health,* 497 U.S. 261, 269 1990) citing *Schloendorff* v. *Society of New York Hospital,* 105 N. E. 92, 93 (1914) (''Every human being of adult years and sound mind has a right to determine what shall be done with his own body''), so, more generally, persons have a right to understand the hazards to which they are exposed and determine whether they wish to take any risk involved.

Dormant commerce clause case law also supports OSHA's analysis. As OSHA discussed in Section III.A., there is no evidence that the California voters harbored any intent to discriminate against out-of-state employers or manufacturers; to the contrary, the law on its face is fully applicable to all private sector businesses which meet the ten-employee size limit. Instead, California voters appear to have been exclusively concerned with public health and safety, which undeniably constitutes a ''legitimate'' or ''compelling'' objective within the meaning of dormant commerce clause decisions. *See, e.g. Kleenwell Biohazard Waste* v. *Nelson,* 48 F.3d 391, 397 (9th Cir. 1995) (''[r]egulations that touch on safety are those that the Court has been most reluctant to invalidate''), *citing Raymond Motor Trans. Co.* v. *Rice,* 434 U.S. 429 (1978); *see generally Goehring* v. *Brophy,* 94 F.3d 1294, 1300 (9th Cir. 1996) (''Public health and well-being have been recognized as compelling governmental interests in a variety of contexts''). Consequently, under the dormant commerce clause, California's non-discriminatory intent would lead the courts to uphold Proposition 65.

Finally, the primary difference between the California and Federal standards is the California standard's incorporation of Proposition 65's provision for citizen enforcement of disclosure laws to augment the scarce resources available to regulatory agencies and public prosecutors. Thus, California may reasonably conclude that enactment of Proposition 65 should lead

[9] The National Research Council comprises councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

to more effective enforcement of the measures prescribed in the Federal standard and improved dissemination of information about hazardous chemicals. (By way of example, in Section III.B.5, OSHA discusses an instance in which an employer who was not in compliance with the general California (or Federal) standard was brought into compliance as a result of a private enforcement action.) This additional enforcement mechanism also is entirely consistent with the employee-protection concerns that motivated Congress in 1970 and that remain relevant today. In 1970, Congress found safety and health inspectors in ''critically short supply[.]'' Legislative History at 161. Today, there are two thousand Federal and State plan inspectors, who must cover more than six million workplaces. Neither OSHA nor Cal/OSHA has ''the resources to find every violation of every law,'' *Carnation Co.* v. *Sec'y.*, 641 F.2d 801, 805 (9th Cir. 1981).

OSHA emphasizes that private suits under Proposition 65 form a supplement, not a substitute, to conventional enforcement of the State's Hazard Communication Standard already being provided by Cal/OSHA. Indeed, the California standard reflects OSHA's previous findings in its hazard communication rulemakings because the primary focus of the State standard is a close adaptation of the Federal standard. Under the applicable regulations, compliance with the measures prescribed by the Federal standard is an acceptable means of compliance with Proposition 65. See Section III.B.2. Accordingly, the State's further incorporation of Proposition 65 into the standard simply provides a supplemental method of ensuring that the standard, as a whole, functions effectively.

Other State plans approved by OSHA contain private rights of action intended to supplement the anti-discrimination provisions of the State plan. North Carolina Code § 95–243; California Labor Code § 98.7(f). Whether such supplements are a useful or appropriate addition to State plan authority is a matter for the State to decide. In the present case, OSHA accepts the judgment of California voters that compelling local conditions justify the inclusion of Proposition 65's additional enforcement remedies into the State plan.

It is true, as several industry commentors point out, that the Federal OSH Act contains no private rights of action or citizen suit provisions. Exs. 18–41, 58, 65, 96, 139, 150, 160, 162, 165. As OSHA explained in Section I.A, however, the OSH Act specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The OSH Act, therefore, does not bar the States from adopting supplemental enforcement mechanisms.

As OSHA noted at the outset, the voters of California have a compelling interest in protecting their right to information about possible risks to their safety and health. *Id.; compare C & A Carbone* v. *Town of Clarkstown,* 511 U.S. 383, 409 (1994) (rejecting a discriminatory town regulation governing solid waste disposal because the town had ''any number of nondiscriminatory alternatives * * * [including] uniform safety regulations enacted without the object to discriminate''). There is no indication in the statutory language of Section 18(c)(2) or the legislative history of the Act that Congress intended to bar a State's voters from determining how to best protect their right to make informed decisions. Rather, the limited legislative history shows that Congress simply wanted ''to prevent States from making unreasonable limitations[.]'' *Legislative History* at 501 (statement of Senator Saxbe).

2. Commentor Rebuttal Arguments

As discussed in Sections II.B and II.C, OSHA will presume in the absence of evidence to the contrary that a State's law enacted to foster its workers' safety and health meets the product clause's requirement for compelling local conditions. Industry commentors raised two arguments to rebut the idea that Proposition 65 is supported by compelling local conditions. First, as OSHA outlined and rejected in Section II.B, industry commentors have alleged that California must establish conditions unique to California in order to support approval of the standard. Second, the commentors also assert that the State's failure to apply Proposition 65 to public sector employers (and small businesses) constitutes evidence that California has no compelling local need for Proposition 65. *E.g.*, Exs. 18–150, 18–174. Organization Resource Counselors (ORC) (Ex. 18–150) states that these exemptions effectively exclude 50% of California employees from coverage. California, in response, says that ''while the exemption for small businesses may cover a large number of businesses, such businesses are responsible for a relatively small share of the handling of hazardous chemicals.'' Ex. 22, pages 11–12. California maintains that the law applies ''to the big businesses that produce more than 90% of all hazardous waste in California.'' *Id.*, citing Proposition 65 ballot argument, Attachment B to Exhibit 22.

Proposition 65's exemptions do not provide evidence of discriminatory intent, and do not undermine California's putative interest in protecting its workers' safety and health. The exemption for businesses employing ten persons or fewer applies to all such businesses, regardless of whether they are located inside or outside of the State. Moreover, even assuming that ORC has correctly estimated the percentage of employees covered, its comment does not address the percentage of employees exposed to covered chemicals. No inference, then, can be drawn regarding the intent of California's voters in passing Proposition 65, or the effect of the exemptions.

Finally, as outlined in Section C, there are, in fact, few differences between the occupational aspects of Proposition 65 and the Federal or general State standard. As a practical matter, the effect of the public sector and small business exemptions is to free these entities from the threat of supplemental enforcement. OSHA concludes that it is within the voters' discretion to conclude that small businesses should not be subject to the penalties available under Proposition 65. Employees working for these businesses will still be protected by the general California standard.

B. Remaining Section 18(c)(2) Issues

1. Overview

The following sections of OSHA's decision analyze the remaining issues arising under Section 18(c)(2) of the Act: whether the California standard is at least as effective as the Federal standard, and whether the California standard imposes an undue burden upon commerce.

Commentors have argued that the Proposition 65 components of the California standard require warnings for chemicals not covered by the Federal Hazard Communication Standard and that Proposition 65's warning requirements are in addition to those required by the Federal standard. Section II.B.2 addresses OSHA's reasons for concluding that use of the measures prescribed by the Federal or general California Hazard Communication Standard will constitute compliance with Proposition 65. Section III.B.3 discusses coverage issues. First, OSHA addresses its reasons for concluding that almost all of the chemicals and concentrations of chemicals covered by Proposition 65 are covered by the Federal standard as well. Second, the

decision addresses Proposition 65's applicability to California manufacturers other than chemical manufacturers. Section III.B.4 discusses the substantive differences between the Federal and general California hazard communication standards, including the argument by some commentors that the California standard does not protect trade secrets as effectively as the Federal standard. Section III.B.5 discusses Proposition 65's supplemental enforcement provision.

2. Businesses Can Comply With Proposition 65 by Using Methods Prescribed by the Federal Hazard Communication Standard

Although there are minor differences, discussed in the next section, between the coverage of the Proposition 65 elements of the State plan and the Federal standard, the requirements for compliance are the same. Some commentors have argued that the Proposition 65 elements of the California standard require businesses to provide warnings which are not required by the Federal Hazard Communication Standard. The particular focus of these comments is upon the possibility that Proposition 65 requires a ''safe harbor'' label where the Federal standard would not, or where the Federal standard would require only Material Safety Data Sheet. E.g. Exs. 18–3, 18–149, 18–162.

Other commentors point out that the California standard, as discussed in Section III, permits businesses to comply with Proposition 65 by complying with the general State or Federal standards. Exs. 18–61, 18–143, 18–155. OSHA agrees with the latter commentors and is noting this understanding as a basis for its approval of the standard. OSHA's analysis of the California standard is as follows.

Section 5194(b)(6) of the standard, 8 CCR § 5194(b)(6), incorporates Proposition 65 and outlines the various permutations possible between the remainder of the California standard and its Proposition 65 elements. Admittedly, Section 5194(b)(6) is not a model of clarity. As OSHA's analysis of the regulations shows (see below), however, when a chemical is covered solely by the Proposition 65 list, businesses may comply with Proposition 65 by complying with the Federal Hazard Communication Standard. And when a chemical is covered both by Proposition 65 and the general State standard, businesses must comply with Proposition 65 by complying with the general State standard, which is virtually identical to the Federal Hazard Communication Standard. (For the minor differences, see Sections III.B.3 and 4.)

Section 5194(b)(6) divides exposures into three types:

(1) Section 5194(b)(6)(B) covers exposures to chemicals which appear on the Proposition 65 list and which are subject to general State hazard communication requirements. For these exposures, businesses must comply with the general State hazard communication requirements.

(2) Section 5194(b)(6)(C) covers exposures to chemicals which appear on the Proposition 65 list but which would not otherwise be subject to general State hazard communication requirements. For these exposures, businesses have a choice between several alternative methods of compliance, one of which is compliance with the information, training and labeling requirements of the Federal Hazard Communication Standard.

(3) Section 5194(b)(6)(D) covers exposures to chemicals which do not appear on the Proposition 65 list. These exposures are not relevant to OSHA's analysis here.

As a practical matter, almost all chemicals covered by Proposition 65 will be covered by the Federal and general State hazard communication requirements and, therefore, will be subject to Section 5194(b)(6)(B). For these exposures, compliance with subsections (d) through (k) of the California standard [8 CCR §§ 5194 (d)–(k)] is ''deemed compliance with the Act.'' 8 CCR § 5194(b)(6)(B). With some slight variations discussed elsewhere in this decision (see Section III.B.4), Sections 5194(d) through (I) track the provisions of the Federal Hazard Communication standard at 29 CFR § 1910.1200(d)–(I). Section 5194(k) sets forth five appendices. Appendices A–D appear to be identical to Appendices A–D to 29 CFR § 1910.1200, the Federal standard.[10]

In those rare situations involving exposures to chemicals which appear on the Proposition 65 list but which are not covered by the Federal or general State standards, Section 5194(b)(6)(C) will govern. Under that regulation, employers must provide ''a warning to employees in compliance with California Code of Regulations Title 22 (22 CCR) Section 12601(c)'' (the OEHHA regulations implementing Proposition 65) or comply with the requirements of Sections 5194(d)–(k). 8 CCR §§ 5194(b)(6)(C). Under Section 12601(c), compliance with Proposition 65 can be achieved via compliance with the Federal (or, if the business so chooses, the general State) Hazard Communication Standard. 22 CCR § 12601(C)(1)(c).

Section 12601(c) begins with the statement:

Warnings for occupational exposures which include the methods of transmission and the warning messages as specified by this subdivision shall be deemed clear and reasonable.

The remainder of Section 12601(c) sets forth three alternative methods of providing acceptable warnings:

1. The business may place on the product's or substance's label a warning which complies with the criteria for consumer product warnings [*see* 22 CCR §§ 12601 (b)(1)(A), (b) (3)–(4), (c)(1)(A), (c)(2)]; or

2. The business may post a clear and conspicuous workplace sign [*see* 22 CCR §§ 12601(c)(1)(B)]; or

3. The business may comply with the information, training, and labeling requirements of the Federal Hazard Communication Standard, the California Hazard Communication Standard, or (in cases involving pesticides) California's Pesticides and Worker Safety requirements [see 22 CCR § 12601(c)(1)(C)].

Except in the case of pesticides (discussed in Section III.B.3), then, Section 12601(c) provides that compliance with the measures provided by the Federal Hazard Communication Standard constitutes compliance with Proposition 65.

Although California's statements about the proper interpretation of its standard have been ambiguous, OSHA believes the foregoing understanding is consistent with the State's interpretations. In its February 16, 1996 submission (Ex. 6), Cal/OSHA (on behalf of itself, OEHHA and the Attorney General), stated that:

> [T]he Cal-HCS allows compliance to be achieved either through compliance with subsections (d) through (k) of the HCS, or, where the HCS would not require a warning, either through the methods set forth in subsections (d) through (k) or the alternative warning methods in 22 CCR § 12601(c).

Under the ''HCS Method,'' ''a company may simply give the Proposition 65 warning through a method that complies with the HCS.'' Ex. 6, page 6; see also Ex. 6, pages 7–9; Ex. 18–174A,

[10] There is no Section 5194(j). Appendix E consists of Proposition 65 regulations from Title 22 of the California Code of Regulations, which ''are printed in this Appendix *because they provide terms and provisions referred to in subsection (b)(6)* (emphasis added). Appendix E also includes all of the regulations governing warnings for consumer and environmental exposures. 22 CCR §§ 12601(b), (d). OSHA interprets the California standard to include these provisions solely for the purpose of providing easy access to code sections referenced in the Standard.

Attachment 5, page 3) (Letter from California DOSH to parties in *AYS* v. *Turco*). Such methods generally would include providing relevant material safety data sheets, labels, and (for employers) training. Similarly, California states that if a business chooses to comply with Section 12601(c),

> § 12601(c) itself refers back to the HCS warning methods by providing that compliance may be achieved through 'a warning to the exposed employee about the chemical in question that fully complies with all information, training and labeling requirements of the Federal Hazard Communication Standard'' * * *. However, the regulation does *not* provide specific safe harbor warning language where the HCS method is used to give the warning.

Ex. 6, page 11; see also Cal/OSHA Enforcement Directive, Policy and Procedure C–43. Similarly, Section 5194(b)(6)(E) provides that compliance with the Federal Hazard Communication Standard ''shall be deemed a defense'' in any enforcement action brought under Proposition 65. *Id.*, incorporating 22 CCR § 12601(C)(1)(c).

California does point out that while the language of any ''hazard warning'' ''need satisfy only the more general standard of § 5194(c)''—i.e. ''Any words, pictures, symbols or combination thereof appearing on a label or other appropriate form of warning which convey the health hazards and physical hazards of the substance(s) in the container(s)—such a warning must be ''clear and reasonable'' to meet the requirements of Proposition 65. See Ex. 6 page 9; *see also* 29 CFR § 1910.1200(c).

One commentor, Dow Chemical (Ex. 18–162, page 9), seizes upon a similar statement by OEHHA in its promulgation of 22 CCR § 12601(c) (see Ex. 18–174A, Attachment 2 at page 37) to argue that California will not, in fact, recognize compliance with the Federal standard as compliance with Proposition 65. In its statement however, OEHHA's focus was upon the fact that the Federal standard requires only an ''appropriate'' warning and does not prescribe specific warning language; [11] thus, OEHHA believed that California would have to independently evaluate Federal label or MSDS warnings to determine if they were ''clear and reasonable'' in accordance with Proposition 65's requirements. In OSHA's view, Dow's comment misses a central point. The Federal standard does not prescribe specific warning language. That fact, however, is not a license for businesses to create unclear or unreasonable warnings. An unclear or unreasonable warning would not meet Federal requirements. Thus, there is no substantive distinction between the Proposition 65's requirement of a ''clear and reasonable'' warning and the Federal (and State) requirement of an ''appropriate'' warning. Compliance with the Federal standard, then, constitutes compliance with the Proposition 65.[12] As stated previously, however, in most cases chemicals on the Proposition 65 list will be subject to the general State Hazard Communication Standard and, therefore, employers will have to comply with the State standard. No commentor has pointed to any significant differences between the labeling and MSDS requirements of the two standards. Compare 29 CFR §§ 1910.1200 (f)-(g) with 8 CCR §§ 5194 (f)-(g); see also discussion of trade secrets (California requirement of CAS numbers) in Section III.B.4. Proposition 65, therefore, does not undermine effectiveness or result in an undue burden on commerce.[13]

3. Comparison of Coverage Under Federal Standard and Proposition 65

Overview: OSHA has identified three general areas in which the California standard, including Proposition 65, differs from the Federal standard. In sections three through five, OSHA will discuss these differences and analyze them in light of the requirements of Section 18 of the OSH Act.

Before proceeding to these differences, however, it is important to recognize the overall similarities between the State and Federal standards. In particular, many commentors maintain that the chemicals and concentrations of chemicals covered by Proposition 65 and the Federal standard differ significantly. See, for example, Exs. 18–153, 18–154, 18–162, 18–164, 18–165, 18–166. This is understandable, particularly in light of the fact that the California standard's incorporation of Proposition 65 specifically provides for ''Exposures Subject to Proposition 65 Only.'' 8 CCR § 5194(b)(6)(B). However, once the Federal and State standards are analyzed, it becomes apparent that they are, in fact, quite similar. Most important, both standards require appropriate warnings whenever there is reliable scientific evidence to support the view that a particular chemical is hazardous. As a consequence, both standards, with a few exceptions, cover the same chemicals and concentrations of chemicals.

Under the Federal standard, covered businesses must take appropriate steps to communicate possible chemical health hazards (including carcinogens and reproductive toxins) whenever

> a. A chemical appears on certain ''floor'' lists referenced in the standard; or
>
> b. ''There is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees'' [see 29 CFR § 1910.1200(c)]

See 29 CFR § 1910.1200(c), (d) (3)–(4). The general California standard is equally specific. 8 CCR §§ 5194(c), (d) (3)–(4). Accordingly, Federal and State hazard communication coverage is not limited to specific lists of chemicals but is broad and flexible enough to take into account any chemical which, whether listed or not, meets the ''one study'' test.

Proposition 65 relies upon a list of chemicals. The Proposition 65 ''list'' is based in part upon the ''floor'' lists used in the Federal standard and in part upon the State's evaluation of scientific evidence. *See generally* California Health and Welfare Code §§ 25249.8 (a)–(b).

Much of the confusion in the comments over the chemical coverage issue appears to reflect an undue focus upon comparing the floor lists referenced in the Federal standard with the Proposition 65 list.[14] Although there

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[11] OEHHA also noted that there might be situations in which the Federal standard would not apply to particular employees, but Proposition 65 would. OEHHA did not want Section 12601(c) to be understood to relieve businesses of the duty of providing warnings to these additional employees. Ex. 18–174A, Attachment 2 at page 37.

[12] For example, it appears that several businesses have been sued because the warnings they provided were phrased in ''and/or'' terms and, thus, did not specify whether the chemical involved was a carcinogen or a reproductive toxicant. *E.g. Ex.* 18–39. An ''and/or'' warning also would fail to meet the requirements of the Federal standard because it does not ''convey the specific physical and health hazard(s)[.]'' 29 CFR § 1910.1200(c) (emphasis added).

[13] Assuming, for purposes of argument, that the California standard did require businesses to add a consumer ''safe harbor'' label warning to a product for which the Federal standard would require only an MSDS, OSHA finds that such a requirement neither undermines effectiveness nor constitutes a violation of the product clause. Although some commentors asserted that these labels result in ''over warning,'' the record contains no copies of labels which would undermine the effectiveness of the Federal standard and there is no evidence demonstrating the burden on commerce which has resulted. Most of the commentors' complaints, in any case, focus on the requirements imposed by voluntary settlements, a subject we discuss below.

[14] The existence of the Proposition 65 list represents another difference between the California and Federal standard, but the list itself does not violate the product clause. There is no evidence that California's preparation of a list of hazardous chemicals results in a less effective standard or imposes a burden upon commerce. Indeed, the list as a supplement to the general hazard communication requirements should benefit

is a great deal of overlap between these Federal and Proposition 65 lists, preoccupation with them overlooks the fact that even if a chemical is not on the Federal floor list, it must be classified as a hazardous chemical under the Federal standard if there is at least one scientifically valid study to support a finding that the chemical poses a health hazard to employees. Similarly, chemicals are placed on the Proposition 65 list only after a finding by the State (or another Federal agency) that valid scientific evidence supports their classification as a carcinogen or reproductive hazard.[15]

Proposition 65 requires the California Governor to compose (and regularly update) a list of chemicals known to be carcinogens or reproductive toxins. The statute established four mechanisms for including a particular chemical on this list. First, Proposition 65 created an initial list, which consisted of chemicals automatically included by virtue of their recognition as carcinogens or reproductive toxins by the International Agency for Research on Cancer (IARC) or OSHA. *See* California Health and Safety Code § 25249.8(a), *incorporating* California Labor Code §§ 6382 (b)(1), (d); *see also AFL–CIO* v. *Deukmejian,* No. C002364 (California Court of Appeals, 1989). As the court in AFL–CIO recognized, the initial Proposition 65 list simply mirrored the Federal floor listing references to carcinogens identified by the National Toxicology Program (NTP) or IARC and to carcinogens or reproductive toxins otherwise covered by OSHA (under 29 CFR Part 1910 subpart Z). *See* 29 CFR §§ 1910.1200(d) (3)–(4) and Appendix A. Consequently, the initial Proposition 65 list represented chemicals which would be covered under the Federal standard.

Proposition 65 also provides three methods of supplementing the initial list. These three methods rely upon scientific evidence that a chemical causes cancer or reproductive toxicity and, thus, again mirror the Federal standard. Under California Health and Safety Code Section 25249.8(b), a chemical is listed if, ''in the opinion of the state's qualified experts''

a. ''Scientifically valid testing'' shows that the chemical causes cancer or reproductive toxicity;

b. ''A body considered to be authoritative by'' the State's experts formally identifies the chemical as a carcinogen or reproductive toxin [hereafter, ''authoritative bodies mechanism'']; or

c. A State or Federal agency has ''formally required'' the chemical to be labeled or identified as a carcinogen or reproductive toxin [hereafter, ''formally required to be labeled mechanism''].

The California Code of Regulations, see 22 CCR §§ 12301–12306, implements these provisions by creating a ''Science Advisory Board'' (SAB) which, in turn, comprises two committees: the ''Carcinogen Identification Committee'' and the ''Developmental and Reproductive Toxicant (DART) Identification Committee.'' 22 CCR § 12302(a). The committee members are the ''State's qualified experts'' in their relevant fields for purposes of Proposition 65. See 22 CCR § 12301–2. They advise and assist the California lead agency, the Office of Environmental Health Hazard Assessment (OEHHA), in implementing Proposition 65. 22 CCR § 12305.

As is clear from the statute, when the committees themselves determine that a particular chemical causes cancer or reproductive toxicity, they must rely upon ''scientifically valid testing.'' California Health and Welfare Code § 25249.8(b); 8 CCR §§ 12305 (a)(1), (b)(1). This same ''scientifically valid testing'' would trigger the Federal standard's requirement for hazard communication when ''there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles'' of a potential health hazard. Here again, then, Proposition 65 would not apply to chemicals not covered by the Federal standard.

The committees similarly must rely upon valid scientific evidence when they identify a chemical through Proposition 65's authoritative bodies mechanism.[16] To rely upon an authoritative body's identification of a chemical as hazardous, the committees must find ''sufficient evidence'' of carcinogenicity or reproductive toxicity from studies in humans or in experimental animals. 22 CCR § 12306 (e)–(g). Moreover, OEHHA can reject a chemical ''if scientifically valid data which were not considered by the authoritative body clearly establish that the chemical does not satisfy the criteria'' of subsections (e) and (g). 22 CCR § 12306 (f), (h). OEHHA also affords all interested persons an opportunity to object to a chemical's listing on ''the basis * * * that there is no substantial evidence that the criteria identified in subsection (e) or in subsection (g) have been satisfied.'' 22 CCR § 12306(I). The ''scientifically valid data'' required when the committees identify a chemical for listing under the authoritative bodies mechanism would activate hazard communication requirements under the Federal standard as well.

Finally, under 22 CCR § 12902, OEHHA can identify a chemical pursuant to Proposition 65's ''formally required to be labeled'' mechanism when ''substantial evidence exists to support a finding that the chemical meets the requirements of this section.'' Labeling requirements imposed by a State or Federal agency would have to be based upon at least some scientific evidence; thus, the Federal standard would cover these chemicals if they were not excluded for other reasons.

Thus, regardless of the mechanism used to list a chemical under Proposition 65, the ultimate question is whether there is scientific evidence to support a finding that a chemical is a carcinogen or reproductive toxin.

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both workers and businesses by providing another, comprehensive resource for obtaining information about certain substances.

[15] For example, Dow Chemical Company cites fifteen substances which, it states, ''are treated as carcinogens by Prop. 65 but are not similarly classified by OSHA/NTP/IARC[.]'' Ex. 18–162, page 14 footnote 6. Although it is not entirely clear, this statement suggests that Dow believes hazard communication about cancer risk is unnecessary unless a chemical is specifically recognized as a carcinogen by IARC, NTP or an OSHA standard. This focus misses the ''one study'' requirement of Section 1910.1200(c). The flaw in Dow's analysis is apparent when at least one of its sample chemicals, captan, is considered. Captan's primary use is as a pesticide and that use generally would be regulated by the U.S. Environmental Protection Agency rather than OSHA. See OSHA's 1994 preamble to the Hazard Communication Standard, 59 FR 6126, page 6143 (February 9, 1994). OSHA, however, would regulate the manufacture and formulation of captan and its non-pesticidal uses and recognized the possibility that it is a carcinogen in its 1992 proposed rule on air contaminants, noting that animal studies have been contradictory but that ''high doses caused significant incidences of'' cancer in mice. See 57 FR 26002 (June 12, 1992). Thus, there appears to be ''statistically significant evidence based on at least one study'' that captan is a carcinogen and subject to OSHA hazard communication requirements.

[16] As of September 1996, California had identified five ''authoritative bodies'': IARC; the National Institute for Occupational Safety and Health (NIOSH); the National Toxicology Program (NTP); the U.S. Environmental Protection Agency (USEPA); and the U.S. Food and Drug Administration (USFDA). 22 CCR § 12306(l). Here again, there is considerable overlap between the Federal and State standards: the Federal standard similarly explicitly recognizes IARC and NTP as authoritative sources for identifying hazardous chemicals. See 29 CFR §§ 1910.1200(d)(4)(I)–(ii) and Appendix A. In addition, OSHA has consistently relied upon information provided by NIOSH in promulgating hazard communication requirements. See, for example, the preamble to the 1994 amendments to the Federal standard, 59 FR 6126, 6150–51, 6154 (February 9, 1994). The Federal standard does not similarly require reliance upon ''lists'' compiled by USEPA or USFDA. However, because those agencies base their determinations upon scientific evidence, it is highly likely that the Federal standard would treat a chemical as hazardous if those agencies determined it to be so. (As a practical matter, however, such chemicals might be exempted under 29 CFR § 1910.1200(b)(6), a question addressed below).

Because the Federal standard requires hazard communication so long as there is one reliable scientific study to support the requirement, it is no less expansive than Proposition 65 with regard to cancer and reproductive hazards. 29 CFR §§ 1910.1200(c) (definition of ''health hazard''), 1910.1200(d).

Indeed, the Federal standard may, if anything, encompass more chemicals than Proposition 65:

> The results of any studies which are designed and conducted according to established scientific principles, and which report statistically significant conclusions regarding the health effects of a chemical, shall be a sufficient basis for a hazard determination and reported on any material safety data sheet. 29 CFR § 1910.1200, Appendix B, paragraph 4. Businesses also may report ''other scientifically valid studies which tend to refute the findings of hazard,'' but the existence of refuting studies does not dissolve the obligation to report the hazard. Id. In contrast, it appears that, except for its initial listing mechanism, Proposition 65 requires that the weight of the evidence support the placement of a substance on the statutory list.[17]

The only exceptions to this general principle involve certain chemicals or concentrations of chemicals which are exempted from coverage under the Federal standard in some circumstances. OSHA will discuss these in the next sections and analyze them in light of ''effectiveness'' and ''undue burden'' requirements of Section 18(c)(2).

Mixtures: Under the Federal standard, chemicals present at certain low concentration levels in ''mixtures'' may not be subject to hazard communication requirements. Some commentors (e.g. 18–65, 18–96) allege that Proposition 65 requires businesses to provide a warning for such chemicals when the Federal standard would not. To some degree, these commentors misunderstand the Federal requirements; they are correct, however, to the extent that Proposition 65 allocates the burden of proof differently than the Federal standard does. This different allocation of burden of proof, however, does not violate Section 18 of the Act. See below.

A ''mixture,'' under the Federal standard, is ''any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.'' 29 CFR § 1910.1200(c). Section 1910.1200(d) requires businesses to determine the hazards of chemical mixtures. It further provides, with respect to health hazards associated with untested mixtures, that ''the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section[.]'' 29 CFR § 1910.1200(d)(5)(ii). In the case of mixtures containing chemicals in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent), businesses must communicate hazards if they have evidence that the chemical involved ''could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, *or could present a health risk to employees in those concentrations*[.]'' 29 CFR § 1910.1200(d)(5)(ii) (emphasis added).

Thus, under the Federal standard, a business must follow hazard communication requirements a) whenever a reproductive toxin is present in a mixture at a concentration of one percent; b) whenever a carcinogen is present at a concentration of 0.1% or greater; or c) whenever either hazard is present at any concentration and there is evidence that an exposure limit will be exceeded or a possible health risk posed.

Proposition 65 similarly exempts certain chemical mixtures from coverage, but the relevant exemption is phrased differently: a chemical exposure is exempted from coverage if ''the person responsible'' for the exposure can show that:

> a. ''The exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer'' and
>
> b. ''That the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity[.]''
>
> California Health and Welfare Code § 25249.10(c); see also 8 CCR § 5194(b)(6)(D).

Some commentors appear to interpret the Federal standard's reference to ''a concentration of one percent'' (or .1%) as a ''cut off'' point at which no hazard communication warning is required. *E.g.* 18–106. This understanding is not quite correct. Both the Federal standard and Proposition 65 require hazard communication whenever a chemical poses a health risk, regardless of its concentration in a mixture. Similarly, both provide an exemption from coverage for chemicals which do not pose a health risk to workers. The central difference between the two standards is in the allocation of burden of proof: the California standard imposes the burden of proof upon the business causing the exposure; the Federal standard does not. In essence, the substance of the two standards is the same but the procedures used to apply them differ.

The contrasting burdens of proof under the Federal and California standards do not provide any basis for OSHA to reject the California supplement. It cannot logically be argued that imposing the burden of proof upon business will result in less effective protection for workers. If anything, reversal of the burden of proof should result in more effective protection by requiring employers to provide a warning unless they have some affirmative proof that a substance is not hazardous in a particular concentration.

This difference between the standards also does not create an undue burden on commerce. First, the Supreme Court has held that a State statute's creation of a presumption which may be rebutted by a defendant does not offend the dormant commerce clause. See *Atlantic Coast Line R. Co.* v. *Ford,* 287 U.S. 502, 509 (1933). In keeping with OSHA's earlier statements (see Section II.B) about the importance of dormant commerce clause case law in analyzing OSH Act product clause issues, OSHA finds that California's decision to shift the initial burden of proof to defendants does not impose an undue burden on commerce.[18]

Second, even assuming this statutory presumption theoretically could impose an undue burden on commerce, there is no evidence to support such a burden in this case. Although many commentors

[17] Under the non-Proposition 65 elements of the California standard, of course, businesses would be required to educate workers about hazards covered by the Federal standard, regardless of Proposition 65's applicability.

[18] Shell Oil also maintains that Proposition 65's rebuttable presumption offends Federal APA and the due process clause of the fourteenth amendment to the U.S. Constitution. 18–160, page 21. The Federal APA does not apply to State proceedings. See 5 U.S.C. § 551; *Day* v. *Shalala,* 23 F.3d 1052, 1064 (6th Cir. 1994). Rebuttable statutory presumptions do not offend due process, when there is a rational connection between ''the fact proved and the fact inferred.'' *Atlantic Coast Line,* 287 U.S. at 508–9 (upholding presumption of negligence where railroad company failed to give prescribed warning signals); *see also Usery* v. *Turner-Elkhorn Mining Company*, 428 U.S. 1, 28 (1976) (upholding various presumptions under Federal Black Lung Benefits Act). The presumption created by Proposition 65 is rational because there is a logical connection between the fact that a particular substance is hazardous (the fact proved by the substance's presence on the Proposition 65 list) and ''the fact inferred''—that the substance is hazardous in a particular mixture. Id.

complained generally about the burden imposed by Proposition 65's ''no significant risk'' option, none provided sufficient information addressing the specific point at issue here—that is, whether any business producing a mixture with a chemical which would not require hazard communication under the Federal standard was required by Proposition 65 to provide a warning. Rather, the examples provided by the commentors tend to bolster the opposite point of view.

One commentor, Chemspec, for example, stated that it was ''sued by a private bounty-hunter under California's Proposition 65 for our products that contain nitrilotriacetic acid and its salt (NTA), which appear on the Proposition 65 chemical list'' as a carcinogen. In response to the threatened suit, the Chemspec states, it produced two consultant reports demonstrating that not ''only did both risk assessments predict exposures well below any warning threshold, both independent risk assessments cross-correlated. The bounty-hunter, however, simply dismissed the results out of hand, and threatened to leave the question to a 'battle of experts' trial.'' Ex. 18–127; see also Ex. 18–174, page 47.

The lawsuit against Chemspec involved nitrilotriacetic acid (NTA), trisodium nitrilotriacetate (NTA-Na_3) and 1, 4-Dioxane. Ex. 18–174B, Attachment 25, Exhibit 3 (settlement agreement). One consultant's report (18–127A) addresses NTA-Na_3 and indicates that Chemspec primarily sells two carpet cleaning agents in California, ''powdered Formula 90 and liquid Formula 77,'' which ''typically contain 4.6 percent NTA-Na_3 and 6.5 percent NTA-Na_3 respectively.'' The second consultant's report addresses NTA, with respect to a variety of both consumer and occupational products.[19] The consultant's analysis indicates that NTA's concentration in all of these products is .1% or greater. See 18–127B, pages 14–20.

Given the fact that NTA and NTA-Na_3 are present in these products at concentrations of 0.1% or greater, the Federal Hazard Communication Standard requires appropriate hazard warnings regardless of the consultant's predictions about ultimate exposure. See *General Carbon Co.* v. *Occupational Safety & Health Review Comm'n,* 860 F.2d 479, 483–85 (D.C. Cir. 1988) (accepting OSHA's interpretation of standard as requiring manufacturer to label product, even where product, as ultimately used by worker, might not pose a hazard). Although it is not entirely clear from Chemspec's comments or the remaining material in the record,[20] it is possible that Chemspec believes the low concentrations and exposure assessments relieve it of any burden to provide hazard warnings. This, if true, would be an incorrect assumption.

Articles: The Coalition (Ex. 18–174) alleges that Proposition 65 treats ''articles'' differently than the Federal standard. OSHA concludes that this is a distinction without a difference.

The Federal standard defines an ''article'' as:

> a manufactured item other than a fluid or particle: (I) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, e.g., minute or trace amounts of a hazardous chemical (as determined under paragraph (d) of this section), and does not pose a physical hazard or health risk to employees.

29 CFR § 1910.1200(c). Articles are specifically exempt from coverage under the Federal standard; however, manufacturers bear the burden of proving that the product is an article as defined in Section 1910.1200(c). 29 CFR § 1910.1200(b)(6)(iv). Establishing exemption requires the manufacturer to show, inter alia, that the product poses no health risk. *Sec'y of Labor* v. *Holly Springs,* 16 BNA OSHC 1856 (June 16, 1984).

Proposition 65 does not have a similarly explicit exemption for ''articles''; however, as a practical matter, a manufacturer can establish a California exemption for a product which is a Federal ''article'' by showing that the product poses no significant risk (or no observable effect, in the case of reproductive toxins). Under both the Federal and California standards, then, the manufacturer bears the burden of proving that the product poses no health risk and the distinction, as initially noted, is one without a difference.[21]

Pesticides: The Federal standard exempts from labeling requirements ''[a]ny pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), when subject to the labeling requirements of that act and labeling regulations issued under that Act by the Environmental Protection Agency.'' 29 CFR § 1910.1200(b)(5)(I). In its 1994 amendment of the Federal standard, OSHA further indicated that, following EPA's promulgation of its Worker Protection Standard for Agricultural Pesticides, OSHA agreed ''not to cite employers who are covered under EPA's final rule with regard to hazard communication requirements for pesticides.'' 59 FR 6126, 6143 (February 9, 1994).

The Western Wood Preservers Institute (Ex. 18–2) objects to Proposition 65's application to arsenically-treated wood products.[22] The Institute also outlined a settlement agreement it reached with a private plaintiff, under which members of the industry provide Proposition 65 warnings via ink stamps or end tags. In this context, arsenic is a pesticide and thus would be subject to regulation by EPA rather than OSHA. The National Cotton Council (Ex. 18–159) objected

[19] Neither consultant's report addresses 1, 4-Dioxane and neither Chemspec nor the Coalition mention this chemical in their comments. Consequently, even assuming that the private plaintiff's complaints about NTA and NTA-Na_3 were without merit under Proposition 65, OSHA could not conclude that the lawsuit, as a whole, had no legal basis. Similarly, to the extent the private lawsuit was based upon consumer product exposure, OSHA's review of the California standard could have no effect.

[20] Although the Coalition maintains that Chemspec ''labeled their products and distributed MSDSs in full compliance with the Federal standard'' (Ex. 18–174, page 47), the Coalition does not state whether ''full compliance'' included labeling and MSDSs for all of the chemicals and products involved in this lawsuit. Chemspec itself does not address this issue and there is no indication that it ever attempted to argue that, because it was in ''full compliance'' with the Federal standard, it was in compliance with Proposition 65. As discussed in Section III.B.2, where, as here, a chemical is covered by both Proposition 65 and general State—and Federal—hazard communication requirements, compliance with the general State standard constitutes compliance with Proposition 65, and the compliance requirements of the State and Federal standards are virtually identical. The omission of this issue from Chemspec's or the Coalition's discussion suggests that Chemspec might have believed the Federal standard imposed no obligations for the particular products in question. On the other hand, the record contains MSDSs for two, and a label for one, of Chemspec's products, all of which contain what appear to be hazard communication warnings for the chemicals involved here. Ex. 18–127, 18–127A. Because the lawsuit involved twenty-one other products, however, OSHA cannot determine whether Chemspec believes it was in compliance with the Federal standard.

[21] It is true that the California standard outlines specific requirements for proving ''no significant risk'' and the Federal does not. See 22 CCR §§ 12705–12821. OSHA, however, has never dictated to the States exactly how they must interpret phrases such as ''no significant risk.'' In any case, no commentor has come forward with evidence comparing the burdens of proving ''no significant risk'' under the State and Federal standards.

[22] In terms of product clause analysis, WWPI's comments focus solely on an alleged burden placed upon out-of-state manufacturers shipping treated wood into California. OSHA's finding that California may not apply its State plan standards to out-of-state manufacturers should ameliorate WWPI's concern. In addition, these products have consumer uses which are not addressed by this decision.

more broadly to Proposition 65's application to pesticides, noting that ''the Federal HCS does not require labeling of pesticides[], which are covered by U.S. EPA regulations, whereas the CA Governor's List[] * * * includes many pesticides.'' [footnotes omitted].

OSHA finds that neither comment provides a basis for rejecting the State standard. First, where pesticides are concerned, compliance with Proposition 65 in the occupational setting is based upon compliance with California's Pesticides and Worker Safety Requirements. See 3 CCR §§ 6701–6761, as incorporated into the State plan by 8 CCR § 5194(b)(6)(C) and 22 CCR § 12601(c)(1)(C). Neither the Western Wood Preservers nor the Cotton Council alleges that compliance with California's worker pesticide regulations has proven burdensome in the past.[23] With respect to the settlement outlined by the Wood Preservers, the comment provides insufficient information for OSHA to determine whether occupational exposures were involved; assuming they were, however, Section 12601(c) of OEHHA's occupational regulations provides that compliance with California's worker pesticide regulations constitutes compliance with Proposition 65. The Institute's member companies, therefore, faced no additional compliance burden under Proposition 65 which they did not face as a result of the worker pesticide regulations. The voluntary settlement reached by the Institute does not negate the defense available through Section 12601(c). The industry simply failed to avail itself of that defense.

Second, to the extent these commentors object to ''labeling'' requirements allegedly imposed by Proposition 65, they overlook the Ninth Circuit's decision in *Chemical Specialties Manufacturers Ass'n* v. *Allenby*, 958 F.2d 941 (9th Cir. 1992), cert. denied 506 U.S. 825 (1992). In CSMA, the court found that Proposition 65 does not require labeling and that, if it did, the law would be preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). 958 F.2d at 945. Consequently, pesticide manufacturers and users cannot be required by private plaintiffs enforcing Proposition 65 to provide particular labeling.

Aflatoxins: The National Cotton Council (18–154) argues that Proposition 65 covers aflatoxins, a biological hazard, whereas the Federal standard does not. The Council is correct. The Federal Hazard Communication Standard does not require warnings for aflatoxins or other biological hazards. This is because aflatoxins do not come within the scope of the Federal standard, which was ''intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards'' (emphasis added). 29 CFR § 1910.1200(a)(2). In 1994, OSHA specifically amended the standard to reflect this fact, adding Section 1910.1200(b)(6)(xii), which exempts biological hazards. 29 CFR § 1910.1200(b)(6)(xii). OSHA then explained that:

> Although OSHA has never considered either radioactivity or biological hazards to be covered by the HCS, OSHA has received inquiries regarding such coverage, and therefore added specific exemptions for these types of hazards in the NPRM. * * * OSHA believes that this particular rulemaking is more appropriately limited to chemical hazards, although OSHA does not discourage employers from including coverage of such agents in their hazard communication programs.

59 FR 6126, 6155 (February 9, 1994).

It is unclear whether Cal/OSH's incorporation of Proposition 65 into the State plan was intended in bring aflatoxins (and other biological hazards) within the scope of the State plan. In practical terms, aflatoxins would be unlikely to present an occupational hazard; their presence on the Proposition 65 most likely relates to the hazard they present in consumer products which, as stated previously, will not be affected by OSHA's decision. If the State does not intend to bring aflatoxins within the scope of the State plan, California need not establish that Proposition 65's coverage of biological hazards meets the requirements of Section 18(c)(2).

If the State does intend to apply its Hazard Communication Standard to biological occupational hazards, OSHA finds that Section 18(c)(2) does not prohibit the State from doing so. As OSHA stated in the 1994 preamble, the Federal exclusion of biological hazards was not intended to discourage employers from including these hazards in their hazard communication programs. A State standard covering biological hazards is more effective than a Federal standard which does not cover such hazards. In addition, there is no evidence that coverage of biological hazards would impose an undue burden on commerce. Only one commentor (the Cotton Council) raised this issue and it presented no evidence of Proposition 65 enforcement actions involving occupational biological hazards.

California Non-Chemical Manufacturers: The Coalition argues that the California standard increases the kinds of products to which hazard communication requirements apply by requiring manufacturers other than chemical manufacturers (*e.g.* truck manufacturers) to provide warnings. Ex. 18–174, page 28. Based upon OSHA's findings on the out-of-state manufacturers issue (see Section II.D), the State plan will not regulate out-of-state vendors; this finding may moot the bulk of the Coalition's objections. The question remains, however, whether the California standard covers in-state manufacturers other than chemical manufacturers (hereafter ''non-chemical'' manufacturers), which would make its coverage more expansive than the Federal standard, which applies only to chemical manufacturers as manufacturers. As discussed in Section II.D, above, California's position on application of its standard to non-chemical manufacturers is unclear. On the one hand, California's incorporation of Proposition 65 imposes the law's obligations upon ''employers'' (8 CCR § 5194(b)(6)) and defines an ''occupational exposure'' as one occurring ''in the workplace of the employer causing the exposure, to any employee.'' 22 CCR § 12601(c), as incorporated into the California standard by 8 CCR § 5194(b)(6)(C). This regulatory language suggests that the State plan would subject a manufacturer to Proposition 65 requirements only if the manufacturer was an ''employer'' within the meaning of the State plan and only with respect to the manufacturers' particular employees.

On the other hand, the California Attorney General has argued that the State plan's Proposition 65 requirements also apply to manufacturers other than chemical manufacturers (hereafter ''non-chemical manufacturers''). The Attorney General's position appears to be based upon the fact that some products of non-chemical manufacturers may be combined with a chemical to produce a hazardous chemical. For example, an industrial truck uses diesel fuel, which produces exhaust which is a hazardous chemical. See Ex. 18–156. The Attorney General also has taken the position that Section 12601(c)'s definition of an ''occupational exposure'' does not limit the State plan's Proposition 65 coverage to the duties owed by manufacturers to their own employees. Rather, the Attorney General has maintained that the State plan imposes obligations upon manufacturers in their relation to the employees of other businesses.

[23] California promulgated the regulations referenced in Section 12601(c) in 1988.

Consequently, it appears that California may extend hazard communication requirements to non-chemical manufacturers in their role as manufacturers, which exceeds the scope of the Federal standard.[24] Ex. 18–174, Attachment 31.

OSHA finds that this potential difference in coverage between the Federal and State standards does not violate Section 18(c). Facially, application of hazard communication requirements to non-chemical manufacturers should lead to more, not less, effective protection for employees and there is no evidence suggesting otherwise. Accordingly, OSHA finds that this requirement does not result in less effective protection. Application of Proposition 65 to California non-chemical manufacturers also does not violate the product clause.

Proposition 65, by its terms, applies only to exposures occurring within California. Goods which are manufactured in California by California employers and which remain in that State do not enter interstate commerce, and requirements applicable to such products do not constitute a burden on interstate commerce. Although some manufacturers maintain that they cannot distinguish between goods that will be shipped to points in California and goods that will be shipped elsewhere (and they therefore may elect to apply Proposition 65 warnings to all products regardless of destination), the manufacturer's voluntary assumption of such a task is not imposed by Proposition 65's terms. Finally, even assuming that non-chemical manufacturers are induced by Proposition 65 to provide labeling not otherwise required by hazard communication requirements, they have submitted no concrete evidence establishing the extent of the burden imposed.

4. Substantive Differences Between the Federal and General California Standards

In addition to the objections raised to the Proposition 65 elements of the California standard, commentors have objected to several parts of the general (*i.e.* non-Proposition 65) California standard. These objections relate to trade secret issues; the failure of the State standard to exclude all substances excluded by the Federal standard; and a requirement in the State standard that potential health risks be described ''in lay terms.''

Trade Secrets: Some commentors allege that the California Hazard Communication Standard does not provide adequate protection for trade secrets, as required by OSHA. OSHA's general State plan regulations at 29 CFR § 1902.4(c)(viii) require that a State plan provide adequate safeguards to protect trade secrets, by such means as limiting access to such trade secrets to authorized State officers or employees and by providing for the issuance of appropriate orders to protect the confidentiality of trade secrets.

Shell Oil Company and Elf Atochem North America, Inc., maintain that the California standard does not meet this criterion because it allows access to trade secrets by safety professionals who are not State officials or employers. Ex. 18–160. Other commentors assert that the California requirement that Material Safety Data Sheets (MSDS) contain the Chemical Abstract Service number will jeopardize trade secrets by allowing outsiders to determine the composition of products. Exs. 18–40, 18–154. The Federal standard does not require inclusion of the CAS number. The Color Pigments Manufacturers Association alleges that the California standard fails to require health and safety professionals to treat trade secrets confidentially. Ex. 18–40.

The California Hazard Communication Standard allows disclosure of information to both safety and health professionals, while the Federal Hazard Communication Standard requires disclosure only to health professionals. The inclusion of health professionals in the Federal standard extends trade secret access beyond State officials and employers, the groups previously listed in the general State plan regulation. The State argues that its provision further broadening access to safety professionals is more protective of worker safety, because many safety and health programs are managed by safety professionals who have both safety and health expertise. Importantly, the State requires all persons receiving such trade secret information to treat it confidentially 8 CCR § 5194(I)(3)(E). OSHA finds that California has adequate reason to extend disclosure to safety professionals and that this extension of access does not result in less effective protection of trade secrets. In addition, while requiring that CAS numbers be included on a MSDS, the standard also provides an exemption for trade secrets. 8 CCR § 5194(I)(1). Therefore, OSHA finds that the State standard's protection of trade secrets is in accordance with State plan requirements.

California's Omission of Federal Exemptions and Exclusions: The Chemical Manufacturers Association (CMA) generally protests that the California standard does not include ''the exemptions and exception added to the Federal HCS in 1994.'' Ex. 18–154, page 12. One of these differences, the Federal exclusion of biological hazards, is discussed above (see ''Aflatoxins''). In any case, however, CMA does not explain how this difference results in a less effective standard or produces a burden on commerce and, in fact, states that the differences between the Federal and general California standard ''in practice * * * have not presented significant problems for employers and manufacturers.'' *Id.,* page 4. Logically, if California's standard is stricter than the Federal standard, it should result in more effective protection for workers. OSHA therefore concludes that California's failure to adopt all of the exemptions or exceptions added to the Federal standard in 1994 does not require rejection of the standard.

California's Requirement for Use of Lay Terminology on MSDSs: The general California standard requires that an MSDS include ''[a] description in lay terms, if not otherwise provided, * * * of the specific potential health risks posed by the hazardous substance intended to alert any person reading the information.'' 8 CCR § 5194(g)(2)(M). The Federal standard does not include this language, but does require that the MSDS describe ''[t]he health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical.'' 29 CFR § 1910.1200(g)(2)(iv). The Chemical Manufacturers Association objects to the California requirement but, again, does not explain how it could result in less effective protection or impose an undue burden upon commerce. Ex. 18–154, page 12. See also Ex. 18–121. California's requirement for the use of lay terminology on MSDSs does not appear to undermine the potential effectiveness of its standard. Indeed, in a 1990 grant program announcement, OSHA recognized that the use of lay language on MSDSs may enhance worker understanding of hazards. 55 FR 18195 (May 1, 1990). There also is no evidence that a requirement for the use of lay terminology would pose an undue burden on commerce. As similarly discussed in the context of Proposition 65 (see Section III.B.2), ''appropriate'' hazard warnings should be ''clear and reasonable'; warnings which use lay

[24] California has the power to impose hazard communication requirements obligations upon all employers (in their role as employers) located within the State. The California standard does not exceed the Federal in this respect. Equally clearly, and as discussed above, it cannot impose such obligations upon out-of-state employers under the State plan.

terminology should meet both requirements.

5. Supplemental Enforcement

The most extensive comments to OSHA about Proposition 65 have come from businesses concerned about their vulnerability to lawsuits brought by private plaintiffs under Proposition 65. Commentors also have raised some objections to the participation of the California Attorney General and local prosecutors in Proposition 65 actions, which are discussed in Section II.E.

Proposition 65's supplemental enforcement provisions are the one area where the California standard does differ, clearly and significantly, from the Federal standard. OSHA nevertheless finds that this private right of action does not render the California standard unapprovable. The OSH Act does not prohibit the States from fashioning their own enforcement strategies and the private right of enforcement, as a supplement to standard Cal/OSHA enforcement, violates none of the provisions of Section 18. OSHA notes that Cal/OSHA continues to enforce its Hazard Communication Standard, issuing, for example, citations for almost 1000 violations of the standard during Fiscal Year 1996.

Before outlining its decision on this issue in more detail, OSHA notes initially that most of the anecdotal evidence supplied by commentors about the burdens created by this private right of enforcement involved consumer or environmental (either in addition to, or instead of, occupational) exposures to chemicals. *E.g.* Exs. 18–133, 18–137, 18–149, 18–162. Again, OSHA's decision on the approvability of the State occupational standard cannot affect Proposition 65's consumer and environmental applications.

Effectiveness: Industry commentors generally maintain that Proposition 65's supplemental enforcement provision does not enhance the California standard's effectiveness and may, in fact, render the standard less effective. *E.g.* Exs. 18–65, 18–143, 18–150, 18–160, 18–162, 18–174. Most of the comments also involve other allegations of Section 18 violations. For example, some commentors believe that Proposition 65 enforcement is less effective because Cal/OSHA generally is not involved in the suits or because private plaintiffs do not meet the OSH Act's requirement for ''qualified personnel.'' These issues are discussed separately, above.

The remaining general allegation of ineffectiveness involves some commentors' beliefs that most lawsuits brought by private plaintiffs under Proposition 65 are frivolous. As noted previously, much of this anecdotal evidence appears to concern lawsuits involving consumer or environmental exposures, which are beyond OSHA's jurisdiction. In addition, OSHA's review was made more difficult by a general failure to the commentors to provide specific information. In many cases, commentors alleged that they were in compliance with the Federal standard and were unfairly sued by private plaintiffs. Their comments, however, did not provide sufficient information for OSHA to determine whether they were, in fact, in compliance with the Federal standard. Moreover, based upon the evidence in the comments, none of the commentors alleging that Proposition 65 supplemental lawsuits are frivolous has ever actually moved a California court to dismiss a lawsuit as frivolous. Many have accepted settlements that imposed requirements equal to or beyond those asked by the California Hazard Communication Standard and Proposition 65.[25]

On its face, a supplemental enforcement provision should make a State standard more, not less, effective because it provides an additional method of ensuring that a standard is followed. If a defendant subject to a Proposition 65 lawsuit believes that the complaint is frivolous, it should bring that complaint to the attention of the court considering the lawsuit. In any case, given the absence of specific information about the lawsuits involved, OSHA cannot determine that private lawsuits filed under Proposition 65 have resulted in less effective worker protection.

On the other hand, there does appear to be some evidence that Proposition 65's supplemental enforcement provision has led to better enforcement of California's Hazard Communication Standard generally. For example, the Environmental Defense Fund *et al.* (Ex. 18–163) note the case of *Gonzalez* v. *Rubber Stampede,* Alameda Superior Court No. 714908–3), in which a company which initially had no hazard communication program was sued by one of its workers. Settlement of the lawsuit led to the company's agreement to hire a hazard communication consultant and to implement the consultant's recommendations within ninety days. See Exs. 18–163 (page 10, note 15) and 18–155C (page 30).

Similarly, in *Badenell* v. *Zurn Industries et al.,* No. 92–2993 (C.D. Cal.), Wilkinson Regulator, a manufacturer of brass parts, was sued under Proposition 65 by four workers, two of whom had elevated blood lead levels requiring medical intervention. The company was not following the Cal/OSHA lead standard and its hazard communication program apparently did not include information about lead. The Federal court ordered Wilkinson to request inspections by Cal/OSHA and the company ultimately agreed to comply with all OSHA-recommended procedures and to adhere to the lead standard. Wilkinson also was charged with violating Proposition 65's environmental exposure provisions by dumping lead-laden rinse water; the court ordered the company to clean up any lead contamination that resulted from that activity. Ex. 18–163, page 10 n. 15; see also Ex. 18–155C, page 24.

Cal/OSHA's resources, like those of any government agency, are necessarily limited. *Accord Carnation Co.* v. *Sec'y.*, 641 F.2d 801, 805 (9th Cir. 1981). Given this fact, both Federal and State laws provide an incentive for voluntary compliance. The State may reasonably determine that supplemental private enforcement will produce Hazard Communication Standard compliance at more workplaces than Cal/OSHA could expect to visit, as it apparently did in the cases involving Wilkinson and Rubber Stampede.

In sum, commentors opposing the standard have produced no reliable evidence showing that Proposition 65's supplemental enforcement option has resulted in less effective protection for workers, and the available evidence indicates that California could reasonably conclude that this enforcement method has resulted in increased protection for some workers.

Product Clause: The primary objection raised by industry commentors to Proposition 65's supplemental enforcement mechanism is an alleged burden on commerce created by the burden of litigating cases in California. See, *e.g.* Exs. 18–23, 18–40, 18–41, 18–58, 18–65, 18–75. Many of these comments relate to the burden imposed upon out-of-state businesses. OSHA's finding that supplemental lawsuits cannot be brought against out-of-state businesses under the auspices of the State plan (see Section II.D, above), therefore, moots many of these comments.

None of the comments establish a violation of the product clause. The commentors generally cite two competing burdens in this respect: they either may settle cases brought by private plaintiffs and avoid the costs of litigation, or they may litigate cases (and

[25] The only commenter to address this issue states that no defendant has ever moved to dismiss a suit he filed as frivolous. The record contains no evidence contradicting this assertion. Ex. 18–167.

possibly avoid any award of damages). OSHA finds that any burden imposed by voluntary settlements reached between businesses and private plaintiffs in individual cases is not an undue burden on commerce for purposes of the product clause. Although some commentors attempt to characterize such settlements as ''extortion'' (Exs. 18–92, 18–145, 18–162), there is no evidence to support the idea that these settlements have been involuntary. Nor can OSHA assume, in the absence of specific information, that cases that are voluntarily settled are without merit.

The litigation costs cited by the commentors (*e.g.* Exs. 18–23, 18–40, 18–41, 18–58, 18–65, 18–75, 18–164) also do not establish an undue burden on commerce. To begin with, it seems questionable whether the burden of litigating a case could constitute a burden on ''commerce,'' if the substantive requirements at issue in the litigation are legitimate State requirements. In fact, no commentor cited, and OSHA could not locate, any cases specifically addressing the general question of whether a law's enforcement provisions can burden commerce if its substantive provisions do not. The Supreme Court has rejected the argument that a State statute shifting attorney fees violates the dormant commerce clause. *Missouri, Kansas & Texas Railway Co. of Texas* v. *Harris,* 234 U.S. 412, 416 (1914). Proposition 65's provision for attorney's fees, therefore, does not constitute an undue burden on commerce. The only other relevant cases are two decisions addressing the question of whether an award of punitive damages could create an undue burden on commerce. Both courts rejected this idea. *Daugherty* v. *Firestone Tire & Rubber Co.,* 85 F.R.D. 693 (U.S. District Court for the Northern District of Georgia, 1980); *Brotherton* v. *Celotex Corp.,* 493 A.2d 1337 (Superior Court of New Jersey, Law Division, March 15, 1985). These decisions suggest that the penalties available under Proposition 65 also do not constitute an undue burden on commerce.

The dearth of relevant case law on this enforcement issue reflects the fact that the courts, in considering cases under the Commerce Clause, do not consider the enforcement provisions of particular laws. Rather, these decisions focus on burdens posed by the substantive aspects of particular laws. The courts' focus on the substantive aspects of laws is logical because the burden of litigating a case is not a burden on ''commerce.'' The product clause, like the Commerce Clause, ''protects the interstate market, not particular interstate firms[.]'' *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 127–28 (1978); *Kleenwell Biohazard Waste,* 48 F.3d at 397.

Although burdens on individual businesses could, in some circumstances, add up to a burden on the interstate market, the purely anecdotal evidence in this record does not support such a finding. OSHA received 156 comments from opponents of the standard, but only about fifteen provided specific information about particular lawsuits and the burdens allegedly imposed. Most of these lawsuits involved out-of-state businesses, many of whom should be exempt from enforcement under the auspices of the State plan, as discussed in Section II.D. Almost all of these lawsuits, as stated before, involved voluntary settlements, which have limited relevance to OSHA's consideration of product clause issues. Many cases involved consumer and environmental exposures; the expenses associated with settlements or litigation of such cases are not imposed by Proposition 65's occupational applications.

For example, one lawsuit brought to OSHA's attention was *As You Sow* v. *Shell Oil, Inc.* This case is now pending before the San Francisco Superior Court. Although this suit appears to have occupational aspects, the plaintiff's arguments also focus on potential exposure to consumers. See Ex. 18–174A, Attachment 3 (plaintiff's pleading), pages 3, 5, 14–15, 26. Furthermore, several of the issues pending before the court appear to turn on the proper interpretation of Proposition 65 and OEHHA regulations—*e.g.* what does it mean to ''knowingly and intentionally'' expose someone to a Proposition 65 chemical? Issues relating to consumer exposures are beyond OSHA's jurisdiction. Some additional issues do involve the intersection between Proposition 65 and the Federal Hazard Communication Standard—*i.e.* As You Sow argues that Shell's warning system does not comply with the Federal standard (and therefore does not comply with Proposition 65); Shell argues that it does. See Ex. 18–174A, Attachment 3, pages 18, 27–28 and Ex. 18–174B, Attachment 12 (defendant's pleading), pages 20–31. However, OSHA has no evidence showing that the California court is not capable of resolving the contested issues fairly and reasonably.

Finally, even where the commentors do provide information about expenses associated with lawsuits which were, at least in part, related to occupational exposures, the evidence is insufficient to allow OSHA to judge the quality and extent of any burden imposed. For example, one of the few cases about which information is available is As You Sow's lawsuit against Chemspec. See Exs. 18–127, 18–174 (pages 47–48). Chemspec itself provided no specific information about the financial burden imposed by the settlement. However, the Coalition states that Chemspec paid $12,000 in ''[d]irect costs of settlement'' and $40,000 ''to rework labels, MSDSs, and reformulated [sic] products[.]'' Neither Chemspec nor the Coalition provided information regarding Chemspec's financial condition or the extent to which Chemspec manufactured or sold listed chemicals, which makes it impossible for OSHA to determine the relative burden imposed. In addition, it is unclear whether Chemspec was in compliance with the Federal standard for the chemicals in question prior to the settlement of the lawsuit. See Section III.B.2. Finally, as noted in Section III.B.3, some of the products involved in the lawsuit were consumer products; to the extent the settlement and other expenses reflect costs attributable to Proposition 65's consumer applications, those expenses are not relevant to OSHA's consideration under the product clause.

Accordingly, there is insufficient evidence in the record to allow OSHA to find that the occupational aspects of Proposition 65 have created an undue burden on interstate commerce.

C. Inspections, Employer/Employee Rights

Some commentors also addressed whether Proposition 65's private enforcement mechanism, as incorporated into the State plan, meets OSHA requirements for enforcement under a State plan, including employer and employee rights. Section 18(c)(3) of the OSH Act requires State plans to provide for a ''right of entry and inspection of all workplaces'' which is at least as effective as the provisions of the Act. OSHA regulations require that a State plan: provide for inspection of covered workplaces in the State where there are reasonable grounds to believe a hazard exists (29 CFR § 1902.4(c)(2)(I)); provide an opportunity for employees and their representatives to bring possible violations to the attention of the State agency with enforcement responsibility (29 CFR 1902.4(c)(2)(ii)); provide for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties (29 CFR 1902.4(c)(2)(xii)); and for employees or their representatives to

have an opportunity to participate in review proceedings (29 CFR 1902.4(c)(2)(xii)).

Several industry commentors allege that because the Proposition 65 supplemental enforcement provisions do not involve on-site inspections, walkaround by employer and employee representatives, and administrative review, they do not meet these criteria and should not be approved. Exs. 18–41, 18–58, 18–59, 18–65, 18–81, 18–96, 18–121, 18–134, 18–142, 18–144, 18–148, 18–150, 18–152, 18–153, 18–154, 18–160, 18–164, 18–169, 18–174. (No workers or organizations representing their interest complained about the rights afforded employees, however.) Some commentors believe that businesses are not given adequate notice of alleged Proposition 65 violations and a reasonable amount of time to abate them. The Industrial Truck Association asserted that OSHA cannot enforce without conducting an inspection and that the agency therefore cannot authorize such enforcement by a State plan. Ex. 18–160.

Cal/OSHA in its response asserts that as long as it continues to enforce the Hazard Communication Standard in accordance with its approved inspection procedures, supplemental private enforcement does not need to meet the criteria. (Ex. 22)

As discussed in Section I.A, State plans do not operate under a delegation of Federal authority but under their own authority, and therefore they may use methods of enforcement not included in the Federal Act. OSHA finds that the private enforcement mechanism of Proposition 65 incorporated into the State plan serves only to supplement the enforcement provided by Cal/OSHA and therefore does not need to include the same enforcement mechanisms used by Cal/OSHA. Regular State plan enforcement of the Hazard Communication Standard, including Proposition 65, is still available. Employees continue to have the right to file complaints with Cal/OSHA regarding alleged hazard communication violations, including violations of Proposition 65, and to participate in inspections and review proceedings. In addition, employees have the right to file suits under Proposition 65 and may file amicus briefs in third-party actions. Significantly, neither workers nor organizations representing their interests complained of the rights afforded to employees under Proposition 65's supplemental enforcement provision.

While Proposition 65 does not provide for the setting of specific abatement dates, employers must be served with a ''Notice of Intent to Sue'' before a private suit is filed. Some commentors have stated that these notices have been inadequate in the past. E.g. 18–133, 18–144, 18–164, 18–207. Employers, of course, have all rights available under the judicial system in enforcement proceedings and may bring any inadequacies in the notices of intent to sue to the attention of the courts. Moreover, California recently adopted regulations which clarify the notice requirements and require greater specificity than some previous notices of intent contained. See 22 CCR § 12903 (effective April 22, 1997). These new regulations should alleviate the concerns raised in the comments.

D. Qualified Personnel

Some commentors have questioned whether Proposition 65 as incorporated into the California Hazard Communication Standard complies with the OSHA requirement that State plans be enforced by qualified personnel. Section 18(c)(4) of the OSH Act and 29 CFR § 1902.3(h) require that the designated agency or agencies have a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards. Several commentors pointed out that the prosecutors and private citizens bringing enforcement actions under Proposition 65 need not have specific training or expertise in occupational safety and health. Ex 18–63, 18–150, 18–160, 18–162, 18–166, 18–174. In its response, California maintains that as long as the basic hazard communication requirements are enforced by qualified Cal/OSHA personnel, the supplemental enforcement need not meet these criteria.

OSHA finds that since the designated agency, which enforces hazard communication requirements comparable to those of Federal OSHA, does have qualified personnel to enforce those requirements, there is no violation of this requirement. In addition, while actions under Proposition 65 may be brought by prosecutors or private citizens, the decisions in these cases are made by State courts, which are also the final arbiters in contested Cal/OSHA enforcement actions.

IV. Decision

Based upon the analysis set forth in Sections II and III, OSHA approves the California standard, including Proposition 65 and its supplemental enforcement provision, but subject to the following conditions, which are applicable to all enforcement actions brought under the authority of the State plan, whether by California agencies or private plaintiffs:

- Employers covered by Proposition 65 may comply with the occupational requirements of that law by complying with the measures provided by the OSHA or Cal/OSHA Hazard Communication Standard, as provided in the State's regulations.
- The designated State agency, Cal/OSHA, is responsible for assuring that enforcement of its general Hazard Communication Standard and Proposition 65 results in ''at least as effective'' worker protection; the agency must take appropriate action to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is federally approved.
- The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.

With these conditions in mind, OSHA has determined that:

(1) The California standard is at least as effective as Federal OSHA's Hazard Communication Standard. With a few additions which do not undermine (and may enhance) protection of employees' rights to know about workplace hazards, the standard covers the same chemicals and concentration of chemicals as are covered by the Federal standard. Similarly, the California standard, like the Federal standard, requires clear and reasonable communication of hazard information. The standard also adequately protects business trade secrets. Finally, the evidence available to OSHA does not show that supplemental enforcement of Proposition 65 has resulted in less effective enforcement of hazard communication requirements.

(2) The substantive hazard communication requirements contained in the California standard are applicable to products which are distributed or used in interstate commerce. Consistent with the principle set forth in the 1983 Federal Hazard Communication Standard, OSHA finds that the standard is applicable to products in the sense that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets.

(3) The California standard does not pose an undue burden on interstate commerce. The substantive differences

between the general hazard communication requirements and the Federal hazard communication standard have not been shown to pose a burden on commerce. In addition, the substantive requirements of Proposition 65 may be met by compliance with the general Federal and State hazard communication requirements, thus not posing any additional burden on employers. Finally, based on the evidence in this record, neither financial burdens associated with voluntary settlement of Proposition 65 cases nor the burden of litigating cases has been shown to create an undue burden on interstate commerce within the meaning of the product clause.

(4) The California standard is required by compelling local conditions. The voters of California have a legitimate and compelling local interest in determining how their right to hazard information can best be protected.

(5) The California standard also complies with the remaining requirements of Section 18 of the Act. Cal/OSHA, as the designated State agency, is responsible for the effective administration of the plan throughout the State. This designation meets the requirements of Section 18(c)(1). The State also has adequately trained personnel for the enforcement of the standard, pursuant to Section 18(c)(4). Finally, both the administrative system available under the general California standard and the judicial enforcement available under Proposition 65's supplemental enforcement mechanism adequately protect the rights of employers and employees.

OSHA, accordingly, approves the California Hazard Communication Standard, including its incorporation of Proposition 65, subject to the stated conditions. Finally, as noted at the outset of this decision, OSHA has no authority to address Proposition 65's consumer and environmental applications, and this decision does not affect those applications.

V. 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: Office of the Regional Administrator, OSHA, 71 Stevenson Street, Suite 415, San Francisco, California 94105; and California Division of Occupational Safety and Health, Department of Industrial Relations, 45 Fremont Street, Room 1200, San Francisco, California 94105; Office of the Director, Federal-State Operations, OSHA, U.S. Department of Labor, Room N–3700, 200 Constitution Avenue, NW, Washington, DC 20210.

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 in Washington, D.C., this 2nd day of June, 1997.

Greg Watchman,

Acting Assistant Secretary.

[FR Doc. 97–14723 Filed 6–5–97; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste; Notice of Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 93rd meeting on July 23–25, 1997, in Building 189—Auditorium, Southwest Research Institute, Center for Nuclear Waste Regulatory Analyses (CNWRA), 6220 Culebra Road, San Antonio, Texas.

The entire meeting will be open to public attendance.

The schedule for this meeting is as follows:

Wednesday, July 23, 1997—8:30 a.m. until 6:00 p.m.

Thursday, July 24, 1997—8:30 a.m. until 6:00 p.m.

Friday, July 25, 1997—8:30 a.m. until 12:00 noon

A. A full day's session will be devoted to reviewing the performance assessment (PA) capability of the NRC and CNWRA staffs. This review will include discussions of both high- and low-level waste PA, as well as, the use of PA in site decommissioning management plan remediation efforts. The session will also focus on the use of PA in calculating the consequences of igneous activity on a high-level waste repository, on the use of PA in the prioritization process, and on PA integration into the overall regulatory process.

Representatives from the NRC and CNWRA will participate.

B. A full day's session will be devoted to reviewing the use of probabilistic performance assessment approaches for waste management. The transition to risk-informed, performance based regulation will form part of the discussion. Representatives from the NRC, CNWRA, DOE, and the nuclear industry will participate.

C. The ACNW will hear a description of science and engineering experiments currently in progress at the CNWRA.

D. *Preparation of ACNW Reports*—The Committee will discuss potential reports, including igneous activity related to the proposed Yucca Mountain Repository, and other topics discussed during the meeting as the need arises.

E. *Committee Activities/Future Agenda*—The Committee will consider topics proposed for future consideration by the full Committee and Working Groups. The Committee will discuss ACNW-related activities of individual members.

F. *Miscellaneous*—The Committee will discuss miscellaneous matters related to the conduct of Committee activities and organizational activities and complete discussion of matters and specific issues that were not completed during previous meetings, as time and availability of information permit.

Procedures for the conduct of and participation in ACNW meetings were published in the **Federal Register** on October 8, 1996 (61 FR 52814). In accordance with these procedures, oral or written statements may be presented by members of the public, electronic recordings will be permitted only during those portions of the meeting that are open to the public, and questions may be asked only by members of the Committee, its consultants, and staff. Persons desiring to make oral statements should notify the Chief, Nuclear Waste Branch, Mr. Richard K. Major, as far in advance as practicable so that appropriate arrangements can be made to schedule the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting will be limited to selected portions of the meeting as determined by the ACNW Chairman. Information regarding the time to be set aside for this purpose may be obtained by contacting the Chief, Nuclear Waste Branch, prior to the meeting. In view of the possibility that the schedule for ACNW meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should notify Mr. Major as to their particular needs.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by contacting Mr. Richard K. Major, Chief, Nuclear Waste Branch (telephone 301–415–7366), between 8:00 A.M. and 5:00 P.M. EDT. The CNWRA contact in San Antonio is Ms. Bonnie Caudle (telephone 210–522–5157).

ACNW meeting notices, meeting transcripts, and letter reports are now available on FedWorld from the ''NRC MAIN MENU.'' Direct Dial Access