

**California's Proposition 65: OEHHA Overhauls
"Safe Harbor" Warning Regulations**

... or ...

**If You Didn't Like the Old Regulations,
You're Really Not Going to Like the New Ones**

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Presenter biography

Stanley W. Landfair counsels and represents companies in the chemicals, aerospace, electronics and other manufacturing industries on environmental compliance matters and represents them in environmental enforcement proceedings and other litigation matters. Mr. Landfair is known for his experience in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and counterpart laws in California that regulate the manufacture, distribution, sale and use of pesticides. Mr. Landfair is similarly well-known for his experience in the Toxic Substances Control Act (TSCA) and similar laws in other countries that regulate the manufacture, distribution and use of chemicals in the United States and around the world.

In California, Mr. Landfair is a recognized authority on "Proposition 65," the State's Safe Drinking Water and Toxic Enforcement Act of 1986. He has defended over a thousand companies against "failure to warn" claims under the Act, arising from the sale and use of products such as asphalt roofing materials, orthodontic devices, intravenous feeding devices, dental amalgam, firearms and bullets, cookware, pipe nipples, smoking cessation devices, dry cleaning fluid, tobacco smoke, bulk chemicals, paints, and spray paints. Mr. Landfair won landmark victories in the case of *As You Sow v. Shell Oil Company*, resulting in a ruling Proposition 65 cannot be enforced against out-of-state manufacturers of workplace chemical products; and *Consumer Defense Group v. ARCO*, resulting in a ruling that the Proposition 65 "discharge prohibition" does not give rise to claims for the "passive migration" of chemicals after a discharge occurs. Mr. Landfair also advises and represents companies and industry task forces in preventing the unwarranted listing of chemicals under Proposition 65, including PFOA, bisphenol-A, PFOS, chlorpyrifos, and others.

Presentation abstract

Section 25249.6 of the Safe Drinking Water & Toxic Enforcement Act, the citizen initiative enacted in 1986 as "Proposition 65," makes it unlawful for businesses to expose any individual in California to chemicals designated by the state "known to the state to cause cancer or reproductive toxicity" without first providing a "clear and reasonable warning." In the thirty years that it has been in effect, this single warning requirement, set forth in three words in just one section of one law, it has been the source of thousands of lawsuits, generating tens of millions of dollars in civil penalties, attorney fees and costs, and costing businesses that sell products in California hundreds of millions of dollars more in business and transactional costs, including costs for the so-called "reformulation," repackaging and relabeling of products.

Throughout this thirty-year period manufacturers of products sold in California, and the "citizen-enforcers" or "bounty-hunters" who bring the lawsuits to "enforce" Proposition 65 have turned to the same regulation for guidance as to what warnings must say, where they must be published or placed, and how they must be distributed in order to be considered "clear and reasonable." Published at Title 27, Chapter 1, Section 25601, the regulations created standards referred to as "Safe Harbors," warnings that

were “deemed” to be in compliance with Proposition 65, so long as they copied verbatim the following ubiquitous, awkward, generic and largely meaningless text:

WARNING: This product contains a chemical known to the State of California to cause cancer.	WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.
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In 2015, the Governor launched a “reform” initiative to modernize the warning regulations. After three years of workshops, publication of draft regulations and a substantially re-drafted version, OEHHA is now considering public comments on the final draft, submitted in June, 2016. When this rulemaking is complete, OEHHA will repeal every word of the old Safe Harbor warning regulations and establish a new warning scheme altogether. This presentation will examine the new regulations and the warnings they require, which are expected to be published within the coming year.