Proposition 65's Right-To-Know Provision: Can It Keep Its Promise to California Voters?

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INTRODUCTION

Every day, people are exposed to toxic chemicals in their workplaces and homes through the regular use, discharge, and disposal of industrial chemicals and chemically based consumer products.1 Prompted by the increasing incidence of exposure and the well-founded concerns of their constituents, legislatures have enacted laws attempting to reduce inadvertent exposure to toxics. One provision often contained in these environmental statutes—the "right-to-know" or warning provision—mandates that information about toxic hazards be communicated to those potentially exposed to them. Some right-to-know provisions target the workplace, whereas others seek to inform public officials and citizens of the health and environmental effects of toxics found in their communities.

California voters recently approved a right-to-know provision as part of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.2 Proposition 65 focuses on two substantive goals. First, it seeks to eliminate the discharge of certain toxic substances into the state's drinking water: "No person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water . . . ."3 Second, the initiative requires that those who produce or use toxic substances (or products containing those substances) warn peo-

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1. One source of exposure to these chemicals is drinking water. For example, as of July 1984, sixty-five drinking water wells in California's Silicon Valley had been contaminated with dangerous chemicals such as methyl chloroform, benzene, and acetone, much of it effluent from the so-called "clean" high technology industry. S. Sherry, High Tech and Toxics 30-38 (1985).

2. Proposition 65 is codified at CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (West Supp. 1987). Proposition 65 was passed as an initiative measure, and this Comment uses interchangeably the terms "initiative" and "proposition" to refer to Proposition 65.

3. Id. § 25249.5.
ple before exposing them to such substances: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . . ."4

Focusing on the second of these two goals, this Comment examines Proposition 65's warning provisions in light of goals typically served by warning provisions. Section I explains the ways in which warning provisions can provide information to the public to help them protect themselves against exposures to hazardous substances. To illustrate the different types of warning provisions that have been adopted and to provide a basis for comparison to Proposition 65, Section II reviews right-to-know provisions in three comprehensive environmental statutes: the National Environmental Policy Act of 1969 (NEPA),5 the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),6 and the California Occupational Safety and Health Act (Cal OSHA).7 These statutes represent three different approaches to warning provisions, reflecting different priorities and concerns. Section III focuses on Proposition 65, first discussing the initiative generally and then analyzing the proposition's warning provision and the protection it seeks to provide. The Comment ends with a discussion of the efficacy of Proposition 65's warning provision, analyzing what Proposition 65 achieves based on its structure and content and criticizing the administration of California Governor Deukmejian for attempting to undermine it.

Although Proposition 65 is an important step towards controlling the release of toxic substances into the environment and informing both the community and public officials about toxic hazards, this Comment concludes that it will not fully accomplish its stated purposes. As enacted and currently implemented, Proposition 65 provides unduly limited protection against hazardous substances and, thus, fails to fulfill its promise to California voters.

I

RIGHT-TO-KNOW PROVISIONS GENERALLY

Right-to-know requirements are not novel in legislation governing

4. Id. § 25249.6.
the use of hazardous substances. These provisions are designed to achieve the general goal of providing information about the nature, location, and hazards of toxics. By serving this goal, these provisions contribute to the effectiveness of hazardous substance control laws in several ways.

First, information provided to the public allows people to make informed and voluntary choices about whether to risk the danger of exposure to particular substances. With the information supplied in warnings, individuals can choose intelligently the consumer products they use, the jobs they accept, and the geographic areas where they locate their homes. In addition, information in warnings listed on consumer products or posted at work may help individuals determine whether they have been exposed to hazardous substances in the past and allow them to act on this knowledge.

This rationale behind warning requirements assumes that people understand and take seriously the warnings they read. This assumption, however, is not necessarily correct. Moreover, even if people do com-


9. See, e.g., Waldo & Griffiths, Behind the House Funding and Right to Know Votes, 4 ENVTL. F., Apr. 1986, at 17, 18; see also Initiative Measure, Proposition 65, Nov. 4, 1986, at § 1(a)-(b), reprinted in CAL. HEALTH & SAFETY CODE § 25249.5 note (West Supp. 1987) (declaring the people's right to be informed about exposure to certain chemicals and to protect themselves and their drinking water against those chemicals); CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOVEMBER 4, 1986, at 54 (compiled by Secretary of State March Fong Eu) [hereinafter CALIFORNIA BALLOT PAMPHLET] (Argument in Favor of Proposition 65).

10. For example, if through a warning provided at work an employee is informed that she has been exposed to asbestos in her work environment over the last ten years, she can schedule regular physical examinations and also can consider possible claims against her employer for ex post compensation.

11. A glaring example of how a large segment of the public may disregard warnings is provided by the sale of cigarettes. Cigarette packages include warnings by the Surgeon General alerting smokers to the risk of serious health problems associated with smoking. Despite these explicit warnings, 52 million American adults and 2 million American teenagers con-
prehend the dangers of which they are warned, they may find it difficult or impossible to respond to warnings that concern not just products they use but their home or work environment. The ease with which people can respond to warnings bears directly on the effectiveness of those warnings; because people living near or working with hazardous substances may not be able to move away or change jobs, warnings reaching individual homeowners or workers may have little practical effect.

A second reason why warning provisions can be an effective addition to hazardous substance control laws is that the public, armed with information provided by warnings, can organize to pressure their representatives or a particular industry to reach desired ends. Public pressure, in one situation, can be directed at stopping an industry's use of regulated substances. In another situation, right-to-know provisions can facilitate public participation in and influence over decisions concerning whether to allow those who produce, use, or sell toxic substances to operate in certain geographical areas.

Warning requirements that provide information to the public but that leave to the public the task of organizing have a drawback, however. Organizing even a small segment of the public to exert pressure effectively on government representatives or industry is difficult. Those who want to eliminate a toxic substance or cause a project to be located elsewhere may find organizing to be an obstacle because it requires time, energy, money, and a high level of commitment.

A third reason why right-to-know provisions can be effective is that they provide information that local planners and emergency response personnel can use to prevent or to respond more safely to releases of hazardous substances. To reduce the impact of an accidental release or exposure, for example, local planners and legislatures might exclude from residential, recreational, and high-density areas those businesses that pose risks of exposure. Additionally, if local firefighters, police, and health officials are aware of potential problems associated with hazardous substances in the area, they can be better prepared to handle emergencies that come to be smoke. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SMOKING, TOBACCO AND HEALTH: A FACT BOOK 2 (1987). Perhaps people do not appreciate the danger of disease that can result from cigarette smoking because they view the possibility of such illness as a remote and uncertain danger. The same can be said for the dangers associated with exposure to hazardous substances.

12. See generally M. OLSON, THE LOGIC OF COLLECTIVE ACTION 2-3 (1971) (unless a group is quite small, individuals within that group will not act together to achieve a common goal in the absence of coercion or some other device to force them to act collectively; even in small groups, voluntary collective action tends to cease before reaching the optimal goal for the group as a whole).

stemming from releases and exposures.\footnote{14}

A fourth and final reason for the effectiveness of warning requirements is that, faced with warning requirements, businesses may stop using substances deemed to be hazardous and may substitute less dangerous substances.\footnote{15} This substitution may result when the burdens of complying with numerous regulations and warning requirements outweigh the benefits stemming from the use of a particular substance. In addition, those who receive the warnings may directly pressure users to substitute less hazardous substances.

Forcing substitution, however, is an inefficient method of eliminating the use of dangerous chemicals when compared with the more direct approach of simply outlawing them. Moreover, banning the use of listed substances in favor of unlisted substances is only desirable where the substituted substances are less dangerous than the listed substances they replace. Though not officially deemed "hazardous," these substitutes may present dangers of their own.\footnote{16} It can take years or decades for an unlisted substance to go through the testing process necessary to determine whether it should be listed.\footnote{17} Thus, an unlisted substitute chemical may be used for years before anyone can determine whether it poses dangers comparable to a listed chemical.

II

RIGHT-TO-KNOW PROVISIONS IN OTHER STATUTES

This Section examines representative right-to-know provisions in three statutes, and describes how each provision achieves or falls short of the goals and functions discussed above.

\footnote{14. Emergency response personnel often are injured in emergency situations when they are exposed inadvertently to hazardous substances. Several commentators have noted the need for emergency personnel to take precautionary measures when dealing with such substances. See generally Bowen, Radioactive Materials—Hot Problems for Firefighters, 11 \textit{Current Mun. Probs.} 180 (1984-85) (describing precautions necessary for emergency response personnel handling radioactive materials); Isman & Carlson, \textit{Hazardous Materials: Decontamination}, 12 \textit{Current Mun. Probs.} 171 (1985-86) (describing procedures for decontamination of emergency response personnel). With prior information about the hazards of fighting fires in plants that manufacture silicon chips, for example, firefighters can avoid unnecessary injury to themselves.}

\footnote{15. See, e.g., \textsc{Nossaman, Guthner, Knox, Elliot & Carrick, Surviving Proposition 65: A Basic Guidebook to the Safe Drinking Water and Toxic Enforcement Act of 1986}, at 192 (1987) [hereinafter \textsc{Nossaman & Guthner}].}

\footnote{16. For example, since the Food and Drug Administration (FDA) found saccharine to be a carcinogen that requires a warning, aspartame increasingly is being used as a sugar substitute. There is mounting evidence, however, that aspartame has its own potentially serious risks that are as yet not fully understood. See Herbert, \textit{Mind Altering Sweetener? Bittersweet Victory for Sugar Substitute}, 124 \textit{Sci. News}, Aug. 27, 1983, at 129, 134.}

\footnote{17. See San Francisco Chron., Oct. 28, 1986, at 8, col. 1 ("'When we started out there were 50,000 chemicals that hadn't been tested,' said toxicologist Jim Fouts, who edits the federal government's Annual Report on Carcinogens. 'Now there are probably 100,000. I don't think we'll ever catch up.'").}
A. The National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)\(^\text{18}\) was a watershed in the environmental movement; it attempted to institutionalize rational thinking about the environment.\(^\text{19}\) A key element of NEPA is that it requires an environmental impact statement (EIS) whenever a federal agency takes on a major project that significantly affects the quality of the human environment.\(^\text{20}\) NEPA and its regulations require that, in discussing the environmental impacts of proposed projects, EIS’s must examine: (1) the unavoidable direct and indirect environmental effects of the proposed project; (2) the irreversible resource commitments involved in the project; (3) the relationship between short-term and long-term uses of the resource; (4) the possible conflicts between the proposed project and other land use plans and policies for the affected area; (5) the environmental effects of alternative projects; (6) the energy requirements of the various alternatives; and (7) the methods by which the adverse effects of the project could be mitigated.\(^\text{21}\)

After drafting an EIS, the agency must request comments from appropriate local, state, and federal agencies.\(^\text{22}\) Under NEPA’s regulations, the drafting agency must then respond to the comments in one or more of the following four ways: (1) modify the proposal, or develop and evaluate alternatives; (2) supplement, improve, or modify its analyses; (3) make factual corrections; or (4) explain why the comments do not warrant a response.\(^\text{23}\)

NEPA’s regulations also require that lead agencies\(^\text{24}\) “make diligent efforts” to involve the public in EIS decisionmaking.\(^\text{25}\) Agencies must provide public notice of hearings and meetings related to NEPA actions\(^\text{26}\) and hold these meetings or hearings whenever appropriate or required by statute.\(^\text{27}\) Agencies also must solicit appropriate information from the public and explain where interested persons can get information.

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\(^{21}\) Id.; 40 C.F.R. § 1502.16 (1986).

\(^{22}\) 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.1.

\(^{23}\) 40 C.F.R. § 1503.4. If there are “Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects,” id. § 1504.1(a), such disagreements are resolved by the Council on Environmental Quality (CEQ). Id. §§ 1504.1-.3. CEQ does not mandate any particular course of action; instead, it makes findings and recommendations. Id. § 1504.3(f). CEQ consists of three members appointed by the President with the advice and consent of the Senate. 42 U.S.C. § 4342.

\(^{24}\) The “lead agency” is the agency that supervises the preparation of an EIS if more than one federal agency is involved in the action or related actions. 40 C.F.R. § 1501.5(a).

\(^{25}\) Id. § 1506.6(a).

\(^{26}\) Id. § 1506.6(b).

\(^{27}\) Id. § 1506.6(c). NEPA’s regulations detail when a hearing or meeting might be “appropriate.” Id.
regarding EIS’s for particular projects. Finally, NEPA and its regulations require that agencies make EIS’s available to the public pursuant to the Freedom of Information Act.

NEPA’s “warning” provision—that is, its EIS requirement—serves several of the possible goals of right-to-know provisions. Most directly, the EIS requirement seeks to facilitate public participation in deciding whether or not to allow new projects that could significantly affect the environment. Indeed, the purpose behind the EIS is not only to provide data but also to force a change in the administrative decisions affecting the environment. It was conceived as an action-forcing mechanism and consistently described as such by its proponents. Emphasis—perhaps over-emphasis—upon environmental concerns was considered a necessary means of instilling the new policy into an uncooperative decisionmaking process in which the support of the administration was uncertain and federal agencies were wedded to their own missions and to economic efficiency.

Thus, although EIS’s are not required to determine the correct balance between the costs and benefits of a project, they may aid public participation in policymaking by providing data and by forcing administrative agencies to consider openly and seriously environmental factors.

Furthermore, NEPA requires that the relevant federal agency develop the EIS at agency expense. This requirement forces federal agencies to bear—and, therefore, to spread among all taxpayers—the high cost of providing the expertise necessary for effective environmental analysis. In this way, information that otherwise might be prohibitively expensive to assemble is made available to the public and to local officials.

Less directly, NEPA reaches other objectives of right-to-know provisions. An agency may abandon a hazardous project or substitute a less hazardous one if public opposition to the project renders it practically impossible or politically infeasible to execute. Similarly, EIS’s provide information to local planners and politicians, who in turn may be able to use their authority—including the power to change zoning—to block or force modification of projects. The information contained in EIS’s also may make emergency response personnel aware of the existence of hazardous substances in, and the dangerous conditions of, a project.

Finally, by providing information to the public, EIS’s may limit or reduce involuntary and unknowing exposure to hazardous substances.

28. Id. § 1506.6(d)-(e).
30. Dreyfus & Ingram, supra note 19, at 254.
31. All that is required is that statements contain information regarding the environmental impact of the project. 42 U.S.C. § 4332(2)(C).
32. Id. § 4332. Under NEPA regulations, the agency has the option of hiring a contractor to develop its EIS’s. 40 C.F.R. § 1506.5(e).
There are several limitations, however, on NEPA's ability to achieve this result. First, whereas EIS's are supposed to be straightforward and concise, they are often long and complex. This development threatens to undermine the public's ability to understand the contents of EIS's and therefore to use the statements effectively.

Second, although in theory EIS's are available to the public, and NEPA requires that lead agencies make diligent efforts to involve the public, there is no mechanism to require affirmatively that affected members of the public be informed of a particular project's environmental impact. Instead, it is up to the public to organize and to avail itself of the information available in the EIS through either the Freedom of Information Act or published notices of NEPA-related hearings. In the absence of environmental groups or other organized citizen groups interested in particular projects, the findings of EIS's and the existence and results of public hearings may go unnoticed.

**B. Comprehensive Environmental Response, Compensation and Liability Act**

The federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), more commonly known as "Superfund," authorizes the President to clean up hazardous waste sites and establishes a fund to pay for the remedial measures. Congress recently amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA) to include, among other things, several provisions adding right-to-know and public participation requirements to CERCLA.

As amended by SARA, CERCLA requires that the public be al-
lowed to comment on proposed remedial actions and consent orders into which the Environmental Protection Agency (EPA) enters when settling cases. Under these provisions, EPA must publish a notice and an analysis of its proposed plan that sets forth both a "reasonable explanation" and the "alternatives considered." EPA then must provide a public hearing followed by notice of the final adopted plan, including a discussion of the significant changes, reasons for the changes, and responses to significant public comments. EPA cannot deviate from the plan without a published explanation.

SARA amended CERCLA to authorize EPA to grant an affected group up to $50,000 to obtain the technical assistance necessary to evaluate both a hazard and EPA's proposed remedy. Such grants "are not intended to underwrite legal actions but any information developed may be used in a legal action."

SARA also adds several citizen participation provisions to CERCLA. First, citizens can sue alleged violators of CERCLA standards, and they can sue EPA or other federal agencies for failing to perform a nondiscretionary CERCLA duty. Second, citizens who may be affected by a threatened or actual release of a hazardous substance at any site may petition EPA to perform preliminary risk assessments at the site. Finally, citizens may petition the Agency for Toxic Substances and Disease Registry (ATSDR) to perform health assessments at any Superfund site. These provisions facilitating citizen involvement may spur earlier EPA responses to particular problem areas.

By giving citizens the right to petition EPA and ATSDR and to sue EPA and CERCLA violators, and by requiring public notice and hearing, SARA incorporates into CERCLA the objective of encouraging

39. Id. § 9617.
40. Id. § 9622(d)(2)(B).
41. Id. § 9617(a).
42. Id.
43. Id. § 9617(b).
44. Id. § 9617(c).
45. Id. § 9617(c).
46. Atkeson, supra note 37, at 10,391 n.170.
49. Id. § 9604(i)(6)(B). ATSDR is an agency within the Public Health Service's Center for Disease Control in Atlanta; CERCLA authorized ATSDR to perform hazardous substance tests, toxicity profiles, and health assessments at Superfund sites. See id. § 9604(i).
50. Some commentators have criticized EPA for unacceptable delay and leniency in enforcing CERCLA. See, e.g., Anderson, Negotiation and Informal Agency Action: The Case of Superfund, 1985 DUKE L.J. 261, 276-87. Resource limitations and political considerations also may keep EPA from fully enforcing the law.
public participation in decisions about hazardous substances. On the other hand, because CERCLA regulates hazardous substances only after they have created problems, it fails to force substitution of safer methods or substances before exposure occurs.\(^5\) In addition, CERCLA limits involuntary and unknowing exposures and improves the preparedness of local planners and emergency response personnel only insofar as the existence of the hazardous waste site is made known before exposure or before an event requiring planning or emergency response.

SARA’s novel provisions regarding technical assistance grants, however, may help overcome the barriers to citizen organization, a problem not adequately addressed by right-to-know provisions in other statutes. Such grants may ease the cost and increase the effectiveness of citizen participation by allowing even a relatively small or disorganized group to obtain funds to research potential hazards and to evaluate EPA’s response. Although these grants seem a good idea, it is not clear whether $50,000 will underwrite more than cursory investigation.\(^5\)

C. The California Occupational Safety and Health Act

The California Occupational Safety and Health Act (Cal OSHA)\(^5\)

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\(^5\) Note, however, that CERCLA, as amended by SARA, does impose liability for cleanup costs arising from a release of hazardous substances. 42 U.S.C.A. § 9607 (West 1983 & Supp. 1987). Parties also may be liable under state law. Such liability may well cause substitution of less hazardous substances, particularly among hazardous substance users, producers, or disposal companies who otherwise could be subject to liability in the future. But this type of after-the-fact substitution differs from substitution designed to avoid liability or public opposition before exposure occurs.

\(^5\) Additionally, given the current federal budget deficit and the need for fiscal restraint, it is possible that EPA rarely will award SARA grants.


The federal Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-675 (1982), authorizes the states to promulgate and enforce their own versions of OSHA, provided that the state standards are at least as strict as OSHA standards and that the state plan is approved by the Secretary of Labor. Id. § 667. California has complied with these requirements, see CAL. LAB. CODE § 142.3 (West 1976 & Supp. 1987); therefore, the following discussion focuses on Cal OSHA.

It bears noting that Governor Deukmejian recently proposed dismantling Cal OSHA as a result of budgetary constraints, leaving occupational health enforcement to the federal government under OSHA. Ixta v. Rinaldi, 195 Cal. App. 3d 886, 893, 241 Cal. Rptr. 144, 148-49 (1987). The State Assembly, however, voted to fund Cal OSHA in the next state budget. Id. at 893-94, 241 Cal. Rptr. at 149. The Governor attempted to use his line-item veto to eliminate Cal OSHA’s funding from the budget. Id. at 894-95, 241 Cal. Rptr. at 149-50. The California Court of Appeal recently declared that the Governor’s veto was invalid and ordered that Cal OSHA be restored. Id. at 921-22, 241 Cal. Rptr. at 168-69. Governor Deukmejian has appealed this decision to the California Supreme Court. Ixta v. Rinaldi, No. S3045 (Cal. filed Nov. 5, 1987).
is at its core a comprehensive set of safety standards designed to protect employees of industrial companies and chemical manufacturers, importers, and distributors. Cal OSHA contains numerous provisions regarding the right of workers to know about hazards to which they are exposed while on the job. For example, it establishes standards prescribing

the use of labels or other appropriate forms of warning as are necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions for safe use and exposure. Where appropriate, such standards or orders shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such occupational safety or health standard or order shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employee is adversely affected by such exposure.54

Cal OSHA reflects the legislature’s intent “to ensure the transmission of necessary information to employees regarding the properties and potential hazards of hazardous substances in the workplace.”55 Manufacturers of hazardous substances56 must prepare a material safety data sheet (MSDS) for each substance.57 MSDS’s must include the following, “if pertinent”: the chemical names, common names, and Chemical Abstract Service number of the hazardous substance; the hazards or other risks of using the substance;58 the proper precautions, handling practices, necessary personal protective equipment, and other required safety precautions; the emergency procedures for spills, fire, disposal, and first aid; a description in lay terms of the specific potential health risks from exposure to the substance; the date that the MSDS information was compiled; and, for MSDS’s issued after January 1, 1981, the name and address of the manufacturer responsible for preparing the information.59

55. Id. § 6361(b).
56. The Act defines “hazardous substances” as those substances that have been deemed by certain state, federal, and international agencies to be potentially hazardous to human health. Id. § 6382.
57. Id. § 6390.
58. Such hazards or risks include the potential for fire, explosion, and reactivity; the acute and chronic health effects or risks from exposure; the potential routes for exposure; and the symptoms of overexposure. Id. § 6391(b).
59. Id. § 6391. A manufacturer “shall be relieved” of its MSDS obligations under two conditions: (1) if the manufacturer has a record that it provided the specific purchaser with the most current MSDS, and the product is labeled in accordance with the Federal Insecticide,
ers must (1) make MSDS's available to employees, their union representatives, or their physicians;\(^60\) (2) apprise workers, in writing or through job training, of information regarding the MSDS's;\(^61\) and (3) provide employees with extensive information regarding their medical and exposure records.\(^62\) Finally, manufacturers, importers, and distributors must label containers of hazardous substances to comply with the extensive federal OSHA requirements.\(^63\)

Employers also must post information regarding employee rights under Cal OSHA. For example, an employer must post each citation issued against it for a Cal OSHA violation, provide employees with the opportunity to observe monitoring of employee exposure hazards, allow employees and their representatives access to records of employee exposures, and inform employees who are or have been exposed to hazardous substances in violation of Cal OSHA of such exposure and of the corrective action being taken.\(^64\)

Cal OSHA protects employees who take advantage of its warning provisions. Employers cannot penalize employees in retaliation for exercising their rights under Cal OSHA.\(^65\) In addition, employers may face severe consequences for violating the warning provisions. In *State v. O’Neil*,\(^66\) for example, in which corporate officers were found guilty of

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\(^60\) CAL. LAB. CODE § 6398(a).

\(^61\) Id. § 6398(b).

\(^62\) Id. § 6408 (West 1976). One important loophole in Cal OSHA is that employers are not required to maintain medical exposure records on exposed employees. The statute requires all employers to "allow access by employees or their representatives to accurate records of employee exposures to potentially toxic materials." Id. § 6408(d). Thus, if employers do keep such records, they must make them available to employees, but the language stops short of requiring the maintenance of records. Unless records are required, most employers probably would not voluntarily keep them, either because of the cost of recordkeeping or because of fear that such records would provide a basis for Cal OSHA claims by employees. See Schroeder & Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation and Information*, 72 GEO. L.J. 1231, 1267 (1984). Note, however, that Cal OSHA does require that employers keep complete reports of every occupational injury or illness occurring in the workplace. CAL. LAB. CODE §§ 6409, 6409.1 (West 1976 & Supp. 1987).

In some circumstances, information that qualifies as a trade secret may be withheld from public disclosure. See CAL. LAB. CODE § 6396 (West Supp. 1987); see generally Schroeder & Shapiro, supra, at 1269, 1277-91 (discussing trade secret disclosure requirements and limits under OSHA).

\(^63\) CAL. LAB. CODE § 6390.5. The federal OSHA regulations concerning warnings are set forth at 29 C.F.R. § 1910.1200 (1986).

\(^64\) CAL. LAB. CODE § 6408 (West 1976).

\(^65\) Id. § 6399.7 (West Supp. 1987).

murder in connection with the death of an employee, part of the incriminating evidence consisted of a finding that the officers did not adequately warn the employee of the dangers of the chemical with which he was working.\textsuperscript{67}

Cal OSHA's right-to-know requirements serve several of the typical functions of right-to-know provisions. First, Cal OSHA limits involuntary and unknowing exposures to hazardous substances. Employers are required to provide information about the risks of workplace exposures so that, at least in theory, employees may decide whether or not to continue working in the face of those risks. In practice, however, the voluntariness of the employee's choice may be illusory. If, for example, the only (or best) jobs in town involve significant exposure to hazardous substances, employees may not be financially able to leave those jobs despite a serious risk of harm. Even though it protects employees against retaliation by employers, therefore, Cal OSHA does not eliminate entirely the practical inability of employees to respond to warnings.

Nevertheless, Cal OSHA's extensive information requirements allow workers to protect themselves at work or to seek medical help even if they cannot leave their jobs. As discussed above, MSDS's must include information on methods of handling each substance, safety precautions, protective equipment, and emergency procedures in the event of exposure, and the employer must provide and explain MSDS's to employees.\textsuperscript{68}

Finally, Cal OSHA's information serves to encourage employees to seek compensation for risks of and damages from exposure:

[H]azard warnings would apprise workers that they were being exposed to dangerous substances and that they should take the precautions recommended in the warnings to protect themselves. Armed with this knowledge, workers could attempt to secure \textit{ex ante} compensation for these dangers. In addition, employees are more likely to relate serious illnesses to workplace hazards when they have been previously warned that their workplace may be dangerous. Warnings therefore should also increase the rate at which \textit{ex post} compensation is sought. Employees could use their access to medical and exposure records to obtain evidence for workers' compensation, tort and OSHA proceedings and to monitor employer compliance with applicable health regulations.\textsuperscript{69}

The warning provisions in NEPA, CERCLA, and Cal OSHA reflect

\textsuperscript{67} See Ridgway, \textit{Hazard Communication: The Employee's Right to Know}, 15 COLO. LAW. 225 (1986) (discussing \textit{O'Neil}). \textit{O'Neil} should concern California employers because the warning requirements of the federal OSHA, under which \textit{O'Neil} was decided, are virtually identical to those of Cal OSHA. See, e.g., \textsc{Cal. Lab. Code} § 6390.5 (requires that containers of hazardous substances be labeled in a manner consistent with the OSHA requirements of 29 C.F.R. § 1910.1200(f) (1986)). \textit{O'Neil} is an unusual case, but it illustrates the extent of potential liability for failure to provide adequate warnings.

\textsuperscript{68} See \textit{supra} text accompanying notes 58-62.

\textsuperscript{69} Schroeder & Shapiro, \textit{supra} note 62, at 1267.
different priorities in their attempts to control and provide protection against hazardous substances. All these statutes seek to get the warning information into the hands of the affected group. The warning provisions of NEPA and CERCLA are designed to involve the public in decisions about proposed government projects and the cleanup of Superfund sites. Cal OSHA focuses its protections on employees in industry. Both NEPA and Cal OSHA limit uninformed and involuntary exposures to hazardous substances whereas CERCLA is designed to minimize the harms that may result from an existing toxic dump.

III
PROPOSITION 65

This Section discusses Proposition 65's warning provision in light of the typical functions of right-to-know provisions in general and compares its approach and effectiveness to the statutes reviewed above. Proposition 65's provisions are so closely interrelated, however, that its warning requirement can be understood best only with a more complete discussion of the initiative. This Section, therefore, first discusses Proposition 65 generally, and then focuses on the proposition's right-to-know provision.

A. Introduction to Proposition 65

The dual stated goals of Proposition 65—keeping toxic chemicals out of California's drinking water and warning people before exposing them to such chemicals—70—are promoted by both traditional and innovative regulatory techniques. Vital to Proposition 65 is the requirement that, within four months of the initiative's passage, the Governor assemble and publish a list of chemicals "known to the state to cause cancer or reproductive toxicity."71 This "Governor's list" is integral to the initiative because only chemicals on that list trigger the proposition's regulatory provisions.72

The initiative mandates that the list be compiled from several sources. At a minimum, the Governor's list is to contain the carcinogens and reproductive toxins listed by the National Toxicology Program and the International Agency for Research on Cancer.73 In addition, the

70. See supra text accompanying notes 3-4.
71. CAL. HEALTH & SAFETY CODE § 25249.8(a) (West Supp. 1987). The Governor must update the list yearly. Id. In addition to the Governor's list, Proposition 65 requires the publication of a separate list. This second list, which is to be published on or before January 1, 1989 and at least once per year thereafter, is to contain "those chemicals that at the time of publication are required by [California] or federal law to have been tested for their potential to cause cancer or reproductive toxicity" and that in the opinion of the state's experts have not been tested adequately. Id. § 25249.8(c).
72. See id. §§ 25249.5, 6.
73. Id. § 25249.8(a). This section requires that the Governor's list include substances
Governor’s list is to contain chemicals that the state’s experts\(^74\) determine to cause cancer or reproductive toxicity, as well as chemicals that federal or California agencies require to be labeled or identified as causing cancer or reproductive toxicity.\(^75\)

Relying on this list, the initiative accomplishes the first of its two goals by forbidding the discharge of any significant amount\(^76\) of listed substances into sources of drinking water.\(^77\) Subject to certain exceptions,\(^78\) the scope of this prohibition is extremely broad.\(^79\)

To effectuate the second goal of the initiative, Proposition 65 re-

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\(^74\) The Governor has established the Safe Drinking Water and Toxic Enforcement Act Scientific Advisory Panel as the “state’s experts.” Cal. Admin. Notice Reg. 87, No. 1-Z at A-29 (Mar. 13, 1987). The panel consists of 12 people, including experts in epidemiology, oncology, pathology, reproductive toxicology, teratology, and toxicology. Id. at A-30.

\(^75\) Cal. Health & Safety Code § 25249.8(a), (b). A chemical can also be added to the Governor’s list if a “body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity . . . .” Id. § 25249.8(b).

\(^76\) The initiative defines “significant amount” to mean “any detectable amount except an amount which would meet the exemption test in subdivision (c) of Section 25249.10 if an individual were exposed to such an amount in drinking water.” Cal. Health & Safety Code § 25249.11(c). Section 25249.10(c) exempts an exposure posing no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and . . . hav[ing] no observable effect assuming exposure at one thousand . . . times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical . . . .

Id. § 25249.10(c).

\(^77\) Id. § 25249.5. “Source of drinking water” is defined as “either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses.” Id. § 25249.11(d).

\(^78\) See infra notes 83-89 and accompanying text.

\(^79\) For example, the initiative applies to any “person,” defined to include “an individual, trust, firm, joint stock company, corporation, company, partnership, and association.” Cal. Health & Safety Code § 25249.11(a).
quires that a "clear and reasonable warning" be given to any individuals who are exposed to chemicals on the Governor's list.80 This warning need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable.81

Proposition 65 gives no further guidance on what constitutes a "clear and reasonable" warning, but its meaning is qualified by the use of the term "accomplished." As discussed below, this term is potentially far reaching and could be the basis for stringent warning requirements.82

Proposition 65 contains a number of general exemptions. For example, Proposition 65 does not apply to any individual whose business employs fewer than ten people, to any government agency, or to any entity operating a public water system.83 Proposition 65 also does not apply to an "exposure that takes place less than twelve months subsequent to the listing of [a] chemical"84 or to "any discharge or release that takes place less than twenty months subsequent to the listing of [a] chemical . . . ."85

In addition to these general exemptions, Proposition 65 also relieves a person from liability for violation of the discharge prohibition if that person can show that the release "will not cause any significant amount" of the listed chemical to enter any source of drinking water and that the release is in compliance with all other applicable laws.86 Proposition 65 expressly places the burden of proof on the person discharging the chemical to show that the discharge or release fits within the exemption.87

Proposition 65 provides a similar exemption for violations of its warning provision if the party responsible for the exposure can demonstrate that the exposure actually poses "no significant risk."88 Just as with the exemption from the discharge prohibition, Proposition 65 places the burden of proving "no significant risk" on the person responsible for the exposure.89

80. Id. § 25249.6.
81. Id. § 25249.11(f) (emphasis added).
82. See infra notes 112-13 and accompanying text.
83. CAL. HEALTH & SAFETY CODE § 25249.11(b).
84. Id. § 25249.10(b).
85. Id. § 25249.9(a).
86. Id. § 25249.9(b)(1)-(2).
87. Id. § 25249.9(b)(2).
88. Id. § 25249.10(c) (partially reproduced supra note 76). In addition, Proposition 65's warning provisions exempt any exposure "for which federal law governs warning in a manner that preempts state authority." Id. § 25249.10(a). This preemption "exemption" in Proposition 65 is not in fact an exemption; rather, it only confirms that federal law supersedes state law if there is a conflict between the two. For a discussion of this preemption provision, see NOSSAMAN & GUTHNER, supra note 15, at 137.
89. CAL. HEALTH & SAFETY CODE § 25249.10(c). Note that the meaning of the phrase "significant risk" is unclear and is certainly a point of controversy to be addressed in the
Proposition 65 empowers the Governor to "designate a lead agency and . . . other agencies as may be required to implement the [initiative]." Governor Deukmejian designated the Health and Welfare Agency as the lead agency; he also established a "working group" to advise him on appropriate state actions under Proposition 65. The Health and Welfare Agency is responsible for adopting and modifying regulations to implement the initiative.

Notice and comment on proposed regulations for Proposition 65, although not separately provided for in the proposition as it is in NEPA and CERCLA, is available to Californians through provisions of the California Administrative Procedure Act (APA). When it adopts regulations under Proposition 65, the Health and Welfare Agency (as the lead agency) must file notice of the proposed action, prepare a statement of reasons for the proposed regulation, hold a hearing open to interested persons, and hold all meetings of the agency open to the public. Any person may petition the agency to adopt, amend, or repeal a regulation. In addition, declaratory relief is available in the courts for substantial failure to comply with these procedural provisions.

To enforce its twin goals, Proposition 65 contains both public and private remedies. Actions may be brought by the state attorney general or by district attorneys as well as, in certain instances, by city attor-


91. Exec. Order No. D-61-87, Cal. Admin. Notice Reg. 87, No. 4-Z at B-15 (Jan. 23, 1987). This working group consists of the Directors or Secretaries of the Business, Transportation and Housing Agency, the Environmental Affairs Agency, the Department of Food and Agriculture, the Department of Industrial Relations, the Resources Agency, and the Department of Health Services. Id.
96. Id. § 11346.1 (West Supp. 1987).
97. Id. § 11346.7.
98. Id. § 11346.8.
100. Id. § 11347 (West 1980).
101. Id. § 11350 (West Supp. 1987). The Health and Welfare Agency, however, may have undermined the protections provided by the APA by issuing "interpretive guidelines" without complying with the APA. See infra notes 159-65 and accompanying text.
neys to enjoin any person violating or threatening to violate its provisions. Proposition 65 imposes civil penalties of up to $2,500 per day for each violation. The initiative also authorizes any person to bring an action to enforce its provisions if that person notifies the public attorney at least sixty days prior to filing suit and if no other action has been brought regarding the same violation. In addition, the initiative encourages enforcement by introducing a financial incentive for successful plaintiffs. This provision, which applies to public prosecutors as well as to private citizens, directs that twenty-five percent of all fines collected be given to the plaintiff.

Finally, Proposition 65 amends the provisions of California’s hazardous waste control laws to increase the criminal penalties for violations. The initiative raised the maximum fine for a person convicted under these laws from $50,000 to $100,000 per day of violation, with more severe sanctions available if the act that led to the conviction caused “great bodily injury or caused a substantial probability that death could result.”

B. The Effectiveness of Proposition 65’s Warning Provision

1. Scope of the Warning Provision

A unique feature of Proposition 65 works to ensure that the public will obtain information to make informed choices. Proposition 65 requires that the regulated community accomplish clear and reasonable warnings to affected persons. Because the term “accomplish” is unique in statutory warning provisions, it is not clear how it will be interpreted. “Accomplish” may mean that those who produce and use toxic substances must actually warn affected individuals. In other words, the standard may refer to an affected person’s subjective awareness of the warning. If so, the term “accomplish” imposes a more affirmative obligation on regulated parties than if the initiative had used a term such as “provide.” Requiring that warnings be “accomplished,” therefore, elimi-

103. Id. (only city attorneys of cities with a population exceeding 750,000 may bring such actions).
104. Id. § 25249.7(a).
105. Id. § 25249.7(b).
106. Id. § 25249.7(d). The initiative specifies that the private prosecutor must give notice of his action “to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation [occurred] . . . .” Id.
107. Id. § 25192(a).
108. Id. § 25192(a)(2).
110. Id. § 25189.5(d) (West Supp. 1987).
111. Id. (allowing for an additional imprisonment of up to 36 months and a maximum fine of $250,000 per day of violation).
112. Id. §§ 25249.6, 25249.11(f).
nates any implicit requirement that citizens be sufficiently aware and organized to seek access to existing information; under Proposition 65’s standard of “accomplished” warnings, citizens will acquire the necessary information whether or not they seek it.

Whether the warnings mandated by Proposition 65 must reach all individuals who will be exposed to hazardous substances is not clear. Proposition 65 expressly states that the warning “need not be provided separately to each exposed individual.” This language suggests that a general, objectively reasonable warning might suffice even if some individuals are not actually warned. The initiative also requires that no party expose “any individual” to a listed chemical without “clear and reasonable warning to such individual.” Use of the term “reasonable” suggests that warnings may be judged by an objective standard and may not be required actually to reach all individuals exposed to a toxic substance. On the other hand, requiring warnings to “any individual” exposed to a toxic chemical suggests that “such individual” must actually receive a warning. Arguably, therefore, warnings must reach all affected individuals to satisfy Proposition 65. In any event, any regulations governing what constitutes a “clear and reasonable warning” also will have to take into account the fact that the warning must be “accomplished.”

2. Comparison with Other Statutes

Proposition 65’s right-to-know provision serves the general goal of providing information to the public so that exposures to hazardous substances can be limited or avoided. More specifically, Proposition 65’s warning provision serves (1) to reduce unknowing, involuntary exposures to hazardous substances, (2) to facilitate public awareness of and participation in the enforcement of its provisions, and (3) to encourage substitution of safer substances. One way of evaluating Proposition 65’s effectiveness is by comparing its approach to meeting these goals with the approach adopted by the other statutes discussed above: NEPA, CERCLA, and Cal OSHA.

a. Reducing Unknowing and Involuntary Exposure

The warnings required by Proposition 65 enable employees and consumers to make informed and voluntary choices about whether to risk exposure to listed chemicals. With warnings posted at work or placed on the labels of consumer products, people can protect themselves from exposures to the listed substances. At a minimum, a warning informs workers and consumers that a substance should be handled with care. In

113. See supra text accompanying note 12.
114. CAL. HEALTH & SAFETY CODE § 25249.11(f).
115. Id. § 25249.6.
addition, the warnings required under Proposition 65 can inform workers or consumers that they are being, or have been, exposed to carcinogens or reproductive toxins. With this information, those exposed can seek both medical examination and, perhaps, ex post compensation from employers, manufacturers, or others responsible for the exposure.

Although Proposition 65's warning requirement promotes informed choices about whether to risk exposure, its warning provision does not go as far as some of those in the other statutes discussed above. For example, Proposition 65 requires no more than a simple warning$^{116}$ of potential or actual exposure to a listed chemical.$^{117}$ In contrast, the MSDS's under Cal OSHA require extensive information regarding routes of exposure, treatments, and chemical composition.$^{118}$ Unlike MSDS's,$^{119}$ Proposition 65's right-to-know provision does not inform individuals about how best to avoid exposure to listed chemicals or what precautions to take to minimize harm from exposure. This important function of right-to-know provisions easily could be, yet is not, served by Proposition 65.

Proposition 65 may also suffer from an "overwarning" effect. For example, Proposition 65's opponents have argued that, under its right-to-know provision, necessary warnings will be lost amidst a myriad of unnecessary warnings on everyday consumer products.$^{120}$ This feared proliferation of warnings will not necessarily occur, because those who produce toxic substances or use them in the workplace may substitute other substances for the listed chemicals that trigger Proposition 65's warning requirement.$^{121}$ If unlisted chemicals displace listed ones, there will be no overwarning problem because those substitute chemicals will require no warnings.

In any event, some degree of overwarning may be an acceptable side effect of Proposition 65's requirements that warnings be accomplished and reasonable,$^{122}$ and that persons who use or produce toxic substances bear the burden of proving either that these warnings suffice$^{123}$ or that a

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$^{116}$ See id. § 25249.11(f) (warnings may be provided by general methods, such as labels on consumer products and notices mailed to water customers). Commissioner Frank Young of the federal Food and Drug Administration has somewhat facetiously suggested that a Proposition 65 "warning" label might consist merely of a "smiling bear, a frowning bear, a dying bear or some other symbol." San Francisco Chron., Apr. 17, 1987, at 13, col. 1.

$^{117}$ See CAL. HEALTH & SAFETY CODE §§ 25249.6, 25249.8.

$^{118}$ See supra text accompanying notes 57-59.

$^{119}$ See supra text accompanying notes 58-62.

$^{120}$ See CALIFORNIA BALLOT PAMPHLET, supra note 9, at 54 (Rebuttal to Argument in Favor of Proposition 65); see also SENATE OFFICE OF RESEARCH, ANALYSIS OF PROPOSITION 65: SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT 3 (1986) (report prepared for California State Senate) [hereinafter SENATE REPORT] (same result predicted by nonpartisan report).

$^{121}$ See supra text accompanying note 15.

$^{122}$ See supra notes 80-81 and accompanying text.

$^{123}$ See infra note 141 and accompanying text.
substance poses no significant risk. Rather than risk violation or incur the cost of proving these requirements, companies may opt to increase the number of warnings they provide. If having "too many" warnings is the only way to avoid requiring citizens to discover for themselves the hazards of a particular chemical, this may be a worthwhile tradeoff.

Although Proposition 65's right-to-know provision is not a perfect approach to eliminating unknowing exposures to toxic substances, neither is it subject to a criticism that has been leveled at NEPA: that the warning is too complicated and therefore will not be heeded or understood. For example, a notice informing individuals that they are being exposed to a "hazardous substance" as defined by the State of California is simple enough for most people to understand. The objective of the provision, to provide those exposed to hazardous substances with the opportunity to make an informed choice, will not be lost in overly complicated language.

b. Facilitating Public Involvement in Enforcement

Proposition 65 facilitates citizen participation in the enforcement of its provisions. The initiative authorizes private citizens to bring actions to enforce its provisions and provides incentives for these suits by allowing successful plaintiffs to keep twenty-five percent of all fines collected. Compared to CERCLA, however, the citizen enforcement aspect of Proposition 65 suffers from two shortcomings. First, the new citizen-participation and right-to-know provisions added to CERCLA by SARA are backed with a $50,000 grant to affected groups to enable the groups to obtain the expertise necessary to help evaluate exposure problems. Despite the relatively low dollar amount, these grants could prove helpful to people who otherwise might not be able to take advantage of CERCLA. In contrast to these grants, the financial help provided by Proposition 65 comes only at the end of a lawsuit. Proposition 65, unlike CERCLA, provides no funds to help citizens develop the information necessary to file suit in the first place.

124. See supra notes 88-89 and accompanying text.
125. But cf. supra notes 45, 46 & 52 and accompanying text (discussing whether CERCLA's technical assistance grants are effective in helping citizens to organize, perform research, and distribute information).
126. See supra note 33 and accompanying text.
127. It is possible nonetheless that the warning might not be heeded or taken seriously because of its simplicity or that it might not be understood by those who do not speak English.
128. See supra notes 106-08 and accompanying text.
129. See supra notes 45-46 and accompanying text.
130. See supra note 52 and accompanying text.
131. See supra note 108 and accompanying text.
132. Grants are not a prerequisite for citizen action against toxic pollution. The citizens of Love Canal, for instance, ultimately were able to force the government and the responsible corporation to account for the devastation wrought upon them there. A. Levine, Love Ca-
Second, CERCLA gives citizens who may be affected by a release or threatened release of hazardous substances the right to petition EPA to perform preliminary risk assessments at the site. 133 Citizens also may petition the Agency for Toxic Substances and Disease Registry to perform health assessments at any Superfund site. 134 In contrast, Proposition 65 only allows citizens to petition the Health and Welfare Agency under the APA to adopt, amend, or repeal regulations, 135 or leaves them to the more drastic measure of citizen suits. 136 In addition, once a warning has been properly accomplished, citizens have no enforcement authority under Proposition 65 to guard against continued exposure.

c. Encouraging Substitution of Safer Substances

Proposition 65 may result in substitution of safer substances in place of the toxic substances that are subject to the warning requirements. Pressure from the public, resulting from warnings on signposts and labels and in advertisements, may encourage employers or manufacturers to substitute safer substances. If individual consumers switch to products that do not contain listed chemicals, producers may feel economic pressure to use safer substances. 137 In addition, Proposition 65 places on producers and manufacturers the burden of avoiding the warning requirement by proving that a substance poses no significant risk. 138 Because the task of proving a chemical to be safe is scientifically difficult, 139 placing this burden on employers, manufacturers, and sellers may force substitution. 140 These same parties likewise bear the burden of proving that a warning is reasonable and has been accomplished. 141 Again, the

133. See supra note 48 and accompanying text.
134. See supra note 49 and accompanying text.
135. See supra note 100 and accompanying text.
136. See supra note 106 and accompanying text.
137. Jim Shultz, a policy analyst at Consumer Union, has described this effect, stating, "[T]here's an incentive here to create a product that doesn't have health hazards." San Francisco Examiner, Nov. 8, 1987, at B-5, col. 4. He explains that Proposition 65 is intended to provide information to the public so they can choose "not just based on the price of the product but on the health price." Id.
138. See supra notes 88-89 and accompanying text.
139. See NOSSAMAN & GUTHNER, supra note 15, at 38.
140. Placing the burden of proof on producers and employers—rather than on consumers, workers, or the government—also provides an incentive for industry to support rather than obstruct the rapid promulgation of regulations. These regulations are discussed supra at note 92 and accompanying text.
cost and difficulty of bearing this burden may encourage substitution.

Of course, this substitution effect will depend on whether people consider seriously the warnings they receive and then act upon them. Nevertheless, if low-cost alternatives to a product containing a listed chemical are available to consumers, there is a good chance they will switch products. Declining sales will signal the producer that it should consider using an unlisted substance in its product. Similarly, workers who are warned will avoid risks if the personal cost is low. In any event, information in the hands of consumers and employees will allow them, through the collected force of their individual decisions, to move producers and employers toward the use of unlisted—and hopefully safer—substances.

Unlike NEPA, however, Proposition 65 does not provide for hearings where the public can directly press for the use of safer substances. Once a warning is provided, Proposition 65 provides no political or legal mechanism for the public to pressure government or industry officials in order to force change.

3. Impact of Proposition 65’s Exemptions

Proposition 65’s numerous exemptions may decrease the effectiveness of the initiative’s right-to-know provisions. For example, Proposition 65 exempts government entities and small businesses.142 Proponents and opponents of Proposition 65 disagree as to how much of California’s toxic substance problem is covered by the initiative,143 but at least some exposures to listed substances will not be accompanied by warnings.

Proposition 65 also exempts accidental exposures, covering only “knowing and intentional” exposures.144 In addition, the right-to-know

142. See supra note 83 and accompanying text.
143. Opponents of the initiative argued that “Proposition 65 exempts the biggest water polluters in the state,” CALIFORNIA BALLOT PAMPHLET, supra note 9, at 54 (Rebuttal to Argument In Favor of Proposition 65) (emphasis omitted), while its proponents contended that the initiative applies to “big businesses that produce more than 90% of all hazardous waste in California . . .” Id. at 55 (Rebuttal to Argument Against Proposition 65). The Senate report that analyzed Proposition 65 was extremely vague and even contradictory when discussing the possible impact of the exemption for government entities. The report noted:

Local, state, and federal governments are in certain instances important dischargers of hazardous substances. Indeed, various observers of water quality standards have raised serious allegations about the role of U.S. military installations in contaminating California’s waterways. If the Initiative controlled these exempted entities, the state’s ability to control the total volume of hazardous materials released would be, no doubt, improved. The Initiative’s exclusion of governmental entities, however, does not constitute a weakness regarding the operation of its provisions, except insofar as public health would be further protected.

SENATE REPORT, supra note 120, at 14.

144. CAL. HEALTH & SAFETY CODE § 25249.6. The fact that Proposition 65 covers only “knowing and intentional” exposures could shield some persons from liability. In a complicated corporate structure, it is unclear whose knowing and intentional release of toxic substances will trigger the warning provision. Nevertheless, the intent requirement may allow a
provision in Proposition 65 contemplates warnings in *advance* of exposures. Together, these two provisions encourage regulated parties to consider the effects of exposure to listed substances and to warn individuals in advance. Because of the nature of accidental exposures, however, individuals cannot choose to avoid them. Nonetheless, if warnings were required after all exposures, whether accidental or not, the public would be alerted to the existence of the substances at the sites where the exposures had occurred. As a result, individuals could choose whether or not to risk future exposures, local planners and emergency response personnel could prepare emergency response plans for the site, and employers and manufacturers might be encouraged to discontinue the use or production of listed chemicals. Proposition 65 unnecessarily forecloses such a result.

4. Political Erosion of Proposition 65

Whatever the strengths or limitations of Proposition 65, recent political maneuvering on the part of the Governor and the executive branch may diminish the initiative's potential reach. Two executive acts pertaining to the initiative illustrate Governor Deukmejian's hostility to Proposition 65.

The first executive act was the release of a very abbreviated Governor's list. Rather than containing the approximately 250 substances predicted, the Governor's list contains only twenty-nine substances. The list's brevity can be explained by the Health and Welfare Agency's interpretation of the initiative. Although Proposition 65 directs the Governor to publish a list of chemicals "known to the state to cause cancer or reproductive toxicity," the Health and Welfare Agency interpreted the initiative's mandate to include only chemicals

| corporation to argue that its release of toxic substances fell outside Proposition 65. A corporation could argue, for example, that an intentional toxic release by a low-level employee did not constitute intent on the part of the corporate entity.

Moreover, although Proposition 65 is silent on who bears the burden of proving or disproving intent, in general the plaintiff bears the burden of proof. See W. PROSSER & W. KEETON, THE LAW OF TORTS 239 (5th ed. 1984). Because intent is difficult to prove, successful challenges under Proposition 65 may be rare.

145. Proposition 65's warning provision prohibits any person from exposing an individual to listed chemicals without "first giving clear and reasonable warning to such individual." CAL. HEALTH & SAFETY CODE § 25249.6 (emphasis added).

146. See supra notes 73-75 and accompanying text.

147. See Cal. Admin. Notice Reg. 87, No. 11-Z at A-15, A-16 (Mar. 13, 1987). The notice consisted of one list of 29 chemicals known to cause cancer or reproductive toxicity in humans, *id.*, and an additional list of approximately 200 chemicals either showing potential for carcinogenicity to humans or lacking "sufficient" evidence of carcinogenicity in experimental animals. *Id.* at A-17 to A-21. The notice makes clear that only the list of 29 human carcinogens and reproductive toxins is to be treated as the Governor's list; the other list is only for consideration for later addition to the Governor's list. *Id.* at A-17.

148. CAL. HEALTH & SAFETY CODE § 25249.8.
known to cause cancer in humans.\textsuperscript{149} Many of the substances listed as carcinogens by the National Toxicology Program and the International Agency for Research on Cancer were identified through studies done on laboratory animals; the Health and Welfare Agency apparently concluded that such substances could be excluded from the Governor's list.\textsuperscript{150} This strained reading of Proposition 65 appears to have no basis in the language and intent of the statute. Labor and environmental groups are currently challenging this interpretation of Proposition 65's standards for compiling the list.\textsuperscript{151}

The Governor's manipulation of the list was possible because Proposition 65 specifically exempted the promulgation of the list from notice and comment under the California Administrative Procedure Act.\textsuperscript{152} The requirement of specific administrative procedures is generally thought necessary to ensure against unfairness and arbitrariness in the drafting and application of administrative regulations.\textsuperscript{153} The APA applies to all administrative "regulations," which include every "standard of general application" interpreting or making specific the law enforced or administered by it.\textsuperscript{154} In light of this broad statutory definition of "regulation," California state courts tend to require APA compliance for virtually all substantive interpretations of statutes and regulations by state agencies.\textsuperscript{155} Under this interpretation, the Governor's list probably

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\item \textsuperscript{150} See NOSSAMAN \& GUTHNER, supra note 15, at 74-75.
\item \textsuperscript{151} AFL-CIO v. Deukmejian, No. 348195 (Cal. Super. Ct. filed Feb. 27, 1987). The list is being challenged by the AFL-CIO, Natural Resources Defense Council, Sierra Club, Environmental Defense Fund, Campaign California, Citizens for a Better Environment, Silicon Valley Toxics Coalition, California Rural Legal Assistance, and Bernardo Huerta, a Kern County farmworker. Petition for Writ of Mandate and Complaint for Injunctive Relief at 1, Deukmejian (No. 348195). Contending that the list should contain approximately 250 chemicals, all of which are known carcinogens, the petitioners requested that the court order Governor Deukmejian to expand the existing list. \textit{Id.} at 9-10. The petitioners have one victory to date. On April 24, 1987, the superior court "enjoined [Governor Deukmejian] ... from failing to issue forthwith a list" of approximately 200 substances. Order Granting Preliminary Injunction and Overruling Demurrer at 2-3, Deukmejian (no. 348195). On May 8, 1987, Governor Deukmejian appealed the court's ruling. AFL-CIO v. Deukmejian, No. C002364 (Cal. Ct. App. 3d Dist. filed May 8, 1987). As of this writing, the court of appeal has not reached a decision.
\item \textsuperscript{152} CAL. HEALTH \& SAFETY CODE § 25249.8(e). The California APA is codified at CAL. GOV'T CODE §§ 11340-11528 (West 1980 & Supp. 1987). It provides for the administrative proceedings that generally apply to regulatory hearings within the state. See supra text accompanying notes 93-101.
\item \textsuperscript{153} See generally Cook, Law, Arbitrariness and Ethics, 30 CALIF. L. REV. 151, 164-65 (1942) (law must be predictable in order to be effective; such predictability requires clear laws as well as known and unambiguous procedures for making and interpreting them).
\item \textsuperscript{154} CAL. GOV'T CODE § 11342(b). In addition, the APA provides that no state agency shall issue, among other things, any guideline unless it has been adopted as a regulation and filed with the secretary of state pursuant to the APA. \textit{Id.} § 11347.5.
\item \textsuperscript{155} For example, in Goleta Valley Community Hosp. v. State Dep't of Health Servs., 149 Cal. App. 3d 1124, 197 Cal. Rptr. 294 (1983), a Department of Health Services staff attorney informed a hearing officer by letter that the administrative appeal-adjustment procedure did
would have been subject to the APA had Proposition 65 not expressly exempted it.

Most likely, the determination of the contents of the Governor's list was exempted from the APA because the initiative appeared to establish in a nondiscretionary manner what substances were to be listed.156 The list's exemption from the APA also made sense given the short period of time the Governor had to draft the list;157 applying the requirements of the APA to the list would have greatly delayed its publication. Whatever the reasons for exempting the Governor's list from administrative procedures, the effectiveness of the initiative will be eroded if the list is allowed to stand at only twenty-nine chemicals. The lawsuit158 challenging the contents of the Governor's list is now the only recourse. Ironically, the suit probably will be much more protracted and expensive than administrative procedures would have been.

The other executive act that threatens to undercut the effectiveness of Proposition 65 is the release of what the Health and Welfare Agency calls "interpretive guidelines."159 These guidelines, released on March 13, 1987, serve as the agency's official interpretation of Proposition 65160 and define a number of phrases contained in Proposition 65.161 The guidelines appear to be regulations,162 yet their promulgation did not conform with the APA.

The promulgation of the guidelines has yet to be challenged; for the time being, therefore, the Health and Welfare Agency has successfully circumvented the notice and comment provisions of California law. Guaranteeing procedural protections in administrative agency deliberations is an important way to protect the rights of the public for whose benefit the laws are promulgated.163 In addition, procedural protections

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156. See supra notes 73-75 and accompanying text. Proposition 65 was passed by initiative measure and therefore no legislative history exists to answer this question more concretely.
157. See supra text accompanying note 71.
158. See supra note 151 and accompanying text.
160. The guidelines also note that the Health and Welfare Agency will "modify or rescind interpretive guidelines whenever it is necessary to do so to clarify or change its official interpretation of the Act." Id., 197 Cal. Rptr. at 297-98.
161. Specifically, the interpretive guidelines define the following phrases: "in the course of doing business"; "employee"; "knowingly"; "passes or probably will pass into any source of drinking water"; "expose"; "significant risk"; "threatened illegal discharge"; "substantial injury"; and "general public knowledge." Id. at A-22 to A-25.
162. See supra notes 152-55 and accompanying text.
163. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876-77 (1st Cir. 1978), cert. denied, 439 U.S. 824 (1978) (APA necessary to protect rights of applicant seeking less
lessen the danger of unfairness or partiality in the proceeding.\textsuperscript{164} Given the evident hostility to Proposition 65 by the executive branch, regulations issued by the Health and Welfare Agency in the future without the protections of the APA could continue to weaken the provisions of Proposition 65.\textsuperscript{165}

CONCLUSION

Proposition 65’s right-to-know provision may be a powerful tool for individuals to protect themselves from, or at least to become informed about, risks of exposure to hazardous substances. Unlike other right-to-know laws, Proposition 65 does not limit access to information to a specific class of people. Citizens need not organize in order to take advantage of the law. The initiative also establishes an incentive for citizen suits that enforce its requirements. Moreover, Proposition 65 places on those who wish to avoid the warning requirement the burden of proving that no significant risk will result from exposure to a substance on the Governor’s list. This burden, as well as pressure from informed consumers and employees, may force producers and employers to switch to unlisted substances.

The provision’s simplicity, however, may detract from its efficacy. It is unclear at this time what information the warnings must contain and, therefore, what assistance the warnings will provide to individuals who are exposed to toxic substances. It is also unclear what burden is put on employers, manufacturers, and vendors by requiring them to “accomplish” warnings. The initiative, moreover, does not and cannot be expected to solve the larger problem of what recourse is available to those who—for reasons such as poverty or limited job opportunities—cannot or will not avoid exposure to toxic substances, even if warned.

Yet another problem lies not with the right-to-know provision but with the combined impact of the initiative’s exemptions and the political manipulation that pervades the implementation of the law. Proposition 65’s expansive exemptions, combined with the Governor’s control over what to date is an underinclusive list of carcinogens and reproductive toxins, could render the right-to-know provision ineffectual.

\textsuperscript{164} See supra note 153 and accompanying text.

\textsuperscript{165} For example, the agency may attempt to weaken the warning provision by issuing interpretive guidelines that establish an extremely lenient standard for determining what constitutes the “accomplishment” of a “clear and reasonable” warning.
Proposition 65's warning provision makes progress toward containing the increasingly frightening prospect of hazardous substance exposure. It provides accessible warnings to consumers and employees without requiring either initiative or organization on their part. When compared to right-to-know provisions in NEPA, Cal OSHA, and CERCLA, however, Proposition 65 falls short of accomplishing many of the functions that right-to-know provisions can serve. As a result of both its own shortcomings and resistance from the current state administration, Proposition 65 fails to meet much of its promise to California voters.