

# Prop 65 News

100 Spear Street, Suite 805  
San Francisco, CA 94105

First Class Mail  
U.S. Postage  
**PAID**  
Permit No. 2524  
San Francisco, CA

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April 1992 Vol. 6, No. 4

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## Interview with Michael Freund Public Interest Attorney

days, as suggested by the Agency. To the contrary, the usual quarterly warnings would be required. A business would be foolish to state in those warnings that the exposures occur only on specific days, lest they under-warn for other days that are over the significance level. In short, warnings would occur throughout the year, even though the product risk levels may be at the ten to the minus eight or lower level.

The Agency and the Attorney General's interpretation of the definition of "the level in question" thus leads directly to over-warning and trivialization of the statute. It cannot and will not lead to better risk assessments. To the contrary, fewer and fewer businesses will shoulder the burden of undertaking risk assessments, since any one day over the significant risk level will result in a warning requirement. □

### PROP 65 NEWS

Editor Shane Ahern

Publisher Alejandro Levins

Subscriptions Ken Stevens

Design Shane Ahern

Prop 65 News (ISSN #0895-5042) is published monthly in San Francisco by the California Council for Environmental and Economic Balance and the American Environmental Institute. Annual Subscriptions are \$250. To obtain subscription information, contact Prop 65 News at 100 Spear Street, Suite 805, San Francisco, CA 94105, by phone at (415) 512-7890, or by fax at (415) 512-7897.

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For this month's To The Point, Prop 65 News Editor Shane Ahern interviewed Michael Freund, a public interest attorney in Berkeley who represents numerous environmental and citizen groups including Citizens for a Better Environment, California Earth Corps, Neighbors for Clean Air, the North Coast Environmental Center, Friends of Endangered Species, National Parks and Conservation Association, and Friends of the River. Freund is the first public interest lawyer to prosecute air emissions Prop. 65 cases.

**Prop 65 News: What Prop. 65 cases are you working on currently?**

Freund: I have a trial date set for May 18 in Humboldt Superior Court. I'm representing the North Coast Environmental Center and the Clean Air Network against the Louisiana Pacific Corp., a particle board plant that had been emitting 88,000 pounds of formaldehyde per year. I filed a 60-day notice of intent to sue in the summer of 1991 with the attorney general and the district attorney. Since they did not prosecute the case, we filed under the citizen suit provision alleging failure to warn.

The question in this case is whether the emission posed a significant risk as defined by Prop. 65 such that they were required to warn. Louisiana Pacific did not conduct a sufficient sampling of formaldehyde emissions until 1990. Louisiana Pacific tried to do some in 1989 but sampling came up so high that the company

questions whether those results were accurate. In 1990 they did more sampling, and in the summer of 1990 Louisiana Pacific installed a third dryer at their facility which lowered the temperature which in turn lowered the formaldehyde emissions. So the emis-

sions since summer 1990 have decreased to a level lower than the emissions from January 1989 though the summer of 1990. An issue for the court to decide is which emission numbers to follow. The facility is attempting to present lower emission numbers which demonstrate no significant risk.



Michael Freund

**Prop 65 News: The recent Prop. 65 case against Sawyer of**

*Napa involved a dispute over which emission numbers the court should use for Prop. 65 modeling, and was decided in favor of the defendant. Does that case indicate the way the court will probably rule in your current suit?*

Freund: I was the attorney for Citizens for a Better Environment, the plaintiff in the Napa Case. I filed the 60-day notice and litigated the case until just before trial. Each case has to be viewed separately on its own facts; the Sawyer case is a different case. All cases have the question of what are the emission numbers to be put into the modelling. In the Napa case, the defendant changed the numbers after the case was filed. The company had previously reported the highest perchloroethylene emissions in the Bay Area Air Quality Management District, around 100,000 pounds (continued on page 9 ▼)

## To The Point

Michael Freund (▲ continued from page 5)

per year. After the case was filed, Sawyer claimed that the emissions figures reported to the government for several years were not emissions, but rather usage figures.

*Prop 65 News: What other Prop. 65 cases are you involved in?*

Freund: As you know, the highest toxic emissions numbers in the state are from Los Angeles County. The California Earth Corps, the Southern California chapter of Earth Island Institute, recently sent eleven Prop. 65 notices to Attorney General's office. The district attorney for LA had failed to prosecute companies in violation of Prop. 65, and the Attorney General's office has similarly failed to take the lead. We are currently investigating and will possibly seek legal action against some or all of those eleven companies.

*Prop 65 News: Which companies did you file 60-day notices against?*

Freund: Aerojet, BPCHI, Douglas Aircraft Company, Hickory Springs of California, Lockheed, Modern Plating Company, Northrop and Rockedyne—all major emitters of Prop. 65 chemicals. An interesting issue in these cases is whether placing an ad in a newspaper is a clear and reasonable warning. The California Earth Corps believes that this does not meet the clear and reasonable warning standard. Most people will not read an ad buried somewhere in the LA Times. A person could be living close to an emitting facility and never see the ad.

*Prop 65 News: What do you consider to be a clear and reasonable warning?*

Freund: In order for regulations to be consistent with the statutory language of clear and reasonable warning, the

company needs to mail warnings to people's homes. The intent is not to scare them, so the language needs to be worded carefully. Prop. 65 was passed by two thirds of the voters—a strong message that the people are entitled to know what they are being exposed to.

*Prop 65 News: How have your Prop. 65 cases resulted in benefits to the public?*

Freund: As a result of our Prop. 65 cases, the government has been prompted to take action. The very fact

*"Prop. 65 is the most effective statute that exists for reducing toxic chemicals emitted in the air and present in consumer products. It plays a pivotal role in getting companies to take a hard look at their toxic emissions."*

*—Michael Freund*

of sending out the 60-day notices has had a significant effect. We've created a public benefit. The outcome is a reduction of toxic chemicals, and the people living near the facilities are more protected. This statute is the most effective statute that exists for reducing toxic chemicals emitted in the air and present in consumer products. We can bring benefits just by bringing the 60-day notices. Prop. 65 plays a pivotal role in getting compa-

nies to take a hard look at their toxic emissions and begin to evaluate what they can do to reduce and eliminate those emissions. This will reduce exposures and create a safer environment.

*Prop 65 News: How effective has the Cal-EPA and the Office of Environmental Health Hazard Assessment been in implementing Prop. 65?*

Freund: I have found them to be very knowledgeable and accurate. OEHHA is doing an excellent job in a very short period of time. They are doing more in a short period than any other regulatory agency in the United States. A tremendous amount is being accomplished by Steve Book, Pete Baldrige, their staff and scientists.

*Prop 65 News: What Prop. 65 cases have you been involved with in the past?*

Freund: I brought cases regarding mantles on camping lanterns in the 1980's. The mantles of these lamps are coated with radioactive thorium, so when the lamps are lit, thorium dioxide is emitted into the air. I originally filed a case against the Coleman Company in the early 1980's which resulted in the company providing extensive directions for safe use. After Prop 65 was enacted, I brought 60-day notice, and the DA in Alameda took action to obtain the Prop. 65 warning. I then brought several other cases against mantle manufacturers and distributors. All of these companies agreed to provide both the requisite Prop. 65 warning and thorough directions to use the product safely. As a result, both users and by-standers are more protected. Especially with consumer products, not only warning labels, but also directions that inform people what they should do to use the product safely are very important.

*(continued on page 11 ▼)*

## To The Point

Michael Freund (▲ continued from page 9)

counting methodology; and  
• development of a methodology to determine the cost of environmental regulations as a percentage of Gross State Product on an ongoing basis. □

### Permit Streamlining

Cal-EPA, grappling with what Cal-EPA Secretary James Strock calls California's "puzzle palace" of permitting requirements, is looking for advice from the private sector. Cal-EPA issued its *Draft Recommendations for Consolidating and Streamlining the Cal/EPA Permit Processes* in March, and is presently accepting written comments to improve the draft and better achieve its goals.

After the public comment period which ends May 31, Strock said he will undertake a number of administrative and legislative proposals to reform the permitting process.

During Cal-EPA's review of its permit processes, it identified more than 255,000 existing environmental quality permits issued under its programs alone. The draft report recommended removal of duplication and conflicts in Cal-EPA statutes and regulations in order to simplify and reduce the number of permits issued without lowering environmental standards.

Interested parties may request copies of the draft report by calling (916) 322-2858. Written comments should be submitted not later than May 31, 1992 to: Cal-EPA Permit Streamlining, 555 Capitol Mall, Suite 235, Sacramento, CA 95814. □

*Prop 65 News: What other Prop. 65 cases have you filed?*

**Freund:** With CBE we did an evaluation of emission inventories of companies emitting air toxics in the Bay Area. In one lawsuit that CBE filed, Systron Donner agreed in out of court settlement to stop emitting methylene chloride and chloroform. A nearby trailer park community was being exposed without warning.

In another case we learned that a company in Richmond, California called BioRad was emitting 60,000 pounds of chloroform per year and operating without a permit. They were fined and since that case the company has eliminated the use of chloroform. This was a great result.

In both of these cases, because Citizens for a Better Environment brought 60-day notices, tremendous public benefit has resulted. We prompted the state to take action and the company stopped emitting.

In other actions, CBE sent out notices to Chevron, Dow, DuPont Gaylord Container and met with each company, but did not file a lawsuit. We had extensive meetings with company personnel who assured us that they were working to reduce toxic emissions. Since those meetings, the companies have reduced emissions.

*Prop 65 News: What is your role with environmental groups such as California Earth Corps?*

**Freund:** My role with California Earth Corps is one of discussion and advice in order to go after companies that we believe are in violation of the law. We go over emissions levels, review risk assessments, go on site visits, and prioritize companies. It is quite a long, highly technical assessment to determine in which cases to file 60-day notices and for which cases to actually bring suit. Risk assessments are very

difficult to read. The data is all over the place. It's taken a while to learn what is important to look for in analyzing risk assessments, and to understand the ways in which modeling results can be easily manipulated by changing a few assumptions and input parameters.

*Prop 65 News: What Prop. 65 cases are you planning on bringing in the future?*

**Freund:** We are looking into other consumers cases involving Prop. 65 but I can't talk about those yet.

*Prop 65 News: Is there anything else you would like to add?*

**Freund:** My purpose in doing Prop. 65 is to reduce the existence of toxic chemicals in our daily lives and to eliminate them whenever possible. The statute provides me with ample opportunity to reach that objective. □

### Free Trade Threatens Prop.

**65** Prop. 65 could be nullified if the United States signs on the the latest round of the General Agreement on Tariffs and Trade (GATT), according to Citizens Trade Campaign, a Washington D.C.-based coalition of environmental and public interest organizations.

The group recently ran a full page ad in the *New York Times* which asserted that new trade rules being discussed under the *Uruguay Round* of GATT negotiations could give foreign governments the ability to challenge U.S. laws as impediments to free trade.

The ad states that a U.S. law such as Prop. 65 that has higher standards of health or safety could be "harmonized down" to lower international standards. □