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Via Email (Trish.gerken@doj.ca.gov)

Trish Gerken
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Dear Ms. Gerken:

The Center for Environmental Health ("CEH") thanks the Office of the Attorney General ("AG") for the opportunity to comment on the February 4, 2016 modifications to the proposed amendments to Title 11, Division 4 of the California Code of Regulations, concerning Proposition 65 enforcement actions brought by private parties. On November 9, 2015, CEH submitted detailed comments discussing numerous flaws in the AG's original draft proposal. Unfortunately, it appears that the AG ignores the bulk of those comments since the current draft retains many of the problems identified by CEH. Rather than repeat its previous comments, CEH hereby incorporates those comments by reference and urges the AG to take a hard look at the shortcomings detailed in those comments.

In addition to its November 9th comments, CEH offers the following comments on the latest draft issued by the AG.

1. **While an improvement over the last draft, the proposed amendments could still make it unnecessarily difficult to prove that product reformulation settlements confer a significant benefit on the public for purposes of C.C.P. § 1021.5.**

The proposed modifications to Section 3201(b)(2) address some but not most of the problems previously identified by CEH. In particular, CEH appreciates that the AG has: (1) clarified that the relevant "warning level" for purposes of this guideline is the reformulation level set forth in the settlement; (2) eliminated any need to show that some undefined subset of products will be below that level in the future; and (3) clarified that this regulation applies to cases other than consumer product exposure cases. However, the modified regulation still purports to create a presumption of public benefit, while at the same time placing the burden on the parties (presumably the plaintiff) to provide supporting evidence to support a finding of public benefit. To accomplish its objective of making the presumption rebuttable, and to avoid placing unnecessary and onerous burdens on plaintiffs seeking settlement approval, the regulation should be amended to make it clear that the presumption of public benefit can be rebutted by evidence showing that the specifying conditions were not met.

Furthermore, it is still unclear from the modifications what type of evidence will be required for a party to make the requisite demonstration that some products were previously above the warning level. CEH is particularly concerned that this could be interpreted to require parties to submit confidential test results that were commissioned in anticipation of litigation and are therefore privileged work product. This concern is heightened if the settlement is reached in a multi-defendant case in which some defendants are settling and others are not. Parties should not be required to divulge their work product as to one defendant (and thereby create an argument that the privilege has been waived as to non-settling defendants) just to get a settlement approved. At a minimum, the regulation should be amended as follows: "supporting evidence should show through attorney declaration or otherwise that at least . . ."

2. **The guidelines should provide one year before they take effect.**

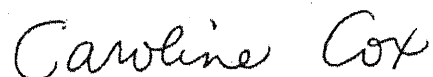
The proposed guidelines substantially change the AG's longstanding regulations that private enforcers, industry and courts have been relying upon for many years. Furthermore, negotiating a Proposition 65 settlement is often a long and time-consuming process, followed by at least 45 days before a court can approve any settlement. To provide time for settlements that are already being negotiated to become finalized and approved, and to enable Proposition 65 litigants time to adjust to the new guidelines, the AG should specify that the new guidelines do not take effect until one

year after they are finalized. Most laws and regulations provide some phase-in period for stakeholders to conform their conduct to any new requirements, and these guidelines should be no exception.

Conclusion

As we have previously indicated, CEH supports efforts to ensure that Proposition 65 actions by private enforcers are pursued and settled in a manner that furthers the purposes of the statute and are in the public interest. However, as described above and in CEH's November 9th comments, several of the AG's proposed amendments will not accomplish that objective and may make it more difficult and expensive for legitimate private enforcers like CEH to continue to use Proposition 65 as the voters intended. Therefore, CEH urges the AG to reconsider its approach.

Sincerely,

A handwritten signature in cursive script that reads "Caroline Cox".

Caroline Cox
Research Director