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

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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 proposed amendments to Title 11, Division 4 of the California Code of Regulations, concerning Proposition 65 enforcement actions brought by private parties. As the AG knows, CEH has a long history of successfully using Proposition 65 enforcement actions for their intended purposes - to reduce unwarned exposures and unlawful discharges of toxic chemicals. Overall CEH supports the AG's goal of curtailing uses of Proposition 65 that provide little public benefit. However, as set forth in more detail below, CEH does not believe that the proposed amendments will accomplish that goal.

1. Instead of restricting how funds are allocated in out-of-court settlements, the AG should ban out-of-court settlements altogether.

To curtail abuses of Proposition 65 enforcement actions, the Legislature amended the statute in 2000 to require court approval of settlements and to provide the AG with the opportunity to provide its views to the court. See Health & Safety Code §§ 25249.7(f)(4) and (f)(5). However, we have heard anecdotally that some private enforcers are routinely circumventing this review and approval process by entering into out-of-court settlements that may or may not ensure compliance with Proposition 65 or otherwise be in the public interest.¹ To prevent this practice, the AG should ban out-of-court settlements altogether and require that all settlements of private Proposition 65 enforcement actions be subject to court approval and AG review.

2. If out-of-court settlements are permitted, the reporting obligation needs to be clarified to minimize opportunities for mischief.

Instead of banning them, the proposed amendments seek to address out-of-court settlements by, among other things, requiring such settlements to be reported to the AG. To the extent the AG does not ban out-of-court settlements altogether, CEH supports this requirement, which is merely a clarification of existing law. However, the language of the amendment needs improvement to ensure that putative plaintiffs do not circumvent the requirement by sending a pre-notice intent to issue a 60-day notice. In particular, the proposed language states:

A Private Enforcer who has agreed to a settlement of any violation *alleged in a notice given pursuant to Health and Safety Code section 25249.7(d)(1)* without filing a complaint shall serve the Attorney General

¹ CEH has occasionally entered into out-of-court settlements to resolve Proposition 65 claims in a situation in which a supplier who has less than 10 employees and is thus exempt from the statute nonetheless wishes to settle with CEH to relieve itself of an indemnity claim from its wholesale customer that is subject to the statute (typically, for example, a large retailer). CEH always reports such settlements to the AG, and the settlements always require compliance with Proposition 65 and otherwise satisfy the requirements of Proposition 65. If the AG does elect to ban out-of-court settlements, it should also clarify that the "less than 10" defense is waivable by a defendant to enable private enforcers to settle with less than 10 entities in court.

with the Settlement and a Report of Settlement in the form set forth in Appendix B within five days after any violation alleged *in the notice* is Subject to Settlement.

Proposed Tit. 11, Cal. Code Regs. § 3003(c) (emphases added). Due to the emphasized language, a putative private enforcer who sends a pre-suit notice that threatens to send a 60-day notice under Proposition 65 without actually calling his or her pre-suit demand a 60-day notice and then settles the alleged violation could avoid the obligation to report.²

To eliminate this problem, the proposed language should be modified as follows:

A person who has threatened to bring any legal action to enforce Proposition 65 and then settles that threatened legal action without filing a complaint shall serve the Attorney General with the Settlement and a Report of Settlement in the form set forth in Appendix B within five days after any alleged violation is Subject to Settlement.

3. If out-of-court settlements are permitted, the AG should not ban “Additional Settlement Payments” in such settlements.

The AG also proposes prohibiting any “Additional Settlement Payments” (e.g., Payments in Lieu of Penalty, or “PILP”) in any out-of-court settlements. This will do nothing to curb abuses of Proposition 65 by anyone intent on abusing the statute (since any such bad actors could simply choose to shift money they would have allocated as “Additional Settlement Payments” to attorneys’ fees in out-of-court settlements and the AG would have no realistic recourse), and will unnecessarily hamstring the ability of legitimate private enforcers like CEH to fund activities that are in the public interest, in furtherance of the statute and tied to the underlying purposes of the enforcement action. Therefore, proposed section 3204(a) should be eliminated altogether.

4. The proposed amendments could 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.

CEH generally applauds any effort to ensure that attorneys’ fees paid in Proposition 65 settlements are reasonable. However, CEH is concerned that the proposed amendments to Section 3201(b)(2) are ambiguous and could make it unnecessarily onerous for a successful plaintiff to prove that a settlement requiring product reformulation confers a significant public benefit deserving of a fee award under C.C.P. § 1021.5.

Proposition 65 prohibits unwarned exposures to listed chemicals. Compliance can be achieved in one of two ways: (1) by eliminating the exposure altogether; or (2) by providing a clear and reasonable warning to individuals prior to exposure. However, it is generally recognized that product reformulation to eliminate actionable exposures to listed chemicals is a better environmental and public health outcome. For this reason, the vast majority of CEH’s Proposition 65 settlements have required product reformulation, which has in turn lead to substantial reductions in industry’s use of, and Californians’ exposure to, toxic chemicals. Efforts such as these should generally be encouraged and recognized for achieving more than the statute requires.

There are several problems with the AG’s proposed amendments to Section 3201(b). First, under current law, a defendant’s agreement to reformulate a product, change its air emissions, or make other changes to reduce or eliminate the exposure to a listed chemical in lieu of providing a warning is deemed to constitute a public benefit. Tit. 11, Cal. Code Regs. § 3201(b)(2). The Initial Statement of Reasons describes this as a presumption of public benefit, and indicates that the AG’s intent in amending the regulation is to make this presumption rebuttable. ISOR, p. 5. However, the language of the proposed regulation does not appear to accomplish this intent since it appears to place the burden on the plaintiff to prove that reformulation of a product has conferred a public benefit. In particular, the proposed regulation requires the parties (presumably the plaintiff) to provide supporting evidence showing that: “(a) at least some of the products in controversy in the action either are, or at some time were, above the warning level, and (b) such products will be below the warning level as reformulated, or else the mere fact of reformulation may not establish the existence of a significant public benefit.” Proposed Tit. 11, Cal. Code Regs. § 3201(b)(2). To accomplish its objective of making the presumption rebuttable, and to avoid placing unnecessary and onerous burdens on plaintiffs

² CEH also notes that the capitalized term “Private Enforcer” is used throughout the regulations but never defined, creating potential further opportunities for mischief and ambiguity.

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.

Second, while CEH supports the concept of making the presumption rebuttable, the proposed regulation appears unnecessarily narrow insofar as it focuses only on product reformulation settlements (and not, for instance, air emission settlements), and disregards other potential factual showings that could be used to rebut the presumption (e.g., the defendant no longer intends to sell the products in California). These limitations will hamper the regulation's effectiveness.

Third, it is unclear what type of evidence will be required for a party to make the requisite demonstration that some products were previously above the warning level and such products will be below the warning level as reformulated. 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 (a) at least . . ."

Fourth, the regulation could create problems by requiring the supporting evidence to show that "some of the products in controversy in the action" were above the level and that "such products" will now be below the level. In particular, what if the particular products that were above the level have been discontinued by the defendant, but the defendant has agreed that future products of the same type will now be below that level? If "such products" is interpreted to refer to "the products in controversy in the action," the plaintiff should be able to make the requisite showing. However, if "such products" is interpreted to mean the products that were previously above the level, the plaintiff may not be able to make the requisite showing even though the action has resulted in meaningful reformulation. To clarify this ambiguity, the regulation should be modified as follows: "(a) at least some of the products in controversy in the action either are, or at some time were, above the warning level, and (b) at least some of the products in controversy in the action will now be below the warning level, . . ."

Fifth, and compounding all of the problems identified above, it is unclear what is meant by the phrase "warning level" in the proposed regulation. If the AG means the reformulation level required by the settlement, it should say so. If the AG means the MADL or NSRL, CEH is concerned that this could lead to a mini-trial just to get a settlement approved as there could be legitimate disputed issues of fact as to, for example, whether and how much of the chemical is naturally occurring (in a food case), the average frequency and/or amount of consumption, and a host of other exposure assessment issues. Worse yet, while Proposition 65 places the burden on the defendant to prove an exposure is exempt from the warning requirement, this interpretation would effectively shift the burden to the plaintiff at the settlement approval stage to disprove any defense based on Health & Safety Code § 25259.10(c). This in turn could hinder the parties' ability to resolve Proposition 65 actions expeditiously and efficiently, and discourage reformulation settlements altogether.

5. The AG's regulations should continue to promote the use of PILP as a way of furthering Proposition 65.

The AG's regulations have long recognized that Proposition 65 settlement payments may be allocated as PILP so long as certain appropriate conditions are satisfied (e.g., the funds are given to a legitimate, accountable organization and being put to use for purposes that are linked to the underlying action). See Tit. 11, Cal. Code Regs. § 3203(b). That regulation essentially codified a practice that had been in use by both the AG and private enforcers since the statute was first enforced. As an initial matter, CEH is not aware of any instances in which the existing regulations have been insufficient to ensure that settlement funds are not properly spent. Therefore, it is unclear why any changes to the existing regulations are necessary.

In any case, CEH appreciates that the proposed amendments would continue to recognize that settlement funds may properly be allocated to PILP (albeit under the new name "Additional Settlement Payments"). This is appropriate as PILP funds negotiated in Proposition 65 settlements have played an important role in protecting Californians from unwarned exposures to toxic chemicals and in otherwise furthering the purposes of the statute. For instance, CEH has used PILP for the following activities:

- In collaboration with the AG's office, CEH's policy work, public outreach and litigation ended the use of cancer-causing arsenic in playground structures used by millions of California children.
- CEH investigated and ultimately eliminated lead exposure threats to millions of California children from baby bibs, lunchboxes, toys, and dozens of other children's products.
- Working with the AG's office and San Diego's leading environmental justice nonprofit the Environmental Health Coalition, CEH investigated and ultimately ended lead threats to children from imported Mexican candy, a problem that state authorities had been struggling to solve for years.
- Again working with the AG's office, CEH investigated and ended the use of lead-containing metals by the entire jewelry industry, including eliminating lead from jewelry sold to millions of California children.
- CEH investigated and ultimately ended the use of lead-containing wheel weights by Chrysler and the three major wheel weight producers. CEH's work also formed the basis of the state law banning lead from all wheel weights. Prior to CEH's efforts, wheel weights dropping from vehicles were the most common source of new lead pollution in the environment, posing risks to the drinking water of millions of Californians.
- CEH has investigated and pursued companies for selling water filtration devices that were adding arsenic to the drinking water the devices were supposed to be cleaning. CEH's work has led to agreements by major water filter manufacturers to substantially reduce the amount of arsenic being leached by the devices.

PILP played a role in funding all of this important work to protect Californians from toxic chemicals. CEH appreciates that the AG's proposed regulations will allow these efforts to be funded by PILP in the future.

6. The relationship between the amount of any civil penalty and any Additional Settlement Payments is irrelevant to the validity of the Additional Settlement Payments.

Under the proposed amendments, the AG will consider whether the total amount of the Additional Settlement Payments exceeds 75% of the amount of any civil penalty in evaluating whether to object to a settlement. Proposed Tit. 11, Cal. Code Regs. § 3204(b)(1). The AG offers no rational basis for what is effectively an arbitrary cap on the amount of settlement funds that can be allocated as Additional Settlement Payments. If Additional Settlement Payments otherwise further the purposes of Proposition 65 (as the AG continues to recognize in the proposed amendments), and assuming the other requirements of the regulation are satisfied (*i.e.*, accountability and nexus), those payments should be considered proper irrespective of their amount in relationship to the amount of the civil penalty. There is simply no reason for this limitation.

The AG's proposed amendment is likely to discourage creativity in negotiating settlements that could create a widespread public benefit. For instance, in lieu of paying a large penalty, a defendant may be willing to fund a \$3 million project that is directly tied to the harm caused by the alleged violations and that will provide a substantial benefit to the individuals impacted by those violations. Under the proposed regulation, the defendant would also have to pay a minimum of a \$4 million civil penalty to ensure that the cost of the project does not exceed 75% of the civil penalty. Again, there is no reason to impose such an artificial constraint on what would otherwise be a great settlement.

This guideline for settlements is particularly inappropriate in the context of court-approved settlements in which both the AG and the Court have an opportunity to review the settlement terms. If the AG feels that a particular settlement allocates an inappropriate amount of the payments as Additional Settlement Payments, the AG can raise that objection with the Court. Likewise if the Court has a concern with the monetary allocations (either on its own accord or in response to an AG objection), the Court is free to reject the settlement's terms.

In conclusion, CEH urges the AG to eliminate any specific restriction on the relationship between the amount of the civil penalty and the amount of any Additional Settlement Payments. Alternatively, to the extent the AG elects to maintain this guideline, it should impose the restriction on out-of-court settlements since there is no opportunity for Court input as to those agreements.

Conclusion

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, 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 make the changes to its proposal described above.

Sincerely,

A handwritten signature in black ink that reads "Caroline Cox". The signature is written in a cursive, flowing style.

Caroline Cox
Research Director