TITLE 11. DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

NOTICE OF FINAL RULEMAKING

Notice is hereby given that the Department of Justice, Office of the Attorney General, has revised Title 11, California Code of Regulations, Division 4, Chapter 1, sections 3000 through 3008, and adopted new Chapters 2 and 3, sections 3100 through 3204, in order to implement new statutory provisions governing civil actions filed by private persons in the public interest pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, as amended by Chapter 599, Statutes of 1999, and Chapter 578, Statutes of 2001 (Proposition 65).

CONTACT: Inquiries concerning the action described in this notice may be directed to Edward G. Weil, Supervising Deputy Attorney General, in writing at 1515 Clay Street, 20th Floor, Oakland, California, 94612, or by telephone at (510) 622-2149. If Mr. Weil is not available, inquiries may be directed to Susan S. Fiering, Deputy Attorney General, at the same address, or by telephone at (510) 622-2142. Inquiries concerning the substance of the proposed regulations may be directed to Mr. Weil, or if he is not available, Ms. Fiering.

INFORMATIVE DIGEST/PLAIN ENGLISH POLICY STATEMENT OVERVIEW

A. Private Enforcement of Proposition 65.

Under Proposition 65, enforcement actions may be brought by the Attorney General, District Attorneys, and certain City Attorneys. In addition, any person may sue "in the public interest" if they give notice of the violation to the alleged violator, the Attorney General, and those District Attorneys in whose jurisdiction the violation is alleged to occur. (Health and Safety Code §25249.7.) In the first few years of the statute, the Attorney General received a small number of notices. From 1998 through 2000, however, several thousand notices were received each year.

Under SB 1269 (Statutes of 1999, Ch. 599), private plaintiffs must notify the Attorney General when they file a case under Proposition 65, and when an action is subject to a settlement. Certain information is required by the statute, and the Attorney General may require other information. The plaintiff must certify to the court that it has complied with this part of the law. The Attorney General promulgated regulations at 11 CCR section 3000 et seq. implementing SB 1269. Those regulations have been in effect since May of 2001.

B. 2001 Legislative Amendment

SB 471 (Statutes of 2001, Ch. 578) adopted additional requirements for private enforcement of Proposition 65. The subjects of this proposed rulemaking are the Certificate of

Merit Requirement and the requirement that courts and the Attorney General review settlements.

1. The Certificate of Merit Requirement

The statute states that sixty-day notices alleging failure to warn must be sent with a notice in which the attorney(s) for the party state that they have consulted with someone with:

> relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, *the person executing the certificate believes there is a reasonable and meritorious case for the private action*. Factual information sufficient to establish the basis of the certificate of merit. . .shall be attached to the certificate of merit that is served on the Attorney General.

(Health and Safety Code § 25249.7(d)(1); emphasis added.) Judicial review of this certificate is limited. A court may review the certificate, but only if the court rules for the defendant and finds that there was no actual exposure. Then, if the court further finds that "there was no credible factual basis for the certifier's belief that an exposure had occurred," the action is deemed frivolous under Code of Civil Procedure section 128.5. The legislation does not specify the necessary elements of the Certificate of Merit or any other consequences of failure to provide a proper certificate. Thus, there is a need to provide greater specificity. The Attorney General has received numerous informal inquiries concerning the nature of a satisfactory Certificate of Merit and supporting information. These regulations include provisions describing the form and content of the Certificate of Merit, as well as potential consequences of failure to comply.

Although the Attorney General is not the Governor's designated "lead agency" for Proposition 65 implementation, he is the official designated by the law to receive all sixty-day notices of violation, the Certificates of Merit, and the information in support of the Certificate of Merit. Moreover, the purpose of the Certificate of Merit and supporting information is in part to enable the Attorney General to determine whether he should pursue the alleged violation. Accordingly, the Attorney General is the appropriate state official to adopt requirements concerning the form and content of the Certificate of Merit and supporting information.

2. Judicial and Attorney General Review of Settlements.

The judicial review of settlements provision requires that any settlement of an action brought by a person in the public interest under Health and Safety Code section 25249.7(d) be submitted to the court upon noticed motion, and that the court may approve the settlement only if it finds that any warning required by the settlement complies with the law, that any attorney's fees are reasonable, and that any civil penalty is reasonable. The plaintiff bears the burden of producing evidence necessary to sustain those findings. The statute also requires that the plaintiff "serve the motion and all supporting papers on the Attorney General, who may appear and participate in any proceeding without intervening in the case." (Health and Safety Code §

25249.7(f)(4).)

The Attorney General has received a number of informal inquiries concerning the Attorney General's views about the type of information necessary to make the showings required by the new legislation. Ultimately, these decisions will be made by the court to which the settlement is submitted. The Attorney General, however, is served with all moving papers in support of the motion for approval, and expects to participate in a number of proceedings. The Attorney General has concluded that non-binding guidelines will assist the public by enabling parties to follow the guidelines, thereby reducing the likelihood that the Attorney General will object to their settlement. The guidelines also may assist courts in reviewing settlements, particularly where a given court has not reviewed significant numbers of settlements in these cases. Even though the Settlement Guidelines portion of this rulemaking is non-binding, it is being adopted through an Administrative Procedure Act rulemaking process because it affects the Attorney General's policies, applies generally throughout the state, and involves a matter of serious consequence involving an important public interest. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal4th 557; *Grier v. Kizer* (198) 219 Cal.App.3d 422.)

Although the Attorney General is not the Governor's designated "lead agency" for implementation of Proposition 65, he is the official designated under SB 471 to review all settlements, and authorized to appear in settlement approval proceedings. Accordingly, he is the appropriate official to adopt Settlement Guidelines.

C. Summary of Regulation

The Regulation has three primary parts. First, it makes some changes to the existing reporting requirements. The existing requirements were written before the law required that settlements in Proposition 65 Private Enforcement Matters be approved by courts on noticed motion, and the timing and nature of the required submissions needed to be modified to fit that process. In addition, since SB 471 amended the reporting requirements to include other actions in which Proposition 65 violations are alleged, changes needed to be made in the regulation to so state.

Second, it adopts binding requirements for the Certificate of Merit. These requirements set forth the form and content of the required certification, define the specific scope of the certification, and also identify the type of supporting documentation that is necessary.

Third, it adopts guidelines to be considered by the Attorney General, parties to litigation, and courts, in crafting and reviewing Proposition 65 settlements. These guidelines cover issues such as penalties, the form and content of clear and reasonable warnings, and evaluation of attorney's fee awards.

D. Chronology of the Rulemaking Process

On February 19, 2002, the Department of Justice, Office of the Attorney General, proposed to revise Title 11, California Code of Regulations, Division 4, Chapter 1, sections 3000 through 3008, and to adopt new Chapters 2 and 3, sections 3100 through 3204, which would implement new statutory provisions governing civil actions filed by private persons in the public interest pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, as amended by Chapter 599, Statutes of 1999, and Chapter 578, Statutes of 2001 (Proposition 65). Notice of this Proposed Regulation (hereinafter "Original Proposed Regulation"), was published in the California Regulatory Notice Register on March 1, 2002. Two public hearings were held, on April 23, 2002, and on April 26, 2002, at which public testimony was received, and numerous written comments were received. The comments received during this process are identified in this document as C-1 through C-72.

In addition, when the Proposed Regulation was first published, the Attorney General included additional materials that form the basis for the proposal. Those documents are included in the rulemaking record and are identified as Exhibits DOJ 1-7.

Pursuant to Government Code section 11346.8(c), a Revised Proposed Regulation (hereinafter "Revised Proposed Regulation"), was issued on August 5, 2002 and circulated for a 15-day comment period. Additional comments were received by the August 21st deadline, as well as further comments received after the deadline, but which were accepted, reviewed, and made part of the record. Comments to the Revised Proposed Regulation are identified in this document as RP-1 through RP-9.

One commenter to the Revised Proposed Regulation (RP-9) objected that the Revised Proposed Regulation was not accompanied by a Statement of Reasons explaining the changes from the Proposed Regulation. This is not required by the Administrative Procedure Act.

During this process, an Emergency Regulation governing some of the matters covered in this regulation has been effect. That regulation initially was adopted effective January 1, 2002, and was readopted on May 1, 2002, and again on August 29, 2002. The Emergency Regulation automatically is repealed when this regulation takes effect.

AUTHORITY AND REFERENCE

The Department of Justice hereby amends the regulations contained in sections 3000 through 3008 of Title 11 of the California Code of Regulations, and adopts sections 3100 through 3204 of Title 11 of the California Code of Regulations, pursuant to the authority granted in Health and Safety Code sections 25249.7(e) and (f). The statute being implemented, interpreted, and made specific is Chapter 578, Statutes of 2001, amending Health and Safety Code sections 25249.7(e) and (f).

DISCLOSURES AND DETERMINATIONS REGARDING THE REGULATIONS

1. Regulations Mandated by Federal Law (Government Code § 11346.2(c)): This regulation is not mandated by federal law or regulations.

2. Other Statutory Requirements (Government Code § 11346.5(a)(4)): There are no other statutory requirements specific to this agency or type of regulation.

3. Local Mandate Determination (Government Code § 11346.5(a)(5)): These regulations would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by Part 7 (commencing with Section17500) of Division 4 of the Government Code.

4. Fiscal Impact (Government Code § 11345.5(a)(6)):

a. There are no costs to any local agency or school district for which Government Code sections 17500-17360 require reimbursement.

b. There are no other non-discretionary costs or savings that would be imposed on local agencies.

c. There are uncertain costs to the Attorney General for implementing the new law, which will be absorbed during the 2002-2003 fiscal year. There are no other costs to any other state agency.

d. There are no costs or savings in federal funding to the state.

5. Effect on Housing Costs (Government Code § 11346.5(a)(12): There is no significant effect on housing costs.

6. Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete (Government Code §§ 11346.3(a), 11346.5(a)(7), 11346.5(a)(8)): The Department of Justice has determined that there will be no such impacts.

7. Assessment Regarding Effect on Jobs/Businesses (Government Code § 11346.5(a)(10):

(a) The creation or elimination of jobs within the State of California: None.

(b) The creation of new businesses or the elimination of existing businesses within the State of California: None.

(c) The expansion of businesses currently doing business within the State of California:

None.

8. Cost Impacts on Representative Person or Business (Government Code § 11346.5(a)(9)): The regulations affect private persons who bring certain civil actions in the public interest. The cost of filing certain documents with the Attorney General and filling out a form concerning those documents should be minor. Costs associated with the filing and support of a motion for approval of a settlement with the court may be $3,000 (based on 15 hours of attorney time at $200 per hour), but the filing of the motion is mandated by the statute. Costs associated with consulting with experts necessary to complete a Certificate of Merit may exist, but are mandated by the statute, even in the absence of a regulation.

9. Effect on Small Business: Pursuant to 1 California Code of Regulations section 4, The Department of Justice has determined that this proposed regulation affects small business. Accordingly:

(A) A concise plain English policy statement overview regarding the proposed regulation that explains the broad objectives of the regulation is included in this notice;

(B) The express terms of the action written in plain English are available from the agency contact person named in this notice.

10. Alternatives considered (Government Code § 11346.5(a)(14)): The Department of Justice has determined that no reasonable alternative considered by the Department of Justice would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the action.

11. Availability of Statement of Reasons, Express Terms, and Information: The Department of Justice has prepared a Final Statement of Reasons for this action, has available all the information upon which the regulation is based (the rulemaking file), and has available the express terms of the regulation. The rulemaking file for this proposed regulatory action will be maintained at the Office of the Attorney General, 1515 Clay Street, 20th Floor, and is available for public review during the Office of the Attorney General's normal business hours (Monday through Friday, 8:30 a.m. to 5:00 p.m.). Requests to review the rulemaking file should be directed to the agency contact person named in this notice.

12. Internet Access (Government Code §§ 11346.4(a)(6), 11346.5(a)(20)): The text of the Regulation and this statement may be accessed at the Attorney General's Website, caag.state.ca.us/prop65.

FINAL STATEMENT OF REASONS
DIVISION 4-PROPOSITION 65 PRIVATE ENFORCEMENT

REVISION OF CHAPTER 1
ADOPTION OF CHAPTERS 2 AND 3
TITLE 11, CALIFORNIA CODE OF REGULATIONS

A. Summary of Legislation

The legislation being implemented, SB 471 (Ch. 578, Statutes of 2001), is set forth and described in the Informative Digest/Plain English Policy Statement Overview above.

B. Section-by-Section Analysis

1. Chapter 1: Reporting Requirements

a. Section 3000: Authority

SB 471 expanded the existing duty to notify the Attorney General of the filing and settlement of any action brought pursuant to Health and Safety Code section 25249.7(d) to include a duty to report the filing and settlement of any action in which violations of Proposition 65 are alleged, e.g., actions under Business and Professions Code section 17200 in which the predicate unlawful conduct is a violation of Proposition 65. SB 471 specifically states that it did not change existing law concerning whether other types of actions in which violations of Proposition 65 are alleged are proper, and this regulation also does not do so.

The Revised Proposed Regulation retained the changes from the Original Proposed Regulation, and added two clarifications. It added the term "private" to "any person in the public interest," because there may have been some confusion as to whether the requirement applied to public prosecutors (even though public prosecutors do not proceed under Health and Safety Code Section 25249.7(d)). One commenter (C-34) seemed to think that the final sentence, in which it is stated that certain persons must "comply with the requirements of this chapter" was an effort to make persons who bring actions that are subject only to the "reporting" requirements also comply with the "judicial approval of settlement" and "certificate of merit" requirements. To avoid this impression, the word "applicable" was added.

Some commenters stated that the Attorney General lacks authority to promulgate any regulations on this subject, arguing that while the Act allows the Governor to designate a "lead agency" to promulgate regulations under Proposition 65, the Governor has designated the Office of Environmental Health Hazard Assessment as that agency, not the Attorney General. (C-34, 48, 49.) As in the case of the previous regulations implementing SB 1269, the Attorney General has sufficient authority to adopt this regulation. The Administrative Procedure Act refers to "[w]henever by the express *or implied* terms of any statute a state agency has authority to adopt

regulations[,]" which specifically acknowledges that such authority may be implied. (Government Code §11342.2.) Courts have found that where a statute grants an agency the authority or power to undertake certain acts, this includes an implicit delegation of authority to adopt regulations necessary for the due and exercise of those duties or powers. (*Calfarm v. Deukmejian* (1989) 48 Cal.3d 805, 825.) In this instance, the Legislature has expressly granted the Attorney General the authority to receive and review Certificates of Merit and information supporting the certificates, and to review and appear in court with respect to motions for approval of settlements, authority granted to no other official or agency, including the designated lead agency for Proposition 65 implementation. These regulations are narrowly tailored to impose requirements only to the extent reasonably necessary to allow the Attorney General to carry out the functions expressly mandated by the Legislature.

Two commenters (C-34, 43) pointed out that when the Legislature adopted SB 1269, a letter from the author was placed in the legislative record stating that the bill did not authorize any agency other than the existing agency to adopt new regulations or standards concerning Proposition 65. This meant that no regulations concerning the substance of the warning and discharge requirements and their implementation could be adopted by the Attorney General, but did not preclude the adoption of regulations implementing the duties expressly given to the Attorney General by SB 1269. Thus, the Attorney General promulgated the initial regulations appearing at 11 California Code of Regulations (hereinafter "CCR") § 3000 et seq. These regulations were proposed on May 8, 2000, and adopted effective June 1, 2001. SB 471 was passed by the Legislature in September of 2001, thus the Legislature presumably was aware of the Attorney General's view of the scope of his authority, and wrote nothing in SB 471 to contradict that view. Indeed, there is no "letter to the Senate File" in the record of SB 471 similar to the letter concerning SB 1269. Accordingly, the Legislature has ratified the Attorney General's view of the scope of his rulemaking authority in this instance.

One commenter stated that it is unfair to give the Attorney General authority to review and comment on proposed settlements in private Proposition 65 litigation. (C-43.) This authority expressly was given to the Attorney General by SB 471, however.

One commenter suggested that SB 471 itself is unlawful, on the ground that it is an amendment to Proposition 65 which does not meet the requirement contained in the initiative that any amendments be limited to those that "further its purposes." (C-43. See also C-19, 34.) The Attorney General has concluded that SB 471 does meet this test and is lawful.

b. Section 3001: Definitions

The reporting requirement now covers private actions not brought under Proposition 65, but in which violations of Proposition 65 are alleged. Because such actions are not covered by the new requirement of a motion for judicial approval, the requirements for the two types of cases are not the same. Accordingly, a definition of "Other Private Action Alleging Violations of Proposition 65," has been added. The Original Proposed Regulation used the terms "Private

Enforcement Matter" and "Other Private Action" in referring to the two types of actions subject to the reporting requirements. In the Revised Proposed Regulation, the term "Private Enforcement Matter was changed to "Private Proposition 65 Action," and the term "Other Private Action" was changed to "Other Private Action Alleging Violations of Proposition 65." These terms more clearly describe the type of action in question. These changes were made wherever the terms appear in the regulation.

The Revised Proposed Regulation modified the definition of "subject to a judgment" to include a judgment pursuant to a stipulation, rather than to exclude it. This was done because the entry of a judgment is the manner in which the Attorney General would receive notice that in fact, the court approved the settlement in question. Absent this change, the AG would not necessarily find out that what action the court took on a proposed settlement, unless he actually participated in the proceeding.

Two commenters (C-5, 19) recommended that the word "settlement" in the defined phrase "Subject to settlement" have an initial capital letter, so that the defined phrase in sub-section (a) reads "Subject to Settlement," wherever the phrase appears in the regulation. This change was adopted.

One commenter suggested that language should be added to the regulation to exclude cases in which a private party brings an action "jointly" with a public agency, arguing that this "entirely obviates the concerns that have been expressed about private enforcers acting entirely alone[.]" (C-34.) This proposed change was not adopted, because "joint" actions still include an action by a private party, and the statutory requirements include any action by a private party. Thus, the Department of Justice cannot exclude such cases from the requirements entirely. If these actions require less scrutiny, then there will be less need for the Attorney General to comment on them.

Section 3001(d), included "other actions," i.e., actions alleging violations of Proposition 65, but which are not brought directly under Proposition 65, within the reporting requirements. One commenter stated that the law does not grant the Attorney General "any regulatory or oversight authority beyond that provided by section 25249.7(f)(1) and (2) over cases that are not filed pursuant to Proposition 65." (C-34.) This is incorrect. SB 471 *expressly* amended the "reporting" requirement of section 25249.7 to include "any action in which a violation of this chapter is alleged." This primarily includes actions brought pursuant to the Unfair Competition Law, Business and Professions Code sections 17200 et seq., in which the underlying "unlawful" conduct alleged is a violation of Proposition 65. It includes other claims that could be raised, in which the plaintiff relies in some way on an alleged violation of Proposition 65. This change to the statute was added for the express purpose of making such actions subject to the reporting requirements, while excluding them from the requirement of judicial approval of the settlement. The regulation expressly limits requirements concerning these "Other Private Actions Alleging Violations of Proposition 65" to the reporting requirements only, and does not apply the judicial approval or certificate of merit requirements to those actions. The same commenter, in

responding to the Revised Proposed Regulation, acknowledged that SB 471 subjects "other actions" to the reporting requirements, but nonetheless recommended deletion of all requirements for other actions. (RP-6.) For the reasons set forth above, this suggestion was not adopted.

The same commenter asserts that "the Attorney General in early drafts of what became SB 471 reportedly sought to include actions under Business and Professions Code section 17200 that contained allegations of Proposition 65; clearly this language did not find its way into the bill." (C-34.) While SB 471 contains no provision subjecting Unfair Competition Law actions to the certificate of merit, notice, or settlement approval provisions of Proposition 65, it very clearly subjects such other actions to the reporting requirements.

A definition of the term "settlement" has been added to the definitions section. Settlement had been defined in later subsections. Since the term is now used throughout the regulation, it is more clear to provide a definition in the definitions section.

c. Section 3002

One commenter (C-43) suggested that "The utility of the required Report of Civil Complaint Filing could be improved by providing a means of identifying whether a complaint is being filed pursuant to a prior settlement agreement between the parties or without such settlement agreement." We do not think this is necessary. If the complaint is filed pursuant to a settlement agreement, then a Report of Settlement also must be filed at the same time, thus it will be clear that a settlement already exists.

Previously, this section required that a Private Enforcer serve a file endorsed copy of any complaint on the Attorney General within five days of filing the complaint with the court. One commenter (C-34) suggested that this time period is too short, since complaints are often filed by mail, with conformed copies being returned by mail, which can take up to a week. This change was adopted. The Revised Proposed Regulation, and the Final Regulation, provide that a complaint shall be served on the Attorney General within five days after the file-stamped copy is received by the plaintiff. A corresponding change was made for amended complaints.

It also was suggested that the complaint should only be served on the Attorney General after the complaint is served on a defendant. (C-34, RP-6.) In some instances, a complaint may not be served for weeks or months, yet the Attorney General and the public have an interest in knowing whether the complaint has been filed at all. Accordingly, this suggestion was not adopted. The same commenter suggested that this change should be made for amended complaints as well. This change was not adopted, for the same reason as it was not adopted for original complaints.

d. Section 3003: Settlements

1. Section 3003(a)

The existing regulation provides that any settlement must be submitted to the Attorney General thirty days before it is submitted to the court. When the regulation was adopted, submission of settlements by noticed motion, with evidence sufficient to support certain required findings, was not required by the statute. Accordingly, the regulation did not provide any timing for the submission of those materials to the Attorney General. Thus, under the existing regulation, the Attorney General would receive the settlement thirty days in advance of submission of the motion to the court, but might receive a relatively short time to review the supporting materials, since a motion could be filed on 21 days notice. Those materials may be key to determining whether the Attorney General objects to the settlement.

Accordingly, the Final Regulation dispenses with the requirement of submitting the settlement to the Attorney General thirty days before submission to the court, and replaces it with a provision that the settlement and all materials supporting the motion for approval of the settlement be submitted to the Attorney General forty-five days before the hearing. This provides the Attorney General with sufficient time to conduct the proper review, and has been retained in the final regulation.

One commenter (C-41) suggested that the regulation require a 90-day review period. Another commenter (C-34), suggested a 30-day review period. While a 90-day review period would provide a longer opportunity to review settlements, the regulation attempts to strike a balance between the opportunity for review and enabling the litigating parties to end their dispute promptly, and the 45-day period best balances these considerations. Accordingly, these suggestions were not adopted.

One commenter (C-34) suggested that the Attorney General does not have authority to set court deadlines. The Attorney General recognizes that courts ultimately control the timing of motions. For this reason, the Proposed Regulation contained, and the Final Regulation retains, provisions stating that the 45 day period applies only where not precluded by court orders or rules, and that, where it is precluded, the plaintiff should seek leave to obtain a 45-day period. If the court does not grant the request, then the plaintiff must advise the Attorney General, and the 45-day period does not apply.

"Other Private Actions Alleging Violations of Proposition 65," however, are not subject to the motion for approval requirement, and therefore are subject only to the thirty-day review period that existed for Proposition 65 settlements under prior law.

Based on some of the comments received in response to the Proposed Regulation, it was apparent that the structure of this section created some confusion about which requirements applied to Private Proposition 65 actions, and which applied to Other Private Actions Alleging

Violations of Proposition 65. Accordingly, this section was divided into subsection (a), covering Private Proposition 65 Actions, and (b), covering Other Actions Alleging Violations of Proposition 65. This should clarify the application of different requirements to the two different types of actions covered by the statute.

One commenter (C-19[1]) suggested that the section clarify that a case is not "Subject to Settlement" until the parties have come to a complete and total agreement on all of the terms. The regulation already clearly provides that an action is not subject to a settlement until there is a document signed by the parties. This assures that, whatever the scope of the agreement, it is final. If the agreement only reflects a partial settlement of the case, it still is subject to the requirements of the statute and regulations, and should be reported at that time.

Another commenter suggested that the language in subsections (a) and (b), which defines "Settlement" for purposes of reporting as including a partial settlement is duplicative, and suggested that this language be removed and then reinserted in a new subsection (c). This suggestion was adopted in the Revised Proposed Regulation by adding the definition of settlement to the definitions section, as new subsection 3000(e).

One commenter (C-41) noted that subsection (a) states that the settlement submission to the Attorney General shall contain the entire agreement between the parties, and suggested that it should be expanded to require that the entire agreement be contained in the submission to the court and to all parties. The report of settlement requires that a copy of the settlement be attached, which means the entire settlement. In order to obtain approval of the settlement, the entire agreement must be submitted to the Court.

Two commenters (C-34, 43) suggested that serving both the actual settlement document and the Report of Settlement form along with the motion for judicial approval of the settlement is duplicative. The form is not duplicative, because it provides an easily usable summary for the Attorney General and the public. In addition, in many instances, the plaintiff does not prepare the motion for approval of the settlement until many weeks after the settlement has been signed, so the separate reporting of the settlement agreement provides the Attorney General and the public with earlier notice of the settlement in those cases. The definition of settlement is deleted here, and moved to the definitions section, 3000(e).

One commenter suggested that the regulations should establish sanctions for failure to comply with their terms. (RP-7.) The appropriate method of enforcement of the binding portions of the regulations, and sanctions for failure to comply, are better left to existing law and the discretion of courts, so this suggestion was not adopted.

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[1]A large number of commenters specifically joined and incorporated in all comments of commenter number 19. These are not specifically noted by number.

2. Section 3003(b)

This subsection extends reporting requirement and 30-day review period to "Other Private Actions Alleging Violations of Proposition 65." One commenter (C-34) objected that this is not authorized by the statute. This objection is addressed in the discussion of section 3001(d), for which the same commenter made the same objection. The expansion of the SB 1269 reporting requirements to these actions is explicit in SB 471.

One commenter (C-41) suggested that Subsection (b) is somewhat confusing to the reader, because it begins by discussing the submission of settlements to a court in Other Private Actions, and then apparently switches gears to discuss the fact that such submission should not be submitted to a court within the 30-day AG review period. The section has been restructured to completely separate the treatment of Private Proposition 65 Actions and Other Private Actions Alleging Violations of Proposition 65 in order to remedy this problem.

One commenter (C-19?) suggested that the regulation be amended to state that parties who wish to obtain court approval of settlements in Other Private Actions Alleging Violations of Proposition 65 must comply with subsection (a). This suggestion was not adopted. If the parties to an agreement in an action that is not a "Private Proposition 65 Action" choose to submit the settlement to the court, this does not bring it within the ambit of the statutory requirements for judicial approval. They remain free to submit the settlement through whatever process they and the court deem appropriate, subject only to the Attorney General's thirty-day review period.

3. Section 3003(c)

One commenter (C-19) suggested that the private enforcer be required to provide notice that a settlement has been submitted to parties in related cases, because such settlements often establish standards for warnings and product reformulation that, while not legally binding on other parties, may have a practical effect on them. The statutes in question require reporting to the Attorney General, not to other parties. Moreover, because these settlements are submitted to the Attorney General, they are available to private parties on request. In addition, courts have rules concerning notification of other parties in cases officially designated as "related" by the court. These procedures will address the commenter's concern in many instances.

One commenter suggested that the existing "Report of Settlement" form does not provide an opportunity to adequately explain a variety of important aspects of a settlement. (C-43.) Nothing precludes a plaintiff from providing additional information to the Attorney General, and in the case of settlements subject to the judicial approval requirements, the papers submitted to the court provide another opportunity. Moreover, neither the Original Proposed Regulation or the Final Regulation has made any changes to this form.

e. Section 3004

This section requires, among other things, that a judgment, including a modification to an existing judgment, be served on the Attorney General. One commenter (C-34) suggested that service of a modified judgment should be required only if the change "effects a material change in the settlement as originally submitted." This suggestion was not adopted. Requiring service of any modification assures that the Attorney General and the public will have ready access to the final, effective, version of the settlement, rather than another document that technically may no longer be in effect. In addition, using the term "material" would create a lack of clarity concerning which modifications must be submitted, and which need not be submitted.

The Final Regulation retains the provision of the Proposed Regulation that if the judgment does not become final because a notice of appeal is filed, the Private Enforcer shall serve a copy of the notice of appeal on the Attorney General within ten days after receipt.

f. Section 3006

One commenter (C-34) objected that hand service of settlements is unnecessary, unjustified and should be deleted. The existing regulation, and all revisions have not required hand service of the settlements, but instead requires service by hand delivery or overnight mail delivery. This is not burdensome, and helps assure that the settlement can be reviewed for nearly the full 45-day, or 30-day period, whichever is applicable.

g. Section 3007

The Final Regulation (consistent with the Proposed Regulation and the Revised Proposed Regulation), makes a change to section 3007, which governs Proposition 65 cases concerning occupational exposures within the purview of the California Division of Occupational Safety and Health ("Cal/OSHA"), in its implementation of the State Plan for Occupational Safety and Health as approved by the U.S. Occupational Safety and Health Administration. Cal/OSHA has its own regulation establishing reporting requirements for those cases, 8 Cal.Code Regs., § 338, as adopted on October 12, 2000. Compliance with those requirements had been deemed adequate to constitute compliance with the provisions of the prior regulation. Since adoption of SB 471 imposed new requirements, however, compliance with the Cal/OSHA regulation no longer is sufficient. Accordingly, the emergency regulation provides that Private Enforcers must comply with the existing regulation, and the new statute. This does not affect or change Cal/OSHA's regulation in any way.

h. Section 3008: Affidavit of Compliance

Since Private Proposition 65 Actions are no longer subject to the thirty-day review period prior to submission of a settlement to the court (instead being subject to the 45-day review period for settlement approval motions), but Other Private Actions Alleging Violations of Proposition 65 are now subject to that requirement, the contents of the Affidavit of Compliance have been modified accordingly.

The Original Proposed Regulation engendered some confusion on this issue, so it was modified in the Revised Proposed Regulation to make clear that the 45-day review period for Private Proposition 65 Actions *replaces* the thirty-day period, rather than being added to it. In addition, since the affidavit of compliance is filed prior to the court hearing (with the reply papers in support of the motion), the language has been changed to state that 45 days "will have" elapsed since service of the motion on the Attorney General.

Health and Safety Code section 25249.7(f)(1) requires that "[a]t the time of filing any judgment," persons bringing actions subject to the statute must file an affidavit verifying that the report required by the statute has been served on the Attorney General. The term "filing of the judgment," however, is somewhat ambiguous, in that it is not clear whether it applies to the initial lodging of the proposed judgment with the court, or the entry of judgment after it is approved by the court. One commenter (C-34) stated that the "affidavit of compliance" procedure is "redundant and unnecessary in light of the new settlement approval procedures," which require that the settlement be served on the Attorney General. The affidavit of compliance requirement remains in the statute, however, and the additional requirements of submitting written comments from the Attorney General to the court would not be satisfied by the service certificate. This same commenter stated that the plaintiff should not have to provide the Attorney General's comments, nor should the plaintiff have to advise the court that a lack of response by the Attorney General does not constitute endorsement of the settlement. While this commenter is correct that the Attorney General may appear in the proceeding, the regulation provides an efficient way for the court to hear the Attorney General's views, or to see that modifications to the settlement have been made based on communications with the Attorney General, without the need for a formal appearance. In addition, in many instances, such correspondence shows modifications to the settlement that the parties make in response to comments by the Attorney General. The availability of this information to the court may enhance the court's willingness to approve some settlements, and creates a more complete record. Given the volume of settlements received (nearly 100 since January, 2002) this efficiency is valuable.

Commenter C-34 again asserts here that the Attorney General has no "regulatory or oversight authority" over cases not filed pursuant to Proposition 65. As explained before, the statute expressly extended the reporting authority to cover any action in which violations of Proposition 65 are alleged.

2. Chapter 2: Certificates of Merit

a. Section 3100: General

This section points out that all sixty-day notices alleging violations of the "warning" provision of the statute must include a Certificate of Merit. The statute requires that the notice attach specified documentation, which shall be treated as official information pursuant to Evidence Code section 1040. The remaining parts of the sixty-day notice, including the Certificate of Merit itself, are public information, however, and frequently are requested by

members of the public under the Public Records Act. In order to easily respond to those requests, and minimize the possibility of an inadvertent disclosure of privileged information, this section requires that the noticing party provide a "public" copy and an "Attorney General" copy, the latter of which would include the privileged material. Although there were no comments on this particular subsection of the Proposed Regulation, since January of 2002, the Attorney General has found that persons giving notice generally do not provide two separate and separately identified copies of the notice as the Proposed Regulation would require (although some do), and that this makes it more difficult to review the documents and organize them in a manner that ensures that the privileged material remains privileged. Thus, this provision was retained in the Final Regulation.

b. Section 3101: Contents

The statute states that the certifier must believe, and have factual support for its belief, that "there is a reasonable and meritorious case for the private action." Even though sanctions at the termination of an action are limited to those situations in which the court finds that there was no credible evidence of an exposure (§ 25249.7(h)(2)), the face of the certification requirement is significantly more broad, requiring a belief that there "is a reasonable and meritorious case for the private action." (§ 25249.7(d)(1)) To hold such a belief as to the entire action, the certifier must have some information concerning other elements required to prevail in the action: knowledge and intent, failure to warn, and that the alleged violator is a business with ten or more employees, i.e., each issue on which the plaintiff would bear the burden of proof.

At the same time, the issue of whether the exposure poses "no significant risk" (for carcinogens) or is less than one one-thousandth of the no observable effect level (for reproductive toxicants) is clearly an affirmative defense, and the plaintiff is not required to produce any evidence on this issue in order to proceed with the matter. (See *Consumer Cause, Inc., v. Smilecare* (2001) 92 Cal.App.4th 454.) SB 471 was not intended to, nor did it in fact, change the statutory burden of proof on any issue. Thus, the regulation does not require the certifier to state, or support, a conclusion that affirmative defenses could be negated. In some situations, however, the noticing party may have discovered information during the course of its investigation that proves that the defendant, in fact, will be able to prove an affirmative defense (e.g., no significant risk). While the noticing party has no legal duty to seek such information, if it obtains such information, the certifier can no longer state a reasonable belief that the "action" is "meritorious." Thus, the section requires that the certifier state that the information collected does not "prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute."

The section also requires that the certificate recite the fact that the appropriate persons were consulted, and that the supporting documentation has been provided to the Attorney General.

This subsection of the Proposed Regulation was the subject of numerous comments, some

suggesting that the requirements are too demanding and exceed the scope of the Attorney General's authority under the statute, and others suggesting that the requirements need to be made more demanding.

Two commenters (C-34 and C-41) objected to the requirement that the certifier "must have a basis to conclude that there is merit to each element of the action on which the plaintiff will have the burden of proof." These commenters contend that the certificate is limited to establishing that there is an exposure to a listed chemical, for two reasons. First, they point out that under SB 471, if the defendant prevails in an enforcement action and the trial court determines that there was no actual or threatened exposure to a listed chemical, the court may review the certificate and the underlying documentation, and award sanctions against the plaintiff, but only if the documentation shows that there was no credible evidence for the certifier's belief that an exposure to a listed chemical occurred. The Attorney General recognizes that potential sanction at the conclusion of the case is limited to those instances in which there was no credible evidence of exposure. The language of the requirement, however, is not so limited. It requires a certification that there is a "reasonable and meritorious case *for the private action*." (Health and Safety Code § 25249.7(d)(1) (emphasis added).) Clearly, for there to be a "reasonable and meritorious case" for the action, the plaintiff must have evidence concerning all elements of the prima facie case, not just one. Moreover, the purpose of the requirement is not just to create a potential sanction for those who proceed without credible evidence of an exposure, but to assure that the Attorney General is provided with more substantial evidence of violations, for use in his review of sixty-day notices. Limitation of the certificate to the "exposure" issue would defeat this purpose of the requirement.

Second, these commenters note that the statute provides that the certifier "has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data *regarding the exposure*...and that, *based on that information,* the person executing the certificate believes that there is a reasonable and meritorious case for the private action." (Section 25249.7(d)(1).) These commenters contend that since the "facts, studies or other data" are limited to the "exposure," and the certificate is "based on that information," then the certificate is limited to the issue of "exposure."

These commenters' construction of the statute is too narrow, for several reasons. In essence, these commenters read the language stating that the certificate shall be "based on that information" received through consultation as meaning "based *exclusively* on that information." The certificate necessarily will rely on the "information" obtained from the consultation with an appropriate expert in order to establish the existence of an exposure, and therefore is "based on" that information. It is logical that the certificate must be based on that information, because the proof of exposure in many instances is a technical matter, about which only persons with "relevant and appropriate experience or expertise" may be competent to express an opinion. Thus, the "based on" language simply assures that the proper consultation has been made. We do not think this language, however, is clear enough to compel (or even justify) the conclusion that it narrowed the requirement of certifying a "reasonable and meritorious case for the private

action" to exclude the numerous other elements of a prima facie case of a violation of the warning requirement. These other elements, such as knowledge and intent, and failure to warn, are critical to forming any reasonable, good faith belief that the action is meritorious. Under these commenters' interpretation, the "reasonable and meritorious case," language would effectively be read out of the statute. If the Legislature had intended these commenters' construction, the language would simply require certification that "an exposure to a listed chemical is occurring," but the Legislature chose much broader language.

One commenter suggested that the Certificate of Merit requirement is "redundant to existing law" concerning standards for filing civil actions, including Code of Civil Procedure section 128.7 and Federal Rule of Civil Procedure 11. (C-43.) Apparently, the Legislature did not think so. In addition, the Certificate of Merit provision serves an additional purpose not served by these other provisions of law--that of providing the Attorney General with better information by which he may evaluate whether to prosecute a case after receiving a sixty day notice.

A number of commenters suggested that the Certificate of Merit requirement should be more detailed and specific with regard to notices sent to property owners. (C-5, 34, 73.) For example, these commenters suggested that the Certificate of Merit should state that the Private Plaintiff has actually visited each specific property and has witnessed an alleged violation. They also suggested that "form letter" certificates should be invalid on their face. The Attorney General has prescribed a form, however, to assure that each certificate contains certain elements. The supporting documentation will provide much of the specific factual support for the claim.

One commenter (C-43) suggested that the private plaintiff should be required to do a minimum amount of due diligence to investigate whether there is a compliance program in place at each property, and should so state in the notice. The Final Regulation does require the certifier to attest to the merit of the case, i.e., that a violation is occurring. If a "compliance program" is in place that is leading to actual compliance, this should affect the plaintiff's ability to execute the certificate. If the "compliance program" is not leading to compliance, it properly falls outside the scope of the plaintiff's duty to certify.

Some commenters stated that the Certificate of Merit should be invalid if the Private Plaintiff does not support it with relevant exposure data--not just a study about the hazards of secondhand smoke in general, but a specific study relevant to the types of exposures in motels (e.g., outside corridors, inside rooms, around pools, etc.). (C-5, 34, 73.) While the regulation does not precisely define the specificity of the required information, it is clear that certifying that an "exposure" has occurred is not satisfied simply by describing the dangers associated with the chemical in question, e.g., second-hand smoke. Thus, the regulation already requires that such information be provided.

Some commenters suggest that the courts will not take judicial notice of these documents as official records of the state of California, and that this will make it impossible to dismiss

meritless lawsuits on demurrer. While there appears to be some debate, the Attorney General in the past has taken the position that sixty-day notices and their attachments are properly subject to judicial notice. At least one reported appellate case has considered a demurrer based on sixty-day notices, without indicating that there was any problem in properly considering the notices in the context of a demurrer. (*Yeroushalmi v. Miramar Hilton* (2001) 88 Cal.App.4th 738.) Accordingly this change is not needed. In any event, it is not clear what language could be placed into the regulation that would have the effect of changing whether the documents are subject to judicial notice under the Evidence Code.

Some commenters (C-5, 19, 41, 49, 50) suggested that the proposed regulation should be clarified to provide that a "reasonable and meritorious case for the private action" requires documentation accompanying the Certificate of Merit that specifies *each* alleged exposure, *each* alleged route of exposure and *each* listed chemical referenced in the 60-day notice, and that the supporting information must be specific in this regard.

The Attorney General agrees that the Certificate must attest to the merit of different products and exposures alleged in the notice, and that the supporting information must support the certificate, but believes that this is required by the existing language. Subsection 3101(c) provides that the facts and other information must be specific to the types of exposures alleged in the notice. This should be sufficient.

Many commenters addressed the requirement that the certifier state that the information obtained "did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute." Some commenters (C-34, 43) suggested that this goes beyond what can be required, because the certificate is limited to the "exposure" issue. This issue has been addressed. One commenter suggested that the language reference above is not appropriate, because there may be "some" merit to an affirmative defense, which should not preclude execution of the certificate. Other commenters (C-50) sought to expand this language to require certification that no evidence "indicates," "tends to support" or "provides a reasonable basis for belief" that an affirmative defense was valid. These suggestions were not adopted, because they would effectively reverse the burden of proof set forth in the statute, which is not permitted. In drafting this language, the Attorney General is mindful that the affirmative defenses under the statute, specifically the "no significant risk defense," are burdens of the defendant. A plaintiff need not have any evidence on such a topic. While we do not think that a certifier can attest that the case is "meritorious" where the certifier already has seen proof of a valid affirmative defense, requiring the certificate to state that there is nothing "tending to prove" or "indicating" that there is an affirmative defense would preclude execution of the certificate even where the affirmative defense in question actually is not valid, but simply has some evidence to support it. The fact that there is "some" evidence supporting an affirmative defense would not preclude execution of the certificate.

One commenter suggested that section 3101(b)(3) should be changed to add "alleged" to clarify that an exposure, at the time the certificate of merit is filed, is still an allegation. (C-19.)

This change was adopted.

c. Section 3102: Supporting Documentation

One commenter (C-41) suggested that, while it understands the purpose behind the designation of the Attorney General Copy of the certificate of merit and its supporting documentation as "Official Information pursuant to Evidence Code section 1040," the regulation should make clear that this designation does not in any way affect the discoverability of any information contained in the certificate or supporting documentation (i.e., making otherwise discoverable information non-discoverable). This requirement is expressly set forth on the face of the statute, so it is not necessary to make it clear in this instance.

In the Certificates of Merit submitted to date, the form and content of the supporting information has varied widely. Standardizing the requirement will help assure that the proper information is provided, and that it is provided in a manner that eases review by the Attorney General. This section requires that the information be physically attached to the Certificate of Merit in a legible, organized format. It would provide that citations to studies are not sufficient.

With respect to the experts consulted, it requires a description of the experts sufficient to demonstrate their competency.

Finally it specifies that the supporting documentation must be as specific as the types of exposures alleged. For example, if a number of different consumer product exposures are alleged, then the documentation must support the certifier's belief with respect to each product identified in the notice. The section contains similar provisions for occupational and environmental exposures.

One commenter (C-34) objected to the requirement that the documentation be "tabbed and identified." This language was deleted in the Revised Proposed Regulation and in the Final Regulation. The remaining requirement that the information be in a "legible and organized format" should be sufficient.

One commenter (C-43) objected that the certificate of merit and supporting documentation will become a basis for a challenges by defendants, or will be given to defendants. Certainly, if the certificate is not sufficient on its face, this an appropriate basis for a challenge. As to other challenges, the information is protected by Evidence Code section 1040, which precludes disclosure of the information (except under certain circumstances specified in that statute), so it is not likely that the information will be disclosed in order to enable such a challenge. Nor would potential ill-taken challenges be a basis upon which the Attorney General could decline to implement the law.

The Revised Proposed Regulation added a statement that the supporting documentation need not establish that a chemical on the Proposition 65 list of chemicals known to the state to

cause cancer or reproductive toxicity in fact causes cancer or reproductive toxicity. While the plaintiff has the burden of proving an exposure to a listed chemical, it does not have to prove that the state was scientifically correct in placing the chemical on the list. Thus the certificate and supporting documentation need not establish this. Some commenters suggested that the Original Proposed Regulation required them to submit huge volumes of documentation to support their experts' statements. (C-34.) The Attorney General has found since January 1, 2002, that plaintiffs submitting certificates of merit often submit documentation that the listed chemical in question is toxic. This is not necessary, and the regulation was changed to clarify this.

One commenter suggested that the certifier should not have to attach hard copies of studies and evidence supporting the certificate. (C-34.) Provision of hard copies, compared to providing citations to studies, makes it significantly easier for the Attorney General to review a large number of certificates in a short period of time, so this suggestion was not adopted. Moreover, this commenter's concern appears in part to have been motivated by concern that the regulation requires large amounts of documentation concerning the toxicity of the chemicals in question, which was addressed in the Revised Proposed Regulation and the Final Regulation, by making clear that the certifier does not need to include information to show that the listed chemicals in question cause cancer or reproductive toxicity.

One commenter (C-50) suggested that the supporting documentation required in proposed Title 11, section 3102, should include an actual statement from the identified person (or persons) with relevant and appropriate expertise as well as the certification from the attorney of the noticing party. This is not required by the statute, which clearly requires the certificate to be executed by the noticing party or attorney, based on, among other things, consultation with the expert. Moreover, the attorney or noticing party is certifying that the action has merit, which includes other issues beyond the scope of the individual expert who was consulted. In addition, the regulation requires that the expert, and the expert's qualifications, be identified in the supporting documentation. We think this is sufficient, and that the statute does not require more.

One commenter (C-19) suggested that the Attorney General be given the discretion to determine whether the expert consulted by the certifier is qualified. This was not necessary. The regulation already requires the submission of information sufficient to enable the Attorney General to make this determination.

d. Section 3103: Effect of Failure to Comply

The only specific sanction under the law for inadequate certification is by the court at the conclusion of the case. (Health and Safety Code § 25249.7(h)(2).) Since the statute specifically requires that each sixty-day notice to which it applies must include the certificate, and the regulatory requirements are binding, the regulation states that, in the absence of a proper Certificate of Merit, the noticing party has no authority to commence an action under Proposition 65. (It would appear that a demurrer or motion to strike would be appropriate if a complaint were filed under such circumstances.)

In addition, the statute does not specifically address any action the Attorney General may take where he concludes that a Certificate of Merit or the supporting documentation are inadequate. Certainly, the statute does not grant the Attorney General authority to prohibit the noticing party from filing a complaint. The Attorney General may, however, indicate orally or in writing his view of the adequacy of the Certificate or supporting documentation. Of course, in so doing, the Attorney General may not disclose information made privileged by the law. So long as no such information is disclosed, however, the Attorney General may choose to send a public letter advising the noticing party and alleged violators of his conclusions, for their use in determining how to proceed. Where the Attorney General does not provide any comment, this should not be interpreted as a comment on the validity of the Certificate of Merit.

Some commenters (C-34, 43) objected that SB 471 did not give the Attorney General any authority to determine whether the certificate of merit is sufficient to allow a suit to be brought. On the other hand, other commenters (C-5, 19, 41) suggested that the regulation should more clearly grant the Attorney General authority to determine that the certificate and supporting documentation are inadequate. One suggested that this be done routinely within sixty days of receipt of the notice. (C-5.) The Attorney General's conclusion is somewhat between these two opposing views: the regulation does not purport to give the Attorney General authority to issue a *binding adjudication* of the validity of the certificate. At the same time, however, the Attorney General is certainly free to publicly state his conclusion as to the validity of the certificate, and the parties and the court may determine what weight to give this determination. As to subsection (a), the Attorney General believes that this subsection simply implements the statutory provision, which expressly requires that a sixty-day notice alleging warning violations be accompanied by a Certificate of Merit, and makes that notice and certificate a prerequisite to filing suit.

Subsection (c) provides that where the Attorney General makes no response concerning a Certificate of Merit, no inference shall be drawn from the lack of response concerning the adequacy of the Certificate or supporting documentation. In many instances, the Attorney General will not publicly comment on the adequacy of the certificate for a variety of reasons unrelated to the adequacy of the certificate. Since there is no mandatory duty to, no inference should be drawn from failure to comment. This provision was included in the initial regulations that implemented SB 1269 and were adopted in June of 2000. After SB 1269 took effect on January 1, 2000, but before the adoption of that requirement, the Attorney General found that some parties that submitted settlements for court approval filed statements with the court that implied that the Attorney General's lack of comments constituted an endorsement of the settlement. Accordingly, it was deemed necessary in adopting the original regulation implementing SB 1269 to require that this statement be made. Nothing has occurred to suggest that this is no longer necessary. One commenter (C-43) suggested that this leaves the private enforcer subject to a "Sword of Damocles" on this issue until the conclusion of the litigation. While the Attorney General does not agree that a letter from the Attorney General is a "Sword of Damocles," any concern about a letter from the Attorney General concerning the adequacy of the certificate should diminish as the case proceeds and more evidence is produced.

One commenter noted (C-43) that the "Official Information" language in subsection (b) may not preclude such discovery efforts or attempts by target defendants to invoke the Attorney General's assistance for such a challenge. Evidence Code section 1040 provides that a public entity has a privilege to refuse to disclose information "acquired in confidence," where disclosure is forbidden by state statute, or where disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evidence Code § 1040(b).) SB 471 provides that the information supporting the Certificate of Merit is "confidential official information to the full extent authorized in Section 1040 of the Evidence Code." (Health and Safety Code § 25249.7(i).) This appears to fall short of constituting a statute prohibiting disclosure under subsection (b)(1), but to render it subject to the "balancing test" under subsection (b)(2).) Since SB 471 states that the "Attorney General shall maintain...the submitted information as confidential official information *to the full extent authorized* under section 1040 of the Evidence Code," however, the Attorney General would expect to routinely assert the privilege, subject only to a court determining under section 1040 that the information should be disclosed. Thus, while it may be possible that disclosure of the information could be ordered, this is because the Legislature expressly chose to invoke Evidence Code section 1040–which on its face may allow disclosure under some circumstances–as the applicable privilege.

One Commenter (C-49) suggested that the information supporting the certificate of merit be provided to the alleged violator. This is precluded by the express statutory language.

One commenter (C-43) Suggested that "judicial economy" necessitates a review of the underlying evidence from the certificate before a potentially wasteful and meaningless trial. The Attorney General will review the underlying evidence, but the statute does not contemplate that this review would be conducted at the outset by the alleged violator or the court.

3. Chapter 3: Settlement Guidelines

Under SB 471, settlements must be submitted to the court by noticed motion, and may be approved only if the court makes the following findings:

(A) Any warning that is required by the settlement complies with this chapter.

(B) Any award of attorney's fees is reasonable under California law.

(C) Any penalty amount is reasonable based on the criteria set forth [in the penalty provision].

The plaintiff must produce the evidence necessary to sustain the findings. The penalty provision now includes seven specific factors, plus an eighth "anything that justice requires" provision. The Attorney General is permitted to appear in the case without intervening, and all of the papers must be served on him.

Non-binding guidelines will assist the public by reducing litigation concerning the meaning of the new law and by enabling parties to follow the guidelines, thereby reducing the likelihood that the Attorney General will object to their settlement. The guidelines also will assist courts in reviewing settlements, particularly where a given court has not reviewed significant numbers of settlements in these cases. Some commenters (C-34, 50) suggested a variety of changes to state in different ways that the settlement guidelines are non-binding. The Attorney General has concluded that this already was clearly stated in the Proposed Regulation. Because there are a number of issues that could occur with respect to settlements that are not addressed in the guidelines, however, language was added to specify that the guidelines are not comprehensive, but instead involve frequently occurring issues.

One commenter (C-50) suggested that the language stating that the guidelines are intended to "assist the parties in fashioning settlements to which the Attorney General is unlikely to object," "is more confusing than helpful and should be eliminated." Given the extent to which other commenters suggested that the guidelines would be tantamount to a binding rule, the Attorney General has concluded that this explanatory language is helpful.

One commenter suggested that these guidelines should be applied to all actions based on alleged violations of Proposition 65, not just those brought directly under Proposition 65. (RP-7.) The specific settlement findings on three specified issues apply only to actions brought directly under Proposition 65, and therefore are not required for other types of actions. "Other Private Actions Alleging Violations of Proposition 65" still are submitted to the Attorney General, and the Attorney General has had, and continues to have, authority to take various actions to protect the public in such cases, including objecting to a settlement that is contrary to law or public policy. The guidelines, however, are intended to address Proposition 65 cases, since they are subject to the statutory settlement approval process.

One commenter (C-34) noted that settlements can and often do contain terms different than what may be allowed after judgment, citing *Rich Vision Centers, Inc.* v. *Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 116, in which the court held that a court may approve a settlement that contains terms not authorized by the statute under which the plaintiff sought relief so long as the settlement terms furthered the purposes of the statute. The guidelines, in discussing payments in lieu of penalties, recognize this.

b. Section 3201: Attorney's Fees

This section specifies certain principles that are consistent with current law under Code of Civil Procedure section 1021.5. The guideline is not intended to be a comprehensive restatement of the law concerning recovery of attorney's fees, but to address issues that frequently occur in the Attorney General's review of settlements in Private Proposition 65 Actions:

- Cases that accomplish only a trivial change in the existing wording of a warning have not conferred a substantial public benefit.

- The defendant's offers to cure the violation at an early stage must be considered in determining whether all of the fees are justified if the plaintiff does not accomplish more than was originally offered.

- Fees should be justified by contemporaneously kept time records. Other methods of proving attorney time may leave questions as to their accuracy.

- Multipliers are justified only in extraordinary cases.

In addition, the Proposed and Final Regulation provide that the additional time spent responding to the Attorney General's inquiries should not ordinarily be recoverable, unless specifically allowed by the court. Many settlements simply specify the amount of attorney's fees, so judicial approval of the settlement would not result in any additional award. Some settlements, however, provide that the defendant must pay any additional fees incurred in responding to our inquiries about settlements. While case law under Code of Civil Procedure section 1021.5 allows for the collection for "fees on fees," i.e., compensation for time spent preparing a fee application, those expenses are caused by the defendant's opposition to the plaintiff's fee application. Moreover, as with other aspects of a fee provision of a settlement, the fact that the parties agreed to it, does not automatically render the fee "reasonable," under the statute, or the statutory provision would have no effect. One commenter (C-19) suggested that the guideline should specifically prohibit any provision requiring that the defendant pay fees caused by the Attorney General's comments. It is not appropriate that, in every case, the defendant should bear the burden of additional costs incurred due to the Attorney General's inquiries. In particular, where the Attorney General's participation results in changes to a settlement or judicial disapproval, it would be inappropriate for the defendant automatically to pay. Thus, the guideline provides that such fees should be awarded only if the court determines it is appropriate.

One commenter (C-34) requested that the guidelines specify that they "are not consistent with existing law." This suggestion was not adopted. While others may differ, the guidelines are intended to set forth the Attorney General's views in a manner consistent with existing law.

A number of commenters (C-5, 21, 24, 26-30, 32, 36, 37, 39, 44, 46-47, 51, 62-70) noted that, under some circumstances, a prevailing defendant may be eligible for an award of attorney's fees under Code of Civil Procedure section 1021.5, and suggested that the guidelines be amended to so state, "in order to make them consistent with California law." This suggestion was not adopted, because it is not a frequently occurring issue in reviewing settlements. The Attorney General has yet to receive a settlement in which the defendant was awarded attorney's fees from the plaintiff in a private Proposition 65 action, thus there is no apparent need to include this in the guidelines.

Some commenters (C-1-24, 26-33, 25-48, 51-72) suggested that the guidelines should

provide that "the fact that a defendant has agreed to provide a warning for exposures to listed chemicals, in and of itself, should be given no weight in determining whether the plaintiff was a 'successful party' for the purpose of an attorney's fees award under Proposition 65," because unnecessary warnings actually harm the public. While there is some merit to the contention that a warning does not benefit the public if in fact there is no significant exposure, in general, the provision of a warning is an indication of success by the plaintiff. Thus, the Final Regulation provides that there is no public benefit if there is no exposure "for which a warning plausibly is required. This language incorporates the duty to make some showing of the need for a warning, while not requiring the plaintiff to demonstrate that there was an exposure above the "no significant risk level" in order to justify the settlement. To require more would effectively require the parties to litigate the merits of the case in order to have a settlement approved, when one of the purposes of the settlement is to avoid that very litigation. In addition, courts traditionally consider whether changes in a defendants' conduct actually was triggered by the plaintiffs, and the guideline should not preclude this. Accordingly, this suggestion was not adopted.

The Original Proposed Regulation stated that where the sole relief is a minor or technical change in the language, appearance, or location of a warning in a manner that is not likely to increase its visibility or effectiveness in communicating the warning to the exposed persons, there is no significant public benefit. One commenter (C-19) suggested that this language be amended to add the word "significantly" before "increase its visibility." This change was adopted, because, if a warning was already being given, and the relief consists exclusively of changes to the warning format, then a "significant" public benefit requires a "significant" improvement in the warning.

Additional language was added in the Revised Proposed Regulation to indicate that where a settlement provides a "formula" under which warnings may be provided, the plaintiff should show that some of the products in controversy are or were above the level provided in the formula, or the "formula" itself may not establish the existence of a public benefit. In at least two settlements submitted to the Attorney General within the last year, settlements have contained specific formulas for determining whether products require warnings, and analysis of the formula has shown that *no* product at issue in the case required a warning under the formula in the settlement. Thus, the settlement was in essence simply an acknowledgment that no warnings were required. While this may be entirely appropriate in a given case, the plaintiff cannot plausibly claim to have prevailed and to have obtained a substantial public benefit in such a matter. No comments were received on this language, and it has been retained in the Final Regulation.

One commenter (C-34) stated that the proposed regulations erroneously focus only on Code of Civil Procedure section 1021.5 and the basis for seeking fees in a Proposition 65 action. This focus is appropriate because section 1021.5 is the primary basis upon which such fees would be sought. This commenter suggested that the guidelines be amended, however, to specify that they apply to fees awarded under 1021.5, and that parts of them may not apply where there is

a different legal basis for seeking fees. This suggestion was adopted, simply to note that the guidelines do not contain substantial provisions concerning those other statutes.

One commenter (C-43) asserted, and in the last several months of reviewing settlements, the Attorney General has found that some parties argue, that any fee that was agreed upon by the parties is per se "reasonable" and therefore meets the statutory requirement that the court find that the fees are "reasonable under California law." This construction, however, would entirely nullify the Legislative requirement for courts to determine whether the fees awarded in settlement are reasonable, since by its terms, the statute only applies to settlements. Accordingly, specific language was added to the Revised Proposed Regulation stating that the fact that the fees were agreed upon is not sufficient to sustain the plaintiffs' burden of showing the reasonableness of the fees. No additional comments were received on this language, and it has been retained in the Final Regulation. The Final Regulation does recognize, however, that the fact that the fees are awarded in a settlement may justify a somewhat less exacting review. For example, in a contested fee application, a defendant and the court may scrutinize timesheets quite closely, examining virtually every one of hundred of time entries. A settlement of an attorney's fee issue is undertaken in part to avoid the time and expense of this review, and therefore the court (and the Attorney General) may not in every instance scrutinize the application with the same level of detail.

One commenter (C-43) argued that the Attorney General has no special competence to determine whether attorney's fee awards are reasonable, and therefore should have no authority to review them. The Attorney General was expressly given authority to review these awards by the Legislature. In addition, the courts, not the Attorney General, ultimately decide whether the fees are reasonable.

Two commenters (C-34, 43) indicated that relief other than warnings, such as reduction in air emissions of listed chemicals, product reformulation, or reduction in discharges, provide the basis for a conclusion that the plaintiff has created a significant public benefit, and suggested that changes should be made to the regulation to so state. The Proposed Regulation was not intended to suggest otherwise, but upon review, it was determined that it could be interpreted to do so. Accordingly, section 3201(b) was changed to clarify that the references to warnings apply in warning cases; to specifically state that reformulation or other changes in practices may constitute the necessary public benefit, and to note that in "discharge" cases, the reduction or elimination of the discharge establishes a significant public benefit.

The Original Proposed Regulation provided that in determining the "necessity of private enforcement" under Code of Civil Procedure section 1021.5,

> [T]he plaintiff should establish that its continued prosecution of the action was necessary to obtain the relief in the settlement. For example, where a defendant proposed in writing to provide certain relief, and the settlement or judgment does not provide any significant additional relief, additional fees incurred after the time that the offer was rejected may not

be reasonable or necessary.

Some commenters (C-19, 21) suggested that a change be made to provide that "a plaintiff should not recover the attorney's fees incurred from the date of the proposal forward when a defendant's proposal is rejected by the plaintiff and, after proceeding with the litigation, the plaintiff fails to obtain anything more than was previously proposed." Given the potential complexity of that factual issue, it is better to simply state that such a course of conduct "may" mean that additional fees are not reasonable or necessary. Two other commenters suggested that this provision should be removed completely, because it allows the Attorney General to "second guess litigation strategy" and will discourage enforcement of the law. Under existing law, the sequence of settlement offers and the ultimate relief obtained is a factor that may be reviewed by courts, and could be a basis upon which a court might find that certain attorney's fees were not necessarily incurred. In addition, there has been concern in some private Proposition 65 cases that small defendants who agreed to settle quickly were kept in litigation unnecessarily. Accordingly, the provision was retained.

One commenter suggested that the guidelines should state that all settlements should simply provide that fees will be paid as determined by the court. (C-19.) While this may be an appropriate way to proceed in many cases, we do not read SB 471 to authorize the Attorney General to preclude parties from agreeing on the amount of attorney's fees to be paid, so long as that agreement is subject to judicial approval as reasonable.

One commenter suggested that the language in section 3201(e) stating that fees should be "justified by" contemporaneous time records should be modified to say "based on" contemporaneous time records. (C-34.) There is little substantive difference between the two phrases. The word "justify" is defined as "to prove or show to be just, right, or reasonable." (Webster's Ninth New Collegiate Dictionary (1987), at 656.) Since time records are a part of showing that the fees are "just, right, or reasonable," the existing language was retained.

One commenter (C-34) suggested that the regulations specify certain practices in obtaining fees that are acceptable, concerning fees in multiple defendant cases, fees for time spent identifying additional defendants who may join the settlement, future work on monitoring compliance with a settlement, and awards on a common fund theory. While these fees may be appropriate in individual cases, they raise enough issues unique to those cases that specific recognition of them was not included in the guideline.

One commenter (C-50) suggested that the reference to a party prevailing where it is the "catalyst" of a change in the defendant's practices raises a number of issues concerning whether in fact the action was the cause of the change in practices. The guidelines are not intended to resolve these issues, which have been the subject of a number of reported appellate cases, but only to point out that existing law may deem a party to have prevailed based on this "catalyst" theory, rather than just the relief obtained formally in the judgment. Accordingly, no greater specificity has been added to this portion of the guidelines.

The Revised Proposed Regulation included a new subparagraph 3201(f) concerning "contingent fee awards." This issue has arisen in cases in which fees were sought as a percentage of the total recovery in the case, e.g., 1/3 of the recovery. The plaintiffs claimed that a 1/3 contingent fee is a standard "reasonable" fee, and that therefore this automatically satisfies the "reasonableness" requirement of the statute. This subparagraph was added because the fact that the attorney has an agreement with the client that the fee will be a specific percentage of the recovery does not establish that the fee is reasonable under SB 471. As the guideline now provides, a traditional contingent fee is a percentage of the recovery obtained by the plaintiff, where the recovery belongs to the plaintiff without restriction. It is not a court-awarded fee at all, and the public has little interest in how the plaintiff chooses to spend any money that belongs to itself. In Proposition 65 cases, however, there typically is very little recovery of funds that simply belong to the plaintiff. Funds are either civil penalties (75% of which go to the state), or "cy pres" or payments in lieu of penalties, which are devoted to specific purposes. (Of course, if the plaintiff chose to give some part of its 25% share of the penalties to its attorney, this would not be a court-awarded fee, and there would be little basis to object to it.) In some settlement approval motions, the Attorney General has found that the plaintiff explains that there is an agreement between the attorney and client that the fees will comprise no more than a fixed percentage of the total recovery, but then establishes that the actual amount of fees awarded in the settlement can be justified based on a "lodestar" calculation. Nothing in the guidelines would preclude such an approach. One commenter, even before this language, had written that SB 471 and the proposed guidelines unlawfully impair the right to enter into a contingent fee contract, and that such right is guaranteed by Business and Professions Code section 6147. (C-43.) Business and Professions Code sections 6147 and 6146 actually impose limits on contingent fee agreements, limits which have been upheld by courts. Simply noting that the fee sought in the settlement was in some way "contingent" on the result of the case does not establish that it is reasonable. No comments were received on this language, and it has been retained in the Final Regulation.

c. Section 3202: Clear and Reasonable Warnings

This section does not supersede or alter in any way the existing and legally valid regulations adopted by the Office of Environmental Health Hazard Assessment. Nonetheless, it provides certain additional guidance concerning the application of those regulations to particular fact situations. The section does the following:

- Identifies wording deviations from the approved "safe harbor" warning language that the Attorney General considers acceptable;

- Provides model environmental tobacco smoke warnings for hotels and apartments;

- Provides specific guidance concerning newspaper warnings for facilities warning residents of the surrounding community;

- Identifies certain words and phrases that should not appear in warnings.

The provision will help parties, whether in litigation or attempting to comply in advance of litigation, to provide appropriate warnings.

While one commenter agreed with the substance of this chapter (C-34), all other commenters (C-1-33, 35-72) oppose this section on the ground that it exceeds the scope of SB471, and if adopted would be an invalid regulation. These commenters suggest that it is not appropriate for the Attorney General to provide guidelines concerning clear and reasonable warnings, because those warnings are the subject of binding regulations adopted by the Office of Environmental Health Hazard Assessment, which is the lead agency for implementation of Proposition 65. Some commenters suggested that these guidelines may conflict with OEHHA's regulations and could create confusion. Other commenters, while indicating that they supported the substantive provisions of the guidelines, nonetheless suggested that they be adopted by OEHHA. (C-34 .)

While fully understanding and respecting the authority of OEHHA in this matter, the Attorney General is the state official charged with reviewing settlements in Private Proposition 65 Actions and determining whether to appear in court and object to settlements on the ground that the warning given does not comply with Proposition 65. Accordingly, he is providing guidance indicating particular examples of warnings that are likely to result in objections. The Attorney General could simply object to any settlement containing warning language which, in his view, does not comply with the statute and regulations. There are four difficulties with that approach, however:

- First, the Attorney General has found that where parties have negotiated a settlement for several months only to find that the Attorney General objects to the warning provisions, they are dissatisfied that they were unable to obtain guidance as to the Attorney General's views before the agreement was fully negotiated. (One commenter specifically commented on this. (C-34.)

- Second, the Attorney General receives numerous oral and written requests for additional guidance concerning whether particular warnings comply with the law, indicating that there is a significant demand not only for additional guidance, but specifically to know the Attorney General's position

- Third, while many parties are able to obtain the Attorney General's view by obtaining publicly available briefs and letters from individual cases in which the Attorney General has addressed these issues, not everyone has easy access to such documents. Some parties have them, others do not, and this can give some parties an advantage over others.

- Fourth, if the Attorney General were to simply apply "internal" non-public guidelines that

actually governed his policy in determining whether to object to settlements, such internal guidance could be challenged as an "underground rule."

Thus, the Attorney General has concluded that the public is better served by having his views and policies on this matter openly and publicly stated.

One Commenter (C-50) suggested that the mention of warning language such as "Using this product will expose you to a chemical . . ." in lieu of "This product contains a chemical . . ."; or (2) deleting the reference of the state of California from the safe-harbor language" is inappropriate, because neither of those options is expressly authorized by title 22, section 12601. By definition, any warning language other than the safe harbor language is not "expressly authorized" in the warning regulations. The Attorney General has found over time, however, that many parties prefer alternative language, and inquire as to whether the Attorney General will object to various alternatives. Accordingly, this language helps provide guidance as to language that the Attorney General will accept.

The same commenter suggested that the language "this product will expose you to a chemical" goes beyond the scope of the duty to warn, because it might cover products that do not contain a listed chemical, but otherwise create an exposure to the chemical (e.g., tobacco smoke). Although the Attorney General has taken the position on a number of occasions that Proposition 65 does apply to products that produce, but do not contain, listed chemicals, that issue is beyond the scope of this rulemaking. Since many parties have employed this language in settlements, this language simply reflects that its use would not result in the Attorney General objecting to a settlement on the grounds that the warning does not comply with the law. Accordingly, this suggestion was not adopted.

Some commenters suggested that the language of section 3202(c) concerning warnings for second hand tobacco smoke "may expand Proposition 65 liability to cover exposures caused by tenants and their guests' lawful use of property, and activities over which property owners and managers have no knowledge or control." (C-1-18, 20-24, 26-30, 32, 33, 35-48, 51-72.) Again, although the Attorney General has taken the position that premises operators can be responsible for exposures to second-hand tobacco smoke where they permit smoking on the premises, this issue is not within the scope of the rulemaking. Many environmental tobacco smoke settlements are reached, and this section simply provides one form of warning to which the Attorney General would not object.

These same commenters pointed out that the language of 3202(c) is specific to tobacco smoke, and therefore does not cover other types of exposures for which warnings may be required, and that suggested warnings should "cover every possible exposure that could occur." It is not possible to provide a guideline as to every type of exposure that could occur, so this suggestion was not adopted. In addition, these commenters suggested that there "is no evidence that second hand smoke exposures reach a level that triggers a Proposition 65 warning in common areas of apartment complexes." This language does not suggest that such warnings are

required, but simply provides acceptable language for those settlements in which the parties agree that a warning will be provided.

d. Section 3203: Reasonable Civil Penalty

This section does not give greater clarity to the specific factors set forth in the statute. It does, however, view "cy pres restitution" as effectively a payment in lieu of penalties, which should be reviewed by the court. This type of recovery has been abused by some private plaintiffs, who have traded penalties for cy pres funds, and then spent them in unrelated, unaccountable ways. These payments should be related to the purpose of the law, be given to publicly accountable organizations, and be subject to an appropriate selection procedure.

One commenter suggested that the inclusion of a guideline governing "payments in lieu of penalties" based on the statutory authorization to consider "other factors which justice may require" may not be authorized. (C-34.) To the contrary, the Attorney General believes that the very common provision of settlements for payments in lieu of penalties, whether denominated as "cy pres," "offsets," "contributions" or "donations," is an important component of settlements, and that justice indeed requires that they be scrutinized as part of the process of determining the adequacy of penalty amounts.

One commenter (C-43) suggested that "a set of guidelines geared to that real world of prior judicial analysis and approval be more in keeping with our traditional *stare decisis* jurisprudence." Unfortunately, this comment is not sufficiently specific to enable the Attorney General to determine how to revise the regulation, other than to state that as a guideline, it is not expected that the criteria for review of penalties will be sufficiently specific to answer every conceivable question that could arise, but the guidelines will provide useful guidance in commonly occurring situations.

One commenter (C-34) stated that there is "no requirement in law that there be a 'nexus.'" The Attorney General disagrees. Any payment collected under the law must in some way be authorized by the underlying statutes or authorities upon which the claim is based, and the relevant authorities in this instance support a nexus requirement. While the fact that a particular form of relief is not authorized by the statute being enforced does not, in and of itself, preclude the court from approving a settlement containing such relief, such payments must further the statutory purpose of the law being enforced. (*Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 116, *Rayan v. Dykeman* (1990) 22 Cal.App.3d 1629, 1634.) Moreover, many of these funds are in effect "cy pres restitution," whether so denominated or not. In that context, the Supreme Court has noted that whether a court will find the funding of an activity proper, "depends upon its usefulness in fulfilling the purposes of the underlying case of action." (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.) In *Levi Strauss*, the court specifically cautioned against awarding funds to existing organizations because they "may view a large recovery as a pot of gold to fund projects ranked high on the group's own agenda but of little or no benefit to the class." (*Id*., 475, n.11.)

The same commenter suggested that this requirement is "hopelessly vague and provides no more guidance than silence would." The Attorney General disagrees. In many instances, settlements have been submitted with no limitations at all concerning the use of payments to various organizations (including the plaintiff), or to organizations with no apparent connection to any of the issues in the action or under Proposition 65. Such expenditures would not be consistent with the guidelines.

Some commenters suggested that the guidelines should provide that a payment in lieu of penalties should not be made to the plaintiff or to "an entity closely associated with the plaintiff" (C-19, 41), that the funds should not be used for additional litigation, and that the funds should be used only for "identified projects" (as opposed to funding of grant programs). If the nexus requirement and the accountability requirements are met, however, such recoveries should not be precluded in all instances. Payment to such entities, however, may bear closer review to assure that they are appropriate. While the funding of additional litigation does raise some concerns, the law concerning the need for a "nexus" to the harms caused by the alleged violations does not appear to preclude further litigation as a strategy for addressing those harms.

One commenter (C-34) pointed out that the proposed guidelines limited recipients to nonprofit corporations, government entities, or court-supervised entities, and suggested that unincorporated associations and for-profit entities should be able to receive funds for appropriate activities. The Attorney General agrees, and the Revised Proposed Regulation removed the reference to non-profit or governmental entities. The reference to being "accountable" was retained.

e. Section 3204: Other Provisions

This section provides that certain other provisions, specifically concerning the preclusive effect of the settlement on other claims, are not appropriate, and therefore may result in an objection by the Attorney General. One commenter suggested that these provisions may be unlawful, because they provide the Attorney General with a basis to object to parts of a settlement other than those for which the court must make specific findings pursuant to SB 471 (warnings, penalties, and attorney's fees). (C-34.) The Attorney General disagrees. Even prior to SB 471, settlements in any case were subject to disapproval by a court if they contained provisions contrary to law or public policy. (*California State Auto. Assn. Inter-Ins. Bureau* v. *Superior Court* (1990) 50 Cal.3d 658, 664; *Mary R*. v. *B & R Corp*. (1983) 149 Cal.App.3d 308, 316-317.) In addition to this pre-existing authority of courts to review settlements, the Attorney General, as the only state-level official authorized to enforce Proposition 65, and as the chief law officer of the State, has authority to intervene in Proposition 65 actions at any time, and has intervened or filed amicus briefs in numerous cases. Certainly, nothing in SB 471 can be construed to limit the pre-existing authority of the Attorney General or the courts in these matters.

This section of the guidelines addresses one area that has been a problem in a large

number of settlements, i.e., the inclusion of language purporting to "release" claims that the private plaintiff has no authority to release. These include claims on behalf of the People of the State, claims about chemicals not subject to the statute, personal injury claims, or claims affected by future changes in the law.

The same commenter (C-34) objected that "this section represents an unnecessary and unauthorized attempt by the Attorney General to interpret the judicial doctrine of *res judicata*." Again, this section simply provides advance notice to those negotiating the terms of settlements, so that they will not unwittingly adopt language that will result in an objection by the Attorney General. This particular issue was addressed because it occurs quite frequently, and because "release" language implicates the authority of the Attorney General in later cases.

The same commenter asserts that "settlement releases that purport to resolve or bar claims beyond the scope of the lawsuit have no res judicata effect." While this may be true, one cannot predict with certainty how a court might treat such language, or whether the mere presence of such language in a settlement might deter a person from bringing an entirely permissible claim. Thus it is better to avoid the inclusion of such provisions in settlements.