TITLE 11-DEPARTMENT OF JUSTICE
DIVISION 4-PROPOSITION 65 PRIVATE ENFORCEMENT
FINAL REGULATION

CHAPTER 1

§ 3000. Authority. This chapter sets forth procedures necessary to comply with Health and Safety Code section 25249.7(e) and (f) as amended by Ch.599, statutes of 1999 and Chapter 578, statutes of 2001. Any private person proceeding "in the public interest" pursuant to Health and Safety Code § 25249.7(d) or bringing any other action (hereinafter "Private Enforcer"), who alleges the existence of violations of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health and Safety Code sections 25249.5 or 25249.6) (hereinafter "Proposition 65"), shall comply with the applicable requirements of this chapter.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

§ 3001. Definitions.

(a) "Subject to a ~~s~~Settlement" means that a written settlement agreement has been signed by the private enforcer and the alleged violator, or an oral agreement has been stated on the record in court in such manner as to render the agreement enforceable pursuant to Code of Civil Procedure section 664.6, even if the settlement is contingent on the entry of a judgment pursuant to stipulation or other judicial approval.

(b) "Subject to a ~~j~~Judgment," means that the court has entered a judgment pursuant to stipulation, or ~~other than a judgment pursuant to a settlement, means~~ that the court has entered an order entitling a party to entry of judgment (e.g., order granting a motion for summary judgment, order sustaining demurrer), regardless of whether the actual form of judgment has yet been

prepared, approved, or filed.

(c) "Private ~~Enforcement Matter~~ Proposition 65 Action," means any complaint filed by a Private Enforcer in court in which a violation of Proposition 65 is alleged and the Private Enforcer is proceeding pursuant to Health and Safety Code section 25249.7(d).

(d) "Other Private Action Alleging Violations of Proposition 65" means a complaint filed by a Private Enforcer in which a violation of Proposition 65 is alleged, but the plaintiff is not proceeding pursuant to Health and Safety Code section 25249.7(d).

(e) "Settlement" means any agreement to resolve all or part of an action, including any settlement by which injunctive relief, whether permanent or preliminary, is agreed upon, and also includes any agreement pursuant to which the case is dismissed, except for a voluntary dismissal in which no consideration is received from the defendant. Private Enforcers shall comply with these requirements for each partial settlement and any final settlement.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

§ 3002. Complaints. A Private Enforcer who commences a Private ~~Enforcement Matter~~Proposition 65 Action or an Other Private Action Alleging Violations of Proposition 65 shall serve a file-endorsed copy of the complaint, and a completed version of the Report of Civil Complaint Filing form attached as Appendix A to these regulation*s*, upon the Attorney General within five days after ~~filing the complaint with~~ receipt of the file-endorsed copy of the complaint from the court. Any amended complaint shall be served upon the Attorney General within five days after filing with the court along with ~~an updated version of the~~ a Supplemental Report of Civil Complaint Filing.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

§ 3003. Settlements. ~~A Private Enforcer who agrees to a settlement of a Private Enforcement Matter shall serve the settlement upon the Attorney General within two working days after the action is subject to a settlement. When a Private Enforcer files a motion for judicial approval of a settlement pursuant to Health and Safety Code section 25249.7(d)(4), it shall serve the Attorney General with the motion and all supporting papers and exhibits no later than forty-five days prior to the date of the hearing of the motion.~~

(a) Settlements of Private Proposition 65 Actions. The Private Enforcer shall serve the Settlement on the Attorney General with a Report of Settlement in the form set forth in Appendix B within five days after the action is Subject to a Settlement, or concurrently with service of the motion for judicial approval of settlement pursuant to Health and Safety Code section 25249.7(f)(4), whichever is sooner. The motion and all supporting papers and exhibits shall be served on the Attorney General no later than forty-five days prior to the date of the hearing of the motion. If court rules or other applicable orders do not permit a forty-five day period, the Private Enforcer shall apply for permission to file the motion with a forty-five day notice period. If the court denies the request in whole or in part, the motion shall be noticed for the maximum time permitted by the court, and a copy of the application seeking a forty-five day time period and the court's order shall be served on the Attorney General with the motion for approval. The forty-five day period shall not apply in any case in which the Attorney General is a plaintiff in consolidated or related matters with the Private Enforcer and the settlement is a Consent Judgment entered into by the Attorney General and the Private Enforcer. The submission to the

Attorney General shall contain the entire agreement between the parties. ~~"Settlement" for these purposes includes any partial settlement by which injunctive relief, whether permanent or preliminary, is agreed upon, and also includes any agreement pursuant to which the case is dismissed, regardless of the type of relief, if any, obtained in exchange for the dismissal . In such instances, Private Enforcers shall comply with these requirements for each partial settlement and any final settlement. The submission shall include all information set forth in the Report of Settlement form attached as Appendix B.~~ The papers filed with the court shall advise the court that the fact that the Attorney General does not object or otherwise respond to a settlement shall not be construed as endorsement of or concurrence in any settlement.

(b) Settlements of Other Private Actions Alleging Proposition 65 Violations. The Private Enforcer shall serve the Attorney General with the Settlement and a Report of Settlement in the form set forth in Appendix B within two days after the action is Subject to a Settlement. The Attorney General shall have thirty days after actual receipt to review the settlement. During the thirty-day period, the settlement shall not be submitted to the court, unless required by court order or rule or the Attorney General has stated in writing that he does not object to entry of the settlement. The fact that the Attorney General does not object or otherwise respond to a settlement shall not be construed as endorsement of or concurrence in any settlement.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

§ 3004. Judgments. Within ten days after a case is subject to a judgment, a Private Enforcer shall serve on the Attorney General a copy of any judgment or order entitling a party to entry of judgment entered in a Private ~~Enforcement Matter~~ Proposition 65 Action or Other

Private Action Alleging Violations of Proposition 65 and a completed version of the Report of Entry of Judgment form attached as Appendix C to this regulation. 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. The Private Enforcer shall serve on the Attorney General a copy of any decision of an appellate court concerning the validity of the judgment within five working days after receipt.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

§ 3007. OSHA matters. For matters in which violations with respect to occupational exposures are alleged, compliance with the Director of the Division of Occupational Safety and Health's Special Procedures for Supplementary Enforcement of State Plan Requirements concerning Proposition 65, 8 Cal.Code Regs., § 338, as adopted on October 12, 2000, constitutes compliance with these requirements, except for the filing of the Affidavit of Compliance required by section 3008 ~~and compliance with additional requirements contained in Health and Safety Code section 25249.7(f) (4) and (5),~~ and the requirements of section 3003(a). That regulation is set forth in Appendix D to these regulation*s*.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

§ 3008. Affidavit of Compliance. A~~t the time of filing or lodging of any judgment with the court, a~~ Private Enforcer shall file with the court a declaration or affidavit, meeting all applicable requirements of the Code of Civil Procedure, verifying compliance with all requirements of this chapter. ~~This declaration or affidavit shall include:~~

(a) In a Private Proposition 65 Action, the declaration or affidavit shall be filed when reply papers in support of the motion for approval of the settlement would be filed, and shall include:

(1) Proper proof of service on the Attorney General of all documents required to be served on the Attorney General by this regulation.

~~(b)~~ (2) If the case is resolved by settlement, a statement that at least forty-five days (or the shorter time period allowed by the court pursuant to section 3003), will elapse between ~~have elapsed since~~ service of the settlement on the Attorney General ~~or the shorter time period allowed by the court pursuant to section 3003~~ and the hearing date. Any written response by the Attorney General to the settlement shall be submitted to the court with any additional papers submitted to the court by the moving party, or at the hearing on the motion, if permitted by the court. The affidavit shall expressly advise the court that pursuant to section 3003 of this regulation, the failure of the Attorney General to comment on a settlement shall not be construed as endorsement of or concurrence in the settlement.

(b) In an Other Private Action Alleging Proposition 65 Violations, if the case is resolved by settlement, the declaration or affidavit shall be filed or lodged with the court at the same time as the judgment pursuant to stipulation or other order disposing of the case is submitted to the court, and shall include a statement that at least thirty days have elapsed since service of the settlement on the Attorney General or that fewer than thirty days have elapsed but the Attorney General has stated in writing that he does not object to entry of the settlement. Any written response by the Attorney General to the settlement shall be made an exhibit to the declaration or affidavit. The affidavit shall expressly advise the court that pursuant to section 3003 of this

regulation, the failure of the Attorney General to comment on a settlement shall not be construed as endorsement of or concurrence in the settlement.

Note: Authority cited: Section 25249.7(f), Health and Safety Code. Reference: Sections 25249.7(e) and 25249.7(f), Health and Safety Code.

CHAPTER 2-CERTIFICATES OF MERIT

§ 3100. General

Any notice of alleged violations provided pursuant to Health and Safety Code section 25249.7(d) in which violations of Health and Safety Code section 25249.6 are alleged shall include a Certificate of Merit. The Certificate of Merit shall be attached to, and be served with, all copies of the notice of alleged violations. A second copy of the entire notice and Certificate of Merit shall be served on the Attorney General, clearly marked "Attorney General Copy: Contains Official Information Pursuant to Evidence Code Section 1040" and shall attach all supporting documentation required by Section 3102. The designated Attorney General Copy is deemed Official Information pursuant to Evidence Code section 1040.

Note: Authority cited: Health and Safety Code Section 25249.7(d), (h),(i). Reference: Health and Safety Code Section 25249.7(d), (h), (i).

§ 3101. Contents.

(a) Health and Safety Code section 25249.7(d)(1) requires that the certifier state that he or she "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 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." "Reasonable and meritorious case for the private action" requires not only documentation of exposure to a listed chemical, but a reasonable basis for concluding that the entire action has merit. 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. The certifier does not need to have a basis to conclude that it will be able to negate all affirmative defenses, but must certify that the information relied upon does not prove that any affirmative defense has merit.

(b) The Certificate of Merit shall contain all of the following statements, and appear in the following form:

CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7(d)

I, (name of certifier), hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice(s) in which it is alleged the parties identified in the notices have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.

2. I am the (noticing party/attorney for the noticing party).

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiffs' case can be established

and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: _____ _____

(Signature)

Note: Authority cited: Health and Safety Code Section 25249.7(d), (h),(i). Reference: Health and Safety Code Section 25249.7(d), (h), (i).

§ 3102 Supporting documentation

(a) The "Attorney General Copy" of the notice of violation and Certificate of Merit shall physically attach the information set forth below. Supporting documentation shall be provided in a legible and organized format. References to studies or other information are not sufficient.

(b) Identification of the person or persons with relevant and appropriate experience or expertise shall include: (1) their full name and address; and (2) sufficient information concerning their background, training and knowledge to establish that they possess the necessary experience or expertise to render a competent opinion on the subject matter for which they have been consulted.

(c) The "facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action" sufficient to establish the basis of the certificate of merit, i.e., that there

is merit to each element of the claim on which the plaintiff will have the burden of proof, shall support each violation alleged in the notice as follows:

(1) For consumer product exposures, sufficient facts, studies, or other data shall be submitted for each consumer product or service, or each specific type of consumer product or service that cause the alleged violation as set forth in the notice;

(2) For occupational exposures, sufficient facts, studies, or other data shall be submitted for each occupational exposure set forth in the notice, whether described by location of the employees, type of task performed, or product used by the employees;

(3) For environmental exposures, sufficient facts, studies, or other data shall be submitted for each location and source of exposure set forth in the notice.

(d) The supporting documentation is not required to contain any information concerning the carcinogenicity or reproductive toxicity of the listed chemical or chemicals to which an exposure is alleged.

Note: Authority cited: Health and Safety Code Section 25249.7(d), (h),(i). Reference: Health and Safety Code Section 25249.7(d), (h), (i).

§ 3103 Effect of Failure to Comply

(a) Where a sixty-day notice does not attach a copy of the Certificate of Merit meeting the requirements of subsection 3101(b), the noticing party has no authority to commence an action pursuant to Health and Safety Code section 25249.7(d).

(b) The Attorney General may contact the noticing party orally or in writing concerning the Certificate of Merit . If such communications include material from the supporting documentation, then the portion of the communications containing or specifically describing the

supporting documentation shall remain Official Information pursuant to Evidence Code section 1040.

(c) 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.

Note: Authority cited: Health and Safety Code Section 25249.7(d), (h),(i). Reference: Health and Safety Code Section 25249.7(d), (h), (i).

CHAPTER 3-SETTLEMENT GUIDELINES

§ 3200. Authority and Scope.

This chapter contains the Attorney General's guidelines for review of settlements by persons proceeding "in the public interest" pursuant to Health and Safety Code section 25249.7(f)(4). The provisions of this chapter are guidelines, which are not binding on litigants or the courts, but provide the Attorney General's view as to the legality and appropriateness of various types of settlement provisions, and the type of evidence sufficient for the private plaintiff to sustain its burden of supporting the proposed settlement. The guidelines are not a comprehensive identification of all factors that should be considered in reviewing settlements, but identify particular issues that are likely to occur frequently. This should assist the parties in fashioning settlements to which the Attorney General is unlikely to object, and assist the courts in determining whether to approve settlements.

Note: Authority cited: Health and Safety Code Section 25249.7(f)(4), (5). Reference: Health and Safety Code Section 25249.7(f)(4), (5).

§ 3201. Attorney's fees.

Code of Civil Procedure section 1021.5 permits an award of attorney's fees to a "successful party...in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit...has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement...are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." These guidelines are intended to be consistent with existing law interpreting Code of Civil Procedure section 1021.5, but provide assistance to the litigants and the court in applying them to issues commonly arising under Proposition 65. These guidelines apply to settlements under which the basis for a fee award is provided by Code of Civil Procedure section 1021.5. Where there is a different or additional basis for an award of fees, parts of these guidelines may not apply. Since the Legislature has mandated that the court must determine that the attorney's fees in all settlements of Private Proposition 65 actions must be "reasonable under California law," the fact that the defendant agreed to pay the fee does not automatically render the fee reasonable. The fact that the fee award is part of a settlement, however, may justify applying a somewhat less exacting review of each element of the fee claim than would be applied in a contested fee application.

(a) Successful Party. The fact that a defendant changed its conduct prior to entry of a court order or judgment does not preclude a finding that the plaintiff was successful. If the plaintiff's action was the cause or "catalyst" of the change in conduct, the plaintiff may be deemed successful.

(b) Public Benefit.

(1) In a case alleging failure to warn , a settlement that provides for the giving of a clear

and reasonable warning, where there had been no warning provided prior to the sixty-day notice, for an exposure that appears to require a warning, is presumed to confer a significant benefit on the public. If there is no evidence of an exposure for which a warning plausibly is required; there is no public benefit, even if a warning is given. If the relief consists of minor or technical changes in the language, appearance, or location of a warning in a manner that is not likely to significantly increase its visibility or effectiveness in communicating the warning to the exposed persons, there is no significant public benefit. Where a settlement sets forth a standard or formula for when a given product requires a warning, supporting evidence should show that at least some of the products in controversy in the action either are, or at some time were, above the warning level, or the existence of the standard or formula itself may not establish the existence of a public benefit.

(2) Reformulation of a product, changes in air emissions, or other changes in the defendant's practices which reduce or eliminate the exposure to a listed chemical, in lieu of the provision of a warning, constitute a sufficient showing of public benefit.

(3) In a case alleging violations of Health and Safety Code section 25249.5, the reduction or elimination of the discharge of listed chemicals establishes a significant public benefit.

(c) Necessity of Private Enforcement. To establish necessity of private enforcement, the 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.

(d) Reasonable Fees. Hourly fees should be those reasonable for attorney of similar skill and experience in the relevant market area. Once a lodestar fee is a calculated, a multiplier of that amount is not reasonable unless a showing is made that the case involved a substantial investment of time and resources with a high risk of an adverse result, and obtained a substantial public benefit. No fees should be awarded based on additional time spent in response to the Attorney General's inquiries or participation in the case, unless specifically identified and approved by the court.

(e) Documentation. All attorney's fees should be justified by contemporaneously kept records of actual time spent, which describe the nature of the work performed. Declarations relying on memory or recreated, non-contemporaneously kept records may raise an issue concerning the accuracy of the time estimate.

(f) "Contingent Fee" Awards. A "contingent" fee is an attorney's fee paid pursuant to an agreement between the plaintiff and the plaintiff's attorney under which the attorney will be paid a specified amount or percentage of the total recovery obtained for the plaintiff. Where a plaintiff obtains an award of funds that belong exclusively to the plaintiff without any restriction, these fees generally are not considered to have been awarded by the court, and are reviewed by courts only under specified circumstances (e.g., compromise of a claim of a minor). In Proposition 65 cases, however, there typically is no award of damages or other unrestricted funds to the plaintiff (other than the plaintiff's 25% of any civil penalty recovery). Accordingly, simply denominating a fee award as "contingent" and based on the total monetary recovery does not necessarily render the fee amount "reasonable under California law," and such fees should be justified under Code of Civil Procedure section 1021.5 or another applicable theory.

Note: Authority cited: Health and Safety Code Section 25249.7(f) (4), (5). Reference: Health and Safety Code Section 25249.7(f) (4), (5).

§ 3202. Clear and Reasonable Warnings.

Health and Safety Code section 25249.7(f)(4)(A) requires that, in order to approve a settlement, the court must find that "Any warning that is required by the settlement complies with" the clear and reasonable warning requirement of Proposition 65. This guideline provides additional information concerning the Attorney General's interpretation of the statute and existing regulations governing clear and reasonable warnings and factors that will be considered in his review of settlements. Nothing in this guideline shall be construed to authorize any warning that does not comply with the statute and regulations, or to preclude any warning that complies with the statute and regulations or to conflict with regulations adopted by the Office of Environmental Health Hazard Assessment. This guideline is intended to address some of the types of warnings commonly found in settlements, not to provide comprehensive standards.

(a) Supporting evidence. In order to sustain its burden of producing evidence sufficient to support the conclusion that the warning is legal, the plaintiff should provide (1) the text and appearance of the warning, along with a sufficient description of where the warning will appear in order to ascertain whether the warning will be "reasonably conspicuous" under the circumstances of purchase or use of the product; and (2) sufficient proof that the product causes exposure to a listed chemical to enable a finding that the warning would be truthful.

(b) Warning language. Where the settling parties agree to language other than the "safe harbor" language set forth in the governing regulations (22 CCR § 12601(b)) the warning language should be analyzed to determine whether it is clear and reasonable. Certain phrases or

statements in warnings are not clear and reasonable, such as (1) use of the adverb "may" to modify whether the chemical causes cancer or reproductive toxicity (as distinguished from use of "may" to modify whether the product itself causes cancer or reproductive toxicity); (2) additional words or phrases that contradict or obfuscate otherwise acceptable warning language. Certain other deviations from the safe-harbor warnings are generally clear and reasonable, such as (1) Using the language "Using this product will expose you to a chemical..." in lieu of "This product contains a chemical..."; or (2) deleting the reference to "the state of California" from the safe-harbor language.

(c) Premises warnings for environmental tobacco smoke. A number of cases involve provision of warnings due to exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises where smoking is permitted at any location on the premises.

1. Location of signs. (A) For hotels or apartment buildings in which entry to guest rooms or apartments is on an enclosed hallway and there is a common ventilation system, the sign should be posted at main and subsidiary entrances to the building (including any entrance from a parking structure), and at the registration counter or administrative office open to the public or guests. (B) For hotels or apartment complexes in which entry to guest rooms or apartments is to areas open to ambient air; signs should be posted at a kiosk or gate where cars drive in, if any, and at the registration counter or other administrative office open to the public or guests.

2. Language of Signs. The following language is appropriate and legally sufficient:

"WARNING: This facility allows smoking in some areas. Tobacco smoke, and many of the chemicals in it, are known to the state of California to cause cancer, and birth defects or other reproductive harm. [Optional: Smoking is permitted only in the following areas of this facility: (identify areas, e.g., "swimming pool area," "foyers," "designated guest rooms," "outdoor patios."]"

3. Successful parties. The plaintiff is not successful and has not conferred a substantial public benefit if the defendant had posted signs substantially complying with subparagraphs (1) and (2); and the only additional relief obtained is the posting of additional signs in guest rooms or in hallways that lead to guest rooms in which smoking is permitted.

(d) Environmental Exposure Warnings. In determining whether environmental exposure warnings comply with the law, the parties should consider 22 CCR section 12601(d)(2), which requires, among other things, that the warning "be provided in a conspicuous manner and under such conditions as to make it likely to be read, seen or heard and understood by an ordinary individual in the course of normal daily activity, and reasonably associated with the location and source of the exposure." 22 CCR section 12601(d)(1) also requires that such warnings "target the affected area." Settlements meeting these requirements should:

(1) include a warning other than signs posted at the facility wherever the area for which the exposure occurs at a level requiring a warning ~~is~~ extends beyond the boundaries of the facility to an area of persons who do not actually enter or walk by the facility.

(2) Use hand-delivered or mail-delivered notices rather than media advertisements unless the area of persons to be warned is so large as to make such delivery substantially more expensive than media advertisements;

(3) If newspaper notices are used, they should appear in the main news section of the newspaper with the largest circulation in the area for which a warning is given, be at least 1/4 page in size, and contain a graphic depiction of the location of the facility for which the warning is given and the area for which the warning is given.

Note: Authority cited: Health and Safety Code Section 25249.7(f) (4), (5). Reference: Health and Safety Code Section 25249.7(f) (4)(5).

§ 3203 Reasonable Civil Penalty.

Penalties will be evaluated based on the factors set forth in the Health and Safety Code section 25249.7(b)(2). The following factors are "[other factors] which justice may require" to be considered within the meaning of Health and Safety Code section 25249.7(b)(2)(G):

(a) A settlement with little or no penalty may be entirely appropriate. Civil penalties, however (75% of which must be provided to the Department of Toxic Substances Control) should not be "traded" for payments of attorney's fees.

(b) Where a settlement provides additional payments to an entity in lieu of a civil penalty (including, for example, funds for environmental activities, public education programs, and funds to the plaintiff for additional enforcement of Proposition 65 or other laws), such payments may be a proper "offset" to the penalty amount or cy pres remedy, but are only proper if the following requirements are met:

(1) The funded activities have a nexus to the basis for the litigation, i.e., the funds should address the same public harm as that allegedly caused by the defendant(s) in the particular case.

(2) The recipient should be an entity that is accountable, i.e., is able to

demonstrate how the funds will be spent and can assure that the funds are being spent for the proper, designated purpose.

(3) If the entity receiving the funds will in turn make grants of funds to other entities for specified purposes, the method of selection of the ultimate recipient of settlement funds must be set forth in the settlement agreement or in a separate public document referenced in the agreement. The selection procedure may vary depending on the facts of the particular case, but must give significant weight to a prospective grantee's ability to perform the funded task and its reliability and accountability.

(c) Where a settlement provides that certain penalties are assessed, but may be waived in exchange for certain conduct by the defendant, the necessary actions must be related to the purposes of the litigation, provide environmental and public health benefits, and provide a clear mechanism for verification that the qualifying conditions have been satisfied.

Note: Authority cited: Health and Safety Code Section 25249.7(f) (4), (5). Reference: Health and Safety Code Section 25249.7(f) (4)(5); 25249.7(b)(2).

§ 3204 Other provisions.

Certain other provisions of a settlement may either be unlawful or contrary to public policy, and could provide the basis for an objection by the Attorney General.

(a) Releases or other language describing the intended scope of claims resolved or barred by the settlement shall not purport to:

(1) Be on behalf of the People of the State of California. Appropriate language is that the plaintiffs "suing 'in the public interest' pursuant to Health and Safety Code section 25249.7(d)" and "suing 'in the interest of...the general public' pursuant to Business and Professions Code

section 17204" (whichever applies to the action).

(2) Release or resolve any claim by individuals with personal injuries, unless those claims were properly raised in the complaint and litigated in the action.

(3) Release or resolve any claim concerning listed chemicals that are not present in the product at the time of entry of judgment, or any claim concerning chemicals that are not on the list of chemicals known to the state to cause cancer or reproductive toxicity, but may become listed in the future.

(4) Release or resolve any claim concerning chemicals or exposures not set forth in the sixty-day notice of violation.

(5) Immunize any defendant from any duty caused by a change in law, or to impose a duty that is removed by a change in law.

Note: Authority cited: Health and Safety Code Section 25249.7(f) (4), (5). Reference: Health and Safety Code Section 25249.7(f) (4), (5).