FINAL TEXT OF REGULATION

TITLE 11. LAW

DIVISION 4. PROPOSITION 65 PRIVATE ENFORCEMENT

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.apter 599, statutes of 1999; and Chapter 578, statutes of 2001; and Chapter 323, statutes of 2002. Any private person proceeding "in the public interest" pursuant to Health and Safety Code §section 25249.7(d) or, bringing any other action, or settling any violation alleged in a notice given pursuant to Health and Safety Code section 25249.7(d)(1) (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 (f), Health and Safety Code.

§ 3001. Definitions.

(a) "Subject to a 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 Judgment,” means that the court has entered a judgment pursuant to stipulation, or 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 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~~(1) an action in which a violation of Proposition 65 is alleged, or (2) any violation alleged in a notice given pursuant to Health and Safety Code section 25249.7(d)(1). “Settlement” includes 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.

(f) “Additional Settlement Payment” means any settlement payment that is not a civil penalty, a reimbursement of costs, or a payment of attorney’s fees.

(g) “Private Enforcer” means an individual or entity that gives notice of an alleged violation of Health and Safety Code section 25249.5 or 25249.6 pursuant to section 25249.7, subdivision (d)(1), or a person that has filed an Other Private Action Alleging Violations of Proposition 65.

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

§ 3002. Complaints.

A Private Enforcer who commences a Private 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 regulations, upon the Attorney General within five days after 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 a Supplemental Report of Civil Complaint Filing.

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

§ 3003. Settlements.

(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 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. 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 she or he does not object to entry of the settlement.

(c) Settlement of Noticed Violations Without Complaint. A Private Enforcer who has agreed to a settlement of any violation alleged in a notice given pursuant to Health and Safety Code section 25249.7(d)(1) without filing a complaint shall serve the Attorney General with the Settlement and a Report of Settlement in the form set forth in Appendix B within five days after any violation alleged in the notice is Subject to a Settlement.

(d) 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 (f), Health and Safety Code.

CHAPTER 3. SETTLEMENT GUIDELINES

§ 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 significant 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 significant public benefit.

(2) Reformulation of a product, changes in air emissions, or other changes in the defendant's practices ~~which~~ that reduce or eliminate the exposure to a listed chemical, in lieu of the provision of a warning, ~~constitute a sufficient showing of public benefit~~ are presumed to confer a significant benefit on the public. Where a settlement sets forth a standard or formula for reformulation, supporting evidence should show that at least some of the products in controversy in the action either are, or at some time relevant to the litigation were, above the agreed-upon

reformulation standard or formula, or else the mere agreement to a reformulation standard or formula may not establish the existence of a significant public benefit. Similarly, where a settlement requires changes in air emissions or other changes in the defendant's practices, supporting evidence should show that the changes in air emissions or to the defendant's practices will result in emissions or exposures that are less than the emissions or exposures that either are present or were present at some time relevant to the litigation, or else the mere agreement to make the changes may not establish the existence of a significant 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 attorneys 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 and any investigation costs sought to be recouped in a Settlement should be justified by contemporaneously kept records of actual time spent or costs incurred, 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: Section 25249.7(f)(4) and (5), Health and Safety Code. Reference: Section 1021.5, Code of Civil Procedure; and Section 25249.7(f)(4) and (5), Health and Safety Code.

§ 3203. Reasonable Civil Penalty.

~~Penalties~~ The reasonableness of civil penalties in a settlement 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] that ~~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.~~or not, based on the facts or circumstances of a particular case.

~~(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.~~

(b) Recovery of civil penalties (75% of which must be provided to the Office of Environmental Health Hazard Assessment) serves the purpose and intent of Proposition 65. Accordingly, civil penalties shall not be "traded" for payments of attorney's fees.

(c) Where a settlement provides that certain civil penalties are assessed, but may be waived in exchange for certain conduct by the defendant, such as, for example, reformulating products to reduce or eliminate the listed chemical, the conduct must be related to the purposes of the litigation, provide environmental and public health benefits within California, and provide a clear mechanism for verification that the qualifying conditions have been satisfied.

(d) Where a settlement requires the alleged violator to make any Additional Settlement Payments to the plaintiff or to a third party, such Additional Settlement Payments are viewed as an "offset" to the civil penalty. The plaintiff must demonstrate to the satisfaction of the court that it is in the public interest to offset the civil penalty required by statute.

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

§ 3204. ~~Other Provisions~~ Additional Settlement Payments.

(a) Additional Settlement Payments should not be included in any Settlement that is not subject to judicial approval and ongoing judicial oversight.

(b) The Attorney General will consider settling parties' adherence to the following guidelines in determining whether to object to any Additional Settlement Payments in a proposed in-court settlement:

(1) The total amount of Additional Settlement Payment(s) should not exceed the amount of any noncontingent civil penalty to be deposited pursuant to Health and Safety Code section 25249.12(c)(1). A "noncontingent" civil penalty is the civil penalty that must be paid pursuant to a settlement, regardless of future events or actions of the defendant.

(2) The activities funded by Additional Settlement Payments should have a clear and substantial nexus to the violation alleged, *i.e.*, the activities should address the same public harm as that allegedly caused by the defendant(s) in the particular case. For the purposes of this paragraph, a "clear and substantial nexus" requires that the funded activity be designed to have a direct and primary effect within the State of California.

(3) 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 only for the proper, designated purposes described in the settlement. A statement supporting the recipient entity's accountability should be included in the settlement or in its supporting papers.

(4) The settlement should describe with specificity the activities to be funded and the amount of funding for each activity. It is not sufficient simply to state broadly that the Additional Settlement Payments will be used for future Proposition 65 enforcement, or to reduce exposure to toxic chemicals.

(5) The settlement should require the plaintiff to obtain and maintain adequate records to document that the funds paid as an Additional Settlement Payment, whether to the plaintiff or to a third party, are spent on the activities described in the settlement. The settlement should

require the plaintiff to provide to the Attorney General, within thirty days of any request, copies of all documentation demonstrating how such funds have been spent.

(6) To enable the Attorney General and the Court to evaluate settlements that provide for Additional Settlement Payments, and to promote transparency in how such payments will be spent, any settlements providing for Additional Settlement Payments, or their supporting papers, should provide the following information:

(A) The identity of the entity receiving the payments, including whether it is a tax-exempt organization operating under section 501(c)(3) of the Internal Revenue Code.

(B) A disclosure of any economic interest that a party to the settlement or its counsel, or a spouse or dependent child thereof (collectively, "Disclosers"), has in any individual or entity, besides itself, that is designated in the Settlement to receive all or part of any Additional Settlement Payment ("Recipient Individual or Entity"). For purposes of this subparagraph, a Discloser has an economic interest in a Recipient Individual or Entity if (i) the Discloser has received income in the prior 12 months or expects to receive income in the next 12 months from the Recipient Individual or Entity, or (ii) a Discloser is a director, officer, partner, trustee, employee, or holds any position of management of or for the Recipient Individual or Entity, or (iii) a Discloser has received or has been promised a gift or gifts amounting to a total of at least $460 in the prior 12 months from the Recipient Individual or Entity. If no Discloser has an economic interest in any Recipient Individual or Entity, then the settlement or the supporting papers shall expressly state that no party to the settlement or counsel of record, or spouse or dependent child thereof, has an economic interest in any individual or entity, besides itself, that is designated in the Settlement to receive all or part of an Additional Settlement Payment.

(C) The mechanism by which the plaintiff will track any expenditures of Additional Settlement Payments to ensure that the money is spent consistent with the requirements of the settlement.

(D) If the settlement provides that the recipient entity will in turn make grants of funds to other entities to carry out the funded activities, the method of selection of the grantee. This may be set forth in the settlement or in a separate public document referenced in the settlement. The grantee selection procedure may vary depending on the facts of the particular case, but should give significant weight to a prospective grantee's ability to perform the funded activities in an accountable manner.

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

~~§ 3204.~~ § 3205. 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 are "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: Section 25249.7(f)(4) and (5), Health and Safety Code. Reference: Section 25249.7(f)(4) and (5), Health and Safety Code.