

FINAL STATEMENT OF REASONS
DIVISION 4-PROPOSITION 65 PRIVATE ENFORCEMENT

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

I. UPDATE OF INITIAL STATEMENT OF REASONS

During the initial comment period on the Proposed Amendments, from September 25 to November 9, 2016, the Attorney General received written comments from 209 entities and individuals. Most of the comments (195) were copies of a comment prepared by the Alliance for Natural Health or copies of the comment with small variations.

At the public hearing on November 9, 2016, the Attorney General received verbal comments from three individuals on behalf of themselves and entities they represent.

After review of the comments received, the Attorney General modified the Proposed Amendments and gave notice of the changes on February 4, 2016. An additional public comment period was provided from February 4 to February 26, 2016, during which the Attorney General received four written comments.

The modifications, identified below by their respective section and subdivision numbers to title 11 of the California Code of Regulations, were as follows:

Section 3001(g): A definition for “Private Enforcer” was added since the term is used in the regulations but was not defined.

Section 3201(b)(2): The subdivision was modified in response to comments that compliance with the original proposal would be impractical and deter settlement. The last sentence was added to clarify what evidence is needed where a settlement requires changes in air emissions or other changes in the defendant’s practices, besides reformulation of one or more listed chemicals.

Section 3201(e): The subdivision was modified to clarify that the documentation requirement applies only to investigation costs that a private enforcer seeks to recoup in the settlement.

Section 3204(b)(6)(B): The original Proposed Amendment defined “economic interest” by incorporating through reference regulations adopted by the Fair Political Practices Commission (“FPPC”) to implement the Fair Political Practices Act. The modification replaced the cross-reference with a definition of “economic interest” that is based on the FPPC’s regulations but adapted to apply in the present context.

The Attorney General made no additional modifications to the Proposed Amendments in response to comments received during the second public comment period.

Section VI of the Initial Statement of Reasons states that the Attorney General relied on the annual summaries and reports of private settlements posted on the Attorney General’s Proposition 65 website at www.oag.ca.gov/prop65, on private enforcement reporting and the underlying documents posted at the same location under the “Search 60-Day Notice” tab, and on

the Office of the Attorney General's experience reviewing Proposition 65 private enforcement actions, including but not limited to, motions to approve settlements and/or consent judgments filed by private enforcers. Specifically, the Attorney General relied on the annual summaries and reports from 2000 to 2015, which are part of the record for this rulemaking. The annual summaries and reports are based upon information contained in the other two categories of documents.

On page 2 of the Notice of Proposed Rulemaking, sections 3000-3008 and 3201-3205 of title 11 of the California Code of Regulations are listed as the reference citations. Since the Attorney General is implementing, interpreting, and making specific section 25249.7 of the Health and Safety Code, this is the proper reference citation.

On page 6 of the Notice of Proposed Rulemaking, a forward slash was left out of the website address where copies of the proposed rule and related documents were located. The correct address is <http://oag.ca.gov/Prop65/regs2015>. No inquiries or public comments were made concerning the website address.

II. LOCAL MANDATE DETERMINATION

The amendment of the regulation does not impose a mandate on local agencies or school districts.

III. SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL COMMENT PERIOD OF SEPTEMBER 25, 2015, THROUGH NOVEMBER 9, 2015.

Some parties included in their written or oral comments observations about, or interpretations of, the Proposed Amendments, the Attorney General's Proposition 65 regulations, or other laws and regulations that are not directed at the proposed action or the procedures followed. Some parties also included descriptions of their own actions taken to comply with or to enforce Proposition 65. The Attorney General is not required to respond to such remarks in this final statement of reasons, and does not elect to do so. (Gov. Code, § 11346.9, subd. (a)(3).) The absence of a response from the Attorney General to a comment submitted in this rulemaking, where the comment was not submitted as an objection or recommendation to the proposed action, shall not be construed to mean that the Attorney General concurs with, or approves of, the comment.

A. General Comments to the Proposed Amendments.

This rulemaking is intended to: (1) ensure that the State's Office of Environmental Health Hazard Assessment ("OEHHA") receives the civil penalty funds specified in Proposition 65, so that it has adequate resources for Proposition 65 implementation activities; (2) limit the ability of private plaintiffs to divert the statutorily mandated penalty to themselves or to third parties, in the form of Additional Settlement Payments; (3) increase the transparency of settlements in private party Proposition 65 cases, to ensure that any monies allocated to Additional Settlement Payments are spent on matters with a sufficient nexus to the litigation and to the State of California; and (4) reduce the financial incentives for private plaintiffs to bring and settle Proposition 65 cases that do not confer substantial public benefit, without discouraging cases and settlements that do confer such benefit.

Many commenters supported the Proposed Amendments, but suggested that they do not go far enough to curb abuses of Proposition 65.¹ Some of the commenters submitted requests for further action that goes beyond the scope of these Proposed Amendments. For example, commenters suggested that the Proposed Amendments should call for increased judicial scrutiny of all aspects of private settlements, not only of Additional settlement payments (“ASPs”) (C-1 to C-6); the Proposed Amendments need to do more to decrease financial incentives to file frivolous lawsuits (C-1 to C-6); the Proposed Amendments should disapprove of attorneys’ fees in private Proposition 65 cases (C-18); and the Attorney General should issue guidelines for what constitutes reasonable attorney’s fees and civil penalties (C-8). To the extent that these comments are beyond the scope of the Proposed Amendments, the Attorney General is not required to respond to them. Without expressing any view on whether these measures would help curb abuses of Proposition 65, the Attorney General has determined not to expand the scope of the Proposed Amendments at this time, but may promulgate additional regulations or amendments in the future if warranted.

One commenter (H-2) stated that there needs to be more clarity on how the Proposed Amendments apply to “discharge” cases, i.e., cases brought under Proposition 65’s prohibition of discharges of listed chemicals into sources of drinking water. (Health & Saf. Code, § 25249.5.) The Proposed Amendments apply to review of all settlements by persons proceeding “in the public interest” pursuant to Health and Safety Code section 25249.7, subd. (f)(4), without distinguishing between settlements of “failure-to-warn” cases brought under section 25249.6 and “discharge” cases brought under section 25249.5. (See Cal. Code Regs., tit. 11, § 3200.) That said, since ordinarily the resolution of a discharge case does not involve warnings or reformulation, the provisions in the Proposed Amendments that relate to warnings and reformulation (§ 3201(b)(1), (2)) are not likely to inform the Attorney General’s review of a discharge settlement, while other aspects of the Proposed Amendments, such as reporting out-of-court settlements (§ 3003(c)), evaluating the reasonableness of civil penalties (§ 3203), and Additional Settlement Payments (§ 3204), will inform the Attorney General’s review of settlements in both types of Proposition 65 case. The Attorney General therefore believes that the Proposed Amendments are clear and that no further clarification is necessary.

One commenter (C-11) noted that the capitalized term “Private Enforcer” is used throughout the regulation, but never defined. The Attorney General has added a definition of “Private Enforcer” to section 3001(g).

One commenter (C-12) suggested that the certificate of merit requirement (Health & Saf. Code, § 25249.7, subd. (d)(1)) serves as a filter to ensure that only cases with sufficient investigation and merit are brought by private enforcers, so the Proposed Amendments are not needed to reduce financial incentives for private enforcers to bring Proposition 65 cases that do not confer a substantial public benefit. This comment conflates the standard for executing a certificate of merit (belief that there is “a reasonable and meritorious case for the private action”) with the standard for an award of attorney’s fees under Code of Civil Procedure section 1025.1 (a “significant benefit” has been conferred on the general public or a large class of persons). The

¹ A list of commenters and the abbreviations used to refer to them appears in Appendix A to this document.

standards are not the same. The fact that a private enforcer has a basis to initiate enforcement does not necessarily mean that resolution of the case has conferred a significant public benefit.

Two commenters (C-8, C-9) suggested that the Economic Impact Statement (“EIS”) did not adequately address potential economic impacts of the Proposed Regulation on regulated businesses. The Attorney General disagrees. Nothing in this regulation should increase the cost of settling Proposition 65 cases, and instead may reduce the cost by providing more specific information about what the Attorney General will look for when reviewing proposed settlements and approval motions. The evidence private enforcers must submit to support the presumption that reducing or eliminating exposures to a listed chemical confers a significant public benefit is evidence the private enforcers should already have when agreeing to the settlement in the first place. There is little or no additional cost for submitting this evidence as part of an approval motion. Shifting the balance between civil penalties and ASPs, and imposing recordkeeping requirements on private enforcers that include ASPs in a settlement, should not have an economic impact on regulated businesses because the total penalty amount is set according to statutory factors that are not affected by this regulation. Private enforcers may not demand a higher penalty amount than what is justified by the statute. If they attempt to do so in order to increase their share of the penalty payment, they will be in violation of the law and potentially engaged in an unfair business practice. The Attorney General does not assume that that this will occur.

One commenter (C-13) suggested that the Attorney General does not have authority to adopt the Proposed Amendments, because they go beyond the Attorney General’s express statutory authority to receive reports of Proposition 65 settlements and to appear in settlement proceedings. 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 exercise of those duties or powers. (*Calfarm v. Deukmejian* (1989) 48 Cal.3d 805, 825.) Chapters 1 and 2 of the Attorney General’s Proposition 65 regulations (§§ 3000 *et seq.* [reporting requirements], §§ 3100 *et seq.* [certificates of merit]) are narrowly tailored to impose requirements that are reasonably necessary to allow the Attorney General to carry out functions expressly mandated by the Legislature. Chapter 3 (§§ 3200 *et seq.* [settlement guidelines]) sets forth guidelines for the Attorney General’s internal review of settlements, which also are reasonably necessary for the Attorney General to carry out functions expressly mandated by the Legislature. Implicit in the Attorney General’s authority to adopt the regulations is the authority to amend them, as is being done through this rulemaking.

One commenter (C-8) stated that certain federal statutes, including the Federal Food, Drug and Cosmetic Act and the Occupational Safety and Health Act, “contain provisions that prohibit private enforcement.” The commenter suggested that the Notice of Proposed Rulemaking “fails to acknowledge these limitations.” The Attorney General does not believe that provisions in federal statutes that purportedly prohibit private enforcement, if any, would be relevant to this rulemaking. Accordingly, no change to the proposal or further clarification is necessary.

B. Section-by-Section Analysis

1. Section 3003(c): Reporting Settlements of Noticed Violations Without Complaint.

Section 3003 has been amended to include a requirement, in new subdivision (c), that private parties serve upon the Attorney General any post-notice/pre-filing settlement and a Report of Settlement. The Attorney General's on-line reporting system already accommodates reporting of pre-filing settlements, which parties routinely use. The amendment makes the regulations consistent with Health and Safety Code section 25249.7(f)(1), which provides that "any private person settling any violation of this chapter in a notice... shall, after the action *or violation* is subject... to a settlement... submit to the Attorney General a reporting form that includes the results of that settlement..." (emphasis added).

One commenter (C-11) supports this amendment, but recommends that it be broadened to require reporting of settlement of violations alleged in a pre-notice letter, i.e., in a letter the putative private enforcer sends to an alleged violator before sending a 60-day notice pursuant to Health and Safety Code section 25249.7(d)(1). This would prevent putative private enforcers from circumventing the reporting requirement by sending pre-notice threats to sue. The Attorney General is not aware of any instances in which this has occurred, but agrees that it is improper to use pre-notice communications to circumvent reporting requirements and to avoid providing notice to public prosecutors of alleged violations. However, the Attorney General declines to adopt the suggestion because the language in the Proposed Amendments track the reporting requirement that is in the statute. Further, the commenter's proposed addition suggests that the Attorney General approves of the use of pre-notice settlements. The Attorney General, however, believes that such pre-notice settlements are improper.

2. Section 3201: Attorney's Fees

a. Section 3201(b)(1): Warnings as a Significant Public Benefit

Subdivision (b)(1) has been clarified by the addition of the modifier "significant" before the phrase "public benefit," so that the phrase better tracks the language of the applicable attorney's fee statute (Code Civ. Proc., § 1021.5), and is consistent with section 3201(b)(2).

One commenter (C-7) suggested that warnings cannot be presumed to confer a significant benefit on the public. The presumption that warnings confer a significant public benefit, however, was part of the prior regulation and is not being added through this rulemaking. Furthermore, the two places where the modifier "significant" is being added to the regulation are examples of where a warning requirement in a settlement does *not* confer a significant public benefit, which is in line with the comment. There may be other situations as well, in which the presumption of a significant public benefit does not hold up under the circumstances of the specific case. (See *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941, 948 [private enforcement statutes "are not, in combination with section 1021.5, a license to bounty-hunt for niggling statutory violations that neither harm nor threaten to harm anyone"].) This subdivision merely affirms the Attorney General's view that, in order to obtain attorney's fees, the benefit to the public of the litigation must be "significant," as required by Code of Civil Procedure section 1021.5.

b. Section 3201(b)(2): Reformulation as a Significant Public Benefit.

Subdivision (b)(2) has been modified to provide that reformulation of a product, changes in air emissions, or other changes in the defendant's practices that reduce or eliminate exposures to a

listed chemical are *presumed* to confer a significant public benefit, rather than stating that such changes *constitute* a sufficient showing of public benefit. The change clarifies the Attorney General's intent that agreements to reformulate, change emissions, or make changes to a defendant's practices confer a significant public benefit only if the changes reduce or eliminate exposures to a listed chemical. The original language was susceptible to the mistaken interpretation that a requirement to reformulate or make other changes, alone, confers a significant public benefit. New language was proposed, and is adopted here in part, to describe the evidence needed to show that a reformulation requirement reduces or eliminates exposures to a listed chemical.

One group of commenters (C-1 to C-6) suggested that instead of raising the bar on what constitutes a significant public benefit, there should be a decrease in the amount of attorneys' fees recovered in private enforcement actions. The Attorney General disagrees that the regulation as amended "raises the bar" for demonstrating a significant public benefit. The regulation clarifies the circumstances in which agreements to reformulate or take other actions are presumed to confer a significant public benefit. Furthermore, this section of the regulation relates to whether a private enforcer is entitled to recover attorney's fees, not whether the amount of fees being recovered is reasonable.

One commenter (C-8) suggested that the potential for reformulation as a "tool for abuse" is much greater than the public benefit of reformulation. The commenter recommends that the reformulation provisions be applied only to manufacturers, not to distributors and retailers, because only product manufacturers have the ability to reformulate products. The commenter claims that "most private plaintiffs" require reformulation by making it nonnegotiable, that retailers and distributors (as opposed to manufacturers) cannot reformulate products, and that reformulating some products regulated by the Food and Drug Administration may present problems that private enforcers lack the technical expertise or concern to address.

Even where a retailer has no control over product formulation, however, it can comply with a reformulation requirement by agreeing to sell only reformulated products. That said, the Attorney General agrees that plaintiffs cannot require reformulation from a defendant as a nonnegotiable term of the settlement. The decision to reformulate as a means of complying with Proposition 65 is *voluntary*. If a company chooses not to reformulate products for any reason, it can agree to warn instead of agreeing to reformulate as a means of compliance with Proposition 65. An enforcer may structure a settlement to encourage reformulation over warnings, but the enforcer cannot refuse to settle solely on the ground that a company chooses to comply with Proposition 65 by providing compliant warnings instead of reformulating. The Attorney General does not believe that it is necessary to provide further regulatory amendments to address this issue at this time.

One commenter (C-7) suggested that the presumption that a reformulated product is "better" or "safer" for human health than a non-reformulated product is not valid, and that the plaintiff should bear the burden of proving that it is safer. The Attorney General disagrees that this is not a valid presumption. If reformulation will reduce or eliminate exposures to a known carcinogen or reproductive toxin, then the presumption that this confers a significant public benefit is sound. The Attorney General notes that, under the prior regulations, reformulation automatically constituted a public benefit, with no opportunity to prove otherwise. The Attorney General recognizes that reformulation may not provide a benefit in every circumstance, and has accordingly changed this to a rebuttable presumption. Thus, the Attorney General or some other

interested party may present evidence to rebut the presumption that reducing or eliminating exposures to the listed chemical confers a significant public benefit. Accordingly, the Attorney General rejects the proposal to remove this presumption from the regulation.

One commenter (C-11) suggested that the proposal is too narrow because it focuses only on reformulation and not on other kinds of injunctive relief that reduces or eliminates exposures to listed chemicals. Existing language at the beginning of the subdivision, however, makes it clear that there are ways to reduce exposures to listed chemicals besides reformulation of products, such as reducing emissions or other changes in the defendant's practices. Language has been added to the end of this section to describe the evidence needed to demonstrate that measures other than reformulation will reduce or eliminate exposures to listed chemicals, to avoid any implication that supporting evidence is required only for settlements that include reformulation.

One commenter (C-11) suggested that requiring a plaintiff to submit evidence demonstrating that some products were above an agreed-upon standard or formula, without specifying what type of evidence is required, could be interpreted to require parties to submit confidential test results. The commenter suggests that the regulation clarify that the showing may be made "through attorney declaration or otherwise." The Attorney General rejects this proposal. The purpose for this section of the regulation is to express the Attorney General's view that an agreed-upon reformulation standard or formula that reduces or eliminates exposures to a listed chemical is presumed to confer a significant public benefit and to make clear that the presumption only applies when the parties have demonstrated that the reformulation has reduced or eliminated exposures. It is not to prescribe the types of evidence sufficient to make such a showing. The commenter's proposal would imply that an attorney's declaration is the preferred method for showing a reduction or elimination of exposures, which may or may not be the case for any given settlement. Ultimately, it is up to a court to decide whether the evidence submitted in support of a proposed settlement is adequate to support the court's findings, and whether there are grounds for protecting the confidentiality of evidence submitted in support of a settlement. Through these regulations, the Attorney General does not currently intend to express an opinion on what kind of evidence is sufficient to meet a plaintiff's burden, or on what may or may not be subject to protection from public disclosure.

Two commenters (C-9, C-14) suggested that the proposed language requiring supporting evidence show that "at least some of the products in controversy in the action either are, or at some time were, above the *warning level*" (§ 3201(b)(2)(a) (emphasis added)) would require a defendant to admit liability, contradict their own expert's exposure assessment, or quantify the level of exposure in a manner that should not be required to settle a claim. These commenters take issue with the term "warning level," which represents the level of exposure above which warnings are required. It could be viewed as inconsistent with a "no admission of liability" clause in a settlement to agree that some of the exposures a defendant caused were above the "warning level." In response, the Attorney General replaced the reference to the "warning level" with a reference to the "agreed-upon reformulation standard or formula." This will achieve the Attorney General's purpose of presuming a significant public benefit from reformulation only where some or all of a defendant's products were above the reformulation standard or formula prior to the settlement. (See *Consumer Cause v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1179-80 [finding no justiciable controversy and "nothing to be gained" from litigating or settling a Proposition 65 case where the plaintiff admitted that none of the defendant's products exceeded the no-significant-risk level].)

Many commenters, representing the perspective of both plaintiffs and defendants, suggested that there should be no requirement for evidence that products “will be *below* the warning level as reformulated” (emphasis added), as stated in section 3201(b)(2)(b) of the original proposal. (C-9, C-11, C-12, C-14, C-19, H-2.) The reasons varied, but revolved around the difficulty and expense of demonstrating what the “warning level” is and whether exposures to the average person are below the warning level. As discussed above, a court must find that at least some products are, or were, *above* the agreed-upon standard or formula to support a finding that the settlement confers a significant public benefit. Such a showing is sufficient to support the presumption that a settlement with an agreed-upon reformulation standard or formula confers a significant public benefit. Nothing in this amendment, however, undercuts the court’s independent duty in reviewing a settlement with a reformulation requirement or another alternative to providing warnings to decide if the alternatives result in compliance with Proposition 65.

Two commenters (C-11, C-19) suggested that the Proposed Amendment to section 3201(b)(2) reverses the presumption that reformulation confers a significant public benefit by requiring evidence to support the presumption. Rather than require the plaintiff to produce evidence in support of the presumption, they propose modifying the language to make the presumption automatic with no required evidentiary showing, and to allow evidence to be introduced that refutes the presumption. The commenters appear not to understand the nature of the presumption this subdivision recognizes. The presumption is *not* that every settlement with a reformulation requirement confers a significant public benefit. Rather, the presumption is that *reducing or eliminating exposures to a listed chemical* is presumed to confer a significant public benefit. Therefore, the plaintiff must present evidence that the agreed-upon reformulation will reduce (or already has reduced) exposures to the listed chemical. Once it has done so, under the regulation it would be entitled to the presumption that the reformulation confers a significant public benefit.

There were additional suggestions for changing the wording of “(b) such products will be below the warning level as reformulated” (§ 3201(b)(2)(b)), but because we have removed that text from the proposal, no response is needed

3. Section 3201(e): Documentation of attorney’s fees and investigation costs.

Section 3201(e) has been amended to clarify that, in addition to claims for attorney’s fees, claims for investigation costs should be justified with contemporaneously-kept records of actual time spent or costs incurred. As stated in the Initial Statement of Reasons, this clarifies the intent of the regulation before the Amendment.

One commenter (C-17) suggested that the regulation should clarify that investigation costs are not recoverable in a Proposition 65 settlement, because they are not recoverable under Code of Civil Procedure section 1021.5. The Attorney General disagrees with the commenter that investigation costs may never be recovered in a Proposition 65 settlement, and therefore declines to make this change. Without expressing any view on whether investigation costs are recoverable under Code of Civil Procedure section 1021.5 or some other provision, there is no basis to conclude that the Legislature intended to bar such costs from being recovered in a Proposition 65 settlement. The Proposed Amendment does not state that such costs can be

recovered, but merely requires that, if they are sought to be recovered, the plaintiff must support them by contemporaneously-kept records.

One commenter (C-12) suggested that the plaintiff should not have to document investigation costs to justify a recovery of attorney's fees, since costs are not recoverable under Code of Civil Procedure section 1021.5. If the enforcer seeks to recover only its attorney's fees, then the commenter is correct. However, if the enforcer seeks to recover investigation costs in a settlement as part of an award of attorney's fees, then it must justify the costs using contemporaneously-kept records, as clarified by the Amendment. The Attorney General has modified the proposal to clarify that the requirement to document investigation costs as a prerequisite for recovering the costs as part of an attorney's fee award in a settlement applies only to investigation costs "sought to be recouped in a Settlement."

The same commenter suggested that requiring private enforcers to justify investigation costs with contemporaneously-kept records of actual time spent may result in the waiver of privileges against early disclosure of expert consultations and related information. This subdivision, however, describes how investigation costs (and attorney's fees) must be documented. It does not address the form in which the information must be conveyed to a court. A declaration describing contemporaneously kept records, redacted versions of the records, or submission of records for in camera review (with a copy to the Attorney General subject to protection under Evidence Code section 1040), are some of the ways a private enforcer can balance the need to document investigation costs it seeks to recover with an interest in protecting privileged information.

One commenter (H-3) cautioned against making "the burden of documentation and justification as to every jot and tittle of time" so burdensome as to create, in effect, a second round of litigation over attorney's fees. The Attorney General does not believe that requiring contemporaneous kept records of actual time spent or costs incurred to justify the recovery of investigation costs will have this effect. Rather, it may have the opposite effect by improving the evidentiary basis for recovery of costs.

4. Section 3203: Reasonable Civil Penalty

Section 3203 has been amended to compel greater private party justification, and judicial scrutiny, of settlements through which all or a portion of a civil penalty is waived in response to certain conduct by the defendant, or an Additional Settlement Payment is made in lieu of a portion of the penalty. Subdivisions (a) and (b) in the amended regulation correspond to and elaborate on what previously was expressed in subdivision (a). Subdivision (c) in the amended regulation is similar to subdivision (c) in the original regulation, which sets forth criteria for evaluating waived civil penalties in a settlement. New subdivision (d), in conjunction with amended section 3204, replaces the discussion of payments in lieu of penalties previously contained in subdivision (b).

a. Section 3203(a): Little or no civil penalty.

This subdivision states that a settlement with little or no penalty may be entirely appropriate, which was in the previous regulation, and makes express what previously was implicit: that such a settlement may not be appropriate as well, depending on the facts or circumstances of the case.

One commenter (C-9) suggested that this subdivision should expressly state that settlements with little or no penalty “may serve the purpose and intent of Proposition 65,” since subdivision (b) as proposed included a similar statement. The commenter did not want the presence of the statement in subdivision (b) but not in subdivision (a) to raise a negative inference that settlements with little or no civil penalty might *not* serve the purpose or intent of Proposition 65. The Attorney General does not agree that such an inference would arise, and believes the amended subdivision (a) is clear on its face.

b. Section 3203(b): Trading penalties for attorney’s fees.

This subdivision states that the recovery of civil penalties should not be traded for payments of attorney’s fees, because the recovery of civil penalties serves the purpose and intent of Proposition 65. As discussed above, one commenter (C-7) suggested that saying in this subdivision that the recovery of civil penalties serves the purpose and intent of Proposition 65 implies that settlements without civil penalties may not serve the purpose and intent of Proposition 65. The preceding subdivision, however, expressly states that “[a] settlement with little or no penalty may be entirely appropriate.” (§ 3203(a).) This subdivision simply clarifies that the payment of attorney’s fees is not an alternative to paying a civil penalty where a penalty is warranted.

c. Section 3203(c): Waiving civil penalties for conduct by the defendant.

The text of this subdivision appears in the Proposed Amendment as new text because it is a new subdivision, but some of the text appeared in subdivision (c) of the previous regulation. Changes to the previous text are shown below:

~~(e)-(d)~~ 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 ~~necessary actions~~ 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.

One commenter (C-9) suggested that the regulation should clarify what kind of verification mechanism is necessary to prevent private enforcers from imposing too costly requirements. The need for a verification mechanism is not new, however, and to our knowledge the risk the commenter identifies has not come to pass. Accordingly, the Attorney General rejects this proposal.

The same commenter notes that the discussion at page 6 of the Initial Statement of Reasons, specifically the reference to “these nexus requirements,” conflates the requirement in subdivision (c), that conduct exchanged for civil penalties must be related to the purposes of the litigation, with the nexus requirement for Additional settlement payments referenced in subdivision (d) and in amended section 3204(b)(2). The Attorney General believes the distinction in the regulation is clear between the criteria for waiving civil penalties in exchange for a defendant’s conduct (subdivision (c)), and the criteria for treating certain settlement payments as “Additional settlement payments” instead of as civil penalties (subdivision (d), § 3204(b)(2)). If the discussion in the Initial Statement of Reasons caused confusion, that was not the Attorney

General's intent. Since only one commenter raised the issue, any potential confusion does not appear to have been widespread.

d. Section 3203(d): Additional Settlement Payments.

This subdivision explains that the Attorney General views any Additional Settlement Payments to the plaintiff or to a third party as an "offset" to the civil penalty. As such, the parties must demonstrate to the satisfaction of the court that it is in the public interest to offset the civil penalty required by statute. Subdivision (d) thus confirms that it is the plaintiff's burden to demonstrate that it is in the public interest to offset the civil penalty with an Additional settlement payment, while section 3204(b) lists criteria the Attorney General will consider in deciding whether to object to the Additional settlement payment. Together, these provisions set forth the Attorney General's view of what standards should be applied when evaluating Additional settlement payments.

5. Section 3204: Additional settlement payments

New section 3204 addresses a variety of Attorney General concerns with respect to private litigants' use of Additional Settlement Payments ("ASPs"), and provides expanded requirements for such payments than were previously contained in former section 3203(b).

Several commenters (C-1 to C-9, C-14) suggested that Additional Settlement Payments should be banned altogether. Some of the reasons they offered include their views that:

- There is no express statutory authorization for ASPs.
- Proposition 65 authorizes only civil penalties up to \$2,500 per day.
- Allowing part of a civil penalty to be paid as an ASP contravenes the 75/25 percent statutory apportionment of civil penalties between OEHHA and the enforcer.
- Allowing part of a civil penalty to be paid as an ASP defeats the statutory mandate that the State's share of civil penalties be used "to implement and administer" Proposition 65. (See Health & Saf. Code, § 25249.12, subd. (b).)
- Most settlements do not contain ASPs, so ASPs are not needed to ensure continuing enforcement of Proposition 65 by private parties.
- ASPs originally were used in Proposition 65 settlements as a remedy for accompanying claims under Business and Professions Code section 17200, before that statute was amended by Proposition 64 in 2004 to curtail private enforcement, and allowing for continued use of ASPs is contrary to the voters' intent in adopting Proposition 64.
- Allowing private enforcers to allocate ASPs to themselves poses a conflict of interest between the enforcer's private interests and the public interest that the enforcer represents.

After careful consideration of the issue, the Attorney General rejects the suggestion to ban ASPs as part of this rulemaking. In the first place, the settlement guidelines set forth in Chapter 3, including section 3204, provide the Attorney General's view as to the legality and appropriateness of various types of settlement provisions, but by their own terms they are not binding on litigants or the courts. (Cal. Code Regs., tit. 11, § 3200.) While it certainly is within the Attorney General's authority to object to settlements with ASPs, or to state its intent to do so

in these guidelines, banning ASPs altogether would likely need to be accomplished by the Legislature as a statutory amendment.

Further, to the extent that the commenters are suggesting that the Attorney General take the position that it will object to all ASPs in settlements, the Attorney General believes that, with proper safeguards, ASPs have the potential to fund activities that further the purposes of Proposition 65 and are directly connected to the litigation. Examples include, but are not limited to, programs that monitor ongoing compliance with the settlement or programs that reduce or eliminate existing sources of exposure in communities where they could not otherwise be eliminated through the litigation. ASPs are not expressly recognized in the statute, but 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, provided such payments 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.) The standards in the previous regulation and in the amended regulation are thus intended to ensure that ASPs further the statutory purposes of Proposition 65. If, going forward, the Attorney General believes that the current regulations, as amended, are not adequate to prevent abuses of ASPs, then the Attorney General will consider more restrictive measures, including seeking more stringent restrictions on the use of ASPs or objecting to the use of ASPs in any Proposition 65 settlement.

Two commenters (C-13, H-1) suggested the proposed amendment does not clearly identify the standard for evaluating ASPs. They noted that the previous subdivision (b) expressly stated that such payments were only proper if certain requirements were met, and that, while language in the amended section 3204 appears to serve the same function, it does not expressly say that it does. In addition to the text of the regulation itself, particularly section 3204(b), the Initial Statement of Reasons (p. 6) explained that section 3204 “considerably expands the requirements for such payments that were previously contained in former section 3203(b).” Accordingly, the Attorney General disagrees with the comment.

a. Section 3204(a): ASPs in Out-of-Court Settlements

Section 3204(a) expresses the Attorney General’s view that ASPs should not be included in any settlement that is not subject to judicial approval and ongoing judicial oversight. In order to recover an ASP, therefore, the private enforcer must file an action and submit the settlement for judicial approval.

Two commenters (C-12, C-13) suggested that the Attorney General has no authority to prohibit ASPs in out-of-court settlements, because they are private contracts and such a ban threatens the Constitutional right to the freedom to contract. They also contend that the statute does not expressly authorize the Attorney General to adopt regulations prohibiting ASPs. This subdivision merely expresses the Attorney General’s view that ASPs should not be included in out-of-court settlements. (See Cal. Code Regs., tit. 11, § 3200.) The Attorney General intends by this provision to put private enforcers on notice of its view that ASPs are not proper in out-of-court settlements because there is no judicial determination that the ASP serves the purposes of Proposition 65, there is no judicial oversight of the use of the money, and it is improper for private enforcers to use the threat of a Proposition 65 lawsuit to recover ASPs that are not subject to judicial oversight. To the extent that private parties enter into such settlements, the Attorney General will consider appropriate action to address the improper recovery of ASPs.

On commenter (C-12) wrote that the California Supreme Court encourages private enforcers to try to settle claims out of court as a prerequisite for recovering attorney's fees under Code of Civil Procedure section 1021.5. In the context of Proposition 65 settlements, however, the public policy that favors settlements over litigation does not trump the public policy that favors judicial review of Proposition 65 settlements. (*Consumer Advocacy Group v. Kintetsu Enterprises* (2006) 141 Cal.App.4th 46, 63.) The two policies are easily reconciled by attempting to settle Proposition 65 claims early and then presenting any settlement to a court for its approval. Moreover, under the amended regulation, private enforcers can continue to settle claims out of court without including ASPs.

One commenter (C-11) suggests that the Attorney General should ban out-of-court settlements altogether because private enforcers can use them to circumvent the requirement for judicial review of private Proposition 65 settlements. The Attorney General agrees that private enforcers should not use out-of-court settlements to circumvent the statute. However, the statute appears to recognize that some violations alleged in 60-day notices will be settled out of court. Health and Safety Code section 25249.7, subdivision (f)(1), which requires private plaintiffs to report settlements to the Attorney General, applies to private enforcers who have filed an action *and* to private persons who have sent a 60-day notice. It thus appears that the Legislature contemplated that some enforcers will resolve violations alleged in a 60-day notice before filing an action.

Several commenters (C-12, C-13, H-2) suggested that this subdivision will increase the cost of settling Proposition 65 claims, delay the implementation of corrective measures under settlements, and burden courts, by encouraging court-approved settlements over out-of-court settlements. To the extent this subdivision encourages court-approved settlements, it is consistent with the Legislature's intent to require judicial review of Proposition 65 settlements. Additionally, private enforcers can avoid these perceived consequences of the amended regulation by choosing not to include ASPs in out-of-court settlements.

One commenter (C-11) suggested that, if the regulations do not prohibit out-of-court settlements, then this provision should be removed because it will "unnecessarily hamstring the ability of legitimate private enforcers... to fund activities that are in the public interest, in furtherance of the statute and tied to the underlying purposes of the enforcement action." The Attorney General's purpose in adopting this provision, however, is to further the purposes of the statute by reducing the potential for abusing ASPs and to further the Legislature's intent to have judicial oversight of Proposition 65 settlements. It is not to protect private enforcers' ability to recover ASPs. Further, Proposition 65 enforcers can include ASPs in court-approved settlements.

The same commenter suggested that "bad actors" may simply shift money that would have been allocated as ASPs in out-of-court settlements to attorney's fees to avoid this provision. Section 3203(b) of the amended regulation states that the recovery of civil penalties shall not be traded for payments of attorney's fees. This also applies to the recovery of ASPs, which offset the civil penalty and must not be traded for higher attorney's fees. Evidence that private enforcers are doing so may justify legislative action to restrict or prohibit the use of out-of-court settlements or to impose more stringent requirements on recovery of attorney's fees.

b. Section 3204(b)(1): Capping ASPs.

This subdivision states that the amount of ASPs in a settlement should not exceed the State's 75-percent share of any noncontingent civil penalty. It seeks to balance the statutory framework for

using civil penalties to fund OEHHA's Proposition 65 work with the public interest in funding activities with a clear and substantial nexus to the violation alleged.

One commenter (C-11) claimed the cap is arbitrary and without rational basis. In its view, "[i]f ASPs otherwise further the purposes of Proposition 65... , and assuming the other requirements of the regulation are satisfied ... , those payments should be considered proper irrespective of their amount in relationship to the amount of the civil penalty." We disagree that ASPs can be evaluated "irrespective of their amount in relationship to the amount of a civil penalty." In order to determine if the penalty amount in a settlement is reasonable, courts must consider the civil penalty plus any ASPs, because the ASPs are an offset to the civil penalty. (Health & Saf. Code, § 25249.7, subd. (f)(4)(C); Cal. Code Regs., tit. 11, § 3203, subd. (d).) Penalties further the purpose of Proposition 65 and are important in enabling the lead agency to continue its work implementing the statute. Thus, in reviewing an ASP, the court must consider whether it is appropriate to take money away from the penalty established by statute and allocate it to a different use that furthers the purpose of the statute. It would be impossible to decide if an ASP is reasonable without also considering the amount of the civil penalty.

Nor do we agree that it is arbitrary and capricious for the Attorney General, when deciding whether to object to a settlement, to consider whether the ASP is greater than the share of a civil penalty that is allocated by statute to OEHHA. This is a policy choice by the Attorney General, designed to balance competing interests. On the one hand, the statute allocates 75 percent of civil penalties to OEHHA for its implementation of Proposition 65. On the other, absent express statutory restrictions, ASPs are legal and can fund activities with significant benefits to public health and safety and with a strong nexus to the litigation. Having weighed these interests, the Attorney General has decided to seek parity between the two types of settlement payment as the outside boundary for ASPs. In other words, the Attorney General has decided to object to settlements that provide for ASPs that are greater than OEHHA's share of a civil penalty because, in the Attorney General's view, such a payment – regardless of how it will be used – would tip the balance too far away from the statutory use of civil penalty funds.

The commenter also suggested that capping the ASP amount based on the amount of a civil penalty will discourage creativity in negotiating settlements and potentially preclude ASPs for projects that would have a substantial public benefit. It offers a hypothetical in which a company seeks to fund a \$3 million project with an ASP. Under the new regulation, it could do this only if there were also a \$4 million civil penalty to ensure that the ASP is equivalent to the amount of the civil penalty that goes to OEHHA. The commenter writes that "there is no reason to impose such an artificial constraint on what would otherwise be a great settlement."

The regulation does not create the purported constraint; the statute does. The statute requires 75 percent of the civil penalty to be deposited with OEHHA. If the case went to trial and the court imposed a penalty, then none of the \$3 million project would be funded – unless, of course, the private enforcer chose to fund it with its 25 percent share of the civil penalty, which it can do. Nor would the statute permit an enforcer to demand a \$7 million penalty (using the commenter's hypothetical) where, under the statutory penalty factors, a \$3 million penalty is appropriate. This regulation seeks to balance what is in the statute with the ability to designate settlement funds for other purposes.

Finally, the commenter suggested that the cap is "particularly inappropriate in the context of court-approved settlements in which both the AG and the Court have an opportunity to review

the settlement terms.” We disagree. It is perfectly appropriate to set forth the Attorney General’s criteria for evaluating settlements in a guideline that sets forth “the Attorney General’s view as to the legality and appropriateness of various types of settlement provisions.” (Cal. Code Regs., tit. 11, § 3200.) The commenter correctly notes that, even without the guideline, the Attorney General could still raise an objection to a particular settlement that allocates an inappropriate amount of payments as an ASP. But in light of the Attorney General’s intention to consider objecting to settlements that allocate more than an amount that is equivalent to 75 percent of the civil penalty to ASPs, setting it out in a regulation puts parties on notice and avoids the appearance of having an underground regulation. The Attorney General will continue to evaluate each settlement on its merits and decide whether to object on a case-by-case basis. This regulation simply discloses criteria the Attorney General “will consider” in determining whether to object. (§ 3204(b).)

One commenter (C-9) supports revising the regulations to enhance transparency and accountability in ASPs and ensure that those payments further the intent of the law, but suggested that some of the proposed revisions, including the cap on ASPs, will inadvertently result in increased settlement costs. It expressed concern that private enforcers may seek additional attorney’s fees to cover the perceived “shortfall” in recoveries, or increase the amount demanded in civil penalties. The regulations state elsewhere that attorney’s fees shall not be traded for penalties. (§ 3203(b).) Moreover, ASPs are an “offset” to civil penalties (§ 3203(d)), so a defendant should pay the same amount regardless of whether part of the payment is treated as an ASP or if all of it is treated as a civil penalty. If the commenter is correct that capping ASPs results in plaintiffs increasing attorney’s fees that are not otherwise justifiable, the Attorney General will consider whether further amendments are necessary to protect against this unintended result.

One commenter (C-13) noted that ASPs “are an important source of funding for non-profits such as ERC,” and suggested that the statutory split of penalties between OEHHA (75 percent) and the enforcer (25 percent) does not strike an appropriate balance between funding OEHHA and funding private enforcement activities. This comment goes to the statutory 75/25 split of civil penalties, which is beyond the scope of this regulation and therefore does not require a response.

One commenter (C-7) noted that, pursuant to Government Code section 11346.5, subdivision (a)(13), the Attorney General must determine that no alternative to this regulation would be “more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.” (Gov. Code, § 11346.5.) The commenter suggested that “the most obvious and effective alternative” would be to eliminate the ASP provision in the regulations altogether, rather than simply curtailing ASPs as currently proposed. The Attorney General disagrees. Eliminating this section of the regulations would not prevent parties from including ASPs in settlements. Furthermore, the Attorney General continues to believe that ASPs, if properly limited, transparent, and carefully connected to the specific purpose of the litigation, can serve a legitimate purpose under Proposition 65, as they do in other environmental contexts. For that reason, the purpose of the regulation was not to eliminate ASPs altogether, but to constrain private parties’ use of the payments, to insure a sufficient nexus between funded activities and the violation, to ensure benefit to California, and to increase the transparency of

settlements in private party Proposition 65 cases. Eliminating these payments altogether would not serve that purpose.

The Attorney General notes, however, that she will continue to monitor the use of ASPs to offset the civil penalty and will consider further amendments to these regulations if it appears that additional constraints and limitations are necessary to ensure that the payments are consistent with the purpose of Proposition 65.

c. Section 3204(b)(4): Describing activities to be funded.

This subdivision aims to increase transparency in the use of ASPs, by requiring the recipient entities to describe with specificity the uses to which funds will be put.

One commenter (C-11) suggested that there is no reason to amend this part of the regulations, since there is no evidence that funds have been misspent under the previous regulation (§ 3204(b)). The Attorney General disagrees. Settlements often describe the use of ASPs so generally that it is impossible to evaluate whether they will be put to uses that advance the purpose of Proposition 65 or to determine if funds have been used as intended. The lack of specificity can also mask the lack of a sufficient nexus between the violations and the use of funds needed to justify offsetting the statutory penalty. The new regulation seeks more specificity to enable our office and courts to better evaluate the use of ASPs.

One commenter (H-1) suggested that private enforcers do not know in advance how they will allocate money received through ASPs “such that it could be stated precisely in consent judgments.” Another commenter (C-12) stated that the enforcer may not always know the “specific detailed description of the expense” in advance, and suggested that the description should only require the type of activity or expense; for example, “testing products for compliance with Proposition 65,” or “exposure analysis by experts.” A third commenter (H-2) suggested that the information should be available, but not necessarily included in every settlement.

The intent of this regulation is *not* to require the plaintiff to submit an itemized list of every anticipated expense at the time of settlement. Therefore, the plaintiff does not need to itemize every expense in advance, as long as each type of activity and the amount of funding allocated to each type of activity are described with sufficient specificity to inform the court, the Attorney General, and the public of how the funds will be spent. The activities and amounts allocated for each activity must be described in enough detail to demonstrate a sufficient nexus between the violation and the ASP, and to allow the Attorney General, the court, and/or the plaintiff to determine afterward if funds have been spent in accordance with the settlement.

One commenter (H-3) suggested that it is not appropriate to allow a defendant to decide who receives grants from an ASP. This comment does not appear to be directed toward any of the amendments to the regulations. To the extent a response is needed, ASPs are a negotiated term of a settlement, so they must be agreed upon by both parties. The plaintiff, as the party that represents the public interest and that carries the burden of justifying each ASP to the court, certainly can reject a defendant’s proposal for how to allocate the ASPs. But this is a two-way street. The defendant can refuse to fund particular entities that the plaintiff proposes, just as it can refuse to offset any part of the civil penalty with an ASP. Where the parties cannot agree on an ASP, then the alternative is to settle for a civil penalty without any payments in lieu of the penalty. There is no public benefit to prolonging litigation solely over this issue.

That said, if all or part of an ASP will be used for grants to entities not named in the settlement, the defendant should take no part in approving how the ASPs are spent or by whom, unless the defendant's role is specifically described in the settlement agreement and approved by the court.

d. Section 3204(b)(5): Recordkeeping and disclosure.

This subdivision aims to increase transparency in the use of Additional Settlement Payments by requiring the plaintiff to maintain adequate documentation of fund expenditures and to make the documentation available to the Attorney General within thirty days of any request.

Several commenters (C-13, H-1 to H-3) suggested that the recordkeeping requirement will be burdensome and excessive, and will divert funds away from protecting public health and the environment. Any plaintiff that allows a defendant to offset civil penalties with ASPs must track how the funds are spent. If the plaintiff is unable or unwilling to expend the resources necessary to document that the funds are being properly spent, it should not include ASPs in its settlements. The recordkeeping requirement ensures transparency in the use of ASPs. Under subdivision (3204(b)(4), the plaintiff will need to describe how much of the ASP will be used for recordkeeping. If the amount is unreasonably high and detracts from the underlying purpose of the ASP, then it may not be a proper offset of the civil penalty.

One commenter (C-7) suggested that the new requirements add a new and time-consuming layer of oversight and review onto the AGO and the courts. We disagree. The new regulation will facilitate oversight and review of ASPs by requiring plaintiffs to provide meaningful information about how the funds will be used. Such review already occurs, but can be hampered or complicated by having to track down information about how ASPs are spent. The regulation ensures that this information is available in the settlement agreement or other papers filed with the court. The commenter also suggested that courts may not have the resources to provide "ongoing judicial supervision" of ASP provisions, but such supervision already occurs and is not new to the regulation. The regulation makes the court's existing oversight role easier to fulfill.

e. Section 3204(b)(6)(B): Disclosure of economic interest

This subdivision also aims to increase transparency in the use of ASPs. It requires disclosure of any economic interests the plaintiff or its counsel has in the payments. The original proposal cross-referenced regulations adopted by the Fair Political Practices Commission ("FPPC") to define what economic interests must be reported by public officials. Several commenters (C-12, C-13, H-1, H-2) suggested that it was not clear how the FPPC regulations apply in the context of a Proposition 65 settlement. The Attorney General revised the proposal to define "economic interest" in this context, and circulated the revision for public comments. The definition in the final regulation is based on the FPPC regulations, but adapted to apply here.

IV. SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC, FROM FEBRUARY 4, 2016, TO FEBRUARY 26, 2016.

The Attorney General received four comment letters concerning the Modification of Text of Proposed Regulation first circulated on February 4, 2016. All four of the commenters had submitted comments during the initial comment period. Many comments they submitted during

the second public notice period repeated points they had made before. In this section, the Attorney General responds to any new comments.

A. California Chamber of Commerce (C-21)

The commenter suggests that section 3201(b)(2), as modified, may still be interpreted to require “before-and-after” exposure assessments for every settlement that contains a reformulation requirement. It proposes adding the following text (underlined) to require a showing that “at least some of the products in controversy in the action contained concentration levels of a listed chemical or chemicals that either are, or at some time relevant to the litigation were, above the agreed-upon standard or formula....” Not all settlements, however, express a reformulation standard or formula as a chemical concentration. In settlements over food products or dietary supplements, for example, the reformulation standard or formula may be expressed as a daily exposure based on the expected daily intake of the product, rather than a concentration. The regulation, as worded, affords the plaintiff flexibility in how it demonstrates to the court that at least some of the products in controversy are, or at some times were, above the agreed-upon reformulation standard or formula. Accordingly, the Attorney General rejects this proposal.

B. Center for Environmental Health (C-22)

As an initial matter, the commenter makes two observations about the modification that are not correct. First, referring to modifications to section 3201(b)(2), it writes that the Attorney General has “clarified that the relevant ‘warning level’ for purposes of this guideline is the reformulation level set forth in the settlement.” That is not correct. The Attorney General uses the term “warning level” to refer to the exposure level above which warnings are required in light of the defenses set forth in Health and Safety Code section 25249.10(c). It is a distinct concept from the “reformulation standard or formula” parties have agreed to in a settlement. The plaintiff still must demonstrate to the court’s satisfaction that an agreed-upon reformulation level will not result in exposures above the statutory warning level without requiring a warning

Second, the commenter writes that the modification “eliminated any need to show that some undefined subset of products will be below that level in the future.” It is not clear what is meant by this comment. If, by “that level,” the commenter means the statutory warning level, then this statement is not correct. As discussed, nothing in this section or elsewhere relieves the plaintiff of having to demonstrate to the court that a reformulation requirement, or any other alternative to providing warnings, results in compliance with Proposition 65.

Discussing the same subdivision, the commenter suggests that, even with the modifications, section 3201(b)(2) reverses the presumption that reformulation confers a significant public benefit because it places the burden on the plaintiff to provide supporting evidence. As discussed above, the applicable presumption is that *reducing or eliminating exposures to a listed chemical* confers a significant public benefit. Therefore, the plaintiff must present evidence that the agreed-upon reformulation will reduce (or already has reduced) exposures to the listed chemical for the presumption to apply.

Although not directly responsive to the modifications to the proposed regulation, the commenter asks the Attorney General to “specify that the new guidelines do not take effect until one year after they are finalized.” It notes that private enforcers, industry, and the courts have been relying on the existing guidelines for many years, and that it may be difficult to implement the guidelines in settlements already being negotiated. The regulated community has been on notice

of the proposed regulatory amendment since September 2015, and the Attorney General has publicized its position on several of the issues the amendments address before that. Further, as nonbinding settlement guidelines, the Attorney General and courts may exercise discretion in applying them to settlements that were negotiated before the guidelines became final. Accordingly, the Attorney General rejects this proposal.

C. North American Insulation Manufacturers Association (C-23)

Discussing the presumption that reducing or eliminating exposures to a listed chemical confers a significant public benefit in section 3201(b)(2), the commenter suggests that public benefit can be demonstrated only “when the reformulated product is superior to its former version.” It writes that such superiority should be reflected in the performance of the product for its intended use, and in public safety. “If [the] substitution is untested, there should be no finding of a public health benefit.” The Attorney General acknowledges that in some cases a reformulated product may be inferior for a variety of reasons, including public safety. But it is a reasonable starting point to presume that reducing or eliminating the exposure to listed chemicals, i.e., to chemicals known to cause cancer or reproductive toxicity, confers a public benefit. Making it a rebuttable presumption allows it to be reversed in cases where the agreed-upon reformulation does not result in a superior product from a public health perspective.

D. Peter T. Sato (C-24)

The commenter requests clarification of several aspects of the regulation. To the extent such requests are not “an objection or recommendation directed at the proposed action or the procedures followed,” they do not require a response. Where the request for clarification is accompanied by a suggestion, the Attorney General responds below.

The commenter suggests that it is currently unclear what a court should consider under section 3203(d) when evaluating whether an ASP is in the public interest. It suggests clarifying that the court may consider section 3204(b)(2) (requiring a clear and substantial nexus between ASPs and the alleged violation) in determining whether an ASP is in the public interest. The Attorney General believes it is implicit that a court may consider all of the factors set forth in section 3204(b), which guide the Attorney General’s decision whether to object to an ASP, when determining whether the ASP is in the public interest, in addition to any other factors the court wishes to consider. Accordingly, the Attorney General rejects this proposal.

In response to sections 3204(b)(5) and (b)(6)(C), which impose recordkeeping and disclosure requirements on plaintiffs that include ASPs in a settlement, the commenter proposes including language in the Final Statement of Reasons that “allows for a reasonable amount of the ASPs to be allocated for the costs of said administration.” Nothing in the regulation prevents the plaintiff from designating part of an ASP for administrative tasks, provided the settlement describes with specificity the activities to be funded and the amount of funding for each activity. (See § 3204(B)(4).) As stated above, if the amount is unreasonably high or if it detracts from the underlying purpose of the ASP, then the ASP may not be a proper offset of the civil penalty.

The commenter suggests that clarification is needed of the applicability of sections 3203(d) and 3204 outside the context of the in-court settlement approval process. Section 3200 of the regulations, which is not being amended, describes the purpose and scope of the Attorney General’s settlement guidelines. It applies to all of the guidelines, including those identified by the commenter.

Finally, referring to section 3204(b)(6)(B), the commenter recommends clarifying whether the requirement to disclose certain economic interests the plaintiff or its counsel holds in the recipient of an ASP applies only where the recipient is expressly identified in the settlement document. Section 3204(b)(6)(B) requires disclosure of economic interests a party to a settlement or its counsel has in “any individual or entity, besides itself, *that is designated in the settlement to receive all or part of any Additional Settlement Payment.*” (Emphasis added.) No clarification is needed.

V. ALTERNATIVES DETERMINATION

The Attorney General has determined that no alternative would be more effective in carrying out the purpose for which the Amended Regulation is proposed, would be as effective and less burdensome to affected private persons than the amended regulation, or would be more cost effective to private persons and equally effective in implementing the statutory policy or other provision of law. The Attorney General’s reasons for rejecting any proposed alternatives are set forth in the responses to comments.

APPENDIX A TO FINAL STATEMENT OF REASONS

LIST OF WRITTEN AND VERBAL COMMENTS

Written Comments in Response to Notice of Proposed Rulemaking	
C-1	Alliance for Natural Health (190 identical comments)
C-2	Alliance for Natural Health (Adams)
C-3	Alliance for Natural Health (Anderson)
C-4	Alliance for Natural Health (Cerello)
C-5	Alliance for Natural Health (Scott)
C-6	Alliance for Natural Health (Sievens)
C-7	American Chemistry Council
C-8	Carol R. Brophy, Sedgwick LLP
C-9	California Chamber of Commerce (CalChamber) (Nov. 5, 2015)
C-10	California Dental Association
C-11	Center for Environmental Health (Nov. 9, 2015)
C-12	Peter T. Sato, Yeroushalmi & Yeroushalmi (Nov. 10, 2015)
C-13	Environmental Research Center, Inc.
C-14	Robert L. Falk, Morrison & Foerster LLP
C-15	Harbor City/Harbor Gateway Chamber of Commerce
C-16	Los Angeles Area Chamber of Commerce
C-17	Peter W. McGaw, Archer Norris
C-18	North American Insulation Mfg. Ass'n (NAIMA) (Nov. 9, 2015)
C-19	Clifford A. Chanler, The Chanler Group
C-20	Torrance Area Chamber of Commerce
Written Comments in Response to Notice of Modification	
C-21	California Chamber of Commerce (CalChamber) (Feb. 26, 2016)
C-22	Center for Environmental Health (Feb. 19, 2016)
C-23	North American Insulation Mfg. Ass'n (NAIMA) (Feb. 19, 2016)
C-24	Peter T. Sato, Yeroushalmi & Yeroushalmi (Feb. 26, 2016)
Verbal Comments at November 19, 2015, Hearing	
H-1	Ryan Hoffman
H-2	Mathew MacLear
H-3	James Wheaton