DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

FACSIMILE: (916) 324-4293
(916) 324-5433

September 11, 1997

Michael Freund, Esq.
1915 Addison Street
Berkeley, CA 94704-1101

Raphael Metzger, Esq.
401 E. Ocean Blvd, Suite 700
Long Beach, CA 90802-4966

RE: Corporation for Clean Air, Inc. v. Bekins Moving and Storage, et al., and Corporation for Clean Air v. General Motors Corporation, et al.
San Francisco Superior Court Nos. 984184 and 987208

Dear Messrs. Freund and Metzger:

Our office has been investigating the Proposition 65 notices served by your client, the Corporation for Clean Air, on many businesses that manufacture, own, or operate diesel vehicles or vessels in California or for use in California, or that operate terminals where such vehicles or vessels are used. As you know, the Attorney General has primary State responsibility for enforcement of Proposition 65. Because of the importance of these cases and of the public health issues they raise, we wish to advise you of our office's views on the potential liability under Proposition 65 of the various categories of businesses named in your notices and pending suits.

It should be emphasized that our investigation is still proceeding, and that we may take further positions, or refine those already taken, based on further information that we receive or develop. In particular, our investigation regarding the maritime businesses (terminals, shipping lines, cruise lines, boat builders, and so forth) noticed on behalf of your client has just commenced, and we are expressing very limited positions with respect to these businesses. We will furnish a copy of this letter to counsel for defendants and interested parties in these cases, in order to promote a fuller public understanding of the issues involved.

Adequacy of Notices

Initially, we believe that certain notices you have served do not meet the minimum requirements of Proposition 65 or the

2063787789

implementing regulation adopted by the Office of Environmental Health Hazard Assessment ("OEHHA") that prescribes the necessary content of 60-day notices (22 CCR § 12903). Some of the notices allege that discharges have occurred to "water within the Ports of Los Angeles and Long Beach and/or onto or into land where it passes or probably will pass into sources of drinking water." After careful consideration of these notices, we believe that they are inadequate under the regulation.[1] The regulation clearly requires that a notice of an alleged violation of Health and Safety Code section 25249.5 must provide "a general identification of the . . . . source of drinking water into which the discharges are alleged to have occurred, to be occurring or to be likely to occur." (22 CCR § 12903(b)(2)(B).) Your notices, however, do not identify the source of drinking water into which the discharge is alleged to have occurred, or to be occurring or likely to occur. The waters of the Ports of Los Angeles or Long Beach do not appear to be "source(s) of drinking water," and your notices provide no information as to the identity of any other waters into which the alleged discharges are or were occurring.

Liability of Manufacturers

In the General Motors case, your client seeks penalties and injunctive relief against various manufacturers of diesel powered vehicles, on the theory that they are responsible for giving Proposition 65 warnings to pedestrians and workers exposed to diesel vehicle exhaust in the immediate vicinity of such diesel powered vehicles when in use.

In considering the responsibility of manufacturers of diesel trucks for providing warnings under Proposition 65, we have reviewed Proposition 65 itself and the regulations adopted thereunder. In addition, we have reviewed past cases brought by the Attorney General or in which settlements were approved by the Attorney General. Based on our review, we conclude that the manufacturers of diesel trucks, a consumer product, are not legally responsible under Proposition 65 for providing public warnings of environmental exposures resulting from operation of such trucks in circumstances where the violations are within the control of the operator but not the manufacturer. This principle follows logically from the premise that a manufacturer or operator is liable only for those emissions that are within the control of such manufacturer or operator. This principle particularly applies where, as in this case, the exposures at levels triggering warning requirements occur only where the

1. Nothing in this letter should be read to imply that the remainder of the notices conform in all respects to the regulation. We do not express an opinion on that point.

products (the diesel trucks) are used at particular times and in particular places that are wholly within the control of the operator and not the manufacturer. On the other hand, the manufacturers of consumer products, such as diesel vehicles, would remain responsible for consumer exposures, such as exposures occurring to drivers and operators of diesel trucks.

While existing regulations are not dispositive on this point, they support this conclusion. The regulations define the term "expose" and the term "consumer products exposure," (22 CCR §§ 12201(f), 12601(b)), but those definitions do not focus on the particular issues involved here. The definition of a consumer product exposure as "an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good or any exposure that results from receiving a consumer service," support the conclusion that the maker of the consumer product would be responsible for "consumer product exposures," which do not normally extend to environmental exposures.

These views are supported by a letter written in 1991 by the Interim Director of OEHHA to an attorney for a number of motor vehicle manufacturers. In that letter, Interim Director Dr. Steven Book stated:

> *"Exposures to diesel engine exhaust would generally be caused by the business operating or using diesel engines, rather than by the manufacturer of the engine.* It is likely that warnings regarding diesel engine exhaust would be necessary in areas where exhaust levels build up from non-moving sources (these would include mobile sources such as vehicles operating in a specific site). Mobile sources probably would not warrant warnings because they result in exposures that would almost always be transitory and indistinguishable from those resulting from exhaust levels in ambient air." (Letter to Betty Jane Kirwan, October 24, 1991; emphasis added.)

This letter suggests that the creation of an exposure exceeding the warning threshold for a diesel truck generally would result from a specific combination of the vehicle's normal emissions, the time it is running (e.g., idling time), the load it is carrying, the physical configuration and ventilation of the facility or property, the number of vehicles being operated, and other factors. All but the first factor are within the control of the operator of the vehicles, not the manufacturer. Thus, the manufacturer would not appear to be responsible for providing the necessary public warnings under Proposition 65 for the

environmental exposures occurring in the cases that are at issue here.[2]

This view is also supported by the Attorney General's past enforcement practices. In one notable case, our office brought and settled a suit against makers of portable power equipment such as chain saws, leaf blowers, and lawn mowers. (People v. Ariens Company, et al., San Francisco Superior Ct. No. 969549, filed May 12, 1995.) Although we took the position that the product manufacturers were responsible for exposures occurring to the users of the products, we did not suggest that the manufacturers were responsible for environmental exposures caused to others by the use of the products, such as possible exposures to neighbors or others in the vicinity of where the product was used.

In addition, our office brought several enforcement actions in 1990 against businesses that operated facilities that used ethylene oxide to sterilize medical equipment or spices, based on environmental exposures caused by the operation of the facilities.[3] Also, our office has brought several actions against manufacturing plants that caused exposures to various chemicals, including chloroform, methylene chloride, and lead.[4] In none of these cases did our office name as a defendant the manufacturer of the chemical, or of the machines or units used by those companies; rather, we took the view that the duty to warn belongs to the person or entity that controls the circumstances in which the exposures occur, in terms of time, place, and manner of use. In another case, however, we brought an action against the maker of a small sterilization unit where its use resulted in exposures to ethylene oxide to the users and operators of the equipment, indicating that manufacturers may be liable to provide

---

2. This letter expresses no opinion as to what duty a manufacturer may have to notify purchasers of its vehicles of their potential duties or the characteristics of the vehicles' emissions.

3. People v. Griffith Micro Science (L.A. County Superior Court No. BC006063); People v. Baxter Healthcare Corporation (L.A. Superior Court No. BC 006061); People v. Bentley Laboratories (Orange County Superior Court No. 630727); People v. Botanicals International, Inc. (L.A. County Superior Court No. BC006060); all filed July 18, 1990. Numerous similar cases have been filed.

4. See, e.g., People v. Signet-Armorlite (San Diego Superior Court No. 641085, filed August 8, 1991) (methylene chloride), People v. Bio-Rad Laboratories, Inc. (Contra Costa County Superior Court No. C- 90-05401, filed December 12, 1990) (chloroform), People United for a Better Oakland (PUEBLO) v. American Brass & Iron Foundry (Alameda County Superior Court No. 708543-3, filed November 17, 1992) (lead).

warnings where the use of a consumer product results in consumer exposures.[5]

Finally, our position is consistent with a Superior Court ruling in an action brought against operators of parking garages, alleging exposures to automobile exhaust concentrated within the parking garages. In that case, Mateel Environmental Justice Foundation v. ABM Industries, et al. (San Francisco Superior Court No. 978295), defendants demurred on the ground that the automobile manufacturers, rather than the facility operators, were responsible for the exposures. The trial court overruled the demurrer, and defendant's petition for writ of mandate was denied.

Liability of Owners/Operators of Fleets of Diesel Vehicles

In the Bekins case, and in the various notices filed by Mr. Metzger, your client alleges Proposition 65 violations by businesses that own and operate fleets of diesel powered vehicles or vessels, that operate terminal facilities where such vehicles or vessels operate, or that construct such vessels. The notices allege that these businesses are responsible for giving Proposition 65 warnings to pedestrians and workers who are exposed to the emissions of the diesel powered vehicles or vessels that they own, operate or construct, or that are operated at their facilities.[6] Because of the diversity of these defendants, it is necessary to undertake a more extensive and individual factual and technical analysis than where vehicle manufacturers are concerned, who tend to be more similarly situated.

We are unaware of any evidence demonstrating any provable violation of Proposition 65 by any of the businesses noticed by your client as to the operation of diesel vehicles in ordinary traffic, e.g., driving around town or on freeways or highways. First, it is technically difficult, if not impossible, to distinguish in ordinary situations between diesel emissions from a particular business' diesel vehicles and emissions from other diesels, and thus to prove that a particular diesel exposure at a particular level is attributable to Company A's diesel trucks

---

5. People v. H.W. Andersen Products, San Francisco Superior Court No. 921748, filed July 17, 1990.

6. We are aware that at least one counsel for noticed businesses has alleged that certain businesses are not covered by your notices because their Proposition 65 liability has already been settled by a consent agreement with the Pacific Justice Center. We are reviewing that issue and express no opinion on it at this time.

rather than Company B's diesels. Second, it is technically difficult, if not impossible, to distinguish in ordinary situations between diesel exhaust emissions from a particular business' diesels operating in traffic from background concentrations of diesel exhaust that are in the ambient air from other sources. In addition, while we have had extensive air modeling performed by reputable experts, modeling of the operation of single or small numbers of vehicles does not indicate that a significant risk exists within the range of ordinary scenarios and risk factors we have examined. Because of these circumstances, and based on evidence available to us, we have concluded that it is, in all probability, impossible to demonstrate exposures in excess of Proposition 65 levels that are attributable to the noticed parties for ordinary on-road uses. Accordingly, there is, in our view, no justification based on available evidence for asserting that these parties are in violation of Proposition 65 for such uses.

The situation may be entirely different where a particular business owns or controls a facility--such as a terminal, car barn, home garage or like facility--where a fleet of diesel trucks is garaged or serviced or from which the fleet is dispatched, or any other facility where the vehicles' operations are concentrated. If the emissions attributable to such a facility exceed levels requiring a warning, the owner or operator of the facility--which in some cases may be the owner or operator of the fleet itself--would be required to provide the warning. In some circumstances, the operator and owner might be equally responsible for providing the warning, although only one entity needs to actually provide it.

For example, consider a business that owns a fleet of diesel trucks that are used to deliver a product or to transport personnel who perform a service, and that garages and services these trucks at a central facility, from which the trucks are dispatched upon particular routes or to other locations. This business must give a warning if the diesel emissions from the business' trucks exceed Proposition 65 levels when operating at, leaving from or returning to, or being serviced at, the business' central facility. This warning must be given to any individual known to be exposed to such levels, including individuals in the surrounding neighborhood or at surrounding businesses. Such a garaging or servicing facility should be treated in much the same way as a stationary facility emitting a Proposition 65 listed chemical, because the emissions occurring within and around that facility are analogous to the emissions from the various stacks and other components of a stationary source. Since the garaging facility and its operations cause the diesel exposure, the business that operates the facility should provide the warning mandated under Proposition 65.

Factually, we are currently attempting to determine whether any businesses that have been served with notices have actually caused or are causing sufficient diesel emissions at their facilities to require Proposition 65 warnings to be given. Because of the fact-specific nature of this inquiry, and because of the huge number of businesses named in the notices, we expect that this inquiry will take some time. At this time, we express no opinion as to whether any noticed business is responsible for a level of emissions that would require a warning.

Conclusion

We intend to express our view of the statute to the courts as appropriate. We will share with you any further positions by this office. Please contact Assistant Attorney General Theodora Berger at (213) 897-2603, for any further information.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Roderick E. Walston

RODERICK E. WALSTON
Chief Assistant Attorney General

cc: Michele Corash, Esq.
Richard Jacobs, Esq.
Betty Jane Kirwan, Esq.
Gary Roberts, Esq.
Michael Steel, Esq.
Kurt Weismuller, Esq.

2063787795