

PROPOSED AMENDMENTS TO
TITLE 11, DIVISION 4, CHAPTER 1
DEPARTMENT OF JUSTICE

(Notice published September 25, 2015)

NOTICE OF PROPOSED RULEMAKING

The Department of Justice (DOJ), also known as the Office of the Attorney General, proposes to amend Title 11, Division 4, of the California Code of Regulations (CCR) concerning Proposition 65 enforcement actions brought by private parties. Specifically, DOJ proposes to: amend Chapter 1, sections 3000 through 3008; amend Chapter 3, sections 3201 through 3204; and renumber Chapter 3, section 3204, as section 3205. These amendments would affect settlement terms, penalty amounts, and attorney's fees in civil actions filed by private persons in the public interest pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), codified at Health and Safety Code §§ 25249.5-25249.13; § 25180.7; and § 25192.

WRITTEN COMMENT PERIOD

Any interested person, or her or his authorized representative, may submit written comments relevant to the proposed regulatory action. DOJ must receive written comments at the following address by 5:00 p.m. on November 9, 2015, which is hereby designated as the close of the written comment period:

Trish Gerken
Senior Legal Analyst
Office of the Attorney General
2550 Mariposa Mall, Rm. 5090
Fresno, CA 93721
Fax: (559) 488-7387

DOJ prefers, but does not require, that comments are submitted in duplicate.

PUBLIC HEARING

The Department of Justice does not intend to hold a public hearing in this matter because during its last Proposition 65 rulemaking, there was zero attendance at the scheduled hearing, resulting in a waste of state resources. As per Government Code § 11346.5 (a)(17), however, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Government Code § 11346.8.

AUTHORITY AND REFERENCE

Authority: Health and Safety Code sections 25249.7(e) and (f).

Reference: DOJ proposes to amend sections 3000 through 3008; amend sections 3201 through 3204; and renumber section 3204 as section 3205, in Title 11 of the CCR.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) is designed to reduce human exposure to those chemicals identified on a Governor’s list as “Known to the State” to cause cancer, reproductive harm, or developmental harm. Violations may occur where a business discharges listed chemicals into drinking water, or exposes individuals to listed chemicals without providing the required warning.

Proposition 65 authorizes the Attorney General, District Attorneys, and certain City Attorneys to bring enforcement actions against alleged violators. It additionally permits any private party to sue “in the public interest” if the party gives notice of the violation to the alleged violator, the Attorney General, and those District Attorneys in whose jurisdiction the violation is alleged to occur. (Health & Saf. Code, § 25249.7.) Private plaintiffs must additionally provide to notice recipients a Certificate of Merit that attests to the signer’s belief that “there is a reasonable and meritorious case for the private action.” (Cal. Code Regs., tit. 11, § 3101.)

The Attorney General has by statute been given monitoring and supervisory roles with respect to private enforcement of Proposition 65, and has in the past adopted both binding regulations and guidelines to facilitate the exercise of this authority. The Attorney General has by regulation prescribed the form and content of the Certificate of Merit supporting information that must be provided to the Department of Justice on a confidential basis, which information details the expert consultation that has led a private plaintiff to conclude that there is an exposure to the listed chemical that is the subject of a legal action. (Cal. Code Regs., tit. 11, § 3102.)

The Attorney General also reviews private parties’ motions for settlement approval and supporting papers, and may by right participate in any settlement proceeding without intervening in the underlying case. (Health & Saf. Code, § 25249.7, subd. (f)(4).) To assist the Attorney General and the court in evaluating proposed settlements, the Attorney General has by rule established guidelines for crafting and reviewing Proposition 65 settlements. These cover topics such as penalties, the form and content of clear and reasonable warnings, evaluation of attorney’s fee awards, and the scope of release agreements. (Cal. Code Regs., tit. 11, §§ 3200-3204.)

The Attorney General also monitors overall trends in Proposition 65 litigation, and has issued annual reports summarizing all private-party Proposition 65 cases initiated since January 1, 2000. These reports are available on the Attorney General’s website at www.oag.ca.gov/prop65. Observations of litigation and settlement trends with respect to payments-in-lieu-of penalties, attorney’s fees, and transparency in use of funds has prompted the currently proposed regulations.

Policy Statement Overview and Anticipated Benefits of the Proposed Regulations

The broad objectives of the present rulemaking are to ensure that the State in fact receives the civil penalty funds contemplated by the Proposition 65 statute; to constrain private parties' use of payments-in-lieu-of penalties (described as "Additional Settlement Payments" in the proposed regulations) to insure a sufficient nexus between funded activities and the violation; to ensure benefit to California; to increase the transparency of settlements in private party Proposition 65 cases; and to reduce excessive attorney's fee awards.

The specific anticipated benefits of the rulemaking are that the State would have the funding necessary for Proposition 65 scientific support activities, such as listing chemicals and identifying "safe harbor" exposure levels; private party litigation resources would be focused on those cases conferring actual public benefit; businesses would be spared the expense of defending lawsuits that are not legitimate; and the use of Proposition 65 Additional Settlement Payments would have a closer nexus to the violations alleged, and be more transparent to the public and to the courts that must evaluate the reasonableness of settlements.

DOJ believes that although the proposed reforms are incremental rather than dramatic, *in toto* they will both bring Proposition 65 practice more in line with the drafters' intent, and increase the public accountability of the private Proposition 65 bar. The purpose of the proposed regulations is further described in the Initial Statement of Reasons.

Summary of Proposed Regulation

The Proposed Regulation has three main parts. First, in the Settlement Guidelines, it proposes a cap on the fraction of settlement payments that can be paid "in lieu of" civil penalties, in the form of Additional Settlement Payments. This is intended to effectuate Proposition 65's purpose of directing penalty funds primarily to the Office of Environmental Health Hazard Assessment (OEHHA) to be used for Proposition 65-related activities.

Second, the regulation amends the Settlement Guidelines to require both that projects with an Additional Settlement Payment component be subject to ongoing judicial supervision, and that such payments fund only projects with a clear nexus to specific violations giving rise to the settlement. This includes a requirement that the funded activity be designed primarily to produce public health benefits within California. The revised proposed Settlement Guidelines also require greater specificity and public transparency as to the intended uses, and expenditures, of Additional Settlement Payments.

Third, the Settlement Guidelines aim to discourage the initiation of cases that confer very little (*i.e.*, trivial) public benefit, by raising the bar for determining when a settlement confers the "significant" public benefit prerequisite to obtaining attorney's fees under Code of Civil Procedure section 1021.5(a). The Proposed Regulations would state that reformulation "is presumed to confer a significant public benefit," but would make this presumption rebuttable. The Settlement Guidelines also add a requirement that for fee award purposes, all investigation costs must be justified through contemporaneous records of time/costs incurred.

The Proposed Regulations additionally make one clarifying change, to make explicit that even pre-filing settlements must be reported to the Attorney General. This amendment harmonizes the Attorney General’s Proposition 65 regulations with the text of Proposition 65, and eliminates any ambiguity as to whether pre-filing settlements must be reported.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING REGULATIONS

Consistency with Federal Regulations

This regulation is not mandated by federal law or regulation. There is no federal law analogous to Proposition 65.

Consistency with State Regulations

DOJ has determined that this proposed regulation is not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, DOJ has concluded that these are the only regulations that concern the Attorney General’s review of settlements by persons proceeding “in the public interest” under Health and Safety Code section 25249.7(f)(4).

OTHER STATUTORY REQUIREMENTS

None.

DISCLOSURES REGARDING THE PROPOSED ACTION

DOJ has made the following initial determinations:

Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability to Compete With Businesses in Other States: The Department of Justice has determined that there will be no significant statewide adverse impacts directly affecting businesses.

Small Business Determination: The proposed regulations would have limited effects on small businesses, insofar as any positive and negative effects may be self-canceling, as described under “Cost Impacts,” below.

Cost Impacts on a Representative Person or Business: The Department of Justice is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulation.

Significant Effect on Housing Costs: None.

Local Mandate and Cost Determination (Agencies & School Districts): These regulations would not impose a mandate on local agencies or school districts, nor are there any costs to any local agency or school district for which reimbursement is required by Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

Other Nondiscretionary Cost or Savings Imposed on Local Agencies: None.

Cost or Savings in Federal Funding to the State: None.

Cost or Savings to Any State Agency: There are potentially small ongoing costs to the Attorney General for implementing the new regulations, to the extent that the regulations require closer scrutiny of, and potential court objection to, certain terms in private-party settlements. These may be offset by potentially small cost savings to the Attorney General if the regulations slightly reduce the volume of private-party lawsuits.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

DOJ has made an initial determination that this action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The proposed regulations will not:

1. Create or eliminate jobs within California;
2. Create new businesses or eliminate existing businesses within California; or
3. Expand businesses currently doing business within California.

Benefits of the Proposed Regulation.

The anticipated health, welfare, and environmental benefits of the rulemaking are that the State would have the funding necessary for Proposition 65 scientific support activities, such as listing chemicals and identifying safe exposure levels, and that any penalty payments diverted to payments-in-lieu-of penalties would have a clear nexus to alleged violations, and benefit California. Additionally, it will be easier for courts to ensure that payments-in-lieu-of penalty are being spent for the purposes outlined in settlements, and more likely that private party litigation resources will be focused on those cases conferring actual public benefit. The proposed regulation would also increase the transparency of business operations conducted in California.

CONSIDERATION OF ALTERNATIVES

As required by Government Code 11346.5, subdivision (a)(13), DOJ must determine that no alternative considered by the agency would be more effective in carrying out the purposes for which the action is proposed, or would be more effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to private persons and equally effective in implementing the statutory policy or other provision of law. Any person interested in presenting statements or arguments with respect to alternatives to the proposed regulation may do so during the written comment period, or at any requested public hearing, or both.

CONTACT PERSONS

Inquiries concerning the action described in this notice may be directed to Trish Gerken, Senior Legal Analyst, via e-mail at Trish.Gerken@doj.ca.gov (preferred); in writing at the above address; or by telephone, at (559) 477-1671.

The back-up contact for this action is Harrison Pollak, Deputy Attorney General, Harrison.Pollak@doj.ca.gov; telephone (510) 622-2183.

AVAILABILITY OF RULEMAKING FILE

The full rulemaking file will be available for inspection and copying throughout the rulemaking process. The text of the proposed regulations, the initial statement of reasons, and information upon which the proposed rule is based are available on the DOJ website at: <http://oag.ca.gov/Prop65regs2015>. Copies of all documents may also be obtained from the listed Contact Persons.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, DOJ may adopt the proposed regulations if they remain substantially as described in this notice. If DOJ makes modifications that are sufficiently related to the originally proposed text, DOJ will make the modified text (with the changes clearly indicated) available to the public for at least 15 days, and accept written comments, before adopting the regulations. Copies of any modified text will be available on the DOJ website at: <http://oag.ca.gov/Prop65regs2015>. Copies of all documents may also be obtained from the listed Contact Persons.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available on the DOJ website at: <http://oag.ca.gov/Prop65regs2015>. Copies of the Final Statement of Reasons may also be obtained from the listed Contact Persons.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

The Notice of Proposed Rulemaking, the Initial Statement of Reasons, and the text of the regulations in *strikeout* and *italics* format, as well as the Final Statement of Reasons once completed, are available on the DOJ website at: <http://oag.ca.gov/Prop65regs2015>.