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Submitted electronically to: trish.gerken@doj.ca.gov

SUBJECT: Proposed Changes to California Health & Safety Code Section 25805

Dear Ms. Gerken:

Environmental Research Center, Inc. (hereinafter, "ERC") appreciates the opportunity to submit comments on the Office of the Attorney General ("OAG")'s proposed amendments to Title 11, Division 4, of the California Code of Regulations pertaining to the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly referred to as Proposition 65.

ERC's mission is to "safeguard the public from health hazards that impact families, workers, and the environment" by reducing "the use and misuse of hazardous and toxic substances, facilitating a safe environment for consumers and employees and encouraging corporate responsibility." In furtherance of these stated goals, ERC has actively pursued Proposition 65 claims as a private enforcer since 2009.

OAG has proposed various changes to its regulations implementing Proposition 65 in an effort to increase the public benefit accruing from Proposition 65 settlements facilitated by private enforcers, ensure adequate funding for the California Office of Environmental Health Hazard Assessment ("OEHHA"), and promote transparency and accountability in the allocation of funds from settlements received by private enforcers as payments in-lieu of civil penalties. While ERC agrees that these are important goals worth pursuing, ERC is concerned that several of OAG's proposed regulatory changes affecting how and when private enforcers may designate settlement funds as payments in-lieu of civil penalties (termed "additional settlement payments" under the new proposed regulations) are unauthorized and will have unintended and undesirable consequences.

Additional settlement payments play an important role in the proper functioning of Proposition 65's private enforcement provisions. Seventy-five (75) percent of civil penalties imposed in Proposition 65 settlements are allocated to OEHHA, and twenty five (25) percent are allocated to the private enforcer that has facilitated the settlement. While ensuring that OEHHA receives funding to continue and expand its regulatory activities to effectively implement Proposition 65 is of significant importance, it is equally important to ensure that private enforcers receive funds sufficient to allow them to effectively continue their own enforcement activities. The 75/25 split

in civil penalties does not strike this balance. Many private enforcers of Proposition 65 (including ERC) are non-profit entities, and the money obtained from enforcement actions represents their sole source of funding. A review of the summary of Proposition 65 settlements in 2014 produced by OAG shows that additional settlement payments are an important source of funding for non-profits such as ERC. Additional settlement payments beyond civil penalties allow private enforcers to receive the funding they need to continue to operate in the public interest.

The Proposed Changes Make The Standard For Evaluating The Propriety Of Additional Settlement Payments Unclear

OAG has proposed changes to California Code of Regulations, title 11, section 3203 which addresses, among other things, the standard for evaluating the propriety of additional settlement payments located in subdivision (b). This section provides courts with criteria for determining whether or not a proposed settlement containing payments in-lieu of penalties should be approved. The proposed changes to section 3203 would strike the language setting forth this standard without adding any specific criteria to replace it. Rather, the proposed section 3203, subdivision (d) makes only a general comment that "[t]he plaintiff must demonstrate to the satisfaction of the court that it is in the public interest to offset the civil penalty required by statute." While language in the proposed section 3204 appears intended to serve the same function as that found in the current section 3203, subdivision (b), this is not expressly stated, and it is not made clear which portions are intended as criteria to inform evaluation by the courts.

Disallowing Additional Settlement Payments In Out-Of-Court Settlements Is Not Authorized And Will Have Unintended Consequences

In OAG's proposed section 3204, subdivision (a), OAG would prohibit the allocation of any monies as additional settlement payments in settlements that occur out of court. This proposed regulation is not consistent with Proposition 65 as it will have unintended consequences that are detrimental to effective enforcement and are not in the public interest. Principally, the effect will be to discourage private enforcers from settling cases out of court. Because private enforcers will not settle without filing a complaint, litigation costs will become a component of nearly every Proposition 65 enforcement scenario. In situations where the parties are otherwise amenable to a settlement without litigating the merits of a private enforcer's claims, these are unnecessary and avoidable costs for businesses, and unnecessary inefficiencies for plaintiffs in that the time and expense required to initiate litigation and secure entry of a consent judgment could be better utilized in initiating additional enforcement actions and litigating the merits of other cases. This will also result in unnecessary delays. The processes of obtaining a consent judgment is time consuming. This means significant additional time between the initiation of an enforcement action and the time that the public will receive the benefits of that action in the form of reformulated products that are safer for public use, warnings, and civil penalties paid to OEHHA.

Moreover, while ERC has the utmost respect for OAG in its role as the primary enforcer of Proposition 65, it does not appear that OAG has statutory authority to prohibit additional

settlement payments in out of court settlements, and the proposed regulation and corresponding initial statement of reasons do not shed any light on OAG's basis for doing so.

The statutes cited by OAG in support of its authority to adopt this regulation give OAG authority to receive reports of settlements and appear and participate in settlement proceedings. (Health and Safety Code sections 25249.7, subds. (b)(2)(G) and (f)(4) & (5).) These statutes do not authorize the prohibition of additional settlement payments.

Arguably, OAG could adopt a regulation that implements its record keeping and reporting statutory authority. Instead of prohibiting additional settlement payments in out of court settlements, OAG could simply require that the record keeping and reporting elements proposed for consent judgements also be required for out of court settlements. OAG's initial statement of reasons for the proposed changes states that promoting accountability and ensuring sufficient allocation of money as penalties to fund OEHHA's Proposition 65 activities is OAG's purpose in prohibiting the allocation of monies as additional settlement payments in out of court settlements. A regulation that imposes additional recordkeeping and reporting requirements applicable to additional settlement payments would avoid the negative outcomes discussed above and accomplish OAG's objectives.

The Record Keeping Requirements In Proposed Section 3204 Are Excessive

Proposed section 3204 imposes record keeping and reporting requirements on private enforcers with respect to funds received as additional settlement payments. Subdivision (b)(4) and (b)(5) together would require that "[t]he settlement should describe with specificity the activities to be funded [by the additional settlement payment] and the amount of funding for each activity. It is not sufficient simply to state broadly that the Additional Settlement Payments will be used for future Proposition 65 enforcement, or to reduce exposure to toxic chemicals. . . . The settlement should require the plaintiff to obtain and maintain adequate records to document that the funds paid as an Additional Settlement Payment . . . are spent on the activities described in the settlement." While the intention in imposing these requirements is to promote accountability and transparency in the use of money received as additional settlement payments, the effects will be to make the use of additional settlement payments nearly impossible.

While ERC does generally track where in lieu funds are being spent (for example, on enforcement activities, on new NOVs etc.) the level of specificity proposed by OAG would be costly and highly inefficient as private enforcers would have to devote significant staff time (or potentially hire additional staff at even greater expense) to tracking the ultimate endpoint of every dollar of every individual settlement that was designated an additional settlement payment. ERC foresees the need to have additional staff members who would help determine exactly what specific activities will be listed for each consent judgment, log the activities for each consent judgment as a method of following deadlines for each one, follow up separately on each activity, and potentially create a separate bank account for each consent judgment to make sure funds can be directly tracked. This would a tremendous expenditure of resources with no perceptible public benefit. The time and money that would be required to comply with theses onerous reporting requirements would be much better spent on enforcement activities. Moreover, it is impossible to know in advance exactly how much money will be needed for particular aspects of

Proposition 65 enforcement. For example, a private enforcer may allocate a certain percentage of its settlements as additional settlement payments to fund preparation of new notices of violation such as staff time for research, and a certain percentage to provide for litigation costs such as filing fees, depositions, and expert witnesses. After settlements are signed and funds allocated, a private enforcer may determine that this allocation failed to accurately predict the enforcer's actual needs because more cases required extensive litigation than the enforcer had predicted. The private enforcer would thus be left unable to re-allocate fees to support its litigation activities because it is bound by its consent judgments to spend them only on new notices of violation. The opposite situation could also prevail: a private enforcer could end up settling cases it expected to litigate and, having over-allocated funds to be spent on litigation costs, be left sitting on funds that could be put to use initiating new enforcement actions. This lack of flexibility would effectively cripple private enforcers and would be completely counter to the public's interest in having Proposition 65 effectively enforced. While some additional record keeping and reporting requirements may be appropriate, they should not limit private enforcers' ability to determine how funds received as additional settlement payments are spent on an as-needed basis.

The Economic Interest Disclosure Provision Of Section 3204, Subdivision (b)(6)(B) Is Unclear And Excessive

For settlements involving an additional settlement payment, proposed section 3204, subdivision (b)(6)(B) would require "[a] disclosure of any economic interest that a party to the settlement or its counsel has in any entity, besides itself, that will receive all or part of any Additional Settlement Payment." This subdivision defines economic interest as having "the meaning set forth in Sections 18703 to 18703.5, inclusive, of Title 2 of the California Code of Regulations." Section 18703.5 essentially defines economic interest as "the personal expenses, income, assets, or liabilities of the official or his or her immediate family." This language, especially paired with the language of section 18703, reveals problems with the prospective interpretation and implementation of the proposed section 3204, subdivision (b)(6)(B).

Firstly, the economic interest provisions identified refer to government officials, and section 18703 describes criteria for determining whether or not an action affecting an official's economic interests is permissible by comparing its effect on the official's economic interest with its effect on the interests of members of the public in that officials "jurisdiction." There is no logical analogy or corollary application to private enforcers or their counsel. It is thus unclear why section 3204, subdivision (b)(6)(B) references section 18703, or how the provisions of section 18703 would be applied. At a minimum, the connection between section 18703 and section 3204, subdivision (b)(6)(B) must be clarified; ERC suggests that the reference to section 18703 be removed entirely.

Secondly, the proposed definition of economic interest is so general that determining whether or not it applied to a private enforcer or its counsel would be an unreasonable burden. For example, a person involved in a Proposition 65 settlement (or a family member of that person) might have money in a mutual fund that had purchased stock in the company that would receive an additional settlement payment. Participation in the mutual fund would fall within the definition of economic interest and trigger a disclosure obligation, but learning of this economic connection

would be unreasonably difficult, and would not produce any discernable public benefit. The scope of the economic interest for which disclosure is sought should be clarified, and limited to interest that are readily discernable to the parties involved without requiring extensive background research.

Conclusion

ERC looks forward to continuing to participate in constructive dialogue with OAG and other business groups to develop effective amendments to Proposition 65. Thank you for the opportunity to submit comments on the proposed amendments, and for considering our letter.

Sincerely,

Chris Heptinstall
Executive Director, Environmental Research Center, Inc.