

APPENDIX 3
SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE THIRD NOTICE PERIOD
OF OCTOBER 28, 2005 THROUGH NOVEMBER 14, 2005

COMMENT NO.	COMMENTS & AFFILIATION	COMMENT	RESPONSE
PH2-1	Aaron Locker Toy Industry Association	<ul style="list-style-type: none"> • Recommends adding the U.S. Consumer Product Safety Commission (CPSC) to sub-section (b) to allow use of CPSC recommended test methodologies to test products for potential exposures to listed chemicals. 	<ul style="list-style-type: none"> • OEHHA notes that the Toy Industry Association's comment does not relate to the single amendment made to the proposed regulation that was the subject of the Notice issued on October 28, 2005. Although OEHHA is not required to do so, it considered the comment and agrees that in some circumstances the Consumer Product Safety Commission (CPSC) may "require or sanction" a method of analysis that could comply with the requirements of the proposed regulation. Therefore, OEHHA has amended the proposed regulation to include the CPSC as a potential source of methods of detection and analysis for listed chemicals.
PH2-2	Kristin Power Grocery Manufacturers of America (GMA)	<ul style="list-style-type: none"> • States GMA support of expansion of available laboratories, ability to use a permitted test method even if it is not the most sensitive. • Additional clarification needed as to use of a permitted method of detection. Suggests change to sub-section (c) that would essentially require the use of the test method in the business's permit by adding the phrase, "in the absence of a method required by a permit" immediately following the word "or" in the proposed regulation. • Requests a change to subsection (c) that would allow a person to use any test methodology that is required or 	<ul style="list-style-type: none"> • OEHHA is pleased that the GMA supports many of the amendments that have been made to the proposed regulation. • OEHHA notes that the GMA's comments do not relate to the single amendment made to the proposed regulation that was the subject of the Notice issued on October 28, 2005. OEHHA declines to make the proposed changes to the regulation for the

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PH2-2 (continued)	Kristin Power	sanctioned by an agency listed in subsection (b) rather than the most sensitive of those methodologies.	<p>reasons stated below.</p> <ul style="list-style-type: none"> • As to the first proposal, the intent of the amendment OEHHA already made to the regulation is to allow a person to use a test method required by his or her permit even where it might not be the most sensitive test method available. This is consistent with the stated purposes of the regulation (i.e. to allow a business to rely on test methods they already use for other programs for purposes of ensuring compliance with Prop 65 and to encourage businesses to conduct voluntary compliance testing for their discharges, releases and exposures). The change proposed by GMA would essentially require a business to use only the test method contained in its permit for purposes of this regulation. This reduces the flexibility built into the regulation and could require a business to use a less sensitive test method among those available. • The second amendment proposed by the GMA would essentially allow a business to use any method that is required or sanctioned by the agencies listed under subsection (b). This would expand the available methodologies to the extent that it would negate the requirement in subsection (c) that the

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PH2-2 (continued)	Kristin Power		business use the most sensitive method that meets the criteria in the regulation. Where more than one test methodology is available to a business that otherwise meets the requirements of the regulation, it is reasonable and consistent with the purposes of the Act to require that the business use the most sensitive method.
PH2-3	William Verick Mateel Environmental Justice Foundation and CLEEN	<ul style="list-style-type: none"> • Subsection (c) of the proposed regulation needs clarification. As currently drafted, it is not clear that the permit being referenced has to belong to the person or business using the test methodology required under it. • Suggests additional language for the regulation that would clarify this point. 	<ul style="list-style-type: none"> • Based on this comment, a change has been made to subsection (c) to clarify that a method of detection and analysis used must either be one that is required by the person's own permit, or the most sensitive method that otherwise meets the criteria listed in subsection (b).
PH2-4	Carol Brophy Lynn Roberts Company	<ul style="list-style-type: none"> • Requests that OEHHA make clear in the final statement of reasons for this regulation that use of Section 12900 is voluntary and is not intended to limit or alter the California Rules of Civil Procedure or Evidence as applied to enforcement actions under Proposition 65. • Requests that OEHHA clarify that other regulations should be applied to situations in which the chemical in question has been detected. • Requests that OEHHA clarify that section 12900 does not prevent a defendant from asserting other defenses including facts showing that an alleged exposure is impossible. • Requests that the provisions of Subsection (a)(3) be extended to internationally certified laboratories. 	<ul style="list-style-type: none"> • OEHHA agrees that Section 12900 expressly states that it should not be construed to limit plaintiffs or defendants from offering any evidence that is otherwise admissible under California Law (see Subsection (e) of the proposed regulation). This point was made in the initial statement of reasons for the regulation and will be restated in the final statement of reasons. • OEHHA has consistently noted throughout the record of this rulemaking that this regulation would only apply in circumstances in which the chemical in question is not detected and that in the event the chemical is detected, other

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PH2-4 (continued)	Carol Brophy		<p>regulatory provisions would apply.</p> <ul style="list-style-type: none"> • OEHHA agrees that Section 12900 expressly states that it should not be construed to limit plaintiffs or defendants from offering any evidence that is otherwise admissible under California Law (see Subsection (e) of the proposed regulation). This point was made in the initial statement of reasons for the regulation and will be re-stated in the final statement of reasons. • As for the final point, to the extent that a foreign laboratory can show that it is accredited or certified as required by subsection (a) (3) of the proposed regulation, that laboratory's test results can be used to assert the defense offered by this regulation. The physical location of the laboratory is not significant. What is important is that the laboratory meets the quality standards necessary to be accredited or certified for the particular method of detection and analysis. • No change to the regulation was made based upon these comments.
PH2-5	Michael J. Van Zandt Importers and distributors in the plumbing industry	<ul style="list-style-type: none"> • Supports many of the proposed amendments to the proposed regulation but reiterate and incorporate by reference their prior comments on the proposed regulation. • Supports the expansion of the laboratory certification requirements to include nationally accredited or certified labs and suggests including two additional organizations in 	<ul style="list-style-type: none"> • Most of the comments made have already been raised previously and were considered and responded to in earlier comment periods, so these issues are not addressed again here. • OEHHA believes that the regulation

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PH2-5 (continued)	Michael J. Van Zandt	Subsection (a) (3); the International Association of Plumbing and Mechanical Officials and the American National Standards Institute.	<p>provides sufficient flexibility for business in choosing a laboratory for compliance testing. To the extent that the International Association of Plumbing and Mechanical Officials or the American National Standards Institute is similar to the NELAP, they would already be included within the existing language of the proposed regulation. In the event these organizations do not meet the requirement of the regulation, a business could still use test results obtained from a non-accredited laboratory to defend an enforcement action, assuming such a test result were allowed under the general rules of evidence (see subsection 12900(e)).</p> <ul style="list-style-type: none"> • No change to the regulation was made based upon these comments.
PH2-6	Eileen M. Nottoli Allen, Matkins, Leck, Gamble & Mallory	<ul style="list-style-type: none"> • Alleges that the proposed regulation will impose significant cost burdens on businesses while limiting their ability to defend enforcement actions. • Objects to requirement that a laboratory be certified by the State of California, a federal agency or a nationally recognized accrediting organization such as NELAP as it is difficult to use such a lab for products produced outside the United States. • Objects to the requirement that the method of detection and analysis be “required or sanctioned” by a limited number of federal state and local governmental agencies. • Claims that methods of detection and analysis that may be 	<ul style="list-style-type: none"> • These comments made have already been raised previously by this commenter and were considered and responded to during both of the first two comment periods. The responses are not duplicated here. • To the extent that a foreign laboratory can show that it is accredited or certified as required by subsection (a) (3) of the proposed regulation, that laboratory’s test results can be used to assert the defense offered by this regulation. The

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PH2-6 (continued)	Eileen M. Nottoli	part of a settlement agreement or consent decree will not meet the criteria of the regulation.	physical location of the laboratory is not significant. What is important is that the laboratory meets the quality standards necessary to be accredited or certified for the particular method of detection and analysis. <ul style="list-style-type: none">• No changes were made to the regulation based on these comments.