FINAL STATEMENT OF REASONS

ADOPT SECTION 12903, *NOTICES OF VIOLATION*
TITLE 22, DIVISION 2, CALIFORNIA CODE OF REGULATIONS

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65 (hereinafter referred to as "the Act"), requires businesses to provide clear and reasonable warnings prior to knowingly and intentionally exposing individuals to chemicals that have been listed by the State as known to cause cancer or reproductive toxicity [Health and Safety Code Section 25249.6]. The Act also prohibits businesses from knowingly discharging listed chemicals into sources of drinking water [Health and Safety Code Section 25249.5].

Exemptions from the warning requirement and the discharge prohibition are provided in the Act. Warnings are not required when the business responsible for the exposure to a listed chemical can show that the exposure occurs at a level that poses no significant risk of cancer (defined in regulation as a risk not exceeding one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime), or that does not exceed the "no observable effect level" divided by 1,000 for reproductive toxicants.

By Executive Order W-15-91, the Office of Environmental Health Hazard Assessment (OEHHA) was designated as the lead agency for the implementation of the Act.

Procedural Background

On December 13, 1995, OEHHA held a workshop to receive public comment on the clarification of information to be included in a 60-day notice of intent to sue. OEHHA, working with the Attorney General's Office, proposed to draft regulations to specify information that should be included in 60-day notices served under the Act. Details regarding this proposal are contained in a document entitled, "Draft Clarification of 60-day Notice Requirements." Based upon the comments received during the workshop, OEHHA decided to proceed with the adoption of regulations. With assistance from the Attorney General's Office, draft regulations were prepared and a notice of proposed rulemaking action was published on July 5, 1996 in the California Regulatory Notice Register. A public hearing was held on August 23, 1996 to receive public comments.

Purpose of the Final Statement of Reasons

This final statement of reasons sets forth the reasons for the final language adopted by OEHHA for section 12903 and responds to the objections and recommendations submitted regarding that section. Government Code section 11346.9(a)(3) requires that the final statement of reasons contain a summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. It further provides that this requirement applies only to objections or recommendations

specifically directed at the proposed action or the procedures followed in proposing or adopting the action.

Specific Findings

OEHHA has considered the alternatives available to determine which would be more effective in carrying out the purpose for which the regulation was proposed, or would be as effective and less burdensome to affected private persons than the proposed regulation. The only other alternative considered by OEHHA was to not adopt a regulation addressing notices of violation under the Act. As will be discussed in the subsequent sections, the need to establish clear, consistent requirements which such notices must meet to be considered acceptable is plainly indicated by California's experience with actual notices that have been given by private parties. OEHHA has rejected the alternative of not adopting a regulation on this basis and has determined that no alternative would be more effective than, or as effective and less burdensome to affected persons than the proposed regulation. The proposed regulation does not create any additional requirements that could result in an adverse economic impact on businesses, nor does it impose any mandate on local agencies or school districts.

Necessity for the proposed regulation

Violations of either the warning requirement or the discharge prohibition are enforced through civil lawsuits filed by the Attorney General, by district attorneys, by specified city attorneys, or by any person acting in the public interest [Health and Safety Code Section 25249.7]. The Act allows private persons to file civil actions to enforce its provisions, but only under the following circumstances:

> (d) Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation which is the subject of the action to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation is alleged to occur and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation. [Health and Safety Code section 25249.7; emphasis added.]

Thus, the statute does not permit the citizen merely to provide notice of its intent to sue. Instead, the citizen must provide notice of "the violation which is the subject of the action." While this term is not specifically defined, it mandates two things: first, that the actual violation be described in the notice in some way, and second, that the subject of the action is then limited to the violation for which notice was given. If a "violation" was not included in the notice, it cannot be part of the action.

Accordingly, the content, manner and service, and time of service have substantial legal effects on the public, potential private plaintiffs, regulated entities, and enforcement agencies. Because the statute provides relatively little definition of the notice requirements, there is a need for

guidance on these matters. In the absence of further guidance, substantial controversies have arisen in enforcement litigation concerning the nature of these requirements.

Proposition 65's notice provision appears to be modeled generally after similar "citizen suit/60-day notice" provisions of certain federal environmental laws, such as the Clean Water Act. (See 33 U.S.C. § 1365(b)(1)(A).) In a recent appellate court examination of the notice issue, the Third Circuit in Public Interest Group of New Jersey v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995), described the function of the Clean Water Act notice as follows:

> In deciding whether to initiate an enforcement action, the EPA and the state must be provided with enough information to enable them intelligently to decide whether to do so. At the same time, the alleged violator must be provided with enough information to be able to bring itself into compliance. We will judge the sufficiency of the plaintiffs' 60-day notice letter in terms of whether it accomplishes these purposes.

(Id., at 1249.) Thus, the first focus of a citizen suit notice is to enable the prosecutor "intelligently" to decide whether to file suit. Where a notice provides no real description of the claim, it cannot perform that function. Typically, federal agencies administering statutes with similar sixty-day notice provisions have adopted regulations specifying the required content of the notices (Clean Air Act: 40 CFR §§54-54.3; Clean Water Act, 40 CFR §§135-135.1; Safe Drinking Water Act: 40 CRF §§135.10-135.13; Toxic Substances Control Act: 40 CFR §§702.60-702.62; Resource Conservation and Recovery Act: 40 CFR §254; Surface Mining Control and Reclamation Act: 30 CFR §700.13).

Second, the notice allows the defendant an opportunity to cure the violation. Under Proposition 65, penalties of up to $2,500 per day per violation are provided. Once informed of the violation, the defendant can bring the violation to a halt, and at least prevent the accrual of any further liability for penalties. While this would not by itself necessarily prevent a civil action, since a plaintiff may sue for penalties for past violations, the limitation of continuing liability nonetheless is quite significant. As noted by the court in Public Interest Group of New Jersey v. Hercules, Inc., *supra*, the alleged violator must be provided sufficient information to bring itself into compliance because it is compliance with the Proposition 65 requirements that protects the public and the environment.

Finally, it is critical to understand that under Proposition 65, the citizen plaintiff obtains the right to proceed "in the public interest." It also obtains the right to seek civil penalties, 75% of which would go to the state, and 25% to the plaintiff. Such influence over whether or not penalties will be collected for the public treasury is not to be taken lightly. As a condition precedent to establishing a citizen's right to proceed in the public interest on that matter, and to collect funds for the public treasury, the notice requirement should not be dismissed as a mere technicality.

As a general matter, any notice "is directed to someone who is to act or refrain from acting in consequence of the information contained in the notice." (Bird v. McGuire (1963) 216 Cal.App.2d 702, 713.) As another court stated, "Notices, like that herein involved, are not

designed nor purposed as mere scraps of paper nor empty formalities." (Gianni v. City of San Diego (1961) 194 Cal.App.2d 56, 63.) Thus, failure to give some reasonable effect to the notice requirement not only would be contrary to the wording of the statute, but contrary to the principles of notice established in a wide variety of contexts.

These provisions are important not only in enabling law enforcement officials to investigate a notice, but in defining the scope of the private person's right to sue under the statute. Since the notice must identify "the violation which is the subject of the action," other violations that are not adequately described in the notice cannot properly be a part of the private action. It has been suggested that this requirement could lead to piecemeal litigation, as a private person identifies different categories of products in violation of the law, and provides successive sixty-day notices. This, however, is a necessary consequence of the letter and purpose of the citizen suit provision, which is to allow private persons to identify particular violations, provide law enforcement authorities with an opportunity to prosecute them, and to bring actions only where law enforcement authorities do not do so. Private parties are not granted the unlimited right to prosecute violations that is granted to law enforcement authorities, and the notice provision reflects this.

Accordingly, OEHHA is proposing to adopt Section 12903 to specify the requirements for sixty-day notices in order to assure that such notices actually further the purposes described above.

One commenter (C-6) objected that the statement in the Initial Statement of Reasons that the citizen suit provision "is modeled generally after" similar provisions in federal laws and should be removed because it "is jumping to a reasonable but unsupported conclusion." The reference has been modified to read "appears to be modeled generally after."

One commenter (C-12) disputed the conclusion in the fiscal Impact Section that there would be no additional costs or savings for the affected entities. This commenter, which has given sixty-day notices in the past, asserts that the regulation will increase its costs of mailing and processing notice letters, and will increase its litigation costs as issues of proper notice are litigated. The agency disagrees. There should be little or no increase in mailing costs. As to litigation, the agency has found that there has been an increasing amount of litigation concerning the legal requirements for a sixty-day notice, and the provisions of this regulation will reduce that litigation by specifying a number of requirements that otherwise would be determined through expensive litigation.

Section 12903

Subsection (a). General.

Subsection (a) will provide that a notice under the statute is a notice meeting the requirements of the proposed regulation, and that actions by private persons under the statute must be brought in compliance with these regulations. While many Proposition 65 regulations adopt a "safe harbor" format (i.e., conduct outside the scope of the regulations is not prohibited, it simply is not specifically authorized), Section 12903 is not a "safe harbor" regulation. A notice must comply

with these regulations, or it does not confer upon a private person the authority to commence an action under Health and Safety Code section 25249.7(d).

Two commenters (C-6, C-7) stated that the second sentence of this section is surplusage and should be deleted. The first sentence points out that a notice under the statute must meet the requirements of section 12903. The commenters are correct that this should give rise to the inference that the statute requires such a notice before an action may be commenced by a private person, therefore no further language should be necessary. The agency does not wish to rely on this inference, however, but wishes to make the provision explicit. In addition, the agency wished to make clear that a non-complying notice does not leave the court with authority to fashion whatever remedy it deems appropriate, but instead means that the private person had no legal ability to commence an action under the statute. (We note, however, that the agency has avoided using the term "jurisdiction." That term is commonly used with reference to actions under federal statutes, because federal courts are courts of limited jurisdiction. This term may not be appropriate with respect to California courts, and might implicate other issues concerning the court's authority to entertain the dispute, which the agency did not wish to address in this regulation.)

Another commenter (C-4) suggested that the second sentence of this section should be modified to delete the phrase "the provisions" and replace it with "all relevant requirements." The reference has been changed to "all requirements" in order to use language parallel with the first sentence's reference to "all requirements." This avoids any possibility that someone would claim that the use of the term "provisions" in the second sentence had a different meaning than the use of the term "requirements" in the first sentence.

One commenter (C-7) suggested that the phrase "meeting all requirements of this section" be replaced with "including the information required by subsection (b)." This suggestion was not adopted, because the requirements of the section do not just address information that must be included in the notice, but other issues such as the manner of service and the computation of time.

One commenter (C-6) suggested that language is needed to avoid unclear or misleading notices, proposing that a sentence be added providing:

> A notice shall not be deemed sufficient if compliance with any of these requirements, or the notice taken as a whole, is obscure, contradictory or evasive.

This suggestion has not been adopted. The agency finds the terms "obscure, contradictory or evasive" to be too vague to be applied in this context in a helpful manner.

Subsection (b). Contents of Notice.

Subsection (b) of Section 12903 sets forth requirements relating to the information that must be included in a notice.

Paragraph (b)(1). General Information.

Many notices are sent to businesses, particularly out-of-state businesses, that are not familiar with the requirements of this law. The party giving the notice may not describe, or accurately describe, those requirements. Accordingly, it was determined that a concise summary should be provided to the alleged violator. An earlier draft of the proposed regulatory language, which was circulated informally, specified the contents of this summary, and required it to be included in the notice. Based on comments concerning that proposal, it was concluded that such a summary should be presented in a way that makes clear that it constitutes the lead agency's summary of the statute, not that of the private party.

The text of OEHHA's summary appears as Appendix A to the proposed regulation. The summary is intended only to provide general information to the lay person about the provisions of the statute, and does not represent an interpretation of the law.

This paragraph requires that a summary of the requirements of the statute ("Summary"), which was attached as Exhibit A, be attached to sixty-day notices.

One commenter (C-12) objected to the requirement of providing a summary of the statute with a notice. The agency has concluded, however, that given a lack of knowledge about the statute, particularly among relatively small businesses and out-of-state businesses that sell products into California, general information concerning the statute is needed in order to give meaning to the particular violations alleged in the notice. Thus, the requirement of providing a summary will be retained.

A number of comments were made on the summary of the statute that would be required to accompany the notice. (C-6, C-10, C-12) A number of these comments claimed that the summary actually misstates the law, or asked for other changes that appeared to be designed to incorporate regulatory changes through changes in the summary. As was pointed out previously in this Statement of Reasons, the summary is not intended to have the force and effect of law, or to obviate the need for competent legal advice. It is simply intended to provide general information to the recipient. Indeed, the summary itself specifically so states.

One commenter (C-2) suggested that the summary should state that Proposition 65 provides that the warning requirement does not apply where it is preempted by federal law. While this is correct (and would be correct even if the statute did not so specify), the doctrine of preemption is complex and its application varies depending on the specific provisions of the federal statute at issue. Accordingly, this general statement would provide no useful guidance to the party receiving the notice, and the agency has decided not to include it in the summary.

One commenter (C-10) suggested that the summary include examples of "safe harbor" warning language. This suggestion was not adopted, because it would not be possible to include such language, along with a description of the circumstances under which the language may be used, while maintaining the brevity of the summary. As stated in the summary, if further information is needed, OEHHA is available for assistance.

One commenter (C-6) suggested redrafting the section entitled "Clear and Reasonable Warnings" in a manner that the agency does not think entirely tracks the existing regulations. Thus the suggested language was not adopted.

One commenter (C-6) noted some ambiguity in the last line of the paragraph, which has now been corrected to read "Exposures are exempt from the warning requirement if they occur less than twelve months after the date of listing of the chemical." (A corresponding change has been made to the description of the twenty-month exemption from the discharge requirement.)

One commenter (C-12) suggested that the description of the discharge requirement did not accurately reflect that provision of the statute because it does not reflect that a violation occurs not only where a listed chemical enters a source of drinking water, but also where it "probably will pass" into a source of drinking water. This has been corrected.

One commenter (C-6) suggested rewriting the paragraph on exemptions from the discharge provision in a manner that does not appear to track the existing regulations. Another commenter (C-12) asserted that the phrase "the amount detected", was ambiguous. The last sentence has been rewritten to directly track the relevant language and to clarify ambiguity. It is not intended to address any issues that have not been resolved by regulation. In the final version, it now reads:

> A significant amount means any detectable amount, except an amount that would meet the "no significant risk" or "no observable effect" test if an individual were exposed to such an amount in drinking water.

One commenter (C-6) suggested that the headings concerning the risk based exemptions in the "exemptions" section of the summary be changed to "Exposures to carcinogens which are exempt: and "Exposures to reproductive toxins which are exempt. The agency found this change to be somewhat confusing, because it makes it appear that the carcinogen or reproductive toxin itself is exempt. The heading for reproductive toxins is changed to state "at 1,000 times the level in question."

A commenter (C-6) suggested that the last sentence of the paragraph describing the "no significant risk" exemption was unclear. It has been modified to read "identify specific `no significant risk' levels for more than 250 listed carcinogens."

A commenter (C-6) suggested that the title of the section concerning exemptions from the discharge requirement is clumsy and misleading. The agency did not find the suggested alternative to be better, and retained the language as contained in the proposed regulations.

Paragraph (b)(2). Description of Violation.

Experience over the last several years has shown that many notices do not describe the nature of the alleged violation in an intelligible manner. This makes it difficult for public prosecutors to

evaluate the merit and significance of the alleged violation. In addition, if a civil action is filed based on such a notice, a controversy then exists concerning the proper scope of the suit. In a number of instances, private plaintiffs have sought through discovery or other procedures to expand the scope of the civil action significantly beyond the scope that one would reasonably infer from the notice. This also makes it difficult or impossible for the alleged violator to cure any violation prior to litigation, thereby impeding the achievement of the goals of the statute through quick compliance.

On the other hand, some alleged violators have demanded that the notice include the specific evidence by which the violation would be proven and evidence negating affirmative defenses that might be raised by the alleged violator in litigation. While such information is useful, the production of such evidence does not appear to be required by the operative statutory phrase, i.e., "notice of the violation which is the subject of the action." Thus, the proposed regulation simply provides that the notice "shall provide adequate information from which to allow the recipient to assess the nature of the alleged violation," and specifies the information needed to comply with that standard.

The information requirements set forth in subsection (b) are intended to ensure that notices provide adequate information necessary for the recipients to evaluate the nature and scope of the alleged violation.

Subparagraph (b)(2)(A) sets forth required elements of all notices, as follows:

(i). *name, address, and telephone number of the noticing individual or a responsible individual within the noticing entity and the name of the entity*: Identification of the party giving the notice is needed to give the receiving parties an opportunity to contact the noticing party to resolve the issues raised in the notice and to identify who will be entitled to pursue a civil action.

(ii). *name of the alleged violator(s)*: Identification of the alleged violator is basic information necessary to allow any evaluation of the alleged violation. In addition, this assures that any civil action will be limited to those parties identified in the notice.

In some instances, a single notice may identify as many as 50 or 100 alleged violators. This format may be convenient where the different violators have committed basically the same type of violation, which can be described in a single notice. The proposed regulation does not preclude the use of these types of notices, nor does it require a group or industry-wide notice. A person may provide separate notices to different violators concerning the same type of violation, as long as each individual notice contains all information required by the regulation.

(iii). *the approximate time period during which the violation is alleged to have occurred*: This information is important to allow investigation of the facts and analysis of the overall scope and importance of the alleged violation. This includes determining whether the chemical involved in the alleged violation is in fact subject to the

requirements of the Act at the time period in question, or was exempt because the statutory grace period had not expired.

(iv). *the name of each listed chemical involved in the alleged violation*: The chemicals subject to the Act are determined pursuant to specific standards set in the Act (Health and Safety Code Section 25249.8), and published in the *California Regulatory Notice Register* and the California Code of Regulations. (See 22 CCR Section 12000.) Nearly 600 different chemicals have been placed on this list to date, at different times since 1987. Existing regulations provide guidance for determining levels of exposure to listed chemicals which are exempt from the Act (i.e., levels which pose "no significant risk" of cancer, or which represent the "no observable effect level" divided by 1,000 for reproductive toxicants). The regulations also specify levels of exposure to particular chemicals that are exempt from the Act (22 CCR Section 12701-12711, 12801-12805).

A violation does not consist of exposure to toxic chemicals in general, but of exposure to a particular chemical on the Proposition 65 list. Because of their different properties, different chemicals raise very different issues in determining whether there is a violation. For example:

- Some chemicals are intended constituents present at up to 50% of a product by volume; others are "trace contaminants" present in concentrations measured in parts per billion, and which are found only through sophisticated analytical methods;

- The chemicals have a wide range of potencies. Exposures to toluene at levels not exceeding 7,000 micrograms (inhaled) per day are deemed to be exempt from the Act, while exposures to 2,3,7,8-tetrachlorodibenzodioxin (dioxin) must be below 0.000005 microgram (5 one-millionths of a microgram) per day in order to be deemed to be exempt;

- Some chemicals have been on the list since February 27, 1987, while others were added as recently as September 1, 1996.

In short, knowledge of the particular chemicals involved in the alleged violation is critical to a public agency's ability to intelligently act on the notice. Moreover, if the citizen does not know whether a particular listed chemical is involved in an exposure or a discharge, it is hardly in a position to charge the defendant with violating the statute.

Subparagraph (b)(2)(B) specifies information required as part of notices alleging a violation of Health and Safety Code section 25249.5, the prohibition against discharges into drinking water sources. Where the notice alleges a violation of the "discharge" requirement, it should identify the "source of drinking water" into which a listed chemical is being discharged, to enable investigation. The requirement encompasses both current or potential sources.

Subparagraph (b)(2)(C) specifies that all notices alleging a violation of Health and Safety Code section 25249.6, the warning requirement, identify the route of exposure involved -- i.e., dermal contact, inhalation, or ingestion. Because the human body's ability to absorb different chemicals varies substantially by route of exposure, this is important information in investigating the potential merit of any claim.

Subparagraph (b)(2)(D) specifies that all notices alleging a violation of the Act for failure to warn about exposures from consumer products must identify the product or service or category of product or service involved. This issue has been one of the most problematic in evaluating notices.

Most notices adequately describe the products involved in the alleged violation, e.g., "ceramic dishes" or "spray paint." In some instances, however, the notices describe the products that are to be the subject of the action only in very broad terms, such as "various aerosol, paint, adhesive and/or automotive products, including but not limited to..." or "various chemical products, sold in bulk or as finished products(.)" This reference to the products is totally inadequate to describe the nature of the violation that is claimed. The descriptions are so general that they would appear to encompass virtually any product that might be made by certain companies. To notify the Attorney General of "the violation which is the subject of the action" as required by the Act, there must be some description of those products, otherwise the notice simply declares a general intent to sue this defendant under this law, which does not satisfy the statute.

This is not to suggest that a citizen must describe the product by some obscure product identification number, or describe spray paints by every shade. Clearly, it would be sufficient simply to say "aerosol spray paint," "car wax" or "paint thinner." Such a description would at least identify the category of products that will be the subject of the action, and would enable the public agency to focus the investigation.

In some instances, notices use the phrase "including but not limited to" with respect to both the chemicals and the products involved. Clearly, such expansive language provides no additional information concerning the claimed violation, and under the proposed regulation, would not be considered in any way to expand the alleged violation for which proper notice has been given.

For each product or category of product identified, the specific chemical also must be identified, pursuant to the requirements of subparagraph (b)(2)(A)(iv). In some instances, notices have been provided that identify a long list of chemicals, and a number of products, without indicating which chemicals are alleged to be present in which products. This completely defeats the purpose of identifying the chemicals in question, and would not be permitted under the proposed regulation.

A notice that does not identify specific products, or that purports to identify "all products made by Company X" or for identification of chemicals states "all chemicals on the list" does not comply with this section.

Subparagraph (b)(2)(E) specifies that all notices alleging a violation of the Act for failure to warn about occupational exposures must provide the following information:

(i) *the general geographic location of the unlawful exposure to employees, or where the exposure occurs at many locations, a description of the occupation or type of task performed by the exposed persons*: Most occupational exposures are alleged to take place at a given worksite, i.e., a factory or office, and the regulation would require that this location be identified. Some exposures, however, might be alleged to occur to a given category of workers at a variety of locations, so the regulation would allow identification in that manner where appropriate.

(ii) *where the alleged violator is the manufacturer or distributor of the chemical or products causing the exposure, the notice shall identify products in the same manner as set forth for consumer product exposures*: In some instances, the occupational exposure is caused by the use of a chemical or other product in the workplace. In those instances, the provider of the chemical or product should be identified (if it is an alleged violator), as should the product in question. The same information requirements for notices involving consumer products in subparagraph (b)(2)(D) apply.

Subparagraph (b)(2)(F) specifies that all notices alleging a violation of the Act for failure to warn about environmental exposures identify the general geographic location of the source of the unlawful exposure, and whether the unlawful exposure occurs beyond the property owned or controlled by the alleged violators. For environmental exposures, identification of the general location of the source of the exposure is sufficient. Some alleged environmental exposures occur to persons within the confines of the premises of the facility in question, while others are alleged to occur to persons on premises outside the facility. Since the manner of providing warnings to these different persons differs substantially, this information is needed to evaluate the allegation, and the regulation requires that the notice specify whether the exposure occurs beyond the property owned or controlled by the alleged violators.

One commenter (C-6) objected that the statement in the Initial Statement of Reasons that "many notices do not describe the nature of the alleged violation" is overstated. This commenter states that only a few notices, and only by one particular litigant, are subject to this comment. The agency disagrees. Of over 2,500 notices received by the Attorney General to date under the statute, several hundred notices raised substantial issues concerning their adequacy, and these were not confined to those given by one particular litigant. At the same time, some organizations consistently have given notices that were completely adequate.

One commenter (C-12) asserted the "irony" that enforcers would be required to give "more elaborate" notices than the warnings required to people who are exposed to listed chemicals. This is a function of the fact that a clear and reasonable warning under the statute can be provided in concise and direct terms, indeed, must be concise in order to be read in the information-rich consumer environment. A notice of violation, in contrast, requires a variety of more specific information in order to achieve its function under the statute. Compliance with the Proposition 65 requirements is a fundamental part of protecting public health and the

environment. Therefore, there needs to be adequate information provided to encourage quick correction of the violation.

One commenter (C-6) objected that the Initial Statement of reasons reference to "dioxin" is inaccurate because the "listed chemical in question is 2,3,7,8 TCDD, which is only one of a number of compounds properly identified as `dioxins'." The Initial Statement of Reasons actually refers to "`dioxin' (2,3,7,8-tetrachlorodibenzodioxin)[.]" Thus, the objection is not entirely accurate. Nonetheless, the reference has been changed to refer to 2,3,7,8-tetrachlorodibenzodioxin (dioxin).

The Initial Statement of Reasons used "utility pole technicians" as an example of an employee for which description of the occupation or type of task performed would be more appropriate than a description of the location of the worksite. One commenter (C-1) objected to the use of this example on the ground that there is no exposure to Proposition 65 chemicals to utility pole technicians. The example mentioned was intended to be hypothetical, and not to suggest whether there is an exposure to those employees. It was used as an example of a situation in which it would be impractical to designate the location at which each employee is exposed (since there are thousands of them), but where a description of the task performed would clearly inform the alleged violator of the nature of the violation.

One commenter (C-7) objected that the requirement that occupational exposure notices identify the occupation or type of task performed by the exposed persons would be extremely difficult, if not excessively lengthy. This appears to be based on a misunderstanding of the proposed regulation. This language is not a requirement for all occupational exposure notices, but only an alternative for those situations in which description of the occupation or task performed by the exposed persons is simpler, equally informative, and more practical than identifying multiple locations.

The original draft seemed to cause some confusion among commenters (e.g., C-7) concerning the circumstances under which the occupational exposure occurs due to the use of a product sold for use in the workplace. As originally drafted, subsection (b)(2)(E)(ii) could be interpreted to require that notices in such cases meet both the consumer product notice requirements, and all other occupational exposure notice requirements. The text has been modified slightly to make clear that where the occupational exposure is caused by a product used in the workplace, and the provider of the product (rather than the employer), is the alleged violator, identification of the product in a manner that would meet the requirements for a consumer product satisfies the regulation. A description of the location of the exposure is not necessary. If an employer is an alleged violator, however, then the geographic description requirements under subsection (b)(2)(E)(i) also must be satisfied. For example, suppose that a noticing party alleged that a product sold exclusively for occupational use by employees in their workplace resulted in an exposure that required a warning. If the manufacturer of the product were the only alleged violator, then the notice must identify the product properly, but need not identify the locations of the exposure. Such information would not be necessary to enable the alleged violator to understand the nature of the alleged violation. If the employer were an alleged violator,

however, the location (or task description) requirement must be satisfied. If manufacturer and employer are both alleged violators, then both requirements must be satisfied.

One commenter (C-3) objected to the requirement that the notice contain "only brief and reasonably clear information" on the ground that these terms are vague and unnecessarily limit the scope of what must be set forth in the notice. The agency agrees that the term "brief" should be removed, since whether the notice can be given in "brief" terms depends on whether the nature of the violations alleged can be expressed briefly. The term "reasonably clear" will be retained, however, because the agency wishes to assure that the regulations are not interpreted in a manner that would require the notice to provide information in a manner that is more precise than necessary to assure that the recipients of the notice are given the proper information.

One commenter (C-2) requested that the name and address of the employer in whose workplace the alleged violation has occurred be included in the notice. Another commenter (C-3) suggested that the term "general geographic location" is vague and requires further definition. Where this term was used concerning occupational exposures, section 12903(b)(2)(E), it has been replaced with the phrase "identification of the facility or workplace." This identification may be through describing the general geographic location, or other information that would identify the workplace, e.g., "the Acme Refinery in Smallsville," or "each Acme Auto Glass replacement store in Los Angeles County." The language does not require identification of the specific location of the exposure within the facility or workplace, e.g., a particular office or piece of equipment.

Where this term, "general geographic location", was used in reference to environmental exposures, it has been replaced with the phrase "the location of the source of the exposure, or where numerous sources of the exposure are alleged, the location need not be stated if the notice identifies each facility or source of exposure by stating those common characteristics that result in the allegedly unlawful exposure in a manner sufficient to distinguish those facilities or sources from others for which no violation is alleged." This language has been added because there are some situations in which the alleged violator operates, owns, or controls a number of facilities with similar characteristics that are alleged to result in exposures requiring a warning. If the nature of the violation can be described with sufficient specificity without reference to the location of each facility, it adds no useful information to require the identification of each location. Moreover, if an alleged violator operates fifty facilities with common characteristics, but a notice of violation states the address of only forty of them, nothing is gained by excluding from the action the ten facilities for which no address was given, but which clearly would be understood from the notice to be subject to the same claim. While the specific street address is the clearest way to identify the facility, it is not required. A noticing party that does not provide an address, however, assumes the burden of providing a description that complies with the regulation. The agency notes that the statute requires notice to the District Attorney of each county in which a violation occurs, thus, regardless of the terms of the notice, it would be valid only as to facilities within those counties for which the District Attorney is given notice.

In addition, in response to a comment (C-6) this reference has been divided into two sentences, and the term "unlawful exposure" has been modified to read "exposure for which a warning

allegedly is required". The sentence now reads "The notice shall state whether the exposure for which a warning allegedly is required occurs beyond the property owned or controlled by the alleged violators."

One commenter (C-11) suggested that the phrase "or the category of consumer product or services" and the phrase "of the nature" be deleted from subsection (2)(D). Inclusion of the latter phrase "of the nature" is necessary to assure that the regulation is not interpreted to require identification of the precise items, e.g., the individual cans of paint. The term "category," however, may be too broad, because it may be interpreted as allowing extremely general descriptions such as "paints and coatings," "cosmetics" or other commonly used descriptions of broad categories of products. Accordingly, the term "category" has been deleted, and replaced with the term "specific type." The agency thinks this term will require a somewhat more particular description, e.g., "aerosol spray paint," "typewriter correction fluid," or "paint stripper," without requiring an unnecessarily particular identification of the product.

One commenter (C-7) urged the agency to remove the requirement that the products be described with sufficient specificity to distinguish products for which no violation is alleged from products identified in the notice. This commenter stated that such a requirement would require the noticing party "to investigate the alleged violator's product lines exhaustively in order to distinguish the listed category of products or services from the company's other product or services that may be in compliance with Proposition 65." The language in question, however, would not create any such investigative burden, it simply would require the noticing party to limit the terms of its notice to those products about which it has information to justify alleging a violation. Other products, whether investigated or not, should be left out of the notice.

One commenter (C-4) suggested that a provision be added concerning consumer product notices that would require that it "may not contain any subcategories of products for which there is no good faith basis for alleging a violation." The commenter points out that "overbroad" notices diminish the value of the notice to the prosecutor and the regulated entity. The agency agrees with this view, and discourages private parties from providing overbroad notices. Nonetheless, the specific proposal was not adopted, because it was found to be difficult to define and would create an issue concerning the information available to the noticing party at the time of giving the notice. Two provisions of the proposed regulation already address this issue in part. First, subsection (b)(2)(D) provides that the notice must identify the products that not only identifies the nature of the items, but sufficient "to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged." Thus, if the notice is extremely broad, it may not satisfy this requirement. In addition, subsection (b)(2)(B) provides that the notice must identify the chemical to which exposure is alleged. In order to clarify the application of this provision to consumer products, the final regulation has added a sentence to the end of subsection (b)(2)(D) providing that "[t]he identification of chemical pursuant to subsection (b)(2)(A)(iv) must be provided for each product or service identified in the notice." By requiring that the chemicals in question be identified for each product in the notice, rather than simply setting forth a long list of chemicals that may or may not be contained in some or all of the products identified in the notice, the regulation should make it more difficult to send a notice without a good faith basis for believing that certain specific chemicals are present in each

particular product alleged in the notice. Moreover, a private person that proceeded with a civil action without adequate basis could be subject to sanctions under the relevant provisions of the Code of Civil Procedure.

One commenter (C-6) noted that the notice requirements are more detailed than the requirements for clear and reasonable warnings, and suggests "comparable" rulemaking on that issue. The agency will consider this suggestion, but it is beyond the scope of this rulemaking.

A number of commenters suggested that more specific information should be required where it is available to the noticing party, in that party's possession, or "feasible." (C-4, C-5, C-9) The agency declines to adopt any provision that would vary the notice requirements depending on what is available to or in the possession of the notice party, for two reasons. First, adoption of an "availability" standard would create litigation in any subsequent private action concerning the nature of the information that was available to the noticing party at the time the notice was given. Under such a test, a notice could be found invalid, after months of litigation, not because the information it provided was inadequate, but because it is subsequently discovered that some information that was not in the notice in fact was available when the notice was given. The agency has written the notice requirements so that a defense based on an inadequate notice can be raised and resolved at the outset of any litigation, before substantial resources have been expended, and so that the validity of the notice can be determined from the four corners of the notice itself, with additional information required only as necessary to establish the meaning or vagueness of the text of the notice.

Second, adoption of an "availability" standard would imply that a noticing party is entitled to provide less information in the notice if it has conducted less investigation and therefore has less information available to it or in its possession. A person wishing to bring an enforcement action "in the public interest" has an obligation to obtain enough information to provide an adequate notice before proceeding, and absent such information, should not commence the process. Of course, a concerned citizen may wish to bring a possible violation to the attention of public prosecutors or a business, without possessing the information needed to provide a complete notice of violation under the law. Such an informal notice may be quite valuable and achieve the citizen's objectives, because it may result in a public enforcement action or voluntary correction by the business. Notices that will have the legal effect of allowing private persons to proceed "in the public interest," however, must provide certain basic information.

The agency encourages noticing parties to provide complete information concerning the specific evidence of violation either as part of the notice, or soon thereafter. While such information is not needed to give adequate notice of the nature of the violation, it may be necessary to enable the alleged violator to identify the specific problem and take steps to remedy it immediately. A person seeking to proceed "in the public interest" should take any steps that might help bring a halt to the very violations of which it complains. In addition, a party seeking to recover attorney's fees pursuant to Code of Civil Procedure section 1021.5 must demonstrate a "necessity of private enforcement." A party that withheld information that would have enabled the defendant to remedy the violation upon receipt of the notice, which might have rendered

litigation concerning future conduct unnecessary, might not be able to satisfy the court that private enforcement was necessary under the statute.

Paragraph (b)(3)

Some notices allege violations that involve two or more of the following categories of exposures: environmental, occupational, and consumer product exposures. This paragraph clarifies that, where more than one category of violations is alleged, the notice requirements for each applicable category must be satisfied.

Paragraph (b)(4)

As noted above (see discussion on paragraph (b)(2) on page 7), the proposed regulation is not intended to require that highly technical information be provided, to require disclosure of the evidence by which a violation will be proven, or to otherwise turn the notice requirement into a trap for the unwary. Accordingly, paragraph (b)(4) specifies that the following information need not be provided because, in the agency's view, they are not needed to adequately identify the nature of the alleged violation:

- the specific retail outlet or time or date at which the product which is the subject of the notice was purchased;
- the level of exposure to the chemical in question;
- the specific admissible evidence by which the person will attempt to prove the violation;
- the UPC number, SKU number, model or design number or stock number or more specific identification for notices involving consumer products; or
- the lot, block or other legal description of the property in question, for notices involving geographic areas.

While the above information may be helpful and could be provided in an effort to resolve the matter prior to litigation, it is not legally mandated.

A number of commenters suggested that more specific information concerning products, such as SKU numbers, UPC codes, and copies of labels should be provided in or with the notice. (C-4, C-5, C-9, C-10, C-11) The agency has not adopted this suggestion. This type of information is not necessary to notify the alleged violator or public prosecutors of "the violation which is the subject of the action," which is all that is required by the statute. More general identification of the type of product will give all recipients sufficient information concerning the basic nature of the claim, and those products to which it applies. Identification of specific codes and product numbers would simply increase the possibility that products that clearly fall within a description of the products in question might be excluded from the action simply because the business uses different numbers for them, even though they are similar in all relevant characteristics. For example, a product that is identical in content, but comes in three different size containers (8, 16, and 32 ounces) may have different UPC codes and be considered separate Stock Keeping Units. If the notice adequately stated "Brand X Waterless Hand Cleaner," however, there would be no

reason to exclude from the scope of the action different size containers simply because their UPC codes or SKU numbers were not provided.

One commenter (C-7) suggested that the reference in subsection (b)(4)(D) to "consumer" products should be changed to include industrial products, for which occupational exposures may be alleged. The considerations that justify this provision with respect to consumer products also apply to industrial-use products. Accordingly, the word "consumer" has been deleted, as has the word "the" where it appeared at the end of the sentence.

A number of commenters objected to subsection (b)(4), which specifies certain information that does not need to be in the notice. (C-3, C-4, C-5, C-9, C-10, C-11) The agency has decided to retain this provision, because it is necessary to accomplish one of the objectives of the regulation, which is to provide guidance for businesses and private individuals concerning the notice requirements, both what is necessary and what is not necessary. This also will reduce litigation concerning the validity of notices. Stating certain items that need not be in the notice, where the agency thinks they are not necessary to follow the letter and purpose of the statute, will eliminate disputes in litigation concerning notices that do not include those items.

One commenter (C-6) proposed adding a sentence to subsection (b)(4) providing that it is not an exclusive or complete list of the information that is not required, and that the fact that information is not included in the list of "non-required" information does not mean that it is required. This suggestion was not adopted because it is unnecessary. Only those items required by the terms of the remainder of the regulation are required, and the fact that an item does not appear in the list of "non-required" items would not justify the inference that it is required.

One commenter (C-8) suggested that subsection (b)(4) be revised to include a requirement that sufficient specificity in the notice "should allow the recipient to understand the particular model or variation which is the subject of the notification." This suggestion was not adopted. While the model or variation may be material in some cases, in many it will not be, and slightly different models should not be excluded due to a failure to reference them in the notice. Moreover, in many instances it will not be possible for the noticing party to be aware of slightly different models or formulae used by a manufacturer.

Subsection (c). Service of Notice.

The statute provides no guidance concerning the manner of service. However, since the notice has important legal effects, and disputes have arisen concerning the fact of service, it is necessary to adopt regulations that specify the manner of service.

The proposed regulation provides that notices may be served by first class mail or in a manner which meets the provisions for service of a summons and complaint under the California Code of Civil Procedure.

In order that the parties receiving the notice can determine that the service requirements have been met, a service certificate is required. This should not be burdensome to persons giving

notice, because ordinary prudence suggests that such documentation should be prepared in the event of a later dispute over the fact of service.

The provision in paragraph (c)(3) concerning the persons served is intended simply to track the statute. Two issues have arisen concerning these requirements. First, in some instances, parties have sued concerning sales of a consumer product throughout the entire state, while giving notice only to one or a few district attorneys. With respect to a consumer product, the "violation occurs" wherever the product is used in a manner that creates an exposure without a warning, or where it is purchased. Thus, a notice confers the right to sue under Proposition 65 only as to violations occurring within each county for which the district attorney was notified.

Second, the statute requires notice to "any city attorney in whose jurisdiction the violation is alleged to occur." In this context, the term "city attorney" means only those city attorneys specifically authorized to bring suits by Health and Safety Code section 25249.7(c), i.e., "any city attorney of a city having a population in excess of 750,000." Although the statute allows a "city prosecutor" to sue with the consent of the district attorney, the notice is required to be served only on a "city attorney," not any city prosecutor. Moreover, since only the specified city attorneys have an unqualified right to sue, there is no point in requiring service of the notice on other city attorneys who lack legal authority to take action on the notice. Since the district attorney will receive the notice, and the ability of other city prosecutors relies on the consent of the district attorney, notice to the district attorney satisfies the statute.

One commenter (C-9) objected that service by first class mail should not be permitted to assure that prompt and timely notice is given. The agency has not adopted this recommendation. The agency, in the informal draft circulated in the fall of 1995, proposed requiring the notices to be served in the same manner as a summons and complaint in a civil action. After reviewing comments on that proposal and considering the matter, however, the agency concluded that postage pre-paid first class mail, with a contemporaneously prepared certificate of service, and the allowance of additional time (five, ten, or twenty days) to account for mailing time, is sufficient to assure prompt and timely service.

Another commenter (C-9) suggested that the notice should be addressed to the chief executive officer, chief legal officer, or agent for service of process of the business entity, because failure to do so can delay receipt of the notice by responsible officers. At the same time, for many businesses, there is no publicly available list of corporate officials. Accordingly, the agency has added a provision stating that where an entity has a current registration with the California Secretary of State that identifies a Chief Executive Officer, President, or General Counsel of the corporation, the notice shall be addressed to that person.

One commenter (C-2) suggested that the regulation require that notices alleging occupational exposures be served on the California Division of Occupational Safety and Health (Cal-OSHA), since Cal-OSHA regulations incorporate Proposition 65 requirements and can be enforced by Cal-OSHA. The statute requires that notice be served on the alleged violator and the specified public enforcement officials, and the agency does not have the authority to require that it be served on other parties. Of course, either a noticing party or a party receiving a notice may send

the notice to Cal-OSHA if it wishes to encourage Cal-OSHA to become involved in the enforcement process with respect to the alleged violations.

Subsection (d). Computation of Time.

The statute does not establish specific provisions for the computation of time. To provide greater certainty to all participants in the process, subsection (d) specifies that time is computed essentially as it would be in civil litigation.

First, it provides that the sixty days runs from the date of service as calculated under Code of Civil Procedure section 1013, and in paragraph (d)(3), that the first and last day are calculated as provided under section 12 of the Code of Civil Procedure. Thus, where a notice is served by hand, the first day of the sixty day period is the next day. Where it is served by first class mail within the State of California, there is a five-day extension, an additional ten days within the United States, etc., as provided in the referenced code sections.

In some instances, the sixtieth day after service of the notice may fall on a legal holiday. To assure that the law enforcement agencies are not under any circumstances deprived of the full sixty-day period to determine whether to take action without any possibility of a citizen suit being filed first, the regulation (specifically paragraph (d)(2)), would extend the sixty-day period where the sixtieth day falls on a legal holiday. It is necessary to specify this because it is not clear that Code of Civil Procedure section 12a would apply here. That code section applies wherever "the last day for the performance of any act provided or required by law to be performed within a specified period of time" falls on a defined legal holiday. Under Proposition 65, the sixtieth day is not the last day on which a prosecutor may file suit; it is simply the final day of the waiting period before which a private party may sue. Indeed, a private suit would be barred any time the public prosecutor commenced an action first, even if it occurred substantially after the expiration of the sixty day period. To avoid any dispute over this issue, the regulation would provide that there is an extension wherever the sixtieth day is a legal holiday.

OEHHA notes that "legal holiday" under this provision is defined in a manner that includes all Saturdays, all Sundays and other specified holidays. It also defines holidays to include a day on which any government office is closed "insofar as the business of that office is concerned." As applied to this situation, this would mean that any day upon which the office of the district attorney that files the suit, the office of the Attorney General, or the court in which the action is filed, are closed, is a legal holiday.

One commenter (C-12) objected that the provision of subsection (d)(2), is beyond the agency's authority because it improperly extends the sixty-day period under the statute, and does not eliminate any uncertainty or ambiguity. The agency disagrees. A number of statutes specifically provide a manner of computing time under various circumstances, which suggests that such time-computing provisions can be considered ambiguous. In addition, in this instance, the regulation takes only the modest step of assuring that the time is not computed in a manner that actually could deprive the public prosecutors of having the full sixty days to act on the notice.

Appendix A

Subsection (b)(1) of the proposed regulation requires that general information regarding Proposition 65 in the form of an attachment entitled, "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," accompany the notice. Appendix A provides the text of that attachment.

Appendix A provides basic information about Proposition 65 by summarizing the provisions of the statute, with references to certain provisions found in regulations (e.g., clarification on what constitutes a "clear and reasonable" warning, the definition of "no significant risk" and reference to information and procedural requirements governing notices of violations). This summary is intended to furnish the recipient of a notice with background information about the law that it is alleged to have violated.