

AMENDED IN SENATE MARCH 23, 2004

SENATE BILL

No. 1722

Introduced by Senator Ducheny

February 20, 2004

An act to ~~add Section 25249.7.3 to~~ *amend Section 25249.7 of the Health and Safety Code, relating to toxic substances.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1722, as amended, Ducheny. Proposition 65: enforcement: judgments.

(1) The existing Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from discharging or releasing such a chemical into any source of drinking water, except as specified. The act imposes civil penalties upon persons who violate those prohibitions, and provides for the enforcement of those prohibitions by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest. Existing law requires 75% of all civil and criminal penalties collected pursuant to the act be deposited in the Safe Drinking Water and Toxic Enforcement Fund in the State Treasury, which may be expended by the director of the lead agency, who is designated by the Governor to implement the act, to implement and administer the act, upon appropriation by the Legislature. Existing law requires 25% of all civil and criminal penalties collected pursuant to the act be paid to the prosecuting office or the person who brought the action in the public interest. The act requires any person bringing an action in the public interest, or any

private person filing an action in which a violation of the act is alleged, to notify the Attorney General that such an action has been filed.

~~This bill would prohibit a person from filing an action in the public interest or bringing an action that alleges a violation of the act if the defendant has previously entered into a settlement or has been a party to a final judgment in another action brought pursuant to the act, and the person filing or bringing the action alleges the same violation of the act that was settled or adjudicated. The bill would provide that any person who files an action in the public interest or brings an action that alleges a violation against a defendant would be deemed to be in privity with any other person who files an action in the public interest or brings an action that alleges a violation of this chapter against that same defendant additionally require that an action brought in the public interest not be barred by the doctrine of res judicata. The bill would provide that a person who files an action in the public interest is deemed to be in privity with any other person who files an action in the public interest.~~

(2) The bill, in conformance with the requirements of Proposition 65, would make a legislative finding and declaration that this change would further the purposes of the act.

Vote: ²/₃. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1.—Section 25249.7.3 is added to the Health and~~
2 *SECTION 1. Section 25249.7 of the Health and Safety Code*
3 *is amended to read:*

4 25249.7. (a) Any person that violates or threatens to violate
5 Section 25249.5 or 25249.6 may be enjoined in any court of
6 competent jurisdiction.

7 (b) (1) Any person who has violated Section 25249.5 or
8 25249.6 shall be liable for a civil penalty not to exceed two
9 thousand five hundred dollars (\$2,500) per day for each violation
10 in addition to any other penalty established by law. That civil
11 penalty may be assessed and recovered in a civil action brought in
12 any court of competent jurisdiction.

13 (2) In assessing the amount of a civil penalty for a violation of
14 this chapter, the court shall consider all of the following:

15 (A) The nature and extent of the violation.

16 (B) The number of, and severity of, the violations.



- 1 (C) The economic effect of the penalty on the violator.
- 2 (D) Whether the violator took good faith measures to comply
- 3 with this chapter and the time these measures were taken.
- 4 (E) The willfulness of the violator's misconduct.
- 5 (F) The deterrent effect that the imposition of the penalty
- 6 would have on both the violator and the regulated community as
- 7 a whole.
- 8 (G) Any other factor that justice may require.
- 9 (c) Actions pursuant to this section may be brought by the
- 10 Attorney General in the name of the people of the State of
- 11 California, by any district attorney, by any city attorney of a city
- 12 having a population in excess of 750,000, or, with the consent of
- 13 the district attorney, by a city prosecutor in any city or city and
- 14 county having a full-time city prosecutor, or as provided in
- 15 subdivision (d).
- 16 (d) Actions pursuant to this section may be brought by any
- 17 person in the public interest if ~~both~~ *all* of the following
- 18 requirements are met:
- 19 (1) The private action is commenced more than 60 days from
- 20 the date that the person has given notice of an alleged violation of
- 21 Section 25249.5 or 25249.6 that is the subject of the private action
- 22 to the Attorney General and the district attorney, city attorney, or
- 23 prosecutor in whose jurisdiction the violation is alleged to have
- 24 occurred, and to the alleged violator. If the notice alleges a
- 25 violation of Section 25249.6, the notice of the alleged violation
- 26 shall include a certificate of merit executed by the attorney for the
- 27 noticing party, or by the noticing party, if the noticing party is not
- 28 represented by an attorney. The certificate of merit shall state that
- 29 the person executing the certificate has consulted with one or more
- 30 persons with relevant and appropriate experience or expertise who
- 31 has reviewed facts, studies, or other data regarding the exposure
- 32 to the listed chemical that is the subject of the action, and that,
- 33 based on that information, the person executing the certificate
- 34 believes there is a reasonable and meritorious case for the private
- 35 action. Factual information sufficient to establish the basis of the
- 36 certificate of merit, including the information identified in
- 37 paragraph (2) of subdivision (h), shall be attached to the certificate
- 38 of merit that is served on the Attorney General.



1 (2) Neither the Attorney General, any district attorney, any city
2 attorney, nor any prosecutor has commenced and is diligently
3 prosecuting an action against the violation.

4 (3) (A) *The action is not barred by the doctrine of res judicata.*

5 (B) *For purposes of this paragraph, any person who files an*
6 *action in the public interest pursuant to this subdivision shall be*
7 *deemed to be in privity with any other person who files an action*
8 *in the public interest pursuant to this subdivision.*

9 (e) Any person bringing an action in the public interest
10 pursuant to subdivision (d) and any person filing any action in
11 which a violation of this chapter is alleged shall notify the Attorney
12 General that the action has been filed. Neither this subdivision nor
13 the procedures provided in subdivisions (f) to (j), inclusive, shall
14 affect the requirements imposed by statute or a court decision in
15 existence on January 1, 2002, concerning whether any person
16 filing any action in which a violation of this chapter is alleged is
17 required to comply with the requirements of subdivision (d).

18 (f) (1) Any person filing an action in the public interest
19 pursuant to subdivision (d), any private person filing any action in
20 which a violation of this chapter is alleged, or any private person
21 settling any violation of this chapter alleged in a notice given
22 pursuant to paragraph (1) of subdivision (d), shall, after the action
23 or violation is subject either to a settlement or to a judgment,
24 submit to the Attorney General a reporting form that includes the
25 results of that settlement or judgment and the final disposition of
26 the case, even if dismissed. At the time of the filing of any
27 judgment pursuant to an action brought in the public interest
28 pursuant to subdivision (d), or any action brought by a private
29 person in which a violation of this chapter is alleged, the plaintiff
30 shall file an affidavit verifying that the report required by this
31 subdivision has been accurately completed and submitted to the
32 Attorney General.

33 (2) Any person bringing an action in the public interest
34 pursuant to subdivision (d), or any private person bringing an
35 action in which a violation of this chapter is alleged, shall, after the
36 action is either subject to a settlement, with or without court
37 approval, or to a judgment, submit to the Attorney General a report
38 that includes information on any corrective action being taken as
39 a part of the settlement or resolution of the action.



1 (3) The Attorney General shall develop a reporting form that
2 specifies the information that shall be reported, including, but not
3 limited to, for purposes of subdivision (e), the date the action was
4 filed, the nature of the relief sought, and for purposes of this
5 subdivision, the amount of the settlement or civil penalty assessed,
6 other financial terms of the settlement, and any other information
7 the Attorney General deems appropriate.

8 (4) If there is a settlement of an action brought by a person in
9 the public interest under subdivision (d), the plaintiff shall submit
10 the settlement, other than a voluntary dismissal in which no
11 consideration is received from the defendant, to the court for
12 approval upon noticed motion, and the court may approve the
13 settlement only if the court makes all of the following findings:

14 (A) Any warning that is required by the settlement complies
15 with this chapter.

16 (B) Any award of attorney's fees is reasonable under California
17 law.

18 (C) Any penalty amount is reasonable based on the criteria set
19 forth in paragraph (2) of subdivision (b).

20 (5) The plaintiff subject to paragraph (4) has the burden of
21 producing evidence sufficient to sustain each required finding.
22 The plaintiff shall serve the motion and all supporting papers on
23 the Attorney General, who may appear and participate in any
24 proceeding without intervening in the case.

25 (6) Neither this subdivision nor the procedures provided in
26 subdivision (e) and subdivisions (g) to (j), inclusive, shall affect
27 the requirements imposed by statute or a court decision in
28 existence on January 1, 2002, concerning whether claims raised by
29 any person or public prosecutor not a party to the action are
30 precluded by a settlement approved by the court.

31 (g) The Attorney General shall maintain a record of the
32 information submitted pursuant to subdivisions (e) and (f) and
33 shall make this information available to the public.

34 (h) (1) Except as provided in paragraph (2), the basis for the
35 certificate of merit required by subdivision (d) is not discoverable.
36 However, nothing in this subdivision shall preclude the discovery
37 of information related to the certificate of merit if that information
38 is relevant to the subject matter of the action and is otherwise
39 discoverable, solely on the ground that it was used in support of the
40 certificate of merit.



1 (2) Upon the conclusion of an action brought pursuant to
2 subdivision (d) with respect to any defendant, if the trial court
3 determines that there was no actual or threatened exposure to a
4 listed chemical, the court may, upon the motion of that alleged
5 violator or upon the court's own motion, review the basis for the
6 belief of the person executing the certificate of merit, expressed in
7 the certificate of merit, that an exposure to a listed chemical had
8 occurred or was threatened. The information in the certificate of
9 merit, including the identity of the persons consulted with and
10 relied on by the certifier, and the facts, studies, or other data
11 reviewed by those persons, shall be disclosed to the court in an
12 in-camera proceeding at which the moving party shall not be
13 present. If the court finds that there was no credible factual basis
14 for the certifier's belief that an exposure to a listed chemical had
15 occurred or was threatened, then the action shall be deemed
16 frivolous within the meaning of Section 128.6 or 128.7 of the Code
17 of Civil Procedure, whichever provision is applicable to the action.
18 The court shall not find a factual basis credible on the basis of a
19 legal theory of liability that is frivolous within the meaning of
20 Section 128.6 or 128.7 of the Code of Civil Procedure, whichever
21 provision is applicable to the action.

22 (i) The Attorney General may provide the factual information
23 submitted to establish the basis of the certificate of merit on
24 request to any district attorney, city attorney, or prosecutor within
25 whose jurisdiction the violation is alleged to have occurred, or to
26 any other state or federal government agency, but in all other
27 respects the Attorney General shall maintain, and ensure that all
28 recipients maintain, the submitted information as confidential
29 official information to the full extent authorized in Section 1040
30 of the Evidence Code.

31 (j) In any action brought by the Attorney General, a district
32 attorney, a city attorney, or a prosecutor pursuant to this chapter,
33 the Attorney General, district attorney, city attorney, or prosecutor
34 may seek and recover costs and attorney's fees on behalf of any
35 party who provides a notice pursuant to subdivision (d) and who
36 renders assistance in that action. ~~Safety Code, to read:~~

37 ~~25249.7.3. (a) (1) Notwithstanding subdivision (d) of~~
38 ~~Section 25249.7, except as provided in subdivisions (b) and (c), a~~
39 ~~person may not file an action in the public interest pursuant to~~
40 ~~subdivision (d) of Section 25249.7 or bring an action that alleges~~



1 a violation of this chapter if the defendant has previously entered
2 into a settlement or has been a party to a final judgment in another
3 action brought pursuant to this chapter, and the person filing or
4 bringing the action alleges the same violation of this chapter that
5 was settled or adjudicated.

6 (2) For purposes of this subdivision, any person who files an
7 action in the public interest pursuant to subdivision (d) of Section
8 25249.7 or brings an action that alleges a violation of this chapter
9 against a defendant shall be deemed to be in privity with any other
10 person who files an action in the public interest pursuant to
11 subdivision (d) of Section 25249.7 or brings an action that alleges
12 a violation of this chapter against that same defendant.

13 (b) The prohibition specified in subdivision (a) does not bar an
14 action that may be brought by the Attorney General alleging a
15 violation of this chapter in the State of California, by a district
16 attorney alleging a violation of this chapter within the county of
17 the district attorney's jurisdiction, or by a city attorney alleging a
18 violation of this chapter within the city of the city attorney's
19 jurisdiction.

20 (c) A person who files an action in the public interest pursuant
21 to subdivision (d) of Section 25249.7 or brings an action that
22 alleges a violation of this chapter, and who has entered into a
23 settlement, or was a party to a final judgment pursuant to this
24 chapter regarding that same violation, may only file an action for
25 an order to show cause to enforce the terms of the prior settlement
26 or judgment. In an action authorized by this subdivision, the
27 burden of proof that the defendant's conduct violates the original
28 settlement or judgment is on the plaintiff. A private plaintiff
29 bringing an action authorized by this subdivision shall comply
30 with any other requirements imposed by subdivision (d) of Section
31 25249.7.

32 SEC. 2. The Legislature finds and declares that this act
33 furthers the purposes of the Safe Drinking Water and Toxic
34 Enforcement Act of 1986.

