

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 3004 (Mike Fong)
Version: April 1, 2024
Hearing Date: June 18, 2024
Fiscal: Yes
Urgency: No
AM

SUBJECT

Proposition 65: certificates of merit: Attorney General communications

DIGEST

This bill requires any product testing conducted in support of a certificate of merit to have been conducted within one year of the submission of the certificate of merit, and requires any report from a laboratory that is submitted with the certificate of merit to indicate the brand name, if any, of the product tested on the certificate. The bill also requires the Attorney General (AG), if they provide a comment, suggestion, or any other communication in response to the report provided to them by one of the parties in a settlement or judgment, to provide that comment, suggestion, or other communication to all parties to the settlement or judgment.

EXECUTIVE SUMMARY

The Safe Drinking and Toxic Enforcement Act of 1986 (“the Act”), Proposition 65, provides protections for Californians, including requiring a person doing business in California to provide clear and reasonable warning to individuals before knowingly and intentionally exposing them to a chemical known to the state to cause cancer or reproductive toxicity. Actions for violations of the Act can be brought by the AG or specified local prosecutors and by individuals in the public interest, subject to certain conditions, including providing a certificate of merit. This bill seeks to ensure that a certificate of merit is current that it includes the brand name of the product tested, as specified. The bill also requires the AG to provide any comment, suggestion, or other communication made to all parties in a settlement or judgment. This bill is supported the Asian Food Trade Association. No timely opposition was received by the Committee. This bill passed the Senate Environmental Quality Committee on a vote of 7 to 0. This bill requires a two-thirds vote because it amends an initiative statute.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits a person in the course of doing business from knowingly discharging or releasing a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, except as specified. (Health and Saf. Code § 25249.5.¹)
- 2) Prohibits a person from knowingly and intentionally, in the course of doing business, exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. (§ 25249.6.)
- 3) Provides that any person who violates the provisions of 1) or 2), above, is liable for a civil penalty not to exceed \$2,500 per day for each violation in addition to any other penalty established by law. The civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction. (§ Section 25249.7(b)(1).)
- 4) Authorizes the AG, a district attorney, a city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, a city prosecutor in a city or city and county having a full-time city prosecutor, or a private individual representing the public interest to bring an action to seek civil penalties. (*Id.* at (c).)
- 5) Authorizes a private individual to bring a private action so long as neither the AG, a district attorney, a city attorney, nor a prosecutor has commenced and is diligently prosecuting an action against the violation.
 - a) The action must be commenced more than 60 days from the date that the person has given notice of an alleged violation to the AG and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. (*Id.* at (d).)
 - b) If the notice alleges a violation of the provisions in 2), above, the notice must include a certificate of merit, as provided.
 - i. The certificate of merit must state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action.
 - ii. Factual information sufficient to establish the basis of the certificate of merit must be attached to the certificate of merit that is served on the Attorney General. (*Ibid.*)

¹ All further references are to the Health and Safety Code unless specified otherwise.

- 6) Requires the AG, if the AG believes there is no merit to the action, to serve a letter to the noticing party and the alleged violator stating the Attorney General believes there is no merit to the action. Provides that not serving a letter does not serve as an endorsement of the action. (*Id.* at (e)(1).)
- 7) Requires a private individual bringing an action in the public interest pursuant to 6) to notify the Attorney General that the action has been filed. (*Id.* at (e)(2).)
- 8) Requires a private person bringing an action in the public interest or a private person settling a violation of this law to, after the action or violation is subject either to a settlement or to a judgment, submit to the Attorney General a reporting form that includes the results of that settlement or judgment and the final disposition of the case, even if dismissed. (*Id.* at (f)(1).)
- 9) Requires that a person bringing an action in the public interest, after the action is either subject to a settlement, with or without court approval, or to a judgment, to submit to the Attorney General a report that includes information on any corrective action being taken as a part of the settlement or resolution of the action. (*Id.* at (f)(2).)
- 10) Requires the Attorney General to maintain a record of the information submitted, as required, and make that record available to the public. (*Id.* at (g).)
- 11) Authorizes, pursuant to the California Constitution, that the Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval. (Cal. Const., art. II, Sec. 10.)
 - a) Proposition 65 from the November 4, 1986, election provides that it may be amended by statute to further its purposes if passed in each house by a two-thirds vote.

This bill:

- 1) Requires any product testing conducted in support of the certificate of merit to have been conducted within one year of the submittal of the certificate of merit.
- 2) Requires the AG, if they provide a comment, suggestion, or any other communication in response to the report provided to them by one of the parties in a settlement or judgment, to provide that comment, suggestion, or other communication to all parties to the settlement or judgment.
- 3) Requires, if a report from a laboratory is submitted with the certificate of merit, to indicate the brand name, if any, of the product tested on the certificate.

COMMENTS

1. Stated need for the bill

The author writes:

AB 3004 makes minor changes to Proposition 65 to ensure that the Act is carried out as intended – to ensure that consumers are aware of products containing certain chemicals. Private enforcers who are simply seeking settlement money may reuse the same laboratory test on multiple products over a number of years. This hurts small businesses who must pay sometimes thousands of dollars to settle the claim while possibly not receiving credible information. They may put the label on a product, but they will not know if the product indeed contained the chemicals. This bill ensures that the laboratory test is current and identifies the brand name of the product that was tested. The bill also ensures that communication from the Attorney's General's office to one party is shared with all parties involved in a settlement.

2. Proposition 65: Safe Drinking Water and Toxic Enforcement Act of 1986

Proposition 65, a state initiative measure, was approved on November 4, 1986, and became effective on January 1, 1987. It added the Safe Drinking Water and Toxic Enforcement Act of 1986 ("the Act"), Health and Safety Code Section 25249.5 et seq., to state law. The Act places two main requirements on businesses. The first is a prohibition on knowingly discharging or releasing a chemical known to the state to cause cancer or reproductive toxicity (hereinafter "chemical") into water or onto land where the chemical has a certain likelihood of passing into a source of drinking water. The second is the more well-known warning requirement. It prohibits any person, in the course of doing business, to knowingly and intentionally expose any individual to a chemical without first giving clear and reasonable warning to such individual. Both have exemptions enumerated in the Act and neither applies to persons employing fewer than 10 employees in the person's business or to most governmental entities. The Act is administered by the Office of Environmental Health Hazard Assessment (OEHHA).

The Act provides a cause of action to enforce its provisions and to seek certain specified remedies, including injunctive relief and civil penalties. The AG, a district attorney, a city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, a city prosecutor in a city or city and county having a full-time city prosecutor, can bring an action against a person who has violated or threatens to violate the Act. In addition, a person can also bring an action in the public interest pursuant to the Act if the AG or a local prosecutor has not already commenced and is diligently litigating claims based on the alleged violation.

3. Private actions pursuant to the Act

Before a private action can be filed, a person must provide notice to the Attorney General, the local prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. The private action cannot commence until 60 days after such notice has been provided.

In addition, if there is an alleged violation of the notice requirement, Section 25249.6, the notice must include a certificate of merit executed by the person or the person's attorney. The certificate must indicate that the person executing the certificate has consulted with experts that have reviewed facts, studies, or other relevant data regarding the alleged exposure to a listed chemical underlying the action. The certificate of merit must further state that based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. For the certificate of merit that is served on the Attorney General only, factual information sufficient to establish the basis of the certificate must be attached, including the identity of the persons consulted with and relied on by the certifier, and the facts, studies, or other data reviewed by those persons. If, after reviewing such materials, the Attorney General finds there is no merit to the action, the Attorney General must serve a letter to the noticing party and alleged violator stating that finding.

This bill requires any product testing conducted in support of the certificate of merit to have been conducted within one year of the submittal of the certificate of merit. If a report from a laboratory is submitted with the certificate of merit, the report is required to indicate the brand name, if any, of the product tested on the certificate. Lastly, the bill requires the AG, if they provide a comment, suggestion, or any other communication in response to the report provided to them by one of the parties in a settlement or judgment, to provide that comment, suggestion, or other communication to all parties to the settlement or judgment.

4. Statements in support

The Asian Food Trade Association, the sponsor of the bill, writes in support stating:

One of the biggest challenges API owner-operators face, is the abuse of Prop 65 (Clean Water Bill) and how it is being weaponized against all types of businesses and their products. In the food industry, the national FDA has already done more than enough to protect American consumers from reasonable levels of chemicals. However, the loophole that Prop 65 gives a few bad lawyers the legal protection to stretch the law and extorting money from California's hardworking small businesses.

If passed, we're only asking that reasonable evidence be given to defendants so they can compare accredited lab reports they should be presenting to the AG, and also to defendants upon request. Our group feeds tens of millions of California consumers

every month, and seeing over labeling is actually causing more harm than informative benefits.

SUPPORT

Asian Food Trade Association

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1521 (Mike Fong, 2023) would have required a person bringing an action under Proposition 65, when providing factual information sufficient to establish the basis of the certificate of merit to the AG, to additionally include information supporting the certificate of merit, including dates and studies related to the product that is the subject of the notice of the alleged violation. This bill was never set for a hearing in the Assembly Environmental Safety and Toxic Materials Committee.

AB 2743 (Mike Fong, 2022) would have required a person bringing an action under Proposition 65 to provide the notice of the alleged violation and factual information for the basis for the certificate of merit to the AG, local district attorney, and the alleged violator. This bill was never set for a hearing in the Assembly Environmental Safety and Toxic Materials Committee.

AB 1123 (Reyes, Ch. 187, Stats. 2019) required that a specified notice be provided to the Attorney General before certain proceedings involving the Safe Drinking and Toxic Enforcement Act of 1986 are filed in the Supreme Court, court of appeal, or the appellate division of the superior court.

AB 1583 (Chau, Ch. 510, Stats. 2017) required the AG to serve a letter on a notifying party and the alleged violator when it determines, after reviewing a certificate of merit and accompanying evidence regarding an alleged violation of the Safe Drinking Water and Toxic Enforcement Act of 1986, that the relevant allegations have no merit. This bill reorganized the provision governing the discoverability of certificates of merit. It also required the Governor's Office of Business and Economic Development to post a disclaimer regarding the requirements the Act places on businesses.

AB 1252 (Jones, 2015) would have prohibited any person from bringing an enforcement action against a company that employs 25 people or less for failure to provide a

warning for an exposure to a chemical known to the state to cause cancer or reproductive toxicity, in violation of Proposition 65, unless certain conditions are met. This bill died in the Assembly Environmental Safety and Toxic Materials Committee.

AB 227 (Gatto, Ch. 581, Stats. of 2013) provided for the remediation of lawsuits alleging a violation of the clear and reasonable warning requirement for four specified circumstances. It prohibited the person who filed an action from exposure from doing so until 14 days after they have served the alleged violator with a notice of alleged violation.

AB 1756 (Committee on Budget, Ch. 228, Stats. 2003) established the Safe Drinking Water and Toxic Enforcement Fund in the State Treasury and authorized the director of the lead agency, who is designated by the Governor to implement the Act, to expend the funds in the Safe Drinking Water and Toxic Enforcement Fund upon appropriation by the Legislature, to implement and administer the Act.

SB 471 (Sher, Ch. 578, Stats. 2001) requires a court, in assessing the amount of a civil penalty for a violation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), to consider specified factors. It also required a certificate of merit to be filed with the appropriate parties before a private action could be filed.

PRIOR VOTES

Senate Environmental Quality Committee (Ayes 7, Noes 0)

Assembly Floor (Ayes 65, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Judiciary Committee (Ayes 12, Noes 0)

Assembly Environmental Safety and Toxic Materials Committee (Ayes 7, Noes 0)
