



Councilmember Susan Wengraf
District 6

CONSENT CALENDAR
May 21, 2013

To: Honorable Mayor and Members of the City Council
From: Councilmember Susan Wengraf
Subject: Oppose Assembly Bill 227 (Gatto)

RECOMMENDATION

Adopt a Resolution opposing AB 227, amending section 25249.7 of the Health and Safety Code, relating to toxic substances. Send copy of the adopted resolution to Judiciary Committee Chair, Assemblyman Bob Wieckowski and Assemblywoman Nancy Skinner indicating that the City of Berkeley opposes AB 227.

FINANCIAL IMPLICATIONS

No General Fund impact.

BACKGROUND

For more than 25 years, our children have benefitted from California's unique consumer protection law, Proposition 65, the Safe Drinking and Toxic Enforcement Act. The California Judiciary Committee will soon be voting on proposed legislation (AB 227). This bill will limit Proposition 65, one of California's most effective tools for protecting children from chemicals that can cause cancer, infertility, and other serious health problems. AB 227 would amend Section 25249.7, "Enforcement". If AB 227 passes, corporations would be granted an unprecedented right to avoid any consequences when they violate Prop 65.

Assemblymember Gatto says that we need AB 227 to protect small businesses from "frivolous" lawsuits. But this bill doesn't make provisions for small businesses. In fact, AB 227 allows any corporation regardless of size to ignore a law that has protected millions of Californians for decades.

CONTACT PERSON

Councilmember Susan Wengraf, Council District 6, 510-981-7160

Attachments:

1. Resolution
2. Assembly Bill 227

RESOLUTION NO. ##,###-N.S.

OPPOSE ASSEMBLY BILL 227 (GATTO), AN ACT TO AMEND SECTION 25249.7 OF
THE HEALTH AND SAFETY CODE, RELATING TO TOXIC SUBSTANCES

WHEREAS, for more than 25 years, our children have benefitted from California's unique consumer protection law known as Prop 65; and

WHEREAS, Prop 65 curbed threats from lead poisoning to children from candy, baby bibs, diaper creams, children's jewelry, and hundreds of other everyday products; and

WHEREAS, Prop 65 eliminated cancer-causing arsenic from wood playground structures; and

WHEREAS, Prop 65 stopped polluting factories from fouling our clean air and water; and

WHEREAS, AB 227 proposes to amend section 25249.7 of the Health and Safety Code relating to toxic substances.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Council hereby opposes the passage of AB 227 (Gatto).

BE IT FURTHER RESOLVED that a copy of the resolution indicating the Council's opposition to AB 227 be sent to the California Judiciary Committee chair Bob Wieckowski and Assemblymember Nancy Skinner.

BILL NUMBER: AB 227 INTRODUCED
BILL TEXT

INTRODUCED BY Assembly Member Gatto

FEBRUARY 4, 2013

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

LEGISLATIVE COUNSEL'S DIGEST

AB 227, as introduced, Gatto. Proposition 65: enforcement: chemical listing.

(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 knowingly discharging or releasing such a chemical into water or 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. 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, the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and the alleged violator that such an action has been filed.

This bill would allow a person who receives a notice that alleges the person is in violation of the warning requirements of Proposition 65 to correct the violation within 14 days after receiving that notice and demonstrate to the Attorney General, the city attorney, or the district attorney in whose jurisdiction the notice is filed that the violation has been corrected. The bill would prohibit an enforcement action from being commenced if the Attorney General, the city attorney, or the district attorney concurs that the violation has been corrected. The bill would impose a state-mandated local program by imposing new duties upon local agencies with regard to concurring in that correction of a violation.

(2) Proposition 65 provides that it may be amended by a statute, passed in each house by 2/3 vote, to further its purposes.

This bill would find and declare that it furthers the purposes of Proposition 65.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

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

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 25249.7 of the Health and Safety Code is amended to read:

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

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

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

- (A) The nature and extent of the violation.
- (B) The number of, and severity of, the violations.
- (C) The economic effect of the penalty on the violator.

(D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.

(E) The willfulness of the violator's misconduct.

(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.

(G) Any other factor that justice may require.

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California, by ~~any~~ a district attorney, by ~~any~~ a city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, by a city prosecutor in ~~any~~ a city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by ~~any~~ a person in the public interest if both of the following requirements are met:

(1) The private action is commenced more than 60 days from the date that the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. If the notice alleges a violation of Section 25249.6, the notice of the alleged violation shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is

not represented by an attorney. The certificate of merit shall 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. Factual information sufficient to establish the basis of the certificate of merit, including the information identified in paragraph (2) of subdivision (h), shall be attached to the certificate of merit that is served on the Attorney General.

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

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

(f) (1) ~~Any~~ A person filing an action in the public interest pursuant to subdivision (d), ~~any~~ a private person filing ~~any~~ an action in which a violation of this chapter is alleged, or ~~any~~ a private person settling ~~any~~ a violation of this chapter alleged in a notice given pursuant to paragraph (1) of subdivision (d), shall, 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. At the time of the filing of ~~any~~ a judgment pursuant to an action brought in the public interest pursuant to subdivision (d), or ~~any~~ an action brought by a private person in which a violation of this chapter is alleged, the plaintiff shall file an affidavit verifying that the report required by this subdivision has been accurately completed and submitted to the Attorney General.

(2) ~~Any~~ A person bringing an action in the public interest pursuant to subdivision (d), or ~~any~~ a private person bringing an action in which a violation of this chapter is alleged, shall, after the action is either subject to a settlement, with or without court approval, or to a judgment, 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.

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

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

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

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

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

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

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

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

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

(2) Upon the conclusion of an action brought pursuant to subdivision (d) with respect to ~~any~~ a defendant, if the trial court determines that there was no actual or threatened exposure to a listed chemical, the court may, upon the motion of that alleged violator or upon the court's own motion, review the basis for the belief of the person executing the certificate of merit, expressed in the certificate of merit, that an exposure to a listed chemical had occurred or was threatened. The information in the certificate of merit, 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, shall be disclosed to the court in an in-camera proceeding at which the moving

party shall not be present. If the court finds that there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened, then the action shall be deemed frivolous within the meaning of Section ~~128.6 or~~ 128.7 of the Code of Civil Procedure ~~— whichever provision is applicable to the action —~~. The court shall not find a factual basis credible on the basis of a legal theory of liability that is frivolous within the meaning of Section ~~128.6 or~~ 128.7 of the Code of Civil Procedure ~~—, whichever provision is applicable to the action~~.

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

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

(k) *A person who receives a notice pursuant to paragraph (1) of subdivision (d) that alleges the person is in violation of Section 25249.6 may, prior to the commencement of an enforcement action, correct the violation within 14 days after receiving that notice and demonstrate to the Attorney General, the city attorney, or the district attorney in whose jurisdiction the notice is filed that the violation has been corrected. An enforcement action shall not be commenced if the Attorney General, the city attorney, or the district attorney concurs that the violation has been corrected.*

SEC. 2. The Legislature finds and declares that this act furthers the purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code).

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

