

ARTICLES

PROPOSITION 65 ENFORCEMENT: REDUCING LEAD EMISSIONS IN CALIFORNIA

MICHAEL FREUND*

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I. INTRODUCTION

This Article addresses the role of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986,¹ in reducing air

* Public interest environmental attorney; J.D. 1980, University of San Diego School of Law; A.B. 1977, University of California, Santa Cruz. The author specializes in the enforcement of Proposition 65 air toxics cases and has initiated most of the air toxics litigation in the State of California. Mr. Freund has been involved with all of the lead emission cases described in this Article.

toxic emissions in the State of California. In particular, the inquiry focuses on lead, a chemical known under the Act to cause birth defects, reproductive toxicity and cancer,² as well as a host of other serious health and societal effects not covered by the Act.

Proposition 65 was an initiative measure passed overwhelmingly by the voters in the November 4, 1986, California election.³ It is based on the recognition that hazardous chemicals pose a serious potential threat to the health and well-being of California's inhabitants, and that government has failed to provide the necessary protection from this threat.⁴ The statute covers both carcinogens and reproductive toxicants. In sum, Proposition 65: (1) prohibits discharges of listed chemicals into drinking water,⁵ and (2) requires that a "clear and reasonable warning" be provided prior to knowingly and intentionally exposing anyone to the listed chemicals.⁶ This Article addresses the warning or "right to know" provision of the statute.⁷

While litigation was infrequent during the first few years after the initiative's enactment, today there can be no doubt that Proposition 65 has become one of the most powerful legal tools for environmental groups to effectuate significant benefits to the public interest in the State of California. Proposition 65 enforcement has drastically altered the manner in which companies do business in California. These actions have arguably led to the achievement of more direct benefits to the environment and human health than any other recent environmental law. By filing a complaint as a "private attorney general" against a company emitting a Proposition 65 chemical into the air, plaintiffs can achieve benefits for the public that often far exceed what any other state or federal agencies have been able to accomplish, and certainly exceed what individual companies have done voluntarily. Most notably, consent judgments entered into during the last four years have led to the

1. CAL. HEALTH & SAFETY CODE 25249.5-25249.13 (Deering 1996) (enacted as voter initiative measure proposition 65 in the November 4, 1986 general election) [referred to throughout this article as Proposition 65].

2. Lead was listed as a chemical known to the State of California to cause birth defects or other reproductive harm on February 27, 1987. Lead and lead compounds were listed as a carcinogen on October 1, 1992. CAL. CODE REGS., tit. 22, § 12000 (1992 & Supp. 1997).

3. See Kevin Roderick, *Toxics Measure Breezes, AIDS Initiative Fails*. L.A. TIMES, Nov. 5, 1986 at 1.

4. See CAL. HEALTH & SAFETY CODE § 25249.5.

5. *Id.*

6. *Id.* § 25249.6.

7. The duty to provide clear and reasonable warning of lead exposures went into effect one year after the chemical was listed. See *id.* § 25249.10(b). The Proposition 65 lead warning level for lead as a reproductive toxicant is .5 micrograms/day. CAL. CODE REGS., tit. 22, § 12805.

elimination of hundreds of thousands of lead exposures that would otherwise still exist. This public benefit has been achieved due to the reduction of thousands of pounds of lead emissions that were allowed by all other environmental regulations and laws.

The reality is that the agencies mandated to safeguard the public's health, while achieving industry wide reductions in many instances, have often neglected to adequately control Proposition 65 chemicals—chemicals which are emitted into the air in communities that do not know of the emissions and are powerless to act. Too often, federal and state laws and local air district regulations designed to supposedly protect people involve archaic standards and are simply unenforced. In other instances, standards are either nonexistent or too weak. Recently, environmental groups have uncovered many instances in which residential communities have been exposed to cancer causing and reproductive effecting chemicals for many years without any government challenge to the status quo. The objective in these situations has been to handle cases involving significant exposures that have been overlooked for whatever reason by regional air districts, and to compel these companies to install state of the art equipment, thereby significantly reducing chemical exposures.

This Article is divided into two parts. First, the Article provides an overview of the process and steps leading up to the filing of a Proposition 65 lawsuit. Second, the Article provides a brief account of settlements involving emitters of Proposition 65 chemicals other than lead, followed by a more thorough description of cases filed and settlements reached involving companies that have emitted significant amounts of lead into the air. The lead exposure cases reveal the extent to which cases brought under proposition 65 result in significant health and environmental benefits to the public.

II. TARGETING THE POTENTIAL VIOLATOR

Potential plaintiffs in Proposition 65 air toxic cases first obtain emissions data from a variety of sources. Certain companies are required to submit to the Environmental Protection Agency "Form R," the Toxic Chemical Release Inventory Reporting Form, pursuant to Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986.⁸ Furthermore, pursuant to The Air Toxics "Hot Spots"

8. 42 U.S.C. §§ 11001-11050. EPCRA was enacted in conjunction with the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613-1781.

Information and Assessment Act of 1987 (AB 2588), various companies must provide local air districts with a comprehensive emissions inventory plan and health risk assessments prepared for the highest priority facilities.⁹ Finally, since most of the toxic emitters targeted under Proposition 65 are located in the Los Angeles and Orange County areas, it is important to be aware that the South Coast Air Quality Management District's Rule 1420 requires facilities to submit information on lead emissions.¹⁰

After the agency data is reviewed, the facilities are prioritized and site visits to the companies are undertaken. The initial focus of the investigation is evaluating whether there is a residential community located close to the emitter. An estimate of the nearby population is made, and the distance of the company from the community is noted. It is particularly important to note whether there are any sensitive receptors such as day care centers, pre-schools and other schools, adult education centers, retirement homes and hospitals situated nearby. These persons clearly have the most vulnerability to toxic air contaminants and every effort should be made to protect them. Finally, it is essential to evaluate the socio-economic level of the surrounding community as a first step in determining whether the case involves an issue of social justice or even environmental racism. Unfortunately, as is too often the case, the toxic emitter is located in a poor area where both the knowledge about toxic chemicals and the power to protect the community have been historically inadequate.

The next step in the investigation process is reaching out to the community by meeting with individuals and/or existing organizations. Here, the environmental group can learn what the community knows about the company, whether it is aware of toxic emissions, and what attempts, if any, have been made to redress the problem in the past. Shockingly, residents often have no clue about what companies are emitting into the air of their own communities. We can further obtain information from community members as to how the emissions have effected the use and enjoyment of their homes and properties, and the extent to which any cancers, miscarriages, or other health problems are present in the area. Finally, this encounter can be fruitful in revealing the history of the company and its relationship with the neighborhood or community. Many times, the personal disclosures made in these

9. CAL. HEALTH & SAFETY CODE §§ 44300-44394.

10. The South Coast Air Quality Management District compiles a data base of lead emitters with information on pounds per day of emissions.

meetings uncover real life stories that are not found in any agency file. They often provide the real motivation and force behind the commencement of an enforcement action.

Since Proposition 65 is a warning statute, the environmental client must obtain information about whether Proposition 65 warnings have been provided by the company, and if so, what type of warning was issued and what language was used in the warning. A case where no warning has been provided becomes a higher priority than one where a good faith attempt to actually notify persons of the exposure has been made by the company. When there has been a warning, it is then necessary to distinguish between the types of warnings that have been issued by the company, namely, warnings at the facility, warnings published in the newspaper, and mailed warnings.

In the area of air toxics, many companies have attempted to comply with Proposition 65 by providing a warning to its workers at the plant gate and inside the facility, and to the public by publication in a local newspaper. However, groups enforcing Proposition 65 take the position that these types of warnings are insufficient under Proposition 65 because they do not provide clear and reasonable notice to the public.¹¹ This view asserts that under most circumstances, compliance is only achieved by a Proposition 65 warning mailed or otherwise delivered to persons residing or working in the isopleth area, informing them that an exposure is taking place. There is ample support for this contention in the regulations promulgated to implement Proposition 65.¹²

Often, investigations involve several companies at the same time. Based on a review of public records and the information obtained during our investigation, the cases are prioritized for purposes of serving a 60-day notice¹³ and eventual court filing. Companies with high emissions that are located in close proximity to a residential area become high priority cases. If the case involves an environmental justice issue, it attains top status on our priority list. Based on the review process

11. Interview with Don May, President of California Earth Corps, September 27, 1996. California Earth Corps has litigated more successful Proposition 65 air toxics cases than any other party in the State.

Typical newspaper warnings are insufficient because it is highly unlikely that the person exposed will read the warnings. Although the trend is for larger and more visible warnings, most warnings in the past have been fairly small, and are often buried in the back of a newspaper. Typically, warnings have failed to include isopleth maps indicating the boundaries of the exposure and the fact that the exposure is taking place.

12. CAL. CODE REGS. tit. 22, § 12601(d).

13. See CAL. HEALTH & SAFETY CODE § 25249.7(d).

described, the facilities designated as high priority will be served with a 60-day notice.

The 60-day notice is mailed to the Attorney General's Office, county district attorney's office, cities with a population in excess of 750,000 and the violator.¹⁴ Although not required by statute, it is good practice to send the violator a side letter explaining the reasons for the 60-day notice and requesting any information which the company believes is relevant to the noticing party's determination to take legal action. Such a letter requests; (1) the facility's annual lead emissions since February 27, 1988, the date the warning requirement for lead as a reproductive toxin went into effect, (2) any warnings provided to comply with Proposition 65 along with the dates of the notices, (3) any information which demonstrates that the company does not have to provide a warning, and (4) measures taken by the company to reduce lead emissions during the recent past and whether there are any concrete plans to do so in the immediate future.

This side letter is important because it offers the company an opportunity to present a case for why a lawsuit should not be filed. Sometimes, the company has information regarding reduced emissions that should be evaluated. If there are lower emissions, the company must provide documentation that the emissions are indeed low enough not to require a warning. If the company can do so, a lawsuit has been averted and only those cases that are meritorious will be brought.

During the 60-day notice period and prior to filing a complaint in court, the highest priority cases are referred to a consultant who performs air dispersion modeling. Input data is required in order to create an air dispersion model. This data includes emissions information in pounds per hour, stack dimensions and locations, temperature of the effluent in the stack, velocity of emissions leaving the stack, a plot plant of the facility and meteorological data.¹⁵

14. *See id.* § 25249.7(c).

15. The meteorological data is often obtained from nearby airports or weather stations. Based on all of these input parameters, modeling will predict concentrations at varying distances from the emitter. For purposes of Proposition 65 enforcement, the major purpose of conducting air dispersion modeling is to determine the number of residents and workers exposed to levels of the chemical above the warning threshold. The modeling will generate an isopleth map showing the area exposed. Lead modeling for plaintiffs, the California Attorney General's Office, and the Los Angeles County District Attorney's Office has been performed by Robert Sears. The model currently used is the Environmental Protection Agency's ISCST3 dispersion model. Several examples of isopleth maps are provided in the Appendix.

The results of the model, namely, an assessment of the number of residents and workers exposed to lead levels in excess of .5 ug/day, 1.0 ug/day or 5.0 ug/day, along with an isopleth map showing where the exposures are taking place, will shape the plaintiff's case. The number of exposures and the concentrations of lead at varying distances from the facility, as revealed by the modeling, will determine the profile of the case.

In addition to modeling, another extremely valuable technique to bolster the plaintiff's case is to conduct monitoring of the air beyond the plant boundaries.¹⁶ Here, monitors which are sensitive to lead are placed both upwind and downwind of the facility. Given the right meteorological conditions and placement of the monitors, this technique is useful in detecting the contribution of lead to the atmosphere from both fugitive and stack emissions. This adds to plaintiff's knowledge about emissions and concentrations because typically the model is only based on stack emissions, not fugitive emissions. Furthermore, once the monitors detect lead concentrations, the data can be inserted into the model to more accurately predict concentrations at different locations in the community.¹⁷ If the modeling or monitoring reveals high lead concentrations, then it becomes even more imperative that the environmental plaintiff ensure that emissions are substantially reduced.

During the 60-day period, several events may take place that are critical to the determination of which cases to file in court. First, updated information from the company or other sources may necessitate a reevaluation of which cases are the most compelling, and in which cases the plaintiffs will most easily be able to demonstrate a significant violation. Second, defense counsel may decide to meet with the noticing party in order to settle the case. Increasingly, companies are choosing

16. Monitoring is a very risky proposition due to its cost and the uncertainty regarding where to place monitors. Emissions could be taking place without detection if monitors are placed in the wrong location. The wind could be extremely variable on any given day as well. With all of the difficulties of obtaining a "hit," it is not unusual to miss. Thus, it should not be detrimental to a plaintiff's case if little or no lead is detected. On the other hand, if the monitors detect a large concentration, this could greatly enhance plaintiff's knowledge about emissions, the need for abatement equipment, and the importance of the case.

17. Monitoring performed by California Earth Corps at the Teledyne Battery Products facility in Redlands, California showed levels that far exceeded source tests performed by the company. With no other lead emitters in the area, the evidence was compelling. Original modeling based on source tests conducted by Teledyne showed an isopleth with approximately 500 residents exposed in excess of the levels allowed by Proposition 65. By using the more accurate monitoring data, which included monitoring for fugitive emissions (those escaping from unauthorized sources), the modeling showed that over 9000 residents were exposed at levels above those allowed by Proposition 65.

this route due to the high costs associated with defending a Proposition 65 enforcement action, the low likelihood of prevailing on the merits, and because they realize that exposures can be reduced in the community through operational changes and the installation of appropriate emissions control equipment.

In a case where there is an off-site exposure and defense counsel fails to contact plaintiff's counsel to rebut emission information, filing an action will typically take place on the 61st day after providing notice if the Attorney General or the local district attorney has failed to bring an action. The reason for this should be clear. The company has had two months to provide information to the noticing party regarding why a suit should not be filed. The failure to respond must be deemed to mean that the information relied on by the environmental group is accurate.

During the 60-day period, it is important for counsel for the noticing party to contact the Attorney General's Office to discuss the case and to determine whether the State intends to file suit within the statutory period. In the last few years, the Attorney General has generally preferred not to preempt an environmental group seeking to enforce an air toxics case.¹⁸ In those air toxics cases in which the Attorney General has participated, the Attorney General's role has ranged from active observer,¹⁹ to active negotiator with an

18. This could be due to the Attorney General's immersion for the past several years in arduous litigation with lead faucet manufacturers. *See, e.g.,* Lundgren v. American Standard, Inc., 926 P.2d 1042 (Cal. 1996) (holding that "faucet water" is a "source of drinking water" within the meaning of proposition 65, and that manufacturers of faucets are therefore subject to regulation under the Act). For whatever reason, plaintiff's counsel has found little threat of preemption, especially when the Attorney General has been informed that the environmental group has substantially prepared for the case already by obtaining public records, conducting a site visit, and conducting monitoring and modeling.

19. *See* California Earth Corps v. Delco Remy, Inc., No. CV 94-2203 (C.D. Cal. May 15, 1995). In *California Earth Corps v. Delco Remy*, the Attorney General's office participated in settlement discussions, but did not intervene formally. Pursuant to the Consent Judgment filed on May 15, 1995, the Attorney General's Office received \$20,000 in civil penalties.

environmental group,²⁰ to intervenor,²¹ to co-plaintiff with a district attorney's office,²² to sole plaintiff.²³

There have also been occasions where the Attorney General's Office or the Los Angeles County District Attorney have worked with the environmental group in tandem.²⁴ In one case, an environmental group brought Proposition 65 violations to the attention of public prosecutors, and both the Attorney General and the Contra Costa District Attorney's Office jointly prosecuted the case which led to the elimination of a potent carcinogen.²⁵ In each of these cases, a substantial public benefit resulted.²⁶ Of interest is the fact that, in each of the three cases where the District Attorney's Office in Los Angeles litigated against a toxic emitter without an environmental plaintiff, the public benefits were less substantial in that none of the judgments involved any requirement to reduce lead emissions. Instead, the Consent Judgments provided only for warnings and monetary payments.²⁷

20. Prior to filing an action, the Attorney General worked closely with Communities for a Better Environment regarding a glass manufacturing facility in Hayward, California. For reasons unrelated to the Proposition 65 case, the company filed for bankruptcy and the Attorney General's office filed its own action. See *California v. Anchor Glass Container Corp.*, No. H-1926871, (Cal. Super. Ct. Alameda Co. Oct. 3, 1996) (Complaint).

21. See *People United for a Better Oakland v. American Brass & Iron Foundry*, No. 708543-3 (Cal. Super. Ct. Alameda Co. Nov. 9, 1992) (Consent Judgment). The State intervened on March 2, 1993. See *id.* at 2. Of the \$50,000 which the defendant was required to pay in the case, \$24,000 was related to the State's costs, \$14,000 of which went to the California Public Health Foundation.

22. See *California v. Bio-Rad Lab., Inc.*, No. C90-05401 (Cal Super. Ct. Contra Costa Co. Dec. 12, 1990) (Consent Judgment).

23. See *California v. McDonnell Douglas Corp.*, BC055494 (Cal. Super. Ct. L.A. Co. Aug. 23, 1994) (Consent Judgment). The Attorney General litigated the issue of the company's emissions of lead, hexavalent chromium, methylene chloride, tetrachloroethylene, 1,4 dioxane, and 1,1,1 trichloroethane from several of defendant's facilities in California. See *id.* at 2. The Consent Judgment called for the installation of high efficiency particulate air filter (HEPA) systems at the Long Beach and Huntington Beach facilities and publication of a Proposition 65 warning in the Los Angeles Times for the above facilities and the Culver City and Torrance facilities. See *id.* at 8. Furthermore, McDonnell Douglas paid civil penalties in the sum of \$70,000, fees and costs of \$25,000, and a payment of \$30,000 to the California Public Health Foundation. See *id.* at 4.

24. See *People United for a Better Oakland v. American Brass & Iron Foundry*, No. 708543-3 (Cal. Super. Ct. Alameda Co. Nov. 19, 1993) (Consent Judgment); *California Earth Corps v. GNB, Inc.*, No. BC079211 & BC079212 (Cal. Super. Ct. L.A. Co. Aug. 5, 1994) (Final Judgment Pursuant to Stipulation); *California Earth Corps v. Delco Remy*, No. CV 94-2203 (Consent Judgment).

25. See *Bio-Rad Lab.*, No. C-90-05401 at 1-2.

26. See *infra* Part III.B.

27. See *California v. Hickory Springs of California, Inc.*, No. BC 057005 (Cal. Super. Ct. L.A. Co. June 18, 1992) (Final Judgment) (requiring the defendant to provide a warning in English and Spanish delivered or mailed to those persons exposed to methylene chloride and to

Even when the Attorney General does not file against the violator, the office will have some involvement in the case if the defendant seeks some form of protection from other lawsuits, including from lawsuits instituted by the State itself.²⁸ Thus, over the years it has become customary for the Attorney General to write a “no further action letter.” The letter essentially states that based on the relief obtained in the settlement agreement, the alleged violations of Proposition 65 covered by the terms of the agreement do not warrant any further action by the Attorney General. Thus, if any of the terms of the proposed settlement are contrary to the public’s interest or inconsistent with Proposition 65 and its regulations, the State can effectively hold up the agreement until unwarranted provisions are modified. Arguably, the “no further action letter” should carry considerable weight to bar another action which involves the same period of violation already settled by the original parties.²⁹ This letter is extremely important for the defendant to obtain. Typically, counsel in Proposition 65 enforcement actions have provided defense counsel with their consultant’s air dispersion modeling results prior to the expiration of the 60-day notice period or shortly after filing an action in court. Sharing this information will serve to educate the company early in the proceeding of the seriousness of the case, and

pay \$20,000 to the Los Angeles County District Attorney’s Office and \$10,000 to the Public Health Foundation of Los Angeles); *California v. Quemetco, Inc.*, No. BC 080112 (Cal. Super. Ct. L.A. Co. Apr. 30, 1993) (Final Judgment). The Quemetco Judgment required the defendant to mail or deliver a Proposition 65 warning in English and Spanish, provide a one-time warning for past exposures and annual warnings for current exposures as long as Quemetco continued to emit lead and arsenic in amounts for which Proposition 65 requires a warning. *Id.* at 4-7. The Quemetco judgment further provided for a warning to be published in the main news section or in the local news section of one English language daily newspaper, and in one Spanish language daily newspaper. *Id.* Quemetco was required to pay \$107,500 of which \$47,500 represented civil penalties pursuant to the Business and Professions Code Section 17206 and Health and Safety Code Section 25249.7 (Proposition 65), as well as \$17,720 for legal and investigative costs. *See id.* at 7-8. Quemetco was also required to pay \$42,280 to the Los Angeles Health Department for a “Occ Lead” Education and Awareness Demonstration Project, a special project of the Public Health Foundation of Los Angeles County, Inc. *See id.* *California v. Trojan Battery Co.*, No. BC094480 (Cal. Super. Ct. L.A. Co. Jan. 10, 1995) (Final Judgment). This Judgment required the defendant to provide a one time retroactive warning for past exposures in English and Spanish, an annual warning for current exposures mailed or delivered to the isopleth area, the same warning in the main news section of the Los Angeles Times and La Opinion at least one-quarter page in size, and published four times per year. *Id.* at 4-5. Trojan was obligated to pay \$50,000, \$20,000 of which was for attorney’s fees and costs, \$10,000 of which was a donation to the Public Health Foundation for their lead project, and \$20,000 of which was civil penalties pursuant to the Business and Professions Code Section 17206. *See id.* at 6.

28. In the air toxics cases, the defendant always seeks such protection, and the plaintiff should always support this request.

29. Thus far, no other action has been filed against the same facility for a Proposition 65 violation after a settlement has been reached.

that exposures are on-going and corrective action must take place quickly. The modeling report provides the company with the factual basis to make important decisions concerning new technology and other methods of reducing lead exposures in the community. If the defendant produces a report, this information is also frequently exchanged. In this manner, the factual contentions of the parties are developed quickly and inexpensively.

III. PROPOSITION 65 SETTLEMENTS

There can be no doubt that Proposition 65 enforcement has created a tremendous benefit to the public by substantially reducing air toxic emissions and exposures, especially from lead. The following is a discussion of several noteworthy cases involving chemicals other than lead.

In the first air toxics Proposition 65 enforcement action, on February 5, 1990, Citizens for a Better Environment (CBE) served a Proposition 65 notice because Systron Donner Corporation, a facility located in Concord, California was exposing residents of a nearby trailer park³⁰ to chloroform and methylene chloride, both of which are carcinogens.³¹ No warning had been provided. In short order, the environmental plaintiff obtained an agreement from the company which required elimination of the use of chloroform and methylene chloride. The consent judgment also provided for payment of \$22,000 to the Toxics Coordinating Project of the California Toxics Coalition for the purposes of investigation, remedy, and enforcement of Proposition 65 violations. The consent judgment also provided that CBE would receive \$33,000 in attorneys fees and costs.³²

Another 60-day notice by CBE led to enforcement of Proposition 65 by the Attorney General and the Contra Costa County District Attorney³³ and an administrative action by the Bay Area Air Quality Management District for a facility's failure to have an operating permit. Bio-Rad Laboratories (a biotechnology company) was emitting approximately 60,000 pounds of chloroform in 1988, without providing

30. In fact, the nearest trailer was located approximately 30 feet from Systron Donner's property line.

31. Chloroform was listed as a carcinogen on October 1, 1987 and methylene chloride was listed as a carcinogen on April 1, 1988. See CAL. CODE. REGS. Tit. 22 § 12000 (1997).

32. See *Citizens for a Better Env't. v. Systron Donner Corp.*, No. C 90-04539 (Cal. Super. Ct. Contra Costa Co. Oct. 18, 1990) (Consent Judgment).

33. See *Bio-Rad Lab.*, No. C-90-05401.

a warning.³⁴ A Consent Judgment provided for elimination of chloroform emissions and payment of civil penalties and costs of \$550,000, \$187,000 of which would be used for further Proposition 65 enforcement actions by the Attorney General. The judgment also provided for payment of \$150,000 to the Air District for violation of its rules and regulations.³⁵

In the area of air toxics, clearly the Attorney General's greatest success has been against emitters of ethylene oxide.³⁶ In a programmatic effort, the State prosecuted numerous violators in the early 1990s and achieved remarkable public benefits. In these cases, settlements were achieved that required that companies either eliminate the use of ethylene oxide or that state of the art equipment be installed to control emissions.³⁷ In one of the cases, ethylene oxide emissions from a spice manufacturer created a cancer risk 278 times above the warning threshold.³⁸ As a whole, these enforcement actions resulted in the elimination of hundreds of thousands of exposures.³⁹ Other enforcement actions have also led to the elimination of methylene chloride emissions,⁴⁰ a significant reduction of asbestos exposures,⁴¹ and significant reduction of hexavalent chromium emissions.⁴²

34. See Elliot Diringer, *Pollution Charges Filed Against Chemical Lab*, S.F. CHRON. Dec. 13, 1990 at A4.

35. See *Bio-Rad Lab.*, No. C-90-05401 at 3-4.

36. Ethylene oxide is a reproductive toxicant and carcinogen listed on February 27, 1987. See CAL. CODE REG. Tit. 22 § 12000. The warning threshold for ethylene oxide as a reproductive toxicant is 20 ug/day.

37. See *People v. McGhan Medical Corp.*, No. 178922 at 2 (Cal. Super. Ct. Santa Barbara Co. Oct. 26, 1990) (Consent Judgment); *California v. Mentor Corp.*, No. 178922 (Cal. Super. Ct. Santa Barbara Co. Oct. 24, 1990) (Consent Judgment); *California v. Santa Maria Chili*, No. SM64010 (Cal. Super. Ct. Santa Barbara Co. Apr. 10, 1991) (Consent Judgment); *California v. Griffith Micro Science*, No. BC006063 (Cal. Super. Ct. L.A. Co. May 1, 1991) (Stipulated Judgment); *People v. Baxter Healthcare Corp.*, No. BC006061 (Cal. Super. Ct. L.A. Co. Super. Ct., Oct. 1991) (Stipulated Judgment); *California v. Bentley Labs and Baxter Healthcare Corp.*, No. 630727 (Cal. Super. Ct. Orange Co. Sept. 3, 1991) (Stipulated Judgment); *California v. Botanicals International, Inc.*, No. BC006060 (Cal. Super. Ct. L.A. Co. Mar. 6, 1991) (Consent Judgment); *California v. Sterilization Services and Vacudyne*, No. 630728 (Cal. Super. Ct. Orange Co. Oct. 21, 1991) (Stipulated Judgment).

38. See William S. Pease, *Chemical Hazards and the Public's Right to Know: How Effective is California's Proposition 65?*, 33 ENV'T 12, 18 (1991).

39. Telephone conversation with Robert Sears on October 25, 1996. Mr. Sears performed the air dispersion modeling analysis for the Attorney General's Office.

40. See *California Earth Corps v. Laminating Co. of America*, No. 706725 at 1 (Cal. Super. Ct. Orange Co. Aug. 19, 1993) (Consent Judgment).

41. See *Alviso Community Org. v. Maciel*, No. 723808 at 1 (Cal Super. Ct. Santa Clara Co. Oct. 5, 1994) (court approval of settlement). The complaint alleged failure to warn of asbestos exposure due to truck use and construction activities raising asbestos laden dust. See *id.*

The following is an overview of the lead cases that have been litigated under the statute

A. *People United for a Better Oakland v. American Brass & Iron Foundry/California v. American Brass & Iron Foundry*

The first Proposition 65 case involving lead emissions was filed on November 17, 1992, by People United for a Better Oakland (PUEBLO) against American Brass and Iron Foundry (AB&I).⁴³ PUEBLO is a multiracial, multilingual membership based organization dedicated to improving the environment, health care, housing, and educational needs of the people of Oakland. PUEBLO has worked extensively to protect persons from lead exposures, and was responsible for passing of the first county ordinance on the West Coast requiring blood testing in persons who are or might be exposed to lead.⁴⁴ PUEBLO based its case on source test results conducted by AB&I that showed the company was emitting 872 pounds of lead per year into the atmosphere. Clearly, AB&I did not have sufficient controls on its lead emissions. The company's Proposition 65 warning was small, inadequate for failing to disclose that a lead exposure was occurring, and was buried in the Oakland Tribune. Subsequent to PUEBLO's filing, the California Attorney General's Office intervened in the action.⁴⁵ Computer modeling showed that AB&I emissions exposed nearly 200,000 persons to levels of lead at or greater than 0.5 ug/day. Persons residing very close to the plant were exposed to several hundred micrograms per day. Based on additional source tests conducted by the Bay Area Air Quality Management District, further modeling also showed significant exposures.⁴⁶

at 1. The settlement restricted the disputed activities in the area and provided more than \$1 million for medical monitoring, attorney's fees and costs. *Id.* at 10-12.

42. See *California v. McDonnell Douglas Corp.*, No. BC055494 (Cal. Super. Ct. L.A. Co. Aug. 23, 1994) (Consent Judgment).

43. *People United for a Better Oakland v. American Brass & Iron Foundry*, No. 708543-3, (Cal. Super. Ct. Alameda Co. Super. Ct. Nov. 12, 1993) (Consent Judgment).

44. See e.g. Judy Ronningan, *Lead Testing of Children Gets Boost in East Bay*, S.F. CHRON. Dec. 24, 1992 at A12 (describing PUEBLO's involvement in advocating for lead screening for low income children).

45. *People United for A Better Oakland v. American Brass & Iron Foundry*, No 708543-3 at 2.

46. Air dispersion modeling demonstrated that 11,552 persons were exposed to lead at or greater than 0.5 ug/day, covering an area of 6.5 square kilometers. Moreover, 3,472 persons were exposed to levels at or greater than 1.0 ug/day and 872 persons were exposed to levels at or greater than 5.0 ug/day. The large numbers of exposures presented a compelling case.

While there were numerous exposures, the company was on the brink of bankruptcy, a factor which had to be taken into consideration in settlement. The plaintiffs' goal was to reduce the exposures and impose some monetary penalty on the company, rather than shut the plant down by imposing a draconian penalty. This objective was met by a Consent Judgment which required substantial emission reductions, warnings to the public and a modest monetary payment.⁴⁷

The consent judgment required AB&I to construct a baghouse dust transportation system to contain fugitive emissions of dust.⁴⁸ Vacuum lines were to be installed to transport dust from the baghouse to a storage bin. Collection hoods and a baghouse were to be installed to restrict emissions from the furnace areas.⁴⁹ Furthermore, the company agreed to provide a warning which became the model Proposition 65 warning for all subsequent air toxic cases.⁵⁰ Essentially, the warning was to be published in the main news section of the Oakland Tribune, had to be at least one-quarter page in size and published four times per year.⁵¹ The warning was also to be delivered by U.S. Postal Service or other direct delivery service to numerous persons in the community. In light of AB&I's financial status, \$55,000 was agreed upon for attorney's fees and costs, lead education to persons within the Oakland community by PUEBLO, and funds for the California Public Health Foundation.

From the public's standpoint, the case was enormously successful. After the plant improvements, AB&I's lead emissions were reduced by more than 800 pounds annually.⁵²

B. California Earth Corps, Inc. v. Quenell Enterprises, Inc.

Subsequent to the AB&I case, California Earth Corps, (CEC) a nonprofit environmental organization, commenced a programmatic effort to reduce lead emissions from the largest emitters throughout the southern California region.⁵³ CEC's first lead case was against Quenell

47. See *People United for a Better Oakland v. American Brass & Iron Foundry*, No. 708543-3 at 3, 5.

48. See *id.*

49. See *id.* at 3-4.

50. See *id.* at 4, Exhibit B.

51. See *id.*

52. BAY AREA AIR QUALITY MANAGEMENT DISTRICT, TOXIC EMISSIONS INVENTORY, 1996.

53. CEC also negotiated a settlement with several emitters of methylene chloride, including a company that agreed to discontinue use of methylene chloride by January 30, 1994. See *California Earth Corps v. Laminating Co. of America*, No. 706725 (Cal. Super. Ct. Orange Co. Aug. 19, 1993) (Consent Judgment). Prior to filing, CEC had obtained information from the South Coast Air Quality Management District's 1991 Annual "Hot Spot Report" that the facility's

Enterprises, Inc.,⁵⁴ who owned a facility in Commerce, California that manufactured an oxidized form of lead for use in various other off-site industries.⁵⁵ Emissions information submitted by Quenell to the South Coast Air Quality Management District (AQMD) disclosed 3857 pounds of lead oxide emitted in 1990, 3,178 pounds emitted in 1991, and 1,321 pounds emitted in 1992.⁵⁶ CEC also obtained AQMD monitoring data from the area surrounding the facility.⁵⁷ Fortunately, however, the facility is located in an industrial area and is not close to any residential receptors. Quenell did not provide an adequate Proposition 65 notice prior to the litigation.

CEC and Quenell, who proceeded without legal counsel, entered into a settlement negotiated during the summer of 1993. The company agreed to complete the following plant modifications by November 30, 1993, to reduce lead and lead oxide emissions: (1) installation of re-designed lids and seals on all oxide reactors to eliminate leaks, (2) installation of automatic Honeywell computer controls on all reactor systems to limit fluctuations in operating parameters inherent in manually operated units and to minimize fugitive emissions, and (3) enclosure of a truck loading facility and baghouses exposed to the outdoors.⁵⁸ The company also agreed to pay \$36,000 for CEC's attorneys' fees and costs in the case and to provide a mailed warning to the industrial receptors exposed.⁵⁹

C. California Earth Corps, Inc. v. GNB Battery Technologies

Subsequent to the *Quenell* case, CEC filed a complaint against GNB Battery Technologies on April 26, 1993.⁶⁰ GNB operates a battery recycling plant in Vernon, California. At the facility, old lead acid batteries are crushed, metals are melted, useable metals are refined and new batteries are formed. GNB also operates a battery

risk for the most exposed individual was 7.6 E-5, a level 7.6 times higher than the level allowed by Proposition 65 for carcinogens.

54. California Earth Corps. v. Quenell Enter., No. BC086292 (Cal. Super. Ct. L.A. Co. Aug. 13 1993) (Consent Judgment). All of CEC's cases discussed in this Article were litigated by the author as well as John Cohn of Venice Beach, California.

55. See *id.* at 1.

56. By the end of 1992, Quenell was involved with the installation of HEPA filters to reduce emissions.

57. This data revealed concentrations much higher than allowed under Proposition 65.

58. See *California Earth Corps v. Quenell Enter.*, No. BC086292 at 5.

59. See *id.*

60. California Earth Corps v. GNB Battery Tech., Inc., Nos. BC0079211 & BC0079212 (Cal. Super. Ct. L.A. Co July 13, 1994)(Final Judgment).

manufacturing plant in Industry, California.⁶¹ CEC had obtained information from the Air Resources Board that the Vernon plant was emitting 1,398 pounds, and the Industry plant was emitting 319 pounds of lead during 1989.⁶² When modeled, these emissions led to a huge isopleth. During the early 1990s, GNB engaged in plant improvements at both facilities which led to sizable reductions in emissions. Nevertheless, there were still substantial improvements to be made, and many off-site exposures occurred even during 1994.⁶³

The complaint alleged that GNB failed to warn the public under Proposition 65 and the Unfair Competition Act in Section 17200 of the Business and Professions Code.⁶⁴ The Los Angeles County District Attorney's Office worked on the case jointly with CEC, while the California Department of Toxic Substances Control was simultaneously prosecuting GNB for hazardous waste violations regarding lead.⁶⁵

The parties entered into a consent judgment on August 5, 1994. Under the terms of the consent judgment, GNB Industry was required to install a ventilated enclosure for the unloading of lead oxide delivery trucks to prevent fugitive lead emissions and to remove existing portions of the grid casting process and duct remaining portions to a baghouse.⁶⁶ GNB Vernon was required to vent its raw material preparation system mud tanks to the demister and to install a 225,000 cubic feet per minute capture and collection system for lead emissions.⁶⁷ Both of these improvements were expected to dramatically lower emissions.

In regard to warnings, the consent judgment set forth a very detailed warning program with a requirement of retroactive warnings for past exposures. The reason for the retroactive warning was simple: numerous people had been exposed to lead in the past and had a right to be apprised of this fact. An isopleth map detailing the area of exposure at or above 1.0 ug/day was to accompany the warning delivered by U.S. mail or other direct delivery service. A delivered warning for current exposures was also mandated for the 1.0 ug/day isopleth. Finally, a

61. *See id.* at 3.

62. AIR TOXICS EMISSIONS DATA SYSTEM SUMMARY, AIR RESOURCES BOARD (July 19, 1994). The emissions data was from 1989 and 1990.

63. For the City of Industry facility, lead emissions were reduced to approximately 47 pounds for 1994 which created over 3000 worker exposures and over 200 residential exposures.

64. GNB provided a newspaper warning which plaintiffs alleged was inadequate.

65. *See In re GNB, Inc.*, No. HWCA 93/94006 (July 19, 1993) (Consent Agreement and Order, State of California Environmental Protection Agency, Department of Toxic Substances Control).

66. *See California Earth Corps v. GNB Battery Tech.*, No. BC079211 & BC079212 at 4-5.

67. *See id.* at 5.

warning was to be published in the main news section of the *Los Angeles Times* or the *San Gabriel Valley Tribune* as well as in Spanish in *La Opinion*. The warnings were required to be at least one-quarter page in size so as to be conspicuous. The monetary aspect of the settlement involved payments totaling \$165,000 for CEC's environmental activities, programs, enforcement actions, attorneys fees and costs, a donation to the Los Angeles County Public Health Foundation for lead reduction enforcement activities, and civil penalties pursuant to Business and Professions Code section 17206 to the Los Angeles District Attorney's Office.⁶⁸

D. California Earth Corps, Inc. v. Thakar Aluminum Corporation

Immediately after completing the *GNB* case, CEC filed and settled with Thakar Aluminum Corporation and Imco Recycling of California, Inc.⁶⁹ This was the first case involving a recycler, a company who was attempting to do good work for the environment, and yet was in violation of the law. The facility did not add lead to its recycling operation. Rather, lead entered Thakar's facility in the form of lead weights placed inside cans by persons attempting to increase their payment for returning these cans to the local recycling center. During the course of melting operations, there were shockingly high lead emissions. A 1989 Health Risk Assessment disclosed 898.3 pounds of lead emissions and a Facility Emissions Summary Form submitted to the South Coast AQMD indicated 495 pounds of lead emissions for 1991. No warning had been provided to the public. Modeling showed that several hundred residents were being exposed including those situated in a trailer park, approximately 600 meters away.

In the settlement, Thakar agreed to install an air knife system designed to remove contaminants, including lead, from aluminum cans prior to melting operations, at a cost of approximately \$100,000.⁷⁰ Thakar also agreed to provide a warning containing an isopleth map, delivered by mail or other delivery service to the exposed area.⁷¹ Upon

68. Pursuant to the Unfair Competition Act, the government may elect to seek civil penalties for a four-year period. CAL. BUS. & PROF. CODE § 17208 (Deering 1996). Private litigants are not entitled to civil penalties under the Act, only restitution and injunctive relief. *See id.*

69. *California Earth Corps, Inc. v. Thakar Aluminum Corp.*, No. 254720, (Cal. Super. Ct. Riverside Co. Aug. 30, 1994) (Final Judgment Pursuant to Stipulation).

70. *See id.* at 4.

71. *See id.*

installation of the air knife, the company's warning obligation ceased.⁷² Finally, Thakar paid \$22,000 for attorneys fees, costs, and a donation to CEC for further environmental activities, programs and enforcement actions.⁷³ The public benefit derived from this case was the elimination of all off-site exposures.

E. California Earth Corps, Inc. v. Ramcar Batteries, Inc.

On July 22, 1994, CEC filed against Ramcar Batteries, Inc. in Los Angeles County Superior Court.⁷⁴ Ramcar operates a battery manufacturing facility in Commerce, California.⁷⁵ The company disclosed to the South Coast AQMD in June of 1992 that it was emitting 229 pounds per year of lead, and in July of 1993 it further revealed that it was emitting 350 pounds per year of lead.⁷⁶ Ramcar had mailed some Proposition 65 warnings to the surrounding area. CEC contended that Ramcar's warning was confusing and inaccurate. Interestingly enough, despite the two prior submittals to the air district, subsequent to CEC's filing, Ramcar substantially revised its emission disclosure downward to between 23 and 35 pounds per year. Fortunately, the current exposures in the case were primarily worker exposures in the surrounding industrial area.

In the Final Judgment Pursuant to Stipulation, Ramcar agreed to publish a warning in English in the main news section of the *Los Angeles Times* as well as in Spanish in *La Opinion* and to mail a warning to those persons exposed at or above 1.0 ug/day.⁷⁷ The company also agreed to hire an environmental consultant to conduct an assessment of the lead producing operations and to recommend modifications to reduce lead emissions.⁷⁸ Ramcar agreed to retrofit its machines to seal and control lead dust, modify ducting to increase lead dust capture, retrofit lead pot hoods for more efficient control and other items.⁷⁹ The company further reimbursed CEC for attorneys fees and costs in the sum

72. *See id.*

73. *Id.*

74. *See California Earth Corps, Inc. v. Ramcar Batteries, Inc.*, No. BC109210 (Cal. Super. Ct. L.A. Co. July 22, 1994) (Final Judgment Pursuant to Stipulation).

75. Businesses are located 36 meters from the facility. The residential area is situated between 500 meters to 1,000 meters from Ramcar.

76. *See Ramcar Batteries, Inc. Facility Emission Summary Forms* submitted to the South Coast AQMD and *The AB 2588 Air Toxics Risk Assessment* prepared by Fero Environmental Engineering, Inc.

77. *See California Earth Corps Inc. v. Ramcar Batteries*, BC 109210, at 5.

78. *See id.* at 5.

79. *See id.*

of \$20,000 and paid \$1,000 in civil penalties to the Hazardous Substance Account in the State General Fund.⁸⁰

F. California Earth Corps, Inc. v. Concorde Battery Corporation

In October of 1994, CEC filed a Proposition 65 lawsuit against Concorde Battery Corporation.⁸¹ Concorde operates a battery manufacturing plant immediately adjacent to a trailer park community in West Covina, California.⁸² Living at the park are many retired persons and families with young children who play in the area. CEC became involved in this case due to the proximity of the facility to the residential area along with high emissions.

Prior to July of 1994, Concorde emitted approximately 172 pounds of lead per year. This information was provided in the company's "Facility Emission Summary" form provided to the South Coast Air Quality Management District. The majority of these emissions came from the grid caster at the facility which had no pollution controls on it. During the summer of 1994, the company installed control equipment for these emissions.

In response to CEC's case, Concorde conducted source tests at its battery plant in January of 1995. During the tests, it was determined that several bags in a baghouse used to filter lead emissions were not working properly. The company replaced these bags. As a result of the installation of controls on the grid caster and the insertion of new bags, the source test showed lead emissions to be about 25 pounds per year.

During the summer of 1995, Concorde again conducted source tests and determined that the emissions had decreased to below 25 pounds per year. During this time, CEC hired a consultant to monitor the lead emissions in the area. CEC was primarily concerned about the health effects from the company's emissions on the nearby trailer park population. Our monitoring showed emissions to be approximately 16 pounds per year—still significant enough to require a warning under Proposition 65.

The modeling demonstrated that 577 persons living in the residential area were being exposed to lead at 0.5 ug/day or greater and that 309 of these persons were exposed to lead 1.0 ug/day or greater.

80. *See id.*

81. *California Earth Corps, Inc. v. Interspace Battery, Inc.*, BC 115205 (Cal. Super. Ct. L.A. Co. Oct. 21, 1994) (Settlement Agreement).

82. *See id.* at 1.

Modeling of the pre-July 1994 emissions showed that 6,565 persons living in the residential area were exposed at the 0.5 ug/day level, 2,831 persons were exposed to 1.0 ug/day or greater, and 550 persons were exposed to 5.0 ug/day or greater. Most disturbing was the fact that several of the trailer park residents were obtaining blood tests with elevated lead levels.

The defendant in the case clearly expressed its willingness to resolve the matter. The terms of the consent judgment confer one of the most impressive air toxics Proposition 65 settlement in the State. It requires the company to become a state of the art facility by October 31, 1996, by installing plastic curtains to restrict fugitives, paving the outside area, implementing a central vacuum system and installing a further filter system on the facility's major emission area, the grid caster.⁸³ All filters must maintain an efficiency of 99.93% or greater.⁸⁴ The judgment provides for payments totaling \$340,000 of which \$155,000 will be used by CEC to hire contractors to remove lead from homes and soil in Los Angeles County. The remainder will be used by CEC to bring further Proposition 65 cases and for attorneys fees and reimbursement of costs.⁸⁵ Most notably, this is the first settlement that requires as a remedial measure for the company to pay money to eliminate lead in the environment. It is also the first case in California which required a company to conduct monitoring at or near the facility to determine lead concentrations in the area.⁸⁶

The consent judgment requires Concorde to send a mailed notice if the modeling shows a concentration of 1.0 ug/day and a newspaper warning if the modeling shows a concentration of 0.5 ug/day or greater.⁸⁷ The warnings will be in Spanish and English and inform persons that they are being exposed to lead, a chemical known to the state to cause cancer and reproductive toxicity.⁸⁸

G California Earth Corps, Inc. v. Delco Remy, Inc.

In January of 1994, CEC filed a complaint for injunctive relief and civil penalties in Orange County Superior Court against Delco Remy, (now Delphi Energy and Engine Management Systems) a

83. *See id.* at 4.

84. *See id.*

85. *See id.* at 10.

86. *See id.* at 6-10.

87. *See id.* at 3-4.

88. *See id.* at 4.

division of General Motors Corporation.⁸⁹ Delco Remy subsequently removed the case to the United States District Court for the Central District of California.⁹⁰

Delco Remy is one of the largest battery manufacturers in the United States. The focus of the litigation involved Delco's Anaheim plant which is surrounded in all directions by a residential community. Pursuant to the South Coast Air Quality Management District's Rule 1420, the company reported 293 pounds per year of annual lead emissions in 1993. Delco contended that since 1987 it had complied with the requirements of Proposition 65 by publishing quarterly warning notices in English and Spanish in the Orange County Register.

Air dispersion modeling showed a residential population of 18,257 and a worker population of 8,413 exposed to levels at or greater than 0.5 ug/day. The modeling further showed a residential population of 4,352 and a worker population of 4,407 exposed to levels at or greater than 1.0 ug/day. The area of exposure covered 6.4 square kilometers for the 0.5 ug/day isopleth and 2.1 square kilometers for the 1.0 ug/day isopleth.⁹¹

For more than a year, Delco Remy insisted that the battery facility's emission controls were adequate. In actuality, the plant's emission control system, which had been state of the art decades ago, needed substantial improvement to control emissions. Finally, the company agreed to improve their facility to enhance the efficiency of 10 baghouses by installing and maintaining filter bags of 99.993% or more efficiency, as represented by the manufacturer of the bags.⁹² Delco agreed to a daily check of the pressure at each bag collector, a monthly check of major ventilation hoods, and a weekly inspection of mechanical ventilation systems components.⁹³ It also agreed to enhanced high volume air sampling (including installation and ongoing operation of three new units), installation and operation of an on-site meteorological station to continuously record wind speed, temperature, and other data during sampling periods, enhanced efficiency testing of the lead

89. California Earth Corps, Inc. v. Delco Remy, Inc., No. 723203 (Orange County Super. Ct. Jan. 6, 1994) (Complaint).

90. Defendant removed the action from Orange County Superior Court to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1441(b) on April 6, 1994.

91. See Appendix (modeling results performed by Robert Sears).

92. See California Earth Corps, Inc. v. Delco Remy, Inc., No CV-94-2203 at Exhibit B (E.D. Cal. May 15, 1995).

93. See *id.*

emission control devices at the plant, using South Coast AQMD methods, and quarterly inspections of the baghouses by an outside contractor.⁹⁴

The consent judgment further required that a one-time mailed warning be sent to the persons residing within the isopleth prepared by CEC's consultant and that warnings, in English and Spanish be published in the Metro Section of the Orange County Register, at least 2 columns 8 inches in height using language previously used in prior settlements.⁹⁵ Finally, a monetary payment of \$165,000 was required, \$20,000 of which was categorized as civil penalties, payable to the Office of the Attorney General, \$6,000 of which was a donation to the California Public Health Foundation for lead reduction enforcement activities, and \$139,000 of which was slated for further CEC environmental activities, programs, and enforcement actions and as reimbursement of attorney's fees and costs.⁹⁶

H. California Earth Corps v. Johnson Controls Battery Group, Inc.

One of the most impressive Proposition 65 air toxics settlements involved Johnson Controls Battery Group.⁹⁷ Johnson operates a lead smelting facility in Fullerton, California which manufactures automotive batteries. A sizable residential community is located several hundred meters away and other industries and commercial operations are located near the facility.

In evaluating this case, CEC reviewed several filings by Johnson and monitoring conducted in 1991 by the South Coast AQMD Which indicated that this case involved a very large exposure area.⁹⁸ Johnson reported annual emissions of 498.7 pounds for 1989. In Johnson's Rule 1420 Compliance Plan, dated June 30, 1993, the company reported a staggering 3.78 pound maximum daily lead emission rate. Plant improvements lowered this total to 0.398 pounds per day toward the end of 1993. However, CEC believed that the company could have done more to reduce lead emissions from several operations at the plant. In light of the existence of technology to control lead emissions further and

94. *See id.*

95. *See id.* at 3.

96. *See id.* at 4.

97. California Earth Corps v. Johnson Controls Battery Group, No. 737816 (Cal. Super. Ct. Orange Co. May 14, 1996) (Consent Judgment).

98. *See* SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, CHARACTERIZATION OF STATIONARY SOURCE IMPACTS ON THE NATIONAL AMBIENT AIR QUALITY STANDARD FOR AMBIENT CONCENTRATIONS OF AEROSOL PARTICULATE LEAD (Oct. 1993) (Final Report).

the residential area being situated adjacent to the Johnson facility, CEC served a 60-Day Notice on August 17, 1994.

In this case, exposures in the 1993 0.5 ug/day isopleth were off the chart. Air dispersion modeling performed by the plaintiff's consultant and emission figures supplied by Johnson's consultant (3.36 pounds per day) showed that there were 115,572 residential and 82,845 worker exposures at or greater than 0.5 ug/day, 37,991 residential and 38,925 worker exposures at or greater than 1.0 ug/day, and 754 residential and 7,936 worker exposures at or greater than 5.0 ug/day.⁹⁹ Modeling of lower emissions showed significant worker exposures, and an exposure at the Proposition 65 threshold at the edge of the residential community.

Similar to prior cases, the defendant in the case indicated a willingness to resolve the case.¹⁰⁰ A substantial amount of effort was then spent in working out a settlement, which took place on May 14, 1996. The consent judgment required Johnson to mail warnings to the residents within the 0.5 ug/day isopleth.¹⁰¹ In all prior settlements, the mailed warnings went to those persons exposed to levels at or exceeding 1.0 ug/day on the theory that the persons most exposed should receive actual notice. Finally, the court in *Johnson Controls* recognized that it was as important to provide actual notice based on Proposition 65's 0.5 ug/day standard. In the settlement, not only was Johnson required to mail a warning for current exposures, but also one for past exposures.¹⁰² Thus, it was agreed that Johnson would mail a retroactive warning to approximately 73,868 residences and 94,335 workers. The envelope of the warning contained in bold print "Proposition 65 Lead Exposure Warning," in order to increase the likelihood that the warning would be read.¹⁰³ Furthermore, the settlement required Johnson to publish a current warning, at least one-quarter page in size, in the Orange County Register on a quarterly basis.¹⁰⁴ The Proposition 65 warning from the *American Brass and Iron Foundry* case was used for the mailed and published warning. Another addition to this agreement was a provision requiring Johnson to post a warning sign readable at twenty-five feet at

99. See Appendix (results of modeling performed by Robert Sears).

100. The Orange County District Attorney had no involvement in the case. The Attorney General had no involvement either, except in reviewing the Consent Judgment and issuing a "No Further Action Letter."

101. See *California Earth Corps, Inc. v. Johnson Controls Battery Group*, No. 737816 at 3.

102. See *id.* at 4.

103. See *id.* at Exhibit E.

104. See *id.* at 3.

each point of access around the periphery of the facility and at each external building entrance.¹⁰⁵

To reduce lead emissions, Johnson agreed to control a major operation at the facility which was not being adequately controlled and to control fugitive emissions by installing plastic strip curtains at three entrances to the plant.¹⁰⁶ The major controls would involve either removing two tricasters from operation or upgrading the tricasters to be vented to the existing baghouse which controls the gross emissions from the other six tricasters.¹⁰⁷ The company also agreed to continue to implement a comprehensive quality control, operation, and maintenance program that had been developed.¹⁰⁸ This program included daily, weekly, quarterly and yearly inspections of the baghouse, weekly inspection and maintenance of the ventilation system, biweekly calibration of all plant instrumentation, and monitoring of the grid caster/tricaster controls.¹⁰⁹

I. People United for a Better Oakland v. Owens-Brockway Glass Container, Inc.

Owens-Brockway Glass Container, Inc., recycles more glass bottles in California than any other company. Owens-Brockway receives recycled glass, melts it in furnaces and makes new glass bottles. The company is located in a poor, predominately minority section of Oakland. Owens-Brockway has no emission controls at its facility.

Owens-Brockway had provided a Proposition 65 newspaper warning for several years and then stopped providing the notice. The plaintiff, PUEBLO,¹¹⁰ obtained Owens-Brockway's 1992 Health Risk Assessment which disclosed lead emissions of 463 pounds. 1994 production data from Owens-Brockway revealed a slightly higher emission level of 485 pounds per year. Due to a tall stack (40 meters high) the Proposition 65 isopleth covered a relatively small area. It was not until the Bay Area Air Quality Management District (BAAQMD) decided to conduct a source test at the Owens-Brockway plant in January and February of 1996 that the true extent of the problem came to light. These source tests revealed 3.6 pounds per day of lead emissions,

105. *See id.* at 4.

106. *See id.* at 4, Exhibit F.

107. *See id.*

108. *See id.*

109. *See id.*

110. PUEBLO brought the first successful Proposition 65 lead emission case. *See supra* notes 23-24 and accompanying text.

which at 350 days of operation was producing 1,230 pounds per year. By modeling the pounds per hour disclosed in the source test, an isopleth was generated showing 40,685 residents and 18,230 workers exposed to levels at or exceeding .5 ug/day, and 888 residents and 139 workers exposed to levels at or greater than 1.0 ug/day.¹¹¹ Thus, the high stacks in this case helped spread the lead emissions from Owens-Brockway to a very large area.¹¹²

PUEBLO filed their action on December 7, 1995.¹¹³ By March of 1996, a significant breakthrough had already occurred in the litigation. Owens-Brockway agreed to stop using recycled green cullet (the color of the glass of red wine bottles) which was believed to be the primary cause of the high lead emissions due to lead foils contained in red wine bottles. A source test conducted by the BAAQMD after the green cullet was eliminated from the waste stream confirmed that indeed, recycled green cullet was the cause of the high lead emissions. Lead emissions had dropped so significantly that the model showed no off-site exposures coming close to the Proposition 65 threshold. After extensive mediation, the parties entered into a consent judgment which was approved by the Court on February 18, 1997.¹¹⁴ The consent judgment prohibits the company from using recycled green cullet except under certain narrowly defined circumstances.¹¹⁵ No warning was required due to the low lead emissions. A series of five source tests are to be conducted during 1997 and 1998, and if such emissions exceed Proposition 65's limits, warnings will be delivered to persons within the exposed isopleth in Spanish, Vietnamese, Chinese and English.¹¹⁶ Finally, Owens-Brockway agreed to pay PUEBLO \$75,000 to support its work in the area of lead poisoning prevention, \$20,000 as reimbursement of costs, \$55,000 for attorney's fees, \$10,000 to Clinica De La Raza to test children for lead, and \$10,000 to Lincoln Child Center for lead education, testing and abatement activities.¹¹⁷ In sum, the PUEBLO action is extraordinary in that it reduced lead emissions by more than 1000 pounds and eliminated 59,000 exposures.

111. See Appendix (results of modeling performed by Robert Sears).

112. This supports the environmental viewpoint that the solution to pollution is definitely not dilution.

113. See *People United for a Better Oakland v. Owens-Brockway Glass Container, Inc.*, No. 760492-6 (Cal. Super. Ct. Alameda Co. Dec. 7, 1995) (Stipulation to Consent Judgment and Order).

114. See *id.*

115. See *id.* at 2-3.

116. See *id.* at 3, 5-6.

117. See *id.* at 7.

Other ongoing lead enforcement cases in California include *California Earth Corps, Inc. v. Teledyne Industries, Inc.*,¹¹⁸ *California Earth Corps, Inc. v. U.S. Battery Mfg. Co.*,¹¹⁹ *Communities for a Better Environment v. Acme Packaging Corp.*¹²⁰ and *California v. Anchor Glass Corp.*¹²¹

118. *California Earth Corps v. Teledyne Indus., Inc.*, No. BC 149991 (Cal. Super. Ct. L.A. Co. May 14, 1996) (Complaint). Teledyne operates a battery manufacturing facility in Redlands, California that is situated adjacent to a residential community. The closest receptors are approximately 100 feet from the plant boundary. Teledyne's Rule 1420 Compliance Plan showed approximately 86 pounds of lead emissions. Subsequent source tests showed varying amounts of emissions. Nevertheless, CEC was able to verify lead emissions in the residential community by setting up monitors beyond the company's property line. These monitored results (which include fugitive emissions) were greater than Teledyne's 1995 source test data. By inserting the monitored results into the model, the exposure assessment showed 9,245 residents and 4,718 workers exposed to 0.5 ug/day or greater, 3,589 residents and 1,601 workers exposed to 1.0 ug/day or greater, and 357 residents and 157 workers exposed to 10 ug/day or greater. Thus, CEC was able to document levels more than 20 times the Proposition 65 standard. Teledyne's newspaper warning only provided that the company was using a chemical known to the state to cause cancer, birth defects or other reproductive harm, with no isopleth or mention of exposure. Furthermore, no one received any delivered warning. Currently, settlement negotiations are continuing.

119. *California Earth Corps v. U.S. Battery Mfg. Co.*, No. 277313, (Cal. Super. Ct. Riverside Co. Feb. 13, 1996) (Complaint). U.S. Battery operates a lead and storage battery manufacturing facility in Corona, California. A low income Hispanic community and a working class trailer park community are located to the south of the facility. Using U.S. Battery's South Coast AQMD-approved Rule 1420 Report of 0.5 pounds per day of lead emissions, modeling showed 1,416 residences and 1,275 workers exposed to 0.5 ug/day or greater. U.S. Battery's Proposition 65 warning was contained in the local newspaper which failed to indicate that lead was causing the public exposure. Settlement discussions are ongoing.

120. *Communities for a Better Environment v. Acme Packaging Corporation*, No. C 96-02505 (Cal. Super. Ct. Contra Costa Co. June 10, 1996) (Complaint). Based on a source test conducted in 1994 by the Bay Area Air Quality Management District, lead emissions of 0.2 pounds per day were revealed. Prior to CBE's 60-day notice, Acme provided no warning to the public whatsoever. Acme manufactures steel strapping and uses a lead vat to clean the strapping. There are no emission controls to prevent lead from entering the atmosphere. A residential community is situated directly across the street. Modeling demonstrated that 8,291 residents and 860 workers were exposed to levels at or greater than 0.5 ug/day and 4,408 residents and 309 workers were exposed to levels at or greater than 1.0 ug/day. No progress has been made in the case despite three settlement meetings.

121. *California v. Anchor Glass Corp.*, No. H-192687 1 (Cal. Super. Ct. Alameda Co. Oct. 3, 1996) (Complaint). Anchor operates a plant in Hayward, California to produce glass bottles. A working class community, largely Hispanic, surrounds the facility. This is the second Proposition 65 litigation against a glass container company. Similar to *Owens-Brockway*, the emissions were determined to be substantial, with numerous persons exposed. In this case, a source test conducted by the Bay Area Air Quality Management District in the beginning of 1996 showed that the company was emitting more than 4 pounds per day of lead with no emission controls. Based on these emissions, air dispersion modeling demonstrated 43,911 residents and 24,242 workers exposed to levels at or greater than 0.5 ug/day and 2,825 residents and 588 workers exposed to levels at or greater than 1.0 ug/day. These are the probably the largest exposures in any ongoing Proposition 65 case. In this case, Communities for a Better Environment served a 60-day notice on April 16, 1996. Settlement discussions took place with little progress. On

IV. CONCLUSION

Clearly, Proposition 65 has had a considerable impact in reducing lead and other toxic air emissions in California.

While enforcement started slowly, in the last several years, many more cases have been brought, which have resulted in eliminating toxic exposures to numerous persons throughout the State. As long as emitters continue to avoid warning the public about the exposures, new cases will be brought that will be successful in further reducing exposures. These new cases will extend to other toxic chemicals like hexavalent chromium, perchloroethylene, methylene chloride and other listed chemicals that have thus far been largely ignored by the environmental community.

Thus far, no other state in the country has enacted a statute which operates like California's Proposition 65.¹²² Based on California's experience, there is obviously enormous potential for right-to-know statutes to reduce toxic exposures in other states. It is the hope of the author that other states will enact similar statutes, thereby producing enormous health and environmental benefits for the citizens of those states.

September 13, 1996, Anchor filed for relief under chapter 11 of Title 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1994). Prior to CBE's 60-day notice, Anchor had published a grossly inadequate newspaper warning. Subsequent to CBE's notice, Anchor published another notice which, although improved, was still not adequate.

122. An attempt in Ohio in 1992 failed. See Jerry Tailor, *Campaign Trail Littered with Environmental Wrecks* (editorial), THE PLAIN DEALER, Dec. 5, 1992 at 7B.

APPENDIX

Robert Sears**1264 Ferrara Drive, Ojai, CA 93023**

Tel: (805) 646-2588

CompuServe: 74362,577 Internet: clouds@rain.org

July 21, 1995

Mr. Don May
 President, California Earth Corps
 4972 Minturn
 Lakewood, CA 90712

Subject: *Johnson Controls (Fullerton Facility) eight and 24-hour average lead exposure isopleths for 1993 emissions*

Dear Mr. May:

As you requested, I have assessed the lead impacts from 1993 emissions at the Johnson Controls facility in Fullerton, California. The modeled impacts in this assessment are based on lead emissions and other input parameters presented in Johnson Controls AB 2588 health risk assessment.

The results of this analysis are shown on the attached two maps. Each map shows contours of 0.5, 1.0 and 5.0 µg/day exposures overlaid onto an Orange County street file; there are separate maps for residential and worker exposures. Using a Geographic Information System and performing data aggregation by block group, calculations were performed to estimate the number of people who come to work within the exposure isopleths (based on 1992 privately-employed "daytime" population attribute data). These population exposure results are presented below.

Exposure in ug/day	Residential	Worker
0.5	115572	82845
1.0	37991	38925
5.0	754	7936

These exposure analyses were prepared as follows:

1. Modeling was performed with the EPA ISCST2 dispersion model (version 93109) to calculate eight and 24-hour average ambient air concentrations of lead. Urban dispersion coefficients were used; calm-processing was not used.
2. Lead emissions were modeled with 1981 meteorological data from Anaheim – these data were developed by the SCAQMD.

3. The lead emissions, stack parameters, and source locations were obtained from the Johnson Control AB 2588 health risk assessment reporting forms; building dimensions were from an ISCST2 input file prepared by Environ. The lead emissions modeled in this analysis totaled 3.36 lb/day.
4. All sources were modeled as operating 24 hours per day.
5. A grid of receptors was prepared to encompass the area covered by the 0.5 $\mu\text{g}/\text{day}$ residential and worker isopleths. This grid contained 250 meter spaced receptors out to one kilometer from the facility boundary and 500 meter spaced receptors from 1000 to 7000 meters from the facility boundary. A total of 1062 receptors were modeled.
6. Residential exposures were calculated using modeled 24-hour average lead concentrations (in $\mu\text{g}/\text{m}^3$). Conversion to exposures in $\mu\text{g}/\text{day}$ was accomplished by multiplying modeled air concentrations by the residential inhalation rate of 20 cubic meters of air inhaled per day.
7. Worker exposures were calculated using modeled eight-hour average lead concentrations (in $\mu\text{g}/\text{m}^3$). Conversion to exposures in $\mu\text{g}/\text{day}$ was accomplished by multiplying modeled air concentrations by the worker inhalation rate of 10 cubic meters of air inhaled per eight hours.
8. Contour plots for the 0.5 $\mu\text{g}/\text{day}$ residential and worker exposures were created using Surfer for Windows. These contours were exported to a Geographic Information System to prepare the attached map an exposure attributes.
9. Consistent with the Johnson Control AB 2588 health risk assessment, no fugitive lead emissions were included in this analysis.

Please call me if you have any questions or require additional information.

Very truly yours,

Robert Sears

Delco-Remy Lead Exposure Statistics: Anaheim Facility		
Residential population attributes are from the 1990 Census (block group data)		
Worker population attributes are 1992 private- employment figures (block group data)		
	24-Hour Pb Exposures	
Attributes	0.5 ug/day	1.0 ug/day
Total Residential Population	18257	4352
Number Privately Employed	8413	4407
Area of Exposure (square-km)	6.4	2.1
Number of Households	5745	1409

Robert Sears

Tel: (805) 646-2588

1264 Ferrara Drive, Ojai, CA 93023

CompuServe: 74362,577 Internet: clouds@rain.org

March 16, 1996

Michael Freund, Esq.
1915 Addison Street
Berkeley, CA 94704Subject: Owens Brockaway (Oakland Facility) Proposition 65 lead exposures using
BAAQMD 1996 source-test data

Dear Mr. Freund:

As you requested, I have assessed the lead exposures from the Owens Brockaway facility in Oakland, California. I prepared this exposure assessment using facility emissions representative of current operating conditions; the assessed lead emissions are based on 1996 Bay Area Air Quality Management District (BAAQMD) source-test data collected at the Owens Brockaway facility.

The results of this analysis are shown on the attached maps (two color and two B&W copies are provided), with 0.5 and 1.0 $\mu\text{g}/\text{day}$ residential and worker exposure contours overlaid onto an Alameda County street file. Using a Geographic Information System and performing data aggregation by block group, calculations were performed to estimate the number of people who come to work within the exposure isopleths (based on 1992 privately employed "daytime" population attribute data) and residents within the exposure isopleths (based on 1990 census attribute data). These population exposure estimates are presented below:

Exposure in $\mu\text{g}/\text{day}$	Number of Residents	Number of Workers
1.0	888	139
0.5	40685	18230

This analysis was prepared as follows:

1. Modeling was performed with the EPA ISCST3 dispersion model (version 95250; compiled with Lahey Fortran 90) to calculate eight and 24-hour average ambient air concentrations of lead. Urban dispersion coefficients and calm processing were used.
2. Lead Emissions were modeled with 1984 – 1988 meteorological data from the Alameda Naval Air station – these data were provided on disk by the BAAQMD.

3. Source locations, stack heights, stack diameters, and building dimensions for this analysis were provided on disk in the form of ISCST input files prepared by Owens Brockaway. Lead emission rates, stack gas velocity, and stack gas temperature were obtained from 1996 source-test data collected by the BAAQMD at the Owens Brockaway facility. The following sources and lead emission rates were modeled in this assessment:

Source	Pound/Hour	Pounds/Day	Gram/Second
Furnace "C"	2.20E-02	0.528	2.77E-03
Furnace"D"	1.20E-01	2.88	1.51E-02
Furnace "E"	6.60E-03	0.158	8.32E-04

The modeled stack parameters were as follows:

Source	Easting (m)	Northing (m)	Stack Ht. (m)	Diameter (m)	Exit Velocity (m/s)	Temperature (K)
Furnace "C"	568100	4180285	39.62	1.52	6.81	543.7
Furnace"D"	568073	4180295	39.62	1.52	7.14	585.9
Furnace "E"	568050	4180300	39.62	1.52	4.74	547

4. All emission sources were modeled as being released 24 hours per day.
5. A grid of 250 meter-spaced receptors was prepared to encompass the area covered by the 0.5 µg/day residential and worker isopleths. In addition, receptors were placed on the facility property boundary in 50 meter increments. A total of 827 receptors were modeled.
6. Source base and receptor terrain elevations were extracted from the USGS 7.5 minute Oakland East, Oakland West, and San Leandro Digital Elevation Models (DEM) and inserted into the ISCST3 input file.
7. Residential exposures were calculated using modeled 24-hour average lead concentrations (in µg/m³). Conversion to exposures in µg/day was accomplished by multiplying modeled air concentrations by the residential inhalation rate of 20 cubic meters of air per day.
8. Worker exposures were calculated using modeled eight-hour average lead concentrations (in µg/m³). Conversion to exposures in µg/day was accomplished by multiplying modeled air concentrations by the worker inhalation rate of 10 cubic meters of air per eight hours.
9. Contour plots for the residential exposures were created using Surfer for Windows version 6. These contours were exported to a Geographic Information System (Atlas GIS for Windows, version 3.0) to prepare the attached map and exposure attributes.

Please call me if you have any questions or require additional information.

Very truly yours,

Robert Sears



