

August 5, 2005

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Re: Potential Regulatory Action Excluding from the Proposition 65 Warning
Requirements Exposures from Chemicals that Form from Natural Constituent in
Food During Cooking or Heat Processing

Dear Dr. Denton:

This letter is submitted on behalf of a coalition of associations whose members produce, process, prepare, serve, and sell the foods consumed by virtually all Californians.¹ We are writing to set the record straight regarding contentions in a June 6, 2005 letter from Fred Altshuler and David Roe to OEHHA concerning the proposal currently before OEHHA – to exclude from “exposures” subject to Proposition 65 those exposures to chemicals formed unintentionally when the natural constituents of foods are cooked or heated (“Natural Constituent Exclusion”).²

¹ Members of the coalition include the California Chamber of Commerce, California Grocers Association, California Restaurant Association, California Retailers Association, American Bakers Association, American Frozen Food Institute, Chocolate Manufacturers Association, Grocery Manufacturers of America, Institute of Shortening and Edible Oils, National Confectioners Association, Food Products Association, National Oilseed Processors Association, National Potato Council, National Restaurant Association, Snack Food Association, Wheat Foods Council, California League of Food Processors, and the California Manufacturers and Technology Association (hereinafter, collectively, “the Coalition”).

² See Letter from Fred Alschuler to Dr. Joan Denton (June 6, 2005) (“Altshuler Letter”). Because it is relevant to the Agency’s decision whether and how to proceed, we request that this letter be incorporated into the administrative record concerning the Natural Constituent Exclusion, which was

Dr. Joan Denton
August 5, 2005
Page Two

Stripped of its bluster and name-calling, the letter comprises a single (incorrect) assertion: that a private 1992 settlement agreement between the Agency and the plaintiffs in *AFL-CIO v. Deukmejian*, Case No. 502541 (“Duke II”) prohibits OEHHA from adopting the exclusion for the “exposures” contemplated by the Natural Constituent Exclusion. As discussed below, the *Duke II* settlement has no relevance to the proposed Natural Constituent Exclusion. Messrs. Altshuler’s and Roe’s assertion is at odds with the plain language of the settlement and with fundamental principles of contract interpretation, administrative law, and sound public policy.

I. THE *DUKE II* SETTLEMENT IS IRRELEVANT TO THE PROPOSED REGULATION.

It is axiomatic that the interpretation of a contract is governed by the mutual intent of the parties.³ Where intent is clear from the plain language of the instrument, no further inquiry is required.⁴ The agreement may not be interpreted in a way that expands or supplements its terms beyond their intended scope.⁵

the subject of the workshop held by OEHHA on May 9, 2005, and which the Coalition addressed in comments submitted to the Agency on June 6, 2005 and July 8, 2005. See Letter from Michèle B. Corash to Cynthia Oshita (June 6, 2005) (“June 6 Coalition Letter”); Letter from Michèle B. Corash to Susan Luong (July 8, 2005).

³ Cal. Civil Code § 1636 (contract must be interpreted to give effect to the mutual intent of the parties at the time the contract was formed). That the contract at issue takes the form of a settlement agreement between a private party and the State in no way alters these rules of analysis. *Weddington Productions, Inc. v. Flick*, 60 Cal. App. 4th 793, 810 (1998) (“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts.”); *Gorman v. Holte*, 164 Cal. App. 3d 984, 988 (1985) (“Compromise settlements are governed by the legal principles applicable to contracts generally.”); Cal. Civ. Code § 1635 (“All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code.”); *Oberg v. Los Angeles*, 132 Cal.App.2d 151, 158 (1955) (“A contract entered into by a governmental body and an individual is to be construed by the same rules which apply to the construction of contracts between private persons.”).

⁴ Cal Civil Code § 1638 (“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”); *Oberg*, 132 Cal. App. at 158 (“[T]he language of the contract, if clear and explicit and not conducive to an absurd result, must govern its interpretation.”).

⁵ Cal. Civil Code § 1648 (“However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”); *Estate of Morris*, 56 Cal. App. 2d 715, 725-26 (1943) (role of the court in interpreting a written instrument is “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted”).

Dr. Joan Denton
August 5, 2005
Page Three

Here, the plain language of the *Duke II* settlement and the context in which it arose make clear that the parties intended it to apply only to regulatory activity that is separate and distinct from that invoked by the proposed Natural Constituent Exclusion. Thus, Messrs. Altshuler's and Roe's attempt to fit the settlement to the rulemaking now before OEHHA is simply incorrect, as is their unsupported assertion that the two are "legally identical."

A. The *Duke II* Settlement and the Natural Constituent Exclusion Apply to Separate Statutory Provisions.

1. The plain language and context of the *Duke II* settlement limit its application to the definition of "no significant risk" under section 25249.10(c).

The parties' intent regarding the scope of the *Duke II* settlement agreement could not be clearer. Paragraph 13 of the settlement agreement – the provision upon which Messrs. Altshuler and Roe base their contention – is expressly limited to one specific type of regulatory activity:

Defendants agree that any provision which is adopted after the date of this agreement *to define the term "no significant risk" of the Act* for any food, drug, cosmetic or medical device product, and *which employs standards derived from existing state or federal law* shall be based upon specific numeric standards for the chemical, as evidenced by the rulemaking file. Such levels shall be consistent with and conform to sections 12703 and 12721 of title 22 of the California Code of Regulations.⁶

On its face, this language limits the scope of this provision to OEHHA's adoption of Article 7 regulations implementing the "no significant risk" term found only in section 25249.10(c) of the Act.⁷ Under California law, such clear and unambiguous language is sufficient to establish intent without resort to further evidence.⁸

⁶ Exhibit B *Altshuler Letter*, at p. 3 (emphasis added).

⁷ Article 7 contains regulations that implement the "no significant risk" language found in section 25249.10(c). *See* Cal. Code Regs. tit. 22, § 12701 (defining the general bases for the establishment of no significant risk levels; *id.* § 12703 describing determination of no significant risk through quantitative risk assessment); *id.* § 12705 (providing specific regulatory levels that the agency has already determined pose no significant risk); *id.* § 12707 (describing considerations of routes of exposure when establishing safe harbor levels); *id.* § 12709 (establishing that exposure to trace amounts of Proposition 65 chemicals poses no significant risk); *id.* § 12711 (establishing procedures

Dr. Joan Denton
August 5, 2005
Page Four

The same conclusion regarding intent is inescapable if, notwithstanding its clear language, one were to look at the context in which the *Duke II* settlement was negotiated.⁹ First, the regulation at issue in the *Duke II* litigation was the former section 12713, a provision adopted in an emergency rulemaking pursuant to section 25249.10(c) of Proposition 65. Section 12713 adopted a narrative definition of “no significant risk” for these three broad categories of products based solely on their compliance with preexisting state and federal regulatory standards. The two documents that bookended the *Duke II* action – the Complaint and the settlement agreement – clearly demonstrate the parties’ understanding of the narrow scope of litigation:

The complaint sought judicial invalidation of an emergency regulation adopted by Defendants on February 16, 1988 and subsequently adopted through formal rulemaking. This regulation is found at section 12713 of title 22 of the California Code of Regulations¹⁰

Indeed, the only relief sought by plaintiffs was explicitly aimed at the State’s definition of “no significant risk”: a declaration that section 12713 was unlawful and an injunction preventing the enforcement of section 12713 and prohibiting the promulgation of any regulation that provides “an automatic exemption from the ‘no significant risk’ requirement based on conformity with other federal or state laws”¹¹ Under the terms of the *Duke II* settlement, section 12713 was repealed.

Second, the *Duke II* parties had the opportunity to draft a provision that would prohibit *all* narrative exemptions for food, including those that did not define “no significant risk.” They did not do so even though there were on the books at that time numerous categorical exemptions in the regulations, including an exclusion from the term “exposure” for naturally occurring chemicals, adopted under section 25249.6 of Proposition 65. Moreover, that regulation had been expressly upheld nineteen months earlier by the California Court of Appeal in *Nicolle-Wagner v. Deukmejian*.¹² Like the proposed rule to which Messrs.

for adopting NSRLs based on state or federal standards); *id.* § 12721 (defining the way in which levels and rates of exposure may be calculated to analyze cancer risks).

⁸ Cal. Civil Code § 1638; *Oberg*, 132 Cal. App. 2d at 158.

⁹ This context is relevant to explain the nature and scope of the contract. *See* Cal. Civil Code § 1647 (“A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.”).

¹⁰ *See* Ex. B to *Altshuler Letter*, at 1.

¹¹ Ex. A to *Altshuler Letter*, at 10:11-26 (Complaint for Declaratory and Injunctive Relief, *AFL-CIO v. Deukmejian*, Case No. 502541) (emphasis added).

¹² *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652 (1991). The decision in *Nicolle-Wagner* was filed May 24, 1991. The *Duke II* settlement was executed in December 1992.

Dr. Joan Denton
August 5, 2005
Page Five

Altshuler and Roe now object, the regulation approved by the court in *Nicolle-Wagner* defined the terms “expose” and “exposure” under section 25249.6 to create a narrative food-related exemption that was not based on a chemical-by-chemical analysis.¹³

As parties to the *Nicolle-Wagner* action, the *Duke II* defendants were obviously aware of this decision, and there is little question that the *Duke II* plaintiffs were as well. Thus, had the parties in fact intended to prohibit any categorical exclusion to Proposition 65, they would have drafted Paragraph 13 broadly enough to bar the type of regulatory exemption at issue in *Nicolle-Wagner* and here.¹⁴ They did not.

Nonetheless, Messrs. Altshuler and Roe imply that such a broad effect was the intent of the *Duke II* settling parties. This assertion ignores the fundamental principle that it is the “mutual intention of the parties at the time of contracting” that governs interpretation of a contract.¹⁵ Even if the plaintiffs had desired such an outcome at the time that Paragraph 13 was drafted (despite their failure to say so in the settlement), there is no evidence that the *Duke II* defendants were willing to cede more regulatory authority than was actually at stake in that litigation.

In fact, it seems inconceivable that the State had any intention of surrendering the authority that it had fought for and successfully defended in *Nicolle-Wagner* less than two years earlier. Without such evidence, a court could not conclude that the parties intended anything other than what appears in the plain language of Paragraph 13.

2. The proposed Natural Constituent Exclusion defines the term “expose” under section 25249.6 and Article 5 of the regulations, not “no significant risk.”

Messrs. Altshuler and Roe concede that the proposed Natural Constituent Exclusion “does not use exactly the same terms” as the *Duke II* provision addressing “no significant risk” regulations adopted under section 25249.10(c).¹⁶ Nonetheless, they argue that the proposed rule is “legally identical” to the regulatory activity prohibited by the *Duke II* settlement. To the contrary, what they would dismiss as mere semantics is a distinction with a very real legal difference.

¹³ *Id.* at 658.

¹⁴ The *Duke II* settlement was a private agreement that was not submitted to the court for approval and entry as a judgment. This may have been because the parties had no interest in, and in fact renounced, any res judicata effect. Ex. B to *Altshuler Letter* at p. 2. In any event, the parties were free to broaden the scope of matters addressed in the settlement beyond those raised in the Complaint.

¹⁵ Cal. Civil Code § 1636 (emphasis added).

¹⁶ *Altshuler Letter*, at 3.

Dr. Joan Denton
August 5, 2005
Page Six

In fact, the proposed Natural Constituent Exclusion interprets an entirely different section of Proposition 65 and would be adopted under a different Article of the statute's implementing regulations. These two statutory sections have different legal effects and have been separately interpreted. To conflate them defies yet another fundamental principle of construction: that "significance should be given to *every word, phrase, sentence and part* of an act in pursuance of the legislative purpose."¹⁷

Section 25249.6 forbids certain "exposures" without warnings.¹⁸ It describes prohibited conduct, thereby establishing the elements of the prima facie showing required for a plaintiff to sustain a claim in an enforcement action. Proving an "exposure" is one prong of that showing. Limits on what is considered an "exposure" under section 25249.6 are defined in regulations adopted under Article 5 of Title 22.¹⁹

By contrast, section 25249.10(c) establishes an affirmative defense to claims brought pursuant to section 25249.7.²⁰ To avail itself of this defense, a defendant bears the burden of demonstrating that an exposure poses "no significant risk," as that term is defined under regulations adopted pursuant to Article 7.²¹

Finally, and most significantly, unlike the exemption before the trial court in *Duke II*, the Natural Constituent Exclusion is based on an exercise of statutory authority identical to that exercised in past Agency rulemaking and ratified by an appellate court. Both the "conceptual" regulation circulated by OEHHA in advance of its May 9 workshop on the Natural Constituent Exclusion and the alternative version proposed by the Coalition in its June 6, 2005 comments would amend Article 5 to define the term "expose" under

¹⁷ *Select Base Materials, Inc. v. Board of Equalization*, 51 Cal. 2d 640, 645 (1959); *People v. Garcia*, 21 Cal. 4th 1, 6 (1999) ("It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit.") (emphasis added) (internal citation omitted).

¹⁸ Cal. Health & Safety Code § 25249.6.

¹⁹ See Cal. Code Regs. tit. 22, § 12501 (the "naturally occurring" exemption); *id.* § 12502-503 (exemptions for chemicals that originated in properly handled water obtained from a public or private source of drinking water); *id.* § 12504 (exemption for chemicals present in ambient air).

²⁰ Cal. Health & Safety Code § 25249.10(c).

²¹ *Id.*; Cal. Code Regs. tit. 22, §§ 12701-12721.

Dr. Joan Denton
August 5, 2005
Page Seven

section 25249.6.²² This regulation is identical in rationale and statutory basis to the rulemaking activity approved by the Court of Appeals in *Nicolle-Wagner*.²³

Nicolle-Wagner was a challenge to section 12501, another Article 5 regulation providing that companies selling or distributing foods containing “naturally occurring” chemicals do not “expose” consumers for purposes of section 25249.6 of Proposition 65.²⁴ Because the terms “expose” and “exposure” are not defined by the statute, the court agreed with the State that the lead agency has the authority to interpret the terms in a way that is consistent with the statute and reasonably necessary to further the statutory purpose.²⁵ The court went on to hold that the “naturally occurring” exemption satisfied both requirements.²⁶

In the context of analyzing whether the Agency’s definitions of “expose” and “exposure” were consistent with and furthered the purposes of the statute, the court also considered the statute’s “no significant risk” language.²⁷ The Agency’s 1987 conclusions about the safety of unprocessed foods were expressly not based on a chemical-by-chemical analysis, but rather on “consumer experience over time [demonstrating] that [such foods] are safe to consume.”²⁸ The court found this conclusion reasonable, given the presumption that “foods that have been eaten for thousands of years are healthful, despite the presence of small amounts of naturally occurring toxins.”²⁹ Thus, the Agency’s policy decision was consistent with the no significant risk provision and furthered the purposes of the statute. Given the “insignificant risk,” the court further agreed with the Agency that avoiding warnings on “most or all foods” would further the fundamental purpose of the “clear and reasonable

²² See Agenda for the Workshop Concerning Natural Constituent In Foods (05/01/05), available at http://www.oehha.ca.gov/prop65/public_meetings/warningwork2.html, visited July 29, 2005.

²³ *Nicolle-Wagner*, 230 Cal. App. 3d at 658 (“We find that the regulation is not in conflict with the statute. Section 12501 was adopted by the Agency in order to interpret the terms ‘expose’ and ‘exposure’ as they are used in section 25249.6 of the Health and Safety Code. These terms are not specifically defined in the statute.”)

²⁴ *Nicolle-Wagner*, 230 Cal. App. 3d at 657.

²⁵ *Id.* at 658.

²⁶ *Id.* at 661-62.

²⁷ *Id.* at 659-661.

²⁸ Final Statement of Reasons for section 12501, at 4.

²⁹ *Nicolle-Wagner*, 230 Cal. App. 3d at 660.

Dr. Joan Denton
August 5, 2005
Page Eight

warning” provisions by avoiding overwarnings and assuring that consumers were given useful information about exposures.³⁰

As explained in the Coalition’s June 6 letter, the proposed Natural Constituent Exclusion addresses the same policy concerns as the exemption at issue in *Nicolle-Wagner*.³¹ It was drafted under the same statutory provision and would amend the same Article of the regulations. It shares the same “consumer experience over time” rationale (consumers have been safely consuming heated food for thousands of years), and is intended to avoid overwarning and consumer confusion. Thus, contrary to Messrs. Altshuler’s and Roe’s assertion, if the proposed regulation is “legally identical” to anything, it is the naturally occurring exemption approved in *Nicolle-Wagner*, rather than the provision at issue in *Duke II*.

The fact is that Paragraph 13 had no effect on the scope of the regulation approved in *Nicolle-Wagner* because the two simply address different issues. For the same reasons, the *Duke II* settlement agreement has no relevance to the proposed Natural Constituent Exclusion.

B. The Proposed Natural Constituent Exclusion Does Not Rely on Existing State or Federal Standards.

Aside from its clear limitation to rules implementing section 25249.10(c), the *Duke II* settlement has a further restriction. It applies only to rulemaking that “employs standards derived from existing state or federal law” for food, cosmetics, or pharmaceutical products.³² The proposed Natural Constituent Exclusion contains no such provision.

The Coalition has proposed language that will require companies who seek the benefit of the Natural Constituent Exclusion to demonstrate compliance with emerging rules concerning manufacturing practices aimed at reducing the levels of Proposition 65 chemicals in a product as the result of cooking.³³ Unlike the former section 12713, which required nothing

³⁰ *Id.* at 661 (“This exemption, therefore, will further the statutory purpose in safeguarding the effectiveness of warnings which are given, and in removing from regulatory scrutiny those substances which pose only an ‘insignificant risk’ of cancer or birth defects, within the meaning of the statute.”).

³¹ *June 6 Coalition Letter*, at 5-19.

³² Ex. B to *Altshuler Letter*, at 3.

³³ Specifically, the Coalition’s proposed language reads:

22 CCR 12501(c) A person otherwise responsible for an exposure to a listed chemical in food does not “expose” an individual within the meaning of section 25249.6 of the Act to the extent the person can show that the chemical is an unintended by-product of heating or cooking natural constituents of foods, provided that the cooking or heating process complies with any requirements

Dr. Joan Denton
August 5, 2005
Page Nine

further from companies and relied on *the fact* of existing FDA regulations to demonstrate no significant risk, the proposed language adds an obligation to comply with new (and potentially increasingly stringent) requirements that emerge as the result of ongoing research.

As reflected by the record regarding the acrylamide rulemaking and the Natural Constituent Exclusion proceedings, such reduction strategies are the objective of ongoing research by the U.S. Food and Drug Administration and a wide array of independent academic and industry food scientists worldwide.³⁴ This language was proposed to address concerns expressed by OEHHA and others in the May 9, 2005 workshop regarding incentives for industry to continue working on developing strategies for reducing the levels of chemicals such as acrylamide.³⁵ While more specific, it is the functional equivalent of the “good agricultural or good manufacturing practices” requirements of the “naturally occurring” exemption approved in *Nicolle-Wagner*.³⁶

II. THE *DUKE II* SETTLEMENT CANNOT BE INVOKED TO CONTRAVENE OEHHA’S RULEMAKING AUTHORITY.

Messrs. Altshuler and Roe would expand the very clear language of Paragraph 13 of the *Duke II* settlement to *forever prohibit* OEHHA from exercising discretion under *any* provision of Proposition 65 to adopt a narrative exemption pertaining to food, cosmetics, or pharmaceutical products. Even if the basic rules of construction did not prohibit it, this interpretation would represent an unacceptable surrender of OEHHA’s rulemaking authority.

A. *Duke II* Provision Waiving Future Rulemaking Authority is Void and Unenforceable.

While public agencies may enter into contracts with private citizens thereby creating legally binding obligations, such private agreements may not barter away rights and obligations intended to convey a public benefit. Section 25249.12 of Proposition 65 provides that OEHHA, as lead agency, is charged with adopting and modifying regulations “as necessary to conform with and implement this chapter and to further its purposes.”³⁷ This

adopted (and in effect) by the United States Food and Drug Administration and/or the California Department of Health Services for the purpose of reducing the level of such chemical in food.

June 6 Coalition Letter, at 24.

³⁴ *June 6 Coalition Letter*, at 19-23, and accompanying notes.

³⁵ Transcript from May 9, 2005 Workshop at 165-66.

³⁶ Cal. Code Regs. tit. 22, § 12501(a)(4).

³⁷ Cal. Health & Safety Code § 25249.12.

Dr. Joan Denton
August 5, 2005
Page Ten

responsibility is owed to the public and cannot be contravened by private agreement.³⁸ Indeed, private groups or individuals may not be granted the type of veto power that the authors of the June 6 letter seek to exercise here.³⁹

At the very least, such far-reaching policy commitments constitute a rulemaking that should have been conducted in compliance with the requirements of the California Administrative Procedure Act rather than in a private agreement that was never subjected to notice and comment or submitted to a court for review.⁴⁰ Indeed, the “future rulemaking” language in Paragraph 13 forever commits OEHHA to forego adopting certain regulations that it is otherwise authorized to make in the exercise of its discretion after notice and comment. Such regulatory authority cannot be bartered away in a private agreement that provided no opportunity for review by the public or the court.

For all of these reasons, Paragraph 13 is not enforceable for the purpose of permanently disabling the exercise of OEHHA’s rulemaking authority.

³⁸ Cal. Civil Code 3513 (“Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”); Because Proposition 65 was passed by voters for the general benefit of all Californians, the duties and obligations created by the Act are for the public benefit for purposes of section 3513. *Benane v. Int’l Harvester Co.*, 142 Cal. App. 2d Supp. 874, 878 (1956) (“A law has been established ‘for a public reason’ only if it has been enacted for the protection of the public generally, i.e., if its tendency is to promote the welfare of the general public rather than a small percentage of citizens.”); *see also Mendly v. County of Los Angeles*, 23 Cal. App. 4th 1193, 1207 (1994) (“The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements.”) (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)).

³⁹ *See Int’l Assn. of Plumbing & Mech. Officials v. Cal. Bldg. Standards Comm’n*, 55 Cal. App. 4th 245, 247 (1997) (rejecting argument by private organization that would have forced the State to adopt its version of the model code for building standards).

⁴⁰ Even if the suspension of rulemaking authority in the *Duke II* settlement could be viewed as an interpretive rule or guidance for future policy decisions rather than an exercise of regulatory authority, it would have been subject to notice and comment requirements. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 18 & n.3 (1998) (noting that federal law exempts interpretive rulings from the Federal APA requirements and holding that no such distinction exists under California law); *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 574-75 (1996) (noting that an agency would arguably have to comply with California APA rulemaking procedures when implementing an interpretive rule).

Dr. Joan Denton
August 5, 2005
Page Eleven

B. Even if Enforceable, Paragraph 13 is Limited to its Express Terms.

Even if Paragraph 13 created an enforceable waiver of rulemaking authority, the language effecting surrender of governmental authority must be strictly construed and not expanded beyond its clear terms. Contractual obligations impinging on governmental authority may arise expressly or through implication from a statute.⁴¹ However, once established, such concessions must be

rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the concession clearly required. There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language.⁴²

As discussed above, there is absolutely no evidence that the State ever intended the *Duke II* settlement to extend beyond regulations adopted pursuant to section 25249.10(c) to those interpreting other parts of the statute. Indeed, the context in which the agreement was negotiated provides strong evidence to the contrary. Thus, the attempt by Messrs. Altshuler and Roe to expand Paragraph 13 beyond its plain-language application must fail.

⁴¹ *Cal. Teachers Assn. v. Cory*, 155 Cal. App. 3d 494, 509 (1984).

⁴² *Newton v. Commissioners*, 100 U.S. 548, 561 (1880) (emphasis added) (cited by *Cory*, 155 Cal. App. 3d at 509). *Cory* held that provisions of the California Education Code clearly implied intent to create private contract rights regarding state pensions. *Id.* (“As we have shown, a clear manifestation of intent to contract does not require explicit statutory acknowledgement. Similarly, the suspension of legislative control may be inferred from less than an explicit disavowal of any rights to modify the promise. “Nothing is to be taken as conceded but what is given in unmistakable terms *or by an implication equally clear.*”). However, the court in *Cory* drew a distinction between the *existence* of a contract, which could be established by implication, and the *interpretation* of its terms, which, as demonstrated in *Newton*, is held to a more rigorous standard. *Id.* at n8.

Dr. Joan Denton
August 5, 2005
Page Twelve

III. CONCLUSION.

The private settlement agreement between the parties to the *Duke II* litigation has no bearing on OEHHA's legal authority to proceed with the proposed Natural Constituent Exclusion. As established by the Court of Appeals in *Nicolle-Wagner*, and as explained in the June 6 Coalition Letter, the proposed regulation is consistent with and will further the purposes of Proposition 65. Nothing in the *Duke II* settlement changes that analysis. We therefore urge the Agency to go forward and avoid becoming distracted by this irrelevant assertion and instead move forward with consideration of formally proposed regulatory language to implement the Natural Constituent Exclusion.

Very truly yours,



Michèle B. Corash

Robin Stafford

Counsel to the Coalition