

**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT**

**SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986
PROPOSITION 65**

**NOTICE OF PROPOSED RULEMAKING
TITLE 27, CALIFORNIA CODE OF REGULATIONS**

**PROPOSED AMENDMENTS TO ARTICLE 5
EXTENT OF EXPOSURE**

**ADOPTION OF SECTION 25505
EXPOSURES TO LISTED CHEMICALS IN COOKED OR HEAT PROCESSED FOODS**

August 7, 2020

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) proposes to amend Title 27, California Code of Regulations, by adopting Section 25505 Exposures to Listed Chemicals in Cooked or Heat Processed Foods.¹ Some chemicals on the Proposition 65 list that are found in food are formed by the cooking or heat processing of the food. The presence of these chemicals can be unavoidable, but levels can be reduced in many circumstances. Taking this into account, the proposed regulation lays out what constitutes a Proposition 65 exposure that would compel warning for listed chemicals that are formed in food by cooking or heat processing, in a new Section 25505.

PUBLIC PROCEEDINGS

Written Comment Period

Any written comments concerning this proposed regulatory action, regardless of the form or method of transmission, must be received by OEHHA no later than **October 6, 2020**, the designated close of the written comment period. Due to the COVID-19 emergency, OEHHA is providing a longer period than required under the Administrative Procedure Act. All written comments will be posted on the OEHHA website at the close of the public comment period.

Because of limited in-office staffing during the COVID-19 emergency, OEHHA strongly recommends that the public submit written information electronically, rather than in

¹ All further references are to sections of Title 27, Cal. Code of Regs., unless indicated otherwise.

paper form. **Comments may be submitted electronically through our website at <https://oehha.ca.gov/comments>.** Comments submitted in paper form can be mailed, faxed, or delivered in person to the address below, but delays may occur if staff are unable to timely access them.

All non-electronic submissions should be directed to:

Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
P. O. Box 4010
Sacramento, California 95812-4010

Telephone: 916-323-2517
Fax: 916-323-2610

OEHHA is subject to the California Public Records Act and other laws that require the release of certain information upon request. If you provide comments, please be aware that your name, address, and e-mail may be available to third parties.

Public Hearing

A public hearing on these proposed regulatory amendments will only be scheduled upon request. The hearing would be web-based due to the COVID-19 emergency². To request a hearing, send an e-mail to Monet Vela at monet.vela@oehha.ca.gov or to the address listed above. The request must be received no later than **September 21, 2020**. If such a request is made, OEHHA will e-mail a notice of the hearing to the requester and interested parties, and the notice will be posted on OEHHA's web site at least ten days before the public hearing date. The notice will provide the date, time, and information for accessing the hearing.

CONTACT

Please direct inquiries concerning the proposed regulatory action described in this notice to Monet Vela at (916) 323-2517, or by e-mail to monet.vela@oehha.ca.gov. Mario Fernandez is a back-up contact person for inquiries concerning processing of this action and is available at (916) 323-2635 or mario.fernandez@oehha.ca.gov

AUTHORITY

Health and Safety Code section 25249.12.

² Executive Orders [N-25-20](#) and [N-29-20](#).

REFERENCE

Health and Safety Code sections 25249.5, 25249.6, 25249.9, 25249.10 and 25249.11.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

BACKGROUND

OEHHA is the lead agency that implements Proposition 65³ and has the authority to promulgate and amend regulations to further the purposes of the Act. Proposition 65 prohibits a person in the course of doing business from knowingly and intentionally exposing any individual to a chemical that has been listed as known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual⁴. An exemption from the warning requirement is provided by the Act when the exposure for which the person is responsible can be demonstrated to fall below significant levels⁵. Besides these statutory exemptions, in certain situations, regulatory exceptions have been adopted for specific types of exposure as specified in Article 5. Currently there are regulatory exceptions from the warning requirement for exposures to naturally occurring chemicals in food⁶, specific concentrations of naturally occurring arsenic in rice⁷, and for certain exposures to listed chemicals in water⁸ or air⁹. Recognizing the desirability of incentivizing businesses to reduce levels of these chemicals in foods, the proposed regulation would create an exception from the warning requirement for listed chemicals in food that are unavoidably created during cooking or heat processing, and that have been reduced to the lowest level currently feasible.

SPECIFIC BENEFITS OF THE PROPOSED REGULATIONS

This proposal will further the statutory purposes of Proposition 65 by providing more certainty to businesses, incentivize them to lower the concentration levels in foods when feasible, encourage consistency and predictability and ensure that warnings will be given for the foods causing the highest levels of exposure. This will allow consumers to

³ Health and Safety Code section 25249.5 et seq., The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as “Proposition 65”. Hereafter referred to as “Proposition 65” or “the Act”.

⁴ Health and Safety Code section 25249.6.

⁵ Health and Safety Code section 25249.10: for carcinogens, the exposure poses no significant risk, and for reproductive toxicants will have no observable effect assuming exposure at one thousand (1000) times the level in question.

⁶ Title 27, Cal. Code Regs., section 25501.

⁷ Title 27, Cal. Code Regs., section 25501.1.

⁸ Title 27, Cal. Code Regs., sections 25502 and 25503.

⁹ Title 27, Cal. Code Regs., section 25504.

identify foods with significant, avoidable levels of listed chemicals created during cooking or heat processing, while mitigating against a proliferation of warnings on many foods with lower, unavoidable levels of these chemicals.

NO INCONSISTENCY OR INCOMPATIBILITY WITH EXISTING REGULATIONS

OEHHA has conducted an evaluation and has determined that Article 5, including Section 25505, is the only regulation concerning exposure exemptions under Proposition 65. Therefore, the proposed regulatory action is neither inconsistent nor incompatible with any other existing state regulations. The action does not change the existing warning requirements on businesses subject to Proposition 65 or state or local agencies, and does not address compliance with any other law or regulation.

LOCAL MANDATE/FISCAL IMPACT

Because Proposition 65 by its terms¹⁰ does not apply to local agencies or school districts, OEHHA has determined the proposed regulatory action would not impose a mandate on local agencies or school districts; nor does it require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. OEHHA has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action, nor will there be any costs or savings to the state or in federal funding to the state because of the proposed regulatory action.

EFFECT ON HOUSING COSTS

OEHHA has initially determined that the proposed regulatory action will have no effect on housing costs because it does not impose any significant new requirements on any business.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE

OEHHA has made an initial determination that the adoption of this action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

RESULTS OF ECONOMIC IMPACT ANALYSIS (Gov. Code section 11346.3(b))

OEHHA finds there will be no economic impact related to the proposed regulatory action. The new regulation would not impose any new costs because it is providing an

¹⁰ See Health and Safety Code section 25249.11(b).

exception to the warning requirement when listed chemicals in food that result from necessary cooking or heat processing are reduced to the lowest feasible level, and in the case of acrylamide, are below the specified concentration levels in certain foods. The action would not alter the requirement to provide a warning under the Act nor impose any new requirements on businesses but instead would provide additional guidance as to when a warning is required.

Creation or Elimination of Jobs within the State of California

The proposed regulatory action will not impact the creation or elimination of jobs within California. The proposed regulation will help businesses comply with the requirements of Proposition 65 by establishing feasible concentration levels for chemicals formed in foods by cooking or heat processing.

Creation of New Businesses or Elimination of Existing Businesses within the State of California

The proposed regulatory action will not impact the creation of new businesses or the elimination of existing businesses within California. The proposed regulation will help businesses comply with the requirements of Proposition 65 by establishing feasible concentration levels for chemicals formed in foods by cooking or heat processing.

The Expansion of Businesses Currently Doing Business within the State

OEHHA does not anticipate any major impact on the expansion of businesses currently doing business within the state. The proposed regulation will help businesses comply with the requirements of Proposition 65 by establishing feasible concentration levels for chemicals formed in foods by cooking or heat processing.

BENEFITS OF THE PROPOSED REGULATION

OEHHA has concluded that the public would benefit from the proposed regulatory action because sound considerations of public health support the establishment of feasible concentration levels for chemicals unavoidably formed in foods by cooking or heat processing. OEHHA recognizes the importance of promoting healthy eating choices and the important role a balanced diet plays in promoting and maintaining optimal health. This regulatory action will protect the health and welfare of the California public by incentivizing businesses to reduce levels of certain listed chemicals in their food products, as well as avoid consumer confusion that could result from a proliferation of warnings on foods.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

OEHHA is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulatory action. The action does not impose any new requirements upon private persons or businesses.

EFFECT ON SMALL BUSINESSES

The proposed regulatory action will not adversely impact very small businesses because Proposition 65 is limited by its terms to businesses with 10 or more employees.¹¹

CONSIDERATION OF ALTERNATIVES

Pursuant to Government Code section 11346.5(a)(13), OEHHA must determine that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to the attention of OEHHA, would be more effective in carrying out the purpose for which Proposition 65 is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

OEHHA has prepared and has available for public review an Initial Statement of Reasons for the proposed regulation, all the information upon which the regulation is based, and the text of the proposed regulation. These documents are available on OEHHA's web site at www.oehha.ca.gov.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The full text of any proposed regulation that is changed or modified from the express terms of this proposed action will be made available at least 15 days prior to the date on which OEHHA adopts the resulting regulation. Notice of the comment period on the revised proposed regulation and the full text will be mailed to individuals who testified or submitted oral or written comments at the public hearing, whose comments were received by OEHHA during the public comment period, and anyone who requests notification from OEHHA of the availability of such change. Copies of the notice and the changed regulation will also be available on the OEHHA web site at www.oehha.ca.gov.

¹¹ Health and Safety Code section 25249.11(b).

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

A copy of the Final Statement of Reasons may be obtained, when it becomes available, from Monet Vela at the e-mail or telephone number indicated above. The Final Statement of Reasons will also be available on OEHHA's web site at www.oehha.ca.gov.

OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT

Allan Hirsch
Chief Deputy Director

Dated: August 7, 2020