

OEHHA Modifies Its Proposed Changes to Its Regulation Calculating Prop. 65 Exposure Levels in Food

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Prop. 65 Clearinghouse

Last October the Office of Environmental Health Hazard Assessment (OEHHA) proposed to modify two of its regulations to change [the way that concentrations of Prop. 65-listed reproductive toxicants are calculated](#) for determining exposure levels for foods. The agency has now proposed modifications to its October proposal based on comments it received.

The October 8, 2018 proposal involved changes to two OEHHA regulations: section 28521(a) and 25821(c) [see [OEHHA Proposes Changes to Calculating Exposure Levels to Reproductive Toxicants in Food](#), October 18, 2018].

Section 25281(a) currently provides that the "level in question" (i.e., the level of exposure to the chemical) for a listed reproductive toxicant means the chemical concentration of the chemical for the exposure in question. The section further limits the exposure to the extent that the exposure comes from some third party. OEHHA's October proposal contemplated adding language for exposures in food products only that bars a producer from calculating an average exposure level from multiple samples based on food from different manufacturers or from different manufacturing facilities.

Section 25821(c)(2) currently provides that that the level of exposure shall be calculated using the reasonably anticipated rate of intake or exposure for average users of the product. OEHHA's proposed October 8 proposal would have added language providing that the rate of intake or exposure is calculated as the "arithmetic mean" of the rate of intake or exposure.

OEHHA said that the purpose of these amendments was to override the appellate court decision in [ELF v. Beech-Nut Nutrition](#), which OEHHA had argued was inconsistent with the Proposition 65 statute [see [Appellate Court Upholds Lower Court Decision on Determining Safe Harbor Level for Lead](#), July 10, 2015].

The agency gave interested parties an initial 45-day comment period, which was extended through December 3, 2018 at the request of the California Chamber of Commerce and the Grocery Manufacturers Associations.

[Ten written comments were received](#) by the end of the extended comment period.

Based on these comments [OEHHA is proposing the following two modifications](#) to its October 2018 proposal:

1. It is proposing to add the following additional language to the October proposed change to Section 25821(a): "The level in question may be based on the concentration of the

chemical in a food product as it is offered for sale to the end consumer, even if that product contains ingredients sourced from different manufacturers or producers."

2. It is proposing to eliminate the change to section 258231(c)(2) meaning that there will be no requirement that level of exposure is calculated based on the arithmetic mean.

At the request of the Grocery Manufacturers Association, California Chamber of Commerce, and a coalition other interested parties, OEHHA has extended the comment period on the latest modification of the proposed rule from Monday, July 22 to Monday, August 5, 2019.