

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

SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986

**NOTICE OF INTENT TO REPEAL
TITLE 22, CALIFORNIA CODE OF REGULATIONS
SECTION 12901**

September 17, 2004

Notice is hereby given that the Office of Environmental Health Hazard Assessment (OEHHA) has reviewed all the public comments received during the 45-day public comment period and the public hearing regarding the proposed amendments to or repeal of Title 22, California Code of Regulations, Section 12901, which was the subject of the Notice of Proposed Rulemaking published on June 4, 2004 and has determined, following public input and internal discussion that repeal of the regulation in its entirety is the most appropriate action.

OEHHA has determined that the proposed amendments to the regulation that were included with the June 4, 2004 notice will not adequately address the legal and technical concerns that prompted the regulatory action and may in fact exacerbate the problems that have been experienced by the regulated community, courts and litigants in interpreting the regulation. Based upon the comments received from the public, it appears that there is a stronger argument for repeal of the regulation and that it is not possible at this time to craft a regulation that will not conflict with existing California Law on evidence or create additional cause for litigation concerning the intent or application of the regulation. OEHHA received five oral comments at the hearing on July 20, 2004, of these, two supported repeal of the regulation, two opposed repeal and one was neutral. Of the eight written comments received, four supported repeal and four took no apparent position on repeal and only addressed issues or concerns with the amended language for the regulation that had been proposed by OEHHA. In reviewing the comments received, it became apparent that additional attempts to amend the regulation would most likely fail to add clarity or certainty concerning the appropriate methods of detection to be used for Proposition 65 listed chemicals.

Based upon the comments received concerning this regulation, it appears that there generally are scientific protocols in existence that can be used by regulated businesses to determine whether a given exposure to a listed chemical may require a warning under Proposition 65, or whether a given release of a listed chemical may violate the discharge prohibition under the Act. These methods of detection protocols vary depending upon the chemical involved, route of exposure, type of medium causing the exposure or release, etc. There appears to be no consensus in the regulated or enforcement community regarding any standard approach that may be applied to all exposure and discharge scenarios that arise under Proposition 65 that could be captured in this regulation. There are also fundamental disagreements among the various stakeholders concerning the scope and effect of the regulation that would be very difficult to satisfactorily resolve in a rule of general application. Therefore, given that an

existing body of statutory and case law concerning the conduct of scientific tests and the admissibility of scientific evidence already exists in California, OEHHA has determined that Title 22, Cal. Code of Regulations section 12901 is not needed and that the regulation does not further the purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65, codified at Health and Safety Code section 25249.5 et seq.) because it fails to provide clarity or certainty for either the regulated community or those involved in the enforcement of Proposition 65 concerning the appropriate methods of detection for chemicals regulated under the Act.

This Notice of Intent to Repeal serves to commence a 15-day public comment period on the proposed action. If you have any comments regarding the proposed action, OEHHA will accept written comments between **September 17 and October 4, 2004**. In order to be considered, the comments must be received by OEHHA by 5:00 p.m. on **October 4, 2004**.

A copy of the text of the regulation that would be repealed is attached. If you wish to submit formal comments on OEHHA's proposed action to repeal Title 22, Cal. Code of Regulations, section 12901 in its entirety, you may submit your comments by mail, fax, courier or hand-delivery to:

Ms. Cynthia Oshita
Office of Environmental Health Hazard Assessment
Mailing address: P.O. Box 4010
Sacramento, California 95812-4010
Street address: 1001 I Street, 19th Floor
Sacramento, California 95814
Fax No.: (916) 323-8803 Telephone: (916) 445-6900

Comments may also be transmitted via email addressed to: (coshita@oehha.ca.gov).
Inquiries concerning the action described in this notice may be directed to Cynthia Oshita, in writing at the address given above, or by telephone at (916) 445-6900.