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Monet Vela
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Dear Monet Vela:

The Center for Environmental Health thanks the Office of Environmental Health Hazard Assessment for the opportunity to comment on the possible addition of Title 27 § 25501.1 to OEHHA's regulation existing entitled "Naturally Occurring Concentration of Chemicals." CEH offers the following comments.

1. Any exception to the warning requirement for naturally occurring chemicals in foods needs to be narrowly tailored and carefully circumscribed to further the purposes of Proposition 65.

Proposition 65 was passed by California voters due to their concern about being exposed to toxic chemicals in the water they drink, the air they breathe, the products they use and the food they eat. Moreover, consumers expect that the food they purchase is safe and healthy for themselves and their families. They also expect that government agencies are actively working to make the food supply even safer and healthier. Furthermore, the toxicity of a chemical is unrelated to whether its source is natural or anthropogenic. Therefore, to the extent it is retained at all, the exemption for naturally occurring chemicals must be narrowly tailored and carefully circumscribed to ensure that California consumers are not unwittingly exposed to high levels of toxic chemicals in the food they eat and feed to their families. CEH is concerned that, as drafted, the proposed amendment to OEHHA's naturally occurring regulation appears to be a step in the wrong direction.

2. Regardless of any specific levels that are established as "naturally occurring," food growers and producers should always be required to use good agricultural and manufacturing practices and to reduce the amounts of listed chemicals to the lowest feasible level.

Under OEHHA's current regulations, a chemical can only be considered naturally occurring "to the extent that it was not avoidable by good agricultural or good manufacturing practices." 27 Cal. Code Regs. § 25501(a)(4). The regulations further provide that, "The producer, manufacturer, distributor, or holder of the food shall at times utilize quality control measures that reduce natural chemical contaminants to the 'lowest level currently feasible,' . . ." *Ibid*. It is unclear from the proposed amendment whether these requirements will still apply to companies seeking to take advantage of the specific proposed numeric limits for naturally occurring levels of arsenic and lead in certain foods, but they should. In other words, a company should not be able to automatically expose consumers to 130 parts per billion ("ppb") inorganic arsenic in brown rice without a warning unless the company can demonstrate that it using good agricultural and manufacturing practices and that it is implementing quality control measures that reduce the arsenic levels in its rice to the lowest level feasible.

3. Any numerical levels for naturally occurring chemicals in foods must be based on data that are specific to the region where that food is grown.

OEHHA is apparently basing the proposed levels for naturally occurring levels of arsenic and lead on section 25501(a)(2) of its existing regulations, which states, “The ‘naturally occurring’ level of a chemical in a food may be established by determining the natural background level of the chemical in the area in which the food is raised, or grown, or obtained, based on reliable *local or regional data*.” 27 Cal. Code Regs. § 25501(a)(2) (emphasis added). However, OEHHA then proceeds to ignore the emphasized language by basing its proposed levels for lead on national data from the FDA’s Total Diet Study (“TDS”) and its proposed levels for arsenic on California statewide data. Worse yet, in both instances OEHHA is proposing to allow use of the specified levels for food irrespective of where that food is grown. Thus, for instance, based solely on California data, up to 130 parts per billion of inorganic arsenic in rice will be deemed to be naturally occurring whether that rice was grown in the Sacramento Valley, the San Joaquin Valley, Texas, or China, and even if the natural background level of arsenic in the region where that rice was grown is zero. OEHHA provides no scientific, factual or legal justification for assuming that data on background levels in one area can be extrapolated to food grown in another part of the state, country or world.

4. Allowances for naturally occurring chemicals must be limited to truly trace amounts in chemicals that are widely present in the foods at issue.

OEHHA promulgated the naturally occurring regulation due to concerns that many food products naturally contain trace levels of listed chemicals, and that requiring warning on all such products would lead to meaningless warnings on all food products. See generally *Nicolle-Wagner v. Deukmejian* (1991) 230 Cal.App.3d 652, 660. This rationale falls apart, however, in instances in which the chemical at issue is not present in most foods or when the levels at issue are too high to be considered “trace.” Here, the data OEHHA are relying upon for lead indicate that most of the food at issue do not contain any detectable levels of lead, whereas the arsenic data and proposed levels are much higher than anything that could reasonably be considered trace.

Conclusion

The underlying purpose of the Safe Drinking Water and Toxic Enforcement Act is to provide Californians with information about toxic exposures. To be consistent with the statute, § 25501.1 should provide minimal exemptions from the warning requirements of the statute.

Sincerely,



Caroline Cox
Research Director