



April 13, 2016

OAL Reference Attorney  
Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
[staff@oal.ca.gov](mailto:staff@oal.ca.gov)

RE: NOTICE OF EMERGENCY ACTION TO AMEND SECTION 25603.3 TITLE 27, CALIFORNIA CODE OF REGULATIONS WARNINGS FOR EXPOSURES TO BISPENOL A FROM CANNED AND BOOTLED FOODS AND BEVERAGES

*Submitted Electronically*

To Whom It May Concern:

Agricultural Council of California ("Ag Council") appreciates the opportunity to comment on the Office of Environmental Health Hazard Assessment's ("OEHHA") Notice of Emergency Action regarding Proposition 65 ("Prop. 65") Warnings for Bisphenol A ("Emergency Action"). Ag Council represents approximately 15,000 farmers across California, ranging from small, farmer-owned businesses to some of the world's best-known brands. As such, many of our member companies and their farmer owners could be impacted by this Emergency Action as Bisphenol-A ("BPA") is commonly utilized throughout the food industry for food safety purposes. Ag Council has been engaged in discussions with OEHHA since it listed BPA in May 2015 and continues to work with OEHHA on all issues for the food industry as it relates to Prop. 65.

Section 25603.3 (g): Warnings for Exposure to Bisphenol A in Canned and Bottled Foods and Beverages

*Provision Needed on Retail Signage for "Early Adopters" and Other Types of Packaging*  
Ag Council supports OEHHA's proposed Emergency Action, however language on the retail sign could impact sales for companies that have already moved out of the use of BPA based linings. The process to replace food containers is a very lengthy, involved process, particularly when it comes to finding alternatives that comply with food safety requirements. Some food companies have successfully moved out of the use of BPA after significant investment of resources. Having a general store sign that does not indicate that some food companies no longer use BPA could discourage consumers from purchasing these healthy products.

There are stringent requirements of food labels, and as a result companies may not be able to label products as “BPA-free” or “non-BPA” in a timely manner. Many of these products are already in the supply chain, so attempting to add an additional label to them is not feasible. Furthermore, there are other types of packaging that may also have BPA. Creating a special label for food products in order to meet the May 11 timeframe, under either scenario, is unrealistic. Adding language to signage at the point-of-sale is the only way to minimize this issue.

In order to encourage consumption of products that have already moved out of the use of BPA, Ag Council requests the addition of the following language to the store signage (underlined) as outlined in Sections 25603.3 (2)(A) and (B):

“WARNING: Many food and beverage cans have linings containing Bisphenol A (BPA), a chemical known to the State of California to cause harm to the female reproductive system. Jar lids, bottle caps and other types of packaging may also contain BPA. You can be exposed to BPA when you consume food or beverages packaged in these containers.”

Some food and beverage packages no longer use BPA. Consumers are urged to follow-up with food and beverage manufacturers to determine which products do not contain BPA.

For more information, go to: [www.P65Warnings.ca.gov/BPA](http://www.P65Warnings.ca.gov/BPA)”

#### Section 25603.3(f): Responsibility to Provide Warnings for Exposures to Bisphenol A in Canned and Bottled Foods and Beverages

##### *Opportunity to Cure*

Ag Council strongly supports language outlined in Section 25603.3(f) (2)(A)(iii) allowing retailers an opportunity to cure where there is a minor deviation from the requirements of the Emergency Action. The point-of-sale is a high traffic area, so there will likely be circumstances where signs will inadvertently be moved or fall down during regular retail activities. Retailers should be given an opportunity to rectify the situation as part of their daily operations.

##### Emergency Action is Needed

As stated in the Notice, OEHHA has not developed a safe harbor or Maximum Allowable Dose Level (MADL) for food companies to measure against in order to achieve compliance for BPA as it relates to Prop. 65. OEHHA is awaiting additional studies to be conducted by the U.S. Food and Drug Administration (FDA) in order to set a MADL. These studies could take another 18 months to two years. Many food products that utilize BPA have a shelf life of up to three years. Therefore, several food products on grocery store shelves today that have BPA in the packaging would have to find various ways to comply or be subject to litigation. For these inventories already in the supply chain at the retail level, OEHHA’s Emergency Action is the only way to comply.



For practical purposes, the lack of a MADL means that there is no tolerance for BPA in food products. Consequently, if no emergency action is taken, litigation from private enforcers could begin as soon as May 11, 2016, which would force companies to develop what would likely result in an inconsistent patchwork of compliance measures.

Without a MADL or Emergency Action, food companies would seek independent counsel to determine how to comply with Prop. 65 regulations. It is highly likely that companies would employ a variety of methods to provide warning that are inconsistent across food products. OEHHA's Notice of Emergency Action would provide much needed consistency for retailers and food companies to comply, in a clear, succinct way. This would avoid confusing the public with various forms of health warnings that could differ in language and interpretation.

Emergency action is needed. Specifically, Ag Council agrees with OEHHA on the following "Facts Constituting the Need for an Emergency Action":

- BPA is commonly found in the linings of cans, and jar bottle lids, for food and beverage products that are sold throughout California.
- Because canned and bottled foods have shelf lives of up to three years, there are large inventories of canned and bottled food products currently on store shelves.
- Proposition 65 warnings for BPA are not provided on the cans, bottles or jars that are already in commerce. OEHHA anticipates that retailers will post multiple warning signs where canned and bottled foods and beverages are displayed, resulting in a plethora of warnings that will confuse consumers.

Ag Council urges OAL to adopt OEHHA's Emergency Action with the addition of our suggested language to the store signage. Thank you for your time and consideration of our requests. If you have any questions or concerns, please feel free to contact me at (916) 443-4887.

Sincerely,



Emily Rooney  
President

CC: Gordon Burns, Undersecretary, California Environmental Protection Agency  
Lauren Zeise, Acting Director, Office of Environmental Health Hazard Assessment  
Monet Vela, Office of the Chief Counsel, Office of Environmental Health Hazard Assessment

