

NOTICE OF PROPOSED RULEMAKING
TITLE 27, CALIFORNIA CODE OF REGULATIONS

PROPOSITION 65

**NOTICE OF PROPOSED RULEMAKING
AND ANNOUNCEMENT OF PUBLIC HEARING**

AMENDMENT TO SECTION 25603.3

TITLE 27, CALIFORNIA CODE OF REGULATIONS
WARNINGS FOR EXPOSURES TO BISPHENOL A
FROM CANNED AND BOTTLED FOODS AND BEVERAGES

JULY 29, 2016

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) proposes an amendment to the Proposition 65 warning requirements for bisphenol A (BPA). On April 18, 2016, OEHHA implemented an emergency regulation for BPA, amending section 25603.3 of Title 27 of the California Code of Regulations to provide a safe harbor warning method and content for exposures to BPA from canned foods and beverages sold at retail level. Because emergency regulations are only valid for 180 days, OEHHA is proposing a regular rulemaking process to establish a continuance of this emergency regulation. This new regulation will sunset on December 30, 2017 unless reenacted. This proposal takes into account all comments received on the emergency regulation.

BACKGROUND

On May 11, 2015, BPA was added to the Proposition 65 list of chemicals known to cause reproductive toxicity. The listing is for the female reproductive toxicity endpoint. BPA is an industrial chemical used to make polycarbonate, a hard, clear plastic, which is used in many consumer products. BPA is also used to make epoxy resins, which act as a protective lining on the inside of some metal-based food and beverage cans, as well as lids for glass bottles and jars.

This new regulation will further the “right-to-know” purposes of the statute and give more specificity for the content of safe harbor warnings for BPA, thus offering compliance assistance for those businesses that are required to provide warnings.

PUBLIC PROCEEDINGS

A public hearing on this proposed regulatory amendment is scheduled for 10:00 a.m. on September 12, 2016 in the Sierra Hearing Room at the CalEPA Headquarters building 1001 I Street in Sacramento. The hearing will also be webcast (<https://video.calepa.ca.gov/>).

Any written comments concerning this proposed regulatory action, regardless of the form or method of transmission, must be received by OEHHA by **5:00 p.m. on September 26, 2016**, the designated close of the written comment period. All comments will be posted on the OEHHA website at the close of the public comment period.

The public is encouraged to submit written information via e-mail, rather than in paper form. Send e-mail comments to P65Public.Comments@oehha.ca.gov. Please include "BPA Warnings" in the subject line. Hard-copy comments may be mailed, faxed, or delivered in person to the appropriate address below.

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E-mail: P65Public.Comments@oehha.ca.gov

Please be aware that 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.

CONTACT

Please direct inquiries concerning the proposed regulatory action described in this notice to Monet Vela, in writing at the address given above, (916) 323-2517 or via email at monet.vela@oehha.ca.gov. Fran Kammerer will be a back-up contact. She can be contacted at (916) 445-4693 or via email at fran.kammerer@oehha.ca.gov.

AUTHORITY

Health and Safety Code section 25249.12 and Health and Safety Code section 25249.8(a).

REFERENCE

Health and Safety Code sections 25249.5, 25249.6, 25249.8(a), 25249.10, 25249.11 and 25249.12

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

BACKGROUND

OEHHA is the state entity responsible for the implementation of Proposition 65.¹ OEHHA has the authority to adopt and amend regulations to make specific and further the purposes of Proposition 65. OEHHA maintains a list of chemicals known to cause reproductive toxicity or cancer. Proposition 65 requires businesses to provide a warning when they knowingly and intentionally cause an exposure to a listed chemical, and prohibits the discharge of listed chemicals into sources of drinking water.

As discussed above, on May 11, 2015, bisphenol A (BPA) was added to the Proposition 65² list of chemicals known to cause reproductive toxicity. Effective May 11, 2016, warnings are required for exposures to BPA unless the person causing the exposure can show that an exposure 1,000 times the level in question has no observable effect.³ Because canned and bottled foods and beverages have a longer shelf life and products manufactured before BPA was listed are still in the market, OEHHA promulgated an emergency regulation to allow temporary use of a standard point-of-sale warning message for BPA exposures from canned and bottled foods and beverages until warnings can be placed on newly manufactured cans and/or BPA is removed from the linings.⁴ This proposed action will continue this temporary use of point-of-sale warning messages until December 30, 2017.

SPECIFIC BENEFITS OF THE PROPOSED REGULATIONS

The proposed regulation will benefit the health and welfare of California residents and improve worker safety by providing more information to the public and facilitating businesses' compliance with the Act. The proposed regulation will provide consistent, informative, and meaningful warnings to consumers about significant exposures to BPA. The proposed safe harbor warning for canned and bottled foods and beverages will identify BPA by name, and disclose that it causes harm to the female reproductive system. The warnings will also provide the public with supplemental information via a

¹ The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.5 *et seq.*, commonly referred to as "Proposition 65".

² http://oehha.ca.gov/prop65/CRNR_notices/list_changes/051115listBPA.html

³ Health and Safety Code, sections 25249.10(b), 25249.10(c)

⁴ In a separate rulemaking process, OEHHA adopted a Maximum Allowable Dose Level (MADL) that establishes a level of dermal exposure to BPA that does not require a warning. The regulation will be effective October 1, 2016. This rulemaking package involves oral exposures from ingestion of canned and bottled foods and beverages and not dermal exposures.

link to OEHHA's website, which will contain fact sheets, links to informational materials on BPA from other authoritative organizations, and a searchable list of food and beverage products where BPA is intentionally used in the can or lids.

NO INCONSISTENCY OR INCOMPATIBILITY WITH EXISTING REGULATIONS

OEHHA has conducted an evaluation and has determined that this is the only regulation concerning Proposition 65 BPA warnings. Therefore, the proposed regulation is neither inconsistent nor incompatible with any other existing state regulations. The regulation does not change the existing mandatory requirements on businesses subject to Proposition 65, state or local agencies and does not address compliance with any other law or regulation.

LOCAL MANDATE/FISCAL IMPACT

Because Proposition 65 by its terms⁵ 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.

COSTS OR SAVINGS TO STATE AGENCIES

Because Proposition 65 by its terms⁶ does not apply to any state agency and this regulation is simply a clarification of existing procedures, OEHHA has initially determined that no significant savings or increased costs to any state agency will result from the proposed regulatory action.

EFFECT ON FEDERAL FUNDING TO THE STATE

Because Proposition 65 by its terms⁷ does not apply to any state agency and this regulation is simply a clarification of existing procedures, OEHHA has initially determined that no costs or savings will occur on any federal funding to the state.

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 new mandatory requirements on any business.

⁵ See Health and Safety Code section 25249.11(b).

⁶ See Health and Safety Code section 25249.11(b).

⁷ See Health and Safety Code section 25249.11(b).

IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

Because Proposition 65 by its terms⁸ 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.

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

Because the proposed regulatory level provides compliance assistance to businesses subject to the Act, but does not impose any mandatory requirements on those businesses, OEHHA has made an initial determination that the adoption of the regulation 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))

Creation or Elimination of Jobs within the State of California

This regulatory action will not likely have a major impact on the creation or elimination of jobs within the State of California.

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

This regulatory action will not likely have a major impact on the creation of new businesses or the elimination of existing businesses within the State of California. The economic impact of the proposed regulation is very small relative to any one establishment's typical cost of operation and the need for business to be created or eliminated as a result of the proposed regulation does not exist.

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 because the proposed regulation will not change whether BPA warnings are required by a business. The proposed regulation focuses on the method and content of the warnings, and providing information to OEHHA and retailers that businesses already have, i.e. whether their canned and bottled food and beverage products use intentionally added BPA or are causing exposures to BPA that require a Proposition 65 warning.

⁸ Health and Safety Code section 25249.11(b).

Benefits of the Proposed Regulation

The health and welfare of California residents will likely benefit from the increased information regarding exposures to BPA from canned and bottled foods and beverages. More informative warnings about BPA in these products will further the purposes of Proposition 65 by increasing the public's ability to make informed decisions regarding canned and bottled foods and beverages.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE 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 the regulation is proposed, or would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

EFFECT ON SMALL BUSINESSES

OEHHA has determined that the proposed regulatory action will not affect small business as it does not impose any mandatory requirements on small businesses. Proposition 65 expressly exempts businesses with less than 10 employees⁹ from the warning requirement of the law.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The proposed regulation will allow businesses to comply with the warning requirements of Proposition 65 by using a point-of-sale warning until the regulation's sunset date. Any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action is very small relative to the typical cost of operating a business.

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

⁹ Health and Safety Code section 25249.11(b).

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.

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: July 29, 2016