

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

NOTICE OF PROPOSED RULEMAKING

TITLE 22, CALIFORNIA CODE OF REGULATIONS

**AMENDMENT TO SECTION 12104 SAFE USE DETERMINATIONS
SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986**

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) proposes to amend Title 22, California Code of Regulations, Section 12104.

PUBLIC PROCEEDINGS

A public hearing will be held on **Monday, July 1, 2002**, at which time any person may present statements or arguments orally or in writing relevant to the action described in this notice. The public hearing will commence at 10:00 a.m. in the Coastal Hearing Room, California Environmental Protection Agency Building, 1001 I Street, 2nd Floor, Sacramento, California and will last until all business has been conducted, or until 5:00 p.m.

Any written statements or arguments regardless of the form or method of transmission must be received by OEHHA by 5:00 p.m. on **Monday, July 1, 2002**, which is hereby designated as the close of the written comment period.

Written comments regarding this proposed action may be sent by mail or by facsimile addressed to:

Cynthia Oshita
Office of Environmental Health Hazard Assessment
Proposition 65 Implementation Program
P. O. Box 4010
Sacramento, California 95812-4010
FAX: (916) 323-8803
Telephone: (916) 445-6900

Comments sent by courier should be delivered to:

Cynthia Oshita
Office of Environmental Health Hazard Assessment
1001 I Street, 19th Floor
Sacramento, California 95814

Comments may also be transmitted via email addressed to: (coshita@oehha.ca.gov).

It is requested, but not required, that written statements or arguments be submitted in triplicate.

If you have special accommodation or language needs, please contact Cynthia Oshita at (916) 445-6900 or coshita@oehha.ca.gov by Monday, June 24, 2002. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

CONTACT

Inquiries concerning the substance and processing of 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. Ms. Susan Luong is a back-up contact person for inquiries concerning processing of this action and is available at the same telephone number.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65 (hereinafter referred to as “Proposition 65” or “the Act”), was enacted as a voters’ initiative on November 4, 1986. Included among the mandates of the statute is a prohibition against contaminating sources of drinking water with chemicals known to the state to cause cancer or reproductive harm (Health and Safety Code Section 25249.5) and a requirement upon businesses to provide warnings before exposing individuals to chemicals known to the state to cause cancer or reproductive harm (Health and Safety Code Section 25249.6). Failure to comply with these provisions may subject a business to a civil lawsuit and subject it to civil penalties of up to \$2,500 per day for each violation pursuant to Health and Safety Code Section 25249.7.

Businesses need to know whether they are in compliance with the provisions of the Act relative to the specific discharge or exposure circumstances of their business. Many businesses would like to seek the assurance and advice of OEHHA regarding the lawfulness of the business’s discharge or exposure activities under the Act. The safe use determination process serves that purpose. Based upon the specific set of facts presented by the requester, OEHHA will issue a decision representing its best judgment on whether the discharge or exposure in question was “safe” (i.e., does not trigger the discharge prohibition or warning requirement) in light of the application of the Act.

Thus far, few requests for a safe use determination have been submitted to OEHHA. Although many businesses would have liked to seek the assistance of OEHHA, many have been hesitant to apply. Among the reasons OEHHA has received for this hesitancy, has been business’s apprehension that submission of a safe use determination request may invite service of a 60-day notice of violation upon the requester by a private party. Under the current regulations, service of such a notice precludes OEHHA from issuing a safe use determination. Under the proposed regulations, this prohibition would no longer apply. However, under the current regulations, pending civil or criminal litigation on the subject matter of the safe use determination request is grounds for OEHHA to terminate

the request. This remains the rule under the proposed regulations unless the request was accepted before litigation was initiated.

A related concern that has been expressed is the issue of confidentiality of the request and the supporting data and information submitted. To address these concerns and, in turn, enhance the usefulness of the SUD process, OEHHA is proposing to amend the regulations to identify when OEHHA will consider and issue a safe use determination; and when OEHHA will publicly disclose the acceptance of a request and the supporting data or information. OEHHA proposes to continue the process if a completed request is received and accepted by OEHHA before a 60-day notice of violation has been served or before a complaint by a public prosecutor with jurisdiction has been filed. Also, the request and supporting data and information is proposed to be considered official information pursuant to Evidence Code Section 1040 and would not be publicly disclosed until the request was accepted as complete.

AUTHORITY

Health and Safety Code Section 25249.12.

REFERENCE

Health and Safety Code Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11.

IMPACT ON 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

The issuance of a safe use determination is subject to the reimbursement by the requester of costs to OEHHA and other state agencies that were necessarily incurred in considering the request. OEHHA has determined that no other savings or increased costs to any State agency will result from the proposed regulatory action.

EFFECT ON FEDERAL FUNDING TO THE STATE

OEHHA has determined that no costs or savings in federal funding to the State will result from the proposed regulatory action.

EFFECT ON HOUSING COSTS

OEHHA has determined that the proposed regulatory action will have no effect on housing costs.

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

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. The request for a safe use determination is voluntary. Businesses are not required to apply.

IMPACT ON THE CREATION, ELIMINATION, OR EXPANSION OF JOBS/BUSINESSES

OEHHA has determined that the proposed regulatory action will not have any impact on the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

OEHHA is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The proposed regulation is voluntary, not obligatory, and does not impose any requirement upon private persons or business.

EFFECT ON SMALL BUSINESSES

The proposed regulation is voluntary, not obligatory, and does not impose any requirement upon any business, including small business. In fact, the safe use determination provides a means for business, including small business, to seek assistance with regulatory compliance from OEHHA.

CONSIDERATION OF ALTERNATIVES

In accordance with 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 action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

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 regulations, all the critical information upon which the regulation is based, and the text of the proposed regulations. A copy of the Initial Statement of Reasons and a copy of the text of the proposed regulations are available upon request from OEHHA's Proposition 65 Implementation Program at the address and telephone number indicated above. These documents are also posted on OEHHA's Web site at www.oehha.ca.gov.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The full text of any regulation which is changed or modified from the express terms of the 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 changed proposed regulations 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 who request notification from OEHHA of availability of such change. Copies of the notice and the changed regulation will also be available at the OEHHA's Web site at www.oehha.ca.gov.

FINAL STATEMENT OF REASONS

A copy of the Final Statement of Reasons may be obtained, when it becomes available, from OEHHA's Proposition 65 Implementation Program at the address and telephone number indicated above. The Final Statement of Reasons will also be available at the OEHHA's Web site at www.oehha.ca.gov.

OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT

VAL F. SIEBAL
Chief Deputy Director

Dated: **May 17, 2002**