

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

TITLE 27, CALIFORNIA CODE OF REGULATIONS

PROPOSED ADOPTION OF NEW CHAPTER AND SECTION

CHAPTER 3: NATURALLY OCCURRING LEAD IN CANDY

SECTION 28500: NATURALLY OCCURRING LEVELS OF LEAD IN CANDY

June 19, 2020

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) is proposing to add a new chapter and section to Title 27 of the California Code of Regulations, Chapter 3: Naturally Occurring Lead in Candy, section 28500, Naturally Occurring Levels of Lead in Candy.¹ If adopted, this proposed regulation would establish the naturally occurring level of lead in candies containing chili and/or tamarind as required by Health and Safety Code section 110552. This is a continuation of the rulemaking process that OEHHA initially began on March 15, 2019.

PUBLIC PROCEEDINGS

Written Comment Period

Any written comments concerning this proposed regulatory action, regardless of the form or method of transmission, must be received by OEHHA no later than **August 18 2020**, the designated close of the written comment period. Due to the COVID-19 emergency, OEHHA is providing a longer period than required under the Administrative Procedure Act. All written comments will be posted on the OEHHA website at the close of the public comment period.

Because of limited in-office staffing during the COVID-19 emergency, OEHHA strongly recommends that the public submit written information electronically, rather than in paper form. Comments may be submitted electronically through our website at <https://oehha.ca.gov/comments>. Comments submitted in paper form can be mailed, faxed, or delivered in person to the address below, but delays may occur if staff are unable to timely access them.

All submissions should be directed to:

Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
P. O. Box 4010

¹ All further references are to sections of Title 27, Cal. Code of Regs., unless indicated otherwise.

Sacramento, California 95812-4010

Telephone: 916-323-2517

Fax: 916-323-2610

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.

Public Hearing

A public hearing on these proposed regulatory amendments will only be scheduled upon request. The hearing would be web-based due to the COVID-19 emergency². To request a hearing, send an e-mail to Monet Vela at monet.vela@oehha.ca.gov or to the address listed above by no later than **August 3, 2020**. If such a request is made, OEHHA will mail a notice of the hearing to the requester and interested parties, and the notice will be posted on OEHHA's web site at least ten days before the public hearing date. The notice will provide the date, time, and location of the hearing.

CONTACT

Please direct inquiries concerning the proposed regulatory action described in this notice to Monet Vela at (916) 323-2517, or by e-mail to monet.vela@oehha.ca.gov. Mario Fernandez is a back-up contact person for inquiries concerning processing of this action and is available at (916) 323-2635 or mario.fernandez@oehha.ca.gov.

AUTHORITY

Health and Safety Code section 110552(c)(3).

REFERENCE

Health and Safety Code sections 110552(b) and 110552(c)(1).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Health and Safety Code section 110552 requires OEHHA, in consultation with the California Department of Public Health (CDPH) and the Office of the Attorney General, to determine the "naturally occurring level" of lead in candy containing chili and tamarind. The proposed regulation establishes this naturally occurring level of 0.02

²Executive Orders N-25-20 and N-29-20

parts per million (ppm) based on a scientific approach summarized in the Initial Statement of Reasons and discussed in detail in the accompanying technical document titled *Naturally Occurring Lead in Certain Candies. Candies Flavored with Chili and/or Tamarind* (OEHHA 2020).

The purpose of this regulation is to establish a naturally occurring level of lead in candies containing chili and tamarind, as required by section 110552(c)(3). OEHHA initially proposed a naturally occurring level of lead in these candies on March 15, 2019 (hereafter, “the 2019 proposed rulemaking”), but was unable to complete the proposed rulemaking within the one-year statutory timeframe. While the proposed level has not changed, OEHHA has incorporated additional information received during the comment period for the 2019 proposed rulemaking into this Initial Statement of Reasons and the attached technical support document.

Anticipated Benefits of the Proposed Regulation

The proposed regulation will further the goals of the authorizing statute by establishing a naturally occurring level of lead in candies flavored with chili and/or tamarind. This level will be used by CDPH when testing for levels of lead in candy for the purpose of enforcing other provisions of the statute. The proposed regulation will therefore benefit the health and welfare of California residents by setting a science-based naturally occurring level that will be used to ensure that candy sold or distributed in California is not adulterated.

No Inconsistency or Incompatibility with Existing Regulations

OEHHA has determined that no other state regulations establish a naturally occurring level for lead in candies containing chili and/or tamarind. The proposed regulatory action is therefore neither inconsistent nor incompatible with any other existing state regulations because it sets a naturally occurring regulatory level as required by statute and does not address compliance with any other law or regulation.

LOCAL MANDATE/FISCAL IMPACT

OEHHA has determined that the proposed regulatory action would not impose a mandate on local agencies or school districts. OEHHA has also determined that the proposed regulation would not impose any costs to any local agency or school district requiring reimbursement under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, that no other nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action, and that there will be

no costs or savings to any state agency because of the proposed regulatory action. There are also no costs or savings in federal funding to the state.

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 this 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 proposed regulation establishes a naturally occurring level for lead in candies flavored with chili and/or tamarind and OEHHA has determined this level is achievable by following good agricultural, manufacturing, and procurement practices, or by other currently feasible practices, at little to no additional costs to California businesses.

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 significantly impact the creation or elimination of jobs within the State of California because OEHHA has determined this level is achievable by following good agricultural, manufacturing, and procurement practices, or by other currently feasible practices, at little to no additional costs to California businesses.

Most manufacturers of candies containing chili and/or tamarind are located outside of California, with many located in Mexico. OEHHA was able to evaluate the types of candies made by over 100 of the approximately 200 candy manufacturers based in California, and fewer than ten companies currently produce any candies containing chili and/or tamarind. Further, based on the evaluation of recent testing data for similar candies, OEHHA has determined that the few California manufacturers that produce this type of candy are likely already in compliance with the proposed level. And for any manufacturer that might be impacted, OEHHA has determined that the proposed naturally occurring level is achievable with minimal cost to the manufacturer. For example, the lead in chili powder can be significantly reduced by washing the chili peppers before processing and employing simple and relatively low cost drying

procedures or by using higher-grade chili peppers at an increased cost ranging from fractions of a cent per candy to no more than three cents per candy.

Additionally, California retailers and distributors are not likely to incur additional costs or face difficulty in obtaining candy products containing chili and/or tamarind that meet the proposed lead level requirements. OEHHA has reviewed test results for levels of lead present in candies containing chili and/or tamarind that were produced by multiple manufacturers in Mexico. Data from testing of candies produced by nine different manufacturers between 2012 and 2017 for sale into California indicate that fewer than 8% of the tested candies would have exceeded the proposed level of 0.02 ppm, and no candy was reported to contain more than 0.03 ppm lead. Additional data from testing conducted between 2017 and 2018 of candies containing chili and/or tamarind produced by one of the largest candy manufacturers in Mexico indicate that fewer than 6% of candies would have exceeded the proposed level of 0.02 ppm, and only four candies were reported to contain more than 0.04 ppm lead. Given that the majority of Mexican candies flavored with chili and/or tamarind are already in compliance with the proposed level of 0.02 ppm, and that Mexico is a leading producer of such candies, most importers and distributors/retailers of these candies in California are already sourcing compliant candies from Mexican manufacturers. As the majority of candies flavored with chili and/or tamarind manufactured by both California and Mexican manufacturers for sale in California are already compliant with the proposed regulation, California retailers of these candies are unlikely to be significantly impacted.

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

For the reasons noted above, this proposed regulatory action will not impact the creation of new businesses or the elimination of existing businesses within the State of California because very few California manufacturers of this type of candy exist and the costs of compliance are likely to be minimal.

The Expansion of Businesses Currently Doing Business within the State

For the reasons noted above, this proposed regulatory action will not impact the expansion of businesses within the State of California because very few California manufacturers of this type of candy exist and the costs of compliance are likely to be minimal.

Benefits of the Proposed Regulation

The proposed regulation would establish a naturally occurring level of 0.02 ppm lead in candies containing chili and/or tamarind for the purpose of enforcing other provisions of the law related to the sale or distribution of candy within California. The proposed regulation will therefore benefit the health and welfare of California residents by setting a science-based naturally occurring level that will be used to ensure that candy sold or distributed in California is not adulterated.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

Some candy manufacturers—those that produce candies containing chili and/or tamarind—may incur costs in order to ensure their product does not exceed the proposed naturally occurring level of lead in candy flavored with chili and/or tamarind. However, based on the evaluation of recent testing data, OEHHA has determined that the few California manufacturers that produce this type of candy are likely already in compliance with the proposed level. Furthermore, for any manufacturer that might be impacted, OEHHA has determined that the proposed naturally occurring level is achievable with minimal cost to the manufacturer by following good agricultural, manufacturing, and procurement practices, such as washing the chili peppers before processing and employing simple and relatively low cost drying procedures, or using higher-grade chili peppers. Therefore, any compliance costs are likely to be minimal.

EFFECT ON SMALL BUSINESSES

The proposed regulatory action may adversely impact some small businesses in California. However, for the reasons discussed above, any costs are likely to be minimal.

CONSIDERATION OF 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 action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. A detailed discussion of alternatives proposed during the comment period for the 2019 proposed rulemaking can be found on pages 8 to 10 of the Initial Statement of Reasons.

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

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. Due to limited in-office staffing during the COVID-19 emergency, OEHHA strongly recommends that interested parties access these documents via its website at www.oehha.ca.gov. However, a notice of the comment period on the revised proposed regulation and the full text will be provided to individuals whose comments were received by OEHHA during the public comment period or who testified or submitted written comments at the public hearing, if one is held, and anyone who requests notification from OEHHA of the availability of such change.

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 Monet.Vela@oehha.ca.gov or the telephone number indicated above. The Final Statement of Reasons will also be available on OEHHA's website at www.oehha.ca.gov.

OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT

Allan Hirsch
Chief Deputy Director

Dated: June 19, 2020