



Submitted Via Public Comment Portal

September 8, 2026

Office of Environmental Health Hazard Assessment
Post Office Box 4010
Sacramento, CA 95812-4010

Re: Comments on Proposition 65 Omnibus 2026 Pre-Rulemaking

The National Fisheries Institute (“NFI”) respectfully submits these comments on the Office of Environmental Health Hazard Assessment’s (“OEHHA”) Proposition 65 Omnibus 2026 Pre-Rulemaking to address the potential amendment to the naturally occurring exemption.

NFI is a national trade association representing the nation’s seafood producers. NFI member companies in California and across the nation run the gamut of the commercial seafood value chain, including harvesters, exporters, importers, processors, distributors, retailers, and seafood restaurants.

NFI members have a substantial interest in the potential amendment because seafood originates in complex aquatic environments and may contain trace levels of substances that occur naturally in those environments. The potential amendment to the naturally occurring regulation – specifically, Cal. Code Regs., tit. 27, section 25501, subd. (a) – would provide that a listed chemical extracted or concentrated from any source, including a plant, may be present in a product as the result of human activity even if the extraction or concentration does not change the chemical’s Chemical Abstract Services Registry number.

NFI respectfully urges OEHHA not to formally propose this regulatory addition. Instead, OEHHA should use its rulemaking authority to reform Section 25501 to provide a realistic, science-based pathway for food businesses to establish the exemption when a listed chemical is naturally present in the food or its source environment.

1. The Proposed Amendment Conflicts with OEHHA’s Prior Interpretation.

On January 8, 2002, OEHHA’s former Chief Counsel issued a letter explaining that methyleugenol separated from basil or other natural herbs and spices remained naturally occurring when it had the same chemical identity as the methyleugenol found in those natural sources. (See Attachment 1.) OEHHA further concluded adding that naturally

occurring constituent to another food or consumer product did not itself constitute “human activity” under the regulation.

Importantly, OEHHA grounded that conclusion in the Final Statement of Reasons for the naturally occurring exemption. The agency explained that “it is evident from the regulation as a whole that once a chemical is exempt as a naturally occurring chemical in food, the exempt status of that particular chemical will ‘carry over’ to any other food to which it is added.” OEHHA therefore concluded that adding methyleugenol to another food or consumer product does not create an “exposure” when the resulting food was consumed.

The potential amendment to the naturally occurring regulation cannot be reconciled with that interpretation. It would newly-declare that a listed chemical extracted or concentrated from any source may be present as the result of human activity even where the chemical retains the same CAS number. In practical effect, the proposal would negate the “carry over” principle articulated in OEHHA’s methyleugenol letter: a naturally occurring constituent could lose its exempt status simply because it was separated, extracted, or concentrated before being incorporated into another food or consumer product. OEHHA has not explained why chemicals the agency previously regarded as retaining their naturally occurring status through separation and later use should now be recharacterized as human-caused solely because of processing that *does not change its chemical identity*. The potential amendment would thus reverse a reasoned agency interpretation of the regulation as a whole and replace it with a categorical process-based rule.

2. The Potential Amendment Does Not Solve the Exemption’s Existing Proof Problems.

The current regulation already construes the naturally occurring exemption narrowly. It limits naturally occurring status to the portion that did not result from “known human activity,” requires attribution between natural and anthropogenic contributions, and requires measures that reduce natural chemical contaminants to the lowest level currently feasible. Cal. Code Regs., tit. 27, § 25501, subds. (a)(3) and (4). Where a food contains a chemical, in part naturally occurring and in part added because of known human activity, “exposure” can only occur as to that portion of the chemical which resulted from such human activity. *Id.* at subd. (a)(3). The producer, manufacturer, distributor, or holder of the food must “utilize quality control measures that reduce natural chemical contaminants to the ‘lowest level currently feasible.’” *Id.* at subd. (a)(4).

As a practical matter, these requirements make the exemption extraordinarily difficult to establish. A company must distinguish natural from anthropogenic contributions in global, dynamic environments and then demonstrate that any naturally occurring contaminant has been reduced to the lowest feasible level. For seafood, tracing every constituent to its ultimate environmental source is often commercially impracticable. The proposed

amendment adds another categorical obstacle for food companies, rather than addressing the problem the exemption was designed to solve: how to prevent warnings for constituents that occur naturally in healthy and wholesome foods despite responsible sourcing, manufacturing, and quality controls.

3. *Tri-Union* Illustrates Both the Necessity and the Difficulty of the Existing Exemption.

The experience of NFI member companies that were defendants in *People ex rel. Brown v. Tri-Union Seafoods, LLC*, 171 Cal. App. 4th 1549 (2009), demonstrates the practical stakes. Following a six-week bench trial, the tuna companies prevailed on the naturally occurring defense after a multi-million-dollar joint defense effort. The Court of Appeal affirmed on the ground that substantial evidence supported the finding that virtually all methylmercury in canned tuna was naturally occurring and thus exempt from Proposition 65's warning requirement.

To NFI's knowledge, *Tri-Union* remains the only reported appellate decision sustaining the naturally occurring defense for a food product on that basis. It is not evidence that the exemption is overbroad; it is evidence of how demanding the defense already is. The defendants were required to develop and present extensive expert testimony addressing the origin of methylmercury in the ocean and in tuna. The appellate court affirmed under the deferential substantial evidence standard, and expressly limited its decision to that ground.

Yet, even after *Tri-Union*, seafood companies continue to receive Proposition 65 notices of violation alleging exposure to **total mercury** in seafood, including sardines, salmon, and tuna, among other seafood products.¹ These notices appear to seek an end run around *Tri-Union* by pleading total mercury rather than methylmercury, even though methylmercury is the predominant form of mercury in fish and is the form at issue in seafood consumption.²

The potential amendment would impose an additional categorical restriction on an already difficult defense and could compound the use of such notices against food companies – with no showing of additional public health benefit.

¹ See, e.g., Proposition 65 Notices of Violation assigned Attorney General Nos. [2026-03217](#) (alleging exposure to mercury in sardines); [2026-03001](#) (alleging exposure to mercury in sardines); [2026-00776](#) (alleging exposure to mercury in tuna); [2025-04953](#) (alleging exposure to mercury in salmon); [2025-04798](#) (alleging exposure to mercury in salmon); [2024-05146](#) (alleging exposure to mercury in sardines).

² *Mercury in Food*, U.S. Food and Drug Administration, available at: <https://www.fda.gov/food/environmental-contaminants-food/mercury-food>.

The governing appellate decisions underscore that Section 25501 was intended to be narrow but meaningful. In *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652 (1991), the court sustained the naturally occurring regulation. The court reasoned that, without the exemption, warnings on most or all foods could dilute the significance of warnings that consumers need to heed. *Id.* at p. 661. OEHHA's Final Statement of Reasons for the naturally occurring exemption correctly observed that the "[a]bsence of such an exemption could unnecessarily reduce the availability of certain foods or could lead to unnecessary warnings, which could distract the public from other important warnings on consumer products." *Id.* at p. 661.

That rationale remains compelling today. But proving the exemption applies is oftentimes financially or practically infeasible, a problem that has resulted in a proliferation of Proposition 65 warnings for healthy and wholesome food products that do not require such warnings.

4. OEHHA Should Pursue Practical Reforms Instead of Further Narrowing the Exemption.

Rather than move forward with the potential the amendment to Section 25501(a)(3), OEHHA should instead consider a rulemaking that makes the existing exemption administrable while preserving its safeguards. Specifically, OEHHA should:

- **Recognize natural background conditions.** One of the most significant practical problems is that businesses must prove the "natural background" of a chemical in a specific source environment. For seafood, migratory fish, and globally sourced commodities, that burden can be nearly impossible. OEHHA should permit businesses to rely on credible regional, national, or scientifically appropriate data to establish natural background levels when local data are unavailable or impracticable to obtain, particularly for migratory species and global aquatic supply chains.
- **Replace the "no known human activity" requirement with a reasonable-cause standard.** The existing regulation requires proof that the chemical did not result from "any known human activity," which effectively forces businesses to prove a negative. OEHHA should revise the regulation to better reflect real world environmental conditions, where distinguishing natural from anthropogenic sources is often scientifically infeasible.
- **Create a rebuttable presumption for certain foods and chemicals.** OEHHA should consider identifying combinations of foods and contaminants that are widely understood to occur naturally and create presumptions that the exemption applies unless a plaintiff proves otherwise.

- **Adopt an attainable evidentiary standard.** The agency should confirm that businesses need not trace each molecule or constituent through the entire environment to its ultimate source, particularly where natural and anthropogenic pathways cannot be scientifically apportioned with reasonable certainty.
- **Provide an OEHHA advisory pathway.** Finally, OEHHA should establish a transparent procedure through which food industries can seek agency guidance or a determination based on representative scientific evidence, rather than forcing each company to relitigate complex environmental-source questions in private enforcement actions.

These reforms would remain faithful to the regulation's core limitations. They would allow responsible businesses to demonstrate that a listed chemical is naturally occurring under conditions in which the current proof burden is otherwise prohibitive.

In summary, NFI supports a regulatory regime that reduces unnecessary warnings for healthy and wholesome food products. But a naturally occurring exemption that exists only in theory does not advance consumer protection. OEHHA should not proceed with formally proposing the potential amendment and instead should pursue a balanced rulemaking that makes the naturally occurring exemption practical and feasibly attainable. That approach will better preserve meaningful warnings, promote informed consumer choice, and avoid discouraging consumption of healthy seafood.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert DeHaan", followed by a stylized flourish.

Robert DeHaan
Executive Vice President & General Counsel

ATTACHMENT 1

Office of Environmental Health Hazard Assessment



Winston H. Hickox
Agency Secretary

Joan E. Denton, Ph.D., Director

Headquarters • 1001 I Street • Sacramento, California 95814

Mailing Address: P.O. Box 4010 • Sacramento, California 95812-4010

Oakland Office • Mailing Address: 1515 Clay Street, 16th Floor • Oakland, California 94612



Gray Davis
Governor

January 8, 2002

Mr. Gary M. Roberts
O'Donnell & Shaeffer LLP
633 West Fifth Street, Suite 1700
Los Angeles, California 90071

RECEIVED

JAN 14 2002

GARY M. ROBERTS

Re: Methyleugenol

Dear Gary:

Thank you for your letter of December 21, 2001, concerning the application of 22 CCR § 12501 to methyleugenol.

I understand from assertions in your letter that basil and other natural herbs and spices contain methyleugenol (CAS No. 93-15-2) as a natural constituent, and that naturally occurring methyleugenol may be separated from other constituents of basil through various chemical or physical processes. Your letter also contains representations that the separated methyleugenol has the same chemical identity (i.e., CAS number) as the methyleugenol found in the natural sources. This letter relies upon these assertions and representations, and applies only to the extent such assertions and representations are accurate.

As a natural constituent of basil and other natural herbs and spices, methyleugenol is a “naturally occurring” chemical within the meaning of 22 CCR § 12501.

Methyleugenol is a food within the meaning of 22 CCR § 12501 because it is used to flavor jellies, baked goods and other items. See Californian Health & Safety Code § 109935(a) (“‘Food’ means . . . : (a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal.”). Further support for the status of methyleugenol as a food can be found in the Food Chemicals Codex, 4th Edition (1996), which recognizes methyleugenol as a flavor chemical. Methyleugenol also is a natural constituent of food within the meaning of 22 CCR § 12501 because it is a natural constituent of basil, a food.

You further have asserted that methyleugenol found in natural herbs and spices results from the natural process of plant growth, not from any known human activity that would alter its “naturally occurring” status. Nor does the action of adding methyleugenol to another food or consumer product constitute “human activity” within the meaning of 22 CCR § 12501(a)(3).

California Environmental Protection Agency

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January 8, 2002
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The Final Statement of Reasons for 22 CCR § 12501 explains "it is evident from the regulation as a whole that once a chemical is exempt as a naturally occurring chemical in food, the exempt status of that particular chemical will 'carry over' to any other food to which it is added. Subdivision (b) provides that this exempt status will even 'carry over' to other consumer products." Final Statement of Reasons for Section 12501 at 9. Thus, adding methyleugenol to another food or a consumer product does not create an "exposure" within the meaning of 22 CCR § 12501 when that food or consumer product is consumed or used.

Because methyleugenol is a food, not a "chemical contaminant," 22 CCR § 12501(a)(4) does not apply.

Thus, any methyleugenol found in or separated from basil leaves or other natural herbs or spices does not cause an "exposure" for purposes of Health and Safety Code section 25249.6 when consumed in food or when found in a consumer product. Since no exposure arises from consuming naturally occurring methyleugenol in food or from naturally occurring methyleugenol in consumer products other than food, the warning obligation of Proposition 65 would not apply to naturally occurring methyleugenol.

Sincerely,


Colleen Heck
Chief Counsel