

OEHHA CONSIDERING REGULATION ESTABLISHING BACKGROUND LEVELS FOR NATURALLY OCCURRING CHEMICALS IN FOOD, INCLUDING LEAD

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The Office of Environmental Health Hazard Assessment (“OEHHA”), the state agency responsible for implementing Proposition 65, has announced that it is considering adopting a regulation that would establish background levels for certain chemicals, such as lead, that are naturally present in unprocessed food.

Proposition 65 requires businesses to provide a warning when they cause an exposure to a chemical listed as known to the state to cause cancer or reproductive toxicity. Proposition 65 implementing regulations provide, however, that naturally occurring levels of listed chemicals in food are not considered an “exposure” for purposes of Proposition 65. Under such regulations, the person responsible for the exposure may establish the “naturally occurring level” of a chemical in the food by determining the natural background level of the chemical in the area in which the food is raised, grown, or obtained, based on reliable local or regional data.

The problem, however, is that it is difficult to make such a calculation for some chemicals, leaving the possibility that different parties may calculate naturally occurring levels of a given chemical differently, even within the same growing region. The potential regulation would provide guidance for businesses and the public by establishing default natural background levels for certain chemicals in foods. Particularly, the new regulation would add a new section – Section 25501.1 – that provides safe harbor values for naturally occurring levels of chemicals in food. In evaluating the exposure to a chemical in food for which the business is responsible, the naturally occurring concentration would be subtracted from the actual measured concentration in the food to determine if the food product is exempt from Proposition 65 warning requirements.

The soil in California naturally contains lead and arsenic, and the possible regulation initially would provide safe harbor naturally occurring concentrations for lead in certain fresh foods, and for arsenic in dry rice grain. The concentration for lead would be established at 0.0088 parts per million in leafy vegetables and 0.0062 in non-leafy vegetables, fruit, meat, seafood, eggs, and milk. The value for leafy vegetables is higher because lead is detected more frequently and in higher concentrations as compared to other fresh foods, even when grown in the same soil. The concentration of inorganic arsenic in rice would be established at 0.06 ppm for white rice and 0.13 ppm for brown rice. Additional levels for other chemicals or types of foods may be adopted over time.

OEHHA is holding a pre-regulatory workshop for the potential new regulation on **October 14, 2015, from 1:00 p.m. to 4:00 p.m.** in the Coastal Hearing Room at the CalEPA Headquarters building at 1001 I Street in Sacramento. Interested parties are encouraged to attend the workshop and participate in the discussion. Written comments on the proposed regulation may be submitted by **5:00 p.m. on October 28, 2015** to:

Monet Vela

Regulations Coordinator

Office of Environmental Health Hazard Assessment

1001 I Street

Sacramento, CA 95812

Or via email to monet.vela@oehha.ca.gov

It should be noted that OEHHA also is conducting a separate hearing regarding lead in consumer products the same day as the “naturally occurring” workshop – **October 14, 2015, from 10:00 a.m. to 12:00 noon at the same location.** The hearing will address a petition OEHHA received July 3, 2015 from the Center for Environmental Health (“CEH”) to repeal or amend Proposition 65 regulations pertaining to the Maximum Allowable Dose Level (“MADL”) for lead. CEH claims the existing MADL for lead of 0.5 micrograms per day is too high and is not based on any scientifically valid testing. CEH further argues that current scientific studies show that there is no safe level of exposure to lead.

MADLs are important because a company need not provide a Proposition 65 warning if it can prove that exposure will cause “no observable effect assuming exposure at one thousand (1,000) times the level in question.” Thus, to determine the level at which a warning is required (beyond any applicable naturally occurring concentration in food), it is necessary to determine the maximum level of exposure to the chemical that will have “no observable effect,” and divide that number by a safety factor of 1,000 to determine the MADL. If a business can prove that any exposures to a listed chemical are below the MADL, the business need not provide a warning for those exposures.

The purpose of the hearing on CEH’s petition is to initiate rulemaking to update the existing MADL for lead in consumer products. OEHHA is seeking public input on a potential new approach to calculating multiple MADLs for lead, which would set maximum levels of exposure to lead that could occur for different exposure frequencies. For example, one MADL may be for an exposure that occurs every day (0.2 micrograms) and a different value may be for an exposure that occurs once every 6-9 days (1 microgram). Like the comments on the “naturally occurring” levels in certain foods, comments on the updated MADLs for lead should be submitted in writing to the address above by **5:00 p.m. on October 28, 2015.**

For additional information regarding OEHHA’s “naturally occurring” workshop, please visit http://www.oehha.ca.gov/Prop65/CRNR_notices/082815WorkshopBackgroundLevels.html.

For more information on the hearing to address CEH’s petition regarding updating the MADL for lead, please visit http://www.oehha.ca.gov/Prop65/CRNR_notices/082815CEHhearing.html.