

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

**NOTICE OF PROPOSED RULEMAKING**

**TITLE 22, CALIFORNIA CODE OF REGULATIONS**

**PROPOSED ADOPTION OF SECTION 12900  
USE OF SPECIFIED METHODS OF DETECTION AND ANALYSIS FOR  
LISTED CHEMICALS FOR VOLUNTARY COMPLIANCE TESTING  
SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986**

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) proposes to adopt a new regulation in Title 22, California Code of Regulations, Section 12900<sup>1</sup>.

**PUBLIC PROCEEDINGS**

A public hearing will be held on **April 4, 2005**, 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, 2<sup>nd</sup> 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 **April 4, 2005**, 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, 19<sup>th</sup> Floor  
Sacramento, California 95814

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<sup>1</sup> All further references are to Title 22 of the California Code of Regulations, unless otherwise indicated.

Comments may also be transmitted via email addressed to: ([coshita@oehha.ca.gov](mailto: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](mailto:coshita@oehha.ca.gov) by March 21, 2005. 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 and codified at Health and Safety Code section 25249.5 et seq. The Office of Environmental Health Hazard Assessment (OEHHA), within the California Environmental Protection Agency is the state entity responsible for the implementation of the Act. OEHHA has the authority to promulgate and amend regulations to further the purposes of the Act. Included among the provisions of Proposition 65 is a prohibition against contaminating sources of drinking water with chemicals known to the state to cause cancer or reproductive harm and a requirement that businesses provide warnings before exposing individuals to chemicals known to the state to cause cancer or reproductive harm. Health and Safety Code section 25249.11, subsection (c) defines “significant amount” of a listed chemical to mean “any detectable amount,” other than an amount which poses no significant risk for carcinogens, or would have no observable effect assuming exposure at one thousand times the level in question with regard to chemicals known to cause reproductive harm. The Act, however, does not specify what analytical test methods must be used to determine whether a discharge, release, or exposure contains a detectable amount of a chemical listed under the Act.

Section 12901 was originally adopted in 1989 to clarify and make more specific what is meant by “any detectable amount.” In recent years, litigants and courts have had difficulty interpreting and applying Section 12901, particularly in the context of consumer products exposures.

On June 4, 2004, OEHHA issued a Notice of Proposed Rulemaking announcing that OEHHA was proposing changes to the Proposition 65 regulations, specifically, Title 22, California Code of Regulations, Division 2, Chapter 3, Section 12901. Following the Notice it had become clear from the comments received concerning the existing and proposed regulation, that neither provided adequate clarity for the regulated community and that the best approach would be to repeal the regulation in its entirety, an alternative discussed in the June 4 Notice. A Notice of Intent to Repeal Section 12901 was issued on September 17, 2004.

Following the September 17 Notice of Intent to Repeal, OEHHA met with representatives of all the stakeholder groups that had filed substantive comments concerning that proposed action. In that meeting, the stakeholders discussed a possible new, pared-down draft version of Section 12901 that would accomplish the original purpose of the regulation of allowing regulated businesses to rely on the results of testing methods they were already using to determine compliance with Proposition 65.

OEHHA drafted a new proposed regulation that attempted to address the key issues raised by the various stakeholders at the November 15 meeting which was more limited in scope than the existing regulation and could replace Section 12901 if it were repealed. The draft was acceptable to some of the participants, with minor changes, and rejected entirely by others. OEHHA determined that the appropriate action at that time was to proceed with repeal of the regulation. The existing Section 12901 was submitted to the Office of Administrative Law for repeal on February 8, 2005. At the same time, OEHHA decided to propose a new regulation that it believed would meet the basic concerns of the regulated community, would further the purposes of the Act and be consistent with California evidentiary law.

OEHHA believes the narrower focus of the proposed regulation will allow it to provide more clarity and certainty for the regulated community, encourage compliance testing on the part of regulated businesses, while at the same time recognize that existing state law adequately and appropriately addresses many of the other issues that the existing regulation attempted to address.

#### 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

OEHHA has determined that no 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 proposed regulation does not impose any new requirements upon private persons or business. In fact, the proposed regulatory action is intended to provide an affirmative defense, under specified circumstances, to allegations that a person doing business may have violated the Act.

#### 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.

#### EFFECT ON SMALL BUSINESSES

OEHHA has determined that the proposed regulatory action will not impose any new or additional requirements on small business. Proposition 65 is limited by its terms to businesses with 10 or more employees (Health and Safety Code §§ 25249.5, 25249.6 and 25249.11(b)). The proposed regulation is intended to address core needs for clarity and certainty that were specifically requested by regulated businesses. Further, it provides for an affirmative defense, under specified circumstances, to allegations that a person doing business may have violated the Act.

#### 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](http://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](http://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](http://www.oehha.ca.gov).

OFFICE OF ENVIRONMENTAL  
HEALTH HAZARD ASSESSMENT

VAL F. SIEBAL  
Chief Deputy Director

Dated: February 18, 2005