

**SUPPLEMENTAL FINDING OF EMERGENCY FOR
EMERGENCY ACTION TO AMEND SECTION 25603.3
TITLE 27, CALIFORNIA CODE OF REGULATIONS
WARNINGS FOR EXPOSURES TO BISPHENOL A
FROM CANNED AND BOTTLED FOODS AND BEVERAGES**

The following information supplements the “Finding of Emergency” in the Notice of Emergency Action filed on April 1, 2016 (OAL File 2016-0408-02E/Title 27, Amend E).

1. The emergency situation at issue here was not foreseeable in time to accomplish it via the normal rulemaking process.

As explained in its Notice of Emergency, OEHHA attempted to develop a Maximum Allowable Dose Level (MADL) for oral exposure to BPA. A MADL identifies the level of exposure to a listed chemical that does not require a warning. Businesses often rely on safe harbor levels in making decisions whether they need to warn. OEHHA typically uses its safe harbor levels to gauge the possible impact of the warning requirement for newly listed chemicals.

OEHHA determined that it could not develop a safe harbor level for oral exposures to BPA because of complex scientific issues that may be resolved by current research expected to be completed in the next one to two years. Once it became clear that it could not develop an oral MADL, OEHHA immediately began work on this regulation. In order for the provisions of the regulation to become effective in time for the May 11, 2016 warning requirement, the regulation must be enacted through the emergency rulemaking process.

OEHHA intends to follow with a regular rulemaking process to adopt a regulation for approximately a one-year period, which should be sufficient for an orderly transition to more traditional warning methods and for the food industry to transition away from use of BPA where possible.

2. Warning labels and shelf signs are not feasible in this situation.

Government Code 11342.545 defines an emergency as a “situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare.” This proposed temporary regulation addresses an emergency meeting this definition. In the absence of this regulation, businesses will take

inconsistent approaches to compliance, ranging from no warnings to ubiquitous warnings. Inconsistent warnings on similar or even identical products would confuse citizens on a topic of vital importance to them—food.

Absent this regulation, consumers would not have clear choices between food and beverage products in BPA-containing and BPA-free packaging. Variations in language and interpretation of the warning requirement from one retailer or manufacturer to the next will cause more confusion than there would be if retailers and manufacturers were permitted to temporarily employ a uniform point of sale warning to meet the new Proposition 65 requirements.

The temporary regulation is needed to avert a unique situation stemming from the fact that the BPA warning requirement will apply to a high percentage of the canned and bottled food and beverage supply in California. There is evidence that between 66 and 90% of canned foods contain varying levels of BPA. Given the long shelf life of these types of products, some of them were likely manufactured prior to the listing of BPA in 2015. These products do not currently carry warning labels for BPA exposures. There is a real concern that variations in warnings on a vast array of canned and bottled foods in grocery stores throughout the state will create consumer confusion. And while there is always this risk when a new chemical gets listed, this situation is unique because of the volume of products that will be affected.

The only viable way to provide warnings for these products, absent the emergency regulation, is with shelf signs. Once these older products are no longer in the stream of commerce, OEHHA expects many newer products requiring warnings will have them on the label. The end of the emergency regulation and/or sunset of a temporary regulation will once again make canned and bottled foods and beverages subject to general Proposition 65 warning requirements. OEHHA is not aware of any instance in the history of Proposition 65 where the effective date of a warning requirement has resulted in a similar profusion of Proposition 65 warnings.

Placing point-of-display signs throughout a facility at each location where an affected product is displayed would be unworkable given the number of products affected. Canned foods and beverages are located in many locations throughout a facility and their point of display may change frequently. For example, products currently on sale are often grouped together on endcaps or in other locations away from the normal canned food aisle. Refrigerated foods and beverages are similarly located in different locations from the canned food aisles. Placing and maintaining adequate signage at every point of display of a vast array of food

product is infeasible. Further, if the regulation is not enacted, each food manufacturer, distributor and retailer would be responsible for providing a clear and reasonable warning for their products. If each business in the supply chain develops its own warning method and message content, there is a high likelihood that they will differ substantially from each other. As noted in OEHHA's Notice, the sudden appearance of a multitude of different warnings for food products throughout a store would likely confuse consumers and cause them unnecessary concern. Clearly, the situation calls for a *temporary solution* that will provide the required warning in a manner that complies with Proposition 65, but that allows for an orderly and reasonable transition to the more typical Proposition 65 warning regimen.

3. Providing an opportunity for a retailer to repost or replace a sign that has inadvertently been removed or otherwise damaged within 24 hours of notification or discovery is not beyond OEHHA's authority and is needed in order to ensure that the proposed warning program for BPA works smoothly and to avoid frivolous enforcement actions. It is foreseeable that a warning sign posted in a high-traffic area within a retail facility, or on a vending machine, might fall down or be damaged from time to time. Most facilities will have the sign posted in more than one location, so the absence of the sign from a single check-out line will not likely result in the complete absence of signage. Conversely, the need for retailers to have multiple point-of-sale signs increases the likelihood that a sign might fall down or be damaged. Providing an opportunity for a retailer who is complying with the regulation to correct an inadvertent error of this type will not encourage blatant violations of law, but will curtail filing of frivolous lawsuits for a brief absence of the required signage.

Further, the proposed regulation would put specific requirements in place to ensure that the retailer practices due diligence in posting and maintaining the required signage. This includes provisions that require the retailer to practice normal quality control and maintenance procedures to ensure the signage is in place and maintained properly in the same manner as other signage or maintenance requirements for the facility. Lastly, the provision includes a limitation that the error must be corrected within 24 hours of discovery or notification, again to help ensure that the problem is corrected promptly, thus furthering the purposes of the Act by ensuring the signage is available to the consumer prior to purchase of products containing BPA.

4. Additional documents relied on:
 - a. Noonan GO, Ackerman LK, Begley TH (2011). Concentration of bisphenol A in highly consumed canned foods on the U.S. market. *J Agric Food Chem.* 13;59(13):7178-85.
 - b. “BPA Buyer Aware”; a report by: Breast Cancer Fund, Campaign for Healthier Solutions, Clean Production Action, Ecology Center, Mind the Store Campaign, published March 2016. Available online at: <http://www.breastcancerfund.org/assets/pdfs/publications/buyer-beware-report.pdf>
 - c. Lorber M, Schechter A, Paepke O, Shropshire W, Christensen K, Birnbaum L (2015). Exposure assessment of adult intake of bisphenol A (BPA) with emphasis on canned food dietary exposures. *Environment International*, 77, 55–62. <http://doi.org/10.1016/j.envint.2015.01.008>
 - d. *Journal of Agriculture and Food Chemistry* article “Concentration of Bisphenol A in Highly Consumed Canned Foods on the U.S. Market” *J. Agric. Food Chem.*, 2011, 59, 7178-7185