

MEMORANDUM

From: Martin J. Hahn
Xin Tao

Date: July 9, 2020

Re: Proposition 65 Updates: Permanent Injunction Against Glyphosate, Proposed Naturally-Occurring Lead Levels in Certain Candies, and Safe Harbor Level Adopted for Chlorpyrifos

We would like to bring to your attention three recent developments related to California's Proposition 65. On July 8, the Office of Environmental Health Hazard Assessment (OEHHA) adopted three safe harbor levels or maximum allowable levels (MADLs) for the chemical chlorpyrifos. ^{1/} On June 22, the United States District Court (Eastern District of California) entered a permanent injunction barring the enforcement against the cancer warning requirements for glyphosate under Proposition 65. ^{2/} The court reasoned the cancer warning requirements violate Plaintiffs' First Amendment rights by compelling them to make false and misleading statements. On June 19, OEHHA proposed to establish a naturally-occurring level of lead in candies containing chili and/or tamarind at 0.02 parts per million (ppm). Notably, OEHHA developed an ingredient-based approach to estimate the sum of lead in candies containing chili and tamarind, based on an evaluation of the lead in each ingredient. Written comments to the proposed rule are due by August 18, 2020.

- **Permanent Injunction Against Glyphosate Cancer Warning**

For background, glyphosate is one of the most heavily used weed control chemicals in food and agricultural production. OEHHA listed glyphosate as a carcinogenic chemical under Proposition 65 in July 2017 based on the classification by the International Agency for Research on Cancer (IARC). ^{3/} Businesses are required to provide a "clear and reasonable" warning before knowingly

^{1/} OEHHA, "Notice of Adoption of Amendment to Section 25805 Specific Regulatory Levels: Chemicals Causing Reproductive Toxicity Maximum Allowable Dose Levels For Chlorpyrifos (Oral, Inhalation And Dermal Exposures)," (July 8, 2020), *available at*: https://oehha.ca.gov/proposition-65/cnr/notice-adoption-amendment-section-25805-specific-regulatory-levels-chemicals?utm_source=P65+-+Proposed+Maximum+Allowable+Dose+Levels+for+Chlorpyrifos&utm_campaign=Proposition+65+-+Proposed+Maximum+Allowable+Dose+Levels+for+Chlorpyrifos&utm_medium=email (accessed on July 8, 2020).

^{2/} *National Assoc. of Wheat Growers et al. v. Becerra*, Case No. 2:17-civ-02401, 2020 U.S. Dist. LEXIS 108926 (E.D. Cal. June 22, 2020).

^{3/} OEHHA, "Glyphosate Listed Effective July 7, 2017, as Known to the State of California to Cause Cancer," (June 26, 2017), *available at*: <https://oehha.ca.gov/proposition-65/cnr/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer> (accessed on June 26, 2020).

and intentionally exposing anyone in California to a listed chemical. ^{4/} One important exemption from the warning requirement is the so-called “safe harbor” exemption. It embodies the idea that no Proposition 65 warnings are required if the businesses can establish the level of a listed chemical in the products would result in a dietary intake level that is within a “safe harbor.” ^{5/} OEHHA has established 1,100 µg per day as the safe harbor level for glyphosate intake.

In granting the permanent injunction barring enforcement of the warning requirements for the Plaintiffs, the court found a Proposition 65 warning for glyphosate was not purely factual and uncontroversial under the First Amendment. Notwithstanding the IARC’s determination that glyphosate is a probable carcinogen, the court held the statement that glyphosate is “known to the state of California to cause cancer” is misleading. The court noted that every regulator of which the court is aware, with the sole exception of IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show it does. Even it may be literally true that California technically “knows” that glyphosate causes cancer as the State has defined that term in the statute and regulations, the required warning would nonetheless be misleading to the ordinary consumer.

The Attorney General also argued the enforcement action would be unlikely in the event that a product did not exceed the “safe harbor.” The court responded that in light of the “safe harbor” exemption defense, the instigation of Proposition 65 enforcement actions is easy – and almost “absurdly easy at the pleading state and pretrial stage.” To bring suit and avoid sanctions, a private plaintiff only needs to credibly allege that a product has some amount of the chemical at issue, not that the amount of chemical is harmful or that it exceeds the safe harbor level. Further, to take advantage of the “safe harbor” exemption, defendants would be required to test their products to determine whether their products exceeded the “safe harbor” level, incurring costs, which is in itself a cognizable injury.

The current lawsuit represents another development on the application of Proposition 65 to the food industry. Last year, the California Chamber of Commerce filed a lawsuit against the state of California challenging the legality of requiring Proposition 65 warnings for acrylamide in food products. ^{6/} Similar to the current case, the Complaint in that case is seeking declaratory relief asking the court to rule that Proposition 65 warning requirements for cancer as applied to acrylamide in food products violate the First Amendment. The Complaint also seeks injunctive relief prohibiting the Defendant and private plaintiffs from enforcing Proposition 65 warning requirements for cancer with respect to acrylamide in food products. We will keep you apprised of any developments in the Chamber of Commerce litigation.

^{4/} Cal. Health & Safety Code § 25249.6.

^{5/} Cal. Health & Safety Code § 25249.10.

^{6/} *California Chamber of Commerce v. Becerra*, Case No. 2:19-at-00962, copy of complaint available at: <https://advocacy.calchamber.com/wp-content/uploads/2019/10/CalChamber-v.-Becerra-Complaint.pdf> (accessed on June 29, 2020).

- **OEHHA’s Proposed Naturally-Occurring Lead Level In Certain Candies**

Under California’s Health and Safety Code section 110552, OEHHA is proposing to establish naturally-occurring lead levels in candies containing chili and tamarind at 0.02 ppm. ^{7/} The proposed regulatory text is copied below:

§ 28500. Naturally Occurring Levels of Lead in Candy

For purposes of Health and Safety Code section 110552(c)(3), the following levels of lead in candy are deemed by the Office of Environmental Health Hazard Assessment to be naturally occurring:

Type of Candy	Naturally-Occurring Level (parts per million)
<i>Candies flavored with chili and/or tamarind</i>	<i>0.02 ppm</i>

This action follows the March 15, 2019 proposed regulation which OEHHA was unable to complete within the one-year statutory timeframe. To estimate the sum of naturally-occurring lead in candies containing chili and tamarind, OEHHA developed an ingredient-based approach based on an evaluation of the level of naturally-occurring lead plausibly contributed by a given ingredient and amounts of each such ingredient typically present in these candies including: chili peppers and chili powder, tamarind, food-grade salt, sugar, food-grade silicon dioxide, and food-grade titanium dioxide. Detailed scientific basis for the naturally-occurring level is included in a supporting document titled “Naturally Occurring Lead in Certain Candies. Candies Flavored with Chili and/or Tamarind” ^{8/}

In its Initial Statement of Reasons, ^{9/} OEHHA reported that lead was detected in only seven individual candy samples of the more than 1,000 samples of any candies or related products tested since January 2015. Further, of candies produced by Mexican manufacturers that were tested between 2012 and 2017, approximately 87% to 94% would be compliant with the proposed level of 0.02 ppm. Based on the data collected, OEHHA believes that this proposed naturally-occurring level is achievable by following good agricultural, manufacturing, and procurement practices.

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.

^{7/} OEHHA, “Proposed Adoption of New Chapter and Section for Naturally Occurring Lead in Candy,” available at: <https://oehha.ca.gov/risk-assessment/cnr/proposed-adoption-new-chapter-and-section-naturally-occurring-lead-candy> (accessed on June 29, 2020).

^{8/} Available at: <https://oehha.ca.gov/media/downloads/cnr/leadincandysuportdoc061920.pdf> (accessed on June 29, 2020).

^{9/} OEHHA, Initial Statement of Reasons, Proposed Adoption of New Chapter and Section Chapter Regarding Naturally Occurring Lead in Candy, available at: <https://oehha.ca.gov/media/downloads/cnr/leadincandyisor061920.pdf> (accessed on June 29, 2020).

- **Adoption of Safe Harbor Levels for Chlorpyrifos**

Chlorpyrifos was added to the Proposition 65 list as known to the state to cause reproductive toxicity (developmental endpoint) in 2017. Chlorpyrifos is one of the more widely-used pesticide on crops, including corn, soybeans, broccoli, and apples, and is also widely used in non-agricultural settings like golf courses. The oral and inhalation MADLs established by this amendment are both 0.58 micrograms per day, and the dermal MADL is 7.2 micrograms per day for chlorpyrifos. The regulation will be effective on October 1, 2020.

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We will continue to monitor the case and any other Proposition 65 litigation and regulation, as they relate to our clients. Please contact us if you have any questions.