

STATE OF CALIFORNIA  
**Budget Change Proposal - Cover Sheet**  
 DF-46 (REV 02/15)

Fiscal Year 2016-17	Business Unit 3980	Department Office of Environmental Health Hazard Assessment	Priority No. 2
Budget Request Name 3980-002-BCP-BR-2016-GB		Program 3730	Subprogram

Budget Request Description  
 Proposition 65 - Legal Workload

Budget Request Summary

The Office of Environmental Health Hazard Assessment (OEHHA) requests 1.0 Attorney position and \$138,000 from the Safe Drinking Water and Toxic Enforcement Fund. This proposal covers the ongoing and anticipated increased workload of the Office of the Chief Counsel and its ability to provide litigation support to the Attorney General's Office on cases filed against OEHHA related to the Safe Drinking Water and Toxic Enforcement Act (referred to herein as "Proposition 65"), respond to Public Records Act (PRA) requests in a timely manner, and to provide general legal support to OEHHA.

Requires Legislation <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Code Section(s) to be Added/Amended/Repealed
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Does this BCP contain information technology (IT) components? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <i>If yes, departmental Chief Information Officer must sign.</i>	Department CIO	Date
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For IT requests, specify the date a Special Project Report (SPR) or Feasibility Study Report (FSR) was approved by the Department of Technology, or previously by the Department of Finance.

<input type="checkbox"/> FSR <input type="checkbox"/> SPR	Project No.	Date:
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If proposal affects another department, does other department concur with proposal?     Yes     No  
*Attach comments of affected department, signed and dated by the department director or designee.*

Prepared By Carol Monahan-Cummings <i>[Signature]</i>	Date 1-5-16	Reviewed By Allan Hirsch <i>[Signature]</i>	Date 1-6-16
Department Director Lauren Zeise, Acting Director <i>[Signature]</i>	Date 1/6/16	Agency Secretary Matthew Rodriguez <i>[Signature]</i>	Date 1/6/16

**Department of Finance Use Only**

Additional Review:  Capital Outlay     ITCU     FSCU     OSAE     CALSTARS     Dept. of Technology

BCP Type:                       Policy                       Workload Budget per Government Code 13308.05

PPBA	Original Signed By: Ellen Moratti	Date submitted to the Legislature 1/7/16
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## Analysis of Problem

### A. Budget Request Summary

The Office of Environmental Health Hazard Assessment requests 1.0 Attorney position and \$138,000 from the Safe Drinking Water and Toxic Enforcement Fund. This proposal covers the ongoing and projected increased workload of the Office of the Chief Counsel for legal review of responses to litigation-related PRA requests, discovery/litigation support to the Office of the Attorney General (OAG) for defense of Proposition 65 related cases filed against OEHHA, and to provide general legal support to OEHHA. This proposal would allow OEHHA to:

- Provide litigation defense support to the Attorney General's Office on cases filed against OEHHA including responding to discovery requests in those cases.
- Record collection and review for litigation-related PRA requests.
- Provide general legal support to OEHHA programs as required.
- Enable OEHHA's other attorneys to focus on Propositions 65 regulatory actions addressing recent legal decisions and to do the more complex litigation support functions.

### B. Background/History

The Safe Drinking Water and Toxic Enforcement Act of 1986 is a "right-to-know" law that requires businesses to warn individuals when the businesses knowingly expose individuals to a chemical listed by the State of California as known to cause cancer or reproductive toxicity. The law has provided Californians with general information about exposures to hazardous chemicals and has resulted in the reformulation of products to make them safer by reducing or eliminating listed chemicals. Following the adoption of Proposition 65 by the voters in 1986, the Health and Welfare Agency, at that time the lead agency responsible for the implementation of Proposition 65, quickly developed a comprehensive set of regulations to implement the statute. In 1991 the responsibility for implementation of Proposition 65 moved to OEHHA.

Proposition 65 affects most businesses in California, the law and regulations continually elicit interest from a wide range of stakeholder groups including the food industry, agriculture, retail trade groups, environmentalists and chemical producers. Much has changed in the scientific and legal landscape since the law was passed in the 1980s, and the regulations require extensive updating. Stakeholders have identified many issues with the regulations that need to be addressed. Work on regulatory updates has accelerated, with several projects in process including a contentious, high-visibility modification to the regulations providing guidance as to what constitutes a clear and reasonable warning. At the same time, there are many unresolved issues regarding the interpretation of Proposition 65 that have prompted stakeholder groups to initiate lawsuits and petitions for rulemaking with the objective of securing judicial resolution in a manner favorable to their interests. This has resulted in a substantial increase and backlog of regulatory work, an increase in litigation and a corresponding increase in the workload of OEHHA attorneys.

At the present time, OEHHA is defending eight lawsuits filed by stakeholders (including seven lawsuits relating to Proposition 65). OEHHA has never had to manage this number of lawsuits at one time. Stakeholder groups with increasing frequency have filed lawsuits with the intent of delaying, preventing or overturning listings, or influencing when businesses are required to provide warnings. Examples include current litigation filed in January 2015 primarily concerning the safe harbor level for lead as it applies to foods, a case filed in March 2014 and a related case filed in July 2015 intended to prevent the listing of several herbicides, litigation in 2014 intended to overturn the listing of DINP, a plasticizer used in many consumer products, and cases filed in March 2013 and December 2015 concerning BPA (a chemical used in food-can linings). In addition, a non-Proposition 65 case filed in July 2015 challenges the Public Health Goal level established for perchlorate in drinking water. These legal challenges add to OEHHA's workload.

In terms of attorney staffing, the Office of the Chief Counsel consists of the Chief Counsel, one full-time permanent Attorney III, and one, two-year limited term Attorney III. Because of limited attorney resources, the permanent Attorney III has focused the majority of her efforts towards responding to a

## Analysis of Problem

recent surge in PRA requests related to current or pending litigation and for litigation/discovery support, namely the search for, review and production of documents required in the discovery process of defending multiple, pending lawsuits. The limited term attorney, meanwhile, has been fully immersed in ongoing regulatory activity. As both the regulatory and litigation workload is projected to increase, additional legal support is vital to OEHHA's ability to maintain timeliness and continuity in its regulatory processes, meet litigation deadlines and comply with PRA request deadlines.

OEHHA currently receives \$4.5 million (approximately one-half from the General Fund and one-half from the Safe Drinking Water and Toxic Enforcement Act Fund [SDWTEF]) to carry out duties as the lead agency for implementation of Proposition 65. These duties consist of maintaining the Proposition 65 chemical list, administering the program's two expert scientific panels, evaluating chemicals for listing, developing "safe harbor numbers" that identify levels of exposure to listed chemicals that require warnings, updating existing Proposition 65 regulations, and responding to lawsuits that challenge these activities. OEHHA's current budget is insufficient to support the litigation workload associated with recent new litigation and the time required to collect and review records for litigation-related PRA requests.

This proposal requests funding from the SDWTEF. The SDWTEF contains revenues from Proposition 65 penalties paid by businesses that violate the requirements of Proposition 65. The SDWTEF commitment can support this request.

### Resource History (Dollars in thousands)

Program Budget	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Authorized Expenditures	361	392	413	473	740	746
Actual Expenditures	361	392	413	473	740	746
Revenues	2286	2559	3348	3390	3388	2015
Authorized Positions	3.0	3.0	3.0	3.0	5.0	5.0
Filled Positions	3.0	3.0	3.0	3.0	5.0	5.0
Vacancies	0.0	0.0	0.0	0.0	0	0

### Workload History

Workload Measure	2012/13	2013/14	2014/15	2015/16 (YTD)	2016/17	2017/18
Litigation Defense - work includes document preparation, document review, coordination with Attorney General's Office, legal research, coordination with scientific staff, discovery including document retrieval, review, preparation of privilege logs and production, motion practice, settlement negotiations, strategy meetings, meet and confer meetings with opposing counsel, appeals (# of active cases)	4	5	7	7		
Prelitigation - includes work such as legal research, discussions with stakeholder counsel, discussions with	20-25	20-25	25-30	25-30		

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Attorney General's Office, review and response to letters (# of tasks completed).						
Public Records Act – Providing legal review of litigation related PRA requests and OEHHA responses (# of reviews)	179	202	232	163		

### C. State Level Considerations

As the lead agency for the implementation of Proposition 65, OEHHA is responsible for listing chemicals and developing regulations that implement the statute, and must respond to PRA requests for documents pertaining to its activities. OEHHA provides litigation support to the Attorney General's Office in defense of actions filed against OEHHA, which are often of a technical nature. Due to the recent increase in litigation filed against the office and pre-litigation PRA request activities, the Legal Office needs additional resources to keep pace with the increased workload. This proposal is consistent with the OEHHA Strategic Plan, Goal #7: "Recruit and retain highly qualified technical, clerical and support staff to best achieve OEHHA's mission." OEHHA does not have sufficient attorney staff to work on this project. This proposal will provide the additional needed expertise to achieve OEHHA's mission.

### D. Justification

This proposal addresses the increased workload associated with litigation defense support, PRA compliance, and general legal support for OEHHA's programs. This work is necessary in order to implement the full intent of Proposition 65 as applied to Californians who are being exposed to chemicals that are known to cause cancer, birth defects and other reproductive harm.

To implement this proposal, OEHHA is requesting: One Attorney position.

The activities contained in this proposal can be grouped into three categories:

1. OEHHA provides litigation support to the California Attorney General's Office in defense of cases filed against OEHHA.
2. OEHHA responds to Public Records Act (PRA) requests related to litigation that require attorney review.
3. The OCC provides legal support to OEHHA

In recent years there has been an increase in the number of cases directly challenging OEHHA's actions in listing chemicals and promulgating its implementing regulations. These cases are very time consuming because they involve a complex interplay between scientific and legal issues concerning the listing of several high-profile chemicals and safe harbor levels.

OEHHA currently has one Chief Counsel, one permanent Attorney III, one limited-term Attorney III and two AGPA positions in the legal office. Both Attorney positions are primarily dedicated to regulatory work under Proposition 65. In the past 6 months, the workload related to Public Record Act Requests and civil discovery has increased substantially. Although one of the AGPAs is the PRA Coordinator for the office, certain PRA requests require direct involvement by an attorney including conducting electronic record searches and reviewing documents for privilege. For example, in the past six months, OEHHA has received four separate PRA requests that are directly related to current or anticipated litigation against the office. Given that most litigation is based on an administrative record prepared by the office, civil discovery is often limited. Businesses and other groups who are suing or intend to sue the office often use the PRA as an informal discovery tool so they can obtain records that are not part of the formal rulemaking record. These litigation-related PRAs often produce hundreds and sometimes thousands of electronic and hard-copy records that must then be reviewed by an attorney to identify

## Analysis of Problem

those that are privileged or otherwise exempt from release under the PRA. In at least two instances, after litigation was filed, the plaintiffs filed civil discovery requests that duplicate and or overlap the prior PRA requests. When that occurs, the search and review process has to be repeated because time has passed and because different privileges and exceptions apply in civil litigation. Currently, virtually all of one of the Attorney III's time is being taken up collecting and reviewing PRA documents. Therefore, this attorney is unable to carry the usual regulatory workload. Adding an additional attorney to handle the workload related to complex PRA and discovery requests, general litigation support and general legal support for the office will enable both the Attorney IIIs to return to their normal regulatory workload.

### E. Outcomes and Accountability

This position is directly supervised by the Chief Counsel, which ensures that there is appropriate use of the requested resources and that litigation defense and PRA activity is monitored. These reporting processes would be applicable to the new Attorney.

#### Projected Outcomes

##### Attorney

Workload Measure	2015-16	2016-17	2017-18
Providing litigation defense support for Prop 65 cases filed against OEHHA.	450 hours of litigation defense support	450 hours of litigation defense support	450 hours of litigation defense support
Provide legal support for the review of document requests under the PRA related to Prop 65 litigation.	450 hours of document retrieval and first level review	450 hours of document retrieval and first level review	450 hours of document retrieval and first level review
Legal research projects supporting litigation defense.	250 hours of legal research	250 hours of legal research	250 hours of legal research
OEHHA's other programs and activities are fully staffed and supported while Chief Counsel works on legal and policy issues related to Prop 65.	250 hours of "back up" support	250 hours of "back up" support	250 hours of "back up" support
Tracking and internal reporting of non-routine PRA requests	150 hours	150 hours	150 hours
Research and provide answers to questions from the public and businesses, where specialized legal information is required.	10 questions per week (based on current volume) – 100 hours	10 questions per week (based on current volume) – 100 hours	10 questions per week (based on current volume) – 100 hours

### F. Analysis of All Feasible Alternatives

**Alternative 1:** Approve this BCP and provide OEHHA with 1.0 position and \$138,000. OEHHA will provide legal support to the OAG, review and respond to PRA requests.

#### Pros:

- This alternative will provide OEHHA the resources to provide litigation defense support for cases filed against OEHHA and to respond to litigation-related PRA requests.
- This will allow OEHHA's existing attorneys to develop critically needed regulatory amendments required to address recent court decisions expressing confusion or lack of clarity in interpretation of existing regulations, and to meet OEHHA's general legal support needs.

#### Cons:

- This will require an increase in authorized positions and augmentation from the Safe Drinking Water and Toxic Enforcement Fund.

**Alternative 2:** Deny this BCP.

## Analysis of Problem

### Pros:

- No new expenditures from the SDWTEF will be required.

### Cons:

- OEHHA will have to pull existing attorney staff off of their high-priority regulatory work to assist with litigation support and responses to litigation-related PRAs
- OEHHA may be sued for failure to respond to litigation-related PRA requests within statutorily mandated timeframes.
- Critically needed updates to the Proposition 65 regulations will be delayed. Critical adjustments that are needed to address recent legal decision will not be accomplished.

### Alternative 3: Contract for legal services.

- **Pro:** OEHHA would not need additional position authority.
- **Con:** The minimum cost per hour would be \$158 (BL 08-29 – cost of Attorney Services from Department of Justice) and likely substantially higher if a private legal service was used.

## G. Implementation Plan

Due to the criticality of the needed services, OEHHA administratively established the position in FY 2015/16. The position was filled November 2015 by a limited-term Attorney.

## H. Supplemental Information

N/A

## I. Recommendation

**Alternative 1.** Approve this BCP and provide OEHHA with 1.0 position. OEHHA will provide legal support to the OAG in defense of cases filed against OEHHA and timely respond to litigation-related PRA requests while still making progress on critical regulatory changes.

# BCP Fiscal Detail Sheet

BCP Title: Proposition 65 – Legal Workload

DP Name: 3980-002-BCP-DP-2016-GB

## Budget Request Summary

	FY16					
	CY	BY	BY+1	BY+2	BY+3	BY+4
Positions - Permanent	0.0	1.0	1.0	1.0	1.0	1.0
<b>Total Positions</b>	<b>0.0</b>	<b>1.0</b>	<b>1.0</b>	<b>1.0</b>	<b>1.0</b>	<b>1.0</b>
Salaries and Wages						
Earnings - Permanent	0	80	80	80	80	80
<b>Total Salaries and Wages</b>	<b>\$0</b>	<b>\$80</b>	<b>\$80</b>	<b>\$80</b>	<b>\$80</b>	<b>\$80</b>
Total Staff Benefits	0	38	38	38	38	38
<b>Total Personal Services</b>	<b>\$0</b>	<b>\$118</b>	<b>\$118</b>	<b>\$118</b>	<b>\$118</b>	<b>\$118</b>
Operating Expenses and Equipment						
5301 - General Expense	0	3	3	3	3	3
5302 - Printing	0	1	1	1	1	1
5304 - Communications	0	1	1	1	1	1
5306 - Postage	0	1	1	1	1	1
5320 - Travel: In-State	0	1	1	1	1	1
5322 - Training	0	1	1	1	1	1
5324 - Facilities Operation	0	10	10	10	10	10
5346 - Information Technology	0	2	2	2	2	2
<b>Total Operating Expenses and Equipment</b>	<b>\$0</b>	<b>\$20</b>	<b>\$20</b>	<b>\$20</b>	<b>\$20</b>	<b>\$20</b>
<b>Total Budget Request</b>	<b>\$0</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>
<b>Fund Summary</b>						
Fund Source - State Operations						
3056 - Safe Drinking Water and Toxic	0	138	138	138	138	138
<b>Total State Operations Expenditures</b>	<b>\$0</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>
<b>Total All Funds</b>	<b>\$0</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>
<b>Program Summary</b>						
Program Funding						
3730 - Health Risk Assessment	0	138	138	138	138	138
<b>Total All Programs</b>	<b>\$0</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>	<b>\$138</b>