What Happens in California Isn't Staying in California

Western Agricultural and Environmental Law Conference

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DOWNEYBRAND ROUX

Overview

- What is California's Prop. 65?
- Current Trends in Prop. 65 Claims for Food Products
- New Regulations
- Exposure Assessment
- Accounting for Emerging Contaminants
- What should the agriculture industry be doing?

What is Proposition 65?

- A law in California that requires all products sold in the State (including food) to have a warning label if:
  - Use/consumption of the products
  - Causes an **exposure** to chemicals on the Prop. 65 list

- Prop. 65 List contains 900 + chemicals the State determined to be carcinogens and/or reproductive toxicants.
  - Commonly noticed chemicals for foods include **lead**, acrylamide, mercury, cadmium and arsenic.

- “Bounty hunter” plaintiffs send 60-Day Notices and then can initiate litigation and recover attorneys’ fees/penalties.

When Does an Exposure Require a Warning Label?

- Prop. 65 list is expansive – but not every exposure to a listed chemical necessarily requires a warning label.
- Safe Harbors
  - E.g. Lead safe harbors
    - MADL: Reproductive Harm: 0.5 micrograms per day <<LOW LEVEL>>
    - Cancer: 15 micrograms per day
- Exemption for small businesses
- Certain defenses (e.g. naturally occurring)
  - Chemical at issue is “naturally occurring” in the food as a natural component
  - Not generated by any human activity - existing natural levels of that chemical or element are directly affected by the area in which the food is obtained
  - Lowest levels feasible of the chemical
  - Burden is on defense; cost is high

Example Prop. 65 Warning Label for Food

WARNING: Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

Current Trends

Current Trends in Prop. 65 Claims for Food Products

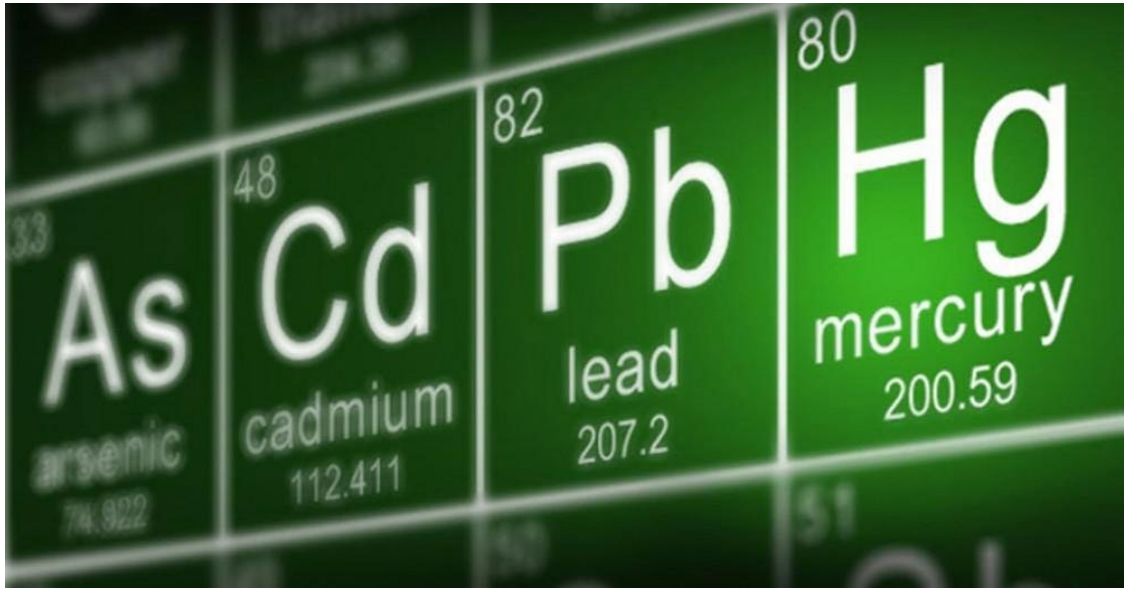
- Fresh Fruits and Vegetables
  - Leafy greens: spinach, kale, salad and slaw mixes
  - Cut/sliced vegetable mixes and carrots

- Dried Fruits and Vegetables
  - Seaweed – long been the subject of many Prop. 65 Notices
  - Imported Dried Tropical Fruits, ex. pineapple, mango, apricots, fruit mixes
  - Vegetable powders for seasoning or supplements, ex. kale/ cauliflower powder

- Canned Fruits and Vegetables
  - Beans
  - Fruits in syrup/ juice
  - Pureed fruit like baby food pouches (Beech-Nut case)

Current Trends in Prop. 65 Chemicals in Claims for Food Products

- Lead
- Acrylamide*
- Mercury
- Cadmium
- Arsenic



Current Trends – By the Numbers (Overview)

- Citizen prosecutors have filed more than 30,000 violation notices since Prop. 65 went into effect in 1988.

- Labeling requirements expected to cost companies between $410 million and $818 million over the next decade.

- Average settlement above $30,000; goes up every year.
  - Majority of settlement amount is attorneys' fees.

Current Trends – By the Numbers (2022)

<u>2022 Out-of-Court Settlement Data</u>

- 735 Settlements
- Over $1.7 million in civil penalties
- Over $14 million in plaintiff's attorneys' fees

<u>2022 Consent Judgment Data</u>

- 151 Consent Judgments
- Close to $2 million in civil penalties
- Over $7 million in plaintiff's attorneys' fees

New Regulations

New Regulations – Short Form Labels

⚠ **WARNING**: Cancer and Reproductive Harm -- www.P65Warnings.ca.gov.

- Do not have to use chemical name
- Must use warning symbol
- Unclear if OEHHA intended for use on food products

OEHHA
California Office of Environmental Health Hazard Assessment

New Regulations – Alternative Acrylamide Warning

- Newly effective (Jan. 1, 2023) regulation re: exposures to Prop. 65 chemicals formed when food is cooked or heat processed. 27 CCR 25506.
- Additional non-mandatory, safe harbor warning option for businesses for acrylamide.
- Narrowed to apply only to acrylamide.
- Lists acceptable levels of acrylamide.
- Particular foods identified.

Exposure Assessment

“The dose makes the poison”

Little or no effect

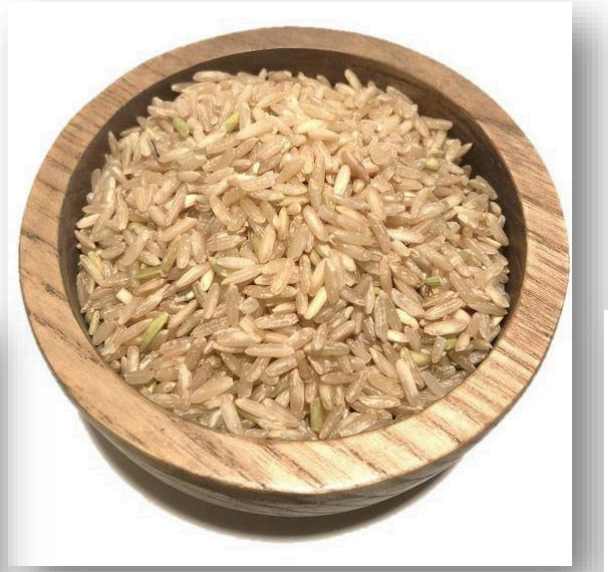
Relaxing

“Buzzed” or drunk

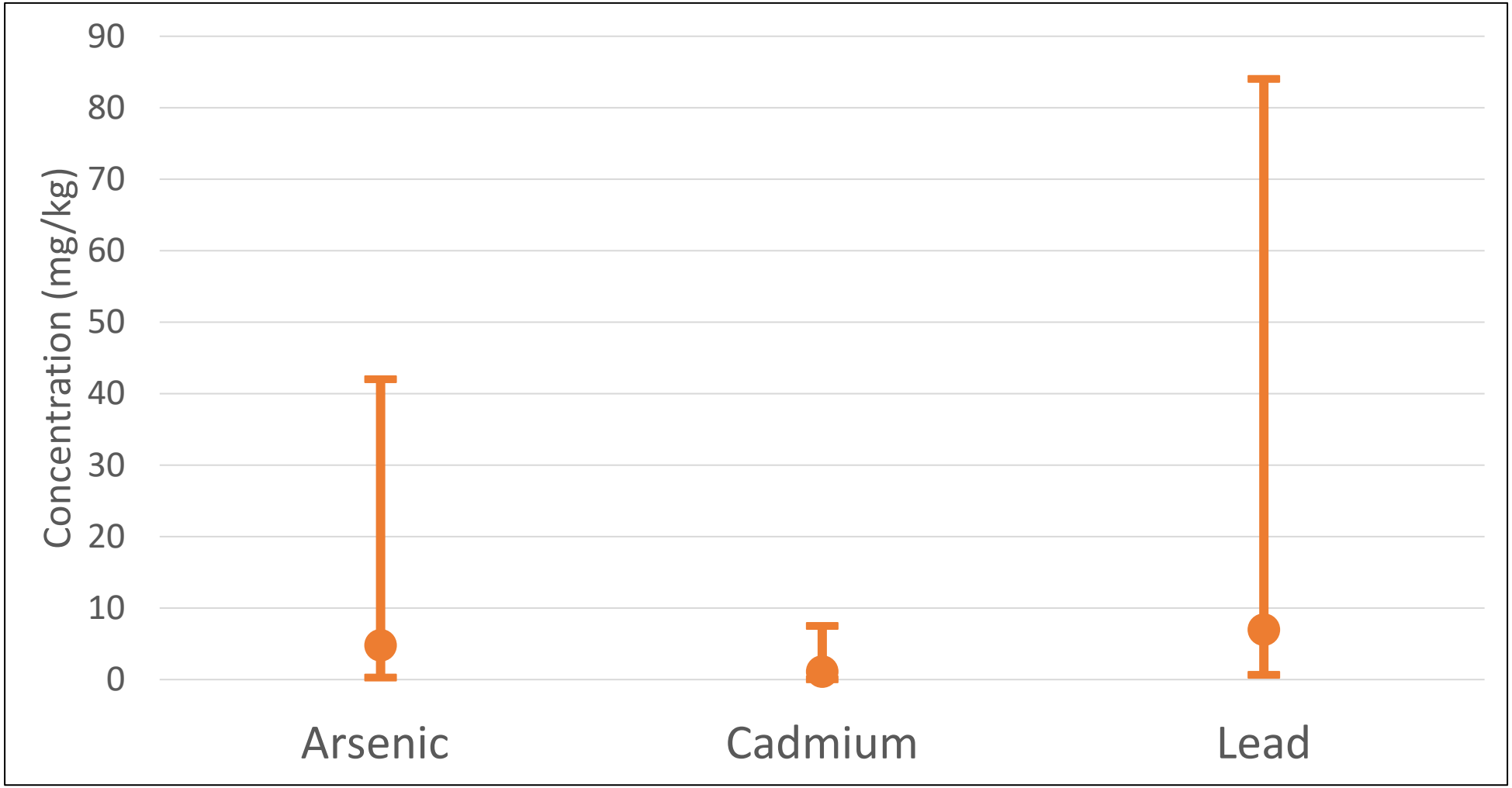
Coma or death

Chemicals Commonly Detected in Foods

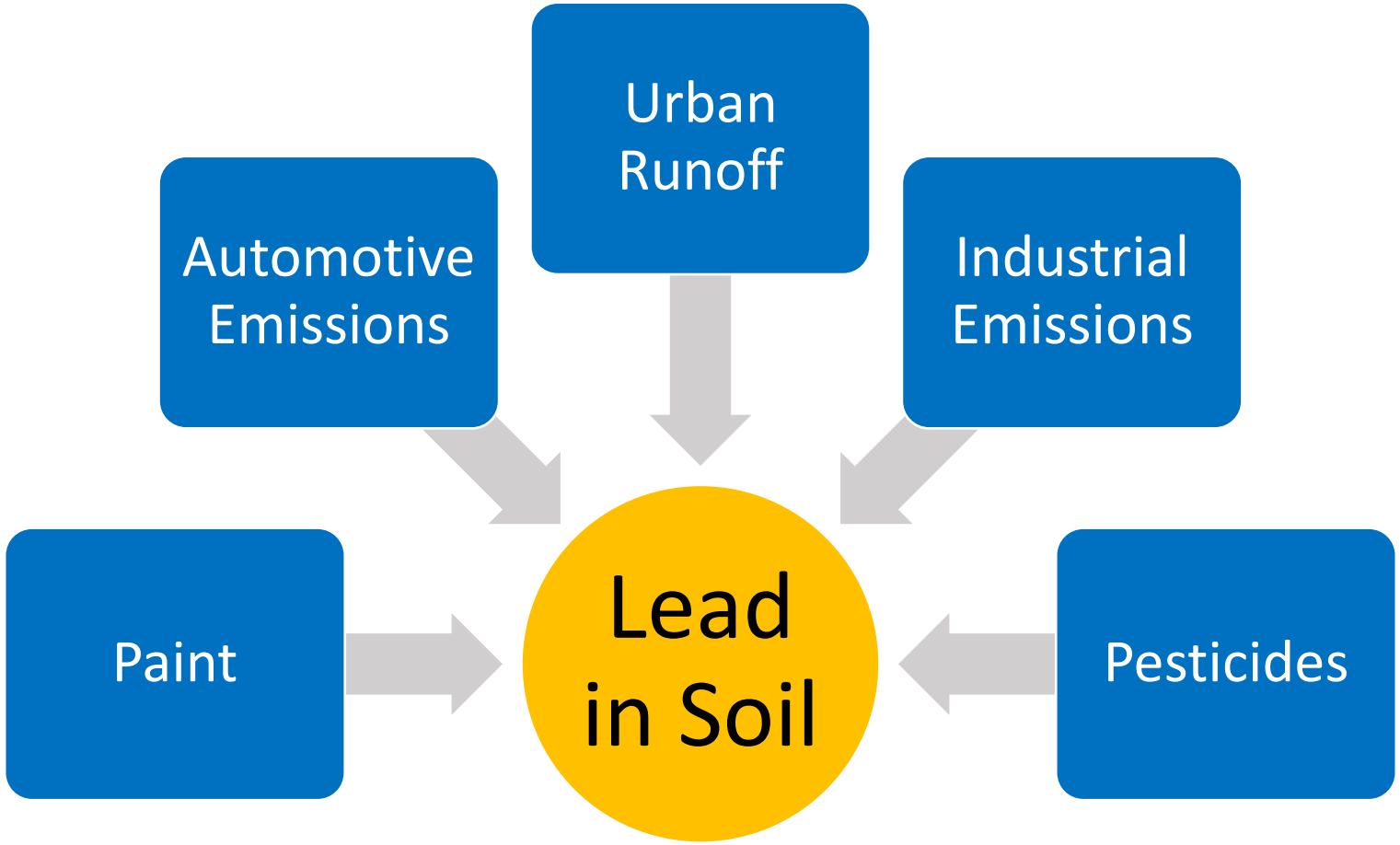
- Lead (Pb)
- Arsenic
- Cadmium



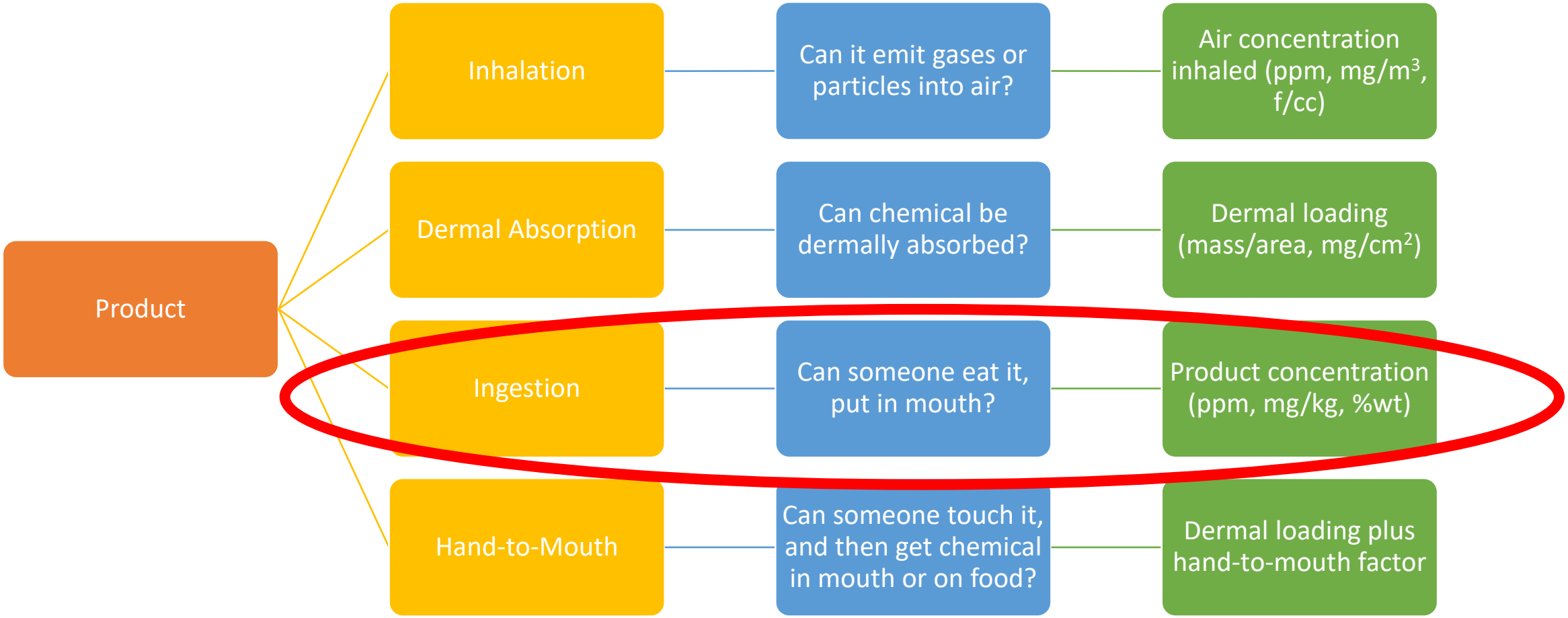
Background (Naturally-Occurring) Levels Metals in Soils



Anthropogenic Sources of Metals in Soils



Exposure Pathways and Measurements



Issues in Calculating Exposures

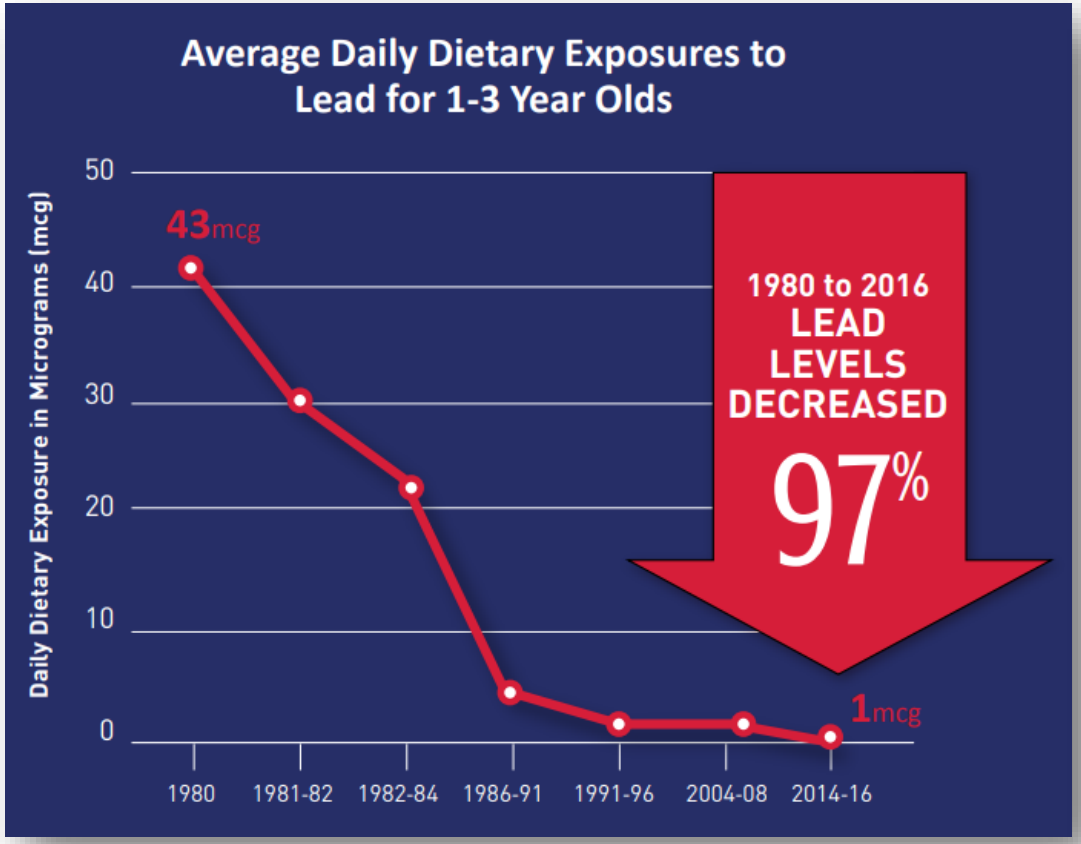
$$\mathbf{DOSE} = \mathbf{CONCENTRATION} \times \mathbf{EXPOSURE}$$

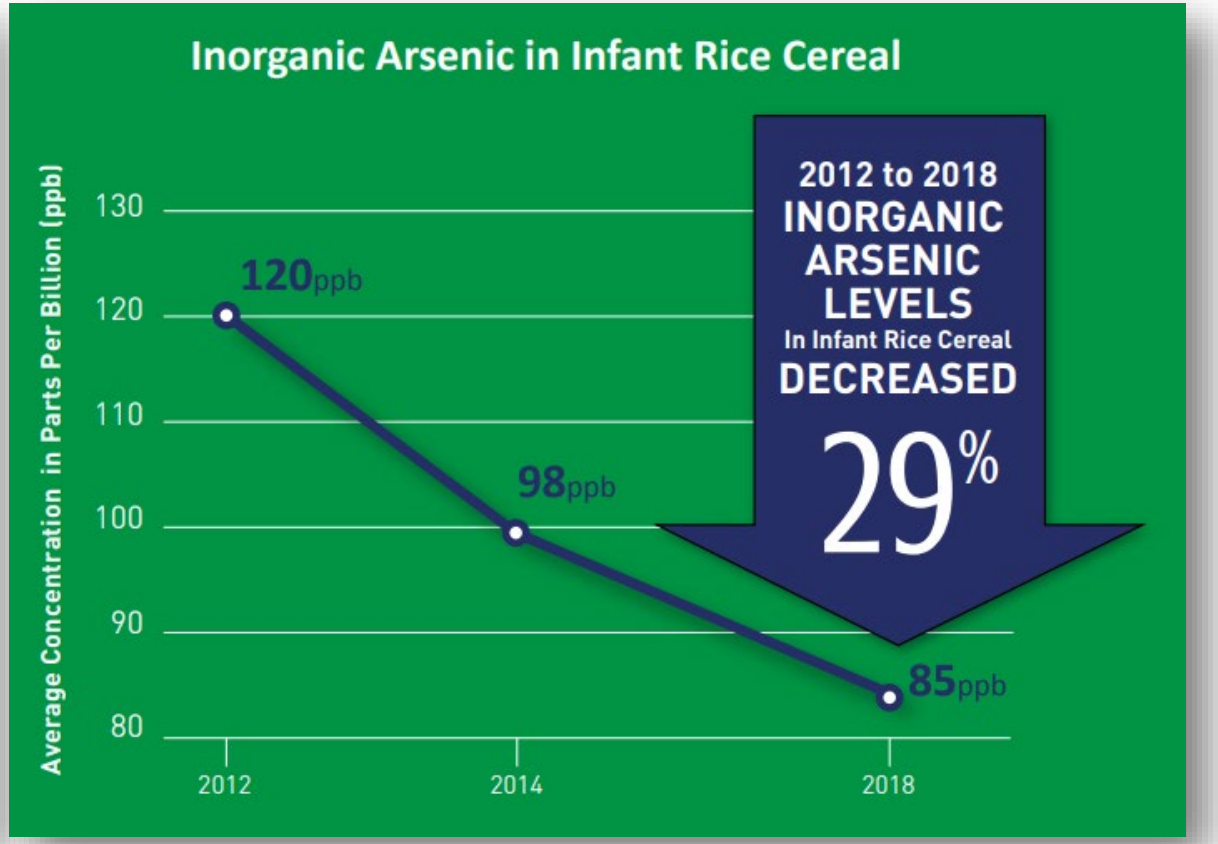
$$\frac{\mu g}{day} \qquad \frac{\mu g}{kg\ food} \qquad \frac{kg\ food}{event} \times \frac{avg\ events}{day}$$

Spices – Exposure Considerations

- Relatively small amounts of food – can allow for higher concentrations
- Cultural differences
- Using recipes to determine exposures

Reduction in Metals Ingestion





Source: U.S. Food and Drug Administration

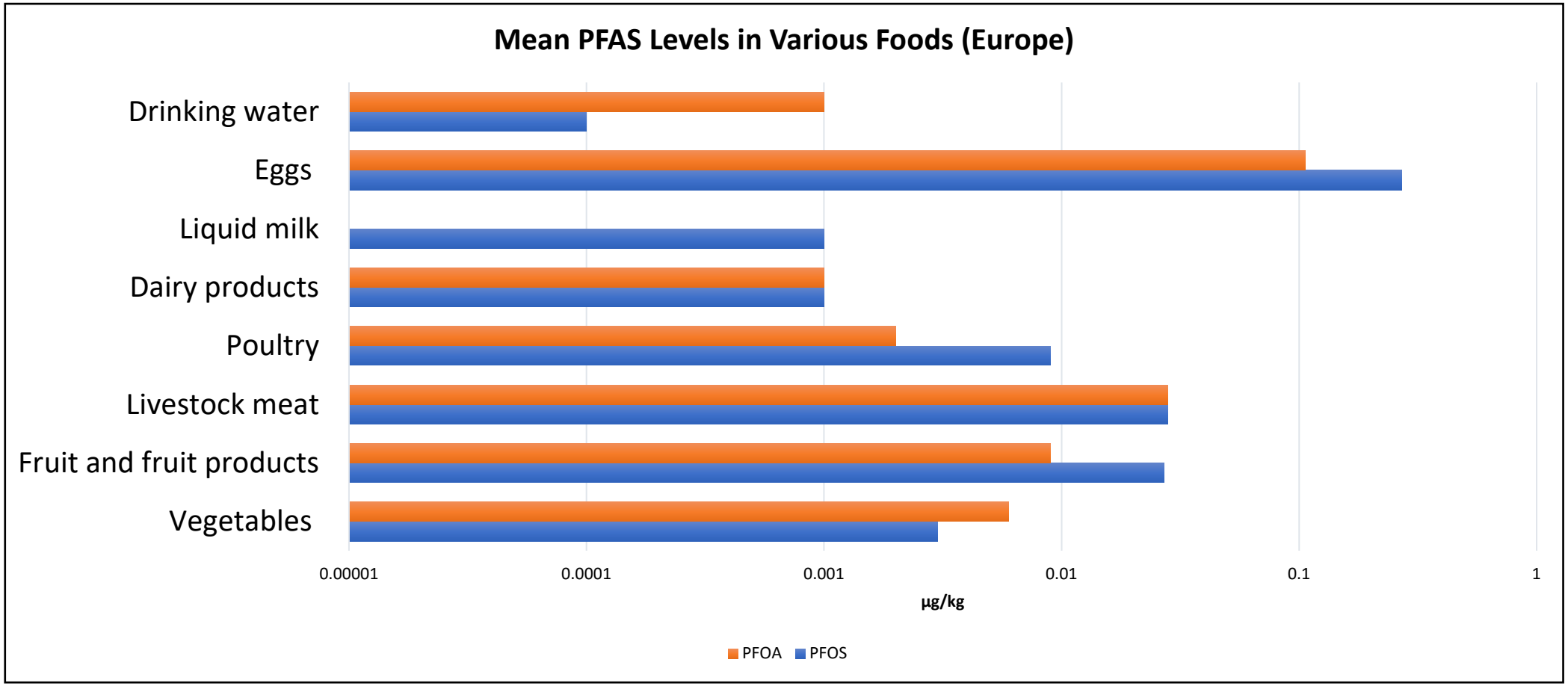
Emerging Contaminants: PFAS in Produce

PFAS Chemical	Type	Date Listed
PFOA	Developmental	11/10/2017
PFOS	Developmental	11/10/2017
PFOS + salts	Cancer	12/24/2021
PFNA	Developmental	12/31/2021
PFOA	Cancer	2/25/2022

‘All-natural’ Simply Tropical juice has high toxic PFAS levels, lawsuit alleges

Coca-Cola claimed juice was healthy despite toxic ‘forever chemicals’ levels ‘hundreds of times’ above federal limits, suit says

Emerging Contaminants: PFAS in Produce



Source: Adapted from EFSA. 2020. Risk to human health related to the presence of perfluoroalkyl substances in food. [Risk to human health related to the presence of perfluoroalkyl substances in food (wiley.com)]

Compliance Guidance

What should the agriculture industry be doing?

- Monitor Prop 65 trends
- Work together with other growers
- Strategic testing for certain produce (risk-based)
- Understand contractual indemnity obligations


QUESTIONS?

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