

April 8, 2015

Monet Vela  
Office of Environmental Health Hazard Assessment  
P. O. Box 4010  
1001 I Street  
Sacramento, California 95812-4010

**Re: Potential Amendment to Proposition 65 Article 6, Clear and Reasonable Warnings and Potential Adoption of Article 2, Section 25205**

Dear Ms. Vela:

The National Marine Manufacturers Association (NMMA) is pleased to provide the Office of Environmental Health Hazard Assessment (OEHHA) with the following comments with respect to the proposed amendments to the Water and Toxic Enforcement Act of 1986 (Proposition 65), published in the California Regulatory Notice Register on January 16, 2015.

NMMA is the leading recreational marine industry trade association in North America, representing 1,400 boat, engine, and accessory manufacturers. NMMA members collectively produce more than 80 percent of the recreational marine products sold in the United States. Statewide, recreational boating is a significant contributor to the California economy by employing nearly 72,000 people through more than 3,000 boating businesses. The total economic impact for recreational boating in California was \$8.94 billion in 2012.

NMMA supports sound OEHHA regulations that ensure the public's health and safety. In fact, our organization has been the industry leader in Proposition 65 compliance, providing both our members and non-members with compliant warning labels to be used throughout California. Manufacturers and suppliers can acquire a Proposition 65 hangtag—a flexible tag which is designed for all boats sold in the state—directly from the NMMA website.

NMMA looks forward to continuing to work with OEHHA to ensure that the recreational marine industry in the state of California complies with all applicable laws and regulations, and maintains the safety of its residents and the environment. As such, we are pleased to submit the following comments on the proposed repeal of Article 6 and the adoption of new Article 6 Proposition 65 *Clear and Reasonable Warnings*, and providing comments on the proposed adoption of Article 2, Section 25205 Proposition 65 *Lead Agency Website*, as well as providing additional analysis of the regulation and its implications to the recreational marine industry.

## **Article 6 Proposition 65 *Clear and Reasonable Warnings***

NMMA is pleased to have collaborated with OEHHA on language for marine vessels and engines to provide clear and reasonable warning language that benefits the consumer and industry. Achieving a tailored warning language for marine vessels and engines will prevent unnecessary warnings that confuse the public and businesses alike.

Similar to passenger vehicles (§25608.16-25608.17), recreational marine vessels are complex, durable goods comprised of many working parts and components. With a multitude of manufacturers working in the industry, and numerous models per manufacturer, the total product line is large and diverse. As such, a tailored warning is needed to effectively regulate the industry.

The following tailored warning was drafted following the meeting between NMMA and OEHHA on February 18, 2015. The tailored warning is to protect consumers and manufacturers against product exposures as defined in Section 25600.1.

### *§ 25610.XX Recreational Marine Vessel Exposure Warnings – Method of Transmission*

- (a) A warning for exposures that occur during the operation or maintenance of a recreational marine vessel, as defined in Section 21 of Chapter of 1 of the California Boating Laws, meets the requirements of this Article if it is provided using both of the following methods and includes the elements required in Section 25610.XX.
  - (1) The warning is printed in the operator’s manual for the specific recreational marine vessel, printed in no smaller than 12 point-type enclosed in a box printed or affixed to the inside or outside the front or back cover of the manual, on the first page of the text, or in any other appropriate warning section and;
  - (2) The warning is provided on a hangtag readily visible from the helm in the final installation.

### *§ 25610.XX Recreational Marine Vessel Exposure Warnings – Content*

- (a) A warning for exposures that occur during the operation or maintenance of a recreational marine vessel meets the requirements of this Article if it is provided using all the following elements.
  - (1) The symbol required in Section 25606(a)(1).
  - (2) The word “**WARNING**” in all capital letters and bold print.

- (3) The words: “Operating, servicing and maintaining a recreational marine vessel can expose you to chemicals such as lead, engine exhaust, carbon monoxide, and phthalates that are known to the State of California to cause cancer and birth defects or other reproductive harm. To minimize exposure, avoid breathing exhaust, service your vessel in a well-vented area and wash your hands frequently when servicing your vessel. For more information go to: [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov)”

These chemicals are all known by the recreational marine industry to be present on vessels and can lead to exposure in routine usage of the product. Further analysis can be provided upon request.

In addition, NMMA proposes to amend Section 25608.14 Diesel Engine Exposure Warnings (Except Passenger Vehicle Engines)- Methods of Transmission and Section 25608.15 Diesel Engine Exposure Warnings (Except Passenger Vehicle Engines)- Content by striking the word “diesel” from all usage:

*§ 25608.14 Engine Exposure Warnings (Except Passenger Vehicle Engines) –Methods of Transmission*

- (a) A warning for exposure to engine exhaust from products other than passenger vehicle engines meets the requirements of this Article if it is provided using all of the following methods and includes the elements required in Section 25608.15.

- (1) The warning is printed in the owner’s manual for the specific vehicle, engine or other equipment. Such notice must be printed in no smaller than 12-point type and be enclosed in a box and appear inside or outside the front or back cover of the manual, on the first page of the text, or in any other appropriate warning section and;

- (2) The warning is provided on a label permanently attached to the product in a location that is easily visible to the operator of the vehicle, engine or other equipment when it is being operated, and;

- (3) If other warnings or operating instructions are provided in an on-screen display, the warning is provided in that manner, using the same size and font as other operator warnings.

*§ 25608.15 Engine Exposure Warnings (Except Passenger Vehicle Engines) –Content*

- (a) A warning meets the requirements of this Article if it is provided using the methods described in Section 25608.14 and includes all the following elements.

- (1) The symbol required in Section 25604(a)(1).
- (2) The word “WARNING” in all capital letters and bold print.
- (3) The words: “Breathing engine exhaust can expose you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.”
  - Always start and operate the engine in a well-ventilated area.
  - If in an enclosed area, vent the exhaust to the outside.
  - Do not modify or tamper with the exhaust system.

For more information go to: [www.P65warnings.ca.gov/engines](http://www.P65warnings.ca.gov/engines).”

Unlike passenger vehicle engines, marine engines are frequently bought aftermarket. There is a significant industry of engine sales in the state of California, with engines being purchased by the consumer independently of the vessel. Thus the amended standalone warning that encompasses diesel and non-diesel engines is necessary to sufficiently protect the consumer.

### *Definitions*

NMMA has concerns over the definitions found in Section 25600.1. In Section 25600.1(a) the phrase “reasonably calculated to occur at a level that requires a warning” places the burden of proof on the business as determined in Health and Safety Code Sections 25249.9 and 25249.10. Unfortunately not all manufacturers, suppliers, distributors and retailers have the requisite professional staff who are qualified to determine if a product’s effects are reasonably calculated to occur at a level that requires a warning. Thus, as written this will result in businesses erring on the side of caution and overwarn in order to avoid any compliance issues.

Additionally, Section 25600.1(h) fails to define what constitutes exposure. What is the threshold for exposure? Does it differ per chemical? Who is the governing body determining the exposure level? NMMA believes that an additional subsection to Section 25600 defining “exposure” would be quite beneficial; with a clear and objective definition, Article 6 will be more effective and productive for businesses and consumers alike—preventing any need to overwarn, removing the threat of unmerited lawsuits and providing the public with relevant information concerning their health and well-being.

### *Responsibility to Provide Product Exposure Warnings*

NMMA has questions regarding the protocol and enforcement of Section 26000.2(b)(4)(5). It is a heavy burden to require that the manufacturer, every 180 days, contacts the retailer and receive a written acknowledgment that they have received the signs or labels. The retailer is the customer of the manufacturer—there is no way to enforce a response or, in the case where a third party is used as the supplier or distributor, to fully know which retailers ultimately end up with the

product. For manufacturers in such scenarios, are there any recourses for manufacturers who do not know who the retailer is and/or if the retailer does not respond every 180 days?

### *Product Exposure Warnings—Methods of Transmission*

NMMA has concerns over the application of Section 25603(b)(c). Many of our member companies engage in consumer outreach and sales via the Internet and catalogs, without a physical presence in the state. For example, it is likely that a company based in Wisconsin maintains and operates a website that sells products across the United States, including into California. Despite not having a presence in California, nor knowing in advance whether a website visitor is from California, Section 25603(b) would require a warning message to be “prominently displayed” on the product page.

This would provide the majority of consumers, those who don’t reside in California, with irrelevant information, while detracting from the main purpose of the company website. This is additionally true for catalog purchases, which are produced in mass and distributed across the country. In the absence of producing a California-specific catalog, at an added cost, the requirements in Section 25603(c) are ineffective for the majority audience.

This section is also problematic for original equipment manufacturers (OEMs) who frequently sell their products online and in catalogs to other businesses, who then produce a final product for the general public. In such a scenario, it is not clear if the OEM would be responsible to display known chemicals on a website or catalog.

NMMA requests that products being sold across multiple states via the Internet or print catalogs are exempt from Section 25603(b)(c).

### *Aftermarket Sales and Resales*

A large portion of the recreational boating industry is comprised of aftermarket sales and resales. Pre-owned boat sales are a significant driver of the overall industry’s performance. According to the Mariner Retailers Association of the Americas (MRAA), the vast majority of California’s hundreds of dealers retail pre-owned vessels at their locations. NMMA has concerns that in such scenarios, the manufacturer of the pre-owned product could be susceptible to Proposition 65 notices.

Despite best efforts, the original hangtag may not remain with the vessel after the initial sale, and while the warning might be included in the owner’s manual it would still fail to meet the definition of the regulation. This would make the retailer and the manufacturer in jeopardy of being on the receiving end of a Proposition 65 notice.

NMMA requests that protections to avoid such unmerited notices should be written into the final regulation to best protect the consumer and businesses.

## **Article 2, Section 25205 Proposition 65 *Lead Agency Website***

NMMA appreciates the work that OEHHA has done to address a number of our initial concerns relating to the development of a new lead agency website. However, we are still concerned that a Proposition 65 website will ultimately place an excessive burden on businesses. The website requirement, even if ultimately administered by the state, will add new layers to entering into business and open the door for unnecessary hurdles.

Specifically, NMMA is concerned over the lack of established protocol in the website disclosure process. As stated by OEHHA, the agency may request product information from a business, manufacturer, producer, distributor, or importer—this is a lot of different sources potentially being asked to send in information, with no clearly defined chain of command. This not only lacks a clear protocol to follow, but adds unnecessary confusion for businesses.

Such lack of clarity is likely to lead to regulatory nightmares for our members, and endless red tape. Many NMMA members are small businesses who do not possess the resources to adhere to said requests, and thoroughly determine what needs to be disclosed and who needs to do the disclosure. Additionally, many of our larger members have such complex and diversified operations that will make such disclosure difficult and imprecise. Further, our members are diligent. If any receives a request from OEHHA, or any other government agency, they are going to make sure they comply to the fullest extent that they can.

NMMA also has concerns that OEHHA is allowing any person to provide them with information to be considered for posting on the website—and not limiting it to the responsible entity. This presents a host of problems and potential complications that will impede business activity and ultimately fail the public. It is possible that allowing any person to provide information will devolve into a way for outside groups to essentially serve a digital Proposition 65 notice to businesses, compelling them to act whether or not disclosure is merited.

Finally, NMMA still believes that the website will fail to achieve OEHHA's intended goal of educating the public. The chemical names and health effects expected to be documented online are technical and complex. This information will be of little use to the average consumer, and will not provide more awareness or clarity on the chemicals' potential effects. There is no evidence to support any demand amongst the public for access to additional information, or studies showing that the public would even use this additional information.

### **Additional Analysis**

During the February meeting between NMMA and OEHHA, a productive discussion was held on how Proposition 65 regulates the recreational boating industry's parts and accessories segment, and how this segment complies with the existing regulation. We appreciate the chance to further expand on our discussion, and as requested, highlight examples of current and potential compliance complications.

This segment is complex and multi-layered; the retailer is often many layers removed from the OEM, and conversely the OEM often is unaware of where their goods are ultimately being sold. In such a complex system, it is not realistic for the manufacturer or the retailer to “knowing and intentionally” produce or sell a good that merits a Proposition 65 warning label—either the manufacturer has no knowledge that the product is retailed in California or the retailer has no knowledge that the product contains potentially hazardous chemicals.

On the surface, this lack of “knowing and intentionally” should absolve all parties from violations, but who is the ultimate arbiter of “knowing and intentionally?” What would prevent a Proposition 65 notice being issued by an external group? And what would prevent such a case from entering California’s court system? Even if the manufacturer is ultimately found not responsible, the notice and potential suit are burdens in and of themselves. This is a difficult scenario for the OEM to manage, and likely will cause them to overwarn to avoid any potential complication.

For an example, a Tennessee company manufactures brass nuts containing lead. These nuts are packaged in Tennessee and shipped to business-to-business customers across the world—some of these businesses strictly use the nuts internally and thus no warning is merited; others employ the nuts on a larger item, which presumably would have a sufficient warning attached to; yet other businesses repackage the nuts and distribute them to be sold to consumers in stores, exposing the public to exposure and meriting a warning.

What is the OEM supposed to do in such an example? They have no knowledge ahead of time where the product they produce will end up or how it will be used. Nor are they intentionally selling the product. Most of the time, a warning would not be needed, but if they fail to protect against the times where a warning is needed, are they ultimately liable?

This is a problem faced by companies in our industry and many others; one that needs to be adequately addressed by OEHHA. Otherwise, companies will overwarn. They will add labels that protect their own best interests in order to avoid any possible lawsuit or notice. Ultimately, this will do a major disservice to the California public and go against the spirit of the regulation and OEHHA’s best intentions.

## **Conclusion**

NMMA looks forward to working with OEHHA to ensure our members continue to comply with Proposition 65. We believe that this regulation can effectively serve our members, the industry at large and the California public. We are open to discuss these comments further—notably the tailored warning language—and make our members available to expand on how the regulation will impact their operations. NMMA members are willing to speak with OEHHA, either via conference call or in-person, to provide more context and exemplify how the regulation can be best applied.

For additional questions, please feel free to contact me at [mlewan@nmma.org](mailto:mlewan@nmma.org) or 202-737-9760.

Sincerely,



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