

January 25, 2016

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

Re: Proposed Repeal of Proposition 65 Article 6 and Adoption of New Article 6 Clear and Reasonable Warnings

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 notice of proposed rulemaking to Article 6 in Title 27 of the Water and Toxic Enforcement Act of 1986 (Proposition 65), published November 27, 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.

NMMA was pleased to see our April 2015 comments incorporated into the November 2015 proposal—notably the inclusion of § 25607.18 and § 25607.19 will provide great clarity to boat builders and provide NMMA with concrete guidance on proper labeling procedures. Our organization remains the industry leader for Proposition 65 compliance, providing both our members and non-members with compliant warning labels to be used throughout California. Sections 25607.18 and 25607.19 will ensure that manufacturers and suppliers can continue to acquire an updated Proposition 65 hangtag—a flexible tag which is designed for all boats sold in the state—directly from the NMMA website.

However, the industry still has outstanding concerns that were not addressed in this proposal. Most significantly, NMMA and our member companies remain concerned with the excessive burdens being placed on the manufacturing industry. Additionally, NMMA remains concerned over the many ambiguities in the proposal that will prove problematic for compliance. Lastly, the industry still wishes to address tailored warnings for spark-ignited marine engines.

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 to address outstanding concerns that were not addressed in the November proposal.

Burden on the Manufacturer

NMMA still asserts that the proposed changes to Article 6 will place an undue burden on manufacturers. Section 25600.2 affirmatively places the burden on manufacturers, and specifically, in Section 25600.2(a), states to minimize the burden on retailers. In practice, compliance will be difficult for even the best-intentioned manufacturer.

In the recreational boating industry, aside from the big ticket items like vessels and engines, most of the products produced are small parts and accessories—items that a consumer purchases to enhance their boating experience. For these parts and accessories, the retailer is often many layers removed from the manufacturer, and conversely the manufacturer often is unaware of where their goods are ultimately being sold. This is magnified when taking into account the full supply-chain, where products are distributed, repackaged, shipped, and/or bundled before being available to the public. Thus, placing the burden on the manufacturer makes it difficult for them to comply, while forcing them to spend time and resources to ensure compliance to the best of their abilities. As a result, it would be in the best interest of the manufacturer to overwarn to avoid any potential compliance issue—adding labels and retail instructions for all products sold in the state of California, whether needed or not, will ultimately be the easier and safer business decision.

NMMA strongly requests that OEHHA includes language to the proposal that clarifies the burden on the manufacturer, as it has done for the retailer. This will not only prove beneficial to the manufacturers, but will do a great service to the people of California by eliminating excessive warnings. To achieve this, NMMA proposes that OEHHA work with manufacturers and manufacturing associations to form a working group that can deliver consensus language that better balances the concerns of industry, the public and the state.

Section 25600.2(b)(5): 180 Day Requirement

The expectations outlined in Section 26000.2(b)(5) places a heavy burden on the manufacturer. Requiring the manufacturer, every 180 days, to contact the retailer and receive a written acknowledgment that they have received the signs or labels is unrealistic. 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. This requirement will force manufacturers to spend onerous amounts of time and resources trying to comply, without ever actually guaranteeing compliance.

NMMA requests that Section 26000.2(b)(5) is amended to reflect actual retailer-supplier relationships by eliminating the 180 day requirement. In its stead, NMMA proposes that the manufacturer is required to include in the product packaging sent to the retailer clear instructions that outline the warning requirements per Section 25249.6 of the Act. An additional notice is required immediately if a new chemical name or endpoint (i.e. cancer or reproductive toxicity) is required to be included in the warning.

Section 25600.2(b)(3): Costs Incurred

Section 26000.2(b)(3) states that the manufacturer is responsible for all costs related to Proposition 65 compliance. This will result in higher costs of production, which in turn could lead to a higher cost for California consumers. With the cost of doing business in the state already high, placing additional cost burdens on the manufacturer will negatively impact the economic prospects of businesses.

Thus, NMMA requests that Section 26000.2(b)(3) is amended to eliminate the mandate for manufacturers to solely be responsible for costs. NMMA proposes OEHHA removes the phrase “at no charge to the retailer,” as follows:

“Either includes all necessary warning materials such as labels, labeling, shelf signs or tags that satisfies Section 25249.6 of the Act, or offers to provide such materials to the retail seller”

Section 25602(b): Internet Purchases

Section 25602(b), governing internet purchases, will impose additional economic and compliance burdens on manufacturers, particularly those out-of-state. The inclusion of the phrase “prior to purchase” requires that a warning is included per each product on each retailer’s website—despite the fact that the potential consumer(s) may or may not be in California, and thus not subjecting the product to Proposition 65 regulations. This is an economic burden that could cut into sales and detract potential customers from making a purchase, while also setting a very high compliance burden—it will be very time consuming for a manufacturer to continuously ensure that its products, on a myriad of websites, are in compliance with the regulation. NMMA thus requests that a warning is not necessitated for purchases made online until the consumer identifies him or herself as a California resident upon entering their shipping address.

Further, Section 25602(b) does not identify who carries the responsibility to warn on internet purchases. Considering that under Section 25600.2(b) the state has stated its intentions to minimize the burden on retailers, a manufacturer would be lead to believe that the onus to warn “prior to purchase” online falls on them. This is very unrealistic as it would force the manufacturer to be in constant communication with online retailers of all sizes, while simultaneously monitoring all websites to ensure that their products contain the proper warning.

As such, NMMA requests that Section 25602(b) has language included that outlines the compliance protocol for the manufacturer.

Problematic Ambiguities

Article 6 contains many confusing, contradictory and/or ambiguous requirements that make it difficult to comply. Significant changes and modifications are needed to make the regulation more easily understood by the layperson, and thus more effectively followed.

Section 25600.1(i): Exposure Definition

Section 25600.1(i) fails to define what constitutes a consumer product exposure. Considering that not all manufacturers 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—a clear, scientific definition of exposure is needed. This will result in the manufacturer potentially overwarning to avoid any risks and potential violations. An additional subsection to Section 25600.1 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.

NMMA proposes exposure is defined in accordance with OSHA's Permissible Exposure Limits (PEL), which has already outlined clear, and understandable maximum levels of exposure for chemicals in question. NMMA also believes that in defining exposure it is important to distinguish the difference between hazard and risk—a chemical present in a product could be a hazard, but due to its location within the product, it may not pose a risk to exposure. While this may be implied in the regulation, NMMA asserts that it needs to be clearly outlined in the regulation to avoid any misinterpretations.

Section 25601(c): Multiple Chemical Procedures

Section 25601(c) has confusing language that could easily be misinterpreted by the manufacturer. The phrase, “one or more of the listed chemicals for which the warning is being provided is included in the text of the warning,” is problematic for a product that contains multiple exposure-causing chemicals. A manufacturer would interpret this as needing to list only one chemical to meet compliance, but an outside party might interpret it differently and file a suit because all chemicals were not specified in the warning. And since the burden to prove that no warning is required falls on the manufacturer, this ambiguity will prove costly—even if the manufacturer has the right interpretation.

To avoid this ambiguity, NMMA requests that Section 25601(c) is modified to the following:

Except as provided in Section 25603(c), a warning meets the requirements of this article if the name of one or more of the listed chemicals for which the warning is being provided is included in the text of the warning. If the warning is for more than one listed

chemicals, the warning is in compliance with this article if the name of any one of these listed chemicals is included in the text of the warning.

Section 25607.18(a)(1): Flexibility of Owner's Manual Labelling

Section 25607.18(a)(1), which limits the manufacturer to only three locations for a warning label in an owner's manual, contradicts the definition of "labelling" in Section 25600.1(g) and the label requirements for consumer products found in Section 25602. Per sections 25600.1(g) and 25602, the manufacturer should have the flexibility to include a warning label in the owner's manual at their own discretion and/or as an insert or addendum included in the owner's manual package. Limiting the manufacturer to just three potential locations forces the manufacturer to either produce a California-specific owner's manual, or change the universal owner's manual to comply with Proposition 65, at the expense of other needed language.

Thus, NMMA requests that Section 25607.18(a)(1) is amended to the following:

The warning is printed in the owner's manual for the specific recreational vessel, in no smaller than 12-point type enclosed in a box printed or affixed in any appropriate warning section of the manual or as an insert included with the owner's manual, and;

Tailored Warning for Non-Diesel 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. This is not unique to the recreational boating industry, as many other non-passenger vehicle engines are sold in the state. Thus the amended standalone warning that encompasses diesel and non-diesel engines, by striking out "diesel," is necessary to sufficiently protect the consumer above and beyond the requirements outlined for consumer products found in Section 25602.

§ 25607.14 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 25607.15.

(1) The warning is printed in the owner's manual for the specific vehicle, engine or other equipment. Such notice must be printed or affixed in no smaller than 12-point type and be enclosed in a box and appear 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.

§ 25607.15 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 25607.14 and includes all the following elements.

(1) The symbol required in Section 25603(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.”

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, but that certain clarifications need to be made to reduce the burden on manufacturers and simplify the warning process. We are open to discuss these comments further 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 or 202-737-9760.

Sincerely,



Michael Lewan
Government Relations Manager
National Marine Manufacturers Association