

April 26, 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 revision to Article 6 in Title 27 of the Water and Toxic Enforcement Act of 1986 (Proposition 65), published March 25, 2016.

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 has been pleased to work with the agency during this revision process, including the submission of comments dated January 25, 2016. NMMA remains confident that the recreational boating industry will benefit immensely from the agency's inclusion of § 25607.18 and § 25607.19. While the latest revision has made some notable steps to further assuage the industry's concerns over compliance, there remains some significant areas that need to be addressed before this proposal is finalized.

In particular, NMMA remains concerned over the many ambiguities in the proposal that will prove problematic for compliance. It is the industry's assertion that failure to address these significant ambiguities will lead to manufacturers erring on the side of caution and overwarning in order to eliminate any potential threat of lawsuit. NMMA believes that such a culture of overwarning would violate the spirit of Proposition 65, fail to meet the Governor's stated goal of reforming Proposition 65, and would provide limited benefit for the consumer; yet based on the interpretation of this proposal, overwarning would be NMMA's recommended best course of action to our members.

NMMA is hopeful that the agency can address these ambiguities before finalizing the rule. It is our goal 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 revised proposal.

*Section 25600.1(e): Exposure Definition*

Section 25600.1(e) 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. Failure to include a clear definition will result in the manufacturer 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 that “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 maintains its belief that in defining exposure it is important for OEHHA 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 could 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. Regardless of the right interpretation, a manufacturer would overwarn to eliminate the possibility that they could be at fault.

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.

The above modification would also eliminate any concerns over the multiple endpoint clause in the proposal—for cancer and reproductive toxicity. NMMA concurs with the interpretation of

the California Chamber of Commerce that such a requirement would make existing “Safe Harbor” warnings unsafe in practice and compel a business to overwarn to protect itself.

### *Section Labelling*

#### *Sections 25601(d) and 25607.18(a)(1): Flexibility of Owner’s Manual Labelling*

NMMA asserts that Section 25601(d) enables any consumer product warning to be displayed on or with the product as long as it meets the requirements outlined in Section 25600.1(j): “written, printed, graphic, or electronically provided communication that accompanies a product including tags at the point of sale or display of a product.” As such Section 25607.18(a)(1), governing recreational vessels, should be amended to better reflect the multitude of display options.

Presently Section 25607.18(a)(1) limits the manufacturer to only three locations for a warning label in an owner’s manual. This limitation contradicts the definition of “label” and “labelling” in Section 25600.1 and the label requirements for consumer products found in Section 25602. Per sections 25600.1 and 25602, the manufacturer should have the flexibility to include a warning label in the owner’s manual in any location, as an insert and/or as an 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;

### **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 minimize any potential complications, simplify the warning process and avoid overwarning. 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](mailto:mlewan@nmma.org) or 202-737-9760.

Sincerely,



Michael Lewan  
Government Relations Manager  
National Marine Manufacturers Association