



March 26, 2021

Ms. Monet Vela  
Office of Environmental Health Hazard Assessment (OEHHA)  
1001 I Street, 23rd Floor  
Sacramento, CA 95812-4010

Via portal at: <https://oehha.ca.gov/comments>

Re: DEMA Comments on OEHHA's Proposed Amendments to Article 6, Clear and Reasonable Warnings Short Form Warnings

Dear Ms. Vela:

The Diving Equipment and Marketing Association (DEMA) appreciates this opportunity to provide comments to the Office of Environmental Health Hazard Assessment (OEHHA) on its Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short Form Warnings (January 8, 2021). DEMA opposes the proposal since it is in direct conflict with the Proposition 65 regulations that took full effect on August 30, 2018, following years of development through public discussion and collaboration.

DEMA is a non-profit trade association representing the business and consumer interests of the recreational scuba and snorkel diving industries around the world. DEMA's mission is to bring businesses together to grow the Diving Industry worldwide, and we are actively engaged in promoting recreational diving of all kinds throughout the U.S. and globally. DEMA represents more than 1,400 member businesses, including manufacturers, training organizations, consultants, media, retail stores and dive destinations. California is the second largest state for numbers of divers trained and certified to safely dive.

DEMA opposes the proposed revision to the short form warning requirements for the following reasons:

Proposed Amendments Represent a Major Change: OEHHA is proposing to withdraw the short form warning option for businesses across the country less than three years after this form took effect. Businesses in California and those outside the state selling products into California have invested enormous time and resources in learning and complying with the 2018 Prop 65 regulations, including the option of providing short form warnings. DEMA members reviewed the 2018 regulations, retooled their product labels, revised their websites, updated catalogs, and instructed downstream distributors and retailers. OEHHA is threatening to negate the significant expenditure of time and money by companies found throughout the United States by spontaneously revising the short form warning requirement without sufficient justification, and without sufficient public review and comment.

No Alternatives Considered: The only alternative considered by OEHHA was to repeal the short form warning altogether, but the agency acknowledged this would be impossible when there were packaging size constraints.

In its Initial Statement of Reasons (ISOR), the agency then stated that *“OEHHA has determined there are no reasonable alternatives to the proposed regulatory action that would carry out the purposes of the Act”* (ISOR, p. 16). This conclusion seems to have been reached in a vacuum given that OEHHA *did not rely on any technical, theoretical, and/or empirical studies, reports, or documents* (ISOR, p. 15) and did not solicit public comment prior to publishing the ISOR.

Significant Economic Impact: OEHHA failed to undertake a comprehensive analysis on the potential economic burden placed on the business community if its proposed rule takes effect. Rather, the agency simply states *“The proposed regulatory action will not have a significant adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The action does not impose any new requirements upon private persons or businesses because the safe harbor regulations are non-mandatory guidance.”* (ISOR, p. 16).

OEHHA failed to acknowledge that many companies will need to invest time, money, and resources in understanding the changes, retooling product labeling, and revising catalogs and websites. These are direct costs. The reference to “non-mandatory” regulations is non-sensical. Companies relied on OEHHA to uphold the regulations implemented in 2018 which included a safe-harbor warning option. Every business using a short form warning will automatically be required to make changes and incur costs.

Regulations are National in Scope: OEHHA notes that Proposition 65 is a California law that has no federal counterpart. In fact, OEHHA needs to appreciate that California has established a de facto federal standard and be mindful that decisions it makes have a direct impact on companies across the country engaged in interstate commerce. The fact that there is no federal equivalent or similar program in any other state places an extra fiduciary obligation on California officials to take a cautious regulatory approach.

Number of Covered Chemicals: The list of Prop 65 chemicals keeps growing. In 2018, the list was over “900” chemicals. Less than three years later, it is over “1,100” chemicals and growing. No one is challenging that there are many chemicals that may pose a potential toxic risk if not handled correctly. Rather, the public also deserves context for the exposure risk. Simply referencing a chemical name on a warning label provides little context or value. Further, OEHHA should recognize that companies face a significant burden in tracking the constantly expanding list of chemicals and considering whether it is applicable to their products. The expansion provides additional opportunities for bounty hunters to pursue claims. DEMA is not challenging the legitimacy of any listed chemicals or the fact that the list continues to expand. Instead, the short form warning debate provides an opportunity for OEHHA to assess whether the Prop 65 program is fulfilling its mission. While the law may be effective in prompting companies to reformulate consumer products when possible to remove or reduce exposure to certain chemicals, the proliferation of both long and short form warning labels have proven to be of questionable value to consumers.

Arbitrary Short Form Warning Label Requirements: OEHHA does not adequately explain how it arrived at 5 square inches or less as being the surface area permitted for a short form warning label. The agency did not publish an analysis. The warning must now include the listing of at least one chemical. Simultaneously, OEHHA removes the short form label as an option for catalogs and websites. There is no accompanying analysis justifying OEHHA’s conclusion that mandating a long form for catalogs and websites is necessary or practical in all cases. Additionally, OEHHA does not acknowledge that companies will be spending money to make the revisions, and failure to do so provides private party enforcers one more weapon for alleging Prop 65 violations.

Private Party Enforcers: Prop 65 is a well-intentioned 1986 California ballot initiative that has a significant flaw: California has deputized private parties to be the primary enforcers. The private attorneys receive a portion of

the fine or settlement ultimately assessed on the alleged violator. Under the law, fines can run up to \$2,500 per day, per violation.

For many faced with Prop 65 cases, often called “bounty hunter” suits, it can feel like a shakedown because Prop 65 lawsuits are expensive to fight, and defendants often settle quickly to avoid the high cost of litigation. Many times, it is questionable as to whether there has been a violation of the law since there may be limited consumer exposure to the specific chemical. The burden of proof is on the defendant to prove an absence of risk or exposure, or reasonable warnings. OEHHA does not raise the issue of private party abuses while the agency seeks to rescind the proposed short form warning option for many companies. OEHHA fails to acknowledge that the number of private enforcements keeps rising year after year costing companies tens of thousands of dollars. The claims are pursuits of profit, not public interest.

Future Short Form Warning Enforcement: If the proposed rule takes effect, OEHHA is potentially providing bounty hunters with yet another shakedown weapon. The private enforcers will potentially prey on companies that are unaware of changes to the 2018 rule and fail to revise their markings.

COVID-19: Companies large and small have been struggling to address the enormous financial and physical challenges presented by the pandemic. The federal government, states and local jurisdictions have sought to respond by providing financial assistance and regulatory relief when possible. Given this context, it is confusing that OEHHA would be pursuing a significant regulatory change at this time while companies are barely surviving the current economic downturn.

Inadequate Notice: On January 8, 2021, OEHHA issued proposed amendments to the Prop 65 safe harbor warnings. They represent a significant change to the current short form warning requirements. The public was not first alerted in advance of the impending proposal and did not have a chance to provide feedback before OEHHA drafted the amendments. Following public outcry, OEHHA scheduled a hearing for March 11, 2021 and extended the comment period to March 29, 2021. These actions underscore that there was inadequate notice for a now widely criticized rulemaking.

Insufficient Basis for Changes: The justification for taking such a drastic action is insufficient and the proposed changes seem arbitrary and capricious. While OEHHA is now providing the opportunity for a hearing and comments, DEMA members are concerned that the agency still intends to move forward despite insufficient basis. In its Initial Statement of Reasons (ISOR), the agency admits that “*OEHHA did not rely on any technical, theoretical, and/or empirical studies, reports, or documents as part of this rulemaking*” (ISOR, p. 15). This admission should be sufficient to overturn the rulemaking.

When the 2018 Prop 65 regulations took full effect, the business community felt assured that there was certainty and clarity in how the law was being implemented. The proposed rule has now produced concern and anxiety. For the reasons provided above, DEMA respectfully urges OEHHA to withdraw its proposed short form warning rule changes. Thank you for this opportunity to provide comments.

Sincerely,



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