

January 21, 2022

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
P. O. Box 4010
Sacramento, CA 95812-4010

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

SUBJECT: COMMENTS ON MODIFICATION OF TEXT, PROPOSED AMENDMENTS TO ARTICLE 6, CLEAR AND REASONABLE WARNINGS, SHORT-FORM WARNINGS

Dear Ms. Vela:

The 110 member companies of the Outdoor Power Equipment Institute (OPEI) would again like to express their concerns with the proposal to amend the Proposition 65 warning regulations with respect to short-form warnings. OPEI is also a signatory to the coalition comments submitted by the California Chamber of Commerce and the Consumer Brands Association.

The amended proposal dated December 17, 2021, like the earlier proposal, would upend the Article 6 warning requirements that went into effect just over three years ago. OPEI members invested significant time and capital to overhaul their Proposition 65 warning programs to bring them into compliance with the 2018 regulations. Now, just over three years later, OEHHA proposes to change this framework, creating new uncertainty for both the consumer and manufacturers and extensive new financial burdens for business, all while providing no demonstrated benefit to California consumers.

For these reasons, OPEI requests that OEHHA:

- withdraw this rulemaking, or alternatively;
- delay the adoption of this rulemaking (in light of challenges and business disruptions described hereafter);
- extend the implementation date to three years after its adoption;
- clarify an unlimited sell-through provision for goods already manufactured;
- clarify that only one chemical per toxicity is required on the short-form warning;
- increase the allowed space for short-form warnings from 12 to 40 square inches;
- eliminate ambiguities in the proposal.

About OPEI

OPEI is an international trade association representing the manufacturers and their suppliers of non-road gasoline powered engines, personal transport and utility vehicles, golf carts, and consumer and commercial outdoor power equipment (“OPE”). OPE includes lawnmowers, garden tractors, trimmers, edgers, chain saws, snow throwers, tillers, leaf blowers and other related products. OPEI member companies and their suppliers contribute approximately \$16 billion to US GDP each year. Last year they shipped 40 million products in the U.S. with millions sold in California.

The OPE industry's products are ubiquitous to California's households and businesses. They are sold across the state through a diversity of retail outlets, including national and regional home improvement chains, local hardware stores, e-commerce retailers, and independent dealers. Our member companies have invested significant resources to implement warnings consistent with OEHHA's safe harbor guidelines, including those adopted just over three years ago for short-form warnings. Current OEHHA regulations, including those for short-form warnings, are followed by our industry to warn where appropriate for whole-good products, accessories, and spare (service) parts, which together account for a significant diversity of products and a complex industry supply chain and retail network.

The proposed amendments would create uncertainty for consumers and OPEI members alike, and real financial burdens for businesses

As explained in our previous comments dated March 19, 2021, OPEI disagrees that these proposed amendments would achieve OEHHA's stated reasons for its proposal, namely "clarifying" improvements to warnings for state consumers and reduction of over-warning.

Instead, these amendments would needlessly upend safe harbor warnings developed and implemented within the last three years at considerable cost to OPEI members, and lead to significant new burdens upon our members and confusion rather than clarity among consumers. The concept of safe harbor is at least in part based on the consistency of agency regulations, free from frequent amendment as is the case with the subject proposal. The warnings meeting the 2018 regulations have proven to be an effective method for OPEI members to provide safe harbor warnings, and their continued use will protect against confusion by the consumer and new undue burdens upon manufacturers.

The proposal by OEHHA would do little or nothing to address OEHHA's stated goal of reducing over-warnings. The proposal would only further exacerbate the already abusive Proposition 65 litigation climate by providing additional opportunities for private enforcers to file frivolous enforcement lawsuits against businesses. Year after year, the California Attorney General's summary shows that the volume of settlements and settlement amounts is consistently high and trending upward. There is a litany of other ways for OEHHA to reduce over-warnings, but the proposed changes to the short-form warnings is not the way.

OEHHA's proposed revisions to the short-form warning are inappropriately timed. These changes would be extraordinarily difficult, expensive, and burdensome. They would come after companies just spent significant resources to implement changes by 2018. OPEI is also concerned that this proposal is ill-timed when businesses are already burdened with a global pandemic, and its likely lasting impacts on company supply chains, workforces, and retail markets.

These proposed amendments would have significant adverse economic impacts on OPEI members of all sizes, with costs for some members adding up to millions of dollars to re-label the thousands of whole-goods, accessories, and spare (service) parts that they manufacture and sell.

There are numerous examples of how these amendments would place undue burdens on OPEI members already providing safe harbor warnings. The financial impacts on OPEI members would vary according to their size and presence in the California marketplace, but would nonetheless be significant and burdensome.

Examples of new necessary investments, creating new burdens, include:

- Manufacturing of new labeling and packaging for new warnings, while discarding inventory of old labeling and packaging, with such inventory extending in most cases well beyond the proposed 1-year transition, creating undue waste and lost dollars;
- Retooling of manufacturing lines where application of some warnings may be applied, these significant changes in process, tooling/hardware, dyes and labelling, and even workforce needs require not only financial investment but time likely beyond the proposed 1-year transition period;
- Engagement with retailers and authorized dealers who in some cases share responsibility for the application and proposed changeover of Prop 65 warnings. This cooperative effort requires financial investment and time likely to exceed the proposed 1-year transition period;
- Additional testing of products, parts, components, materials for trace quantities of listed chemicals and/or future/pending listed chemicals, requiring up to two years.

OEHHA should withdraw this proposal

These proposed amendments to the Proposition 65 regulations would serve to only create new undue burdens on OPEI members, while confusing state consumers and providing them with no measurable public health benefit.

For these reasons, OPEI urges OEHHA to withdraw this proposal.

Alternatively, OEHHA should delay the adoption of this rulemaking

The subject rulemaking, and its resulting new requirements and burdens on OPEI members, is ill-timed when businesses are already in the midst of an ongoing global pandemic with impacts on their supply chains, workforces, and retail markets.

For these reasons, OPEI urges OEHHA to delay the adoption of this rulemaking.

OEHHA should provide a three-year transition period after adoption

If OEHHA does not withdraw the proposal, OPEI urges OEHHA, at a minimum, to provide a reasonable transition period. OPEI recommends a three-year transition period to reflect the fact that the proposal is a complex technical amendment of Article 6, rather than a clarifying rule. OEHHA provided a two-year transition period for the Article 6 amendments adopted in 2016. Industry experience showed that even a two-year period was insufficient, as many companies had to continue their implementation actions well after the August 2018 effective date. This proposal poses even further technical complexities than did the 2016 final rule, in that the short-form warning option would not be available for many products. Instead, the proposal would require broad identification of chemicals for placement on the revised labels whether or not short-form warnings are used. This burden was not required last time as companies often transitioned to the short-form warnings authorized in the 2016 amendments. This added burden and necessary investments by OPEI members would require at least a 3-year transition period.

The proposal would provide a one-year transition period. That would be unworkable for businesses that must evaluate and re-label all their Proposition 65 warnings on labels and in published materials. Outdoor power equipment suppliers often have thousands of Stock Keeping Units (SKUs) to review, re-design packaging, or re-label, considering whole goods, accessories, and spare (service) parts.

Specific to the distribution and sale of spare parts in the OPE industry, there is an added and significant complexity since businesses in the retail chain downstream of the OEMs (i.e., distributors, dealers, and

retailers) are often the companies that must provide Proposition 65 warnings to consumers. Especially in the sale of spare parts, this can include thousands of SKUs per manufacturer, adding great complexity to the process.

The proposal would require significant investments in educational tools, website upgrades, packaging, and communications to coordinate across the distribution/retail chain, all requiring a three-year transitional period. These same burdens required significant investments by OPEI members responsive to the 2016 amendments. Under the proposal, they would now require a redoubling of efforts, with complex adjustments necessary to meet the proposed safe harbor warnings.

OPEI members also have complex supply chains, often extending through one or more countries outside the United States. This makes communication through the supply chain extremely challenging, and requires time to work through such a substantial change to Prop 65 warnings.

OEHHA should clarify an unlimited sell through provision for goods already manufactured

OPEI supports the following comment on this subject as stated in the coalition letter submitted by the California Chamber of Commerce and Consumer Brands Association, to which OPEI is a signatory.

Businesses made substantial financial commitments complying with the 2016 modified short-form warning requirements. To minimize an increase in waste, reduce costs on businesses, and to minimize litigation liability, OEHHA should make expressly clear of its intent to provide an unlimited sell-through provision for those products already manufactured within 36 months from adoption by the Office of Administrative Law.

OEHHA should clarify that only one chemical per toxicity is required on the short-form warning

OPEI supports the following comment on this subject as stated in the coalition letter submitted by the California Chamber of Commerce and Consumer Brands Association, to which OPEI is a signatory.

As written, the modified rulemaking is not clear how a business should select which Prop 65-listed chemical(s) to warn for. The newly proposed section 25603 appears to require that the short form warning identify all chemicals to which the warning applies, thus inferring that any chemical exposures not listed in the warning would not provide safe harbor protection for businesses. This would be a radical departure from existing law that provides a safe harbor for a business that warns for a single chemical per toxicity in the current long-form warning. We urge OEHHA not to adopt this revision, or alternatively, clarify that the new short form warnings only need contain one exemplar chemical per toxicity (i.e., cancer and reproductive). This could be achieved by adding a new section 25603(b)(3) as follows:

(3) Using the elements identified in subsection (b)(1) and (b)(2) of this section, shall be deemed a clear and reasonable warning for all carcinogens when an cancer warning is provided pursuant to subsection (b)(2)(A) and for all reproductive toxicants when a reproductive toxicity warning is provided pursuant to subsection (b)(2)(B) and for all carcinogens and reproductive toxicants when a warning is provided pursuant to subsection (b)(2)(C).

OEHHA should increase the allowed space for short-form warnings from 12 to 40 inches

OPEI supports the following comment on this subject as stated in the coalition letter submitted by the California Chamber of Commerce and Consumer Brands Association, to which OPEI is a signatory.

The warning label size limitation is still insufficient to account for the realities of today's marketplace. Additionally, the size limitation is completely random and lacks any justification based on marketplace surveys. There are numerous other state and federal regulations that require specific warnings or safety instructions to the consumer that must be included on product labels. These regulations in many instances also require the information be provided in an alternative language. Absent a marketplace survey, the Coalition suggests the short-form warnings be allowed for all labels less than or equal to 40 square inches, a number that balances an average size consumer product label and the reality of competing labeling requirements.

Additionally, it would be very difficult or impossible to fit all required consumer and other information on a label that is only slightly larger than 12 square inches (about 3.5 inches on a side if the label is square) in appropriate font size, if that information would have to include the long-form warning. This is particularly the case for some OPEI members who must provide information in multiple languages, as that would mean translated long-form warnings as well. Such practical limitations mean that OEHHA should allow short-form warnings to be included on labels up to 40 square inches.

OEHHA should eliminate ambiguities in the proposal which will only increase litigation

OPEI supports the following comment on this subject as stated in the coalition letter submitted by the California Chamber of Commerce and Consumer Brands Association, to which OPEI is a signatory.

The newly proposed regulations introduce two concepts that would be the subject of significant litigation and that are unduly and unreasonably ambiguous: (1) the "label available for consumer information" concept, and (2) the "package shape or size cannot accommodate" concept. See Proposed Section 25602(a)(4). Neither of these concepts is defined. As such, the short form warning will not actually serve as a safe harbor because litigious private enforcers could argue that long form warnings could have been given because the entire label is "available for consumer information" rather than just a part of the label. Similarly, litigious private enforcers could argue that the package could accommodate the long form warning. If adopted in this form, the overall effect will be to repeal the short form warning. Should OEHHA proceed with this proposed rulemaking, we urge OEHHA to remove the second concept from the regulation in its entirety because it is not readily susceptible to predictable application and dramatically undermines or totally eliminates the safe harbor concept. We also urge OEHHA, if it does not simply abandon these revisions as it should, to state in the revised regulation that only one-third of a label is "available for consumer information" so that there is a clear, measurable standard.

In conclusion, OPEI requests that OEHHA withdraw this proposal. If it does not withdraw the proposal, OEHHA should delay its adoption, provide a three-year transition after adoption, and implement OPEI's other recommended amendments and requested clarifications. Thank you for the consideration of these comments, and please let me know if you have any questions.

Best regards,



Daniel J. Mustico
Senior Vice President, Government & Market Affairs
(703) 678-2990; dmustico@opei.org