



December 18, 2023
Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, CA 95812-4010

These comments submitted online at: <https://oehha.ca.gov/comments>

Dear Ms. Vela:

The Pool and Hot Tub Alliance (PHTA) appreciates the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHHA") Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings dated October 27, 2023 ("Proposed Rulemaking"). PHTA is also a signatory to the Coalition comments filed by the California Chamber of Commerce and the Consumer Brands Association, and the Coalition comments filed by the American Chemistry Council. PHTA incorporates those Coalition comments in full by reference here.

PHTA's additional comments follow.

1. Duplicative labeling requirements for products sold over the Internet or from catalogs will cause confusion.

The proposed changes to Section 25602 (b) (1) and (2) will require duplicate labeling for products sold over the internet and those sold from catalogs.

With the proposed change, the warning language for internet sales will have to be provided at least twice, but with the option to provide it as many as four times. Companies who seek to comply may end up providing the warning on 1) the product page, 2) by hyperlink labeled "WARNING," 3) on the checkout page prior to purchase, and 4) on accompanying required labeling when the product is received, all to help ensure that the product is fully compliant.

With the number of possible locations for presenting this information on internet-sold products, consumers are left with a possibly confusing array of places to look for the required warnings.

For products sold from catalogs, the requirements are less onerous in that only two presentations of the warning are provided: 1) in a space in the catalog that clearly associates the warning with



the product and 2) again, on the product when it is received by the customer. Given the often-extensive amount of lead time required for publishing catalogs, even with fewer locations for warnings available, the potential for a misalignment between catalog warnings and product warnings or simple error in assembling these multiple warnings has the potential to mislead or confuse customers.

In short, this change will provide potential for inconsistency between these warnings. This will have the tendency to increase consumer confusion and potentially expose the companies seeking to comply with greater risk of private enforcement lawsuits.

2. Changes to the information required by the Short-form label will expose more companies to specious and frivolous lawsuits.

Proposition 65 relies largely on private claimants for enforcement of its provisions. This has led to both the widespread prophylactic presentation of Prop 65 safe harbor labels that the OEHHA cites as its reason for changing the short-form labeling requirements, and a cottage industry of attorneys who specialize in suing product manufacturers based on the information presented in the Proposition 65 labeling or lack thereof. Manufacturers cannot reasonably know all trace elements that may be included in their products or its packaging.

Though OEHHA cannot change the enforcement mechanism presented by its enabling legislation, the act of reducing the number of companies who will be able to place safe harbor labels on their products because of inability to name a chemical from the Proposition 65 list in good faith will necessarily lead to more companies being sued because of alleged failure to warn. This is a cost that will be borne by the manufacturers and their insurance companies alone and will have widespread negative effects on the California economy.

3. The Proposed Rulemaking is a change that will disrupt and burden businesses.

OEHHA's proposed changes are not mere clarifications to non-binding guidance. OEHHA is proposing changes that will require all businesses currently using the short-form warning to change that warning everywhere it is used.

For manufacturers who have hundreds or even thousands of SKUs affected by the Proposition 65 warning, this change in labeling requirements will result in hundreds of thousands of discrete warnings, on products and packaging, online presentation, and on Safety Data Sheets (SDSs) and accompanying product documentation.



For a given pool chemical manufacturer, the potential burden of just making the short-form label changes themselves is substantial. For example:

- For labels printed before fulfillment, a manufacturer would need to reprogram labeling templates to accommodate the new requirement. The existing software, hardware, and labeling stock may not be able to accommodate the new labeling font size or content, requiring potentially expensive upgrades and changes to workflows.
- For pre-printed labels, existing labels would need to be revised. If chemical names are also added, this adds another layer of complexity to the process of managing those labels in the flow of commerce. In addition to ensuring that labels are consistent with the product, a manufacturer will need to monitor for changes to names presented because of its own or supplier formulation changes, and new chemicals that may appear on the Proposition 65 list in future.

Many chemicals on the Proposition 65 list are essential or inherent to pool industry products (resins, biocides, and the like) and cannot simply be formulated out of them. This means that the only compliance option is to issue a warning.

The proposed regulatory economic impact analysis should take these compounded costs and burdens on business into account.

4. OEHHA's proposed change lacks justification.

OEHHA makes several assumptions relating to the effect of the prophylactic over-labeling taking place now to support its regulatory proposal. From those assumptions, it concludes that the addition of a specific chemical exposure for which a warning is given will improve the information conveyed. These assumptions are largely unsupported by any evidence presented by OEHHA.

The agency has revealed no results from analysis of consumer behavior to show: 1) whether consumers will consider the newly proposed information in the short-form warning differently than the existing labeling, 2) whether they will better understand the changed information, and 3) whether the labels promote better decision-making during product selection or at point of sale.

Before taking action to modify the short-form labeling, the OEHHA should survey consumers to better understand how they interpret and act on the information presented by both short and long



form labels. OEHHA should release the results of such a survey to support these or any further changes to Proposition 65 warning labels.

5. If OEHHA proceeds with changes to the Short-form Warning, then the effective date should account for pre-printed label stock.

Many manufacturers purchase an advance supply of pre-printed label stock, often in excess of a million or more labels due to pricing considerations. It is very costly, and environmentally wasteful, to dispose of pre-printed label stock every time a regulation changes. If OEHHA ultimately proceeds with changes to the short-form warning, manufacturers should be allowed a period enabling the use of existing label stock. This period should apply not only to products manufactured and labeled before the operational date, but also to the label stock that was purchased or produced before the operational date. A minimum of five years will be required for many companies to sell through existing label stock.

6. Additional labeling requirements will tend to increase minimum package size for smaller packages.

Many products in the pool and hot tub industry are packaged in small containers. The proposal to add a requirement to identify a specific chemical and add text relating to the warning content per the changes to section 25603 Consumer Product Exposure Warnings - Content to the short-form label would have a negative impact on companies that market their products in small packaging. The six-point font size limit and requirement to name at least one chemical plus the added verbiage will overburden the short-form labels to the point where they will no longer be able to be considered “short-form.”

This added information will have an impact on container size to accommodate the additional information and will likely force companies who produce relatively small items to increase the size of their packaging to accommodate existing necessary branding and use instructions along with the larger short-form warning. The need to increase and change the size of packaging will have an added cost for these companies in addition to other costs already mentioned. It will also have a cumulative negative environmental effect through disposing of unused packaging as waste, increased energy and resource use through new packaging production, and increased carbon footprint for less efficient transport of larger packages in addition to the additional energy costs.



7. New labeling requirements will not increase usable information provided to consumers.

Despite a chemical's inclusion on the Proposition 65 list and the associated testing that placed it there, a change in the Proposition 65 labeling to include a named chemical does nothing to increase the ability of consumers to make informed choices between products. The Proposition 65 safe harbor short-form warning labels do not provide any additional information about the actual risk that the presence of these chemicals may cause to the purchaser or user, and do not give meaningful information to any but the most educated consumers.

PHTA requests that the Proposed Rulemaking amending the short-form warning requirements under Article 6 be withdrawn. PHTA would appreciate the opportunity to discuss the points above more fully and answer any questions you may have. Please feel free to contact me at gceton@phta.org.

Sincerely,

A handwritten signature in black ink, appearing to read "GCeton", written over a light blue horizontal line.

Gregory Ceton
Director, Codes and External Standards
Pool and Hot Tub Alliance

cc. Justin Wiley, Vice President, Government Relations, Standards, and Codes, PHTA
Tyler Jones, Director, Government Relations, PHTA
Seth Ewing, Senior Director, Member Programs and Services, PHTA

Please note that effective January 1, 2024, the PHTA headquarters will change address. The new address will be:

Pool and Hot Tub Alliance
1650 King Street, Suite 602
Alexandria, VA 22314