

January 3, 2024

Ms. Monet Vela
Office of Environmental Health Hazard Assessment (OEHHHA)
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 (SECTIONS 25601 - 25603, 25607.2), AND PROPOSED NEW SECTIONS (25607.50 - 25607.53)

Dear Ms. Vela:

The Outdoor Power Equipment Institute (OPEI) and Outdoor Power Parts & Accessories Association (OPPAA) submit the following comments on the subject rulemaking. We request amendments to:

- a. Modify the proposed new sections § 25607.50. and § 25607.51. to include the products manufactured and distributed by our members, consistent with definitions in the California Code of Regulations, and
- b. Modify section § 25603 to revise the transition period to at least three years following the date of adoption.

OPEI and OPPAA are also signatories to the coalition comments submitted by the California Chamber of Commerce and Consumer Brands Association, and the American Chemistry Council.

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. OPEI members ship approximately 35 million products in the U.S. annually, including 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 OEHHHA’s safe harbor guidelines, including those adopted approximately five years ago for short-form warnings. Current OEHHHA 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.

About OPPAA

For over 35 years, the Outdoor Power Parts and Accessories Association (“OPPAA”) has promoted quality of replacement parts and accessories as an equivalent and economical means for the maintenance and repair of outdoor power equipment. As a member-driven organization, representing outdoor power equipment parts and accessories manufacturers, suppliers, and distributors, with a purpose to facilitate the growth and availability of quality replacement parts and accessories to the outdoor power equipment industry.

§ 25607.50. Passenger or Off-Highway Motor Vehicle Parts Exposure Warnings – Methods of Transmission; § 25607.51. Passenger or Off-Highway Motor Vehicle Parts Exposure Warnings – Content.

The outdoor power equipment industry shares a common supply chain with the motor vehicle industry, and with it, the challenge of thousands of disparate, and many times small, replacement and spare parts stocked and sold by a vast network of retailers and dealers. The OPE industry also, like the motor vehicle industry, manufactures products which are durable, have extended service periods, and are commonly serviced, repaired, and re-sold.

For these reasons, OPEI and OPPAA request that OEHHA revise the scope of these new safe harbor warnings to include “‘off-road vehicle’ or ‘off-road equipment’”¹, “‘small off-road engine’”², “‘small off-road equipment’”³ and “‘zero-emission small off-road equipment’”⁴ manufactured and distributed by our

¹ CA Code of Regulations, Title 13, § 2401 (a) (37): “‘Off-road vehicle’ or ‘Off-road equipment’ means any non-stationary device, powered by an internal combustion engine or motor, used primarily off the highways to propel, move, or draw persons or property including any device propelled, moved, or drawn exclusively by human power, and used in, but not limited to, any of the following applications: Marine Vessels, Construction/Farm Equipment, Locomotives, Small Off-Road Engines, Off-Road Motorcycles, and Off-Highway Recreational Vehicles.”

² CA Code of Regulations, Title 13, § 2401 (a) (45): “‘Small off-road engine’ means any engine that produces a gross horsepower less than 25 horsepower (at or below 19 kilowatts for 2005 and later model year), or is designed (e.g., through fuel feed, valve timing, etc.) to produce less than 25 horsepower (at or below 19 kilowatts for 2005 and later model year), that is not used to propel a licensed on-road motor vehicle, an off-road motorcycle, an all-terrain vehicle, a marine vessel, a snowmobile, a model airplane, a model car, or a model boat. If an engine family has models below 25 horsepower (at or below 19 kilowatts) and models at or above 25 horsepower (above 19 kilowatts), only the models under 25 horsepower (at or below 19 kilowatts) would be considered small off-road engines. Uses for small off-road engines include, but are not limited to, applications such as lawn mowers, weed trimmers, chain saws, golf carts, specialty vehicles, generators and pumps. All engines and equipment that fall within the scope of the preemption of Section 209(e)(1)(A) of the Federal Clean Air Act, as amended, and as defined by regulation of the Environmental Protection Agency, are specifically not included within this category. Any compression-ignition engine, as defined in Section 2421, produced during the 2000 and later model years shall not be defined as a small off-road engine.”

³ CA Code of Regulations, Title 13, § 2401 (a) (46): “‘Small off-road equipment’ means any off-road equipment powered by a small off-road engine, or comparable electric motor or other power source.”

⁴ CA Code of Regulations, Title 13, § 2401 (a) (61): “‘Zero-emission small off-road equipment’ means any small off-road equipment that produces zero emissions of any criteria pollutant (or precursor pollutant) under any and all possible operational modes and conditions.”

member companies. This terminology is the basis of state regulation of our industry by the California Air Resources Board.⁵

It is also important to note that there is regulatory precedent for the use of a broad definition of off-road equipment, which includes heavy, agricultural and outdoor power equipment. Recent examples include definitions used for qualified commercial clean vehicle tax credits included in the 2022 Federal Inflation Reduction Act⁶ and the U.S. Environmental Protection Agency's regulation of PIP 3:1 under the Toxic Substances Control Act.⁷

Examples of products manufactured and distributed by our members and consistent with the referenced state definitions include:

- Lawn mowers – includes ride-on, stand-on, remote controlled, autonomous and robotic mowers, and walk-behind models.
- Handheld equipment – examples include trimmers, chainsaws, and blowers.
- Off-road vehicles – examples include all-terrain vehicles, utility vehicles, golf carts that are manufactured primarily for off-road use and generally cannot be used on public highways.
- Compact utility tractors – tractors with four wheels and a powertrain and chassis that perform primarily farming activities. These tractors typically have standard in-built mechanisms to power and attach implements for various farming activities including mechanical power take off (PTO) with rotating shafts, 3-point hitch for lifting and off highway towing, and hydraulic PTOs.
- Turf management equipment – includes, but is not limited to, aerators, seeders, brush cutters, dethatchers, top dressers, groomers, debris blowers, turf vacuums, sweepers, power brooms, turf sprayers, bunker rakes and greens rollers.
- Construction equipment – includes, but is not limited to, excavators, horizontal directional drills, walk-behind and riding trenchers, surface miners, skid steers and compact utility loaders, vibratory plows, concrete and mortar mixers and material buggies.
- Tree care equipment – includes, but is not limited to, stump grinders, log splitters, chippers and shredders.

In summary, we request that OEHHA include the definitions outlined above, by reference, in the covered scope of the proposed new section amendments.

⁵ Final Regulation Order, Amendments to the Small Off-Road Engine Exhaust Emissions Regulations, California Code of Regulations, Title 13, Division 3, Chapter 9. Off-Road Vehicles and Engines Pollution Control Devices, Article 1. Small Off-Road Engines – Small Off-Road Engine Exhaust Emission Regulations, Adopted August 2022, Section 2401 – Definitions, (a), (37), (45), (46) and (61).

⁶ 26 U.S. Code § 45W (c) (2) (B)

⁷ 87 Fed. Reg. 82287, 82301 (Nov. 24, 2023). “Lastly, as explained in the March 2022 PIP (3:1) final rule extending the PIP (3:1) compliance date, EPA generally interprets the term “motor vehicle” to mean a transport vehicle that is propelled or drawn by mechanical power, such as cars, trucks, motorcycles, boats, and construction, agricultural, and industrial machinery. EPA is proposing to include a reference to “heavy machinery” in the exclusion to clarify this.”

§ 25603. Consumer Product Exposure Warnings – Content.

The current proposal, like the preceding rulemaking proposal from January 2021, amended in December 2021, would upend the Article 6 warning requirements that went into effect five years ago. During this period, OPEI and OPPAA members invested significant time and capital to overhaul their Proposition 65 warning programs to bring them into compliance with the 2016 regulations, including use of short-form warnings.

Furthermore, the proposed amendments are coming at a time that the OPE industry is just coming out of the COVID pandemic and supply chains have not yet returned to their pre-COVID status. OPEI and OPPAA members are still experiencing supply chain shortages for some components although things are significantly better than they were a year ago. The industry is also facing significant challenges on the chemical regulations front with PIP 3:1, PFAS, and other substances. The proposed restrictions and reporting requirements regarding TSCA, REACH, and state-level registration and reporting requirements are already burdening manufacturers and their suppliers, requiring adequate, and in the case of these amendments, additional time to collect information from suppliers.

The current proposal would impact OPEI and OPPAA members of all sizes, with costs for some members, for the second time in five years, 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 and OPPAA 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, and far exceed the individual business and overall estimates included in OEHHA's proposal.

Examples of new investments that would be required if OEHHA were to finalize the proposed amendments include:

- Manufacture 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 two-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 two-year transition period.
- Engagement with retailers and authorized dealers who in some cases share responsibility for the application and proposed changeover of Proposition 65 warnings. This cooperative effort requires financial investment and time likely to exceed the proposed two-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.

For these reasons, we request that OEHHA amend the effectivity date to at least three years following adoption of the regulation, instead of the proposed two. This request is consistent with our comments on the 2021 and 2022 rule proposals and is necessary for our members to address the practical and financial burdens explained above.

We recommend a three-year transition period to reflect the fact that the proposed amendments to § 25603 are a complex technical amendment of Article 6. 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 option of a short-form warning without identifying specific chemicals would not be available.

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 three-year transition period.

The current proposal would provide a two-year transition period. This is an improvement on the one-year transition period proposed as part of the 2021 and 2022 rulemakings. Nevertheless, it would be insufficient for our industry. Member companies would be compelled to evaluate and re-label all their short-form 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 outdoor power equipment 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 retailer, adding great complexity to the process.

The proposal would require significant investments in IT infrastructure, educational tools, website upgrades, packaging, and communications to coordinate across the distribution/retail chain, all requiring at least 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, including thousands of different suppliers, 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. We also reiterate that all of these challenges are common between our industry and the motor vehicle sector, based on the nature of our manufactured products and our common supply chain.

In summary, OPEI and OPPAA request amendments to:

- a. Modify the proposed new sections § 25607.50. and § 25607.51. to include the products manufactured and distributed by our members, consistent with definitions in the California Code of Regulations, and
- b. Modify section § 25603 to revise the transition period to at least three years following the date of adoption.

Thank you for consideration of these comments, and we are available to provide additional information or answer questions as may be required.

Best regards,

A handwritten signature in black ink that reads "Daniel J. Mustico". The signature is written in a cursive style with a large, sweeping initial 'D'.

Daniel J. Mustico
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