June 13, 2014

ELECTRONIC MAIL

Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, California 95812-4010
E-mail: P65Public.Comments@oehha.ca.gov

Re: Proposition 65 Warning Regulation

Dear Ms. Vela:

The California Parks and Attractions Association (CAPA) submits these comments to the Office of Environmental Health Hazard Assessment's (OEHHA) pre-regulatory draft proposal to amend warning regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act (Proposition 65). These comments express the concerns of CAPA's members to the draft regulations and propose revisions that are essential if a workable regulation is to be achieved.

CAPA is a trade association which represents virtually all of California's theme, amusement and water parks, from world renowned destinations such as Disneyland, Universal Studios and SeaWorld, to small family-owned parks throughout the state. Our members produce more than $14 billion in annual state commerce and directly employ more than 125,000 workers. Our industry serves as a vital foundation of the state's $97 billion per year tourism industry and provides the economic livelihood for communities throughout California.

CAPA members appreciate and support the portion of the amusement parks specific regulation that makes explicit that posting signs for guests to see before they enter the parks satisfies the parks' obligation to warn. Warning guests before they enter the premises satisfies the requirement of Proposition 65, it is prior to any exposure. It also allows parks to preserve the total, entertainment environment for guests, permitting them to escape from reality during their visit. Whereas, signs posted throughout the premises would detract from the parks' themes and result only in redundant and unnecessary warnings, threatening to diminish the positive economic impact that amusement parks have on California tourism.
While CAPA members support warning signs placed for guests before they enter the parks, they would oppose virtually all of the rest of the regulation unless the amusement park portion is revised to produce a workable warning mechanism that does not increase abusive litigation. The revisions that are necessary to achieve a realistic warning approach for amusement parks are addressed in the following comments.

A. METHOD OF TRANSMISSION

1. Location of Signs.

The draft regulation provides in paragraph 1, subsection (e), section 25607.17, Warnings for Specific Environmental Exposures, that the warning message shall be posted so that it is available before people enter the park premises. CAPA's members support this proposal. That clarification is needed to avoid unnecessary future litigation. Private enforcement actions have been brought in the past because signs were not posted throughout the park facilities at each location where an exposure, no matter how inconsequential, could occur. If guests are advised about possible exposures before entering, little is gained and much is lost from installing dozens of additional signs throughout the parks.

While CAPA members support the concept of the proposal in paragraph (1), the language needs to be revised to avoid unintended consequences. The intent, of course, is to ensure guests pass by a conspicuous warning before they enter the premises. The draft language, "at each point of entry" could be construed to include every conceivable entry to the premises, which could lead to unintended litigation. To remove that ambiguity, CAPA urges that the language should be revised as follows:

(1) The warning message shall be provided at each point of entry to the facility on a 20 by 20 inch sign in a print font no smaller than 72-point type, placed so that it is readable and conspicuous to individuals before they enter the premises.

In addition, CAPA urges OEHHA to define what is meant by the term "premises" in the context of amusement parks. Amusement parks in California are varied. They range from relatively small parks with limited services other than their principal attractions to large parks with substantial services, such as restaurants and hotels, to support guests as they visit the attractions. To avoid ambiguity about what is intended within the meaning of a park's "premises," CAPA urges the following definition to be added to paragraph (1), subsection (e):

CAPA supports and endorses the comments and recommendations provided by the California Chamber of Commerce Coalition to strike nearly all of the draft regulation, maintain the current safe harbor warning approach, and simply add a reference in the warning to OEHHA's Web site on Proposition 65. CAPA also supports the Coalition's comments and recommendations relating to the activities of amusement parks, such as, the sale of consumer products, including food, the operation of restaurants and hotels, and occupational and other environmental exposures.
For this subsection and subsection (f) of this section, "premises" shall mean the entirety of the amusement park facility, including, but not limited to, parking lots, hotels, restaurants, and retail, dining and entertainment complexes.

2. **Warnings Not Required.**

   CAPA appreciates the sentiment reflected in paragraph (2), subsection (c), section 25607.17, that no warning is required if there is no exposure within the meaning of Health and Safety Code section 25249.6. That statutory provision prohibits a person from causing an exposure without first providing a warning.

   Candidly, while no amusement park wants to provide an unnecessary Proposition 65 warning, parks have concluded that they are required to do so to minimize the threat of private enforcement lawsuits. If a private enforcer may allege that a listed chemical is present, the park feels compelled to warn even if the potential for exposure is slight or the exposure level is likely below the applicable no significant risk level or maximum allowable dose level. Paragraph (2) does not change the analysis that parks have made about the risk of litigation. However, CAPA is concerned that the subsection may have other unintended consequences.

   Paragraph (2) may be construed to prohibit a warning where a chemical is present but the potential for exposure or level of exposure is slight. If that is the case, amusement parks could find themselves being sued for warning as well as for not warning. Accordingly, CAPA suggests that paragraph (2) be removed from any definition of a clear and reasonable warning for amusement parks.

3. **Other Warnings Required.**

   Paragraph (3), subsection (c), section 25607.17 requires an amusement park to provide, in addition to the warning sign required in paragraph (1), the warnings also "specified for retail sellers of consumer products, alcoholic beverages, and foods where such exposures occur on the premises." CAPA objects to this provision. It mandates duplicate warnings. It requires warnings for the same exposures that are included in the warning provided to guests prior to their entering the premises. Accordingly, CAPA suggests that paragraph (3) be removed and warnings for all exposures be encompassed in the entry warnings.

**B. WARNING CONTENT**

   The required content of the warning signs is set out in subsection (f), section 25607.17 in five paragraphs. CAPA addresses each of those requirements that are problematic to its members in the following sections of these comments.
1. Pictogram.

The proposal in paragraph (f), subsection (f), section 25607.17, to require the addition of the international health hazard pictogram should be dropped or, at least, deferred until evidence exists demonstrating that most California consumers can correctly identify the symbol. Today, the pictogram is, at best, meaningless and most likely, confusing and misleading. Moreover, it is redundant on a label or sign that begins with the bolded word “WARNING.”

The pictogram, often referred to as the exploding chest symbol, was adopted by the European Union initially to communicate hazards to workers engaged in handling cargo being shipped throughout the 28 countries that make up the European Union. The committee that developed the pictogram chose a symbol for which no previous experience existed anywhere in the world which is a significant reason that the pictogram is not recognized.

The pictogram is intended to communicate a health hazard other than one that poses “acute toxicity,” “very toxic (fatal),” or “toxic.” Those hazards are characterized by a skull and crossbones pictogram. The exploding chest is intended also to communicate a hazard other than “acute toxicity (harmful),” or a “skin and eye irritant,” “respiratory irritant,” “skin sensitizer,” and “narcotic.” Those hazards are characterized by an exclamation mark. The exploding chest can mean “carcinogen,” “mutagenicity,” “reproductive toxicity,” “respiratory sensitizer,” “target organ toxicity,” and “aspiration toxicity.” In other words, even if someone recognized the pictogram, it would symbolize three health outcomes totally unrelated to Proposition 65. Of course, the pictogram symbolizes nothing to most people in the United States, let alone California, and not even to people in the European Union where the symbol has been used.

The European Union began implementing the Globally Harmonized System (GHS), of Classification and Labeling of Chemicals in January 2009, to provide information on the hazards and toxicity of chemicals to workers and consumers during the handling, transport, storage and use of chemicals. See Study on the Communication of Information to the General Public, European Chemicals Agency (Jan. 2012). The European Union regulation required the European Chemicals Agency (ECHA) to study the communication of information to the general public.

The communication study was conducted in two parts. First, over 26,000 European citizens were interviewed from all member states. Second, qualitative research was conducted by a team of academics in the field of risk research and consisted of in-depth interviews with 242 citizens. Ibid. In the interviews, only 20% of EU citizens reported that they were familiar with the exploding chest pictogram. In the qualitative research, conducted nearly one year later, only 12% reported they were familiar with the symbol. Ibid.

The low familiarity with the exploding chest pictogram contrasts dramatically with the U.S. standard for comprehension acceptability. To be acceptable in terms of comprehension, 85% of a sample of 50 people must comprehend the intended concept with no more than 5%

Interestingly, only U.S. OSHA has adopted the pictograms of the GHS in the United States. None of the federal agencies generally involved with consumer hazards and public health, such as the Consumer Product Safety Commission, Department of Commerce, Environmental Protection Agency, and Food and Drug Administration, have moved to adopt the GHS pictograms. Hence, the pictogram will have very limited recognition in the United States. Certainly, the recognition here will be nothing compared to its use in Europe where only 12-20% of the people surveyed in 2012 were familiar with the exploding chest pictogram. That is a far cry from ANSI’s 85% comprehension standard.

OSHA recognized that the pictograms are not familiar to workers, and as a consequence, required employers to train workers on the new safety data sheets, including the pictograms. Ibid. No such training exists for California consumers. It would take a multi-million dollar campaign to raise Californians awareness of the exploding chest pictogram. Even then, it would add nothing to the Proposition 65 warning. It performs less well because of its ambiguity than the use of the bolded word “WARNING” on every notice. No purpose is served by adding ineffective redundancy.

At best, the pictogram is meaningless, but it consumes space on product labels and warning signs. Of even greater concern is that the pictogram is most likely confusing and misleading. Few people will know what it means, others will speculate, and some will assume a hazard that is many orders of magnitude greater than the hazard posed by the particular exposure giving rise to the warning.

The fact that the draft regulation does not require the pictogram for prescription drugs, dental care, and for foods, whether purchased at a store or in a restaurant, including alcoholic beverages demonstrates a recognition that the exploding chest pictogram (1) is likely to overstate the hazard, (2) cause confusion in that it could mean that the product, location, or service may have immediate and fatal health consequences, and (3) a textual message is more informative than an ambiguous symbol. The same is equally true for all products, workplaces, and environmental warnings.2

2. Will vs. May Expose.

Paragraph (3), subsection (f), section 25607.17 requires the warning to state at the beginning, “Entering these premises will expose you to varying levels of chemicals such as lead, cadmium, vehicle exhaust, and certain phthalates....” This is a significant change from

CAPA’s position on the pictogram is the same as that of the Chamber Coalition. To ensure that its comments are comprehensive and establish a complete record, CAPA includes the Coalition’s comments on the pictogram in these comments.
the current safe harbor warning that provides, “This area contains a chemical known to cause....”

The current regulation recognizes that while an area may contain a listed chemical, whether an exposure occurs depends on a person’s activities while in that area. That is certainly true for amusement parks.

The draft regulation specifies four chemicals to be included in the warning — lead, cadmium, vehicle exhaust, and phthalates. However, a park guest could spend an entire day without ever being exposed to any of those chemicals. A guest who never touches a brass rail, handles a product containing cadmium or phthalates, or parks in a parking garage would not be exposed to any of those four listed chemicals. Hence, it is more truthful and accurate to state that a guest may be exposed to one of those chemicals. In fact, it is an overstatement, a false statement, to state that a guest will be exposed to one of those chemicals simply by entering the premises. Requiring a park to make such a statement would violate its First Amendment rights. “Laws that restrict commercial speech remain subject to heightened scrutiny, as do laws that compel a commercial speaker to adopt, endorse, or subsidize a message or viewpoint with which it disagrees.” *Beeman v. Anthem Prescription Mgmt., LLC* (21013) 58 Cal.4th 329, 363.

Accordingly, CAPA urges you to revise Paragraph (3) to require the warning to state that, “Entering these premises may will expose you to the listed chemicals.”

3. Pamphlet.

Paragraph (3), subsection (f), section 25607.17, requires the warning to include a statement that an informational pamphlet is available at each of the parks’ public entrances, and paragraph (4) specifies the information that is to be included in the pamphlet. CAPA objects to both provisions and urges OEHHA to remove them from the definition of a clear and reasonable warning for amusement parks.

Maintaining and distributing Proposition 65 pamphlets as envisioned by the draft regulation is no small task. For example, one park has 27 entrances for guests. The proposal would require parks to produce and maintain pamphlets at each entrance. An even greater concern is that the proposal would require the parks to provide staffing at each entrance to assure that the Proposition 65 pamphlets are available and provided to anyone who requests one. The cost of assuring compliance with that requirement would be disproportionately high.

Moreover, experience demonstrates that such pamphlets containing detailed, technical information would not hold a guest’s interest for any more than a very short time. Then the pamphlets would become litter to be picked up and disposed as solid waste throughout the day. Pamphlets simply are not workable.

Finally, OEHHA has inconsistently provided for pamphlets in the draft regulations. In some parts of the regulation, pamphlets are permitted but not mandated. No rationale for
treated various businesses differently has been provided. Certainly, no sound basis exists for requiring pamphlets at every entrance at amusement parks. Again, CAPA urges OEHHA to strike the provisions in paragraphs (3) and (4) relating to the pamphlets.

4. Website.

Paragraph (3), subsection (1), section 25607.17, also requires the warning to refer to OEHHA's Proposition 65 website. CAPA does not object to this requirement. However, as set out below, CAPA objects to the mandate in section 25604 requiring its members to submit detailed information to OEHHA to populate the website.

5. Languages Other Than English.

Paragraph (5) requires the warning sign to be in other languages if languages other than English are used in other signage. California amusement parks host guests from around the world who speak scores of languages. A park that posts an exit or entrance sign in, for example, just two other languages, would be compelled to triple the number of Proposition 65 warning signs. A park with 27 entrances would be required to produce, post, and maintain 81 signs, imposing a significant burden. Also, the absence of just one of those 81 signs could expose that park to litigation.

In addition, parks provide maps describing the location and nature of the various attractions, often in multiple languages. While those maps are technically not signage, they can be displayed in ways to resemble small signs. Again, that would create an obligation for parks to post dozens of additional Proposition 65 warning signs. To require multiple signs in those guests' languages is unnecessary and totally unworkable.

CAPA urges OEHHA to drop the "other languages" provision from the definition of a clear and reasonable warning for amusement parks.

C. OEHHA'S WEBSITE

OEHHA proposes, in section 25604, to require that all businesses submit 11 items of information for each of their Proposition 65 warnings for OEHHA to post on its Web site. This proposal turns a blind eye to the major problem with Proposition 65 today – excessive litigation. Rather than address that problem, section 25604 will exacerbate it. The Web site requirement will cause an exponential increase in unnecessary, but expensive, resource-draining litigation.

OEHHA can avoid adverse consequences while still providing greater information to the public. It can do so by removing the Web site provision from the warning portion of the regulations, by eliminating it as a required element of providing a clear and reasonable warning, and by providing that businesses, or their trade associations such as CAPA, may voluntarily submit information for posting on the Web site without risk of litigation.
During the recent, pre-regulatory workshop, OEHHA staff asked, “How will the Web site requirement increase litigation?” This question can best be answered by comparing the potential for litigation today under the safe harbor warnings with the potential for litigation under the draft regulation.

Today, the safe harbor warnings, whether for products or occupational or environmental settings, cover all chemicals and all exposure scenarios. Hence, the potential for litigation arises only when the business fails to warn and the enforcer alleges that the product or the occupational or environmental setting contains a listed chemical, albeit at infinitesimal levels.

Under the draft regulation, a business is obligated to name in its warnings the specific chemical or chemicals giving rise to the warnings if the chemical or chemicals are among the 12 chemicals listed in section 25605. Then, the Web site regulation requires the business to provide 11 items of information for each chemical to be posted on OEHHA’s Web site. Businesses have to describe the anticipated routes of exposure, the anticipated level of exposure, and actions a person can take to minimize or eliminate exposure.

Under the draft regulation, the potential for litigation arises not only for failing to warn about a de minimis exposure, but it arises in the following illustrative situations even when a warning is provided:

1. A private enforcer alleges that a business is responsible for an exposure to one of the over 900 chemicals on the Proposition 65 list for which the business has not made disclosures pursuant to section 25604.

2. A business describes the apparent route of exposure, but a creative enforcer concocts a plausible, but unlikely, exposure scenario. An example will illustrate this situation. The apparent route of exposure to DEHP in plastic sandals is dermal absorption through the feet. The enforcer, however, alleges that the business should also have described ingestion of DEHP through hand to mouth activities occurring after putting on the sandals.

3. A business describes several locations in an environmental setting where an exposure may occur, but the enforcer alleges that an exposure may occur at another, perhaps more remote, location.

4. The business hires an expert to assess the likely exposure level and submits the report to OEHHA, but the enforcer identifies other information the expert did not consider that the enforcer alleges was “reasonably available.”
5. The business provides information of a practical action to minimize or avoid the exposure, but the enforcer alleges that a less feasible action would be more effective. For example, the business may report that consumers should wash their hands after putting on sandals containing DEHP. The enforcer alleges that consumers should wear gloves in putting on sandals.

The situations described above illustrate that the potential for litigation increases with each variable or factor for which a business will be required to provide information to the OEHHA Web site. Those situations are just some of the obvious ways in which businesses will be exposed to increased litigation. In the hands of creative enforcers, the regulation provides innumerable opportunities to assert that the business failed to provide a clear and reasonable warning.

Businesses should be encouraged to voluntarily provide OEHHA with helpful information regarding potential exposure to listed chemicals for use on the proposed Proposition 65 Web site. However, such information should not be part of the warning regulation, and businesses should not be subject to private enforcement actions based on the information they provide to OEHHA for the Web site. Otherwise, the burden of compliance and costs of litigation on businesses will rise dramatically, in sharp contrast to the stated goals of these proposed regulations.3

D. CONCLUSION

CAPA appreciates OEHHA’s intent to clarify that warning signs at amusement parks satisfy the requirements if they are made available to guests before they enter the premises. CAPA has made suggestions to carry out that intent, including suggesting a definition of “premises” for the specific warnings for amusement parks. In addition, CAPA urges OEHHA to make further revisions to the amusement park subsections to achieve a workable warning approach, that is, one that both reduces litigation and increases information to consumers. Finally, CAPA concurs with the Chamber Coalition’s comments on the draft OEHHA Web site and urges OEHHA to revise the regulation so that businesses may voluntarily submit information for inclusion in the Web site.

3 To ensure that its comments are comprehensive and establish a complete record, CAPA has included portions of the Chamber Coalition’s comments on the Web site in its comments.
All of CAPA’s proposed revisions are set out in a redlined version of the regulation and included as Attachments A and B. CAPA looks forward to working with OEIIIA to achieve a workable regulation for amusement parks.

Sincerely,

CALIFORNIA ATTRACTIONS AND PARKS ASSOCIATION, INC.

By: John Robinson, President and CEO

Enclosures

SAC 442512567v1
(e) Amusement Parks – Method of Transmission

1. The warning message shall be provided at each point of entry to the facility on a 20 by 20 inch sign in a print font no smaller than 72-point type, placed so that it is readable and conspicuous to individuals before they enter the premises. For this subsection and subsection (f) of this section, “premises” shall mean the entirety of the amusement park facility, including, but not limited to, parking lots, hotels, restaurants, and retail, dining and entertainment complexes.

2. Notwithstanding the other requirements of this section, a warning is not required for any chemicals for which there is no exposure within the meaning of Health and Safety Code section 25249.6.

3. In addition to the warning methods and content provided in this subsection, amusement parks must also comply with the warning methods and content specified for retail sellers of consumer products, alcoholic beverages and foods where such exposures occur on the premises.

(f) Amusement Parks – Content

1. The international health hazard symbol.

2. The word “WARNING” in all capital letters and bold print.

3. The words “Entering these premises may will expose you to varying levels of chemicals such as lead, cadmium, vehicle exhaust, and certain phthalates that are known to the State of California to cause cancer or reproductive toxicity or both. An informational pamphlet is available at each public entrance with information about these exposures and how to reduce or avoid them. For additional information go to www.P65Warnings.ca.gov.”

4. The pamphlet required by this subsection shall include information on all known exposures to listed chemicals that occur on the premises, including the location the exposure will occur, the route or routes of exposure, the name or names of the listed chemicals, whether the chemical causes cancer or reproductive toxicity or both, and ways to avoid or minimize exposure, if any. The pamphlet shall not dilute or negate the warning provided pursuant to Health and Safety Code section 25249.6.

5. Where other signage is provided in a language or languages other than English, the warnings required by Health and Safety Code section 25249.6 shall also be provided in those languages in the same manner that the other information is provided.


March 7,
§ 25205604 Lead Agency Website

(a) A person in the course of doing business, or his or her authorized agent, may provide the Lead Agency with any of the following information in the form or manner specified by the Lead Agency, for any listed chemical for which it provides a warning pursuant to Health and Safety Code section 25249.6, within 30 days after it provides the warning.

1. The name and contact information for the person providing the warning.
2. The name and contact information for the manufacturer of any product the warning is intended to cover.
3. The specific products or category of products the warning is intended to cover, including barcodes, if any.
4. The type of occupational exposure to a listed chemical the warning is intended to cover, if any.
5. The type of environmental exposures the warning is intended to cover, if any, and the affected area.
6. The name of the chemical or chemicals for which the warning is being provided.
7. Whether the warning is being provided for cancer, or birth defects or other reproductive harm, or both.
8. The anticipated route, routes, or pathways of exposure to the listed chemical for which the warning is being provided.
9. Reasonably available information concerning the anticipated level of human exposure to the listed chemical, if known.
10. Information concerning actions a person can take to minimize or eliminate exposure to the listed chemical, if any.
11. Whether the warning is being provided in any language other than English and a copy of the translated warning, if any.

(b) A person doing business that provides in the warning all the required information in subsections 1 through 10 is not required to provide the information listed in subsections 1 through 11 to the Lead Agency, but is encouraged to do so. A person providing information pursuant to subsection (a) shall not be considered to be diluting or negating any warning that person provides.

(c) Updates to the information submitted under subsection (a) may be provided within 30 days after if the person providing a warning becomes aware of that an exposure to an additional chemical or chemicals for the same product, occupational or environmental exposure requires a warning, or if any other updates to the information provided pursuant to subsection (a) by subsections 1 to 11 are needed.

(d) The Lead Agency shall develop and maintain a website to collect and provide information to the public concerning exposures to listed chemicals for which warnings are being provided.
pursuant to Health and Safety Code section 25249.6. In carrying out this provision the Lead Agency shall:

1. Develop an interactive web-based portal to collect and display the information provided pursuant to subsection (a).

2. Review the information provided to the Lead Agency pursuant to subsection (a), to assure minimum standards of quality and accuracy.

3. Provide an objective process to correct or remove information pursuant to an appeal by a person in the course of doing business who objects to information contained on the website, for example, on the ground that the information is not supported factually or by sound science, or is otherwise inaccurate or invalid.

4. Provide general information to the public concerning listed chemicals, common routes or pathways of exposure and strategies for reducing or avoiding exposure to those chemicals where possible, including but not limited to exposures from listed chemicals, through:
   (A) Ingesting foods
   (B) Contact with or use of consumer products or dental services
   (C) Common environmental scenarios
   (D) Occupational activities

5. Provide links to other entities including, but not limited to the following: the federal Food and Drug Administration, the federal National Toxicology Program, the Surgeon General, the National Institute of Occupational Safety and Health, the National Academy of Sciences, and the U.S. Environmental Protection Agency, the International Agency for Research on Cancer, the National Institute of Health, as appropriate, to assist individuals who wish to obtain additional information about listed chemicals, nutritional benefits, health concerns or related issues.

(c) A person in the course of doing business is not in violation of Health and Safety Code section 25249.6 whether the person submits no information or some information to the Lead Agency pursuant to subsection (a). A person who, in the course of doing business, voluntarily provides information to the Lead Agency pursuant to subsection (a) shall not be subject to an enforcement action with respect to either the adequacy or sufficiency of the information provided or otherwise subject to suit under Health and Safety Code section 25249.7.