April 8, 2015

ELECTRONIC MAIL

California's Great America
Children's Fairyland
Disneyland Parks and Resorts
Funderland
Gilroy Gardens Theme Park
Golfland Entertainment Centers
Knott's Berry Farm
LEGOLAND California
Pacific Park
Palace Entertainment
Pixieland Amusement Park
Redwood Valley Railway
Santa Cruz Beach Boardwalk
SeaWorld Parks and Entertainment
Six Flags Discovery Kingdom
Six Flags Magic Mountain
Sonoma Train Town
The Wave Water Park
Universal Parks and Resorts
Water World California
Wild Rivers Water Park
*Partial list

Monet Vela
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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 in response to the Office of Environmental Health Hazard Assessment (OEHHA) notifying the public on January 16, 2015 of its intent to repeal the current Clear and Reasonable Warning Regulation in Article 6, Title 27 of the California Code of Regulation and to adopt a new Clear and Reasonable Warning Regulation in Article 6. CAPA acknowledges and appreciates the work that OEHHA staff conducted to develop a specific proposed warning regulation for amusement parks. These comments both seek clarity and suggest modest, but important, changes to the regulations that CAPA members ultimately will have to satisfy if and when these regulations are adopted and become effective.

I. Amusement Park Facility

During the public hearing on March 25, 2015, a commenter criticized the proposed regulation, arguing that other than the heading, nothing makes section 25608.20 applicable to amusement parks. Amending that section to read as follows would eliminate that ambiguity:

For amusement parks, entities providing family amusement, recreation, or entertainment at permanent sites, ~~A~~ a warning satisfies the requirements of this Article if it includes the elements required in Section 25608.21 and is provided on a sign posted at each public entrance to the facility in a font no smaller than 72-point type, placed so that it is readable and conspicuous to individuals before they enter the premises.

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II. Other Regulations Affecting Amusement Parks

Subsection (c) of section 25608.20 provides as follows:

> In addition to the warning specified in this section, warnings must be provided for exposures to chemicals in products, alcoholic beverages, food, and enclosed parking facilities where such exposures are reasonably calculated to occur on the premises.

In addition, section 25608.21(a)(1) requires warnings provided by amusement parks to include the symbol required in section 25604(a)(1). Accordingly, amusement parks have a substantial interest in other provisions of the proposed regulations.

a. Symbol

Under the proposed regulation amusement parks will be required to include "a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline" on warnings at the entrance to amusement parks, parking garages, facilities where alcoholic beverages and food and non-alcoholic beverages may be served, and in connection with the sale of products. CAPA urges OEHHA to eliminate, or at least, change the requirements of the symbol.

No need exists for the addition of a symbol on a warning. The warning itself is required to contain the word **WARNING** in all capital letters and bold print. The symbol adds nothing to the warning. In fact, the word **WARNING** is much more informative than a symbol that has an unknown meaning. If the word **WARNING** is not understood, no part of the warning would be understood. Nothing is accomplished by the symbol if the balance of a warning cannot be understood. A much higher percentage of people will recognize and understand the word **WARNING** than will recognize and understand the proposed symbol.

If OEHHA insists on a symbol, it should use one that is simply and clearly associated with Proposition 65. "P65" will quickly be associated with Proposition 65. In fact, OEHHA made P65 its symbol of choice. It recognized the simplicity and clarity of that symbol when it proposed every warning message to include the following statement:

> For additional information go to www.P65Warnings.ca.gov.

During the public hearing, several commenters highlighted the printing problems posed by the required yellow background. This is a particular problem on consumer products for which labels are printed in other colors. Also, labels containing warnings, directions for use and ingredients are typically printed in limited colors. Printing costs will increase significantly if the color yellow must be added to the label.

Also, the proposed regulation will obligate retailers to post warning signs even when the warnings are provided by product manufactures. Such warnings can most effectively be provided electronically by manufacturers to retailers, who need only to print the warning on standard size paper. Many small retailers operate within amusement parks, and what is true for them is true for most retailers, particularly the smaller ones. While most retailers will have black and white printer, it is the rare small retailer who has a color printer. While no symbol is preferable, or at most a P65 symbol, the requirement of yellow in a triangle is problematic for product manufacturers and retailers. It is not necessary. If an exclamation point and a triangle with a bold outline is imposed, it will be just as effective if the exclamation point is set out in a contrasting color, without requiring a specific color.

b. Alcoholic Beverages

Section 25608.3 sets out the proposed methods for providing warnings for exposures to alcoholic beverages. Subsection (a), paragraph (1) of that section provides the following as a method of providing a warning:

> An 8 ½ by 11 inch sign placed at eye level so that it is readable and conspicuous to patrons as they enter the area or areas where, by permit or license, alcoholic beverages are served.

It appears that the purpose of that provision is to require warnings at the entrances to areas where a license issued by the Department of Alcoholic Beverage Control permits alcoholic beverages to be served. ABC licenses areas where the licensee may sell alcoholic beverages and the buyers may consume them. If this is the intent, CAPA urges OEHHA to modify the language to read as follows:

> An 8 ½ by 11 inch sign placed at eye level so that it is readable and conspicuous to patrons as they enter the area or areas where, by permit or license, alcoholic beverages ~~are~~ may be served.

OEHHA's intent should also be confirmed in the Final Statement of Reasons (FSOR). This confirmation together with modifying the language as proposed above will provide guidance to retailers who are required to comply and to private enforcers and courts who have to interpret the meaning of the regulation.

c. Food and Non-Alcoholic Beverages

Section 25608.5 proposes only two methods for providing warnings for exposures resulting from the consumption of food or non-alcoholic beverages. These are the following:

(1) An 8 ½ by 11 inch sign, placed so that it is readable and conspicuous to customers as they enter each public entrance to the restaurant or facility printed in no smaller than 28-point type.

(2) A notice or sign no smaller than 5 by 5 inches placed at each point of sale so as to assure that it is readable and conspicuous printed in no smaller than 20-point type.

CAPA urges OEHHA to address two issues with respect to the methods of providing warnings for food and non-alcoholic beverages.

The first issue relates to providing a warning in a menu. The current regulation specifically includes menus as a method for product warnings. Section 25603.1 today states that one method for providing a warning is "through shelf labeling, signs, menus, or a combination thereof."

Menus are a simple method for providing a warning about exposures resulting from the consumption of food or beverages. It is a particularly elegant method for providing a warning in a themed environment where signs unrelated to the theme are disruptive to the desired ambiance. CAPA urges OEHHA to restore menus as a warning option for food and non-alcoholic beverages.

The second issue relates to the clarity of the warning method. As noted above, the proposed regulation requires a sign at each public entrance to the restaurant or "facility." CAPA assumes that facility means a facility where food or beverages may be consumed. However, the language is not explicit. OEHHA would add clarity to this language if it confirms in the FSOR that CAPA's interpretation is correct. Again, OEHHA can add more clarity if it amends the language to read as follows:

> An 8 ½ by 11 inch sign printed in no smaller than 28-point type, placed so that it is readable and conspicuous to customers as they enter each public entrance to the restaurant or facility where food or beverages may be consumed ~~printed in no smaller than 28-point type~~.

d. Product Warnings

Section 25603 sets out three methods for providing product warnings. Subsection (a), paragraph (2) describes one of these methods as follows:

> A product-specific warning provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the product, without requiring the purchaser to seek out the warning.

The Initial Statement of Reasons (ISOR) provides on page 24 that subsection (a)(2) is a "catch all" provision "to capture existing methods of communication, including currently available tools such as electronic shopping carts, QR Codes, smartphone applications, barcode scanners, self-checkout registers, pop-ups on Internet websites, and any other electronic device that can immediately provide a consumer with the required warning."

Section 25600.1 defines "labeling" in subsection (l) and "sign" in subsection (j) to include "electronically provided communication." The ISOR, on page 9, provides that the definition of labeling has been updated to allow the use of newer technology to communicate the required warning. It also provides that the definition of "sign" has been changed to be consistent with the definition of "labeling" to clarify that signs can be presented electronically.

Although it is not clear, CAPA interprets the reference to "electronic device or process" in section 25603 and the reference to "electronically provided communication," in the definition of "labeling" and "sign" in section 25600.1 to include a warning printed on a cash register receipt, provided that a notice at the point-of-sale informs consumers to check the receipt for a Proposition 65 warning and the warning is printed on the receipt only for products for which the retailer has determined a warning is appropriate and not for all products sold. If CAPA's interpretation is consistent, confirmation by OEHHA in the FSOR would provide needed clarity and would provide guidance to retailers and to private enforcers and courts who will be called on to interpret the meaning of the regulation.

III. Website

CAPA endorses OEHHA's decision to divorce section 25205, the website regulation, from the Clear and Reasonable Warning Regulation. To link the two would, most likely, generate a never-ending stream of lawsuits. Accordingly, CAPA also strongly supports the inclusion of subsection (d) in the website regulation. That subsection reads as follows: Compliance with the requirements of subsection (b) shall not be deemed to constitute compliance with the requirement to provide a "clear and reasonable" warning pursuant to Section 25249.6 of the Act, nor shall failure to comply with this section constitute a violation of Section 25249.6 of the Act.

CAPA urges OEHHA to preserve the separation of the website from the clear and reasonable warning requirements and to assure that no private right of action can be initiated against any business based on the website regulation.

IV. Conclusion

CAPA urges OEHHA to adopt the changes to the proposed regulation set out in the comments above to provide the clarity to those who are required to interpret the regulations. CAPA is available to discuss any of these issues at any time if OEHHA desires expansion or clarification of these comments.

Sincerely,

CALIFORNIA ATTRACTIONS AND
PARKS ASSOCIATION, INC.

By: _____
John Robinson, President and CEO

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