



April 26, 2016

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

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) is surprised and disappointed that once again it is compelled to comment on the Proposition 65 warning regulations. When it submitted comments on January 25, 2016 to the warning regulations noticed on November 27, 2015, it expressed acceptance of the amusement parks specific warning regulation. It asked only that OEHHA confirm in the regulatory language and in the Final Statement of Reasons what it had stated during the public hearing, that only one chemical has to be named for the warning to be compliant.

Between CAPA's last comment and the release of the revised regulation on March 25, 2016, a period of only two months, OEHHA made two significant changes to the amusement park warning regulation that reversed the progress toward a workable and legally sound warning regulation. These two changes were made with no notice to anyone connected to amusement parks, despite our regular and ongoing communications concerning the proposed warning regulation for the past two years, and our offer to address any question that OEHHA may have about the impact certain regulatory approaches would have on amusement parks.

Specific Warning for Amusement Parks

The specific warning for amusement parks is found in section 25607.23 of the regulation. After the revision, it provides, [Name of one or more exposure source(s)] in this amusement park can expose you to chemicals such as [name of one or more chemicals] which is [are] known to the State of California to cause cancer or birth defects or other reproductive harm.

The requirement for amusement parks to name one or more chemicals, is, of course, modified by section 25601, subdivision (c). That subdivision revised in the March 25, 2016 version provides, "... a warning meets the requirements of this article if the name of one or more of the listed chemicals for which the person has determined a warning is required is included in the text of the warning. Where a warning is being provided for more than one endpoint (cancer and reproductive toxicity) the warning must include the name of one or more chemicals for each endpoint, unless the named chemical is listed as known to causer both cancer and reproductive toxicity and has been so identified in the warning."

Two Revisions to the Warning Regulation Impose Major Problems

The two changes that have rendered this warning regulation unworkable for amusement parks and of questionable legal validity are (1) the requirement to name one or more exposure sources and (2) the requirement that at least one chemical be named but only a chemical for which the person providing the warning has "determined that a warning is required."

Naming an Exposure Source

The requirement that amusement parks name one or more exposure sources in their Proposition 65 warnings is inconsistent with the thrust during the past two plus years of working on updating the warning regulation; it imposes a confusing burden on parks, subjecting them to increased litigation; and it is legal invalid because of the process OEHHA used for its adoption.

The Effort for Two Years has been to Put Warning Details on the Website

It was generally recognized in 2014 by most of the participants involved in developing this warning regulation that Proposition 65 warnings cannot answer all questions. A detailed, comprehensive warning that covers a multitude of situations will not be read or understood. Accordingly, the decision was made to require businesses to provide a warning designed to attract visitors' attention and supplement that warning with OEHHA's Proposition 65 warning website.

The January 16, 2015 regulation as well as the November 27, 2015 regulation added a warning symbol containing an exclamation point in a triangle on a yellow background. The purpose of the symbol is to attract the attention of visitors to the parks. The regulation also

requires the warning to include the message, “For additional information go to www.P65Warnings.ca.gov.”

The website regulation being developed at the same time expressly calls on businesses to provide OEHHA with exposure information to populate the website. The balance that was struck, while challenging to implement, was nevertheless rational. The temptation to expand the warning instead of relying on the website should be resisted for the reasons that motivated the website in the first place.

The Term “Exposure Source” is Confusing

In addition, the term “exposure source” is ambiguous, rendering it difficult to implement and impossible to use in a way to avoid lawsuits claiming that the true source of the exposure was not named. Take for example a park with Go Karts. Should the warning reference the area where the gasoline powered Go Karts are racing; should it reference the Go Karts themselves, applicable only to drivers; should it reference the exhaust that contains listed chemicals. Whatever choice the park makes, it is vulnerable to a lawsuit claiming that the warning did not identify the true source of the exposure.

The goal of the proposed warning regulation has been to reduce, not increase, litigation. The March 25, 2016 revisions requiring the warning to name the exposure source creates enormous litigation opportunities that are limited only by the creativity of the private enforcers.

Requiring an Exposure Source Cannot be Added with a 15-Day Notice

Moreover, the revision requiring the warning to name at least one exposure source is the kind of change that requires a 45-day notice. It cannot be made consistently with the California Administrative Procedure Act with only a 15-day notice. Government Code section 11346.8 provides that no agency may adopt a regulation that has been changed from what was originally made available to the public “unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.”

The addition of the requirement to name an exposure source is substantial; it is not solely grammatical. Also, it is not sufficiently related to the regulation noticed on November 27, 2015 to place anyone on notice that it could be added. Certainly, there was nothing in the original regulation that placed the parks on notice that such a requirement would be imposed on them.

In addition, the adoption of OEEHA’s website regulation was moving in parallel with the adoption of the warning regulation. The two are complementary – attract visitor’s attention with a warning; provide more detail on OEHHA’s website. The website regulation promises

to provide information on how to reduce or avoid exposure to listed chemicals, provide information concerning human exposure, and require businesses to provide to OEHHA to include on the website information for environmental warnings about the source of the chemical and the area for which the warning is provided. Title 27 CCR section 25205.

It was made explicit by the website regulation that OEHHA would provide exposure information on its website, eliminating any thought that businesses would have to add exposure source to their warnings. The entire focus had been to direct any idea of exposure to the website; not once had there been any reason to expect the regulation to be revised to require the warning to name one or more exposure sources.

The exposure source addition falls outside the standard articulated in Government Code section 11346.8. To be adopted, it requires a 45-day notice. It cannot be adopted by giving only a 15-day notice even if that 15 days is expanded first by seven days then by eight more days.

The addition of the requirement to name one or more exposure sources in the warning regulation for amusement parks should be struck.

A Determination that a Warning is Required

The second revision to the warning regulation that causes substantial concern is the addition of the requirement that at least one chemical be named in the warning **for which the business has determined that a warning is required**. In other words, to name a chemical is to admit that visitors are exposed to carcinogens or reproductive toxicants at levels above the no significant risk level and maximum allowable dose level, that is, at a level that could be harmful.

A reality of Proposition 65 is that businesses provide prophylactic warnings. That is a consequence of the statute that shifts the burden to businesses to prove that any exposure is below a no significant risk level for carcinogens or below a maximum allowable dose level for reproductive toxicants.

Realistically, it is impossible to assess and quantify every possible exposure to the nearly 900 listed chemicals, yet that is what the regulation requires. The truth of the matter is that exposures to listed chemicals in amusement parks are most likely below any applicable NSRL or MADL. Nevertheless, the statute gives parks only two choices, attempt to conduct an on-going impossible scientific assessment or post a prophylactic warning.

The choice from a business perspective is simple. It warns even though no warning is legally required to be given. Businesses should be free to make that choice, and to do so without conducting an exposure assessment.

A Warning is not an Admission

Proposition 65 requires a warning before a business exposes a person to a listed chemical. Health & Safety Code section 25249.6. It then provides that businesses have no obligation to warn under certain circumstances. Health & Safety Code section 25249.10. However, nothing in the statute prohibits a business from providing a warning even if one or more of those circumstances exists. That is true whether Proposition 65 is preempted by federal law or the exposure is below the NSRL or MADL.

The March 25, 2016 revision to the regulation converts a warning to an admission that a warning is required. The implication is that neither of the two circumstances exists, that is, the business has no defense. Nothing in the statute requires such a result. Moreover, circumstances are common where a business will choose to present a defense that the exposure is below the NSRL or MADL despite having provided a warning.

A business may be sued despite having provided a warning; the Plaintiff may assert that the warning varies from the safe harbor and is, therefore, neither clear nor reasonable. That business today could assert that the warning is clear and reasonable; it could also assert that it has no obligation to provide any warning because the exposure is below the applicable NSRL or MADL. The March 25, 2016 version of the warning regulation would preclude the latter defense. The regulation converts every warning into an admission that the exposure is above the NSRL or MADL.

The Revision Will Provoke Toxic Tort Lawsuits

In addition, a person who contracts cancer or suffers an adverse reproductive effect may claim that the harm was caused by the environmental exposure, and the warning constitutes an admission that the exposure occurred at a level above the NSRL or MADL. Class actions could be brought on behalf of people claiming to have been exposed but not yet harmed, seeking medical monitoring. The consequences of this regulation cannot be fully divined today, but in the hands of creative plaintiff attorneys, the admission that millions of people have been exposed to chemicals above the NSRL and MADL carries substantial liability risks.

The second portion of section 25601, subdivision (c) is equally problematic. It requires the name of a chemical for each outcome (cancer and reproductive toxicity) unless the one chemical named causes both. CAPA agrees with comments submitted by the California Chamber Coalition that this provision creates the potential for more litigation, that is, lawsuits predicated on allegations of "bad warnings".

CAPA urges OEHHA to amend section 25601, subdivision (c) to read simply as follows: Except as provided in Section 25603 (c), a warning meets the requirements of this article if the name of one of more of the listed chemicals for which the warning is being provided is included in the text of the warning.

Monet Vela
April 26, 2016
Page 6

CAPA has focused these comments on the two significant revisions made in the March 25, 2016 version of the warning regulation as it affects amusement parks. Nevertheless, it urges OEHHA to review its January 25, 2016 comments to the earlier version of the warning regulation and to address those issues as well. CAPA remains open to answering any questions stimulated by these comments and to work with OEHHA and the California Environmental Protection Agency toward a workable and legally sound warning regulation.

Sincerely,

CALIFORNIA ATTRACTIONS AND
PARKS ASSOCIATION, INC.

By:


John Robinson, President and CEO