



OEHHA, LITIGATION, CHEMICALS OF INTEREST, FIRST AMENDMENT

Monsanto and Farm Groups Sue to Overturn Glyphosate Listing

By ROGER PEARSON, December 21, 2017

On November 15 Monsanto Company, along with several agricultural associations, filed suit to overturn California's recent listing of the herbicide glyphosate as a carcinogen under Proposition 65. Glyphosate is the active ingredient in several herbicide brands, including Monsanto's Roundup, generally believed to be the most widely used herbicide in the world.

OEHHA listed glyphosate on July 7 of this year. The listing was finalized by the agency administratively based on what is known by OEHHA as the Proposition 65 Labor Code listing mechanism [see **OEHHA Lists Glyphosate After Supreme Court Rejects Monsanto Plea¹⁾**, July 17, 2017].

OEHHA has interpreted the Proposition 65 statute as requiring it to list any substance that is found to be a "probable" human carcinogen by the International Agency for Research on Cancer (IARC), based on substantial evidence of carcinogenicity in either humans or experimental animals. IARC made such a finding in 2015.

OEHHA issued its notice of intent (NOI) to list glyphosate in September of 2015. OEHHA said in that notice that it is required "ministerially" to list any IARC identified probable carcinogen, meaning that it cannot consider whether the scientific basis of the IARC finding is valid. Consequently, it warned those commenting on the listing that it would not consider comments challenging the science that IARC relied upon or the conclusions reached by IARC in its review of that science. In fact in issuing its final listing determination in July, OEHHA refused to consider several comments arguing that IARC failed to adequately consider numerous studies concluding that glyphosate is non-carcinogenic.

In this lawsuit, **National Association of Wheat Growers v. Lauren Zeise²⁾**, Monsanto and its agricultural allies point out that numerous governments and other organizations have studied glyphosate and none of them have come to the same conclusion as IARC. The plaintiffs also cite various news stories questioning both the motives and expertise of the IARC panel that reached the carcinogenicity finding. However, note the plaintiffs, OEHHA rules require an automatic listing "even if IARC is absolutely alone in its views, as is the case here where IARC's conclusion is opposed by every global regulatory body that has examined the issue, including OEHHA itself." This latter reference refers to a determination by OEHHA that glyphosate is non-carcinogenic in **establishing a Public Health Goal³⁾** (PHG) for the herbicide pursuant to the California Safe Drinking Water law.

The plaintiffs allege that if the listing is not voided, agricultural producers who use glyphosate will

have three options, beginning one year from the listing:

(1) they can attach what they claim would be a "false and disparaging" Prop. 65 warning to their products,

(2) they can try to show that the glyphosate residual level in their products is below any safe harbor level ultimately established by OEHHA for glyphosate exposure, an option that would require expensive and difficult testing, or

(3) they can stop using the herbicide. The plaintiffs allege that there are already indications of the difficulties that producers and farmers will face. For example, the National Association of Wheat Growers, one of the plaintiffs, has already been told by wheat millers that they will require farmers to undertake glyphosate residue testing as a condition for accepting product that could be incorporated into flour to be sold in California.

The plaintiffs use all of these allegations to support the following causes of action:

(1) that the listing will force producers to make false and misleading statements (i.e., the warnings) contrary to the First Amendment of the U.S. Constitution;

(2) that the listing is preempted by the Food, Drugs, & Cosmetic Act's prohibitions against misbranding of regulated products; and

(3) that the listing violates the Due Process Clause of the 14th Amendment to the U.S. Constitution in that OEHHA relied upon an IARC finding for which there is no rational basis.

This is the second time that Monsanto and some of the same plaintiffs have sued to block this listing. A lawsuit filed earlier this year, prior to the listing, arguing that OEHHA had no authority under Prop. 65 to proceed with it. That suit was dismissed by a state court trial judge--a decision that was ultimately upheld by the California Supreme Court.

The lawsuit was filed in the federal District Court for the Eastern District of California.

*A correction has been made to this article, see **Glyphosate Case Correction**⁴⁾, January 17, 2018.

Resources for this article

1. OEHHA Lists Glyphosate After Supreme Court Rejects Monsanto Plea

<https://ceitoday.com/articles/13123>

2. National Association of Wheat Growers v. Lauren Zeise

<https://ceitoday.com/documents/24756>

3. establishing a Public Health Goal

<https://oehha.ca.gov/water/public-health-goal/public-health-goal-glyphosate>

4. Glyphosate Case Correction

<https://ceitoday.com/articles/13304>