



The Scotts Company LLC

---

October 20, 2015

VIA E-MAIL P65PUBLIC.COMMENTS@OEHHA.CA.GOV

Ms. Esther Barajas-Ochoa  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010, MS-19B  
Sacramento, California 95812-4010  
Fax: (916) 323-2265

**Re: NOIL (Malathion and Glyphosate) – Notice of Intent to List Malathion and Glyphosate Under Proposition 65**

Dear Ms. Barajas-Ochoa:

On behalf of the The Scotts Company LLC (“Scotts”), we thank you for the opportunity to comment on the Office of Environmental Health Hazard Assessment’s (“OEHHA”) Notice of Intent to List (“NOIL”) malathion and glyphosate as carcinogens under California’s Safe Drinking Water and Toxic Enforcement Act of 1985 (“Proposition 65”).

Scotts understand that OEHHA takes the position that it lacks discretion to determine whether listing malathion and glyphosate is appropriate when utilizing the Proposition 65 Labor Code listing mechanism. Scotts respectfully disagrees with OEHHA determination that its review under the mechanism is limited solely to determining whether the International Agency for Research on Cancer (“IARC”) has classified an agent as likely to cause cancer. *See* 27 Cal. Code Regs. § 25904(b). In adopting Proposition 65, the People of California did not intend to replace the reasoned judgment of the state’s regulatory apparatus with the non-published or contradictory findings of an unrepresentative foreign body.<sup>1</sup>

**A. Malathion Should Not Be Listed Pursuant to the Labor Code Mechanism**

IARC has not published its evaluation for malathion.<sup>2</sup> As more fully explained in the concurrently filed Comment submitted by Cris A. Williams and Robert P. DeMott of Ramboll-Environ Inc., IARC’s failure to publish its analysis and conclusion with respect to malathion is more than a technical oversight, as it prevents the public from accessing and understanding

---

<sup>1</sup> In addition to the positions set forth in this letter, Scotts joins in the comments submitted by the Consumer Specialty Products Association and Monsanto Company.

<sup>2</sup> *See* IARC, Monograph Vol. 112, available at <http://monographs.iarc.fr> (last visited Oct. 16, 2015) (noting that portions of monograph pertaining to, among others, malathion “will be published subsequently”).

IARC's processes and procedures in reaching its conclusion.<sup>3</sup> Indeed, without such information, interested parties cannot review IARC's analyses to determine even basic issues, such as whether IARC has listed the correct substances on its monograph. This deprives the public of a meaningful opportunity to provide comments to OEHHA regarding whether "the identification of the chemical or substance meets the requirements" of the Labor Code listing mechanism. *See* 27 Cal. Code Regs. § 25904(c). Thus, OEHHA's proposed listing of malathion is premature.

## **B. Glyphosate Should Not Be Listed Pursuant to the Labor Code Mechanism**

IARC's conclusion regarding the carcinogenicity of glyphosate directly contradicts OEHHA's own findings. In 2007, OEHHA reviewed health effects from contaminants in drinking water, focusing specifically on the risks posed by glyphosate. After analyzing the scientific literature concerning the carcinogenicity of glyphosate, OEHHA ultimately determined that glyphosate "is unlikely to pose a cancer hazard to humans."<sup>4</sup> Nevertheless, eight years later, a group of individuals appointed by IARC reviewed the same literature and concluded that glyphosate is "probably" carcinogenic to humans because there is "sufficient evidence" of carcinogenicity in animals. No court has addressed (let alone approved) the use of the Labor Code listing mechanism in situations where (as here) OEHHA already has independently determined -- based on the same studies considered by IARC -- that a chemical "is unlikely to pose a cancer hazard to humans". Because Proposition 65 cannot be read as displacing the state's regulatory and rule making authority with the findings of an unrepresentative foreign body,<sup>5</sup> the Labor Code mechanism codified at Title 27 of the Code of Regulations contravenes the basic tenets of California's Constitution as applied to the facts and circumstances presented here. *See, e.g., Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (facially valid statute or ordinance may be deemed unconstitutional "as applied" to "facts of a particular case" if "in those particular circumstances the application" violates constitutional rights or requirements); *Broadrick v. Oklahoma*, 413 U.S. 601, 615–616 (1973); *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 672 (1974); *In re Marriage of Siller*, 187 Cal. App. 3d 36, 49 (1986).

The case coming closest to authorizing the listing of glyphosate under the present circumstances is *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425 (1989), but that case addressed

---

<sup>3</sup> *See* Mssrs. Cris A. Williams & Robert P. DeMott, Comments on Notice of Intent to List Chemicals by the Labor Code Mechanism (attached hereto).

<sup>4</sup> OEHHA, Public Health Goals for Chemicals in Drinking Water: Glyphosate (June 2007), available at <http://oehha.ca.gov/water/phg/pdf/GlyPHG062907.pdf> (last visited Oct. 16, 2015).

<sup>5</sup> It is a fundamental precept of a representative democracy that the people are governed by their elected officials and the agencies acting under the direction of that representative body, as opposed to a foreign, unelected, non-representative body unaccountable to the electorate. The abdication of legislative authority to such an unelected body violates the foundation of the social contract between the electorate and the elected. As a result, such delegations of authority have been criticized and struck down by the courts. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936) (striking down law that empowered industry associations to draw up regulatory codes that carried the force of law); *Natural Resources Defense Council v. EPA*, 464 F.3d 1, 9 (D.C. Cir. 2006) ("[A]ssigning law-making functions to international bodies . . . would raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers."); *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 26–27 (1976) (employing non-delegation doctrine to invalidate voter initiative that would have allowed wages to be set by an arbitrator, and holding that "the city possessing no power under existing state statute to provide for arbitration of wage rates, such power cannot be created by local initiative").

an entirely different set of circumstances. In *Deukmejian*, the court held that the state lacked discretion to exclude chemicals identified by IARC as known animal carcinogens from the initial Proposition 65 list, explaining that such chemicals must be included in the initial iteration of the list and the state could then supplement the list to add additional chemicals after conducting its own analysis and review of the new chemicals. *Id.* at 439-440. The chemicals at issue in *Deukmejian* had not been analyzed and rejected by the state for inclusion on Proposition 65's list. In *California Chamber of Commerce v. Brown*, 196 Cal. App. 4th 233 (2011), the *Deukmejian* ruling was extended beyond the publication of the initial Proposition 65 list to authorize the use of the Labor Code listing mechanism for all subsequent revisions to the list. *Id.* 259. Like *Deukmejian*, *Brown* did not address a circumstance where IARC's findings contradicted OEHHA's own conclusions.

Thus, *Deukmejian* and its progeny do not support listing glyphosate under the circumstances presented here. In neither case had a state entity expressly rejected the carcinogenicity of a chemical in the first instance, only to have IARC subsequently find the same chemical, based on the same studies, to be carcinogenic. In fact, *Brown* expressed its concern with such situations, identifying IARC's flip-flopping with respect to saccharine as adding to "the significant costs attendant to listing" chemicals on the Proposition 65 list. *See, e.g., id.* at 259. There, IARC had identified saccharine as a cancer-causing substance, causing OEHHA to add it to the Proposition 65 list. *Id.* at 245. Fifteen years later, IARC changed course, requiring OEHHA to undergo the process of de-listing saccharine. *Id.* IARC's indecision undercut the purposes of Proposition 65, because for 15 years a chemical was listed as a known carcinogen, despite posing no risks to the public. As explained by the *Brown* court, the saccharine episode illustrated that "despite the statutory descriptor of the [Proposition 65] list—as including chemicals 'known' to the state to cause cancer or reproductive toxicity—the list, in fact, also includes chemicals only suspected to cause such harms and which, upon further research, may prove to have no such pernicious affect." *Id.* at 250; *see also Deukmejian*, 212 Cal. App. 3d at 437-38 ("The trial court found, and we agree, that only those chemicals that are known, *and not merely suspected*, of causing cancer or reproductive toxicity must be on the list.") (emphasis added).

Proposition 65 cannot be read as requiring IARC's conclusions to take precedence over the state's chief regulatory agency charged with implementing the statute. Indeed, courts have interpreted the statute as distinguishing between the role of IARC's conclusions and OEHHA's own scientific inquiry, concluding that IARC's conclusions only inform the minimum substance of the Proposition 65 list, but OEHHA must engage "in a diligent, thorough and continuing search for additional chemicals which evolving scientific knowledge demonstrates are subject to the Act." *Deukmejian*, 212 Cal. App. 3d at 441. The listing of glyphosate under these circumstances renders the state's "continuing search for additional chemicals" superfluous, because the outcome of that search can at any time be overridden by IARC.

In light of OEHHA's determination that glyphosate does not pose a risk of cancer, using the Labor Code mechanism to require listing of glyphosate is an inappropriate delegation of authority to IARC. Such a process raises serious constitutional questions and undermines the intent underlying Proposition 65 as well as the principles underlying our constitutional system. *See,*

October 20, 2015  
Ms. Esther Barajas-Ochoa  
Page 4

*e.g., Natural Resources Defense Council, 464 F.3d at 9; see also supra n. 5.* Accordingly, we urge OEHHA to reconsider its position regarding the propriety of using the Labor Code listing mechanism for glyphosate on the facts presented here.

In sum, we respectfully urge OEHHA to decline listing malathion and glyphosate under Proposition 65.

Please do not hesitate to contact me if you have any questions, require additional information, or if you believe a meeting to discuss these comments would be helpful.

Very truly yours,



Dimitre Todorov  
Vice President, Legal

Enclosure

- Comment submitted by Cris A. Williams and Robert P. DeMott of Ramboll-Environ Inc.