

The following comments are being submitted by Quadratec, Inc., 1028 Saunders Lane, West Chester, PA 19380.

Quadratec strongly opposes the Office of Environmental Health Hazard Assessment (OEHHA) proposed amendment of the Prop 65 regulations. The proposed amendment is unconstitutional because it violates the U.S. Constitution's First Amendment right to be free from compelled speech. Remarkably, the OEHHA has already been down this road, when (last month) the U.S. Court of Appeals for the Ninth Circuit affirmed an injunction against the California Attorney General for unconstitutional Prop 65 compelled speech. The reasoning of the Court of Appeals in that earlier case applies directly to the present situation, as will be explained below.

In the present situation, OEHHA has proposed to amend the Prop 65 regulations with regard to the "short form" customer warning that provides businesses with "safe-harbor" protection from exposure to potential private enforcement lawsuits. The current "short form" warning includes 1) the word WARNING; 2) the word "Cancer" or "Reproductive Harm" (or both); and 3) the website address www.P65Warnings.ca.gov.

OEHHA proposes an amendment to compel businesses to include a specific chemical name in the "short form" warning. Specifically, the proposed amendment compels the short form to 1) identify a chemical; and 2) warn of "risk" of cancer and/or reproductive harm from exposure to that chemical. As an alternative, the language "can expose you to" a chemical that is a "carcinogen" and/or "reproductive toxicant" would be mandated. If exposure to two chemicals creates respective risk of cancer and reproductive harm, then those two chemicals must be named.

The proposed amended language to the "short form" warning is unconstitutional as violating the First Amendment because of the following "three prongs":

- 1) The proposed amendment to the "short form" is misleading to the ordinary customer;
- 2) The proposed amendment is misleading; therefore it is not narrowly drawn to advancing California's interest in protecting consumers from carcinogens and reproductive toxicants; and
- 3) California has less burdensome ways to convey its message than to compel businesses to convey it for them.

On November 7, 2023, the United States Court of Appeals for the Ninth Circuit published its opinion in *NAWG v. Bonta*, No. 20-16758 (November 7, 2023) (hereafter "NAWG"). In that opinion, the Ninth Circuit held that amended Prop 65 language compelling a warning for Glyphosate was unconstitutional using the same "three prongs" that Quadratec relies on in these comments. Quadratec will explain those "three prongs" in detail as they applied to NAWG and how they apply to the presently proposed "short form" amendment.

- 1) THE PROPOSED AMENDMENT TO THE "SHORT FORM" IS MISLEADING TO THE ORDINARY CUSTOMER
 - a) The proposed amendment mandates identification of a chemical from a list that California maintains of over 900 chemicals. While California has created that list, however, not everyone agrees with it. Glyphosate is on that list, but the Environmental Protection Agency has concluded

that Glyphosate does not pose a cancer hazard or risk to humans. Acylamide is on that list, but in *California Chamber of Commerce v. Council for Education and Research on Toxics*, 29 F. 4th 468 (9th Cir. 2022), the Ninth Circuit affirmed an injunction against enforcement of an acrylamide warning, stating that the warning was “controversial” because of scientific debate over its toxicity.

To put it another way, the proposed amendment requires identifying a chemical that is allegedly carcinogenic to a reproductive toxicant, but WHO has made that determination? The proposed amendment does not explain to consumers that the State of California identified chemical as a carcinogen or reproductive toxicant. The proposed amendment does not explain to consumers that the inclusion of chemicals on that list is disputed. Simply stating that a chemical is present and toxic, without stating that the conclusion is disputed, is misleading to consumers.

- b) The proposed rule requires identification of ONE chemical if the possibility of exposure to that one chemical exists. A consumer wanting to avoid ANOTHER chemical on the 900 chemical list will look at the ONE chemical that is listed in the proposed warning and have no idea whether exposure to the ANOTHER chemical could occur. OR, the consumer will see ONE chemical on the proposed warning and will be misled into thinking that exposure to the ANOTHER chemical will not occur. Consumers will be misled. Thus, the proposed amendment does not achieve OEHHA’s stated objective of providing “clear and reasonable” warnings to consumers.

Put another way, the proposed amendment does not inform a consumer of a risk the consumer is trying to avoid. Specifying a single chemical in a product warning neither deters nor educates a consumer regarding potential risk.

- c) The “right to speak and the right to refrain from speaking are complimentary components of free speech principles.” NAWG @26 citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). “[A] statement may be literally true but nonetheless misleading and, in that sense, untrue.” NAWG @29 citing *CTIA – The Wireless Ass’n v. City of Berkeley*, 928 F. 3d 832 (9th Cir. 2019). “Under Prop. 65, a ‘known’ carcinogen carries a complex legal meaning that consumer would not glean from the warning without context” NAWG @ 32 citing *California Chamber of Commerce v. Council for Education and Research on Toxics*, 29 F. 4th 468 (9th Cir. 2022). The proposed Prop 65 amendment compels manufacturers to make statements that are misleading to consumers.

2) CALIFORNIA’S INTERESTS ARE NOT BEING ADVANCED

The State of California created Prop 65 to inform consumers of “risk” and not “hazard”:

[T]he distinction between hazard and risk is significant. In this context, a hazard indicates that at some theoretical level of exposure, the chemical is capable of causing cancer. Risk on the other hand, is the likelihood that cancer will occur at a real-world level of exposure. At its core, the function of Prop 65 is to inform consumers of risks, not hazards. See Cal. Code Regs. Tit. 27, section 25701 (explaining why a certain chemical need not include statutory warning if it “poses no significant risk” (emphasis added)

NAWG @ 14

By mandating a “short form” warning that lists a chemical and uses the word “risk”, consumers MAY be advised that a chemical in a product carries RISK, but they don’t know if that is the chemical in the product that carries SIGNIFICANT RISK or the GREATEST RISK. Also, if a consumer deliberately wants to avoid a chemical, and that chemical is not listed on the “short form” (because another chemical has), the consumer may be given false confidence that the chemical desiring avoidance is not present. One version of the proposed “short form” does not even include the word “risk” and instead uses the vague terminology “CAN expose you to [name of chemical], a carcinogen.” (emphasis added). How do any of the proposed amendments help the consumer? The language being proposed is misleading, the consumer does not know if he/she is being warned of a “risk” they want to avoid, and a portion of the proposed amendment includes language that does not identify whether “risk” or “hazard” is being advised. Misleading language does not advance California’s governmental interest to protect its citizens. “[C]ompelling sellers to warn consumers of a potential “risk” never confirmed by any regulatory body – or of a hazard not “known” to more than a small subset of the scientific community – does not directly advance [California’s] interest.” NAWG @ 42.

3) LESS BURDENSOME WAYS TO CONVEY THE MESSAGE

“California could employ various other means to promote its (minority) view that glyphosate puts humans at risk of cancer “without burdening [Plaintiffs] with unwanted speech...For example, the State could reasonably post information about glyphosate on its own website or conduct an advertising campaign” NAWG @ 42

The above language refers to Glyphosate, but the same rationale applies to any chemical California is proposing to include in the amended “short form.” The state’s website and advertising campaigns are available to the State of California.

The proposed amended language to PROP 65 is misleading, it does not advance the State of California’s interests, and less burdensome avenues exist for California to convey its message. Therefore, the proposed amended language to the PROP 65 short form is unconstitutional and should not be approved.

ADDITIONAL ARGUMENTS

Quadratec strongly advances the above arguments. There are additional arguments against the proposed amendment that Quadratec wishes to state:

- 1) Identification of single chemical composition in the specific products will require costly testing and/or lengthy investigations within the supply chain. These costs will be passed on to the consumer, without the consumer receiving a true benefit from that identification.
- 2) The proposal discriminates against small businesses. Distributors may opt to carry less product from small businesses (vendors) who struggle to quickly provide Prop 65 compliance documents based on the measure. Small business will be unable to afford the bill for the testing that the amendment requires. Large businesses (with more capital than small businesses) WILL be able to

afford the bill. Small businesses will be unable to compete with large businesses in supplying merchandise that complies with the amendment.

- 3) OEHHA states the amendment intends to make the short-form warning more informative to consumers. In reality, the proposal shifts costs to small businesses. OEHHA fails to realize that small businesses lack the bargaining power to change global manufacturing processes or the resources to make these short-form warning changes. The lack of resources is what has led business to over-warn consumers in the first place. Small businesses generate 44% of U.S. economic activity and create two-thirds of net new jobs (per the U.S. Small Business Administration), but the amendment will require small businesses to shift their focus from their business to identifying chemical composition. This move will inevitably increase cost and burden of companies selling consumer products in California.
- 4) More than 75% of Prop 65 settlements go to attorneys' fees. OEHHA has proposed an amendment that will be HARDER for companies to comply with, and will thus increase the amount of money going to lawyers. This is glaring problem in Prop 65 regulations and the OEHHA amendment will make this problem significantly worse.