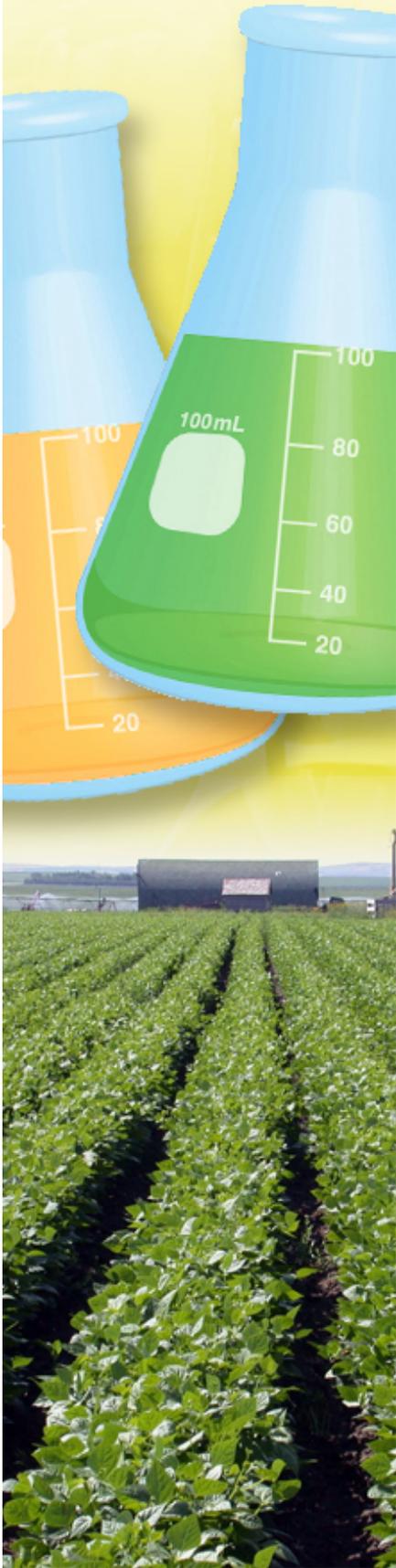


# Chemical & Pesticide News



## Letter from the Editor

### Welcome

We hope that this new, slightly delayed issue of the Chemical and Pesticide News finds you well. There have been many changes on the US regulatory front, many related to the mid-term elections and change in Congressional control. See, for example, the articles on TSCA reform and Clean Water Act permitting for pesticide applications. This issue also contains several pieces with a “green” theme, including California’s green chemistry rules and the Federal Trade Commissions revisions to the Green Guides. We hope you find these articles timely and informative.

As always, should you have any questions, comments, or ideas for future content, please do not hesitate to call me at (314) 259-2317 or email me at [bwneuschafer@bryancave.com](mailto:bwneuschafer@bryancave.com).

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## In This Issue

Letter from The Editor.....	1
FTC Proposes Revisions to its “Green Guides” .....	2
US and EU Authorities Address Chemical Confidentiality.....	2
TSCA and FIFRA Enforcement Roundup .....	2
California Green Chemistry Rules Postponed .....	3
TSCA Inventory Update Reports Due Soon, But Reporting Rules Are Not Final...3	
Second Endocrine Disruptor Screening Program List Published.....	3
New York to Pursue Additional Cleaning Product Content Disclosures .....	3
EPA Publishes Web-Distributed Pesticide Label Notice.....	4
Courts Uphold Common Law Claims Relating to Pesticide Applications .....	4
Update on Clean Water Act Permitting for Pesticide Applications.....	4
EPA Clarifies the Status of Certain Products as Pesticides.....	5
TSCA Reform Update .....	5
Info .....	5

## **FTC Proposes Revisions to its “Green Guides”**

The Federal Trade Commission recently published proposed revisions to its Green Guides, a collection of guidelines issued to assist companies avoid making misleading environmental marketing claims with respect to their products. According to the FTC, the changes include “guidance on marketers’ use of product certifications and seals of approval, ‘renewable energy’ claims, ‘renewable materials’ claims, and ‘carbon offset’ claims.”

The modifications to the Green Guides are primarily the result of a distinction between how consumers interpret and understand “green” claims and what manufacturers and marketers mean by making such claims. For example, the modifications direct companies away from making general claims such as “environmentally friendly,” because a manufacturer may not intend to convey, or the product may not provide, the full-range of environmental benefits that a consumer perceives are associated with such a claim. Accordingly, the main thrust of the revisions is to focus marketers on making more specific claims and qualifying claims where necessary. Notably, the Green Guides still do not provide guidance with respect to use of the terms “sustainable,” “natural” or “organic,” “either because the FTC lacks sufficient information to provide meaningful guidance or because the FTC wants to avoid proposing guidance that duplicates rules or guidance of other agencies.”

## **US and EU Authorities Address Chemical Confidentiality**

Chemical researchers and manufacturers are constantly analyzing existing and new chemicals for consumer applications. Laws regarding chemical regulation often provide confidentiality provisions to allow researchers and manufacturers to maintain as confidential certain information, such as chemical identity, so as not to result in the disclosure of trade secret or confidential business information (CBI).

EPA has recently taken steps to limit the availability of CBI protections, establish a more formal process for making CBI claims and analyze existing CBI claims to determine whether a confidential classification is warranted. EPA has recently sent letters to a number

of chemical manufacturers asking them to analyze historical TSCA CBI claims. Although this effort is ongoing, EPA has already begun declassifying many historical CBI claims made by companies.

Obviously, confidentiality with respect to chemicals is not a purely American concern. This summer, the European Chemicals Agency (ECHA) released a manual containing guidance on asserting and justifying confidentiality claims under REACH. This includes procedures for asserting confidentiality with respect to chemical and impurity identities, as well as manufacturing volumes. The manual also outlines the procedures ECHA will use in reviewing confidentiality claims. The manual can be found at [http://echa.europa.eu/doc/press/na\\_10\\_43\\_confidentiality\\_claims\\_REACH\\_20100730.pdf](http://echa.europa.eu/doc/press/na_10_43_confidentiality_claims_REACH_20100730.pdf).

## **TSCA and FIFRA Enforcement Roundup**

On September 15, 2010, EPA announced a \$409,490 contested penalty levied against “99¢ Only Stores” in California, Arizona and Nevada. EPA alleged 166 violations of FIFRA largely relating to sales of a household cleaner not registered in the United States. EPA also made misbranding allegations relating to labels on registered product being upside-down or inside out, “making them hard to read.” EPA originally sought almost \$970,000 in penalties, but an administrative law judge found that EPA failed to prove that its proposed fine was appropriate for many of the allegations.

On January 13, 2011, EPA announced a \$526,500 settlement with Millipore Corp. EPA’s complaint against Millicorp alleged violations relating to importation of unregistered pesticides and failure to comply with FIFRA’s import requirements. The products at issue were chlorine tablets and pesticide devices used for water purification.

On February 14, 2011, EPA announced a \$222,000 fine against Marukai Corp. for selling and distributing unregistered and/or improperly labeled pesticide products at its Hawaii grocery stores. The products at issue were cleaners, detergents, roach traps and other household products making pesticidal claims.

EPA also announced a significant TSCA penalty against DuPont on December 20, 2010. The \$3.3

million penalty relates to DuPont's failure to make reports to EPA pursuant to section 8(e) of TSCA for 57 inhalation studies. TSCA 8(e) requires that information on chemicals that could present a substantial risk of injury to health or the environment be reported to EPA. The products involved were chemicals for possible use as surface protection, masonry protection, water repellants, sealants and paints.

### **California Green Chemistry Rules Postponed**

In September, the California Department of Toxic Substances Control published proposed regulations implementing the green chemistry initiative mandated by A.B. 1879. DTSC released revisions to these proposed regulations in November. The regulations are designed to reduce, and eventually eliminate, the use of harmful substances in consumer products by requiring the use of safer, "greener" alternatives.

The regulations would require that chemical manufacturers submit to DTSC the same type of information that they submit to US and European chemical regulatory authorities. DTSC would use this data, along with sales volumes, potential for exposure and disposal methods, to prioritize chemicals for further assessment of potential alternatives. In the first five years of the program, DTSC would focus on children's products, personal care products and home cleaning products.

The regulations were met significant opposition by both industry and environmental groups. In general, environmental groups felt the rules were too limited and not consistent with the original purpose of the legislation, and that they would result in little to no improvement on chemical use. Industry comments were varied, but included concerns about protection of confidential business information and the review process. Based on these criticisms, California EPA Secretary Linda Adams asked the CDTSC to postpone the rulemaking process to engage in additional stakeholder consultation. This consultation is ongoing.

### **TSCA Inventory Update Reports Due Soon, But Reporting Rules Are Not Final**

As reported in the last issue of the Chemical and Pesticide News, 2010 is a TSCA IUR reporting year.

Reports will be due to EPA in mid-2011. Despite that approaching deadline, EPA has yet to finalize the rules it proposed in August 2010 to modify the IUR reporting requirements for the 2010 reporting year. This failure to finalize rules could be particularly problematic where the reporting might require information on the 2006 through 2009 calendar years in addition to 2010, and where EPA's procedures for protecting confidential business information (like production volumes, sources, etc.) are in flux and becoming more burdensome on claimants.

### **Second Endocrine Disruptor Screening Program List Published**

Those tracking EPA's endocrine disruptor screening program are certainly aware that on November 17, 2010, EPA published its second list of 134 chemicals to run through the screening program. This list is more focused on contamination of drinking water sources using EPA's endocrine disruptor screening authority under the Safe Drinking Water Act. EPA also published policies and procedures associated with List 2. These policies and procedures contain some notable modifications from the policies and procedures associated with List 1. For example, because List 2 is the Safe Drinking Water Act, recipients of test orders will no longer be able to limit sales of their chemicals to use only in non-pesticide products (although presumably if the chemical is a pesticide active ingredient with no non-pesticidal uses, exiting the pesticide market by cancelling a registration and not supplying other domestic registrants would be sufficient).

### **New York to Pursue Additional Cleaning Product Content Disclosures**

The New York State Department of Environmental Conservation is currently considering proposals to require content disclosures on household cleaning products. Such disclosures, which may come in the form of labeling requirements, would include the disclosure of ingredients (or functional descriptors), estimated content by weight, and whether the ingredients exhibit certain toxicological characteristics. NYSDEC is currently in the process of consulting stakeholders and preparing draft rules.

## **EPA Publishes Web-Distributed Pesticide Label Notice**

On December 29, 2010, EPA published a notice outlining a web-distributed pesticide label notice program. The basic premise behind web distribution of pesticide labels is to reduce the amount of information distributed at the time of sale via labeling, and direct users to a website or phone number to obtain use directions. EPA does not expect this program to entirely replace hard copy labeling, but to supplement such labeling and provide for greater flexibility in modifying labels and directions for use.

Despite this effort that has been in a pilot phase for several years, pesticide registrants are concerned about liability and safety issues associated with such a program. They assert that such a program is not consistent with FIFRA's requirement that all required labeling information accompany the pesticide product at the time of sale, and are concerned about the potential for consumer misuse or failure to follow EPA-approved directions for use.

EPA's proposal can be found at 75 Fed. Reg 82011 (Dec. 29, 2010). Comments are due to the agency by March 29, 2011.

## **Courts Uphold Common Law Claims Relating to Pesticide Applications**

Two recent court decisions have upheld the right to pursue common law claims for damages relating to pesticide applications, demonstrating that an applicator's duties of care may go beyond only following label instructions. The first, in California, concerns an organic herb farmer who sued a pesticide applicator that applied pesticide to a neighboring field, which then volatilized and was detected in the organic farmer's herbs. The California Court of Appeals upheld the farmer's right to sue the applicator and the \$1 million damage award. The applicator argued that it broke no laws and complied with the label in performing its application services, but the court found that compliance with the law was separate and distinct from meeting the standard of care necessary to avoid tort liability.

In a second case in Virginia, homeowners who hired a commercial applicator were found to have retained tort claims against the applicator for negligence and not contracted away such claims. In this case, the applicator sent unlicensed personnel to perform the treatment, and the unlicensed applicator's failure to properly clean equipment resulted in residual product not registered for residential use being applied to the home. Although there was a breach of contract, the homeowners also suffered tort injuries relating to the defendants breach of common law standards of care, and the court determined that the plaintiffs had both breach of contract and tort claims against the applicator.

## **Update on Clean Water Act Permitting for Pesticide Applications**

There has been a flurry of recent activity relating to EPA's proposed Clean Water Act permit for pesticide applications. Since EPA published its draft general permit, states with delegated permitting authority have been scrambling to prepare their own permits. As of the date of this publication, EPA and the states have until April 9, 2011, to have final permits in place to meet the Sixth Circuit Court of Appeals deadline.

On March 3, however, EPA asked the Sixth Circuit for a six-month stay of its ruling, allowing EPA and the states additional time to finalize permits and undertake necessary outreach to the regulated community. EPA also indicated that it needs to complete its Endangered Species Act analysis, and to create an electronic permit tracking system.

Congress is also taking steps to address the Sixth Circuit's ruling and deadline. Several bills were introduced last session to overturn the Sixth Circuit's ruling and exempt pesticide applications consistent with labeled directions from Clean Water Act permitting. This session, Rep. Bob Gibbs (R-OH) introduced the "Reducing Regulatory Burdens Act of 2011" that would accomplish the same purpose. The bill, which has over 20 co-sponsors and bipartisan support, received approval from the House Agriculture Committee on March 9. We will continue tracking this issue in future issues of the Chemical and Pesticide News.

## **EPA Clarifies the Status of Certain Products as Pesticides**

EPA has taken two actions recently to clarify the status of certain products as pesticides. The first, relating to cleaning products, is that “cleans or removes algae or mold stain” is no longer a pesticidal claim, meaning that claim alone should not subject a cleaning product to FIFRA regulatory obligations. (Of course, other claims may do so.)

The second relates to ammonia- and urea-based products for control of microbes. EPA determined that such products manufactured by Nalco must be registered pursuant to FIFRA. Nalco had argued essentially that the products themselves do not have pesticidal activity, but that when combined with chlorinated water create chloramine, which does have pesticidal properties. EPA then determined that Nalco could continue marketing its product while the registration process occurred, a decision which has recently resulted in an appeal to the United States Court of Appeals for the District of Columbia by Nalco’s competitors.

## **TSCA Reform Update**

Despite a change in Congressional control, Sen. Frank Lautenberg (D-NJ), author of a 2010 bill to reform TSCA, has indicated that he would still like to see TSCA reform occur in the 112th session of Congress. With Congress currently considering numerous proposals to reduce EPA’s funding for certain programs and limit EPA’s authority under certain environmental laws, it is not clear that TSCA reform will be a high priority for this Congress. Sen. James Inhofe (R-OK), the ranking minority member on the Senate’s Environment and Public Works Committee,

recognizes the need to “modernize” TSCA and bring it “into the 21st century.”

Additionally, a major French chemical manufacturing group has called US-proposed TSCA reform measures inadequate in light of REACH, and has called on the US (and other countries) to adopt a REACH-style regulatory program so as to “avoid the market distortion that would happen if substances not in compliance with REACH could still be produced outside of the European Union.”

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