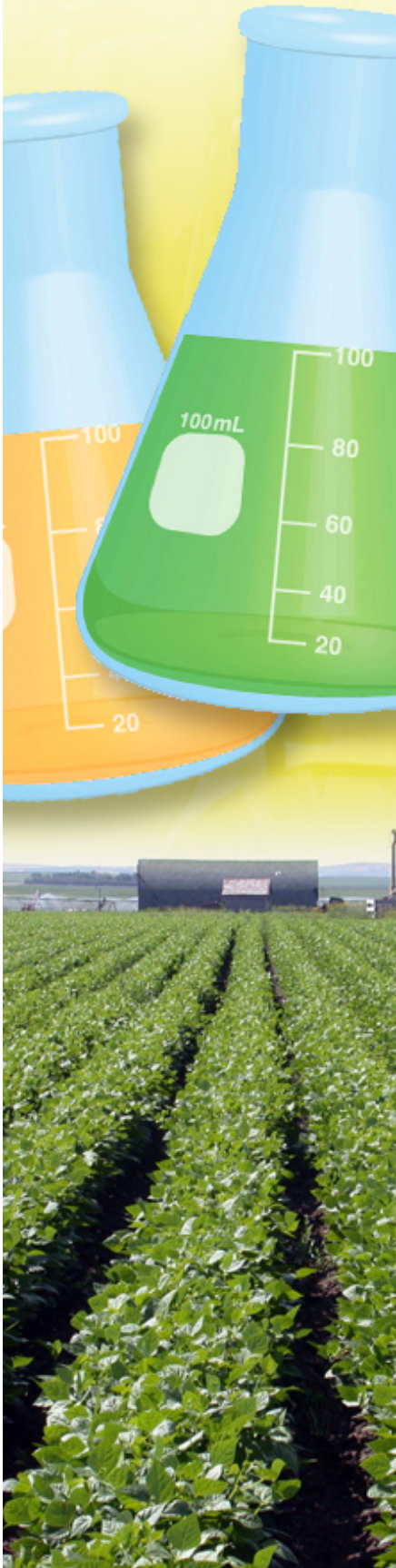




# Chemical & Pesticide News



## Letter from the Editor

Welcome to the inaugural issue of the Chemical and Pesticide News, published by Bryan Cave LLP. The Chemical and Pesticide News is intended to provide an update of legal and regulatory news to those involved in the manufacturing, distribution and sale of chemical and pesticide products. We hope you will find the Chemical and Pesticide News to be a valuable tool to help you to continually improve compliance and keep abreast of current legal and regulatory issues. If you have any questions about the information in this newsletter or recommendations for future content, don't hesitate to call me at (314) 259-2317 or email me at [bwneuschafer@bryancave.com](mailto:bwneuschafer@bryancave.com).

Brandon W. Neuschafer  
Bryan Cave LLP

## Summer 2010 – In This Issue

Letter from The Editor.....	1
TSCA Reform Update .....	2
EPA Seeks to Restrict Pesticide Product Brand Names.....	2
New EPA Limits on Claims of Confidential Business Information under TSCA and FIFRA .....	2
2010 Is a TSCA IUR Reporting Year .....	3
Pesticides Container and Containment Rule Extension .....	3
EPA Announces Intent to Streamline and Clarify Pesticide Export Obligations.....	3
Draft General NPDES Permit Issued for Certain Pesticide Applications Affecting Waters of the United States.....	4

## **TSCA Reform Update**

Critics have long alleged that the primary law regulating chemicals, the Toxic Substances Control Act, has little teeth and does an inadequate job of ensuring protection from risks posed by chemicals. Indeed, EPA Administrator Lisa Jackson has made clear that EPA and the Obama administration would be working to strengthen the regulation of chemicals in the United States. In connection with this effort, congressional leaders have proposed legislation to rewrite TSCA.

In April of 2010, Sen. Frank Lautenberg (D-NJ) announced a draft bill called the “Safe Chemicals Act of 2010.” On the same day, Reps. Bobby Rush (D-IL) and Henry Waxman (D-CA) released a discussion draft of the “Toxic Chemicals Safety Act of 2010.” Sen. Lautenberg and Rep. Waxman are no strangers to toxics regulation, as both (along with Rep. Hilda Solis (D-CA)) are also sponsors of the Kid Safe Chemical Act, which is intended to regulate the use of toxic chemicals in everyday consumer products, including baby bottles and children’s toys.

There are a lot of similarities between the Safe Chemicals Act and the Toxic Chemicals Safety Act, and each represents a significant overhaul of chemicals regulation. The most prominent feature of both (and of the Kid Safe Chemicals Act) is a requirement that data be submitted on all chemicals for review and risk-assessment by the EPA. Given the more than 80,000 chemicals currently in use in the United States and the short timeframes pursuant to which these data packages must be submitted (five years under the Toxic Chemicals Safety Act), the efforts by industry to prepare data packages and by EPA to review them will be monumental. Anyone who has experienced similar procedures during EPA’s pesticide inerts tolerance revocation and endocrine disruptor screening program or in EU’s REACH process can appreciate the substantive and logistical hurdles to be overcome.

Another significant feature is the requirement for pre-approvals from EPA based on risk assessments. Sen. Lautenberg’s Safe Chemicals Act, for example, moves toward adopting a precautionary principle and imposing on manufacturers and users the burden of

demonstrating that the chemical is safe before it is marketed, as opposed to the government identifying harm before it takes action.

Needless to say, a detailed summary of all of the provisions of these bills could fill volumes. These bills are in the early stages, and significant modifications can be expected as the political and lobbying machine begins working. Given EPA’s prioritization of TSCA reform, updates on this legislation will certainly be a regular column in the Chemical and Pesticide News.

## **EPA Seeks to Restrict Pesticide Product Brand Names**

As pesticide registrants know, EPA commonly regulates pesticide registrations through the issuance of guidance entitled “Pesticide Registration Notices.” On May 19, 2010, EPA published a draft PR Notice entitled “False or Misleading Pesticide Product Brand Names.” This draft PR Notice, which follows on a similar draft PR Notice issued in 2002 but never finalized, seeks to provide guidance to registrants regarding brand names that EPA consider false or misleading.

Although EPA indicated that determinations will be made on a case-by-case basis, the Agency is particularly concerned about brand names that convey a false or misleading message about composition, effectiveness, or safety (including comparative safety). The draft PR Notice would impact not only future products, but products currently existing on the pesticide market. The guidance also provides procedures for correcting false or misleading names (for example, use qualifiers or disclaimers), and for implementation of new brand names and labeling. The public docket for comments on this PR Notice is currently open until August 17, 2010, and interested parties are encouraged to comment.

## **New EPA Limits on Claims of Confidential Business Information under TSCA and FIFRA**

EPA has recently published several documents indicating an increased scrutiny on the ability to

claim confidentiality under the CBI provisions of TSCA and FIFRA. EPA is taking these actions pursuant to its goal of increasing transparency and providing more information on chemicals to the public.

With respect to FIFRA, EPA is considering proposals to require the disclosure of inert ingredients used in pesticide formulations. Currently, pesticide registrants are only required to identify on product labels active ingredients and certain inert ingredients. In December of 2009, EPA published an Advanced Notice of Proposed Rulemaking seeking comments on a rule that would require the disclosure of inert ingredients.

EPA has also taken actions to limit the availability of CBI protection for chemical identities under TSCA, particularly in the context of a health and safety study submitted under TSCA Section 8(e). As announced in the Federal Register on January 21, and May 27, 2010, EPA intends to issue determination letters when chemical identities are claimed to be CBI. Generally, EPA will not allow a claim of CBI for a chemical identity where: (a) the chemical is part of a health or safety study submitted under TSCA; (2) the chemical identity does not reveal process information; (3) the chemical identity does not reveal data disclosing the portion of the mixture comprised by any of the chemical substances in the mixture; or (4) the chemical is already listed on the TSCA Inventory. Although not a formal rulemaking, EPA has announced an interest in receiving comments on this new policy by August 25, 2010.

Additionally, in June 4, 2010 letters to chemical industry trade organizations, EPA has also asked companies to voluntarily review old notices and filings containing CBI and identify instances where CBI can be declassified. As part of this "TSCA CBI Declassification Challenge," EPA has also asked industry to "strictly limit" CBI claims in future TSCA filings.

### **2010 Is a TSCA IUR Reporting Year**

Just a reminder to those impacted by TSCA Inventory Update Reporting – 2010 is a year for

which reporting must be made. IUR Reports covering the 2010 reporting year are currently due between June 1, 2011 and September 30, 2011. Generally, IUR Reports regarding production and importation of chemicals identified on the TSCA Inventory must be filed if a site manufactures or imports more than 25,000 pounds or greater of a subject chemical. Additional information must be reported for chemicals manufactured or imported in amounts of 300,000 pounds or more.

### **Pesticides Container and Containment Rule Extension**

The Container and Containment Rule was originally promulgated by EPA on October 29, 2008. This rule creates standards and procedures for pesticide containers and containment structures, and contains obligations with respect to nonrefillable containers, refillable containers, containment structures (like bulk storage), repackaging and labeling. On June 15, 2010, EPA extended the compliance date from August 16, 2010 to December 16, 2010, in part to allow pesticide registrants additional time to submit revised compliant labeling to EPA and the states for approval. EPA has also proposed extending the compliance date until August of 2011. At this point in time, however, registrants are strongly encouraged to submit revised labeling by August 16, 2010.

### **EPA Announces Intent to Streamline and Clarify Pesticide Export Obligations**

On June 24, 2010, EPA's Office of Pesticide Programs announced its intent to streamline procedures for submitting Foreign Purchaser Acknowledgment Statements required under FIFRA Section 17(a) for exports of unregistered pesticide products. EPA also announced that it will be clarifying the labeling requirements for unregistered pesticides produced for export. Both actions are expected by the end of the year. Stay tuned to Bryan Cave's Pesticide and Chemical News for more information.

### Draft General NPDES Permit Issued for Certain Pesticide Applications Affecting Waters of the United States

For years, pesticide applicators have not been required to apply for National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act. In 2006, EPA promulgated a rule memorializing that an NPDES permit was not necessary for pesticide applications to, near or above waters of the United States when such applications were made in compliance with FIFRA. However, in 2006, the Sixth Circuit Court of Appeals overturned this 2006 EPA rule in the *National Cotton Council* case (553 F.3d 927).

As a result, EPA recently promulgated a draft general NPDES permit for point source discharges from the application of pesticides. This general permit is intended to cover only certain applications, including mosquito and other flying insect control, algae and aquatic weed control, aquatic nuisance animal control and forest canopy pest control. Those individuals or entities involved in these types of pesticide applications should be very interested in the final permit. However, EPA has made clear that, while it believes these activities cover a majority of the pesticide applications resulting in point source discharges, other land-based applications may result in point source discharges that may need an individual permit.

The *National Cotton Council* case and resulting permitting obligations represent a significant change in the regulatory requirements associated with pesticide applications. For example, EPA estimates that this general permit alone could increase the number of discharges subject to NPDES regulation by 65%. Additionally, enforcement could include the potential for Clean Water Act penalties (up to \$37,500 per violation per day, as opposed to \$7,500 under FIFRA) and Clean Water Act citizen suits, which are not available under FIFRA.

### For More Information

Bryan Cave LLP is a leading business and litigation firm with global reach, a strong reputation and a long history of success. With more than 1,000 attorneys and other professionals in 19 offices worldwide, we pride ourselves on proactive, solution-oriented work in every major area of interest to clients.

For more information on the issues addressed in this Newsletter, please contact the following attorneys at Bryan Cave LLP:

Brandon Neuschafer (St. Louis)  
(314) 259-2317  
[bwneuschafer@bryancave.com](mailto:bwneuschafer@bryancave.com)

Dale Guariglia (St. Louis)  
(314) 259-2606  
[daguariglia@bryancave.com](mailto:daguariglia@bryancave.com)

Mark Mansour (Washington, D.C.)  
(202) 508-6019  
[mark.mansour@bryancave.com](mailto:mark.mansour@bryancave.com)

Joan Sasine (Atlanta)  
(404) 572-6647  
[joan.sasine@bryancave.com](mailto:joan.sasine@bryancave.com)

Phil Karmel (New York)  
(212) 541-2311  
[pekarmel@bryancave.com](mailto:pekarmel@bryancave.com)

Mike Ohm (Chicago)  
(312) 602-5032  
[michael.ohm@bryancave.com](mailto:michael.ohm@bryancave.com)

Susannah Mitchell (Irvine)  
(949) 223-7145  
[susannah.mitchell@bryancave.com](mailto:susannah.mitchell@bryancave.com)

This bulletin is published for the clients and friends of Bryan Cave LLP. To stop this bulletin or all future commercial e-mail from Bryan Cave LLP, please reply to: [opt-out@bryancave.com](mailto:opt-out@bryancave.com) and either specify which bulletin you would like to stop receiving or leave the message blank to stop all future commercial e-mail from Bryan Cave LLP. Information contained herein is not to be considered as legal advice. Under the ethics rules of certain bar associations, this bulletin may be construed as an advertisement or solicitation