

EPA CLARIFIES REGULATION OF ION-GENERATING EQUIPMENT

Lawrence E. Culleen
Allison Carroll

On Sept. 21, the U.S. Environmental Protection Agency (EPA) issued a notice in the *Federal Register* clarifying the agency's position on the regulation of ion-generating equipment. Pesticide Registration: Clarification for Ion-Generating Equipment, 72 Fed. Reg. 183, 54039 (Sept. 21, 2007). According to the notice, if the equipment contains silver or other substances and generates ions of those substances for express pesticidal purposes, then the equipment will be regulated as a pesticide pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA first addressed this issue in September 2005, when it advised a manufacturer that washing machines utilizing silver electrodes to produce silver ions for pesticidal purposes were "devices" and not pesticides *per se*, and thus did not require registration pursuant to section 3 of FIFRA.

Under FIFRA, a product that incorporates a substance or mixture of substances intended to prevent, destroy, repel, or mitigate pests is considered a pesticide and as such must be registered with EPA. Alternatively, a device which uses only physical or mechanical means to trap, destroy, repel, or mitigate a pest, including a microbial pest, does not require registration. Thus, one of the key distinctions between a pesticide and device is whether the pesticidal activity is attributed to physical or mechanical actions or to a substance or mixture of substances. Nevertheless, producers of devices, like producers of pesticides, are subject to certain labeling and packaging requirements and must be produced in registered establishments. *See* 40 C.F.R. § 152.500, Subpart Z.

The products covered by EPA's recent notice are ion-generators that incorporate a substance, like silver or copper, in the form of an electrode, and pass a current through the electrode to release ions of that substance

for the purpose of preventing, destroying, repelling, or mitigating a pest. In recent years, several manufacturers have begun to market ion-generating washing machines and water purifiers. It is because these items incorporate a substance or substances to accomplish their pesticidal function that the agency has classified them as pesticides for purposes of FIFRA. It is the agency's position that this is not a "new" policy with regard to ion-generating devices, but rather a clarification of the existing policy.

The implementation schedule for the policy clarification and registration efforts is as follows:

- Any person who was distributing or selling ion-generating equipment on or before Sept. 21, 2007 and who is not the producer or importer of such equipment may continue to sell or distribute it until their existing inventory is exhausted.
- Any producer or importer of ion-generating equipment who also was distributing or selling the equipment on or before Sept. 21, 2007, may continue to do so after March 21, 2008, provided that they have submitted an application to commence the registration process.

The agency has pledged to work with producers of ion-generating appliances to identify the data required to support an application for registration and bring their products into compliance with FIFRA, although it is unclear at this time how such guidance will be developed or when it will be articulated by the agency. It also remains unclear the extent to which the policy can be interpreted to extend to other "pesticide-producing" equipment, that might rely on differing technologies, such as "precursors" which are not specifically metallic electrodes, to generate the "pesticidal" substance. For further information, refer to EPA's docket ID number EPA-HQ-OPP-2007-0949.

Mr. Culleen is an attorney and **Ms. Carroll** is a legal assistant in the Washington, D.C. offices of *Arnold & Porter LLP*.