

Chemicals and Pesticides Enforcement Will Be An EPA Priority For Coming Fiscal Year

Rosemarie A. Kelley, the Environmental Protection Agency's (EPA or Agency) Director of Waste and Chemical Enforcement, recently advised members of the bar who represent makers of chemical and pesticide products that the Agency will demonstrate a renewed emphasis in the coming months on enforcement of the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA will target in particular makers of certain nanoscale chemicals and chemicals that it considers to be of particular concern because they represent priority regulatory targets for EPA based on their potential health and environmental effects. This announcement could signal the need for makers of pesticide and chemical products to be prepared for a more aggressive EPA enforcement team, both in headquarters and the regions. The key components of EPA's heightened chemicals and pesticides enforcement program will include: increased coordination across programs with respect to inspections, increased use of subpoenas to gather data, more frequent referral of cases to the Department of Justice to pursue injunctive relief, and a greater willingness on the Agency's part to hold administrative hearings in lieu of negotiating settlements through consent decrees. Producers and processors of chemical-based products will be well-served to review the highlights of EPA's enforcement priorities that are outlined below.

TSCA Enforcement Priorities

Monitoring imported products containing chemical substances will be a significant enforcement priority for EPA in the coming year. EPA already has begun working with the Commercial Targeting and Analysis Center (CTAC) of the US Customs and Border Protection, among other agencies, to more closely track imported chemical-based products and to identify noncompliant shipments. In addition to reviewing for TSCA import certifications at ports, EPA will also be routinely reviewing Customs' data to determine whether chemicals not on the TSCA Inventory have been imported.

Another focus of EPA will be on ensuring facility compliance with TSCA Section 5, including Premanufacture Notice (PMN) requirements, Significant New Use Rules (SNUR), and Low Volume Exemptions (LVEs). In particular, EPA inspectors will be targeting facilities that produce and process "chemicals of concern," which Ms. Kelley suggested includes nanotechnology products in general and carbon nanotubes in particular. Facilities handling chemicals that have been identified in Agency "Action Plans," such as short-chained and

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other chlorinated paraffins, also will be examined. In an effort to coordinate across media, Agency inspectors will be using Resource Conservation and Recovery Act and Clean Air Act facility inspections as additional opportunities to seek out and identify TSCA and FIFRA violations when reviewing facility records. Ms. Kelley explained that the Agency will now be adopting more of a mass-balance, process-based approach to enforcement, expanding its focus during facility inspections to include comparisons of process inputs and outputs.

Nanotechnology

In the past six years, EPA has received more than 110 premanufacture notices for nanoscale materials. It was not until 2008 however that EPA issued a Federal Register Notice regarding chemical identity questions in the nanotechnology context in which it articulated that the Agency considers allotropes of carbon such as carbon nanotubes (CNT) to be new chemicals. The Agency has been issuing consent orders and SNURs in the course of its review of nanoscale substances and the enforcement staff have conducted more than 20 focused inspections at nanotechnology production facilities already.

Chlorinated Paraffins

Unlike nanotubes, basic chlorinated paraffins are not “new” and some have been on the chemical Inventory for many years. During the period following the Inventory’s creation, however, industry began to fracture the carbon chains, which can create short-chain chlorinated paraffins. EPA believes that these short-chain chlorinated paraffins behave differently and may even present different risks to human health than longer-chain chlorinated paraffins. Moreover, EPA considers certain short-chain paraffins to be “new” chemicals and has been issuing subpoenas to and inspecting facilities that it believes are manufacturing fractions that are not in the Inventory. EPA’s interest in fractionation processes extends beyond the chlorinated paraffins issue and the practice will be a focus during inspections of chemical manufacturing facilities and oil refineries.

EPA will also be targeting companies that fail to submit substantial risk information required under TSCA Section 8(e). Ms. Kelley explained that the Agency is increasing its internal coordination of inspections across programs for this purpose and plans to use subpoenas for data gathering and will make referrals of such violations to the Department of Justice.

Finally, EPA is updating its Enforcement Response Policies (ERPs) to ensure consistency across programs. A key focus of these updates will be an increased emphasis on capturing economic benefits derived from violations of TSCA, which could include both delayed and avoided costs as a result of noncompliance.

FIFRA Enforcement Priorities

Ms. Kelley announced that EPA will focus on two key areas when enforcing FIFRA at the national level. First, EPA will begin targeting illegal importation of noncompliant pesticide products to prevent and reduce the risks from use of unsafe products. Second, EPA plans to more closely scrutinize so-called “distributor products” to address discrepancies in labeling between the labeling and formulation which is authorized for use by the terms of the basic registrant’s product and the labeling and content of “supplemental distributor” (aka private label) products. EPA and state officials have been discussing their concerns about unauthorized disparities for some time. Because EPA considers a supplemental distributor to be acting as an agent of the primary registrant, EPA considers both parties to be potentially liable for any violation related to the distributor’s product. Ms. Kelley also discussed a number of additional focus areas for EPA’s regional enforcement teams, including:

- **Fumigants/Fumigation**—EPA intends to improve compliance with labeling requirements and use directions for fumigant pesticides.
- **Worker Safety**—Regional EPA offices are encouraged to support allegations of agricultural pesticide misuse brought by state enforcement officials through the use of federal enforcement actions in an effort to better

protect agricultural farm workers and applicators from pesticide exposure.

- Retail Marketing—EPA intends to make retailers more aware of their compliance obligations.
- Container/Containment—EPA also intends to ensure effective implementation of new container/containment requirements.

Conclusion

EPA appears determined to take a much more aggressive stance towards enforcement of TSCA and FIFRA for the coming fiscal year. Thus, pesticide registrants and distributors as well as chemical manufacturers and processors should expect to see EPA making an increasing number of referrals of cases to the Department of Justice and anticipate that settlements may be less frequent when the Agency's lawyers believe a case can be tried successfully in an administrative proceeding. Manufacturers and importers of chemicals and pesticides, particularly those who have products noted among those being targeted by EPA, will need to be vigilant in fulfilling their TSCA and FIFRA compliance obligations.

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