

EPA Clarifies Position on Ion-Generating Equipment

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Certain washing machine manufacturers probably didn't think they needed to register their products as pesticides when designing and making them. However, this is exactly what they'll be required to do under 72 Fed. Reg. 54039, which the U.S. Environmental Protection Agency (EPA) clarified on September 21.

Washing machines using silver electrodes to produce silver ions to kill germs are considered "pesticides," not "devices," and such equipment will be regulated as pesticides, states EPA. While this may not sound like big news, it could mean that household appliances such as washing machines as well as even some industrial equipment may need to be registered as pesticides if certain product claims are made. Here's why.

Is it a pesticide or a device?

Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA may regulate a product as a pesticide when claims are made by the product manufacturer about the product's ability to kill pests, including germs. Recently, many manufacturers of all kinds of consumer products have been touting the ability of their products to kill germs to prevent disease and illness, largely because we live in a very germ-conscious society.

In September 2005, EPA advised a manufacturer that washing machines using silver electrodes to produce silver ions to kill germs are considered "devices" rather than pesticides. Under FIFRA, devices specifically don't require a FIFRA registration. EPA based its decision on a November 19, 1976, determination in which EPA distinguished between an article that uses physical or mechanical means to trap, destroy, repel or mitigate any pest and an article that incorporates a substance or mixture of substances to prevent, destroy, repel or mitigate any pest. EPA determined then that the former was a device and the latter was a pesticide. EPA based its 1976 decision on the statutory definitions of device and pesticide.

EPA's 2007 decision states that it has since determined that, under the statutory interpretation set forth in its 1976 policy, "such ion-generating equipment would require registration as a pesticide under FIFRA." The key distinction between pesticides and devices is whether the pesticidal activity is due to physical or mechanical actions, a substance or mixture of substances. In the 2007 notice, EPA states that, in 1976, it wasn't aware of equipment such as the ion-generating washing machine that was first presented to EPA in 2005.

Potentially affected equipment include, but aren't limited to, "washing machines containing electrodes that emit silver, copper, or zinc ions and ion generators used in swimming pools to kill algae and as an adjunct to the chlorination process." EPA intends to provide a "guide for readers" about entities likely to be affected by its clarification and notes that "[o]ther types of technology not listed in this notice could also be affected." This might even include equipment used for

disinfection in manufacturing. EPA requests information on any other type of equipment that generates ions from electrodes for pesticidal purposes that could be covered under the notice.

EPA notes that there's great confusion in the regulated community about its interpretation of the distinction between pesticides and devices. EPA will work with producers of ion generators to bring such equipment into compliance for equipment being distributed or sold in the U.S. on September 21. Accordingly, any person distributing or selling such equipment on or prior to September 21, may continue distribution or sale of the equipment until March 21, 2008.

What are the consequences?

EPA doesn't speculate on what becomes of entities that neglect to obtain FIFRA registrations by that date. The inference, however, is EPA would take the position that the product is an unregistered pesticide and its marketing would be susceptible to enforcement action. Readers should carefully consider the implications of EPA's new interpretation on relevant products and respond accordingly.