



MEMORANDUM

Via E-Mail

DATE: August 8, 2006

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: State Coalition Petitions EPA to Require Disclosure of Inert Ingredients

On August 1, 2006, a coalition of 14 states and the U.S. Virgin Islands petitioned the U.S. Environmental Protection Agency (EPA) to amend its rules governing the disclosure of inert ingredients on pesticide product labels. The petitioners want EPA to require the disclosure of 360 ingredients for which they claim federal determinations of hazard have already been made under the following legal authorities: the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); Emergency Planning and Community Right-to-Know Act (EPCRA); Toxic Substances Control Act (TSCA); Resource Conservation and Recovery Act (RCRA); Clean Water Act (CWA); Clean Air Act (CAA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and Occupational Safety and Health Act (OSH Act).¹ Petitioners argue that, because EPA or OSHA has identified the 360 inerts as hazardous under other statutory authorities, EPA should require that these inerts be disclosed on pesticide labels, consistent with the requirements EPA imposes on inerts determined to be of toxicological concern (List 1 inerts). If EPA does not issue a finding covering all 360 ingredients, then the petitioners ask that EPA either (a) assess as a group the chemicals identified as hazardous under each statutory authority and determine which groups of chemicals are sufficiently hazardous to require disclosure on products labels; or (b) assess individually each of the chemicals included under those authorities and determine specifically which individual hazardous chemicals are

¹ The petitioners derived the list of 360 ingredients primarily from EPA's Substance Registry System, which is available at <http://www.epa.gov/srs/>; the list of Occupational Safety and Health Administration (OSHA) Toxic and Hazardous Substances not included in the Substance Registry List, which is available at <http://www.osha.gov/dts/chemicalsampling/toc/chmcas.html>; and the 2004 edition of the American Conference of Governmental Industrial Hygienists (ACGIH) *TLVs and BEIs*.



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sufficiently hazardous to require disclosure on product labels. The petition is available on the Internet at http://www.oag.state.ny.us/press/2006/aug/Petition.As%20Submitted.%208_1_06.pdf. The Northwest Coalition for Alternatives to Pesticides (NCAP) and 21 other environmental and public health organizations filed a similar petition with EPA on August 1, 2006.

Background

According to the petition, it is guided by statements made by EPA in a July 12, 2001, letter, and by the U.S. District Court for the District of Columbia in an October 12, 2004, oral decision. EPA's letter denied a January 16, 1998, petition to list the identity of all inert ingredients on pesticide labels filed by the Attorneys General of Alaska, Connecticut, Guam, Massachusetts, Minnesota, New Hampshire, New York, and Wisconsin. NCAP and approximately 260 other organizations filed a similar petition. In the July 12, 2001, letter from Marcia E. Mulkey, then Director of the Office of Pesticide Programs, EPA denied the petition, citing its "statutory inability to grant the specific relief requested (requiring the identities of all inert ingredients to appear on product labels)." According to EPA, "[t]he determination in [40 C.F.R. §] 156.10(g)(7) that '[the] Administrator may require the name of any inert ingredient(s) to be listed in the ingredient statement if he determines that such ingredient(s) may pose a hazard to man or the environment' is likewise made on a case-by-case basis . . . , and cannot support the listing of all inert ingredients in all products."

NCAP and its co-petitioners subsequently filed a complaint in the U.S. District Court for the District of Columbia against EPA. In the court's October 12, 2004, oral decision, the court held that EPA could not be ordered to require that all inert ingredients be publicly disclosed on pesticide labels. According to the August 1, 2006, petition, the court noted that "EPA can and does mandate disclosure of 'inert' ingredients when necessary to protect against the risk of injury to human health or the environment," and that "EPA clearly has the authority to require the disclosure of 'things' when 'other sections of EPA or other agencies under this or other statutes find that certain ingredients may be harmful.'"

Basis of the Hazard Determination for 360 Inerts Identified by Petitioners

According to petitioners, EPA and OSHA have determined that many chemicals used as inert ingredients in pesticides are hazardous to human or environmental health. Petitioners argue that these determinations are the functional equivalent of determinations made under FIFRA Section 10(d)(1) that disclosure "is necessary to protect against an unreasonable risk of injury to health or the environment" and are sufficient for EPA to require manufacturers to list these ingredients on pesticide labels. The petitioners summarize the toxicity of six inerts to illustrate the variety of toxic effects that may arise from exposure to inert ingredients. The six



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inerts are naphthalene, ethylbenzene, 2-propen-1-ol (allyl alcohol), ethoxyquin, sodium chromate, and chloroacetic acid. The statutes and determinations cited by the petitioners in preparing their list of 360 inerts are listed below.

- **FIFRA:** In 1996, EPA differentiated between certain minimum risk active ingredients, which were exempted from FIFRA requirements, and the remaining active ingredients, which remained subject to FIFRA regulation. EPA stated that it exempted the minimum risk ingredients in part to focus its resources on the remaining ingredients, “which pose greater risk to humans and the environment.” Petitioners claim that any inert ingredient that is a registered active ingredient and not on the list of minimum risk active ingredients should be identified on product labels and ask that EPA move 14 chemicals on FIFRA Inerts List 2 (potentially toxic other ingredients/high priority for testing inerts), List 3 (inerts of unknown toxicity), List 4A (minimal risk inert ingredients), and List 4B (other ingredients for which EPA has sufficient information to reasonably conclude that the current use pattern in pesticide products will not adversely affect public health or the environment) be moved to List 1.
- **EPCRA:** Under EPCRA Section 302(a), EPA is required to publish a list of extremely hazardous substances and establish threshold planning quantities for each of the listed substances. Under EPCRA Section 313, EPA is required to regulate the manufacturing, processing, or use of toxic substances. Petitioners ask that the 13 inerts included on Lists 2 through 4B that are also listed under EPCRA Section 302(a) as extremely hazardous substances be moved to List 1. Petitioners also ask that the 93 inerts on Lists 2 through 4B that are also included on the Toxics Release Inventory under EPCRA Section 313 be moved to List 1.
- **TSCA:** Petitioners state that under TSCA Section 6, EPA has identified a group of substances that “present[] or will present an unreasonable risk of injury to health or the environment,” otherwise known as the TSCA Section 6 Unreasonable Risk list. Petitioners ask that the two inerts on Lists 2 through 4B that are also included on the TSCA Section 6 Unreasonable Risk list be found to be of “toxicological concern” and moved to List 1.
- **RCRA:** RCRA defines a hazardous waste as a solid waste that can “cause, or significantly contribute to an increase in mortality or an



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increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment.” Under RCRA, EPA classifies hazardous wastes either as listed (F-list, K-list, P-list, or U-list), or by the characteristics (toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors, such as flammability, corrosiveness, and other hazardous characteristics) exhibited by their constituents. Petitioners ask that the eight inerts on FIFRA Lists 2 through 4B that are listed as RCRA F wastes be moved to List 1; that the two inerts on FIFRA Lists 2 through 4B that are listed as RCRA P wastes be moved to List 1; that the 37 inerts on FIFRA Lists 2 through 4B that are listed as RCRA U wastes be moved to List 1. Petitioners also ask that the 16 inerts listed in 40 C.F.R. Part 261 Appendix VII and 31 inerts listed in Appendix VIII be moved from FIFRA Lists 2 through 4B to List 1.

- **CWA:** CWA Section 311 requires EPA to compile a list of hazardous substances that, when discharged in any quantity to navigable waters or adjoining shorelines, present an imminent and substantial danger to the public health or welfare. Under CWA Section 307, EPA is mandated to promulgate pretreatment standards for pollutants that, because of their hazardous properties, require pretreatment so they do not either pass through the system unchanged, and thus directly endanger human health or the environment, or disrupt the operation of the sewage treatment system, thereby allowing other pollutants to pass through untreated. Petitioners ask that the 78 inerts on FIFRA Lists 2 through 4B that listed under CWA Section 311 be moved to List 1. Petitioners also ask that the 79 chemicals on FIFRA Lists 2 through 4B that are included in the Pretreatment Standards/Paragraph 4-C list be moved to List 1.
- **CAA:** Under CAA Section 112, EPA maintains and periodically reviews a list of hazardous substances that have been determined to contribute to air pollution. This list includes all “pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects.” The CWA directed EPA to develop a list of 100 substances “known to cause death, injury, or serious adverse effects to human health



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or the environment,” and EPA promulgated this list at 40 C.F.R. Section 68.130. Under CAA Section 202, EPA develops standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines that contribute to air pollution and that “may reasonably be anticipated to endanger public health or welfare.” Petitioners ask that the 27 inerts on FIFRA Lists 2 through 4B that are listed under CAA Section 112 be moved to List 1, that the 16 inerts on FIFRA Lists 2 through 4B that are listed in 40 C.F.R. Section 68.130 be moved to List 1, and that the three inerts on FIFRA Lists 2 through 4B that are listed under CAA Section 202 be moved to List 1.

- **CERCLA:** CERCLA Section 101(14) defines hazardous substances by reference to various federal environmental statutes, including CAA, CWA, TSCA, and RCRA. Pursuant to CERCLA Section 104, EPA and the Agency for Toxic Substances and Disease Registry are required to develop and periodically revise a priority list of hazardous substances, including substances that have been determined to pose a “significant potential threat to human health due to [their] known or suspected toxicity to humans.” The petitioners ask that the 109 inerts on FIFRA Lists 2 through 4B that are also on CERCLA Section 101(14) lists be moved to List 1. The petitioners also ask that the 51 inerts on FIFRA Lists 2 through 4B that are also on the CERCLA Section 104(i)(2) priority hazardous substance list be moved to List 1.
- **FIFRA List 2 Inerts:** FIFRA List 2 inerts are those that EPA “believes are potentially toxic and should be assessed for effects of concern [While] [m]any of these inert ingredients are structurally similar to chemicals known to be toxic[, others] have data suggesting a basis for concern about the toxicity of the chemical.” According to petitioners, some List 2 inerts are mixtures for which EPA has determined that one or more of the constituents are hazardous to public health or the environment. There are 96 List 2 inerts.
- **OSH Act:** Under OSHA’s regulations, the chemicals listed at 29 C.F.R. Section 1910 Subpart Z are chemicals that are “a physical hazard” or a “health hazard.” OSHA’s hazard communication regulation at 29 C.F.R. Section 1910.1200(d)(3)(ii) defines as hazardous chemicals listed in the latest edition of ACGIH’s threshold limit values (TLV) booklet. The petitioners ask that the 115 inerts on FIFRA Lists 2 through 4B and listed



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in Subpart Z be moved to List 1, and that the 177 inerts on FIFRA Lists 2 through 4B that also have ACGIH TLVs be moved to List 1.

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We hope this information is helpful. As always, please call if you have any questions.