



## MEMORANDUM

### Via E-Mail

DATE: August 22, 2006

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: EPA Publishes Custom Blending Policy Guidance

On August 16, 2006, the U.S. Environmental Protection Agency (EPA) issued in the *Federal Register* a final rule setting forth standards for pesticide containers and containment for the safe storage and disposal of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>1</sup> EPA, in the preamble to this rule, provides additional guidance on its policy for “custom blenders” -- companies that provide the services of mixing certain registered pesticides to customers’ specifications. EPA’s 1982 Custom Blending Policy states that a “custom blender,” a term which EPA has defined in 40 C.F.R. Section 167.3 for purposes of establishment registration requirements under FIFRA,<sup>2</sup> need not register a blend of a registered pesticide and other ingredients when it meets certain conditions.<sup>3</sup> In the August 16, 2006, rule, EPA provided its guidance intended to clarify its position that its custom blending policy applies to situations when a blend is diluted. Below we provide a background of the Custom Blending Policy and EPA’s new guidance.

### **Background**

Absent meeting the terms of the 1982 Policy exemption, the development of custom blended customer-specific products would potentially run afoul of the FIFRA Section 12(a)(1)(A) prohibition against the sale or distribution of an unregistered pesticide product and

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<sup>1</sup> 71 Fed. Reg. 47330 (Aug. 16, 2006).

<sup>2</sup> 40 C.F.R. § 167.3. The criteria set forth in 40 C.F.R. Section 167.3 must be satisfied for a producer to custom blend at an unregistered establishment.

<sup>3</sup> EPA, FIFRA Compliance Program Policy No. 3.4 (May 10, 1982) (1982 Policy).



Memorandum to Firm Clients and Friends  
August 22, 2006  
Page 2

possibly the FIFRA Section 12(a)(2)(G) prohibition against the use of a registered pesticide in a manner inconsistent with its labeling. This is because, absent the exemption, the blending of currently registered pesticide products to create a custom product would appear to create a new pesticide product, which could not be sold or distributed without registration. The use of such a product could also violate FIFRA Section 12(a)(2)(G) if such use is not consistent with the labeling of a registered product.<sup>4</sup> EPA, however, has issued a policy that allows “custom blending” under certain circumstances.

EPA issued its custom blending policy in the form of a FIFRA Compliance Program Policy in 1982. The 1982 Policy states that “[a]lthough custom blenders of pesticides are subject to the registration requirements of Section 3, they need not meet these requirements when certain prescribed conditions are met.”<sup>5</sup> These conditions include the following:

- 1) the blend is prepared to the order of the user and is not held in inventory by the blender; and
- 2) the pesticide(s) used in the blend bears end-use labeling directions which do not prohibit use of the product in such a blend; and
- 3) the blend is prepared in a registered establishment; and
- 4) the blend is delivered to the user together with:
  - a) a copy of the end-use labeling of the pesticide used in the blend, and

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<sup>4</sup> FIFRA Section 2(ee) states, relevant hereto, that “[t]he term ‘to use any registered pesticide in a manner inconsistent with its labeling’ means to use any registered pesticide in a manner not permitted by the labeling, except that the term shall not include (1) applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling unless the labeling specifically prohibits deviation from the specified dosage, concentration, or frequency. . . .” FIFRA § 2(ee), 7 U.S.C. § 136(ee).

<sup>5</sup> 1982 Policy at 1. The 1982 Policy defines a custom blender as one who “provide[s] the service of mixing pesticides to a customer’s specifications, usually a pesticide(s)-fertilizer(s) or pesticide-pesticide mixture.” *Id.*



Memorandum to Firm Clients and Friends  
August 22, 2006  
Page 3

- b) a statement specifying the composition of the mixture.<sup>6</sup>

### **New Guidance**

Under the August 16, 2006, rule, EPA, in part, exempts custom blending from the repackaging requirements, although custom blenders of agricultural pesticides are subject to certain containment regulations. In addition, EPA addresses the issue of whether the 1982 Policy applies when a pesticide is mixed with water or other diluents. EPA states it is “appropriate to clarify our position on diluting custom blends” because various offices and Regions within EPA, as well as the States, “have not had a consistent policy about whether custom blends can be diluted with water or another diluent.”<sup>7</sup>

In the preamble, EPA states that the definition of “custom blender” provides “flexibility.” Under EPA’s regulations, custom blenders are defined as “any establishment which provides the service of mixing pesticides to a customer’s specifications, usually a pesticide(s)-fertilizer(s), pesticide-pesticide, or a pesticide-animal feed mixture, when” certain conditions described are met. EPA states: “the word ‘usually’ in this definition provides flexibility and allows water (or other diluents when specified by the labeling of the pesticide[s] in the blend) to be added to custom blends.”<sup>8</sup> EPA states further:

EPA believes that the language of § 167.3 allows custom blends to be diluted with water or a diluent specified on the labels of all pesticides in the blend. In many ways, it is more efficient and possibly more accurate for the facility that is measuring and blending pesticides, fertilizers and/or animal feed to also measure and blend the diluent into the custom blend. In addition, custom blends (with diluents) that are delivered to an end user as a use-dilution (usually in refillable containers) offer worker exposure and environmental protection benefits including eliminating the need for end users to mix, handle and potentially spill the pesticide in the field; eliminating the need for the end user to rinse containers

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<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> 71 Fed. Reg. at 47383.

<sup>8</sup> *Id.*



Memorandum to Firm Clients and Friends  
August 22, 2006  
Page 4

in the field; allowing the use of closed systems; and reducing the number of nonrefillable containers that must be disposed or recycled.<sup>9</sup>

EPA also states that custom blends with a diluent added still must comply with all the conditions in the definition of “custom blending” set forth in the newly added Section 165.3 of the regulations. Aside from the requirement noted above that custom blenders of agricultural pesticides are now subject to certain containment regulations set forth in this final rule, this rule does promulgate new regulatory provisions expressly governing custom blenders.

In addition, EPA states that, “from a regulatory point of view,” it does not view a difference between “custom blending” and “custom mixing.” EPA states:

A custom mixer is a facility that stores materials previously purchased by end-users and that custom mixes the products just prior to application. A custom mixer does not own, sell or apply the product, although the conditions in the § 165.3 definition of custom blending are met. Over the years, there have been different interpretations of whether or not there is a difference between custom blending and custom mixing. At least a few businesses have been established as custom mixers under the determination that they are not custom blenders. This final rule does not distinguish between custom blenders and custom mixers. Similarly, the policy of allowing diluents to be added to custom blends applies to both custom blenders and custom mixers.<sup>10</sup>

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

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*