



BERGESON & CAMPBELL, P.C.

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MEMORANDUM

Via E-Mail

DATE: December 10, 2007
TO: Firm Clients and Friends
FROM: Bergeson & Campbell, P.C.
RE: SFIREG Discusses Current Pesticide Issues

On December 3-4, 2007, the State FIFRA Issues Research & Evaluation Group (SFIREG) met in Arlington, Virginia for presentation and discussion of current issues that state pesticide regulators are confronting. This memorandum summarizes information presented at the meeting.

SFIREG POM Committee Meeting

Jim Gray, Chair, SFIREG Pesticide Operation and Management (POM) Committee work group reviewed key issues raised at the working group's October 2007 meeting. Key issues raised in Gray's presentation included:

- ***Cause Marketing:*** POM members expressed concern with the process the U.S. Environmental Protection Agency (EPA) has employed in reviewing cause marketing label provisions and would prefer to be included in the review process.
- ***Unenforceable Label Language:*** POM members discussed making label reviewers accountable for including unenforceable label language.
- ***Regulation of Prions:*** An EPA representative from EPA's Office of Pesticide Programs (OPP) Antimicrobials Division (AD) presented to the POM EPA's plans on a proposed rulemaking to include prions in the definition of "pest" under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The revised definition would require that all products intended to control prions on inanimate surfaces be evaluated and



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BERGESON & CAMPBELL, P.C.

Memorandum to Firm Clients and Friends
December 10, 2007
Page 2

registered as pesticides. A proposed rulemaking is scheduled for February 2009.

- ***Pesticide Drift:*** POM members have stressed need for any drift reduction technology (DRT) label restrictions to be clear and enforceable. POM offered assistance to EPA in drafting DRT label language.

SFIREG WQ Committee Meeting

Joe Zachmann, Chair, SFIREG Water Quality and Pesticide Disposal (WQ) Committee work group, reviewed key issues raised at the working group's October 2007 meeting.

- ***Chemigation:*** In mid-December 2007, the WQ Committee work group will have a teleconference to discuss whether referring users of chemigation equipment to materials that are not part of the pesticide product label is appropriate. The issue raised in the discussion is that when a party relies on material other than the product label, it is less clear if or when the party may be violating the label.
- ***Surface and Drinking Water Quality:*** State officials are very interested in being able to obtain water quality criteria information for surface water from any available data source. The WQ Committee is keeping abreast of U.S. Geological Survey (USGS) water quality projects for opportunities to coordinate with USGS on water quality information needs. EPA's Office of Water (OW) is providing information on drinking water to assist help states on safe drinking water issues in the context of pesticides.
- ***Inert Ingredients:*** The WQ Committee is interested in looking at the water quality impact of inert ingredients.
- ***WQ Review Triggers:*** The WQ Committee discussed a need for Standard Operating Procedures that could be followed for qualitative, rather than quantitative, triggers for water quality review of new active ingredients that exceed certain levels of concern.



®

BERGESON & CAMPBELL, P.C.

Memorandum to Firm Clients and Friends
December 10, 2007
Page 3

Fumigants

John Leahy, Special Review and Reregistration Division of OPP provided an update regarding the reregistration of the fumigant cluster active ingredients, and Mary Waller, Registration Division of OPP addressed the registration of iodomethane.

Leahy reviewed the six-phase reregistration review process for agricultural fumigants. Leahy stated that EPA is now in Phase 6 of the review process, describing it as “the decision-making phase.” He stated that EPA expects to be able to announce reregistration decisions regarding the fumigants under review in **May 2008**.

Leahy stated that EPA continues to believe that modeling is the best way to address the exposure issues related to fumigants because, among other reasons, generating empirical data is too costly and labor intensive. In its review, EPA examined other models and found, Leahy stated, that each model generates results that reach the same basic conclusion -- “fumigant products under normal considerations off-gas and move off-site and pose a potential threat to surrounding communities and people.”

Leahy reviewed the basis for EPA’s analyses of the fumigants. According to Leahy, EPA used three lines of evidence to support its efforts to this point: monitoring data, modeling results, and incident information. Regarding the latter of these three, Leahy stated that EPA believes information on the circumstances that led to incident exposures can be very useful, though there are constraints; particularly in that EPA is looking to regulate at the no observed effects level, rather than at the level that generated the incident. Also, Leahy stated that EPA recognizes that incident reporting is not perfect. In the context of the three lines of evidence, each has its weaknesses and strengths, and yet together they lead EPA to the conclusion that “more protection is needed,” Leahy said. EPA is currently “wrestling with the comments it has received and aspects specifically related to the fumigants as a whole, including the factor that geography could play in fumigant use patterns, crops, cultural practices, climate, weather, and other factors,” all of which Leahy said can lead to variability in the risk assessment.

Leahy also stated that:

- Fixed buffers have greater impacts than scalable impacts;
- Notification is likely to have high impacts as well. Other options appear to have lesser impacts;



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BERGESON & CAMPBELL, P.C.

Memorandum to Firm Clients and Friends
December 10, 2007
Page 4

- EPA is looking for options that are clear, enforceable, practical, and protective; and
- EPA wants to hear from states. EPA may target a few of these states as they develop label language, to get a real world check on the registrations.

Waller presented information on the recent registration for iodomethane. She stated that the registrant presented EPA with 50 chemical-specific studies. EPA, she said, used state-of-the-art models to develop applications within a margin of safety protective of workers and bystanders. One year after the registration approval, EPA will re-examine the iodomethane registration to ensure it is consistent with EPA's decisions on the other fumigants (*i.e.*, mitigation options). Waller stated that the buffer zones for iodomethane are currently 250 to 500 feet in size. Waller explained that reductions in the buffer zone may be achieved depending upon the rate of application and the area covered, the application method, and whether tarps or other control measures are being used. A member of SFIREG stated that "12 or 14 states have approved iodomethane registrations."

ESA Implementation

Arty Williams, Associate Director, Environmental Fate and Effects Division reported that a new lawsuit has been filed against EPA in California for allegedly not complying with the Endangered Species Act (ESA) for 11 listed species in the San Francisco Bay Watershed, in the registration approval of 43 active ingredients. Williams stated that the lawsuit will have significant implications for EPA resources, and that EPA will have difficulty implementing existing ESA requirements while it is defending the lawsuit.

Unenforceable Label Language Report

SFIREG members stated that their agencies are confronting a number of consequences stemming from "bad" label language, including:

- Unenforceable statements that could affect regulatory authority;
- Potential misuse of a product due to conflicting language on the same label;
- Human injury or environmental contamination that may be due to vague language; and



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BERGESON & CAMPBELL, P.C.

Memorandum to Firm Clients and Friends
December 10, 2007
Page 5

- A perceived loss of public respect for pesticide labels, particularly for restricted-use pesticides.

SFIREG members mentioned several examples of what they believed to be unenforceable label language, including: “for use by,” or “recommended.” Members also cited as an example of what they would consider vague label language statements such as “avoid drift.” SFIREG members cited statements such as “for commercial use only,” or “for pest management professional” as being unenforceable and therefore problematic to them.

SFIREG members discussed holding label reviewers accountable and having EPA treat state lead agencies as partners rather than as stakeholders in the label review process. Jim Roelofs, Field and External Affairs Division (FEAD) stated that FEAD has recently provided OPP a label accountability assessment report. In generating this report, Roelofs stated, EPA found it was difficult to identify label issues using enforcement cases, but he suggested that incident data might be another way to discern whether “bad” labels are in use.

Cause Marketing

Dennis Edwards, AD, reviewed for SFIREG members the cause marketing issue, which is a controversial subject for SFIREG members. Edwards reviewed the draft Pesticide Registration (PR) Notice on cause marketing on which EPA currently is seeking public comment. He also reviewed the questions EPA posed in its request for comments. SFIREG members raised a number of issues, including:

- EPA should require that the cause marketing item be on an outside cellophane wrapper, separate from the label, so that it can be removed from the label after purchase of the product.
- EPA should not rely solely on surveys to understand public perceptions of cause marketing. Asking people through a survey how they interpret a cause marketing item is not useful because it is not clear who is completing the survey, who actually has time to complete such a survey, or how representative/scientific this information is.
- Several state representatives indicated that states can deny the cause marketing label.
- SFIREG’s position is that cause marketing items should not be on a pesticide product label.



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BERGESON & CAMPBELL, P.C.

Memorandum to Firm Clients and Friends
December 10, 2007
Page 6

- State lead agencies need to be consulted at the time of the label filing.

Edwards stated that the comment period on the PR notice is a “golden opportunity” for SFIREG members to have their voices heard. SFIREG will be asking EPA for a 90-day extension to the comment period.

Water Quality Benchmarks

Zachmann presented to members a background summary of SFIREG’s work to date on water quality benchmarks, which, he stated, has principally focused on building bridges between existing information databases and sharing existing information on water quality benchmarks. Efforts to this point have involved OPP, OW, USGS, and SFIREG working together and independently to derive benchmarks for evaluating risk. The focus for states to this point has been on a top 10 list of pesticides, which includes synthetic pyrethroids, atrazine, acetochlor, 2,4-D, metolachlor, and glyphosate.

Currently, OPP is posting screening benchmarks for states to use, and these screening benchmarks focus on the most sensitive organism. OPP and SFIREG are evaluating additional screening benchmarks; OW is proceeding with development of criteria for two substances -- acrolein and atrazine; and states are developing standards independently of EPA. For this last effort, states are proceeding with efforts that examine fewer taxa and employ uncertainty factors to account for the fact that regulators are looking at fewer taxa; the result is conservative numbers. States will have to consider if the values generated are robust enough; the uncertainty factors applied can be quite large. SFIREG members seemed to recognize that something better than the OPP screening is needed, but seemed also to believe that something less resource intensive than how OW generates benchmark criteria is appropriate. Jim Leland from Vermont stated that Vermont is generating aquatic standards from National Pollutant Discharge Elimination System (NPDES) permits for the purpose of permitting golf course applications.

Additional Items

- EPA plans to issue a PR notice on chemigation, though the timing is uncertain. An issue to be addressed is how far to extend any chemigation requirements beyond agricultural applications.
- The pesticide container and containment rule will have a compliance date in the range of **April 2008**.



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BERGESON & CAMPBELL, P.C.

Memorandum to Firm Clients and Friends

December 10, 2007

Page 7

- EPA's labeling consistency website is being reorganized to facilitate use of the website.

- SFIREG agreed to develop issue papers to address experimental use permits and incident reporting, the latter of which SFIREG members believe is an area that needs significant improvement given what they described as the vagaries and potential obstacles to accurate incident reporting.

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