

# Review of EPA Policy on Eco-Labels

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# Overview

- Review of Applicable Authorities
- Application of Authorities to Environmental Claims
- EPA Position and Risks to Industry
- State Issues
- Possible paths forward

# Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

- Unlawful to distribute or sell any pesticide for which any claims made in connection with the distribution or sale differ substantially from those provided to EPA in support of registration. FIFRA § 12(a)(1)(B).
- Unlawful to distribute or sell a misbranded pesticide. FIFRA § 12(a)(1)(E).

# FIFRA

- A pesticide is misbranded if its labeling bears any statement, design, or graphic representation that is false or misleading.  
FIFRA § 2 (q)(1)(A).

# FIFRA: Regulations

- Under EPA's regulations, examples of misbranding include:
  - False or misleading statements as to the effectiveness of the product. 40 CFR § 156.10(a)(5)(ii);
  - False or misleading statements as to the value of the product for purposes other than as a pesticide. 40 CFR § 156.10(a)(5)(iii);
  - A true statement used in such a way as to give a false or misleading impression to the purchaser. 40 CFR § 156.10(a)(5)(vii);
  - Label disclaimers which negate or detract from required label statements. 40 CFR § 156.10(a)(5)(viii);
  - Claims as to the safety of the pesticide or its ingredients. 40 CFR § 156.10(a)(5)(ix);
  - Comparative statements on the safety of the product, such as "Contains all natural ingredients" or "Among the least toxic chemicals known." 40 CFR § 156.10(a)(5)(x).

# FIFRA: Regulations

- It is unlawful to 'offer for sale' any pesticide if ... claims made for [that pesticide] as part of its distribution and sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. See 40 CFR § 168.22(a).

# EPA Label Requirements

- Label language required by EPA includes:
  - Product name, signal word, and ingredient statement;
  - First aid statements;
  - Precautionary statements such as “Hazards to Humans,” “Environmental Hazards,” and “Physical or Chemical Hazards;”
  - Directions for use
  - Storage and disposal statements

See 40 CFR § 156.10 and Label Review Manual ch. 3.

# EPA Label Review Manual

- Internal guidance document.
- May be revised by EPA at any time, without notice.
- Has not been, and is not required to be subject to notice and comment
- Will be given deference by courts as interpretation of statute by Agency, but there is an issue as to how much deference.

# EPA Label Review Manual

- Advertising and collateral literature or verbal claims for the product must not differ substantially from any claims on the label or labeling. See Label Review Manual, Chapter 12, sec VII.
- In English: if a claim is not on a label or substantially differs from what is on the label, it cannot be made in advertising.

# EPA Label Review Manual

- EPA does not routinely review advertising but may require advertising to be submitted upon request and reviewed for compliance with FIFRA § 12(a)(1)(B). See Label Review Manual, page 12-7.

# EPA Label Review Manual: Unacceptable Claims

- The following claims are unacceptable to EPA:
  - Safety claims such as “trusted,” “safe,” “harmless,” or “nontoxic to humans and pets,” etc.
  - Comparative claims such as “Contains all natural ingredients” or “Among the least toxic chemicals known.”
  - “Natural” or “naturally.”
  - “Biodegradable” except when used in reference to the package.
  - Implied claims such as “professional strength,” “extra strength,” or “maximum efficacy,” etc.

See Label Review Manual, chapter 12.

# EPA Label Review Manual: Non-FIFRA Labeling

- Some labels contain non-FIFRA information, e.g., DOT shipping rules, New York City fire code symbols, Hazardous Materials Identification System (HMIS) and National Paints and Coatings Assoc. (NPCA) and National Fire Protection Assoc. (NFPA) hazard codes and ratings systems, FDA and USDA numbers and bar codes.
- Such text may be placed on the label but may not replace, obscure, conflict with, or supercede the FIFRA required text.

See Label Review Manual, page 3-7.

# Advertising

- It is unlawful to 'offer for sale' any pesticide if ... claims made for [that pesticide] as part of its distribution and sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. See 40 CFR § 168.22(a).
- EPA interprets this as extending to advertisements in any advertising medium to which pesticide users or the general public have access.

# Eco-labels

- EPA's position is that any statements, certifications or logos providing information related to a pesticide's effects on human health or the environment must be evaluated by the Agency.
- EPA reviews these statements for use on pesticide labels on a case-by-case basis.
- EPA has taken the position that use of logos, such as Green Seal, may be interpreted as claims that the product has some elevated properties that allow better protection of the environment or human health. Therefore, EPA has concluded such logos are *not* permitted on labeling or advertising materials.

# Green Seal

- Green Seal has taken the position that FIFRA does not prohibit pesticide products from being Green Seal certified but the packaging, advertising or collateral materials may not display the certification. See <http://www.greenseal.org/newsroom/pr120806.cfm>.
- Purchasers may search for Green Seal certified products on Green Seal's website.

# Green Seal

- Is Green Seal's position likely to be acceptable to EPA?

# Sporicidin International Situation and Decision

- EPA brought action against Sporicidin International for making unauthorized claims in violation of FIFRA. See 1991 EPA App. LEXIS 3; 3 E.A.D. 589.
- Sporicidin distributed reports conducted by independent laboratories supporting claims not approved by EPA for use on the Sporicidin label.
- The reports were distributed with other marketing materials including price lists and promotional materials.
- The Environmental Appeals Board found that Sporicidin adopted the claims in the reports by distributing them. Therefore, the company made unauthorized claims for its products.

# Sporicidin International Situation and Decision

- Under the Sporicidin decision, a registrant is considered to have made statements in independent publications it makes customers or potential customers aware of.
- A company that refers specifiers or purchasers to the Green Seal web site for information on a registered product could be viewed as adopting the statements there, and therefore making claims that EPA considers prohibited.

# EPA's Current View of Environmental Claims re Registered Pesticides

- ALL products that EPA registers are environmentally responsible. There are no gradations among the environmental acceptability of pesticides.
- Registrants cannot differentiate among the registered products except by what is on the label, and all labels bear very similar language re environmental hazards.

# Impact of EPA's Position

- There is risk making any environmental claim re a registered product, even by reference or implication.
- Listing registered products on an "Environmentally Preferable Product" web site itself may create some risk.

# States Also May Raise Issues re Environmental Claims for Registered Products

- States have a role in pesticide regulation.
  - Separate programs.
  - Inspection and enforcement.
- States also regulate advertising to preclude deceptive or unfair claims.

## States Also May Raise Issues re Environmental Claims for Registered Products

- In addition to EPA, the states also have pesticide enforcement programs.
- Some states, such as California and New York, are very aggressive.
- New York brought a case against Dow AgroSciences for making false safety claims in pesticide advertising.
  - Dow paid a \$2 million penalty.

## States Also May Raise Issues re Environmental Claims for Registered Products

- All states have deceptive advertising laws.
- Product labeling and collateral materials may be subject to deceptive advertising claims.
- State attorneys general or environmental groups may bring claims under these programs.

## States Also May Raise Issues re Environmental Claims for Registered Products

- For example, California's Business & Professions Code § 17200 (Unfair competition) and § 17500 (False advertising) provide a private right of action.

# States Also May Raise Issues re Environmental Claims for Registered Products

- Federal preemption is unlikely to be a defense to an action taking issue with environmental claims.
  - Pesticide programs
  - Advertising authority

# Challenges and Opportunities for Industry

- EPA's Office of Pesticide Programs may not be completely aware of the pressure that members of the I & I industry are under and that there are an array of potential approaches:
  - Better communication from EPA on the meaning of the product label;
  - Convince EPA to move forward with some sort of environmental program applicable to pesticides:
    - Private certification programs;
    - Design for the Environment.

# Challenges and Opportunities for Industry

- There is significant uncertainty in the adoption of environmental claims by industry and the risks involved.
- Important to focus on working with EPA to bridge the gap between the current policies and the perceived need in the marketplace.