

## **PESTICIDE AND CHEMICAL POLICY IN 2009: FASTEN YOUR SEATBELTS**

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On Feb. 10, 2009, the Pesticide, Chemical Regulation, and Right-to-Know Committee of the American Bar Association (ABA) Section of Environment, Energy, and Resources convened its first program of the new year in Washington, D.C. Hosted by Latham & Watkins, LLP, the program featured current and past government officials from the U.S. Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS), and distinguished private practitioners and consultants in the field, discussing emerging issues in pesticide and chemical law and policy. The four-hour program reflected both the variety and complexity of issues facing the diverse membership of the committee.

### **A Full Plate for EPA's Pesticide Program**

Representatives from EPA's Office of Pesticide Programs (OPP), including Dr. Debra Edwards, Director, Mark Dyner, Office of General Counsel, and William Jordan, reported on a wide-ranging review of regulatory, science, and policy activities underway at the 800-person office. Topics covered included: OPP's Endocrine Disruptor Screening Program, revised spray drift labeling guidance, federal efforts to move toward less animal-intensive testing policies, recent reports suggesting long-range transport of semi-volatile pesticides, OPP's schedule for responding to a pending inert disclosure petition, the status of OPP's nanopesticide and biotechnology policies, and growing concern over declining bee populations.

**ESA**—One of OPP's major challenges for 2009 appears to be reconciling federal pesticide registration processes established under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) with the consultation requirements of the Endangered Species

Act (ESA). As discussed by Rick Sayers, FWS, and Angela Somma and Pam Lawrence, NMFS, under the ESA, OPP must consult with FWS and NMFS before making pesticide registration decisions that could adversely impact threatened or endangered species. Implementing this consultation process has proven difficult in light of inadequate government resources and lingering interagency disagreements as to what constitutes an adequate consultation package. OPP reported that FWS recently rejected forty-seven consultation packages submitted by OPP on the grounds that they were inadequate or incomplete. In another recent situation, the Services accepted OPP's consultation package but recommended substantive mitigation measures that may pose significant practical challenges for OPP and its agricultural stakeholders to implement. All parties agree that more dialogue is needed to fashion a workable consultation process going forward.

**CWA**—A second area of legal tension highlighted at the ABA meeting is the intersection of FIFRA and the Clean Water Act (CWA), summarized by Michele Knorr from EPA's Office of General Counsel, Pesticides and Toxic Substances Law Office. In 2006, EPA issued a final rule exempting pesticides applied in accordance with the FIFRA label from the CWA's discharge permit requirements. *See* 71 Fed. Reg. 68,483 (Nov. 27, 2006) (interpreting 33 U.S.C. § 1342). On Jan. 7, 2009, the Sixth Circuit vacated the 2006 rule. *National Cotton Council v. EPA*, slip op. (6th Cir. filed Jan. 7, 2009) (*available at* <http://www.ca6.uscourts.gov/opinions.pdf/09a0004p-06.pdf>). The court held that a discharge permit is required where an aerial or terrestrial pesticide application results in excess or superfluous products finding their way to waters of the United States, or where residual quantities of an aquatically-applied pesticide remain in the water after the pesticidal purpose has been completed. The court also rejected the notion that pesticides must be residual wastes at the time of release from the point source (e.g., applicator's nozzle) to be regulated under the CWA. While Linda

Boornazian, division director of Permits for EPA's Office of Water, stated that it likely will establish one or more general permits to accommodate the typical pesticide applications scenarios likely to trigger a permit requirement, the *National Cotton Council* holding raises significant new legal and practical questions for growers that OPP, the Office of Water, and states, and their many stakeholders will need to address.

## Looking into the Future: TSCA Reauthorization

The final session of the Feb. 10 meeting was a panel discussion on the Toxic Substances Control Act (TSCA) and prospects for TSCA reauthorization. Panel members included Charles Auer, former director of EPA's Office of Pollution Prevention and Toxics; James Aidala, former assistant administrator of EPA's Office of Prevention, Pesticides, and Toxic Substances, and now with Bergeson & Campbell, P.C.; William Rawson, Latham & Watkins; and Mark Duvall, Beveridge & Diamond P.C. While TSCA's core provisions have yet to be changed in over 30 years, the prospects for a TSCA bill appear stronger this year than previously. The recent shift from Republican to Democratic control of the White House, and Henry Waxman's (D-CA) ascension to the House Energy and Commerce Committee Chairmanship is particularly promising. In the Senate, Senator Barbara Boxer (D-CA), chair of the Senate Environment and Public Works (EPW) Committee, not only supports TSCA reform, she recently named another TSCA-reform supporter, Senator Frank Lautenberg (D-NJ), to chair the new EPW Subcommittee responsible for handling TSCA.

Along with these political shifts, some industry stakeholders appear to be revising their position with respect to TSCA reform. While panelists emphasized that there is no single "industry position" on TSCA reauthorization, factors prompting some industry stakeholders to soften their positions include: (1) the belief that TSCA reform may be inevitable, making it better to be inside the room for negotiations, (2) the fact that many larger U.S. companies are already complying with elevated chemical control requirements

in response to the European Union's REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) directive, (3) the proliferation of state and local chemical control bills, which has prompted some to favor a revised federal program with state-preemption provisions, (4) the concern that industry needs to provide an alternative to the onerous TSCA-reform bills being circulated by advocacy groups, and (5) the growing market for "green chemistry" alternatives to conventional toxics, which is creating new industry players that see a competitive advantage in rigorous chemical controls.

Given these trends, panelists agreed that some activity to develop a reauthorization bill likely would be in Congress by 2010, if not sooner. Indeed, under certain scenarios, TSCA reform could actually leapfrog to the front of the legislative agenda if other, higher-priority items like climate change get bogged down and politicians start looking for a quick environmental win. With consensus growing that TSCA may be in play, like it or not, this is sure to be the first of many discussions within the committee (and elsewhere) regarding the future of U.S. chemical control policy.

The committee is sponsoring further discussion on TSCA and chemical reform at the 38th Annual Conference on Environmental Law in Keystone, Colorado. Moderated by EPA's Leslie Schaaff, Director of Policy and Regulatory Analysis, Office of the Administrator, the panel includes Richard Denison, Environmental Defense Fund, Inc., Koen Van Maldegem, Field Waterhouse LP (Belgium), and Lynn L. Bergeson, Bergeson & Campbell, P.C.

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