FROM THE CHAIR:
“OH, WHAT A DIFFERENCE AN ELECTION DAY MAKES . . .”

Charles L. Franklin

As we kick off the new year, a new Congress, and an evolving administration, my resolution as chair of the Pesticides, Chemical Regulation, and Right-to-Know (PCRRTK) Committee is to increase membership and participation in the PCRRTK Committee, and to expand the breadth and diversity of perspectives within its ranks of chemical, pesticide, and product regulatory attorneys. Let me point out some trends that explain my excitement for the coming year:

TSCA at a Crossroad

The postelection changes in House and committee control have reshuffled the strategic and tactical decks in Congress, creating uncertainty and opportunity for stakeholders interested in influencing chemical and pesticide control policy at the legislative level. Sure, the House flip could put Toxic Substances Control Act (TSCA) reform legislation on the back burner for this year—neither Fred Upton (R-MI), chair of the House Energy and Commerce Committee, nor John Shimkus (R-IL), chair of the relevant subcommittee, has expressed interest in TSCA reform, signaling the intent to focus the committee’s early attention on opposing greenhouse gas regulation and other pending regulatory initiatives.

In any event, Lisa Jackson and Steve Owens have promised to move full speed ahead with an aggressive regulatory agenda under their current TSCA and related authorities. The U.S. Environmental Protection Agency (EPA) is reasserting its authority under TSCA section 6 to place restrictions on lead, mercury, and PCBs in products, and is developing chemical action plans to address other substances it deems to be “chemicals of concern.” EPA is using its TSCA sections 4, 5, and 8 authority to expand testing and reporting requirements for high production volume (HPV) chemicals, new and existing nanoscale chemicals, and chemicals reportedly found in drinking water sources. These and many other activities by EPA and sister regulatory agencies, not to mention states like California, Washington, and Maine, are redefining the regulatory environment for many industrial,
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Pesticides, Chemical Regulation, and Right-to-Know Committee Newsletter
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Lynn L. Bergeson, Editor

In this issue:

FIFRA on the Defense
The election also brings new leadership to the House and Senate committees responsible for oversight of federal pesticide policy. Last year, both chambers considered but failed to move bills to override the Sixth Circuit’s National Cotton Council decision requiring Clean Water Act (CWA) permits for the countless pesticide applications in and around water. Representative Frank Lucas (R-OR), chair of the House Agriculture Committee, and Senator Debbie Stabenow (D-MI), chair of the Senate Agriculture, Nutrition, and Forestry Committee, both have stated that they want to address this Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)/CWA conflict, opening the possibility for a stand-alone bill or an amendment to the 2012 Farm Bill.

In the meantime, all eyes are on EPA and the state efforts to develop and implement national pollutant discharge elimination system (NPDES) general permit programs by April 2011 for pesticide uses in or near water. Agricultural users and manufacturers will also be watching to see how pending Endangered Species Act litigation and related court settlements will affect the future availability of new and existing crop protection tools under federal registration and registration review programs.

Antimicrobial pesticide users and registrants expect EPA to issue a number of new policies regarding the data and regulatory requirements for proposed new nanopesticides, as well as the legal status of hundreds of consumer products already on the market making antimicrobial claims based on nanotechnology. Expect EPA to continue its recent efforts to impose penalties on companies making antimicrobial claims without obtaining the necessary regulatory approvals.

Right to Know—Right to Protect
Numerous bills introduced during the last Congress, involving products ranging from industrial chemicals to oil dispersants and hydraulic fracturing fluids, sought to commercial, and consumer chemicals and chemical-containing products.
narrow the scope and applicability of traditional confidential business information (CBI) claims long used by companies to protect trade secrets and other proprietary information. Lisa Jackson, in turn, has made “right-to-know” a core principle of both her TSCA and FIFRA regulatory agenda, proposing or implementing numerous programs to increase the availability of public information on EPA-regulated chemicals and pesticides, or to restrict CBI claims by data owners.

These bills and policies reflect the tension between the principles of public transparency and openness, and sometimes competing principles of intellectual property protection, competition, and promotion of innovation. Look for this issue to enter the public debate in the next year.

Join the Debate

If these issues pique your interest, consider joining the PCRRRTK Committee today. We welcome your involvement as a writer or presenter, as a planner, or as an active observer. There are many sides to the pesticide, chemical regulation, and right-to-know debates that will occur in the coming year. Regardless of the side you take, we hope you will bring your perspective to the committee.

Charles L. Franklin is an attorney with Akin Gump Strauss Hauer & Feld LLP in Washington, D.C.

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WHEN IS YOUR CLEANING PRODUCT JUST A CLEANSER? EPA “CLARIFIES” RULES FOR CLEANING PRODUCT PESTICIDAL CLAIMS

Irene Hantman

Selling unregistered pesticides cost the 99 Cents Only Stores $409,490. The U.S. Environmental Protection Agency (EPA) and California Department of Pesticide Regulation charged 99 Cents with Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) violations for selling thousands of containers of household cleanser—produce wash and liquid cleanser—that made claims that the contents would “inhibit mold, fungus, & bacteria including Ecoli” or “disinfect.” Under FIFRA, household cleaning products are pesticides when promoted as able to prevent, destroy, repel, or mitigate pests such as viruses, bacteria, and other microorganisms. 7 U.S.C. § 136(u), (t). The company was found liable for numerous FIFRA labeling and registration violations. 99 Cents violated FIFRA section 12(a)(1) when it sold/distributed unregistered pesticides and products without registration numbers displayed on the labels. In re 99 Cents Only Stores, Docket No. FIFRA-09-2008-0027 (June 24, 2010).

The fine levied against 99 Cents totaled more than ten times the economic benefit to the company from alleged delayed and avoided compliance costs, and the “illegal competitive” advantage gained from the sale of illegal products. Id. at 16. No direct human health harms were evidenced; nor did the Environmental Appeals Board (EAB) find any harm to the environment. Nonetheless, the EAB held that “such a penalty appropriately reflects the gravity of the violations, including the harm to the FIFRA regulatory program caused thereby, and will serve as deterrent to Respondent and other companies committing similar violations in the future.” Id. at 49. In its decision, the EAB noted that “[e]ach sale or distribution of a pesticide [i.e., each container of product] . . . constitutes a distinct unit of violation and thus is grounds for the assessment of a separate penalty.” Id. at 40, citing Chempace Corp., 9 E.A.D. 199, 120, 127–31 (EAB 2000) and Microban Products Co., 9 E.A.D. 674, 683–84 (EAB 2001).
Prompted by this case and other instances of noncompliance, EPA’s Office of Pesticide Programs recently published guidance to clarify the types of claims and the types of cleaning products that are regulated by FIFRA. EPA explains the basic rules of product labeling and advertising as follows: if a product makes a pesticidal claim, it must be registered as a pesticide.

Responsibility for compliance is required of every party in the supply chain, including manufacturers, distributors, retailers, and pest control service providers. It is possible for a party to indemnify itself against noncompliance, although the standard for securing a “valid guaranty” under FIFRA is quite narrow. See, e.g., id. at 1, 23–26, citing Sultan Chemists Inc., 9 E.A.D. 323 (EAB 2000), aff’d 281 F.3d 73 (3d Cir. 2000).

Generally deodorizers, bleaches, and cleaning agents are not considered pesticides. EPA considers cleaners to be pesticides, however, when these products are promoted as having the ability to prevent, destroy, or repel pests, including allergens, bacteria, and other germs, algae, and mold. See, e.g., Determining If a Cleaning Product Is a Pesticide Under FIFRA, available at http://www.epa.gov/pesticides/factsheets/pest-habitat-claims.html. Key “pesticidal” terms include “sanitize,” “disinfect,” or “sterilize.” Thus, pesticidal claims are made by many household cleaning products. In addition, the new guidance expressly notes that pesticidal claims are made by products that advertise their ability to “prevent, block, remove, neutralize, or control bacteria or other pests that cause odors.” Id. Furthermore, EPA notes that pesticidal claims may be implicit. In other words, only when cleaning products limit their claims to the product’s ability to remove dirt or other debris, without any linkage to mitigating a pest, its food, food source, or its habitat, is the product clearly not intended for a pesticidal purpose. Id.

99 Cents emphasizes the necessity of exercising due care in the purchase, distribution, and sale of pesticidal products. This duty applies to retailers and distributors, as well as manufacturers. In addition to ensuring FIFRA registration of all cleaning products that “sanitize, disinfect, and sterilize” (i.e., products that make pesticidal claims), the “exercise of due care” requires inspecting goods to affirm conformity with FIFRA standards, guarding against product substitution, and formalizing procedures to do so.

Irene A. Hantman is a 2010 graduate of the University of Maryland’s Environmental Law Program.
CALIFORNIA DELAYS ADOPTION OF ITS SAFER CONSUMER PRODUCT ALTERNATIVES REGULATIONS, BUT THE PARADIGM SHIFT IN CHEMICALS AND PRODUCTS REGULATION IS COMING NEVERTHETELESS

Philip Moffat

For the past two years, the California Department of Toxic Substances Control (DTSC) has been engaged in a multi-stakeholder process to develop its Safer Consumer Product Alternatives Regulations (SCPA regulations). The regulations and their enabling legislation (AB 1879) address “chemicals of concern” in consumer products, a key component of California’s vaunted Green Chemistry Initiative. AB 1879 essentially tasked DTSC with the herculean feat of developing a set of regulations that would shift the paradigm for chemicals and products regulation. Consumer products containing chemicals of concern would be required to undergo an alternatives assessment to determine how best to limit risks from those chemicals. This new approach was intended to make products “benign by design” and foster the development and use of “safer” chemicals.

AB 1879 required DTSC to complete the rulemaking by January 1, 2011, but that did not happen. After receiving comments on its first proposal, the September draft of the regulations, the department made substantial changes in November and released them for a 15-day comment period extending over the Thanksgiving holiday. The changes largely streamlined and clarified the requirements and removed potential impediments to innovation. Critics accused DTSC of employing “bait-and-switch” tactics and violating the California Administrative Procedures Act, however. In response, DTSC’s parent agency, the California Environmental Protection Agency (CalEPA), decided to delay adoption and violate the statutory deadline. CalEPA announced the decision in a December 23, 2010, letter to Assembly Member Mike Feuer, the primary author of AB 1879. The letter states that DTSC will reconvene its Green Ribbon Science Panel and revisit the issues, but the department has not yet committed publicly to a new deadline for completing the rulemaking. The following paragraphs provide background on California’s recent efforts as well as an overview of the proposed regulations.

Background

CalEPA launched the Green Chemistry Initiative in 2007. In a report published in 2008, titled California Green Chemistry Initiative: Final Report, CalEPA stated that the initiative had the “goal of . . . develop[ing] policy recommendations to stimulate ‘green’ design of products so that the manufacturing, use or disposal of products generates, uses and releases less hazardous chemical substances.” The initiative culminated in six recommendations, one of which encouraged the creation of a systematic science-based process to evaluate chemicals of concern and alternatives to ensure product safety and reduce the need for chemical-by-chemical bans. AB 1879 was enacted to give CalEPA the necessary legal authority to implement that recommendation. It established the Green Ribbon Science Panel, a multidisciplinary advisory body, and required DTSC to promulgate the SCPA regulations. On August 31, 2008, the California legislature passed the legislation, along with a companion bill, SB 509, and Governor Schwarzenegger signed them into law on September 29, 2008.

Overview of the Requirements

The SCPA regulations set out a three-step process—(1) identification of chemicals of concern and the priority products containing them; (2) assessment of alternatives to determine whether a viable, safer alternative is available; and (3) imposition of a regulatory response to protect health and the environment from the alternative selected. DTSC included this process in its September and November drafts.

1. Scope and Application

Article 1 of the SCPA regulations establishes their scope and application. Consistent with AB 1879, the regulations are broad, capturing many products not commonly considered “consumer products.” Excluded from the definition are prescription drugs and devices and their packaging, dental restorative materials and
their packaging, medical devices and their packaging, food, pesticides, and mercury-containing light bulbs (until December 31, 2011). Moreover, “person” is defined to include entities, thereby ensuring that many products sold only to businesses could be subject to regulation. “Chemicals” include both substances and mixtures, following definitions similar to those found in the federal Toxic Substances Control Act.

Despite the broad definition of consumer product, the regulations would exclude the following: (1) products placed into the stream of California commerce solely for the purpose of manufacturing a product that is not a consumer product; (2) products manufactured or stored in, or transported through, the state solely for use outside the state; (3) unintentionally added chemicals; (4) chemicals and products whose regulation pursuant to ratified international trade agreements, California or federal law, adequately addresses the health and environmental risks that would otherwise require action under the SCPA regulations; and (5) products containing chemicals of concern when clear and convincing evidence demonstrates the absence of an exposure pathway threatening health or the environment.

In each product’s supply chain, only a limited universe of persons—product manufacturers and retailers—would be the “responsible entities” shouldering the primary compliance obligations. Retailers would act, however, only when product manufacturers failed to do so. Chemical manufacturers that were not “responsible entities” would need to respond to certain information requests, but they would otherwise face few requirements. A safe harbor from the regulations would be available to responsible entities, either product manufacturers notifying the department that they had ceased to place an affected product into the stream of commerce or retailers notifying that they had stopped ordering the product. Critics have challenged this narrow assignment of responsibilities, which first appeared in November, preferring the September draft’s imposition of joint and several liability on manufacturers, distributors, retailers, and other supply chain actors.

2. Prioritization

Articles 2 and 3 of the regulations set out the chemicals and products prioritization process. DTSC would select chemicals of concern using factors such as hazard characteristics; prevalence in consumer products and potential for harmful levels of exposure; availability of “reliable information”; and adequacy of risk management provided by other laws and agreements, as well as the availability of DTSC resources. After identifying chemicals of concern, DTSC would prioritize products containing those chemicals using a number of factors such as volume in commerce; consumer uses and extent of public exposure, as well as the adequacy and availability of resources; reliable information; and legally mandated risk management measures. The initial list of chemicals of concern is due no later than December 31, 2011, and the initial list of priority products is due one year later.

In the November draft, DTSC recognized the challenge of implementing an entirely new regulatory scheme and limited for five years (until January 1, 2016) the categories of products from which priority products could be identified. These include children’s products, personal care products, and household cleaning products. Of all the changes in the November draft, this one has been the most controversial.

The regulations would include several tools to aid prioritization. DTSC could request information from responsible entities and chemical manufacturers. This call-in process would be available to assist with implementing all aspects of the regulations, not just prioritization. Multiple opportunities for public comment would be provided. In addition, article 4 would authorize persons, including economic competitors, to petition DTSC to evaluate chemicals or products for prioritization. After announcement of a final list of priority products, each responsible entity for such a product would notify DTSC.

3. Alternatives Assessment

In the November draft, DTSC streamlined the alternatives assessment process and removed a notification requirement that could have stifled innovation. Nonetheless, article 5 remains complex, prescribing the scope and content of three key tasks: development of a work plan, performance of the product and alternatives assessment, and preparation of the final report. After accepting a final report, DTSC would review the alternative selected, including the
responsible entities’ proposed regulatory response, before choosing the required response. An exemption from the assessment process would be available to product manufacturers that submitted notifications to DTSC demonstrating either (1) removal of the chemical(s) of concern without replacing it with other chemicals or increasing the amount of chemicals already present, or (2) presence of the chemical(s) at or below the de minimis level, generally 0.1 percent by weight.

Critics of the November draft have also directed their ire at changes to article 5. They are primarily concerned with removal of the so-called tier I notification, a streamlined alternatives assessment for a product voluntarily redesigned or reformulated to reduce or remove chemicals of concern prior to the product being identified as a priority product. Avoidance of “regrettable substitutions” was the goal of this requirement, but DTSC and others concluded that it potentially stifled innovation.

4. Regulatory Response

Article 6 would provide DTSC with a range of regulatory options to further protect health or the environment from the selected alternative. The range includes, among other things, no response, information to consumers, end-of-life management, sales prohibitions, use restrictions, engineered safety measures to limit access or exposure, and funding of green chemistry research challenge grants. The regulations specify when certain responses are required, but otherwise provide the department with considerable latitude in selecting a response after considering public comments. Responsible entities may request an exemption from the required response if they can show with clear and convincing evidence either that the response would conflict with, or substantially duplicate, a requirement of another California or federal law or ratified international agreement.

5. Other Noteworthy Considerations

In addition to understanding the substantive regulatory requirements, counsel may also want to review the applicable provisions concerning enforcement, dispute resolution, and the protection of trade secrets and confidential information, all of which have remained largely unchanged in the November draft. Responsible entities are subject to joint and several liability for violations, and may be subject to one or more of the following: notices of noncompliance, and substantial administrative, civil, and criminal penalties and fines, as well as inclusion on the failure-to-comply list posted on DTSC’s Web site. Before challenging a DTSC decision in court, a responsible entity or other manufacturer would need to exhaust the available administrative remedies, which include informal and formal dispute resolution, depending on the nature of the decision. Lastly, the provisions for protecting trade secrets and other confidential information are complex, despite having been streamlined somewhat, and will require a detailed legal analysis of the regulations and multiple statutes to prepare a successful claim.

Conclusion

Although the department’s decision to delay adoption raises interesting administrative law questions, it also creates considerable uncertainty for the regulated community, which has been struggling to understand the full import of the regulations and prepare for their implementation. The impending debate is certain to be contentious as stakeholders further scrutinize the changes in the November draft. Those changes seem meritorious, but they were proposed in a manner that appears to have eroded trust and damaged the spirit of cooperation. Notwithstanding the importance of the details that emerge, AB 1879 ensures that the regulations ultimately adopted will represent a paradigm shift in California and other states may choose to follow its lead. Accordingly, counsel should advise their clients to monitor the debate and begin in earnest discussions to prepare for implementation.

Philip Moffat is an attorney at Verdant Law, PLLC, a Washington, D.C., law firm specializing in product risk management with a particular emphasis on sustainability and other environmental challenges.
EPA SOLICITS COMMENTS ON CRITERIA FOR EVALUATING ALTERNATIVES TO CHEMICALS OF CONCERN

Lawrence E. Culleen

The U.S. Environmental Protection Agency’s (EPA) Design for the Environment (DfE) Program has released for public comment its “Alternatives Assessment Criteria for Hazard Evaluation.” The criteria are intended be a “transparent tool” for evaluating chemicals based on a rudimentary scoring system, which reflects basic information concerning human health and environmental effects data. Notwithstanding the solicitation of comments, the criteria are expected to be applied in ongoing and future EPA efforts to identify and assess potential alternatives for the use of certain chemicals of concern to EPA, which undergo EPA-sponsored DfE alternatives assessments. For a list of the chemicals that currently are undergoing, or will undergo, alternatives assessments, go to http://www.epa.gov/dfe/alternative_assessments.html.

The criteria are intended to assist decision makers within the community of producers and users of chemicals of concern to EPA, as well as entities such as retailers and nongovernmental organizations that EPA considers to be stakeholders in seeking alternatives to such chemicals. DfE alternatives assessments are multi-stakeholder “partnerships” intended to identify and evaluate alternatives to the use of a chemical of concern and encourage substitution through the use of “safer” alternatives. The assessments also are intended to reduce the likelihood of unintended consequences that might result if poorly understood alternatives are chosen.

The alternatives assessment criteria do not provide a strict “ranking” of individual alternative chemicals along a continuum, but instead assign the labels “high,” “moderate,” and “low” to the known data reflected in studies, or modeled estimates, concerning various human health and environmental effects end points. The labels are drawn from criteria and cutoff points that were used by other sources, such as the United Nation’s Globally Harmonized System (GHS) for the Classification and Labeling of Hazard Substances and EPA programs. The EPA’s announcement states that the evaluation of chemicals under these criteria will be based on the “best available” data, taking into consideration (in order of preference): (1) measured data on the chemical being evaluated; (2) measured data from a suitable analog; and (3) estimated data from appropriate models. In the event a particular hazard end point cannot be evaluated, it will be noted as “no data.” A summary of DfE’s alternatives assessment criteria is located in the appendix of the criteria document available at http://www.epa.gov/dfe/alternatives_assessment_criteria_hazard_eval_nov2010_final_draft2.pdf.

Over the course of the last year, EPA has issued various “action plans” which have provided the basis for which a chemical of concern is selected for an alternatives assessment (see http://www.epa.gov/opptintr/existingchemicals/pubs/ecactionpln.html). DfE has applied the alternatives assessment methodology for certain flame retardants in furniture and flame retardants in printed circuit boards. DfE is applying this approach now for bisphenol A alternatives in thermal paper and the flame retardant decabromodiphenylether (DecaBDE). Additional alternatives assessments will be undertaken for phthalates used as plasticizers and in other applications and hexabromocyclododecane (HBCD) used in expandable polystyrene foam for insulation. For more, visit http://www.epa.gov/dfe/alternative_assessments.html.

Lawrence E. Culleen is with the Washington, D.C., office of Arnold & Porter LLP.
D.C. CIRCUIT REJECTS CHALLENGE TO PESTICIDE REGISTRATION AS UNTIMELY

Kathy Szmuszkovicz  
Jimmy Slaughter  
Sarah Doverspike  
Beveridge & Diamond, P.C.

Steven Goldberg  
BASF Corporation

In *Hardin v. Jackson*, 625 F.3d 739 (D.C. Cir. Oct. 29, 2010), the U.S. Court of Appeals for the District of Columbia Circuit held that a civil action challenging alleged defects in a pesticide registration was time barred under the federal civil statute of limitations and was not saved by the discovery rule. The challengers knew or should have known of the alleged flaws in the registration at the time they learned that the pesticide was registered, which occurred more than six years before filing the complaint. The *Hardin* decision underscores that any legal challenge to a pesticide registration issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) will be held to a strict reading of the statute of limitations and the discovery rule, and that parties claiming an injury from a pesticide have a duty to investigate promptly the legitimacy of the pesticide’s registration. The case is also noteworthy in that the challengers were unsuccessful in their argument that the delays of the U.S. Environmental Protection Agency (EPA) in ruling on their administrative petition to cancel the same pesticide registration could somehow restart the statute of limitations period for a court challenge.

**The FIFRA Pesticide Registration and Cancellation Process**

FIFRA and its regulatory scheme govern the registration, sale, distribution, use, and cancellation of pesticides. 7 U.S.C. § 136–136y; 40 C.F.R. Parts 150–189. FIFRA section 3 grants EPA authority to register pesticides after EPA determines that the “use of the pesticide is in the public interest” and that “the pesticide . . . will not cause any unreasonable adverse effect on the environment.” FIFRA § 3(c)(7)(C), 40 C.F.R. § 152.114. During the registration process, EPA is required to publish certain notices in the Federal Register regarding the receipt of registration applications and the issuance of pesticide registrations. 40 C.F.R. § 152.102.

FIFRA and its regulations also establish detailed procedures that govern the prosecution and defense of efforts to cancel a pesticide registration. FIFRA section 6 provides an administrative process through which pesticide registrants, pesticide users, and the public can petition EPA to cancel pesticide registrations. Following the filing of a petition to cancel, EPA collects and evaluates information regarding the pesticide’s use, human and environmental effects, and economic impacts. 7 U.S.C. § 136d. Section 6 also provides for a hearing process in which petitioners, registrants, and users participate prior to EPA canceling a pesticide registration. *Id.*; 40 C.F.R. Parts 164, 178, 179 (governing hearings under FIFRA for cancellation of registrations).

**Litigation History of the Registration Challenges**

The litigation that preceded the *Hardin* case is important because it proved that the challengers were on notice of the pesticide’s registration shortly after it issued, a critical fact for the D.C. Circuit’s decision. The prior litigation also illustrates how pesticide cancellation petitions can be used as an adjunct to tort litigation for damages.

In 1992, EPA registered Facet®, a herbicide containing the new active ingredient quinclorac, to BASF Corporation. In 1995, Randy Hardin and Vernon Blasingame, the plaintiffs/appellants in the *Hardin* case, and other tomato growers in northeastern Arkansas began bringing lawsuits in Arkansas state courts against rice farmers and pesticide application companies for alleged damage to their crops from off-target spray drift from aerial application of Facet onto rice crops. In 2000, Hardin and others brought a federal civil action in the Eastern District of Arkansas challenging the validity under FIFRA of the Facet registration and subsequent quinclorac products (“the registrations”), along with tort claims for damages for alleged spray drift of Facet. See *Hardin v. BASF*
The parties settled the suit in 2006 with no admission of liability by BASF and no changes to the Facet registrations.

In September 2003, while the Arkansas federal lawsuit was ongoing, the plaintiffs filed a petition to cancel, asking EPA to cancel for the same reasons the same Facet registrations being challenged in Arkansas federal court. While the petition to cancel was pending before EPA, in August 2004 plaintiffs filed a lawsuit against EPA in the U.S. District Court for the District of Columbia, again alleging that the Facet registrations are invalid and seeking their cancellation in that forum. The two farmers contended that the Facet registrations were flawed because (1) the products were registered under the incorrect FIFRA section; (2) EPA did not formally sign and publish in 1992 its determination that the first Facet registration met FIFRA’s safety and public interest standards; and (3) EPA did not publish a Federal Register notice in 1992 of its decision to register Facet. On July 27, 2005, the district court stayed the suit in light of the pendency before EPA of plaintiffs’ petition to cancel the Facet registrations, which, if granted in plaintiffs’ favor, would moot their claims.

When EPA had not issued a decision on the petition to cancel Facet by January 2008, the case was reactivated at the request of plaintiffs and EPA. BASF was granted intervenor status in the case at that time because it is the principal registrant, data submitter, owner, and manufacturer for Facet products. Hardin v. Jackson, 600 F. Supp. 2d 13 (D.D.C. 2009). In August 2009, the district court granted EPA’s and BASF’s motions to dismiss plaintiffs’ complaint for lack of jurisdiction because plaintiffs failed to file the lawsuit within the statute of limitations period in 28 U.S.C. § 2401(a), which allows a party to challenge an agency action within six years after the right of action accrues. Hardin v. Jackson, 648 F. Supp. 2d 42 (D.D.C. 2009). Because plaintiffs did not challenge the jurisdictional nature of the statute of limitations period, the district court assumed it was jurisdictional and, therefore, did not reach alternative bases for dismissal, including the lack of jurisdiction under FIFRA for a civil action challenging a pesticide registration. See id. at 47, n.8.

The D.C. Circuit Affirms the Dismissal and Applies the Discovery Rule in the Pesticide Registration Context

Hardin and Blasingame argued on appeal that application of the discovery rule resulted in their right of action accruing much later than the date of Facet’s registration. Pursuant to the discovery rule, “a cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured.” Hardin, 625 F.3d at 743. Plaintiffs contended that they did not discover their procedural injuries until July 2000 when BASF put it on notice that the Facet products were registered under FIFRA through assertion of the preemption defense in the Arkansas federal case, or alternatively, until 1999 when the University of Arkansas issued results of a study regarding spray drift from Facet application. Id. at 743–44. Plaintiffs also claimed that the district court’s reinstatement of the case in 2008 when EPA had not acted on their petition to cancel triggered the running of a new statute of limitations period because the restatement was in effect a denial of their petition. Final Brief for Appellants, 2010 WL 2753905, *24 (C.A.D.C. June 23, 2010).

EPA and BASF argued that plaintiffs’ claims were untimely because the statute of limitations period in 28 U.S.C. section 2401(a) is jurisdictional and cannot be extended by equitable tolling doctrines like the discovery rule. Hardin, 625 F.3d at 743. EPA and BASF further contended that even if the discovery rule applied, plaintiffs’ claims were late because they were aware in the early 1990s of their alleged injuries from Facet, and that EPA approved the Facet registration. Id. In addition, BASF argued in the alternative that FIFRA provided the exclusive basis for jurisdiction over a civil action challenging a pesticide registration and that absent a ruling on plaintiffs’ petition to cancel Facet, the plaintiffs could not bring their lawsuit. Brief for Appellee BASF Corporation, 2010 WL 2753903, *23–26 (C.A.D.C. June 23, 2010).
In October 2010, a little over a month after oral argument, a unanimous panel of the D.C. Circuit affirmed the district court’s dismissal of the case, applying a similar analysis of the six-year statute of limitations period and the discovery rule. Unlike the district court, the D.C. Circuit held that the six-year statute of limitations in 28 U.S.C. section 2401(a) was jurisdictional, which dispelled questions raised by recent Supreme Court opinions regarding the jurisdictional nature of section 2401(a). Hardin, 625 F.3d at 740, n.1. In another threshold issue, the D.C. Circuit acknowledged the question of whether the discovery rule could act to toll the six-year statute of limitations period—which is jurisdictional—particularly in a case alleging a procedural defect in agency action. See, e.g., Felter v. Norton, 412 F. Supp. 2d 118, 122 (D.D.C. 2006) (“Traditionally, when a statute of limitations has been deemed jurisdictional, it has acted as an absolute bar and could not be overcome by the application of judicially recognized exceptions . . . such as . . . the discovery rule.”). The Hardin panel, however, like the district court, reserved this issue and decided that the discovery rule did not save any cause of action that the plaintiffs might have. Hardin, 625 F.3d at 743. The D.C. Circuit found that plaintiffs should have known that the Facet products were registered by EPA when the state tort cases were filed in the early 1990s because the fact that Facet was registered under FIFRA was “obvious from the registration notice appearing on the label of Facet 50.” Id. In addition, the court found that plaintiffs “could have investigated the product’s FIFRA registrations as soon as they were put on notice of it.” Id. at 744.

The Hardin v. Jackson decision demonstrates that courts will apply strictly the statute of limitations and the discovery rule to lawsuits alleging defects in the registration of a pesticide. As the court noted, the discovery rule may not be applicable to a pesticide registration because the statute of limitations is jurisdictional. Moreover, any publication of the registration could provide constructive notice to start the running of the statute of limitation period. Importantly, the court’s ruling was not affected by the fact that, at the time of decision, plaintiffs’ administration petition to cancel had been pending for seven years. The court was not persuaded by plaintiffs’ argument that the statute of limitations period was restarted by the district court’s reinstatement of the case in 2008 following EPA’s failure to rule on plaintiffs’ petition by that time.

The dismissal of the registration challenge despite the delay in EPA action on the plaintiffs’ petition to cancel supports the position that pesticide registrations must be evaluated by EPA through the FIFRA section 6 petition to cancel process in the first instance. As mentioned above, BASF argued that plaintiffs’ petition to EPA was the only proper forum for their challenge to the registrations and that the lack of jurisdiction under FIFRA provided an alternative basis for affirmance of the district court’s dismissal. Brief for Appellee BASF Corporation, 2010 WL 2753903, *23–26 (C.A.D.C. June 23, 2010) (FIFRA section 6 cancellation provisions demonstrate that Congress intended FIFRA to provide the exclusive means for removing a pesticide from use); see also Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (“We believe Congress intended that FIFRA provide the exclusive means of cancelling a registration.”). Accordingly, even if a lawsuit challenging a registration were timely and therefore provided threshold jurisdiction, such a lawsuit could be dismissed for lack of jurisdiction under FIFRA unless EPA had been presented with and ruled on a petition to cancel. See, e.g., Beyond Pesticides/Nat’l Coal. Against the Misure of Pesticides v. Whitman, 360 F. Supp. 2d 69, 70–71 (D.D.C. 2004) (dismissing a challenge to a pesticide registration for lack of jurisdiction under FIFRA because EPA had not yet ruled on a petition to cancel the pesticide registration at issue).

Kathy Szmuszkovicz and Jimmy Slaughter are principals and Sarah Doverspike is an associate at Beveridge & Diamond, P.C., in Washington, D.C., with practices focusing on pesticide regulation, arbitration, and litigation, and were counsel for BASF in the Hardin case. Steven Goldberg is vice president and associate general counsel for Regulatory and Government Affairs for BASF Corporation.
The U.S. Environmental Protection Agency (EPA) closed out 2010 by announcing two new public access initiatives. These steps are part of the administration’s ongoing efforts to increase “transparency” by providing Web-based tools that enable the public to gain access to health and safety studies that were submitted to the EPA under the Toxic Substances Control Act (TSCA).

One such tool that EPA debuted on December 22, 2010, provides information accessible through EPA’s Web pages that also can be linked through the Web site known as “Data.Gov.” This Web site was developed by the Obama administration to provide public access to a variety of sources of information obtained by the federal government. The Web site will allow users to search EPA’s database electronically to locate data concerning chemicals from among more than 10,000 health and safety studies and reports that were submitted in the context of TSCA section 8 information submittal requirements, section 4 testing rules and agreements, and section 5 new chemical and new use reporting regulations. EPA expects that the data also will be made more accessible by other efforts announced earlier in 2010 intended to reduce companies’ ability to keep the identity of chemicals confidential when reported as part of health and safety studies submitted to EPA. For more information about the new Web tool visit http://www.epa.gov/oppt/existingchemicals/pubs/transparency.html.

Also during late December, EPA and the European Chemicals Agency (ECHA) announced a partnership to promote enhanced cooperation between the two agencies primarily responsible for chemicals risk management in the United States and the European Union. The partnership has thus far been defined only though a joint statement of intent, but it is expected that the partnership will lead to increased sharing of nonconfidential information and data obtained by the agencies under TSCA and the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation. Eventually, EPA and ECHA hope to increase their collaboration to expand beyond information exchange to include other areas of mutual interest such as toxicity testing, risk assessment of chemicals, and even the use of common risk management tools.

The two agencies also have pledged to share criteria for managing confidential business information so as to increase the availability of chemical-related information to the public and to examine ways to more efficiently address chemicals of concern. The joint statement of intent appears at http://www.epa.gov/oppt/echa.epa.soi.pdf.

Lawrence E. Culleen is with the Washington, D.C., office of Arnold & Porter LLP.

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For full details, please visit http://apps.americanbar.org/environ/calendar/

- **March 17-19, 2011**
  - *40th Annual Conference on Environmental Law*
  - Salt Lake City

- **April 1, 2011**
  - *Environmental Justice Symposium*
  - Oxford, MS

- **April 11-12, 2011**
  - *Petroleum Marketing Attorneys’ Meeting*
  - New Orleans

- **August 4-9, 2011**
  - *ABA Annual Meeting*
  - Toronto

- **October 12-15, 2011**
  - *19th Section Fall Meeting*
  - Indianapolis