

# Pesticides, Chemical Regulation, and Right-to-Know Committee Newsletter

Vol. 16, No. 1

December 2014

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## MESSAGE FROM THE CHAIR

Joanne Thelmo

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Dear Friends and Colleagues,

Thank you for your interest in the Pesticides, Chemical Regulation, and Right-to-Know Committee (PCRRTK)!

As I start my year as chair, I wish to express my sincere gratitude to former chair Martha Marrapese for her two years of superlative service and to those who have led our committee since its inception. Martha's leadership was acknowledged and rewarded at the Section's 22nd Fall Conference in Miami where the committee was voted Best Environmental Committee, tied with the Air Committee. Similarly, the committee's newsletter was voted Best Newsletter for the second year in a row! Our thanks to Martha and Newsletter Editor Lynn L. Bergeson, and all who contributed to the newsletter, for their outstanding work! Their leadership has enabled our committee to flourish with an esprit de corps that makes it a privilege and honor to serve as your chair.

At the forefront, our committee strives to provide opportunities for professional discourse, substantive information exchange, and legal scholarship within the diverse bar of attorneys interested or involved in pesticide, chemical, and information disclosure law and policy. We address these goals by encouraging broad participation in

our programs, publications, and policy dialogues, and by developing programs and materials of value to law students, private, nonprofit, and government practitioners.

So what will the PCRRTK world look like in 2014–2015? Here's a glimpse:

- Quarterly Newsletter (November, January, April, June) provides insightful analysis on recent issues and trends in the PCRRTK space as well as publishing opportunities.
- Monthly Complimentary Friday Forums provide networking opportunities with colleagues, meeting thought/government leaders, and learning about critical issues.
- Monthly PCRRTK Conference Call, typically held on the third Thursday at 2:30 p.m. (ET).
- Opportunities to present, network, and collaborate with other organizations.
- Programming to be developed: Quick Teleconference/Brown Bags/Webinars.
- Some key issues that the PCRRTK plans to address in 2014–2015 include:
- Toxic Substances Control Act modernization

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Pesticides, Chemical Regulation, and  
Right-to-Know Committee Newsletter  
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Lynn L. Bergeson, Editor

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**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT,  
ENERGY, AND RESOURCES**

**CALENDAR OF SECTION EVENTS**

December 17, 2014

**Anatomy of a Suspension/Debarment Case in  
Federal Contracting: Strategies and Practice  
for Effective Resolution**

Primary Sponsor: Section of Public Contract  
Law

January 23-25, 2015

**Winter Council Meeting**

Dana Point, CA

March 4, 2015

**Key Environmental Issues in U.S.  
Environmental Protection Agency Region 4**

Georgia State Bar Conference Center  
Atlanta, GA

March 26-28, 2015

**44th Spring Conference: The ABA  
Superconference on Environmental Law**

The Palace Hotel  
San Francisco, CA

April 15-17, 2015

**Section of Litigation's Annual Conference**

New Orleans, LA

Primary Sponsor: Section of Litigation

April 16-17, 2015

**ABA Petroleum Marketing Attorneys' Meeting**

The Loews Madison Hotel  
Washington, DC

June 3, 2015

**33rd Water Law Conference**

Denver, CO

**For full details, please visit  
[www.ambar.org/EnvironCalendar](http://www.ambar.org/EnvironCalendar)**

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- Endangered Species Act and its application to pesticide registrations
- Hydraulic fracturing and confidential business information
- Green/sustainable chemistry; U.S. and EU cooperation of chemical regulation; nanotechnology; and biotechnology, among other areas.

I invite you to browse our pages to learn more about our committee: <http://apps.americanbar.org/dch/committee.cfm?com=NR351500>.

I also encourage you to contact me or any vice chair with your ideas to expand our offerings or resources, or questions.

Now, it is with great pleasure that I introduce you to our vice chairs for 2014–2015. Please know that their information can also be found on the committee’s website (see the Committee Leadership panel).

Lynn L. Bergeson, Committee Newsletter  
Freedom Smith, Electronic Communications  
Steven M. Christenson, Membership, Corporate  
In-house  
Caleb Pearson, Membership, Students & Young  
Lawyers  
Shailesh Sahay, Membership, Law Firm &  
Eastern Region  
Karyn Schmidt, Membership, Trade  
Association  
Pat Sims, Membership, Public Sector  
Baskut Tuncak, Membership, Non-  
governmental Organizations  
Lori Warner, Membership, Law Firm &  
Western Region  
Larry Cullen, Programs  
Keith Matthews, Programs  
Emilee Scott, Social Media  
Rachel Lattimore, Special Projects

Claudia O’Brien, *The Year in Review*  
Alicia Edwards, *The Year in Review*  
Mark Duvall, At-Large  
Herb Estreicher, At-Large  
Charles Franklin, At-Large, Government  
Affairs Special Committee Liaison  
Warren Lehrenbaum, At-Large  
Todd Stedeford, At-Large  
Sara Beth Watson, At-Large

I look forward to working with you to make this a memorable year.

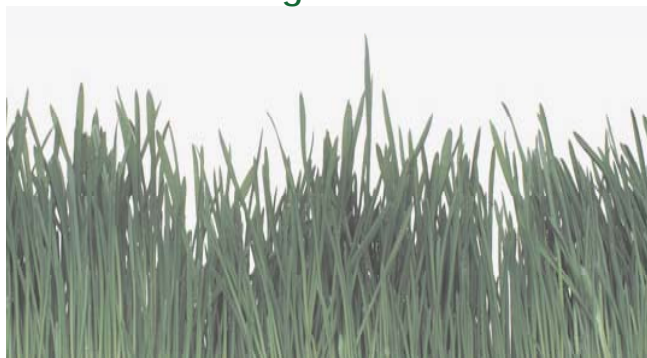
Best regards,

Joanne Thelmo  
Chair, Pesticides, Chemical Regulation, and Right-  
to-Know Committee

*Joanne Thelmo is Chair of the ABA SEER, Pesticides, Chemical Regulation, and Right-to-Know Committee.*

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Visit the committee webpage:  
[www.ambar.org/EnvironCommittees](http://www.ambar.org/EnvironCommittees)



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## UPPING THE ANTE: SENATOR BOXER CIRCULATES TSCA REFORM PROVISIONS

Lawrence E. Culleen

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Months of quiet negotiations on potential amendments to the Toxic Substances Control Act (TSCA) organized by senators and staff working across party lines were surprisingly upended in late September when Senate Environment and Public Works Chairwoman Barbara Boxer (D-CA) issued a statement and her own markup of what had been a closely held confidential draft of amendments to the May 2013 Lautenberg-Vitter compromise TSCA reform bill (the Chemical Safety Improvement Act, S. 1009), [http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord\\_id=69343ad5-ff65-15c3-6d34-53c14f435018&Region\\_id=&Issue\\_id=](http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=69343ad5-ff65-15c3-6d34-53c14f435018&Region_id=&Issue_id=). Notwithstanding the progress that had been made collaboratively by Senators Tom Udall (D-NM) and David Vitter (R-LA), prognosticators have concluded this development signals that all hopes have faded that the 113th session of Congress could produce a compromise TSCA reform bill capable of being enacted.

Because the changes Senator Boxer made to the previously confidential Udall-Vitter drafts are being described as being less radical than has been suggested by the tone and sentiments expressed in her statements in the press, certain features of the Boxer markup are worth noting, especially if they could serve as a starting point for discussions in the next session of Congress. Following are eight changes made by Senator Boxer that are among the more interesting, and potentially complicating, developments:

- Senator Boxer’s markup tosses out the “unreasonable risk of injury” standard in the current law, as enhanced in the previously confidential version in the Udall-Vitter draft, and would establish a “safety standard” requiring the U.S. Environmental Protection Agency (EPA), in undertaking assessments and

making determinations regarding the safety of chemical substances, to “ensure with reasonable certainty, without taking into consideration cost or other non-risk factors, that no harm to human health or the environment will result” from chemical exposures or releases under “foreseeable conditions of use,” including “reasonably foreseeable” unintended exposures such as spills (“unplanned releases”). Moreover, EPA’s safety determinations will be required to address aggregate exposures from multiple pathways of exposures to the same substance.

- Senator Boxer ups the ante on Senators Udall and Vitter repeatedly in her markup of their draft, by raising from 10 to 15 the number of substances EPA must include on its initial list of high-priority substances for safety assessments and determinations to be released six months following enactment. Senator Boxer would also require that the high-priority list be further expanded by 15 high-priority substances 12 months after its initial publication and each year thereafter for four years, and for each substance EPA removes from the high-priority list following a safety determination, Senator Boxer’s markup would require the agency to add three other substances to the list.
- The Boxer bill would modify the discussion draft such that “low-priority” determinations would become final actions subject to judicial review.
- Costs and benefits analysis in support of section 6 (risk management) rulemakings would be triggered under the Boxer markup (unlike the versions we have seen of the working draft) only when the proposed rule is determined to have an annual effect on the national economy of greater than \$100 million. Exemptions to risk management regulations would be considered only when available information demonstrates that

“the risks to health or the environment from continued use of the substance are substantially lower than the risk to health or the environment of replacing that use of the substance with reasonabl[y] available alternatives.”

- The Boxer markup would add as section 6(f) a requirement that EPA issue, within 180 days of enactment, a list of “persistent, bioaccumulative and toxic [substances that] have the potential for high or widespread exposure.” Within 60 days thereafter, EPA must issue orders requiring manufacturers and processors to submit “any additional information” EPA determines to be “necessary to conduct an expedited assessment” of the “intended, known or reasonably foreseeable uses of, and exposures to” the persistent, bioaccumulative, and toxic substances (PBTs). EPA’s use and exposure assessment of the listed PBTs must be completed within a year of receiving the requested information. Not later than two years after completing the use and exposure assessment, EPA must issue rules imposing “restrictions . . . necessary to achieve the maximum practicable reduction in human or environmental exposure to” the listed PBTs. Exemptions to such rules may be granted for not greater than five years.

- Asbestos is addressed specifically in Senator Boxer’s markup of section 6 of the previously confidential discussion draft, as she would require all forms of asbestos be listed among the high-priority substances and specify that a safety assessment and determination for the listed forms of asbestos be completed within two years from enactment with a final rule addressing asbestos promulgated no more than three years after enactment.
- The Boxer bill adds a fee structure to fund actions taken under the bill. Fees are to be assessed on a basis of a manufacturer’s production or import volumes.
- Not surprisingly, the Boxer bill strikes the preemption provisions in the Udall-Vitter discussion, inserting terms providing that “nothing in this Act, nor any regulation . . . shall affect the right of a State or a political subdivision . . . to adopt or enforce” a health or environmental restriction.

Since the House Republicans who had been active on TSCA reform seem to have lost interest in their own discussion drafts, all eyes will remain on the new Republican-controlled Senate to see what effect it will have on the future of TSCA reform.

**Lawrence E. Culleen** is a partner with *Arnold & Porter LLP* in Washington, D.C.



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## TREE DEATH DATA RESULT IN \$1.8M PENALTY

Shannon Frede

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On September 15, 2014, the U.S. Environmental Protection Agency (EPA) announced a settlement with E.I. du Pont de Nemours and Company (DuPont) to resolve allegations that DuPont failed to report the potential adverse effects of an herbicide product called Imprelis. EPA also alleged that DuPont sold Imprelis with labeling that did not ensure its safe use in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Consumers' application of the misbranded Imprelis product led to widespread death and damage to trees.

As a civil penalty, DuPont paid an assessment of \$1,853,000. The penalty, the third highest of its kind after EPA settlements with Scotts Miracle-Gro Company (\$6.5M) in 2012 and Monsanto Company (\$2.5M) in 2010, telegraphs an important message—EPA will prosecute the failure to submit known harmful effects of pesticides.

### Background

In September 2008, DuPont submitted a registration application to EPA for Imprelis, a product containing “aminocyclopyrachlor” designed to selectively control weeds such as dandelions, clover, thistle, plantains, and ground ivy without harming non-target vegetation. EPA conditionally registered Imprelis as a selective broadleaf weed herbicide in August 2010.

By June 2011, DuPont and EPA began receiving numerous complaints claiming damage (including death) to non-target trees in connection with the use of Imprelis. DuPont's own test data confirmed damage to coniferous trees, including Norway spruce and balsam fir, from Imprelis applications. DuPont also had evidence that non-coniferous trees such as maple, honey locusts, lilacs, sycamores, and alders were susceptible to damage from Imprelis. On June 15, 2011, DuPont verbally informed EPA that it received allegations

of damage from Imprelis. On July 18, 2011, EPA reminded DuPont of its reporting obligations under FIFRA section 6(a)(2), and required DuPont to report to EPA any information about adverse incidents, studies, and data pertaining to the use of Imprelis that DuPont possessed but had not previously submitted to EPA. In response to the EPA letter, DuPont submitted reports, including 18 reports of field trial studies to EPA for the first time.

In August 2011, EPA Region III issued a Stop Sale, Use or Removal Order to DuPont prohibiting the distribution, sale, movement, or removal of Imprelis products under DuPont's control or custody without EPA's written approval.

To date, DuPont submitted over 7000 adverse incident reports related to the application of Imprelis. Home owners, landscapers, and golf courses filed over 30,000 claims for compensation to DuPont related to Imprelis damage based on the laws of multiple states: Connecticut, Delaware, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, and Wisconsin. To resolve these claims, DuPont reached a settlement with representative plaintiffs in a class action suit filed in the U.S. District Court for the Eastern District of Pennsylvania last year.

### Settlement

EPA investigated DuPont's sale and distribution of Imprelis and found several FIFRA violations. On September 15, 2014, EPA and DuPont resolved these violations in a consent agreement and final order (CAFO). In the CAFO, EPA alleged that in the eight-month period from October 2010 to June 2011, DuPont distributed or sold Imprelis on 320 occasions with labeling that did not include adequate directions for use and/or warning statements to protect non-target plants. The lack of adequate labeling rendered Imprelis a pesticide product that was misbranded under FIFRA section 2(q)(1)(F) and 2(q)(1)(G). DuPont's sales or distributions of a misbranded pesticide product

were unlawful acts under FIFRA section 12(a)(1) (E).

The settlement included FIFRA violations related to the reporting requirements for risk-benefit information under FIFRA section 6(a)(2) and 40 C.F.R. part 159 subpart D regulations. The regulations at 40 C.F.R. part 159 subpart D require companies to submit to EPA reports on a product's potential adverse impacts. EPA alleged that DuPont failed to timely submit 18 field trial study reports to EPA that showed potential adverse effects from the use of Impreliis. EPA stated that DuPont possessed these studies and knew (or reasonably should have known) that the information should have been reported to EPA, which might regard such information alone or in conjunction with other information about Impreliis—including the claims of adverse incidents. DuPont's failure to report this information was determined by EPA to be an unlawful act under FIFRA section 12(a)(2)(B)(ii) and 12(a)(2)(N).

## Conclusion

EPA asserted that the DuPont settlement demonstrated the importance of compliance with FIFRA section 6(a)(2) reporting requirements. Cynthia Giles, EPA assistant administrator for

Enforcement Compliance and Assurance, stated, "EPA's ability to protect the public from dangerous pesticides depends on companies complying with the legal obligation to disclose information on the harmful effects of chemicals. This case sends the message that illegally withholding required information will be treated as a very serious violation."

Legal practitioners should note that the DuPont settlement illustrates an instance where serious misbranding violations occurred even though the pesticide product label was approved by EPA. Adverse effects information does not stop when EPA registers a pesticide product. The DuPont settlement places companies on notice to report any information regarding adverse effects to EPA as soon as it is discovered.

More information is available at <http://www2.epa.gov/enforcement/consent-agreement-and-final-order-ei-du-pont-de-nemours-and-company>.

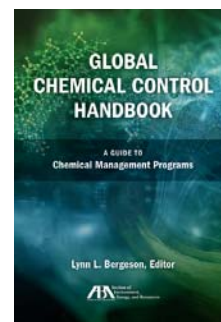
*Shannon Frede is a law clerk in the Waste and Chemical Enforcement Division of the Office of Civil Enforcement at the U.S. Environmental Protection Agency. She is currently enrolled at the University of Maryland Francis King Carey School of Law in Baltimore, MD.*

## Global Chemical Control Handbook: A Guide to Chemical Management Programs

Lynn L. Bergeson, Editor

The business of chemicals is being impacted by measures being taken by governments as well as industry stakeholders to improve all aspects of chemical management, from production and processing to distribution, use, and disposal. Governments across the globe are increasingly aware of the need for heightened and improved management of chemicals. Along with improved management standards developed by the chemical industry, international governments have been enhancing their domestic management programs and increasing their levels of regulatory control.

**Global Chemical Control Handbook** keeps practitioners abreast of these important developments—what they are, on what segment of the global supply chain they apply, and when and how these measures impact the business of chemicals.



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## SNO ADDRESSES THE DIVIDE BETWEEN THE APPLICATIONS AND IMPLICATIONS OF NANOTECHNOLOGY

Barbara Karn, Ph.D. and Wunmi Sadik, Ph.D. *Sustainable Nanotechnology Organization Washington, D.C.*

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The Sustainable Nanotechnology Organization (SNO) focuses on advancing sustainable nanotechnology around the world through education, research, and the responsible development of nanotechnology ([www.susnano.org](http://www.susnano.org)). Nanotechnology has become an enabling technology for industries that produce nanoscaled materials, such as the chemical and pharmaceutical industries, and for industries that produce products containing nanomaterials, such as electronics, textiles, packaging, food, and many others. Because there is little formal regulation of this emerging field, SNO is committed to promoting and disseminating research to ensure that the technology is launched safely and sustainably and that its products will not cause harm at any stage in their life cycle.

To this end, SNO promotes sustainable development of nanotechnology through its annual conferences, outreach activities at various meetings, publication of scientific research, social media, and an informative website. SNO's 3rd annual conference in Boston, November 2–4, 2014, brought together over 200 scientists and experts from academia, industry, and government agencies to present and discuss current findings on the subject of nanotechnology and sustainability. In addition to scientific research, the conference featured discussions of the policy and legal aspects of nanotechnology with participants from the legal, insurance, and industrial sectors. While the successful application of nanotechnology is contingent upon scientific excellence, it will not be truly sustainable without close examination of the economic, environmental, and societal benefits and risks.

SNO provides an excellent venue for this dialog.

The annual meeting is small enough to provide meaningful discussions while providing a neutral ground to exchange ideas on the applications and implications of sustainable nanotechnology. We invite you to join us for our next meetings. In March, SNO partners with two European research centers for a conference in Venice. Next November, we hold our next SNO meeting in New Orleans.

The Committee on Pesticides, Chemical Regulation, and Right-to-Know is very much engaged in the law, regulation, and policy of nanoscale materials. Section members and others, especially law students, may wish to learn more about SNO and consider becoming a member. Visit [www.susnano.org](http://www.susnano.org) for details and to join our mailing list.

**Barbara P. Karn, Ph.D.** is Executive Director of the Sustainable Nanotechnology Organization.  
**Wunmi Sadik, Ph.D.** is Professor of Bioanalytical and Environmental Chemistry at Binghamton University.

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## EPA PROPOSES SNUR FOR NONYLPHENOLS AND NONYLPHENOL ETHOXYLATES

Lynn L. Bergeson

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On October 1, 2014, the U.S. Environmental Protection Agency (EPA) proposed a Significant New Use Rule (SNUR) for 15 related chemical substances commonly known as nonylphenols (NP) and nonylphenol ethoxylates (NPE). For 13 NPs and NPEs, EPA would designate any use as a “significant new use,” and for two additional NPs, EPA would designate that any use other than use as an intermediate or use as an epoxy cure catalyst would constitute a “significant new use.” Persons subject to the SNURs would be required to notify EPA at least 90 days before they manufacture (including import) or process any of these 15 chemical substances for a significant new use. More information is available at <http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/np-npe.html>.

EPA is proposing to designate any use of certain listed NPs and NPEs as a significant new use, and any use other than use as an intermediate or use as an epoxy cure catalyst as a significant new use of two additional NPs identified in the proposed rule.

The proposed SNUR would apply to the uses that are not ongoing at the time of the proposed rule. Uses not ongoing at the time of the proposal would be designated significant new uses in the final SNUR. EPA states that it is specifically requesting comment on whether it has correctly identified the current and ongoing uses of the 15 NPs and NPEs covered by this proposed rule. According to the *Federal Register* notice, EPA is particularly interested in whether anyone is currently using these chemicals in a manner that is not described in this proposal.

Of the 13 linear NPs and NPEs identified in the proposal, EPA states that 12 of the chemical substances were not reported to the 2012 Chemical Data Reporting (CDR) rule. One of the 13 substances was reported to the 2012 CDR, but, according to EPA, “the available information

indicates that the chemical substance is not currently being manufactured or is otherwise used or distributed in commerce.” The two branched NPs listed in table 2 included in the proposal are not in use except as intermediates and epoxy cure catalysts. EPA states that, based on the “reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of these chemical substances,” it is concerned that future manufacturing or processing could have the potential to increase significantly the magnitude and duration of environmental exposures. EPA determined that “individual evaluation of the activities associated with those new uses is warranted to allow the Agency to determine whether any controls are necessary before such manufacturing (including importing) or processing starts or resumes.” EPA specifically requests comment “on all aspects of this proposed rule, including the commercial production of linear forms of NPs and NPEs, as well as any ongoing uses of the subject chemical substances.”

### Discussion

Although the NPs and NPEs are a class of chemicals known to be persistent and toxic in the environment, what may be new about the proposal is the way that EPA apparently relied exclusively upon a narrow data set—the 2012 CDR and two databases (Household Products Database and Consumer Products Information Database)—as the basis for determining that 13 of the chemicals are not in production. Accordingly, EPA has proposed an “any use” SNUR for each identified chemical. There is no indication in the record that suggests EPA conducted other Internet searches, e.g., using the Chemical Abstracts Service Registry Number (CASRN) to search for commercial availability information, Material Safety Data Sheets (MSDS), or other information that might indicate continued commercial availability. A quick CASRN search of 4-nonylphenol (CASRN 104-40-5) showed a number of hits, including, among others, on the [chemicalbook.com](http://www.chemicalbook.com) website, which reported 70 global suppliers with 15 located in the United States. On the other hand, the chemical identified

as CASRN 7311-27-5 showed only one global supplier (from China) on this site. The search for the chemical CASRN 9016-45-9 showed MSDSs from a number of well-known domestic chemical companies and many other hits that seemed indicative of continued commercialization. Similar searches were conducted for other chemicals in the proposal with similar results for all but one of the chemicals, which had no hits.

EPA's confidence in concluding 13 chemicals are commercially dead, based on the limited due diligence revealed in the record, is puzzling. While EPA appears to have a basis for concluding that production or importation in excess of the CDR trigger for 2012 (25,000 lbs at a site) is known not to have occurred in the CDR reporting year, the leap to a proposed conclusion that the 13 chemicals are no longer in commerce—and thus justifying an “any use” SNUR—is questionable. Further, there is no discussion in the notice of the limitations in the 2012 CDR (site-specific volume trigger with no reporting required if trigger is not met) and no background discussion of reporting under other earlier inventory update rule (IUR) cycles. Additional reporting data points (e.g., reporting under the IUR, results of contemporaneous Internet searches for indicators of commercial availability) could provide potentially relevant information given that the 2012 CDR reporting only covered the year 2011. Also, in the case of other proposed SNURs (e.g., perfluorooctane sulfonate (PFOS), long chain perfluorinated chemicals (PFC), polybrominated diphenylethers (PBDE), among others), EPA cited industry commitments to phase out certain chemicals/uses, or statements indicating that production or a use has ceased, as a basis for the proposal. No such commitments or statements appear in the proposed SNUR.

While EPA has developed a number of innovative ways to use its SNUR authority to regulate problematic existing chemicals over past years, it is surprising that EPA in this case has proceeded with such limited review of the market. EPA's approach has shifted the burden on industry to disprove its contentions.

These deficits make it all the more important for companies with interest in NPs and NPEs at issue to review the proposal carefully. It will be essential to consider their commercial status and, as appropriate, comment on the proposal and ensure EPA is aware of any ongoing production, processing, or uses. Processors and users of such surfactant chemicals should be especially careful to review the proposal, given that they are not otherwise required to consider the specific chemicals and volumes they obtain and use for purposes of reporting under the CDR, as is the case for manufacturers and importers.

**Lynn L. Bergeson** is managing partner of *Bergeson & Campbell, P.C. (B&C®)*, a Washington, D.C., law firm focusing on conventional, nanoscale, and biobased industrial, agricultural, and specialty chemical product regulation and approval matters, and chemical product litigation. She is president of *The Acta Group, L.L.C.*, and managing director of *The Acta Group EU, Ltd* with offices in Washington, D.C., and Manchester, UK.



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