

## **COURSE DESCRIPTION: Federal Toxic Substance Chemical Law**

Regulating the manufacture, use and disposal of commercial chemicals is complex and offers challenges to regulators, counsel to the regulated communities, environmentalists and the general practitioner. From the accidental poisoning of children by pest control operators in the home to chemical monitoring and reporting requirements under TSCA, FIFRA and EPCRA, this course provides an overview of the federal regulatory landscape for toxic - though legal - commercial chemicals.

### **COURSE INSTRUCTOR:**

Mike Walker serves as the Senior Enforcement Counsel for Administrative Litigation Training in the Office of Enforcement and Compliance Assurance, U.S. EPA, Washington, D.C. Mr. Walker has been involved in the litigation and negotiation of many high profile environmental enforcement actions since he began his career in EPA's Chicago, IL, Regional office in 1979. Mr. Walker is the author of numerous articles including: "*High Stakes on a Fast Track: Administrative Enforcement at EPA*," "*Introducing the Environmental Data Police*," "*Attitude is Everything - Dealing With EPA's Enforcement Program*," "*How to Handle Difficult Chemicals: The Unused Tool in EPA's Chemical Toolbox - TSCA Section 7 of the Toxic Substances Control Act*," "*Alternate Dispute Resolution in EPA Enforcement Proceedings*," "*The Use of the Toxic Release Inventory in Low Income and Minority Communities*," and "*EPCRA Citizen Suits: An Evolving Opus with a Discordant Note*." Mr. Walker is a graduate of the University of Toledo College of Law and serves as Adjunct Professor of Law at the University of Maryland School of Law, teaching Natural Resources Law as well as at the USDA Graduate School where he teaches Environmental Regulation & Policy: TSCA and FIFRA. He is a frequent speaker and lecturer at academic, professional and continuing legal education seminars throughout the United States and numerous foreign countries including Russia, Germany, Indonesia, the Philippines, Japan, Thailand, Mexico, England and Canada. He was appointed to the federal Senior Executive Service in 1991.

## **COURSE OUTLINE: Commercial Chemicals Survey 101**

### **A. Overview of the Toxic Substances Control Act**

- "TSCA is a four letter word meaning check it out"
- TSCA offers protection.....beyond "cradle to grave"
  - interaction with other statutes
    - FIFRA, RCRA, CERCLA, EPCRA, CAA, CWA
  - examples: hexavalent chromium, dioxins
- TSCA is the original pollution prevention statute

Video Presentation: Dow Chemical: "*TSCA, The Wrong Formula for Success*"

### **B. Statutory Central Core:**

PRE-MANUFACTURE REVIEW - TSCA is the original pollution prevention statute

DATA COLLECTION/MONITORING/ASSESSMENT TOOLS

- TSCA Section 8© (adverse reactions)
- TSCA Section 8(e) (substantial risk to health or the environment)

RULEMAKING - examples: PCBs, some asbestos, some dioxins; some metalworking fluids, some CFCs. Relation to Administrative Procedure Act.

Significant additional features:

- No state delegation (inspections by contract)
- TSCA ADMINISTRATIVE SUBPOENAS
- TSCA Confidential Business Information
- Regulation of Imports & Exports
- Court-Directed Seizure
- Unique features:
  1. No civil judicial civil penalty authority
  2. Potential for civil & criminal liability

**C. Representative TSCA Enforcement Priorities of Concern to Practitioners**

- PCB DISPOSAL & USE VIOLATIONS
- PREMANUFACTURE NOTICE REQUIREMENTS
- RECORD KEEPING & REPORTING TSCA 8© and 8(e)  
Discussion: TSCA §8(e) Compliance Audit Program (CAP)
- TEST RULES; example: chloranil dye cases
- SECTION 5(e) CONSENT ORDERS
- IMPORTS & EXPORTS
- ASBESTOS IN SCHOOLS; Interaction with Clean Air Act NESHAPS
- Inventory Update Rule
- Residential Lead

E. What is the lawyer's role in TSCA? What do I need to know?

**F. Overview of Federal Insecticide, Fungicide & Rodenticide Act:**

License to Kill?

Pesticides are commercial or economic poisons. Many are far more acutely toxic than anything you will find at a typical Superfund site.

To be a regulated substance a claim must be made that a substance can "kill or repel" a pest species. (See 40 CFR )

Example: Man Charged with Manslaughter in Methyl Bromide Death

Historically regulated by the Department of Agriculture, (Insecticide Act of 1910) pesticide regulation was assigned to EPA in 1970.

What is a “pest”? “Any insect; rodent; nematode; fungus, weed; or other form of terrestrial or aquatic or animal-like virus; bacteria or other microorganism (except viruses, microorganisms on or living in man or other living animals), which the EPA Administrator declares to be a pest. (Hinkley, Ohio buzzards?)

Pesticides remain an issue of substantial public concern.

EPA Science Advisory Board - pesticides in food is one of the top three public health concerns

- food safety issues (First, Delaney Clause; later science-based 1996 Food Quality Protection Act)
- contamination of surface and ground water (Example: Lake Michigan)
- multiple chemical sensitivity - pesticides; food additives; pollution: cumulative effects?

Emerging Trends - Future Developments

## **G. Pesticide Registration: The Statutory Central Core**

- always look for EST and REG numbers
- Federal registration:
  - Name
  - Copy of label
  - Confidential statement of formula for general or restricted use
  - Test data: efficacy; residue data for food/feed; environmental fate
  - Grandfather clauses...

Discussion: Albertson's *Pesticide Retailing & Environmental Compliance* DVD (15 min)

- General use or restricted use pesticides: there is a difference

Unlawful acts:

It shall be unlawful to distribute or sell:

- Unregistered
- Claims differ
- Composition differs
- Misbranded
- Adulterated

It is unlawful to use a pesticide in a manner inconsistent with its labeling.

Penalties:

\$6,500 - for registrants; commercial applicators; dealers; retailers

\$1,500 - for private applicators (after a written warning for a first offense)

NOTE: States have first responsibility for misuse enforcement; (Sections 26-27)

## **H. Some Critical Areas to Watch: Data & Data Quality**

Reliable - Reproducible - Accurate

Example: Carter-Wallace pays \$132,000 to settle FIFRA Good Laboratory Practices violations

- \* submission of a false compliance statement - 40 CFR §160.12
- \* failure to isolate test subjects - §160.90(b)
- \* establishment of a quality assurance unit - §160.35
- \* no summary of training for personnel engaged in or supervising study
- \* no date study was initiated, completed or terminated - §160.185(a)(1)
- \* no description of the test system used - §160(a)(7)
- \* no location where specimens, raw data or final report are stored - §160.185(a)(13)

\* Increased Emphasis on Risk - Danger from Misuse

Example: Triple A Hay - using an uncertified applicator to apply Phostoxin, a restricted use product; use inconsistent with the label. Fine sought: \$479,000

Example: Union Elevator & Warehouse Company \$135,000 sought 26 counts of failure to placard railcars and failure to notify consignee that the rail cars had been fumigated. Tests showed fumigant gas levels in excess of allowable limits.

Example: Odessa Union Warehouse Co-op, Inc. \$90,000 sought for 18 counts of failure to take required safety precautions regarding fumigated commodities.

Example: P.J. Taggares Company: 479 separate fumigant violations \$2,395,000 sought.

\* Increased Emphasis on Risk - Disinfectants & Sterilants

\* Increased Emphasis on Risk - Sale of Unregistered Products

Example: Safe & Sure Products - 88 counts of selling seven unregistered pesticides; proposed fine: \$392,000

\* Increased Emphasis on Risk - Farm worker Protection

\* Increased Emphasis on Risk - Misbranding/Adulteration

Example: DuPont Benlate benomyl contaminated product; \$2.4 million penalty sought.

\* Increased Emphasis on Risk - Criminal Enforcement

Example: New Directions in Adverse Effects Reporting

Example: Hartz-Mountain

Example: Miles Inc. faces \$10,000 penalty for failure to tell EPA about possible health effects

## **I. Future Directions for Pesticides**

\* Design for Safety - Greener Products?

\* Anticipate and Prevent

\* Expect Significant Command & Control but Look For Pollution Prevention

## **J. What is the lawyer's role in FIFRA? What do I need to know?**

Key areas of concern for potential practitioners:

- represent registrants; all products and producing establishments must be registered and maintain registration requirements with EPA; including updated data and reports of adverse effects.

- represent users; EPA specifies on every label how and where the chemicals may be used; if the substance is used "in accordance with label directions" there is no FIFRA violation.

Example: FIFRA Held No Bar To State Action Alleging Toxic Fumes Killed Pregnant Woman

- represent victims or tort claimants; the product was used in accordance with label directions

- represent insurance carriers

- represent laboratories; vendors; suppliers (data & data quality)

- represent advocacy groups

- represent regulators at the federal, state or local level

## **K. Overview of the Emergency Planning & Community Right To Know Act.**

Discussion: "Nightmare on Main Street" Chlorine release in Springfield, Mass(VHS)

Since EPCRA, has fostered a major change in the way both EPA and corporate America do business. As the Congressional response to the Bhopal, India incident, EPCRA requires annual reporting of chemical storage and usage, as well as immediate reporting of certain chemical releases. EPCRA has no mandate to reduce emissions, just report. EPA, states and others use this reporting data for a wide array of enforcement targeting and planning activities. Industry, not wanting to be "first" in emissions for the nation; their state; county; city; township; zip code or watershed has responded in a variety of ways including

emissions reduction. Accurate and conscientious reporting of TRI data can be a public relations plus for corporate citizens, demonstrating emissions reductions or a well developed plan to reduce emissions.

- EMERGENCY PLANNING PROVISIONS OF EPCRA
- TOXIC RELEASE INVENTORY PROVISIONS OF EPCRA
- Community Right-To-Know means access to timely and accurate data.
- How EPA uses TRI data
  - Pollution Prevention
  - Protection of Whole Ecosystems
  - Identifying National Priorities
  - Building Partnerships and Environmental Justice

Pollution Prevention: The New Environmental Ethic

- Definition
- Regulations and Compliance
- Public Information/The Right-to-Know

EPCRA & The Toxics Release Inventory

- The broadest regulatory net ever cast by Congress
- Community Right-To-Know;
- SIC Codes 20-39....
- 10 employees or more....
- One or more of 581+ chemicals....
- Right-To-Know More..... and More???

EPA uses TRI Daily

- o To measure reductions
- o Improved targeting
- o Negotiation leverage
- o Pollution prevention settlements.

Toxics In the Community - Looking at the Big Picture

## **L. EPCRA & the Enforcement Process: Current Status & Trends**

a. 200+ Administrative Law Judge Decisions Suggest Few Defenses Are Available To Violators; Genicom Corporation Upheld Penalty Calculation; no need to show “off site” risk or actual harm; failure to report can be a continuing violation.

b. All Regions Laboratories Appeals Fail At Both District and Appellate Courts; \$89,000 Fine for failure to report chlorine release.

c. Citizen Groups can enforce EPCRA; Atlantic States Legal Foundation v. Whiting Roll-Up Door Manufacturing Corporation; Federal District Court for the Western District of New York.

c. Citizens for a Better Environment v. The Steel Company U.S. Supreme Court

#### **M. What is the lawyer's role in EPCRA? What do I need to know?**

#### **N. Selection of Appropriate Enforcement Response for Chemical Violations**

1. EPA has Enforcement Response Policies, see [www.EPA.Gov/Compliance](http://www.EPA.Gov/Compliance)
2. Administrative penalty actions  
see: Moore Business Forms; New York PCB cases; asbestos in schools; import cases.....
3. Injunctive cases in the District Courts
4. Criminal referrals to the U.S. Attorney
  - o Falsified data or PMN submittals are likely candidates
  - o Federal Sentencing Guidelines limit scope of plea bargains

#### **O. Practical Problems in Complying with TSCA, FIFRA & EPCRA**

- it's chemistry.....but not rocket science
  - inventory your "chemical" operations
  - ask before you buy
  - put "must meet TSCA regulatory requirements"
    - in your contracts and purchase orders
  - watch R & D, process changes & customer-requested modifications
  - report substantial risk data in a timely manner
  - maintain a TSCA Section 8© file
- develop in-house routine environmental auditing procedures, see Ejhler Industries.

Recommended Text Books:

**TSCA Handbook, 4<sup>th</sup> Edition, Government Institutes. (2006)**

**Handbook on Environmental Law, Government Institutes. (2008)**

**Selected materials, DVDs, videos and actual "product" and product labels to be supplied by instructor.**