

Some Pesticide Producers Face Unique Challenges Post-OSHA SDS Deadlines

By Tracy A. Heinzman and Roger H. Miksad

Industry and regulators alike in several sectors are still struggling to fully implement the U.S. Occupational Health and Safety Administration's (OSHA) 2012 overhaul of its Hazard Communications Standard. That overhaul, the first in several decades, for the most part adopted the United Nation's Globally Harmonized System

of Classification and Labeling of Chemicals and required all companies with regulated workplace products to redesign the Safety Data Sheets (SDSs) and, if not exempt, product labels. As of December 1, 2015, all of the deadlines have passed for

manufacturers and distributors to comply with the massive overhaul of OSHA's SDS and product labeling requirements.

For the pesticide industry, because U.S. Environmental Protection Agency (EPA)-regulated pesticides are exempt from OSHA's product labeling requirements, only the SDSs have required an update for most products. But many pesticide producers have discovered that their products face unique challenges, and some have struggled to meet the SDS deadlines. In particular, producers of only end-use products and registrants of generic versions of active ingredients have struggled to compile and analyze all of the necessary health data required to properly classify each chemical.

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Proposed Changes to New Jersey E-Waste Law Could Expand DEP's Reach, Increase Manufacturers' Burdens

By Joseph S. Kakesh

On December 17, 2015, the New Jersey General Assembly passed a number of controversial amendments¹ to the state's Electronic Waste Management Act (E-Waste Law)² that could impose significant additional burdens on manufacturers of a wide range of consumer products and allow for an unprecedented expansion of the New Jersey Department of Environmental Protection's (DEP) authority over end-of-life product stewardship in the state. Consumer product manufacturers and trade associations lined up to criticize the legislation after it was introduced in the Senate earlier this

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Agreement Reached Under Wassenaar Arrangement to Raise Energy Density Limits on Secondary (Rechargeable) Cells

By George A. Kerchner

During the 21st plenary meeting of the Wassenaar Arrangement, held in Vienna on December 2-3, 2015, participating States agreed to new export controls in a number of areas, including an increase in the energy density limits on secondary cells from 300 Wh/kg to 350 Wh/kg.

The Wassenaar Arrangement was established in 1996 and advocates implementation of effective

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One significant concern in the pesticide industry is that generic/me too registrants may not have access to the necessary data to generate an SDS, potentially leading to differences among SDSs for substantially identical products. This is because a generic/me too registrant may be able, under FIFRA, to rely on all of the toxicity data generated by other registrants without ever seeing that data to bring a new product to market. However, when it comes time to generate the SDS required by OSHA, it is the results of those very toxicity studies which would provide the information necessary to properly classify their chemicals. Absent cooperation from the data holder, a generic/me too registrant may be forced to look for toxicity data and reported toxicity classifications from other sources such as published literature, EPA reviews, and other secondary sources. In a worst-case situation, a generic/me too registrant may have to assume toxicity classifications using only the EPA label language.

These issues may lead to significant inconsistencies between SDSs generated with access to the original data and SDSs generated without such access—a situation that can only cause confusion among users, generic/me too registrants, and basic registrants. However, there may be solutions to this situation. First, generic/me too registrants who have entered into data-compensation agreements may have the right to review the data for the purpose of generating health and safety information for the SDS, even if they do not have the right to “hard copies” of the studies. Other industries facing common classification questions have chosen to work together to develop exemplar SDSs for their products in an attempt to present consistent information to customers. Registrants who have formed a chemical-specific task force may wish to similarly utilize those arrangements to coordinate, or at least discuss, recommended SDS classifications.

In addition, within a single company there are opportunities for streamlining and coordinating SDSs. Where a producer makes numerous similar products (e.g., product lines that vary only by small formulation changes or label statements), that producer may be able to use a single SDS for all of those products. This may enable a consistent SDS and help prevent inadvertent inconsistencies in the future when changes are made to the SDS. But, when using a shared SDS, it is important to ensure that the differences between the products do not introduce new hazards that must be separately warned, or that would change the hazard classification.

A second issue, one that is not necessarily unique to the pesticide industry, is how downstream pesticide producers (e.g., formulators, re-labelers, supplemental distributors) deal with a lack of information. For example, if an active or inert ingredient supplier provides an SDS, but withholds key information as trade-secret, the downstream formulator may again be forced to either make worst-case assumptions, attempt to locate information from secondary sources, or generate its own data. In addition, a producer may be presented with conflicting SDSs for commodity ingredients from multiple suppliers. In such instances, the formulator must make its own determination as to the appropriate classification of the ingredient as they generate their own SDSs. And, because the party whose name appears on the SDS is fully responsible for its content, these downstream pesticide producers should not take these responsibilities lightly—it is they who will face enforcement, and it is not a good defense to argue that they simply relied on another company’s SDS.

For its part, OSHA has recognized some of the challenges faced by all downstream manufacturers—not just pesticide producers—and adopted a policy which allows for some leniency for companies who have “exercised reasonable diligence and made good faith efforts” to create their new SDS, but who have been stymied by non-cooperative upstream partners. While this policy has occasionally been inaccurately described as a “deadline extension,” it is not. It is a hardship policy only available in limited circumstances. OSHA has been very clear that once a company has received the information necessary to generate an SDS, it is allowed only six months to do so. And, even if an upstream supplier will not, or cannot, provide the needed data, each producer is under an obligation to seek the data from other sources. In short, if a company still does not have an updated SDS in distribution, OSHA expects that company to be taking significant efforts to rectify the shortcoming.

OSHA has also made it clear that it expects those efforts to be well-documented. OSHA will not extend leniency in situations where there is insufficient documentation to prove all of the steps a company has tried (and failed) to come into compliance. Companies still facing compliance struggles would be well advised to keep comprehensive files documenting their efforts if they hope to be afforded any leniency.

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year, and it appears that some, but not all, of the most objectionable provisions were removed by the General Assembly Appropriations Committee when it took up the legislation, Assembly bill A4763, on December 10.³ These changes followed those made on December 7 during a second reading on the Senate floor of an identical Senate bill, S2973 Senate Substitute.⁴ Below is a short summary of the existing E-Waste Law and some of the key provisions in the bills that are causing so much heartburn in Trenton and elsewhere.

Background on New Jersey's E-Waste Law

Like many states, New Jersey's E-Cycles program requires manufacturers of "covered electronic devices" (CEDs) to register with the state, pay annual registration fees, and submit a plan to the state showing how they will provide consumers with the opportunity to recycle CEDs free of charge. Under the current New Jersey E-Waste Law, CEDs include only televisions, computer monitors, laptops, telephones, and a few other electronic devices. Each manufacturer is obligated to provide for the recycling of a minimum amount of CEDs, by weight, in a given year, and ensure that there is at least one collection location in each county in the state for consumers to drop CEDs off for recycling.

The Proposed Legislation

As most recently reported out of the Senate and the Assembly, S2973/A4763 continues to contain a number of important changes to the current E-Waste Law, and a key theme throughout continues to be the expansion of the reach of DEP's E-Cycles program. This expansion would be achieved in at least four ways:

- 1. Expansion of definition of "consumer."** The legislation proposes to expand the definition of "consumer" to include any "State entity, school district, or local government unit."⁵ Such entities could potentially increase the volume of CEDs deposited at collection sites and increase manufacturers' costs of running their programs. In addition, the proposed expansion shifts the emphasis of the E-Waste Law from providing New Jersey residents and households with a convenient means of disposing of their CEDs—a means that would otherwise not be readily available to them—to requiring manufacturers to bear more of the burden of the state's electronic waste management operations.
- 2. Expansion in number of collection locations.** The legislation would replace the one county/one collection site requirement with the requirement that manufacturers provide a "sufficient" number of collection locations throughout the state.⁶ The legislation does not provide any metric to cabin the scope of DEP discretion in determining what constitutes a sufficient number of collection locations, thereby imposing potentially onerous requirements on manufacturers and potentially weakening the efficiency of existing collection networks.
- 3. Authority to create state-run program.** The legislation would give DEP the authority to establish a state-run CED collection and recycling program.⁷ The program would have specific convenience requirements

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It is clear that both industry and OSHA have devoted significant resources over the past three years to understanding and implementing the new HazCom standards. But questions and challenges remain. OSHA continues to issue Letters of Interpretation addressing unique issues as they are brought to OSHA's attention, but the deadlines for compliance have passed. The pesticide industry's unique challenges have meant that some producers may not yet be in compliance, and those that are not need to invest the time and resources to come into compliance as soon as possible.

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(e.g., 90% of consumers must be within 15 miles of a collection location), and small CED manufacturers (those whose national market share of CED sales is less than 10%) would be required to join unless they participate in a private recycling program with other manufacturers whose market share collectively is greater than 10%. A state program would potentially be more expensive to operate, and manufacturers would likely have little control over recycling costs and the quality of the recycling vendors and little contractual protections regarding potential liability should anything go awry during collection, recycling, and/or disposal of CEDs.

4. Expansion of definition of “covered devices.” The legislation proposes to add printers, fax machines, and cell phones to the list of products governed by the Act, but it deleted a provision in an earlier version that would have given the DEP discretion to add to the list of “covered electronic devices” those devices that: (1) are “used in conjunction with a covered electronic device”; (2) “contain[] materials that may harm the environment or the public health if disposed of as solid waste”; or (3) that “may have economic value or its collection and recycling may have a positive impact on the economics of electronics recycling.”⁸ The provisions quoted above could have included a wide range of items, including batteries and even items that would not ordinarily be considered “electronic” devices at all. At the end of the day, the only requirement would have been that the product potentially poses environmental concerns upon disposal. Outside of the exclusions noted above, DEP would thus have had very wide latitude to add more products to be covered under its purview and to require additional plan submissions, require additional fees, and impose additional agency oversight.

Perhaps most importantly, however, and despite all of these expansions to the current E-Waste Law, both the Assembly and the

Senate nevertheless rejected a provision in their respective bills that would have greatly expanded DEP's enforcement authority by allowing DEP to recover costs for the cleanup of any CEDs that are “improperly abandoned, discarded, or otherwise disposed of on the lands or waters of the State,” regardless of whether the manufacturers are responsible for the CEDs or not.⁹ This provision would have been problematic because it basically would have put manufacturers on the hook for cleaning up CEDs illegally dumped by bad actors anywhere in the state.

Next Steps

A4763/S2973 is sure to continue to attract a lot of attention from manufacturers, recyclers, and others who have a stake in the ongoing success of the E-Cycles program. Manufacturers in particular are likely to resist many of the bills' changes as unworkable, impractical, and overly burdensome. The latest amendments suggest that the Legislature is becoming somewhat more sensitive to industry concerns. Whether this sensitivity continues remains to be seen. Stay tuned.

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¹A4763, First Reprint, passed by General Assembly on third reading (A4763).

²N.J. Rev. Stat. § 13:1E-99.94 *et seq.*

³A4763, First Reprint (reported out of the Assembly Appropriations Committee December 10, 2015).

⁴S2973 Senate Substitute, First Reprint (reported out of the Senate December 7, 2015) (S2973).

⁵A4763/S2973, Section 2.

⁶*Id.*, Section 5.

⁷*Id.*, Section 6.

⁸*Id.*, Section 2.

⁹*Id.*, renumbered as Section 10(b).

OSHA Letters Would Expand OSHA's Reach Over Otherwise Exempt "Articles"

By Roger H. Miksad

In December, the U.S. Occupational Safety and Health Administration (OSHA) disclosed, for the first time, that OSHA does not consider lithium batteries to meet the definition of an "article" under that exemption from OSHA's Hazard Communication Standard. If it stands, this interpretation has major implications for the electronics industry and its customers.

The OSHA position was offered in interpretation letters sent to at least two private parties. As of the date of this publication, OSHA has not yet released the letters publicly. Historically, most companies have considered lithium batteries to be "articles" because of their sealed designs and near-zero risk of exposing individuals to chemicals or related risks. As a result, many—perhaps most—manufacturers do not supply Safety Data Sheets (SDS) or put OSHA labels on their products, although many voluntarily provide substantively similar information.

At a minimum, the new interpretation would mean that shipments of many workplace lithium batteries and lithium battery powered devices could require an SDS and OSHA labeling, and recipients' employees would have to be trained to understand the documentation and labels. Even some products intended for consumers might require an SDS or label in certain circumstances. OSHA's new letter references a 12-year old interpretation letter which answered a similar question with regard to lead-acid batteries:

As OSHA explained in the 2004 [lead-acid battery] letter . . . lead-acid batteries cannot be considered articles because they have the potential to leak, spill, break, and emit hydrogen, which could result in a fire or explosion upon ignition. Similarly, lithium-ion batteries (or lithium battery-powered devices) on a whole, although sealed, have the potential to leak, spill, or break during normal conditions of use and foreseeable emergencies and expose employees to chemicals which can pose health (e.g., lithium cobalt, graphite) and/or physical (e.g., burns, fire) hazards, and therefore, cannot be considered an article.

OSHA therefore appears to consider the potential for exposure to the chemicals contained in a lithium battery, and/or the potential for a fire, to be similar to the potential for exposure to acid or explosion from lead-acid batteries. However, OSHA's letter provides no substantiation for that conclusion, and it does not say whether OSHA has performed any sort of testing of the panoply of lithium cells and batteries available.

At this point, therefore, industry is left to guess at OSHA's rationale. This is causing significant confusion about the agency's analysis. With regard to the potential for leaks, for example, many lead-acid batteries—such as car starter batteries—are heavy and filled with liquid acid. So the potential for droppage, damage to a plastic case, and human exposure is hard to dispute. But the same cannot be said for small form-factor lithium batteries.

Another potential concern is the potential for gas emission. Older lead-acid battery designs routinely allow venting of small amounts of gas formed during charging, but lithium battery designs only vent gases as an emergency safety measure in extreme circumstances. It is not clear why OSHA sees the risks to be similar.

Some have posited that OSHA's interpretation may be influenced by published news accounts of a limited number of dramatic lithium battery failures in Chinese-made hoverboards. Certainly, those incidents have not encouraged careful analysis.

OSHA's letters are careful to state that they do not create new or additional requirements but rather explain the Agency's view of its existing requirements. This raises important questions as to how those interpretations can be challenged and what potentially-regulated entities should be doing now to respond to them. PRBA-The Rechargeable Battery Association is developing a strategy to address these matters, in consultation with other industry trade associations.

Other industries also should be paying attention. While the direct impact of these letters will be on the lithium battery and electronics industries, OSHA's interpretation could also have wide-reaching importance for other industries manufacturing "sealed" products that today rely on the articles exemption. If OSHA's policy is to now consider even the rarest defect or failure event to be a "normal condition of use," other currently exempt products could also become subject to OSHA's Hazard Communication standards. This would open the door to the regulation of a vast array of products currently beyond OSHA's reach.

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Big Decision Coming for the California Carpet Stewardship Program

By Carolyn R. Schroll

In 2010, California passed AB2398,¹ creating a carpet stewardship program that placed the burden of managing post-consumer carpet on industry rather than local government. When the program was created, many thought that its consumer fee element would be a favorable precedent for solving funding concerns faced by other state stewardship programs. However, the carpet stewardship program has raised many of the same issues for industry that unfunded requirements on manufacturers create. The carpet industry now faces uncertainty as it awaits a decision in January 2016 on whether the state agency, CalRecycle, will accept recent changes to the current carpet stewardship plan.

California's carpet stewardship statute requires manufacturers of carpet sold in California to join a carpet stewardship organization. To date, only one carpet stewardship organization has been created: the Carpet America Recovery Effort (CARE). CARE was required to submit a carpet stewardship plan to CalRecycle, the state agency charged with overseeing the stewardship program, for approval. The plan must include an assessment per square yard of carpet sold, to be added by manufacturers to the carpet price and remitted to CARE. The statute requires CARE to spend the funds only on implementing the program, including subsidizing those who process and recycle post-consumer carpet.

The statute also requires CARE submit an annual report to CalRecycle showing "meaningful progress" in increasing carpet recycling and reuse. CalRecycle is to determine, based on this report, whether CARE is in compliance with the statute's requirements. Lack of compliance can lead to civil penalties and limit all carpet manufacturers' carpet sales in California.

The statute initially set the assessment level at \$0.05 per square yard. In December 2014, CARE submitted and CalRecycle approved Addendum

#1 to its Carpet Stewardship Plan. It raised the assessment level to \$0.10 per square yard. In September 2015, CalRecycle reviewed CARE's annual report and found CARE noncompliant, in part for failure to raise adequate funds to provide sufficient subsidies to processors, which CalRecycle asserted had led to insufficient increases in recycling and reuse. CalRecycle required CARE submit an additional Addendum to the Plan to explain how CARE would address the issues and become compliant.

In response, on November 30, 2015, CARE submitted Addendum #3, which proposed to further raise the assessment to \$0.20 per square yard. This Addendum is currently under consideration by CalRecycle. It will be discussed at a public meeting on January 26, 2016, and action upon the revision by CalRecycle is expected at the meeting or shortly thereafter.

It is unclear what the decision will be. CalRecycle indicated in its finding of noncompliance that if the Addendum did not adequately address its concerns, the Agency might initiate an enforcement action. Alternatively, CalRecycle may accept the addendum for now, but signal its intention to revisit the issue later this year.

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¹AB 2398 is codified at Chapter 20 of California's Public Resources Code, Cal. Pub. Res. Code §§ 42970-42983.

Agreement Reached Under Wassenaar Arrangement to Raise Energy Density Limits on Secondary (Rechargeable) Cells *continued from page 1*

export controls on strategic items with the objective of improving regional and international security and stability. It also promotes transparency in the international sales of “conventional arms and dual-use goods and technologies.”

The energy density of secondary lithium ion cells has significantly increased over the past 10 years due to improvements in lithium ion technologies and demand for higher energy batteries to meet the demands of many consumer, medical, and industrial products. Lithium ion also has become the dominant rechargeable battery chemistry for consumer electronics and is poised to become commonplace for industrial, transportation, and power-storage applications.

Without a change in the Wh/kg limit, companies who wanted to export secondary cells that exceed 300 Wh/kg from the U.S.—or any other Participating State of the Wassenaar Arrangement—would have

been required to secure the necessary licenses from the appropriate regulatory authorities. This change to 350 Wh/kg provides temporary relief for an industry that is seeking to optimize and market a number of cutting-edge, high-density secondary lithium ion and lithium metal cell technologies.

The new 2015 version of the control list under the Wassenaar Arrangement is now publicly available at <http://www.wassenaar.org/control-lists/>. The Bureau of Industry and Security with the U.S. Department of Commerce will publish a Final Rule in the first half of this year to revise its Commerce Control List and implement all of the changes made to the Wassenaar Arrangement’s List of Dual-Use Goods and Technologies.

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