Hazard Labeling and Adjuvants: A New World Dawns

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How Will the New GHS Affect State Adjuvant Labeling?

Nine states have adjuvant labeling requirements. Although these states regulate these products under the state pesticide laws, they are not pesticides under the Occupational Safety and Health Administration Hazard Communication Standard (HCS). OSHA exempts FIFRA-defined pesticides from HCS label requirements.

On March 20, 2012, OSHA published a final rule to align the hazard determination, labeling and Material Safety Data Sheets (now called Safety Data Sheets or SDS) requirements of the HCS with the United Nations’ Globally Harmonized System for Chemical Classification and Labeling (GHS). As of June 1, 2015, all chemical container labels and SDSs subject to the HCS, including those applicable to adjuvants, must be revised to meet new requirements. Because these nine states define adjuvants as pesticides, they require specific labeling text that may not be consistent with the new HCS requirements. As a result, this potential conflict raises an interesting question: how will the revised HCS affect labeling of adjuvants regulated as pesticides under state law?

Some of the states may find their regulations partially preempted by the upcoming GHS requirements, specifically with regard to signal words, the use of pictograms to depict the hazards of the product and the specific language used to describe hazards, precautionary measures and related content. At least one state – Washington – has anticipated this conflict and implemented a policy by which adjuvant manufacturers may comply with both GHS and the state pesticide law. Will other states follow Washington’s lead?

State Requirements for Labeling Adjuvants

Pesticide adjuvants generally include wetting and spreading agents, adhesives, emulsifying agents and other similar substances intended to be used with a pesticide to assist in its application or efficacy. Because adjuvants do not have pesticidal properties as defined by FIFRA, EPA does not require their registration. However, nine states define “pesticide” to include adjuvants: Arkansas, California, Idaho, Kentucky, Mississippi, Tennessee, Utah, Washington and
Wyoming. In these states, adjuvants must be registered as pesticides and are subject to labeling requirements.

The extent of labeling requirements for adjuvants in the states differ; all nine states require basic labeling information, such as the name of the product, name and address of the manufacturer, net contents, name and type of functioning agent(s), percentage of functioning and ineffective ingredients, and directions for use.

Several states go beyond these basic label requirements. In Arkansas, Utah, Washington and California, if the adjuvant is “highly toxic,” its label must also bear a skull and crossbones, the word “POISON” in red prominently displayed. Adjuvant toxicity is evaluated like other pesticides, and generally incorporates EPA standards. For example, the Arkansas pesticide board’s determination of whether a substance is highly toxic must be made using the definition of “highly toxic” under federal EPA regulations. Similarly, in Washington State, “highly toxic” is defined as any pesticide that conforms to the criteria in federal EPA regulations for toxicity category I due to oral inhalation or dermal toxicity.

In addition, in seven states, an adjuvant could be deemed “misbranded” if the label does not contain a warning or caution statement which may be necessary and, if complied with, is adequate to protect health and environment.

Washington and California impose the most extensive state requirements on adjuvant labeling. Both states may require, in addition to the basic information mentioned above, the statement, “Keep out of the reach of children,” and a “Danger,” “Warning,” or “Caution” signal word. In addition, the regulations in these states require precautionary statements consistent with product toxicity data. In Washington, certain products must also bear a statement prohibiting aquatic use, unless the registrant provides data to demonstrate that the statement is unnecessary.

GHS Preemption

As mentioned above, GHS requirements may preempt some existing state laws with regard to adjuvant labeling. This issue presents important questions of federal preemption of state law involving the Occupational Safety and Health Act (OSH Act) and the HCS.

The Supremacy Clause of the Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” State laws that conflict with federal law are “without effect.”

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1 Utah Ag. Code Sec. 4-14-4.
2 See RCW 15.58.040(2)(b).
4 WAC 16-228-1400.
5 U.S. Const. art. VI cl. 2.
Absent an express preemption provision, “state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.”

The Supreme Court has held that the OSH Act preempts state action on issues for which OSHA has promulgated a federal standard because state law “is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act.” In particular, the Supreme Court has found that Congress intended to avoid “duplicative, and possibly counterproductive, regulation” under the OSH Act.

Under relevant preemption case law and principles, state adjuvant labeling requirements that directly conflict with the amended HCS are preempted, and will become invalid on the effective date.

When enacting the OSH Act, Congress sought to establish uniform health and safety requirements, including labeling of hazards to workers handling hazardous chemicals. As the Supreme Court has explained, the OSH Act’s statutory scheme demonstrates that “Congress intended to subject employers and employees to only one set of regulations, be it federal or state,” and “promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation.” Moreover, the OSH Act impliedly preempts state law where a federal standard is in place – such as in the area of hazard communication – because it “conflicts with the full purposes and objectives of the OSH Act.”

In some cases, the amended HCS’s labeling requirements will directly conflict with state requirements. For example, states may require an adjuvant to bear the word “Warning” on the label, where the amended HCS requires manufacturers to use the term “Danger” for “more severe hazards” and the term “Warning” for “less severe” hazards, and provides that the two terms “shall not” appear together. Therefore, where a “more severe hazard” is at issue, it is impossible for a manufacturer to include the term “warning” on the label without violating federal law. In addition, the category of hazards that trigger a “caution” signal word no longer exist in the GHS scheme.

Similarly, as described above, some states require the skull and crossbones pictograms on labels. Compliance with such a rule could conflict with the amended HCS, which restricts the types of

9 Id. at 102.
10 Id.
11 Id. at 98-99.
12 77 Fed. Reg. at 17,787.
13 Id. at 17,824.
pictograms that may appear together. If this direct conflict arose, such state requirements would be preempted.

Under the OSH Act, a state can avoid preemption in a subject area where OSHA has issued a standard or regulation only if the state submits and obtains Federal approval of a “state plan.” Once approved, a state can take over enforcement and development of individual occupational safety and health standards. State-plan states must then update their state-adopted regulations within a specified period when OSHA adopts or modifies a federal standard or regulation and if such requirements differ from the federal standard, they must be “at least as effective” as Federal standards. In addition, because the HCS applies to products distributed or used in interstate commerce, states imposing requirements different from the HCS must meet the additional burden of showing that the differences are “required by compelling local conditions and do not unduly burden interstate commerce.” Employers will push OSHA to critically assess any proposed state hazard communication standards to ensure that the rules do not conflict with or adversely affect the effectiveness of the Federal HCS.

Of the states that currently require adjuvant registration, California, Kentucky, Tennessee, Utah, Washington and Wyoming have approved state plans. Only these six of the nine states that regulate adjuvants are permitted to have their own requirements for labeling them, and then only if they submit to OSHA the proposed rule on those products and OSHA approves it. The other three states are presently preempted from regulating adjuvant labels.

State Solutions

Washington State has anticipated the conflict between its labeling requirements and GHS, and recently published a guidance document describing how to comply with both state and OSHA rules. The guidance states that with regard to harmonized label elements (hazard pictograms, signal words, and hazard statements), adjuvant registrants may follow the GHS requirements. However, registrants must provide the Washington State Department of Agriculture with documentation, such as the SDS, describing the criteria used to determine the appropriate label element.

All other label requirements (including precautionary information, personal protective equipment, first aid, and storage and disposal instructions) must be consistent with the existing Washington regulations. Washington will consider allowing exceptions for precautionary information on a case-by-case basis.

This strategy could provide a way forward for the remaining states that require adjuvant registration, specifically those that require harmonized label elements, such as signal words and hazard statements. Alternatively, states could revise their labeling requirements to be consistent with the harmonized GHS. States are less likely to revise labeling requirements, because

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14 See 77 Fed. Reg. at 17,824.

15 29 U.S.C. 667(c).

adjuvants are covered as pesticides under comprehensive regulations. State laws and regulations generally do not distinguish between label requirements for EPA-registered pesticides and adjuvants. Given that EPA-registered pesticides will be exempt from OSHA’s HCS as FIFRA-regulated products, states would be required to draft and promulgate new separate standards for labeling adjuvants in accordance with the HCS.

Overall, it is likely that states will adopt strategies similar to Washington State, and will permit adjuvant registrants to comply with the required elements of the revised HCS for harmonized elements beginning in 2015.

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17 Ingredient statements are an exception to this general rule. Several states have issued specific labeling requirements for the description of functioning and ineffective constituents in registered adjuvants. Some states, such as Mississippi and Tennessee, also impose specific requirements for the listing of chemical names in adjuvant ingredient statements.