WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

October 2019

Pesticide Regulation

Prepared by: Ethan Lauer, Staff Attorney

A pesticide is any substance designed, intended, or labeled for use in controlling pests or as a plant regulator, defoliant, or desiccant. The term pesticide generally includes such substances as herbicides, insecticides, fungicides, and rodenticides. Pesticides are regulated by both federal and state law, but generally not by local ordinance in Wisconsin. Applicable federal and state regulations include requirements related to labeling, application, and amount of residue allowable on food intended for human or animal consumption.

FEDERAL REGULATION

Pesticides are regulated at the federal level primarily by two laws: the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and the Federal Food, Drug, and Cosmetic Act (FFDCA). The U.S. Environmental Protection Agency (EPA) administers both laws.

FIFRA

Under FIFRA, a person generally may not sell or distribute a pesticide within the United States unless it has been registered in accordance with the act, although EPA may grant exceptions to this restriction for certain experimental or emergency uses. EPA must review each registration every 15 years.[1]

In addition to satisfying requirements relating to efficacy and labeling, a pesticide proposed for use by the general public must also be found by EPA to perform its intended function without unreasonable adverse effects on the environment. Under the act, "unreasonable adverse effects on the environment" means: (1) any unreasonable risk to humans or the environment, taking into account economic, social, and environmental costs and benefits; or (2) a human dietary risk from pesticide residues in or on any food.[2]

If EPA determines that a pesticide may cause unreasonable adverse effects on the environment if used without additional restrictions, it must classify the pesticide as a restricted use pesticide. These pesticides are not available for use by the general public. Commercial application of restricted use pesticides may require protective gear and special training by the applicator.[3]

A further registration prerequisite applies if a pesticide is intended to be used on food, animal feed, or food or feed crops, or if its intended use could reasonably be expected to result in pesticide residue remaining on such food or feed. In such cases, the pesticide may not be registered unless the EPA has issued a tolerance under FFDCA.[4]

FFDCA

Under FFDCA, EPA must establish a tolerance for any pesticide chemical residue on or in food. A food that bears or contains a residue in a quantity that exceeds the limits of a tolerance is considered adulterated and therefore may not be manufactured or introduced into interstate commerce.[5]

The tolerance is the maximum safe amount of residue that may be present. Under the act, "safe" means that EPA has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information. EPA may establish a tolerance on its own initiative or in response to a petition.[6]

STATE REGULATION

States may not allow the sale and use of a pesticide that is prohibited by FIFRA and may not create labeling or packaging requirements that are in addition to or different from those imposed by FIFRA. Beyond those limitations, however, a state generally is allowed to regulate the sale and use of pesticides.[7]

Wisconsin has enacted certain restrictions, such as an annual licensing requirement for producers and distributors of pesticides. The Department of Agriculture, Trade, and Consumer Protection (DATCP) has prohibited the use of certain pesticides, established special use permits for others, and created a landscape pesticide registry through which a person may receive notification of a pending commercial application of pesticides to neighboring lawns. The Department of Natural Resources regulates the use of certain pesticides that could constitute a serious hazard to wild animals.[8]

LOCAL REGULATION

Units of local government in Wisconsin presently have very limited authority to impose their own pesticide regulations because of state law. When a pesticide applicator in 1985 challenged an ordinance of the Town of Casey (Washburn County) that required a town permit for aerial spraying of pesticides on private lands, the U.S. Supreme Court held that FIFRA did not preempt local regulation of pesticides. A change in state law in 1993, however, explicitly preempted most local regulation.[9]

The relevant state law enumerates the following nine actions that a local government may take by ordinance:

- Regulate pesticide use on property which the political subdivision owns.
- Zone areas with respect to pesticide manufacturing, distribution, and disposal.
- Implement any regulation of pesticides that the political subdivision is required by federal law or other state laws to implement.
- Implement a cooperative agreement with EPA regarding enforcement of FIFRA and training and certifying applicators under that law.
- Prohibit conduct that is prohibited under specified provisions of state pesticide law or under FIFRA.
- Require that, when notification of pesticide use is required by state or federal law, notification of that use be given to the political subdivision.
- Set standards for fire prevention in the storage of a pesticide that poses a fire hazard.
- Regulate pesticides pursuant to a storm water management program that is consistent with a specified federal regulation.
- Regulate the storage, treatment, or disposal of solid waste containing pesticides, pesticide containers, or pesticide residues.[10]

In addition, the state law has been judicially interpreted as not preempting local regulation of the fertilizer component of a product that is both a pesticide and a fertilizer.[11]

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[1] 7 U.S.C. s. 136a (a), (b), (c) (5), and (g) (1) (A); 40 C.F.R. s. 152.15.
[2] 7 U.S.C. ss. 136 (bb) and 136a (d) (1) (B).
[3] 7 U.S.C. s. 136a (d) (1) (c); 40 C.F.R. s. 152.160 (b).
[4] 40 C.F.R. s. 152.112 (g).
[5] 21 U.S.C. ss. 331 (a) and (g) and 342 (a) (2) (B).
[6] 21 U.S.C. s. 346a (a) (1), (b) (1), and (b) (2) (A) (ii).
[7] 7 U.S.C. s. 136v.
[8] ss. 94.68 (1) (intro.) and 94.685 (1), Stats.; ss. ATCP 29.56 (6), 30.05, and 30.10, Wis. Adm. Code.
[9] s. 94.701 (3) (a), Stats.; *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991).
[10] s. 94.701 (3) (b) and (c), Stats.
[11] s. 94.701 (3) (b), Stats.; *Croplife America, Inc. v. City of Madison*, 432 F. 3d 732 (7th Cir. 2005).