

Letter of The Law

Rewriting the "Right-To-Know"

By Lawrence S. Ebner*

No responsible employer can argue with the proposition that his workers have the right to know if they are being exposed to hazardous chemicals in the workplace. But how to design a cost-effective "hazard communication" program is another question. The Reagan Administration thinks it has the answer.

Last March, the Occupational Safety and Health Administration (OSHA) published a proposed workplace standard on hazard communication (47 Fed. Reg. 12092). The standard, which applies to chemical manufacturers and other manufacturing employers who use hazardous chemicals, is still working its way through the formal rulemaking process, including extensive administrative hearings conducted by OSHA in June. It is one of the Administration's first "performance-oriented" regulations. This means that industry rather than government is in the driver's seat; OSHA tells employers where to go, but any reasonable route can be taken to get there.

The current proposal contrasts sharply with the "specification-oriented" hazard identification standard that was proposed as one of the Carter Administration's final acts (46 Fed. Reg. 4412) and withdrawn as one of the Reagan Administration's first. Had that standard been adopted, it would have been reminiscent of a road rally

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for which a detailed route is mapped out in advance and strict adherence is required at every turn.

The Rationale for the Right to Know

The philosophy underlying the right to know is that if workers are to protect themselves, they must be made aware of the occupational hazards to which they are exposed. In the preamble to its current proposal, OSHA states as follows:

Without adequate hazard communication, millions of workers with routine exposures to hazardous chemical substances are unaware of the hazards posed by these substances, and are thus incapable of protecting themselves or ensuring that their employers provide adequate protection . . . to leave workers ignorant of the hazards they face, without the ability to protect themselves, would be incompatible with OSHA's duty under the [Occupational Safety and Health] Act to assure every working man and woman in the nation, so far as possible, safe and healthful working conditions.

47 Fed. Reg. 12094. OSHA's view, therefore, is that hazard communication must result in a level of awareness that will ensure adequate employee protection.

OSHA's Current Proposal

There are two basic requirements in the pending hazard communication standard.

1. Chemical manufacturers must

evaluate the chemicals they produce to determine if they are "hazardous."

2. Chemical manufacturers and other manufacturing employers who use hazardous chemicals must develop and implement hazard communication programs for the protection of their employees.

The proposed standard defines "hazardous chemical" as any chemical which is "combustible, a compressed gas, explosive, flammable, a health hazard, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive." Because the standard is performance oriented, chemical manufacturers "are not required to follow any specific methods for determining hazards, but it is incumbent upon them to demonstrate that they have adequately ascertained the scientifically well-established hazards of the chemicals produced." In terms of "health hazards," only "scientifically well-established" acute or chronic effects resulting from occupational exposure need be identified.

While chemical manufacturers have the burden of determining whether the chemicals they produce are hazardous, each "employer" covered by the standard must make a list of the hazardous chemicals known to be present in the workplace and develop and implement a hazard communication program. An "employer" is "an establishment in SIC [Standard Industrial Classification] Codes 20-39 (i.e., a manufacturer) that manufactures or uses hazardous chemicals." Hazard communication programs must include labeling and placarding of containers in or leaving the workplace, material safety data sheets, and employee information and training. To

the extent that existing hazard communication programs meet the standard's minimum criteria, no new measures need to be taken.

The proposed standard's labeling and placarding requirements apply to "containers" of hazardous chemicals (pipes and piping systems are expressly excluded). Employers must ensure that each container of hazardous chemicals in or leaving the workplace is labeled, tagged or marked with identifying information and hazard warnings. If stationary containers in a work area have similar contents and hazards, signs or placards may be posted in the work area in lieu of labeling individual containers.

Additionally, every employer must obtain or develop and make available to his employees a "material safety data sheet" for each hazardous chemical produced or used in the workplace. Material safety data sheets are to describe chemical and common names (subject to certain trade secret confidentiality protections), physical and chemical characteristics, physical hazards, known acute and chronic effects of exposure to the chemical, exposure routes, precautions and recommendations for safe handling and use, and emergency and first aid procedures. Chemical manufacturers are directed to provide material safety data sheets to their manufacturing purchasers. OSHA assumes that most downstream employers who use hazardous chemicals will obtain material safety data sheets from chemical manufacturers rather than develop them independently.

Finally, employers must provide employees with "information and training" on hazardous chemicals in the workplace. This is to occur at the time of an employee's initial assignment to a work area and whenever a new hazardous chemical is introduced. Employees are to be provided with information on the location of hazardous chemicals in work areas and with training on detection and self-protection measures.

The Earlier Proposal

OSHA estimates that the short-lived and excessively burdensome Carter Administration proposal would have been 10 times as costly to implement. It would have covered all manufacturing industries and importers and repackagers of chemical products.

The standard would have specified detailed search and evaluation procedures for hazardous chemicals. Labeling or placarding of pipes and piping systems as well as containers would have been required. Furthermore, no provision was made for protection of trade secrets, and employers would have had to certify that particular chemicals are not hazardous. The Reagan Administration has suggested that the earlier proposal, with its heavy emphasis on providing large amounts of technical information to employees, would have resulted in "information overload" and inhibited effective hazard communication.

Regulatory Relief and Preemption

Information overload is one reason why a federal standard on hazard communication in the workplace is needed. A number of state and local governments already have enacted or are considering their own worker right-to-know laws. Multiple labeling and other requirements could result in workers being confronted with a maze of confusing, redundant or inconsistent information. This would defeat the very purpose of effective hazard communication and create an unwarranted cumulative burden on industry. Adoption by OSHA of a federal standard on hazard communication, however, might preempt state and local right-to-know regulatory activities other than OSHA-approved state plans. Thus, this is one area for which regulatory relief might require more federal coordination and less state and local regulation.

While the proposed standard might avert conflicting state and local requirements, it nevertheless could encroach upon areas already regulated by other federal agencies and thereby result in information overload. For example, because the proposed standard's labeling requirements apply to containers "leaving" as well as "in" the workplace, OSHA's requirements may overlap with those promulgated by the Department of Transportation (DOT) under the Hazardous Materials Transportation Act. The extent to which required DOT labeling and placarding would satisfy the OSHA standard is unclear. It should be noted in this regard that § 4 (b)(1) of the Occupational Safety and Health Act expressly precludes OSHA from regulating working conditions of employ-

ees with respect to which other federal agencies "exercise statutory authority to prescribe or enforce standards affecting occupational safety and health."

Employee Exposure and Medical Records

Ensuring access to employee exposure and medical records is an important adjunct to OSHA's right-to-know program. The Carter Administration adopted a broad records retention and access rule in May 1980 (45 Fed. Reg. 35212), but it was immediately challenged in the courts. To moot industry's objections, OSHA is in the process of revising the access rule. These modifications are intended to narrow the rule's regulatory focus and to afford greater protection to an employer's trade secrets.

The existing rule (29 C.F.R. § 1910.20) applies indiscriminately to general industry, maritime and construction employees who are "exposed" to toxic substances or harmful physical agents. A working draft of the revised rule, however, covers only employees whose work directly involves exposure to, or who are exposed accidentally to, toxic substances or harmful physical agents.

Employers would have to provide employees access to personal medical and exposure records within 15 working days. OSHA has indicated, however, that the rule is not intended to interfere with physician-patient confidentiality. (The National Labor Relations Board ruled last April that unions representing chemical workers are entitled to certain workplace safety information as part of the collective bargaining process, but not to individual employee medical records.) Access to exposure records of similarly exposed employees would be permitted only in the absence of relevant personal exposure records.

Employers would have to retain medical records for at least the duration of an employee's employment or 30 years, whichever is longer (under the existing rule, medical records must be retained for the duration of employment plus 30 years). As in the existing rule, employee exposure records would have to be retained for at least 30 years, but such records would be limited to workplace and biological monitoring results and to material

safety data sheets. Unlike the existing rule, other records which reveal the identity of toxic substances or harmful physical agents would not be considered exposure records subject to the retention requirements.

Protection of trade secrets has been a particularly controversial subject. The existing rule requires identification of toxic substances, even if their identities are considered trade secrets. OSHA has suggested a revision to the rule which, like the proposed hazard communication standard, would re-

quire identification (subject to a confidentiality agreement) only of certain categories of highly toxic chemicals (such as carcinogens and teratogens). Secret identities of other hazardous chemicals would not have to be revealed, except to physicians who have a need to know.

A Challenge to Industry

The Reagan Administration obviously has not turned its back on the

right to know. As ongoing rulemaking activity suggests, OSHA still is very much committed to effective hazard communication and records access programs. Furthermore, regulatory relief does not imply diminished industry responsibility. To the contrary, with less burdensome regulations, chemical manufacturers and other employers will have to assume an even greater responsibility for ensuring that employees are provided with the information they need to protect themselves from occupational hazards. □

Fenvalerate

Continued from page 44

TABLE IV
Summarized Results of Residual Efficacy Comparing Fenvalerate and Chlorpyrifos Formulations on German Cockroaches

Week	Avg % Dead & Moribund (48 Hr) ^a											
	Formulation Containing Chlorpyrifos				Free Choice Formulation Containing Fenvalerate				Forced Contact ^b Formulation Containing Fenvalerate			
	Foil	Wood	P. Wood	Tile	Foil	Wood	P. Wood	Tile	Foil	Wood	P. Wood	Tile
1)	100	87	97	87	100	90	40	0	—	—	—	—
1)	100	97	83	77	100	67	23	10	—	—	—	—
2)	97	97	50	67	97	67	57	10	100	100	67	7
3)	37	97	33	17	97	73	30	10	100	100	83	0
4)	—	90	—	—	97	37	13	—	100	100	80	—
5)	—	100	—	—	90	—	—	—	100	100	67	—
6)	—	93	—	—	97	—	—	—	100	100	37	—

^a German cockroaches were again exposed to the fenvalerate wood and foil panels and to the chlorpyrifos wood panels after they had aged 3 months. One hundred percent kill was obtained.

^b Starting at week 2, roaches were confined to treated surfaces and counts taken in the same manner as the other treatments.

in a similar manner as above on a wide variety of arthropod pests to determine residual efficacy. Some of these pests were: stored product pests, ants, sowbugs, centipedes, ticks, fleas and crickets. Generally, this formula gave good residual control of all species on the foil and untreated wood surfaces. Of particular interest is the length of control obtained on cat fleas and brown dog ticks—8 weeks and 5 weeks, respectively, on all surfaces.

Another area of homeowner use, where fenvalerate has shown it can be used effectively, is as a wasp and hornet spray. A formula consisting of 0.20 percent tetramethrin and 0.125 percent fenvalerate was tested by an independent research firm against bald-faced hornets and yellow jacket wasps. Tests were conducted under controlled laboratory conditions, and in actual field conditions. The results from both evaluations document com-

plete knockdown within 30 seconds with no recovery of the insects.

Summary and Conclusions

Fenvalerate has a promising future in the insect control marketplace for homeowner and industrial use, because of its effectiveness on a broad spectrum of arthropod pests and its residual properties. Fenvalerate fits well into several types of delivery systems. It has been developed and shown to be effective as a 2 lb/gal water or oil dilutable spray concentrate for use in commercial and industrial structures. The products particularly suited for the homeowner combine fenvalerate with a knockdown and flushing agent. These products include a total release aerosol, a cockroach spray, and a wasp and hornet spray. Because of fenvalerate's excellent cockroach control, a total release aerosol can now be made with the claim of "kills cockroaches" on the label. □

References

1. *Pesticide & Toxic Chemical News*, September 10, 1980, p. 14.
2. *Cockroach Spray Test Method (1971). Soap and Chemical Specialties—Blue Book*, Vol. 47 (4A), p. 166.