Class Determination 1-91

Identity of Importing Country Under FIFRA Section 17(A)(2)

I. Background

Section 17(a)(2) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) sets out the conditions under which pesticides not registered for use in the United States may be exported to other countries. Under that provision and the Environmental [*9079] Protection Agency (EPA) statement of policy governing its implementation (45 FR 50274, July 28, 1980), a pesticide which is not registered under section 3 or sold under section 6(a)(l) of FIFRA may be exported only if, prior to export, (1) the foreign purchaser signs a statement acknowledging it understands that the pesticide is unregistered and cannot be sold in the United States and (2) a copy of the acknowledgement statement has been transmitted to EPA for sending to the government of the importing country. Under EPA's policy, these requirements apply only to the first shipment of each unregistered pesticide to a particular purchaser in a given country annually.

EPA's 1980 policy statement permitted exporters to claim as confidential business information required to be reported to EPA on the foreign purchaser's acknowledgement statement. The information required to be reported is as follows:

(a) Name and address of the exporter;

(b) Name and address of the foreign purchaser;

(c) Name of the product and the active ingredient and an indication that the purchaser understands that the product is not registered for use in the United States;

(d) Destination of the export shipment if different than purchaser's address;

(e) Signature of the foreign purchaser; and

(f) Date of the foreign purchaser's signature.

In the past, and in accordance with that policy statement, EPA has treated this information as confidential when so claimed by the exporter. However, EPA issued another policy statement on January 12, 1990 (55 FR 1261) addressing the confidential status of information reported to EPA under section 7 of FIFRA which necessarily affected the confidentiality of certain information reported under section 17(a)(2).

Specifically, because section 7 mandates that certain information is not entitled to confidential treatment, the fact that a company has submitted a notice under section 17(a)(2) for a given pesticide is necessarily public as well. (The active ingredient of that pesticide is also public information).

This class determination addresses the confidentiality of the identity of the importing country of the unregistered pesticide export. It does not address the status of information about the foreign purchaser,

information reported about research and development products, or quantity of shipment information which may be recorded on the purchaser acknowledgement statement.

II. Findings

Under EPA's regulations on business confidentiality at 40 CFR 2.207, I have authority to issue class determinations concerning entitlement of business information to confidential treatment. In the case of the information reported to EPA under FIFRA section 17(a)(2) concerning the identity of importing country I have found:

(1) EPA possesses numerous notices filed under FIFRA section 17(a)(2) and will continue to receive such notices in the future.

(2) The information reported concerning importing country is of the same nature and therefore can be treated similarly for the purpose of this determination.

(3) A class determination will serve a useful purpose by simplifying EPA responses to Freedom of Information Act (FOIA) requests for information contained in the notices, reducing the burden of individual determinations and informing requesters and affected businesses of EPA's position in advance.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions in the Act. One exemption is for "trade secrets" and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The matter to be decided in this class determination is whether the identities of importing countries reported under FIFRA section 17(a)(2) are entitled to be withheld from disclosure under this exemption of the FOIA.

The information in question is clearly commercial information obtained from a person. The issue is whether this information is trade secret or otherwise confidential within the meaning of 5 U.S.C. 552(b)(4) and EPA's business confidentiality regulations at 40 CFR part 2, Subpart B.

Before EPA may conclude that information is exempt from disclosure as trade secret or confidential commercial information, the Agency must find that the information is in fact maintained in confidence by the business and is not publicly available. If it is not maintained in confidence or is publicly available, it is not entitled to confidential treatment and EPA must disclose the information.

The weight of evidence shows that destination information on unregistered pesticides is publicly available for many such exports. For example, some countries publish lists identifying monthly imports including information on the name or type of pesticide, the exporting country and the exporting company. Other countries make this information available on request.

Also widely available is information on international markets for particular pesticides. There is widespread advertising by United States exporters on billboards and in stores in foreign countries for pesticides sold in those countries but not registered in the United States. Similar advertising appears in domestic and foreign publications.

There also exist compilations listing pesticides and their regulatory status throughout the world, such as three volumes published jointly by the Agricultural Requisites Scheme for Asia and the Pacific and the International Co-operation Centre for Agricultural Research and Development covering Asia, the Pacific, and Africa.

In addition, considerable information on destination of pesticide exports is available from private publishers at a cost which is high but not prohibitively so for pesticide manufacturers. For example, Battelle publishes "World Pesticide Programme" reports which provide detailed information on pesticide use in foreign countries. "Agrow World Crop Protection News" offers market planning and development information and lists pesticides registered in various countries.

Finally, the Port Import/Export Reporting Service (PIERS) database of the Journal of Commerce provides information on all shipments leaving the United States. Information available to customers of PIERS varies in the level of detail provided, but may include commodity exported, manufacturer or shipper, destination and quantity.

Therefore, it appears that in many instances destination information on unregistered pesticide exports is not maintained in confidence and is in fact available to the public. For those exports, destination information is not entitled to confidential treatment by EPA. Since this determination must cover all notices received under section 17(a)(2), however, it is necessary to continue the confidentiality analysis to apply to those exports for which destination information may in fact be held in confidence.

Information that has been kept in confidence may be entitled to confidential treatment under 5 U.S.C. 552(b)(4) if it meets one of the tests set out in National Parks Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Under Morton, commercial or financial information may be withheld from disclosure if revealing the information would be likely (1) to impair the ability of the government to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the submitter of the information.

The first test is not applicable to export destination information because such information is required to be submitted to EPA under FIFRA 17(a)(2) and EPA's policy statement. Therefore, the information is not voluntarily submitted and EPA's ability to obtain it in the future would not be impaired by disclosure. Accordingly, the applicable Morton test is the second one, whether disclosure of this information would be likely to cause substantial harm to the competitive position of the submitter.

Country of destination information other than information concerning pesticides in the research and development stage is not the type of information that would likely cause substantial competitive harm to a submitter if it were released. If not coupled with information about quantity shipped, the identity of the country of destination does not reveal specific information about the company's customer list or market share. While an argument can be made that releasing information concerning research products could enable competitors to learn new areas of chemistry being explored by the exporter and thwart "first to file" patent laws, no similar argument can be made for pesticides in an established market. Therefore, under the second Morton test, information identifying the country of destination of unregistered pesticide exports is not entitled to confidential treatment.

III. Conclusion

For the foregoing reasons, I find that information reported to EPA under FIFRA section 17(a)(2) on unregistered pesticide exports identifying the importing country is not entitled to confidential treatment under 5 U.S.C. 552(b)(4) or FIFRA. [*9080]

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