

US EPA ARCHIVE DOCUMENT



**U.S. Environmental Protection Agency
Office of Pesticide Programs (OPP)**

**Guidance on Warranty Statements
October 17, 2006**

WARRANTY STATEMENTS

Most, if not all, pesticide labels contain some type of warranty disclaimer language. It is important, as always, that the Agency be consistent in reviewing such language when it is first submitted or subsequently amended. The Office of Pesticides Programs (OPP) has found warranty disclaimer statements that contain potentially false or misleading language, or words and phrases that are in some way objectionable. Additionally, OPP is frequently asked by applicants/registrants about warranty disclaimer language they wish to place on pesticide labels. Therefore, OPP is reissuing the Agency's guidance on warranty statements. As described more fully below, the updated guidance will include examples of improper warranty statements that go beyond what the agency considers acceptable, as well as examples of how to fix these statements. We will also include examples of statements that are acceptable under FIFRA, and that could be incorporated into FIFRA labels.

Warranty and Disclaimer statements containing language intended to limit liability of the registrant or act as disclaimers or warranties for the product are generally covered by state law or may fall under the jurisdiction of the Federal Trade Commission. The Agency will evaluate these statements to assess the extent to which the statements impact FIFRA label standards or the Agency's implementing regulations. In general, OPP will not accept: (1) disclaimers that attempt to limit liability for what is expressly warranted by statements on the label (e.g., "this product may not work as intended" or "seller makes no warranty of results to be obtained by use of the product"); and (2) statements that ignore that the possibility of warranty enforcement under state or other applicable laws governing warranties.

There are four types of label language associated with warranty disclaimers, and statements of limitations of liability that the Agency has found to be unacceptable under statutory and regulatory standards. It is important to recognize that these statements must be assessed on a case-by-case basis. Following are examples of statements that have been found unacceptable:

1. Overly broad statements negating or detracting from the Directions for Use or other label language (including precautionary statements and directions for use). For instance, the warranty statement that the product may not work would negate Directions for Use that explained how the product was to be used.

2. Label language asserting that the buyer has accepted the manufacturer's statement of his/her respective rights (e.g., manufacturer states buyer's rights are extremely limited or require a specific process to be realized). Because these statements are almost always incomplete (in terms of fully explaining a buyer's rights in the jurisdiction (state) of purchaser and because they can mislead buyers into thinking that they have no legal remedy, they may constitute "misbranding" under FIFRA.
3. Overly broad language implying buyer has no legal right to recover damages from manufacturer (e.g., "all such risks shall be assumed by the buyer").
4. Because Experimental Use Permit (EUP) labels must be used in strict accordance with the EUP program, the warranty on EUP labels may not disclaim control over use. As with No. 2 above, these statements can be considered to be misleading.

The proposed label must be checked for warranty disclaimer/liability language statements (like those above) which appear to negate or detract from Directions for Use or other language. Reviewers should make sure that the disclaimer statement makes it clear that it is the registrant's or manufacturer's warranty disclaimer, by using such statements like "To the extent consistent with applicable law..." or "It is the manufacturer's intention that...". This way it is clear that the language is coming from the registrant (and not EPA).

Section 24(c) Special Local Needs

In 1997, OPP, in coordination with OGC and the regulated community, developed general guidance on language acceptable in waiver of liability statements that may be used on section 24(c) Special Local Needs labels. This guidance included:

1. The label statement may indicate that the registrant intends that the 24(c) only be distributed to users that have agreed in writing to the terms and conditions of the use including a waiver of liability. But, it is not acceptable to have label language that **requires** (appears to represent that EPA will enforce) a user to sign an agreement before purchasing it or using it. This guidance can be found at <http://www.epa.gov/opprd001/24c/addendum.htm>.

2. The special conditions and disclaimer for use do not require an action by growers that imposes an enforcement burden on the Federal or state government.
3. The label statement cannot require that the user be a member of a specific group in order to use the product.

Even though FIFRA restricts what can be placed on a label, the statute and implementing regulations allow for some warranty disclaimer statements. OPP needs to be sure these statements conform to FIFRA, most importantly that the statements do not contain false or misleading information. The following are examples of problematic warranty statements. The problematic portions of the label statements are stricken, and necessary language is added in red.

EXAMPLES OF PROBLEMATIC WARRANTY DISCLAIMERS

Even though FIFRA restricts what can be placed on a label, the statute and implementing regulations allow for some warranty disclaimer statements. OPP needs to be sure these statements conform to FIFRA, most importantly that the statements do not contain false or misleading information. In general, OPP will not accept: (1) disclaimers that attempt to limit liability for what is expressly warranted by statements on the label; and (2) statements that ignores the possibility of warranty enforcement under state or other applicable laws governing warranties. Disclaimers that purport to limit liability for statements made or implied by the label are not acceptable (e.g., "this product may not work as intended" or "seller makes no warranty of results to be obtained by use of the product"). The following are examples of problematic warranty statements. The problematic portions of the label statements are stricken, and necessary language is added in red.

EXAMPLE 1**IMPORTANT: READ BEFORE USE**

Read the entire Directions for Use, Conditions of Warranties and Limitations of Liability before using this product. If terms are not acceptable, return the unopened product container at once.

By using this product, user or buyer accepts the following Conditions, Disclaimer of Warranties and Limitations of Liability.

CONDITIONS: The directions for use of this product are believed to be adequate and ~~should~~ **must** be followed carefully. However, it is impossible to eliminate all risks associated with the use of this product. Crop injury, ineffectiveness or other unintended consequences may result because of such factors as weather conditions, presence of other materials, or the manner of use or application, all of which are beyond the control of XXXX. All such risks shall be assumed by the user or buyer.

DISCLAIMER OF WARRANTIES: **To the extent consistent with applicable law,** XXX makes no other warranties, express or implied, of merchantability or of fitness for a particular purpose or otherwise, that extend beyond the statements made on this label. No agent of XXX is authorized to make any warranties beyond those contained herein or to modify the warranties contained herein. **To the extent consistent with applicable law,** XXX disclaims any liability whatsoever for special, incidental or consequential damages resulting from the use or handling of this product.

LIMITATIONS OF LIABILITY: **To the extent consistent with applicable law,** the exclusive remedy of the user or buyer for any and all losses, injuries or damages resulting from the use or handling of this product, whether in contract, warranty, tort, negligence, strict liability or otherwise, shall not exceed the purchase price paid or at XXX's election, the replacement of product.

Reasons for corrections

The phrase “should follow directions” could mislead users to believe that the directions for use are only suggestions and not enforceable restrictions on how the product may be used; therefore, all statements relating to using the product in accordance with its labeling will be required to be mandatory (i.e., “must”).

The phrase, “to the extent consistent with applicable law” has been added to the disclaimers of liability and damages to avoid the statements being false or misleading. Some states or localities may not allow certain disclaimers of liability or damages; therefore, the user/buyer may have a remedy under other law governing warranties.

EXAMPLE 2

Warranty

The directions for use of this product are believed to be adequate and ~~should~~ **must** be followed carefully, it is impossible to eliminate all risks inherently associated with the use of this product. Crop injury, ineffectiveness, or other unintended consequences may result due to such factors as weather conditions, presence or absence of other materials, or the manner of use or application, all of which are beyond the control of XXX, the manufacturer, or the seller.

To the extent consistent with applicable law, the products sold to you are furnished “as is” by XXX. The manufacturer and the seller are subject only to the manufacturer’s warranties, if any, which appear on the label of the product sold to you. Except as **warranted by this label** ~~expressly provided herein~~, XXX, the manufacturer, or the seller makes no warranties, guarantees, or representations of any kind to the buyer or the user, either express or implied, or by usage of trade, statutory or otherwise, with regard to the product sold or use of the product, including, but not limited to, merchantability, fitness for a particular purpose or use, or eligibility of the product for any particular trade usage. ~~Except as expressly stated herein, XXX, the manufacturer, or the seller makes no warranty of results to be obtained by use of the product.~~ **To the extent consistent with applicable law,** Buyer’s or user’s exclusive remedy, and XXX, the manufacturer’s or the seller’s total liability shall be limited to damages not exceeding the cost of the product. No agent or employee of XXX, or the seller is authorized to amend the terms of this warranty disclaimer or the product’s label or to make a presentation or recommendation different from or inconsistent with the label of this product.

To the extent consistent with applicable law, XXX, the manufacturer, or the seller shall not be liable for consequential, special, or indirect damages resulting from the use, handling, application, storage, or disposal of this product or for damages in the nature of penalties, and the buyer and the user waive any right that they may have to such damages.

Reasons for Corrections

Prior to legal use of a pesticide product the use must be registered under the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA). Registration of a pesticide requires, in part, that the product be effective in controlling the pest(s) for which it is registered. In registering the product under FIFRA, the product must perform as purported when used in accordance with its labeling. The phrase, "Except as expressly stated herein, XXX., the manufacturer, or the seller makes no warranty of results to be obtained by use of the product," is overly broad and could be misleading to the consumer. Overly broad statements, which negate or detract from the Directions for Use, must be qualified by a phrase such as "Except as warranted in this label." Statements such as those used in the example above ("Except as expressly provided herein" and "Except as expressly stated herein") are not adequate qualifiers because they are misleading in that they do not clearly incorporate the warranty offered through the act of registration.

State and local laws may not allow the manufacturer to limit its liability by offering its product "as is." In addition, the same laws may not allow certain limitations of liability or remedy. Therefore "to the extent consistent with applicable law" has been added in appropriate places.

EXAMPLE 3

LIMITATION OF WARRANTY AND LIABILITY

NOTICE: Read this Limitation of Warranty and Liability Before Buying or Using This Product. If the Terms Are Not Acceptable, Return the Product at Once, Unopened, and the Purchase Price Will Be Refunded.

It is impossible to eliminate all risks associated with the use of this product. Such risks arise from weather conditions, soil factors, off-target movement, unconventional farming techniques, the presence of other materials, the manner of use or application, or other unknown factors, all of which are beyond the control of XXX. These risks can cause: ineffectiveness of the product; crop injury, or; injury to non-target crops or plants.

XXX does not agree to be an insurer of these risks **beyond what is expressly warranted by this label**. When you buy or use this product, you agree to accept these risks.

XXX warrants that this product conforms to the chemical description on the label thereof and is reasonably fit for the purpose stated in the Directions for Use, subject to the inherent risks described above, when used in accordance with the Directions for Use under normal conditions.

To the extent consistent with applicable law, XXX makes no other express or implied warranty of fitness or of merchantability or any other express or implied warranty.

To the extent consistent with applicable law, in no event shall XXX or seller be liable for any incidental, consequential or special damages resulting from the use or handling of this product. Buyer's or user's bargained-for expectation is crop protection. **To the extent consistent with applicable law**, the exclusive remedy of the user or buyer and the exclusive liability of XXX or seller, for any and all claims, losses, injuries or damages (including claims based on breach of warranty or contract, negligence, tort or strict liability), whether from failure to perform or injury to crops or other plants, and resulting from the use or handling of this product, shall be the return of the purchase price of the product, or at the election of XXX or seller, the replacement of the product.

To the extent consistent with applicable law allows such requirement, XXX or its Ag Retailer must have prompt notice of any claim so that an immediate inspection of buyer's or user's growing crops can be made. Buyer and all users shall promptly notify XXX or a XXX Ag Retailer of any claims, whether based on contract, negligence, strict liability, or other tort or otherwise be barred from any remedy.

This Limitation of Warranty and Liability may not be amended by any oral or written agreement.

Reasons for Corrections

See the explanations for Example 2 above.

EXAMPLE 4

Note: Seller warrants that this product complies with the specifications expressed in this label. **To the extent consistent with applicable law**, Seller makes no other warranties, and disclaims all other warranties, express or implied, including but not limited to warranties of merchantability and fitness for the intended purpose. **To the extent consistent with applicable law**, Seller's liability or default, breach or failure under this label shall be limited to the amount of the purchase price. **To the extent consistent with applicable law**, Seller shall have no liability for consequential damages.

Reasons for Corrections

See explanations for Examples 1 through 3 above.

EXAMPLE 5--INDEMNIFICATION TYPE

Conditions and risks of use for special local need

Use of XXX herbicide (the "product") on clover grown for seed (the "crop") for this special local need may result in crop injury, crop yield reduction and/or crop loss as further discussed below. Read and understand these conditions and risks of use for special local need before using the product on the crop.

This Product is available for use in the manner described in this Supplemental Labeling on the basis that, in the sole opinion of the user, the benefits and utility derived from the use of the Product on the Crop outweigh the potential risk of Crop injury, Crop yield reduction or Crop loss. The decision to use this Product in the manner described in this Supplemental Labeling must be made by each individual user on the basis of anticipated benefits versus (i) the potential risk of Crop injury, Crop yield reduction and Crop loss, (ii) the severity of the target pest infestation, (iii) the cost and availability of alternative pest controls and (iv) any other relevant factors.

By purchasing the Product for use, or using the Product, in the manner described in this Supplemental Labeling, you acknowledge and accept that, **to the extent consistent with applicable law:**

- (1) you assume all risk of Crop injury, Crop yield reduction and Crop loss;
- (2) XXX does not make, and do not authorize any agent or representative to make, any representations or recommendations regarding the use of this Product on the Crop other than the statements on this Supplemental labeling;
- (3) XXX does not make, and do not authorize any agent or representative to make, any warranties, express or implied, with respect to the use of the Product on the Crop and disclaim all warranties, expressed or implied, including any implied warranty of merchantability;
- (4) XXX disclaims all liability for any damages, losses, expenses, claims or causes of actions arising out of or relating to Crop injury, Crop yield reduction and/or Crop loss;
- (5) These Conditions and Risks of use for Special Local Need supersede any contrary representations or recommendations by XXX, or its respective agents or representatives, and any provisions in or recommendations by XXX, or its respective agents or representatives, and any provisions in or on any Product literature or labeling including any provisions on the label affixed to the Product container.

If these Conditions and Risks of Use for Special Local Need are not acceptable, the unopened Product may be returned to the seller for a refund or used for a different labeled use in accordance with the label affixed to the Product container.

This "Conditions and Risks of Use for Special Local Need" statement is required by XXX and not specified by the US EPA or the State of Oregon.

Potential Concerns for 24(c) disclaimers

EPA believes that products bearing labeling that requires growers to waive their rights to bring suit as a condition of lawful use of a product are not consistent with FIFRA and should not, therefore, be registered by states pursuant to section 24(c). EPA believes the inclusion of such statements on product labeling may constitute misbranding pursuant to section 2(q)(1)(A) of FIFRA and 40 CFR 156.10(a)(5), because these statements may give growers the misleading impression that federal authorities have sanctioned such labeling and support the imposition of civil and/or criminal penalties against growers who choose to use a pesticide without first agreeing to waive their rights to bring civil actions for damages resulting from the use of the pesticide. The FIFRA enforcement scheme should not be used, nor does EPA believe it was intended to be used, as a means of enforcing private agreements regarding product liability. For this reason, EPA does not believe the use of such provisions on 24(c) labeling is consistent with the purposes of FIFRA.

EPA does not object to statements on 24(c) product labeling that merely references the existence of private liability agreements, or that disclaim liability to the extent permitted by law. These statements are distinguishable from those discussed above in that they do not require that growers sign away their legal rights as a condition of lawful use of the product. However, such statements must not provide false or misleading information to growers about the legal remedies available to growers in the event growers suffer damage resulting from the use of the product. As a general rule of thumb, EPA believes that any such statements should clearly indicate that they represent the position of the registrant only, or should be otherwise qualified to indicate clearly that the limitations on liability provided on the label may be inapplicable if a grower's state does not allow the limitations on damages asserted on the label.

The example above is made acceptable by including "to the extent consistent with applicable law."