Supplemental Federal Register Notice Summary

On October 21, 1999, EPA published a supplemental notice in the *Federal Register* (64 FR 56918). The purpose of the supplemental notice was to re-open the public comment period for the container and containment rule in order to obtain comments on four specific issues. Two of these issues addressed significant changes being considered for the final rule based on public comments on the proposal, one addressed the implementation of a statutory provision that was added to FIFRA in 1996 and one was essentially a procedural issue.

For each issue, this document describes how EPA addressed it the proposed rule and the alternative approach in the supplemental notice.

Issue 1: Overall Scope of the Container Regulations

Proposal
EPA proposed that the container standards would generally apply to all pesticides and containers, regardless of the pesticide market sector, the type of pesticide or the type of container. Only manufacturing use products were exempt in the proposed rule.

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Many commenters opposed the broad scope and requested exemptions for certain categories of pesticides, such as household pesticides, industrial biocides, swimming pool chemicals, disinfectants and lower-risk pesticides.

EPA is considering exempting some pesticides and containers from the final rule. However, rather than exempting products based on the pesticide market sector or the type of pesticide, the supplemental notice stated that EPA believed it was more appropriate to exempt pesticides based on the relative risk they pose. The supplemental notice described an alternative approach for the final rule where the container standards would apply if at least one of the criteria are met:

- The pesticide product is classified in Toxicity Category I or II; or
- The container capacity is greater than or equal to 5 liters (1.3 gallons) for liquid products or 5 kilograms (11 pounds) for dry products; or
- The pesticide is intended for outdoor use and the label includes one of several specified environmental hazard statements (for wildlife, fish, birds and groundwater).

Issue 2: Exemption for Certain Antimicrobial Pesticides

Proposal
As described for issue 1, EPA proposed that the container standards would generally apply to all pesticides (except manufacturing use products) and containers. The proposal did not include specific provisions or exemptions for antimicrobial pesticides.

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In 1996, the Food Quality Protection Act (FQPA) amended FIFRA to exempt certain types of antimicrobial pesticides from the pesticide container standards under certain circumstances. Specifically, FQPA added the following:

> "A household, industrial, or institutional antimicrobial product that is not subject to regulation under the Solid Waste Disposal Act ... shall not be subject to the provisions of ... [the container design and residue removal standards] unless the Administrator determines that such product must be subject to such provisions to prevent an unreasonable adverse effect on the environment."

Because this language was added after the pesticide container and containment rule was proposed, EPA believed it was appropriate to solicit public comments on the applicability of this provision to the proposed container

regulations. In addition, EPA had to interpret the antimicrobial exemption to answer two broad questions: (1) What is the scope of household, industrial, or institutional antimicrobial products that are not subject to regulation under the Solid Waste Disposal Act? and (2) Which products must be subject to the container provisions to prevent an unreasonable adverse effect on the environment?

In the supplemental notice, EPA defined a "household, industrial or institutional antimicrobial product that is not subject to regulation under the Solid Waste Disposal Act" as a product that satisfies all of the following criteria:

- It meets the definition of antimicrobial pesticide in section 2(mm) of FIFRA; and
- It is classified in one of the household, industrial or institutional antimicrobial product use categories in the developing antimicrobial registration rule; and
- It is not a hazardous waste under the Resource Conservation and Recovery Act when it becomes a waste.

EPA considered a range of options for determining which antimicrobial pesticides that are eligible for the exemption must be subject to the container standards to prevent an unreasonable adverse effect on the environment. Four of the options were described in the supplemental notice. In EPA's preferred option, the products classified in Toxicity Category I would be subject to the container provisions with two exceptions. All other eligible antimicrobial products (i.e., those in Toxicity Categories II, III and IV) would be exempt. The two exceptions for Toxicity Category I antimicrobials are that they would be exempt from the nonrefillable residue removal standard and that products used in swimming pools would be exempt from certain refillable container standards.

The scope modifications in issue 1 and the exemption for certain antimicrobials in issue 2 would change which pesticides and containers would be subject to the container regulations. A summary of the potential changes is provided in Attachment 1.

Issue 3: Adopt DOT standards

Proposal

The proposed regulations would establish standards for pesticide containers that apply in addition to any applicable DOT standards. The proposal also included several references to the DOT standards and it adapted the drop test requirement from United Nations packaging standards.

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Many commenters on the proposed rule urged EPA to be consistent with the DOT regulations in terms of definitions, requirements and testing. Respondents argued that such consistency would:

- Facilitate compliance because the industry is already familiar with the DOT standards;
- Eliminate the potential burden of complying with two different, overlapping regulatory schemes; and
- Not establish additional trade barriers.

Most of the commenters on the DOT issue specifically favored the use of DOT's packing group III criteria as the minimum standards for pesticides not regulated by DOT as hazardous materials.

EPA is considering adopting this suggestion. While the DOT standards were discussed in the 1994 proposal, we did not specifically discuss the approach of adopting and referring to the DOT requirements in the final rule. Therefore, we described the following approach in the supplemental notice and requested comment on it:

- Pesticides that are classified as DOT hazardous materials would continue to be packaged in accordance with the DOT hazards materials regulations.
- Pesticides that are not classified as DOT hazardous materials would have to be packaged in accordance with the specified packaging design, construction and marking standards that would apply to a DOT packing group III material.
- All pesticides, regardless of DOT hazardous material classification, would have to comply with additional requirements for pesticides that have no equivalents in the DOT hazardous materials regulations.
- A provision similar to the limited quantity exceptions in the DOT hazardous materials regulations would be included for pesticides not classified as DOT hazardous materials.

Issue 4: Definition of Small Business

Proposal

The economic analyses of the proposed rule divided businesses (pesticide formulators, agrichemical dealers and commercial applicators) into small, medium and large categories. The definitions of the small categories were different than the Small Business Administration's (SBA's) definitions of small businesses.

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Because the definitions for small businesses used in the economic analyses are different than SBA's definitions, EPA had to follow certain procedures, including consulting with SBA on the definitions, publishing the alternative definitions in the Federal Register and soliciting comments on the alternative definitions.

Attachment 1: Summary of the Scope Modifications and the Antimicrobial Exemption Approach in the 1999 Supplemental Notice

According to the changes discussed and considered in the 1999 supplemental notice, a pesticide must comply with the container-related regulations if it is included in the regulations as set out in this table.

If your pesticide is...	And if it is...	And if it is...	And if it...	And if it...	Then your pesticide is...
(a) a manufacturing use product					exempt.
(b) not a manufacturing use product	an antimicrobial pesticide	used in at least one of the household, industrial, or institutional antimicrobial use categories	is not a hazardous waste when it is intended to be disposed	is in Toxicity Category I	included.
(c) not a manufacturing use product	an antimicrobial pesticide	used in at least one of the household, industrial, or institutional antimicrobial use categories	is not a hazardous waste when it is intended to be disposed	is in Toxicity Category II, III, or IV	exempt.
(d) not a pesticide described in line (a), (b), or (c) above [1]	in Toxicity Category I				included.
(e) not a pesticide described in line (a), (b), or (c) above [1]	in Toxicity Category II				included.
(f) not a pesticide described in line (a), (b), or (c) above [1]	in Toxicity Category III or IV	sold or distributed in a container with a capacity equal to or greater than 5 liters or 5 kilograms			included.
(g) not a pesticide described in line (a), (b), or (c) above [1]	in Toxicity Category III or IV	sold or distributed in a container with a capacity less than 5 liters or 5 kilograms	has a label that includes one of the environmental hazard statements	has a label that permits outdoor use	included.
(h) not a pesticide described in line (a), (b), or (c) above [1]	in Toxicity Category III or IV	sold or distributed in a container with a capacity less than 5 liters or 5 kilograms	has a label that includes one of the environmental hazard statements	has a label that does not permit outdoor use	exempt.
(i) not a pesticide described in line (a), (b), or (c) above [1]	in Toxicity Category III or IV	sold or distributed in a container with a capacity less than 5 liters or 5 kilograms	has a label that does not include one of the environmental hazard statements		exempt.

Note: (1) This includes end use products that are: (a) antimicrobial pesticides not used in at least one of the household, industrial or institutational antimicrobial use categories; (b) antimicrobial pesticides that are hazardous wastes when intended to be disposed; or (c) pesticides other than antimicrobials.