

Disclosing Environmental Data Without Violating Trade Secrets Law

The use of pesticides to control weeds and damage caused by insects has become a crucial method of promoting agricultural productivity in the United States. However, pesticides can also be harmful to people and the environment. As a result, the Environmental Protection Agency (EPA) has been regulating pesticide use for nearly 75 years to protect the public interest.

The EPA's regulatory role often requires pesticide manufacturers and other pesticide users to submit environmental data that contains protected trade secrets. Accordingly, the EPA's public disclosure of such data involves trade secret law.

Registering Pesticides Under FIFRA

As the regulatory system now stands, the EPA is responsible for enforcing and adhering to the regulatory provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Enacted in 1947, FIFRA governs the licensing of pesticides and is a source of federal control over pesticide distribution, sale and use. In significant part, FIFRA gives the EPA authority to:

1. Study the consequences of pesticide usage; and
2. Require users (e.g., farmers) to register with the EPA when purchasing pesticides.

In fact, under FIFRA provisions, all pesticides used in the United States must be licensed by the EPA and properly labeled. Pursuant to its authority, the EPA considers data submitted by applicants to determine whether a particular pesticide is environment-friendly. Part of the data that applicants must submit includes pesticide formulas, which often contain information that applicants want to protect from competitors. Based on the data submitted, the EPA may be required to publicly disclose some information, to make sure that a pesticide will not cause unreasonable harm to human health or the environment.

Fifth Amendment Property Interests in a Trade Secret

Even though trade secret information is intangible, it shares much in common with tangible property, such as the ability to be transferred. When an individual has property

rights, the Taking Clause of the Fifth Amendment of the U.S. Constitution guarantees that no governmental agency will take that property from the individual or interfere in any other way with the individual's property interests without "just compensation." If an applicant has a property right in trade secrets submitted to the EPA for registration, then the EPA's public disclosure of the trade secret information can constitute a Fifth Amendment "taking." In such case, the applicant will have the right to pursue a constitutional remedy against the EPA under the Fifth Amendment.

In 1984, the U.S. Supreme Court considered the property rights of an applicant for registration of pesticides in *Ruckelshaus v. Monsanto Co.* In that case, the applicant challenged the EPA's public disclosure of environmental data that the applicant had filed with the EPA in accordance with FIFRA. In order to determine whether the EPA's disclosure of trade secret information constituted a "taking," the Court focused on the EPA's interference with the applicant's "reasonable investment-backed expectation." Ultimately, the Court held that the applicant for registration of pesticides had a property interest in data submitted between 1972 and 1978, and that the EPA's disclosure of protected data for that time period could constitute a "taking."

Therefore, depending on when an applicant for registration of a pesticide submitted environmental data to the EPA for licensing, the trade secrets contained within such data may be considered property for purposes of the Fifth Amendment, as discussed below.

Public Disclosure of Environmental Data that Contains Trade Secrets

The EPA's authority to make public disclosures of trade secrets generally turns on when the environmental data was submitted to it. Prior to 1972, FIFRA was silent on the EPA's authorized use and disclosure of data submitted to it. As there was no guarantee of confidentiality to applicants prior to 1972, an applicant for registration of a pesticide generally had no "reasonable, investment-backed expectation" in environmental data. Therefore, the EPA's public disclosure of trade secrets contained in environmental data prior to 1972 did not constitute a Fifth Amendment "taking."

However, there have been two important amendments to FIFRA that affect the EPA's disclosure authority. First, FIFRA was amended in 1972 to give applicants the opportunity to protect their trade secrets from disclosure by designating trade secrets as such at the time of submission. Taking measures to protect the public disclosure of certain information is typically sufficient to qualify something as a trade secret. Next, FIFRA's data disclosure provisions were amended in 1978 to authorize the public disclosure of all health, safety and environmental data, even if it results in the disclosure of trade secrets.

Subsequently, the EPA's disclosure of data submitted between 1972 and 1978 may constitute a "taking," if the applicant indicated a desire to keep certain data confidential. In contrast, the EPA's disclosure of data submitted after 1978, under the authority

granted to it by the FIFRA amendments effective in 1978, will not usually constitute a "taking."

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