

Message

---

**From:** Lynn L. Bergeson [lbergeson@lawbc.com]  
**Sent:** 6/29/2017 10:57:15 PM  
**To:** Traylor, Patrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b6d06c6b766c4b4b8bfd6b0fea4b998-Traylor, Pa]  
**CC:** Beck, Nancy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=168ecb5184ac44de95a913297f353745-Beck, Nancy]  
**Subject:** Thank You  
**Attachments:** TSCA Final Clarification on Activated Phosphors Fed Reg 2-24-2010.pdf; 00180384.pdf; 1367\_001.pdf

Patrick,

Thank you for visiting with me this afternoon. I greatly appreciate your time and enjoyed seeing you again!

Nancy, thank you for planning to visit. I appreciate how busy you both are.

Patrick, I spoke with counsel for the Region 2 entity we discussed (Debra Rosen, Archer & Greiner, P.C.). Debra confirmed EPA Region 2 has verbally communicated its decision to waive penalties on multiple occasions, but has not rendered that decision in writing. Debra is forwarding to you directly (or perhaps to me) the contact information of the EPA Region 2 counsel with whom you may wish to confirm that decision. I shared your contact information with Debra this afternoon.

Without getting into the details, a quick summary for Nancy's benefit is as follows:

- The Statutory Mixture exemption from TSCA Section 5 notification has been the source of confusion for years.
- We have shared with EPA on several occasions (OGC and OPPT) a binder of illustrations of this lack of regulatory clarity.
- In the more recent past, EPA actually initiated a process (it was assigned a RIN and published in the *Federal Register*) to revise the 1995 EPA guidance on statutory mixtures, but the effort was abandoned about 5 years ago for no stated reason.
- EPA's interpretation of TSCA nomenclature has evolved over the years. The *Dover Chemical* and related cases illustrate the mischief that arises when EPA uses TSCA Section 5 to address TSCA Section 6 issues.
- EPA has used its enforcement authority in a case very similar to ours in EPA Region 2, the company there being a U.S. subsidiary of a UK entity.
- Before EPA filed a show cause and NOV against our client in Region 5, our client, the Region 2 entity, and three other companies joined forces to seek EPA's assistance in clarifying the application of the statutory mixture exemption to certain mixed metal oxides (MMO) like what our client, the Region 2 entity, and the other members of the coalition produce and to work with EPA to update the guidance and ensure unsuspecting companies are not the subject of random enforcement actions based on new interpretations of old exemptions and EPA guidance.
- We met with OGC months before EPA Region 5 inspected our client's plant, and long before receiving the NOV.
- As noted, EPA Region 2 has waived all penalties and has expressed to the Region 2 entity its desire that it submit a PMN and get on with its life. The notification was made last year.
- We believe these mixtures fall squarely within the scope of the statutory mixture exemption and no notification is required. There are other entities, likely many, making and importing these MMOs. For this reason, we have urged OPPT to work with us to clarify the guidance and allow regulated entities an opportunity to come into compliance with any new interpretation that suggests notification is required, and to do so by a time certain (*i.e.*, submit a PMN within a defined period of time) to avoid the threat of enforcement consequence
- EPA has done exactly this on at least three occasions (activated phosphors, isotopes, and carbon nanotubes—attached are the notices/EPA statement for your easy reference).

- We are frustrated by Region 5's seeming disinterest in solving problems efficiently, in pursuing an enforcement action despite the state of play on these complicated TSCA nomenclature issues, by burdening our client with requiring that it respond to extensive demands as a result of the show cause order and NOV when it was fully aware of our client's simultaneous preparation of a consolidated PMN which it initiated late last year due to commercial imperatives, and with its refusal to even discuss waiving penalties as EPA Region 2 has done despite the fact it has had numerous calls and meeting with EPA Region 2 and Headquarters. Our efforts to elicit a consistent approach to these issues from EPA have failed despite our vigorous attempts to harmonize these approaches.
- We appreciate your view that the local entity should first and foremost address these matters, while at the same time ensuring that Headquarters do what it can to avert inconsistent approaches when it has a clear line of site on such inconsistencies. We have redoubled our efforts to ensure Region 5 knows the notification was submitted (it was clearly copied on the letter I shared with you and Joel has called several times). If we obtain no response or an unfavorable one, we will circle back.

Thanks again. I hope you both enjoy the 4<sup>th</sup> of July holiday.

Lynn

**LYNN L. BERGESON**  
**MANAGING PARTNER**

**BERGESON & CAMPBELL PC**

2200 Pennsylvania Avenue, N.W. Suite 100W | Washington, D.C. 20037

T: 202-557-3801 | F: 202-557-3836 | [lawbc.com](http://lawbc.com)

**Ex. 6**