

## ***GE Labeling – Legal Points***

- **Vermont’s labeling law should survive a First Amendment challenge.**

- A court should uphold Vermont’s GE disclosure requirement as long as it is reasonably related to a legitimate state interest. Vermont’s labeling bill is supported by many state interests, including public health and food safety, environmental impacts, consumer confusion and deception, economic development, and religious and cultural practice. (H.112)
- Examples of disclosure laws that courts have upheld:
  - Labeling of mercury products sold in Vermont (Second Circuit 2001).
  - Calorie disclosure requirements on menus in New York (Second Circuit 2009).
  - Country of origin labeling on meat products (District of DC 2013).
- The 1996 case that struck down Vermont’s labeling law for dairy products derived from cows treated with rBGH is different from GE labeling.
  - The Court said Vermonters may have been concerned about health effects and the like, but the State had not “adopted” those concerns. Rather, the State’s interest was in alleviating “consumer curiosity.” The Court said that even if the State had adopted the concerns, the concerns would need to be reasonable. Court said there was no scientific evidence from which objective observer could conclude rBGH had any effect on final product. Court noted that FDA had determined rBGH products were safe. Court noted that scientists could not distinguish rBGH-derived products from conventional ones.
  - GE labeling is different:
    - 1) Numerous scientific studies show that there are health risks associated with GE foods.
    - 2) FDA has not made a determination that GE foods are safe; unlike in the rBGH case, there is no Final Rule and FDA has not conducted a “thorough review” (instead relying on industry to provide studies on a voluntary basis).
    - 3) Finally, there are numerous ways to test for whether a food is GE or non-GE.

- **Vermont’s labeling law should not be preempted.**

- The Federal Food, Drug, & Cosmetic Act says that only certain things are preempted by federal law. GE labeling would not fall under any of those categories. For example:
  - GE labeling doesn’t change a “standard of identity.” “Bread” would still be labeled as “bread.”
  - GE labeling doesn’t associate a nutrient (e.g., fiber) with health (e.g., “may help prevent cancer”).
- FDA’s draft policies on GE foods and labeling shouldn’t have preemptive effect.
  - They don’t have the force of law and weren’t developed through formal, deliberative processes. For example, in one case, a court said that FDA’s policy regarding use of the term “natural” couldn’t preempt because it didn’t “have the force of law” (Third Circuit 2009).
  - Even if FDA adopted GE regulations, they wouldn’t necessarily conflict with state law.

- **Vermont’s labeling law should survive a Dormant Commerce Clause challenge.**

- Vermont’s law wouldn’t discriminate against interstate commerce because both in-state and out-of-state products would have to be labeled.
- The local benefits of Vermont’s law would outweigh any “burdens” imposed.
- Examples of laws that courts have upheld under the DCC:
  - Minnesota law requiring all milk sold in state to be in paper, not plastic, containers (Supreme Court 1981).
  - Vermont law requiring labels on mercury products sold in state (Second Circuit 2001).
  - Ohio law requiring disclaimers on certain milk products sold in state (6th Circuit 2010).

## ***Response to Legal Challenge Claims***

In response to the February 9, 2014 editorial in The Valley News, “What’s for Dinner? Good Question,” VPIRG and the VT Right to Know GMO Coalition wish to clarify a few points:

1. There is no consensus on GMO safety.
2. Vermont’s proposed GMO labeling bill (H.112) is on strong legal ground.
3. H.112 differs in legally important ways from the previous milk labeling law.
4. H.112 is not a problem under the Commerce Clause of the U.S. Constitution.

### **There is no consensus on GMO safety.**

A statement by the European Network of Scientists for Social & Environmental Responsibility—300 scientists, researchers, and medical professionals—explained that “the claimed consensus on GMO safety does not exist” and that the claim could “lead to a lack of regulatory and scientific rigor and appropriate caution, potentially endangering the health of humans, animals, and the environment.” The U.S. Food and Drug Administration has never actually determined that GMOs are safe. Instead, in a draft policy statement issued more than 20 years ago, the FDA decided to treat GMO foods the same as conventional foods while at the same time laying out several potential health risks of GMOs (allergenicity, toxicity, etc.). The FDA does not conduct its own studies of the safety of GMOs, but instead recommends that the GMO industry conduct and submit their own voluntary assessments. Further, numerous independent studies have shown that GMOs present potential risks to human health and the environment.

### **Vermont’s proposed GMO labeling bill (H.112) is on strong legal ground.**

On the legal front, at least two respected institutions have conducted thorough analyses of potential constitutional challenges to GMO labeling. Emord & Associates, a law firm with expertise in the First Amendment and food issues, and the Environmental & Natural Resources Clinic at Vermont Law School acting on behalf of VPIRG, each determined that GMO labeling is on strong legal ground.

### **H.112 differs in legally important ways from the previous milk labeling law.**

Vermont’s unsuccessful earlier law required dairy products to be labeled when produced from milk that came from cows treated with the growth hormone rBGH. H.112 is significantly different because the State has identified compelling concerns about the potential health, environmental, and economic risks associated with genetically engineered foods. By requiring labels on GMO foods and forbidding such foods to be labeled as “natural,” H.112 strives to reduce consumer confusion and deception. After the rBGH decision, federal case law has upheld labeling laws that go beyond satisfying consumer curiosity. Vermont successfully defended a law that required products containing mercury to be labeled, and New York City successfully defended a law that required nutrition labeling on certain restaurant foods. Most recently, a federal court in Washington, D.C. upheld country-of-origin disclosure requirements for specified food commodities.

### **H.112 is not a problem under the Commerce Clause of the US Constitution.**

H.112 does not distinguish between in-state and out-of-state products; GMO products from producers in all states must be labeled. And, any “burden” the bill would impose on producers is outweighed by the local benefit to Vermont. For example, in 2010, a federal court in Ohio ruled that the state could require labels on dairy products sold in the state. Vermont’s mercury labeling law was upheld when the Second Circuit Court ruled that it did not impose improper burdens on interstate commerce under the Commerce Clause.

For those who desire more in-depth information about the reasons for GMO labeling, or the legal underpinnings of H.112, we urge you to visit the Resource pages on the VT Right to Know GMO Coalition’s website: <http://www.vtrighttoknowgmoms.org>.