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*Keeping an Eye on Washington*

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**CPDA Submits Comments to EPA on Proposed Revisions to Pesticide Container and Containment Rule**

On July 11, 2008, CPDA submitted comments to EPA on the Agency's proposed amendments to the pesticide container and containment standards rule. The draft revisions were published in the *Federal Register* on June 11, 2008 with a 30-day public comment period. EPA is proposing to amend the container and containment regulations to: 1) provide for a one-year extension of the labeling compliance date from August 17, 2009 to August 17, 2010; 2) change the phrase "sold or distributed" to "released for shipment" as associated with all of the compliance dates; 3) provide for exceptions to the labeling language requirements for some specific non-refillable packages; 4) allow for waivers of certain label requirements for other refillable and non-refillable containers on a case by case basis; and, 5) correct typographical and other minor errors appearing in the original rule. In addition, EPA is proposing to establish a new definition of "released for shipment" as follows:

*"A product is released for shipment when the producer has packaged and labeled it in the manner in which it will be shipped, or has stored it in an area where finished products are ordinarily held for shipment. An individual product is only released for shipment once, except where subsequent events constitute production (e.g., re-labeling, repackaging)."*

The proposed changes respond to concerns articulated by CPDA and allied industry stakeholders that the delay in EPA's release of guidance on how to effect the required labeling revisions made it difficult to meet the August 2009 compliance date set forth in the final pesticide container and containment rule. Specifically, a number of registrants have refrained from making the required label changes pending the issuance of EPA guidance on whether these changes could be made through the more expedient notification process rather than the more complex and time-consuming amendment process. The Agency did not issue its guidance in the form of PR Notice 2007-4 until November 7, 2007, some 15 months after the final container and containment rule was promulgated. As such, although the final rule envisioned a full three year period for

registrants to implement the label changes, in actuality, companies have had a significantly shorter period of time.

In its comments, CPDA expressed overall support for the changes proposed by EPA including the draft definition of “released for shipment.” The new definition proposed by EPA establishes the following two separate criteria which, independent of one another, would support a determination that a product has been released for shipment or introduced into the stream of commerce: 1) a producer has packaged and labeled the product in a manner in which it will be shipped; **or**, 2) the product is stored in an area where finished products are ordinarily held for shipment (emphasis added). Previously, EPA held that for compliance inspection purposes, a product was not deemed to have been released for shipment unless it was “packaged, labeled, **and** stored in an area where finished products are normally stored” (emphasis added). Under EPA’s proposed definition, simply packaging and labeling a product in a manner that is representative of how it would be sold in commerce would serve as an independent benchmark for making a finding that a product has been released for shipment. CPDA requested that the Agency clarify its proposed definition to make clear that it establishes two separate independent elements that would each provide a basis for a “released for shipment” finding for any subsequent compliance or enforcement action.

CPDA also expressed its support for EPA’s proposal to use the phrase “released for shipment” in lieu of the phrase “distributed or sold” in Section 156.159 of the final pesticide container and containment regulations. This section of the final rule addresses the compliance date by which all containers subject to the rule must bear the required labeling. Under EPA’s draft revision to Section 156.159, all products released for shipment prior to the proposed August 17, 2010 compliance date would not be subject to the container labeling requirements if they are returned to the producer and redistributed or sold, or if they remain in storage or in commerce provided they have not been subject to subsequent production activities such as repackaging or re-labeling.

Finally, CPDA articulated its support for EPA’s draft plan to exempt certain specified containers from the non-refillable and reuse label statements required under the rule and the Agency’s proposal to allow for the exemption of other container types on a case-by-case basis.

As reported previously, EPA hopes to move forward with final rule revisions in October 2008. However, until such time as the proposed amendments are finalized, the requirements of the current version of the August 2006 pesticide container and containment rule remain in effect.

### **OMB Rejects EPA Draft Proposal on Pesticide Container Recycling**

The White House Office of Management and Budget (OMB) has determined that EPA’s draft pesticide container recycling initiative does not meet certain requirements of Executive Order 12866. In a July 3, 2008 letter to EPA Deputy Administrator Marcus

Peacock, OMB Office of Information and Regulatory Affairs Administrator Susan Dudley noted that while the objective of the draft initiative is to reduce the improper disposal of un-rinsed or poorly rinsed pesticide containers, it remains unclear whether providing the proposed recycling program will result in a “meaningful reduction in the improper disposal of these containers.”

Dudley also pointed out that EPA's analysis of the proposed program indicates that the quantified costs imposed by the draft recycling initiative will exceed the quantified benefits by more than “two orders of magnitude.” Dudley objected that EPA had not analyzed other alternatives that could potentially increase net benefits and reduce burdens on small businesses. “Consistent with Section 1(b)(6) and 1(b)(II) of Executive Order No. 12866,” she stated, “EPA should determine whether alternatives exist that would impose the least burden on society and ensure that the benefits of the intended regulation justify its costs.”

In the aftermath of OMB’s rejection of the draft rule, the Agency has signaled that it is considering the “next steps for this particular rulemaking effort.” However, should EPA decide to continue to pursue a rulemaking on this issue, it is possible that the Agency may have to restructure the focus of its pesticide container recycling initiative pursuant to language included in the Farm Bill that has now become law. Section 14209 of the Food, Conservation and Energy Act of 2008 amends Section 19(a) of FIFRA by adding a new paragraph on container recycling that reads as follows:

*“The Secretary may promulgate a regulation for the return and recycling of disposal pesticide containers used for the distribution or sale of registered pesticide products in interstate commerce. Any such regulation requiring recycling of disposal pesticide containers shall not apply to antimicrobial pesticides (as defined in section 2) or other pesticide products intended for non-agricultural uses.”*

The Farm Bill statutory language is explicitly clear in that it excludes non-agricultural and antimicrobial pesticides from EPA’s discretionary pesticide container recycling rulemaking authority. However, in its draft rule that EPA sent to OMB in April 2008 (prior to the Farm Bill becoming law), the Agency proposes mandatory container recycling requirements for registrants of *both* agricultural *and* professional specialty pesticides. OMB’s web site includes an abstract of EPA’s draft “Pesticide Agricultural Container Recycling Program” that reads as follows:

*“EPA is proposing a regulation that would require certain pesticide registrants to recycle certain plastic pesticide containers. All registrants who sell agricultural and professional specialty pesticides in rigid, non-refillable high density polyethylene (HDPE) containers (with capacities of 55 gallons or less) would have to recycle, each year, a quantity of HDPE equivalent to a specified percentage (20, 30 or 40 percent or more) of the weight of all rigid non-refillable HDPE containers used for their pesticide products during the previous calendar year. Pesticide container recycling programs subject to the proposed rule would*

*be required to meet the American National Standards Institute and American Society of Agricultural and Biological Engineers Standard S569 for 'Recycling Plastic Containers from Pesticides and Pesticide-Related Products.'*”

CPDA will continue to monitor the pesticide container recycling issue and will keep its members informed as further developments unfold.

### **Update on Electronic Submission of Certain Pesticide Applications and Data**

An EPA notice appearing in the June 27, 2008 *Federal Register* announces that as of July 15, 2008, OPP began accepting certain types of pesticide applications and associated data electronically. EPA states that the types of applications that will be accepted electronically are Section 3 applications and amendments, Experimental Use Permits, tolerance petitions, and supplemental distributor applications. OPP has established a new web site to help registrants properly format their electronic submissions. The web site may be accessed at <http://www.epa.gov/pesticides/regulating/registering/submissions/index.htm>.

### **EPA Web Portal Serves as One-Stop Source of Information on Pesticide Imports and Exports**

EPA has announced the availability on its web site of a “one-stop” portal that provides information on the legal requirements for importing and exporting pesticides (including pesticide residues on foods), substances regulated under the Toxic Substances Control Act, and a variety of other materials subject to regulation pertaining to human health, safety, and the environment. The Agency states that the portal is being released in conjunction with the federal government’s update to the November 2007 *Action Plan for Import Safety*. The EPA web portal may be accessed at <http://www.epa.gov/compliance/international/importexport.html>.