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Keeping an Eye on Washington

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EPA Refrains from Moving Forward With Proposal to Establish Mandatory Plastic Pesticide Container Recycling Requirements for Registrants

Press reports indicate that senior EPA officials have decided to not move forward with the promulgation of a rulemaking that would establish a mandatory requirement for pesticide registrants to support the recycling of plastic pesticide containers. An article appearing in the October 24, 2008 edition of *Pesticide and Toxic Chemical News* notes that the Agency's decision came after EPA was not able to allay concerns expressed by the White House Office of Management and Budget (OMB) in its review of the proposal. In a July 3, 2008 letter to EPA Deputy Administrator Marcus Peacock, OMB Office of Information and Regulatory Affairs Administrator Susan Dudley concluded that the container recycling proposal failed to meet certain requirements of Executive Order 12866. In its letter, OMB stated that "it remains unclear whether providing the proposed recycling program will result in a meaningful reduction in the improper disposal of these containers." OMB also determined that "EPA's analysis of the proposed recycling program will exceed the quantified benefits by more than two orders of magnitude." In addition, OMB objected that EPA had not analyzed other possible alternatives that may increase net benefits and potentially reduce burdens on small businesses. "Consistent with Section 1(b)(6) and 1(b)(11) of Executive Order 12866," OMB 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."

EPA Adopts Amendment to Final Pesticide Container and Containment Standards

On October 29, 2008, EPA published in the *Federal Register* a final rule amending the pesticide container and containment regulation that was unveiled in August 2006. The amendments to the final rule set forth the following changes: 1) extends the labeling compliance date from August 17, 2009 to August 17, 2010; 2) changes the phrase "sold or distributed" to "released for shipment" where it is used in conjunction with compliance dates; 3) provides certain exceptions to some of the label language

requirements for some specific non-refillable types of containers; 4) allows EPA to grant waivers of the container-type label requirements for other refillable and non-refillable containers on a case-by-case basis; 5) provides for exceptions to the requirement for residue removal instructions for some specific types of containers; and, 6) corrects minor errors, including typographical errors that appeared in the original rule. The amendment to the final pesticide container regulation becomes effective December 29, 2008.

The amendments to the final rule incorporate many of the changes to the original pesticide container and containment standards regulation sought by a coalition of industry groups that includes CPDA and allied trade association partners. Specifically, CPDA and its sister organizations voiced concern that since the promulgation of the final pesticide container and containment regulations in August 2006, a number of registrants have refrained from making any of the required label changes (as set forth in the rule) in the hopes that the Agency would move quickly to issue promised guidance allowing label revisions to be done through the notification process rather than through the amendment process. Although the final rule provided three years from date of promulgation to the August 17, 2009 effective date of the new labeling requirements, the release of the guidance document on how to effect those changes was not released until November 5, 2007. Therefore, registrants did not have the full three years to implement the required label changes as envisioned in the final rule. The industry coalition was also concerned that much of the pesticide product already situated in warehouses, distribution centers, and/or retail facilities as of the August 17, 2009 effective date of the rule may technically be owned by the registrant until it is subject to final sale. As such, in the absence of a clarification that products released for shipment prior to the effective date would not be subject to the new labeling requirements, potentially thousands of products already in the distribution chain will have to be relabeled to come into compliance with the rule.

The amendment responds to these and other concerns expressed by CPDA and its industry partners. One of the changes included in the recently published amendment is a revised definition of “released for shipment” as follows: “A product becomes released for shipment when the producer has packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment. Products stored in an area where finished products are ordinarily held for shipment, but which are not intended to be released for shipment must be physically separated and marked as not yet released for shipment. Once a product becomes released for shipment, the product remains in the condition of being released for shipment unless subsequent activities, such as relabeling or repackaging, constitute production.” In its amendment, EPA emphasizes that a product will be deemed “released for shipment” if either one of two independent elements are met. Specifically, a product that is “packaged and labeled in a manner in which it will be distributed or sold” is reasonably considered to be “released for shipment.” Similarly, a product that is stored in an area where finished products are ordinarily held for shipment is also reasonably considered to be “released for shipment.” EPA states that if it had adopted a definition that required both conditions to be met in order for a product to be considered “released for shipment,” inspectors might not be authorized to collect samples from a loading dock or in transit as they would not necessarily be “stored in an area where products are

ordinarily held for shipment.” The Agency further explains, “Conversely, inspectors might not be able to collect samples of mislabeled products even if they were stored in an area where products were ordinarily held for shipment if, upon recognizing the error, a registrant announced that they were not packaged and labeled in the manner in which it will be distributed or sold.” The Agency also points out that under its revised definition, for purposes of FIFRA the action of releasing a product for shipment occurs only once for a given pesticide product, and that a product remains in the condition of “released for shipment” unless subsequent activities constitute production. Labeling requirements pursuant to the August 2006 pesticide container and containment rule will apply only to products released for shipment after the new August 16, 2010 compliance date. Pesticide products already in the distribution chain on or before August 16, 2010 will not be required to display the new labeling.

A copy of the amendment to the final rule as published in the October 29, 2008 *Federal Register* may be accessed at <http://edocket.access.gpo.gov/2008/pdf/E8-25665.pdf>. In addition, EPA has devoted a section of its web site to the new container labeling requirements. Individuals may visit <http://www.epa.gov/pesticides/regulating/containers.htm> for more information on the pesticide container rule and amendment.

CPDA Submits Comments on Proposed Rule to Revise ESA Section 7 Consultation Requirements

On October 14, 2008, CPDA submitted comments on an August 15, 2008 proposed rule released by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (i.e., the Services) that would revise the Section 7 interagency consultation process under the Endangered Species Act (ESA). Section 7 of the ESA requires federal agencies, including EPA, to consult with the Services to ensure that an agency action (such as the registration of a pesticide) is not likely to have an adverse impact on federally listed threatened or endangered species or habitats. Such consultation may involve either a formal written request or an informal conversation between federal agencies.

The draft August 15th rule proposes changes that would allow federal agencies to make “not likely to adversely affect” decisions on habitats and species consistent with the intent of the Joint Counterpart Endangered Species Act Section 7 Consultation Regulations promulgated by the Department of the Interior in 2004. The Counterpart Regulations put in place a streamlined, efficient process for consultation between EPA and the Services in determining the effects of a pesticide on a listed species or habitat. These regulations were intended to provide EPA with flexibility in the way it meets its obligations under the ESA by creating alternative consultation processes that more effectively utilize the Agency’s expertise in evaluating the ecological effects of pesticides. If EPA determines that a proposed pesticide registration action will have “no effect” on any listed species or designated critical habitat, consultation is not required. A determination that a proposed pesticide registration action is “not likely to adversely affect” any listed species or designated critical habitat is subject to “informal

consultation” with the Services. If EPA determines that a pesticide registration action is “likely to adversely affect” a listed species or critical habitat, the Counterpart Regulations require EPA to enter into a process with the Services called “formal consultation.” At the conclusion of formal consultation, the Services may propose reasonable and prudent alternatives, to the extent available, to avoid jeopardy to a listed species or habitat.

Third party litigation brought by activist and environmental groups in 2006, however, prompted a judicial ruling that rejected provisions of the Counterpart Regulations allowing EPA to make “not likely to adversely affect” findings without consultation with the Services. The draft rule released on August 15th addresses the impediments to implementation of the Counterpart Regulations and establishes exemptions for certain consultations under Section 7 of the ESA that federal action agencies deem unnecessary. In so doing, the proposed rule allows for more time and resources to be allocated to the protection of the most vulnerable species. Agency actions that could cause an adverse impact to listed species would remain subject to consultation. Specifically, under the proposed rule, a federal agency would not have to formally consult or obtain a written concurrence for a “not likely to adversely affect” finding if an informal consultation has terminated without the Services’ written concurrence within sixty days of a request for a concurrence and an action agency’s written notice of an intent to terminate the informal consultation.

In its comments, CPDA expressed support for this type of flexibility in the consultation process but added that the proposed rule should allow EPA to conduct “not likely to adversely affect” determinations without consulting the Services as consistent with the Counterpart Regulations. CPDA stated, “...EPA’s Office of Pesticide Programs has proven to be an action agency with substantial resources and the demonstrated expertise to evaluate the effects of its actions on threatened and endangered species and critical habitats.” CPDA also encouraged the Services to seek increased dedicated funding that would better enable them to meet their ESA consultation obligations. CPDA stated, “OPP has recently dedicated substantial funds and resources to meeting its ESA obligations, which have not been similarly dedicated by the Services, resulting in significant consultation delays. Although the Services’ efforts to streamline the consultation regulations are helpful, greater efforts must be made to marshal the additional resources needed to conduct timely consultations.”

CPDA continues to monitor the progress of the proposed rule and will report on further developments as they occur.

EPA Posts Updated PRIA Decision Tree on its Web Site

EPA has posted on its web site an updated decision tree that reflects the 5% increase in PRIA registration fees that went into effect on October 1, 2008. The online decision tree helps applicants accurately identify the correct product action category and the amount of the required fee before making a PRIA submission. The decision tree also includes action code interpretations or descriptions for each individual PRIA product

action. The decision tree may be accessed at <http://www.epa.gov/pesticides/fees/tool/index.htm>.

As reported previously, PRIA mandates that pesticide registration fees for covered applications received on or after October 1, 2008 increase by five percent rounded up to the nearest dollar from the previous PRIA fee schedule published on October 30, 2007. With the 5% increase in PRIA fees, certain application categories will have shorter review periods.

CPDA and EPA Conduct Successful Registration Workshop

CPDA partnered with EPA to hold a very successful Pesticide Registration Workshop on October 29-30, 2008 at the facilities of the Office of Pesticide Programs (OPP) in Arlington, Virginia. The workshop featured a full slate of speakers from EPA as well as industry specialists known for their expertise in the field of pesticide registration and regulation. Some 50 companies and firms belonging to the pesticide registrant and pesticide services community were represented at the workshop with a total attendance of 76 individuals. Of this, 25 organizations were CPDA member companies represented by 44 individuals in attendance.

Attendees of the two-day event praised the workshop for the opportunity it provided that allowed audience members to interact closely with OPP staff assigned to the front lines of product registration. CPDA believes that the educational benefits afforded by this free hands-on training session provided value to those individuals who attended and offered members of the registrant community a wealth of information on how to get a product registration approved by EPA.

The presentations from the workshop are now posted on CPDA's web site and may be accessed at www.cpda.com.