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Keeping an Eye on Washington

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2009 Mid-Year Meeting Focuses on Change

As a new Administration gets comfortable on Capitol Hill, this year's meeting will be all about the changes taking place in Washington and what these changes mean for the pesticide industry. There are new faces to get to know, as well as new policies and issues with which to gain familiarity. From March 9th – 11th, CPDA intends to present the most important of this information to its membership.

With six weeks to go until the Mid-Year Meeting, online registration is available at <http://www.cpda.com/>. While the meeting may focus on change, CPDA has gone to great lengths to ensure that the meeting registration rates stay the same. Members can still expect to pay the same \$350 registration fee they paid last year; Non-Members retain a fee of \$500. A tradeshow will be held again during the Welcoming Reception on Monday night, exhibitor fees are still \$100. A full breakdown of the meeting registration fees can be found on the [2009 Mid-Year Meeting page](#).

The meeting will be held at the Sheraton Crystal City in Arlington, Virginia. The room block is open until February 13th so attendees are encouraged to reserve their rooms as early as possible to take advantage of the \$205 a night room rate. To make a reservation, attendees can call (703) 486-1111 or 1-800-627-8209 and ask to be placed in the CPDA block.

This year's meeting offers a new feature, the CPDA-PAC lunch. The lunch will be held on Tuesday, March 10th prior to the afternoon appointments on Capitol Hill. Attendees of the lunch will enjoy one of DC's sleekest restaurants, Sonoma's Restaurant and Wine Bar (some of its more recent customers were comedian Ray Romano and singer Alicia Keys), as well as a lunch speaker. The fee for the lunch is \$60 per person and because this is a PAC event all payments must be in the form of a personal check made payable to the CPDA-PAC. Corporate checks will not be accepted.

CPDA's annual Congressional Reception will be held on Tuesday, March 10th from 5:30 – 7:00 pm. This year an electronic version of the reception invitation will be distributed to members via email. Members will be able to forward the invitation to

whomever they wish through the convenience of email with the simple click of a button. Hard copies of the invitation will be sent to members of Congress and will be available for CPDA members upon request.

The 2009 Mid-Year Meeting is shaping up to provide excellent opportunities for CPDA members. It's a chance for the membership to get their foot in the door with the new folks on the Hill. It's a time to better recognize and understand issues that the pesticide industry will face over the next four years. Change is occurring in Washington and CPDA is proud to offer their members the chance to be a part of it.

Membership of the House Committee on Agriculture for the 111th Congress is Finalized

The new membership of the House Committee on Agriculture for the 111th Congress has been finalized. The Committee makeup includes 27 Democrats (11 freshmen and 17 returning Members) and 17 Republicans with one minority seat remaining vacant.

The 27 Democrats who will serve on the committee are named as follows: Chair Collin C. Peterson (MN), Representatives Tim Holden (PA), Mike McIntyre (NC), Leonard L. Boswell (IA), Joe Baca (CA), Dennis A. Cardoza (CA), David Scott (GA), Jim Marshall (GA), Stephanie Herseth Sandlin (SD), Henry Cuellar (TX), Jim Costa (CA), Brad Ellsworth (IN), Timothy J. Walz (MN), Steve Kagen (WI), Kurt Schrader (OR), Deborah L. Halvorson (IL), Kathleen A. Dahlkemper (PA), Eric J. J. Massa (NY), Bobby Bright (AL), Betsy Markey (CO), Frank Kratovil, Jr. (MD), Mark H. Schauer (MI), Larry Kissell (NC), John A. Boccieri (OH), Earl Pomeroy (ND), Travis W. Childers (MS), and Walt Minnick (ID).

The 17 Republicans (with one additional vacant seat) who will serve on the Committee include: Ranking Member Frank Lucas (OK), Bob Goodlatte (VA), Jerry Moran (KS), Timothy V. Johnson (IL), Sam Graves (MO), Mike Rogers (AL), Steve King (IA), Randy Neugebauer (TX), K. Michael Conaway (TX), Jeff Fortenberry (NE), Jean Schmidt (OH), Adrian Smith (NE), Robert E. Latta (OH), Phil Roe (TN), Blaine Luetkemeyer (MO), Glenn W. Thompson (PA), and Bill Cassidy (LA).

On January 28, 2009, the Committee held an organizational meeting at which time it adopted a set of rules under which it will operate during the 111th Congress and ratified the membership and leadership of all six Subcommittees including the Subcommittee on Horticulture and Organic Agriculture which has jurisdiction over pesticides. Representative Dennis Cardoza (CA) retains Chairmanship of this Subcommittee and Representative Jean Schmidt (OH) is Ranking Minority Member. For a complete list of the Subcommittee membership, visit http://agriculture.house.gov/list/press/agriculture_dem/pr_012809_orgmtg.html.

House Effort to Overturn ESA Section 7 Consultation Rules

On January 15, 2009, Representative Nick Rahall (D-WV), Chairman of the House Committee on Natural Resources, introduced H.J. Res. 18, a House Joint Resolution providing for Congressional disapproval of a rule promulgated by the Bush Administration in December 2008 that addresses interagency consultation under the Endangered Species Act (ESA). Chairman Rahall was joined by 12 co-sponsors in introducing the measure including Representatives Ed Markey (D-MA), George Miller (D-CA), Peter DeFazio (D-OR), Maurice Hinchey (D-NY), Lois Capps (D-CA), Jay Inslee (D-WA), Rush Holt (D-NJ), Raul Grijalva (D-AZ), John Dingell (D-MI), Norm Dicks (D-WA), Sam Farr (D-CA), and Earl Blumenauer (D-OR). H.J. Res. 18 would initiate the process established by the Congressional Review Act of 1998 that gives Congress the authority to overturn a broad range of regulatory rules issued by Federal agencies with the enactment of a joint resolution disapproving the particular rule in question.

On December 15, 2008, the U.S. Department of Interior and the U.S. Department of Commerce published in the Federal Register final regulations that make certain narrowly crafted changes to the consultation process under Section 7 of the ESA. The rule, which became effective January 15, 2009, specifies when Section 7 inter-agency consultation is necessary, establishes time frames for the informal consultation process, and clarifies several definitions including the definition of “biological assessment” and “cumulative effects” as related to the ESA. The final rule is available online at <http://edocket.access.gpo.gov/2008/pdf/E8-29701.pdf>. Section 7 of the ESA requires all federal agencies to consult with the Fish and Wildlife Service or the National Marine Fisheries Service to determine whether a proposed agency action may jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat of a listed species.

During the comment period preceding promulgation of the final rule, CPDA submitted comments supporting the flexible approach to the consultation process as envisioned by the proposal. CPDA emphasized that EPA should be allowed to conduct “not likely to adversely affect” determinations without consulting the Services as consistent with the Joint Counterpart Regulations. The Joint Counterpart ESA Section 7 Consultation Regulations, published as final in the August 5, 2004 Federal Register, established a streamlined, efficient process for inter-agency consultation between EPA and the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (i.e., 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.

Legislation to Establish National Ocean Policy Introduced in House

On January 6, 2009, Representative Sam Farr re-introduced legislation, H.R. 21, titled the "Ocean Conservation, Education and National Strategy for the 21st Century Act." The measure is identical to legislation (also numbered H.R. 21) sponsored by Congressman Farr in the 110th Congress. The measure calls for the establishment and implementation of a National Ocean Policy and the creation of a National Ocean Advisor within the Executive Office of the President. In addition, the bill calls for the creation of a Committee on Ocean Policy that would include the Administrator of the U.S. Environmental Protection Agency and the Secretary of Agriculture among other federal agency and department heads.

Under the legislation, covered federal actions affecting U.S. ocean waters or resources must be conducted in a manner that is consistent with the protection, maintenance, and restoration of healthy ecosystems. Any covered action that may significantly affect United States ocean waters or ocean resources may proceed only if the covered action, individually and in combination with other covered actions, is not likely to significantly harm the health of any marine ecosystem; and, is not likely to significantly impede the restoration of the health of any marine ecosystem.

The bill stipulates that in the case of incomplete or inconclusive information as to the effects of a covered action on United States ocean waters or ocean resources, decisions shall be made using the "precautionary approach" to ensure the protection, maintenance, and restoration of healthy marine ecosystems. H.R. 21 defines the term "precautionary approach" as the approach used to ensure the health and sustainability of marine ecosystems for the benefit of current and future generations, in which lack of full scientific certainty shall not be used as a justification for postponing action to prevent environmental degradation.

President Obama Orders Review of Last Minute Bush Administration Rulemakings

President Barack Obama has instructed heads of executive departments and agencies that no proposed or final regulation should be sent to the Office of the Federal Register for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President. Agency and department heads may delegate this review and approval power to any other person so appointed or designated by the President consistent with applicable law. The President's directive was issued on January 20, 2009, his first day in office, in the form of a memorandum from White House Chief of Staff Rahm Emanuel. In addition, President Obama has called upon agency and department heads to: 1) withdraw from the Office of the Federal Register all proposed or final regulations that have not yet been published so that they can be reviewed; 2) consider extending for sixty days the effective date of regulations that have been published in the Federal Register but have not yet taken effect; 3) where such an extension is made, reopen the notice-and-comment period for 30 days to allow interested parties the opportunity to provide comments about issues of law and

policy germane to the rule in question. For those rules that raise substantial questions of law or policy, agencies are directed to notify the OMB Director and take appropriate further action. The Presidential directive does not apply to any regulation that is subject to a statutory or judicial deadline. Moreover, if an agency or department head believes that a particular regulation may affect critical health, safety, environmental, financial, or national security functions, he or she must notify the OMB Director who, in turn, will review the rule in question to determine whether an exception from the Presidential directive is appropriate.

Subsequent to the White House memo, OMB Director Peter Orszag issued a memo providing guidance to federal agencies and departments on the criteria to use in determining whether to order a 60-day postponement of the effective date of a rule that raises significant concerns involving law or policy and re-open a notice and comment period. The OMB memo instructs agency and department heads to consider the following: 1) whether the rulemaking process was procedurally adequate; 2) whether the rule reflected proper consideration of all relevant facts; 3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; 4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; 5) whether the rulemaking process was open and transparent; 6) whether objections to the rule were adequately considered including whether interested parties had fair opportunities to present contrary facts and arguments; 7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and, 8) whether the final rule found adequate support in the rulemaking record. Federal agencies and departments that decide they want to extend the effective date of a rule based on these considerations are instructed to provide a 30-day notice and comment period seeking comment on a proposed extension of the effective date and the rule in question. If at the end of this comment period a federal agency or department determines that an extension of the effective date of the rule in question is appropriate, they must consult with the Office of Legal Counsel within the Department of Justice and OMB's Office of Information and Regulatory Affairs (OIRA).

President Obama Issues Orders to Increase Sunshine in Government

On January 21, 2009 President Barack Obama issued two memorandums directed to heads of executive departments and agencies that focused on his commitment to bring sunshine and greater accountability to government. President Obama reiterated his commitment to creating an "unprecedented level of openness in government" and emphasized that government should be transparent, participatory, and collaborative. The President directed the Chief Technology Officer, in coordination with the Director of OMB and the Administrator of General Services, to develop a set of recommendations within 120 days for an Open Government Directive. The Open Government Directive would instruct executive departments and agencies to take specific actions implementing the Obama Administration's principles for establishing transparency, public participation, and collaboration in government. President Obama also set forth his Administration's principles for the implementation of the Freedom of Information Act (FOIA). He stated

that all federal agencies should adopt a presumption in favor of disclosure and take affirmative steps to make information public. The President emphasized that all agencies should use modern technology to inform citizens about what is known and done by their government. As such, President Obama directed the Attorney General to issue new FOIA guidelines that will be published in the Federal Register. The Attorney General is further directed to review FOIA requests produced by agencies under Executive Order 13392 of December 14, 2005. In addition, the President has instructed the Director of OMB to update guidance to agencies on ways to increase and improve information dissemination to the public including the use of new technology. The guidance to agencies will be published in the Federal Register. The two memos from President Obama are posted on CPDA's web site at the following links:

<http://www.cpda.com/CPDA/files/ccLibraryFiles/Filename/000000000240/President%20Obama's%20memo%20on%20Transparency%20in%20Government.pdf>

<http://www.cpda.com/CPDA/files/ccLibraryFiles/Filename/000000000241/President%20Obama's%20memo%20on%20FOIA.pdf>

Appeals Court Vacates EPA Rule Exempting Pesticide Applications From NPDES Permitting

On January 7, 2009, a three-judge panel of the Sixth Circuit Court of Appeals vacated a U.S. Environmental Protection Agency (EPA) final rule that exempted pesticides applied in accordance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) from Clean Water Act (CWA) permitting requirements. Environmental interest groups and pesticide industry organizations both challenged the November 2006 rule on different grounds. The petitions for review were filed in multiple federal circuits and consolidated for resolution in the Sixth Circuit, which ruled that EPA's interpretation of the CWA in the final rule was not reasonable and contrary to the plain language of the CWA.

In promulgating the final rule, EPA determined that FIFRA-compliant pesticide applications made directly to navigable waters or near such waters (with some pesticide unavoidably entering the water) were not subject to CWA National Pollutant Discharge Elimination System (NPDES) permits. The rule exempted both applied pesticides and any "residual materials" and "excess pesticide" that remain in the water after the treatment period.

In defending its final rule, EPA concluded that FIFRA-compliant pesticide applications directly to navigable waters or near such waters (with some pesticide unavoidably entering the water) were not subject to CWA National Pollutant Discharge Elimination System (NPDES) permits. The rule exempted both applied pesticides and any "residual materials" and "excess pesticide" that remain in the water after the treatment period. EPA argued that the CWA is "ambiguous" with respect to pesticides, and that the Agency reasonably determined in the final rule that such pesticides applied

according to FIFRA requirements, and the associated residues and excess pesticide, were not “pollutants” regulated by the CWA. Although EPA conceded that the excess pesticides and residues are pollutants (i.e., wastes of the applied pesticide), the Agency also argued that those materials are not regulated by the CWA because the pesticide was not a pollutant at the time it was discharged and that the residues and excess pesticides were not discharged from point sources. Industry plaintiffs agreed with EPA that pesticides applied in accordance with FIFRA do not require NPDES permits because they are beneficial products and not pollutants (i.e., not wastes), but disagreed with the Agency’s concession that the residues and excess pesticide were pollutants. Industry argued that the final rule is arbitrary and capricious because it treats the same pesticide as being either a pollutant or not a pollutant based solely on whether it is in compliance with FIFRA.

The Court concluded that all pesticide applications are discharges from point sources subject to NPDES permit requirements if either: 1) a terrestrial-use pesticide or its related excess or residues reach navigable waters; or, 2) excess pesticide or residues remain in water treated with a FIFRA-compliant aquatic pesticide. Thus, the only exception to the permit requirement is when an excess pesticide and/or residue from an aquatic-use pesticide does not remain in navigable waters treated with the pesticide. Consequently, EPA (or an authorized state) now must regulate through specific or general NPDES permits all terrestrial applications reasonably likely to result in discharges to navigable waters. However, it is also likely that the industry petitioners will file a motion for a rehearing by the full court and/or a motion for a temporary stay of the ruling, which would postpone nationwide implementation of the permitting requirements. Of particular concern to pesticide applicators, and the pesticide and agricultural industries in general, is timely processing of permit applications to meet the diverse needs of agricultural operations. Moreover, there is a real possibility of environmental organizations using the citizen suit provisions of the CWA to enforce this new requirement if this judicial panel’s ruling is not reversed by the expected appellate efforts.

Lisa Jackson Takes the Helm at EPA

Lisa P. Jackson has been sworn in as the new Administrator of EPA. In a memo to EPA employees prior to assuming her post, Administrator Jackson vowed to uphold the following three values for EPA as articulated by the Obama Administration: scientific integrity, rule of law, and transparency.

Administrator Jackson highlighted five priorities that she noted will receive her personal attention. Among these is managing chemical risks. She stated, “...More than 30 years after Congress enacted the Toxic Substances Control Act, it is clear that we are not doing an adequate job of assessing and managing the risks of chemicals in consumer products, the workplace and the environment. It s now time to revise and strengthen EPA’s chemicals management and risk assessment programs.” A full transcript of Administrator Jackson’s statement may be accessed at <http://www.epa.gov/administrator/memotoemployees.html>.

Update on Personnel Changes at EPA

The start of the New Year has brought with it several personnel changes within EPA's Office of Pesticide Programs (OPP). Long-time EPA staffer Anne Lindsay has retired. Taking over her post as OPP Deputy Office Director for Programs is Steve Bradbury. In other changes, Rick Keigwin has been named Director of the Special Review and Reregistration Division (SRRD). Patricia Moe is the Product Reregistration Branch Chief within SRRD. Jack Housenger is Associate Director of OPP's Biological and Economic Analysis Division (BEAD). He is also serving as Acting Director of BEAD on an interim basis. As previously reported, Don Stubbs has retired. A search for his replacement continues as of this writing.

With the change in Presidential Administrations, Jim Jones has been tapped as Acting Assistant Administrator of the Office of Prevention, Pesticides and Toxic Substances (OPPTS). Previously, Jones served as the Principal Deputy Assistant Administrator of OPPTS.