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Keeping an Eye on Washington

March 5, 2009

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2009 Mid-Year Meeting Update

With just a matter of days left before the start of the CPDA 2009 Mid-Year Meeting next week at the Sheraton Crystal City Hotel in Arlington, Virginia, CPDA is in the final throes of shoring up last minute details we hope will make for a terrific conference! The agenda includes a number of interesting speakers who will address the most pertinent issues facing the pesticide industry today. With a projected registration of 47 people, the 2009 Mid-Year Meeting attendance is on par with that of last year demonstrating that despite the current economic downturn, attendees continue to place significant value on the information they derive from participating in this meeting.

The evening of Monday, March 9th begins with the Welcoming Reception and Trade Show which provides attendees the opportunity to socialize with both long-time industry colleagues and newcomers to the association alike. This year's exhibitors include CCL Label, EPL Bio Analytical Services, Kadant GranTek Inc., PhibroWood, LLC, and Product Safety Labs. Be sure to stop by the tables of the exhibitors during the reception and check out what they have to offer!

A CPDA-PAC lunch is scheduled prior to the afternoon Hill appointments on Tuesday, March 10th at Sonoma's Restaurant and Wine Bar. The featured luncheon speaker is Betsy Croker who serves on the minority staff of the Senate Committee on Agriculture, Nutrition and Forestry. Betsy will provide luncheon attendees her take on what direction the 111th Congress will likely take on legislative issues impacting the agricultural industry.

The CPDA Congressional Reception will be held Tuesday evening in the Committee on Agriculture Hearing Room on Capitol Hill. The exact location is 1302 Longworth House Office Building. Last year's event attracted more than 70 guests. CPDA is hoping to exceed that number this year.

Wednesday's programming will focus on regulatory issues with featured speakers from EPA and USDA. Highlighting the Wednesday morning speakers program will be Debbie Edwards, Director of EPA's Office of Pesticide Programs (OPP) who will

provide an overview of the Agency's top pesticide registration and review priorities. CPDA members attending the Mid-Year Meeting are invited to join an association delegation that will travel that afternoon to EPA's offices in Arlington, Virginia for the opportunity to meet with OPP senior management and staff. CPDA anticipates some 8 to 10 EPA representatives will be on hand to discuss a number of issues of importance to pesticide manufacturers, formulators, distributors as well as suppliers of inert ingredients. We at CPDA encourage you to take advantage of this unique opportunity to engage in a very productive dialogue with the Agency policy-makers who regulate your products.

If you plan on attending this year's meeting and have not yet registered, you may still do so. Online registration is available at www.cpda.com. We look forward to seeing everyone next week!

President Obama Calls for Recommendations on Regulatory Review

President Barack Obama has instructed the Director of the Office of Management and Budget (OMB), in consultation with representatives of regulatory agencies, to develop a set of recommendations for a new Executive Order on regulatory review. In moving forward with the President's directive, OMB published an announcement in the February 26, 2009 *Federal Register* inviting public comment on how to improve the process and principles governing regulation. Public comments must be in writing and received by March 16, 2009 and may be emailed to oir_submission@omb.eop.gov or faxed to (202) 395-7245.

The President's directive was issued in a January 30, 2009 memorandum in which he calls for a review of the formal regulatory rulemaking process as set forth in Executive Order 12866 released on September 30, 1993 during the Clinton Administration. President Obama states, "...A great deal has been learned since that time. Far more is now known about regulation – not only about when it is justified, but also about what works and what does not. Far more is also known about the uses of a variety of regulatory tools such as warnings, disclosure requirements, public education, and economic incentives. Years of experience have also provided lessons about how to improve the process of regulatory review."

Executive Order 12866 describes the mechanism by which the OMB Office of Information and Regulatory Affairs (OIRA) conducts its review of proposed regulations before they are issued by federal agencies. Executive Order 12866 amended the formal process for the centralized review of proposed rulemakings within OIRA that was initially established in 1981 by President Reagan. As signed by President Clinton, Executive Order 12866 limited OIRA review of rules to "significant" regulatory actions defined as those with at least a \$100 million impact on the economy. In addition, Executive Order 12866 required OIRA review of actions that: 1) are inconsistent or interfere with an action taken or planned by another agency; 2) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; or, 3) raise novel legal or policy issues. Executive Order 12866 also required a detailed cost-benefit

analysis for draft rules determined to be “economically significant.” Such cost-benefit analysis must include an assessment of “potentially effective and reasonably feasible alternatives to the planned regulation.”

In his memorandum, President Obama calls for suggestions on the relationship between the OMB Office of Information and Regulatory Affairs (OIRA) and the agencies citing the role OIRA plays in coordinating regulatory policy, ensuring consistency with Presidential priorities, and offering a dispassionate and analytical “second opinion” on agency actions. In addition, the President indicates that the recommendations should offer suggestions on the following: disclosure and transparency, encouraging public participation in agency regulatory processes, the role of cost-benefit analysis, the role of distributional considerations, fairness, and concern for the interests of future generations, methods of ensuring that regulatory review does not produce undue delay, the role of the behavioral sciences in formulating regulatory policy, and the best tools for achieving public goals through the regulatory process. OMB must submit its recommendations to President Obama within 100 days from the date of the January 30th memorandum.

President Obama Revokes Bush Administration Executive Order on Regulatory Review

In related developments, President Obama has revoked Executive Order 13422, issued by former President George W. Bush on January 18, 2007, which made amendments to the existing Executive Order 12866 on “Regulatory Planning and Review.” President Obama’s rescission of Executive Order 13422 is part of his newly announced initiative to improve the federal rulemaking process (see related story in this issue of “*Keeping an Eye on Washington*”). Critics of Executive Order 13422 charged that its provisions politicized the regulatory review process, gave the President broad, unprecedented power over federal rulemaking, and compromised the ability of agencies to exercise their authority to regulate as intended by Congress.

Among its provisions, Executive Order 13422 established a requirement that each agency head designate a presidential appointee within the agency as a “regulatory policy officer” who could control upcoming rulemaking activity. President Bush’s Executive Order 13422 also expanded OIRA regulatory review to include significant guidance documents described as “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.” Included in the definition of a significant guidance document is one that “may reasonably be anticipated to” lead to an annual effect of \$100 million or more or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. In addition, Executive Order 13422 required federal agencies to identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that warrant regulation.

President Obama Unveils FY 2010 EPA Budget Request

On February 26, 2009 President Barack Obama unveiled his proposed FY 2010 budget request for EPA which calls for \$10.5 billion in funding or a 34% increase over the Agency funding level that is expected to be enacted as part of the FY 2009 Omnibus Appropriations Act. The omnibus spending bill was passed by the House on February 25, 2009 and is now being considered on the Senate floor. *(Editor's Note: The Omnibus spending package includes nine unfinished appropriations bills that provide discretionary monies for government programs that have been operating under temporary funding authority since the start of the federal fiscal year that began October 1, 2008. Stop-gap funding of the departments and agencies covered under the unfinished appropriations bills is provided under a Continuing Resolution set to end on March 6, 2009).*

Of the \$10.5 billion sought by the Obama Administration for FY 2010, \$3.9 billion would be allocated to EPA's operating budget which encompasses core research, enforcement and regulatory activities. A summary table accompanying the President's budget request includes a proposal for the imposition of \$52 million in presumably new pesticide fees beyond those authorized under existing PRIA and indicates that these fees would likely be assessed as a means of reducing the federal deficit. The budget summary documents accompanying President Obama's funding request for EPA do not provide a detailed breakdown of how the Administration proposes to arrive at a total of \$52 million in new pesticide fees. However, it is possible that the Obama Administration's pesticide fee proposal is modeled after the Bush Administration's pesticide fees initiative that was included in the FY 2009 budget request for EPA. As reported previously, the Bush Administration's budget for FY 2009 called for \$52 million in new pesticide fees comprised of: 1) the generation of \$13 million in new tolerance fees through the removal of the PRIA statutory prohibition that bars EPA from collecting this fee; 2) an additional \$12 million in registration fees beyond those already authorized by PRIA; 3) a restructuring of maintenance fees to provide for a \$23 million increase from the current level of \$22 million; and, 4) a total of \$4 million generated from the elimination of the statutory cap in the Toxic Substances Control Act on Pre-Manufacturing Notification (PMN) fees. The Bush Administration's proposal failed to gain any traction in Congress and was also put forward largely as a deficit reduction measure.

President Obama's FY 2010 budget anticipates that a total of \$255 million in new pesticide fees will be collected over the next five fiscal years. Specifically, the President's budget request projects the collection of \$52 million in FY 2010, \$56 million in FY 2011, \$55 million in FY 2012, \$45 million in FY 2013, and \$47 million in FY 2014.

CPDA will monitor the progress of Congressional action on the FY 2010 budget request for EPA and will keep its members informed of further developments as they occur.

White House Establishes Economic Stimulus Bill Website

The White House has established a website where the public may track how the money from the American Recovery and Reinvestment Act is being spent. Federal agencies will soon be required to report on how the targeted money from the economic stimulus bill is being allocated. Once this information is reported, visitors to the website will be able to search by state or Congressional district and will be able to look up names of Federal contractors or other recipients of funding from the stimulus bill. The new web site may be accessed at www.recovery.gov.

President Obama Issues Memorandum on ESA Section 7 Rules

President Obama has issued a memorandum to the heads of all federal executive departments and agencies in which he instructs them to continue the Endangered Species Act (ESA) Section 7 consultation procedures that were in place prior to the revisions promulgated by the Bush Administration and published in the *Federal Register* on December 16, 2008. Section 7 of the ESA requires all federal agencies to consult with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) 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. The Bush Administration rule, which became effective on January 15, 2009, clarifies the circumstances under which Section 7 interagency consultation is necessary and establishes time frames for the informal consultation process. In essence, the rule provides agencies discretionary authority to forego the consultation process under ESA if they conclude that a proposed action will not harm or jeopardize an endangered species or critical habitat. CPDA supports the flexible approach embraced by the Bush Administration rule and believes it will reduce unnecessary interagency consultations that consume significant agency resources on actions that have no adverse impact on listed species or critical habitats.

In his memorandum which was signed on March 3, 2009, President Obama directs the Secretaries of the Interior and Commerce to review the Bush rule titled "Interagency Cooperation Under the Endangered Species Act" and determine whether a new rulemaking should be initiated to address the consultation and concurrence process under the ESA. "Until such review is completed," the President stated, "I request the heads of all agencies to exercise their discretion under the new regulation, to follow the prior longstanding consultation and concurrence practices involving the FWS and NMFS."

Omnibus Spending Bill Includes ESA Provision

In a related development, the Omnibus Appropriations Act of FY 2009 (H.R. 1105) as passed by the full House on February 25, 2009 includes language that would allow the Secretaries of the Interior and Commerce to unilaterally withdraw or reissue,

without public comment or the opportunity for judicial review, the Bush Administration rule on ESA Section 7 within 60 days from date of enactment.

The language contained in the House version of the omnibus spending bill stipulates that a withdrawal or reissue of the ESA Section 7 rule may take place “without regard to any provision of statute or regulation that establishes a requirement for such withdrawal.” The language further states that if the Secretary of the Interior or the Secretary of Commerce (or both) withdraws the rule, “such Secretary shall implement the provisions of law under which the rule was issued in accordance with the regulations in effect under such provisions immediately before the effective date of such rule, except as otherwise provided by any Act or rule that takes effect after the effective date of the rule that is withdrawn.”

The FY 2009 Omnibus Appropriations bill has now been referred to the Senate where it is being debated this week. A bipartisan amendment offered by Senators Lisa Murkowski (R-AK) and Mark Begich (D-AK) along with James Inhofe (R-OK), David Vitter (R-LA), and Sam Brownback (R-KS) addresses the House provision on the ESA Section 7 interagency consultation rule. The Murkowski-Begich amendment requires that if the ESA Section 7 rules are withdrawn or revised, the action is subject to the Administrative Procedures Act with a public comment period of not less than sixty days.

Speaking on the Senate floor on March 3, 2009 in support of the Murkowski-Begich amendment, Senator James Inhofe (Ranking Member of the Senate Committee on Public Works and the Environment) derided the House provision as “an attempt to legislate on a spending bill.” Senator Inhofe explained that without the Senate amendment, the House provision as passed would allow federal agencies to make “dramatic changes to the Endangered Species Act rules and regulations without having to comply with longstanding Federal laws that require public notice and public comment by the American people and knowledgeable scientists. These changes have the potential for far-reaching and unintended consequences in our economy.” Senator Inhofe described the House provision as an “activist-friendly rider” that would allow the Secretary of the Interior and the Secretary of Commerce to undo a regulation making “commonsense” adjustments to the ESA.

CPDA Urges EPA to Deny NRDC Petition on 2,4-D Pesticides

CPDA has submitted comments to EPA urging the Agency to deny a November 6, 2008 petition filed by the Natural Resources Defense Council (NRDC) requesting that the Agency revoke all tolerances and cancel all registrations for the pesticide 2,4-dichlorophenoxyacetic acid (2,4-D). The NRDC petition claims that the EPA did not consider “the full spectrum” of potential human health effects associated with 2,4-D in the reassessment of existing tolerances and in evaluating related environmental risks as required under FIFRA and FQPA. Specifically, the NRDC petition asserts that the Agency failed to consider 2,4-D data or information pertaining to: 1) possible endocrine disrupting effects; 2) neurotoxicity effects associated with exposure; 3) potential

mutagenic effects; 4) data claiming to show that dermal absorption of 2,4-D is enhanced by alcohol consumption, sunscreen, and DEET; and, 5) developmental effects at doses below those included in EPA's risk assessment related to infant exposure to breast milk.

In its response to the NRDC petition, CPDA emphasized that both FIFRA and FQPA require EPA to balance the risks of using a pesticide against the benefits of such use to society when making regulatory decisions under these statutes. "These balancing decisions require 'reasonableness,' not absolute certainty," CPDA explained. "In this instance," CPDA continued, "EPA has concluded after careful assessment of a significant amount of scientific evidence that 2,4-D does not present an '...unreasonable risk to man or the environment...' under FIFRA and is safe with a '...reasonable certainty that no harm will result from aggregate exposure...' to 2,4-D under FQPA." CPDA noted that EPA has expended considerable resources to reach those conclusions and pointed out that the available scientific studies support the Agency's decision about the approved uses of 2,4-D under FIFRA and FQPA. CPDA maintained that the NRDC petition repeats many of the same issues raised previously during the public comment periods established in conjunction with the reregistration and tolerance reassessment of 2,4-D and which EPA has appropriately addressed in detailed responses. CPDA cautioned that the petition process should not be used to divert scarce Agency resources to undermine or postpone science-based decisions. "This would set an inappropriate precedent of allowing a petitioner that fully participated in the rulemaking process to prevent implementation of the regulatory decision-making process even though the overwhelming available data support the agency's decision," CPDA commented.

CPDA also voiced support for EPA's decision to defer the incorporation of endocrine disruption studies into the human risk assessment for 2,4-D as requested by NRDC. "Waiting until testing protocols have been developed under the Endocrine Disruption Screening Program before testing 2,4-D is the appropriate and prudent scientific approach," CPDA stated.

EPA Releases its Annual Report on PRIA Implementation

EPA has released its annual report that describes the Agency's activities in implementing PRIA during the 2008 Fiscal Year that covers the period October 1, 2007 through September 30, 2008 (the first fiscal year under PRIA 2). The newly published report is the fifth one since PRIA was originally enacted as part of the Consolidated Appropriations Act of 2004. The annual report includes a status report on fee waivers and exemptions, reregistration, registration review, product reregistration, science review requirements, and funding set-asides in PRIA 2 dedicated to worker protection, partnership grants, and the Pesticide Safety Education Program.

The latest annual report cites CPDA by name and the CPDA Registration Workshop held last fall featuring representatives from EPA who discussed the implementation of PRIA 2. To access the PRIA annual report, visit EPA's web site at http://www.epa.gov/pesticides/fees/2008annual_report/pria_annual_report_2008.html.

Representative Frank Pallone Introduces Bill to Revise TRI Reporting Requirements

On January 29, 2009, Representative Frank Pallone (D-NJ) introduced H.R. 776, legislation to amend the Emergency Planning and Community Right-to-Know Act by codifying stronger Toxic Release Inventory (TRI) reporting requirements that were in place prior to the Bush Administration's promulgation of a final rule in 2006 that sought to reduce the burden associated with this activity. The Toxics Release Inventory Burden Reduction Final Rule expanded eligibility for TRI reporters to use Form A, a simpler form with less detailed information in lieu of the more detailed Form R. The final rule expands the use of Form A for reporting releases of non-PBT (Persistent, Bioaccumulative, and Toxic) chemicals by raising the eligibility limit on waste management from 500 pounds to 5,000 pounds with a cap on releases and other disposal of 2,000 pounds. Facilities may use Form A for PBT chemicals (except for dioxin and dioxin compounds) when there have been no releases or other disposal into the environment and the total amount of the chemical managed by treatment, energy recovery, and/or recycling is not more than 500 pounds.

A press release issued by Representative Pallone's office states, "...These rules have significantly reduced the amount of information available to the public about toxic chemicals by eliminating detailed reports from facilities that release up to 2,000 pounds of chemicals every year, and facilities that manage up to 500 pounds of chemicals known to pose some of the worst threats to human health, including lead and mercury."

The press release also states that a recent Government Accountability Office (GAO) report concluded that the 2006 rule will allow more than 3,500 facilities to stop reporting detailed information about their toxic chemical releases and waste management practices. "As a result," the statement reads, "more than 22,000 of the nearly 90,000 TRI reports would no longer be available to hundreds of communities in states throughout the country."

The legislation is identical to a bill introduced by Representative Pallone in the 110th Congress.

In a related development, the FY 2009 Omnibus Appropriations Act adopted by the House on February 25, 2009 includes language that prohibits EPA from using any appropriated funds to implement the TRI final rule promulgated by the Bush Administration. The House provision would essentially nullify the Bush rule and stipulates that the affected regulatory text shall revert to what it was before the final rule became effective until any future action is taken by the EPA Administrator.

Chemical Facility Security Update

CPDA has joined as a signatory on a letter regarding chemical facility security to House and Senate members that included a total of 34 trade associations representing a variety of chemical, commodity, agricultural, transportation, and other industry interests. The letter expresses industry support for reauthorizing legislation that would remove the October 1, 2009 sunset date and make the DHS Chemical Facility Anti-Terrorism Standards permanent. The letter also voices industry's strong opposition to any measure that would establish a mandate to "substitute products and processes with a government-selected technology." The letter urges Congress to reject any legislation that would weaken protection of sensitive information, impose stifling penalties for administrative errors, create conflicts with other security measures, or move away from a performance or risk-based approach to regulating chemical facility security.

Meanwhile, press reports indicate that chemical facility security legislation could be taken up by the House Homeland Security Committee by the end of May 2009. According to the media, negotiations are underway between the House Homeland Security and Energy and Commerce Committees in an effort to resolve jurisdictional issues and to develop one legislative package that could be considered by both panels.

AAPCO/SFIREG Committee Meeting Announced

The AAPCO/SFIREG Working Committee on Environmental Quality Issues and Pesticide Operations Management will hold a 2-day meeting on April 27-28, 2009. The meeting will take place at EPA's offices located at One Potomac Yard (South Building), 2777 Crystal Drive, Arlington, Virginia, 4th Floor South Conference Room. The agenda includes an endangered species update, web-distributed labeling, green labeling, NPDES permitting of pesticides, and other issues.

President Obama Announces Three Key Nominations

As he continues to fill his Administration, President Barack Obama has announced three key nominations of importance to the agricultural and pesticide industries. All three nominees are subject to Senate confirmation.

Jon Cannon has been tapped to be Deputy Administrator of the U.S. Environmental Protection Agency. Cannon presently teaches environmental law and is director of the Environmental and Land Use Law Program at the University of Virginia. He previously served as senior counsel at the law firm of Beveridge & Diamond and has held numerous positions within EPA during the Administrations of former Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton.

Tom Strickland has been nominated to serve as Assistant Secretary for Fish and Wildlife and Parks within the U.S. Department of the Interior. Strickland is presently the

Chief of Staff to Interior Secretary Salazar. Previously, he was UnitedHealth Group's Chief Legal Officer and also served as a U.S. Attorney in Colorado. In addition, Strickland was managing partner in the Denver office of the national law firm Hogan & Hartson.

Kathleen A. Merrigan has been selected by President Obama to serve as Deputy Secretary of the Department of Agriculture. Merrigan is an Assistant Professor and Director of the Agriculture, Food and Environment graduate programs at Tufts University. Previously, Merrigan held various policy positions at the state, federal, and international level. She was formerly Administrator of the Agricultural Marketing Service within the U.S. Department of Agriculture. Merrigan also worked at the Wallace Institute for Alternative Agriculture and served as an expert consultant at the Food and Agriculture Organization of the United Nations.