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Keeping an Eye on Washington

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House Committee Passes Chemical Facility Security Bill

On June 23, 2009 the House Committee on Homeland Security reported favorably the Chemical Facility Antiterrorism Act of 2009 (H.R. 2868) which would make permanent the authority of the Department of Homeland Security (DHS) to regulate chemical site security. Currently, DHS exercises its regulatory authority over chemical site security through the Chemical Facility Anti-Terrorism Standards (CFATS) which are set to sunset in October 2009 in the absence of the enactment of reauthorizing legislation. The legislation reported favorably out of committee includes a provision, strongly opposed by CPDA, that would require chemical facilities classified in risk Tiers 1 and 2 to adopt “inherently safer technology” in their manufacturing and production processes. The bill also includes language allowing for a private right of action to be brought by an individual against chemical facilities and DHS for alleged violations of security regulations. The measure has now been referred to the House Committee on Energy and Commerce which has jurisdiction over provisions that address security at drinking water facilities. The Senate Committee on Homeland Security and Governmental Affairs is watching the progress of H.R. 2868 in the House but has not yet begun the process of drafting a companion measure.

Congress Considers FY 2010 Appropriations Measure for DHS

The House and Senate have passed their respective versions of the FY 2010 appropriations measure for the Department of Homeland Security. A House-Senate conference committee will convene to iron out differences in the measure passed by each chamber. Current funding authority for DHS ends on September 30, 2009. Both the House and Senate versions of the measure include a provision that would extend the current authority of DHS to regulate chemical facility security for a period of one year until October 4, 2010. The House version of the DHS appropriations measure, H.R. 2892, was approved by the full House on June 24, 2009 by a vote of 389-37. The Senate version of the measure, S. 1298, was passed on July 9, 2009 by a vote of 84-6.

As reported out of the House Committee on Appropriations on June 16, 2009, the House measure provides \$103,363,000 for the costs of regulating the security of chemical facilities and ammonium nitrate transactions, an increase of \$25,363,000, or nearly 33 percent over 2009 funding levels. Of this increase, \$12,000,000 will pay for implementation of new Ammonium Nitrate regulations, \$7,000,000 will be used to continue expansion of the Chemical Facility Anti-Terrorism Standards (CFATS) program, and \$6,363,000 will fund inflationary increases and staff pay raises at DHS.

S. 1298, approved by the Senate Committee on Appropriations on June 18, 2009, provides the same funding level for chemical facility and ammonium nitrate security programs within DHS as contained in the House bill. In other provisions, the Senate Appropriations Committee report accompanying S. 1298 directs the DHS Deputy Secretary to review and, if necessary, consider revising its information security regulations related to chemical facilities “to ensure companies cannot misuse the regulations to improperly delay or impede Federal safety investigations following chemical accidents.” The language directs DHS to report back to the Senate Committee on Appropriations no later than 90 days after date of enactment of the bill (and quarterly thereafter) on the Department’s efforts to coordinate chemical security across the agency. In particular, the Senate Committee report instructs DHS to focus on the ability of the Department to conduct prompt and comprehensive federal safety investigations of chemical accidents.

House Addresses EDSP during Consideration of EPA Spending Bill

On June 26, 2009 by a vote of 254-173 the House passed H.R. 2996, the FY 2010 Interior, Environment and Related Agencies Appropriations bill that provides funding for EPA. The House Appropriations Committee report accompanying the bill directs EPA to create a database of the initial pesticides to be screened in the Endocrine Disruptor Screening Program (EDSP) and to make this database publicly available on its web site. The Committee report instructs EPA to update the database when a test order is issued and to include information on the identity of the test order recipient, the due date for completing and submitting the data, the recipient’s response to the order, requests for extensions, and the results of Tier I screening or Tier II testing for each chemical listed. In addition, within one year of enactment EPA would be required to develop and publish criteria for evaluating the results of Tier I screening and determining whether a chemical should undergo Tier II analysis. In so doing, EPA would establish a process that allows for public input. The Committee report also instructs EPA to publish within one year of enactment a second list of no less than 100 chemicals for screening that includes drinking water contaminants such as halogenated organic chemicals, dioxins, flame retardants, pharmaceuticals and personal care products, and to issue 25 orders per year for the testing of these chemicals using a mechanism that allows for public input. In its other provisions, the Committee report calls for EPA to engage in timely re-evaluation of the battery of screening and to replace outdated ones with updated, more efficient screens that have been validated.

House Appropriations Committee Weighs in on Colony Collapse Disorder

Committee report language accompanying the House passed FY 2010 Interior, Environment and Related Agencies Appropriations measure addresses bee Colony Collapse Disorder in relation to pesticide exposure. The report states, "...Colony Collapse Disorder is the latest manifestation of pollinator decline in the United States. During the winters of 2006-2007 and 2007-2008 more than 35 percent of managed honey bee populations disappeared, threatening \$15 billion worth of agriculture that is pollinated by commercial beekeeping operations. Although the cause is unknown, pesticides have been linked to bee deaths in the past and are suspected to contribute to the latest decline. The Committee strongly urges the Agency to incorporate an assessment of the impacts on pollinators into the ecological assessment and registration or reregistration determination for each pesticide."

Senate Appropriations Committee Addresses Chemical Facility Risk Management in EPA Appropriations Measure

The Senate Committee on Appropriations reported its version of H.R. 2996, the FY 2010 Interior, Environment and Related Agencies Appropriations measure on July 7, 2009. The conference report accompanying the measure includes language that directs EPA to provide the Committee a report no later than 90 days after enactment of the measure outlining an action plan for improving its chemical facility risk management program (including current and future staffing and resource requirements). The Committee cites its concern with a recent Office of Inspector General report which concludes that EPA has not inspected or audited more than half of the 493 chemical processing facilities identified by the Agency's Office of Emergency Management. The Committee has called upon EPA to develop: 1) inspection requirements to further prioritize its facilities inspections; 2) a system to track the Agency's progress in completing the required inspections; and 3) additional management controls to identify facilities with regulated chemicals that have not filed risk management plans. The appropriations measure now goes to the Senate floor for consideration.

U.S. Appeals Court Grants EPA Request for Two-Year Stay of Decision Vacating Final Rule on NPDES Permitting Requirements for Pesticides

On June 8, 2009 the U.S. Sixth Circuit Court of Appeals granted EPA's request for a two-year stay of the effective date of the court's decision handed down earlier this year striking down the Agency's rule which held that a pesticide applied in or near water in accordance with the label is not subject to NPDES permitting requirements under the Clean Water Act (CWA). The two-year stay allows the EPA rule to stand until April 9, 2011. After that time, NPDES permits will be required for pesticides applied directly to water to control pests and/or applied to control pests that are present in or over, including near waters. Irrigation return flows and agricultural runoff will not require NPDES

permits as they are specifically exempted from the CWA. Prior to April 9, 2011, EPA intends to develop a general NPDES permit for covered pesticide applications and will assist authorized states to develop their NPDES permits. In addition, the Agency states it will work closely with state water permitting agencies and provide outreach and education to the regulated community. Meanwhile, the U.S. Appeals Court has yet to rule on pending petitions seeking a rehearing of *National Cotton Council et al. v. EPA*.

EPA Staff to Give Greater Scrutiny to Distributor Labels

At the recent SFIREG meeting held in the latter part of June 2009, EPA representatives reported that the Agency is changing its internal process for handling distributor labels and that these actions will be receiving “extra scrutiny.” Meredith Laws from EPA told the group that Branch Chiefs within the Registration Division will now review distributor labels – a departure from the Agency’s previous policy as articulated in its Label Review Manual. Specifically, the Label Review Manual states, “Supplemental distributor labels are **not** submitted to EPA for review though supplemental distributor products are still subject to FIFRA and its implementing regulations.” The EPA Label Review Manual further states, “The distributor label must be the same as that for federally registered product (basic registration) except for: product name, name and address of distributor, distributor number, establishment number (final Establishment at which the product was produced), and any claims (uses, for example) that are deleted from the label. No new claims may be added. Distributors may not make amendments to a product’s master label. Only the basic registrant can amend the EPA-approved registered label.” EPA personnel, however, signaled that distributor labels are not always adhering to these constraints. According to EPA staffers, the Agency has become aware of problems with misleading product names (e.g., names suggesting that a product may be environmentally friendly or “organic”) as well as heightened safety and efficacy claims that are appearing on some distributor labels. It is important to note that the distributor is considered an agent of the registrant for all purposes under FIFRA and both the distributor and the registrant can be held liable for violations pertaining to the distributor product.

EPA Announces Availability of Proposed Stipulated Injunction in Response to ESA Lawsuit Brought by the Center for Biological Diversity

On July 1, 2009, EPA published in the *Federal Register* a notice announcing the availability for public comment of a proposed “Stipulated Injunction” that could settle a May 30, 2007 lawsuit brought against the Agency by the Center for Biological Diversity (CBD) in the U.S. District Court for the Northern District of California. The lawsuit alleges that EPA failed to meet its consultation obligations under Section 7(a)(2) of the Endangered Species Act (ESA) for some 47 pesticides and 11 species that are listed as endangered or threatened. Ultimately, 74 pesticides were impacted by the CBD lawsuit. EPA states that it will evaluate all comments received during the public comment period to determine whether all or part of the proposed Stipulated Injunction warrants

reconsideration or revision. If EPA determines that the proposed Stipulated Injunction does not need to be reconsidered or revised, the document will be submitted to the Court and shall become effective upon entry of an Order by the Court ratifying it. The deadline for public comment was originally set for July 16, 2009. However, EPA recently extended the deadline to August 17, 2009. Comments must be identified by docket number EPA-HQ-OPP-2009-0481 and may be submitted electronically at the federal eRulemaking Portal: <http://www.regulations.gov>.

The Stipulated Injunction would establish a series of deadlines for EPA to make “effects determinations” and initiate consultation, as appropriate, with the U.S. Fish and Wildlife Service for the pesticides and listed species in question. The species are found in the San Francisco Bay area. The schedule embodied in the proposed Stipulated Injunction sets forth deadlines for the completion of effect determinations on a rolling basis with the first batch due by October 20, 2009 and the last batch due no later than June 30, 2014. In addition, EPA states that the Stipulated Injunction would with some exceptions, “enjoin, vacate and set aside EPA’s authorization of use of the pesticides in and adjacent to certain habitat features associated with each of the 11 species in specific geographic areas within 8 California counties (Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma).” EPA adds that this interim injunctive relief would terminate automatically for a pesticide upon completion of EPA’s Section 7(a)(2) consultation obligations for a particular pesticide.

The proposed Stipulated Injunction is available on EPA’s web site and may be accessed at <http://www.epa.gov/oppfead1/endorsement/litstatus/stipulated-order-6-30-2009.pdf>. The *Federal Register* notice announcing its availability may be viewed at <http://www.epa.gov/fedrgstr/EPA-PEST/2009/July/Day-01/p15531.htm>.

Senate Confirms President Obama’s Pick for OPPTS Assistant Administrator

On July 6, 2009, the Senate confirmed the nomination of Stephen Alan Owens to be Assistant Administrator of EPA’s Office of Prevention, Pesticides and Toxic Substances (OPPTS). Owens previously served as head of the Arizona Department of Environmental Quality. With the appointment of Owens as OPPTS Assistant Administrator, Jim Jones who previously held that position in an acting capacity now becomes Deputy Assistant Administrator.

Center for Biological Diversity Files 60-Day Notice of Intent to Bring ESA Lawsuit Against EPA that Addresses Impact of Pesticides on Polar Bears

On July 8, 2009, the Center for Biological Diversity (CBD) filed a 60-day notice of intent to sue EPA for failing to meet its consultation obligations under Section 7 of the Endangered Species Act (ESA) in considering the impacts of pesticide registrations and reregistrations on polar bears and other ESA-listed species in the Arctic. The 60-day notice of intent to file is statutorily required before a lawsuit can be brought forward

under the citizen suit provisions of the ESA. Section 7 of the ESA requires each federal agency to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species determined to be critical. In fulfilling this requirement under the law, agencies must consult with the “Services” (Fish & Wildlife Service and the National Marine Fisheries Service) and the Services must conduct intra-agency consultation whenever their actions “may affect” a listed species.

The polar bear was listed as a threatened species under the ESA on May 15, 2008. In its filing, CBD contends “...Notwithstanding the fact that the polar bear has now been subject to the protections of the ESA for over a year, the EPA has failed to take required actions under the ESA in furtherance of the conservation of the polar bear and in order to ensure its actions do not jeopardize the species.” CBD asserts that “pesticides and pesticide derivatives, approved for use in the United States by EPA are known to be transported long-distance via various atmospheric, oceanic and biotic pathways to the Arctic, where such chemicals, individually and collectively, bioaccumulate in polar bears, adversely affecting health, reproduction and survival of these apex predators of the Arctic.”

The notice of intent to sue cites specific pesticides that CBD maintains have been detected in the Arctic that “may affect” the polar bear and therefore require consultation. Among these are the following organophosphates: Chlorpyrifos, Diazinon, Disulfoton, Fenitrothion, Methyl-parathion, and Terbufos. The following non-OP pesticides are cited in the CBD filing: Atrazine, Alachlor, Chlorothalonil, Dicofol, DCPA (Dachtal), Endosulfan, Metolachlor, and Trifluralin.

According to CBD, EPA’s registration of these pesticides constitutes an “agency action” under the ESA and since such action at a minimum “may affect” the polar bear, the Agency is required by Section 7 of the ESA to ensure through consultation that registration of these pesticides does not jeopardize the continued existence of the polar bear. CBD states, “EPA has utterly failed to comply with this procedural and substantive mandate.”

CBD concludes that an appropriate remedy that would prevent litigation would be for the EPA to initiate formal consultation under ESA Section 7 regarding the effects on polar bears of the pesticides identified in its filing that would include an analysis of the cumulative effects of these products in the context of a warming climate. CBD has also called upon EPA to rescind or suspend registration of all pesticides that “may affect” the polar bear pending the completion of such consultation. CBD advises that if EPA does not act within 60 days, it will file a lawsuit seeking declaratory and injunctive relief.

CPDA Announces Availability of its “Report from the Association” Covering the Period 2007-2009

CPDA has posted on its web site a “Report from the Association” that covers the period 2007-2009 focusing on the many internal changes that have transpired during this time as well as the legislative and regulatory issues that have ranked high on CPDA’s agenda. CPDA would like to extend a special thanks to Makhteshim Agan of North America, Inc. for sponsoring the publication of this report. To access the report, visit CPDA’s web site at www.cpda.com.