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*Keeping an Eye on Washington*

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**PRIA Fees to Increase 5% Effective October 1, 2010**

EPA has published a revised pesticide registration fee schedule that includes a 5% increase as required under the Pesticide Registration Improvement Renewal Act. The new fees go into effect on October 1, 2010 and cover PRIA applications submitted during FY 2011 (October 1, 2010 – September 30, 2011) and FY 2012 (October 1, 2011 – September 30, 2012). Registrants wishing to avoid the fees increase must have their applications “pin-punched” (dated by Office of Pesticide Programs mail room staff) on or before September 30, 2010. The revised PRIA fee schedule was published in the Federal Register on August 11, 2010 and may be accessed at <http://edocket.access.gpo.gov/2010/pdf/2010-19720.pdf>.

**CPDA Submits Comments on EPA's Draft Pesticide General Permit**

On July 16, 2010, CPDA submitted comments to EPA on the Agency's “Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP) for Point Source Discharges from the Application of Pesticides.” The draft PGP was issued in response to a January 2009 Sixth Circuit Court of Appeals decision that vacated EPA's 2006 rule exempting from NPDES permitting mandates those pesticide applications made to, over, or near waters of the United States as long as they are made in accordance with FIFRA labeling requirements. Revocation of the EPA rule is currently subject to a two-year stay of the federal Appeals Court decision that will lift on April 9, 2011.

In its comments, CPDA called upon EPA to clarify what conveyances are subject to the PGP by providing specific examples of the most obvious conveyances that are covered or not covered and why. CPDA also asked that EPA clarify compliance and enforcement expectations for operators jointly sharing permit obligations. In addition, CPDA recommended that EPA modify the draft PGP to include language that would direct applicators to minimize pesticide discharges to waters of the U.S. by maintaining, calibrating, and operating equipment so that the appropriate quantity of pesticide is delivered to best control the target pest consistent with the FIFRA label, manufacturers' specifications for equipment precision, weather conditions of the day, and in accordance with their best professional judgment. CPDA also emphasized that EPA should be prepared to revise its economic analysis if the Agency's ongoing Endangered Species Act (ESA) consultation with the Services result in potentially costly restrictions and performance

requirements being added to the draft PGP prior to its finalization. Finally, CPDA urged EPA to work with the Court to extend the compliance deadline if it appears the PGP and State counterpart permits will not be finalized by the time the stay lifts in April 2011. To read CPDA's comments, please visit <http://www.cpda.com/cpda/files/ccLibraryFiles/Filename/00000000400/CPDA%20Comments%20on%20NPDES%20Pesticide%20Permit.pdf>.

### **Legislation Introduced in House and Senate Would Exempt FIFRA Compliant Pesticide Applications from NPDES Permitting Requirements**

On August 5, 2010, Senator Blanche Lincoln (D-AR), Chair of the Senate Committee on Agriculture, Nutrition, and Forestry, along with Ranking Member Saxby Chambliss (R-GA), introduced legislation (S. 3735) which clarifies that a Clean Water Act permit is not required for pesticide applications made in accordance with FIFRA.

In a statement delivered on the Senate floor when introducing the measure, Senator Lincoln expressed her concern that farmers, foresters, and ranchers are facing new restrictions on their operations as a result of court decisions that are "misinterpreting" Congressional intent. "A prime example of this," she stated, "is the Environmental Protection Agency's effort to regulate the use of crop protection products under the Clean Water Act. EPA, at the discretion of the Federal courts, is requiring Clean Water Act permits for pesticide applications even if an application does not occur directly into the water. Congress never intended for agricultural chemicals to be regulated under the Clean Water Act." Senator Lincoln added that subjecting farmers to an additional layer of bureaucracy under the Clean Water Act is "duplicative and unnecessary since human health and the environment is already protected by FIFRA."

A companion bill, H.R. 6087, was introduced in the House on August 10, 2010 by Representative Frank D. Lucas (R-OK), Ranking Member of the House Committee on Agriculture. Joining Congressman Lucas as co-sponsors of H.R. 6087 are Representatives Cynthia Lummis (R-WY), Jerry Moran (R-KS), Michael Conaway (R-TX), David P. Roe (R-TN), Sam Graves (R-MO), and Steve King (R-IA).

### **CPDA Comments on EPA's Draft PR Notice on "False or Misleading Pesticide Product Brand Names"**

On August 17, 2010, CPDA submitted comments to EPA on the Agency's draft PR Notice 2010-X, entitled "False or Misleading Pesticide Product Brand Names," issued on May 19, 2010. In its comments, CPDA emphasized that EPA must provide greater clarity by offering examples of why words are false or misleading, including the acceptable and unacceptable contexts used to make false or misleading determinations. CPDA recommended that EPA develop a comprehensive list of words, statements, and phrases that the Agency would always, or would highly likely consider false or misleading in brand names under FIFRA, based on rationale and supporting information consistent with FIFRA requirements.

As reported previously, the draft PR Notice explains the statutory and regulatory requirements that a pesticide product brand name, either by itself or in close proximity to a company name or trademark, must meet in order not to be deemed false or misleading under

FIFRA. The document encourages applicants and registrants to review their product names and, if warranted, take corrective action within two years of the issuance of the final PR Notice. EPA states that after the final implementation date, the Agency may consider the guidance in the final PR Notice when determining whether a product is misbranded under FIFRA. EPA's draft PR Notice was originally published for public comment on March 28, 2002 but was never finalized. However, the issue surrounding false and misleading product brand names resurfaced when, in mid 2009, EPA began to inform registrants during routine registration actions about a "new policy" the Agency was using to reject words such as "professional (Pro)," "professional grade," "maximum (Max)," "super," "plus," and "ultra" in pesticide product brand names and advertising. EPA staff claimed these and similar words and phrases were potentially "false and misleading," in violation of FIFRA. Consequently, EPA began requiring registrants to either remove such words or develop acceptable qualifying label language to minimize the potential for a brand name or related advertising to be false or misleading under FIFRA. In response, CPDA and its industry partners asked EPA to suspend implementation of this policy and to reissue the draft PR Notice for public input.

In its comments, CPDA maintained that EPA had mischaracterized the draft PR Notice as non-binding guidance. CPDA argued that the Notice, in effect, amends current regulations by cautioning registrants and distributors that they may face enforcement actions if, after the effective date of the Notice, they release for shipment products that are not in compliance with the Notice. In addition, CPDA pointed out that EPA expressly states that it intends to "begin a more thorough review of existing products for compliance problems" after the effective date, thereby establishing a de facto enforceable requirement. As such, the purported "non-enforceable" guidance document would be used to improperly amend an enforceable legislative rule each time EPA enforces its determination that a specific brand name is false or misleading under FIFRA labeling regulations.

In calling for greater clarity in the draft PR Notice, CPDA noted that the Agency has used internal "evergreen lists" which only recently have been revised to include the addition of words such as "professional" and "pro" in making regulatory decisions regarding "false or misleading" words and statements. However, in so doing, EPA has not provided any information to support its claims that such words "could bias a customer's selection" of products or "mislead" users in ways that they "may not obtain optimal pest control results" or may believe the product is 'safe' and not follow use directions "as carefully as they otherwise might."

CPDA emphasized that EPA's pesticide registration system cannot function equitably if some prohibited words are cited in an enforceable legislative rule while others are added to a vague, amorphous "evergreen list" of words and phrases that could be subject to the same enforcement action. This is especially true when EPA has previously authorized the use of such words in brand names appearing on the label. CPDA stressed that in lieu of the "evergreen list" approach, EPA should provide registrants and distributors with greater certainty so that applicants for registration are able to make more informed decisions in avoiding the use of certain words when choosing pesticide product brand names. CPDA argued that requiring registrants to re-evaluate existing brand names, already approved by EPA, to comply with an ever-changing guidance list is an unwarranted, disruptive, and costly burden that could be minimized through rulemaking as an alternative.

CPDA also commented that EPA has under-estimated the potential economic impacts of its draft PR Notice and stated that the Agency failed to enumerate how many labels may be affected. Moreover, CPDA asserted that EPA failed to consider the significant actual costs registrants and distributors would incur if forced to modify existing brand names. Such costs include the expenses associated with the relabeling of product, the disposition of existing inventories, the development of new marketing and advertising strategies, the filing of new trademark applications, and making revisions to state registrations. CPDA's comments in full may be accessed at

[http://www.cpda.com/cpda/files/ccLibraryFiles/Filename/00000000475/CPDA%20Comments%20on%20Draft%20PR%20Notice%202010-X%20\(2\).pdf](http://www.cpda.com/cpda/files/ccLibraryFiles/Filename/00000000475/CPDA%20Comments%20on%20Draft%20PR%20Notice%202010-X%20(2).pdf) .

### **EPA Seeks Volunteer Participants for Web-Distributed Labeling Virtual Pilot**

In the August 18, 2010 *Federal Register*, EPA published a notice announcing its intention to conduct a web-distributed labeling "User Acceptance Pilot" and invited volunteers to participate in this initiative. The Agency is hoping that the pilot will provide information on the feasibility and ease of utilizing the Internet to access product labeling and help EPA determine whether individuals would be willing to visit a website and download use-specific pesticide application information. Comments on EPA's plans to conduct the pilot, including expressions of interest to participate, must be submitted to the Agency no later than September 17, 2010. The Agency intends to launch the pilot by October 15, 2010.

As reported previously, in 2009 a PPDC work group recommended that the Agency move forward with a virtual pilot that would serve as a test drive for EPA, industry, growers, and other stakeholders to gauge the practicality of web-distributed labeling. Web-distributed labeling is predicated on making the most current version of pesticide labeling available to users electronically through the Internet. Portions of the label would no longer physically accompany the pesticide container. Users instead would be directed to a website where they would retrieve crop specific labeling by entering the product registration number, the state/county where the pesticide would be applied, and the applicable use pattern or crop. EPA states that the website would provide streamlined labeling for the user to download that would include only the information germane to the particular application requested. As such, EPA believes that this initiative will improve label comprehension, readability, and compliance. When fully operational, a web-distributed labeling system would offer alternate delivery mechanisms for those who lack Internet access. The Agency states that this initiative is being proposed initially as a voluntary option for registrants and acknowledges that it would not be appropriate for all pesticide products.

The pilot websites would be required to provide web-distributed labeling for at least three different products chosen by the participants or mock labels provided by EPA. A prominent statement must appear on each page of the downloaded labeling making it clear that the information retrieved from the website is not legally valid for purposes of making a pesticide application. The pilot websites must offer users a mechanism for providing feedback on what their experience was in using web-distributed labeling.

EPA hopes that the pilot will provide information on whether users prefer the current paper-based labeling or the more streamlined web-distributed labeling format and whether individuals are able to easily navigate the website and successfully retrieve the relevant labeling information. The Agency also hopes that the feedback obtained from the pilot will help EPA assess the potential impact on the user's compliance with labeling.

Individuals wishing to participate in EPA's User Acceptance Pilot are instructed to contact Michelle DeVaux, Field and External Affairs Division, Office of Pesticide Programs ([devaux.michelle@epa.gov](mailto:devaux.michelle@epa.gov), telephone: 703-308-5891). The *Federal Register* notice announcing the pilot may be accessed at <http://edocket.access.gpo.gov/2010/pdf/2010-20449.pdf>.

### **EPA Seeks Public Comment on Petition for Rulemaking to Establish Procedures for the Creation and Amendment of Endangered Species Protection Bulletins**

EPA is accepting public comment on a January 19, 2010 petition that seeks the promulgation of a rule for creating and amending the County Bulletins that the Agency intends to require pesticide registrants to cross-reference on product labels as part of the EPA's Endangered Species Protection Program (ESPP). The petitioners (Dow AgroSciences LLC, Makhteshim Agan of North America, Inc., and Cheminova Inc. USA) hold registrations of three pesticides – chlorpyrifos, diazinon, and malathion – that are the subject of proposed use limitations and restrictions sought by EPA relative to a November 2008 National Marine Fisheries Service (NMFS) Biological Opinion. As noted by the petitioners, the November 2008 BiOp is the first of seventeen to be issued by February 19, 2012 pursuant to a 2008 Stipulated Settlement Agreement and Order of Dismissal reached in *Northwest Coalition for Alternatives to Pesticides v. NMFS*.

The November 2008 BiOp addresses the potential impact of chlorpyrifos, diazinon, and malathion on 28 Pacific salmon and steelhead species and includes the following recommendations: 1) a requirement for spray drift buffers, 2) a wind speed restriction, 3) a requirement for a non-crop vegetative runoff buffer, 4) a soil moisture/48-hour storm restriction, 5) a fish mortality incident reporting requirement, and 6) an effectiveness monitoring program for off-channel habitats. EPA has demanded that the registrants implement the proposed restrictions by amending certain product labels to reference County Bulletins applicable to the use of these products in California, Idaho, Washington, and Oregon.

The petition asserts that EPA has failed to establish a mechanism for receiving input from the agricultural and forestry communities. In addition, the petition maintains that EPA has not provided a process that would assure the registrant's ability to review, comment upon and/or challenge proposed language in County Bulletins that would be referenced on the label. The petitioners emphasize that "with dozens of ESA consultations relating to pesticide registrations slated to occur over the next few years, many of which will result in publication of or modification to County Bulletins, appropriate procedures must be established." The petitioners added that the lack of an established system for addressing restrictions arising from these BiOps "will lead to chaos."

The rulemaking process sought by the petitioners would require EPA to provide timely notification to a registrant if the Agency is contemplating the creation or revision of a County Bulletin specific to that company's product. Registrants and potentially affected pesticide users and state governments would be allowed 30 days to submit comments to the Agency. EPA would be required to evaluate all comments and inform all affected registrants of its determination prior to making any final decision on County Bulletin language. Registrants would be granted the opportunity to negotiate with EPA regarding the Agency's response to the comments received.

The petitioners are also seeking a commitment from EPA that FIFRA Section 6 cancellation proceedings will be used if registrants are not prepared to approve County Bulletin language preferred by EPA. The proceedings would be narrowly focused on the justification for the Agency's proposed revisions to the County Bulletin language. As a first step in this process, EPA would draft a cancellation notice and provide it to the Department of Agriculture and the FIFRA Scientific Advisory Panel for review. The petitioners state that "this will assure that the important interests of grower communities are considered by the Agency."

The deadline for submitting comments to EPA on the petition is September 27, 2010. Comments may be submitted electronically through [www.regulations.gov](http://www.regulations.gov) and must be identified by docket identification number EPA-HQ-OPP-2010-0474. To read the petition, visit <http://www.cpda.com/cpda/files/ccLibraryFiles/Filename/00000000520/ESPP%20Petition.pdf>.

### **Senate Panel Passes Chemical Facility Security Legislation**

On July 28, 2010, the Senate Homeland Security & Governmental Affairs Committee unanimously agreed to legislation authored by Senator Susan Collin (R-ME) that would extend the chemical facilities security law for three years. Importantly, the legislation does not include the controversial Inherently Safer Technology (IST) mandate that is opposed by CPDA and other members of the chemical industry. The existing legislative authority for the Department of Homeland Security (DHS) to implement the Chemical Facilities Anti-Terrorism Standards (CFATS) expires on October 4, 2010.

CPDA and a number of its member companies sent letters to Senators on the panel expressing support for extending the current law and opposing an IST mandate. The concerns expressed by CPDA and other stakeholders in the chemical industry helped to derail the Democratic majority's push for an IST requirement during Committee deliberations. Meanwhile, the Senate Homeland Security Appropriations Act includes a one-year extension of CFATS as a back-up should Senate consideration of the authorizing legislation stall.

Despite the Committee's rejection of IST, proponents remain optimistic that an agreement may be reached when the Senate merges its measure with the House-passed bill that does contain IST language (the House adopted its bill on November 9<sup>th</sup> of last year). Expressing his desire to strengthen the bill as it moves forward, Senate Committee Chairman Joe Lieberman (I-CT) signaled his support for including a consensus provision on IST as part of a long-term reauthorization measure. In addition, Senator Tom Carper (D-DE) stated his intentions to bring up an amendment during conference that would allow the states to mandate some form of IST.

Given that Democrats hold substantial majorities in both the House and Senate, it is possible that a long-term chemical facility security reauthorization measure could include an IST provision.

Before IST becomes a reality, however, several major steps must transpire. First, the full Senate must pass its bill either by unanimous consent or a vote. The Senate would then have to request a conference with the House to resolve the differences in the measure as passed by each chamber. The conference bill would then be returned to the House and Senate for a full vote before it could be sent to the President for his signature. Given the limited number of legislative days remaining before the November elections, this scenario is likely a long-shot at best thus making it more likely that the pending one-year extension of the CFATS, as contained in the homeland security appropriations measure, will be adopted.

### **EPA Releases Draft Strategy for Achieving Clean Water**

On August 20, 2010, EPA released a public discussion draft that outlines the Agency's strategy for improving water quality in the U.S. The draft document is the product of an EPA forum held on April 15, 2010 that brought together a diverse group of stakeholders to discuss "opportunities for reinvigorating" the Agency's approach to achieving clean water. EPA is accepting public comment on the draft strategy through September 17, 2010. The Agency has created a blog where interested parties may post comments at <http://blog.epa.gov/waterforum/2010/08/draft-clean-water-strategy-is-released/#respond>.

Among the options set forth in the discussion draft, EPA proposes to more fully utilize existing regulatory and enforcement authorities under the Clean Water Act to address a number of "water quality challenges." The discussion draft specifically calls for the development of NPDES permit requirements to reduce pesticide discharges to waters of the U.S.

The Agency states that where regulatory approaches are not appropriate, EPA will consider the use of "administrative action" and it will support the enactment of legislation to achieve the goal of water quality improvement. The discussion draft may be accessed on EPA's web site at <https://blog.epa.gov/waterforum/wp-content/uploads/2010/08/Coming-Together-for-Clean-Water-Disc-Draft-Aug-2010-FINAL.pdf>.

### **SFIREG Pesticide Operations and Management Committee to Meet in September**

The AAPCO State FIFRA Issues Research and Evaluation Group (SFIREG) Pesticide Operations and Management Committee will hold a one-day public meeting on Monday, September 20, 2010 from 8:30 a.m. to 5:00 p.m. at the offices of EPA (One Potomac Yard, South Building, First Floor Conference Room, 2777 Crystal Drive, Arlington, Virginia). The announcement of the meeting was published in the August 25, 2010 *Federal Register* and may be accessed at <http://edocket.access.gpo.gov/2010/pdf/2010-20842.pdf>.