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**Legislation to Exempt Pesticides from NPDES Permitting Requirements Introduced in the House**

On March 2, 2011, bipartisan legislation (H.R. 872) titled the “Reducing Regulatory Burdens Act of 2011” was introduced by Representatives Bob Gibbs (R-OH), Jean Schmidt (R-OH), and Joe Baca (D-CA). The legislation would amend FIFRA and the Clean Water Act to clarify Congressional intent and eliminate the National Pollutant Discharge Elimination System (NPDES) permitting requirement for the proper use of FIFRA registered pesticides (to read a copy of the bill, click [here](#)). Joining as original co-sponsors of the bill were House Agriculture Committee Chairman Frank Lucas (D-OK) as well as Representatives Collin Peterson (D-MN), John Mica (R-FL), and Mike Simpson (D-CA). The measure has been referred to both the House Committee on Transportation and Infrastructure and the House Committee on Agriculture for markup. CPDA is working closely with allied agricultural and pesticide interests in seeking swift approval of the measure that includes a sizeable majority of the members of both committees. The immediate goal is to move the bill quickly through the House on the suspension calendar in order to get it to the Senate for their consideration before the court ordered April 9<sup>th</sup> implementation date for the permitting scheme.

**EPA Seeks Extension of Stay of Sixth Circuit Court of Appeals Ruling that Would Require NPDES Permits for Pesticide Applications**

In related developments, on March 3<sup>rd</sup>, EPA announced that it was requesting an extension of the two-year stay of the Sixth Circuit Court of Appeals ruling issued in January 2009 which holds that biological pesticides and residues left in water from products regulated under FIFRA are a pollutant and therefore require an NPDES permit under the Clean Water Act. EPA has requested that the deadline for implementing the permitting regime be extended from April 9, 2011 to October 31, 2011. EPA states that during the period while the court is considering the extension request, permits for pesticide applications will not be required under the Clean Water Act. The Agency explains that the extension request will allow sufficient time for EPA to engage in Endangered Species Act consultation and complete the development of an electronic database to streamline requests for coverage under the general permit. EPA adds that

the extension will allow time for authorized states to finish developing their state permits and for permitting authorities to provide additional outreach to stakeholders on pesticide permit requirements. EPA's announcement may be accessed at [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=410](http://cfpub.epa.gov/npdes/home.cfm?program_id=410).

Meanwhile, Senator Debbie Stabenow (D-MI), Chair of the Senate Committee on Agriculture, Nutrition and Forestry, wrote a March 2<sup>nd</sup> letter to EPA Administrator Lisa Jackson requesting that the Agency seek a nine month extension of the 2-year court issued stay. In her letter, Chairwoman Stabenow emphasized that neither EPA nor States with delegated NPDES programs are sufficiently prepared to implement the permitting requirements. Senator Stabenow wrote that providing additional time will give the relevant regulatory agencies an opportunity to properly implement the Court's 2009 ruling (please click [here](#) to read Senator Stabenow's letter to EPA Administrator Lisa Jackson). Over the coming days, CPDA will be working in an effort to garner Congressional support for H.R. 872 and encourages its members to write to their elected Representatives asking them to co-sponsor this critical legislation. Further developments on the NPDES issue will be announced as they occur.

### **House Hearing Addresses Issue of NPDES Permitting Requirement for Pesticides**

In the weeks immediately preceding the introduction of H.R. 872, the House Agriculture Committee's Subcommittee on Nutrition and Horticulture (chaired by Representative Jean Schmidt, R-OH) and the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment (chaired by Representative Bob Gibbs, R-OH) held a joint hearing on February 16, 2011 to address the ramifications of the United States Sixth Circuit Court of Appeals decision in *National Cotton Council v. EPA*. As reported elsewhere in this issue of "Keeping an Eye on Washington," the January 2009 court decision vacated an EPA rule which held that a pesticide applied in, over, or near a receiving water of the U.S. in accordance with the FIFRA approved label is not subject to NPDES permitting requirements under the Clean Water Act. As such, NPDES permits will be required for discharges to waters of the U.S. from the application of biological pesticides and chemical pesticides that leave a residue. As stated previously, the permitting regime is slated to become effective on the court ordered deadline of April 9, 2011. At that time, pesticide applications made in the absence of a permit could be subject to a fine of up to \$37,500 per day per violation. In addition to the costs of compliance, pesticide users will be subject to an increased risk of litigation under the citizen suit provisions of the CWA.

In her opening statement at the hearing, Representative Schmidt emphasized that in the absence of Congressional action, the Circuit Court's order will impose a burden on EPA, state regulatory agencies, and pesticide applicators, which will cost jobs. Representative Schmidt also noted that the judicial ruling threatens the "already critical" budget situation facing government at all levels. "It is particularly unfortunate that this court order imposes a new requirement that will imperil our water resource boards, our mosquito control boards, and our forestry and agricultural sectors, yet provides no additional environmental or public health protection," she stated.

In his opening remarks, Representative Gibbs stated, "This new Clean Water Act permit for covered pesticides stands to be the single greatest expansion of the permitting process in the

history of the Clean Water Act program. EPA has said it can expect approximately 5.6 million covered pesticide applications per year by approximately 365,000 applicators – virtually doubling the number of entities currently subject to Clean Water Act permitting. Requiring a permit under the Clean Water Act in addition to an approval under FIFRA adds delays, costs, and other burdens on both the regulatory agencies who have to issue the permits and those who need to get a permit, without increasing environmental protection. It also could result in significant environmental and human health impacts by hampering the ability to respond to disease and pest outbreaks.”

Among the witnesses testifying at the hearing was Steve Bradbury, Director of EPA’s Office of Pesticide Programs (OPP) who provided House Members an overview of the Agency’s process for evaluating pesticides through registration and registration review. Bradbury stated, “The regulatory restrictions imposed by EPA under FIFRA directly control the amount of pesticide available for transport to surface waters, either by reducing the absolute amount of pesticide applied, or by changing application conditions to make transport of applied pesticide less likely. In sum, EPA uses its full regulatory authority under FIFRA to ensure that pesticides do not cause unreasonable adverse effects on human health or the environment, including our nation’s water resources.”

In other testimony, Dr. Andrew Fisk, president of the Association of State and Interstate Water Pollution Control Administrators, told the Subcommittees that the general permits being developed must work for an estimated 360,000 new permittees brought within the purview of the NPDES program by the Sixth Circuit Court of Appeals ruling. “Adding sources to the NPDES program,” he stated, “carries with it regulatory and administrative burdens for states beyond merely developing and then issuing permits. It goes without saying that a meaningful environmental regulatory program is more than a paper exercise. It is not just a permit. EPA and states must provide technical and compliance assistance, monitoring, and as needed, enforcement. These 360,000 new permittees do not bring with them additional federal or state funding. In fact, federal and state funding for water programs has been insufficient for a long time.” Noting the complexities and delays encountered by EPA in developing a final general permit, Dr. Fisk reported that his organization and other state regulatory groups have requested that EPA pursue a six month stay of the April 9th court mandated implementation date. “If sought by the Agency and granted by the court, a further stay may allow more states to finalize permits,” Dr. Fisk explained. However, he added that a stay does not address the more fundamental question as to whether an NPDES mandate is an appropriate way to manage pesticide applications in or near water.

### **CPDA Urges Congress to Pass Legislation that Exempts FIFRA Regulated Pesticides from NPDES Permitting Requirements**

CPDA weighed in on the joint House subcommittee hearing that addressed NPDES permitting requirements for FIFRA regulated products with the submission of testimony for the record that urged Congress to amend the Clean Water Act to formally exempt EPA registered pesticides. In so doing, CPDA cited President Obama’s January 18, 2011 initiative calling for the improvement of regulation and regulatory review (*see related story in this issue of “Keeping an Eye on Washington”*). The President’s directive is set forth in Executive Order 13563 which requires all federal agencies to develop a plan for the review of existing regulations in an effort

to identify those rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, or repeal those rules so as to make the agency's regulatory program more effective or less burdensome in achieving its goals.

In its testimony, CPDA emphasized that Congress now has the opportunity to join together in bipartisan fashion to eliminate a regulation that meets the President's rationale for repeal. CPDA argued that the NPDES permitting scheme for certain pesticide applications is duplicative, costly, burdensome, and unnecessary. "By amending the Clean Water Act to specifically exempt EPA-registered pesticide products," CPDA stated, "Congress will make government more efficient while ensuring human health and the environment are protected and at the same time, protect jobs." CPDA added that EPA is developing an NPDES general permit applicable to pesticides not for any lack of federal regulation of these products but rather in response to the decision handed down by the Sixth Circuit Court of Appeals. CPDA described the extensive review process that all registered pesticides undergo in order to receive approval from EPA's Office of Pesticide Programs (OPP). CPDA pointed out that the NPDES mandate is not expected to result in any appreciable environmental benefit since EPA does not plan to use the permit process as a means of directing how, when, where or how much of a pesticide can be applied.

In addition, CPDA projected that the likely burden of the new permitting mandate will be an annual 200 to 250 hours per permittee due to the imposition of onerous reporting and record-keeping requirements that could cost as much as \$1 billion or more. In essence, permittees will have to keep extensive records to prevent frivolous citizen lawsuits from bankrupting their business merely over a paperwork issue. CPDA also voiced its concern that potentially burdensome prohibitions relating to Endangered Species Act Section 7 consultation determinations could impact the permitting process as a result of activist environmental lawsuits or some other federal/state action. Finally, CPDA noted that CWA violations are punishable with fines of up to \$37,500 per day per violation. "The permits' complex compliance requirements will impose tremendous new burden on thousands of businesses, communities, counties, and state and federal agencies legally responsible for pest control, exposing them to legal jeopardy through citizen suits over paperwork violations," CPDA warned. "Ultimately, the permit could jeopardize jobs, the economy and threaten human health and environmental protection across America as regulators and permittees grapple to implement and comply with the permit process."

CPDA concluded its testimony by reiterating its position that the NPDES permitting requirement for pesticides meets the President's standard for repeal in that this scheme will subject the regulated community to significant costs and burden while producing little, if anything, in the way of increased environmental protection. As such, CPDA urged Congress to quickly pass legislation that nullifies the need for permitting by exempting FIFRA approved products from the CWA. To read a copy of CPDA's Congressional testimony, click [here](#).

### **CPDA Members Discuss NPDES Mandate for Pesticide Applications with their Elected Members of Congress**

On February 16<sup>th</sup>, CPDA Spring Meeting attendees descended upon Capitol Hill to express their concern that many states will not be able to meet the April 9<sup>th</sup> court ordered deadline for having their final NPDES pesticide permit programs in place, resulting in those states and applicators being potentially subject to citizen suits under the Clean Water Act

(CWA). In visits with their Congressional representatives, CPDA members explained that the Sixth Circuit Court of Appeals wrongly decided the case in *National Cotton Council v. EPA* by not deferring to EPA's interpretation of the CWA that biological pesticides and residues of chemical pesticides applied in accordance with FIFRA are not pollutants subject to CWA permits because they are not "both a pollutant, and from a point source" at the time of discharge. In addition, CPDA members pointed out that the permitting requirement will be tremendously burdensome, taking over a million man-hours (about 114 years) in paperwork alone to comply, at a cost of over \$50 million annually for the permittees and 44 states. Moreover, CPDA members stressed that the environmental benefits derived from a CWA permitting regime for pesticides already regulated under FIFRA are negligible at best. CPDA members called upon lawmakers to move quickly to pass legislation that would exempt FIFRA-approved products from the CWA permit requirements.

In related activities, CPDA has been working with a broad coalition of agricultural groups in urging Congress to address the looming regulatory threat posed by the NPDES pesticide permitting requirement and joined with 34 allied agricultural organizations in signing a February 15, 2011 letter delivered to every Member of the House and Senate. The letter stated:

*"For most of the past four decades, water quality concerns from pesticide applications were addressed within the registration process under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) rather than a Clean Water Act permitting program. We believe these NPDES permits will not provide any identifiable additional environmental benefits."*

CPDA and the other signatories emphasized that:

*"The permit's complex compliance requirements will impose tremendous new burdens on thousands of small businesses, farms, communities, counties and state and federal agencies legally responsible for pest control, and expose them to legal jeopardy through citizen suits over paperwork violations. Ultimately, the permit could jeopardize jobs, the economy and human health protections across America as regulators and permittees struggle to implement and comply with these permits."*

The signatories to the letter also urged Congress to take action before the permits become final, stating that:

*"The permit includes unrealistic deadlines for state delegated implementation and compliance, and it has become abundantly clear that many states will not meet the court ordered implementation date of April 9, 2011. Even at this late date, EPA has yet to release a final permit. Moreover, pesticide users will not have time to fully understand or come into compliance with the permits by the deadline, further increasing their liability."*

### **CPDA Submits Comments to EPA on Second Draft List of Chemicals Targeted for EDSP Screening**

On January 18, 2011, CPDA submitted comments to EPA on the second draft list of chemicals and substances for which EPA intends to issue test orders under the Endocrine

Disruptor Screening Program (EDSP). The second list of chemicals expands the EDSP to include priority drinking water chemicals as authorized by the Safe Drinking Water Act (SDWA) and the House Appropriations Committee report for EPA's FY 2010 appropriations. EPA states that the list includes chemicals that have been identified as priorities under the Safe Drinking Water Act and may be found in sources of drinking water where a substantial number of people may be exposed. The list also includes some 50 pesticide active ingredients that are being evaluated under EPA's registration review program to ensure they meet current scientific and regulatory standards.

In its comments, CPDA emphasized that EPA is under no statutory requirement to begin testing SDWA chemicals at this time. CPDA stated, "...neither the FFDCA nor the SDWA contains a mandated time period or a deadline for EPA to begin EDSP screening generally or for SDWA chemicals specifically. Moreover, EPA incorrectly interprets language in the Appropriations Committee report as a constitutionally valid legislative mandate to initiate EDSP screening. This rush to screen additional chemicals without a statutory deadline is premature and will undermine the valuable opportunity the initial Tier 1 screening can provide for future experience and science-based improvements to this highly complex program."

In its other remarks, CPDA emphasized that EPA should be more transparent in the procedures it used to develop the second list of chemicals. In releasing List 2, EPA described the categories of chemicals it chose to exclude from screening but did not disclose the actual physiochemical criteria and data in support of its decisions. In the absence of this information, independent validation of the appropriateness of including certain chemicals on the list and excluding others is not possible. As such, CPDA urged EPA to publish the specific criteria it relied upon in developing the second list.

CPDA also called upon EPA to adhere to the Administrative Procedures Act (APA) which requires the Agency to formally respond to public comment received concerning the draft list. CPDA explained that once it is finalized, List 2 will create new duties and obligations for members of the regulated community that will be subject to EDSP test orders. As such, EPA's actions relating to List 2 are tantamount to a rulemaking. "Consequently," CPDA concluded, "EPA has a legal obligation under the APA to avoid arbitrary and capricious actions in interpreting applicable law and in identifying chemicals and manufacturers and importers that will be subject to enforceable EDSP testing requirements." To read CPDA's comments, click [here](#).

### **CPDA Submits Comments on EPA's Draft Weight-of-Evidence Guidance Document**

On February 3, 2011, CPDA submitted comments to EPA on its draft Weight-of-Evidence Guidance Document recommending that the Agency revise its approach so as to provide the detail necessary for users to ascertain why each specific Tier 1 assay result can be relied upon and how that assay should be integrated with the other assays to assess a chemical's potential to interact with the endocrine system. CPDA emphasized that as written the document does not provide useful guidance for evaluating Tier 1 screening results or for assessing "Other Scientifically Relevant Information" (OSRI) for use in the EDSP. Specifically, CPDA noted that the Guidance Document fails to include an explanation of which assays and which endpoints

carry the greatest weight for evaluating potential hormonal activity within the Tier 1 battery, nor does it provide an explanation of how a response pattern for a chemical can be extrapolated across all Tier 1 assays to determine a chemical's overall potential to interact with each hormonal pathway covered by the Tier 1 assays. In its other comments, CPDA pointed out that the data evaluation criteria referenced in the Guidance Document, such as "nature of the effect(s) seen," "potency of the responses," and "dose-and time-dependent changes," are typically used for toxicological data evaluation of adverse effects. In contrast, the singular purpose of Tier 1 screening is to assess the *potential* of a chemical to interact with the endocrine system, not to assess adverse effects. As such, CPDA urged the Agency to develop a weight-of-evidence evaluation approach that is specific to potential endocrine disruptors. CPDA emphasized that such an approach must be premised on scientifically supported and peer reviewed criteria thus ensuring that the data generated through the Tier 1 assays and offered through existing OSRI can be reliably, repeatedly and consistently evaluated. To read CPDA's comments, click [here](#).

### **CPDA Comments on Draft EDSP Policies and Procedures Document**

On January 18, 2011, CPDA submitted comments to EPA on the Agency's draft policies and procedures document that sets forth the process for responding to EDSP test orders issued for drinking water chemicals under the authority of the Safe Drinking Water Act (SDWA). In its comments, CPDA urged EPA to refrain from moving forward with any expansion of the current Tier 1 screening initiative until the results of the first round of testing now underway have been thoroughly vetted and appropriate modifications are made to test batteries and assay protocols. CPDA also highlighted the need for EPA's interpretation of specific SDWA language to enable the public to ascertain whether the Agency is acting in accordance with its statutory authority. In addition, CPDA cited EPA's failure to develop meaningful guidance for weight-of-evidence (WoE) determinations of Tier 1 test results and evaluating other scientifically relevant information (OSRI). Noting the inadequacy and deficiencies of the draft WoE guidance document published by EPA on November 4, 2010, CPDA stated, "Without solid, functional guidance to direct Agency actions, the Agency will be unable to properly assess Tier 1 data, and actions it takes in response to Tier 1 findings may be arbitrary and may not be scientifically sound." CPDA also called upon the Agency to develop meaningful guidance that could be used by industry in evaluating other scientifically relevant information (OSRI) (*see related WoE story*).

With respect to the scope of EPA's authority to screen chemicals in drinking water, CPDA noted that the Agency's authority is bounded by its interpretation of the statutory phrases "substances may be found in sources of drinking water" and "a substantial population may be exposed." CPDA commented that although EPA's reliance on three existing lists of chemicals provided the Agency with a convenient method for generating a list of potential substances for EDSP screening, those lists may not be appropriate for identifying "substances that may be found in sources of drinking water" to which a "substantial population may be exposed." Until EPA clearly defines these two key phrases, CPDA emphasized, selection of substances or use of existing lists of substances for this second phase of screening is arbitrary. CPDA suggested that in developing its definition, EPA should rely on reasonable, probable scenarios or on actual data that demonstrate a substance is found in drinking water to which people are exposed. CPDA also urged EPA to take into account realistic potential risks to human health and to limit its

consideration to actual, rather than theoretical, sources of drinking water. In the absence of such limits, any surface or ground water could be deemed a potential source of drinking water and any chemical might be determined to find its way into some source of drinking water. Therefore, absent an express congressional intent to require testing of any chemical, EPA must assume that Congress did not intend to grant the Agency unfettered screening authority under the EDSP. Similarly, CPDA maintained that EPA should not, without clear statutory authority, consider persistence when listing or issuing orders for List 2 chemicals. CPDA stated, “[i]t is not clear how EPA would incorporate persistence in determining whether a chemical may be found in sources of drinking water and whether a substantial population may be exposed. Those findings should be based on actual data concerning the presence of a chemical and a determination of what constitutes a substantial population. A chemical that meets those statutory limitations will do so regardless of persistence.”

Turning its attention to data compensation, CPDA maintained that EPA should develop new procedures to ensure the fair and equitable sharing of test costs for all chemicals subject to EDSP screening. CPDA recommended that EPA develop its data compensation procedures through formal rulemaking rather than the proposed non-binding approach. In promulgating the policies and procedures through a formal rulemaking, EDSP data submitters would be assured that they possessed explicit, legally enforceable data compensation rights. CPDA explained, “EPA offers its data compensation/cost sharing approach in non-binding policies and procedures, and EPA makes it very clear that it is not bound to these policies and procedures. Therefore, the usefulness of this approach depends on the Agency’s future desire to enforce the outlined provisions and to diligently issue catch up orders.” As such, CPDA urged the Agency to propose for comment in the near future a rule that establishes EPA’s duties and its policies and procedures, and legally binds the Agency to those duties and policies and procedures.

In other areas, CPDA concurred with EPA’s proposal to limit the issuance of test orders to current manufacturers of listed substances and to exempt from Phase 2 screening those companies that do not currently produce the listed chemical. CPDA also agreed with EPA’s proposal to allow a List 2 order recipient to comply with a test order by ceasing all manufacturing of the listed chemical. To read CPDA’s comments, click [here](#).

### **CPDA Comments on Draft Addendum to Current EDSP Information Collection Request**

On January 18, 2011, CPDA submitted comments to EPA on the Agency’s draft addendum to an existing Information Collection Request (ICR) that was released in conjunction with the proposed second list of chemicals selected for Tier 1 screening under the EDSP and the accompanying draft policies and procedures document. In its comments, CPDA emphasized that EPA has not met the letter or intent of the Office of Management and Budget’s (OMB) Terms of Clearance which qualified the approval of the original ICR. In the original ICR, OMB directed EPA to collect new data on the burden (or cost) of complying with the first set of Tier 1 test orders and utilize these new data before moving forward with any subsequent ICR revisions. As such, OMB limited its approval of the original ICR as follows: 1) OMB stipulated that EPA’s statutory authority to compel respondents to provide test data does not supersede the Paperwork Reduction Act’s prohibition on the imposition of a duplicative information collection; 2) to ensure that duplication did not occur, OMB required EPA to promote and encourage submission

of other scientifically relevant information (OSRI) and describe any instance in which OSRI is rejected; 3) OMB required EPA to publish for meaningful public comment and peer review its weight-of-evidence guidance and standard evaluation procedures (both of which test order recipients clearly need to make informed decisions about how to respond); and 4) OMB required EPA to re-estimate burden using new data derived from actual experience. CPDA pointed out that EPA was directed to comply with these conditions prior to submitting any request for renewal or revision of the ICR. The Agency, however, has not done so.

CPDA emphasized that EPA significantly underestimated the burden-hours and costs of responding to test orders in the original ICR and has failed to provide objectively-supported estimates of burden in both the ICR and the addendum. In its comments, CPDA asserted that information EPA provided to the Organization for Economic Cooperation and Development (OECD) suggests that the Agency knew before approval of the original ICR that it had underestimated the cost of Tier 1 screening, and further, did not use its own contracted data for burden estimation in the addendum. EPA, however, continues to deny that actual assay costs are a component of burden despite the Agency's recognition that they are clearly included in the definition of burden as set forth under the Paperwork Reduction Act.

CPDA also objected that EPA did not adhere to applicable information quality guidelines with respect to transparency, reproducibility, objectivity, and utility. Finally, CPDA pointed out that EPA relied on selective third-party information without applying its own guidelines for the review and dissemination of such information. To read CPDA's comments, click [here](#).

### **CPDA Submits Comments to EPA on Proposed Changes to Data Compensation and Exclusive Use Regulations**

On February 4, 2011, CPDA submitted comments to EPA in response to the Agency's November 5, 2010 proposed changes to regulations governing the protection of exclusive use and data compensation rights of data submitters. Among EPA's proposed changes is a requirement that applicants for registration submit a General Offer to Pay Statement or Formulators' Exemption Statement to the Agency as part of the initial product application. Current regulations allow applicants to submit the required data compensation certification form at any time prior to EPA's approval of the registration rather than at the time of application. EPA suggests that the proposed change is driven by the 21-day content screening requirement included in PRIA. In its comments, CPDA voiced strong opposition to this proposed change, noting that FIFRA is silent as to when offers to pay must be submitted during the application process. CPDA disagreed with EPA's assertion that the 21-day screen required by the Pesticide Registration Improvement Renewal Act (PRIA II) mandates that all forms, data, and draft labeling be included when an application is first submitted. CPDA emphasized that PRIA authorizes EPA to determine the contents of a complete application but does not compel the Agency to require that an offer to pay be part of the 21-day completeness determination. CPDA urged EPA to retain its 26-year policy of allowing registrants the flexibility of submitting an offer to pay any time before the application is approved. Elimination of this policy would disrupt the current approach that balances the needs of EPA, data submitters, and generic registrants. Moreover, such a change would make generic applicants vulnerable to significantly increased costs and registration delays due to unwarranted petitions to deny registrations or

initiation of binding arbitration early in the registration process. To read CPDA's comments, click [here](#).

### **CPDA Urges EPA to Remove Endocrine Effects Criteria from Proposed Changes to the DfE Safer Cleaning Product Standard and Assessment Criteria**

CPDA has submitted comments to EPA on the Agency's proposed changes to its Design for the Environment (DfE) Standard for Safer Cleaning Products. The objective of the DfE program is to encourage the use of chemicals and technologies that pose less risk to human health and the environment. Eligible products are allowed to bear the DfE logo if they satisfy certain criteria established under this initiative. As part of its draft revision to the cleaning standard, EPA is proposing to include endocrine effects criteria in determining whether a substance meets the DfE safer product parameters.

In separate comments submitted to EPA on [December 31, 2010](#) and [January 31, 2011](#), CPDA recommended that EPA exclude proposed endocrine effects criteria from its DfE assessment. CPDA explained that although chemicals are appearing on various U.S. and European lists as potential endocrine disruptors, no criteria-based determinations have yet been made on what constitutes an adverse effect. For example, CPDA noted that EPA has repeatedly emphasized that the public should not presume that a chemical or substance interferes with the endocrine system of humans or other species simply because it has been listed for screening under the EDSP. CPDA pointed out that initial screening will indicate only whether a chemical has the potential to interact with the endocrine system and not whether a chemical does indeed interact with, or adversely affect, the endocrine system. "Only when that potential has been confirmed during the Tier 1 screening," CPDA stated, "will mandatory testing be used to determine any actual endocrine effects." As such, CPDA urged EPA to remove endocrine effects definitions and criteria from the DfE standard until such time as the endocrine effects of chemicals have been conclusively proven through adequate, reliable, and reproducible scientific studies and appropriate endpoint criteria have been established on which to base a DfE product review.

### **CPDA Comments on Proposed Revisions to FTC Green Guides**

On December 10, 2010, CPDA submitted comments on proposed revisions to the Federal Trade Commission's Guides for the Use of Environmental Marketing Claims, commonly referred to as the "Green Guides" or "Guides." The Green Guides were first published by the FTC in 1992 and subsequently revised in 1996 and 1998. The Guides help marketers avoid making deceptive claims by outlining general principles that apply to all environmental marketing claims and providing specific guidance about how reasonable consumers are likely to interpret particular claims, how marketers can substantiate them, and how they can qualify those claims to avoid consumer deception. The proposed revisions were published in the October 6, 2010 *Federal Register*. In announcing the revisions, FTC explained that periodic review of the Guides ensures that they keep pace with evolving consumer perceptions and new environmental claims. The FTC noted that since the Guides were last revised in 1998, consumers have become increasingly concerned about the environmental impact of the products and services they use and marketers have expanded their promotion of the environmental attributes of their products and

services. FTC adds that some of these promotions have prompted enforcement actions in which certain environmental claims have been challenged as being false.

Among the changes proposed by FTC is the addition of a section to the Guides on third-party environmental certifications and seals to the Green Guides to clarify the conditions under which they may be used without violating the Federal Trade Commission Act (FTCA). The Commission considers certifications and seals to be endorsements and cautions that they may imply a general environmental benefit claim that is difficult to substantiate. Accordingly, the FTC cautions that marketers using third-party certifications and seals have an obligation to anticipate and substantiate “all claims reasonably communicated” by a certification or seal. In its comments, CPDA expressed its concern that the FTC may incorrectly consider marketers of certain products having third-party certifications or seals to be communicating implied general environmental claims. CPDA explained that if packaged in certain ways (i.e., green colors and agricultural/rural graphics), third-party certifications and seals could be construed as implied environmental claims. CPDA urged the FTC to provide examples of what advertising conditions would cause the mere presence of an unqualified seal to result in a reasonable consumer perceiving an unintended implied environmental benefit claim.

In its other comments, CPDA expressed its support of FTC’s decision to defer to the USDA’s National Organic Program in the development of new guides for “organic” claims. CPDA also articulated its support of FTC’s decision to postpone the development of guides for “natural” claims. CPDA stated that at this juncture FTC does not have sufficient consumer perception evidence to construct general guidance for using the term “natural.” To read CPDA’s comments, click [here](#).

### **Activist Groups File ESA Suit against EPA – Prompts Congressional Reaction**

In what is yet another in a series of legal challenges brought against EPA for the Agency’s failure to meet its consultation obligations under Section 7 of the Endangered Species Act (ESA) in assessing the effects of pesticides on threatened and endangered species, the Center for Biological Diversity together with Pesticide Action Network North America filed a lawsuit on January 19, 2011. The complaint was lodged with the U.S. District Court for the Northern District of California. Section 7 of the ESA requires EPA to assess the effects of pesticides on endangered species and to consult with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (i.e., the “Services”) on the potential impacts of pesticides on listed species and habitats. The current complaint covers 381 pesticides and 214 species and is somewhat smaller in scope than the Notice of Intent to sue that was filed in January 2010. The lawsuit seeks a judicial order compelling EPA to initiate (or reinstate) consultations on the 381 pesticides, and also asks the Court to direct EPA to impose interim use restrictions on the named pesticides where they may affect endangered and threatened species and critical habitats until the consultation process is completed.

#### **Congressional Reaction:**

This legal action prompted a January 26, 2011 Congressional letter to Nancy Sutley, Chairwoman of the White House Council on Environmental Quality. Signed by 18 Members of

the House of Representatives, the bipartisan letter calls upon the Obama Administration to ensure that NMFS, EPA, the Department of the Interior, the U.S. Department of Agriculture, and the U.S. Department of Justice cooperate in a coordinated effort to ensure consultation proceedings and drafting Biological Opinions (BiOps) are open and transparent processes based on use of the best available science.

The letter criticizes a November 2008 NMFS BiOp that addresses the pesticides diazinon, malathion, and chlorpyrifos and calls for significant restrictions on the use of those chemicals in Washington, Oregon, Idaho, and California. The letter also notes that the Congressional signatories "...are concerned that confusion about the Administration's policy will likely result in conflicting court rulings, legal uncertainty, and additional lawsuits about the policy and scientific ramifications of these BiOps. Better intra-agency coordination amongst these agencies and with the Department of Justice, tasked with defending the government's position in these lawsuits, is needed immediately." Finally, the signatories also urged that the Department of Justice seek an extension of the current court-imposed deadlines for the release of future BiOps so that EPA, in consultation with USDA and other state agencies, is able to ensure that the NMFS BiOps are based on the best available science.

### **EPA Solicits Public Comment on Periodic Retrospective Review of Existing Rules**

EPA is inviting public comment on how to design a plan for conducting a periodic retrospective review of the Agency's existing regulations. The deadline for public comment is March 20, 2011. The Agency's announcement is in response to President Obama's January 18, 2011 Executive Order (EO) 13563, titled "Improving Regulation and Regulatory Review," which directs each federal agency to consider "how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome." Specifically, the EO calls on every agency to develop "a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether such regulations should be modified, streamlined, expanded or repealed to make the agency's regulatory program more effective and or less burdensome in achieving its regulatory objectives." EPA states that by late May 2011, it will provide the public with its retrospective review plan, as well as the initial list of regulations selected for review.

The Agency is encouraging interested parties to provide public comment on: 1) how EPA should identify candidate regulations for periodic retrospective review; 2) what criteria EPA should use in prioritizing regulations for review; 3) how the review plan should be integrated with existing requirements to conduct retrospective reviews; 4) the frequency with which EPA should solicit public input on existing rules; and, 5) whether a regulation should be in effect for a certain amount of time before it is reviewed. EPA has established several dockets within [www.regulations.gov](http://www.regulations.gov) where comments may be submitted according to the following categories: 1) specific program areas (i.e., pesticides, water, air, etc.); 2) specific regulatory issues or impacts; and/or 3) general ideas.

EPA has established a web site that will provide updates on its retrospective regulatory review initiative that will include links for submitting comments to the docket. The web site may be accessed at <http://www.epa.gov/improvingregulations/index.html>.

In related activities, EPA will hold a public meeting on this initiative on Monday, March 14, 2011 at the Hilton Arlington located at 950 N. Stafford Street in Arlington, Virginia. EPA also intends to conduct several regional public meetings throughout the country during the month of March.

### **EPA Proposes a Rule that Would Classify a Prion as a Pest under FIFRA**

In the January 26, 2011 *Federal Register*, EPA published a proposed rule that would amend existing regulations so that a prion (proteinaceous infectious particle) is considered a pest under FIFRA. On September 10, 2003, EPA decided that a prion meets the regulatory definition of a pest under FIFRA and that products intended to inactivate prions should be regulated under FIFRA as pesticides. The Agency states that this decision was made partly in response to the widespread occurrence of chronic wasting disease among deer and elk in a number of states, particularly in the Rocky Mountain region. EPA notes that the January 26<sup>th</sup> proposed rule would codify its current interpretation of FIFRA's definition of the term "pest."

The deadline for public comment is March 28, 2011. Comments must be identified by docket number EPA-HQ-OPP-2010-0427 and may be submitted electronically at [www.regulations.gov](http://www.regulations.gov). To read the proposed rule, visit <http://www.gpo.gov/fdsys/pkg/FR-2011-01-26/html/2011-1636.htm>.