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Keeping an Eye on Washington

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House Appropriations Measure Includes Language to Exempt Pesticides from NPDES Permitting Requirements

On July 12, 2011, the House Committee on Appropriations approved H.R. 2584, legislation making appropriations for the Department of the Interior, Environment, and Related Agencies for the fiscal year ending September 30, 2012. House floor debate on the bill began on July 25th. The House, however, adjourned for its summer district work period on July 28th leaving the appropriations measure as unfinished business. As reported out of committee, the measure includes the provisions of H.R. 872, the “Reducing Regulatory Burdens Act of 2011.” This bill, introduced by Representatives Bob Gibbs (R-OH), Jean Schmidt (R-OH), Joe Baca (D-CA), and others would amend FIFRA and the Clean Water Act to eliminate the requirement of a National Pollutant Discharge Elimination System (NPDES) permit for the proper use of FIFRA registered pesticides. In the absence of a legislative fix, effective October 31, 2011 NPDES permits will be required for discharges to waters of the U.S. from some applications of biological and chemical pesticides. H.R. 872 was previously passed by the full House as a stand-alone bill on March 31, 2011 by a vote of 292-130.

While House deliberations on the funding bill are expected to resume in September, it is unlikely that the GOP led House and Democratic Senate will be able to move any appropriations measures in regular order. Should such a scenario unfold, Congress would need to pass a stopgap funding measure through a Continuing Resolution which likely would not include the provisions of H.R. 872.

In report language accompanying the spending bill, House Appropriations Committee members expressed their concern with “EPA's movement toward requiring a permit under the Clean Water Act for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under FIFRA, or the residue of such a pesticide, resulting from the application of such pesticide.” Committee members note, “This rule would have far-reaching implications and move beyond the intended application of the Clean Water Act.”

Senators Block Movement of H.R. 872

Meanwhile, in related developments the Senate Committee on Agriculture, Nutrition and Forestry passed H.R. 872 on June 21, 2011 during a business meeting attended by committee members. Following committee passage, Senators Barbara Boxer (D-CA) and Ben Cardin (D-MD) placed a hold on the measure which effectively blocks it from advancing to the Senate floor as a stand-alone bill. Sixty votes are required to overcome the hold.

Recent press reports indicate that Senator Cardin (who chairs the Water and Wildlife Subcommittee of the Senate Environment and Public Works Committee) may be amenable to limited exemptions from NPDES permitting requirements applicable to small pesticide users such as plant and tree nurseries and gardening centers. However, he does not appear willing to accept broader exemptions under EPA's Pesticide General Permit.

As reported previously, CPDA has been working diligently in support of H.R. 872 through a series of Congressional office visits in both the House and Senate, a number of letters to lawmakers urging their support for the measure, and the submission of testimony in response to a February 2011 joint Congressional hearing on pesticides and NPDES permitting requirements. With the October 31, 2011 NPDES permitting deadline fast approaching, CPDA remains firmly committed in its efforts aimed at securing enactment of this critical piece of legislation.

Appropriations Language Contains Provision on EPA's Draft PR Notice on False or Misleading Pesticide Product Brand Names

As reported elsewhere in this issue of "*Keeping an Eye on Washington*," the House Appropriations Committee approved H.R. 2584, the FY 2012 Department of Interior, Environment and Related Agencies appropriations bill on July 12, 2011. Its provisions include an amendment offered by Representative Steven LaTourette (R-OH) that prohibits EPA from using appropriated funds to finalize the Proposed Guidance on False or Misleading Pesticide Product Brand Names (PR Notice 2010X; Docket ID EPA-HQ-OPP-2010-0282).

The draft PR Notice was originally published for public comment in 2002 but was never finalized. However, in mid 2009 EPA began to inform registrants during routine registrations of its new policy of rejecting as potentially "false or misleading" in violation of FIFRA words such as professional, professional grade, super, plus, and ultra in pesticide product brand names and advertising. Registrants were required 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. 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.

CPDA submitted comments on this draft PR Notice on August 17, 2010, emphasizing 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. CPDA emphasized that EPA mischaracterizes the Notice as nonbinding guidance because it, in effect, amends current regulations by the Agency's caution that registrants and distributors may face enforcement actions if they release for shipment products that are not in compliance with the Notice. CPDA also pointed out that EPA expressly notes that it intends to thoroughly review existing products for compliance problems, thereby establishing a de facto enforceable requirement. As such, the purported "non-enforceable" guidance document could be used to improperly amend an enforceable legislative rule each time EPA enforced its determination that a specific brand name is false or misleading under FIFRA labeling regulations.

FY 2012 Interior, Environment and Related Agencies Appropriations Bill Includes ESA Language

In its other provisions, the FY 2012 Interior, Environment and Related Agencies Appropriations bill contains a provision that prohibits EPA from using any appropriated funds to modify, cancel or suspend the registration of a pesticide registered or reregistered under Section 3 or 4 of FIFRA in response to a final biological opinion or other written statement under Section 7(b) of the Endangered Species Act. Proponents of this provision maintain it will allow time for an independent scientific review of the issue in question to be completed. This amendment, offered by Representative Ken Calvert (R-CA), was adopted in committee on July 12th by voice vote.

In related developments, during the late July floor debate on the appropriations package reported out of committee, an amendment was adopted striking language included in the underlying measure (dubbed the "Extinction Rider" by its opponents) that would have prevented the FWS from using any public funds to list new species, designate critical habitat, or upgrade species from threatened to endangered under the ESA. The amendment, offered by Representatives Norm Dicks (D-WA), Michael Fitzpatrick (R-PA), Mike Thompson (D-CA), and Colleen Hanabusa (D-HI) was approved by the House on July 27, 2011 by a vote of 224-202.

CPDA will closely monitor the status of the FY 2012 Department of Interior, Environment and Related Agencies appropriations bill and keep its members apprized of further developments.

Representatives Markey and Napolitano urge FWS to Fulfill its ESA Section 7 Consultation Obligations

Representatives Edward J. Markey (D-MA), Ranking Member of the House Natural Resources Committee, and Grace Napolitano (D-CA), Ranking Member of the Subcommittee on Water and Power, wrote an August 9, 2011 letter to Dan Ashe, Director of the U.S. Fish and Wildlife Service urging FWS to fulfill its consultation obligations under Section 7 of the Endangered Species Act in assessing the potential impact of EPA's draft Pesticide General Permit on endangered aquatic species. EPA is finalizing the PGP in response to the January 2009 decision of the U.S. Sixth Circuit Court of Appeals in *National Cotton Council v. EPA* vacating an Agency rule under which a pesticide applied in, over, or near a receiving water of the U.S., in accordance with the FIFRA approved label, would be subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under the Clean Water Act. As mentioned

previously, effective October 31, 2011, NPDES permits will be required for discharges to waters of the U.S. from some applications of biological and chemical pesticides.

In the letter, Reps. Markey and Napolitano note that EPA initiated consultations under Section 7 of the ESA on July 30, 2010 to determine whether the issuance of the PGP might jeopardize the existence of any endangered or threatened species and that the National Marine Fisheries Service (NMFS) submitted its biological opinion on the PGP to EPA on June 17, 2011 after eleven months of work. “Given the ability of the NMFS to complete its consultation obligation,” the Democrats stated, “we write to request more information from the FWS regarding why it was unable to accomplish the same task given the same set of available data and information as NMFS.”

The Democrats also requested information from the FWS regarding past instances where the Service was unable to complete similar Section 7 consultations with EPA regarding the registration of pesticides. They emphasized, “The inability of the FWS to complete consultations on pesticide registrations after they have been requested by the EPA potentially undermines the effectiveness of the ESA. We understand that large-scale, programmatic consultations, like the review of the PGP, are difficult, and that the FWS has suffered from years of chronic underfunding. Nevertheless, it is critical that the FWS improves its ability to complete these consultations and to meet these ongoing environmental challenges. For Congress to assist the FWS in improving the consultation process, we need a better understanding of the limitations that are prohibiting FWS from completing its obligations under Section 7 of the ESA.”

Reps. Markey and Napolitano also posed a series of questions to FWS with regard to its process in engaging in consultations under the ESA. Among these, the two Democrats asked FWS several questions regarding the counterpart regulations published in 2004 specific to the consultation process for the assessment of pesticide registrations under FIFRA.

In addition to the letter to FWS, Reps. Markey and Napolitano wrote a separate August 9th letter to EPA Administrator Lisa Jackson urging the Agency to adopt the Reasonable and Prudent Alternative (RPA) set forth by the NMFS in its draft biological opinion (see brief summary below). The two Democrats maintained that the requirements of the RPA would not impose any significant additional burdens in the implementation of the PGP. Moreover, they contend that by adopting the RPA or developing similar measures, EPA will demonstrate it “is able to successfully reconcile its obligations under both the ESA and the CWA [Clean Water Act] to fully protect our environment, our drinking water, and our nation’s most endangered species.”

Summary of NMFS Draft Biological Opinion on EPA's Proposed Pesticide General Permit

In its draft biological opinion issued on June 17, 2011 in response to EPA’s proposed Pesticide General Permit, NMFS concluded that the Agency’s PGP “is likely to jeopardize the continued existence of 33 endangered or threatened species under NMFS’ jurisdiction and result in the destruction or adverse modification of critical habitat that has been designated for 29 of those species.” NMFS states, “...as the general permit is currently structured, the EPA would not be likely to know where or when most of the discharges it intends to authorize would occur; if these discharges were resulting in exposures to pesticide pollutants in concentrations, durations or

frequencies that would cause adverse effects to ESA listed species or designated critical habitat and would not be in a position to take measures to avoid those adverse effects; or whether the permittees were complying with the conditions of the permit designed to protect ESA listed species and designated critical habitat from being exposed.”

The NMFS maintains that the conditions of its recommended RPA are intended to change EPA’s draft PGP to more fully meet the requirements of ESA Section 7(a)(2) to protect listed species and their designated habitat from pesticide applications made in the range of NMFS’ jurisdiction in Idaho, Massachusetts, New Hampshire, District of Columbia, all Indian lands nationwide, and federal lands in Delaware, Vermont and Washington. The RPA would limit the scope of the PGP to the following: 1) pesticide applications that would not occur in the range of any endangered or threatened species under NMFS’ jurisdiction; 2) pesticides known not to cause adverse effects to endangered or threatened species under NMFS’ jurisdiction or to representative surrogate species; or, 3) pesticides that at their maximum allowed use rates are not expected to result in aquatic peak concentrations that exceed the No Observed Adverse Effect Concentrations or No Observed Adverse Effect Levels (“NOAEC/NOAEL”) for those listed species or for representative surrogate species.

The RPA would also require decision makers to file a Notice of Intent (NOI) to discharge that identifies the pesticide product to be discharged, the planned quantity and rate of discharge, the number of planned discharges, and the category of that discharge as described above. Decision makers would also be required to file an annual report containing: 1) a description of treatment area, including location and size; 2) the approximate date of any discharge; 3) identification of any waters of the U.S. to which pesticide pollutants are discharged; 4) the pesticide use pattern resulting in any discharge (i.e., mosquito and other flying insect pest control, aquatic weed and algae control, aquatic nuisance animal control, or forest canopy pest control); 5) any target pest; 6) contact information for the decision maker or any pesticide applicator, if different from the decision maker; 7) the total amount of each pesticide product applied for the reporting year by application method; 8) an annual report of any adverse incidents as a result of any discharge; and, 9) a description of any corrective action. EPA would be required to collect and summarize these reports and provide this summary to NMFS.

The final element of the RPA would require EPA to develop and implement a monitoring plan, within two years of the issuance of the PGP, to detect the presence of pesticide pollutants in habitats where endangered or threatened species, or designated critical habitat occur to insure that the pesticide pollutant discharges it authorizes under the general permit do not exceed any Water Quality Criterion or occur in concentrations that are likely to result in adverse effects to endangered or threatened species or to designated critical habitat under NMFS’ jurisdiction. The plan must include sampling and analyses for the presence of pesticide pollutants in representative habitats where and when endangered or threatened species, or designated critical habitat may be exposed to discharges of pesticide pollutants as authorized by the proposed general permit, including non-target waters of the U.S. into which these discharges may flow.

EPA held a 30-day public comment period on the draft biological opinion which concluded on July 25th. To access a full copy of the NMFS draft biological opinion, click [here](#).

Endocrine-Disrupting Chemicals Exposure Elimination Act Introduced in House and Senate

On July 13, 2011, Senator John Kerry (D-MA) and Representative Jim Moran (D-VA) introduced legislation (S. 1361/H.R. 2521) titled the “Endocrine-Disrupting Chemicals Exposure Elimination Act.” The measure would establish an Endocrine Disruption Expert Panel to study and evaluate up to ten chemicals per year that are potentially endocrine-disrupting to determine whether they pose a high, substantial, minimal, or no level of concern. Any chemical that is deemed a high level of concern could be banned from use within two years. The bill would also create a research program through the National Institute of Environmental Health Sciences to further endocrine research. In a statement made upon introducing the measure, Senator Kerry emphasized, “There are approximately 80,000 known chemicals in our environment that are potentially harmful. Many of those chemicals have never been tested to determine if they are damaging to human health. Products that American families use every day such as household cleaners, cosmetics, and personal care products could actually be causing them harm...The increased rate of disorders affecting the human endocrine system is alarming. Children developing in the womb are particularly vulnerable. Many scientists believe there are connections between effects on the endocrine system and the chemicals around us, and it is time to do more about it.”

The legislation has been referred to the Committee on Health, Education, Labor, and Pensions in the Senate and the Committee on Energy and Commerce in the House.

Chemical Facility Security Update

On June 29, 2011, the Senate Committee on Homeland Security and Governmental Affairs adopted S. 473, legislation to extend the Chemical Facility Anti-Terrorism Standards (CFATS) which are set to sunset on October 4, 2011. Ranking Member Susan Collins (R-ME), and Senators Mary Landrieu (D-LA), Rob Portman (R-OH), and Mark Pryor (D-AR), co-sponsored the bill to extend the Department of Homeland Security program requiring high-risk chemical facilities to comply with federal security standards. The bipartisan legislation includes language providing for:

- A 3-year extension of the current CFATS program;
- The development of voluntary exercise and training programs to improve collaboration with the private sector and State and local communities under the CFATS program;
- The creation of a voluntary technical assistance program under the existing CFATS structure that would allow DHS, at the request of the owners/operators of covered chemical facilities, to provide recommendations or assistance to covered facilities to aid in compliance with the CFATS program or to reduce the risk of consequences of a terrorist attack on the covered facility; and
- The creation of a chemical facility best practices clearinghouse and private sector advisory board at DHS to aid in the implementation of CFATS and the voluntary technical assistance program.

Meanwhile, in the House, on June 22nd the Homeland Security Committee passed H.R. 901, introduced by Rep. Dan Lungren (R-CA) which extends the CFATS through 2018. On May 26th, the Energy and Commerce Committee approved H.R. 908, introduced by Rep. Tim Murphy (R-PA) which extends DHS authority to regulate chemical facility security through 2017. It is important to note that the bills reported out of the House and Senate committees do not include any controversial provisions that would establish an inherently safer technology mandate that is opposed by CPDA and other industry groups.

CPDA Comments on EPA's Proposed Policy on Nanoscale Materials in Registered Pesticides

On June 17, 2011, EPA published in the *Federal Register* for comment possible approaches the Agency could use to obtain information about nanoscale materials in registered pesticide products and its policy for registering products containing those materials. EPA's preferred approach is to use its authority under FIFRA Section 6(a)(2) to obtain information on the presence, production process, and type of nanoscale material present in a registered pesticide product to assess its potential effects on humans or the environment. An alternate approach would be to obtain such information using Data Call-In notices under FIFRA Section 3(c)(2)(B). EPA also intends to adopt a policy of presuming that all new registration applications for products containing nanoscale materials are applications involving new active or inert ingredients even though a non-nanoscale form of the material is already registered.

In its comments, CPDA opposed EPA's use of section 6(a)(2) authority due to the likely stigma that would be associated with a product linked to section 6(a)(2) "adverse effects" information collection. CPDA stated, "Despite EPA's clarification that it 'is not making a judgment that the presence of any particular nanoscale material poses a risk' and that information other than actual 'adverse effects' must also be reported under section 6(a)(2), the general public is not aware of such distinctions." In addition, CPDA asserted that using section 6(a)(2) to obtain information on nanoscale materials in pesticides could also result in mischaracterization of the reason why the information was submitted. "For instance," CPDA explained, "plaintiffs in tort lawsuits involving drift of pesticides containing nanoscale materials to non-target areas would likely allege that EPA had identified those pesticides/materials as causing or being associated with unreasonable adverse effects on the environment. Nanotechnology is a relatively new commercial endeavor, especially for the pesticide industry, and the potential for a product to be stigmatized simply because the Agency is seeking information on the presence of nanoscale materials in registered products is unwarranted."

CPDA recommended that the Agency use a more targeted DCI approach under FIFRA Section 3(c)(2)(B) which would remove the stigma concerns about using section 6(a)(2) and minimize the information collection burdens on EPA and registrants. This approach would not require a response from DCI recipients who either do not have or do not know they have nanoscale materials in their products, and could also focus initial data gathering only on pesticide classes that are most likely to or known to contain nanoscale active or inert ingredient material. Future case-by-case registrant/product DCIs could then be used to obtain any subsequently needed data.

CPDA also expressed its concerns about EPA's proposal to classify an application to register a product containing a nanoscale active or inert ingredient as an application for a "new" active or inert ingredient based on a presumption that the ingredients are not "identical or substantially similar" to an existing non-nanoscale or nanoscale registered product. An applicant could rebut this presumption by providing the Agency with "sufficient" data or information that demonstrates substantial similarity "to EPA's satisfaction" to qualify as a "me-too" registration. CPDA objected that this presumption policy would effectively require all pesticide registrants and ultimately inert ingredient manufacturers to incur significantly higher PRIA fees and experience much longer review timelines. CPDA emphasized that the costs and uncertainties of such a policy are a likely barrier to development and use of nanoscale active and inert ingredients in pesticide products and that EPA should not implement the presumption policy at this time. To read the full text of the comments of CPDA, click [here](#).

EPA Publishes Antimicrobial Pesticide Registration Guidance for Voluntary Communication of Ingredient Information

On July 15, 2011, EPA published guidance for antimicrobial pesticide registrants who voluntarily communicate ingredient information to consumers on their company website and/or product labels. EPA states that the guidance does not create any binding requirements even though it references existing statutory and regulatory requirements. The Agency also clarifies that it may change the guidance at any time and that it is separate and apart from the inert ingredient disclosure proposal published in December 2009.

The guidance encourages companies to disclose information on all intentionally added ingredients on their labels and websites. The Agency cautions that under the requirements of 40 CFR 168.22, when a website address is referenced on the pesticide label, which it recommends, the website is considered labeling under FIFRA section 2(p)(2) and is subject to the misbranding provisions of FIFRA section 2(q) and 12(a)(1)(E). The guidance further instructs companies to (i) link products on their website to their EPA registration numbers, (ii) use bi-lingual language on the web site and the entire label, (iii) utilize a widely recognized chemical naming scheme, (iv) include a PDF of the Material Safety Data Sheet if any ingredient requires listing in accordance with OSHA regulations, (v) identify ingredients in alternate formulations, and (vi) maintain the production information website for at least two years after the product is no longer in the channels of trade.

Companies that wish to make changes to pesticide labels under this guidance must apply for and receive EPA approval of the label changes, consistent with existing requirements of 40 CFR Parts 152 and 156.

EPA Releases New Pesticide Product Label System (PPLS) Web Application

EPA has made available on its website a new version of the PPLS, which consists of a collection of over 170,000 Agency approved current and historical pesticide product labels. The new PPLS application will allow users to search by product name, company name, and/or EPA Registration Number. Users also will be able to view labels in PDF format, search label content, and view the history of products that have been transferred from one company to another. EPA states that the

improved web application furthers the Agency's goal of transparency. The PPLS application may be accessed at <http://www.epa.gov/pesticides/ppls>.

An Analysis of the Super Committee Created Under the Debt Ceiling Compromise

Authored by John Boling, CPDA Director of Legislative Affairs

As the nation teetered between stability and fiscal calamity, senior members of Congress realized that both sides were too far apart to reach an agreement addressing the debt limit and something needed to be done before calamity could strike. An honest short-term solution needed to be found that could satiate both sides while giving Congress a bit more time to find an acceptable fiscal solution. From this need rose the Super Committee, which will be composed of equal numbers of Senators and Representatives from both parties and who will be tasked with finding an additional \$1.5 trillion in savings before Thanksgiving. Failure is not an option.

The Super Committee is modeled after the successful Base Realignment and Closure (BRAC) process, where a commission makes recommendations as to which military installations should be shuttered and Congress must vote yea or nay on the whole package and amendments are prohibited. The Super Committee was designed in the same fashion, but with an added provision constructed to force them to reach an agreement. As structured, the committee must find \$1.5 trillion in deficit reduction over 10 years by Nov. 23 and approve it with a majority vote in order to fast track it through Congress by Christmas. If the panel deadlocks along partisan lines, it would instead trigger painful across-the-board spending cuts in the range of \$1.2 trillion with half of those cuts coming from defense, and the rest from discretionary spending. A third option is that the panel could agree to spending cuts below their \$1.5 trillion target, which if approved, would lower the trigger amount for spending cuts. Because of the severity of the across-the-board cuts to programs dear to the respective party bases, there is a real sense of urgency to figure out a solution.

The legislative committees of Congress are required to report to the Super Committee their recommendations by October 14th. Within 40 days of then, by November 23rd, the Super Committee must make their recommendation in order for Congress to act by Christmas. Appointed to the committee are: Senators Max Baucus (D-MT), John Kerry (D-MA) Patty Murray (D-WA), Jon Kyl (AZ), Pat Toomey (R-Pa.) and Sen. Rob Portman (R-OH). Members of the House appointed to the committee include: Rep. Jeb Hensarling (R-TX), Rep. Fred Upton (R-MI) and Rep. Dave Camp (R-MI), Rep. James Clyburn (D-SC), Chris Van Hollen (D-MD), and Xavier Becerra (D-CA). Each member is respected, trusted by their leaders, brings something to the table and fills a political need. Sen. Murray will be a co-chair of the Super Committee along with Rep. Hensarling.

Adding to the pressure to find a solution are the recent fluctuations in the stock market, S&P's downgrading of America's credit rating, along with instability in Europe and the ongoing crisis in Afghanistan.

The complexity before the committee is being referred to as a three-level chess match where one has to consider moves on multiple levels with the clock ticking in the background. This makes the task at hand an extremely difficult one.