

# Policy and Regulatory Update

Jay Feldman  
Executive Director  
Beyond Pesticides  
Washington DC

Pesticides and the Chesapeake Bay  
Watershed Project

Maryland Pesticide Network  
Johns Hopkins Center for a Livable Future

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# Clean Water Act

“restore and maintain the chemical, physical, and biological integrity of the Nation's waters” 33 U.S.C. 1251 (a)

“for the protection and propagation of fish, shellfish, and wildlife” 33 U.S.C. 1251(a)(2).

EPA is given the authority of “preventing, reducing, or eliminating the pollution of the navigable waters and ground waters...” 33 U.S.C. 1252(a).

Establishes National Pollution Discharge Elimination System (NPDES) permit process requiring permits for pesticide applications that discharge into water.



- ***Headwaters v. Talent* (Ninth Circuit, 2001)** – Upheld NPDES permitting requirements. (2001)
- **In *National Cotton Council of America v. EPA*** (Sixth Circuit, 2009), court requires permits for all pesticide applications that leave a residue in water when such applications are made in or over, including near, waters of the U.S. reversing EPA regulation eliminating requirement for NPDES permit for pesticide applications (Nov. 2006)
- **Supreme Court lets Sixth Circuit decision**  
Affirms NPDES requirement not fulfilled by FIFRA registration.

## **Food Quality Protection Act** (amendments to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Federal Food Drug and Cosmetic Act (FFDCA))

- Aggregate risk (food + water + non-dietary exposure)
- Common mechanism of toxicity and cumulative risk
- Extra margin of safety for children

# Chesapeake Bay Program: Improved Strategies Are Needed to Better Assess, Report, and Manage Restoration Progress

(October 2005, GAO-06-96)

In developing such an approach, the Bay Program also faces the challenge of finding a way to incorporate the results achieved in implementing the 81 nonquantifiable commitments contained in *Chesapeake 2000* with the results achieved in implementing the 21 quantifiable commitments. For example, under the *Water Quality Protection and Restoration* goal, the Bay Program has a nonquantifiable commitment to reduce the potential risk of pesticides flowing into the bay by educating watershed residents on best management practices for pesticide use.



# **GAO: Chesapeake Bay Program: Improved Strategies Are Needed to Better Assess, Report, and Manage Restoration Progress , continued**

(October 2005, GAO-06-96)

Not only does the Bay Program currently have no method for measuring the progress made on this commitment, but it also has no approach for integrating these results with the results of the other 19 commitments listed under the water quality goal. Consequently, the program cannot currently assess the progress made in meeting the water quality goal. (p21)

# Chesapeake Bay Program

(Chesapeake Bay Watershed Partnership, including Maryland, Virginia, Pennsylvania, the District of Columbia, EPA, and the Chesapeake Bay Commission)

## Goal

**“reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources that inhabit the or on human health.”**



# Chesapeake Bay Executive Order 13508

(May 29, 2009)

The Administrator shall identify pollution control strategies and actions authorized by the EPA's existing authorities to restore the Chesapeake Bay that:

(a) establish a clear path to meeting, as expeditiously as practicable, water quality and environmental restoration goals for the Chesapeake Bay;





# Chesapeake Bay Executive Order

(May 29, 2009)

## PART 3 – RESTORE CHESAPEAKE BAY WATER QUALITY

Sec. 301. Water Pollution Control Strategies. In preparing the report required by subsection 202(a) of this order, the Administrator of the EPA (Administrator) shall, after consulting with appropriate State agencies, examine how to make full use of its authorities under the Clean Water Act to protect and restore the Chesapeake Bay and its tributary waters and, as appropriate, shall consider revising any guidance and regulations.



# Chesapeake Clean Water and Ecosystem Restoration Act of 2010

S. 1816, Sen. Cardin; H.R. 3852, Rep. Cummings  
(not introduced in the 112<sup>th</sup> Congress)

“(1) MANAGEMENT STRATEGIES.—The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implemented by Chesapeake Bay States to achieve and maintain

“(A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and the watershed of the Chesapeake Bay;

“(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem;



# Chesapeake Clean Water and Ecosystem Restoration Act of 2010, continued

‘(C) the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal of reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Bay ecosystem or on human health;

“(D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories for wetland, riparian forests, and other types of habitat associated with the Chesapeake Bay ecosystem; . . .



# Chesapeake Bay Compliance and Enforcement Strategy

May 12, 2010

In addition to nutrients and sediments other serious contaminants are negatively affecting water quality in the Bay, such as PCBs; PAHs; and metals—such as mercury, endocrine disruptors, and pesticides. The U.S. Geological Survey estimates that 72 percent of the Bay segments are impaired by contaminants.



# To prohibit the use, production, sale, importation, or exportation of any pesticide containing atrazine

(H.R.5124, April 22, 2010, Rep. Ellison)  
(not reintroduced in the 112<sup>th</sup> Congress)

Notwithstanding any other law, the use, production, sale, importation, or exportation of atrazine or any atrazine product is prohibited.



# Organic Foods Production Act (OFPA)

Section 2118; “[S]ubstances – (i) would not be harmful to human health or the environment; (ii) is necessary to the production or handling of the agricultural product because of the unavailability of wholly natural substitute products; and, (iii) is consistent with organic farming and handling.”

Category 1. Adverse impacts on humans or the environment?;

Category 2. Is the substance essential for organic production?, and;

Category 3. Is the substance compatible with organic production practices



# OFPA Checklist

- Are there adverse effects on environment from manufacture, use, or disposal?
- Is the substance harmful to the environment and biodiversity?
- Does the substance contain toxic inert ingredients?
- Is there potential for detrimental chemical interaction with other materials used?
- Are there adverse biological and chemical interactions in agro-ecosystem?
- Are there detrimental physiological effects on soil organisms, crops, or livestock?
- Is there a toxic or other adverse action of the material or its breakdown products?



# OFPA Key Checklist Question and Guiding Principle

Is there another practice that would make the substance unnecessary?



# EPA proposes new permit requirements for the discharge of pesticides into U.S. waterways.

June 2010

EPA is developing an NPDES general permit for point source discharges from the application of pesticides to U.S. waters, also known as the Pesticide General Permit (PGP), in response to a 2009 decision by the Sixth Circuit Court of Appeals (*National Cotton Council, et al. v. EPA*). The court vacated EPA's 2006 Final Rule on Aquatic Pesticides that said NPDES permits were not required for applications of pesticides to U.S. waters. Court requires permit requires by October 31, 2011.

Pesticide application use patterns not covered by EPA's Pesticide General Permit may need to obtain coverage under an individual permit or alternative general permit if they result in point source discharges to waters of the U.S.



# National Marine Fisheries Service finds EPA's proposed Pesticides General Permit threatens endangered and threatened species

June 17, 2011, Draft Biological Opinion

In its draft Biological Opinion (issued under 7(a)(2) of the *Endangered Species Act*), NMFS finds that the General Permit is likely to jeopardize the continued existence of endangered and threatened species and cause the destruction or modification of critical habitat of the species without the implementation of a reasonable and prudent alternative (RPA).

*“NMFS reached this conclusion because 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. . .”*



# To amend the Federal Insecticide, Fungicide, and Rodenticide Act to improve the use of certain registered pesticides (S. 3735, August 5, 2010; Sens. Lincoln, Chambliss)

## Overturns 6<sup>th</sup> Circuit Decision on NPDES

Section 3(f) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136a(f)) is amended by adding at the end the following: “(5) USE OF REGISTERED PESTICIDES.— Not- withstanding any other law, no permit shall be required for use under this Act, if that use is in accordance with this Act. . .



# Reducing Regulatory Burdens Act of 2011

H.R. 872, March 2, 2011, Rep. Robert Gibbs

## To reverse a 2009 Sixth Circuit court decision

To amend the *Federal Insecticide, Fungicide, and Rodenticide Act* (FIFRA) and the *Clean Water Act* (CWA) to eliminate provisions requiring pesticide applicators to obtain a permit to allow pesticides or their residues to enter waterways.

- Bill passed the House by a vote of 292-130 in April, 2011.
- Last major action: June 21, 2011. Senate Agriculture Committee passes bill out of committee, placed on Senate Legislative Calendar.
- H.R. 872 language as an amendment (#720) was overruled from inclusion in the recent China currency bill, S. 1619.

## H.R. 872

H.R. 872 would amend FIFRA by stating that EPA or a state permitting agency “may not require a permit under such Act for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under this Act, or the residue of such a pesticide...”

It would also amend the NPDES section of the CWA with the same language, while stipulating a few limited instances where it would still allow permits to be required, such as stormwater discharge or industrial effluent.



# Bill to amend the FIFRA to improve the use of certain registered pesticides.

S. 718, April 4 2011, Sen. Pat Roberts

## To reverse a 2009 Sixth Circuit court decision

To amend the *Federal Insecticide, Fungicide and Rodenticide Act* (FIFRA) stating that no *Clean Water Act* permit shall be required for the use of a pesticide that is registered under FIFRA.

- Latest Action: April 4, 2011. Referred to Senate Committee on Agriculture, Nutrition, and Forestry.



## S. 718

S. 718 would amend only FIFRA by stating “notwithstanding any other law, no permit shall be required for the use of a pesticide that is registered or otherwise authorized for use under this Act” or for any “biological control organisms” (as defined by the *Plant Protection Act*) to control plant pests or noxious weeds.



# Clean Water Cooperative Federalism Act of 2011

H.R. 2018, May 26, 2011, Rep. John Mica

To amend the *Federal Water Pollution Control Act (Clean Water Act)* to preserve the authority of each State to make determinations relating to the State's water quality standards, and for other purposes. The bill would also prevent EPA from refining its existing water standards to reflect the latest science without first getting approval from a state agency.

- Passed in the House by a vote of 239 – 184.
- Latest Action: On July 18, 2011 placed on Senate Legislative calendar.
- White House threatened to veto the bill.





## Other Related Bills

### **H.R. 1, Full-Year Continuing Appropriations Act, 2011**

Passed House, placed on Senate calendar

- Amdt 136 (Rep. Goodlatte), Blocks funds for the development of maximum contaminant load levels for the Chesapeake Bay. *(passed)*
- Amdt 157 (Rep. McKinley), Blocks EPA from revoking *Clean Water Act* permits based on adverse effects on water, fish or wildlife. *(passed)*

### **H.R. 2354, Energy and Water Development and Related Agencies Appropriations Act, 2012**

Passed in House, placed on Senate calendar

- Amdt 591 (Rep. Moran), Preserves EPA authority to use funds to change the definition of water under *Clean Water Act*. *(failed)*

# H.R. 2584, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012

Introduced in House (Rep. Simpson)

- Over 70 amendments added to bill, including prohibiting federal restoration of salmon to the San Joaquin River in California; and banning EPA from studying the impacts of pollution from industrial livestock facilities (factory farms, or concentrated animal feeding operations (CAFOs)) on waters.

