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ENVIRONMENTAL PROTECTION AGENCY

[OPP-2004-0095; FRL-7351-3]

Notice to Pesticide Retailers and State Agencies Regarding
Washington Toxics Coalition et al. v. EPA Litigation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to a January 22, 2004 Court Order, EPA has developed a point of sale notification regarding urban use pesticide products containing any of seven active ingredients. As further directed by the January 22 Order, EPA is hereby notifying retailers of lawn and garden pesticides in urban areas of California, Oregon and Washington through which ``salmon supporting waters'' pass that they are to make the point of sale notification whenever pesticide products containing these active ingredients are sold. The notifications will be distributed to retailers in these urban areas on or before April 5, 2004, by defendant-intervenors in this case (numerous groups representing pesticide registrants, growers and other pesticide users). Unit III. of this Notice provides retailers with the names of the affected active ingredients, information regarding the urban areas where the notifications must be made, and information regarding how retailers can obtain the point of sale notification if they have not received notifications from defendant-intervenors by April 5, 2004. Finally, the court further directed EPA to produce and provide copies of

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the point of sale notification to state pesticide agencies, state fish agencies and Land Grant University extension coordinators in the urban areas and to request that they, in turn, provide this information to certain Certified Applicators in California, Oregon and Washington. The notifications will be distributed to these parties by EPA on or before April 5, 2004. Until further judicial proceedings occur, EPA cannot determine the extent to which the Order will remain effective. If, however, the January 22, 2004 Order is stayed or modified, EPA intends to provide notice on its Web site (See Unit I.B.3. of the SUPPLEMENTARY INFORMATION for the Web site address).

FOR FURTHER INFORMATION CONTACT: Arty Williams, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-

0001; telephone number: 703-305-5239; fax number: 703-308-3259; e-mail address: williams.arty@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to certain pesticide product retailers and registrants, state pesticide agencies, state fish agencies and Land Grant University extension coordinators in California, Oregon and Washington. This notice may also be of particular interest to persons in California, Oregon and Washington who may wish to use a pesticide in urban areas of those states through which ``salmon supporting waters'' pass. The Court has defined ``salmon supporting waters'' in its January 22, 2004 Order, which is available at <http://www.epa.gov/espp>. Since other

entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under FOR FURTHER INFORMATION CONTACT.

B. How Can I Get Copies of this Document and Other Related Information?

1. Docket. EPA has established an official public docket for this action under docket identification (ID) number OPP-2004-0095. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall 2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

2. Electronic access. You may access this Federal Register document electronically through the EPA Internet under the ``Federal Register'' listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to view public comments,

access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ``search,'' then key in the appropriate docket ID number.

3. EPA Web site. You may also find these documents on EPA's Endangered Species Web site at <http://www.epa.gov/espp>.

II. Background

On January 30, 2001, the Washington Toxics Coalition and a number of other public interest groups filed suit against the U.S. Environmental Protection Agency in the United States District Court for the Western District of Washington alleging that EPA had failed to consult with the National Marine Fisheries Service (NMFS) on whether certain pesticides posed jeopardy to 26 federally listed endangered and threatened Pacific salmon and steelhead (salmon evolutionarily significant units (ESUs)). Under the Endangered Species Act (ESA), EPA must ensure that its registration of a pesticide is not likely to jeopardize the continued existence of species listed as endangered and threatened, or to adversely modify habitat critical to those species' survival. In addition to the obligation to ensure that its actions do not jeopardize listed species, the Agency must consult, as appropriate, with the U.S. Fish and Wildlife Service (FWS) or NMFS if a pesticide's use may affect listed species or designated critical habitat for a listed species.

On January 22, 2004, the District Court issued an Order granting interim injunctive relief pending EPA's compliance with an earlier Order of the Court that directed EPA to make effects determinations and consult, as appropriate, with NMFS regarding the effects of pesticides containing any of 55 active ingredients on threatened and endangered Pacific salmon and steelhead. Because of EPA's review and effects determinations made to date on many of these pesticides, the January 22 Order applied only to 38 of these pesticides. The Order (with some exceptions) enjoins, vacates and sets aside EPA's authorization of use of these 38 pesticides within 20 yards of salmon supporting waters for ground applications and within 100 yards of salmon supporting waters for aerial applications, in California, Oregon and Washington, effectively establishing buffer zones around those waters. The Court also ordered EPA to notify a variety of entities in the affected states of this injunction, and of previous Orders issued by the Court in this case, and to instruct registrants and the affected states to inform certain persons who sell, distribute and use pesticides of the Order. In the Federal Register of February 17, 2004 (69 FR 7478) (FRL-7345-8), EPA provided the notification and instruction ordered by the Court. The Court also ordered EPA to develop and facilitate, on or before April 5, 2004, the availability of a point of sale notification in urban areas in the three states for certain products containing any of seven active ingredients. The Court Order further directed EPA to produce and provide copies of the point of sale notification to state pesticide agencies, state fish agencies and Land Grant University extension coordinators in the urban areas and to request that they, in turn, provide this information to certain Certified Applicators in California, Oregon and Washington.

III. What Action is EPA Taking Today?

A. Notifications in Compliance with the Court Order of January 22, 2004

1. As directed by the January 22, 2004 Order, EPA has developed a point of sale notification regarding pesticide products containing any of the following seven active ingredients:

2,4-D

Carbaryl
Diazinon
Diuron
Malathion
Triclopyr BEE
Trifluralin

2. As further directed by the Court, EPA is hereby notifying retailers of lawn

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and garden pesticides in urban areas of California, Oregon and Washington through which ``salmon supporting waters'' pass that they are to make the point of sale notification whenever products containing these seven active ingredients are sold. The Court's Order also requires defendant-intervenors (groups representing pesticide manufacturers, growers and other pesticide users) to distribute the point of sale notifications to sales outlets in these urban areas on or before April 5, 2004.

The January 22 Order does not direct defendant-intervenors to distribute the point of sale notifications as ``labeling'' within the meaning of section 2(p) of FIFRA. To the extent, however, that intervenors or pesticide registrants wish to distribute the point of sale notification developed by EPA as labeling, EPA will exercise its enforcement discretion authority. This will allow defendant-intervenors to distribute the notifications for the duration of the Court's injunction without notifying EPA, without seeking or obtaining approval from EPA and without the need for establishment registration or reporting regarding the production of the notification. Further, EPA will not take enforcement actions on the basis of misbranding under FIFRA, solely with respect to the point of sale notification materials that may be attached to or accompany any of the subject pesticide products. Any labeling changes different from or in addition to the point of sale notification developed by EPA remain subject to FIFRA's labeling requirements and misbranding provisions, and the existing procedures of 40 CFR parts 152 and 167.

3. Through this Notice, EPA is requesting that state pesticide agencies, state fish agencies and Land Grant University extension coordinators in urban areas of California, Oregon and Washington, provide the point of sale notification to Certified Applicators certified in any category that would permit the applicator to apply pesticides in parks, golf courses and housing areas in the urban areas. EPA will provide to the state pesticide agencies, state fish agencies and Land Grant University extension pesticide coordinators in California, Oregon and Washington, copies of the point of sale notification on or before April 5, 2004.

B. Court's Definition of Urban Areas

The urban areas subject to the Order are defined by the Court as all urbanized areas in California, Oregon and Washington with populations of at least 50,000 people (as defined by the 2000 U.S. Census) within a federally listed salmon ESU. These areas are identified in exhibit 2 of the January 22, 2004 Order, which can be accessed on EPA's Web site at <http://www.epa.gov/espp>.

C. Time Period for Which These Requirements are in Effect

1. As explained in detail in the January 22, 2004 Order, the Order terminates automatically for a particular pesticide and salmon ESU upon the occurrence of one of the following: (i) Completion by EPA of its ESA section 7(a)(2) consultation obligation; (ii) the issuance by NMFS of a biological opinion; (iii) a finding by EPA made for ESA section 7 compliance purposes that the pesticide is ``not likely to adversely affect'' that particular salmon ESU, provided that NMFS has not rejected or affirmatively failed to concur in that ``not likely to adversely affect'' determination; or (iv) a finding by EPA made for ESA section 7 compliance purposes that the pesticide will have ``no effect'' on the particular salmon ESU. EPA's findings for particular pesticides and salmon ESUs as of the January 22, 2004 Order are set forth in exhibit 1 of that Order. As EPA makes additional effects determinations, or as NMFS moves ahead in its review of EPA's determinations, pesticide registrants, retailers and users should review EPA's Web site, as well as any additional information updating the Order, to ascertain the applicability of the Order, including the requirement to make point of sale notifications, in their area.

2. On February 17, 2004, CropLife America and other defendant-intervenors in the Washington Toxics Coalition case, appealed the Court's Order. If further judicial proceeding occur that may affect the Order, EPA intends to provide notice on its Web site at <http://www.epa.gov/espp>

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D. Obtaining Additional Copies of Point of Sale Notifications

1. Any sales outlet of lawn and garden pesticide products subject to the point of sale notification provisions in the January 22, 2004 Order, in these urban areas that have not received the point of sale notifications from defendant-intervenors by April 5, 2004, may obtain such materials from defendant-intervenors through the following Web site: <http://www.pestfacts.org>.

2. Any state pesticide agency, state fish agency, or Land Grant University extension coordinator subject to the request to distribute the point of sale notification to certain Certified Applicators who have not received the point of sale notifications from EPA by April 5, 2004, or who need additional copies of the point of sale notification, may obtain such materials by contacting the person indicated in this Notice under FOR FURTHER INFORMATION CONTACT.

E. What is the Agency's Authority for Taking this Action?

This action is taken pursuant to the January 22, 2004 Order of the Court in Washington Toxics Coalition, et al. v. EPA, CO1-0132 (W.D. WA).

List of Subjects

Environmental protection, Endangered species.

Dated: March 18, 2004.

James Jones,
Director, Office of Pesticide Programs.
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