Senate Committee on Agriculture, Nutrition & Forestry
Oversight Hearing to Examine the Impact of EPA Regulation on Agriculture
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Thank you, Chairman Lincoln and Ranking Member Chambliss, for the opportunity address the Committee on behalf of CropLife America and its members, as well as their customer the American farmer. CropLife America is the leading trade association representing the U.S. crop protection industry and our members supply virtually all of the crop protection products used by American farmers. CropLife America's member companies, and members of our counterpart association at RISE[1], proudly discover, manufacture, register and distribute crop protection products for American agriculture, and specialty use products such as those used to protect public health and safety.

CropLife members work with farmers, ranchers and growers everyday to ensure that crop protection tools are registered properly and used correctly. As a matter of fact, America's abundant, affordable food supply depends on the availability of safe, effective crop protection products. Significant portions of the $100 billion in US farm exports each year are made possible due to the careful use of crop protection products. CropLife America members support modern agriculture by looking forward: each year the crop protection industry spends hundreds of millions of dollars on research and development, with much of that investment going into producing data that meets or exceeds the Environmental Protection Agency's (EPA) information requirements and requests for pesticides.

CropLife America has a long history of working cooperatively with EPA and the U.S. Congress on issues affecting crop protection, human health and the environment. But, recently, the businesses that support American agriculture have seen serious deviations from the regular order, transparency and scientific integrity of EPA's pesticide review process. We hope that today's hearing will put EPA and agriculture back on a path to a more productive dialogue that leads to reasonable, timely, and consistent solutions to our shared concerns.

[1] Responsible Industry for a Sound Environment (RISE) – www.pestfacts.org

First, and most significantly, CropLife brings to the Committee's attention the new regulations for the Clean Water Act (CWA) permitting of aquatic pesticide applications. Never in the 62 years of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) nor 38 years of the CWA has the federal government required a permit to apply pesticides "to, over or near" waters of the U.S. for control of such pests as mosquitoes, forest canopy insects, algae, or invasive aquatic weeds and animals, like Zebra mussel. As a matter of fact, Congress specifically omitted pesticides in 1972 when it enacted the CWA, and despite major rewrites since, never looked beyond FIFRA for the regulation of the regular, label-approved uses of pesticides.

Nonetheless, last year, the U.S. 6th Circuit Court of Appeals overturned EPA's 2006 rule which specifically exempted from CWA National Pollutant Discharge Elimination System (NPDES) permitting of aquatic pesticide applications. Agriculture and the rest of the pesticide user community are still baffled by the federal government's choice not to more rigorously defend the 2006 rule. Especially since the government, in a brief to the Solicitor General, stated that the 6th Circuit got it wrong in *National Cotton Council v. EPA*, and, went so far as to suggest that the circuit court violated earlier Supreme Court precedent by failing to provide proper due deference to an agency determination.

CropLife America believes the 6th Circuit got it wrong, and EPA should have done more to defend its previous rule. The court agreed that pesticides when applied consistent with FIFRA label directions are not pollutants, and, as such, should not require NPDES permits. But, the court went on to rule that any residues that may remain after the beneficial use has been completed are pollutants, and, in order to control those residues, NPDES permits are necessary when the pesticides are initially *applied.* We believe that the court incorrectly reversed EPA's long-standing policy thus layering CWA regulations on top of established, rigorous FIFRA requirements.

We understand that EPA now hopes to finalize its NPDES general permit for certain pesticide uses in December 2010. EPA and the states would then begin implementing and enforcing the permit program starting in April 2011. We are very skeptical about this overly optimistic timetable. Even if things go smoothly, for the Federal government and individual

states to get all this work done well before April--and then for the regulated community to have time to get up to speed on compliance--seems nearly impossible to achieve. We have also heard EPA talk openly about the fact that this permit will require Endangered Species Act (ESA) "consultation" with either or both of the ESA authorities in the U.S. Departments of Commerce and Interior. That step alone seems impossible given the court deadline.

The permit will add performance, recordkeeping and reporting requirements to an estimated 1.5 million pesticide applications per year, and preempt the science-based ecological review of pesticides and label requirements for uses regulated under the FIFRA. And, this one decision overnight will nearly doubles the population of entities requiring permits under CWA and affects state agencies, local municipalities, recreation , utility rights-of-way, railroads, roads and highways, mosquito control districts, water districts, canals and other water conveyances, commercial applicators, farm, ranches, forestry, scientists, and many, many others. This is an enormous burden--and we see no related benefit to protection of humans or the environment.

Many of the businesses impacted by the permit are small businesses. The permit will threaten their economic survival, either due to the cost of obtaining a permit or due to their vulnerability to citizen law suits under CWA. New requirements for monitoring and surveillance, planning, recordkeeping, reporting and other tasks will create significant delays, costs, reporting burdens and legal risks from citizen suits for hundreds of thousands of newly-minted permit holders without enhancing the environmental protections already provided by FIFRA compliance. We have one example from an aquatic weed management company treating a marina in Washington State, showing a $1,500.00 permit is required to apply $350.00 worth of pesticides. A copy of this invoice is attached to this testimony.

To date, EPA's proposed general permit only covers applications of pesticides registered for aquatic use and applied to water or forest canopies into or over flowing or seasonal waters, and conveyances to those waters; it would not cover pesticide applications registered and intended for terrestrial use. However, activists indicate that they believe most pesticide applications should require a permit if there is even a chance that the pesticide could come in contact with any "water," either flowing water or seasonal drainage ditches that *could be a conveyance* to a water of the US. So, even though EPA may not currently cover farmland and

rangeland pesticide applications, nothing in the CWA or the proposed permit protects against citizen suits against farmers for not obtaining a permit. This establishes an uncertain, increased level of liability for farmers and ranchers, as well as users applying pesticides to golf courses and public utility rights of way, and private homes and businesses.

Madame Chairman and Senator Chambliss, it is clear that you understand the serious nature of the 6th Circuit's ruling and EPA subsequent actions. We commend you on the introduction of S. 3735, the FIFRA Paperwork Reduction Act. CropLife America fully supports the bill's intent to clarify that permits (specifically, water permits) are not required for pesticides applied in compliance with FIFRA. Along with so many other stakeholders, we believe that the legislation would re-establish the legal primacy of FIFRA over all pesticide use, as well as instruct EPA and the courts that Congress did not intend other environmental laws to overtake FIFRA and thereby creating duplicative regulatory burdens.

The next issue I would like to discuss is commonly referred to as spray drift -- which is the de minimus deposition of pesticide particles onto non-target areas during routine applications. EPA and state pesticide policies have long acknowledged that small amounts of pesticide drift are unavoidable and, when used according to the product's label, does not pose 'unreasonable adverse effects'(the risk standard in FIFRA) to humans or the environment. EPA's risk assessment and registration process include spray drift considerations, and label requirements include drift reduction management considerations. Despite these protections, anti-pesticide litigation and activists' policy pressures are pushing EPA and the states to consider zero-drift policies. And, in response, some state pesticide enforcement officials have indicated a need for more clear guidance on enforcement as relates to spray drift.

Therefore, in late 2009 EPA proposed new spray drift policy--that would result in new label language on the order of: "*Do not apply this product in a manner that results in spray [or dust] drift that <u>could cause</u> an adverse effect to people or any other non-target organism*." This precautionary-based proposal would have effectively replaced the FIFRA risk-benefit standard with a new zero-risk standard. We understand that EPA may still be planning to apply this new spray drift language to both professional and consumer product labels for uses commonly

performed by hired personnel, including, orchards, vineyards, farms, forests, golf courses, parks, roadway and other rights-of-way, and residential lawns and gardens.

EPA's new zero-drift language would abandon FIFRA's science-based risk-benefit standard of "no unreasonable adverse effect" and put the precautionary principle into practice. Applicators could *not* apply registered pesticides if spray or dust drifts *could* cause an adverse effect to people or any other non-target organism. They would have to anticipate and avoid potential situations, and be ready to promptly shut down operations depending on meteorological or ecological situation changes (e.g., the wind gusts, or birds fly nearby). This scenario would make it nearly impossible for farmers to protect their crops, and, opens the door to frivolous law suits and enforcement actions against farmers and other applicators, forces state regulators to become assessors of theoretical risks, and puts applicators at legal risk every time they go to work. EPA's proposed label language is unachievable, for both the applicator and the regulator. There is near universal agreement that, even in the most ideal circumstance, eliminating off-target spray drift is simply not possible.

CropLife America believes that EPA's proposed changes to labels are based on an unreasonable and unattainable new standard of no drift. Potential spray drift effects are already taken into account in EPA's risk assessment and assignment of registration restrictions and product label language. By changing the Spray Drift policy and label language, EPA would overlook the safety risk factors already built into product-use restrictions, as well as the additional protections of advanced drift-reduction technologies, such as Global Positioning System (GPS), guided shutoff nozzles; low-drift spray tips; large droplet/low pressure application equipment; drift-reduction product formulations, foaming agents and adjuvants; and on-board sensors and drift software that transmit prevailing wind conditions and real-time corrections to the pilot to limit spray drift at application height. This change in policy would unnecessarily eliminate from use many pest control products. Moreover, many state agencies, including the National Association of State Departments of Agriculture, commented that EPA's proposal does not lend to better guidance on enforcement, but only further confuses the issue.

CropLife America urges EPA to officially withdraw its recent policy proposal, and again seek input from legitimate stakeholders in order to craft a reasonable policy for drift that fully

incorporates use of drift-reduction technologies and is consistent with FIFRA standards. Congress could further help by making even more explicit that spray drift policy and regulation can and must reflect the risk standard of FIFRA.

Lastly, I would like to discuss agriculture's ongoing struggles regarding pesticide review under the Endangered Species Act (ESA). Several court decisions and out-of-court settlements related to the failure of federal agencies to strictly comply with the procedural consultation process required by the ESA have resulted in forcing the EPA, National Marine Fisheries Service (NMFS), and Fish & Wildlife Service (FWS) to conduct hasty consultations oftentimes based on outdated and/or incomplete information. Most recently, as a result of a court decision stemming from the *Washington Toxics Coalition vs. EPA* lawsuit, NMFS issued a Biological Opinion (BiOp) that was the basis upon which EPA made a precedent-setting decision to impose harsh restrictions on the use of critical crop protection products. These restrictions will essentially prohibit their use in public health vector control programs and food production in large areas of Washington, Oregon, California and Idaho. If the decision making process proceeds as-is, agriculture can expect similar restrictions stemming from the lawsuit on the use of a total of 37 active ingredients found in many commonly used products.

In 2004, the federal government first attempted a cure for this lack of consultations on FIFRA actions by taking advantage of the regulatory authority allowing counterpart ESA § 7 rules that were more tailored to an individual program.[2] Joint FWS/NMFS ESA § 7 counterpart rules for the FIFRA program were adopted at 69 Fed. Reg. 47732 (Aug. 5, 2004). Those counterpart rules relied more heavily on EPA's expertise to assess the effects of a given pesticide on listed species and wildlife generally.

The counterpart rules were challenged by environmental groups. On August 24, 2006, the U.S. District Court for the Western District of Washington largely overturned the counterpart rules. The court set aside key provisions in light of an adverse administrative record that suggested widespread dissatisfaction in the Services and their staff with EPA effects determinations that would be the basis for managing consultation under the counterpart rules.[3]

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[2] 50 C.F.R. § 402.04.
[3] *Washington Toxics Coalition v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

The court let stand an "optional formal consultation" process in which the Service(s) can adopt EPA effects determinations as their own in preparing of their separate biological opinions.

Since this time, EPA and the Services have been unable to cooperatively develop and implement a workable process that would result in the timely completion of accurate consultations. This is largely because the Services and EPA disagree on fundamental legal and science policy matters, and have dramatically different views on approaches to assessing and managing risk.

The process required by the ESA that directs EPA to consult with the FWS or the NMFS regarding the effect of pesticides on endangered species is broken. This issue will have nationwide consequences. In January 2010, the Center for Biological Diversity filed a Notice of Intent to sue the EPA that could negatively affect the use of nearly 400 crop protection compounds across the entire United States.

The law requires that the best available science and data be used to create BiOps. However, the Services apparently do not have the resources or experience to properly compile and evaluate data used to render a valid BiOp as evidenced by the fact that the current BiOps were created ***without***: (1) input from stakeholders in the affected areas regarding agricultural management practices and protective measures already in place; (2) input from experts in the state governments of Washington, Oregon, California and Idaho; (3) using the best available scientific data that show current use restrictions for products already protect fish as the amounts of products in the water are already below harmful levels; (4) statutorily-mandated analysis of the economic impact to agriculture resulting from the restrictions; (5) realizing that the definition of waters to be protected is so overly broad and ambiguous that it includes areas where there is no salmonid habitat; and, (6) considering whether the proposed changes regarding product use and labeling within the mandated timeframe can be implemented in a practical and timely manner.

In the short-term regarding where the BiOps already or about to be issued, CropLife America urges the Administration to delay or halt implementation of the bulletin restrictions until NMFS re-does the current BiOps using best available science. In the long-term regarding

the consultation process, we urge the Administration to reinstitute a revised form of the Counterpart Regulations that was issued jointly by the Services and EPA in 2004 that made the consultation process more efficient and timely.

Further, we ask consideration of the following to help facilitate agency action: (1) request a GAO report focused on the immense resources needed for pesticide consultations. The last GAO report, *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* (GAO-04-93) was released more than six years ago (March 2004) and recommended that the Services improve the data regarding time and efforts on the consultation process; (2) continued Congressional oversight to provide a formal process by which Congress could determine whether the Services and the EPA have upheld their respective legal and regulatory ESA obligations; (3) establish an intervening third party mechanism to assist in resolving the key issues and areas of dispute may require a new approach in the form of an open, third-party mechanism that allows for participation by all stakeholders (e.g., a "Keystone Center-like" Committee mediated process; a review and report from a Committee of the National Research Council (NRC) of the National Academies of Sciences; a new Federal Advisory Committee; or a negotiated rulemaking process); (4) consider enacting legislation directing the Administration to adopt one of these approaches. This and previous Administrations have had the discretion to initiate any one of these strategies to resolve outstanding issues, and each failed to exercise its authority to do so. Consequently, the train wreck that is the ESA consultation process for pesticides continues unabated.

We in the agribusiness industry exist for one reason – the American Farmer. American agriculture depends on the responsible use of crop protection products to feed, clothe and power our nation and the world. The topics I have discussed here today are only a sample of our challenges with EPA: we have serious concerns on many other important issues[4]. Much is as stake. CropLife America knows that the oversight and action of this Committee may well determine whether the pesticide program descends further into disarray - regulating based on

[4] Other EPA concerns, include:

- Serious process concerns relating the recent review, assessment and/or regulatory action on atrazine, aldicarb, carbofuran, endosulfan, methyl iodide and other active ingredients.
- Current and future activity relating to PRIA.
- Recent label-related actions on "false & misleading pesticide product brand names" and web-based labeling.

unsupported science, activism and politics - or whether you can thoughtfully guide EPA back to the order of FIFRA's transparent, science-based review and rigorous process. Again, thank you to Committee for allowing CropLife America to share our perspective, and I am happy to answer any questions you may about this testimony.