



BEYOND PESTICIDES

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October 8, 2004

Stephen Nesbitt, Assistant Inspector General for Investigations
Environmental Protection Agency
Office of Inspector General
1200 Pennsylvania Avenue, N.W. (2441T)
Washington, DC 20460

RE: Possible Abuse of Authority
EPA's "Labeling Statements on Products Used for Mosquito Control."
Docket ID No. OPP-2004-0018

Honorable Assistant Inspector General for Investigations, Mr. Nesbitt,

We are highly concerned about the authority of the EPA's Office of Pesticide Programs proposal released April 28, 2004 to alter the labeling statements on products used for mosquito control. There are essentially two issues we are questioning and would appreciate it immensely if your office would investigate. One concerns the legality of the Agency's re-interpretation of the label without an evaluation of the impact on human health and the environment of the subsequent new use patterns. The second concerns the Agency's disclaimer in the Scope of Policy section issued in its proposal. We understand that PR notices are designed to "adjust" interpretations of law, but in this case the PR notice appears to be changing law by allowing label protections to be overridden and perhaps even rewritten to allow the protections to be overridden.

EPA writes, "This Notice presents the Agency's guidance on appropriate label language for pesticide products intended for wide-area application to control adult mosquitoes. EPA occasionally undertakes initiatives such as this in order to improve and clarify pesticide product labeling. The specific label statements and label organization principles recommended in this Notice are intended to improve existing labels by clarifying language conveying environmental hazards posed by these products, as well as specific use directions and instructions to the applicators." (Draft Pesticide Registration (Pr) Notice 2004 -XX, p. 1.)

EPA is proposing to change label language of adult mosquito control products by allowing the vague, widely subjective and undefined notion of a "public health threat," "imminent threat to public health" or "public health emergency" as "declared by state, tribal or local health or *vector control agency*" [emphasis added] to override any environmental mitigation measures provided by the label (p. 10). It should be noted here that numerous municipalities across the country consider nuisance mosquitoes (i.e. mosquitoes not known to vector disease) a public health threat and that the proposal could be devastating for wildlife and the industries that rely on that wildlife

such as fishing associations, the honeybee industry, and agricultural operators reliant on pollinators.

The current product labels for adult mosquitoes use various measures to mitigate risks posed to certain sections of the environment. For example, most of the mosquito pesticides are highly toxic to bees and fish, and therefore restrictions are placed on the label regarding use where bees are visiting, where fish are present, buffer zones near waterways, and the like. The “recommendation” by the Agency to allow the label restrictions to be overridden would clearly result in elevated uses of the pesticide products in areas where they were previously not allowed, hence the creation of a new use. Such an agency determination is forbidden under the Administrative Procedure Act (APA), which not only sets forth non-waivable notice and comment procedures, but also forbids agency action that is “arbitrary and capricious.” *See* 5 U.S.C. § 551 et seq.

The Agency makes the argument that the changes will allow “officials to improve effective mosquito control and protection of public health, while ensuring that use of these products will not pose unreasonable risks to the environment.” (p.1). Yet, the Agency has no evidence to substantiate such a statement. The Agency has not fulfilled its legal obligation to evaluate the impacts of the new use patterns on human health and the environment to determine if such practices will or will not result in unreasonable adverse effects. In fact, the EPA excluded public health uses altogether from its 2002 cumulative risk assessment for organophosphates – many of which, including malathion, naled, and chlorpyrifos, are widely used for mosquito control. Furthermore, there has not been a risk assessment done for the majority of pesticides used for adult mosquito control (particularly, synthetic pyrethroids) since they were first registered in the 1970s and early 1980s.

Under the *Federal Insecticide, Fungicide, And Rodenticide Act* (FIFRA), as amended by the FQPA, Section 3(c)(5)(D), the law requires that the Agency must assess that: “when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.” If the Agency is to change the widespread and commonly recognized uses then certainly it must assess the impacts of those uses prior.

The stated assumption by the Agency that mosquito control is conducted responsibly and in a manner consistent with integrated pest management unfortunately is wholly incorrect. As a national membership organization concerned about the excessive use of hazardous pesticides, Beyond Pesticides along with a number of other public interest groups can attest that mosquito control – even when done for public health purposes – is not consistently managed nor is it always responsible. Since at least the outbreak of West Nile virus in 1999, this organization has received copious reports of careless, improper and even illegal application of adulticides (pesticides used for adult mosquito control) that we believe results in a higher public health threat (particularly for children, the elderly, people with respiratory problems like asthma, compromised immune systems, or a whole range of other illnesses that make them susceptible to additional illness from pesticide exposure) than that posed by the nuisance or potential disease vectoring mosquitoes. Unlike other professions, there is no oversight in the U.S. over methods of mosquito control and no document in particular that can be highlighted as the guidebook of best practices for safe and effective mosquito control.

The other issue concerns the Agency's disclaimer on page 12 of the Agency's Draft Pesticide Registration (Pr) Notice 2004 –XX. Section V. Scope of Policy, reads, "This Notice describes certain requirements set forth by FIFRA and its regulations and provides general guidance to EPA and affected parties. While the requirements in FIFRA and its regulations are binding on EPA and other affected parties, this Notice is intended to provide guidance to EPA, applicants, registrants and the public. As guidance, this policy is not binding on either EPA or any outside parties, and EPA may depart from the guidance where circumstances warrant and without prior notice. Registrants and applicants may propose alternatives to the recommendations in this Notice, and the EPA will assess them on a case-by-case basis. If a product does not meet the requirements of FIFRA section 2(q) or the regulations at 40 C.F.R. Part 156, the Agency may find the product to be misbranded and may take appropriate enforcement and/or regulatory action."

As you well know, EPA is the enforcement agency for pesticide label laws in the U.S., but this statement seems to negate the Agency's responsibility of enforcement of its "recommendations." EPA recommends vector control be allowed to override the precautions on the label, but if, for example, it does and mass bee kills result along with a lawsuit against the vector control, then the Agency may or may not prosecute the vector control. The EPA cannot abdicate its express obligations to enforce statutes such as FIFRA without actual statutory amendment.

It is further unclear what is meant by the Agency's statement that it "will assess on a case-by-case basis, requests for alternatives to the LABEL by registrants." Such a major issue cannot be left to essentially a closed-door assessment without all stakeholders; APA rulemaking requirements clearly apply to such an action. The EPA seems to have shifted from using the PR Notice to interpret regulation to effectively changing or negating laws. Further, the Agency is stating that the label law applies unless a wide range of authorities say it does not.

We respectfully request the Inspector General's office to investigate the legal aspects of what the EPA Office of Pesticide Programs is doing with this PR Notice. Please feel free to contact us with any questions or for more information. Thank you.

Sincerely,

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Encl.: EPA Draft Pesticide Registration (PR) NOTICE 2004-XX
EPA Comments on PR Notice 2004-XX by Beyond Pesticides and others, 7/21/04

cc: Nikki L. Tinsley, Inspector General