

Center for Regulatory Effectiveness

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January 8, 2010

The Honorable Joseph R. Biden, Jr.
President of the Senate
1600 Pennsylvania Avenue, NW
First Floor, West Wing
Washington, DC 20500

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Office of the Speaker
H-232, US Capitol
Washington, DC 20515

RE: Request for EPA Compliance with the Congressional Review Act

Dear President Biden and Speaker Pelosi:

The Environmental Protection Agency (“EPA”) has violated the Congressional Review Act (“CRA”) by not sending CRA-covered rules to the two Houses of Congress and to the Government Accountability Office (“GAO”). These rules include EPA’s “Endocrine Disruptor Screening Program; Policies and Procedures for Initial Screening,” 74 FR 17559 (April 15, 2009) (“EDSP Rule”).

The CRA, 5 USC § 801(a)(1)(A), states that “Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing- (i) a copy of the rule....”

Based on the clear statutory text of the CRA, the EDSP Rule does not take effect prior to their submission, along with other specified material to each House of Congress and the Comptroller General.

BACKGROUND

The CRS Says that EPA has Violated the CRA with regard to the EDSP Rules

The Congressional Research Service (“CRS”) recently published a report entitled *Congressional Review Act: Rules not submitted to GAO and Congress*, (December 29, 2009)(“CRS Report”).¹

¹ Available online at <http://op.bna.com/hl.nsf/r?Open=sfak-7zdtrd>.

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The CRS Report concludes that many agencies are violating the CRA by failing to submit all their covered rules to GAO, the House, and the Senate. These missing rules included the EPA EDSP rules. The CRS Report at pages 18-19 described these rules as follows:

The subjects covered by these missing rules also varied, and included the following: ...

An April 2009 EPA rule on “Endocrine Disruptor Screening Program,” which described....

The footnote for the listing for the EDSP Rule in the CRS Report names the same EPA Federal Register notice that is cited on the first page of this letter.

It is important to note that the CRA, 5 USC §804(3), defines “rule” in the broadest possible manner. A recent CRS letter to Senator Rockefeller explained that

The legislative history of the CRA emphasizes that by adoption of the § 551 (4) definition of the term “rule”, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variations of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”²

We also note that the Office of Management and Budget (“OMB”) reviewed the EDSP rules under Executive Order 12866, Regulatory Review, and listed it as a “Final Rule,” see below reprinted from www.RegInfo.gov.

AGENCY: EPA-OPPTS	RIN: 2070-AD61
TITLE: Endocrine Disruptor Screening Program (EDSP); Policy and Procedures for Initial Screening	
STAGE: Final Rule	ECONOMICALLY SIGNIFICANT: No
RECEIVED DATE: 03/13/2009	LEGAL DEADLINE: None
COMPLETED: 03/26/2009	COMPLETED ACTION: Consistent with Change
PUBLICATION DATE: 04/15/2009	

² Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service, “Applicability of the Congressional Review Act to a CMS Guidance Document Regarding Statutory and Regulatory Requirements to be Used in Reviewing State Requests to Extend Eligibility Under SCHIP,” January 10, 2008, p. CRS-7.

REQUESTED ACTIONS

We request that you advise EPA that, pursuant to the CRA, 5 USC § 801(a)(1)(A), the EDSP Rule is not in effect until the agency sends them to the House of Representatives, the Senate, and the GAO.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Tozzi".

Jim Tozzi
Member, Board of Advisors.

cc:

Mr. Gene L. Dodaro, Acting Comptroller General, GAO

Hon. Steve Owens, Assistant Administrator for Prevention, Pesticides and Toxic Substances, EPA

Hon. Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, OMB

Hon. John V. Sullivan, Parliamentarian, United State House of Representatives