

Endangered species litigation

Center for Biological Diversity v. EPA — Potential impact on pesticide use in production agriculture

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By Chris Paul

On May 30, 2007, the Center for Biological Diversity filed a lawsuit alleging that the U.S. Environmental Protection Agency (EPA) was failing to comply with Section 7(a)(2) of the Endangered Species Act (ESA) in regard to 47 pesticides and 11 species that are listed as endangered or threatened under the ESA (*Center for Biological Diversity v. EPA*, Case No. 07-2794-JCS, N.D. Cal.).



The species identified in the lawsuit are all reportedly found in the greater San Francisco Bay area: Alameda whipsnake, bay checkerspot butterfly, California clapper rail, California freshwater shrimp, California tiger salamander, delta smelt, salt marsh harvest mouse, San Francisco garter snake, San Joaquin kit fox, tidewater goby and the valley elderberry longhorn beetle.

Various allegations of impacts on the environment and the specific species harmed were claimed by the plaintiffs. These included a broad claim that the pesticides contaminated waters throughout the San Francisco Bay area, claims that Bay area sediments were impacted, and claims that pesticides could harm aquatic life and the identified species by causing acute toxicity and stress, reproductive and immunity disorders, endocrine disruption, cancer, birth defects, neurological impacts, skeletal malformations, weight loss and decreased resistance to disease. In short, the pesticides were blamed for about every possible problem, even where no evidence of actual causation was presented. *This is not said to diminish concerns that pesticides can, in certain doses, present serious problems, but the claims in this case were much more of the “could cause” rather than a “did cause” nature.*

Ultimately, 75 pesticide ingredients fell under scrutiny in this case:

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|---------------------------|-----------------------------|----------------------------|--------------------------|
| <i>2, 4-D</i> | <i>chlorpyrifos</i> | <i>imidacloprid</i> | <i>phenothrin</i> |
| <i>acephate</i> | <i>cyfluthrin</i> | <i>magnesium phosphide</i> | <i>phosmet</i> |
| <i>acrolein</i> | <i>cyhalothrin (lambda)</i> | <i>malathion</i> | <i>phorate</i> |
| <i>alachlor</i> | <i>cypermethrin</i> | <i>maneb</i> | <i>potassium nitrate</i> |
| <i>aldicarb</i> | <i>deltamethrin</i> | <i>mancozeb</i> | <i>propargite</i> |
| <i>aluminum phosphide</i> | <i>diazinon</i> | <i>metam sodium</i> | <i>resmethrin</i> |
| <i>atrazine</i> | <i>difencoum</i> | <i>methamidophos</i> | <i>s-metolachlor</i> |
| <i>azinphos-methyl</i> | <i>difethialone</i> | <i>methidathion</i> | <i>simazine</i> |
| <i>bensulide</i> | <i>dimethoate</i> | <i>methomyl</i> | <i>sodium cyanide</i> |
| <i>beta-cyfluthrin</i> | <i>diphacinone</i> | <i>methoprene</i> | <i>sodium nitrate</i> |
| <i>bifenthrin</i> | <i>disulfoton</i> | <i>methyl bromide</i> | <i>strychnine</i> |
| <i>brodifacoum</i> | <i>diquat dibromide</i> | <i>metolachlor</i> | <i>tetramethrin</i> |
| <i>bromadiolone</i> | <i>endosulfan</i> | <i>naled</i> | <i>thiobencarb</i> |
| <i>bromethalin</i> | <i>EPTC (eptam)</i> | <i>oryzalin</i> | <i>tralomethrin</i> |
| <i>carbaryl</i> | <i>esfenvalerate</i> | <i>oxydemeton-methyl</i> | <i>trifluralin</i> |
| <i>carbofuran</i> | <i>ethoprop</i> | <i>oxyfluorfen</i> | <i>warfarin</i> |
| <i>chlorophacinone</i> | <i>fenpropathrin</i> | <i>PCNB</i> | <i>zeta-cypermethrin</i> |
| <i>chlorothalonil</i> | <i>fipronil</i> | <i>pendimethalin</i> | <i>zinc phosphide</i> |
| <i>cholecalciferol</i> | <i>fluvalinate</i> | <i>permethrin</i> | |

The EPA agreed to a stipulated injunction to resolve the lawsuit. The stipulated injunction commits EPA to:

- A schedule by which EPA will review the registrations of pesticides containing any of 75 pesticide ingredients for their potential effects to one or more of 11 federally-listed threatened or endangered species (listed above) in eight counties around the San Francisco Bay area;



- Identify interim pesticide use limitations intended to reduce exposure to the 11 species during the time EPA is assessing these pesticides in consultation with the U.S. Fish and Wildlife Service;

- Develop and make available a brochure to inform pesticide users of the stipulated injunction and the 11 species involved;

- Mail copies of the stipulated injunction to all registrants of the pesticides subject to the stipulated injunction;
- Provide to certain retail establishments shelf tags they may use to identify certain pesticides identified in the stipulated injunction as “urban use” pesticides;
- Annually notify certain retail establishments and certain user organizations that the stipulated injunction is still in effect and refer them to EPA’s website for further information; and
- Display on its website a copy of the stipulated injunction, maps identifying the areas where the interim injunctive relief applies, and fact sheets for the 11 species identified in the stipulated injunction.

What does this mean for use of pesticides with these ingredients, and other pesticides, at other locations? First and foremost, users must use all pesticides and other chemicals as directed by manufacturer instructions and good application practices. Proper use is not only effective use, but also reduces potential legal exposures and actual damage to the environment. That said, some groups will invariably misuse legal processes to push a no-chemical use agenda. Further, some regulators may be complicit in using the legal process, including tacit acceptance or even encouragement of agency defendant status, to enter into settlements such as that in this case to

effectively limit pesticide use without engaging in the otherwise required administrative and scientific steps to establish actual harm and develop proper regulations.

Users of pesticides must be prepared to address the science of both impact of pesticide use on the environment, and impact of non-use on crop yields and quality. Users of pesticides must also recognize that they face a public relations disadvantage that requires preparation for addressing these issues of science in the best available forum, which is likely the courts, and most certainly not in the media. Aggressive legal intervention may be the best vehicle to present a complete case to a neutral fact-finder (the court) that has the tools and the duty to apply known standards for determining scientific fact, and can require an actual showing of cause and effect before arbitrarily limiting use of legal and useful products.

LINKS

- [Chris Paul's Bio](#)
- [McAfee & Taft AgLINC Newsletter - June 2011](#)
- [McAfee & Taft's Agriculture and Equine Industry Group](#)

Oklahoma City Tenth Floor • Two Leadership Square 211 N. Robinson • Oklahoma City, OK
73102-7103 (405) 235-9621 office • (405) 235-0439 fax
Tulsa 1717 S. Boulder Suite 900 • Tulsa, OK 74119
(918) 587-0000 office • (918) 599-9317 fax