

Stipulated Injunction and Order to Protect Red-Legged Frog (and Other Recent Injunctions)

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Three recent injunctions have invalidated registrations of certain pesticides in certain areas that are occupied or potentially occupied by federally listed species. The injunctions are outside of FIFRA and are not enforced by EPA, DPR or county agricultural commissioners, but they could expose applicators to third-party lawsuits. The injunctions pertain to California Red-Legged Frog, Salmonids (Chinook Salmon, Coho Salmon and Steelhead); and eleven Bay Area Species collectively referred to as the "Goby Eleven." The plaintiffs are anti-pesticide groups that are exploiting a technicality in the federal Endangered Species Act. The injunctions are based on alleged failure of the Environmental Protection Agency to consult with the U.S. Fish and Wildlife Service or (for salmonids) the National Marine Fisheries Service (Services). They are not based on documented harm to listed species, only the potential for harm. Almost all federally listed species were listed because of loss of habitat, some were never abundant and are naturally limited to small geographic areas. The best defense against claims of adverse effects of pesticides (or any other stressor) is a thriving local population of listed species. Informed applicators can help to protect local populations of listed species.

Older classes of pesticides, especially the organochlorines and DDT in particular caused well documented harm to federally listed species, notably Bald Eagle, Peregrine Falcon and Brown Pelican. As these pesticides were phased out the species have recovered. These cases have influenced a generation of wildlife biologists who view even relatively benign pesticides as harmful. Whereas the U.S. Fish & Wildlife Service exhibited restraint in finding jeopardy in only 1% of all non-pesticide consultations, they found jeopardy in 99% of all pesticide consultations.

The key to protection of listed species (or any other non-target species) is selective exposure. The injunctions specify absolute buffer zones regardless of site specific conditions and measures applicators can take to control exposure. Buffer zones are essential to define distances beyond which exposure is unlikely but they are misused as indiscriminant distances within which all use is prohibited.

The injunctions rely heavily on computer models that screen pesticides against worst case exposure scenarios, even in preference to field monitoring data. These models are useful to discern pesticides that pose no threat to listed species even under worst case conditions, but failure to pass this screen does not mean that a likelihood of harm exists, only that additional precautions are warranted. The EPA Endangered Species Protection Program allows for development of local plans as alternatives to default buffer zones. Local plans present an opportunity for communities to come up with alternative measures to protect listed species. When the Services accept these proposals with a "not-likely-to-adversely-affect" determination then the injunctions end as does the threat of further injunctions. A dialogue with the Services is needed to move beyond injunctions and absolute buffer zones toward more reasonable solutions. For more information, see: <http://www.cdpr.ca.gov> and select "Endangered species."