

Court-Ordered Injunctions on Pesticide Use and the Protection of Endangered Species

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Over the last 9 years, three separate pesticide use injunctions have resulted from litigation between U.S. EPA and environmental advocacy groups such as Californians Against Toxic Substances (CATS), Washington Toxics Coalition, and the Center for Biological Diversity

The first injunction was put into place in February of 2004, and is known as the “Salmonid Injunction”. It resulted from a lawsuit by environmental and fishery groups charging U.S. EPA with failure to solicit National Marine Fisheries Service (NMFS) formal consultation on the risks from 38 pesticides to 26 distinct populations of Chinook salmon, Coho Salmon and Steelhead. This injunction imposes prohibitions for use of 38 active ingredients 100 yards by air, and 20 yards by ground from “Salmon Supporting Waters”. It also requires EPA to consult with NMFS on the potential hazards posed by the 38 active ingredients to Salmon populations.

The first round of consultations in 2008 resulted in a Biological Opinion for Chlorpyrifos, Diazinon, and Malathion. DPR expressed disagreement with the Biological Opinion and posted comments to the Public Docket. The Biological Opinion proposed buffers of 500 feet for ground applications and 1000 feet for aerial applications. Additionally, it imposes requirements for fish kill reporting, runoff prevention measures, and environmental monitoring. Consultations between U.S. EPA and National Marine Fisheries Service have continued and their completion expected in the Summer of 2013:

<http://www.epa.gov/oppfead1/endanger/litstatus/effects/biop-revised-3-2012.pdf>

In response, U.S. EPA decided to impose variable buffers depending on application rate + droplet size + size of adjacent body of water. Nevertheless, for aerial applications the resulting buffers are still almost 1000 feet. For ground applications, the resulting buffers can be a minimum of 100 feet.

In November of 2009, U.S. EPA submitted 40 draft California Bulletins for Chlorpyrifos, Diazinon and Malathion. They were reviewed by DPR’s Endangered Species Program staff and comments sent to U.S. EPA. In January of 2010 U.S. EPA submitted the revised bulletins, including a test version of an application intended to help pesticide applicators calculate the corresponding buffer for their intended application rate, droplet size and body of water adjacent to the application site. U.S. EPA is asking registrants of Chlorpyrifos, Diazinon and Malathion to voluntarily modify labels for pesticides containing these active ingredients and refer users to the Bulletins Live Web site at: http://137.227.242.131/espp_front/view.jsp in order to find out which buffer size applies to the product they intend to apply. Registrants will be granted 18 months to generate new labels or update existing product. If the registrants don’t agree to modify product labels, they could face cancellation proceedings. The use limitations imposed by the bulletins will be voluntary until product labels are modified.

The second injunction in place is known as the “Stipulated Injunction and Order for Protection of California red-legged frog”. It became effective on 10/20/2006. The lawsuit by the Center for Biological Diversity alleged that U.S. EPA failed to solicit U.S. Fish & Wildlife Service (FWS) formal consultation on the risks from 66 pesticides to California red-legged frog (CRLF). It imposes prohibitions for use of 66 active ingredients 200 feet by air, and 60 feet by ground from California red-legged frog’s aquatic and upland habitats occurring in 33 counties. As with the Salmonid injunction, the Ninth District Court in Seattle ordered U.S. EPA to initiate Formal Consultations with the FWS, and schedule it in such a way it can be completed in approximately 5 years. Since 2007, U.S. EPA has been working on effects determinations for all 109 active ingredients included in this and other injunctions. This information has been made available at: <http://www.epa.gov/oppfead1/endanger/litstatus/effects/>

The third and latest injunction is referred to as the “Bay Area Stipulated Injunction and Order”. This lawsuit by the Center for Biological Diversity charges U.S. EPA with failure to consult U.S. Fish & Wildlife Service (FWS) on the risks from 75 active ingredients to 11 listed species in the San Francisco Bay Area. Eight counties are affected: Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano and Sonoma. The injunction imposes different “no-use” buffers for some of the 75 active ingredients, depending on the type of species. The species included are: 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 Valley elderberry longhorn beetle. The buffers imposed by this injunction range from 100 to 700 feet for ground applications, and from 200 to 700 feet for aerial applications.

During the public comment period, DPR recommended U.S. EPA replace the proposed interim buffer zones with use limitations specified in our WEB-based database PRESCRIBE.

U.S. EPA completed their review of public comments and posted the final injunction on May 17, 2010 in their Web site at: <http://www.epa.gov/espp/litstatus/stipulated-injuc.html>

All these injunctions share some common denominators:

- 1) They have resulted from the lack of consultation by U.S. EPA on the effects of “pesticide x” on “species y” with the U.S. Fish & Wildlife Service (FWS) or National Marine Fisheries Service (NMFS).
- 2) They impose a consultation schedule between EPA and The Services (FWS or NMFS) typically 4 to 6 years minimum.
- 3) Public vector control and invasive weed control programs are exempt. However, in the case of the Salmonid Injunction, the use limitations resulting from consultation don’t provide exemptions for vector control or invasive weed control programs.
- 4) They can only be enforced through citizen lawsuits. Federal, State, County and other local authorities are “vacated’ from enforcing them.
- 5) As products go through consultation, if deemed “not likely to adversely affect” a species they will be taken off the injunction list.
- 6) If deemed “likely to adversely affect” a species, EPA may impose restrictions to be enforced through labeling.

This process is very contentious, generating a great deal of mistrust between the regulated community and regulatory agencies – in this case U.S. EPA. It also affects DPR, since each injunction comes with its own set of buffers and species; DPR’s comprehensive, programmatic

approach to protection of endangered species is being impacted by the multitude of injunctions and their litigation-derived buffers. The imposition of court-ordered absolute buffers further discourages good land stewardship efforts, since growers who in previous years might have managed their fields to include field-edge vegetation cover, hedgerows, etc., see their habitat enhancement efforts as a potential liability if listed species move in. Under these injunctions - even with exemptions- some invasive weed programs are still facing no-use zones that become refuges for noxious weeds.