

# WASHINGTON UPDATE

By Lee Van Wychen

January 2010

## **EPA Says Pesticide Ruling Was Wrong But Opposes High Court Review**

EPA is urging the Supreme Court not to grant an industry petition to review a key Clean Water Act (CWA) case requiring discharge permits for pesticides spraying on or near waters, although the agency also says the decision was wrongly decided, offering the Obama EPA's first detailed legal defense of the original exemption for spraying.

The agency's arguments are another signal EPA will interpret narrowly the U.S. Court of Appeals for the 6th Circuit's ruling in *National Cotton Council, et al. v. EPA* -- a decision that industry officials have feared could cause a host of nonpoint sources to fall under CWA regulation. The 2009 ruling vacated EPA's 2006 rule exempting agricultural pesticide users, state pest controllers and others who spray pesticides on or near water from having to obtain a National Pollutant Discharge Elimination System (NPDES) permit.

Environmentalists hailed the decision, saying it would protect water quality. Activists also say industry groups are exaggerating the precedent the ruling sets. But industry officials, fearing the impact of the ruling, have withdrawn litigation challenging other EPA permit regulations from the 6<sup>th</sup> Circuit. And Sen. Max Baucus (D-MT) last year floated legislative language that would exempt pesticide spraying from the CWA, reflecting the depth of concern (Water Policy Report, July 20). Further, Senate agriculture Committee Chair Blanche Lincoln (D-AR) and 36 other lawmakers Dec. 4 urged the Supreme Court to grant industry's request for review of the case, arguing the decision would have broad impacts.

The appellate court in *Cotton Council* ruled that pesticides that remain in water once their purpose -- eliminating aquatic pests -- has been accomplished fall under the CWA's definition of "pollutant" because they are "chemical wastes," according to a Jan. 7 brief filed by the Department of Justice (DOJ) on behalf of EPA. The court further ruled that pesticides are a "point source." Pollutants discharged by point sources require NPDES permits under the water law, so pesticides sprayed on or near waters require a permit, the court said. EPA's 2006 rule exempting spraying from the permits argued the pesticides are not a "pollutant" when sprayed, but only become a "chemical waste" "pollutant" at some point afterward, when they are no longer fulfilling their pest killing purpose. The "pollutant" "chemical wastes" are not "from" a point source because they were not a "pollutant" when discharged, EPA argued. EPA said pesticides spraying is a nonpoint source not requiring a NPDES permit.

In its Jan. 7 brief, DOJ argues the 6th Circuit erred in not affording EPA proper deference to interpret key terms of art, leading to "an erroneous application" of the high court's Chevron doctrine, which outlines when courts should grant federal agencies deference.

But despite its displeasure with the ruling, DOJ says the high court should not review the decision because it only applies to a very narrow range of activities and, because the 6th Circuit granted a two-year stay of its ruling, EPA will have sufficient time to craft a general permit that will avoid undue disruption stemming from the ruling. "Although the government agrees that the court of appeals misapplied Chevron to EPA's 2006 rule, the Sixth Circuit's ruling does not conflict with any decision of this Court or another court of appeals," the brief says. "And while the decision below potentially applies to thousands of applications of pesticides to or over, including near, waters protected by the CWA, the court of appeals' two-year stay of its mandate has provided time to EPA and authorized States to mitigate the administrative burdens resulting from the decision. Indeed, EPA is currently in the process of developing general permits governing the types of pesticide applications covered by its rule."

Environmentalists in a brief filed Jan. 11 are defending the Cotton Council decision on the merits and also urging the high court to reject industry's certiorari petition. "The Sixth Circuit's opinion is perfectly in line with more than 35 years of federal jurisprudence addressing the purview of the Act's permit program generally, and its specific holding that certain point source pesticide discharges to waters of the United States are subject to the Act's permitting requirements is in accord with the holdings of three separate panels of the Ninth Circuit," environmentalists' brief says. Charles Tebbutt, Charles Caldart and Reed Super are three of the lawyers who signed the environmentalists' brief.

On the key issue of whether pesticide residue is "from" a point source, the brief notes that "pesticides become waste material with no transformation whatsoever" and argues "even if one were to assume that none of the pesticide became waste until after discharge to the water, there would be nothing remarkable about the conclusion that the discharge to the water of something that inexorably becomes a pollutant shortly after discharge is the discharge of that pollutant." The brief further argues industry officials are exaggerating the precedent the ruling sets. "Imagining catastrophe, Petitioners argue that the Sixth Circuit's opinion will sweep into the Act's permitting program a variety of activities Congress did not intend to regulate. These arguments either misread the court's opinion or ignore other portions of the statute. At best, they suggest that this case warrants review because other courts may mistakenly extend the Sixth Circuit's analysis beyond the opinion's holding. This is not the standard for certiorari."

### **USDA R&D Gets a 30% Boost**

This month, Congress finally passed the FY 2010 agriculture spending bill. Included in the bill is a 30% (\$61 million) increase for the Agriculture and Food Research Initiative! Contributing to this significant increase in funding for USDA science was the collective efforts of the AFRI Coalition, which is co-led by ASA, CSSA and SSSA; National Coalition for Food and Agriculture Research (NCFAR); and Association of Public and Land-Grant Universities (APLU), and 2) new, visionary leadership for USDA science, namely Under Secretary for Research, Education, and Economics (REE) and USDA Chief Scientist Rajiv Shah and newly named Director of the National Institute of Food and Agriculture (NIFA), Roger Beachy.

Additional final FY 10 agriculture spending bill numbers include: Hatch formula which received a 3.8% increase over FY 2009, bringing total funding to \$215 million; McIntire-Stennis was slated for a 5.3% increase over FY 09 for a total funding of \$29 million; Integrated programs saw a 5.5% increase (total funding \$60 million); Sustainable Agriculture Research and Education (SARE) got a small boost to \$14.5 million; Smith-Lever extension formula funding was increased 3% to \$297.5 million. Most education programs received flat funding. Meanwhile, the Energy and Water (funds DOE Office of Science) and Commerce, Justice and Science (funds NSF and NOAA) and Interior and Environment (funds US Geological Survey and Forest Service) spending bills are making their way through the Senate. Conferences with the House on these appropriations measures should begin soon.

### **Economics Brief on Invasive Species Issued by USDA-ERS**

'Integrating Invasive Species Prevention And Control Policies' is the title of a report from the USDA Economic Research Service (ERS) which synthesizes the implications of a series of studies that describe the information and data needed by public and private decision makers.

Keeping detailed records about the estimated size of an invasion, control costs, and the numbers of organisms removed—or acreage cleared—will enable decision makers to modify control programs as needed to improve program efficacy and economic efficiency. Information about an organism's ability to spread and a potentially invaded ecosystem's carrying capacity is also important. Understanding how agricultural producers and homeowners, both at home and abroad, will respond to outbreaks and public prevention/control policies is important, especially when the decision maker can affect the risk of infestation only indirectly.

The report is at <http://www.ers.usda.gov/Publications/EB11/>

The USDA ERS Briefing Room on Invasive Species Management is at <http://www.ers.usda.gov/Briefing/InvasiveSpecies/>

### **Weeds Lurk as a Menace to Food Production**

It has been said before but needs to be said again: crop loss figures clearly show that weeds should be regarded as growers' No. 1 enemy. That comes as no surprise to weed scientists who agree with the observations of newly retired FAO weed scientist R. Labrada-Romero that weeds pose a huge problem and threat to global food production.

Consider, Dr. Labrada-Romero remarks, that smaller area farmers spend more than half the time in their fields performing weed control . Yet, if farms are going to increase productivity, one of the first things that must done is to significantly improve weed management.

"Droughts, insects and diseases--like Swine Flu-- are attention grabbers because their effects are dramatic," Labrada-Romero points out. "Weeds are different. They play havoc quietly all year round, year after year." Little wonder weeds are dubbed a huge, largely unnoticed "hunger-maker."

According to Land Care New Zealand, weeds are responsible for \$95 billion a year in lost food production globally, compared to \$85 billion for pathogens, \$46 billion for insects, and \$2.4 billion for vertebrates (excluding human-caused losses). That \$95 billion loss translates into nearly 400 million tons of wheat, or more than half the world's production expected in 2009.

Perhaps nowhere are these losses more critical than in Africa where weeds have been identified as a major cause of stagnating yields and production. Labrada-Romero notes that "with only manual labor available, African smallholders need to weed every day and that means a family can't handle more than 1 to 1.5 hectares. Proper management would allow them to farm more land and grow more food."

In an interview for an FAO news article, Labrada-Romero mentions the need for applying more advanced technologies such as solarization, biocontrol, and herbicides, the latter only if absolutely necessary. "The fight against weeds," he insists, "must go on, otherwise more people will starve."

--excerpted, with thanks, from an FAO news article; thanks also to R. Labrada-Romero.

### **EPA to Review Atrazine, Again.**

U.S. EPA announced the start of a review of an herbicide used heavily to protect crops, golf courses and lawns. The agency is weighing a possible revision of its risk assessment for the herbicide, atrazine. Steve Owens, assistant administrator for EPA's Office of Prevention, Pesticides and Toxic Substances, said the review is spurred by Administrator Lisa Jackson's interest in improving the management and assessment of chemical risks. "As part of that effort, we are taking a hard look at the decision made by the previous administration on atrazine," Owens said in a statement.

EPA's review will focus on atrazine's potential for causing cancer, birth defects, and premature and low-weight births. The agency plans to examine data generated since 2003 from laboratory and population studies and seek advice from an independent science advisory panel.

EPA plans to finish its evaluation of the pesticide by September 2010 and seek a peer review then. The agency also plans to seek public comments about how to spread the word to utility customers about results of atrazine monitoring in their water supplies. Syngenta AG, a leading atrazine manufacturer, said it continues to stand behind the safety of the herbicide and that it expects EPA to make a positive decision based on sound science.

"EPA has looked at atrazine extensively, and other respected regulatory authorities have looked at it extensively, and they've all come to the same conclusion," said Sherry Ford, a Syngenta spokeswoman. "We look at a transparent review as a part of the normal transparency process at EPA, and we will participate fully."

### **Obama to issue order to expand NEPA**

Obama administration officials reported that the president may issue an executive order which would add climate change to the list of factors federal agencies must consider when policies and projects are evaluated. Currently requiring agencies to take into account environmental factors such as land use, biodiversity and air quality, the 40-year-old National Environmental Policy (NEPA), claim environmentalists should also include consideration of climate change. Understandably, business groups oppose the proposed revision claiming that such stricter requirements would slow down federal approvals and ultimately hurt the economy. Currently, a few state and federal agencies already consider climate impact when analyzing projects.

### **Invasive species cause \$1.4 trillion of losses a year globally**

Costs of damage caused by invasive species globally are estimated to be a staggering \$1.4 trillion per year. The inaugural meeting of the Int'l. Congress on Biological Invasions convened in Fuzhou, China, in November with the aim to "Strengthen international collaboration and work together towards managing biological invasions under global change". The enormous threat of invasive species continues to require more attention by policy-makers globally. The congress heard the latest figures from China, that suggest there are now more than 500 species which are recognized as being invasive. About 300 of these species have proven to be harmful. More than half of the 100 dangerous alien species listed by the World Conservation Union have been found in China.

Invasive Alien Species are comprehensively addressed under Article 8h of the Convention on Biological Diversity and the ICBI meeting was an important contribution to the CBD process. The United Nations has declared 2010 as International Year of Biodiversity. As invasive species constitute the 2nd biggest threat (after habitat destruction) to biodiversity globally, the timing of ICBI 2009 in the lead-up to 2010, was particularly strategic. Key outcomes of the 2009 congress include: 1) A call to governments, international organizations and conventions to reaffirm their commitment to CBD Article 8h, to prioritize invasive species and provide the necessary resources to address this global threat; 2) Establishment of an Int'l. Expert Committee to provide scientific, technical and policy guidance to the Int'l. Congress of Biological Invasions on the development of an ICBI website, e-newsletter and a forum for the exchange of scientific ideas and capacity building; and 3) Agreement that the Int'l. Congress on Biological Invasions would in the future be held on a regular basis (4-year interval).

Lee Van Wychen, Ph.D.  
Director of Science Policy  
The National and Regional Weed Science Societies  
900 2nd St. NE, Suite 205  
Washington, DC 20002  
[Lee.VanWychen@WSSA.net](mailto:Lee.VanWychen@WSSA.net)  
202-746-4686