

Chemically Speaking

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Organic Oversprayed Request Supreme Court Action

Representing Minnesota organic farmers Oluf and Debra Johnson, Farmers' Legal Action Group, Inc. (FLAG), has filed a Petition for *Writ of Certiorari* asking the U.S. Supreme Court to overturn part of a Minnesota Supreme Court ruling that decreases the integrity of the organic food chain by allowing increased pesticide contamination on organic farmland.

On August 1, 2012, the Minnesota Supreme Court held that USDA-accredited certifying agents do not have the discretion to decertify organic farm fields that have been contaminated by third-party application of prohibited chemical substances (such as pesticides and herbicides) unless testing reveals chemical residues at certain levels. In the petition, the Johnsons argue that federal law allows organic certifying agents to decertify organic fields due to the drift of prohibited substances (e.g., chemical pesticides and herbicides) caused by a third party (e.g., a commercial pesticide applicator). The Johnsons assert that the Minnesota Supreme Court's

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decision misunderstood the U.S. Department of Agriculture National Organic Program regulations and framework.

In 2005, 2007, and 2008, the Johnsons' organic certifier had decertified their organic fields due to contamination from pesticide overspray caused by commercial pesticide applicator Paynesville Farmers Union Cooperative Oil Company, the defendant in this case. When the Johnsons sued the company for damages caused by the overspray, including crop losses and monetary losses from the decertification of the organic crop, the Minnesota Supreme Court held that the company was not responsible for damages related to decertification because the organic certifying agent was wrong to decertify the Johnsons' organic farmland. "The Minnesota decision produced a catch-22 for farmers who are victims of pesticide drift," said FLAG Staff Attorney Amanda Heyman, who authored the petition. "USDA says organic farmers must take contaminated fields out of organic production for three years and forfeit the higher organic market price. But the Minnesota Supreme Court says that these same farmers can't recoup financial losses from the companies who damage organic farming businesses by overspraying chemicals. This decision is both unfair and wrongly decided. "The Minnesota Supreme Court decision, according to the Johnsons, creates a diminished standard for toxic chemical contamination of USDA-certified organic products in Minnesota compared to other states and foreign nations. The focus on producing food without synthetic chemicals is one of the cornerstones of the USDA organic program. Consequently, the Minnesota Supreme Court decision disrupts the efficient administration of an important national program and threatens adverse economic consequences for multi-state certifying agents, organic farmers, and organic handlers. The Johnsons' petition focuses solely on the Minnesota Supreme Court's interpretation of the federal

National Organic Program regulation regarding pesticide drift on organic farmland. The petition does not seek to overturn the Minnesota Supreme Court's ruling that pesticide drift cannot constitute trespass. (*USAgnNet*, 12/4/12).

Certain GM Traits Eligible for Carbon Offset Credits

The United Nations-overseen emissions-market regulator has approved a system of rules that will allow farmers using genetically improved seeds to claim carbon offset credits, according to Arcadia Biosciences Inc. Nitrogen-efficient seed allows farmers to maintain high crop yields while using less fertilizer, the Davis, California-based agricultural-technology company said in a statement. Nitrogen is a large source of agricultural emissions because less than half the element applied to fields is used by plants, with most of the rest entering water systems or converting into nitrous oxide, a greenhouse gas almost 300 times more potent than carbon dioxide, the company said.

"There are significant opportunities for agriculture to play a central role in the cost-effective mitigation of climate change," Eric Rey, president of Arcadia Biosciences. "We are particularly pleased with the approval of this new methodology because it is the first to recognize the huge opportunity for genetic improvements to mitigate climate change and create value at multiple levels."

The rules approved by the Clean Development Mechanism (CDM) Executive Board in Bonn, known as a methodology, will potentially add to supply of credits in the emission trading market. The CDM, formed as part of the 1997 Kyoto

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Protocol, is the largest carbon offset market, having generated \$215 billion in investment for greenhouse gas mitigation projects around the world, Arcadia said. (*Bloomberg*, 12/19/12).

Illegal Pesticides Uncovered

The U.S. Environmental Protection Agency (EPA) has issued legal complaints against two companies, the Daifuku Trading Corp. of Englewood, New Jersey and the Everyday Group of Brooklyn, New York, for selling unregistered pesticides. Both companies face penalties for violating federal pesticides law. Daifuku faces additional fines for making false and misleading statements on one of its pesticide products, for not properly labeling six products and for the improper importation of pesticide products. Under federal law, products used to kill pests must be registered with the EPA and contain labels written in English with instructions on their proper use. "When stores sell illegal pesticides, the health and safety of people are put at risk," said EPA Regional Administrator Judith A. Enck. "Unless pesticide products are registered with the EPA and have the required EPA labels, they should not be sold. Store owners should protect the health of their customers and remove any unregistered pesticides from their shelves immediately."

The EPA inspections of the Daifuku Trading Corp.'s stores revealed that the company was selling unregistered and misbranded pesticide products, including insect repellents, laundry detergents and disinfectants. In addition, Daifuku failed to notify the EPA it was importing pesticide products into the U.S., also a violation of federal pesticide law.

The EPA inspections of the Everyday Group's offices and a warehouse revealed the company was selling pesticide products that had not been registered with the EPA to stores throughout the area. Among the products were mothballs imported from China that could be easily mistaken for candy. The product, called Fuji Lavender Moth Tablets, contain para-dichlorobenzene, which is a toxic chemical.

Before a pesticide product is registered, the producer of the product must provide data from tests conducted according to EPA guidelines to ensure that the product will not be harmful to people's health. The EPA examines the ingredients and the way in which the product will be used, and assesses a wide variety of potential human health and environmental effects associated with its use. Distributors and retailers are responsible for ensuring that all pesticides distributed and sold fully comply with the law.

Federal pesticide law additionally requires the filing of a "Notice of Arrival" prior to the arrival of all imported pesticides into the United States. Companies must submit detailed information on the Notice of Arrival form to allow the EPA to determine if the pesticide is approved for use in the United States or meets one of the few allowable exemptions. Products not registered with the EPA for use in the United States are denied entry and destroyed by U.S. Customs and Border Protection, or immediately exported back to their country of origin under Customs supervision.

The EPA recently reached penalty agreements with three companies for previous violations of pesticide regulations. Man Li Trading, Hong Kong Supermarket, and NJ Cash and Carry were found to have violations. During 2011 and 2012, EPA Region 2 conducted over 250 inspections of retail

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outlets, and pesticide distributors and importers, removing over 20,000 units of illegal pesticides in the process. (EPA Release, 12/28/12).

Atrazine Settlement Final

On October 23, the law firm of Baron and Budd announced a \$105 million settlement on behalf of more than 1,000 community water systems that have detected the chemical atrazine in their water supplies. In late November, the deadline to appeal the court's approval of this settlement expired and the settlement is now final. "This settlement sends a message to chemical companies that they must bear the responsibility for products that contaminate water supplies and provides significant economic relief to water providers," was the conclusion provided by the firm. This settlement concludes class action litigation that has been pending for more than eight years against Syngenta Crop Protection, which produce and market atrazine and atrazine-containing materials. According to Baron and Budd, the water providers who will benefit from the settlement will likely receive their share of proceeds within approximately 60 days. Atrazine, an agricultural herbicide widely used in the United States and particularly in the Midwest, is commonly used to control weeds in corn and soybean crops. Once applied, the chemical migrates into surface waters and drinking water. As a result, many municipalities and water providers have detected atrazine in their water supplies and spent significant sums to remove it from finished water. The settlement will reimburse these costs to more than 1,000 water providers who serve water to more than 30 million Americans. In 2004, a water provider filed a lawsuit in the Illinois state court system against Syngenta AG and Syngenta Crop Protection, Inc. The water provider alleged that Syngenta knew atrazine would run off into surface water such as

lakes, streams and rivers but decided to market the product with complete disregard for the expense water providers would ultimately pay to remove the dangerous chemical from the water before supplying it to consumers. In 2010, numerous other public drinking water providers filed a similar suit in the United States District Court for the Southern District of Illinois. After conclusive discovery and hard-hitting litigation, the parties reached a class action settlement. (USAgNet, 11/30/12).

Pesticide Registrations and Actions

Food Related Actions

- On December 13, the Florida Department of Agriculture and Consumer Services (FDACS) registered the pesticide combination of sedaxane, difenoconazole, mefenoxam, and thiamethoxam (CruiserMaxx Vibrance Cereals®) for control of pests in barley, oat, rye, triticale, and wheat. The EPA registration number for the Syngenta Crop Protection product is 100-1383. (FDACS PREC Agenda, 1/3/13).
- Based on a request by Syngenta Crop Protection, the EPA has approved tolerances for the fungicide propiconazole (Tilt®/Orbit) on sugarcane. (*Federal Register*, 12/19/12).
- On December 20, the FDACS reported that the EPA has issued a specific exemption for the use of hop beta acids (Hopguard®) for control of Varroa mite in honey bee colonies. The exemption runs from 1/1/13 to 12/31/13. (FDACS letter, 12/20/12).

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- Based on a request by IR-4, the EPA has approved tolerances for the insecticide/miticide fenpyroximate (Portal®). Tolerances of importance to the region include avocado, canistel, citrus, pop/field corn, cotton, cucumber, mango, melons (subgroup 9A), pecan, papaya, sapodilla, strawberry, black/mamey sapote, star apple, and fruiting vegetable (group 8-10). (*Federal Register*, 12/12/12).
- Based on a request by IR-4, the EPA has approved tolerances for the insecticide zeta-cypermethrin (Mustang®). Tolerances of importance to the region include avocado, canistel, buckwheat grain/hay/straw, rye grain/hay/straw, mango, oat grain/hay/straw, papaya, sapodilla, black/mamey sapote, and star apple. (*Federal Register*, 12/7/12).
- Based on a request by IR-4, the EPA has approved tolerances for the insecticide pyriproxyfen (Knack®). Tolerances of importance to the region include blueberry, citrus fruit, herbs, bulb vegetables (group 3-07), and fruiting vegetables (group 8-10). (*Federal Register*, 12/12/12).
- On January 8, the FDACS authorized experimental use of the herbicide penoxsulam (Galleon® LZR Aquatic Herbicide) through the end of the year for aquatic sites. The EPA experimental use permit for the SePRO Corp. product is FL13-EUP-01. (FDACS letter, 1/8/13).
- Based on requests from Dow AgroSciences and Helena Chemical Company, all uses (turf) of the insecticide halofenozide (Mach 2®) have been terminated. (*Federal Register*, 12/21/12).

Other Actions

- The EPA is seeking comment on its proposed decision to conditionally register the new active ingredient sulfoxaflor, formulated as a technical product and two end-use products for use in production agriculture. The proposed use sites are barley, bulb vegetables, canola, citrus, cotton, cucurbit vegetables, fruiting vegetables, leafy vegetables, low growing berry, okra, ornamentals (herbaceous and woody), pistachio, pome fruits, root and tuber vegetables, small fruit vine climbing (except fuzzy kiwifruit), soybean, stone fruit, succulent, edible podded and dry beans, tree nuts, triticale, turfgrass, watercress and wheat. The Agency finds this decision to be in the public interest because the registration of this pesticide for use on these crops will provide growers with a new pest management tool to kill a broad spectrum of piercing/sucking insects, including species that are difficult to control. For example, the agency granted a Section 18 Emergency Exemption in Arkansas,

Non-food Actions

- On January 8, the FDACS canceled the SLN FL-090006 for the use of diquat (Knockout®) for weed control in aquatic sites. The uses are available on SLN FL-110009 for (Tribune®). The EPA registration number for the Syngenta Crop Protection product is 100-1390. (FDACS letter 1/8/13).

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Mississippi, Tennessee and Louisiana for use of unregistered sulfoxaflor on cotton to control the tarnished plant bug, an insect that has developed resistance to alternative registered pesticides. Sulfoxaflor is also a valuable new tool for managing the development of pesticide resistance. The EPA's proposed decision document and supporting documents to conditionally register the new active ingredient sulfoxaflor is posted at www.regulations.gov under EPA-HQ-OPP-2010-0889 for a 30-day public comment period. (OPP Update, 1/14/13).

- The EPA states that more than 53 million children and 6 million adults spend significant amounts of time in schools. They face risks associated with not only exposure to pesticides, but also pests. Since 1996, the EPA has invested more than \$3.2 million in extramural resources to support projects designed to advance the cause of S(school)IPM. In 2010, EPA's Office of Chemical Safety & Pollution Prevention (OCSPP) launched an initiative to promote the expanded use of IPM in schools. The effort was intended to accelerate the move from mere IPM demonstration to actual implementation. The EPA's vision is that all of the nation's children be covered by a verifiable and ongoing school IPM program. The EPA will compile existing information and tools into a single, accessible location for school officials looking to adopt IPM practices and will establish IPM coordinators in each of its 10 regions. The coordinators will play a key role in encouraging schools to adopt IPM practices. Coordinators will also draw on existing relationships with SIPM change agents, states and tribes in their given regions.

Coordinators will allow SIPM activities to be tailored to address regional concerns, while still remaining aligned with national goals. A Center of Expertise for School IPM will also be established. The Center will provide leadership and expertise to help ensure that the goal of implementing IPM programs across the country is achieved. The Center will be located in Dallas, TX, and will be established in early FY13. *GreenIndustryPros.com* (12/19/12).

Pesticide Potpourri

- CropLife Foundation (CLF) announced that it will publish a comprehensive report in spring 2013 entitled "The Role of Precision Seed Protection in Modern Crop Production." The report closely examines research from case studies conducted throughout the U.S. and outlines the benefits of using pesticides for sustainable crop production. The report cites many specific benefits for modern crop production as a result of precision seed protection, including stress tolerance under drought conditions, reduction of soybean cyst nematode damage, chemical footprint reduction, reduced cost, and reduced erosion. The report states that global precision seed protection sales grew from \$700 million in 1997 to \$2.25 billion in 2010 and are projected to exceed \$3 billion in 2016. (*Plant Health Progress*, 12/20/12).
- A new agricultural electronic insect trapping device has the potential to automatically monitor insect pest populations and reduce the amount of insecticides emitted into the environment. The Z-Trap is an insect

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trapping device that automatically detects the number of target insects captured by the trap and sends the data wirelessly to the grower's mobile phone or computer. The Z-Trap is a Purdue University discovery being commercialized by Spensa Technologies Inc. "Tracking insect populations is a fundamental part of any pest management program and being able to track those numbers in real time electronically through a smartphone or a computer helps growers choose how to use insecticides more judiciously," said Johnny Park, president and CEO of Spensa and a Purdue research assistant professor in electrical and computer engineering. In the U.S. in 2010, crop growers lost \$20 billion to insect damage and spent \$4.5 billion on insecticides, according to Park. "Currently the technology is being used to collect data on codling moths, oriental fruit moths, and leaf rollers in apple orchards," said Tom Puterbaugh, Spensa Technologies vice president of products. "But Z-Trap will eventually be used to collect insect data from other types of crops including almond, walnut, orange, pear, grape, cherry, vegetable, corn, soybeans and many other stored products." Z-Trap can be used in conjunction with MyTraps.com, an online app that helps growers and pesticide consultants track the number of insects for any agricultural crops. The technology is available as an online subscription service.

"Z-Trap is a hardware that collects insect data and MyTraps.com is a software that presents the data to growers and consultants so they can make insightful decisions about insect control," Park said. (Purdue Release, 12/12/12).



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