

# CropLife America Washington Perspectives

National Agronomic Environmental Health and Safety School  
2011

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*Helping Feed a Hungry World and Advancing Agriculture*

# CLA Engagement

- CLA is engaged on issues affecting American Agriculture and the Crop Protection Industry with coordinated action on Business Plan Priorities from different areas of expertise
  - Government Affairs
  - Legal
  - Science and Regulatory including Stewardship Activities
  - Communications

# 2011 CLA Business Plan

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## Priority Issues include:

- Endangered Species Act Litigation and Compliance
- CW Act and NPDES Permitting Requirements
- Human Health Risk Assessment
  - Endocrine Modifier Screening
- Environmental Risk Assessment
- Spray Drift
- Chemical Facility Site Security
- Stewardship
  - Container and Containment
  - Pollinator Protection
- Modern Agriculture and Sustainability
- Toxic Substance Control Act Reform (TSCA)
- Reauthorization Pesticide Registration Improvement Act (PRIA) (2012)
- Farm Bill (2012)



# Clean Water Act

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## Section 301 (a)

Discharge of a pollutant from a point source into the navigable waters of the US



- Exemption to violation – permit under the National Pollutant Discharge Elimination System (NPDES)

# Court Decisions about CWA Jurisdiction

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- Courts have issued conflicting decisions on whether NPDES permits are required for “aquatic” pesticide applications:
  - **Headwaters, Inc. v. Talent Irrigation district (9<sup>th</sup> Cir. 2001)**
    - Application of pesticides to irrigation canals to control vegetation **requires** NPDES permit.
  - **League of Wilderness Defenders v. Forsgren (9<sup>th</sup> Cir. 2002)**
    - Aerial application of pesticides to waters of the United States **requires** NPDES permits.
  - **Fairhurst v. Hagener (9<sup>th</sup> Cir. 2005)**
    - Application of pesticides to a water of the U.S. **does not require** an NPDES permit.



# NPDES Aquatic Pesticide Rule

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- EPA published a final rule in 2006 to resolve the issue: “Application of Pesticides to Waters of the United States in Compliance with FIFRA” (40 CFR 122)
- Rule stated that Clean Water Act NPDES permits are not required when applications of pesticides to, over or near waters of the U.S. are consistent with FIFRA
- Rule overturned January 7, 2009 :
  - National Cotton Council vs EPA, 6th Circuit Decision:
  - a three-judge panel struck down EPA’s 2006 Final Rule, ruling that it conflicts with CWA permit requirements

# CLA Action on NPDES Permitting

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## Legislative

HR 872 – “Reducing Regulatory Burdens Act of 2011”

(legislation to correct Sixth Circuit ruling: NCC v EPA (2009))

- H.R. 872 passed in the U.S. House of Representatives (292-130) March 31
- H.R. 872 passed the Senate Agriculture Committee by voice vote June 21
  - ❖ H.R. 872 – next step = U.S. Senate floor for final vote
  - ❖ HOLDS by Senators Boxer (D-CA) and Cardin (D-MD)
  - ❖ **CONTACT YOUR SENATORS...Support HR 872**

## Regulatory

- EPA development of NPDES Pesticide General permit
  - NMFS BiOp (June 24) exacerbates the burden of the PGP
  - Court’s stay extended to October 31

# Endangered Species Act (ESA) Consultation Requirements

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- **Assessment**

- EPA specifically considers the potential for effects on endangered species in risk assessment before registering a plant protection product

- **Review**

- Federal Actions (such as registering a pesticide) must be reviewed by Services responsible for administering the Act to ensure that there is no impact of that action on endangered species

- **Mitigation**

- The US Fish and Wildlife Service and National Marine Fisheries Service provide an Opinion of measures required to mitigate risk to endangered species

# A Broken Process

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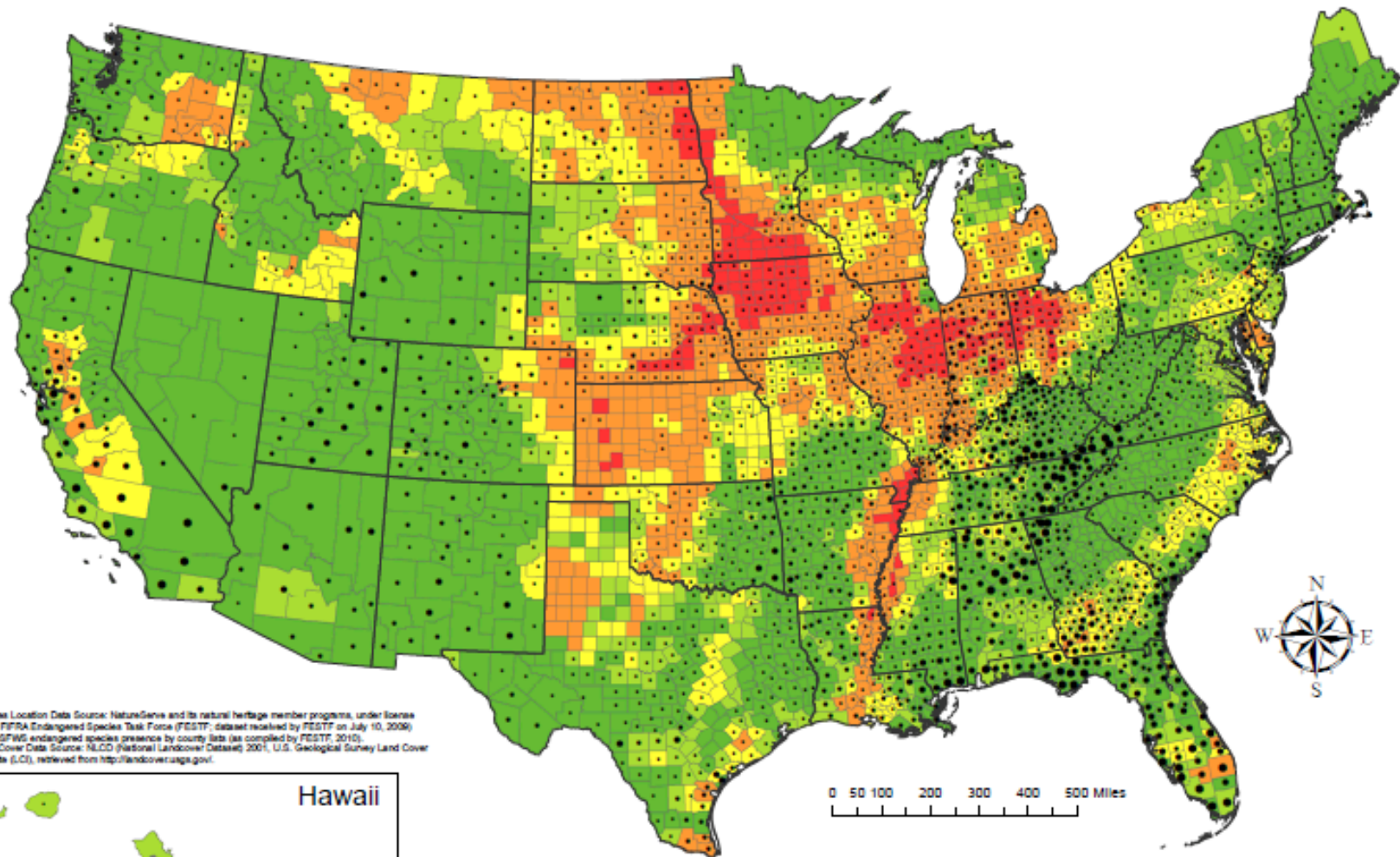
- Courts threw-out key portions of agreement designed to streamline process
- There is disagreement between EPA and Services on how to do a Risk Assessment – they both do their own
- Citizen action lawsuits filed re: EPA's **failure to consult** with Fish & Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) for specific active ingredients
  - Procedural, not merit-based lawsuit
  - No claim or evidence that products actually harm species – only that no consultation occurred
- ES Assessments are being done under court order with interim mitigation being ordered by the courts
- Departments and Agencies involved have requested input from the National Academy of Sciences to resolve impasse

# ESA: Lawsuits – Significant Case History

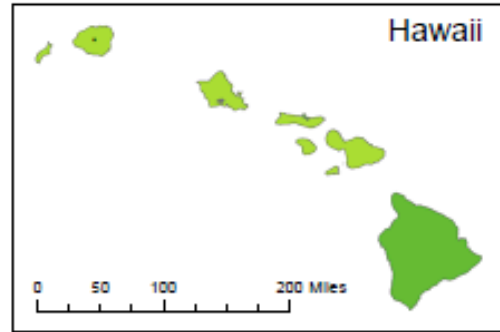
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- **Washington Toxics Coalition v. EPA (2001)**
  - Activists sue EPA for alleged 7(a)(2) violation for not consulting on effects of 900 pesticides on 26 species of Pacific salmon
- **Natural Resources Defense Council v. EPA (2003)**
  - Chesapeake Bay species, atrazine
  - Settlement agreement: 27-month consultation schedule, no immediate interim relief
- **Center for Biological Diversity v. Leavitt (2004)**
  - Barton Springs Salamander, 6 pesticides
  - Settlement agreement: 25-month schedule, no immediate interim relief
- **Center for Biological Diversity (“CBD”) v. Leavitt (2005)**
  - Red-Legged Frog, 66 pesticides
  - Stipulated injunction
    - ❖ EPA consultation schedule
    - ❖ Buffer Zones
- **Goby 11 (2009)**
  - San Francisco Bay, 11 species, 74 pesticides
    - ❖ Buffer zones and consultation schedule
- **Center for Biological Diversity/Pesticide Action Network N. America v. EPA (2011)**
  - 214 species, 306 chemicals, 49 states
  - True nationwide lawsuit

# Number of Species in CBD v. EPA (2011) and Percent Cultivated Crops per County



Species Location Data Source: NatureServe and its natural heritage member programs, under license to the FIFRA Endangered Species Task Force (FESTF; dataset received by FESTF on July 10, 2006) and USFWS endangered species presence by county lists (as compiled by FESTF, 2010).  
 Land Cover Data Source: NLCD (National Landcover Dataset) 2001, U.S. Geological Survey Land Cover Institute (LCI), retrieved from <http://landcover.usgs.gov/>.



### Number of species per county (obtained from the FESTF IMS on 2/8/2011)

- 1 - 2
- 3 - 5
- 6 - 9
- 10 or more

### Percent cultivated crops (class 82; NLCD, 2001)

- 0 - 5
- 5 - 15
- 15 - 35
- 35 - 75
- 75 - 100

- Additional notes:
1. The gray wolf is also identified in Alaska.
  2. The following species are also identified in U.S. Territories:
    - a. Guajon
    - b. Piping plover
    - c. Puerto Rican crested toad
    - d. Roseate tern
    - e. West Indian manatee
  3. The killer whale is included in the lawsuit, but not represented on this map.

# CLA Involvement

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- Science – Research and Position Papers
  - Data quality and use of best available information
  - Risk Assessment
    - ❖ Exposure evaluation
    - ❖ Effects determinations
  - Research on key NAS panel issues
- Legislative Actions
- Legal

# ESA on Capitol Hill (112<sup>th</sup> Congress)

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- May 3 - Joint Agriculture and Natural Resources Committee hearing: “At Risk: American Jobs, Agriculture, Health and Species – the Costs of Federal Regulatory Dysfunction”
  - Hearing to consider ESA consultations for FIFRA pesticides
- June 23 - Letter from Chairmen (Hastings – Natural Resources, Lucas – Agriculture, and Simpson – Interior Appropriations) to Obama Administration Cabinet officials to expand scope of National Academy of Sciences (NAS) review
- HR 2584 - Interior Appropriations FY’12
  - Calvert Amendment to suspend implementation of FIFRA-related biological opinions for one year.
- HR 2596 – Commerce-Justice-Science FY’12
  - Kingston Amendment to expand the scope of the NAS review to include ALL outstanding science questions and economic impacts
- Engagement by states (NASDA, et al.) to support congressional action

# CLA Action re: ESA Litigation

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- **Intervenor**
  - *CBD/PANNA v. EPA (“MEGA”)* (N.D. Cal.)
    - ❖ Complaint: EPA violated ESA Section 7(a)(2) by failing to ensure registration of 381 chemicals not likely to jeopardize 214 endangered species and their critical habitat.
  - *NCAP et al v. EPA* (W.D. Wa.)
    - ❖ Alleging that EPA violated ESA Section 7(a)(2) by failing to ensure that its registration of six pesticides (diazinon, malathion, chlorpyrifos, carbaryl, carbofuran, and methomyl) is not likely to jeopardize listed salmon or adversely modify or destroy the salmon's critical habitat

# EPA Spray Drift Label Language

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Proposed that labels will include drift statements as:

- Design Standards
- Performance Standards

*“...Do not apply this product in a manner that results in spray [or dust] drift that harms people or any other non-target organisms or sites.”*

CLA Position:

policy guidance **MUST** be within scope of FIFRA’s  
“no unreasonable adverse effect”

# Spray Drift Research and Stewardship

- CLA is supporting publication of best management practices in spray application
- CLA is supporting research aimed at better understanding factors that influence drift potential and quantifying potential off-site movement under varying field conditions





# FIFRA Litigation

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Congressional intent → FIFRA to protect registrants' due process rights

- *Reckitt v. EPA* (D.D.C.)
  - ❖ CLA amicus brief → EPA cannot circumvent FIFRA and cancel a product's registration and deny a registrant proper due process.
- *National Corn Growers et al. v. EPA* (D.C. Cir.)
  - ❖ CLA amicus → Government's improper denial of the right to a hearing in conjunction with the banning of a product, and the vesting of almost unlimited discretion in an agency to deny statutory hearing rights

# Human Health Risk Assessment Priorities:

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- Endocrine – together with the Endocrine Policy Forum;
  - Reduce duplication and redundant testing
- Ag Health and epidemiology –
  - Establishing criteria for inclusion of epidemiology studies in risk assessments
- Food Safety
  - Communications – ‘Dirty Dozen’
- Harmonizing DNT evaluation between PMRA and EPA.
- Securing science basis for regulation to allow for waiver of immunotoxicology studies based on retrospective analysis.
- Promoting science and the next generation of toxicology with the TGx publication.

# Stewardship

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- Container and containment rule implementation
- ACRC
- Life-cycle approach to product Stewardship
  - Handling
  - Application
  - Field management

# Chemical Facility Security

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U.S. House advancing legislation to extend CFATS authority

- does not include IST mandate
- U.S. Senate pursuing same course

# Thank You

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