

Environmentalists Try to Bypass EPA at the State Level to Stop Pesticide Use in Oregon

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Unwilling to wait for the U.S. Environmental Protection Agency (EPA) to act, the Northwest Environmental Advocates (NWEA) on August 9 filed a petition requesting that the Oregon Environmental Quality Commission implement measures mitigating the use of pesticides described in several biological opinions issued by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS).

Generally, NWEA is asking that the Commission incorporate restrictions from the biological opinions into Oregon's water quality standards and require the use of buffers throughout the state for all pesticides—or ban their use altogether. It also asks that the Commission itself petition the Oregon Department of Agriculture to adopt restrictions on the sale and use of pesticides, including rules to restrict the use of pesticides by farmers, and that the Oregon Board of Forestry adopt greater restrictions on pesticide use.

The underlying bases for the petition are six biological opinions issued by NMFS covering 28 pesticides, a 1989 biological opinion by FWS covering 41 pesticides, and a biological opinion regarding EPA's pesticides general permit under the Clean Water Act, allowing applications of pesticides to water. According to NWEA, species at risk in Oregon covered by the opinions include threatened and endangered salmon, steelhead, inland fish, frogs, turtles, and salamanders.

All the biological opinions have concluded that continued use of the covered pesticides according to label directions would jeopardize threatened and endangered species and cause adverse habitat modification. As a result, each includes reasonable and prudent alternatives (RPAs) to avoid jeopardy and reasonable and prudent measures (RPMs) to lessen any incidental take. As a practical matter, the most impactful and restrictive mitigation required by the biological opinions is large no-spray buffers around any waters that may harbor threatened and endangered species.

NWEA contends that because the EPA has not implemented any of the RPAs and RPMs in a timely fashion, Oregon is under obligation to do so. If it does not, NWEA claims, the state will be in violation of both the Clean Water Act (CWA) and the Endangered Species Act (ESA).

The CWA allegations in the petition are tied to water quality standards that states are required to set under the Act. These include: 1) setting beneficial uses; 2) formulating narrative and numeric criteria protective of the uses; and 3) crafting an antidegradation policy. There are supposedly three ways Oregon is in violation here. First, because salmonids and aquatic life have been designated as beneficial uses, the state's failure to implement the RPAs and RPMs violates the requirement to support those uses. Next is that continued unmitigated use violates the state's narrative criteria, which includes, for example, a requirement that there be "no amounts, concentrations, or combinations that may be harmful to aquatic life or wildlife." Last is that the state is ignoring its antidegradation policy by allowing the continued use of pesticides that NMFS and FWS have concluded are jeopardizing threatened and endangered species and are adversely modifying or destroying habitat.

As a corollary, NWEA also warns that the state could lose federal funding under the Coast Zone Reauthorization Amendments, which control funding to states under the CWA and Coastal Zone Management Act, if it does not put mechanisms in place before November 15, 2013 to avoid violation of state water quality standards.

Lastly, and perhaps as motivation for state action, NWEA alleges that EPA's inaction to implement the biological opinions obliges the state to avoid an unlawful "taking" of a threatened or endangered species. Therefore, they claim, that unless the state takes some action, such as revising its water quality standards as suggested by NWEA, the state—and even local governments and private individuals—could be liable for "take" under the ESA and subject to potential civil and criminal penalties.

The Commission has 90 days to act on the petition.