



November 2, 2009

Fr: Student Animal Legal Defense Fund of Lewis & Clark Law School
10015 S.W. Terwilliger Blvd., Portland, Oregon 97219
Phone: (503)768-6795 Fax: (503)768-6671
<http://go.lclark.edu/saldf>

To: Public Comments Processing
Attn: EPA-HQ-OPP-2009-0629
Office of Pesticide Programs Regulatory Public Docket
Environmental Protection Agency
1200 Pennsylvania Ave, NW.
Washington, DC 20460-0001

**Re: Petition to Revoke Tolerances for 13 Pesticides [Docket No. EPA-HQ-OPP-2009-0629;
FRL-8432-9]**

I. Introduction

The Student Animal Legal Defense Fund (SALDF) at Lewis & Clark Law School submits the following comments on the petition from the American Bird Conservancy to revoke the import tolerances of 13 pesticides. We support the petition in full and agree that the EPA should revoke the import tolerances of cadusafos, cyproconazole, diazinon, dithianon, diquat, dimethoate, fenamiphos, mevinphos, methomyl, naled, phorate, terbufos, and dichlorvos. The EPA has obligations under the Endangered Species Act (ESA), Executive Order 13186 (EO 13186), and the Migratory Bird Treaty Act (MBTA) to avoid regulatory actions that have negative effects on migratory birds and to take actions that promote the conservation of threatened and endangered species. By allowing for the import tolerances of pesticides known to be hazardous to birds, the EPA is not fulfilling these obligations.

The Lewis & Clark Law School Student Animal Legal Defense Fund ("SALDF") is devoted to enhancing the welfare and legal status of all animals, wild and domestic, through legal advocacy. The Lewis & Clark chapter is the oldest and largest of over 130 chapters at law

schools across the Nation. Lewis & Clark Law School is home to the preeminent animal law program, which draws students from across the country.

II. The EPA has an obligation under the Endangered Species Act to support the conservation of endangered and threatened species, which includes a number of species of US migratory birds.

The EPA is required under the Endangered Species Act of 1973 (ESA) to actively conserve endangered and threatened species [§7(a)(1)] and to ensure that no action carried out or authorized by the EPA is likely to be deleterious to the conservation of endangered and threatened species [§7(a)(2)]. In furtherance of these and other requirements, the EPA Office of Pesticide Programs Environmental Fate and Effects Division (EFED) regularly develops risk assessments for pesticides, including the evaluation of associated environmental hazards and risks to endangered and threatened bird species. Largely because of the findings of such risk assessments, the EPA has cancelled the use of the pesticides at issue in the United States.

Many of the migratory bird species at risk from the use of the pesticides at issue are listed as endangered or threatened species. When these birds migrate to their wintering grounds in Central and South America, they are exposed to the pesticides used in and around their habitat, which may include the pesticides at issue. Currently, the EPA maintains tolerances for these pesticides on agricultural crops that are imported to the U.S. By maintaining these import tolerances the EPA is consenting to the use by foreign countries of pesticides that are known to be hazardous to many bird species. The EPA should revoke these import tolerances in order to fulfill its obligation to actively conserve endangered and threatened migratory bird species and to ensure that they are not authorizing an action that is likely to be deleterious to the conservation of endangered and threatened migratory bird species.

A. ESA §7(a)(1)

As a Federal agency bound by the ESA, the EPA has a duty to actively promote the conservation of endangered species and threatened species. Under §7(a)(1) of the ESA, "federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act."

In accordance with §7(a)(1), the EPA should utilize its authority to revoke the import tolerances for the pesticides at issue in the petition. Much of the work done by the EPA is strictly domestic, but the purposes of the ESA include the conservation of endangered and threatened species in foreign territory, including migratory birds' wintering habitats. In fact, the success of the EPA's domestic work is dependent upon effective and thorough foreign policy, because migratory birds need healthy habitat and protection from hazardous pesticides during the entire year, not just while they are in the United States. Since US agencies cannot directly regulate foreign countries, the EPA must act to impose indirect regulation on hazardous pesticide use abroad by revoking the import tolerances. Such revocation would actively promote the conservation of endangered and threatened species as required by the ESA.

B. ESA §7(a)(2)

As a Federal agency bound by the ESA, the EPA has a duty to ensure that no action carried out or authorized by the EPA is likely to be deleterious to the conservation of endangered and species. According to §7(a)(2) of the ESA, each Federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species..."

Given the conditions of §7(a)(2), the EPA should utilize its authority to revoke the import tolerances for the pesticides at issue. As stated above, the health and survival of migratory birds is dependent upon the well-being of their environment, and lack of exposure to hazardous pesticides, year-round. By approving the import tolerances for the pesticides at issue, the EPA has authorized an action that is likely (and, for the majority of these pesticides, has been shown) to jeopardize migratory birds' environments and health. To correct this violation of §7(a)(2), the EPA should revoke the current import tolerances for the pesticides at issue. Such revocation would help ensure that no action carried out or authorized by the EPA is likely to be deleterious to the conservation of endangered and threatened species.

III. Executive Order 13186 authorizes the EPA to revoke import tolerances for pesticides deemed hazardous to birds.

As expressed in the petition of the American Bird Conservancy (ABC), Executive Order 13186 (EO) orders the EPA to consult with the U.S. Fish and Wildlife Service to "identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations . . .", and furthermore to "develop and use principles, standards, and practices that will lessen the amount of unintentional take . . ." (EO 13186, Section 3(9)).

Sections 13 and 15 of the EO provide further support to the EPA's obligations regarding the conservation of migratory birds. These sections mandate that each agency shall "promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State . . ." (EO 13186 Section 3(13) and "develop partnerships with non-Federal entities to further bird conservation." (EO 13186 Section 3(15)). The EPA is thus authorized and obligated to promote migratory bird conservation with other countries, and also to create partnerships with non-Federal bodies to do so. Current EPA regulations, which allow other countries' use of pesticides deemed hazardous to birds, ignore these mandates. Ignoring these mandates constitutes a violation in itself, because the mandates are directives rather than permissions to act. The violations are made particularly serious and necessary to remedy because the trade arrangements are having an opposite effect to the mandates: they are discouraging migratory bird conservation in international activities and with other countries.

The EPA Office of Pesticide Programs Environmental Fate and Effects Division (EFED) has already identified the risk to birds from the pesticides at issue in this petition. Accordingly, all of these pesticides have been banned for use in the U.S. Despite disallowing the use of these pesticides domestically, the EPA continues to approve or maintain import tolerances for these hazardous pesticides. Thus, Central and South American farmers have access to the U.S. market to sell a variety of crops grown with the use of the very same pesticides deemed hazardous to birds by the EPA. Migratory birds, while protected in the U.S., may nonetheless be exposed to these hazardous pesticides in their wintering grounds.

The EPA should change its practices in order to meet its obligations under EO 13186. It should do so by revoking import tolerances on the hazardous pesticides at issue. If the EPA continues to allow import tolerances for such pesticides, at the very minimum it is explicitly required by EO 13186 to consult with the Fish and Wildlife Service to determine what measures it should take to lessen the amount of unintentional take.

The EPA had duly recognized the environmental risks posed to birds from the hazardous pesticides at issue. Pesticides do not discriminate; what is hazardous to birds in the U.S. is hazardous to those same birds when in their wintering habitats in Central and South America.

By continuing to approve and maintain import tolerances for hazardous pesticides, the EPA is failing to implement, as required by the various sections of the EO cited above, principles, standards, practices, and partnerships to lessen the amount of unintentional take and to promote bird conservation. To best promote bird conservation and protection, the EPA should unequivocally oppose the use of pesticides determined to be hazardous to birds. Since it does not have the power to directly ban these pesticides in foreign countries the EPA should use the power it has to revoke the import tolerances of such pesticides. This will send a strong message to countries that have not yet banned such hazardous pesticides and will encourage the use of safer alternatives among farmers who currently use these pesticides and would like to export crops to the US.

IV. The EPA must avoid agency actions that have negative effects on birds protected under the Migratory Bird Treaty Act (16 U.S.C. 703-711).

In addition to its obligations under the ESA and EO 13186, the EPA is also required to follow the Migratory Bird Treaty Act (MBTA). The MBTA implements various treaties and conventions between the U.S. and a number of other countries for the protection of migratory birds. Under the MBTA, taking, killing, or possessing migratory birds is unlawful. This protection extends beyond those species protected under the ESA to a large number of migratory birds (as listed in 50 C.F.R. 10.13). By maintaining import tolerances of pesticides known to be hazardous to birds, the EPA is sanctioning the use of these pesticides by foreign countries and allowing for the unintentional “taking” of U.S. migratory birds in their wintering habitats. Since the EPA is unable to directly regulate pesticide use in sovereign nations it should use the tool that it has to support the protection of U.S. migratory birds and reduce the unintentional “take” of these birds in their wintering habitats. This tool is the EPA’s control over whether or not pesticide tolerances will be allowed on crops imported to the U.S. By cancelling the import tolerances of pesticides known to be toxic to birds, the EPA will contribute to the protection of migratory birds.

V. Conclusion

We support the American Bird Conservancy's petition and agree that the EPA should revoke the import tolerances of the 13 pesticides listed in the petition. The EPA has obligations under the ESA, Executive Order 13186 and the MBTA to both avoid regulatory actions that have negative effects on migratory birds and to take actions that promote the conservation of threatened and endangered species. While the pesticides at issue have been banned in the U.S., partly due to their toxicity to birds, migratory birds may still encounter these hazardous pesticides when in their wintering habitats in Central and South American countries. By revoking the import tolerances of the pesticides at issue the EPA will be taking a positive step towards the fulfillment of these obligations.

Sincerely,

Jesse Buss, Member

Jennifer Loda, Member

Lindsay Tallon, Member

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