



Chemical Makers Want Say In EPA Pesticide Suit

By Dietrich Knauth

Law360, New York (April 18, 2011) -- Chemical makers moved Monday to intervene in a California lawsuit accusing the U.S. Environmental Protection Agency of failing to consult with wildlife agencies about pesticides' effects on 214 endangered and threatened species, joining agricultural groups also lobbying for a say.

The American Chemistry Council, a trade association whose members produce 90 percent of the basic industrial chemicals made in the United States, told a federal court in California that it should be allowed to intervene to protect its business interests. The court has also received motions to intervene from farming groups, including the American Farm Bureau Federation and CropLife America, as well as household chemical maker Reckitt Benckiser LLP.

The case is currently stayed to allow the EPA and environmental groups to discuss a possible settlement. The court has yet to rule on any of the motions to intervene.

The Center for Biological Diversity and Pesticide Action Network North America filed their complaint Jan. 20, calling the suit "the most comprehensive legal action ever brought under the Endangered Species Act to protect imperiled species from pesticides."

While the center has filed similar suits seeking review of pesticide permits given out by the EPA, the previous lawsuits focused narrowly on a single species or a single geographic area.

The current suit has a nationwide focus, covering 381 chemical pesticides and every U.S. state except Alaska. The EPA allegedly failed to consult with federal wildlife agencies regarding the harmful impacts of the pesticides before authorizing them for use, according to the complaint.

The center has opposed the intervention of the American Farm Bureau Federation and other agricultural groups, saying their intervention would be premature during the liability phase of litigation.

"Their participation would likely delay resolution of the case and waste judicial resources," the center said in a response to the AFBF's motion. "Thus, only intervention during the remedial phase of this case is appropriate."

Collette Adkins Giese, the attorney for both plaintiffs, said the plaintiffs would oppose the intervention of the ACC and Reckitt on similar grounds, although the chemical makers are welcome to join out-of-court talks with the EPA.

"We've invited all the groups that wish to intervene to participate in any settlement discussions with the EPA," Adkins Giese said.

Reckitt, which makes the d-CON brand of rat poison, filed its motion Monday, saying it had spent millions of dollars to get pesticide registrations from the EPA and that it could be forced to undergo the entire process again if the plaintiffs succeed.

Both Reckitt, and the ACC which makes biocides, said they represent a different segment of the pesticide industry from the farming groups.

"The ACC represents a different industry segment than that of other proposed intervenors, such as CropLife America and the American Farm Bureau," the ACC said in its motion. "The other proposed intervenors generally represent the producers and users of agricultural chemicals, which involve very different uses than biocides."

The Center For Biological Diversity has said its first concern is to keep the pesticides at issue, which have already been studied for environmental harm, out of the habitats of endangered species. But the organization said it also hopes the suit will serve as a wake-up call to the EPA and force it to change its process of reviewing and registering pesticides.

Because the primary way that pesticides harm the environment is through the contamination of water sources, fish and aquatic wildlife are prominent on the list of endangered species in the suit. But better-known endangered animals such as the Florida panther, California condor and black-footed ferret are also affected by pesticides through the contamination of their food supply, the suit said.

More than a billion pounds of pesticides are used annually in the U.S., and the EPA has registered more than 18,000 different pesticides for use, the CBD said. Extensive scientific studies show widespread and pervasive pesticide contamination in groundwater, drinking water and wildlife habitats throughout the country, according to the organization.

Steptoe & Johnson LLP represents the American Chemistry Council. Arnold & Porter LLP represents Reckitt Benckiser.

The plaintiffs are represented by attorneys with the Center for Biological Diversity.

The case is Center for Biological Diversity et al. v. Environmental Protection Agency et al., case number 3:11-cv-00293, in the U.S. District Court for the Northern District of California.

--Editing by Lisa Uhlman.