



2007 North Dakota Legislative Results

This year, the Legislature grappled with five major pieces of legislation pertaining to pesticides. All eventually passed by overwhelming margins in both chambers and the governor had signed all but two of these measures at the time of this writing. (The governor is expected to sign these two measures in the next couple of weeks.)

Project Safe Send

The Legislature once again provided resources for this popular waste pesticide and container collection program, which is funded with pesticide registration fees. The legislation was contained in HB 1085. The twist this time around is that legislators removed the sunset provision. So, the program will not need reauthorization each biennium, as had been the case since its inception in the early 1990s.

Pesticide Applicator and Pesticide Definitions Retooled

The North Dakota Department of Agriculture asked the Legislature to clarify what uses of certain pesticides would require a commercial/public certification, a private certification or no certification. This was embodied in SB 2095. For most professional and farm applications of pesticides, these changes will be insignificant. But for occasional public users, such as school janitors or building maintenance employees, this legislation will require them to be certified to use any pesticide unless that pesticide is a ready-to-use formulation. (More details on this law can be found elsewhere in this newsletter.)

Verified Pesticide Report of Loss Revamped

The industry petitioned the Legislature to change how a pesticide misapplication that causes property

damage is reported. Essentially, the old law required the person who is injured to file a report with the North Dakota Department of Agriculture. This little-used and often-ignored law was so incomprehensible that it was virtually useless in protecting the claims of a plaintiff or the rights of the applicator. So the Legislature, via SB 2228, overhauled this provision, which now calls for the injured party to serve notice of the alleged damage directly to the applicator rather than through a third party. The provision passed overwhelming in both chambers. (See additional article in this issue of the *Pesticide Quarterly* regarding the details.)

Pesticide Registration Fee Amount and Distribution Formula Changed

This bill, under SB 2323, was conceived as a vehicle to establish an endangered species program with the North Dakota Department of Agriculture. However, budgetary concerns morphed it into a bill that only removed the sunset provision on the pesticide registration fee (currently at \$350 per product). If the sunset provision was not removed, the fee would have reverted to \$300. Part of the proceeds from the registration fees (\$50) then was directed to the state general fund and the balance (\$300) to the

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COORDINATOR'S COMMENTS

During any legislative session, one never knows what to expect by the time the Legislature packs up and goes home. Well, this Legislature managed to get a variety of things accomplished that ultimately will benefit users of pesticides, so I think kudos are in order.

Project Safe Send finally was given its due by having its sunset provision removed. So this year, next year and well into the future, this valuable tool for disposing of waste pesticides and coordinating container recycling will be available to pesticide users. Good show!

The Legislature also tidied up some confusing language regarding the **use of pesticides by certain public entities**. This needed to be done because, while the old language did adequately protect the public, it was too confusing and resulted in uneven enforcement actions that sent mixed messages to applicators. Excellent.

The **change to the pesticide report-of-loss** law was long overdue. This was not the Legislature's fault, but rather it was the industry not really knowing what needed fixing. The good news is that it places the reporting clearly on the shoulders of the injured party and puts the applicator on direct notice about a problem and that follow-up needs to be expeditious. Under the old system, applicators basically ignored the law because they feared it would trigger an enforcement action and the damaged party thought the North Dakota Department of Agriculture was somehow going to fix his or her problem. Of course, that was never true. But the confusing nature of the provision made people think it was. Gerry Thompson, the enforcement coordinator for the North Dakota Department of Agriculture, deserves

special credit for defining this problem and looking for a solution. In the future, this law should streamline the settlement of pesticide misapplication claims and minimize the need for the North Dakota Department of Agriculture to get involved in a matter that is between neighbors. Hooray!

Finally, the Legislature tackled the challenge of **endangered species and pesticide use**. Since the 1990s, environmental advocacy groups have been trying to regulate pesticides through the court system by claiming that the Environmental Protection Agency (EPA) was not adequately carrying out the Endangered Species Act (ESA). They claimed pesticide registration and labeling by the EPA was not meeting the requirements of the ESA.

In 2003, efforts by environmental groups gained traction by convincing federal judges to hand down new restrictions on the use of many popular agricultural and nonagricultural use pesticides in Washington, Oregon and California. In the 2004 training season, the NDSU Pesticide Program recognized this fact and began informing applicators what was happening in this newsletter, and at commercial and private certification trainings. By 2006, the North Dakota Department of Agriculture began a concerted effort, through our trainings, to educate users on why this was so important.

Three years after this issue came to the forefront, legislators acted because you communicated to them that we needed to have our own endangered species program so that when the EPA or a court needed facts regarding local environment and pesticide use conditions, we could provide it. Without this, we would be at the mercy of a judge in California

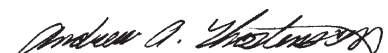
or an EPA scientist in Washington, D.C., making determinations about use restrictions for North Dakota. Celebration regarding this whole ESA matter is not in order, basically because doing this work means limited North Dakota resources (from the state's general fund and the NDSU Pesticide Program) are being siphoned away from more productive endeavors to play a game that environmentalists, through the courts, are forcing upon us. (For an example of this, see the recent court order in this newsletter on California's red-legged frog). So, we will grit our teeth and do what North Dakotans always do. We will make the best of it and move on.

Now, for Something Completely Different

We had another great training year, but late in the season, we started seeing a significant number of new applicators showing up at our agricultural trainings who we did not expect. Plus, we started getting an unusually large number of requests for study materials in agricultural categories. Why the jump? The answer: corn and ethanol.

You see, with all the acres going into corn (1.41 million in 2005, 1.69 million in 2006 and 2.6 million projected in 2007) we will need to make more pesticide applications than we ordinarily would with traditional crops, such as small grains or cool-season oilseeds. Hence, we will need more applicators to get the job done. The world is changing and we need to roll with it, so this summer, we are going to work on a strategy to meet this new challenge.

In the meanwhile, have a safe and hugely profitable season,



Andrew A. Thostenson,
Pesticide Program Specialist

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Environment and Rangeland Protection Fund (EARP). The EARP fund traditionally is used to fund a variety of programs, including Project Safe Send, noxious weed control and several other environment- or pesticide-related programs the North Dakota Department of Agriculture manages. Ultimately, what this appropriation did provide was additional resources for the North Dakota Department of Agriculture's budget to establish an endangered species program outlined in SB2009. (See the following for details.)

Agriculture Commissioner's Budget to Include the Establishment of an Endangered Species Program

The agriculture commissioner's budget funds the North Dakota Department of Agriculture. The entire budget is contained in SB 2009. The portion that refers to the establishment of the endangered species program is contained in Sections 8 and 9 of the budget. The Legislature provided \$150,000 out of the state's general fund (new resources) to partially pay for the program. The Legislature also redirected \$50,000 out of the North Dakota State University Extension Service's pesticide enforcement fund. (Revenues for this fund are obtained from pesticide enforcement actions and traditionally are used to support pesticide certification and training efforts.) Exactly how this \$200,000 in resources will be used will be up to the discretion of the commissioner, but ultimately the Legislature expects a report on the establishment of the endangered species program for the 61st Legislature.

Pesticide User and Use Definitions (SB 2095)

Senate Bill No. 2095 changed two definitions and added one definition in the Pesticide Act. The sections that were changed are printed below. (Also for reference purposes, the definition of private applicator is reprinted for additional clarification – this language has not changed.)

An act to amend and re-enact section 4-35-05 of the North Dakota Century Code relating to pesticide definitions, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT.

Section 4-35-05 of the North Dakota Century Code is amended and re-enacted as follows:

4-35-05. Definitions.

As used in this chapter:

6. "Commercial applicator" means a person who by contract or for hire engages in the business of applying pesticides for compensation to the land of another by aerial, ground, hand or any other equipment. The term "commercial applicator" does not include a person using a pesticide for a private agricultural purpose unless that person is being compensated for the pesticide application.

26. "Private applicator" means a certified applicator who uses or supervises the use of any pesticide that is classified for restricted use to produce any agricultural commodity on property owned or rented by the applicator or the applicator's

employer or, if applied without compensation other than trading of personal services between producers of agricultural commodities, on the property of another person.

28. "Public applicator" means a certified applicator who applies pesticides as an employee of a state or federal agency, municipal corporation, public utility, hospital, privately owned golf course, nursery, greenhouse or other governmental agency. Persons using only ready-to-use pesticides are exempt from this requirement.

29. "Ready-to-use pesticide" means a pesticide that is applied directly from its original container, consistent with label directions, such as an aerosol spray can, a ready-to-use spray container, bait packs or other types of containers that do not require mixing or loading before application.

This bill was passed with an emergency clause and took effect on March 5, 2007, when the governor signed the bill.

Need help with pesticide certification or general pesticide use issues?

Contact:

NDSU Pesticide Training and Certification Program
Box 5051, Fargo, ND 58105-5051

Tel: (701) 231-7180
Fax: (701) 231-5907
E-mail: pesticid@ndsuxext.nodak.edu
Internet: www.ndsupesticide.org

Verified Report of Loss Reporting Requirement Repealed (SB 2228)

The 60th legislative assembly repealed the verified report of loss reporting requirement and substituted the following new section concerning alleged pesticide application damage. The new section requires certified mail notification to the applicator within 28 days of the time the property damage is known or the person claiming that damage occurred should have known about the alleged damage. If the person alleging damage does not notify

the applicator by certified mail, the claim will be barred from proceeding to the courtroom in an effort to collect damages.

The new law also limits the harvesting of the crop to 20 percent of the damaged field if the producer notices damage in a field at harvest time. If that person plans to claim damages from a spray application, he or she must notify the applicator by certified mail before completing the harvest of the damaged crop. If more than 20 percent of the field is harvested before the applicator is notified and allowed to look at the alleged damage, the claim will be barred from proceeding to court for the collection of civil damages.

This provision does not apply if the person seeking reimbursement for property damage was the applicator of the pesticide. This bill was passed as an emergency provision and took effect when the governor signed the bill on April 13, 2007.

The text of the legislation reads:

Sixtieth Legislative Assembly of North Dakota In Regular Session Commencing Wednesday, January 3, 2007

Senate Bill No. 2228
(Senator Klein)
(Representative DeKrey)

An act to create and enact a new section to chapter 4-35 of the North Dakota Century Code relating to notification of alleged pesticide damage; to repeal sections 4-35-21, 4-35-21.1 and 4-35-21.2 of the North Dakota Century Code relating to reports of loss resulting from pesticide application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA: SECTION 1.

A new section to chapter 4-35 of the North Dakota Century Code is created and enacted as follows:

Pesticide application – Alleged property damage – Notification of applicator.

1. a. Before a person may file a civil action seeking reimbursement for property damage allegedly stemming from the application of a pesticide, the person shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

- (1) Twenty-eight days from the date the person first knew or should have known of the alleged damage; or
- (2) Before 20 percent of the crop or field allegedly damaged is harvested or destroyed.

b. Subdivision a does not apply if the person seeking reimbursement for property damage was the applicator of the pesticide.

2. Upon notifying the applicator as required under subsection 1, the person seeking reimbursement for the alleged property damage shall permit the applicator and up to four representatives of the applicator to enter the person's property for the purpose of observing and examining the alleged damage. If the person fails to allow entry, the person is barred from asserting a claim against the applicator.

SECTION 2. REPEAL.

Sections 4-35-21, 4-35-21.1 and 4-35-21.2 of the North Dakota Century Code are repealed.

SECTION 3. EMERGENCY.

This act is declared to be an emergency measure.

Corrections to the January 2007 Pesticide Quarterly listing of 2005 and 2006 enforcement actions

By Gerald Thompson, North Dakota Department of Agriculture, Pesticide Enforcement Coordinator

The 2005 enforcement actions listed Blair's Flying Service as a \$200 penalty for a 2005 complaint alleging drift on sunflowers. The violation indicated the penalty was for drift on sunflowers. The listed violation should have been a \$200 penalty for incomplete application records.

The 2006 enforcement actions listed Farmers Union Oil of Hazelton as having made illegal sales two different times. They should have been listed only once and the name should be James Leno, the manager at the time of the violation, rather than Brian McNeal, the person that was inspected.

The department apologizes for these errors.

2007 Project Safe Send Collection Sites

Sixteen sites have been selected for the 2007 Project Safe Send collection of unusable pesticides, scheduled for July 10-24. (See list below for dates, times and locations.)

“This is a good time for anyone with pesticides – farmers, ranchers, chemical dealers and applicators, government agencies and homeowners – to take stock of their inventory and set aside unusable pesticides for disposal,” said Agriculture Commissioner Roger Johnson. “With 16 collection sites, no one will have to drive far to get rid of their waste pesticides safely, efficiently and at no charge.”

People with more than 1,000 pounds of pesticides should call Judy Carlson with the North Dakota Department of Agriculture at (701) 328-4997 to preregister. No other preregistration is required. A maximum of 20,000 pounds of pesticide per participant will be accepted.

Pesticide rinse water also will be accepted at any of the 16 collection sites. The first 100 pounds of rinse water will be taken free of charge; a fee of \$1 per pound will be charged for each additional pound.

Since 1992, more than 5,000 participants have used Project Safe Send to safely get rid of more than 1.8 million pounds of unusable pesticides, including DDT, arsenic and mercury compounds.

Project Safe Send is funded through the fees paid by pesticide manufacturers to register their products in North Dakota.

All collections are located at North Dakota Department of Transportation (DOT) facilities unless otherwise noted from 9 a.m. to 3 p.m. local time.

Tuesday, July 10	Casselton	15482 37th St. S.E.: take Interstate 94 Exit 331, go north on N.D. Highway 18, take frontage road west about three-fourths of a mile.
Wednesday, July 11	Hillsboro	590 6th St N.W.: take Interstate 29 Exit 104 at Hillsboro, east one-half block, one-third mile north on 6th St. N.W.
Thursday, July 12	Larimore	1524 Towner Ave.: north side of Larimore, west side of N.D. Highway 18.
Friday, July 13	Cavalier	9398 138th Ave. N.E.: three miles west of Cavalier, south side of N.D. Highway 5.
Monday, July 16	Mohall	802 County Road 9 N.: heading west through Mohall on N.D. Highway 5, cross railroad tracks on the west edge of town, turn right at County Road 9 and go mile north, on the right side of the road.
	Lidgerwood	25 4th Ave. S.E.
Tuesday, July 17	Litchville	808 1st Ave.: one-fourth mile south of the railroad tracks on the east side of the road.
	Stanley	8250 62nd St. N.W.: from Junction of U.S. Highway 2 and N.D. Highway 8, north on N.D. Highway 8 to 6th Ave. S.E., west approximately one-quarter mile. Shop is on north side of 6th Ave. S.E.
Wednesday, July 18	Williston	605 Dakota Parkway W.: on U.S. Highway 2 and U.S. Highway 85 bypass across from the Kum & Go gas station.
	Napoleon	59 Broadway: take I-94 Exit 208, proceed south on N.D. Highway 3, one-fourth mile south of the city, east side.
Thursday, July 19	Dickinson	1700 3rd Ave. W., Suite 101: on east side of N.D. Highway 22, one-half mile north of the junction of I-94 and N.D. Highway 22.
	Carrington	6739 Highway 200: one-half mile east of the junction of N.D. Highway 200 and U.S. Highway 281, on the north side of the road.
Friday, July 20	Devils Lake	1905 Schwan Ave. N.W.: 2½ miles west of Devils Lake, Industrial Park, south side of U.S. Highway 2.
	Mott	9108 71st R St. S.W.: one-half mile north of Mott, west side of N.D. Highway 8.
Monday, July 23	Beulah	205 Highway 49 S.: take I-94 to Exit 110, then go 30 miles north on N.D. Highway 49 to the south side of Beulah. The DOT is west of N.D. Highway 49 and just south of the railroad tracks.
Tuesday, July 24	Garrison	515 Highway 37 S.E.: east edge of town on the north side of N.D. Highway 37.

Court Issues Stipulated Injunction Regarding Pesticides and the California Red-legged Frog

(Editor's note: The endangered species program that North Dakota is initiating logically would have input on the review process the EPA undertakes in the effects determination scheme described in this article. Without this sort of input, the use for these types of pesticides could be curtailed dramatically without regard or consultation with a state agency, such as the North Dakota Department of Agriculture.)

The court has issued a stipulated injunction regarding a lawsuit brought against the EPA by the Center for Biological Diversity. As part of the stipulated injunction, the EPA must determine the effects of 66 pesticides on the California red-legged frog within certain areas of California under a court-ordered schedule of three years. The EPA also must provide information regarding the provisions of this stipulated injunction to the public on its Web

site. This page contains, among other things, information on the history of the litigation, the pesticides under assessment and the affected areas within California, and assists pesticide users in determining how the stipulated injunction pertains to their pesticide application.

History

On April 2, 2002, the Center for Biological Diversity (CBD) filed a lawsuit in federal district court for

2007 Pesticide Damage Complaints

By Gerald Thompson, North Dakota Department of Agriculture, Pesticide Enforcement Coordinator

The North Dakota Department of Agriculture (NDDA) would appreciate complainants filing crop or vegetation complaints with the NDDA within 30 days of the pesticide application that is alleged to have caused the damage.

Several of the new chemistries reach their half-life in just a few days, so the department needs to be at the site as quickly as possible. Past delays of months to years on some complaints resulted in the NDDA expending significant resources on investigations without hope of the complaint being proven.

This request comes about as a result of the NDDA's need to gather evidence of drift damage in a timely manner to prove the pesticide application allegedly causing the damage has really drifted off target. Evidence we

obtain may include laboratory results for vegetation samples, records, labels, complainant and applicator statements, maps, weather records and other information.

Existing policy states that all complaints must be handled through the Bismarck office. Complaints are taken by pesticide staff from 7:30 a.m. to 4:30 p.m. Monday through Friday. Complaints can be filed by calling (800) 242-7535 and asking for someone from Pesticide Enforcement. A complaint form will be completed during the telephone call, so it will take more than a minute or two for completion of the complaint information process.

The NDDA investigates 40 to 60 pesticide misuse complaints each year. A large percentage of these complaints are for crop or vegetation damage and many are related to the smell of the chemical or someone "should not be spraying today" statements.

The largest single reason for damage reports is the spraying of herbicides in excessive winds, in winds that are blowing toward a sensitive area or conditions favorable for an inversion. These are the types of spray applications that cause drift or movement onto sensitive areas.

Complainants should be aware that the NDDA does not become involved in financial settlements and does not issue yield loss estimates. In addition, it does not act in the capacity of a crop consultant or other similar activity. The NDDA's sole investigation activity is to determine if violations of state or federal law occurred.

Investigations generally require a minimum of 90 days for completion. Some can last for a year or more before the case is completed.

For more information, contact Gerald Thompson or Rochelle Olson at (800) 242-7535 or e-mail gthomps@nd.gov.

the Northern District of California, alleging that the EPA failed to comply with section 7(a)(2) of the Endangered Species Act by not ensuring that its registration of 66 named pesticide active ingredients will not affect the California red-legged frog, a federally-listed threatened species. The CBD, EPA and defendant-intervenors, CropLife America, American Forest Paper Association, Western Plant Health Association, Oregonians for Food and Shelter, and Syngenta Crop Protection Inc., engaged in discussions to try to resolve the case.

On Sept. 1, 2006, the EPA issued a notice in the Federal Register announcing the availability of a proposed stipulated injunction and opening a 15-day public comment period on the draft. The EPA received numerous comments from the public, California state agencies and others regarding certain aspects of the proposed stipulated injunction. These comments, as well as the proposed and final versions of

the stipulated injunction, are available in the public docket, ID number EPA-HQ-OPP-2006-0702.

Based on public comments received and subsequent discussion with the CBD and defendant-intervenors, the federal government agreed to the stipulated injunction with a modification to the definition of "upland habitat" in section 3(b) of the injunction to conform to this definition, which applies outside designated critical habitat, with the definition of "upland habitat" used by the U.S. Fish and Wildlife Service in its designation of critical habitat for this species (71 FR 19244-19346, April 13, 2006).

On Oct. 13, 2006, the federal government joined the CBD and defendant-intervenors in asking the court to issue a stipulated injunction resolving the lawsuit. The court ordered the stipulated injunction on Oct. 20, 2006. The key provisions of the stipulated injunction are listed below.

Terms of Stipulated Injunction

Schedule for effects determinations: The stipulated injunction establishes a series of deadlines for the agency to make "effects determinations" for 66 named pesticides to determine their potential effect on the California red-legged frog (a threatened species native to California).

Interim injunctive relief: The stipulated injunction also (with some exceptions) enjoins, vacates and sets aside the EPA's authorization of uses of the 66 pesticides in certain parts of 33 counties in California. The injunctive relief, vacatur and setting aside of the EPA's authorizations would terminate for a particular use of a pesticide when the agency makes a determination that the pesticide's use has "no effect" on the California red-legged frog, or, where the EPA determined the pesticide's use may affect the species, when the EPA completes consultation with the U.S. Fish and Wildlife Service.

Continued

Pesticides Named in Lawsuit

The 66 pesticides named in the lawsuit brought by the CBD against the EPA are listed below:

2,4-D	Diflubenzuron	Methamidophos	Phorate
Acephate	Dimethoate	Methidathion	Phosmet
Alachlor	Disulfoton	Methomyl	Prometryn
Aldicarb	Diuron	Methoprene	Pronamide
Atrazine	Endosulfan	Methyl parathion	Propanil
Azinphos-methyl	EPTC	Metolachlor	Propargite
Bensulide	Esfenvalerate	Molinate	Rotenone
Bromacil	Fenamiphos	Myclobutanil	Simazine
Captan	Glyphosate	Naled	Strychnine
Carbaryl	Hexazinone	Norflurazon	Telone (1,3-dichlorpropene)
Chloropicrin	Imazapyr	Oryzalin	Thiobencarb
Chlorothalonil	Iprodione	Oxamyl	Triclopyr
Chlorpyrifos	Linuron	Oxydemeton-methyl	Trifluralin
DCPA	Malathion	Oxyfluorfen	Vinclozolin
DEF	Mancozeb	Paraquat dichloride	Ziram
Diazinon	Maneb	Pendimethalin	
Dicofol	Metam sodium	Permethrin	

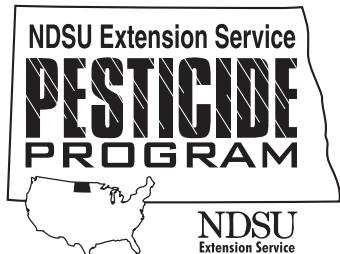
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Development and Distribution of a Bilingual Brochure

The injunction also requires the EPA to develop and distribute a bilingual (English and Spanish) brochure regarding certain aspects of the injunction, the California red-legged frog and frogs in general, and pesticides. The EPA is required to distribute this brochure to all commercial certified applicators within California; to all private certified applicators residing in counties where use authorizations have been set aside; to registrants of the 66 pesticides; the California Departments of Pesticide Regulation, and Fish and Game; and the Pacific Region of the U.S. Fish and Wildlife Service. In addition, the EPA is to distribute 250 copies of the brochure to the county agricultural commissioner and Cooperative Extension agent offices in the affected counties.

Schedule for Effects Determinations

The stipulated injunction establishes time frames for the EPA to make effects determinations for the 66 named pesticides. The time frames indicated below are from the date of the court order, Oct. 20, 2006. From that date, the EPA must make effects determinations and initiate consultation, as appropriate, for:

10 pesticides within nine months

10 additional pesticides within 12 months

Seven additional pesticides within 16 months

Seven additional pesticides within 20 months

Seven additional pesticides within 24 months

Eight additional pesticides within 28 months

Eight additional pesticides within 32 months

Nine additional pesticides within 36 months

for a total of 66 pesticides