

Pesticide Definition: California Appellate Court Addresses Challenge to Fine for Failure to Register



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The Court of Appeals (“Court of Appeals”) of the State of California (Fifth Appellate District) addressed an appeal of an administrative decision of the California Department of Pesticide Regulation (“DPR”) involving the scope of the term “pesticide.” See *CALTEC AG v. Department of Pesticide Regulation et al.*, Super. Ct. No. 2016497.

DPR had determined that three of Appellate Caltec Ag, Inc. (“Caltec”) products constituted pesticides under DPR’s pesticide regulations.

Pesticides are regulated by the federal government pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). See 7 U.S.C. § 136 et seq. However, FIFRA provides states the opportunity to regulate the sale or use of any federally registered pesticide in the state. States may only regulate such pesticides if they do not permit any sale or use prohibited by FIFRA. Further, FIFRA attempts to promote uniformity by prohibiting states from imposing labeling or packaging requirements different from those required by the federal statute and implementing regulations.

California has statutory authority and regulations in place to regulate pesticides. A pesticide cannot be sold in California unless the product’s label is registered with DPR. As a result, a combination of FIFRA and California’s program require sequential registration of a product that DPR has decided is a “pesticide.”

Caltec challenged a final administrative decision of DPR that three of its products were pesticides. DPR imposed fines upon Caltec totaling \$784,000. The fines were assessed based on the state agency’s finding that the products should have been registered as pesticides before being sold in California.

Caltec appealed this administrative decision to the Court of Appeals.

California’s statutory scheme defines “pesticide” to include:

1. any “spray adjuvant”
2. any mixture of substances intended to be used for regulating plant growth
3. any substance used to prevent, destroy, repel, or mitigate any pest

DPR determined that Caltec products denominated “Greenfeed 27-0-0” and “Terra Treat” were spray adjuvants. The Caltec product denominated “Kelpak” (a liquid extract from edible seaweed) was characterized as a plant growth regulator.

The California Department of Food and Agriculture had issued certificates registering the products as specific types of “fertilizing material” prior to DPR’s determination. Greenfeed 27-0-0 was registered as a “commercial fertilizer,” Terra Treat as an auxiliary soil and plant substance, and Kelpak as an organic input material. These registrations were contended by Caltec to indicate that the products were fertilizers and not pesticides.

The Court of Appeals held in a 51-page opinion that substantial evidence supported the finding that a commercial fertilizer is also a spray adjuvant. It references a Caltec document noting that the product is compatible with pesticides other than sulfur, has excellent sticking and spreading qualities, and can be used as a carrier for pesticides. This was indicated to support a finding that Greenfeed 27-0-0 is a spreading agent intended to be used with another pesticide as an aid to the application of a pesticide, therefore satisfying the definition of spray adjuvant.

Terra Treat is also deemed a spray adjuvant (i.e., a wetting agent that aids the application of pesticides). Noted was the product’s label describing it as a soil surfactant/penetrant designed to uniformly distribute fertilizer, pesticides and water throughout the root zone. A technical information sheet stating that the product significantly increases the effectiveness of certain insecticides and herbicides was also referenced. These were deemed to support a finding that Terra Treat is a spray adjuvant.

Finally, as to Kelpak, evidence was deemed in place to support a finding that:

1. the product is liquid auxin concentrate;
2. naturally occurring auxins in concentrated form are plant growth regulators; and
3. Caltec sold the product with the intent that it be used as a plant growth regulator.

The Court of Appeals also determined that the California Department of Food and Agriculture’s prior determination regarding the three products did not preclude DPR from determining they were pesticides.

A copy of the opinion can be found [here](#).