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# AGLINC

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AGRICULTURE & EQUINE INDUSTRY LEGAL INFORMATION NEWS & COMMENTARY

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## Jacky Martin racing again

*Racing legend looks to McAfee & Taft to regain jockey license*

To say the least, the name Jacky Martin is well known in Quarter Horse racing circles. In fact, it is not a stretch to describe the jockey as a legend in the sport. Jacky won his first All American Futurity in 1976. Since then he has won the prestigious All American six more times. Over the years, Jacky built a Hall of Fame career by winning the biggest Quarter Horse races in the United States, including Oklahoma.

Unfortunately, Jacky's career took a turn for the worse in 1996 when he was charged in Texas for crimes unrelated to racing. Jacky later pled guilty to two felony counts and received suspended sentences which included substantial community service obligations. As a result, Jacky's jockey licenses were suspended, and he lost his ability to compete in the sport that he had been devoted to for most of his life.

At 52 years old, most would have pulled down their tents and walked away. Not Jacky. He used the adversity as a positive life-changing experience and turned his personal life around. He became a better person, a better husband, and perhaps even a better jockey. In September 2010, Jacky's dedication to changing his life was rewarded when he received "judicial clemency" from the judge presiding over his case. In Texas, this is similar to a pardon and means that Jacky was no longer a convicted felon.

Unfortunately, the judicial clemency did not mean that Jacky could automatically start racing again. Rather, he was required to go to the governing board over racing in each state where he wanted to race and request that his license be reinstated.

In February, we were asked to assist in Jacky's efforts by representing him before the Texas Racing Commission and the Oklahoma Horse Racing Commission. Time was of the essence, especially in Oklahoma because the Remington Park Quarter Horse meet started in March and ended in May. Our first objective was to regain licensure in Texas because Oklahoma's revocation was based on reciprocity with Texas. My partner Spencer Smith, who practiced in Austin, Texas, for several years before joining us at McAfee & Taft, quickly and successfully obtained an order on March 1, 2011, declaring that Jacky was eligible for licensure before the Texas Racing Commission. It was then my turn to convince the Oklahoma Horse Racing Commission to follow suit and lift Jacky's suspension. After a heated hearing, on March 22,



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2011, the Oklahoma Horse Racing Commission entered an order that it was in the best interest of racing in Oklahoma for Jacky to be licensed as a jockey.

As they say, “the rest is history.” Jacky received his license in time to participate in the 2011 Quarter Horse meet at Remington Park where the horses he rode earned more than \$450,000! We could not be more pleased for our client. Way to go, Jacky.

Contributing author Jeff Todd can be reached at [jeff.todd@mcafeetaft.com](mailto:jeff.todd@mcafeetaft.com).

# Endangered species litigation

## Center for Biological Diversity v. EPA - potential impact on pesticide use in production agriculture

On May 30, 2007, the Center for Biological Diversity filed a lawsuit alleging that the U.S. Environmental Protection Agency (EPA) was failing to comply with Section 7(a)(2) of the Endangered Species Act (ESA) in regard to 47 pesticides and 11 species that are listed as endangered or threatened under the ESA (*Center for Biological Diversity v. EPA*, Case No. 07-2794-JCS, N.D. Cal.).



CHRIS PAUL

The species identified in the lawsuit are all reportedly found in the greater San Francisco Bay area: Alameda whipsnake, bay checkerspot butterfly, California clapper rail, California freshwater shrimp, California tiger salamander, delta smelt, salt marsh harvest mouse, San Francisco garter snake, San Joaquin kit fox, tidewater goby and the valley elderberry longhorn beetle.

Various allegations of impacts on the environment and the specific species harmed were claimed by the plaintiffs.

These included a broad claim that the pesticides contaminated waters throughout the San Francisco Bay area, claims that Bay area sediments were impacted, and claims that pesticides could harm aquatic life and the identified species by causing acute toxicity and stress, reproductive and immunity disorders, endocrine disruption, cancer, birth defects, neurological impacts, skeletal malformations, weight loss and decreased resistance to disease. In short, the pesticides were blamed for about every possible problem, even where no evidence of actual causation was presented. *This is not said to diminish concerns that pesticides can, in certain doses, present serious problems, but the claims in this case were much more of the “could cause” rather than a “did cause” nature.*

Ultimately, 75 pesticide ingredients fell under scrutiny in this case (*listed right*). The EPA agreed to a stipulated injunction to resolve the lawsuit. The stipulated injunction commits EPA to:

- A schedule by which EPA will review the registrations of pesticides containing any of 75 pesticide ingredients for their potential effects to one or more of 11 federally-listed threatened or endangered species (listed right) in eight counties around the San Francisco Bay area;
- Identify interim pesticide use limitations intended to reduce exposure to the 11 species during the time EPA is assessing these pesticides in consultation with the U.S. Fish and Wildlife Service;
- Develop and make available a brochure to inform pesticide users of the stipulated injunction and the 11 species involved;
- Mail copies of the stipulated injunction to all registrants of the pesticides subject to the stipulated injunction;

### PESTICIDE INGREDIENTS UNDER SCRUTINY

2, 4-D	imidacloprid
acephate	magnesium phosphide
acrolein	malathion
alachlor	maneb
aldicarb	mancozeb
aluminum phosphide	metam sodium
atrazine	methamidophos
azinphos-methyl	methidathion
bensulide	methomyl
beta-cyfluthrin	methoprene
bifenthrin	methyl bromide
brodifacoum	metolachlor
bromadiolone	naled
bromethalin	oryzalin
carbaryl	oxydemeton-methyl
carbofuran	oxyfluorfen
chlorophacinone	PCNB
chlorothalonil	pendimethalin
cholecalciferol	permethrin
chlorpyrifos	phenothrin
cyfluthrin	phosmet
cyhalothrin (lambda)	phorate
cypermethrin	potassium nitrate
deltamethrin	propargite
diazinon	resmethrin
difenacoum	s-metolachlor
difethialone	simazine
dimethoate	sodium cyanide
diphacinone	sodium nitrate
disulfoton	strychnine
diquat dibromide	tetramethrin
endosulfan	thiobencarb
EPTC (eptam)	tralomethrin
esfenvalerate	trifluralin
ethoprop	warfarin
fenpropathrin	zeta-cypermethrin
fipronil	zinc phosphide
fluralinate	

- Provide to certain retail establishments shelf tags they may use to identify certain pesticides identified in the stipulated injunction as “urban use” pesticides;
- Annually notify certain retail establishments and certain user organizations that the stipulated injunction is still in effect and refer them to EPA’s website for further information; and
- Display on its website a copy of the stipulated injunction, maps identifying the areas where the interim injunctive relief applies, and fact sheets for the 11 species identified in the stipulated injunction.

What does this mean for use of pesticides with these ingredients, and other pesticides, at other locations? First and foremost, users must use all pesticides and other chemicals as directed by manufacturer instructions and good application practices. Proper use is not only effective use, but also reduces potential legal exposures and actual damage to the environment. That said, some groups will invariably misuse legal processes to push a no-chemical use agenda. Further, some regulators may be complicit in using the legal process, including tacit acceptance or even encouragement of agency defendant status, to enter into settlements such as that in this case to effectively limit pesticide use without engaging in the otherwise required administrative and scientific steps to establish actual harm and develop proper regulations.

Users of pesticides must be prepared to address the science of both impact of pesticide use on the environment, and impact of non-use on crop yields and quality. Users of pesticides must also recognize that they face a public relations disadvantage that requires preparation for addressing these issues of science in the best available forum, which is likely the courts, and most certainly not in the media. Aggressive legal intervention may be the best vehicle to present a complete case to a neutral fact-finder (the court) that has the tools and the duty to apply known standards for determining scientific fact, and can require an actual showing of cause and effect before arbitrarily limiting use of legal and useful products.

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# The Oklahoma Livestock Owner’s Lien Act

## *Legislature takes swift action to protect Oklahoma livestock producers*

**P**rior to November 2010, Eastern Livestock Company, LLC (“Eastern”) was one of the largest cattle brokerage companies in the United States. Eastern bought and resold cattle throughout the country under a variety of contractual arrangements. In many cases, Eastern would buy and then immediately ship and resell the cattle. In November 2010, the speed of such cattle transactions proved disastrous to hundreds of cattle producers when Eastern’s primary lender froze Eastern’s accounts, causing millions in checks paid for cattle purchases to bounce.



JEFF TODD

Eastern was eventually put into bankruptcy which is currently pending in the United States Bankruptcy Court for the Southern District of Indiana (Case 10-93904-BHL-11). Numerous Oklahoma cattlemen were negatively affected by the Eastern debacle.

While it could not fix the problem caused by Eastern in 2010, the 2011 Oklahoma Legislature took prompt steps to protect Oklahomans from being put in a similar position in the future. Senate Bill 530, known as the Oklahoma Livestock Owner’s Lien Act of 2011 (the “Act”), quickly moved through the legislature and was signed into law on April 26, 2011. The Act will become effective on November 1, 2011. (A copy of SB 530 to be codified at 4 Okla. §§ Stat. 201.1-.11 may be found at [www.mcafeetaft.com/ag](http://www.mcafeetaft.com/ag)).

The purpose of the Act is to protect the rights of Oklahoma livestock owners by granting a statutory lien to secure payment of the sales price negotiated by the livestock owner for his stock. The intended benefit of the Act is to put Oklahoma producers in the position of holding a secured claim either in (i) the livestock sold, or (ii) the proceeds held from the resale of the livestock. The statutory lien exists only until the owner or his sales agent (i.e. sale barn or auction) receives payment of the sales price. Recognizing that most livestock transactions involve a lender, the Act provides that the lien accrues to the benefit of the livestock owner’s secured lender who may also be exposed to loss by the nature of livestock transactions.

An important aspect of the Act is to insure that the statutory lien does not interrupt commerce or discourage the resale or secondary purchase of the livestock. Accordingly, if a buyer (such as a broker like Eastern) immediately resells the livestock in good faith, the lien “jumps” from the livestock and attaches to the proceeds received on the resale of the livestock. Thus, secondary purchasers can be confident that they are taking the livestock free and clear of the statutory lien.

The Act also addresses typical lien issues and other circumstances particular to livestock transactions:

- Section 201.4 provides that the lien is perfected automatically without filing of documentation.

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- Section 201.5 addresses issues where small lots of livestock are commingled and grants a lien in a percentage of the commingled herd.
- Section 201.7 provides that the statutory lien has priority over other liens (except for liens already in existence).
- Section 201.9 protects owners from being forced to waive their rights granted under the Act.
- Section 201.10 provides for the enforcement of the lien in ways similar to the enforcement of other statutory liens.
- Section 201.10(B) protects Oklahoma sale barns and auctions which often pay livestock owners and assume the risk of payment by brokers and in such cases allows the sales agent to step into the shoes of the livestock owner to enforce the lien.

The lien created by the Act will give Oklahoma producers added security and means of collection if their buyer breaches while still possessing the cattle.

Jeff Todd represents ag producers nationwide and assisted Oklahoma lawmakers in the drafting of Senate Bill 530. He can be reached at [jeff.todd@mcafeetaft.com](mailto:jeff.todd@mcafeetaft.com).

## Winds of change

### New laws encourage wind farm development while protecting Oklahoma landowners

In the September 2010 issue of *AgLINC*, Jeff Todd wrote that “wind farms have been sweeping the plains.” Indeed, wind farms are gaining a greater presence in Oklahoma where the topography, demographics and abundance of wind make Oklahoma a prime target for wind energy developers to set up shop. The presence of the wind industry in Oklahoma is only expected to grow, as Governor Fallin has recently traveled to California with a group of Oklahoma business leaders to the American Wind Energy Association’s annual tradeshow and convention to promote Oklahoma as a great place for the wind industry to do business.



COLE MARSHALL

Not surprisingly, the Oklahoma legislature has recently enacted a number of statutes relative to the development of wind farms in Oklahoma. Most notably is the Oklahoma Wind Energy Development Act (the “Development Act”) which became effective on January 1, 2011. Among other things, the Development Act imposes minimum decommissioning requirements for wind developments, requires wind developers to provide documentation for landowners to understand and verify the amount of the payments made to the landowner, and requires the wind developer to carry liability insurance with the landowner identified as an additional insured party. Most recently, on May 10, 2011, Governor Fallin signed into law a new statutory restriction prohibiting the use of eminent domain for the siting or building of wind turbines on private property. Previously, there was no such statutory restriction preventing wind developers from attempting to utilize eminent domain to acquire land for the purpose of developing a wind farm. With this new statute landowners are ensured that they have the right to decide whether their land should be the site for wind turbines, which provide economic benefit but also significantly burden the land.

As the wind industry continues to grow in Oklahoma, more landowners will be contacted by prospective wind developers about leasing their land for a wind farm. With these new laws now in effect, it is important that landowners become familiar with the complexities of wind energy development and engage counsel experienced in such issues so their rights are adequately protected when entering into any negotiations for such developments.

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