

Preemption and Defamation



John Wargo, Yale University
Lecture 11
Environmental Politics and Law
February

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Atrazine – Management Possibilities



- ❧ **Ban the Chemical**
- ❧ **Modify use patterns**
- ❧ **Restrict Use Spatially Vegetative buffers**
- ❧ **Restrict application methods**
- ❧ **Regional restrictions**
- ❧ **Protective equipment**
- ❧ **Require additional data**

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Environmental Protection Agency

2003

**“EPA ADOPTS AGGRESSIVE MEASURES ON HERBICIDE
ATRAZINE”**

***“Approach Ensures Protection of Nation's Most Vulnerable
Drinking Water Sources”***

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

*Stephen Johnson,
Head of EPA's Pesticide Division*

Atrazine could be safely used if people were careful with it and watersheds were monitored.

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

“The Agency has concluded that atrazine may continue to be used, provided all the precautions and the new specific measures are implemented to reduce risks to drinking water. These new measures will help ensure the continued protection of drinking water.”

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

‘Syngenta is required to conduct a specialized testing program in vulnerable watersheds on a weekly basis during certain times of the year to monitor "raw" drinking water during high-use periods for this pesticide.’

‘If the Agency's regulatory safety standards are exceeded in raw drinking water, atrazine use is cancelled in that geographic area.’ (EPA Jan. 31, 2003)

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Comments Submitted by an Obscure Yale Professor...

First, evidence that atrazine may alter normal hormonal function is now sufficient to justify shifting the burden to the registrants to demonstrate the absence of hormonal effects, especially early in life.

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Comments Continued...

Second, millions of Americans are routinely exposed to the chemical without their knowledge or consent.

Comments Continued...

Third, EPA has no ability to prevent human exposure to atrazine from contaminated water supplies.

Comments Continued...

Fourth, neither the registrant nor the Agency has demonstrated that there is a reasonable certainty that exposures to atrazine and its metabolites will induce no harm to children, as required by the FQPA.

Children's Hazard



❧ *"Because of the rapid developmental brain changes, the influence of atrazine on neurotransmitters in the hypothalamus and on GnRH (gonadotropin releasing hormone) may well have a differential, permanent effect on children."*

❧ *EPA Scientific Advisory Panel*

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Comments Continued....

Finally, why should the public bear the financial burden of water testing and filtration? My view is that the registrants should bear this responsibility.

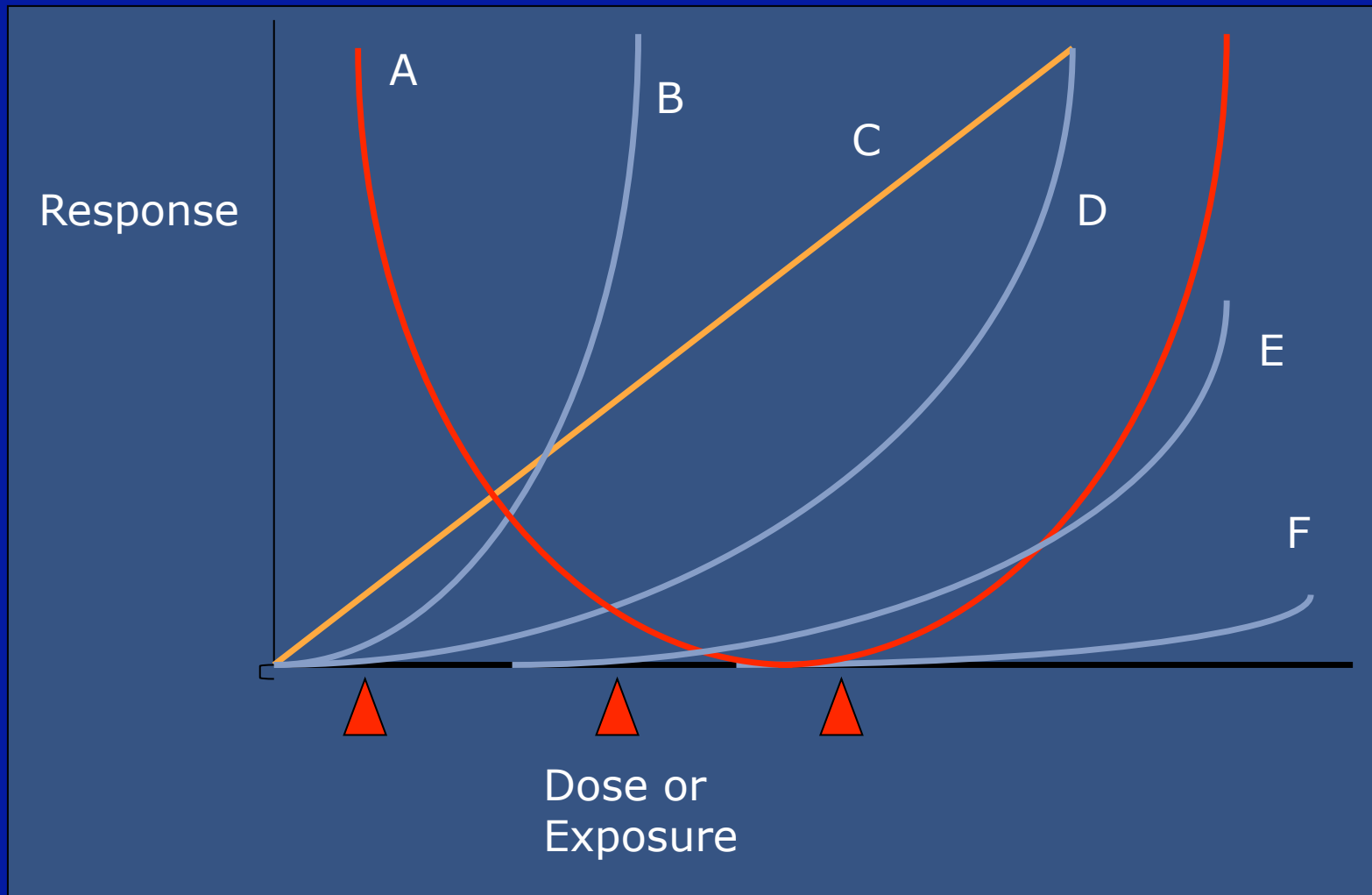
CORPORATE LESSONS FROM ATRAZINE

1. Delay Regulatory Decision (19 Years...20 Year Patent Life)
2. Overwhelm EPA With Evidence
3. Attack Studies That Find Adverse Effects
4. Fund Research of EPA Science Advisors
5. Avoid Considering Effects of Mixtures
6. Suggest Use Reduction, Geographic Restriction, Seasonal Restriction, Labeling
ing to Avoid National Ban

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Using Law and Regulation to Effect Chemical Substitution & Risk Reduction

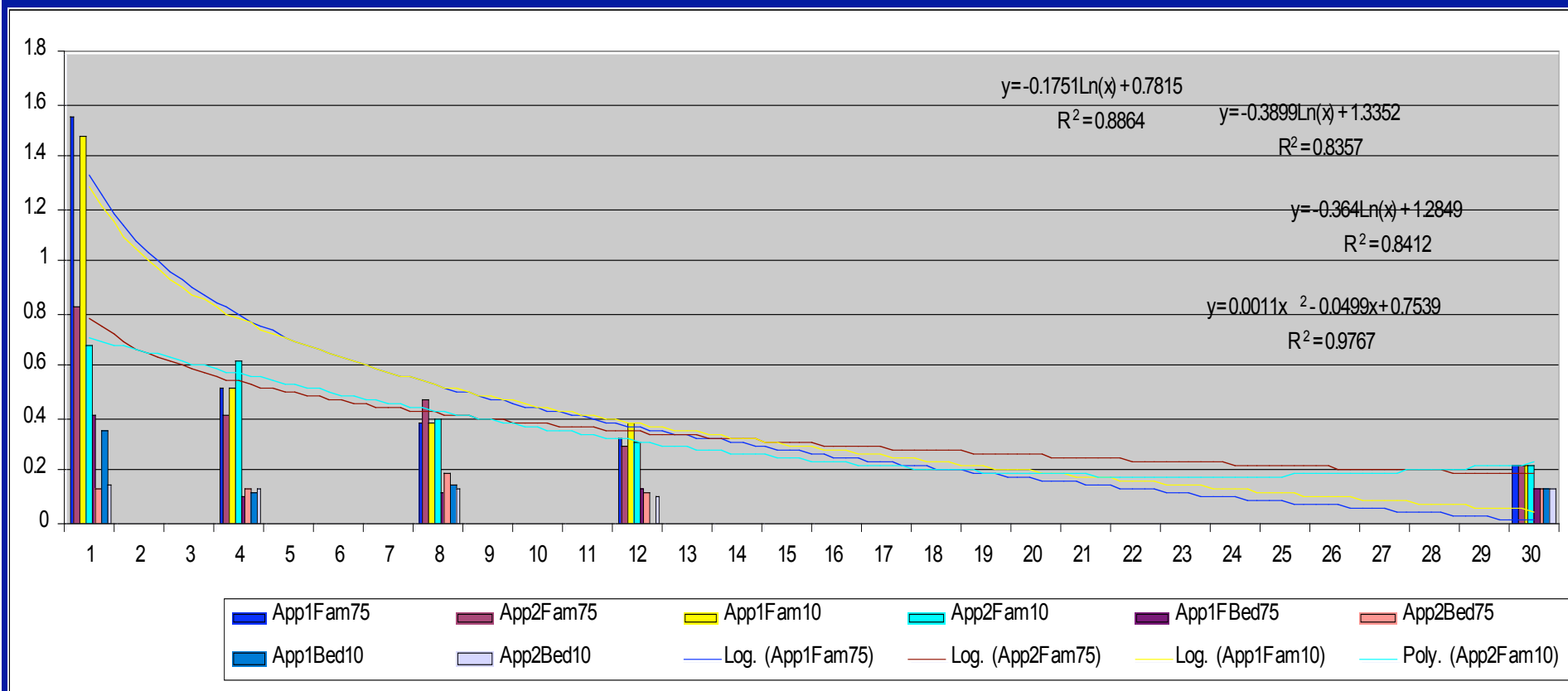


Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Diazinon Indoor Air Concentrations: Days Following Application

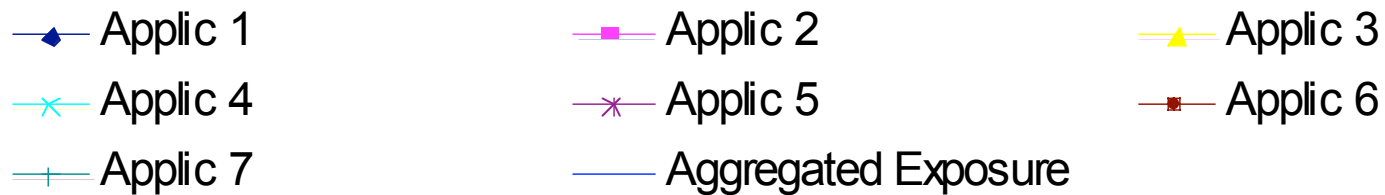
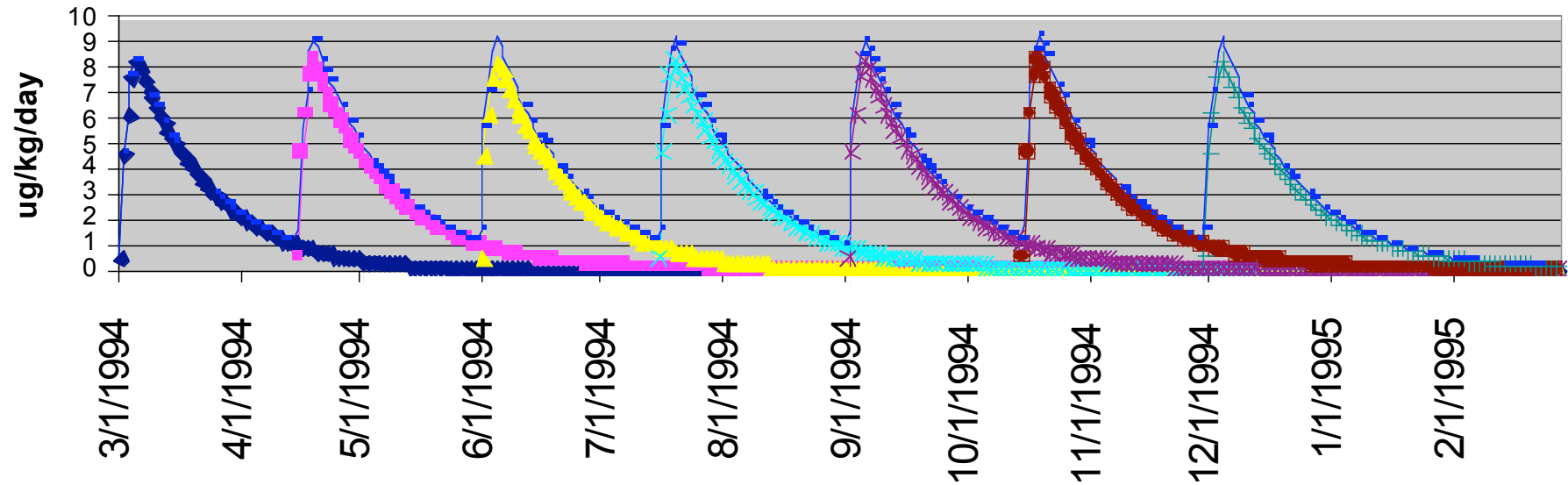
Lewis et al. 2001.



Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

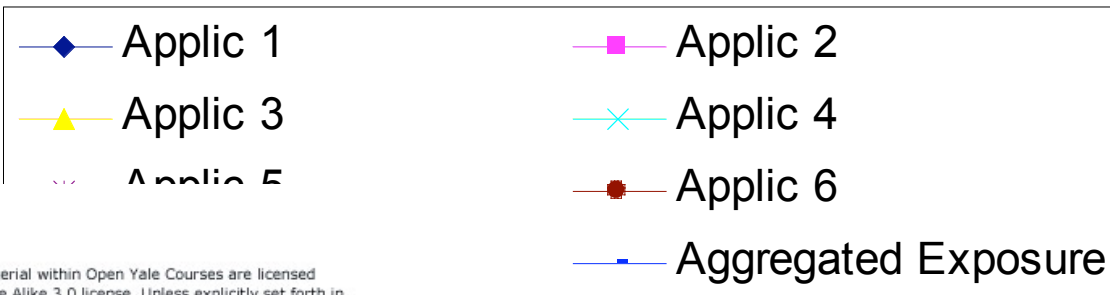
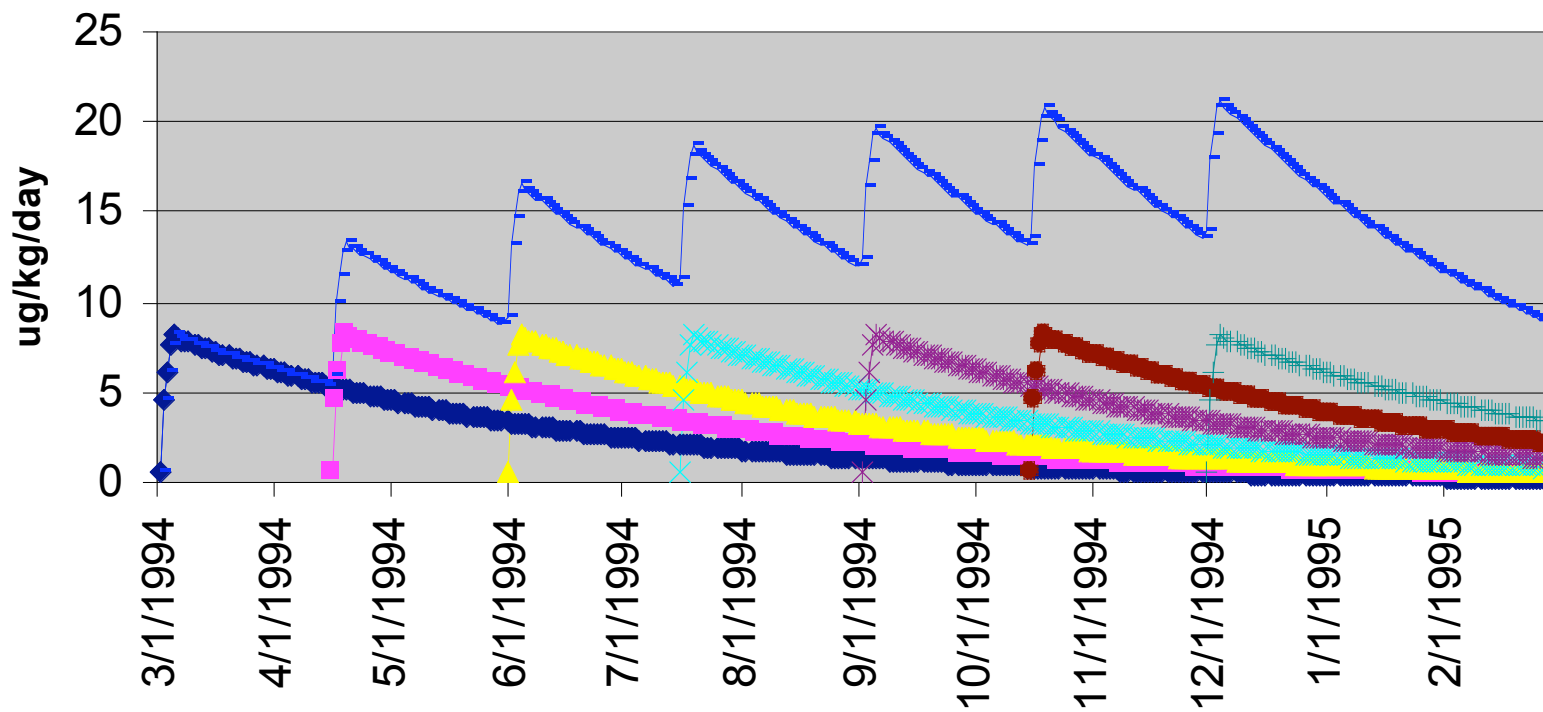
Repeated Air Exposures & Decay Rate Analysis 6 Week Delay Between Applications



Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Repeated Air Exposures & Decay Rate Analysis 6 Week Delay Between Applications Assume 1% Decay Rate Per Day



Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Microencapsulation: 1988

NAS 1993

DNT Studies: 1999

Chlorpyrifos Cancellation 2000

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Preemption

Supremacy Clause of the
US Constitution, “This
Constitution and the Laws
of the United States...
shall be the supreme Law
of the Land; and the
Judges in every State shall
be bound thereby...”

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Theories of Recovery



- ❧ Failure to Warn Family
- ❧ Applicator Negligence: Failure to exercise reasonable care
- ❧ Design Defects: High Concentration
- ❧ Failure to Disclose Incident Reports

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Bates v. Dow Agrosciences LLC (2005) (Bates)



- ✧ 29 Texas peanut growers alleged that application of a Dow Agrosciences' weed killer, Strongarm, damaged their peanut plants during the year 2000 growing season.
- ✧ The pesticide label however claimed that "Use of Strongarm is recommended in all areas where peanuts are grown."
- ✧ When the herbicide was used on the Texas peanut farm land where soils often exceed a pH of 7.2, it not only damaged the peanut crop, but failed to control the weeds.

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

- ✧ By 2001, EPA approved a new label for the chemical that included a new warning, "Do not apply Strongarm to soils with a pH of 7.2

US Supreme Court:



∞ “Congress surely would have expressed its intent more clearly if it had meant to deprive injured parties of a long available form of compensation. Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in distributing inherently dangerous items.”

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Industry Arguments

1. Emphasize Benefits of Product or Technology
2. Evidence is Insufficient to Justify Reg: Play the Good Scientist
3. Challenge Every Claim of Hazard: Compare to Natural Hazards
4. Human Experimentation: justify relief from 10 X safety factor
5. Exposure: Average nationally, yearly and demographically
6. Label Restrictions: Meet Any Disclosure Requirement in 6 point type
7. Restricted Use: Applicator Training and Licensing
8. Registration Is a Property Right: Prohibition Demands Compensation (5th Amend.)
9. Patent Life: Long Lag Time; Existing Stock Provision
10. If Product is Banned Domestically: Let Us Export
11. Substitutes: Don't Compare Us; Relative Risk is Uncertain
12. Environmental Surveillance is Acceptable If We Self Monitor and

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

er Than Ban

14. Comparative Risk: Spend \$ on Seat Belts, Drug Control and Suicide Prevention

Environmental & Consumer Group Arguments:

1. Burden of Proof Shifted to Private Sector: Demonstrate Safety
2. Evidence is Insufficient to Justify Finding Safety (Need 10XSF)
3. Susceptibility: Toxicity: Developmental, Endocrine, Neuro, Immune: Data Are Incomplete....Don't Wait
4. Exposure: Demand Distributional Analysis by Age Class
5. Mixtures: Common Mechanism Demands Collective Analysis
6. Aggregate Exposure: Air, Water, Foods, Indoor/Outdoor, CP's
7. Pace of Review: Keep to Schedule or See you in Court
8. Restricted Use, Label Changes and Ecological Restrictions....
9. Environmental Testing: EWG—25 million exposed
10. Are the most exposed the most susceptible?
11. Oppose Federal Preemption of State and Local Control
12. Demand Disclosure of Inert Ingredients

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

Strategic Targets for Reform

1. Governments

- *Legislative Branch*
- *Executive and Administrative (EPA, USDA, FDA, OMB, WH)*
- *Judicial*
- *Int'l, Nat'l, State, Local... Citizens*

2. Media

3. Consumers: Corporations, Universities, Hospitals, Golf Courses

4. 2nd & 3rd Party Commercial Vendors

5. Labor Groups

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

7. Institutional Risk Bearers: Insurance Companies

Reform

1. *Labeling Requirements: Ingredients, Warnings, Education*
2. *Balancing v. Health Protective Standards*
3. *Prior Informed Consent*
4. *Secrecy: Property Rights to Knowledge of Risk*
5. *Certification: Process vs. Product*
6. *Defamation Laws: Alar Case*
7. *Preemption: Bates Case*
8. *Riskiest First: Strategic Attention to Highest Risk*
9. *Burden of Proof: Innovators vs. Public*
10. *Protection of the Most Vulnerable*

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.

in the Face of Uncertainty

12. *Export of Banned Substances*