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NEWSLETTER

Summer Decisions Shape the ESA-FIFRA Battlefield

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The near-term battlefield for Endangered Species Act-based (ESA) challenges to the U.S. Environmental Protection Agency's (EPA) pesticide regulation program has become clearer this summer. For the moment, the activist community appears to be willing to allow EPA and the ESA-implementing National Marine Fisheries and Fish & Wildlife Services some breathing room to integrate ESA consultations with the ongoing Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[1] "registration review" evaluation of existing registered products, which is supposed to be completed by October 1, 2022.[2] Meanwhile, the activists have turned their attention to "new" products.

The existing products were the subject of the first round of litigation relating to the adequacy of EPA's ESA consideration of impacts of pesticide registration actions under FIFRA, which began over a decade ago. In those cases, plaintiffs focused on the Agency's alleged failures to consult with the Services under ESA §7 in the registration of hundreds of pesticide products.[3] The cases resulted in an injunction[4] and subsequent negotiated settlements which established deadlines for revisitation of the challenged registration determinations. More recently, however, EPA has obtained the various parties' and court's consent to adjust the established schedules to conform with the Agency's registration review plans.[5]

One reason for the plaintiffs' accommodation of EPA's plan to integrate ESA reviews into registration review was the release by EPA and the Services, in November, 2013, of an "interim approach," which committed EPA to consultation whenever there was an overlap between use of a particular pesticide and species habitat.[6] Even as EPA and the Services have made it clear that the "interim" process

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may be substantially revised as a result of implementation experience,[7] the activists have continued to let the process evolve. As of today, three products that had been the focus of initial litigation-driven ESA consultations regarding potential effects on salmonids—chlorpyrifos, diazinon, and malathion—have become the test cases for developing consultation procedures and principles. And the first products of that integrated effort are expected to be released by EPA later this year.[8]

More recently, however, the activists' focus has shifted. Some litigation attention still is being given to ESA concerns with existing products—in the *Ellis* case that challenges registration of two neonicotinoids[9] and the longstanding "mega" case,[10] the last of the original batch of existing product consultation-failure cases. But more attention is being given to "new" products—some new chemistries, some combinations of previously registered active ingredients. ESA-based challenges have been brought against registrations of four such products: Enlist (2,4-D and glyphosate), Acuron (the new active ingredient bicyclopyrone and atrazine, mestrione, and S-metaolachlor), cyantraniliprole, and flupyradifurone. In these cases, EPA approved the products at issue in part because they presented lower risk than existing products that would be displaced. But, the challengers allege, in none of them did EPA adequately comply with ESA consultation obligations.

The remainder of this article reviews recent decisions and pending issues as to all these cases.

Enlist: "New" Product But No Consultation Because "No Effect"

Two Court of Appeals cases challenge the registration of Dow AgroSciences' "Enlist Duo" products.[11] These herbicides combine a reduced-drift formulation of 2,4-D with glyphosate, for use on corn and soybeans. In this case, EPA undertook a full-scale ESA evaluation on a state-by-state basis. It then granted registrations in two tranches, after concluding that, because of the restrictions placed on the usage and characteristics of the chemicals, the products would have "no effect" on any threatened or endangered species or their habitat in the states in that tranche.

Although EPA's authority is well established to determine whether consultation is necessary—whether, in ESA-speak, an action "may affect" a threatened or endangered species or critical habitat[12]—the Center for Food Safety, Natural Resources Defense Counsel (NRDC), and others in October 2014 challenged EPA's approval of Dow AgroScience's Enlist Duo registration applications. Then, in February 2014, the petitioners moved to stay the registrations until the merits of the cases had been decided.

As with any stay situation, to succeed the petitioners would have had to establish (among other things) a likelihood of success on the merits and the risk of irreparable harm if relief was not granted. Faced with strong arguments from EPA, Dow AgroSciences (as intervenor) and CropLife America (as *amicus*) as to both issues (as well as the other pertinent issues of the balance of the equities and the public interest), the court on August 11 denied the stay motions.[13] Unfortunately, the Court issued no opinion, so it is impossible to know whether the decision reflects doubts about the petitioners' legal theories, the absence of irreparable harm—Dow AgroSciences has only introduced limited amounts of product into the market in 2015—or other considerations.

However, the process did elucidate several of the substantive issues that will be put before the Ninth Circuit. One will be the authority of EPA to apply its substantial expertise in making "may affect" determinations. In their stay briefings, petitioners took a very restrictive view of EPA's discretion. They essentially argued that the ESA requires that the test being applied by the Agency on an interim basis, as it works through the integration of FIFRA and ESA issues in the registration review process described above, must control all EPA ESA evaluations. As noted above, that test requires at least informal ESA consultation wherever there is a geographic overlap between species' presence and potential pesticide use. But the Department of Justice, representing EPA, made explicitly clear in its stay briefs a view that the highly conservative approach embodied in the "Interim Approaches" document is not compelled by statute.[14] And the Services expressly concurred in that view in a report they jointly sent to the Congress in late 2014 with EPA and the Department of Agriculture.[15]

Another key issue in the Enlist briefing will be whether EPA can grant new applications for existing products when registration review is pending. The glyphosate component of Enlist products has been a particular target in this context, by virtue of NRDC's repeated characterizations of glyphosate as a principal cause of the decline in Monarch butterfly populations. Glyphosate is far along in registration review, and successful marketing of the Enlist products will actually result in a reduction in glyphosate use. Thus, EPA has quite rationally taken the position that no independent ESA evaluation of glyphosate is necessary in the Enlist context.

Notwithstanding their effort to obtain a stay in this case, plaintiffs recently have moved to extend the merits briefing schedule. If their motion is granted, merits briefing will run through early 2016. Even if the Ninth Circuit hears argument on an accelerated basis after briefing is completed, this schedule means that no decision is likely before early summer. More realistically, a decision may be a year or more away.

Cyantraniliprole, Flupyradifurone, and Acuron (Bicyclopyrone): New Products, No Consultation

The remaining cases challenging new FIFRA registrations on ESA grounds involve the insecticides cyantraniliprole and flupyradifurone and the herbicide Acuron (which contains the new active ingredient bicyclopyrone). All were filed by the Center for Biological Diversity and mixed sets of others. In each case, EPA had determined that the products at issue were "reduced risk" products and that it was sensible to delay ESA evaluations and any resulting consultations until the processes being developed in registration review had matured.

The first case, challenging registration of cyantraniliprole, was filed in both U.S. District Court in the District of Columbia, citing the ESA as providing jurisdiction,[16] and in the U.S. Court of Appeals for the District, relying on FIFRA's judicial review provision, Section 16(b).[17] The District Court case was filed on June 3, 2014; the appellate case, four months earlier. The plaintiff's undisputed goal was to establish that District Court jurisdiction exists to review ESA compliance in the context of FIFRA registrations, and they promptly asked that the appellate case be stayed until the district court had resolved the jurisdictional issue. The Court of Appeals granted that request, and the case remains stayed pending a further court order.

The plaintiffs must have been aware that they faced an uphill battle in establishing district court jurisdiction. Requiring that the challenge be heard in the Court of Appeals is consistent with both longstanding D.C. Circuit precedent[18] and more recent Ninth Circuit rulings.[19] It came as little surprise, therefore, when on July 27, District Court Judge Gladys Kessler granted the motions of EPA and the intervening registrants to dismiss the cyantraniliprole district court case.[20] Unsurprisingly, Judge Kessler cited the D.C. Circuit rule that "[i]f a special statutory review procedure [exists], it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review of those cases to which it applies,[21] and a case that specifically applied that rule in the FIFRA context [22] and specifically that FIFRA contained just such a provision. She also noted the consistent recent Ninth Circuit precedent to the same effect.[23]

Also unsurprisingly, given their request to hold the FIFRA-based parallel case in abeyance, plaintiffs quickly filed an appeal of Judge Kessler's decision, and moved to consolidate it with the FIFRA appeal. Before the appellate court could rule on that consolidation motion, however, EPA on July 27 filed a Motion for Summary Affirmance of the District Court decision. That motion is currently pending, with plaintiffs/appellants response filed on September 3 and EPA's reply expected on September 18.

Also currently pending, but being held in abeyance until resolution of the jurisdictional issue in the cyantraniliprole case, are two other review proceedings filed by the Center for Biological Diversity (CBD) and others in the D.C. Circuit, pursuant to FIFRA § 16(b). These are the cases challenging two other new active ingredients, flupyradifurone[24] and Acuron (bicyclopyrone).[25] Petitioners in the two cases have also served on EPA 90 day notice, letters necessary to establish District Court jurisdiction, should Judge Kessler's cyantraniliprole decision be overturned, but those cases are unlikely to be filed if it is affirmed.

Based on the precedent, affirmance seems far more likely than not. If so, attention in the D.C. Circuit will turn to a question not previously litigated: EPA's discretion to defer ESA evaluations on registration actions it determines do not merit priority attention. This is an issue independent of the question raised in the Enlist litigation, of course, where the Agency undertook an ESA analysis, but concluded that because the action would have no impact on species or their habitat, no consultation was required. That will place more squarely before a court fundamental question of the relationship between FIFRA and ESA than has any other case since the Ninth Circuit's ruling in *Washington Toxics Coalition v. EPA* in 2005. Those cases, therefore, will be of considerable importance.

Ellis v. Housenger: **Challenges to Older Neonicotinoid Registrations**

A third decision this summer that will shape forthcoming ESA litigation was the June 12 ruling by District Court Judge Maxine M. Chesney in *Ellis v. Housenger,* a case which challenges the registration and ongoing use of the neonicotinoid pesticides chlothianidin and thiamethoxam. In April 2014, Judge Chesney had dismissed a number of the original claims in which plaintiffs sought to block the use of these alleged bee-killing neonicotinoid products.[26] That order allowed several claims to survive, however. In her June decision, Judge Chesney held that review of the legality of EPA's ESA-related decisions connected with those registrations was not limited to the record.[27] This opened the door to plaintiffs' reliance on expert testimony regarding the threat to species that the registrations allegedly present, and allowed discovery by EPA and the intervening

registrants into those experts' opinions.

The result is discovery and, likely, subsequent *Daubert* motions challenging the experts' qualifications.[28] This process probably will continue into the coming winter. Only after those matters are put to rest will Petitioner's motion for summary judgment on liability be heard, and cross motions from the defendants and intervenors. And the schedule for that briefing means no decision will be forthcoming before early summer: the first motion is to be filed
28 days after any Daubert motions are resolved, or (if no motions are filed) on January 29, 2016, and further briefing will continue for four months.

Mega: The Last of the Scheduling Cases?

One more case is likely to be decided in the next several months—or, at least, in 2016—that will affect the future of FIFRA-ESA integration. This is the so-called "mega" case, in which CBD originally (in 2010) challenged EPA's registration actions pertaining to product registrations related to 383 pesticide active ingredients and their effect on over 214 species. After giving the plaintiffs three opportunities to write a viable complaint, in October, 2014, District Court Magistrate Judge Joseph Spero dismissed all 31 counts in the third amended complaint that alleged consultation failures.[29] But he allowed a number of counts to survive. All of these allege EPA failed to reinitiate consultation as to products after various actions specified in the Services' ESA-implementing regulations occurred. But further action on those surviving has been deferred while plaintiffs pursue appeal of the dismissals.

The issues in the pending appeal include the same district court jurisdictional issue presented in the cyantraniliprole case, along with whether a failure-to-consult claim can be based on nothing more than EPA's continued authority over a pesticide registration. The issues have now been fully briefed, but argument has not yet been scheduled. Given Ninth Circuit calendars, it is unlikely that it will be heard before the new year. If the Ninth Circuit reverses Judge Spero, this case will again become alive with both failure to consult and failure to reinitiate claims. Even if the court affirms Judge Spero, however—which Circuit precedent establishes should be the case—attention will turn to the reinitiation claims unless the plaintiffs-appellants seek a further stay while seeking reconsideration or Supreme Court review.

The potential impact of those claims should not be underestimated, however. Under the Services' regulations—which Judge Spero held merit deference—every listing of a new endangered species and a variety of other developments, some as indefinite as the discovery of "new information,"[30] could trigger an obligation to reopen previously-completed consultations. If broadly interpreted, this holding could frustrate all of EPA's efforts to bring administrative regularity to the FIFRA-ESA integration process by incorporating "catch-up" reviews of existing products in registration review. And a decision addressing the issue is likely to be reached at a time EPA and the Services are trying to determine or implement the lessons learned from those three test cases.

1 *See* 7 U.S.C. §§ 135 *et seq.*
2 But they continue to keep the pressure on the services. *See e.g., Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 15-CV-00658-JCS, 2015 WL 5012889 (N.D. Cal. Aug. 24, 2015).
3 *See, e.g., Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1028 (9th Cir. 2005); *Ctr. for Biological Diversity v. EPA*, 65 F. Supp. 3d 742 (N.D. Cal. 2014).
4 *See* Order Granting Injunctive Relief, *Washington Toxics Coal. v. EPA,* No. 01-0132 (W.D. Wash. Jan. 22, 2004).
5 Registration review is a process by which EPA reviews and updates the scientific basis for its prior conclusion that existing pesticides meet FIFRA's standard of not causing unreasonable adverse effects on the environment. FIFRA Section 3(g) requires that reviews occur every fifteen years. Prior to the initiation of the registration review program, EPA implemented a similar "reregistration" program under authority of FIFRA Section 4.
6 Interim Approaches for National-Level Pesticide Endangered Species Act Assessments Based on the Recommendations of the National Academy of Sciences April 2013 Report (November 2013), *available at* http://www.epa.gov/espp/2013/interagency.pdf.
7 EPA, Fish & Wildlife Serv., Nat'l Marine Fisheries Serv., and Dep't of Agric., *Interim Report to Congress on Endangered Species Act Implementation in Pesticide Evaluation Programs* at 1 (Nov. 2014), *available at* http://www.epa.gov/oppfead1/endanger/2014/esa-reporttocongress.pdf; Brief of Respondent at 16-18, *Ctr. for Food Safety v. EPA*, No. 14-73359 (9th Cir. Mar. 13, 2015).
8 Those will be environmental assessments; the ultimate determination as to whether consultation is appropriate and the scope of any consultation will not come for months thereafter.
9 *Ellis v. Housenger,* No. 13-1266 (N. D. Cal. filed Mar. 21, 2013).
10 *Center for Biological Diversity v. EPA*, No. 14-16977 (9th Cir. filed Jun. 20, 2015).
11 The cases, *Natural Resources Defense Council v. EPA* (9th Cir., Nos. 14-73353, 15-71213) and *Center for Food Safety v. EPA* (9th Cir., Nos. 14-73359, 15-71207) were consolidated.
12 *See* 40 C.F.R. § 402.14.
13 *See* Order, *Natural Res. Def. Council v. EPA*, No. 14-73353 (9th Cir. Aug. 11, 2015).
14 *See* Brief of Respondent at 16-18, *Ctr. for Food Safety v. EPA*, No. 14-73359 (9th Cir. Mar. 13, 2015).
15 *Interim Report to Congress on Endangered Species Act Implementation* at 1.
16 *See* Complaint at 6, *Center for Food Safety v. EPA*, No. 14-cv-942 (D.D.C. June 4, 2014).
17 *See* Petition for Review, *Ctr. for Biological Diversity v. EPA,* No. 14-1036 (D.C. Cir. Mar. 24, 2014).
18 *Envtl. Def. Fund, Inc. v. Costle*, 631 F.2d 922, 926–32 (D.C. Cir.1980).
19 *See, e.g., United Farm Workers of Am., AFL–CIO v. Adm'r, EPA*, 592 F.3d 1080, 1082–83 (9th Cir.2010).
20 *See Ctr for Biological Diversity v. EPA*, No. 14-942, 2015 WL 2342394, at *8 (D.D.C. May 14, 2015).
21 *Id.* at *5 (quoting *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989).
22 *Envtl. Def. Fund, Inc. v. EPA*, 485 F.2d 780, 783 (D.C.Cir.1973).
23 *See, e.g., Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1194 (9th Cir.2008); *Ctr. for Biological Diversity v. EPA*, No. 11–cv–00293, 2013 WL 1729573, at *18 (N.D. Cal. Apr. 22, 2013).
24 *Ctr. for Biological Diversity v. EPA*, No. 15-1054 (D.C. Cir. filed Mar. 13, 2015).
25 *Ctr. for Biological Diversity v. EPA*, No. 15-1176 (D.C. Cir. filed June 18, 2015).

26 *Ellis v. Bradbury*, No. C–13–1266, 2014 WL 1569271 (N.D. Cal. Apr. 18, 2014).

27 *Ellis v. Housenger*, No. C-13-1266, 2015 WL 3660079, at *4 (N.D. Cal. June 12, 2015).

28 *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

29 *Ctr. for Biological Diversity v. EPA*, 65 F. Supp. 3d 742, 772 (N.D. Cal. 2014).

30 50 C.F.R. § 402.16.