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Summer Decisions Shape the ESA-FIFRA Battlefield: Part 2

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Part one of this article series showed the continued focus of the activist community on new product registrations under the Federal Insecticide, Fungicide, and Rodenticide Act, and their attempts to limit the U.S.Environmental Protection Agency's discretion to decide whether and when to consult on impacts to species listed under the Endangered Species Act.

Yet, a second risk to the agricultural community stems from new challenges to the EPA's previous registration actions and ongoing use of products, many of which were first registered several years ago. In these cases, courts must directly confront whether the ESA provides a continuing basis to challenge registration of pesticide products, long after a pesticide product was first approved by the EPA and after the time limit for challenges under FIFRA has expired. If the activists are successful in these cases, it would place many commonly used pesticides in near-constant threat of litigation.

Ellis v. Housenger: Challenges to Older Neonicotinoid Registrations

One of these challenges led to a June 12 decision by U.S. District Court Judge Maxine M. Chesney that will shape forthcoming ESA litigation. In *Ellis v. Housenger,* the activist petitioners challenged 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.[1] That order allowed several claims to survive, however. In her June decision, Judge Chesney held that review of the legality of the EPA's

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ESA-related decisions connected with those registrations was not limited to the record.[2] This opened the door to plaintiffs' reliance on expert testimony regarding the threat to species that the registrations allegedly present, and allowed discovery by the EPA and the intervening registrants into those experts' opinions.

The result is discovery and, likely, subsequent *Daubert* motions challenging the experts' qualifications.[3] 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 Jan. 29, 2016, and further briefing will continue for four months.

Mega: 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 the Center for Biological Diversity originally (in 2010) challenged the 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, U.S. Magistrate Judge Joseph C. Spero dismissed all 31 counts in the third amended complaint that alleged consultation failures.[4] But he allowed a number of counts to survive. All of these allege the EPA failed to reinitiate consultation as to products after various actions specified in the National Marine Fisheries Service and U.S. Fish and Wildlife Service's 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 the 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 U.S. Supreme Court review.

The potential impact of those claims should not be underestimated, however. Under the NMFS and FWS' 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"[5] — could trigger an obligation to reopen previously completed consultations. If broadly interpreted, this holding could frustrate all of the 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 the EPA and the NMFS and FWS are trying to determine or implement the lessons learned from those three test cases.

[1] *Ellis v. Bradbury*, No. C-13-1266 (N.D. Cal. April 18, 2014).

[2] *Ellis v. Housenger*, No. C-13-1266 at *4 (N.D. Cal. June 12, 2015).

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

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

[5] 50 C.F.R. § 402.16.