wiley

ARTICLE

Summer Decisions Shape the ESA-FIFRA Battlefield: Part 1

Law360
October 15, 2015

The near-term battlefield for Endangered Species Act-based challenges to the U.S.Environmental Protection Agency's pesticide regulation program has become clearer this summer. For the moment, the activist community appears to be willing to allow the EPA and the ESA-implementing National Marine Fisheries Service and U.S. Fish and Wildlife Service some breathing room to integrate ESA consultations with the ongoing Federal Insecticide, Fungicide, and Rodenticide Act[1] "registration review" evaluation of existing registered products, which is supposed to be completed by Oct. 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 the 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 EPA's alleged failures to consult with the NMFS and FWS under Section 7 of the ESA 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, the EPA has obtained the various parties' and court's consent to adjust the established schedules to conform with the EPA's registration review plans.[5]

One reason for the plaintiffs' accommodation of the EPA's plan to integrate ESA reviews into registration review was the release by the EPA and the NMFS and FWS, in November 2013, of an "interim approach," which committed the EPA to consultation whenever there

Authors

David B. Weinberg
Senior Counsel
202.719.7102
dweinberg@wiley.law

Practice Areas

Endangered Species
Environment & Product Regulation
Pesticides and FIFRA

was an overlap between use of a particular pesticide and species habitat.[6] Even as the EPA and the NMFS and FWS have made it clear that the "interim" process 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 the 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 long-standing "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, the 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 the EPA adequately comply with ESA consultation obligations.

Part one of this article series reviews recent decisions and pending issues in the challenges to the EPA's registration of new products. These cases raise fundamental questions about the intersection of FIFRA and the ESA, including the authority of the EPA to determine whether consultation is necessary and, if so, when it must occur. Part two analyzes pending challenges to existing registrations. These cases are an end run around FIFRA and challenge whether the ESA provides a separate means to challenge the EPA's ongoing oversight of pesticides even if such challenges would otherwise be blocked by FIFRA's jurisdictional provisions.

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, the 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 the 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 and others in October 2014 challenged the 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 the 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 Aug. 11 denied the stay motions.[13] Unfortunately, the court issued no opinion, so it 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 as the case is briefed. One will be the authority of the EPA to apply its substantial expertise in making "may affect" determinations. In their stay briefings, petitioners took a very restrictive view of the EPA's discretion. They essentially argued that the ESA requires that the test being applied by the EPA 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 U.S. Department of Justice, representing the EPA, made it explicitly clear in its stay briefs the view of the United States government that the highly conservative approach embodied in the "Interim Approaches" document is not compelled by statute.[14] And the NMFS and FWS expressly concurred in that view in a report they jointly sent to Congress in late 2014 with the EPA and U.S. Department of Agriculture.[15]

Another key issue in the Enlist briefing will be whether the 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 the 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, the 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, the 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 the U.S. District Court for the District of Columbia, citing the ESA as providing jurisdiction,[16] and in the D.C. Circuit, 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 long-standing D.C. Circuit precedent[18] and more recent Ninth Circuit rulings.[19] It came as little surprise, therefore, when on July 27, U.S. District Judge Gladys Kessler granted the motions of the 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, the 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 Sept. 3 and the EPA's reply filed on Sept. 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 and others in the D.C. Circuit, pursuant to FIFRA Section 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 the 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: the 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 EPA 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 the 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.

Stay tuned for part two of this article, which analyzes challenges to existing product registrations rather than to new product registrations.

[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 (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 the 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 15 years. Prior to the initiation of the registration review program, the EPA implemented a similar "re-registration" program under the 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, Ctr. for Biological Diversity 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 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 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).