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NEWSLETTER

Status of the FIFRA-ESA Wars

June 2013

With three major court decisions in the last six months, the publication of the National Academy of Sciences (NAS) report, *Assessing Risks to Endangered and Threatened Species From Pesticides,*[1] and the impending release of the drafts of the final biological opinions mandated in the landmark 2004 *Washington Toxics* injunction,[2] the time is ripe for a report on the status of efforts to find a sensible way to integrate Endangered Species Act (ESA) evaluations into the pesticide registration and registration review schemes described in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

After decades of sporadic efforts to expand its standard ecological risk assessment mechanisms to provide special attention to threatened and endangered species, the U.S. Environmental Protection Agency (EPA) began a priority effort to address ESA Section 7 consultation issues over a decade ago after a spate of cases challenging the agency's historic lack of compliance with that provision. The first, *Washington Toxics Coalition v. EPA*, was filed in 2001 and resulted in a 2004 injunction compelling EPA to follow a schedule for assessing the possible effects of use of 54 pesticides on salmonids in California and the Pacific Northwest and seeking consultation with the National Marine Fisheries Service (NMFS) where potential effects were identified. That injunction was upheld by the Ninth Circuit in 2005, resolving—at least until further congressional action—the fundamental question of whether EPA had to comply with both FIFRA and ESA in regulating pesticides. The answer, the Ninth Circuit affirmed, was "yes."

Similar subsequent suits sought similar injunctions dealing with potential pesticide impacts on the California red-legged-frog, a dozen species in the San Francisco Bay area, the Barton Springs (Texas) salamander and, eventually, in the so-called "megasuit," the impact

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of 382 pesticides on a list over 200 species found across the nation.[3] Most were settled with agreements by EPA to undertake effects evaluations and consultations on specified schedules.

The practical effect of these decisions was to demonstrate the inadequacy of existing governmental infrastructure to respond. NMFS's initial response to the *Washington Toxics* injunction was inept, and a 2004 effort to implement a more workable administrative mechanism by adding FIFRA-specific "Counterpart Rule" provisions to the Services' existing consultation regulations were frustrated by a partially-successful court challenge and bureaucratic infighting.[4] By the time the House Committees on Natural Resources and Agriculture held a joint oversight hearing in May 2011, even the Acting Director of the Fish and Wildlife Service (FWS) had to admit that, "We literally are swamped."[5]

What light have recent court decisions shed on this situation? First, in February, the Fourth Circuit confirmed that the same administrative law principles that apply to all other federal agency decision-making apply to biological opinions. Thus, in *DowAgroSciences, et al. v. National Marine Fisheries Service,* the court vacated the first of the *Washington Toxics* biological opinions because of the Service's failure to adequately respond to the comments and criticisms of EPA, several state governments and the registrants of the pesticides at issue, or to explain key elements of the Service's analytical approach.[6] In essence, the court underlined the significant efforts the Services are going to have to make to understand pesticides and their action mechanisms, as well as species locations and sensitivities, before adequate FIFRA-related biops can be presented.

Next, in April, Magistrate Judge Joseph Spero granted motions to dismiss filed by pesticide registrant intervenors and, belatedly, the EPA, in the "mega case."[7] In doing so, he became the third District Court judge to apply to ESA challenges the principle set forth by the Ninth Circuit in the 2010 *United Farm Workers of America v. EPA* decision that challenges to EPA pesticide registration actions taken after a public comment period must be filed within 60 days of the allegedly-unlawful EPA action and in the Court of Appeals.[8] Judge Spero gave the plaintiffs in *CBD* the choice of dropping their case, amending their complaint to try to state a lawful claim or appealing, and as of this article's publication, it appears that an amended complaint will be filed later in June. Presumably, it will assert claims against a far smaller number of registered products than did the dismissed iteration of the complaint.

The third decision, issued by the Ninth Circuit on May 17 in *Center for Food Safety, et al. v. Vilsack*, confirmed EPA's obligation to evaluate at least some aspects of its registration decisions on threatened and endangered species, but appears to have signaled judicial willingness to allow EPA adequate time to address the issues in a systematic way.[9] In affirming a prior district court holding that the U.S. Department of Agriculture's (USDA) Animal & Plant Health Service did not have to undertake ESA consultations regarding the potential increase in pesticide use that might result from approval of a genetically-modified seed trait, the court recognized that EPA's consultations on those issues, if necessary at all, would occur in the normal course of EPA's routine, 15-year "registration review" program, not simply because APHIS had approved the new seed trait.[10]

This conclusion, albeit dicta, is consistent with the approach EPA has adopted to catching up on its prior ESA inadequacies. It is to incorporate effects determinations, informal consultations and, where necessary, formal consultations into the registration review program. If adequate funding could be made available for that program to progress on schedule, this would mean completion of the catch-up process by 2022.

This month's NAS report is a step toward achieving that goal, but also an indication of how unlikely it is to be reached. The report came in response to a joint request from EPA, the Services and the USDA for advice on how to resolve a number of thorny risk evaluation issues on which the several agencies' staffs have long been at loggerheads (and which has been one of the principal reasons for delay in resolving FIFRA-ESA conflicts). It points the way to resolving most of those disputes, but how it will be received by the historically-antagonistic agencies remains to be seen.

Broadly speaking, the NAS report appears to more often favor the risk assessment approaches advocated by EPA staff than those of the Services, but it also presents several major challenges to EPA. For example, the NAS panel urged reliance on probability models in evaluating potential effects on threatened and endangered species, rather than the "risk quotient" approach EPA uses in the rest of its registration program. (In the "risk quotient" approach, a level of exposure that would present concern is identified, and the predicted exposure of species populations or habitat to that level is compared to it. This eases analysis but is far less sophisticated than computerized analyses of the likelihood of various exposure levels being experienced by various population segments over a period of time.)

So where does this put us? EPA has said it expects it to take another 90 days or so for it and the Services to evaluate the implications of the NAS report.[11] Clearly, however, EPA leadership anticipates then moving into the same sort of transparent process for developing applicable science policies that was successful in the implement of the 1996 Food Quality Protection Act. That statutory enactment presented to EPA challenges that are in many ways analogous to those presented by efforts to integrate the ESA and FIFRA. But whether the agency will have the luxury of pursuing that strategy is uncertain.

For one thing, registration review is an ongoing exercise. Dockets pertaining to about 750 of the existing pesticide active ingredients already have been opened, with the remainder to begin in the next several years. As to each of these, EPA is to consider potential nationwide impacts of the pesticide use on every threatened and endangered species, and to initiate and conclude consultations with one of the Services wherever there may be an effect. But it is hard to imagine that adequate governmental resources will be available to support this effort, at least on a timely basis.

In addition, further litigation is threatened. As noted above, the plaintiffs in the "megasuit" have indicated their intention to file an amended complaint by mid-June. Also, last month the plaintiffs in a pending case that sought to compel EPA to implement the biop vacated by the Fourth Circuit in its January *Dow AgroSciences* decision, and one other biop, signaled their intention to pursue that case, notwithstanding the Fourth Circuit ruling.[12] Their signal was a notice letter that restates their prior claims in ways intended to escape the appellate court's ruling, and notification to the District Court before which the case is pending that they intend to file an amended complaint by late June.

In addition to seeking to compel implementation of reasonable and prudent alternatives set forth by NMFS in two biops, the current complaint in the *NCAP* case alleges that because of EPA's failure to adequately protect salmonids from the pesticides at issue, the agency is "taking" endangered species under ESA Section 9. The recently-filed notice letter referenced above indicates that the plaintiffs intend to retain this claim in their amended complaint. In addition, another recent complaint alleges such "takes" by EPA in registering neonicotinoid pesticides, which allegedly affect bees and other insects[13] focuses on neonicatoid products that allegedly harm pollinators (bees), and includes a number of other causes of action. But the plaintiffs in *Ellis* also have indicated they expect to be filing an amended complaint in the near future, so the potential impacts of that litigation are today impossible to evaluate.

In short, all that is certain is uncertainty. The events of the last several months have shed some light on how EPA may meet the challenge of integrating its ESA and FIFRA obligations, but principally have served to underline the immensity of that challenge. The simple fact is that without enormous additional resources, neither EPA nor the Services can both catch up on ESA evaluations of existing products through registration review and meet statutory deadlines to timely evaluate new active ingredients or new uses of existing products. And, with those resources unavailable, Congress either must revisit the scope and complexity of the existing statutory scheme or face ongoing disruptions which serve neither to protect the species nor meet the production needs of farmers and the business predictability needs of suppliers of key input products.

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[1]National Research Council, *Assessing Risk to Endangered and Threatened Species for Pesticides* (National Academies Press, 2013), *available at* http://www.nap.edu/catalog.php?record_id=18344.

[2]*Washington Toxics Coalition v. Environmental Protection Agency*, 357 F.Supp. 2d (W.D. Wash 2004), *aff'd*, 413 F.3d 1024 (9th Cir. 2005). *Seealso* stipulated Settlement Agreement and Order of Dismissal *Northwest Coalition for Alternatives to Pesticides v. NMFS*, W.D. Wash. No. 07-1791-RSN (Aug. 1, 2008) mandating NMFS publication schedule.

[3]*Center for Biological Diversity v. EPA*, No. 11-cv-293-JCS, 2013 WL 1729573 (N.D. Cal., Jan. 20, 2011).

[4]*See* 50 C.F.R. Subpart D, upheld in part and vacated in part by *Washington Toxics Coalition v. U.S. Dept. of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006) (filed Sept. 23, 2004).

[5]Statement of Dr. Rowan Gould, *At Risk: American Jobs, Agriculture, Health and Species—The Costs of Federal Regulatory Dysfunction: Joint Oversight Hearing Before the H. Comm. on Natural Res. and H. Comm. on Agric.*, 112th Cong. (2011) at 93.

[6]2013 WL 632857 (4th Cir. Feb. 22, 2013). Wiley Rein represented two of the three appellants in this case.

[7]*Center. for Biological Diversity v. EPA*, No. 11-cv-293-JCS, 2013 WL 1729573 (N.D. Cal. Apr. 22, 2013).

[8]592 F.3d 1080 (9th Cir. 2010). Wiley Rein represented two agricultural chemical companies as intervenors in the *UFW* case and authored the motion that resulted in the ruling described in the text. The United States opposed that motion before the District Court, but later joined in successfully seeking affirmance of the District Court's dismissal.

[9]No. 12-15052.

[10]Slip op. at 10-11.

[11]*See* Status of Efforts to Implement the Recommendation of the NAS Report on Ecological Risk Assessment for Endangered and Threatened Species under FIFRA and ESA, May 23, 2013, *available at* http://www.epa.gov/oppfead1/endanger/nas-report.html.

[12]*Northwest Center for Alternatives to Pesticides v. EPA*, No. 2:10-cv-01919 (W.D. Wash.). Wiley Rein represents intervenor Dow AgroSciences LLC in this case.

[13]*Ellis v. Bradbury*, No. C-13-1266-LB (N.D. Cal, filed March 21, 2013).