

Wiley Rein Obtains Dismissal of Pesticide “Mega Case”

April 23, 2013

In Wiley Rein’s second major victory this year in an Endangered Species Act (ESA) case, Federal Magistrate Judge Joseph C. Spero yesterday dismissed claims that the U.S. Environmental Protection Agency (EPA) had violated the Act by failing to adequately consider the impact of 382 pesticides on threatened and endangered species.

The 33-page decision came in response to a motion filed by intervenor CropLife America, the nation’s leading association of crop protection chemical manufacturers, and several other industry interests. Wiley Rein served as co-counsel to CropLife and several regional associations and took the lead in briefing and arguing the motion to dismiss.

The case, *Center for Biological Diversity v. EPA* (N.D. Cal., No. 11-cv-00293-JCS), was filed in 2011, but dispositive motions had been delayed while Judge Spero allowed settlement negotiations to occur. In November 2012, as settlement negotiations dragged on, the court acceded to CropLife’s repeated requests to hear its motion to dismiss. Defendant EPA subsequently filed a parallel motion.

Judge Spero’s decision is precedent-setting in several important respects. First, it confirms CropLife’s argument that a 2012 *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit (*Karuk Tribe*) requires plaintiffs who challenge EPA compliance with ESA to explicitly specify the particular EPA pesticide registration actions in which they assert EPA erred. In doing so, Judge Spero rejected the plaintiffs’ effort to rely on the earlier Ninth Circuit *Washington Toxics* decision, which dealt directly with challenges to pesticide registrations, to support the theory that EPA’s continuing oversight of pesticide use was sufficient to establish jurisdiction.

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Second, Judge Spero reinforced the conclusion, previously reached by two other district court judges, that a Ninth Circuit case Wiley Rein won in 2010, *United Farm Workers v. EPA*, requires that challenges to allegedly improper EPA registration decisions be brought within 60 days of the specific action challenged, and brought in a U.S. Court of Appeals.

Third, the court held that recent U.S. Supreme Court decisions regarding the necessary specificity of complaints precluded plaintiffs from pursuing vague assertions that EPA had somehow failed to reinstate previous ESA consultations because of changed circumstances.

The *Center for Biological Diversity* case marks Wiley Rein’s second major Endangered Species Act victory this year. In February, the U.S. Court of Appeals for the Fourth Circuit responded favorably to Wiley Rein’s arguments on behalf of three pesticide producers when it vacated an ESA “biological opinion” issued by the National Marine Fisheries Service (NMFS). (*Dow AgroSciences, et al. v. NMFS*).

David B. Weinberg, chair of Wiley Rein’s Environment & Safety Practice, argued the dispositive issues in both the *Center for Biological Diversity* and *Dow AgroSciences* cases. Associate Roger H. Miksad played a key role in preparing the *Center for Biological Diversity* motion and briefs.

To view Judge Spero's decision, please [click here](#).

For more information, please contact David B. Weinberg at 202.251.1830 (April 23-24), or 202.719.7102 (Starting April 25 after 4pm), or dweinberg@wiley.law.