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Environmentalists Narrow 'Mega' Suit After Judge Threatens Dismissal

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By Jenny Hopkinson

Environmentalists have narrowed their suit seeking to force EPA to retroactively review the effects of scores of pesticides on hundreds of endangered species, filing a new complaint that targets agency approval of more than 50 active ingredients, down from nearly 300 named in the original suit.

In the June 5 amended complaint in Center For Biological Diversity (CBD), et al., v. EPA, environmentalists argue that the agency has failed to consult with federal wildlife agencies as required under section 7 of the Endangered Species Act (ESA) when it granted Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) registration for 31 pesticides and to re-initiate consultations after making changes to the registration of 43 pesticides, though some chemicals fall into both categories.

According to the complaint, the pesticides that remain at issue in the suit are either those "for which EPA has indicated that Estimated Environmental Concentrations are likely to exceed Levels of Concern for endangered or threatened species or may cause indirect effects on endangered species by altering habitat or food sources," or "that are 'highly acutely toxic' or 'very highly acutely toxic' to one or more taxa groups" as based on toxicity data in one or more of the three databases EPA maintains.

EPA officials told a meeting of State-FIFRA Issues Research and Evaluation Group June 10 in Arlington, VA, that they are weighing how to respond to environmentalists' amended complaint after the groups pared down the complaint to reflect issues raised in an April order from Judge Joseph Spero of the U.S. District Court for the Northern District of California provisionally granting a motion to dismiss largely based what he said was a lack of specifics in the original suit.

Spero in his April 22 ruling granting EPA and industry's motion to dismiss arguments that the plaintiffs lacked standing, were too vague, failed to allege specific claims for relief and "ongoing agency actions" and that appellate courts are the appropriate venue for many of the counts.

The amended complaint from environmentalists seeks to address those issues, detailing timely agency actions for each chemical and focusing on data-rich substances such as 2,4-D, atrazine and chlorpyrifos -- which have come under fire from environmentalists and public health advocates in the past over health

concerns. The groups in the complaint maintain their original calls for EPA to initiate consultations on the pesticides and immediately apply restrictions to their use to ensure protections during the process.

While Spero left the door open for environmentalists to refile the suit, his future review of the case may be guided by the 2008 American Bird Conservancy v. Federal Communication Commission decision from the U.S. Court of Appeals for the 9th Circuit, which found that the statutes granting appellate review of agency actions take precedence over statutes with general review provisions in the district court, such as the ESA, casting doubt on whether the groups efforts will be successful. -- Jenny Hopkinson (jhopkinson@iwpnews.com)

After Court Loss, Environmentalists Eye ESA 'Take' Rules To Target Pesticides

Environmentalists are considering using onerous provisions of the Endangered Species Act (ESA) that prohibit "take" of a protected species to force EPA to strengthen pesticide controls after a federal court blocked them from using less-burdensome procedural provisions of the law that requires EPA to consult with wildlife services to mitigate harms.

A source with the Center for Biological Diversity (CBD), which has been behind most of the ESA challenges to EPA's pesticide decisions, says environmentalists are looking at how the "take" prohibition of ESA section 9 can be used to force stricter pesticide restrictions.

CBD has recently used the threat of a section 9 suit to win additional restrictions on certain rodenticides from the California Department of Pesticide Regulation (DPR) after alleging that the state's approval of the chemical could cause take of listed bald eagles and golden eagles.

"So long as DPR continues to authorize the use of rodenticides with the capacity to harm, harass, injure, or kill endangered species, DPR is causing ongoing take to occur," according to the group's petition.

California has since responded to the petition, committing to put stricter restrictions on the four anticoagulants at issue.

But the CBD source cautions that section 9 requires plaintiffs to provide considerably more data to back up their claims than section 7 consultation requirements, so groups will have to be more selective when filing suit. "There are not a lot of section 9 cases frankly in relation to section 7 cases because they are more complicated to prosecute," the CBD source says. "It's the old saying that you need dead bodies to prove take," the source says.

While environmentalists are concerned about their burden of proof, industry groups fear that if advocates are successful, they could face liability even in cases where they are applying pesticides in accord with EPA labeling requirements.

"One of the issues that will have to be dealt with at some point in the future is whether or not pesticides that are being used within the limits of their label" are potentially harassing a species, and thus could be causing "take" in violation of section 9 of the law, David Weinberg, an attorney with the firm Wiley Rein LLP told a recent pesticide industry meeting.

Environmentalists have been trying for years to force EPA to account for potential harms to listed species when approving pesticides. They have filed a series of suits aimed at forcing EPA to consult with federal wildlife officials as ESA section 7 requires.

The suits have been aimed at forcing the wildlife agencies to craft Biological Opinions (BiOps), assessments of potential risks, and subsequent suits aimed at forcing EPA to implement the BiOps reasonable and prudent alternatives to mitigate any potential harms.

The requirement, if successful, generally has the effect of imposing stricter controls because the agency has to meet the ESA's "no jeopardy" protection standard, which is usually significantly more protective than the standard in the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), which requires no "unreasonable adverse effect."

But EPA has rarely conducted the consultations over the past several decades, having reached an impasse in the 1980s with the resource agencies over their different statutory requirements.

Consultations

While the National Academy of Sciences (NAS), at the request of EPA and other agencies, April 30 issued recommendations for how EPA and federal wildlife services may be able to overcome their differences for future pesticide registrations, environmentalists have been struggling to force the agencies through a series of lawsuits, including one known as the "mega" suit, to retroactively consult on existing registrations.

But courts have generally rejected their challenges on procedural grounds, finding they were really collateral attacks on the registration, not a legitimate ESA challenge, and should therefore be brought under FIFRA. Most recently, a federal district court in California ruled provisionally April 22 to dismiss the mega suit, known as CBD, et al., v. EPA, et al, which challenged EPA over its registrations for more than 300 pesticides and their effects on 200 species.

Judge Joseph Spero the U.S. District Court for the Northern District of California backed an industry argument that a pesticide registration is not an "ongoing" agency action that can trigger the need for consultation at any time, limiting the time frame of challenges to registrations.

Environmentalists June 5 revised their complaint to address Spero's April 22 ruling, dropping scores of chemicals from the list of those they had originally alleged EPA had failed to assess for their species' impacts.

But the court may be guided in its future review of the case by the U.S. Court of Appeals for the 9th Circuit findings in the 2008 American Bird Conservancy v. Federal Communication Commission case, which found that the statutes granting appellate review of agency actions take precedence over statutes with general review provisions in the district court, such as the ESA.

With section 7 cases now more difficult, environmentalists say they are considering using provisions in section 9 to challenge registrations.

Section 9 of the ESA prohibits the take -- defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" -- of any species protected under the act. Agencies can gain an "incidental take waiver" from the services under section 10 of the act, which is often obtained through consultation under section 7.

For a section 9 claim to be successful, there must be sufficient data linking a pesticide to the take of a species.

Though "take" has a broader definition under the ESA than just death of species, the source adds, in a "trial-based context," plaintiffs have the onus to provide data from necropsies. "You have to show that take is from the incident you are alleging," the source says.

But these can be difficult to produce given that corpses are often found far from human populations or are largely unreported. While some environmental groups are trying to collect more information, and the states of California and New York have their own programs, there is often very little data available, the CBD source says.

An attorney familiar with the ESA says that unlike section 7 claims against agencies, section 9 claims are more likely to target applicators than government agencies. "You could approach this two ways -- what you could say is that EPA has failed to consult on the impacts of approving pesticide X on endangered or threatened species and has therefore violated section 7; the other way you could do it is say that XYZ company is violating the ESA by using the pesticide and that pesticide is taking species," the source says.

While the recent section 9 challenge against the California DPR targeted an agency, the source says such cases are actually "grounded in fact in section 7, because federal agencies have a responsibility to ensure no impact [to species]. So what they are arguing that the action by the agency is causing the take, therefore they have to consult. If you look at it for a minute, it's a little hard to argue that the federal government needs to have a section 10 permit."

As a result, any efforts by environmentalists to use section 9 would likely be to immediately stop the use of a pesticide, the source adds. "It's not likely you have a habitat conservation plan [which is required under section 10] for the federal government, so a section 9 suit would be a shut-down suit."