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Endangered Species Act Case on Pesticides Can Proceed, Says Court

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Federal regulators must do more to ensure that approved pesticides don't harm imperiled wildlife, a U.S. appeals court ruled Feb. 2, backing environmental activists' claims (*Ctr for Biological Diversity, et al v. EPA* , 9th Cir., No. 14-16977, 2/2/17).

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed, in part, a lower court's decision to dismiss claims on certain triggering actions that require the Environmental Protection Agency to consult with the Fish and Wildlife Service and the National Marine Fisheries Service for 31 pesticide active ingredients.

The Ninth Circuit judges disagreed with the lower court's decision that certain older pesticides were immune from lawsuits pushing for a consultation process under Section 7 of the Endangered Species Act, and sent the case back to the U.S. District Court for Northern California.

Although the judges affirmed many of the district court's conclusions in this "complex environmental case," they found the court

erred in applying the "collateral attack doctrine"—overturning a prior judgment in a new case—and in requiring the Center for Biological Diversity to amend its complaint with additional data, wrote Ninth Circuit Judge Richard Paez in his opinion.

'Common-Sense Measures'

The Center for Biological Diversity, which initially brought suit in 2011, lauded the decision to send the issue back to the lower court.

"The goal is to put in place some common-sense measures where the information shows that endangered wildlife is being affected," Stephanie Parent, the attorney who argued on behalf of the center, told Bloomberg BNA.

The district court ruled in favor of the EPA in 2014, upholding the agency's claim that the challenges to 15 of the 31 Reregistration Eligibility Decisions had passed the statute of limitations, which expired Jan. 20, 2005. These include decisions for chlorpyrifos, paraquat, dicamba and other pesticides that environmentalists are battling on many fronts.

The district court also directed the center to specify which EPA actions would trigger the consultation process on endangered species

In response, the center filed more than 900 pages of new data on the pesticides to support the complaint.

The decision comes ahead of a suite of legal challenges on how the agency addresses endangered species when registering new chemicals. The center is set to argue March 6 in a separate challenge that claims the EPA did not follow the ESA in registering cyantraniliprole, a more recently-approved insecticide. The arguments will likely center on what is the appropriate legal venue—local district courts or appeals courts—for challenging pesticides under the ESA. A decision in that case will lay the groundwork for several other lawsuits on the consultation process under the endangered species law.

Judge Carlos Bea dissented in part, specifically on the majority opinion's conclusion that some of the center's claims for triggering the consultation process were not a collateral attack on the EPA's prior approval of the pesticides.

CropLife America, the pesticide trade association who intervened on behalf of EPA, applauded the court's upholding in part of the lower court's decisions, but said there remains questions on how the EPA should approach the Endangered Species Act for pesticides registrations.

“Unfortunately, today's decision still leaves unresolved the full conflict between the ESA and the pesticide registration law,” Jay Vroom, CropLife America's president and CEO, said in a statement.