Crowell

# Client Alert

## CITIZEN SUIT WATCH: District Court to Enjoin Use of Pesticide Pending Completion of Endangered Species Act Consultation

**July 1, 2011**

On June 14, 2011, the U.S. District Court for the District of Columbia issued an opinion in *Defenders of Wildlife, et al. v. Jackson*,[1] a consolidated action challenging EPA's registration of the pesticide Rozol without engaging in consultation with the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA), and without providing notice and an opportunity for comment on the registration application. The court dismissed most of the plaintiffs' claims as moot because EPA had initiated ESA consultation and provided an opportunity for public comment in the meantime. But the court granted one plaintiff's request for injunctive relief against the use of the pesticide pending the completion of ESA consultation.

Further, in a critical ruling on jurisdiction, the court sided with the plaintiffs and rejected the pesticide registrant's argument that exclusive jurisdiction over *any* claim under the ESA relating to the registration of a pesticide rests solely with the court of appeals under the judicial review provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and cannot be brought in district court as a citizen suit under the ESA, thus paving the way for future ESA citizen suits related to pesticide registration.

**Background**

The pesticide Rozol is used to control the prairie dog population in Western states. Its active ingredient is chlorophacinone. EPA had requested ESA § 7(a)(2) formal consultation with FWS for chlorophacinone in 1991 in the course of "reregistering" it under § 4 of FIFRA.[2] FWS issued a 1993 Biological Opinion noting that some birds and mammals were "highly sensitive" to the chemical, which acts as an anticoagulant. Four years later, when EPA deemed chlorophacinone eligible for reregistration, the chemical had already been locally registered by twenty states. Acknowledging that other species feeding on small mammals could be affected by the chemical's use, EPA noted that further consultation and studies could be required.

Between 2004 and 2008, six states registered Rozol under FIFRA's special local need provision for the purpose of controlling the prairie dog population. Concerned about the potential for prairie dog predators, including species listed under the ESA as endangered or threatened, to consume the chemical, FWS wrote letters to both the Nebraska Department of Agriculture and EPA suggesting that no registrations be approved until they addressed "important data gaps." EPA continued to approve registrations.

In January 2008, Rozol's manufacturer LiphaTech applied to register Rozol as a "new pesticide product" for use in all states in which black-tailed prairie dogs live. Though some of the states had not approved local registration, LiphaTech promised to "request voluntary cancellation" of any special local needs registrations following the issuance of a general registration. EPA conducted a risk assessment that noted special concern about potential harm to the "most endangered mammal in the United States," the black-footed ferret, which

feeds on prairie dogs and uses their burrows for shelter. The risk assessment also noted exposure risks for other listed and non-listed species. EPA registered Rozol in May 2009 without consulting with FWS under the ESA, or making a finding under FIFRA that Rozol would not have "unreasonable adverse effects on the environment," or publishing notice of either the application or approval of the application as required by FIFRA.

In 2009, the World Wildlife Fund (WWF) petitioned EPA to suspend the registration of Rozol until EPA: (1) formally consulted with the FWS; (2) entered into a Memorandum of Understanding with the FWS regarding bird conservation under the Migratory Bird Treaty Act (MBTA); (3) prohibited Rozol's use in counties with black-footed ferrets; and (4) ordered LiphaTech to complete an "Avian Reproduction Survey." In response, the agency began formal consultation with FWS and published notice of an opportunity for public comment on WWF's petition. In November 2010, EPA denied WWF's petition, declining to cancel or suspend Rozol's registration in light of the "pending" formal consultation, the existing "risk mitigation measures," the benefits of Rozol, and the potential for future voluntary mitigation through labeling amendments.

No party sought judicial review of the denial of the petition to cancel. In July 2009, however, the Defenders of Wildlife and Audubon of Kansas filed a petition for review of the agency's decision to register Rozol with the D.C. Circuit under FIFRA. Then, following a 60-day notice of intent to sue as required by the ESA, they also filed suit in the district court under the ESA citizen suit provision and the judicial review provision of FIFRA, challenging the registration and alleging violations of the ESA, FIFRA, the MBTA, the Bald and Golden Eagle Protection Act (Eagle Act), the Administrative Procedure Act (APA), and Executive Order 13186. The case was consolidated with a later case filed by the Natural Resources Defense Council (NRDC), which also alleged violations of the ESA, FIFRA, and the APA.

## The District Court's Decision

### Jurisdiction

As an important threshold matter, the court rejected LiphaTech's argument that, under FIFRA's judicial review provision, 7 U.S.C. § 136n, the court of appeals had exclusive jurisdiction over the ESA claims. LiphaTech relied on *Pesticide Action Network v. EPA*[3] to argue that, because FIFRA gives the court of appeals exclusive jurisdiction to review certain EPA pesticide decisions, that court also has exclusive jurisdiction over EPA's decision to register Rozol. The court distinguished *Pesticide Action Network* and construed FIFRA's judicial review provision more narrowly, holding that ESA challenges to *registration* decisions made without notice and comment, as opposed to *cancellation* decisions made with notice and comment, are not within the "exclusive jurisdiction" of the court of appeals.

### The ESA Claims

All the plaintiffs requested both declaratory and injunctive relief under the ESA. Defenders sought an order declaring that EPA did not comply with the ESA when it registered Rozol without formal consultation and an injunction requiring EPA to consult with FWS before reissuing the Rozol registrations. NRDC requested much the same relief but with one crucial difference. NRDC requested an injunction requiring that EPA not only engage in

consultation but also *complete* consultation before reregistering Rozol. The court's decision not to dismiss NRDC's ESA claims hinged on this distinction.

Defendants argued that all these claims were moot because EPA had already begun formal consultation with FWS. The court agreed that the request for an order directing EPA to consult with FWS was moot inasmuch as EPA had already begun consulting. However, NRDC had also sought injunctive relief until EPA had *completed* formal consultation with the FWS. The court, relying on *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), stated that an order enjoining EPA from authorizing the use of Rozol "pending completion of its obligation to consult with FWS" would be appropriate. That relief would constitute at least a "partial remedy" for NRDC's claims. The court will request input from the parties and hold a hearing on the scope of appropriate interim injunctive relief.

**The FIFRA Claims**

The court held that the plaintiffs' FIFRA claims were moot because the court could no longer provide effective relief. The court agreed with the defendants that remanding the case for notice and comment would be duplicative because the agency had already engaged in notice and comment in response to WWF's cancellation petition. Plaintiffs had argued that they were seeking notice and comment on the *registration* decision, not on the cancellation decision, but the court rejected that distinction. It noted that the standards underlying the two proceedings under FIFRA are functionally the same: in either situation – registration or cancellation – EPA must determine whether the product causes "unreasonable adverse effects" on the environment. The court held that, because EPA had provided notice and opportunity to comment on that aspect of Rozol in the course of the cancellation proceedings, remand for another round of notice and comment would be duplicative.

The court also declined to grant the other aspect of relief on the FIFRA claims – an order vacating the registration. Although the defendants conceded that vacating the registration would have provided plaintiffs with relief, the court determined that vacatur would be inappropriate despite the "serious deficiencies" of the registration. Because LiphaTech had already cancelled its individual state registrations of Rozol, vacating the registration would be inequitable – it would not return LiphaTech to the status quo but rather would punish the company for complying with EPA's directions to cancel those registrations. In addition, the product was already being used in the field in six states and vacatur at this stage would be an "invitation to chaos." Despite the agency's "serious and fundamental failure" to follow the procedural requirements of the APA, the court determined that the disruptive consequences of vacatur were serious enough to weigh against it. Because remand would be duplicative and vacatur was inappropriate, the court held that the FIFRA claims were moot.

**Additional Claims**

The court dismissed plaintiffs' claims under the MBTA and the Eagle Act, relying primarily on the Eighth Circuit's precedent in *Defenders of Wildlife v. Administrator, EPA*.[4] In that case, the court dismissed an attack on EPA's registration of strychnine under the MBTA and the Eagle Act, holding that "challenges to pesticide registrations were more properly pursued under FIFRA." The court found that the plaintiffs' MBTA and Eagle Act claims in the present case were also more properly pursued under FIFRA than through general judicial review under the APA. Finally, the court dismissed plaintiffs' claims under Executive Order 13186 (concerning agency conservation

measures to protect migratory bird populations) because the express language of the Order itself precludes judicial review.

**Lessons Learned**

This district court decision is instructive for citizen suits generally, for judicial review under FIFRA, and for litigation at the intersection of the ESA and regulatory statutes such as FIFRA.

A defendant can respond to a citizen suit by attempting to cure the alleged violation of law in hopes of mooting the case and avoiding an actual finding of liability and a court-ordered remedy. Courts will scrutinize the defendant's actions to ensure that they are not just self-serving, but also provide the plaintiff with the relief he or she could obtain by prevailing in the lawsuit. The court's refusal in this case to find that the lawsuit was completely moot illustrates how a defendant's willingness to comply with the law, as EPA showed here by initiating ESA consultation and giving notice and opportunity to comment as required by FIFRA, may not be enough once a lawsuit is filed and the plaintiff continues to be harmed during the time it takes the defendant to achieve full compliance.

This ruling also adds, rather confusingly, to the limited body of case law addressing the respective jurisdiction of the district courts and courts of appeals under FIFRA's judicial review provision, 7 U.S.C. § 136n. That provision addresses jurisdiction for review of a broad swath of EPA decisions under FIFRA – "the refusal of [EPA] to cancel or suspend a registration or to change a classification . . and other final actions of [EPA] not committed to the discretion of [EPA] by law." Under 7 U.S.C. § 136n(a), the dividing line between district court and court of appeals jurisdiction is not whether the litigant is challenging registration or cancellation, but whether the challenged EPA action was taken "following a hearing." The court's attempt to distinguish *Pesticide Action Network* as involving cancellation is confusing because in that case and in this one, the plaintiffs challenged *registration* decisions, not rulings on *cancellation* petitions.[5] Further, the court's reliance in this case on the absence of notice and comment (which could suffice for a "hearing" for purposes of FIFRA jurisdiction) on EPA's *registration* decision seems at odds with the court's determination that notice and comment on the *cancellation* petition cured that procedural defect.

Finally, the court's ruling contributes to the emerging jurisprudence addressing when an ESA citizen suit can be used to bypass the judicial review provisions in a regulatory statute such as FIFRA. The court readily dismissed the plaintiffs' claims under two other wildlife protection statutes (the MBTA and the Eagle Act) because "FIFRA already provides a framework for reviewing the Agency's decisions." The same logic would seem to dictate that FIFRA's judicial review provisions should also trump the plaintiffs' ESA claims. The court here concluded otherwise based on the Ninth Circuit's 2005 decision in *Washington Toxics Coalition*. But the Ninth Circuit has since ruled differently in *American Bird Conservancy v. FCC*,[6] where it held that ESA-based challenges to FCC licensing decisions cannot be brought under the ESA citizen suit provision and instead must be brought in a court of appeals under separate statutory provisions governing challenges to FCC orders. *Defenders v. Jackson* may provide the vehicle for the D.C. Circuit to add its voice to this emerging body of case law on the citizen enforcement interaction between the ESA and FIFRA.

[1] Civ. No. 09-1814 (ESH), 2011 WL 2321882 (D.D.C. June 14, 2011).

[2] *See* 16 U.S.C. § 1536(a)(2), 7 U.S.C. § 136a-1(a).

[3] No. C 08-1814 MHP, 2008 WL 5130405, at *6 (N.D. Cal. Dec. 5, 2008).

[4] *See* 882 F.2d 1294, 1302 (8th Cir. 1989).

[5] Since the district court's ruling in *Pesticide Action Network*, the Ninth Circuit has held that under 7 U.S.C. § 136n, the court of appeals has exclusive jurisdiction over a challenge to a pesticide reregistration decision that was preceded by a "hearing" in the form of public notice and opportunity to comment. *United Farm Workers of America v. EPA*, 592 F.3d 1080 (9th Cir. 2010).

[6] 545 F.3d 1190 (9th Cir. 2008).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Kirsten L. Nathanson**
Partner – Washington, D.C.
Phone: +1.202.624.2887
Email: knathanson@crowell.com