

## Endangered Species Considerations in Relation to Pesticide Registration are not Likely to Become Less Burdensome

The US Environmental Protection Agency (EPA) has faced increased litigation in recent years regarding its consideration of whether a pesticide may affect a threatened or endangered species under the Endangered Species Act (ESA) when registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>1</sup> While EPA, the Fish and Wildlife Service (FWS), and the National Oceanic and Atmospheric Administration (NOAA), have together attempted to expand EPA's ability to unilaterally make such a determination, it seems likely that EPA will no longer be able to exclude wildlife agency oversight from the pesticide registration and reexamination processes.

The ESA directed the Secretaries of Commerce (NOAA) and the Interior (FWS) to list threatened and endangered species and designate their critical habitats.<sup>2</sup> The ESA also directs all Federal Agencies to insure that any agency action is not likely to "jeopardize the continued existence of any listed species."<sup>3</sup> An agency makes such a determination by considering the best available toxicity data on all relevant species to find potential risks to those that are listed.<sup>4</sup> If an agency determines that an action may affect a listed species, they are to undergo consultation with the Services, which includes: FWS, NOAA, and the National Marine Fisheries Service.<sup>5</sup>

EPA has been found to have violated these consultation requirements under the ESA when registering pesticides under FIFRA. In May 2007, the Center for Biological Diversity sued EPA for failing to consult with other agencies to adequately consider the impacts on endangered species of pesticides used in the San Francisco Bay Area.<sup>6</sup> The Center claims that at least 60 different pesticides have been applied in the area and that EPA has "consistently failed" to consult with FWS on endangered species impacts when approving such pesticides.<sup>7</sup> The Center has already forced EPA to properly assess the impact of registered pesticides on the California Red-Legged Frog as a result of a stipulated injunction entered into September 2006.<sup>8</sup>

In 2004, FWS, NOAA, and EPA, had attempted to avoid such litigation by issuing regulations that were meant to streamline the consultation process. This was done by removing FWS's input and allowing EPA to independently determine whether a pesticide was likely to adversely impact endangered species.<sup>9</sup> Soon thereafter, environmental groups filed suit claiming that FWS had violated the ESA by delegating consultations required by the Act to EPA. The court in *Washington Toxics Coalition v. DOI* agreed and invalidated the regulations because EPA lacked the expertise to make such a determination without FWS oversight.<sup>10</sup>

EPA has also attempted to argue that they do not have to comply with ESA consultation requirements because sufficient endangered species assessments are conducted under FIFRA. FIFRA establishes a comprehensive regulatory scheme governing the use, sale, and labeling of pesticides<sup>11</sup> and allows EPA to suspend a pesticide's registration when there is an immediate hazard to an endangered species.<sup>12</sup> Although this inquiry seems to be similar to the requirements under the ESA, the *Washington Toxics Coalition v. EPA* court concluded that FIFRA compliance does not exempt EPA from also complying with ESA requirements.<sup>13</sup>

Therefore, it seems that EPA will have to work more closely with the Services that oversee the ESA in future pesticide registration and the process is likely to become more backlogged in order to appropriately assess impacts on endangered species in an environmentally conscientious atmosphere.

This is an important issue for registrants of pesticides and antimicrobials. The situation is likely to get more complex as EPA works to find a way to reconcile the ESA with its registration process under FIFRA and escape from having local pesticide use subject to court supervision.

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1 7 U.S.C. 136 et seq.

2 See 16 U.S.C. 1533.

3 16 U.S.C. 1536(a)(2).

4 See "Pesticide Regulation & Protection of Endangered Species" available at <http://www.epa.gov/oei/proceedings/2005/pdfs/jordan.pdf>.

5 See Endangered Species Act Section 7 Consultation Regulations.

6 See *Biological Diversity v. EPA*, 9th Cir., No. C-072794JCS, filed 5/30/2007.

7 See *EPA Hit with Lawsuit Over Protection of Species in Bay Area from Pesticides*, BNA (quoting Jeff Miller, conservation advocate with the Center for Biological Diversity).

8 See 72 Fed. Reg. 20, 544.

9 See Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 50 CFR Part 402.

10 *Washington Toxics Coalition v. U.S. Department of the Interior*, 413 F.3d 1024 (9th Cir. 2005).

11 See *Bates v. Dow Agro Sciences LLC*, 125 S. Ct. 1788, 1794-1795 (2005).

12 7 U.S.C. 136d(c)(1).

13 *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005). See also *Defenders of Wildlife v. EPA*, 450 F.3d 394 (2005) (requiring EPA to consult under the ESA before approving the State of Arizona's application to administer the National Pollution Discharge Elimination System program under the Clean Water Act).