01-CV-00132-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et al., Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, and CHRISTINE TODD WHITMAN, ADMINISTRATOR, Defendants, AMERICAN CROP PROTECTION ASSOCIATION, et al., Intervenor-Defendants.	CASE NO. C01-132C ORDER

This matter comes before the Court on plaintiffs' motion for further injunctive relief (Dkt. No. 94). The Court has considered the papers submitted by all parties and scheduled oral argument for August 14, 2003. To assist the parties in preparations for oral argument, this brief order 1) summarizes the Court's conclusions with respect to the various legal issues raised by the parties in connection with plaintiffs' motion, and 2) defines the issues to be addressed at oral argument. The Court intends to follow this brief order with an order more fully detailing the Court's reasoning and conclusions.

Previously, the Court determined "as a matter of law, that EPA has violated section 7(a)(2) of the

ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients."[1] Given this substantial procedural violation of section 7(a)(2), plaintiffs are entitled to injunctive relief with respect to the 54 ongoing agency actions pending EPA's compliance with section 7(a)(2). See Southwest Ctr. for Biological Diversity v. United States Forest Serv., 307 F.3d 964, 972 (9th Cir. 2002); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).[2] Traditional standards for injunctive relief do not govern under these circumstances. See, e.g., Sierra Club v. Marsh, 816 F.2d 1376, 1382-83 (9th Cir. 1997). However, agency actions may continue during the section 7(a)(2) consultation process so long as the actions are *non-jeopardizing* to the protected species and will not result in a substantive violation of the ESA. See Southwest Ctr., 307 F.3d at 973; see also 16 U.S.C. § 1536(a)(2) (2003); 50 C.F.R. § 402.02 (2002) (defining "jeopardize the continued existence of" and "adverse modification"). To invoke this "narrow exception," *the acting agency bears the burden* to demonstrate that its ongoing actions are non-jeopardizing. See Southwest Ctr., 307 F.3d at 973. Plaintiffs do not bear the affirmative burden to demonstrate that each of the 54 ongoing agency actions, as presently defined, will jeopardize threatened and endangered salmonids or result in irreparable harm. See Southwest Ctr., 307 F.3d at 972; Thomas, 753 F.2d at 765.

Neither EPA nor Croplife has identified the proper legal burden, instead relying on unrelated, inapplicable case law.[3] Likewise, as a matter of fact, neither EPA nor Croplife has demonstrated that the 54 ongoing agency actions, as presently defined, are non-jeopardizing to threatened and endangered

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[1] The Court ordered EPA "to initiate and complete section 7(a)(2) consultation with NMFS regarding the effects of pesticide-registrations on threatened and endangered salmonids" per a schedule proposed by EPA and endorsed by plaintiffs.

[2] Plaintiffs need not pursue administrative remedies pursuant to FIFRA. See, e.g., Defenders of Wildlife v. Adm'r, Envtl. Protection Agency, 882 F.2d 1294, 1298-1300 (8th Cir. 1989).

[3] For example, neither Nat'l Wildlife Fed. v. Burlington N. R.R., Inc., 23 F.3d 1508 (9th Cir. 1994) nor Water Keeper Alliance v. United States Dept. of Defense, 271 F.3d 21 (9th Cir. 2001) were cases in which the district court had found a substantial procedural violation under section 7(a)(2).

salmonids.[4] Compare id. (acting agency voluntarily imposed mitigation measures, presented evidence of habitat improvement, and consultation process near completion).[5] In contrast, plaintiffs have demonstrated that the relevant agency actions, as presently defined, present a significant, potential harm to threatened and endangered salmonids. See Greenpeace v. Nat'l Marine Fisheries Serv., 106 F. Supp. 2d 1066, 1076-80 (W.D. Wash. 2000). Therefore, plaintiffs are entitled to interim injunctive relief to avoid jeopardy to threatened and endangered salmonids. Further, plaintiffs have demonstrated, with reasonable scientific certainty, that the requested buffer zones – 20 yards for ground applications, 100 yards for aerial applications – will, unlike the status quo, substantially contribute to the prevention of jeopardy. The evidence submitted – including the declarations of *all* parties' experts, reregistration eligibility decisions, EPA risk assessments, prior EPA consultations with the Fish and Wildlife Service, EPA's reliance on California's county bulletin buffer zones, and an EPA expert's current section 7(a)(2) recommendations – demonstrate that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids.

At oral argument, the Court will not entertain a full-blown evidentiary hearing. As stated above, plaintiffs are entitled to injunctive relief, EPA and Croplife have failed to demonstrate no-jeopardy, and buffer zones are an appropriate means to avoid jeopardy pending complete section 7(a)(2) consultation.[6]

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[4] This *does not* include any ESUs of threatened and endangered salmonids for which EPA has made a corresponding "no-effect" determination with respect to one of the 54 pesticide active ingredients, such as alachlor (all 26 ESUs) or propargite (7 ESUs). Plaintiffs seek no injunctive relief vis-a-vis these specific ESUs and these specific pesticide active ingredients, which are outlined in the declarations of Arthur Jean B. Williams.

[5] EPA makes no discernible effort to demonstrate no-jeopardy. Although Croplife does attempt to carry this burden, its arguments and selective citations simply do not comport with the evidence submitted and the institutionalized caution mandate of the ESA. See, e.g., Atrazine Reregistration Eligibility Decision, April 2002 (discussing potential significant adverse effects of atrazine on homing and reproduction in endangered salmon).

[6] The Court will not entertain further argument with respect to these issues. EPA made no timely request to bifurcate the threshold legal arguments upon which it principally relies from factual arguments regarding appropriate interim injunctive relief.

Moreover, it is the responsibility of EPA and NMFS, not this Court or plaintiffs, to complete the section 7(a)(2) consultation process and determine, via fact-intensive inquiry, the precise effects of pesticide active ingredients on threatened and endangered salmonids. See Thomas, 753 F.2d at 765; see also Idaho Watersheds Project v. Hahn, 307 F.3d 815, 831-33 (9th Cir. 2002). It is this consultation process that will determine the long-term measures necessary to prevent jeopardy to threatened and endangered salmonids from EPA's pesticide registrations. However, because EPA failed to propose any interim mitigation measures itself or to make counter-recommendations with respect to plaintiffs' requested buffer zones, the Court will entertain limited argument regarding those buffer zones. That is, EPA and Croplife may present arguments with respect to *the specific size* of the ground and aerial buffer zones requested by plaintiffs. These arguments shall be specific to particular pesticide active ingredients and particular ESUs of threatened and endangered salmonids.[7] In addition, the Court will entertain arguments regarding the additional urban-use restrictions requested for 13 pesticide active ingredients.[8]

Finally, at oral argument the Court would welcome any voluntary input or recommendations regarding the requested buffer zones and urban-use restrictions from NMFS, the agency ultimately responsible for the protection of salmonids. See generally 50 C.F.R. §§ 402.13(b), .14(g)-(h) (2002). However, the Court shall not reopen discovery in connection with any participation from NMFS. Rather, NMFS's participation is contingent on its cooperation with all parties. That is, NMFS shall not participate as a witness for any particular party, but may act akin to an informal Court-appointed expert. Even following oral argument and the imposition of interim injunctive relief, the Court shall consider any jeopardy-prevention recommendations from NMFS that may warrant the modification of such relief prior to an EPA "no-effect" determination, NMFS written concurrence, or biological opinion.

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[7] Absent an EPA "no-effect" determination or stipulation from plaintiffs, the Court shall not entertain arguments that *no* buffer zones are appropriate. EPA and Croplife have had a full and fair opportunity to present such arguments and have failed to carry their burden.

[8] At oral argument, plaintiffs should provide the Court clear and concise definitions and maps of all urban watersheds within the geographic scope of this litigation.

SO ORDERED this 16th day of July, 2003.

CHIEF UNITED STATES DISTRICT JUDGE