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Ellis v. Bradbury

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I. ABSTRACT

The United States District Court for the Northern District of California reiterated the need for a party seeking suspension or cancellation of an EPA registered pesticide to fully exhaust their administrative remedies under FIFRA. Here, plaintiffs filed a number of claims, including claims requesting either cancellation or suspension of pesticides containing clothianidin and thiamethoxam. However, as described by the court, plaintiffs failed to adequately exhaust existing administrative remedies outlined within § 136d of FIFRA. Additionally the court found that claims asserting § 7 violations of the ESA could be filed prior to exhaustion of administrative remedies under FIFRA.

II. INTRODUCTION

Plaintiffs, a group of beekeepers and public interest groups, brought this action against the Environmental Protection Agency (“EPA”) challenging the agency’s approval of registration of pesticide products containing the chemicals clothianidin and thiamethoxam.¹ Fourteen separate claims were filed arising under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) and the Endangered Species Act (“ESA”). Plaintiffs alleged that clothianidin and thiamethoxam adversely affect honeybees and other pollinators deemed vital to agricultural production; therefore the EPA should cancel or suspend the pesticides registration under FIFRA.² Furthermore, it was also alleged that the pesticides negatively impact other species, including those listed as threatened and endangered under the ESA.³

¹ *Ellis v. Bradbury*, No. C-13-1266 MMC, 2014 U.S. Dist. LEXIS 54339 at *3 (N.D. Cal. Apr. 18, 2014).

² *Id.*

³ *Id.*

In their challenge, plaintiffs alleged that the EPA: failed to follow public notice procedure prior to approving the use of clothianidin and thiamethoxam; failed to utilize updated scientific evidence in modifying the permitted use of the pesticides; and failed to give deference to requests submitted by plaintiffs seeking suspension of the use of the identified harmful pesticides.⁴

III. FACTUAL AND PROCEDURAL BACKGROUND

The United States District Court for the Northern District of California reviewed two motions to dismiss filed by the EPA and defendant-intervenors, Bayer CropScience LP, Syngenta Crop Protection, LLC, CropLife America and Valent U.S.A.⁵ The motions to dismiss were aimed at all fourteen claims filed by plaintiffs, which alleged numerous substantive and procedural violations committed by the EPA under FIFRA and the ESA. Defendants challenged the claims based on lack of subject matter jurisdiction, plaintiffs' failure to sufficiently state a claim upon which relief can be granted, and plaintiffs' failure to exhaust administrative remedies.⁶ Of the fourteen claims the first and ninth claim survived the motion to dismiss and the third, fourth, thirteenth and fourteenth claim were dismissed with leave to amend.⁷ All other claims were dismissed.⁸

IV. ANALYSIS

A. Exhaustion of Administrative Remedies Under FIFRA

In accordance with FIFRA "no pesticide may be distributed or sold, unless the pesticide has been registered by the EPA."⁹ The EPA has the authority to cancel registration or change the

⁴ *Id.* at **3-4.

⁵ *Id.* at *4.

⁶ *Id.*

⁷ *Ellis*, 2014 U.S. Dist. LEXIS at *4.

⁸ *Id.*

⁹ *Id.*

classification of previously registered pesticides.¹⁰ Should the EPA determine that re-classification or cancellation of a previously registered pesticide is necessary due to the imminent hazard of such pesticide, the EPA may act immediately.¹¹ Jurisdiction pertaining to a challenge to the EPA's failure to cancel or re-classify previously registered pesticides lies with the federal district courts.¹²

Any lawsuit brought against the EPA challenging the agencies failure to cancel or suspend a registered pesticide under FIFRA must be preceded by an exhaustion of administrative remedies as provided for under FIFRA.¹³ FIFRA, specifically 7 U.S.C. § 136d, outlines such an administrative remedy process.¹⁴ Under FIFRA, a party may bring an action seeking the EPA to either cancel or suspend a pesticide registration by showing that “the pesticide ‘causes unreasonable adverse effects on the environment.’”¹⁵

The plaintiffs filed a number of claims attacking the EPA for purported violations of FIFRA through the issuing of a number of “conditional” and “unconditional” registrations for both clothianidin and thiamethoxam.¹⁶ Plaintiffs alleged that the time period within which conditions tied to the conditional pesticide registrations were to have been met had been exceeded.¹⁷ Plaintiffs contended that the conditional registrations should have been suspended because they cause “unreasonable adverse effects.”¹⁸

As outlined by the Supreme Court in *McKart v. United States*¹⁹, the doctrine of exhaustion of administrative remedies has been established to avoid premature interruption of the

¹⁰ *Id.* at *5.

¹¹ *Id.*

¹² *Id.* at **5-6.

¹³ *Ellis*, 2014 U.S. Dist. LEXIS at *12.

¹⁴ *Id.* at *18.

¹⁵ *Id.* (quoting 7 U.S.C. § 136d (1996)).

¹⁶ *Id.* at *17, **24-25.

¹⁷ *Id.* at *17.

¹⁸ *Id.* at **17-18.

¹⁹ *McKart v. United States*, 395 U.S. 185, 193 (1969).

administrative process.²⁰ Where, in regards to administrative procedure, a specific statutory framework is lacking, the Ninth Circuit has established a three-part factor test used to determine if exhaustion is necessary.²¹ Exhaustion of administrative remedies may be required if: (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.²²

The court notes that it is imperative that an agency be allowed to utilize its expertise in determining whether a specific pesticide registration should be suspended or cancelled.²³ The court goes on to hold that in making such determination, the EPA has the requisite authority and knowledge necessary to balance “agricultural and environmental concerns” as it is obligated to do under FIFRA.²⁴

In its review of the second factor, the court held that “allowing plaintiffs to avoid exhausting the administrative remedies available under FIFRA would encourage bypass of the detailed procedures Congress enacted with respect to cancellation or suspension of registration.”²⁵ The court further pointed out that Congress had specifically provided the Court of Appeals with exclusive jurisdiction to review EPA decisions to challenged registrations after completion of the FIFRA administrative review process.²⁶

The court concluded its analysis by determining that allowing the administrative process to play out would provide the EPA, assuming the EPA in fact committed error in issuing both

²⁰ *Ellis*, 2014 U.S. Dist. LEXIS at *20.

²¹ *Id.* at **20-21.

²² *Id.* at *21.

²³ *Id.* at *22.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Ellis*, 2014 U.S. Dist. LEXIS at *23.

conditional and unconditional pesticide registrations, the opportunity to correct such error by providing an appropriately tailored remedy.²⁷

B. Claims Arising Under the ESA

Exhaustion of administrative remedies under FIFRA is not a prerequisite to filing a claim under § 7 of the ESA.²⁸ The court indicated that this requirement has been “expressly rejected” by the Ninth Circuit.²⁹ However, prior to filing any civil action under the ESA, notice in accordance with 16 U.S.C. § 1540(g)(2)(A)(i) detailing what provisions of the ESA have been violated must be submitted to the Secretary of the Interior and to the alleged violator 60-days prior to filing suit.³⁰

Plaintiffs challenged the EPA’s approval of some 103 products containing clothianidin and thiamethoxam.³¹ Unfortunately, plaintiffs failed to provide adequate notice to the Secretary of the Interior or the EPA in relation to challenges tied to seventeen of the identified products.³² However, the court held that claims arising against thirteen of the seventeen unmentioned products would survive because the notice letter submitted by plaintiffs generally challenged all pesticide products approved by the EPA which contain clothianidin and thiamethoxam.³³ The Ninth Circuit has held that a notice letter that “provide[s] sufficient information of a violation so that the [EPA] could identify and attempt to abate the violation” may be found sufficient.³⁴ The court concluded that the original notice letter was sufficient to put the EPA on notice and

²⁷ *Id.* at *24.

²⁸ *Id.* at **32-33.

²⁹ *Id.* (See *Wash. Toxics Coal. v. Env'tl. Protec. Agency*, 413 F.3d 1024, 1033 (9th Cir. 2005)).

³⁰ *Id.* at *30.

³¹ *Id.* at *34

³² *Ellis*, 2014 U.S. Dist. LEXIS at *34

³³ *Id.*

³⁴ *Id.* (quoting *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998)).

therefore § 7 claims related to the EPA's violation relative to thirteen products not specifically identified within the notice letter were not subject to dismissal.³⁵

V. CONCLUSION

The necessity to exhaust all administrative remedies and follow outlined procedure prior to filing a suit against an administrative agency is a doctrine well entrenched in our legal framework. FIFRA, like other administrative acts, has a specific administrative remedy process that must be followed. Additionally, failure to provide requisite notice of intent to challenge a violation under the ESA will result in a dismissal of any applicable claims. Here, the United States District Court for the Northern District of California following guidance from both the Supreme Court and the Ninth Circuit reaffirmed this doctrine.

³⁵ *Id.* at *39.