Center for Food Safety v. Regan—Ninth Circuit remands EPA decision registering the pesticide sulfoxaflor for failure to comply with FIFRA and ESA

In *Pollinator Stewardship Council v. U.S. Environmental Protection Agency*, 806 F.3d 520 (9th Cir. 2015), the court of appeals vacated a determination by the Environmental Protection Agency to register unconditionally the chemical sulfoxaflor under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(a), on the ground that the agency action was based "on flawed and limited data." 806 F.3d at 522. Sulfoxaflor, while a cost-effective pesticide for a wide range of crops, is highly toxic to honeybees, and the "EPA had 'no real idea whether sulfoxaflor will cause unreasonable adverse effects on bees, as prohibited by FIFRA.'" *Id.* at 532. The court vacated the registration and remanded the matter to "the EPA to obtain further studies and data regarding the effects of sulfoxaflor on bees, as required by EPA regulations." *Id.* at 533.

On remand, the applicant (then named Dow Agrosciences LLC) amended its application to add certain restrictions aimed at reducing the likelihood of honeybee harm beyond its immediate use area, and after notice and comment the EPA "unconditionally registered sulfoxaflor for 'limited uses' with restrictions" in 2016. However, in 2019, "without notice to the public" about a subsequent Dow request to expand its sulfoxaflor registrations, EPA announced that it not only was unconditionally approving new uses of sulfoxaflor under § 3(c)(5) of FIFRA" but also "added new uses that Dow had applied for in 2014, added back the indeterminate blooming crops (that is, citrus, cotton, cucurbits, soybeans, and strawberry) from the vacated registration, and removed certain restrictions that EPA had required when it reregistered crops in 2016." The agency did conduct an "ecological risk assessment" concerning "whether the expanded registration posed any unreasonable adverse effects to the environment" prior to the 2019 registration decision and in part "concluded that it 'ha[d] adequate data to demonstrate that there will be no unreasonable adverse effects to honey bees resulting from the expanded registration of sulfoxaflor' and that the pest-control benefits outweighed the risk to the bee population." The EPA simultaneously chose "to not make an 'effects determination' for sulfoxaflor, meaning that the agency did not determine whether the new proposed uses 'may affect' or are 'not likely to adversely affect' an endangered or threatened species or its habitat, as required by federal regulation" implementing the Endangered Species Act. *See* 50 C.F.R. §§ 402.13(c), 402.14(a).

Various interested groups and an individual filed judicial review petitions alleging ESA and FIFRA violations. The Ninth Circuit panel unanimously agreed that the EPA had violated both statutes. A panel majority accordingly "remand[ed the matter] without vacatur for EPA to make an effects determination for sulfoxaflor, solicit additional notice and comment for the sulfoxaflor amendments, and address the economic costs to beekeepers in determining whether the registration will cause 'unreasonable adverse effects'" within 180 days of the mandate's issuance. *Ctr. for Food Safety v. Regan*, Nos. 19-72109 & 19-72280, 2022 WL 17826872 (9th Cir. Dec. 21, 2022). One panel member dissented, arguing that the registration should be vacated.

As to the ESA claim, "EPA acknowledged its noncompliance [with the statute's consultation requirement] and granted the unconditional registration of sulfoxaflor" anyway, and the panel therefore found the agency had violated 16 U.S.C. § 1536(a)(2). It dismissed the agency's justification—i.e., effective use of limited resources by focusing on evaluation of "'what EPA believes to be more toxic compounds that, among other things, pose greater risk, to endangered

species than do sulfoxaflor'"—with the observation that "an agency cannot ignore the will of Congress just because it genuinely believes that it has a good reason or excuse for doing so. As the Supreme Court recently reminded us, 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends'" (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021)). The panel later returned to this principle: "EPA explains that it has a backlog because FIFRA predates the ESA, and the agency has 'many hundreds' of registered pesticides. But a half century has passed since the statute's enactment. ... How long does the agency expect us to excuse its failure to follow the law?"

As to the FIFRA claim, the panel began by rejecting the EPA's position that it could "avoid further public scrutiny by relying on the 2010 application to support the sulfoxaflor registration amendments." Although it agreed with the EPA that *Pollinator Stewardship Council* did not require the agency to have Dow resubmit its sulfoxaflor application, the panel found the "EPA's argument that it treated the original application as pending ... unsupported by the record." On this score, it pointed to the amended application filed on remand. Turning to "whether the vacated uses that Dow requested trigger notice and comment under FIFRA[,]" the panel answered "yes" because "FIFRA requires EPA to 'promptly' publish in the Federal Register 'a notice of each application for any pesticide if it contains any new active ingredient or if it would entail a changed use pattern'" and because the three "ways in which Dow could have asked EPA to add the cancelled uses back" under the statute's regulations "all require notice and comment."

Finally, as to the vacatur issue, the panel stated that "[w]hen determining whether an agency's action should remain in effect on remand, we apply a two-factor balancing test first outlined in the D.C. Circuit's *Allied-Signal* decision: We weigh the seriousness of the agency's errors against 'the disruptive consequences of an interim change that may itself be changed.'" *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). The majority held that the balance tipped in favor of non-vacatur for two reasons. *First*, "[d]espite our serious concern that EPA has continued to flout the ESA, we ultimately conclude that EPA could maintain the same registration decision once it makes an effects determination and engages in any required consultation" and that "where an agency is likely to be able to offer better reasoning and adopt the same rule on remand, vacatur for failure to provide notice and comment is not required." Here, "[t]hough EPA failed to provide notice of Dow's request to amend the sulfoxaflor registrations, its ecological risk assessment and decision memorandum reflect that the agency considered sulfoxaflor's impact on bees." *Second*, remand without vacatur (1) served to protect the environment "because sulfoxaflor has a more favorable toxicological profile compared to alternatives" and (2) would avoid "disruption to the agricultural industry" given sulfoxaflor's now widespread use.

The partial dissent characterized the majority's non-vacatur remedy as "leav[ing] [the remanded agency action] in place" and simply "giv[ing] the EPA a disapproving wag of a finger, and ask[ing]the agency to spend the next six months trying harder." It deemed the ESA and FIFRA violations as "not merely technical or formal; they raise significant doubts about the EPA's choices." The dissent added:

> It is the EPA's job, not ours, to assess the risks of a pesticide. But it is difficult for us to know whether the EPA did so correctly when its errors obscure our view of the alternatives. I do not share the court's confidence that the EPA's violations

> could not have made a difference. ... [¶] The EPA's serious errors have raised correspondingly serious questions about its decision. The unresolved risks to bees and beekeepers mean that "[o]n remand, a different result may be reached." ... These deficiencies should lead us to follow the ordinary course of vacating the agency's action.

Nor did the dissent share in the majority's concern about industry disruption:

> Vacatur would not pose a risk of "disruptive consequences of an interim change that may itself be changed." ... As the District of Columbia Circuit has recognized, "a quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction in order to impose a new outcome." ... Here, by contrast, there is little evidence that the "interim change" created by vacatur of the registration would have disruptive consequences. The agency has not disbursed funds based on the registration, nor has anyone taken irreversible actions in reliance on it.

Instead, in the dissent's view, "[h]ad the EPA simply announced at the outset that it thought sulfoxaflor was so useful that it should be registered without complying with the statutory procedures, we would not uphold the agency's action. But that is the practical effect of our decision not to vacate the registration."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/12/21/19-72109.pdf