



## Court Curbs Endangered Species Act Authority

Posted on November 28, 2011 at 10:02 AM

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The day before Thanksgiving provided a little joy for American farmers. The cause for celebration is that a U.S. District Court in Arizona reversed a September 27, 2011 decision regarding consultation requirements under the Endangered Species Act (ESA) involving pesticides.

The federal Court on November 23, 2011, reconsidered its September 27th decision, which in essence allowed an ESA complaint to proceed to discovery and potential trial regarding whether EPA failed to sufficiently "consult" with two other federal agencies on endangered species. The Court decided it did not have jurisdiction and approximately two months later reversed itself.

### Background

The ESA requires any federal agency to "...insure that any action authorized, funded or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...to be critical."

In order to carry out this mandate, the ESA goes on to require that an agency consult with Interior's Fish and Wildlife Service and the National Marine Fisheries Service whenever an agency takes action that "may affect" a listed endangered species or its habitat.

To make this provision even more dangerous, any person filing a citizen suit in federal court can seek to enjoin or stop any federal agency from acting which is alleged not to have consulted with these two agencies.

Environmental groups attempting to kill off old pesticides have been using the ESA, claiming that EPA is violating the ESA by failing to consult with Fish and Wildlife and the Marine Fisheries Service regarding impact of a pesticide on endangered species.

The environmental groups seek to have EPA review re-registration decisions and during that time seek to have injunctions put in place by courts to prohibit the pesticide in question being used which may be affecting an endangered species.

On November 23, the District Court in Arizona ruled on a citizen suit involving a Re -registration Eligibility Determination (RED) of an old pesticide named Rotenone.

Rotenone has been around since 1947. The environmental plaintiffs claimed that EPA violated the ESA by failing to consult the Fish and Wildlife Service before approving the use of rotenone.

EPA used a jurisdictional argument to defeat the environmentalists in this case.

EPA claimed the district court did not have jurisdiction because there had been a sufficient record created and hearing held, therefore the matter must be heard by a court of appeals not a district court. (No trial, in plain English.)

EPA argued successfully that a hearing had been held, a record created, and as a result the district court had no jurisdiction to hear the case.

The district court decided that, based on prior law, "a hearing simply requires that notice be given of a decision to be made and presentation to the decision-maker of the positions of those to be affected by the decision." Does this sound like a fair hearing to you?

On this basis, the Arizona District Court reversed itself and concluded a public hearing had occurred under the Federal Insecticide Fungicide Rodenticide Act (FIFRA) and that a court of appeals has jurisdiction, which the District Court lacked.

### Good news for Ag

The good news for agriculture is the court concludes that FIFRA specifically trumps the ESA, which is a more generalized act governing citizen suits. Because FIFRA explicitly grants jurisdiction to a court of appeals for challenges to an EPA registration review this court decision is positive for agriculture.

EPA has been and is involved in a major effort to re-register pesticides registered prior to November 1, 1984. It must determine if any pesticide's active ingredient has any "unreasonable adverse effects". If it has no such effects, it is eligible for re-registration under FIFRA.

This court decision and EPA's decision means that rotenone will have at least another 15 years of use by American agriculture to kill insects.

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### Comments

Posted by Anonymous on December 5 at 10:49 AM

Could farmers find an accommodation with the ESA. No law is perfect, but the goal of this one is to make sure that entire species of wildlife do not disappear off the earth forever. Do you really want your grandchildren to live in a world without bald eagles, alligators, Florida panthers, or condors? The ESA has been critical in preventing the extinction of these species, and your great grandchildren will be grateful that ours will not be the last generation to share the earth with these species.

Posted by Anonymous on December 5 at 7:57 AM

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