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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

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

16 Neither EPA nor Croplife has identified the proper legal burden, instead relying on unrelated,
17 inapplicable case law.³ Likewise, as a matter of fact, neither EPA nor Croplife has demonstrated that the
18 54 ongoing agency actions, as presently defined, are non-jeopardizing to threatened and endangered
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21 ¹ The Court ordered EPA “to initiate and complete section 7(a)(2) consultation with NMFS
22 regarding the effects of pesticide-registrations on threatened and endangered salmonids” per a schedule
23 proposed by EPA and endorsed by plaintiffs.

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

26 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).

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

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

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

23 ⁵ EPA makes no discernible effort to demonstrate no-jeopardy. Although Croplife does attempt
24 to carry this burden, its arguments and selective citations simply do not comport with the evidence
25 submitted and the institutionalized caution mandate of the ESA. See, e.g., Atrazine Reregistration
26 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.

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

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

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23 ⁷ Absent an EPA "no-effect" determination or stipulation from plaintiffs, the Court shall not
24 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.

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

SO ORDERED this 16th day of July, 2003.



CHIEF UNITED STATES DISTRICT JUDGE

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