

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR FOOD SAFETY and
CENTER FOR BIOLOGICAL
DIVERSITY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.

Respondents,

and

BASF CORPORATION

Respondent-Intervenor.

Case No. 21-71180

JOINT MOTION TO HOLD CASE IN ABEYANCE
PENDING VOLUNTARY CANCELLATION OF REGISTRATIONS

Petitioners Center for Food Safety and Center for Biological Diversity (“Petitioners”), Respondents U.S. Environmental Protection Agency and Administrator Michael Regan (“EPA” or the “Agency”) and Respondent-Intervenor BASF Corporation (“BASF”) jointly move to hold this case in abeyance for 90 days because BASF has filed a request to voluntarily cancel the trifludimoxazin registrations that are the subject of the Petition. Once the statutory

process for voluntary cancellation is complete, which EPA and BASF anticipate will occur in less than 90 days, the parties will jointly file a status report with the court updating it on next steps. Assuming the registrations have been cancelled, if necessary, BASF and EPA may file a motion or motions for summary disposition on mootness grounds. If such a motion or motions are necessary, the parties will propose a briefing schedule in their joint status report.

I. BACKGROUND

On July 16, 2021, Petitioners filed a Petition for Review challenging EPA's decision to grant registrations for Tirexor Technical and Tirexor Herbicide, pesticide products which contain the new active ingredient trifludimoxazin, under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.*, (the "registrations"). The Petition alleges, in part, that EPA violated Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, by failing to consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service before issuing the registrations. *See* ECF No. 1-4. EPA does not contest that it failed to meet its obligations under the ESA with respect to the registrations.

On January 11, 2022, EPA announced a new policy for addressing the requirements of ESA Section 7 in connection with applications for registration of

conventional pesticides containing a new active ingredient under FIFRA.¹ Among other things, the policy indicates that the Agency will “incorporat[e] ESA assessments into the registration process for new pesticides.”² More specifically, “[a]s of January 11, 2022, before registering any new conventional pesticide active ingredient, EPA will evaluate the potential effects on listed species and their designated critical habitats and initiate ESA consultation with the Services, as appropriate.”³

This policy applies to new conventional active ingredient applications under consideration by EPA as of January 11, 2022 as well as any new conventional active ingredient applications received by EPA on or after January 11, 2022; it does not apply retroactively. As a result, BASF decided to file a request to voluntarily cancel the registrations. After cancellation is complete, BASF intends to reapply for registration of trifludimoxazin products. Upon receipt of such applications, EPA will consider these applications as applications for the registration of a pesticide containing a new active ingredient and will incorporate

¹ EPA Announces Endangered Species Act Protection Policy for New Pesticides (January 11, 2022), available at <https://www.epa.gov/newsreleases/epa-announces-endangered-species-act-protection-policy-new-pesticides>.

² *Id.*

³ Progress Toward Protections for Federally Listed Species (January 11, 2022), available at <https://www.epa.gov/endangered-species/progress-toward-protections-federally-listed-species>.

an ESA assessment into the registration process for trifludimoxazin in accordance with the policy announced by the Agency on January 11, 2022.

BASF filed the request for voluntary cancellation of the registrations on February 14, 2022. *See* Declaration of Fredric Scott Kay, attached hereto as Exhibit 1, at ¶ 7 & Exhibit A. Because the registrations include approval for use on minor crops, FIFRA requires publication of notice of the request for voluntary cancellation in the Federal Register and a 180-day comment period, which can be waived on request in favor of a 30-day comment period. 7 U.S.C. § 136d(f)(1)(B)-(C). Cancellation of the registrations will not “adversely affect the availability of the pesticide for use” on minor crops because BASF has never manufactured, distributed, or sold the products in the United States and will not do so prior to cancellation. 7 U.S.C. § 136d(f)(1)(C); Kay Decl. ¶ 10. BASF requested that the 180-day comment period be waived in favor of a 30-day comment period and EPA has agreed. Kay Decl. Exhibit A. No existing stocks provision will be necessary in connection with the cancellation. *See* 7 U.S.C. §§ 136d(a)(1), 136j(a)(2)(k) (EPA “may permit” the continued sale and use of existing stocks of a pesticide whose registration has been cancelled, in accordance with the terms of the cancellation order). BASF will not withdraw its cancellation request, Kay Decl. ¶ 9, and EPA expects to issue a cancellation order after the 30-day comment period.

Briefing in this matter is ongoing, with Respondents' response and any cross motion to Petitioners' Motion for Summary Vacatur and Respondents' and Petitioners' response to Respondent-Intervenor's Motion to Dismiss ESA Claims due on February 25, 2022.⁴ The parties therefore request this case be held in abeyance for 90 days while the voluntary cancellation process is completed. If it proceeds as anticipated, the cancellation process should be finished within the 90 days. At that time, assuming the registrations have been cancelled, EPA and BASF anticipate that they will file a motion or motions for summary disposition on mootness grounds unless Petitioners commit to voluntarily withdraw the Petition or withdraw it.

II. ARGUMENT

Granting a stay for 90 days pending completion of the voluntary cancellation process will serve efficiency and prevent the unnecessary burden of further briefing in light of the pending request to cancel the registrations that are the subject of this Petition.

Under Article III of the Constitution, federal courts are limited to the adjudication of actual, ongoing controversies between litigants, and federal courts

⁴ Should the Court deny this joint motion for abeyance, the parties alternatively request that the Court give Respondents and Petitioners 14 days after the Court enters its order denying this motion to file their responses to Petitioners' Motion for Summary Vacatur and Respondent-Intervenor's Motion to Dismiss ESA Claims.

lack the jurisdiction “to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). A claim is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *People of Village of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993). A case that becomes moot at any point during the proceedings is “no longer a ‘Case’ or ‘Controversy’ for purposes of Article III,” and is outside the jurisdiction of the federal courts. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

Cancellation of the registrations at issue would render the Petition moot. Petitioners challenged EPA’s orders granting the registrations, alleging that EPA violated its obligations under FIFRA and the ESA. Petitioners have asked the Court to vacate the registrations and stop the sale and use of the trifludimoxazin products subject to the registrations. Cancellation would render Petitioners’ claims and requested relief moot, because the registrations would be extinguished and there is no stock of manufactured products to be sold or used. Moreover, cancellation of the registrations would render Petitioners’ ESA claims moot because once they are cancelled there will be no “action” triggering ESA Section 7 consultation requirements. 16 U.S.C. § 1536(a)(2). Any subsequent application for registration of trifludimoxazin products submitted by BASF will be addressed by

EPA in a new administrative process under EPA's new policy of incorporating ESA assessment into the registration process for new conventional pesticide active ingredients. This will result in a new administrative record and, potentially, changes in the scope and requirements of any future registrations as compared to the registrations challenged by Petitioners. Any challenges to such future registrations would be subject to judicial review under the provisions of FIFRA § 16, 7 U.S.C. 136n.

III. CONCLUSION

For the foregoing reasons, the Court should hold this case in abeyance for 90 days while the statutory process for BASF's voluntary cancellation request is conducted.

Dated: February 23, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, I filed the foregoing Joint Motion for Abeyance Pending Voluntary Cancellation of Registrations with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

February 23, 2022

/s/ Kathryn E. Szmuszkovicz
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