

## NOTES

### *Pollinator Stewardship Council v. U.S. Environmental Protection Agency: The Ninth Circuit Reaffirms the Prioritization of Protecting the Environment over Agency Action*

I. OVERVIEW OF THE CASE .....	87
II. BACKGROUND .....	89
III. THE COURT’S DECISION.....	93
IV. ANALYSIS .....	97
V. CONCLUSION .....	99
VI. ADDENDUM .....	99

#### I. OVERVIEW OF THE CASE

A delicate balance exists between the need to produce crops for human use and consumption and the desire to avoid leaving a detrimental impact on the environment in the process. In an effort to protect the environment from pesticides that cause unreasonable harm, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) prohibits farmers from utilizing, or companies from selling, a pesticide that the Environmental Protection Agency (EPA) has not yet approved and registered.<sup>1</sup> In 2010, Dow Agrosciences, LLC (Dow) asked the EPA to approve three pesticide products with sulfoxaflor as the main/active ingredient.<sup>2</sup> As part of its application, Dow had to submit studies regarding sulfoxaflor’s effects on bees in response to an alarming rate of bee deaths in recent years and in light of the essential role that bees play in pollinating important crops.<sup>3</sup> Upon analyzing these studies, the EPA made a baseline determination that sulfoxaflor is highly toxic to honey bees.<sup>4</sup> Finding that sulfoxaflor poses risks to honey bees, the EPA next sought to determine the magnitude of the risks, when and where the risks

---

1. *Pollinator Stewardship Council v. EPA*, 800 F.3d 1176, 1177 (9th Cir. 2015) (citing 7 U.S.C. § 136a(a) (2012)).

2. *Id.* at 1178.

3. *Id.* at 1177-78.

4. *Id.* at 1179.

occur, and the effects of sulfoxaflor on the bee colony as a whole.<sup>5</sup> When the EPA analyzed the studies Dow had submitted, however, the EPA noted that the data did not give a definitive picture of sulfoxaflor's effects on bees.<sup>6</sup> This was partially due to the fact that the tests were performed largely below the application rate that Dow proposed in its application and also partially due to the fact that the data was unclear concerning sulfoxaflor's impact on the brood development and long-term health of bee colonies.<sup>7</sup> The effects of sulfoxaflor on brood development and long-term colony health are crucial data because a honey bee colony is considered an interdependent superorganism, which means that a negative effect on one type of bee within the hive can have ripple effects throughout the rest of the hive.<sup>8</sup>

Due to the gaps in data, sulfoxaflor's impact on bees remained unclear, so the EPA proposed a rule, which conditioned its registration of sulfoxaflor in part upon the requirement that Dow supply additional studies to resolve those questions left unanswered by the original studies.<sup>9</sup> Yet, when the EPA issued its final rule less than seven months later, the EPA surprisingly changed its registration of sulfoxaflor pesticides to an unconditional status albeit with certain mitigation measures, such as a lowering of the maximum application rate, but without ever having received the requested additional studies or even sufficient studies that demonstrated the effects of sulfoxaflor under the conditions the EPA unconditionally approved.<sup>10</sup> In response to the EPA's unconditional registration of sulfoxaflor, petitioners, who are commercial beekeepers and beekeeping organizations, filed a petition for review.<sup>11</sup> The EPA and Dow (respondents) defended the EPA's decision on the grounds that the EPA was able to obtain sufficient data from the studies to register sulfoxaflor; moreover, they argued that the determination of the type of data needed to support a pesticide registration is within the EPA's discretion.<sup>12</sup> The matter went directly to the United States Court of

---

5. *Id.* (quoting Office of Chem. Safety & Pollution Prevention, Office of Pesticide Programs, Pest Mgmt. Regulatory Agency & Ca. Dep't of Pesticide Regulation, *White Paper in Support of the Proposed Risk Assessment Process for Bees*, CA. DEP'T OF PESTICIDE REGULATION 35 (Sept. 11-14, 2012), [http://www.cdpr.ca.gov/docs/emon/surfwtr/presentations/epa\\_whitepaper.pdf](http://www.cdpr.ca.gov/docs/emon/surfwtr/presentations/epa_whitepaper.pdf)).

6. *Id.* at 1181.

7. *Id.*

8. *Id.* at 1184.

9. *Id.* at 1181-82.

10. *Id.* at 1182.

11. *Id.* at 1177.

12. *Id.* at 1183.

Appeals for the Ninth Circuit under 7 U.S.C. § 136n(b).<sup>13</sup> That court vacated the EPA’s decision to unconditionally register sulfoxaflor and remanded the matter to the EPA when it *held* that the unconditional registration of sulfoxaflor was not supported by the record as a whole. *Pollinator Stewardship Council v. U.S. Environmental Protection Agency*, 800 F.3d 1176, 1183 (9th Cir. 2015).

## II. BACKGROUND

Under the Administrative Procedure Act (APA), which provides for judicial review of an agency’s action, courts require an agency to explain why it has exercised its discretion in a particular manner.<sup>14</sup> The United States Supreme Court has said that a court reviewing an agency action must uphold the action “on the basis articulated by the agency itself.”<sup>15</sup> For example, in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court reviewed the decision of the National Highway Traffic Safety Administration (NHTSA) to revoke a safety standard which required that all vehicles be equipped with passive restraints, such as automatic seatbelts and airbags.<sup>16</sup> The NHTSA explained that automatic seatbelts were no longer considered effective because people were likely to detach the seatbelts; yet, the NHTSA never explained why a mere modification of the standard to include only airbags, which the agency still considered an effective technology, was not a feasible alternative.<sup>17</sup> The Supreme Court invalidated the NHTSA’s action because the basis for the agency’s decision did not hold up when considering the big picture; there was no doubt as to the necessity of a passive restraint standard and as to the effectiveness of airbag technology.<sup>18</sup> The NHTSA proffered no reason or data to support a complete obliteration of the passive restraint standard.<sup>19</sup> If an agency’s reason for a decision contains deficiencies, then a reviewing court “may not supply a reasoned basis for the agency’s action

---

13. *Id.* (quoting 7 U.S.C. § 136n(6) (2012)).

14. *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) (citing *Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973); *Fed. Trade Comm’n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *Nat’l Labor Relations Bureau v. Metro. Ins. Co.*, 380 U.S. 438, 443 (1965)).

15. *Id.* at 50 (citing *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Sec. Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

16. *State Farm*, 463 U.S. at 34–35.

17. *Id.* at 47–48.

18. *Id.*

19. *Id.* at 48.

that the agency itself has not given,” nor can the court uphold the agency decision.<sup>20</sup>

When the EPA receives a pesticide application and must decide how to rule on it, the EPA receives guidance from FIFRA.<sup>21</sup> The purpose of FIFRA is to ensure that those pesticides that will be most destructive to the environment and to human health are not in use.<sup>22</sup> Thus, when a pesticide manufacturer has a new product, the manufacturer must submit an application to the EPA, and the application must inform the EPA of the pesticide’s ingredients and alleged benefits as well as data regarding the pesticide’s health, safety, and environmental impact.<sup>23</sup> Upon receipt of the application, the EPA has three choices: the EPA can choose to unconditionally register, to deny, or to conditionally register the pesticide.<sup>24</sup> The choice ultimately depends upon whether the pesticide presents “unreasonable adverse effects.”<sup>25</sup> In pertinent part, FIFRA defines “unreasonable adverse effects” as “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the . . . pesticide.”<sup>26</sup>

When the EPA chooses whether to unconditionally register, deny, or conditionally register a new pesticide, FIFRA calls on the EPA to engage in a cost-benefit analysis by weighing the economic, social, health, and beneficial aspects of the pesticide.<sup>27</sup> The EPA unconditionally registers a pesticide if “it will perform its intended function without unreasonable adverse effects on the environment” and if “when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.”<sup>28</sup> If the EPA determines that these requirements have not been met, then the EPA denies the pesticide.<sup>29</sup> If, however, the EPA is unable to determine the pesticide’s environmental impact based on the data submitted in the application, the EPA conditionally registers the pesticide “for a period reasonably sufficient for the generation and submission of required data.”<sup>30</sup>

---

20. *Id.* at 43 (citing *Chenery*, 332 U.S. at 196).

21. 7 U.S.C. § 136a (2012).

22. *See id.* § 136a(a).

23. *Id.* § 136a(c); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 571 (1985).

24. 7 U.S.C. § 136a(c)(5-7).

25. *Id.* § 136a(a).

26. *Id.* § 136(bb).

27. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005) (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001)).

28. 7 U.S.C. § 136a(c)(5).

29. *Id.* § 136a(c)(6).

30. *Id.* § 136a(c)(7)(C).

The EPA must also follow its own agency regulations when analyzing a new pesticide. For example, according to the EPA's regulations, the EPA is to approve a new pesticide only if the agency has reviewed all data pertaining to the pesticide and has concluded that no additional studies are necessary to approve the pesticide under FIFRA's unreasonable adverse effects standard.<sup>31</sup> The EPA's regulations also specifically mandate that a pesticide manufacturer must perform field testing on bees if preliminary data has indicated that the pesticide might have adverse effects upon bee colonies.<sup>32</sup>

In fact, the Ninth Circuit has specifically held that the EPA cannot ignore its own regulations when risk concerns have arisen even if the threshold for finding a risk has barely been met and even if the risk level is based on conservative calculations.<sup>33</sup> For example, in *Natural Resources Defense Council v. EPA*, an EPA risk assessment rule declared that there would be a risk concern and thus a necessity for mitigation measures if the "margin of exposure" (MOE) to a particular pesticide was less than or equivalent to 1000.<sup>34</sup> The EPA determined that the MOE for a person who came into contact with the pesticide both dermally and orally was exactly 1000; yet, the EPA argued that this result did not indicate an actual risk because it was "in the neighborhood" of results that would not trigger concern and the MOE calculations were based on conservative assumptions.<sup>35</sup> The Ninth Circuit vacated the EPA's conclusion because it was not supported by the evidence and violated the EPA's own rule.<sup>36</sup> Further, based on *State Farm*, which held that a court can only uphold an agency decision on the reasons supplied by the agency itself, the Ninth Circuit refused to conduct its own risk assessment, to change the EPA rule, or to modify the purportedly conservative assumptions on which the rule was based.<sup>37</sup>

Similarly, the Ninth Circuit has held that an agency's decision will not be upheld if the decision uses ambiguous or inconclusive studies to corroborate a conclusion that the studies do not actually support.<sup>38</sup> For example, in *Tucson Herpetological Society v. Salazar*, the Ninth Circuit instructed the Secretary of the Interior (Secretary) to reconsider the

---

31. 40 C.F.R. § 152.112(b)-(c), (e) (2014).

32. *Id.* § 158.630 (d)-(e)(25)(i).

33. *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 883 (9th Cir. 2013).

34. *Id.* at 876.

35. *Id.* at 883-84.

36. *Id.* at 884.

37. *Id.* at 884; *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

38. *See Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009).

decision to remove the flat-tailed horned lizard (lizard) from the list of threatened species under the Endangered Species Act.<sup>39</sup> The Secretary did so on the basis that lizard populations were enduring in certain parts of the country, but the administrative record revealed that the population studies on which the Secretary relied were actually quite underdeveloped and inconclusive regarding the vitality of the lizard populations.<sup>40</sup> The Ninth Circuit reversed because “the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence.”<sup>41</sup> Thus, if studies do not specifically support a particular conclusion, then an agency cannot rely upon those studies in the assertion of that conclusion.<sup>42</sup>

When a court has decided that an agency action is invalid for one or more of the aforementioned reasons, the court must next decide whether to vacate or to allow the invalid rule to remain in place while the issue is on remand.<sup>43</sup> This decision is based on a balancing of the gravity of the agency’s mistake versus the disruption that will result from instituting a temporary rule only for the temporary rule to potentially change again in the future.<sup>44</sup> In this balancing test, the Ninth Circuit has clung to two particular considerations.<sup>45</sup> First, a court will choose either to vacate or to leave the rule in place based on the environmental ramifications of each of these options.<sup>46</sup> For example, in *Idaho Farm Bureau Federation v. Babbitt*, the Ninth Circuit elected not to vacate the rule because vacatur would have meant the removal of a snail species from the endangered species list and thus might have resulted in serious species losses before the agency could take any further action.<sup>47</sup> Second, a court considers whether the agency will be able to offer the same rule on remand or whether the decision is so fundamentally flawed that the agency will not be able to promulgate the same rule again.<sup>48</sup> If the agency will be unable or unlikely to offer the same rule, then the court should vacate.<sup>49</sup> For

---

39. *Id.* at 882.

40. *Id.* at 878-79.

41. *Id.* at 879.

42. *Id.*

43. *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

44. *Id.*

45. *North Carolina v. EPA*, 531 F.3d 896, 929 (9th Cir. 2008); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405-1406 (9th Cir. 1995).

46. *Cal. Cmty. Against Toxics*, 688 F.3d at 993-94; *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405-06.

47. *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405-06.

48. *North Carolina*, 531 F.3d at 929 (quoting *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1261-62 (D.C. Cir. 2007)).

49. *Id.*

example, in *North Carolina v. EPA*, the Ninth Circuit found that the EPA's rule was so erroneous that it would be impossible for the EPA to promulgate the same rule on remand and was so flawed that the EPA needed to completely redo its analysis.<sup>50</sup>

### III. THE COURT'S DECISION

In the noted case, the Ninth Circuit followed the approach established by the Supreme Court in *State Farm* that requires a court to uphold an agency action only if the agency itself provided a reasoned explanation for the action; further, the court used EPA regulations and a series of Ninth Circuit cases to demonstrate why the data and the reasoning provided by the EPA could not be used to uphold the unconditional registration of sulfoxaflor.<sup>51</sup> The court showed that in light of the available data, which indicated that sulfoxaflor poses an environmental risk to bee populations in particular, the unconditional registration of sulfoxaflor contradicted EPA regulations.<sup>52</sup> Next, the court reasoned that the EPA cannot uphold its decision on the basis that the ambiguity of the sulfoxaflor studies confirms that sulfoxaflor exposure is safe for bees.<sup>53</sup> The court then reminded the EPA that even if the risk concern was based on conservative estimates and even if the risk concern was only minimally triggered, the EPA chose this risk measurement and is bound to abide by it.<sup>54</sup> For these reasons, the court declared that the EPA's registration of sulfoxaflor was invalid.<sup>55</sup> The court concluded by finding that vacating the registration on remand was preferable to leaving the invalid rule in place.<sup>56</sup> The court reasoned that leaving the registration in place could result in harm to bee populations in the interim, and the court also explained that it did not make sense to leave the invalid registration in place due to the possibility that the EPA will change its conclusion entirely once it has sufficient data to make a proper decision.<sup>57</sup>

The court initially pointed out that it has jurisdiction over this matter under FIFRA, which grants judicial review to anyone who will be

---

50. *Id.*

51. *Pollinator Stewardship Council v. EPA*, 800 F.3d 1176, 1183 (9th Cir. 2015); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (citing *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

52. *Pollinator Stewardship Council*, 800 F.3d at 1183-84 (quoting 40 C.F.R. § 152.112(b)-(c)) (citing 40 C.F.R. § 158.630(d), (e)(25)(i) (2014)).

53. *Id.* at 1185-86.

54. *Id.* at 1186 (citing 40 C.F.R. § 158.630(d), (e)(25)(i)).

55. *Id.* at 1187.

56. *Id.*

57. *Id.*

negatively affected by an EPA order in the court of appeals for the circuit where the person lives or has a business.<sup>58</sup> As another preliminary matter, the court noted the test to uphold the registration of a new insecticide under FIFRA.<sup>59</sup> FIFRA directs the court to “consider all evidence of record” and to sustain the EPA’s decision “if it is supported by substantial evidence when considered on the record as a whole.”<sup>60</sup> With this in mind, the Ninth Circuit explained why the evidence in the record did not support the EPA’s decision to unconditionally register sulfoxaflor.<sup>61</sup>

First, the court demonstrated that the EPA’s unconditional registration of sulfoxaflor violated the EPA’s own regulations because the sulfoxaflor application lacked conclusive information about the pesticide’s effects on bees.<sup>62</sup> The court pointed out that EPA regulations logically require the EPA to declare that additional studies are unnecessary before the EPA can say that a pesticide has no unreasonable adverse effects.<sup>63</sup> Additionally, the court cited EPA regulations that mandate that a manufacturer must perform field tests on bees if there is an indication that the pesticide poses a risk to bees.<sup>64</sup> In the case at hand, both of these regulations were triggered: the EPA declared that additional studies were necessary based on the insufficiency of information, and the initial tests revealed a risk to bees which meant that Dow needed to perform field testing.<sup>65</sup> Despite these two regulatory requirements of additional tests, the EPA unconditionally registered sulfoxaflor even though Dow never sufficiently tested sulfoxaflor’s effects on bees, especially on brood development and long-term colony health, at either the original proposed application rate or even the lowered application rate that the EPA ultimately approved.<sup>66</sup> As the proposed rule and the final rule were based on the exact same information, the decisions are clearly inconsistent, and the respondents failed to offer satisfactory explanations for this inconsistency.<sup>67</sup> Moreover, the final rule both contravenes EPA regulations and lacks evidentiary support for the claim that the lowered application rate would not have unreasonable adverse effects on bees.<sup>68</sup>

---

58. *Id.* at 1183; 7 U.S.C. § 136n(b) (2012).

59. *Pollinator Stewardship Council*, 800 F.3d at 1183 (quoting 7 U.S.C. § 136n(b)).

60. 7 U.S.C. § 136n(b).

61. *Pollinator Stewardship Council*, 800 F.3d at 1183, 1185.

62. *Id.*

63. *Id.* (citing 40 C.F.R. § 152.112(b)-(c) (2014)).

64. *Id.* at 1183 (citing 40 C.F.R. § 158.630(d), (e)(25)(i)).

65. *Id.* at 1183-84; 40 C.F.R. §§ 152.112(b)-(c), 158.630(d), 158.630(e)(25)(i).

66. *Pollinator Stewardship Council*, 800 F.3d at 1185.

67. *Id.*

68. *Id.*; 40 C.F.R. § 158.630(d), (e)(25)(i).



Next the court combatted the respondents' argument that the inconclusiveness of the studies should be read as a sign that sulfoxaflor does not produce unreasonable adverse effects for bees.<sup>69</sup> The court reiterated Ninth Circuit precedent, which maintains that "an agency cannot rely on ambiguous studies as evidence of a conclusion that the studies do not support."<sup>70</sup> Here, the studies were ambiguous as to sulfoxaflor's true effects on bees because the studies did not analyze the bee colony as a whole nor were they performed at either the proposed or lowered application rate.<sup>71</sup> Thus, just as the *Tucson* court invalidated the Secretary's removal of the lizard from the threatened species list due to underdeveloped and ambiguous data, this court reasoned that the absence of evidence and such large data gaps resulted in an inherent inability to arrive at a firm conclusion as to whether sulfoxaflor has unreasonable adverse effects on bees.<sup>72</sup>

The respondents put forward an alternative argument that the results of the studies were "close enough" not to trigger further testing: they argued that the ambiguity and limitations of the studies are ultimately unimportant because the level of risk concern was a conservative number and the preliminary studies performed at the lowered application rate only demonstrated a risk to bees in a few instances.<sup>73</sup> The court rejected these arguments as violations of EPA regulations and as contrary to precedent.<sup>74</sup> The court conceded that the level of risk concern was only triggered in a few instances at the lowered application rate and that the EPA's level of concern might actually be a conservative number, but the court said neither of these concessions matters.<sup>75</sup> The court explained that EPA regulations require additional field testing whenever *some* of the data surpasses the level of concern.<sup>76</sup> Moreover, the court's reasoning for rejecting this argument was compounded by precedent: the court reasserted the Ninth Circuit prohibition against allowing the EPA to "avoid its own regulations when actual measurements . . . were 'in the neighborhood' of measurements that would not trigger such concern."<sup>77</sup> The court declared that the EPA chose its level of concern and thus remained bound to it whenever the level of concern was triggered, even if

---

69. *Pollinator Stewardship Council*, 800 F.3d at 1185-86.

70. *Id.*; *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009).

71. *See Pollinator Stewardship Council*, 800 F.3d at 1185.

72. *Id.*; *Tucson*, 566 F.3d at 870.

73. *Pollinator Stewardship Council*, 800 F.3d at 1186.

74. *Id.* (citing 40 C.F.R. §§ 158.630(d), 158.630(e)(25)(i) (2014)).

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 884 (9th Cir. 2013)).

only minimally so.<sup>78</sup> Additionally, the court refused to even consider the possibility of judicially modifying the agency's rule based on the enduring notion that an agency's action must be sustained on the basis presented by the agency itself.<sup>79</sup> In sum, the court said that the EPA cannot choose to avoid its regulations nor can the court retroactively aid the agency in avoiding its regulations.<sup>80</sup>

Lastly, after having determined that the unconditional registration of sulfoxaflor was not supported by substantial evidence as required by FIFRA and that the matter should be remanded to the agency, the court addressed the remedy.<sup>81</sup> The court explained that an invalid agency rule is left in place on remand only in rare circumstances as "when equity demands" it.<sup>82</sup> To determine whether equity called for the unconditional registration to remain in place, the court weighed the gravity of the EPA's mistake in unconditionally registering sulfoxaflor against the disruption that naturally follows any agency rule change.<sup>83</sup> First and foremost, the court considered the risk to bees.<sup>84</sup> Unlike in *Idaho Farm Bureau Federation* where vacating the agency action was disfavored because that would have put the snail species at risk of extinction, here the opposite was the case: the court determined that vacating the registration was the preferable option in the environmental sense because this removed the potential risk to bees, and such a concern was particularly noteworthy considering the recent vulnerability of bee populations.<sup>85</sup> This conclusion was buoyed by the notion that a court can vacate an invalid agency rule if the court thinks that a different result might be reached on remand.<sup>86</sup> The court reasoned that the invalid registration of sulfoxaflor should not be left in place due to the possibility that once the EPA finally obtains sufficient data the agency might determine that sulfoxaflor is too detrimental to the brood development and colony strength of bees and thus should be outright denied.<sup>87</sup>

Judge Smith concurred with the majority's finding that the unconditional registration of sulfoxaflor should be vacated and the matter

---

78. *Id.*; *Nat. Res. Def. Council*, 735 F.3d at 883-84.

79. *Pollinator Stewardship Council*, 800 F.3d at 1186-87 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

80. *Id.*

81. *Id.* at 1187.

82. *Id.* (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

83. *Id.* (quoting *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)).

84. *Id.*

85. *Id.*; *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405-06.

86. *Pollinator Stewardship Council*, 800 F.3d at 1187.

87. *Id.*

remanded to the EPA.<sup>88</sup> Judge Smith explained that the EPA's unconditional registration of sulfoxaflor failed to overcome both FIFRA's substantial evidence standard and the even lower hurdle of the APA's arbitrary and capricious standard.<sup>89</sup> The EPA failed both standards because the agency did not offer a satisfactory and sufficient explanation supported by scientific data for its action.<sup>90</sup> Judge Smith acknowledged the great deference that courts do and should show to agencies, especially in matters involving agency expertise, but Judge Smith quickly followed up that "[p]rofessional judgment and knowledge do not meet the substantial evidence standard independent of data and facts."<sup>91</sup> Thus, Judge Smith felt that the EPA's unconditional sulfoxaflor registration could have been easily struck down on the statutory basis of failing the substantial evidence standard in FIFRA and the arbitrary and capricious standard of the APA.<sup>92</sup>

#### IV. ANALYSIS

In its handling of this case, the court remained consistent with prior jurisprudence, namely Supreme Court and Ninth Circuit cases. For example, when the court refused to modify the EPA's level of risk concern or to perform its own risk assessment, the court followed the important administrative law principle from *State Farm*, which prohibits a court from supplying an explanation for the agency's action when the agency itself has not submitted an explanation or when the agency's explanation fails to show a rational connection between the evidence and the conclusion.<sup>93</sup> Sticking to this principle is important because doing so forces agencies to articulate why they have exercised their discretion in a particular way. This is a positive principle for courts to continue to advance because it produces a certain level of agency accountability and demonstrates to agencies that a court will not rescue a poorly supported decision. Additionally, the court remained true to Ninth Circuit precedent that prohibits an agency from avoiding its own regulations and rules or from relying upon ambiguous studies.<sup>94</sup> This call for an adherence to agency regulations and sound scientific data is important because it also produces a level of agency accountability.

---

88. *Id.* at 1188 (Smith, J., concurring).

89. *Id.* at 1188-89.

90. *Id.* at 1193 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (2000)).

91. *Id.*

92. *Id.* at 1189.

93. *Id.* at 1187 (majority opinion) (quoting *State Farm*, 463 U.S. at 50).

94. *Id.* at 1186.

Though not really explicitly stated throughout the opinion, the Ninth Circuit seemed to base its reasoning on FIFRA.<sup>95</sup> The purpose of FIFRA is to prevent the sale and use of unreasonably harmful pesticides to the detriment of the environment.<sup>96</sup> The court clearly decides this case with FIFRA's environmental concerns in mind, such as when the court decided to vacate the unconditional registration on remand out of fear that leaving the registration in place would be detrimental to bees.<sup>97</sup> More generally, this decision is consistent with FIFRA in the sense that the court prevented the use of a potentially harmful pesticide until such time as the EPA can determine whether sulfoxaflor passes FIFRA's no unreasonable adverse effects standard.<sup>98</sup> This is exactly what FIFRA was designed to do.<sup>99</sup>

Though it would seem unduly harsh to say that the decision is right for the wrong reasons, it is possible that the decision could have been made via a clearer trajectory. Most obviously, the court could have simply said that the reason it ruled the unconditional registration of sulfoxaflor to be invalid is because the lack of solid evidence about sulfoxaflor's effects on bees prevented the EPA from engaging in the cost-benefit analysis for which FIFRA calls.<sup>100</sup> Additionally, Judge Smith's concurrence outlined how the case could be decided under FIFRA's substantial evidence standard of review or the APA's arbitrary and capricious standard of review: the EPA did not satisfy even the less deferential arbitrary and capricious standard because the EPA failed to provide a reasoned explanation for its decision, so the EPA certainly did not satisfy FIFRA's more burdensome substantial evidence standard.<sup>101</sup> Judge Smith's approach is more streamlined, more rooted in the relevant statutes, and easier to follow than the majority's piecemeal approach. While the majority references FIFRA's cost-benefit analysis and test to uphold the registration of a new insecticide at the outset of the opinion, the majority only references FIFRA again at the very close of its discussion section and fails to give a strong indication that the statute is the foundation upon which the discussion was based. Because FIFRA is at the heart of this controversy, the opinion could have been stronger if the court reiterated or more clearly explained that it was invalidating the EPA's unconditional registration of sulfoxaflor for not being in line with

---

95. *See id.* at 1183.

96. *See* 7 U.S.C. § 136a(a) (2012).

97. *Pollinator Stewardship Council*, 800 F.3d at 1187.

98. *Id.*

99. *See* 7 U.S.C. § 136a(a).

100. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005).

101. *Pollinator Stewardship Council*, 800 F.3d at 1189 (Smith, J., concurring).

FIFRA's requirements. That is, the lack of sufficient data precluded the EPA from performing the necessary cost-benefit analysis and thus from determining whether sulfoxaflor causes unreasonable adverse effects to bees, as FIFRA requires. Additionally, FIFRA calls on a court to uphold a pesticide registration only if there is substantial evidentiary support for the registration, but here the lack of sufficient data clearly prevented the court from finding that the unconditional registration was based on substantial evidence. The majority seemed to only apply these FIFRA requirements briefly at the close of the discussion, but FIFRA deserved more attention than the majority accorded it.

## V. CONCLUSION

Throughout its analysis, the Ninth Circuit reviewed the situation in a manner consistent with past jurisprudence. The court interpreted Supreme Court precedent correctly by declining to uphold an unsupported agency decision and by declining to essentially do the agency's job by supplying a basis for an unsupported decision. The court interpreted Ninth Circuit precedent correctly in its admonitions to the EPA that an agency cannot violate its own regulations and rules or ignore data that indicates a risk. The court was also correct to allow its concern for bees to sway the decision to vacate the invalid registration of sulfoxaflor because FIFRA was designed for such environmental considerations. Though the majority arrived at its conclusion via a somewhat indirect route as compared to the concurring opinion, the holding was the correct one at which to arrive.

## VI. ADDENDUM

As this Note was in line for publication, the Ninth Circuit amended and superseded the opinion on rehearing.<sup>102</sup> The opinion was amended to eliminate any language indicating that FIFRA prohibits the use of a pesticide that has not been approved and registered by the EPA.<sup>103</sup> Thus, as amended, the opinion states that FIFRA only limits the *sale* of such unapproved and unregistered pesticides.<sup>104</sup> In the amended opinion, the court also granted the petitioners' motion for issuance of mandate.<sup>105</sup>

---

102. *Pollinator Stewardship Council v. EPA*, No. 13-72346, 2015 WL 7003600, at \*1 (9th Cir. Nov. 12, 2015).

103. *Id.*; *Pollinator Stewardship Council*, 800 F.3d at 1176.

104. *Pollinator Stewardship Council*, 2015 WL 7003600, at \*1; *Pollinator Stewardship Council*, 800 F.3d at 1172.

105. *Pollinator Stewardship Council*, 2015 WL 7003600, at \*1.

This mandate is in line with the court's original opinion.<sup>106</sup> In accordance with the grant of this mandate, the original opinion, and the amended opinion, the EPA is prevented from unconditionally registering sulfoxaflor pesticides if the EPA does not perform more studies and gather further data concerning sulfoxaflor's impact on bees.<sup>107</sup>

Kristen Hilferty\*

---

106. *Id.* at \*12; *Pollinator Stewardship Council*, 800 F.3d at 1187.

107. *Pollinator Stewardship Council*, 2015 WL 7003600, at \*12; *Pollinator Stewardship Council*, 800 F.3d at 1187.

\* © 2015 Kristen Hilferty. J.D. candidate 2017, Tulane University Law School; B.A. 2014, *summa cum laude*, Political Science and History, Louisiana State University.