

Center for Biological Diversity v. EPA: The D.C. Circuit Deftly Skirts Lujan in Pesticide Challenge

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I. OVERVIEW OF THE CASE

Citing an increased risk to endangered species because of the Environmental Protection Agency’s (EPA) registration of the insecticide cyantraniliprole (CTP), a coalition of environmental organizations sued the agency in federal district court under the citizen-suit provision of the Endangered Species Act (ESA), while also petitioning the United States Court of Appeals for the District of Columbia Circuit for review under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹ Under FIFRA, the EPA is responsible for the regulation of pesticides through its registration process, which considers a pesticide’s unreasonably harmful effects on the environment.² The petitioners alleged that the EPA violated the ESA because it registered CTP without consulting other germane agencies to determine CTP’s effects on listed species and their critical habitats.³ While numerous threatened or endangered species may have been adversely affected by CTP, the petitioners focused on the putative harm to just two—the Valley Elderberry Longhorn Beetle and the Mitchell’s Satyr Butterfly.⁴

Before proceeding to the merits of the case, the court first had to resolve various jurisdictional issues, including questions concerning associational standing and proper forum.⁵ In a 2-1 majority opinion, the United States Court of Appeals for the District of Columbia Circuit *held* that because at least one member of a petitioning organization had demonstrated sufficient injury in fact to establish Article III standing, the environmental organizations ultimately had associational standing for the claim. Further, because the ESA and FIFRA claims were “inextricably

1. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177-80 (D.C. Cir. 2017).
2. *Id.* at 178.
3. *Id.* at 180.
4. *Id.* at 179-80.
5. *Id.* at 181.

intertwined,” and because FIFRA had a more specific statutory jurisdictional provision, the court held that the appeals court was the proper forum for the case. Finally, because the EPA’s violation of the ESA was uncontroverted, the court was left with the discretion to choose between remand and vacatur as the remedial measure. *Center for Biological Diversity v. EPA*, 861 F.3d 174, 185, 187-89 (D.C. Cir. 2017).

II. BACKGROUND

Congress enacted the ESA in 1973 as a reaction to the alarming extinction rate of species and with the understanding that significant resources must be devoted to protecting threatened wildlife.⁶ The ESA mandates that any federal agency authorizing, funding, or carrying out an action must ensure that action is not likely to jeopardize the existence or critical habitat of any endangered or threatened species.⁷ Because the ESA assigns the United States Department of Commerce and Department of the Interior shared responsibility for determining and protecting threatened or endangered species,⁸ § 1536(a)(2) requires that federal agencies consult with the Secretary of Interior or of Commerce regarding actions that may adversely affect threatened or endangered species or their habitats.⁹ Specifically, the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) within Interior and Commerce, respectively, have been tasked with administering the ESA.¹⁰

The interagency consultation process involves, broadly, the possibility of two steps: (1) an informal determination of an agency action’s effects upon protected species or habitats; and, should the action affect a listed species or critical habitat, then (2) the commencement of formal consultation.¹¹ If, after the informal consultation stage, the agency, with the written concurrence of the FWS or the NMFS, determines that the proposed action is unlikely to negatively impact protected species or habitats, then the consultation process is terminated.¹²

The ESA contains a broad citizen-suit provision, which declares that “any person may commence a civil suit . . . to enjoin any person,

6. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176-77 (1978).

7. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2012).

8. *Id.* § 1533(a).

9. *Id.* § 1536(a)(2); *see also In re Am. Rivers*, 372 F.3d 413, 415 (D.C. Cir. 2004).

10. 50 C.F.R. § 402.01 (2017).

11. *Id.* § 402.14.

12. *Id.* § 402.13.

including the United States and any other governmental instrumentality or agency” that is alleged to be in violation of the act.¹³ Further, the ESA mandates that district courts shall have jurisdiction over such suits, regardless of the amount in controversy or the citizenship of the parties.¹⁴

FIFRA generally requires any person who wishes to sell or distribute a pesticide to register that pesticide;¹⁵ the EPA is responsible for administering this registration process.¹⁶ FIFRA decrees that the EPA shall consider a pesticide’s “unreasonable adverse effects on the environment” in deciding whether it should be registered.¹⁷ Unlike the ESA, FIFRA does not contain a broad citizen-suit provision; rather, it provides for federal appellate court jurisdiction for persons who have been adversely affected by an EPA order and who challenge the EPA order within sixty days.¹⁸ In addition to the standard constitutional requirement of standing, a petitioner challenging an EPA order following a public hearing under FIFRA must also have been “a party to the proceedings.”¹⁹ With regard to remediation, FIFRA vests the reviewing court with the exclusive power to “affirm or set aside the order complained of in whole or in part.”²⁰ In deciding to set aside some or all of an order, a court’s decision between vacatur and remand hinges upon the seriousness of the order’s shortcomings and the possible disruptive consequences of temporary changes to the order.²¹

Despite the ESA’s broad citizen-suit provision, a party challenging a governmental entity for failing to properly consult under the ESA must still properly establish Article III standing in federal court through determination of injury in fact, causation, and redressability.²² However, when a party alleges a “procedural injury,” the standing requirements of redressability and imminence (of the injury) are relaxed.²³ Nonetheless, in *Lujan v. Defenders of Wildlife*, the Supreme Court of the United States held that environmental groups alleging a procedural injury under the ESA still had to establish the constitutional minimum of standing through injury in fact, rather than through a general grievance concerning

13. 16 U.S.C. § 1540(g)(1).

14. *Id.*

15. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(a) (2012).

16. 40 C.F.R. § 152.3 (2017).

17. 7 U.S.C. § 136a(c)(5)(c).

18. *Id.* § 136(n)(b).

19. *See id.*

20. *Id.*

21. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

22. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 571-73 (1992).

23. *See, e.g., WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)).

the lawfulness of a government action.²⁴ Thus, while the two aforementioned elements of redressability and imminence are relaxed when a procedural injury is alleged, the injury must still be concrete and particularized, with at least some degree of imminence.²⁵ The petitioner must also establish causation—i.e., the cause of the alleged harm must be “fairly traceable” to the challenged action—to satisfy standing in the case of a procedural injury.²⁶

An association has standing to sue if (1) at least one of its members would have standing in their own right to sue; (2) the interest it seeks to protect is relevant to the association’s general purpose; and (3) neither the claim asserted nor the relief requested requires the association’s member to participate in the suit.²⁷ In *Lujan*, for example, the petitioning environmental organizations attempted to establish the first element of associational standing by submitting affidavits from members.²⁸ The members had once observed the habitats of certain endangered species abroad without having seen the endangered animals themselves and had the hope, but no definite plans, to return to those areas.²⁹ In that case, the Supreme Court held that the members’ mere intent to return to the endangered habitats abroad was not enough to establish sufficient imminence of injury.³⁰ In *Summers v. Earth Island Institute*, the Court likewise held that, where environmental organizations alleged a procedural injury caused by the United States Forest Service and predominantly relied upon the affidavit of a member who had no concrete plans to visit a potentially affected forest area, the organizations failed to establish injury in fact.³¹

In contrast, the Court in *Steel Company v. Citizens for a Better Environment* held that an environmental group did establish injury in fact when it sued a steel manufacturer under the Emergency Planning and Community Right-to-Know Act for failing to properly report toxic chemical releases in areas where the organization’s members lived, worked, and visited.³² Similarly, the Court in *Bennett v. Spear* held that ranchers and irrigation districts suing the FWS over a biological opinion

24. *Lujan*, 504 U.S. at 571-73.

25. *Id.* at 560.

26. *Id.*

27. *Am. Trucking Ass’ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013).

28. *Lujan*, 504 U.S. at 563-64.

29. *Id.*

30. *Id.*

31. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495-96 (2009).

32. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104-05 (1998).

had Article III standing because they properly alleged an injury in fact—a reduction in the amount of water available to them.³³

III. THE COURT’S DECISION

In the noted case, the D.C. Circuit held that the environmental organizations possessed Article III standing to sue the EPA, the matter was properly heard in the appeals court rather than the district court, and, because it was uncontroverted that the EPA had failed to make an effects determination or consultation, in violation of the ESA, it was up to the D.C. Circuit to determine the appropriate remedy.³⁴ Because the court found that the EPA “did not register CTP in total disregard of the pesticide’s potential deleterious effects,” it determined that remand without vacatur was the suitable remedy.³⁵

The D.C. Circuit first tackled the issue of Article III standing. The court stated that it had “no difficulty” in determining that the petitioning environmental organizations met the latter two requirements of associational standing—i.e., that the interest they sought to protect through the lawsuit was germane to their own overall purpose, and that neither the claim asserted nor the relief sought required an individual member to participate in the suit.³⁶ However, the question of whether the petitioners met the first criterion of associational standing—that at least one of their members would have standing in their own right to sue—required a more nuanced analysis.³⁷

In examining whether at least one of the organizations’ members would have standing to sue in their own right, the D.C. Circuit court noted that the petitioners’ claim represented an “archetypal procedural injury.”³⁸ Thus, because the claim emanated from an alleged procedural injury, the standing requirements of imminence and redressability were relaxed.³⁹ Nonetheless, because the injury-in-fact requirement entails a hard constitutional floor for standing,⁴⁰ the petitioners were obligated to

33. *Bennett v. Spear*, 520 U.S. 154, 167-71 (1997).

34. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182-88 (D.C. Cir. 2017).

35. *Id.* at 188.

36. *Id.* at 182 (citing *Am. Trucking Ass’ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013)).

37. *See id.* at 182-85.

38. *Id.* at 182 (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (internal quotation marks omitted) (quoting *Nat’l Parks Conservation Ass’n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005)).

39. *Id.*; *see, e.g., WildEarth Guardians*, 738 F.3d at 305 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)).

40. *Ctr. for Biological Diversity*, 861 F.3d at 183 (citing *Summers*, 555 U.S. at 497).

demonstrate that the EPA's failure to consult before registering CTP would affect at least one member's concrete and particularized interest.⁴¹

Here, the establishment of such a concern relied upon declarations by two members who stated their respective interests regarding the Valley Elderberry Longhorn Beetle and Mitchell's Satyr Butterfly.⁴² One declarant visited the beetle's habitat in California three or four times per year, planned to continue these visits, and had viewed beetle drill holes in trees but had never seen the beetle itself.⁴³ The second declarant was a "frequent" visitor to a park in Michigan that provided a habitat for the butterfly and planned to continue looking for the butterfly.⁴⁴ Citing *Lujan*, the D.C. Circuit held that the desire to observe an animal species, including for purely aesthetic reasons, is clearly a cognizable interest—i.e., sufficiently concrete and particularized—for the purpose of standing.⁴⁵

Next, the court examined the standing requirement of causation, which demands a particular analysis for an alleged procedural injury.⁴⁶ Specifically, the petitioners had to demonstrate causation by showing that the omitted procedural step was linked to some material government decision that *may* have been wrongly decided because of the omission, and that the decision was linked to the member's particularized injury.⁴⁷ The court further noted, "Importantly, with respect to the first link, the party seeking to establish standing need not show that but for the alleged procedural deficiency the agency would have reached a different substantive result."⁴⁸

Therefore, without the petitioner's need to establish "but for" causation to link the EPA's lack of ESA-related consultation with its registration of CTP, the court easily found that the lack of consultation was connected to the registration because FIFRA demands consideration of adverse environmental consequences before pesticide registration.⁴⁹ With regard to linking the registration of CTP to the particularized injuries, the D.C. Circuit found that, because of CTP's toxicity relative to terrestrial insects, its importance to growers of certain fruits, and the likely overlap of CTP usage with Valley Elderberry Longhorn Beetle

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992)).

46. *Id.* at 184 (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 668 (D.C. Cir. 1996)).

47. *Id.*

48. *Id.* (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013)).

49. *Id.* (citing 7 U.S.C. § 136a(c)(5)(c) (2012)).

habitat, the requisite standard of substantial probability of harm to the members' interests was met.⁵⁰ Thus, the court found that, in addition to sufficient injury in fact, the petitioners also met the standing requirement of establishing causation.⁵¹

Finally, in holding that the petitioners ultimately had standing, the court succinctly reasoned that they also met the relaxed redressability standard.⁵² Because the relaxed standard meant that the petitioners needed only to establish some possibility that the EPA could decline to register CTP after properly undertaking the ESA consultation process, the court concluded the relaxed standard was met, despite the EPA's assertion that a strong possibility existed of CTP registration even after ESA consultation.⁵³

Because the petitioners filed suit in district court under the ESA's broad citizen-suit provision and soon thereafter filed suit in the D.C. Circuit under the narrower FIFRA provision, the court next had to determine the proper forum for the case.⁵⁴ Finding that the ESA claim was "inextricably intertwined" with the FIFRA claim,⁵⁵ the court turned to binding precedent establishing that (1) in the case of a specified statutory review process, the supposed intention of Congress was to strictly limit applicable cases to that statutory review process;⁵⁶ and (2) "when two jurisdictional statutes draw different routes of appeal, the well-established rule is to apply only the more specific legislation."⁵⁷ Citing *Environmental Defense Fund v. EPA*, in which the D.C. Circuit held that a FIFRA order challenge under the National Environmental Policy Act must be dismissed from the district court, the D.C. Circuit noted that "[i]n the past, our Court and our sister circuits have required an environmental challenge to be brought in accordance with a specific judicial review statute rather than under a broad citizen-suit provision."⁵⁸ Therefore, because the ESA claim here was inextricably intertwined with the FIFRA claim, and because FIFRA provided a more specific review process than the ESA, the court held that the district court had properly

50. *Id.* at 184-85 (citing *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)).

51. *Id.* at 185.

52. *Id.* (citing *WildEarth Guardians*, 738 F.3d at 306).

53. *Id.*

54. *Id.* at 185-86.

55. *Id.* at 187.

56. *Id.* at 186 (citing *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989)).

57. *Id.* (citing *Ctr. for Biological Diversity v. EPA (Ctr. for Biological Diversity II)*, 847 F.3d 1075, 1089 (9th Cir. 2017) (internal quotation marks omitted) (quoting *Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1194 (9th Cir. 2008))).

58. *Id.* (citing *Envtl. Def. Fund v. EPA*, 485 F.2d 780, 783 (D.C. Cir. 1973)).

dismissed the ESA claim and that the ESA-FIFRA claim was properly heard in the D.C. Circuit.⁵⁹

Finally, because it was uncontroverted that the EPA had violated the ESA by failing to consult before registering CTP, the court's final step entailed a fairly perfunctory decision: whether to remand or vacate the FIFRA order.⁶⁰ In considering whether to remand or vacate the order, the D.C. Circuit noted that the EPA had not registered CTP in total disregard of its environmental consequences, and had indeed observed that CTP had been determined to be less toxic to a range of species than other pesticides.⁶¹ Thus, because FIFRA gave the court discretion between vacatur and remand, and because vacatur could defeat the overall purpose of enhanced environmental protection, the court's remedial order was to remand without vacatur.⁶²

The court's holding in the noted case was not unanimous. In a robust dissent, Senior Circuit Judge Randolph argued that the petitioners did not have Article III standing.⁶³ Judge Randolph found this to be true for two primary reasons: (1) the conservation groups could not establish that CTP's registration would harm their members relative to the status quo; and (2) the groups failed to demonstrate injury in fact to their members.⁶⁴ Citing the majority opinion in *Food & Water Watch, Inc. v. Vilsack*, a case that the majority did not reference, Randolph argued that the organizations must show that CTP would prove a net detriment to listed species.⁶⁵ In support of the proposition that CTP actually represented a meaningful net benefit relative to the existing pesticide mix, Randolph noted that CTP was an EPA-designated "[r]educed [r]isk" insecticide with a favorable toxicity relative to mammals and ecosystems as a whole.⁶⁶ In addition, he commented that "[i]t is therefore no surprise that the [c]onservation [g]roups have provided not a single example of a listed species actually harmed by cyantraniliprole since its registration in early 2014."⁶⁷

Randolph also argued that the environmental organizations did not have standing because they could not demonstrate how an injury to listed

59. *Id.* at 187-88.

60. *Id.* at 188-89.

61. *Id.*

62. *Id.* at 189.

63. *Id.* (Randolph, J., dissenting).

64. *Id.*

65. *Id.* at 190 (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915-18 (D.C. Cir. 2015)).

66. *Id.*

67. *Id.* at 191.

species would harm their members.⁶⁸ He found a lack of geographic specificity with regard to areas of potential CTP application, subsequent provable harm to species, and evidence that members would visit those specific areas.⁶⁹ Even more specifically, Randolph noted that of the nine species named in the members' declarations that were endangered or threatened and that were neither mammals nor birds, only one species—the Bay Checkerspot Butterfly—had actually been viewed by a member.⁷⁰ Importantly, Judge Randolph noted that proving a concrete, particularized injury was significantly more difficult for the petitioners because they were not the object of the EPA's action; rather, their putative injuries would necessarily rely on the actions of third parties (such as farmers actually spraying CTP).⁷¹ Ultimately, Randolph found that the standing arguments required a chain of conjecture that was “thoroughly unconvincing.”⁷²

IV. ANALYSIS

The United States Court of Appeals for the District of Columbia Circuit's decision in the noted case was sound, although for highly contextual reasons.⁷³ While the court's decision was justifiable relative to prior jurisprudence, it was the appropriate decision given the D.C. Circuit's special role as primary judicial reviewer of federal agency action⁷⁴ and the unique standing dynamics associated with the ESA. The D.C. Circuit's decision in the noted case was compelling for two primary reasons: (1) it could reasonably be viewed as a relatively loose reading of the standing requirements as articulated in *Lujan*,⁷⁵ and (2) the court's decision was ultimately sound despite Judge Randolph's dissent.

First, the court's affirmation of the dismissal of the district court case because of the more specific jurisdictional provision in FIFRA was clearly correct and based on well-established ground.⁷⁶ Its decision to remand without vacatur was discretionary and likewise seems particularly reasonable in light of CTP's stated overall lower toxicity to

68. *Id.*

69. *Id.*

70. *Id.* at 191-92.

71. *Id.* at 190 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)).

72. *Id.* at 192.

73. *See id.* at 174 (majority opinion).

74. *See, e.g.*, Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013) (describing and explaining the D.C. Circuit's unique docket, which is composed of a greater proportion of atypical federal cases, including administrative cases).

75. *See Lujan*, 504 U.S. at 561-64.

76. *See Ctr. for Biological Diversity*, 861 F.3d at 186-88.

mammals, birds, fish, and honey bees.⁷⁷ Therefore, the most difficult and controversial aspect of the court's analysis and decision was the issue of Article III standing, specifically with regard to the questions of injury-in-fact and causation.⁷⁸ Here, the majority essentially skimmed the surface of the requisite injury-in-fact analysis. Citing *Lujan*, the court noted that the desire to see an animal species was clearly a cognizable interest for the purpose of standing.⁷⁹ Then, noting that CTP was highly toxic to terrestrial insects, and that areas of potential CTP use overlapped with the habitat of the Valley Elderberry Longhorn Beetle and Mitchell's Satyr Butterfly, the majority found that the petitioners had established sufficient concreteness of injury.⁸⁰

The majority's injury-in-fact analysis, as Judge Randolph noted, was somewhat remiss in failing to apply the requisite scrutiny for an alleged injury that would emanate from the actions of a third party.⁸¹ Such scrutiny, per *Lujan*, encompasses all three elements of standing: injury in fact, causation, and redressability.⁸² This standard is logical because every aspect of standing could be mediated by uncertain third parties—in this case, primarily growers of fruits who might eventually use CTP in California and Michigan.⁸³

Given that the standard for redressability was relaxed because of the alleged procedural injury, Randolph's argument regarding the laxness of the majority's standing analysis was most germane to injury-in-fact and causation elements—two aspects that appeared to be somewhat conflated in the dissent.⁸⁴ Put simply, Randolph argued there was no evidence that CTP would actually injure the relevant beetle and/or butterfly so as to harm the members' interests, and even if CTP were used in the relevant geographical areas, there would be no practical way of proving that CTP had caused an injury rather than some other pesticide.⁸⁵ Thus, in light of the heightened third-party standard, Randolph argued that the majority's analysis of injury-in-fact and causation was unduly speculative.⁸⁶

With regard to the other core thrust of Judge Randolph's dissent—that the majority failed to recognize, per *Vilsack*, the necessity of

77. *See id.* at 189.

78. *See id.* at 181-85.

79. *Id.* at 183 (citing *Lujan*, 504 U.S. at 562-563).

80. *Id.*

81. *Id.* at 191 (Randolph, J., dissenting) (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667, 670 (D.C. Cir. 1996)).

82. *See Lujan*, 504 U.S. at 561-62.

83. *See Ctr. for Biological Diversity*, 861 F.3d at 179-80.

84. *See id.* at 190-92 (Randolph, J., dissenting).

85. *See id.*

86. *Id.*

weighing the putative harm relative to the status quo—it was unclear if the argument was entirely apposite to the matter at hand.⁸⁷ Specifically, *Vilsack* entailed an increased-risk-of-harm (via potential foodborne illness) claim challenging a United States Department of Agriculture regulation, as opposed to an allegation of a purely procedural violation preceding an order.⁸⁸ While the plaintiffs in *Vilsack* alleged a procedural injury, the procedural injury was uncertain, and the *Vilsack* court easily dismissed that claim.⁸⁹ Thus, this argument would have been more apposite if the petitioners had challenged the EPA’s registration of CTP on some other ground. Further, it was unclear if the petitioners would have needed to consider the status quo with regard to all listed species. CTP could, as stated, prove more toxic to certain terrestrial insects while proving less toxic to overall ecosystems,⁹⁰ and the petitioners established standing specifically with regard to the Valley Elderberry Longhorn beetle and Mitchell’s satyr butterfly—two terrestrial insects.⁹¹

Despite the relative cogency of Randolph’s argument regarding the overly conjectural nature of the majority’s standing decision, the dissent’s overall reasoning was fundamentally flawed in failing to recognize that the consultation process was designed to produce at least some of the information it claimed was missing.⁹² Further, by stressing the importance of seeing endangered species, which are by definition often difficult to view, Randolph implied that the most endangered species may receive less standing, which would clearly defeat the purpose of the ESA.⁹³ Even further, by invoking skepticism relative to injuries caused by unknown third parties, Randolph ignored that the entire purpose of registration, including ESA consultation, was to decide whether to allow the usage of CTP at all.⁹⁴

In aggregate, the court’s decision was sound for two primary reasons: (1) it was appropriate given the D.C. Circuit’s unique role as a judicial watchdog of federal agencies,⁹⁵ and (2) it was especially appropriate given the nature of the ESA.⁹⁶

87. See *id.* at 190 (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915-18 (D.C. Cir. 2015)).

88. *Vilsack*, 808 F.3d at 909.

89. *Id.* at 921.

90. See *Ctr. for Biological Diversity*, 861 F.3d at 180, 189; 192 (Randolph, J., dissenting).

91. *Id.* at 183-84 (majority opinion).

92. See 16 U.S.C. § 1536(a)(2) (2012).

93. See *Ctr. for Biological Diversity*, 861 F.3d at 191-92 (Randolph, J., dissenting).

94. See *id.*; see also 7 U.S.C. § 136a(c)(5) (2012).

95. See, e.g., *Fraser et al.*, *supra* note 74, at 132.

96. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176-77 (1978).

First, practically speaking, the most probable result of this proceeding will be that the EPA will consult with the NMFS and register CTP per the ESA.⁹⁷ Thus, CTP—a “reduced risk” pesticide that may present a favorable relative risk profile to ecosystems as a whole⁹⁸—will likely be on the market, and the EPA will have corrected its violation of the ESA. Because of this, the D.C. Circuit, despite an arguably loose application of standing requirements,⁹⁹ will have fulfilled an important function in verifying that the EPA takes endangered species into account when registering pesticides, while not inadvertently preventing a superior insecticide from coming to market. Given the court’s unique function as an expert reviewer of administrative law,¹⁰⁰ its decision served as an important reminder to the EPA that it must not neglect the ESA when registering pesticides.

Second, the Court’s reasoning in *Lujan* left key questions unanswered, resulting in ambiguities relative to standing under the ESA.¹⁰¹ In that case, the affiants had traveled in the past to Sri Lanka and Egypt, viewed the habitats of endangered species like the Nile Crocodile and Asian Elephant without seeing the animals themselves, and expressed mere hopes of one day returning. On those facts, the Court’s majority found no element of imminent harm.¹⁰²

Nonetheless, it is unknown what it may have taken for the Court’s majority to find sufficient imminent harm. For example, would it be enough if a declarant had purchased a ticket to Egypt? What if the ticket were to Cairo, with no firm plans to tour the Nile valley? Would it matter if the ticket were open-ended? How important was it that the relevant species were located far abroad?¹⁰³ Because endangered animals are often hard to find, there is an inherent ambiguity when it comes to alleging injury in fact caused by their potential harm, and such alleged injury may well be supported by highly idiosyncratic, narrative affidavits.¹⁰⁴ Indeed, in the noted case, the affiants consistently traveled to the Valley Elderberry Longhorn Beetle and Mitchell’s Satyr Butterfly

97. See *Ctr. for Biological Diversity*, 861 F.3d at 185.

98. See *id.* at 189.

99. See *id.* at 190-92 (Randolph, J., dissenting).

100. See, e.g., Fraser et al., *supra* note 74, at 146.

101. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563-64 (1992).

102. *Id.*

103. See, e.g., *id.* at 592 (Blackmun, J. dissenting) (“By requiring a ‘description of concrete plans’ . . . demands what is likely an empty formality.”).

104. See, e.g., *id.* at 563-64 (describing the narrative affidavits of two Defenders of Wildlife members and their travels abroad).

habitats without ever actually seeing them. Similarly, the opinion did not mention if the petitioners had specific plans to return to the habitats.¹⁰⁵

While the injury-in-fact requirement of standing provides a hard constitutional floor,¹⁰⁶ and the majority here skirted around aspects of the more expansive yet nebulous standing analysis in *Lujan*,¹⁰⁷ the court's decision was nonetheless entirely justifiable given the questions left open in the *Lujan* standing analysis.¹⁰⁸ Crucially, because Congress intended the ESA to serve as a strong measure against the extinction of species,¹⁰⁹ the court may have unduly defanged enforcement of the act if it had held the petitioners did not have standing given the fact pattern here.

V. CONCLUSION

In sum, the D.C. Circuit's decision in the noted case was sound because it is sufficiently aligned with prior jurisprudence and, more importantly, it achieved an equitable result. Because endangered species are rare and, also, cannot speak for themselves in courts of law, it is desirable, given the intent of the ESA and the reality of accelerating extinction, to err on the side of caution when considering claims seeking to protect them. While standing with regard to the ESA may continue to be indistinct because of the nature of endangered species, it was both wise and proper for the court to remind the EPA of its obligation to consult when registering pesticides that may affect endangered species because the ESA is unambiguous on that point.

Andrew Taylor*

105. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 179-80 (D.C. Cir. 2017).

106. *See, e.g., id.* at 183 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)).

107. *See Lujan*, 504 U.S. at 562-67 (discussing the affiants' injury-in-fact theories with regard to past travel plans, future travel plans, "ecosystem nexus," "animal nexus," and "vocational nexus").

108. *Compare, e.g., id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment) (stating that it did not seem reasonable to assume that the affiants would be using the sites on a "regular basis," while also being open to a "nexus theory" of standing under different circumstances), *and id.* at 581-82 (Stevens, J., concurring in the judgment) (disagreeing with the majority's decision that the respondents lacked standing because the harm was not "imminent"), *with id.* at 606 (Blackmun, J., dissenting) (refusing to join the majority's "slash-and-burn expedition through the law of environmental standing.").

109. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176-77 (1978).

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