No. 05-395

In the Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

WASHINGTON TOXICS COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a suit against a federal agency brought under the citizen-suit provision of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1540(g)(1), a court should apply the same principles of administrative-record review and deference to agency judgments that would be applicable in a suit brought under the Administrative Procedure Act, 5 U.S.C. 551 *et seq*.

2. Whether Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires in all instances that a federal agency must engage in consultation regarding the effect on endangered and threatened species of actions that the agency has determined will have no effect on those species.

3. Whether, in applying Section 7(a)(2) of the ESA to pesticide registrations issued by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq*., a court should take into account the statutory limitations that FIFRA places on EPA's authority to suspend or modify such registrations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 413 F.3d 1024. The opinions of the district court (Pet. App. 20a-87a, 88a-117a, 118a-123a, 124a-150a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2005. The petition for a writ of certiorari was filed on September 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, to protect and conserve endangered and threatened species. 16 U.S.C.

1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533. The Secretary of Commerce, who implements the ESA through the National Marine Fisheries Service (NMFS), has responsibility for the listed species at issue in this case. See 50 C.F.R. 222.23(a), 227.4. The Fish and Wildlife Service (FWS) administers the Act with respect to the species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b).

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b)-(c). Under the regulations, the agency proposing the action (commonly known as the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14.

If the action agency determines that a particular action will have no effect on a listed species or critical habitat, the consultation requirements are not triggered. 50 C.F.R. 402.14(a). If the action agency determines that its action "may affect" listed species, it must pursue either informal or formal consultation with NMFS or FWS (commonly known as the resource agency). Informal consultation is an optional process comprised of all discussions and correspondence between the resource

agency and the action agency intended to determine whether formal consultation is necessary. 50 C.F.R. 402.13. If the action agency determines, with the written concurrence of the resource agency, that the action "is not likely to adversely affect" the listed species or critical habitat, the consultation process is terminated, and formal consultation is not necessary. *Ibid.*; 50 C.F.R. 402.14(b)(1).

If either the action agency or the resource agency determines that the proposed action is "likely to adversely affect" listed species or designated critical habitat, the agencies must engage in formal consultation. 50 C.F.R. 402.13(a), 402.14(a)-(b). Following formal consultation, FWS or NMFS issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If FWS or NMFS concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A).

The regulations governing the consultation process define the term "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. 402.02. "Examples include * * * the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." *Ibid.* The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

The ESA contains a citizen-suit provision allowing "any person" to sue to "enjoin any person, including the United States * * * , who is alleged to be in violation of

any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. 1540(g)(1). The district court in such a suit has authority "to enforce any such provision or regulation." *Ibid.*

b. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, establishes a comprehensive regulatory scheme governing the use, sale, and labeling of pesticides. *Bates* v. *Dow Agrosciences LLC.*, 125 S. Ct. 1788, 1794-1795 (2005). The statute requires the Environmental Protection Agency (EPA) to evaluate individual pesticide products intended for distribution or sale in the United States and to register those that meet FIFRA's requirements. In conducting its evaluation, EPA must determine, *inter alia*, whether a pesticide will cause "unreasonable adverse effects on the environment" when used to perform its intended function. 7 U.S.C. 136a; see 7 U.S.C. 136(bb) (defining the term "unreasonable adverse effects on the environment"). FIFRA makes it unlawful for any person to distribute or sell a pesticide that is not registered or to use any registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. 136a(a), 136j(a). Thus, each registration granted by EPA under FIFRA is a license that establishes the terms and conditions under which the pesticide product may be lawfully sold, distributed, and used.

Section 6(b)-(c) of FIFRA provides for the cancellation and suspension of existing pesticide registrations. 7 U.S.C. 136d(b)-(c). If a pesticide does not comply with FIFRA or, when used in accord with widespread practices, "generally causes unreasonable adverse effects on the environment," EPA may issue a notice of its intent to cancel the registration. 7 U.S.C. 136d(b). In addition, EPA may immediately suspend the registration of a pes-

ticide if it presents an "imminent hazard," which "exists when the continued use of a pesticide during the time required for cancellation proceeding[s] would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened" under the ESA. 7 U.S.C. 136(*l*), 136d(c)(1). Final EPA decisions on cancellation and suspension of pesticide registrations, including refusals to cancel or suspend registrations, are subject to judicial review. 7 U.S.C. 136n(a)-(b).

2. FIFRA's pesticide-registration requirements have been in effect since 1947, Pub. L. No. 80-104, § 4, 61 Stat. 167, and have been enforced by EPA since 1970, Reorg. Plan No. 3 of 1970, § 2, 3 C.F.R. 199 (1970 comp.). More than 900 pesticide active ingredients, in various combinations, are currently contained in approximately 19,000 pesticide products that EPA has registered under FIFRA for use throughout the country. CropLife C.A. E.R. 44. As required by FIFRA, EPA uses a rigorous scientific process to determine whether to register pesticide products. *Id.* at 36-40, 112-114.

Beginning in 1989, NMFS listed 26 evolutionarily significant units (ESUs) of Pacific Northwest salmonids (*i.e.*, salmon and steelhead) under the ESA. CropLife C.A. E.R. 68, 323 n.1. The dominant causes for the decline of wild salmonids have been habitat alteration, hydropower and dam operations, competition with hatchery-bred fish, harvest, and cyclical ocean conditions. *Id.* at 130-140; see, *e.g.*, 65 Fed. Reg. 36,082-36,083 (2000); 64 Fed. Reg. 50,396-50,397 (1999); 64 Fed. Reg. 14,310-14,311 (1999). Pesticides have not been identified as one of the dominant causes for the decline. CropLife C.A. E.R. 140-141.

3. In January 2001, respondent Washington Toxics Coalition and other groups (collectively the Coalition) filed a citizen suit against EPA and its Administrator. CropLife C.A. E.R. 1-18. The Coalition alleged that EPA had violated Section 7(a)(2) of the ESA by failing to consult with NMFS regarding the effects of pesticide registrations on 26 ESUs of endangered and threatened Pacific salmonids. *Id.* at 10-12, 15-16. The primary pesticide manufacturers' trade group and numerous grower groups (some of which are petitioners in this Court) intervened as defendants, and both sides moved for summary judgment. Pet. App. 6a-7a.

In July 2002, the district court issued an order granting summary judgment to the Coalition in part and to the defendants in part. Pet. App. 124a-150a. Among its numerous threshold rulings, the court held that the suit was properly brought under the ESA's citizen-suit provision rather than under FIFRA or the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 128a-129a. The district court further held that the Coalition had established standing to sue with respect to 54 pesticide ingredients. See *id.* at 137a-143a.[1]

On the merits, the court held that EPA had "violated Section 7(a)(2) of the ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients." Pet. App. 143a. The court based that conclusion on its finding that, "[d]espite competent scientific evi-

[1] The district court's July 2002 opinion stated that the Coalition had established standing with respect to "55" pesticide ingredients. See Pet. App. 137a. The court subsequently recognized, however, that it had double-counted one such ingredient. Later opinions of the district court refer to "54" pesticide ingredients as being at issue in this case. See, *e.g. id.* at 21a, 89a, 119a.

dence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations." *Id.* at 142a-143a. The court established a schedule under which EPA would "make effects determinations and consult, as appropriate," with NMFS regarding the effects of those ingredients on threatened and endangered salmonids. *Id.* at 145a-146a.

In July and August 2003, the district court issued orders indicating that it would grant further injunctive relief pending the completion of any required consultation. Pet. App. 88a-123a. The court held that the plaintiffs were not required to exhaust administrative remedies under FIFRA as a prerequisite to relief that would affect existing pesticide registrations. *Id.* at 91a-93a. The court stated that injunctive relief would be appropriate unless EPA's ongoing actions were shown not to jeopardize listed species, *id.* at 94a-101a, and it found that EPA had not made the requisite showing, *id.* at 102a-109a. The court further held that the evidence supported the imposition of buffer zones—*i.e.*, prohibitions on use of the relevant pesticides in defined areas contiguous to salmon-supporting waters. *Id.* at 110a-112a.

In January 2004, the district court issued its order specifying the terms of further injunctive relief. Pet. App. 20a-87a. The order addressed the 54 pesticide active ingredients for which the Coalition had established standing to sue, and it applied to salmon-supporting waters in Washington, Oregon, and California. *Id.* at 21a-24a. The court applied the injunction to ground use of the identified pesticides within 20 yards of identified waters and within 100 yards for purposes of aerial application, with various exceptions. *Id.* at 24a-31a. When EPA makes a determination that a particular pesticide

ingredient will have "no effect" on or is "not likely to adversely affect" a particular ESU, or the agency otherwise completes consultation under Section 7(a)(2), the injunction automatically terminates as to that ingredient and ESU unless NMFS has rejected or affirmatively failed to concur in any EPA "not likely to adversely affect" determination. *Id.* at 33a-34a.[2]

4. The court of appeals affirmed. Pet. App. 1a-19a. The court held that the requirements of Section 7(a)(2) of the ESA apply to the ongoing registration of pesticides under FIFRA. *Id.* at 11a-13a. The court further held that, because EPA retains "discretion to alter the registration of pesticides for reasons that include environmental concerns," the district court possessed authority to award injunctive relief to enforce the ESA. *Id.* at 13a-14a. The court of appeals also held that use of the administrative mechanisms for rescinding pesticide approvals under FIFRA was not a prerequisite to the district court's issuance of an injunction, *id.* at 15a-16a, and that the plaintiffs' suit was properly brought under the ESA citizen-suit provision rather than under the APA, *id.* at 16a. The court additionally concluded that the district court had "correctly assigned EPA the burden of proving that its actions were non-jeopardizing." *Id.* at 18a.

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[2] On August 5, 2004, during the pendency of the appeal in this case, NMFS and FWS promulgated joint counterpart ESA consultation regulations that provide alternative processes that EPA may use to satisfy its obligations under Section 7(a)(2) of the ESA with respect to pesticide-licensing actions taken under FIFRA. 69 Fed. Reg. 47,732. *Inter alia*, those procedures authorize EPA under certain circumstances to complete informal consultation without the need for the written concurrence of the resource agency. *Id.* at 47,761.

ARGUMENT

Although the decision of the court of appeals is legally flawed, that decision does not squarely conflict with any decision of this Court or another court of appeals, and petitioners have not identified a compelling reason for review by this Court in the absence of such a conflict. The petition for a writ of certiorari therefore should be denied.

1. Petitioners contend (Pet. 2, 9-20) that the court of appeals erroneously declined to apply "APA standards"—in particular, the requirements that judicial review be limited to the administrative record and reflect appropriate deference to the agency's expert and technical judgments—in considering the propriety of the district court's injunctive order. Although petitioners are correct that APA standards of review apply in ESA citizen suits brought against federal defendants, nothing in the court of appeals' opinion is inconsistent with that principle.

The court of appeals understood petitioners (though not the government) to be arguing that the Coalition's suit should have been brought under the APA rather than under the ESA citizen-suit provision. In rejecting that contention, the court stated: "Because [the ESA citizen-suit provision] * * * independently authorizes a private right of action, the APA does not govern the plaintiffs' claims. Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA." Pet. App. 16a. The court of appeals did not suggest, however, that review of EPA's conduct would be less deferential or would involve consideration of a different record in an ESA citizen suit than in an APA action.

The court of appeals had no occasion to address those issues because EPA did not contend on appeal that it had made any decision with regard to ESA compliance that deserved deference under the arbitrary-or-capricious standard, and the agency did not present any administrative record to the district court. This case therefore does not provide an appropriate vehicle for the Court's consideration of any issue concerning the application of APA standards to an ESA citizen suit brought against a federal agency.

2. Under the FWS/NMFS regulations that establish a structure for consultation pursuant to Section 7(a)(2) of the ESA, an action agency need not consult with NMFS or FWS if it determines that a particular action will not affect listed species or their habitat. See p. 2, *supra*. Petitioners contend that the court of appeals erroneously treated EPA's duty to consult with NMFS as a "separately enforceable and universal obligation." Pet. 25; see Pet. 22-25. That claim lacks merit.

The courts below did not disapprove the current FWS/NMFS consultation regulations, nor did they require EPA to consult with NMFS regarding existing pesticide approvals that EPA has determined will have no effect on listed species. The district court ordered EPA to "make effects determinations and consult, *as appropriate*," for the pesticide ingredients at issue. Pet. App. 145a-146a (emphasis added). The court's injunction terminates automatically for a particular pesticide and salmon ESU upon, *inter alia*, "[a] finding by EPA made for ESA Section 7 compliance purposes that the Pesticide will have 'no effect' on the particular Salmon ESU." *Id.* at 34a. Consistent with the applicable regulatory scheme, the injunction thus clearly contemplates that, in appropriate circumstances, EPA may satisfy its

obligations under the ESA without engaging in consultation with NMFS. The court of appeals affirmed the district court's orders (*id.* at 19a), and nothing in its opinion suggests that the Ninth Circuit intended to impose a broader duty to consult than is reflected in the district court's injunction.

3. Petitioners contend (Pet. 25-27) that the court of appeals' decision is inconsistent with the balance struck by Congress between protection of listed species and the promotion of food and fiber production. Although the court of appeals' analysis of the interplay between the ESA and FIFRA is flawed, the court's application of the relevant statutory provisions to the particular facts of this case raises no issue of sufficient importance to warrant this Court's review.

Contrary to the court of appeals' understanding (Pet. App. 11a, 13a), the government does not contest the proposition that EPA's approval of pesticide-registration actions under FIFRA may be subject to the ESA as well as to FIFRA. Rather, the government argued in the court of appeals that the provisions of FIFRA are relevant in determining the precise nature of the agency's ESA obligations. Section 7(a)(2) of the ESA does not require the federal government to ensure that the continued existence of a listed species is never placed in jeopardy. Rather, Section 7(a)(2) requires each federal agency to ensure that "any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Thus, the government's duty is simply to ensure that the species is not jeopardized by actions attributable to the government itself.

Section 7(a)(2) of the ESA defines the term "agency action" to include conduct "authorized" by a federal agency. The FWS/NMFS consultation regulations provide that the term "action" includes "the granting of licenses." 50 C.F.R. 402.02. Thus, at the time an agency takes "action" by granting a license, it is obligated to analyze the anticipated future effects of the licensed conduct to ensure that the issuance of the license "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Once the "agency action" has been taken and the license issued, however, there is no continuing obligation to reexamine the issue unless and until the agency takes further "action" by, for example, cancelling, modifying, or reissuing the license. Cf. *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (same rule for National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*).

Even assuming *arguendo* that Section 1536(a)(2) could properly be construed to impose obligations on a licensing agency with respect to previously issued licenses or permits, moreover, the scope of those obligations would necessarily be limited by the scope of the agency's authority, under the provisions of law that govern the relevant licensing program, to rescind or modify the existing license. See *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Thus, for example, if FIFRA absolutely prohibited the EPA from cancelling or modifying existing pesticide registrations, Section 7(a)(2) of the ESA would not override that prohibition. Under that hypothetical statutory scheme, the continuing existence of a pesticide registration could not constitute an "agency action" within the meaning of Section 7(a)(2) because EPA would lack ongoing "discretionary Federal

involvement or control" (50 C.F.R. 402.03) over the registration. In reality, of course, FIFRA does not prohibit the EPA from cancelling or modifying pesticide registrations, but it does significantly limit EPA's discretionary control over existing pesticide registrations by imposing substantive and procedural requirements that EPA must satisfy before taking such steps. 7 U.S.C. 136d(b)-(c).

Because Section 7(a)(2) of the ESA does not apply to agency *inaction* like that at issue here, and does not require agencies to take actions that are not authorized by their organic statutes, the district court should not have ordered injunctive relief affecting pesticide registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration had been met. EPA simply has no "discretionary authority" to cancel or modify pesticide registrations beyond that conferred by—and subject to the limitations of—FIFRA itself. The courts below therefore erred in overlooking those statutory constraints.

Although the court of appeals misapprehended the nature of the relationship between the dictates of FIFRA and the scope of EPA's obligations under the ESA, petitioners do not cite any other court of appeals decision that has addressed the interplay between the two statutes. In the absence of a circuit conflict, the Ninth Circuit's analysis of the relationship between FIFRA and the ESA as applied to this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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