

EPA Failed to Evaluate Potential Adverse Impact of Pesticide on Monarch Butterfly



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For

decades, glyphosate and 2,4-dichlorophenoxyacetic acid (2,4-D) have been separately registered with the EPA for use as pesticides. To counter evolved resistance by weeds to glyphosate, Dow developed "Enlist Duo," which combined glyphosate with 2,4-D, a blend shown to improve crop yield by delaying development of weed resistance and enabling pesticide use later in the growing season. Petitioners challenged the EPA's decision to register Enlist Duo under the Endangered Species Act and FIFRA. The court rejected petitioners' claim that EPA violated the ESA by wrongly concluding that Enlist Duo would have "no effect" on listed species or critical habitat. The court found that EPA's use of risk quotients (based on the calculated amount of exposure to the pesticide divided by toxicity levels) evaluated in light of EPA's established levels of concern was not arbitrary, capricious or contrary to law. Nor did EPA legally err in relying on mitigation measures (including a 30-foot downwind buffer and label restrictions) to reach its no-effect determination. While mitigation measures that merely reduce an impact cannot support a no-effect finding, here, the mitigation measures, combined with risk quotient/level of concern methodology, enabled EPA effectively to rule out any effect on endangered plants and species. As to the FIFRA claim, the court agreed with petitioners that EPA had failed properly to consider the potential adverse effect of expanded 2,4-D use on monarch butterfly habitat. EPA did assess some of these risks, finding that Enlist Duo would only affect treated crop fields, not off-field plants, such as milkweed (the primary

food source for monarch caterpillars). But the court determined EPA should also have considered how the potential destruction of milkweed *on* target fields by the pesticide would affect monarch butterflies. EPA argued it was not required to do so because farmers would control the same amount of milkweed on their crop fields through the use of herbicides or other means, with or without Enlist Duo. The court disagreed, finding that given the record evidence suggesting monarch butterfly habitat might be affected by use of 2,4-D on target fields, EPA was required, under FIFRA, to determine whether that effect was "adverse." Its failure to do so meant its decision lacked substantial evidence. The court remanded to EPA to address the evidence that monarch butterflies could be adversely affected by the destruction of milkweed on target fields.

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