IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CEDAR CHEMICAL CORPORATION,

Plaintiff,

vs. No. 01-2547 G/A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHRISTINE TODD WHITMAN, Administrator, and SYNGENTA CROP PROTECTION, INC.,

Defendants.

SYNGENTA CROP PROTECTION, INC.

Plaintiff,

vs. No. 01-2598 G/A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and CHRISTINE TODD WHITMAN, Administrator,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS

Plaintiffs Cedar Chemical Corporation ("Cedar") and Syngenta Crop Protection, Inc., ("Syngenta") have filed separate complaints in these consolidated cases seeking declaratory and injunctive relief against the Environmental Protection Agency ("EPA"). Cedar's complaint also names Syngenta as a defendant. Both complaints focus on the EPA's review of applications for registration of pesticides that Cedar and Syngenta either currently manufacture or seek to manufacture. The Federal Insecticide , Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C.

§ 136 et seq., provides the statutory framework under which the EPA reviews pesticide applications. Cedar and Syngenta allege that the EPA has acted improperly in reviewing their applications and seek various forms of injunctive and declaratory relief. The court now considers the EPA's motion to dismiss Syngenta's complaint for lack of subject matter jurisdiction and Syngenta's motion to dismiss Cedar's complaint for lack of subject matter jurisdiction and standing and for failure to state a claim upon which relief can be granted.

The following facts are relevant to the motions to dismiss. Syngenta[1] developed metolachlor as a pesticide and registered it with the EPA in 1976. (Syngenta's Am. Compl. ¶ 19.) According to Cedar, the EPA conducted a review of metolachlor's safety in 1995 and determined that its use did not present any unreasonable adverse effects on the environment, a decision presented in the EPA's Metolachlor Reregistration Eligibility Decision. (Cedar's Compl. ¶ 22.) Syngenta claims that the EPA listed metolachlor as one of five pesticides that it proposed to restrict due on its potential to cause groundwater contamination in 1996. (Syngenta's Am. Compl. ¶ 23.) Syngenta claims that as a result of this listing, which occurred as part of the EPA's Reduced Risk Initiative, a program designed to reduce the risks associated with pesticides, it developed S-metolachlor, a new herbicide intended to replace metolachlor. Id. ¶¶ 22, 24. Although S-

[1] Syngenta is the successor in interest to Ciba-Geigy Crop Protection, Inc., a division of Giba-Geigy Corporation, and Novartis Crop Protection, Inc. (Cedar's Compl. ¶ 5.) This order refers to Syngenta and its predecessors in interest collectively as Syngenta.

metolachlor and metolachlor are related isomers, they contain different active ingredients, and the EPA has treated them as distinct herbicides for regulatory purposes. Id. ¶ 26.

After Syngenta applied for registration of S-metolachlor using a "bridging data" concept that included some studies originally generated for metolachlor as well as studies performed solely for S-metolachlor, the EPA issued a registration for S-Metolachlor on March 14, 1997. (Id. ¶ 27; Cedar's Compl. ¶ 26.) Syngenta claims that the EPA has recognized that S-metolachlor is a reduced risk product because it does not have the same adverse environmental effects that metolachlor does. (Syngenta's Am. Compl. ¶¶ 28-33.) According to Cedar, Syngenta initially obtained an eleven month conditional registration for S-metolachlor, pursuant to which Syngenta was required to provide additional data about its risks within eleven months. Cedar contends that on February 6, 1998, about a week before the conditional registration of S-metolachlor would expire, the EPA removed the time limitation on the registration of S-metolachlor without public notice and despite the absence of all relevant data. (Cedar's Compl. ¶¶ 51-54.)

According to Syngenta, the EPA conditioned its initial registration of S-metolachlor on Syngenta's commitment to phase out metolachlor. (Syngenta's Am. Compl. ¶ 34.) Pursuant to this requirement, Syngenta formally requested the EPA to cancel metolachlor on September 3 and 21, 1999. Id. ¶ 35. The EPA published an announcement in the Federal Register in December 1999 indicating that Syngenta had proposed to cancel its

metolachlor registrations and that the cancellations would be effective no sooner than 180 days later, or June 26, 2000. (Id. ¶ 36; Cedar's Compl. ¶ 27.)

In January 2000, Cedar filed an application for registration of Cedar Metolachlor Technical ("CMT"), a pesticide substantially similar if not identical to Syngenta's metolachlor. In its application, Cedar relied on Syngenta's registration of metolachlor, thereby making its application a "cite all" or "follow on" application. (Cedar's Compl. ¶ 28; Syngenta's Am. Compl. ¶ 37.) Syngenta filed a petition to deny Cedar's application to register CMT on March 2, 2000. (Syngenta's Am. Compl. ¶ 53; Cedar's Compl. ¶ 30.) On May 30, 2000 and June 22, 2000, Cedar applied for registration of two end-use products using CMT as the active ingredient. (Cedar's Compl. ¶ 33.) In June 2000, the EPA informed Cedar that all actions necessary to approve the CMT application were complete except for a determination on Syngenta's petition. (Cedar's Compl. ¶ 34.)

On October 12, 2000, Sipcam Agro USA, Inc., ("Sipcam") notified Syngenta that it was seeking a registration of metolachlor and intended to rely upon the selective method of data citation. (Syngenta's Am. Compl. ¶ 39.) Syngenta filed a petition to deny Sipcam's metolachlor registration application on November 20, 2000. Id. ¶ 53.

In a letter dated January 19, 2001, the EPA notified Cedar that it would not be taking any final action on Cedar's CMT application prior to October 19, 2001. The EPA explained that its delay was due to uncertainty regarding the risks of S-

metolachlor and the comparative risks of metolachlor products. (Cedar Compl. ¶ 39.)

On April 11, 2001, Cedar filed a follow on application with the EPA for registration of Cedar Technical Metolachlor II ("CTM II"). CTM II contains an active ingredient identical or substantially similar to the ingredients in Syngenta's metolachlor, and it differs from CMT because its label incorporates revised use rates for control of target weeds.. Id. ¶ 42. Cedar filed applications for two end-use products containing CTM II on April 18, 2001, and it completed the responses to the EPA's questions and requests for additional information pertaining to CTM II on May 5, 2001. Id. ¶¶ 43-44. On July 2, 2001, Syngenta filed a petition to deny Cedar's application to register CTM II with the EPA. (Id. ¶ 47; Syngenta's Am. Compl. ¶ 53.)

Although Syngenta did not pay registration maintenance fees for metolachlor in either 2000 or 2001, the EPA did not cancel Syngenta's metolachlor registrations when it canceled other registrations for non-payment of fees on September 6, 2000. (Syngenta's Am. Compl. ¶¶ 41-42.) On July 25, 2001, the EPA announced cancellation of Syngenta's end-use metolachlor registrations but did not cancel Syngenta's technical metolachlor registration. Id. ¶ 43.

Faced with a motion to dismiss for lack of subject matter jurisdiction, "the party opposing dismissal has the burden of proving subject matter jurisdiction." GTE North, Inc. v. Strand, 209 F.3d 909, 915 (6th Cir. 2000). To do so, the party "must

show that the complaint alleges a claim under federal law, and that the claim is substantial." Id. (internal quotations and citations omitted). A party satisfies this requirement "by showing 'any arguable basis in law' for the claims set forth in the complaint." Id. (quoting Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1248 (6th Cir. 1996)).

In addition to satisfying the requirement of federal subject matter jurisdiction, a complaint must present a justiciable "case or controversy" as required by Article III of the United States Constitution. See National Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 279 (6th Cir. 1997)(noting that Article III "confines the federal courts to adjudicating actual 'cases' and 'controversies' and that "[t]he threshold question in every federal case is whether the court has the judicial power to entertain the suit"). In evaluating whether a case is justiciable, a court must determine whether the plaintiff has standing to bring the lawsuit, whether the case is ripe for judicial review, and whether the plaintiff's alleged injury is amenable to judicial decision. Id. at 279-80.

The Supreme Court has "established that the irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an injury in fact. This injury must be "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. (internal quotations and citations omitted). Second, standing requires a causal

connection between the plaintiff's injury and the defendant's action: the injury must be "fairly traceable to the challenged action of the defendant." Id. (internal quotations and citations omitted). Third, it must be likely that the requested relief will redress the plaintiff's injury. Id. at 561. (internal quotations and citations omitted).

While standing relates primarily to the nature of the plaintiff's injury, ripeness focuses on the timing of the injury, in that it "requires that the injury in fact be certainly impending." National Rifle Ass'n, 132 F.3d at 280, 284 (internal quotation and citation omitted). "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." Id. at 280. Several factors are relevant to determine whether a case is ripe for judicial review: "the hardship to the parties if judicial review is denied" at this stage; "the likelihood that the harm alleged by plaintiffs will ever come to pass"; and "whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." Id. at 284 (internal quotations and citations omitted).

Finally, in order to be "fit for judicial decision," "the alleged injury must be legally and judicially cognizable" and "the issues must be fit for judicial resolution." Id. To satisfy these criteria, the plaintiff's injury must constitute "an invasion of a legally protected interest which is traditionally thought to be capable of resolution through the

judicial process." Id. (internal quotations and citations omitted).

The court first considers the EPA's motion to dismiss Syngenta's complaint for lack of subject matter jurisdiction. Count I of Syngenta's amended complaint is based on the EPA's regulation providing that "at least 30 days before registration of any product containing an active ingredient for which a previously submitted study is eligible for exclusive use under [FIFRA], the [EPA] will notify the original submitter of the exclusive use study of the intended registration of the product." 40 C.F.R. § 152.116(a). Syngenta claims that if the EPA grants a registration to Cedar or Sipcam without providing Syngenta with thirty days advance notice in order to determine the data on which Cedar and Sipcam rely, it will violate its regulations. Furthermore, Syngenta claims that the EPA has refused to provide it with thirty days advance notice.[2] (Syngenta Am. Compl. ¶¶ 70-76.)

Count II of Syngenta's amended complaint alleges violations of the EPA's thirty day notice requirement for exclusive use data as well as the regulation detailing the EPA's obligation to consider petitions to deny the registration of a product filed by an "original data submitter" based on his belief that "he has submitted to the [EPA] a valid study which, he claims, satisfies a data requirement that an applicant purportedly has failed to satisfy." 40 C.F.R. § 152.99. This regulation requires the EPA

[2] For purposes of this order, the court assumes that Syngenta's interpretation of the regulations is correct.

to consider the material submitted by the petitioner and determine whether the petition has merit. Id. § 152.99(c). Syngenta alleges that the EPA's refusal to provide thirty days advance notice prior to granting registrations to Cedar or Sipcam, as well as the EPA's refusal to provide explanations on Syngenta's petitions to deny Cedar and Sipcam's registration applications prior to issuing them metolachlor registrations, constitute arbitrary and capricious action that violates these regulations and Syngenta's right to procedural due process.[3] (Syngenta's Am. Compl. ¶¶ 78-81.)

Although Syngenta may have submitted an "exclusive use study" to support its application for S-metolachlor and may be an "original data submitter," counts I and II of its amended complaint are not ripe for judicial review. Most importantly, Syngenta's alleged injury is speculative because the EPA can still comply with its regulations.[4] Indeed, the factors that are most relevant for a ripeness inquiry all weigh against exercising jurisdiction. First, denying relief at this point will merely require Syngenta to wait for the EPA to provide it with thirty days notice at the appropriate time - thirty days prior to issuing a registration for Cedar and Sipcam, if such registration is granted - and to wait for the EPA to rule on its petitions to

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[3] For purposes of this order, the court assumes that Syngenta's interpretation of the regulations is correct.

[4] Although Syngenta alleges that the EPA has failed to assure it that it will provide thirty days advance notice or written explanations of its decision on Syngenta's petitions to deny Cedar's and Sipcam's applications, (Am. Compl. ¶¶ 58-59), neither FIFRA nor the relevant regulations require the EPA to assure registrants that it will comply with its regulations.

deny Cedar's and Sipcam's applications. Second, the alleged harm is only likely to occur if the court believes the EPA will not comply with its regulations, an assumption the court refuses to make. Third, the factual record is incomplete because the EPA has not taken any actions that would violate its regulations.

The court's analysis of count III of Syngenta's amended complaint, in which Syngenta challenges the EPA's refusal to acknowledge the cancellation of its technical metolachlor registration as an arbitrary and capricious action, (Syngenta's Am. Compl. ¶¶ 83-91), proceeds along a similar path. Under the applicable provisions of FIFRA, Syngenta has a right to request that its pesticide registration be canceled. See 7 U.S.C. § 136d(f)(1)(A). Once such a request is submitted, the EPA must publish a notice in the Federal Register that it received the request and provide a thirty day period for public comment. Id. § 136d(f)(1)(B). Following the period of public comment, "the Administrator [of the EPA] may approve or deny the request." Id. § 136d(f)(1)(D).

Syngenta argues that the court has jurisdiction over count III of its complaint pursuant to 7 U.S.C. §§ 136n(a) and 136n(c). Section 136n(a) grants district courts jurisdiction to review "the refusal of the [EPA] Administrator to cancel or suspend a registration or to change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law." 7 U.S.C. § 136n(a). Section 136n(c) provides district courts "with jurisdiction specifically to enforce, and to prevent and restrain

violations of [FIFRA]." 7 U.S.C. § 136n(c).

As with counts I and II of Syngenta's complaint, count III is not ripe for judicial review. Because the EPA has not yet completed its evaluation of Syngenta's request for voluntary cancellation, no final agency action has occurred. Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997)("In determining whether a particular agency action is final, '[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'")(quoting Franklin v. Massachusetts, 505 U.S. 788, 797 (1992)). Even where no final action has been made, "a case may be considered ripe when there is no compelling judicial interest in deferring review." Dixie Fuel Co. v. Commissioner of Social Security, 171 F.3d 1052, 1058 (6th Cir. 1999). As discussed previously, the existence of such a situation depends upon "whether the issues are fit for judicial review as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." Id. The first of these considerations requires the court "to consider the nature of the challenged issue and inquire whether the agency action is sufficiently final for review." Id. (quoting Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n, 68 F.3d 503, 508 (D.C. Cir. 1995)). Although purely legal questions are generally suitable for judicial review, id., "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for

regulating the subject matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574 (1952). When a case is not fit for judicial review, the court will decline to exercise jurisdiction unless "parties face the prospect of irreparable injury, with no practical means of procuring effective relief after the close of the proceeding." Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 240 (D.C. Cir. 1980); see also Mississippi Valley Gas, 68 F.3d at 509.

The question presented by count III of Syngenta's complaint is whether the EPA has acted in an arbitrary and capricious manner by refusing to render a decision on Syngenta's request for a voluntary cancellation in the time frame desired by Syngenta. Evaluating whether the EPA has acted in an unreasonably dilatory manner would require the court to investigate the procedures by which the EPA reaches its decisions. Such an inquiry clearly involves factual considerations within the expertise of the EPA and relates to the EPA's internal procedures. Although the EPA's final decision will be reviewable in court, the speed with which it acts is not reviewable when no statute or regulation directs it to act in a specified amount of time. Furthermore, Syngenta's argument that the EPA's delay has allowed applicants for metolachlor registration to benefit from the studies Syngenta performed for its technical metolachlor registration does not present a sufficient hardship to warrant immediate judicial review. If the court were to accept Syngenta's logic, any party with complaints about the speed with which agencies act would file actions in federal court. Such complaints about the

administrative process do not present hardships sufficient to justify review of an otherwise unripe case.

For the foregoing reasons, Syngenta's complaint is dismissed as unripe.

The court next considers Syngenta's motion to dismiss Cedar's complaint. As was the case with Syngenta's complaint, counts I and II of Cedar's complaint present allegations relating to pending agency decisions. Count I alleges that the EPA has unlawfully refused to grant Cedar's CMT application, and count II alleges that the EPA has unlawfully refused to grant Cedar's application for CTM II and Cedar's applications for end-use products containing CTM II. (Cedar's Compl. ¶¶ 63-79.) No final action has been made with respect to Cedar's applications. To support its complaint, Cedar alleges that the EPA's technical review team determined that CMT was substantially similar to Syngenta's metolachlor and that registering CMT would not significantly increase the risk of unreasonable adverse effects on the environment.[5] Cedar is correct that when an applicant seeks a conditional registration and these conditions are present, the EPA "may conditionally register" the pesticide.[6] 7 U.S.C. § 136a(c)(7)(A). This language imposes a discretionary

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[5] Cedar contends that the EPA wants to accommodate Syngenta and promote S-metolachlor to the exclusion of other metolachlor products and wants to engage in an unlawful comparison of the environmental effects of metolachlor and S-metolachlor.

[6] Similarly, when both of these conditions exist, the EPA has a duty to act expeditiously on an application for a follow-on pesticide application. 7 U.S.C. § 136a(c)(3)(B)(i). Because Cedar seeks conditional registration, the court focuses on § 136a(c)(7)(A).

rather than a mandatory standard on conditional registration of pesticides that are substantially similar to registered pesticides and do not significantly increase the risk of unreasonable adverse effects on the environment - so called "follow-on" applications. Therefore, the fact that the EPA has not yet acted on Cedar's follow-on applications, without more, does not present a justiciable issue.[7]

Cedar presents two additional arguments in an attempt to establish that its claims are ripe for review. First, Cedar contends that the EPA's letter explaining the reasons for its delay on Cedar's follow-on applications indicates that the EPA's actions are due to "an ultra vires comparison of the relative safety of metolachlor to that of another product, S-metolachlor." (Cedar's Mem. Opp. Syngenta's Mot. to Dismiss at 1.) The January 19, 2001 letter upon which Cedar bases its claim reads,

> The Agency has carefully reviewed the record and the information provided by the parties. At the current time, EPA does not feel the record before it is adequate to support a determination regarding either Cedar's application or Syngenta's petition to deny. EPA feels that neither Syngenta nor Cedar has demonstrated its position regarding the relative risk of S-Metolachlor versus Metolachlor Technical. Therefore, EPA is soliciting further information, outlined in this letter, to assist it in making a final decision in this matter.

(Cedar's Mem. of Points and Authorities Opp. Syngenta's Mot. to

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[7] Although FIFRA establishes an expedited review process for follow-on applications for end-use pesticides, pursuant to which the EPA must notify the registrant whether the application is complete within 45 days of receiving the application and notify the registrant if the application has been granted or denied within 90 days of receiving a completed application, see 7 U.S.C. § 136a(c)(3)(B)(ii), Cedar does not allege that the EPA violated this procedure.

Dismiss, Ex. 1.) Cedar therefore argues that the legal issue before the court is whether the EPA violated FIFRA by comparing its application for CMT with S-metolachlor.

Two problems exist with respect to Cedar's position. First, before mentioning the relative risk of S-metolachlor and Cedar's CMT, the January 19 letter makes clear that the record before the EPA was not sufficient to reach a decision on either Cedar's application of Syngenta's petition to deny Cedar's application. This acknowledgment and the detailed requests in the January 19 letter make clear that factual issues remain at the forefront of the EPA's decisionmaking process. Second, Cedar presents no authority for its allegation that considering the relative risks of S-metolachlor and CMT exceeds the EPA's authority. Indeed, such a comparison may be necessary in light of Syngenta's petition to deny Cedar's applications.

Cedar's second argument is that the EPA has failed to engage in the expedited review process required for "follow-on" applications. To support this position, Cedar devotes significant attention to the Administrative Procedure Act's ("APA") provisions governing judicial review of agency actions. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The definition of "agency action," moreover, includes "failure to act." 5 U.S.C. § 551(13). Although the APA allows for review of agency's failure to act, it does not dispense with the requirement of final agency action prior to judicial review.

As the preceding discussion indicates, the presence of factual issues relating to the EPA's processing of Cedar's applications weigh against exercising judicial review to determine whether the EPA has acted expeditiously with regard to Cedar's applications. As was the case with Syngenta, Cedar's alleged harm due to EPA's delay is a result of the administrative scheme that Congress established when it enacted FIFRA. Cedar's complaint about the timing of the EPA's decision does not present a sufficient hardship to warrant reviewing an otherwise unripe issue at this point. For these reasons, count I and II of Cedar's complaint are not justiciable and must be dismissed.

Count III of Cedar's complaint alleges that the EPA unlawfully granted Syngenta a conditional registration for S-metolachlor.[8] (Cedar's Compl. ¶¶ 81-92.) The court lacks jurisdiction over this count because Cedar has failed to exhaust its administrative remedies. Pursuant to this requirement, "[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." Reiter v. Cooper, 507 U.S. 258, 269 (1993). Where a plaintiff believes that a pesticide for which the EPA has issued a registration fails to meet the requirements of FIFRA, he may petition the EPA to cancel or suspend the registration. See Merrell v. Thomas,

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[8] Cedar alleges that the EPA's actions regarding the registration of S-metolachlor are arbitrary and capricious and an abuse of discretion and violate the EPA's statutory authority and the Due Process Clause of the United States Constitution.

807 F.2d 776, 781-82 (9th Cir. 1986)(noting that "FIFRA contains procedures for canceling or suspending pesticide registrations that invite public participation at several points"); Merrell v. Thomas, 608 F. Supp. 644, 647 (D. Or. 1985)(holding that plaintiff's failure to exhaust his administrative remedies under FIFRA precluded the court from exercising jurisdiction to review the validity of challenged pesticides). Because Cedar has failed to exhaust its administrative remedies by petitioning the EPA to cancel Syngenta's S-metolachlor registration, the court lacks jurisdiction over count III of Cedar's complaint.[9]

In count IV of its complaint, Cedar seeks an injunction to preserve the status quo and prevent the EPA from acting upon Syngenta's proposal that the EPA issue a voluntary cancellation of metolachlor. (Cedar's Compl. ¶¶ 94-99.)

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[9] Cedar relies on Buckholz v. FDIC, 129 F.3d 868, 871-72 (6th Cir. 1997), for the proposition that federal courts have jurisdiction over administrative complaints despite the possibility of administrative review unless a statute contains an explicit exhaustion requirement. In Buckholz, the plaintiff filed an administrative claim, then filed an action in federal district court. The district court allowed the parties to postpone the lawsuit until the administrative claim was resolved. After the plaintiff received notice that her administrative claim was disallowed, the district court dismissed plaintiff's claim for lack of subject matter jurisdiction, even though the time period for filing a new action under the relevant federal law had passed. Faced with this situation, the court held that the doctrine of exhaustion of remedies did not deprive the federal court of subject matter jurisdiction. As the court explained, "[w]e find that under the circumstances, the provisions and purposes of the Act were satisfied and the District Court had jurisdiction after the disallowance of the claim to decide her case." Id. at 871. If the court had not reached this conclusion, the plaintiff would have been unable to obtain judicial review because of the statutory mandated time in which the plaintiff could file a lawsuit. Therefore, the decision rests on the district court's decision to retain jurisdiction over the case while the administrative review was pending and the inequity that would have occurred had the district court refused to exercise jurisdiction following the conclusion of the administrative review. In contrast, nothing prevents Cedar from challenging any decision that the EPA reaches with respect to Syngenta's conditional registration of S-metolachlor after Cedar exhausts its administrative remedies.

At the threshold level, Cedar fails to satisfy the injury in fact requirement necessary for standing. The "legally protected interest" which Cedar seeks to protect through issuance of a preliminary injunction is its ability to rely on Syngenta's metolachlor data studies. This interest exists because § 136a(c)(1)(F)(iv) grants it to an applicant. If the EPA rules on Cedar's CMT and/or CTM II applications - whether approving or denying the registrations - prior to ruling on Syngenta's request for voluntary cancellation, Cedar will suffer no injury because the data studies will have been considered. Similarly, if the EPA denies Syngenta's request for voluntary cancellation, Cedar will suffer no injury because the data studies for a registered pesticide will still be available for consideration. The only scenario in which Cedar might suffer the injury which it seeks to prevent through a preliminary injunction occurs if the EPA grants Syngenta's request for a voluntary cancellation. In that situation, two possibilities exist with respect to Cedar's use of Syngenta's data studies. The EPA will either allow or prevent consideration of Syngenta's data studies. Whichever decision the EPA makes will be reviewable in court after the decision is made. If a court determined that FIFRA requires the EPA to consider a registrant's data studies for an application filed when the pesticide was registered even after the cancellation of the registrant's registration, Cedar will suffer no injury. If a court reached the opposite result, its conclusion would be based on a finding that Cedar lacked the right to rely on data studies after the pesticide for which the data studies were produced had

been canceled. Such a finding would therefore necessarily find that Cedar lacks the legally protected interest that it seeks to protect through the preliminary injunction it seeks.

Additionally, the preceding discussion makes clear that count IV of Cedar's complaint is not ripe for judicial review. The scenario that Cedar fears is hypothetical and not at all certain to occur. Although Cedar may be unable to rely upon Syngenta's metolachlor data studies if the EPA cancels Syngenta's metolachlor registration and then refuses to consider Syngenta's data studies for Cedar's applications, this outcome will only occur if Cedar lacks the right that it seeks to protect through a preliminary injunction.

Finally, non-registrants like Cedar lack the right to seek judicial review of voluntary cancellation decisions. See Northwest Food Processors Association v. Reilly, 886 F.2d 1075 (9th Cir. 1989); McGill v. EPA, 593 F.2d 631 (5th Cir. 1979). In McGill, pesticide consumers challenged the EPA's indefinite suspension of a hearing on the possible cancellation of the pesticide after both the pesticide's registrant and the EPA agreed to the cancellation and the suspension. 593 F.2d at 634. After evaluating FIFRA's language and legislative history, the court held that non-registrants such as the pesticide consumers lacked standing to challenge the EPA's actions. Id. at 637. The court noted that "[a]lthough Congress granted certain rights to non-registrants that are not often found in analogous statutes, it appears to have intended that users act with the consent of registrants or with respect to a commodity actually being

produced for some purposes." Id. In Northwest Food Processors, the court followed McGill and held that "FIFRA does not give non-registrant users . . . the right to prevent a settlement and force further proceedings, once the registrants have agreed to abandon their registrations." 886 F.2d at 1079.

Cedar seeks to distinguish McGill and Northwest Food Processors on three bases. First, Cedar argues that it is not a consumer of pesticide products, but rather is an applicant for a pesticide registration. Second, Cedar argues that it does not seek to ensure a continuing supply of Syngenta's registered pesticide, but rather to prevent any change in the status quo. Third, Cedar contends that it does not seek a permanent change but only the preservation of the status quo.

Cedar's effort to distinguish McGill and Northwest Food Processors is unpersuasive. Both consumers of a pesticide and applicants who rely on a registered pesticide's data studies derive their rights from FIFRA. FIFRA prevents the use of pesticides that are not registered and grants applicants the right to rely on data studies prepared for registered pesticides. Furthermore, regardless of whether a party seeks a hearing after a registrant requests voluntary cancellation of its pesticide or seeks to maintain the status quo, the effect of its action is to alter a registrant's ability to act and the EPA's ability to respond to that action in a manner that FIFRA explicitly allows. Just as FIFRA does not grant non-registrants a right to prevent a registrant and the EPA from agreeing to a voluntary cancellation, FIFRA provides no right to applicants to prevent the EPA from

acting or postponing action on a registrant's request for voluntary cancellation.[10] For these reasons, Cedar lacks the right to intervene in or to compel postponement of the EPA's processing of Syngenta's request for voluntary cancellation.

For the foregoing reasons, count IV of Cedar's complaint is dismissed.[11]

Count V of Cedar's complaint alleges that the EPA has shared or intends to share information concerning the timing of actions on Cedar's applications for CMT and CTM II or related end-use products with Syngenta in violation of applicable laws and its statutory authority. (Cedar's Compl. ¶¶ 101-06.) Cedar seeks a judgment declaring that the EPA "is required by law to maintain the confidentiality of all information pertaining to and concerning the status of Cedar's pending applications" and "that EPA is bound to observe those requirements of law without breaching them by express or implied communications to Syngenta, or by indirect signaling to Syngenta of the Agency's future or

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[10] FIFRA requires the EPA to publish any request for voluntary cancellation in the Federal Register and allow for a thirty day period of public comment. 7 U.S.C. § 136d(f)(1)(B). Because the EPA published its notice in December 1999 and Cedar filed its application for registration of CMT in January 2000, Cedar was presumably aware of Syngneta's request for voluntary cancellation within the public comment period and had an opportunity to present its arguments to the EPA. Furthermore, Cedar does not contend that it has standing to seek judicial review because it participated in a public comment period. Although the thirty day comment period was part of an amendment to FIFRA in 1990, this amendment does not affect the reasoning of McGill and Northwest Food Processors. Indeed, the fact that the pesticide users in McGill were participants in a hearing that began before the registrant and EPA agreed to voluntary cancellation did not give them the right to challenge the cessation of the hearing after the voluntary cancellation.

[11] In light of this decision, the court has no reason to consider Syngenta's argument that jurisdiction to review any final order granting the voluntary cancellation lies exclusively in the court of appeals.

intended action or schedule for action." (Cedar's Compl. Prayer for Relief ¶ 4(a).) Additionally, Cedar seeks injunctive relief to prevent the EPA and Syngenta "from engaging in any communication that is improper or contrary to law according to that judgment." Id. ¶ 4(b). Syngenta seeks dismissal of this claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for which relief can be granted.

In considering a Rule 12(b)(6) motion to dismiss, the court must "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); In re Comshare Inc. Sec. Litig., 183 F.3d 542, 547 (6th Cir. 1999). "In order for dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint." Bower v. Federal Express Corp., 96 F.3d 200, 203 (6th Cir. 1996).

Although the standards for withstanding motions to dismiss under Rule 12(b)(6) are quite liberal, "more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements." Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). Pursuant to this requirement, "a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Id.

FIFRA prohibits the EPA from revealing "information which in the Administrator's judgment contains or relates to trade secrets

or commercial or financial information obtained from a person and privileged or confidential" unless one of several exceptions exists. 7 U.S.C. § 136h(b). Nothing in FIFRA prohibits or even addresses the release of information regarding to the timing or status of a decision on an application for registration. Although Cedar argues that information on the status and timing of Cedar's applications is confidential commercial information, (Cedar's Mem. Opp. Syngenta's Mot. to Dismiss at 29), FIFRA's general protection for trade secrets and other confidential information indicates otherwise. Specifically, FIFRA provides,

> In submitting data required by this subchapter, the applicant may (1) clearly mark any portions thereof which in the applicant's opinion are trade secrets or commercial or financial information and (2) submit such marked material separately from other material required to be submitted under this subchapter.

7 U.S.C. § 136h(a). Rather than being "trade secrets or commercial or financial information" that an applicant might submit in support of its application, information pertaining to the status and timing of a pending application relates to the EPA's procedures and progress concerning the application. FIFRA does not address the EPA's handling of such matters. Because Cedar does not allege that the EPA violated or will violate FIFRA's confidentiality provision in any other manner, Cedar fails to state a claim for violations of FIFRA upon which relief can be granted.

Cedar also alleges that the EPA's alleged communications with Syngenta violate the EPA's policies and procedures. Neither Cedar's complaint nor its response to Syngenta's motion to

dismiss identify which policies the EPA allegedly violated or will violate. In any event, agency publications that contain general statements of policy or procedure and are not published in the Federal Register or promulgated with the procedural requirements for rulemaking lack the "force and effect of law" and are not judicially enforceable. First Family Mortg. Corp. of Florida v. Earnest, 851 F.2d 843, 845 (6th Cir. 1988). Therefore, the existence of the EPA's statements of procedures or policies does not provide Cedar with a claim based on alleged violations of those procedures and policies.

For these reasons, Syngenta's motion to dismiss count V of Cedar's complaint for failure to state a claim is granted.

In sum, Syngenta's complaint is dismissed because it presents claims that are not ripe for judicial review. Cedar's complaint is also dismissed. Counts I and II are dismissed because they involve unripe claims. Count III is dismissed for because Cedar has failed to exhaust its administrative remedies. Count IV is dismissed because it does not involve a legally protected interest. Count V is dismissed for failure to state a claim upon which relief can be granted.

Inexplicably, the EPA did not move to dismiss the Cedar complaint, although it states in its motion to dismiss the Syngenta complaint that it "believes there are jurisdictional deficiencies" in the Cedar complaint and "reserves the right to file an appropriate motion at a later date." (EPA's Mem. Supp. Mot. to Dismiss Syngenta's Compl. at 1 n.1.) The court expected that the EPA would file such a motion at this time, based on

statements of its counsel at the August 6, 2001 hearing in these cases. Nevertheless, all arguments made by Syngenta apply to Cedar's claims against the EPA. When subject matter jurisdiction is not present, the court may dismiss claims sua sponte. Fed. R. Civ. P. 12(h)(3)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); Apple v. Glenn, 183 F.3d 477, 479 (6th Cir. 1999)(noting that a district court may sua sponte dismiss a complaint for lack of subject matter jurisdiction "when the allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion"). Accordingly, Cedar's claims against both the EPA and Syngenta are dismissed.

This order disposes of the cases in their entirety.

IT IS SO ORDERED.

Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

August 27, 2001
DATE