IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOYBEAN ASSOCIATION, and PLAINS COTTON GROWERS, INC.,	)
Plaintiffs,	)
v.	) CASE NO. 1:20-cv-3190-RCL
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*.,	)
Federal Defendants, and	)
BASF CORPORATION, *et al*.,	)
Defendant-Intervenors.	)

FEDERAL DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF COUNTS II AND IV OF THE COMPLAINT

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Federal Defendants, U.S. Environmental Protection Agency, Michael S. Regan[1], in his official capacity as the Administrator of the U.S. Environmental Protection Agency, and Marietta Echeverria, in her official capacity as Acting Division Director of the U.S. Environmental Protection Agency, Office of Pesticide Programs, Registration Division (collectively, "Federal Defendants"), respectfully move this Court pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction to dismiss Counts II and IV of Plaintiffs' Complaint (ECF No. 1) because, *inter alia*, Plaintiffs have failed to comply with the Endangered Species Act's ("ESA") requisite 60-day notice requirement. Federal Defendants move in the alternative for dismissal of Count II pursuant to Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

In October 2020, EPA registered three dicamba-based pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") for use "over-the-top" of genetically modified cotton and soybean plants. Plaintiffs, the American Soybean Association and Plains Cotton Growers, Inc., mistakenly believe that certain 57- to 310-foot buffer zones, measured from the edge of agricultural fields inward, which EPA included in those registrations to protect ESA listed species ("ESA Buffers"), are excessive. Plaintiffs allege at Count II that the ESA Buffers are "unnecessary" to comply with ESA Section 7(a)(2).

Count II is an ESA citizen-suit claim, and so Plaintiffs were required to provide EPA of its intent to sue, and then wait 60 days to allow it the opportunity to consider the allegations and revisit or amend its decision if appropriate. 16 U.S.C. § 1540(g)(1)-(2).

[1] Michael S. Regan is automatically substituted for Andrew R. Wheeler pursuant to Federal Rule of Civil Procedure 25(d).

Plaintiffs did not do so here. As such, Plaintiffs have failed to comply with the mandatory and jurisdictional notice requirements of the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), and the Court should dismiss Count II.

The Court similarly lacks jurisdiction over Count IV, which requests that the Court declare EPA's ESA Section 7(a)(2) "no effect" determinations and "may affect, not likely to adversely affect" determination valid. Neither the Declaratory Judgment Act, the Administrative Procedure Act ("APA"), nor the ESA provides subject matter jurisdiction. The Court should accordingly dismiss Count IV.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ESA in 1973 to, among other things, conserve endangered and threatened species and their habitat. *See* 16 U.S.C. §§ 1531(b), 1532(6), 1532(20), 1533. The ESA requires a list of all endangered or threatened species to be maintained. *Id*. § 1533(c). The ESA imposes certain legal requirements protecting "listed species." As pertinent here, ESA Section 7(a)(2) requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *Id*. § 1536(a)(2) ("ESA Section 7(a)(2)"). To help ensure compliance with this requirement, ESA Section 7(a)(2) and its implementing regulations delineate a process for determining the biological impacts of a proposed action known as ESA Section 7(a)(2) consultation. 16 U.S.C. § 1536; 50 C.F.R. pt. 402.

Through this process, an agency proposing an action ("the action agency") must determine whether its action "may affect" a listed species or the designated critical habitat for a listed species. 50 C.F.R. § 402.14. If the action agency determines that its proposed action will

have "no effect" on a listed species or its designated critical habitat, ESA Section 7(a)(2) consultation is not triggered, and the process comes to an end. *Id*. § 402.12; *Nat'l Family Farm Coalition, et al., v. EPA*, 966 F.3d 893, 922 (9th Cir. 2020) (citing *Calif. ex rel. Lockyer v. U.S. Dep't of Agriculture*, 575 F.3d 999, 1019 (9th Cir. 2009)). A court's review of whether an agency's no effect determination was arbitrary and capricious turns on "whether the [agency] 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.' " *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (citation omitted).

Where the action agency determines that its action "may affect" listed species or designated critical habitat, it must consult with either the Fish and Wildlife Service ("FWS") or National Marine Fisheries Service ("NMFS") ("the consulting agencies"), depending on the species involved. *Id*. §§ 402.13, 402.14. There are two types of consultation: informal and formal. Informal consultation is an optional process that includes all discussions, correspondence, etc., between the action agency and consulting agencies undertaken to assist in determining whether formal consultation is required. *Id*. § 402.13(a). If, during informal consultation, the consulting agency concurs with the action agency's determination that the action is not likely to adversely affect listed species or critical habitat (a "may affect, not likely to adversely affect" finding), the consultation process is terminated, and no further action is necessary. *Id*. On the other hand, if an agency determines that its actions "may affect" and are likely to adversely affect a listed species or its critical habitat, the agency must consult formally with either FWS or NMFS. 50 C.F.R. §§ 402.01; 402.14(a)-(b).

If an entity wishes to challenge whether the action agency complied with its ESA Section 7(a)(2) obligations, including any "no effect" determinations (as EPA did here), they must abide by the requirements of ESA's citizen suit provision, which provides (as relevant here) that:

> (1) . . . any person may commence a civil suit on his own behalf—
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . , who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; . . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.
>
> (2)(A) No action may be commenced under subparagraph (1)(A) of this section—
>
> (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation[.]

16 U.S.C. § 1540(g)(1)-(2)(A)(i).

FACTUAL BACKGROUND

On July 2, 2020, Defendant-Intervenors, Bayer CropScience LP ("Bayer") and BASF Corporation ("BASF") individually submitted applications to EPA for new registrations of dicamba-based pesticides, Bayer's XtendiMax and BASF's Engenia, for use on cotton and soybean plants genetically modified to tolerate the pesticide active ingredient dicamba. Dkt. 1-1 at 3.[2] On August 12, 2020, Defendant-Intervenor Syngenta Crop Protection, LLP submitted a separate application for amendment of its registration of a pesticide product containing dicamba named Tavium to allow its continued use on dicamba-tolerant cotton and soybean plants. *Id*. On

[2] EPA's registration of uses of dicamba-based pesticides for over-the-top use on dicamba-tolerant cotton and soybeans dates to 2016. Dkt. 1-10 at 3-11.

October 27, 2020, after conducting extensive analysis, EPA registered XtendiMax and Engenia, and amended the Tavium registration, under Section 3(c)(5) of FIFRA.[3]

In order to directly address the ESA requirements for this action on dicamba, EPA developed control measures that support a "no effect" finding and integrated those into its registration decision. This required EPA to conduct species-specific "effects" determinations. To do so, EPA conducted evaluations to make effect determinations for federally-listed endangered and threatened species and designated critical habitat. Dkt. 1-1 at 3, 26-28. As part of this process, EPA evaluated the potential for off-field transport of dicamba by the combination of spray drift and vapor-phase transport (movement that occurs post-application), taking into account the measures intended to control such off-field transport ("control measures") mandated on the product labeling. *Id*. at 26. These control measures included a mandatory 310-ft in-field downwind spray drift setback (or buffer) to address drift of fine liquid droplets, and an in-field 57-ft omnidirectional volatile emissions application buffer to address vapor-phase transport. *Id*. at 27. This 57-ft omnidirectional volatile-emissions application buffer, in combination with the temporal prohibition against application of Tavium, Xtendimax, and Engenia after June 30 (for

[3] Dkt. 1-1 at 6; *see generally* Dkt. Nos. 1-1 (EPA's Oct. 26, 2020, Memorandum Supporting Decision to Approve Registration for the Uses of Dicamba on Dicamba Tolerant Cotton and Soybean), 1-3 (EPA's Notice of Pesticide Registration to BASF regarding Engenia pesticide product); 1-4 (EPA's Notice to Syngenta Crop Protection, LLC regarding registration of A21472 Plus VaporGrip Technology); 1-5 (EPA's Notice to Bayer Cropscience LP regarding registration of XtendiMax with VaporGrip Technology); 1-6 & 1-7 (EPA's Oct. 26, 2020, Assessment of the Benefits of Dicamba Use in Genetically Modified, Dicamba Tolerant Cotton and Soybean Production, respectively); Dkt. 1-8 (EPA's Oct. 26, 2020, Dicamba Use on Genetically Modified Dicamba-Tolerant (DT) Cotton and Soybean: Incidents and Impacts to Users and Non-Users from Proposed Registrations); Dkt. 1-9 (EPA's Oct. 26, 2020, Dicamba: Consideration of Newly Submitted Mutagenicity Data and Human Health Risk Assessment Summary); 1-10 (EPA's Dicamba DGA and BAPMA salts – 2020 Ecological Assessment of Dicamba Use on Dicamba-Tolerant (DT) Cotton and Soybean Including Effects Determinations for Federally Listed Threatened and Endangered Species).

soybeans) and July 30 (for cotton),[4] and a host of other control measures, collectively allowed EPA to determine that there would be "no discernible effects for listed species off of the treated field." *Id*. at 26. Therefore, EPA made "no effect" determinations for twenty-two species and one "may affect, not likely to adversely affect" determination ("Effect Determinations"). *Id*. at 28.[5] The three mandatory control measures challenged by Plaintiffs are essential elements of EPA's decision. EPA's Effect Determinations were based on the control measures and are the basis for complying with ESA Section 7(a)(2).

STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction, possessing only those powers specifically granted to them by either the U.S. Constitution or Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. (citations omitted); *Keepseagle v. Vilsack*, 815 F.3d 28, 32 (D.C. Cir. 2016). In a facial challenge regarding the court's jurisdiction brought under Federal Rule of Civil Procedure 12(b)(1), the court is required to "accept as true all of the factual allegations contained in the complaint." *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016) (citation omitted). But courts "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Id*. (citation omitted). If a court determines that it lacks subject matter jurisdiction to hear and decide a claim, the claim must be dismissed. Fed. R. Civ. P. 12(b)(1).

A challenge brought under Federal Rule of Civil Procedure 12(b)(6) tests the legal

[4] This temporal limitation reduces the timing of applications that would have occurred when temperature conditions favor volatility. *Id*. at 28.
[5] EPA obtained FWS' concurrence on its one "may affect, not likely to adversely affect" determination. *Id*.

sufficiency of the claims asserted in a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when there are sufficient factual allegations to draw "the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Although a court must accept as true the factual allegations in the complaint, it is "not bound to accept as true a legal conclusion couched as a factual allegation," and a "formulaic recitation of the elements of a cause of action" is not enough. *Twombly*, 550 U.S. at 555. Moreover, a complaint is not sufficient if it "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (citations omitted).

ARGUMENT

I. COUNT II SHOULD BE DISMISSED BECAUSE PLAINTIFFS DID NOT COMPLY WITH THE MANDATORY AND JURISDICTIONAL NOTICE REQUIREMENTS FOR ESA CITIZEN SUITS.

Plaintiffs' Complaint demonstrates Plaintiffs' intent to challenge EPA's compliance with ESA Section 7(a)(2). Plaintiffs maintain that the EPA, in calculating and applying the ESA Buffers, "imposed an array of application and use conditions on soybean and cotton growers." Dkt. 1 (Complaint) ¶ 5. They argue that the ESA Buffers are "problematic" and may impact their members' productivity. *Id*. at ¶¶ 6, 88. Plaintiffs go on to state that in including the ESA Buffers, the EPA took action "under the ESA" and that the ESA Buffers are judicially reviewable "under the ESA." *Id*. ¶¶ 24, 119, 120 (Plaintiffs alleging ESA Buffers were "action taken in compliance" with ESA); *see also id*. ¶¶ 26-30. Plaintiffs contend that the ESA Buffers "exceed EPA's

authority under the ESA and are unnecessary to comply with" the ESA. *Id*. ¶ 121. Finally, Plaintiffs request that the Court "declare that the ESA Buffers exceed EPA's authority under the ESA" and seek "remand of EPA's temporal dicamba application restrictions and spatial application buffers." *Id*. ¶¶ 29, 35. The suite of documents Plaintiffs refer to as the "Dicamba Decision" further confirms that Plaintiffs target an aspect of EPA's ESA "Effect Determinations," and therefore the agency's compliance with ESA Section 7(a)(2). *See, e.g*., Dkt. 1-1 at 3-5, 8, 13-14, 18, 21, 24, 28; Dkt. 1-10 at 8, 66-71, 301.

As such, it is clear that–although Plaintiffs do not list the citizen suit provision as a basis for their Complaint–Count II alleges a violation by EPA of ESA Section 7(a)(2) and thus Plaintiffs were required to comply with the ESA's 60-day notice requirement. Dkt. 1 ¶ 17. Jurisdiction under this citizen-suit provision is expressly limited by ESA Section 11(g), which requires a would-be plaintiff to provide EPA with written notice of an alleged violation at least 60 days prior to filing a complaint. 16 U.S.C. § 1540(g)(2). Courts have consistently held that the ESA's 60-day notice requirement is "mandatory and jurisdictional" and a plaintiff's failure to provide proper notice warrants dismissal. *Friends of Animals v. Ashe*, 51 F. Supp. 3d 77, 87 (D.D.C. 2014); *Rsch. Air, Inc. v. Norton*, No. 05-cv-623-RMC, 2006 WL 508341, at *10-11 (D.D.C. Mar. 1, 2006); *accord Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17 (D.D.C. 2013); *see also Friends of Animals v. Salazar*, 670 F. Supp. 2d 7, 13 (D.D.C. 2009) (noting that "The Supreme Court has held that similar statutory notice provisions are mandatory and cannot be waived") (citing *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989)); *Common Sense Salmon Recovery v. Evans*, 329 F. Supp. 2d 96, 104 (D.D.C. 2004) (describing the notice requirement as "'mandatory conditions precedent to commencing suit[,]' which 'a district court may not disregard . . . at its discretion'") (quoting *Hallstrom*, 493 U.S. at 31). Failure to strictly comply

with this "preliminary but stringent" jurisdictional requirement "acts as an absolute bar to bringing suit under the ESA," *Rsch. Air, Inc*., 2006 WL 508341, at *10, *11 (quoting *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998)), and courts routinely dismiss ESA claims for failure to provide proper notice. *See, e.g., id*. at *11 (dismissing claims for failure to provide proper notice); *Building Indus. Ass'n of S. Cal. v. Lujan*, 785 F. Supp. 1020, 1022 (D.D.C. 1992) (same). Plaintiffs have provided no notice to EPA regarding alleged ESA violations in connection with the agency's approval of the dicamba registrations.[6] Therefore, the Court must dismiss Count II.

The Court should reject any argument that Count II is an Administrative Procedure Act ("APA") claim, and thus no 60-day notice was required. Count II does not seek review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, the ESA provides a direct avenue for Plaintiffs to seek a remedy. Mapped onto the pertinent language from the ESA citizen suit provision, Plaintiffs have "commence[d] a civil suit" to "to enjoin" EPA, which they "allege[ ] to be in violation of" ESA Section 7(a)(2). 16 U.S.C. § 1540(g)(1). This Court has jurisdiction under the ESA "to enforce" that "provision", *i.e*., ESA Section 7(a)(2). *Id*. § 1540(g)(2)(A)(i). An attack on an action agency's Section 7(a)(2) compliance is plainly a citizen suit claim. *W. Watersheds Project*, 632 F.3d at 495-97 (citing

[6] The notice requirement cannot be cured "by either a 60-day stay of the case or by applying equitable tolling principles." *Building Indus. Ass'n*, 785 F. Supp. at 1022 (citing *Hallstrom*, 493 U.S. at 26-28). Counsel for Federal Defendants raised the lack of a 60-day notice letter with counsel for Plaintiffs during a February 2, 2021, telephonic conference. Today, April 6, 2021, at 2:25 p.m. Eastern, counsel for Plaintiffs sent the email attached as Exhibit "A" to counsel for Federal Defendants purporting to provide such notice to the undersigned. Exh. "A". Plaintiffs' skeletal letter fails to provide any explanation as to why Plaintiffs believe (mistakenly) that EPA has violated the ESA and is therefore facially defective. But in any event, Plaintiffs would have had to dismiss their ESA claims prior to serving such letter on the EPA Administrator, which they have not done. Plaintiffs' belatedly-sent letter does not cure Plaintiffs' failure to provide EPA with the required notice. 16 U.S.C. § 1540(g)(2)(A)(i).

Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005), stating "[b]ecause this substantive statute independently authorizes a private right of action, the APA does not govern 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."). The ESA and pertinent judicial authority thus make it clear that Count II must be brought, if at all, under the ESA citizen-suit provision. *Supra* at 4-5, 9-10.

Moreover, Plaintiffs may not evade the notice requirement by artfully styling their pleading as one seeking relief under the APA. *See, e.g., Proie v. NMFS*, No. 11-cv-5955-BHS, 2012 WL 1536756, at *2-4, *2 n.3 (W.D. Wash., May 1, 2012) (rejecting plaintiff's "misplaced" "effort to craft an APA claim" out of an ESA citizen-suit claim and finding that the court lacked jurisdiction because plaintiff's complaint, plead solely as an APA claim, violated the ESA 60-day notice requirement).

Because Plaintiffs were required, but failed, to comply with the ESA notice requirement, the Court should dismiss Count II under Federal Rule of Civil Procedure 12(b)(1).[7]

II. THE COURT SHOULD ALSO DISMISS COUNT IV FOR LACK OF SUBJECT MATTER JURISDICTION.

The Court also lacks jurisdiction to consider Count IV, which requests that the Court declare that EPA's "no effect" determinations and "may affect, not likely to adversely affect" determination are valid. Dkt. 1 ¶ 136-137, 139. *First*, the Declaratory Judgment Act does not provide an independent source of jurisdiction to consider Count IV. *Lovitky v. Trump*, 918 F.3d 160, 161 (D.C. Cir. 2019) (28 U.S.C. 2201 "(declaratory judgment) is not an independent

[7] Alternatively, for the same reasons, the Court may dismiss Count II under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *See Coos Cnty. Bd. of Comm'rs v. Kempthorne*, 531 F.3d 792, 810 (9th Cir. 2008) (affirming dismissal on grounds that the court "lacked jurisdiction and, in the alternative, that [plaintiff] had failed to state a claim upon which relief could be granted").

source of Federal jurisdiction.") (quoting *Metz v. BAE Sys. Tech. Solutions & Servs., Inc.*, 774 F.3d 18, 25, n.8 (D.C. Cir. 2014)).[8]

Second, the APA does not provide subject matter jurisdiction, either. Like Count II, Count IV concerns an action agency–EPA–taking an action pursuant to ESA Section 7(a)(2). Cases concerning such action agency actions may only be brought pursuant to the ESA citizen suit provision. *Supra* at 7-10.

Third, in light of the foregoing, the only other statutory provision that could theoretically provide jurisdiction is the ESA citizen suit provision, 16 U.S.C. § 1540(g). *Id.* But the ESA citizen suit provision does not help Plaintiffs. It only permits an entity to "commence a civil suit" to "enjoin" action agencies "who are alleged to be *in violation of*" the ESA. *Id*. § 1640(g)(1) (emphasis added). Here, Count IV alleges the opposite–that EPA is *not* "in violation of" the ESA. Dkt. 1 at 29 (¶ "B," requesting that the Court "declare that EPA's No Effects Determinations and NLAA Determination fully comply with all applicable law"); *id*. ¶¶ 136-137, 139. So the citizen suit provision does not provide jurisdiction in this case.[9]

In sum, neither the Declaratory Judgment Act, the APA, nor the ESA provides subject matter jurisdiction for Count IV. Accordingly, the Court should dismiss Count IV for lack of subject matter jurisdiction.

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[8] To the extent Plaintiffs seek to rely on the Declaratory Judgment Act, Count IV also fails to allege a "case" or "controversy" as required by both Article III of the Constitution and the Declaratory Judgment Act. *Gem Cty. Mosquito Abatement Dist. v. EPA*, 398 F. Supp. 2d 1, 6-8 (D.D.C. 2005) ("*Gem County*"). EPA *concurs* with Plaintiffs that its "no effect" determinations and "may affect, not likely to adversely affect" determination are valid. There is, as in *Gem County*, therefore "no adverse legal interest between EPA and the Plaintiffs." *Id*. at 7.

[9] In any event, were the Court to find otherwise, as Federal Defendants have explained, *supra*, Plaintiffs have failed to comply with the 60-day notice requirement for Count IV. *Supra* at 7-10.

CONCLUSION

For the reasons stated above, Count II of the Complaint should be dismissed for lack of subject-matter jurisdiction or failure to state a claim upon which relief may be granted, on the grounds that Plaintiffs failed to provide EPA with its notice of intent to sue 60 days before filing their complaint under the ESA's citizen suit provision. The Court should similarly dismiss Count IV for lack of jurisdiction.

Respectfully submitted on this 6th day of April 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2021, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ J. Brett Grosko
J. Brett Grosko