

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

FRIENDS OF ANIMALS,

Case No. 2:17-cv-01410-SU

Plaintiff,

**FINDINGS AND
RECOMMENDATION**

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and ANDREW
WHEELER, in his official capacity as the
Acting Administrator of the U.S.
Environmental Protection Agency,¹

Defendants,

and

THE HUMANE SOCIETY OF THE
UNITED STATES,

Defendant-Intervenor.

SULLIVAN, United States Magistrate Judge:

¹ Substituted for former defendant Scott Pruitt. Fed. R. Civ. P. 25(d).

Plaintiff Friends of Animals challenges the decision of the Environmental Protection Agency (“EPA”) to deny plaintiff’s Petition for Special Review (“the Petition”) under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and EPA’s refusal to initiate Special Review proceedings for ZonaStat-H, a vaccine used as birth control for wild horses and burros. The Humane Society of the United States (“Humane Society”), which submitted and applied for the initial registration of ZonaStat-H, intervened as defendant. (Docket Nos. 17, 22, 27). The parties have moved for summary judgment. (Docket Nos. 41-43, 52).

Previously, the Court issued a Findings and Recommendation recommending that plaintiff’s motion be denied and EPA and Humane Society’s motions be granted for lack of subject matter jurisdiction. (Docket No. 60). After *de novo* review, United States District Court Judge Michael Simon concluded that the Court does have jurisdiction over the case. (Docket No. 71). Accordingly, Judge Simon declined to adopt the Findings and Recommendation and remanded the case to this Court for a determination of the merits of the parties’ cross-motions for summary judgment. The Court heard supplemental oral argument on July 30, 2019. (Docket No. 72).

For the following reasons, the Court should find that EPA’s decision declining to initiate Special Review was arbitrary and capricious. The Court should DENY defendant and defendant-intervenor’s Motions for Summary Judgment (Docket Nos. 42, 43, 52) and GRANT plaintiff’s Motion for Summary Judgment (Docket No. 41).

BACKGROUND

The factual and legal background of this case is well known to the parties and well described in Judge Simon’s April 2019 Opinion and Order (Docket No. 71). For purposes of this remand, I adopt Judge Simon’s background and supplement it with the following procedural facts concerning the Petition and EPA’s response.

I. Plaintiff's Petition for Special Review

In May 2015, plaintiff petitioned EPA to (1) conduct a Special Review proceeding pursuant to 40 C.F.R. § 154.1 *et seq.*, to consider scientific evidence demonstrating the need to cancel or reclassify the registration for ZonaStat-H;² (2) hold a hearing pursuant to 7 U.S.C. § 136d(b)(2) to determine if the registration should be canceled or reclassified; and (3) issue an order pursuant to 7 U.S.C. § 136d(c)(1) suspending the registration during the Special Review and/or proceeding to cancel or reclassify it. EPA000001-20.³

In the Petition, plaintiff alleged that the original registration application “did not consider the biological, social, and behavioral effects [that ZonaStat-H] can have on wild horses.” EPA000006. Plaintiff further alleged that recent studies had shown four adverse effects on wild horses that warranted Special Review: (1) permanent infertility and ovulatory failure in dosed mares; (2) increased mortality in foals because previously-treated mares may give birth later in the year; (3) decreased herd cohesion caused by behavioral changes in treated mares; and (4) reduction in the genetic diversity of herds with treated mares, which could threaten the viability those herds.

Plaintiff asserted three legal grounds for its Petition. First, plaintiff contended that “PZP can result in residues in the environment of nontarget organisms—the foals of treated mares conceived and birthed post application—that equal or exceed concentrations that are toxic to those organisms.” EPA000015; *see* 40 C.F.R. § 154.7(a)(3). Second, plaintiff contended that “PZP may otherwise pose a previously undisclosed risk to the environment which is of sufficient magnitude

² The active ingredient in ZonaStat-H is porcine zona pellucida (“PZP”). Both terms are used interchangeably throughout this F&R to refer to the pesticide at issue in this case.

³ All citations to the Administrative Record, which is available in the parties’ Joint Appendix (Docket No. 49, 50), use the page number designations from the Administrative Record, “EPAXXXXXX.”

to merit a Special Review[,]” including “physical damage to dosed mares, the increased mortality in foals born to previously treated mares, the disruption of herd cohesion . . . , or the increased risk of a genetic bottleneck[.]” EPA000016; *see* 40 C.F.R. § 154.7(a)(6). Third, plaintiff asserted that the use of PZP violates the Wild Free-Roaming Horses and Burros Act (WHBA) and urged EPA to consider that alleged violation in determining whether to initiate Special Review because “it is in the spirit of FIFRA to consider whether a pesticide would violate a species-specific act.”⁴ EPA000016.

II. EPA’s Denial of the Petition

In a December 2016 letter, EPA denied the Petition. EPA000032-36. EPA determined that the Petition relied on allegations that ZonaStat-H adversely effects wild horses “because of its effectiveness as a contraceptive” and that those concerns “revolve around the choice to use ZonaStat-H as a population management tool.” EPA000032-33. EPA explained that those issues were better left to wild horse managers who have greater expertise in managing wild horse populations and, in the case of the Bureau of Land Management and US Forest Service, have a legal duty to appropriately manage them. EPA000033.

EPA’s letter also responded to plaintiff’s three legal arguments. EPA000034-35. First, EPA explained that plaintiff’s theory of harm to foals did not fall within the residues criterion in 40 C.F.R. § 154.7(a)(3). EPA000034. Second, with respect to plaintiff’s “other environmental risks” argument under 40 C.F.R. § 154.7(a)(6), EPA directly responded to two of the four risks asserted in plaintiff’s Petition – physical impacts to mares and effects on the genetic diversity of a herd with treated mares. EPA000034-35. EPA’s response to plaintiff’s “other environmental

⁴ As noted in Section II below, EPA declined to determine whether the use of PZP violates the WHBA. Plaintiff does not challenge this aspect of EPA’s decision. Tr. 46 (Docket No. 78).

risks” argument did not address impacts to foals of treated mares or social disruption in herds with treated mares. Third, EPA declined to determine whether the use of PZP violates the WHBA because “a violation of another law is not a basis for which to initiate a Special Review.” EPA000035.

Finally, EPA concluded by reiterating that the agency felt that the Petition concerned issues better addressed by other entities, stating:

Having considered the information provided in your petition, EPA has concluded that initiating a Special Review is not warranted at this time. The fundamental issues your petition raised concern whether choosing to use PZP is an appropriate method to manage wild horse populations. EPA has concluded that is best determined by horse management experts who can determine what is appropriate based on a specific factual scenario. To the extent petitioners want wild horse herds managed differently, they must take their arguments to those charged with managing the wild horse herds rather than to EPA.

Id.

LEGAL STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). When reviewing final agency action, however, “there are no disputed facts that the district court must resolve.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985). Instead, the court’s role is “to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Id.* Thus, the court decides whether the agency’s action passes muster under the appropriate standard of review. *Ranchers Cattlement Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agr.*, 499 F.3d 1108, 1115 (9th Cir. 2007).

FIFRA does not provide a standard of review for the denial of a petition for Special Review, thus the general standard set forth in the Administrative Procedures Act (“APA”) applies. *See Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007).

The APA requires a reviewing court to set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). “This inquiry must be searching and careful, but the ultimate standard of review is a narrow one.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quotations omitted). “Although [the court’s] inquiry must be thorough, the standard of review is highly deferential; the agency’s decision is entitled to a presumption of regularity, and [the court] may not substitute [its] judgment for that of the agency.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quotation marks omitted). Agency action is arbitrary and capricious

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

ANALYSIS

Plaintiff contends that EPA’s Special Review decision does not comply with the APA’s requirements by (1) failing to adequately consider the available evidence, including the scientific studies presented with the Petition, or provide a reasoned explanation for its decision that the criteria in 40 C.F.R. § 154.7(a)(3) and (a)(6) were not met; (2) deferring to the registrant, the Humane Society, and to wild horse management experts, rather than exercising its own discretion under FIFRA; and (3) failing to initiate a pre-Special Review process.

I. The Criteria in 40 CFR § 154.7(a)

The APA does not require formal findings in informal adjudicatory proceedings such as a petition for Special Review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,

417 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Rather, the APA states, “[e]xcept in affirming a prior denial or when the denial is self-explanatory, the [agency’s notice of decision] shall be accompanied by a brief statement of the grounds for denial.” 5 U.S.C. § 555(e). An agency’s statement of reasons for its decision must demonstrate that the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “In reviewing that explanation, [courts] must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

Here, the criteria in 40 C.F.R. § 154.7(a) provide six specific factors relevant to EPA’s determination of whether to initiate Special Review. *See* 40 C.F.R. § 154.1(b) (the Special Review regulations, including the criteria in section 154.7(a), “set forth the substantive standards for initiating a Special Review of a pesticide”); Simon O&O (Docket No. 71) at 10 (the criteria provide “‘law to apply’ when evaluating whether the EPA’s refusal to initiate a Special Review was an abuse of discretion, and the EPA actually evaluated Plaintiff’s petition under those regulatory criteria”), *Friends of Animals v. United States Envtl. Protct. Agency*, 383 F. Supp. 3d 1112, 1117 (D. Or. 2019).

As mentioned, the Petition relied on two criteria: 40 C.F.R. § 154.7(a)(3), which permits EPA to initiate Special Review if use of the pesticide “[m]ay result in residues in the environment of nontarget organisms at levels” that either “equal or exceed concentrations acutely or chronically toxic to such organisms” or “produce adverse reproductive effects in such organisms;” and 40

C.F.R. § 154.7(a)(6), which permits EPA to initiate Special Review if use of the pesticide “[m]ay otherwise pose a risk to humans or to the environment which is of sufficient magnitude to merit” Special Review.⁵

In its letter, EPA identified both criteria and responded to plaintiff’s arguments under each.

A. 40 C.F.R. § 154.7(a)(6)

EPA’s letter does not provide a satisfactory explanation for EPA’s rejection of plaintiff’s reliance on 40 C.F.R. § 154.7(a)(6).

The Petition asserted that the adverse effects to foals, treated mares, and entire herds triggered this “other environmental risks” criterion, because “wild horses are part of the western landscape and environment.” EPA000016.

EPA’s letter included responses to some of the specific assertions that plaintiff made regarding certain “environmental” risks posed by ZonaStat-H, including impacts to treated mares and the genetic diversity of herds with such mares. However, the letter did not directly respond to plaintiff’s assertion that impacts to foals and social disruption to herds with treated mares were “environmental” risks that warranted Special Review.⁶ The only reason for the EPA’s rejection of plaintiff’s studies and arguments regarding these risks that can be found in EPA’s letter is the

⁵ The “other environmental risks” criterion is a catch-all provision, which EPA intended to “permit the Agency to initiate a Special Review in circumstances where potential risks may not be anticipated in the specific criteria under” subparagraphs (a)(1) to (a)(5). 50 Fed. Reg. 49003 (Nov. 27, 1985).

⁶ At oral argument, defendants asserted that plaintiff only alleged impacts to foals with respect to the “residues” criterion. Tr. 43-44. However, the Petition expressly referenced impacts to foals in its arguments regarding the “other environmental risks” criterion. *See* EPA000016 (arguing, “[W]ild horses are part of the western landscape and environment. . . . Whether it is physical damage to dosed mares, *the increased mortality in foals born to previously treated mares*, the disruption of herd cohesion that is critical to the health of horses individually and as a herd, or the increased risk of genetic bottleneck, PZP . . . poses a significant risk to these animals.” (Emphasis added.)).

agency's overarching conclusion that the impacts asserted in the Petition were better left to wild horse management experts. *See* EPA000033 (“your concerns revolve around the choice to use ZonaStat-H as a population management tool” and “EPA has determined that the appropriateness of the use of the contraceptive when considering potential adverse effects on the wild horse herds themselves is best left to horse management experts in determining where, when, and whether to use the pesticide”); EPA000035 (“The fundamental issues your petition raised concern whether choosing to use PZP is an appropriate method to manage wild horse populations. EPA has concluded that is best determined by horse management experts.”).

Whether a risk would be better addressed by some other expert involved in pest management, or could be addressed by an applicator's determination of “where, when, and whether to use the pesticide” is not, on its own, a factor that Congress intended EPA to rely on in deciding whether to initiate a Special Review. EPA000033. Instead, EPA must consider whether “a validated test or other significant evidence raise[s] prudent concerns of unreasonable adverse risk to man or to the environment.” 7 U.S.C. § 136a(c)(8). Similarly, the criteria that EPA has established to assess whether new information raises such concerns require EPA to consider whether the pesticide may pose a risk to the environment of sufficient magnitude to merit a Special Review. 40 C.F.R. § 154.7(a)(6). The Court must apply the statutory text and regulatory criteria when evaluating whether the EPA's decision was “an abuse of discretion, and the EPA actually evaluated Plaintiff's petition under those regulatory criteria.” *Simon O&O* (Docket No. 71) at 10, *Friends of Animals*, 383 F. Supp. 3d at 1117. EPA's letter does not connect its management expert

rationale to a specific criterion or to FIFRA's mandate that the agency determine whether a pesticide causes unreasonable adverse effects on the environment.⁷

In support of its summary judgment motion, EPA made several arguments regarding this “other environmental effects” criterion that this Court finds to be *post hoc* rationalizations for its decision. “[C]ourts may not accept . . . counsel’s *post hoc* rationalizations for agency action[;]” instead, “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50.

EPA argues that, when assessing risks to the environment, the agency “considers potential adverse effects on those species and populations that do not coincide with the intended effect of the pesticide: ‘preventing, destroying, repelling, or mitigating [a] pest.’” EPA Mot. Summ. J. at 20 (quoting 7 U.S.C. § 136(u)). EPA’s letter does not assert or fairly suggest that EPA denied the Petition because EPA does not consider impacts to wild horses that “coincide with the intended effect” of ZonaStat-H in controlling fertility to be environmental risks posed by ZonaStat-H.⁸

⁷ EPA objects to plaintiff’s assertion that EPA’s letter states that other agencies should determine whether ZonaStat-H poses “‘unreasonable adverse effects’ under FIFRA and whether a Special Review should be undertaken.” EPA’s Mot. Summ. J. at 25. The Court does not share plaintiff’s reading of EPA’s letter. Instead, the letter states that EPA determined that concerns about whether, when, and how ZonaStat-H should be used to manage wild horse populations should be addressed by wild horse management experts. The problem with EPA’s letter is that it does not explain what determination has to do with the criterion in 40 C.F.R. § 154.7(a)(6) or EPA’s obligation to determine whether Special Review is warranted.

⁸ In fact, a review of the administrative record demonstrates that, during the initial registration process, the only “environmental effects” considered by the agency were impacts to wild horses and burros and one of those effects coincided with the intended effect of ZonaStat-H. *See* EPA000055 (EFED Assessment identifying and assessing two environmental impacts: (1) “Reduction in wild horses/burros” and (2) “increased risk of death and morbidity [in wild horses and burros] resulting from allergic responses”).

Instead, the letter reasoned that EPA believed that such harms were best left to wild horse management experts.

Additionally, EPA does not provide support for that interpretation of the scope of “unreasonable adverse risk . . . to the environment” under FIFRA. EPA’s Motion for Summary Judgment merely quotes FIFRA’s definition of environment, which “includes water, air, land, and all plants and man and other animals living therein, and the interrelationships which exist among these[.]” before asserting its position without further analysis. 7 U.S.C. § 136(j); *see also* EPA Mot. Summ. J. at 20. That definition of environment is broad enough to encompass any impacts to wild horses and burros and herds of wild horses and burros.⁹

EPA also argues that, even if the allegations in the Petition fell within the scope of 40 C.F.R. § 154.7(a)(6), the agency “reasonably concluded” that “they nevertheless would not constitute a risk of sufficient magnitude to merit a Special Review.” EPA’s Reply at 8. However, EPA’s letter does not assert that conclusion and does not reference the gravity, magnitude, or significance of the impacts to foals or herd social cohesion. Similarly, EPA asserts that “Plaintiff’s Petition fails to explain how the risks it alleges are so grave that no benefits can offset them” and that, on review, “[p]laintiff does not even attempt to explain how the effects it claims meet [the ‘sufficient magnitude’] threshold” in 40 C.F.R. § 154.7(a)(6). EPA’s Mot. Summ. J. at 21-22. However, EPA’s letter did not point out this alleged deficiency and it is not the kind of deficiency

⁹ EPA argues that an entire wild horse or burro herd is the “target” of ZonaStat-H that and mares are the mechanism through which its population control effect is achieved. EPA’s Mot. Summ. J. at 20, 20 n. 5; EPA’s Reply at 8. This is also a *post hoc* rationalization. EPA’s letter did not suggest that the entire herd is considered the target of ZonaStat-H. Instead, the letter stated that “[t]he target organisms for PZP are the female horses or burros that have the potential to cause harm.” EPA 000034.

that is “self-explanatory.”¹⁰ See 5 U.S.C. § 555(e) (“Except . . . when the denial is self-explanatory, the [agency’s notice of decision] shall be accompanied by a brief statement of the grounds for denial.”). It is not clear that a petition is supposed to provide this explanation, as opposed to alerting EPA to evidence of risks and allowing the agency to do its own analysis.

B. 40 C.F.R. § 154.7(a)(3)

The Court draws a different conclusion regarding EPA’s rejection of the Petition’s reliance on 40 C.F.R. § 154.7(a)(3), the “environmental residues” criterion. Plaintiff alleged that the use of ZonaStat-H can increase mortality rates for foals born to previously treated mares. Plaintiff explained that when ZonaStat-H-treated mares fail to conceive during the normal breeding season, they will continue to engage in reproductive behaviors and, as the effect of the vaccine wares off, those mares may conceive and give birth later in the year, when less forage is available to support

¹⁰ The parties also dispute whether the evidence in the record could support a decision to deny Special Review. See P’s Mot. Summ. J. at 14-20 (arguing that the studies cited in the Petition demonstrate that ZonaStat-H poses unreasonable adverse effects on the environment); Humane Soc’y’s Mot. Summ. J. at 13-14 (arguing that the Petition did not present “new evidence” of unreasonable adverse effects); *id.* at 19-25 (arguing that the studies cited in the Petition did not support plaintiff’s allegations); *id.* at 27-29 (arguing that the benefits of ZonaStat-H outweigh any of the alleged adverse effects). Several of these arguments address grounds which EPA did not articulate in its letter. More importantly, because the Court concludes that EPA did not provide an adequate explanation of the grounds for its decision, the Court need not consider whether the evidence in the record supports that decision and the Court rejects those arguments without further discussion.

At oral argument, plaintiff gave the Court a “demonstrative” chart, which responded to Humane Society’s argument that the Petition failed to present “new evidence” of adverse effects of ZonaStat-H that were not considered during the initial registration process. For each adverse effect alleged in the Petition, the chart compared the evidence analyzed in 2010 to the evidence submitted with the Petition and asserted the key differences between the two. EPA objected to the chart, and the Court gave defendants 10 days to file a response to the chart. EPA and Humane Society both filed responses. (Docket Nos. 76, 77). Because the Court rejects Humane Society’s “new evidence” argument without consideration of its merits, the Court did not rely on plaintiff’s chart in reaching its decision in this case.

the mother and foal. The Petition appears to acknowledge that ZonaStat-H does not produce residues toxic to foals. *See* EPA000015 (“PZP is not directly killing foals conceived post-PZP effectiveness (i.e., it is not poisoning the foal)[.]”). Nevertheless, plaintiff asserted that this criterion was triggered because “residual PZP in the foal’s pre-birth environment (its mother) is the reason for the increased mortality rate.” *Id.*

EPA adequately reasoned that plaintiff’s theory of harm does not fit within the criterion, which concerns toxic and reproductive harms to nontarget organisms. First, as EPA explained, during the initial registration process, the agency found that ZonaStat-H “was not likely to be toxic or pathogenic to either the target animals or nontarget organisms.” EPA000033. EPA observed that the Petition did not contest that finding. *Id.* Instead, EPA noted that the alleged affects to foals were “due to PZP being effective to various degrees in the target mare.” EPA000034. Second, even if foals could be considered “nontarget organisms,”¹¹ EPA’s letter also explained that peer-reviewed research shows that PZP does not affect foal fertility, and plaintiff does not challenge that finding. *Id.*

II. EPA Impermissibly Deferred to Wild Horse Managers but not to Humane Society

As discussed, EPA’s letter rejects plaintiff’s assertion that increased foal mortality and social disruption in herds triggered the “other environmental risks” criterion solely because EPA

¹¹ EPA and the Humane Society both argue that foals are “pests” not “nontarget organisms” because ZonaStat-H is intended to control wild horse populations as a whole. EPA Mot. Sum. J. at 20-21 (asserting that dosed mares “are simply the mechanism by which the pesticide acts to reduce the overall numbers of the herd”); EPA Reply at 8, 8 n. 4; Humane Soc’y’s Reply at 5-6; *see also* 40 C.F.R. § 159.153(b) (defining “non-target organism” as “any organism for which pesticidal control was either not intended or not legally permitted by application of a pesticide”). EPA’s letter does not assert that its decision is based on that interpretation and, EPA’s response to plaintiff’s concerns about foal mortality appears to assume, for the sake of argument, that foals could be considered “nontarget organisms.” EPA stated that “[t]he target organisms for PZP are the female horses or burros that have the potential to cause harm.” EPA000034.

determined that those risks were better addressed by wild horse management experts. To that extent, EPA erred by deferring to those experts' determinations of whether and when to use the pesticide, rather than exercising its own expert discretion to determine whether the risks asserted in the Petition were "risk[s] to humans or to the environment . . . of sufficient magnitude to merit" Special Review under § 154.7(a)(6).

By contrast, there is nothing in the record to support plaintiff's assertion that EPA impermissibly deferred to Humane Society. Plaintiff argues that EPA relied on a letter from Humane Society in denying the Petition. Humane Society sent the letter opposing the Petition in response to EPA's July 2015 email notifying Humane Society of the Petition and asking for information to help with its determination. P's Mot. Summ. J. at 21-24; EPA 000075-76 (EPA's email); EPA000078-80 (Humane Society's response letter). EPA's letter does not reference Humane Society's response or any of the assertions in it.

III. EPA was Not Required to Initiate a Pre-Special Review Process

Finally, plaintiff argues that, because EPA notified Humane Society of the Petition and requested additional information, EPA should have published a notice of its proposed decision in the Federal Register and provided a public comment period. Plaintiff relies on regulations governing the pre-Special Review phase, 40 C.F.R. §§ 154.23 and 154.25. The public process in the pre-Special Review phase is triggered when EPA decides that it "may initiate a Special Review" and provides formal "preliminary notification" to the pesticide registrant. 40 C.F.R. §§ 154.21(a), 154.23.¹² EPA's email to Humane Society does not suggest that EPA had made a

¹² Registrant notification provides a pesticide's registrant a private opportunity to persuade EPA that the criteria have not been met. 40 C.F.R. § 154.21(b). If EPA sides with the registrant after that private process, EPA publishes its proposal not to initiate Special Review in the Federal Register to provide an opportunity for public involvement. 40 C.F.R. § 154.23.

preliminary decision that one or more criteria had been met. Additionally, although the email notified the registrant of the Petition, it does not bear the hallmarks of formal notification. *See* 40 C.F.R. § 154.21(a) (providing that registrant notification must be made by “written notice by certified mail” and must “set[] forth [EPA’s] decision and a general description of the information which supports it”).

IV. EPA’s Decision was Arbitrary and Capricious

In sum, EPA’s denial letter adequately explains why the Petition fails to assert grounds for Special Review under 40 C.F.R. § 154.7(a)(3), but not why the Petition fails to assert grounds under the catch-all criterion in 40 C.F.R. § 154.7(a)(6). That criterion permits EPA to initiate Special Review if a pesticide “[m]ay otherwise pose a risk to humans or to the environment which is of sufficient magnitude to merit” a Special Review. EPA’s letter does not address whether the risks alleged in the Petition are environmental or the magnitude of the risks to foals and herd social cohesion. Instead, the letter appears to explain that EPA’s decision is based on its belief that plaintiff’s concerns could be adequately and more effectively addressed by wild horse management experts, without explaining the connection between this rationale and the “environmental effects” criterion. Additionally, the letter does not provide enough information for the Court to conclude that the agency’s path from its determination that the alleged effects concerned the appropriateness of its use as a contraceptive to its decision to deny the Petition was based on the reasoning that defendants now assert. In other words, the letter itself does not demonstrate that EPA actually evaluated the Petition under the regulatory criterion in 40 C.F.R. § 154.7(a)(6). An agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider” or “entirely failed to consider an important aspect of the problem[.]” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43; *see also id.* (in reviewing an agency’s

explanation for its decision “must consider whether the decision was based on a consideration of the relevant factors” (quotation marks omitted)).

V. Remedy

In its Complaint, plaintiff sought the following relief: (1) a declaration that defendants acted arbitrarily and capriciously, abused their discretion, and otherwise acted in violation of the law; (2) an order directing defendants to reconsider the Petition, conduct a Special Review of PZP, or to conduct proceedings to cancel or reclassify PZP; and (3) an order requiring defendants to suspend registration of PZP during Special Review, cancellation, or reclassification proceedings. Compl. (Docket No. 1) at 14. However, under the APA, when a court determines that an agency’s action, finding, or conclusion was arbitrary and capricious, the court shall “hold unlawful and set aside” the agency’s action. 5 U.S.C. § 706(2). At oral argument, plaintiff conceded that the appropriate remedy for a successful claim under section 706(2) is for the court to vacate the agency’s action and remand the matter to the agency for reconsideration. Tr. 65. This Court agrees. *See e.g. Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121-22 (9th Cir. 2018) (directing the district court to vacate an agency’s decision and remand to the agency for further proceedings, noting that “*vacatur* of an unlawful agency action normally accompanies a remand”).

RECOMMENDATIONS

For these reasons, the Court should conclude that EPA’s decision not to initiate Special Review for ZonaStat-H was arbitrary and capricious. The Court should DENY defendant and defendant-intervenor’s Motions for Summary Judgment (Docket Nos. 42, 43, 52), GRANT plaintiff’s Motion for Summary Judgment (Docket No. 41), and vacate and remand the decision to EPA for further proceedings consistent with this F&R.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due November 7, 2019. If objections are filed, a response to the objections is due fourteen days after the date the objections are filed and the review of the Findings and Recommendations will go under advisement on that date.

IT IS SO ORDERED.

DATED this 24th day of October, 2019.

/s/ Patricia Sullivan
PATRICIA SULLIVAN
United States Magistrate Judge