

## EPA, Industry Seek To Narrow Claims In Novel ESA Enforcement Case

EPA and industry groups are seeking to further narrow environmentalists' novel efforts to block the agency's approval of several pesticides until officials put in place permanent measures to protect endangered salmon, urging a judge to follow a recent ruling in another case that required plaintiffs' to clearly specify Endangered Species Act (ESA) claims.

Lawyers for the defendants in the case, Northwest Coalition for Alternatives to Pesticides (NCAP) et. al, vs. EPA and CropLife America, et al., are asking a judge in the U.S. District Court for the Western District of Washington to follow an April ruling in the so-called ESA "mega" suit, where a federal judge in the Northern District of California dismissed that case due to lack of specificity, and required environmentalists to refile their complaint.

CropLife America is now using that argument in an Oct. 31 motion that seeks to dismiss two of three claims in the

potentially precedent-setting case where environmentalists are seeking to require EPA to implement federal wildlife officials' recommendations to protect endangered species from certain pesticides and also to consult with wildlife officials on how to protect species from several other pesticides.

And EPA lawyers in a Nov. 18 brief urged the court to dismiss one of the environmentalists' three claims.

The defendants' claims in the enforcement suit appear to have been bolstered after the agency successfully urged the judge hearing the mega suit, Center for Biological Diversity (CBD), et al. v. EPA, et. al, to require plaintiffs to provide even more specificity.

In a Nov. 25 order, Judge Joseph Spero of the Northern District of California granted in part and denied in part EPA's motion for plaintiffs to file a more definitive statement in the mega suit. Spero ordered CBD to "provide an exhaustive list of every affirmative act that

triggered the duty to consult" but did not require the plaintiffs to provide further information for certain claims that allege the agency has failed to re-initiate consultations on certain pesticide ingredients that were the subject of past assessments.

EPA is required under section 7 of the ESA to consult with the National Marine Fisheries Service (NMFS) and the Fish & Wildlife Service -- collectively known as the services -- to determine whether an agency action, such as a pesticide registration, could cause jeopardy to an endangered or threatened species. If the services determine that there is the potential for jeopardy, they will craft a biological opinion (BiOp) laying out reasonable and prudent alternatives (RPAs) that EPA must implement to better protect the species.

But for years, EPA and the services have struggled to complete the ESA consultations regarding registration decisions issued under the Federal Insecticide, Fungicide

and Rodenticide Act (FIFRA). Environmentalists have filed numerous lawsuits to force federal officials to consult and, in this case, to compel EPA to take action to protect species after consultations have been completed.

### **Environmentalists' Lawsuits**

Although the NCAP case is one of several suits environmentalists have filed to force ESA consultations, it also includes the novel step of aiming to force EPA to implement wildlife officials' recommendations from two completed BiOps to protect species.

But since the suit was filed, EPA and the services have also agreed on a new approach for streamlining ESA consultations for new or renewed registration. Earlier this month, they issued a paper outlining interim steps that respond to an April 30 National Academy of Sciences report urging federal officials follow a common risk assessment process that considers statutory obligations under both ESA and FIFRA, a balance which has hampered past federal efforts to protect species.

NCAP and other groups filed the suit against EPA in November 2010 to force the

agency to implement RPAs to better protect salmon from three organophosphate (OP) pesticides and three carbamate pesticides as laid out by NMFS in two BiOps. The BiOps stemmed from prior suits that forced EPA to consult on the pesticides, and at the time the suit was filed had been completed for more than a year. The OP assessment was completed in November 2008, and the carbamate assessment was released in April 2009.

Industry and EPA in the past have both sought to dismiss the case, which was cast in doubt after the U.S. Court of Appeals for the 4th Circuit in a February ruling in *Dow AgroSciences, et al. v. NMFS et al.* vacated the OP BiOp. As a result, environmentalists this summer filed a supplemental complaint, arguing that recent advice from federal science advisors shows that conclusions from wildlife officials that EPA's approval of the OP pesticides are causing harm to listed salmon species are sound despite the rejection of the assessment by an appellate court.

EPA in its Nov. 18 brief in the case argued that ESA claims must identify the specific agency action that requires consultation under section 7 rather than pointing to the agency's broad discretion to

regulate existing pesticide registrations.

In addition to urging the court to dismiss NCAP's section 7 claim for lack of specificity, CropLife in its Oct. 31 motion also urges the court to dismiss environmentalists' claim that section 9 of ESA precludes the take of endangered species. CropLife argues the claim is an inappropriate and time-barred challenge to EPA's authority to register pesticides under the FIFRA.

### **CropLife's Motion**

The CropLife motion to dismiss does not address in detail the second of NCAP's three claims -- that EPA's failure to implement NMFS' 2009 BiOp -- is a violation of the ESA. Instead, CropLife says the claim is without merit, and that the industry group reserves the right to challenge environmentalists' second claim at an appropriate stage in the case. The NMFS BiOp concluded that EPA's continued authorization of uses of three carbamate pesticides--carbaryl, carbofuran and methomyl jeopardizes numerous species of endangered salmon.

Instead, CropLife focuses on environmentalists' first claim under ESA section 7, which alleges EPA failed to complete

consultation on the BiOp for the OP pesticides, and the section 9 claim that EPA's continued authorization of all six pesticides violates ESA by causing take of fish.

In the Oct. 31 motion, CropLife says recent court rulings show EPA's ongoing control over pesticide registrations is not sufficient grounds for claims to compel ESA consultation, and that even if it were, EPA has already initiated and completed consultation with the services on the three OP pesticides in accordance with a prior court's order.

CropLife also argues that the court lacks jurisdiction over environmentalists' "sweepingly broad" section 9 claim for both classes of pesticides alleging take of species, because FIFRA governs EPA decisions to register pesticides and the statute of limitations to challenge the registrations of the pesticides at issue in the case passed several years ago.

In a Nov. 18 motion, environmentalists defend their two claims by arguing that EPA's authorization of the three OP pesticides is an ongoing agency action that triggers ESA consultation, and recent court decisions do not alter that analysis. Environmentalists

also dispute CropLife's assertion that EPA and the services have completed ESA consultation for the three OP pesticides, arguing that after the 4th Circuit vacated that BiOp, EPA cannot be sure its continued authorization of the pesticides will not harm species.

As for the section 9 ESA claim, NCAP says that provision of ESA offers broad authority to protect endangered species by prohibiting anyone, including federal agencies from "taking" listed species.