



Is the ESA Train Wreck in Sight?

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What's Coming Down the Road

- *CBD v. Pirzadeh*, filed in Seattle, December 7, 2009, assigned to Judge Coughenour (“Polar Bear”)
- January 27, 2010 CBD Notice Letter (“Megacase”)
- Consent Decree in *CBD v. EPA* (Goby 11)
- *DAS, MANA and Cheminova v. EPA* (4th Circuit) – Challenge to BiOp
- Motions to dismiss in product-specific CA cases, after 9th Circuit decision in *UFW v. EPA* (azinphos methyl)
- *DAS, MANA, Cheminova* Petition for Rulemaking Re: County Bulletins – filed January 19, 2010

But First, Some Background . . .

Key Statutory Provision: ESA §7(a)(2)

- “Each Federal Agency shall, in consultation with assistance of the Secretary, *insure* that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence or any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.

Consultation to Result In:

- Biological Opinion (“BiOp”)
- If “jeopardy” or “adverse modification” found, suggest “reasonable and prudent alternatives” (“RPAs”)
- If RPAs offered, an incidental take statement that specifies “reasonable and prudent measures” (“RPMs”)

Importance of Incidental Take Statement

- ESA Section 9 makes it unlawful to “take” endangered species
- “Take” means everything from killing to harassing and pursuing, or attempting to harass or pursue
- EPA and EPA employees face “take” liability, as do others
- Civil and criminal penalties, plus private actions for injunctive relief

An Important Distinction Between RPAs and RPMs

- Instituting RPAs is EPA's responsibility, and it can decline to do so
- RPMs protect both EPA and private parties – pesticide applicators, maybe others

History of the C-D-M BiOp

- July, 2002: EPA ordered to do NW salmonid consultation (*Washington Toxics Coalition* case)
- July 30, 2008: NMFS enters into a settlement agreement with BiOp production schedule
- July 31, 2008: NMFS makes draft BiOp available to EPA and registrants
- November 18, 2008: NMFS releases final BiOp
- April, 2009: DAS, MANA and Cheminova file District Court suit against NMFS
- July 29, 2009: District Court dismisses suit; both appeal and Petition for Review filed in August in Court of Appeals (4th Circuit)
- September 10, 2009: EPA informs NMFS that EPA will comply with most of RPA's
- December 2009-January 2010 – EPA provides registrants with draft County Bulletins
- January 19, 2010 – Registrants petition EPA for procedures
- March, 2010 – EPA to publish County Bulletins, ask registrants to amend labels

What's Next in the C-D-M BiOp?

- Registrant's response to forthcoming EPA letters
- If at least one registrant declines to make some amendments, most likely EPA initiates cancellation proceedings
 - Notice to USDA & SAP
 - Eventually, maybe even referral to NAS panel
- EPA could try notice of suspension, misbranding case
- EPA may publish pending Petition for rulemaking
- Activists could bring "taking" case

What About Goby 11, Polar Bear and the CA Product Specific cases?

- CLA has intervened in Goby 11 and is seeking hearing on “interim measures” consent decree
- CLA has filed petition to intervene in Polar Bear, but has not filed motion to dismiss
- DAS has moved to dismiss chlorpyrifos case, others remain stayed – UFW has said it will seek reconsideration of *UFW v. EPA* (due by 3/12)

What about the 111th Congress?

- Ag groups are furious about procedures and substantive limitations
- Pressure on endangered Dems in House to hold oversight hearings
- Pressure on CA and Pacific NW Senators to speak up with EPA
- Legislative fix unlikely, but best chance is narrow focus on ag issues – *e.g.*, Section 1010 (1988)



Questions?

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