



The Train Wreck is Here

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What I'll be reviewing

- The key statutory provision
- The implication of that provision and implementing regulations
- Differences in the worldviews of the Services and EPA, and their implications for CPDA members
- The major pending litigations

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

The Key Differences Between EPA and the Services

- EPA respects studies that have been done by registrants
- EPA focuses on active ingredients
- EPA recognizes real-world practices
- EPA will only rely on models that have been rigorously reviewed
- Services distrust registrant work, prefer “peer reviewed” literature, even “gray literature”
- Services believe they must study constituents of every formulation
- Services think they should analyze any use not forbidden
- Services are very creative in modeling

The 2004 Counterpart Regulations Were To Make Consultations Workable

- Services adopted general regulations governing consultations in 1986
- “Counterpart Regulations” developed in Bush Administration to give EPA more authority, while retaining Services supervision
- Portions of rules ruled unlawful in August, 2006, but Section 402.46 survived. This section allows EPA to
 - Make an “effects determination”
 - Make jeopardy, ITS, RPA and RPM judgments
 - But all subject to Service review
 - Regulation unclear about what happens if Service doesn’t respond within time deadlines
- But EPA has been reluctant to exercise its authority

Lawsuit 1: Salmonids in CA/Pac NW (Washington Toxics)

- July, 2002: District Court rules against EPA
- 2002-2004: EPA sends consultation requests to NMFS
- January, 2004: Buffer zones ordered by District Court
- November, 2004: NCAP sues NMFS to respond to EPA
- July, 2005: EPA enters into schedule to complete BiOps
- August, 2006: First (OP) BiOp draft (OPs) released
- November, 2006: Final OP BiOp released with RPAs and RPMs
- April, 2007: Registrants sue NMFS; after suit dismissed, appeal to 4th Circuit Court of Appeals (Richmond)
- October, 2010: Argument before 4th Circuit
- November, 2010: FNCAP sues EPA to act on first and second (carbamate) BiOps Red Legged Frog in CA
- February, 2011: EPA moves to dismiss or move case to DC
- March-April, 2011: more BiOps expected

Bottom Line on Salmonid BiOps

- Decision in 4th Circuit Case (OP BiOp) soon
 - Could find BiOp unlawful, vacate
 - Could find BiOp unlawful, return to District Court
 - Could uphold BiOp
- Another raft of draft BiOps for “comment” in March
 - Little NMFS attention to comments likely
- *Reckitt Benckiser* decision (Jan. 28) means EPA’s choices after receipt of final BiOps are do nothing or initiate cancellation or suspension
 - “Do nothing” requires EPA explanation
 - Cancellation requires advance notice to USDA, SAP
- No court decision mandating EPA responses to BiOps before summer (if ever)

Lawsuit 2: Red-Legged Frog in CA

- April, 2002: CBD sues EPA
- October, 2006: Settlement Agreement
- 2007-2008: EPA sends requests to FWS, invoking *part* of Counterpart Rules (Section 402.46)
- January, 2009: FWS tells EPA that “the volume and complexity of EPA’s section 7 consultation requests on pesticide registrations exceed our capability to complete consultations within normal statutory timelines”
- July, 2009: EPA reminds FWS that EPA is using Counterpart Regulations
- December 15, 2010: CBD files “60 day notice letter” challenging FWS inaction

Megasuit: Hundreds of products, 300+ Species, all Over the Country

- January, March and May, 2010: CBD and PANNA filed notice letters with EPA
- April, 2010: CLA and registrants filed notice letter with EPA
- January 19, 2011: CBD and PANNA file suit in San Francisco, challenging EPA failure to consult with regard to impacts of registrations containing about 330 pesticide active ingredients on 214 species across the USA

What Does All This Mean?

- The train wreck is here
- Chair of House Natural Resources Committee, Doc Hastings, is from Washington State – and has put the ESA-FIFRA issue at the top of his Committee’s list of concerns
- Other Congressmen and Senators also beginning to understand impact
- RLF case implicates use of Counterpart Rules
- Megacase could set EPA’s agenda for years



Questions?

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