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NEWSLETTER

# Activists Take Another Run at "Authorization of Continued Use" as a Consultation Trigger

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In a Supplemental Complaint filed last week in *NCAP v. EPA* (W.D. Wash., Civ. No. 10-01919-TSZ), activists seeking to use the Endangered Species Act (ESA) to frustrate the U.S. Environmental Protection Agency's (EPA) registration of pesticides have taken another run at the theory that the supervision of pesticide registrations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) triggers an ongoing EPA and ESA consultation obligation.

The issue has arisen repeatedly over the last decade, as pesticide-related ESA suits have proliferated. In 2004's landmark *Washington Toxics Coalition v. EPA* decision, 413 F.2d 1024 (9th Cir. 2005), the appeals court affirmed a district court injunction that compelled EPA to initiate consultations over the potential effects on salmonids of several dozen pesticides. But that panel never addressed the question "just what action was EPA supposed to consult about?" Subsequent decisions have focused on that question, culminating most recently in the holding by U.S. Magistrate Judge Spero in San Francisco that the Ninth Circuit's *en banc* 2012 decision in *Karuk Tribe of California v. USFS, 681 F.3d 1006* (9th Cir. 2012) controls. Judge Spero's decision came in the so-called pesticide "mega-case," *Center for Biological Diversity v. EPA,* 2013 U.S. Dist. LEXIS 57436 * (April 22, 2013).

*Karuk*'s key holding was that an "agency action" triggering consultation obligations only occurs when "a federal agency affirmatively authorized, funded or carried out the underlying activity" and has discretion to "influence or change the activity for the benefit of a protected species." When combined with an earlier Ninth Circuit holding–that challenges to many FIFRA registration actions must be filed in a court of appeals within 60 days of the challenged decision

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(*UFW v. EPA*, 592 F.3d 1080 (9th Cir. 2010))–*Karuk* creates a roadblock to many future efforts to tie the FIFRA registration program into ESA-based knots.

Enter the new Supplemental Complaint in the *NCAP* suit. That litigation initially challenged EPA's failure to act in response to two biological opinions issued in 2008 and 2009. But in February 2012, the Fourth Circuit found one of those biological opinions arbitrary and capricious and vacated it. *DowAgroSciences v. NMFS*, 707 F.3d 462 (4th Cir. 20120). The new Supplemental Complaint comes six months after District Judge Zilly put the *NCAP* litigation on hold while the plaintiffs considered the implications of that decision.

In the new Supplemental Complaint, the *NCAP* plaintiffs continue to press both failure-to-consult and taking claims as to the chemicals addressed in both of the two biops on which their original complaint focused–not only one not directly at issue in the Fourth Circuit decision, but also the now-vacated one. And they seek an order setting aside the registrations of all the products involved unless EPA includes "protections necessary to avoid harm to listed salmonids." The Supplemental Complaint references the 2004 *Washington Toxics* decision in support of its allegations, but does not mention *Karuk Tribe* or *NCAP*.

Under a stipulated briefing schedule, both the defendants and intervening pesticide registrants have until mid-October to file motions to dismiss the Supplemental Complaint, with argument to be heard on early November. It is a good bet that one of the issues which Judge Zilly will be asked to address is the correctness of Judge Spero's conclusions about the binding effect of the *Karuk Tribe* decision.