THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON TOXICS COALITION, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES, Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, and MIKE LEAVITT, ADMINISTRATOR, Defendants, v. CROPLIFE AMERICA, et al., Intervenor-Defendants.	Case No. C01-0132C WASHINGTON STATE POTATO COMMISSION'S AND WASHINGTON FARM BUREAU'S OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY JULY 2, 2002 ORDER (Docket # 316) NOTE ON MOTION CALENDAR: FRIDAY, MARCH 25, 2005

INTRODUCTION

On February 4, 2005, Plaintiffs Washington Toxics Coalition et al. filed a motion (Dkt No. 316) asking the Court to revisit its July 2, 2002 Order establishing a schedule for the

VAN NESS FELDMAN, P.C.
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
(206) 623-9372 Telephone
(206) 623-4986 Facsimile

Environmental Protection Agency ("EPA") to make effects determinations and to consult, as appropriate, with NOAA-Fisheries in connection with the effects of pesticides containing any of the 55 active ingredients on listed salmon and steelhead.

Intervenor-Defendants Washington State Potato Commission and Washington State Farm Bureau (collectively referred to as "WSPC") respectfully request that the Court deny Plaintiffs' motion because the motion both lacks merit and is not timely. WSPC joins in and incorporates by reference the arguments made by the Federal Defendants and Intervenor-Defendants Croplife America, *et al.* in their opposition filings to Plaintiffs' motion. Additionally, WSPC provides the following additional argument.

ARGUMENT

The Plaintiffs are inappropriately requesting that the Court review the substance of EPA's effects determinations. The granting of such a request would both dramatically expand the scope of this litigation and inappropriately interfere with the agencies' ongoing ESA Section 7 consultations. As the Plaintiffs rightly acknowledge, since 2002, in accordance with the Court-order schedule, EPA has made three types of effects determinations for these pesticides: (1) a "no effect" determination; (2) a "may affect" determination; and (3) a "not likely to adversely affect" determination.

With respect to the "no effect" determinations, by requesting that the Court order EPA redo these determinations, Plaintiffs essentially are requesting that this Court set aside EPA's "no effect" determinations without reviewing the merits of those determinations. Plaintiffs' request completely ignores fundamental principles of administrative law. Plaintiffs may obviously challenge such agency actions in a separate lawsuit if they are so inclined, subject to the jurisdictional limitations and constraints of the Endangered Species Act and the Administrative

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Procedures Act.[1] Absent a successful challenge to these determinations, these EPA's determinations are presumed lawful. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (agency action entitled to presumption of regularity).[2]

With respect to the "may affect" and "not likely to adversely affect" determinations, those determinations have triggered Section 7 consultations (either formal or informal), which are still ongoing and are currently not ripe for judicial review. Until those consultations are completed, those initial determinations remain under those agencies' primary jurisdiction. The federal agencies are engaged in a meaningful and thorough analysis of the impacts of these registrations on listed salmon and steelhead (as the exhibits to Plaintiffs' motion reveal and Federal Defendants explain in their opposition filing). The WSPC respectfully submits that this Court should refrain from interjecting itself into the ongoing section 7 consultations for these pesticides. *See, e.g., Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373, 2381 (2004) (guiding principle behind the APA is to "protect agencies from undue judicial interference with their lawful discretion").

As such, WSPC respectfully requests that the Court deny Plaintiffs' motion.

VAN NESS FELDMAN, PC

By _____

Matthew A. Love, WSBA #25281
Van Ness Feldman, PC
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
Attorney for Intervenor-Defendant WSPC

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[1] Plaintiffs appear to recognize this point as demonstrated by their 60-day notice of intent to sue challenging EPA's effects determination. *See* 5 Goldman Ex. 1.

[2] Contrary to Plaintiffs assertions, the EPA has not acknowledged that these determinations are inadequate. Letter from Wayne D. Hettenbach to Patti Goldman (Dec. 13, 2004) (copy at Goldman Declaration, Exhibit 5).

VAN NESS FELDMAN, P.C.
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
(206) 623-9372 Telephone
(206) 623-4986 Facsimile

/s/ Karen Budd- Falen
Karen Budd-Falen
karen@buddfalen.com
Hertha L. Lund
Hertha@buddfalen.com
(307) 632-5105 – Telephone
(307) 637-3891 – Facsimile
Attorneys for Defendant-Intervenors
Washington Farm Bureau, et al.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date set out below, I caused a true copy of the following documents to be served on all parties' counsel of record in the manner indicated on the attached service list:

DATED this 14 day of March 2005, at Seattle, Washington.

Matthew A. Love, WSBA #25281

VAN NESS FELDMAN, P.C.
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
(206) 623-9372 Telephone
(206) 623-4986 Facsimile

Service List

Laurie Kathryn Beale lkbeale@stoel.com, sea_docket@stoel.com

Karen Jean Budd-Falen karen@buddfalen.com, main@buddfalen.com

Terrence Lee Fredrickson tfredrickson@lfdlaw.com

Richard S. Gleason rsgleason@stoel.com, docketclerk@stoel.com;jfaber@stoel.com

Patti A. Goldman pgoldman@earthjustice.org, chamberorg@earthjustice.org

Wayne D. Hettenbach wayne.hettenbach@usdoj.gov

Brian C. Kipnis Brian.Kipnis@usdoj.gov, Christine.leininger@usdoj.gov;civ.USA-WAW-ECF@usdoj.gov

J. Michael Klise Jmklise@crowell.com

John James Leavy jjleary@lfdlaw.com

Kimberly M. McCormick Kimberly.mccormick@lw.com

Joseph P. Mentor mentor@mentorlaw.com, symms@mentorlaw.com

Steward N. Mesher meshers@howrey.com

Cherise M. Oram cmoram@stoel.com, SEA_Docket@stoel.com

Steven P. Quarles squarles@crowell.com

James A. Tupper tupper@mentorlaw.com, symms@mentorlaw.com

Amy C. Williams-Derry awilliams-derry@earthjustice.org, chamborg@earthjustice.org

Janice M. Schneider Janice.Schneider@LW.com

VAN NESS FELDMAN, P.C.
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
(206) 623-9372 Telephone
(206) 623-4986 Facsimile