



## MEMORANDUM

### Via E-Mail

DATE: January 30, 2004

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: Proposed Regulations to Improve the ESA Consultation Process

Today the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) issued proposed regulations to establish a formal, comprehensive multi-agency review process to ensure that pest and rodent control products approved by the U.S. Environmental Protection Agency (EPA) do not jeopardize threatened and endangered species. 69 Fed. Reg. 4465. The regulations were developed following a comprehensive scientific review of EPA's risk assessment methodology. The improved review procedures, developed in cooperation with EPA and the U.S. Department of Agriculture, are intended to provide a workable and efficient framework to ensure necessary measures are taken to protect wildlife, while making sure that farmers have the pest-control products they need to grow food and consumers can continue to use many common household products such as disinfectants and weed killers. Comments on the proposed regulations are due by **March 30, 2004**.

Under the Endangered Species Act (ESA), EPA must consult with the Services to ensure that registration of products under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is not likely to jeopardize the continued existence of federally-listed threatened or endangered species or result in the destruction or adverse modification of critical habitat. Because the agencies lacked an effective process for conducting consultations to examine the effects of pest-control products, there were almost no consultations completed in the past decade. The lack of an effective review program inspired a spate of litigation by environmental groups, which is still ongoing. Recent court decisions have cited the lack of consultations in limiting the use of essential agricultural pest-control products, and on January 22, 2004, the United States District Court for the Western District of Washington restricted the use of certain agricultural pesticides in Washington, Oregon, and California, with the greatest impact on growers of vegetables and tree fruits, such as apples, cherries, and pears. *Washington Toxics Coalition v. EPA*, No. C01-0132C.



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Under current law, EPA routinely evaluates the broad impact of pest-control products on the environment, including the effects on endangered species and other non-target organisms. For the past year, scientists and regulators within the Services have conducted an extensive review of EPA's approach to ecological risk assessment and have offered recommendations that EPA has incorporated as appropriate. Based on this scientific review, the agencies concluded that EPA's approach to risk assessment will produce determinations that reliably assess the effects of these products on listed species and critical habitat.

Public comment is requested on the following proposals:

- Based on EPA's extensive scientific review under FIFRA, the Services would authorize it to make determinations that products are "not likely to adversely affect" a threatened or endangered species without concurrence or informal consultation. A memorandum of understanding among the agencies would govern the processes used by EPA, and the wildlife agencies would perform periodic reviews of these determinations.
- When formal consultation is required, EPA could use a new procedure that would take advantage of its extensive review of the potential effects on listed species. Under one option within the new procedure, EPA would directly involve the Services in the preparation of this effects analysis. When EPA formally submits the results of its analysis to the Services, the two fish and wildlife agencies would have the option of adopting EPA's conclusions concerning appropriate measures to reduce risk to listed species. As required by law, the Services would make the final determination whether threatened or endangered species are jeopardized and what measures may be necessary to prevent jeopardy to species.

The proposed regulations also allow for "partial" biological opinions that would address effects to specific groupings of species affected by a pest-control product. While these would not represent final Service opinions, they would start the process for evaluating the impact of pesticides on listed species and provide EPA with Service evaluations that could be used by EPA in assessing activities under FIFRA.

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We hope this information is helpful. As always, please call if you have any questions.