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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

|                                 |   |
|---------------------------------|---|
| _____                           | ) |
| WASHINGTON TOXICS COALITION, et | ) |
| al.,                            | ) |
|                                 | ) |
| Plaintiffs,                     | ) |
|                                 | ) |
| v.                              | ) |
|                                 | ) |
| ENVIRONMENTAL PROTECTION        | ) |
| AGENCY, et al.,                 | ) |
|                                 | ) |
| Defendants,                     | ) |
|                                 | ) |
| and                             | ) |
|                                 | ) |
| CROPLIFE AMERICA, et al.,       | ) |
|                                 | ) |
| Intervenor-Defendants           | ) |
| _____                           | ) |

NO. C01-0132C  
  
INTERVENOR-  
DEFENDANTS' MOTION  
FOR STAY PENDING  
APPEAL  
  
Note on Motion Calendar:  
Friday, April 2, 2004

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1 Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Rule 8(a)(1)(C) of the  
2 Federal Rules of Appellate Procedure, and Local CR 7(d)(3), Intervenor-Defendants CropLife  
3 America, et al. (“Intervenors”) hereby move the Court for a stay pending appeal of its January  
4 22, 2004 order (“2004 Injunction”) granting further injunctive relief in this action. The 2004  
5 Injunction enjoins, vacates, and sets aside the Federal Insecticide, Fungicide and Rodenticide  
6 Act (“FIFRA”)-registered uses of up to 54 pesticide active ingredients within defined buffer  
7 zones around “Salmon Supporting Waters.” It also requires point of sale warnings and other  
8 measures for certain pesticide ingredients in urban areas.

9 As explained below, the Court has exceeded its jurisdiction, not only in entertaining  
10 plaintiffs’ claims to begin with, but also in ordering unlawful and unjustified injunctive relief –  
11 even to the point of ordering mandatory relief against Intervenor who not only have not been  
12 found to be in violation of any law, but who have not even been *alleged* to be in violation.  
13 Usurping agency authority and reweighing the congressional balancing of interests enacted into  
14 the FIFRA and Endangered Species Act (“ESA”) statutory schemes, the Court has improperly  
15 substituted its judgment for that of the authorized Legislative and expert Executive Branch  
16 officials in issuing sweeping injunctive mandates that will wreak havoc on small farmers and  
17 other innocent third parties whose livelihoods depend on the pesticide products in question.  
18 Numerous others will be irreparably injured as well, such as the farmworkers whose jobs will  
19 be lost, the local governments whose property tax base will be diminished, and the State and  
20 local agencies responsible for noxious weed control, highway maintenance and watershed  
21 restoration whose missions will be frustrated.

22 Given the at best questionable legal bases for the Court’s orders, and the extraordinarily  
23 complex and scientifically uncertain technical regulatory scheme into which the Court has  
24 ventured with its orders, equity demands that the consequent infliction of so much harm on so  
25 many people be at least stayed until the court of appeals has had an opportunity to consider the  
26 propriety of those orders. At a minimum this Court should stay the 2004 Injunction in the

1 interim until the court of appeals has had a chance to consider for itself whether the stay should  
2 be extended until the resolution of this appeal.

3 **ARGUMENT**

4 To obtain a stay of an injunction pending appeal, a moving party must show either “(1) a  
5 combination of probable success on the merits and the possibility of irreparable injury or  
6 (2) that serious questions are raised and the balance of hardships tips sharply” in favor of the  
7 party subject to the injunction. *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir.  
8 1988) (quoting *Los Angeles Mem. Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197,  
9 1201 (9th Cir. 1980)). Intervenors readily satisfy either standard here.

10 **I. INTERVENORS AND DEFENDANTS HAVE RAISED SERIOUS QUESTIONS  
11 AND ARE LIKELY TO PREVAIL ON THE MERITS. THE 2004 INJUNCTION  
12 IS EXCESSIVE AND IS LIKELY TO BE REVERSED ON APPEAL**

13 The most important factor in assessing a stay of the 2004 Injunction is whether it is  
14 likely to be reversed on appeal – whether there are serious questions the Injunction was issued  
15 in error. *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-  
16 45 (D.C. Cir. 1977). The Injunction is very likely to be reversed on at least one of the following  
17 grounds.

18 **A. Jurisdiction Is Lacking Over This Suit**

19 This Court’s underlying jurisdictional holding that “the APA [Administrative Procedure  
20 Act, 5 U.S.C. §§ 701-06], including its peculiar doctrines, does not govern plaintiffs’ claims”  
21 (July 2002 Order at 5) is reversible error. “Judicial review of administrative decisions  
22 involving ESA is governed by section 706 of the APA.” *Arizona Cattle Growers’ Ass’n v. U.S.  
23 Fish and Wildlife*, 273 F.3d 1229, 1235 (9th Cir. 2001).<sup>1</sup> This fundamental error infected the

24 <sup>1</sup> The APA applies to all federal agency actions except to the extent the APA has been “expressly”  
25 superseded. 5 U.S.C. § 559; *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Since the ESA citizen suit provision  
26 (16 U.S.C. § 1540(g)) does not describe the standards or a mode of review for federal ESA actions, normal APA  
principles apply to ESA suits against federal agencies. *E.g., Water Keeper Alliance v. U.S. Dep’t of Defense*, 271  
F.3d 21, 31 (1st Cir. 2001); *Cabinet Mts. Wilderness v. Peterson*, 685 F.2d 678, 685-86 (D.C. Cir. 1982).

1 entire review process.

2 The APA waives the government's immunity from suit only for an "identifiable... 'final  
3 agency action'" specifically named by the plaintiff. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S.  
4 871, 882, 890, 894 (1990); see 5 U.S.C. §§ 702, 704. Plaintiffs bear the burden of proving that  
5 a justiciable controversy exists before an injunction can issue. *Steel Co. v. Citizens for a Better*  
6 *Env't*, 523 U.S. 83, 94-95 (1998); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377  
7 (1994).

8 Neither the Complaint nor this Court's orders identify: (1) the affirmative final agency  
9 actions allegedly reviewable under 5 U.S.C. § 706(2); or (2) when and why EPA's alleged lack  
10 of "effects determinations" became actions "unreasonably delayed" for § 706(1) review  
11 purposes.<sup>2</sup> For example, Plaintiffs do not identify what documents before EPA on what date  
12 regarding pesticide impacts on salmon allegedly provided EPA with sufficient information on a  
13 specific pesticide's effects on listed salmon that it was arbitrary for EPA not to make a "may  
14 effect" determination and initiate ESA § 7 consultation under 50 C.F.R. § 402.14 or 402.16.  
15 Because the APA applies, these are the key issues, as reflected in Judge White's analysis in a  
16 similar pending case alleging ESA § 7 consultation delays on the effects of pesticides on the  
17 red-legged frog.<sup>3</sup> Thus, it was improper to engage in broad review of unidentified "ongoing  
18

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19 <sup>2</sup> The July 2002 Order (at 8-9 and 11) and 2004 Injunction (at 2) review "ongoing actions" on "54 active  
20 ingredients," and maintain that "each pesticide registration constitutes an ongoing agency action" for ESA and  
21 judicial review purposes. The effect was to grant Plaintiffs the generalized judicial review of an agency's "day-to-  
22 day operations" prohibited by *Lujan v. NWF*, 497 U.S. at 891-94, 899. Cases alleging an unreasonable delay in  
23 action under § 706(1) are subject to the same constraints on identifying what made the action unlawfully delayed  
24 and against programmatic review under the United States' interpretation of the APA. The Supreme Court found  
25 this position to be meritorious enough to grant review in a case which will be decided this Term. See Brief for the  
26 Petitioners in *Norton v. S. Utah Wilderness Alliance*, No. 03-101 (filed Jan. 5, 2004) (available at  
<http://www.abanet.org/publiced/preview/briefs/home.html>). The 2004 Injunction should be stayed because it  
hinges on a broad judicial oversight role that is contrary to the APA, as the Supreme Court may again confirm.

<sup>3</sup> Without record information on the timing of FIFRA actions and ESA listings and what EPA knows about  
impacts on salmon and when it knew it, a court cannot decide whether ESA § 7 procedures were "unreasonably  
delayed" (5 U.S.C. § 706(1)) to the point there has been an APA violation that can be subjected to an injunction:

(footnote continued...)

