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FWS, NMFS Sued For ESA Consultation Delays

By **Jesse Greenspan**

Law360, New York (August 03, 2010) -- A water restoration advocacy group has sued two federal agencies, saying they are unlawfully withholding or unreasonably delaying completion of an Endangered Species Act consultation on Oregon's water quality standards for toxic pollutants.

Northwest Environmental Advocates lodged its complaint Monday with the U.S. District Court for the District of Oregon, alleging that the National Marine Fisheries Service and the U.S. Fish and Wildlife Service initiated a formal consultation in January 2008, but that they haven't completed it or issued a biological opinion.

That consultation and opinion are needed before the U.S. Environmental Protection Agency can approve or disapprove of Oregon's revised water quality standards for toxic pollutants for the protection of aquatic life, according to the complaint.

"By failing to complete consultation on Oregon's water quality standards submission to EPA, defendants are failing to ensure that Oregon's water quality standards protect the beneficial uses of Oregon's waters, including threatened and endangered species," the complaint said.

The dispute goes back to July 2004, when Oregon submitted its revised water quality standards for toxic pollutants to the EPA.

When the EPA did not take action to either approve or disapprove Oregon's submission, the Northwest Environmental Advocates filed a lawsuit in 2006. Eventually, pursuant to a consent decree, EPA agreed to take final action by Sept. 1, 2010.

But the EPA recently pointed out it could not take final action without an Endangered Species Act consultation from the NMFS, an agency within the U.S. Department of Commerce's National Oceanic and Atmospheric Administration, and the FWS, an agency

within U.S. Department of the Interior.

As a result, the environmental group brought its second lawsuit Monday to try to move the matter along.

"Those expert agencies have been dragging their feet in completing this consultation," said Allison M. LaPlante, a clinical professor and staff attorney for the Pacific Environmental Advocacy Center who is representing the plaintiff in the case. "We don't know whether the standards are protective enough, and in the view of Northwest Environmental Advocates, they're not."

If the two agencies tell the EPA the standards are not protective enough, then the EPA can promulgate new standards for Oregon or tell Oregon what it needs to do to fix the standards, according to LaPlante.

And if the two agencies agree with the EPA, then a potential lawsuit could be coming, she added.

"We have already been in settlement discussions with the expert agencies, and we have been since before we filed the complaint," LaPlante said.

The toxic pollutants in question, including copper and tributyltin, can build up in the fatty tissues and organs of fish and other animals and can cause reproductive and behavioral problems, said Nina Bell, executive director of Northwest Environmental Advocates.

"There are a whole host of sublethal effects," Bell said.

In fact, there are even examples where male animals behave like females or switch sexes altogether as a result of chemicals, she added.

A representative for NOAA declined to comment on the merits of the case, and a representative for FWS could not immediately be reached for comment Tuesday.

Some of the federally protected aquatic animals being examined in Oregon include multiple species of salmon, multiple species of whales, steelhead, vernal pool fairy shrimp, and the western snowy plover.

Northwest Environmental Advocates is represented in the matter by the Pacific Environmental Advocacy Center, which is the environmental legal clinic of Lewis & Clark Law

School in Portland, Ore.

The case is Northwest Environmental Advocates v. National Marine Fisheries Service et al., case number 3:10-cv-00907, in the U.S. District Court for the District of Oregon.

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