

Case Nos. 17-70810, 17-70817

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

NATIONAL FAMILY FARM COALITION, et al.,  
*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,  
*Respondents,*  
DOW AGROSCIENCES LLC,  
*Respondent-Intervenor.*

---

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Petitioners,*

v.

SCOTT PRUITT, et al.,  
*Respondents,*  
DOW AGROSCIENCES LLC,  
*Respondent-Intervenor.*

---

On Petition for Review from the  
United States Environmental Protection Agency

---

**PETITIONERS' PETITION FOR REHEARING AND REHEARING EN BANC**

CENTER FOR FOOD SAFETY

George A. Kimbrell

Amy Van Saun

Sylvia Shih-Yau Wu

2009 NE Alberta Street, Suite 207

Portland, OR 97211

T: (971) 271-7372

gkimbrell@centerforfoodsafety.org

avansaun@centerforfoodsafety.org

swu@centerforfoodsafety.org

CENTER FOR BIOLOGICAL

DIVERSITY

Stephanie M. Parent

PO Box 11374

Portland, OR 97211

T: (971) 717-6404

sparent@biologicaldiversity.org

*Counsel for Petitioners National Family Farm Coalition, et al.*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners National Family Farm Coalition, Family Farm Defenders, Beyond Pesticides, Center for Biological Diversity, Center for Food Safety, and Pesticide Action Network North America certify that they have no parent corporations and that no publicly held corporation owns more than ten percent of the Petitioners.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	ii
GLOSSARY OF ACRONYMS AND TERMS.....	vii
RULE 35 STATEMENT .....	1
PROCEDURAL HISTORY.....	2
STATUTORY FRAMEWORK.....	3
I.    The “No Effect/May Affect” Standard .....	4
II.   FIFRA and EPA’s “Risk Quotient” and “Levels of Concern” Modeling .....	5
III.  The 2013 National Academy of Sciences Report.....	6
REASONS FOR GRANTING REHEARING EN BANC.....	8
I.    EPA’s Approach Violated the ESA. ....	8
II.   EPA’s “May Affect” Admissions Triggered Consultation. ....	11
III.  EPA’s “No Effect” Determinations Were Arbitrary and Capricious. ....	13
IV.   The Decision is Contrary to <i>Karuk Tribe</i> . ....	14
V.    The Majority Created a Dangerous New Loophole. ....	16
CERTIFICATE OF COMPLIANCE.....	22

## TABLE OF AUTHORITIES

	Page(s)
<b>Federal Cases</b>	
<i>Center for Biological Diversity v. Bureau of Land Management</i> , 698 F.3d 1101 (9th Cir. 2012) .....	1
<i>Conner v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988) .....	1, 3, 11, 18
<i>Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.</i> , 789 F.3d 1075 (9th Cir. 2015) .....	4
<i>Ctr. for Biological Diversity v. Army Corps of Eng'rs</i> , 2015 WL 12659937 (C.D. Cal. 2015) .....	16
<i>Friends of Santa Clara River v. Army Corps of Engineers</i> , 887 F.3d 906 (9th Cir. 2018) .....	16
<i>Karuk Tribe of California v. U.S. Forest Service</i> , 681 F.3d 1006 (9th Cir. 2012) .....	<i>passim</i>
<i>League of Wilderness Defs. v. Connaughton</i> , 752 F.3d 755 (9th Cir. 2014) .....	11
<i>California ex rel. Lockyer v. U.S. Dep't of Agriculture</i> , 575 F.3d 999 (9th Cir. 2009) .....	1, 3, 4
<i>Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	17
<i>Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.</i> , 524 F.3d 917 (9th Cir. 2008) .....	6
<i>National Family Farm Coalition (NFFC) v. EPA</i> , 966 F.3d 893 (9th Cir. 2020) .....	<i>passim</i>
<i>Nw. Coal. for Alts. to Pesticides v. EPA</i> , 544 F.3d 1043 (9th Cir. 2008) .....	17

Federal Cases (Cont'd)	Page(s)
<i>Pac. Rivers Council v. Thomas,</i> 30 F.3d 1050 (9th Cir. 1994).....	8
<i>Sierra Club v. EPA,</i> 671 F.3d 955 (9th Cir. 2012).....	19
<i>Tenn. Valley Auth. v. Hill,</i> 437 U.S. 153 (1978).....	3
<i>W. Watersheds Project v. Kraayenbrink,</i> 632 F.3d 472 (9th Cir. 2011).....	1, 4, 16
<i>Washington Toxics Coal. v. U.S. Dep't of Interior,</i> 457 F. Supp. 2d 1158 (W.D. Wash. 2006) .....	8
<i>Washington Toxics Coalition v. EPA,</i> 413 F.3d 1024 (9th Cir. 2005).....	1
<b>Federal Statutes</b>	
7 U.S.C. § 136(bb).....	6
16 U.S.C. § 1536(a)(2).....	3, 11
<b>Regulations</b>	
50 C.F.R. § 402.01(b).....	3, 4
50 C.F.R. § 402.13(a) .....	14
50 C.F.R. § 402.14(a) .....	3, 4
50 C.F.R. § 402.14(b)(1).....	14
50 C.F.R. § 402.14(h).....	5
<b>Other Authorities</b>	
U.S. Fish & Wildlife Serv., Nat'l Oceanic and Atmospheric Admin., Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).....	4

# Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

### API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

### LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

### FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

### E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.