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24
25 IN THE UNITED STATES DISTRICT COURT
26 FOR THE NORTHERN DISTRICT OF CALIFORNIA
27 SAN FRANCISCO DIVISION

28 **CENTER FOR BIOLOGICAL**
DIVERSITY, a non-profit organization;
Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE;
DAN ASHE, Director, U.S. Fish and Wildlife
Service; **ENVIRONMENTAL**
PROTECTION AGENCY; and **LISA**
JACKSON, Administrator, U.S. EPA;
Defendants.

) Case No. _____

) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**

) **ADMINISTRATIVE PROCEDURE ACT**
) **CASE**

1 **INTRODUCTION**

2 1. Plaintiff Center for Biological Diversity (“the Center”) challenges the failure of
3 defendants U.S. Fish and Wildlife Service (“FWS”) and Environmental Protection Agency
4 (“EPA”) to comply with section 7 of the Endangered Species Act (“ESA”), and its implementing
5 regulations, and section 706 of the Administrative Procedure Act (“APA”). Specifically, EPA
6 and FWS have failed to complete interagency consultation regarding the effects of pesticides on
7 the California red-legged frog within the timelines required under the ESA and its implementing
8 regulations, and this failure also violates section 706 of the APA. Moreover, Defendants have
9 caused unreasonable delay within the meaning of the APA. As a result, EPA continues to violate
10 its obligation to ensure that pesticides it has registered under the Federal Insecticide, Fungicide,
11 and Rodenticide Act (“FIFRA”) do not jeopardize the continued existence of the frog or
12 adversely modify the frog’s habitat.

13 2. Interagency consultation is a central feature of the ESA’s framework for
14 protecting endangered and threatened species. Through the consultation process, federal
15 agencies work with expert federal wildlife agencies, including FWS, to ensure that their actions
16 do not jeopardize the survival of threatened or endangered species.

17 3. As a result of previous litigation and a court-approved settlement, EPA
18 determined that 64 registered pesticides may affect the California red-legged frog and requested
19 consultation with FWS regarding the impacts of these pesticides on the frog. Nearly four years
20 have passed since EPA attempted to initiate the first of these consultations. FWS claims that
21 EPA’s effects determinations are insufficient to initiate formal consultation, and has therefore
22 declined to complete the consultations. EPA, however, disagrees and refuses to provide the
23 additional information and analysis requested by FWS.

24 4. Through this ongoing delay, the agencies have failed to comply with the ESA’s
25 strict time limits for completion of the section 7(a)(2) consultation process. FWS has not
26 completed a single consultation to ensure that these 64 pesticides will not cause jeopardy to the
27 California red-legged frog or adversely modify its habitat. The agencies’ delay in completing the
28 required consultations allows toxic pesticides to continue to harm the California red-legged frog

1 and contaminate its habitat.

2 5. Through this Complaint, the Center seeks injunctive and declaratory relief,
3 including an order compelling the agencies to complete the consultations, and placing
4 restrictions on pesticide use to prevent jeopardy to the California red-legged frog until
5 consultation is completed.

6 **JURISDICTION**

7 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question
8 jurisdiction), 16 U.S.C. § 1540(g)(1)(A) (ESA citizen suit provision), and 5 U.S.C. § 702
9 (Administrative Procedure Act).

10 7. The Center provided EPA and FWS with at least 60 days notice of the ESA
11 violations alleged herein as required by 16 U.S.C. § 1540(g)(2)(c). EPA and FWS have not
12 remedied the violations set out in that 60-day written notice.

13 8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. §
14 1540(g)(3)(A) because a substantial part of the agencies' violations of law occurred and continue
15 to occur in this district, and injury to the Center and its members occurred and continues to occur
16 in this district.

17 **INTRADISTRICT ASSIGNMENT**

18 9. Pursuant to Civil Local Rules 3-2(c) and 3-2(d), the appropriate intradistrict
19 assignment of this case is to either the San Francisco Division or the Oakland Division because a
20 substantial part of the agencies' violations of law occurred and continue to occur in the counties
21 of Alameda, Contra Costa, Marin, Mendocino, Napa, San Mateo, and Sonoma, which are within
22 the range of the California red-legged frog.

23 **PARTIES**

24 10. Plaintiff Center For Biological Diversity is a non-profit 501(c)(3) organization
25 with over 44,000 active members, with offices in San Francisco, California, and elsewhere
26 across the country. The Center and its members are concerned with the conservation of
27 imperiled species, including the California red-legged frog, and the effective implementation of
28 the ESA and APA. Recognizing that pesticides are one of the foremost threats to the earth's

1 environment, biodiversity, and public health, the Center works to prevent and reduce the use of
2 harmful pesticides and to promote sound conservation strategies.

3 11. The Center's members include those who have visited areas where California red-
4 legged frogs are known to occur. They use these areas for observation of the frog and other
5 wildlife, research, nature photography, aesthetic enjoyment, recreational, educational, and other
6 activities. The Center's members derive professional, aesthetic, spiritual, recreational, economic,
7 and educational benefits from the California red-legged frog and its habitats. Those members
8 have concrete plans to continue to travel to and recreate in areas where they can observe the
9 California red-legged frog and will continue to maintain an interest in the frog and its habitats in
10 the future.

11 12. The above-described interests of the Center and its members have been and are
12 being adversely affected by EPA's and FWS's failure to complete consultation on the impacts of
13 pesticides on the California red-legged frog. Once in the environment, pesticides impact the frog
14 and other species through acute and chronic effects, and contamination of habitats. If EPA and
15 FWS completed consultation as required, FWS would detail how the pesticides are affecting the
16 frog and its habitats and, if necessary, would suggest reasonable and prudent alternatives to
17 protect the species. 16 U.S.C. § 1536(a)(3).

18 13. Unless the requested relief is granted, the Center's interests will continue to be
19 adversely affected and injured by the agencies' failure to complete the consultations, as well as
20 by the ongoing harm to the frog and its habitats as a result of ongoing pesticide use. The injuries
21 described above are actual, concrete injuries that are presently suffered by the Center and its
22 members and will continue to occur unless relief is granted by this Court. These injuries are
23 directly caused by the agencies' failure to complete consultations to ensure that EPA's pesticide
24 registrations do not affect the frog. The relief sought herein, an order compelling completion of
25 consultation and placing restrictions on pesticide use in California red-legged frog habitats until
26 the agencies bring themselves into compliance with law, would redress the Center's injuries.
27 The Center has no other adequate remedy at law.

28 14. Defendant FWS is a federal agency within the Department of the Interior. Under

1 the ESA, FWS is responsible for consulting with federal agencies to ensure that agency actions
2 do not jeopardize the survival and recovery of the listed California red-legged frog or adversely
3 affect its critical habitat. 16 U.S.C. § 1536(a)(2).

4 15. Defendant DAN ASHE is the Director of FWS. He is sued in his official capacity
5 as FWS Director.

6 16. Defendant EPA is a federal agency charged with regulating pesticides under
7 FIFRA to protect human health and the environment. Under the ESA, EPA must consult with
8 FWS to ensure that its agency actions, including the registration and regulation of pesticides, do
9 not jeopardize the survival and recovery of the listed California red-legged frog or adversely
10 affect its critical habitat. *See* 16 U.S.C. § 1536(a)(2).

11 17. Defendant LISA JACKSON is the Administrator of EPA. She is sued in her
12 official capacity as EPA Administrator.

13 **LEGAL BACKGROUND**

14 18. The ESA declares that endangered and threatened species are of “esthetic,
15 ecological, educational, historical, recreational, and scientific value to the Nation and its people.”
16 16 U.S.C. § 1531(a)(3). Accordingly, the ESA establishes the “means whereby the ecosystems
17 upon which endangered species and threatened species depend may be conserved” and “a
18 program for the conservation of such endangered species and threatened species” *Id.* §
19 1531(b); *see id.* §§ 1531-1544.

20 19. The Secretaries of Commerce and Interior are charged with administering and
21 enforcing the ESA, but have delegated this responsibility to the National Marine Fisheries
22 Service (“NMFS”) and FWS, respectively. 50 C.F.R. § 402.01(b).

23 20. Section 2(c) of the ESA provides that it is “the policy of Congress that all Federal
24 departments and agencies shall seek to conserve endangered species and threatened species and
25 shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1).
26 The ESA defines “conservation” to mean “the use of all methods and procedures which are
27 necessary to bring any endangered species or threatened species to the point at which the
28 measures provided pursuant to this Act are no longer necessary.” *Id.* § 1532(3).

1 21. To fulfill the substantive purposes of the ESA, federal agencies are required under
2 section 7(a)(2) to engage in consultation with FWS (and/or NMFS) before authorizing, funding,
3 or engaging in any “action” that could “jeopardize the continued existence” of any listed species
4 or “result in the destruction or adverse modification of habitat of such species . . . determined . . .
5 to be critical.” *Id.* § 1536(a)(2). Under the regulations jointly adopted by FWS and NMFS to
6 govern Section 7 consultations, EPA’s ongoing oversight of pesticides under FIFRA constitutes
7 agency “action” subject to ESA section 7(a)(2). 50 C.F.R. §§ 402.02, 402.03; *see also Wash.*
8 *Toxics Coal. v. Env’tl. Prot. Agency*, 413 F.3d 1024, 1033 (9th Cir. 2005).

9 22. A federal agency is relieved of the obligation to consult only if its action will have
10 “no effect” on any listed species or designated critical habitat. 50 C.F.R. § 402.14(a)-(b). If an
11 agency determines that its action “may affect” but is “not likely to adversely affect” a listed
12 species or its critical habitat, the regulations permit “informal consultation,” during which FWS
13 must concur in writing with the agency’s determination. *Id.* § 402.13(a). If the agency
14 determines that its action is “likely to adversely affect” a listed species or critical habitat, or if
15 FWS does not concur with the agency’s “not likely to adversely affect” determination, the
16 agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14 (“General
17 Formal Consultation”). *Id.* § 402.14(a)-(b); *see also id.* § 402.02.

18 23. The federal agency initiates General Formal Consultation with FWS by
19 submitting a written request that includes: (1) a description of the action to be considered; (2) a
20 description of the specific area that may be affected by the action; (3) a description of any listed
21 species or critical habitat that may be affected by the action; (4) a description of the manner in
22 which the action may affect any listed species or critical habitat and an analysis of any
23 cumulative effects; (5) relevant reports, including any environmental impact statement,
24 environmental assessment, or biological assessment prepared; and (6) any other relevant
25 available information on the action, the affected listed species, or critical habitat. 50 C.F.R. §
26 402.14(c); *see also* 50 C.F.R. § 402.02 (defining “action area,” “cumulative effects,” and “effects
27 of the action”). The federal agency requesting formal consultation “shall provide the Service the
28 best scientific and commercial data available or which can be obtained during the consultation

1 for an adequate review of the effects that an action may have upon listed species or critical
2 habitat.” 50 C.F.R. § 402.14(d).

3 24. At the completion of General Formal Consultation, FWS issues a biological
4 opinion that determines if the agency action is likely to jeopardize the species or adversely
5 modify the species’ critical habitat. 16 U.S.C. § 1536(b)(3)(A). If the agency action is likely to
6 do so, FWS must specify reasonable and prudent alternatives that will avoid jeopardy and thus
7 allow the agency to proceed with the action. *Id.*

8 25. As part of consultation, the FWS must also determine whether the “taking” of an
9 endangered or threatened species that will result from the agency’s action will violate section
10 7(a)(2). 16 U.S.C. § 1536(b)(4). If FWS concludes the “taking” will not violate section
11 7(a)(2), FWS “shall provide . . . a written statement that -- (i) specifies the impact of such
12 incidental taking on the species, (ii) specifies those reasonable and prudent measures that the
13 [FWS] considers necessary or appropriate to minimize such impact, . . . and (iv) sets forth the
14 terms and conditions (including, but not limited to, reporting requirements) that must be
15 complied with by the Federal agency” *Id.* Under section 7(o)(2) of the ESA, “any taking
16 that is in compliance with the terms and conditions specified in a written statement provided
17 under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species
18 concerned.”

19 26. FWS must use “the best available scientific and commercial data available” in its
20 consultations, biological opinions, and jeopardy determinations. 16 U.S.C. § 1536(a)(2); 50
21 C.F.R. § 402.14(g)(8).

22 27. EPA, FWS, and NMFS adopted joint counterpart regulations that apply to EPA’s
23 actions taken under FIFRA. *See* 50 C.F.R. §§ 402.04, 402.46. When seeking consultations
24 regarding FIFRA pesticide registration actions, EPA can choose to initiate either General Formal
25 Consultation or the optional consultation outlined in 50 C.F.R. § 402.46 (“Optional Formal
26 Consultation”). *Id.*

27 28. To initiate Optional Formal Consultation, EPA must deliver to FWS a written
28 request for consultation and an effects determination. *Id.* § 402.46(a). The EPA’s effects

1 determination under Optional Formal Consultation must contain the same information required
2 for a federal agency to initiate General Formal Consultation. 50 C.F.R. § 402.40(b). The effects
3 determination must be based on the best scientific and commercial data available. *Id.* §
4 402.40(b)(3).

5 29. Once EPA has initiated an Optional Formal Consultation, FWS must adopt EPA's
6 effects determination by written statement, provide EPA a draft written statement modifying and
7 adopting the effects determination, or provide EPA a draft biological opinion. *Id.* § 402.46(c)(1).
8 As with General Formal Consultation, FWS must use the best available science in its
9 consultations, biological opinions, and jeopardy determinations. *See* 16 U.S.C. § 1536(a)(2).

10 30. The ESA requires that consultation occur at the earliest possible time and be
11 conducted according to a strict timeline in order to ensure that the agency action is not causing
12 jeopardy to listed species and their critical habitat, or otherwise harming the species. *See* 16
13 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1).

14 31. To that end, FWS and EPA are required to conclude General Formal and Optional
15 Formal Consultations within 90 days. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e),
16 402.46(c)(1).

17 32. Exceptions to the 90-day period are limited. Under General Formal Consultation,
18 FWS and EPA may mutually agree to extend the consultation for a specific time period,
19 "provided that the Service submits to the applicant, before the close of the 90 days, a written
20 statement setting forth: (1) The reasons why a longer period is required, (2) The information that
21 is required to complete the consultation, and (3) The estimated date on which the consultation
22 will be completed." 50 C.F.R. § 402.14(e). Moreover, a "consultation involving an applicant
23 cannot be extended for more than 60 days without the consent of the applicant." *Id.*

24 33. The rules governing Optional Formal Consultation do not provide for extending
25 the consultation period. *See generally* 50 C.F.R. § 402.46. Instead, "[FWS] may determine that
26 additional available information would provide a better information base for the effects
27 determination, in which case the [FWS] Director shall notify the EPA Administrator within 45
28 days of the date the Service receives the effects determination." *Id.* § 402.46(b). FWS's

1 notification must “describe such additional information in detail” and “identify a means for
2 obtaining that information within the time period available for consultation.” *Id.*

3 “[I]nterchanges regarding EPA’s submission . . . do not extend the time for conclusion of the
4 consultation.” *Id.* § 402.46(a).

5 34. The regulations governing Optional Formal Consultation also provide that EPA
6 and FWS “shall establish mutually-agreeable procedures for regular and timely exchanges of
7 scientific information to achieve accurate and informed decision-making under this subpart and
8 to ensure that the FIFRA process considers the best scientific and commercial data available on
9 listed species and critical habitat in a manner consistent with the requirements of FIFRA and
10 ESA.” *Id.* § 402.42(b).

11 **FACTUAL BACKGROUND**

12 **I. Natural History of the California Red-legged Frog**

13 35. The California red-legged frog (*Rana aurora draytonii*) is the state’s largest
14 native frog. This subspecies is characterized by red or pink coloring of the abdomen and hind
15 legs of adults. The California red-legged frog is usually found in and around creeks, ponds, or
16 other well-vegetated riparian areas with still water.

17 36. The California red-legged frog’s range historically extended along the California
18 coast from Marin County to northwestern Baja, Mexico, throughout the Central Valley, and
19 within the foothills of the Sierra Nevada. Today, the California red-legged frog has lost more
20 than 70 percent of its historic range. Most remaining populations of the species are found along
21 the Pacific coast and in isolated pockets of the Sierra Nevada.

22 **II. The Impacts of Pesticides on the California Red-legged Frog**

23 37. The use of pesticides has significantly contributed to the California red-legged
24 frog’s decline and continues to pose a hazard to the subspecies. Because amphibians like the
25 California red-legged frog respire through their permeable skin, they are especially vulnerable to
26 chemical contamination. Additionally, the California red-legged frog’s eggs float exposed on the
27 water surface, where pesticides tend to concentrate. Once hatched, larvae live solely in aquatic
28 environments for five to seven months before they metamorphose, making agricultural pesticides

1 introduced into wetlands, ponds, and streams particularly harmful. Fumigants and other
2 pesticides can also imperil the California red-legged frog when they are in burrows or other
3 terrestrial areas.

4 38. Pesticide contamination may cause deformities, depressed immune system
5 functions, endocrine disruption, and death to the California red-legged frog, as well as
6 impairment to the frog's swimming, predator avoidance, reproduction, or other key behaviors.
7 Pesticides can also adversely affect the frog by impacting its food supplies and habitat.

8 39. Due to their sensitivity to chemical contaminants, California red-legged frogs are
9 a strong barometer for the health of California's human residents. Ultimately, the pesticides
10 found in the frogs' habitat also migrate into Californians' drinking water, food, homes, and
11 schools, posing a disturbing health risk.

12 **III. Administrative and Procedural History**

13 40. In 1996, FWS listed the California red-legged frog as threatened under the ESA.
14 61 Fed. Reg. 25,813 (May 23, 1996) (to be codified at 50 C.F.R pt. 17). Notably, in its final rule,
15 FWS acknowledged that the effects of pesticide and herbicide runoff must be considered while
16 planning for the conservation of the California red-legged frog. *Id.* at 25,823.

17 41. In 2002, the Center brought a citizen suit alleging that EPA violated the ESA by
18 failing to consult with FWS regarding the effects of registered pesticides. On September 19,
19 2005, the Court found that EPA violated section 7 of the ESA because it did not consult with
20 FWS to ensure that 66 registered pesticides would not jeopardize the California red-legged frog.
21 *See Ctr. for Biological Diversity v. Leavitt*, 2005 U.S. Dist. LEXIS 40806 (N.D. Cal. Sep. 19,
22 2005). The court ordered the parties to address a reasonable deadline for initiation of the "may
23 affect" determination. *Id.*

24 42. On October 20, 2006, the Center reached a settlement agreement with EPA that
25 prohibited the use of the 66 identified pesticides near core California red-legged frog habitats
26 until EPA completed ESA consultation with FWS regarding the 66 pesticides ("2006 Settlement
27 Agreement"). *Ctr. for Biological Diversity v. Johnson*, Cal. N.D. Case No. 02-1580-JSW (N.D.
28 Cal. Oct. 20, 2006), available at <http://www.epa.gov/espp/litstatus/stipulated-injunction.pdf>.

1 The 2006 Settlement Agreement provides that EPA shall make effects determinations and initiate
2 consultation for all 66 pesticides within 36 months of October 20, 2006. *Id.*

3 43. Pursuant to the agreement, EPA conducted effects determinations for all 66
4 pesticides. For two of those pesticides, Fenamiphos and Molinate, registrations of all products
5 containing the chemicals were cancelled; thus, EPA made a finding of “no effect.” For
6 Methoprene and Telone, EPA determined that the chemicals “may affect,” but are “not likely to
7 adversely affect” the California red-legged frog. For the 62 other pesticides, EPA found that
8 they “may affect” and are “likely to adversely affect” the California red-legged frog. These
9 include: 2,4-Dichlorophenoxyacetic acid, Acephate, Alachlor, Aldicarb, Atrazine, Azinphos
10 methyl, Bensulide, Bromacil, Captan, Carbaryl, Chloropicrin, Chlorothalonil, Chlorpyrifos,
11 DCPA, Diazinon, Dicofol, Diflubenzuron, Dimethoate, Disulfoton, Diuron, Endosulfan, EPTC,
12 Esfenvalerate, Glyphosate, Hexazinone, Imazapyr, Iprodione, Linuron, Malathion, Mancozeb,
13 Maneb, Metam sodium, Methamidiphos, Methidathion, Methomyl, Methyl parathion,
14 Metolachlor, Myclobutanil, Naled, Norflurazon, Oryzalin, Oxamyl, Oxydemeton methyl,
15 Oxyfluorfen, Paraquat, Pendimethalin, Permethrin, Phorate, Phosmet, Prometryn, Propanil,
16 Propargite, Propyzamide, Rotenone, Simazine, Strychnine, Thiobencarb, Tribufos, Triclopyr,
17 Trifluralin, Vinclozolin, and Ziram.

18 44. Between July 2007 and October 2009, EPA requested formal consultation from
19 FWS for the 64 pesticide registrations that it determined may affect the California red-legged
20 frog. *See* Pesticides: Endangered Species Protection Program, U.S. EPA, *available at*
21 <http://www.epa.gov/espp/litstatus/effects/redleg-frog/index.html> (last visited Oct. 18, 2011).
22 Most of EPA’s requests for formal consultation sought Optional Formal Consultation. *Id.*

23 45. In January 2009, FWS responded to EPA with a refusal to begin formal
24 consultation for 41 of the pesticides: Acephate, Aldicarb, Azinphos methyl, Bensulide, Bromacil,
25 Captan, Carbaryl, Chloropicrin, Chlorothalonil, Diazinon, Dimethoate, Disulfoton, EPTC,
26 Esfenvalerate, Glyphosate, Hexazinone, Imazapyr, Linuron, Malathion, Mancozeb, Maneb,
27 Metam sodium, Methamidiphos, Methomyl, Methoprene, Methyl parathion, Metolachlor, Naled,
28 Oryzalin, Oxydemeton methyl, Oxyfluorfen, Permethrin, Phosmet, Phorate, Propargite,

1 Propyzamide, Simazine, Rotenone, Telone, Tribufos, and Ziram. *See* Letter from Marjorie A.
2 Nelson, Chief, FWS Branch of Consultation & HCPs, to Arthur-Jean B. Williams, Associate
3 Director, Env'tl. Fate & Effects Div., Office of Pesticide Programs, EPA (Jan. 14, 2009) ("2009
4 FWS Letter") (attached as Exhibit A). Upon information and belief, EPA and FWS have also
5 failed to complete consultation for the 23 other pesticides that may affect the California red-
6 legged frog.

7 46. The 2009 FWS Letter explains that FWS had not received all of the necessary
8 information from EPA. *Id.* Specifically, FWS asserted that EPA failed to provide: 1) a full
9 description of the action to be considered; 2) a complete description of the manner in which the
10 action may affect the listed species and their critical habitats, including an exposure analysis that
11 represents reasonable worst case scenarios; and 3) an estimate of existing and future pollutant
12 loads in the action area as a basis for determining whether listed species are likely to be
13 adversely affected by the addition of the pesticide products and if so, an analysis of the extent of
14 effects over the reregistration period. *Id.*

15 47. In a letter dated July 2, 2009, Acting General Counsel Patricia K. Hirsch of the
16 EPA disagreed with FWS's assertions. EPA explained that "[w]hile the ESA regulations
17 contemplate that FWS may seek additional information from an action agency such as EPA to
18 better inform a formal consultation, the regulations do not provide that the [FWS] may reject
19 EPA's written request to engage in formal consultation." *See* Letter from Patricia K. Hirsch,
20 Acting Gen. Counsel, EPA, to Arthur E. Gary, Acting Solicitor, U.S. Dept. of Interior (July 2,
21 2009) (attached as Exhibit B). Nonetheless, Ms. Hirsch went on to state that "it is my
22 understanding that EPA's Office of Pesticide Programs is developing a substantive response to"
23 the 2009 FWS letter, "which EPA intends to provide to FWS in the coming weeks for
24 interagency discussion." *Id.* Based on information and belief, EPA never provided a response
25 that FWS found adequate.

26 48. In short, FWS asked EPA for further information and analysis that FWS deemed
27 necessary to initiate the consultation process, and EPA has failed to provide it to FWS'
28 satisfaction. Instead of ensuring the timely flow of information between the agencies, as

1 required by regulation, the consultation process has become indefinitely delayed.

2 49. Nearly four years have passed since EPA requested the first of its consultations.
3 In that time, FWS has not completed any consultation to ensure that the 64 pesticides affecting
4 the California red-legged frog will not harm the frog or adversely modify its critical habitat. Nor
5 has FWS ever agreed with EPA to extend the deadlines for completing the consultations on the
6 64 pesticides affecting the California red-legged frog and at issue in this case. The agencies'
7 refusal to complete the consultations according to mandatory deadlines is unlawful and is
8 allowing toxic pesticides to continue to harm the frog.

9 **FIRST CAUSE OF ACTION**

10 **EPA And FWS Have Failed To Complete Consultation Within The ESA's Timelines, And** 11 **Their Actions Are Arbitrary, Capricious, An Abuse Of Discretion, Or Otherwise Not In** 12 **Accordance With Law, And Are Without Observance Of Procedure Required By Law,** 13 **Under The APA**

14 50. All allegations set forth above in this Complaint are incorporated herein by
15 reference.

16 51. Under section 7(a)(2) of the ESA, EPA has a duty to ensure through consultation
17 with the FWS that its actions are not likely to "jeopardize the continued existence of any
18 endangered species or threatened species or result in the destruction or adverse modification of
19 [critical] habitat" 16 U.S.C. § 1536(a)(2). Formal consultation is required for any pesticide
20 that EPA determines "may affect" a listed species or critical habitat. *See* 50 C.F.R. § 402.14(a).

21 52. Between 2007 and 2009, EPA requested formal consultation from FWS for the 64
22 pesticide registrations that EPA determined "may affect" the California red-legged frog.

23 53. FWS refused to consult with EPA, explaining that EPA has not provided
24 information necessary for FWS to fulfill its statutory obligation to consult.

25 54. The ESA's consultation regulations specify the information that must be included
26 in an effects determination, 50 C.F.R. § 402.14(c), and require that the agencies work together to
27 develop procedures to ensure timely exchange of information to ensure informed
28 decisionmaking, 50 C.F.R. § 402.42(b). But the EPA and FWS have failed to exchange the

1 information and analysis necessary for the completion of consultation.

2 55. Upon information and belief, EPA has failed to provide the requested information
3 to the FWS, and the FWS has failed to issue a single Biological Opinion to protect the frog. The
4 agencies' inaction has thereby indefinitely precluded completion of the consultation process.

5 56. Under the ESA and its implementing regulations, EPA and FWS must complete
6 the consultation process within 90 days after consultation has been initiated by the action agency,
7 unless the agencies mutually agree to extend the consultation period according to regulatory
8 requirements. 16 U.S.C. § 1536(b)(1); 50 C.F.R. §§ 402.14(e), 402.46(c)(1). Upon information
9 and belief, EPA and FWS have failed to agree to such an extension according to the regulatory
10 requirements.

11 57. Both the EPA and FWS, by failing to complete consultations within the ESA's
12 deadlines, are in violation of the ESA, 16 U.S.C. § 1536; 50 C.F.R. §§ 402.14(e), 402.46(c)(1),
13 and their actions are arbitrary, capricious, an abuse of discretion, and not in accordance with the
14 law, and are without observance of procedure required by law, in violation of the APA. 5 U.S.C.
15 § 706(2).

16 **SECOND CAUSE OF ACTION**

17 **EPA Is In Violation Of The ESA By Failing To Ensure That Its Actions Are Not Likely To**
18 **Jeopardize The California Red-Legged Frog Or Adversely Modify The Species' Habitat,**
19 **And EPA's Actions Are Arbitrary, Capricious, An Abuse Of Discretion, Or Otherwise Not**
20 **In Accordance With Law, Under The APA**

21 58. All allegations set forth above in this Complaint are incorporated herein by
22 reference.

23 59. Section 7 of the ESA mandates that agencies "insure that any action authorized,
24 funded, or carried out by such agency is not likely to jeopardize the continued existence of any
25 endangered species or threatened species or result in the destruction or adverse modification of
26 habitat of such species" 16 U.S.C. § 1536(a)(2).

27 60. EPA achieves its section 7 obligations for pesticides by conducting effect
28 determinations and by consulting with the appropriate wildlife agency, here, the U.S. Fish and

1 Wildlife Service. *Id.* At the end of consultation, FWS issues a “biological opinion” that explains
2 if the agency action is likely to jeopardize the species or adversely modify the species’ critical
3 habitat. 16 U.S.C. § 1536(b)(3)(A). If the agency action is likely to do so, the U.S. Fish and
4 Wildlife Service specifies reasonable and prudent alternatives that will avoid jeopardy or adverse
5 modification. *Id.* As part of consultation, the FWS also specifies reasonable and prudent
6 measures considered necessary or appropriate to minimize harm to the species, and sets forth
7 terms and conditions that must be complied with by the action agency. 16 U.S.C. § 1536(b)(4).

8 61. In failing to timely complete biological opinions for the California red-legged
9 frog, EPA and FWS are preventing the timely adoption and implementation of alternatives and
10 measures that would protect the California red-legged frog from the pesticides at issue.
11 Moreover, EPA has found that 64 pesticides may affect the California red-legged frog and its
12 habitat and yet has not determined or instituted any permanent restrictions to protect the frogs
13 from the pesticides. The EPA is therefore in violation of the ESA for failing to ensure that its
14 actions are not likely to jeopardize the California red-legged frog or adversely modify critical
15 habitat for the species, and EPA’s actions are arbitrary, capricious, an abuse of discretion, and
16 not in accordance with the law, in violation of the APA. 5 U.S.C. § 706(2).

17 **THIRD CAUSE OF ACTION**

18 **By Unreasonably Delaying Completion Of Formal Consultation, EPA And FWS Are** 19 **Violating Section 706(1) Of The APA**

20 62. All allegations set forth above in this Complaint are incorporated herein by
21 reference.

22 63. The APA dictates that agencies must conclude a matter presented to it “within a
23 reasonable time.” 5 U.S.C. § 555(b). Accordingly, APA section 706(1) authorizes reviewing
24 courts to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

25 64. Between July 2007 and October 2009, EPA requested consultations with FWS
26 regarding 64 pesticides that EPA determined “may affect” the California red-legged frog.
27 Despite the passage of nearly four years since EPA requested the first of these consultations,
28 EPA and FWS have not completed a single consultation for any of the pesticides. EPA and

1 FWS' delay in completing the consultations constitutes unlawful and unreasonable delay under
2 APA section 706(1).

3 **PRAYER FOR RELIEF**

4 WHEREFORE, the Center prays that the Court:

5 (1) Declare that EPA and FWS are in violation of section 7 of the ESA, 16 U.S.C. §
6 1536, and its implementing regulations, 50 C.F.R. §§ 402.14(e), 402.46(c)(1), and section 706(2)
7 of the APA, by failing to timely complete the consultations for 64 pesticides that EPA
8 determined "may affect" the California red-legged frog;

9 (2) Declare that EPA is in violation of section 7 of the ESA, 16 U.S.C. § 1536, and
10 section 706(2) of the APA, by failing to ensure that its actions are not likely to jeopardize the
11 California red-legged frog or adversely modify its habitat;

12 (3) Declare that EPA and FWS are in violation of Section 706(1) of the APA, by
13 failing to complete the consultations for 64 pesticides that EPA determined "may affect" the
14 California red-legged frog within a reasonable time;

15 (4) Order EPA and FWS to complete all of the required consultations;

16 (5) Order restrictions on, or prohibit use of, the 64 identified pesticides where they
17 may affect the California red-legged frog or its habitats until the consultation process has been
18 completed;

19 (6) Award Plaintiff its attorneys' fees and costs in this action pursuant to 16 U.S.C. §
20 1540(g)(4) and 28 U.S.C. § 2412; and

21 (7) Grant such other and further relief as the Court deems just and proper.

22
23 Respectfully submitted this 19th day of October, 2011,
24
25
26

27 _____
Justin Augustine
Center for Biological Diversity

EXHIBIT A



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/DCHRS/039744

JAN 14 2009

Arthur-Jean B. Williams, Associate Director
Environmental Fate and Effects Division
Office of Pesticide Programs (7507P)
U.S. Environmental Protection Agency
Washington, DC 20460

RE: Request for Initiation of Formal Consultation on the Effects of Reregistration
of pesticides

Dear Ms. Williams:

This letter acknowledges the U.S. Fish and Wildlife Service's (Service) receipt of your letters requesting initiation of formal section 7 consultation under the Endangered Species Act of 1973, as amended (ESA)(see attachment). These consultations concern the possible effects of the Environmental Protection Agency's (EPA) reregistration of pesticides on federally threatened and endangered species and their critical habitats.

The Service has not received all of the information necessary to initiate formal consultation on the reregistration of these pesticides as outlined in the regulations governing interagency consultation (50 CFR §402.14). To complete the initiation packages, additional information, described below, will be required for each consultation request. For a more detailed discussion on the missing information, please refer to our February 11, 2008, letter responding to your consultation request on the effects of atrazine on the Alabama sturgeon (*Scaphirhynchus suttkusi*) and dwarf wedgemussel (*Alasmidonta heterodon*).

1. A full description of the action to be considered. During our interagency meetings of December 10-12, we recall reaching a consensus that the proposed action included EPA's reregistration of pesticide products and approval of labels. To fulfill this requirement, we request that EPA submit a list of all current product registrations for which consultation is being requested (including associated labels defining product uses where available), the ingredients contained therein, the other ingredients in recommended tank mixtures, and any known toxicity data for these chemicals for consultation requests received both prior and subsequent to these meetings.
2. A complete description of the manner in which the action may affect the listed species and their critical habitats, including an exposure analysis that represents reasonable worst

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case scenarios for both the entire action area and for individual portions of the action area relevant to the listed species and designated critical habitats under consultation. In informal consultation, we determine whether listed species or critical habitats are likely to be adversely affected and would base the determination upon the most extreme exposure concentration that could occur to any individuals or critical habitats in the action area. This enables the Service to assist the action agency in complying with not only section 7 of the ESA, but also the section 9 prohibitions on "take." This extreme exposure estimate typically would not be expected to occur uniformly across the range of a listed species or its critical habitat because, for example, the percentage of watersheds dedicated to cropland will vary. For a formal consultation, a reasonable worst-case analysis would characterize the extreme range of exposures likely to occur to the various populations of the listed species or units of critical habitat, or portions thereof. This latter analysis would allow us to characterize the proportion of the species range or critical habitat exposed to the highest concentrations of pesticides, and the proportion exposed to more moderate concentrations.

3. An estimate of existing and future pollutant loads in the action area as a basis for determining whether listed species are likely to be adversely affected by the addition of the pesticide products and, if so, an analysis of the extent of effects over the reregistration period. The Service and NOAA are developing methods for weighing the influence and effects of "environmental mixtures." EPA may choose to await development of these approaches, or adopt their own methods for considering existing environmental conditions that influence the manner in which the action may affect listed species or critical habitat.

We will be unable to fully evaluate the effects of this action or formulate a biological opinion until we receive all of this information.

While EPA is preparing this information, the Service will continue to engage in informal consultation with you on these and other reregistration actions. At our interagency meetings of December 10-12, 2007, our agencies committed to working together in the development of methodologies to fulfill EPA's section 7 requirements for pesticide registration activities. We believe a more collaborative, team-oriented approach would benefit EPA in submitting consultation requests that include all of the information necessary to complete section 7 consultations. Specifically, we agreed work jointly to:

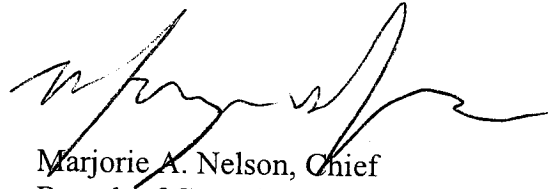
- modify existing modeling to ensure estimated environmental concentrations (EECs) represent worst-case scenario concentrations as a basis for making effects determinations;
- modify existing modeling to ensure EECs are adequately predicted in low-flow and off-channel habitats;
- develop methodology to account for future changes in use of pesticides (at least 15 years) in urban and residential settings;
- identify and develop exposure estimates required for an effects analysis for formal consultation;

- develop an approach for modeling EECs on a nationwide scale for Section 3 Registration Review ;
- develop a methodology to adequately account for exposure to additional chemical ingredients in formulated products and environmental mixtures; and,
- develop a methodology to incorporate information on sublethal effects in making Not Likely to Adversely Affect/Likely to Adversely Affect determination.

Finally, we note that the volume and complexity of EPA's section 7 consultation requests on pesticide reregistrations exceed our capability to complete consultations within normal statutory timelines. We would be happy to continue to discuss with EPA ways in which to best utilize our joint resources to address EPA's consultation workload, including establishing priorities and realistic timelines given the Service's limited staff resources.

We look forward to meeting with your staff to jointly pursue solutions to these complex issues that will meet the standards of the Endangered Species Act. If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact Nancy Golden (703-358-2148; Nancy_Golden@fws.gov) or Dan Buford (703-358-2106; Daniel_Buford@fws.gov) of my staff.

Sincerely,



Marjorie A. Nelson, Chief
Branch of Consultation & HCPs
Division of Consultation, Habitat
Conservation Planning, Recovery and
State Grants

Enclosure

Enclosure 1. Consultation requests received from EPA for pesticide registration activities:

Date request received	Action
March 14, 2007	Approval of products containing the active ingredient atrazine, and effects on seven federally listed endangered freshwater mussels: Pink Mucket Pearly (<i>Lampsilis abrupta</i>) Rough Pigtoe (<i>Pleurobema plenum</i>) Shiny Pigtoe Pearly (<i>Fusconaia edgariana</i>) Fine-rayed Pigtoe (<i>Fusconaia cuneolus</i>) Heavy Pigtoe (<i>Pleurobema taitianum</i>) Ovate Clubshell (<i>Pleurobema perovatum</i>) Southern Clubshell (<i>Pleurobema decisum</i>)
July 22, 2007	Approval of products containing the active ingredients acephate, aldicarb, azinphos methyl, chloropicrin, diazinon, imazapyr, metam sodium, methamidiphos, methomyl, metolachlor and effects on the red-legged frog (<i>Rana aurora draytonii</i>)
September 17, 2007	Approval of products containing the active ingredient atrazine, and effects on the pallid sturgeon (<i>Scaphirhynchus albus</i>)
September 17, 2007	Approval of products containing the active ingredient atrazine, and effects on the Topeka shiner (<i>Notropis topeka</i>)
September 17, 2007	Approval of products containing the active ingredient atrazine, and effects on the fat pocketbook pearlymussel (<i>Potamilus capax</i>), northern riffleshell (<i>Epioblasma torulosa rangiana</i>), and purple cat's paw pearlymussel (<i>Epioblasma obliquata obliquata</i>)
September 21, 2007	Approval of products containing the active ingredient prometon, and effects on the Barton Springs Salamander (<i>Eurycea sosorum</i>)
September 21, 2007	Approval of products containing the active ingredient carbaryl, and effects on the Barton Springs salamander (<i>Eurycea sosorum</i>)
October 22, 2007	Approval of products containing the active ingredients simazine, oxydemeton methyl, mancozeb, maneb, chlorothalonil, bromacil, bensulide, carbaryl, malathion, captan and effects on the red-legged frog (<i>Rana aurora draytonii</i>)
February 20, 2008	Approval of products containing the active ingredients methyl parathion, propyzamide, naled, S-methoprene, dimethoate, esfenvalerate, hexazinone and effects on the red-legged frog (<i>Rana aurora draytonii</i>)

June 20, 2008	Approval of products containing the active ingredients EPTC, disulfoton, linuron, telone, phosmet, propargite and Oryzalin and effects on the red-legged frog (<i>Rana aurora draytonii</i>)
October 20, 2008	Approval of products containing the active ingredients glyphosate, oxyfluorfen, permethrin, phorate, rotenone, tribufos, ziram, and effects on the red-legged frog (<i>Rana aurora draytonii</i>)

EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 2 2009

OFFICE OF
GENERAL COUNSEL

Arthur E. Gary
Acting Solicitor
U.S. Department of the Interior
1849 C St. N.W., Room 6415
Washington, D.C. 20240

Dear Mr. Gary:

I am writing in response to a January 14, 2009 letter from Marjorie Nelson, Chief of the Fish and Wildlife Service (FWS) Branch of Consultation & HCPs, to Arty Williams, Associate Director of the Office of Pesticide Program's Environmental Fate and Effects Division at the Environmental Protection Agency (EPA). In that letter, FWS has declined to engage in formal consultation under the Endangered Species Act (ESA) on the possible effects of certain EPA registered pesticides on federally threatened and endangered species and their designated critical habitats. As discussed more fully below, we do not read applicable ESA regulations to provide for the rejection of a written request to engage in formal consultation. We look forward to discussing this matter further with you.

Between March 2007 and October 2008, EPA submitted to FWS requests for formal consultation under the ESA regarding the effects of pesticides containing any of 47 active ingredients. EPA submitted these requests in compliance with certain court orders and settlement agreements that required EPA to consult with the Services, as appropriate, on specific pesticides and specific listed species. Ms. Nelson's letter states that FWS "has not received all of the information necessary to initiate formal consultation on the reregistration of these pesticides as outlined in the regulations governing interagency consultation (50 CFR section 402.14)." The letter then describes the additional information that will be required to complete the initiation package for each consultation request.

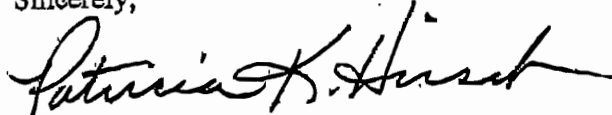
As we read the ESA regulations, they do not precondition initiation of formal consultation on a FWS determination that the information supporting the request is sufficient. While the ESA regulations contemplate that FWS may seek additional information from an action agency such as EPA to better inform a formal consultation, the regulations do not provide that the Services may reject EPA's written request to engage in formal consultation. See 50 CFR section 402.14(f); see also, section 402.02 (defining formal consultation as a process that "commences with the Federal agency's written request"). Further, in the case of formal consultations initiated pursuant to section 402.46 (the pesticide counterpart regulations) -- all but one of the consultations at issue here --, the regulations would seem to make explicit what is implicit in the general consultation regulations cited by Ms. Nelson:

"EPA may initiate consultation on a FIFRA action under this section by delivering to the Service a written request for consultation. . . . Any subsequent interchanges regarding EPA's submission, including interchanges about the completeness of the effects determination, shall occur during consultation and do not extend the time for conclusion of the consultation unless EPA withdraws its request for consultation." 40 C.F.R. §402.46(a).

We view Ms. Nelson's letter as correspondence regarding the completeness of EPA's submissions such as described above. Accordingly, this letter should be addressed as part EPA's ongoing consultations with FWS. In that regard, it is my understanding that EPA's Office of Pesticide Programs is developing a substantive response to the points articulated in Ms. Nelson's letter which EPA intends to provide to FWS in the coming weeks for interagency discussion. It also is EPA's intention to work constructively with the FWS to address the resource and timing concerns raised in Ms. Nelson's letter.

Thank you for your help and consideration of this matter. Please have your staff contact Mark Dyer of my office at (202) 564-1754 if you would like to discuss EPA's understanding above regarding the ESA regulations.

Sincerely,



Patricia K. Hirsch
Acting General Counsel