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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 Case No: C-02-1580-CW

17 CENTER FOR BIOLOGICAL)
DIVERSITY, a non-profit corporation;)

18 Plaintiff,)

19 v.)

20 CHRISTIE WHITMAN, Administrator,)
21 Environmental Protection Agency, and)
22 WAYNE NASTRI, Region 9 Administrator,)
Environmental Protection Agency)

23 Defendants..)
24 _____)

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

I. INTRODUCTION

1
2 1. This action challenges Defendants’ Christie Whitman, Administrator, Environmental
3 Protection Agency, and Wayne Nastri, Region 9 Administrator, Environmental Protection Agency
4 (collectively the “EPA”), failure to comply with the federal Endangered Species Act, 16 U.S.C. §§ 1531-
5 1544 (1994) (“ESA” or the “Act”), in the implementation and administration of the pesticide review
6 program and the registration and reregistration of pesticides and pesticide formulations pursuant to that
7 program. The pesticide review program and the registration and reregistration of pesticides and pesticide
8 formulations are jeopardizing the continued existence of the California red-legged frog, (*Rana aurora*
9 *draytonii*), a federally listed threatened species, and adversely modifying the frog’s critical habitat.

10 2. The EPA’s actions are in violation of three provisions of the ESA. First, the EPA has
11 failed to undergo consultation with the U.S. Fish and Wildlife Service (“FWS”) regarding the impacts
12 of the pesticide review program and the registration and reregistration of numerous pesticides and
13 pesticide formulations on the California red-legged frog, in violation of § 7(a)(2) of the ESA. 16 U.S.C.
14 § 1536(a)(2).

15 3. Second, the EPA has violated and is continuing to violate its duty to utilize its authority
16 in furtherance of the conservation and recovery of California red-legged frogs in consultation with the
17 FWS, in violation of § 7(a)(1) of the ESA. 16 U.S.C. § 1536(a)(1).

18 4. Third, because the EPA continues to operate and administer the pesticide registration
19 program without undergoing consultation regarding the impacts of the program on California red-legged
20 frogs, they have and will continue to irreversibly and irretrievably commit resources in a manner that
21 forecloses the EPA’s ability to implement reasonable and prudent alternatives to protect California red-
22 legged frogs and their critical habitat, in violation § 7(d) of the ESA. 16 U.S.C. §1536(d).

23 5. All of these violations continue despite recent studies that suggest that chemical use
24 affects the health and survival of the California red-legged frog. These studies link the decline of
25 California red-legged frog populations with agricultural activities that use pesticides upwind of the frog’s
26 habitat.

27 6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD”) seeks an order declaring
28 that the EPA has violated Sections 7(a)(2) and 7(a)(1) of the ESA by failing to undergo consultation with

1 FWS concerning pesticide use and its effect on California red-legged frogs and by failing to use their
2 authority to carry out programs to preserve this declining species.

3 7. CBD seeks an order compelling the EPA to begin and complete the consultation process
4 as required by Section 7(a)(2) of the ESA and to utilize its authority to promote conservation programs
5 for the benefit of the threatened California red-legged frog as required by Section 7(a)(1) of the ESA.
6 CBD also seeks an order prohibiting the EPA from registering and/or reregistering pesticides and
7 pesticide formulations that may affect the California red-legged frog until the EPA has completed
8 consultation on such registrations and reregistrations. Finally, CBD seeks an order requiring the EPA
9 to suspend the registration of currently approved pesticides that may affect the California red-legged frog
10 until the EPA has completed consultation on the registration of such pesticides.

11 **II. JURISDICTION AND VENUE**

12 8. This court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(g) and 1540(c)
13 (Endangered Species Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as
14 defendant), 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief).

15 9. To the extent required by the ESA, 16 U.S.C. § 1540(g)(2)(A), the Center for Biological
16 Diversity provided 60 days notice of its intent to sue by letter sent to the Defendants on November 26,
17 2001. The Defendants have not remedied the violations set forth in the 60-day notice.

18 10. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201
19 (declaratory judgments).

20 11. Venue is proper in the District Court for the Northern District of California pursuant to
21 28 U.S.C. § 1391(e).

22 **III. PARTIES**

23 12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD”) is a non-profit corporation
24 with offices in Berkeley, Idyllwild, and San Diego, California; Phoenix and Tucson, Arizona; and Pinos
25 Altos, New Mexico. CBD is actively involved in species and habitat protection issues throughout the
26 continental United States, northern Mexico, Alaska, and Hawaii. CBD has members throughout these
27 regions, including in and near areas that serve as habitat for the California red-legged frog. CBD and
28 its members and staff include local residents with educational, moral, spiritual, scientific, and

1 recreational interests in the California red-legged frog. CBD and its members and staff also enjoy the
2 biological, recreational, and aesthetic values of the areas inhabited by the species. CBD and its members
3 and staff have participated in efforts to protect and preserve the habitat essential to the continued
4 survival of the California red-legged frog. The CBD was among the plaintiffs who won the designation
5 of 4,138,064 acres of "critical habitat" for the threatened California red-legged frog on March 13, 2001.
6 The designation includes 29 separate areas spanning 28 California counties and over 500 miles of
7 streams and rivers. CBD and its members and staff also partake in the above interests by using many
8 of the habitat areas where red-legged frogs are present and where critical habitat is designated. CBD is
9 also involved in efforts to protect other amphibian species throughout the country. CBD brings this
10 action on its own behalf and on behalf of its adversely affected members and staff.

11 13. The above-described educational, moral, spiritual, scientific, recreational, biological, and
12 aesthetic interests of CBD and its members and staff have been adversely affected by the EPA's failure
13 to comply with the ESA and continual registration and authorization of pesticides harmful to the species.
14 Unless the relief requested is granted, CBD's interests will continue to be adversely affected and injured
15 by the failure to consult and the continual commitment of resources and take of the California red-legged
16 frog.

17 14. Defendant CHRISTIE WHITMAN is sued in her official capacity as the Administrator
18 of the Environmental Protection Agency.

19 15. Defendant WAYNE NASTRI is sued in his official capacity as Administrator for Region
20 9 of the Environmental Protection Agency.

21 **IV. THE ENDANGERED SPECIES ACT FRAMEWORK**

22 16. When a species has been listed as threatened or endangered under the ESA, federal
23 agencies have the obligation to assess and bring their programs and activities into compliance with the
24 ESA. These duties fall into two categories: (1) the duty to ensure that agency actions will not jeopardize
25 the survival and recovery of listed species or adversely modify critical habitat for such species; and (2)
26 the duty to utilize agency programs and authorities to conserve listed species. The ESA prescribes the
27 process to be followed to ensure compliance with each set of duties.

1 **Section 7(a)(2) - Consultations to Avoid Jeopardy**

2 17. Section 7(a)(2) of the ESA requires the following:

3 “each federal agency shall, in consultation with and with the assistance of the [FWS], insure that
4 any action authorized, funded, or carried out by such agency (hereinafter in this section referred
5 to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered
6 species or threatened species or result in the destruction or adverse modification of habitat of
7 such species which is determined by the [FWS] . . . to be critical.”

8 16 U.S.C. § 1536(a)(2).

9 18. The ESA establishes an interagency consultation process to assist federal agencies in
10 complying with their substantive Section 7(a)(2) duty to guard against jeopardy to listed species or
11 destruction or adverse modification of critical habitat. Under Section 7(a)(2), federal agencies must
12 consult with the FWS to determine whether their actions will jeopardize listed species’ survival or
13 adversely modify designated critical habitat, and if so, to identify ways to modify the action to avoid
14 that result. 50 C.F.R. § 402.14.

15 19. An agency must initiate consultation under Section 7 whenever it undertakes an action
16 that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). Conversely, an agency is
17 relieved of the obligation to consult on its actions only where the action will have “no effect” on listed
18 species or designated critical habitat. Effects determinations are based on the direct, indirect, and
19 cumulative effects of the action when added to the environmental baseline and other interrelated and
20 interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”).

21 20. Regulations implementing Section 7 broadly define the scope of agency actions subject
22 to consultation to encompass “all activities or programs of any kind authorized, funded, or carried out,
23 in whole or in part, by Federal agencies,” including the promulgation of regulations and the granting
24 of licenses. 50 C.F.R. § 402.02 (definition of “action”).

25 21. Agencies must consult on ongoing agency actions over which the federal agency retains,
26 or is authorized to exercise, discretionary involvement or control. See, e.g., 50 C.F.R. § 402.16 (re-
27 initiation of consultation). Agencies must also consult on ongoing agency actions “if a new species is
28 listed . . . that may be affected by the identified action.” Id.

29 22. To initiate consultation, an agency must assess the impacts of the action on listed species
30 and their habitat and provide all relevant information about such impacts to the expert fish and wildlife

1 agency. 50 C.F.R. § 402.14(c). The ESA provides for formal consultations, culminating in FWS'
2 issuance of a biological opinion. By regulation, FWS has provided that, if the action agency determines
3 that an action “may affect,” but is “not likely to adversely affect” the listed species or its critical habitat,
4 the consultation may be resolved without preparation of a biological opinion if FWS concurs in writing
5 in that determination. 50 C.F.R. § 402.13. If FWS does not concur, or if the action agency has
6 determined that the action is “likely to adversely affect” the listed species, the agencies must conduct
7 a formal consultation. *Id.* §§ 402.02, 402.14(a).

8 23. The end product of formal consultation is a biological opinion in which FWS determines
9 whether the action will jeopardize the survival and recovery of listed species or will adversely modify
10 the species’ critical habitat. 16 U.S.C. § 1536(b). In order to make this determination, FWS must
11 review all relevant information and provide a detailed evaluation of the action’s effects, including the
12 cumulative effects of federal and nonfederal activities in the area, on the listed species. 16 U.S.C. §
13 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). FWS has a statutory duty to use the best available scientific
14 information in an ESA consultation. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). If FWS
15 determines that the action is likely to jeopardize the species, the biological opinion must specify
16 reasonable and prudent alternatives that will avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. §
17 402.14(h)(3). FWS must also formulate discretionary conservation recommendations to reduce or
18 minimize the action’s impacts on listed species or critical habitat. 50 C.F.R. § 402.14(g)(6).

19 **Section 7(a)(1) - Consultations to Utilize Programs and**
20 **Authorities to Conserve Listed Species**

21 24. Under section 7(a)(1) of the Endangered Species Act, federal agencies must “utilize their
22 authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation
23 of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1). As defined
24 under ESA § 3, the term “conservation” means to use all necessary methods and procedures to bring
25 any endangered or threatened species to the point at which the measures provided pursuant to the ESA
26 are no longer necessary. 16 U.S.C. § 1532(3).

1 25. Action agencies, like the EPA, must review the programs that they administer and
2 consult with the expert fish and wildlife agencies to ensure that they utilize their programs and
3 authorities to conserve listed species.

4 **Section 7(d) – Limitation on Commitment of Resources**

5 26. Section 7(d) of the ESA mandates against “irreversible and irretrievable commitment
6 of resources” that would foreclose the agency’s ability to implement reasonable and prudent
7 alternatives. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The purpose of this section is to insure that the
8 existing environmental status quo is maintained during the consultation process so as not to foreclose
9 consideration and adoption of alternatives to the proposed federal agency action. Connor v. Burford,
10 848 F.2d 1441, 1445 n. 34 (9th Cir. 1988). This prohibition on irreversible and irretrievable
11 commitment of resources applies throughout consultation and continues until the requirements of
12 section 7 are completed.

13 **V. THE EPA’S DUTY UNDER FIFRA**

14 27. The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) charges the EPA
15 with registering, reviewing, amending, and reregistering chemicals and chemical formulations for use
16 as insecticides, fungicides, and pesticides in the United States. 7 U.S.C. §§136-136y. Under FIFRA,
17 a pesticide generally may not be sold or used in the United States unless it has an EPA registration for
18 that particular use. 7 U.S.C. § 136a(a). EPA may register a pesticide if it makes the following
19 determinations: (1) the labeling complies with FIFRA’s requirements; (2) the composition claims are
20 warranted; (3) the pesticide will perform its intended function; and (4) the pesticide will not cause
21 unreasonable adverse effects on the environment. 7 U.S.C. § 136a(c)(5). The culmination of the
22 registration process is EPA’s approval of a label for the particular pesticide. FIFRA makes it unlawful
23 to use a pesticide in a manner inconsistent with the label, Id. at § 136j(2)(G), or to make any claims that
24 differ substantially from the label. Id. at § 136j(1)(B).

25 28. EPA must classify pesticides as general or restricted use pesticides, depending on the
26 risks posed to the environment. Where necessary to guard against unreasonable adverse environmental
27 effects, EPA must classify a pesticide as restricted use. 7 U.S.C. § 136a(d)(1)(C). Restricted use
28 pesticides are subject to additional regulatory restrictions, particularly concerning application of the

1 pesticide. Id. EPA must reclassify pesticides as restricted use pesticides where necessary to prevent
2 unreasonable adverse effects on the environment. Id. at § 136a(d)(1)(C)(2).

3 29. After approving a pesticide registration, EPA retains discretionary involvement and
4 control over that registration. EPA must periodically review pesticide registrations with a goal of
5 reviewing each pesticide registration every 15 years. Id. at § 136a(g)(1). EPA has the authority to
6 compel registrants to submit data necessary for a reregistration review. Id. at § 136a(g)(2). Even apart
7 from such explicit data submission requirements, registrants must submit to EPA any information about
8 registered pesticides' unreasonable adverse effects on the environment. Id. at § 136d(a)(2). EPA takes
9 such information into account in reviewing and, where necessary, modifying the pesticide registrations.

10 30. EPA is in a process of reregistering pesticides that have been on the market for years and
11 often decades prior to enactment of the environmental registration requirements currently in place. 7
12 U.S.C. § 136a-1. EPA generally eliminates or imposes restrictions on harmful uses of the pesticides,
13 including those uses that cause harm to threatened or endangered species, as part of the re-registration
14 determination.

15 31. The EPA Administrator has the authority to cancel pesticide registrations whenever “a
16 pesticide or its labeling or other material required to be submitted does not comply with the provisions
17 of this Act or, when used in accordance with widespread and commonly recognized practice, generally
18 causes unreasonable adverse effects on the environment.” 7 U.S.C. § 136d(b). The Administrator may
19 immediately suspend a pesticide registration to prevent an imminent hazard. Id. § 136d(c). An
20 announcement by the Administrator of an intent to cancel a pesticide use often results in the registrant's
21 voluntary cancellation of, or agreement to further constraints upon that use.

22 VI. PESTICIDE USE AND THE CALIFORNIA RED-LEGGED FROG

23 32. The California red-legged frog (*Rana aurora draytonii*) was listed as a threatened
24 species under the ESA on May 23, 1996. Endangered and Threatened Wildlife and Plants;
25 Determination of Threatened Status for the California Red-Legged Frog, 61 Fed. Reg. 25,813 (May 23,
26 1996). Critical habitat was designated for the species on March 13, 2001. Endangered and Threatened
27 Wildlife and Plants; Final Determination of Critical Habitat for the California Red-Legged Frog, 66
28

1 Fed. Reg. 14,626 (March 13, 2001). California red-legged frogs have disappeared from more than 70
2 percent of their historic range in California. Id.

3 33. The FWS Recovery Team for the California red-legged frog discussed the effects of
4 “Contaminants and Agriculture” in its discussion of “Reasons for Decline and Threats to Survival” to
5 the California red-legged frog. United States Fish and Wildlife Service, Draft Recovery Plan for the
6 California Red-Legged Frog (Rana aurora draytonii) 26-27, 39—41 (January 2000) (“Draft Recovery
7 Plan”). According to the Draft Recovery Plan, amphibians generally have complex life cycles, which
8 afford them more opportunities for exposure to chemicals and more potential route of exposure than
9 other vertebrates. Id. at 39.

10 34. Exposure to contaminants may cause deformities, abnormal immune system functions,
11 diseases, injury, and death in California red-legged frogs. Id. at 28. A number of studies have
12 addressed certain contaminants that disrupt biological processes by mimicking the effects of naturally
13 produced hormones, such as the female hormone estrogen. 61 Fed. Reg. 25818. This phenomenon has
14 been implicated in the worldwide decline in amphibians. Id.

15 35. Agricultural practices, which typically use pesticides and herbicides, introduce many
16 toxins into the California red-legged frog’s range. Draft Recovery Plan at 39-40. In 1997, the
17 California Department of Pesticide Regulation reported that there were approximately 150 pesticides
18 or herbicides used within approximately 2 square kilometers (1 square mile) of known California red-
19 legged frog habitat. Id. at 40. The Draft Recovery Plan provided a list and description of chemicals
20 of greatest concern that are used within the range of the frog. Id. This discussion of chemicals cited
21 their prevalent use and potential deleterious impacts on California red-legged frogs. Various other
22 sources readily available to the EPA also document the use of pesticides in the proximity of California
23 red-legged frogs and their habitats. See, e.g., Richard A. Marovich & Steven Kishaba, An Index to
24 Pesticides That Are Used in Proximity to Federally Listed, Proposed, and Candidate Species in
25 California by Active Ingredient 45-49 (1997)(Incomplete list identifying over 200 active ingredients
26 being used near California red-legged frogs).

27 36. Recent studies confirm that there is a strong association between declines in the
28 California red-legged frog population and the amount of upwind agricultural pesticide use. See, e.g.,

1 Carlos Davidson et al., Declines of the California Red-Legged Frog: Climate, UV-B, Habitat, and
2 Pesticide Hypotheses, 11 Ecological Applications 464, 474 (2001). These studies indicate that
3 chemical use is impacting the population status and health of this threatened species. This suggests that
4 wind-borne agrochemicals may be an important factor in declines of the California red-legged frog;
5 Donald W. Sparling et al., Pesticides and Amphibian Declines in California, USA, 20(7) *Envtl.*
6 *Toxicology & Chemistry* 1591 (2001).

7 37. Atrazine is a pesticide registered by the EPA. Atrazine is used within, near, and/or
8 upwind of the current and/or historic range of the California red-legged frog. Use of Atrazine may
9 affect the California red-legged frog. The registration and/or reregistration of Atrazine may affect the
10 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
11 registration and/or reregistration of Atrazine on the California red-legged frog.

12 38. Malathion is a pesticide registered by the EPA. Malathion is used within, near, and/or
13 upwind of the current and/or historic range of the California red-legged frog. Use of Malathion may
14 affect the California red-legged frog. The registration and/or reregistration of Malathion may affect the
15 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
16 registration and/or reregistration of Malathion on the California red-legged frog.

17 39. Chlorpyrifos is a pesticide registered by the EPA. Chlorpyrifos is used within, near,
18 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
19 Chlorpyrifos may affect the California red-legged frog. The registration and/or reregistration of
20 Chlorpyrifos may affect the California red-legged frog. The EPA has not consulted with FWS
21 regarding the impacts of the registration and/or reregistration of Chlorpyrifos on the California red-
22 legged frog.

23 40. Diazinon is a pesticide registered by the EPA. Diazinon is used within, near, and/or
24 upwind of the current and/or historic range of the California red-legged frog. Use of Diazinon may
25 affect the California red-legged frog. The registration and/or reregistration of Diazinon may affect the
26 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
27 registration and/or reregistration of Diazinon on the California red-legged frog.

1 41. Methidathion is a pesticide registered by the EPA. Methidathion is used within, near,
2 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
3 Methidathion may affect the California red-legged frog. The registration and/or reregistration of
4 Methidathion may affect the California red-legged frog. The EPA has not consulted with FWS
5 regarding the impacts of the registration and/or reregistration of Methidathion on the California red-
6 legged frog.

7 42. Endosulfan is a pesticide registered by the EPA. Endosulfan is used within, near, and/or
8 upwind of the current and/or historic range of the California red-legged frog. Use of Endosulfan may
9 affect the California red-legged frog. The registration and/or reregistration of Endosulfan may affect
10 the California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
11 registration and/or reregistration of Endosulfan on the California red-legged frog.

12 43. Chlorothalonil is a pesticide registered by the EPA. Chlorothalonil is used within, near,
13 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
14 Chlorothalonil may affect the California red-legged frog. The registration and/or reregistration of
15 Chlorothalonil may affect the California red-legged frog. The EPA has not consulted with FWS
16 regarding the impacts of the registration and/or reregistration of Chlorothalonil on the California red-
17 legged frog.

18 44. Trifluralin is a pesticide registered by the EPA. Trifluralin is used within, near, and/or
19 upwind of the current and/or historic range of the California red-legged frog. Use of Trifluralin may
20 affect the California red-legged frog. The registration and/or reregistration of Trifluralin may affect the
21 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
22 registration and/or reregistration of Trifluralin on the California red-legged frog.

23 45. Metam Sodium is a pesticide registered by the EPA. Metam Sodium is used within,
24 near, and/or upwind of the current and/or historic range of the California red-legged frog. Use of
25 Metam Sodium may affect the California red-legged frog. The registration and/or reregistration of
26 Metam Sodium may affect the California red-legged frog. The EPA has not consulted with FWS
27 regarding the impacts of the registration and/or reregistration of Metam Sodium on the California red-
28 legged frog.

1 46. Molinate is a pesticide registered by the EPA. Molinate is used within, near, and/or
2 upwind of the current and/or historic range of the California red-legged frog. Use of Molinate may
3 affect the California red-legged frog. The registration and/or reregistration of Molinate may affect the
4 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
5 registration and/or reregistration of Molinate on the California red-legged frog.

6 47. Methyl Parathion is a pesticide registered by the EPA. Methyl Parathion is used within,
7 near, and/or upwind of the current and/or historic range of the California red-legged frog. Use of
8 Methyl Parathion may affect the California red-legged frog. The registration and/or reregistration of
9 Methyl Parathion may affect the California red-legged frog. The EPA has not consulted with FWS
10 regarding the impacts of the registration and/or reregistration of Methyl Parathion on the California red-
11 legged frog.

12 48. Ethyl Parathion is a pesticide registered by the EPA. Ethyl Parathion is used within,
13 near, and/or upwind of the current and/or historic range of the California red-legged frog. Use of Ethyl
14 Parathion may affect the California red-legged frog. The registration and/or reregistration of Ethyl
15 Parathion may affect the California red-legged frog. The EPA has not consulted with FWS regarding
16 the impacts of the registration and/or reregistration of Ethyl Parathion on the California red-legged frog.

17 49. Def is a pesticide registered by the EPA. Def is used within, near, and/or upwind of the
18 current and/or historic range of the California red-legged frog. Use of Def may affect the California
19 red-legged frog. The registration and/or reregistration of Def may affect the California red-legged frog.
20 The EPA has not consulted with FWS regarding the impacts of the registration and/or reregistration of
21 Def on the California red-legged frog.

22 50. Telone is a pesticide registered by the EPA. Telone is used within, near, and/or upwind
23 of the current and/or historic range of the California red-legged frog. Use of Telone may affect the
24 California red-legged frog. The registration and/or reregistration of xx may affect the California red-
25 legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
26 reregistration of Telone on the California red-legged frog.

27 51. Azinphos-methyl is a pesticide registered by the EPA. Azinphos-methyl is used within,
28 near, and/or upwind of the current and/or historic range of the California red-legged frog. Use of

1 Azinphos-methyl may affect the California red-legged frog. The registration and/or reregistration of
2 Azinphos-methyl may affect the California red-legged frog. The EPA has not consulted with FWS
3 regarding the impacts of the registration and/or reregistration of Azinphos-methyl on the California red-
4 legged frog.

5 52. Chloropicrin is a pesticide registered by the EPA. Chloropicrin is used within, near,
6 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
7 Chloropicrin may affect the California red-legged frog. The registration and/or reregistration of
8 Chloropicrin may affect the California red-legged frog. The EPA has not consulted with FWS
9 regarding the impacts of the registration and/or reregistration of Chloropicrin on the California red-
10 legged frog.

11 53. Methomyl is a pesticide registered by the EPA. Methomyl is used within, near, and/or
12 upwind of the current and/or historic range of the California red-legged frog. Use of Methomyl may
13 affect the California red-legged frog. The registration and/or reregistration of Methomyl may affect the
14 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
15 registration and/or reregistration of Methomyl on the California red-legged frog.

16 54. Carabaryl is a pesticide registered by the EPA. Carabaryl is used within, near, and/or
17 upwind of the current and/or historic range of the California red-legged frog. Use of Carabaryl may
18 affect the California red-legged frog. The registration and/or reregistration of Carabaryl may affect the
19 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
20 registration and/or reregistration of Carabaryl on the California red-legged frog.

21 55. Cyanazine is a pesticide registered by the EPA. Cyanazine is used within, near, and/or
22 upwind of the current and/or historic range of the California red-legged frog. Use of Cyanazine may
23 affect the California red-legged frog. The registration and/or reregistration of Cyanazine may affect the
24 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
25 registration and/or reregistration of Cyanazine on the California red-legged frog.

26 56. Diruon is a pesticide registered by the EPA. Diruon is used within, near, and/or upwind
27 of the current and/or historic range of the California red-legged frog. Use of Diruon may affect the
28 California red-legged frog. The registration and/or reregistration of Diruon may affect the California

1 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
2 reregistration of Diruon on the California red-legged frog.

3 57. Maneb is a pesticide registered by the EPA. Maneb is used within, near, and/or upwind
4 of the current and/or historic range of the California red-legged frog. Use of Maneb may affect the
5 California red-legged frog. The registration and/or reregistration of Maneb may affect the California
6 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
7 reregistration of Maneb on the California red-legged frog.

8 58. Naled is a pesticide registered by the EPA. Naled is used within, near, and/or upwind
9 of the current and/or historic range of the California red-legged frog. Use of Naled may affect the
10 California red-legged frog. The registration and/or reregistration of Naled may affect the California
11 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
12 reregistration of Naled on the California red-legged frog.

13 59. Propargite is a pesticide registered by the EPA. Propargite is used within, near, and/or
14 upwind of the current and/or historic range of the California red-legged frog. Use of Propargite may
15 affect the California red-legged frog. The registration and/or reregistration of Propargite may affect the
16 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
17 registration and/or reregistration of Propargite on the California red-legged frog.

18 60. Simazine is a pesticide registered by the EPA. Simazine is used within, near, and/or
19 upwind of the current and/or historic range of the California red-legged frog. Use of Simazine may
20 affect the California red-legged frog. The registration and/or reregistration of Simazine may affect the
21 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
22 registration and/or reregistration of Simazine on the California red-legged frog.

23 61. Thiobencarb is a pesticide registered by the EPA. Thiobencarb is used within, near,
24 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
25 Thiobencarb may affect the California red-legged frog. The registration and/or reregistration of
26 Thiobencarb may affect the California red-legged frog. The EPA has not consulted with FWS
27 regarding the impacts of the registration and/or reregistration of Thiobencarb on the California red-
28 legged frog.

1 62. Ziram is a pesticide registered by the EPA. Ziram is used within, near, and/or upwind
2 of the current and/or historic range of the California red-legged frog. Use of Ziram may affect the
3 California red-legged frog. The registration and/or reregistration of Ziram may affect the California
4 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
5 reregistration of Ziram on the California red-legged frog.

6 63. Captan is a pesticide registered by the EPA. Captan is used within, near, and/or upwind
7 of the current and/or historic range of the California red-legged frog. Use of Captan may affect the
8 California red-legged frog. The registration and/or reregistration of Captan may affect the California
9 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
10 reregistration of Captan on the California red-legged frog.

11 64. Mancozeb is a pesticide registered by the EPA. Mancozeb is used within, near, and/or
12 upwind of the current and/or historic range of the California red-legged frog. Use of Mancozeb may
13 affect the California red-legged frog. The registration and/or reregistration of Mancozeb may affect the
14 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
15 registration and/or reregistration of Mancozeb on the California red-legged frog.

16 65. Dicofol is a pesticide registered by the EPA. Dicofol is used within, near, and/or upwind
17 of the current and/or historic range of the California red-legged frog. Use of Dicofol may affect the
18 California red-legged frog. The registration and/or reregistration of Dicofol may affect the California
19 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
20 reregistration of Dicofol on the California red-legged frog.

21 66. Dimehtoate is a pesticide registered by the EPA. Dimehtoate is used within, near, and/or
22 upwind of the current and/or historic range of the California red-legged frog. Use of Dimehtoate may
23 affect the California red-legged frog. The registration and/or reregistration of Dimehtoate may affect
24 the California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
25 registration and/or reregistration of Dimehtoate on the California red-legged frog.

26 67. Fenamiphos is a pesticide registered by the EPA. Fenamiphos is used within, near,
27 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
28 Fenamiphos may affect the California red-legged frog. The registration and/or reregistration of

1 Fenamiphos may affect the California red-legged frog. The EPA has not consulted with FWS regarding
2 the impacts of the registration and/or reregistration of Fenamiphos on the California red-legged frog.

3 68. Iprodione is a pesticide registered by the EPA. Iprodione is used within, near, and/or
4 upwind of the current and/or historic range of the California red-legged frog. Use of Iprodione may
5 affect the California red-legged frog. The registration and/or reregistration of Iprodione may affect the
6 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
7 registration and/or reregistration of Iprodione on the California red-legged frog.

8 69. Linuron is a pesticide registered by the EPA. Linuron is used within, near, and/or
9 upwind of the current and/or historic range of the California red-legged frog. Use of Linuron may affect
10 the California red-legged frog. The registration and/or reregistration of Linuron may affect the
11 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
12 registration and/or reregistration of Linuron on the California red-legged frog.

13 70. Mancozeb is a pesticide registered by the EPA. Mancozeb is used within, near, and/or
14 upwind of the current and/or historic range of the California red-legged frog. Use of Mancozeb may
15 affect the California red-legged frog. The registration and/or reregistration of Mancozeb may affect the
16 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
17 registration and/or reregistration of Mancozeb on the California red-legged frog.

18 71. Metam Sodium is a pesticide registered by the EPA. Metam Sodium is used within,
19 near, and/or upwind of the current and/or historic range of the California red-legged frog. Use of
20 Metam Sodium may affect the California red-legged frog. The registration and/or reregistration of
21 Metam Sodium may affect the California red-legged frog. The EPA has not consulted with FWS
22 regarding the impacts of the registration and/or reregistration of Metam Sodium on the California red-
23 legged frog.

24 72. Methyl Bromide is a pesticide registered by the EPA. Methyl Bromide is used within,
25 near, and/or upwind of the current and/or historic range of the California red-legged frog. Use of
26 Methyl Bromide may affect the California red-legged frog. The registration and/or reregistration of
27 Methyl Bromide may affect the California red-legged frog. The EPA has not consulted with FWS
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1 regarding the impacts of the registration and/or reregistration of Methyl Bromide on the California red-
2 legged frog.

3 73. Metolachlor is a pesticide registered by the EPA. Metolachlor is used within, near,
4 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
5 Metolachlor may affect the California red-legged frog. The registration and/or reregistration of
6 Metolachlor may affect the California red-legged frog. The EPA has not consulted with FWS regarding
7 the impacts of the registration and/or reregistration of Metolachlor on the California red-legged frog.

8 74. Oryzalin is a pesticide registered by the EPA. Oryzalin is used within, near, and/or
9 upwind of the current and/or historic range of the California red-legged frog. Use of Oryzalin may
10 affect the California red-legged frog. The registration and/or reregistration of Oryzalin may affect the
11 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
12 registration and/or reregistration of Oryzalin on the California red-legged frog.

13 75. Oxyfluoren is a pesticide registered by the EPA. Oxyfluoren is used within, near, and/or
14 upwind of the current and/or historic range of the California red-legged frog. Use of Oxyfluoren may
15 affect the California red-legged frog. The registration and/or reregistration of Oxyfluoren may affect
16 the California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
17 registration and/or reregistration of Oxyfluoren on the California red-legged frog.

18 76. Oxydemeton-methyl is a pesticide registered by the EPA. Oxydemeton-methyl is used
19 within, near, and/or upwind of the current and/or historic range of the California red-legged frog. Use
20 of Oxydemeton-methyl may affect the California red-legged frog. The registration and/or reregistration
21 of Oxydemeton-methyl may affect the California red-legged frog. The EPA has not consulted with
22 FWS regarding the impacts of the registration and/or reregistration of Oxydemeton-methyl on the
23 California red-legged frog.

24 77. Paraquate Dichloride is a pesticide registered by the EPA. Paraquate Dichloride is used
25 within, near, and/or upwind of the current and/or historic range of the California red-legged frog. Use
26 of Paraquate Dichloride may affect the California red-legged frog. The registration and/or reregistration
27 of Paraquate Dichloride may affect the California red-legged frog. The EPA has not consulted with
28

1 FWS regarding the impacts of the registration and/or reregistration of Paraquate Dichloride on the
2 California red-legged frog.

3 78. Pendimethalin is a pesticide registered by the EPA. Pendimethalin is used within, near,
4 and/or upwind of the current and/or historic range of the California red-legged frog. Use of
5 Pendimethalin may affect the California red-legged frog. The registration and/or reregistration of
6 Pendimethalin may affect the California red-legged frog. The EPA has not consulted with FWS
7 regarding the impacts of the registration and/or reregistration of Pendimethalin on the California red-
8 legged frog.

9 79. Permethrin is a pesticide registered by the EPA. Permethrin is used within, near, and/or
10 upwind of the current and/or historic range of the California red-legged frog. Use of Permethrin may
11 affect the California red-legged frog. The registration and/or reregistration of Permethrin may affect
12 the California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
13 registration and/or reregistration of Permethrin on the California red-legged frog.

14 80. Phorate is a pesticide registered by the EPA. Phorate is used within, near, and/or upwind
15 of the current and/or historic range of the California red-legged frog. Use of Phorate may affect the
16 California red-legged frog. The registration and/or reregistration of Phorate may affect the California
17 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
18 reregistration of Phorate on the California red-legged frog.

19 81. Phosmet is a pesticide registered by the EPA. Phosmet is used within, near, and/or
20 upwind of the current and/or historic range of the California red-legged frog. Use of Phosmet may
21 affect the California red-legged frog. The registration and/or reregistration of Phosmet may affect the
22 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
23 registration and/or reregistration of Phosmet on the California red-legged frog.

24 82. Telone is a pesticide registered by the EPA. Telone is used within, near, and/or upwind
25 of the current and/or historic range of the California red-legged frog. Use of Telone may affect the
26 California red-legged frog. The registration and/or reregistration of Telone may affect the California
27 red-legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
28 reregistration of Telone on the California red-legged frog.

1 83. Hexazinone is a pesticide registered by the EPA. Hexazinone is used within, near,
2 and/or upwind of the current and/or historic range of the California red-legged frog. Use of Hexazinone
3 may affect the California red-legged frog. The registration and/or reregistration of Hexazinone may
4 affect the California red-legged frog. The EPA has not consulted with FWS regarding the impacts of
5 the registration and/or reregistration of Hexazinone on the California red-legged frog.

6 84. Triclopyr is a pesticide registered by the EPA. Triclopyr is used within, near, and/or
7 upwind of the current and/or historic range of the California red-legged frog. Use of Triclopyr may
8 affect the California red-legged frog. The registration and/or reregistration of Triclopyr may affect the
9 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
10 registration and/or reregistration of Triclopyr on the California red-legged frog.

11 85. Glysohate is a pesticide registered by the EPA. Glysohate is used within, near, and/or
12 upwind of the current and/or historic range of the California red-legged frog. Use of Glysohate may
13 affect the California red-legged frog. The registration and/or reregistration of Glysohate may affect
14 the California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
15 registration and/or reregistration of Glysohate on the California red-legged frog.

16 86. 2,4-d is a pesticide registered by the EPA. 2,4-d is used within, near, and/or upwind of
17 the current and/or historic range of the California red-legged frog. Use of 2,4-d may affect the
18 California red-legged frog. The registration and/or reregistration of 2,4-d may affect the California red-
19 legged frog. The EPA has not consulted with FWS regarding the impacts of the registration and/or
20 reregistration of 2,4-d on the California red-legged frog.

21 87. Imazapyr is a pesticide registered by the EPA. Imazapyr is used within, near, and/or
22 upwind of the current and/or historic range of the California red-legged frog. Use of Imazapyr may
23 affect the California red-legged frog. The registration and/or reregistration of Imazapyr may affect the
24 California red-legged frog. The EPA has not consulted with FWS regarding the impacts of the
25 registration and/or reregistration of Imazapyr on the California red-legged frog.

26 88. In addition to the pesticides named in paragraphs 37-87 above, over 200 additional
27 pesticides are used within, near, and/or upwind of the current and/or historic range of the California red-
28 legged frog. Use of each of these pesticides may affect the California red-legged frog. The EPA has

1 not consulted with FWS regarding the impacts of the registration and/or reregistration of any of these
2 pesticides on the California red-legged frog.

3 89. The EPA has also not consulted with the FWS pursuant to Section 7(a)(1) of the ESA
4 with regard to the California red-legged frog. The EPA has not carried out any programs specifically
5 for the conservation of the California red-legged frog.

6 **VII. CLAIMS FOR RELIEF**

7 **FIRST CLAIM FOR RELIEF**

8 **Violation Of The Endangered Species Act**
9 **[16 U.S.C. §1536(a)(2)]**
10 **(The EPA's Failure To Consult On Pesticide Registrations That May Affect California Red-**
11 **Legged Frogs And Their Critical Habitat)**

12 90. Each and every allegation set forth above in this Complaint is incorporated herein by
13 reference.

14 91. The EPA is violating Section 7(a)(2) of the ESA and its implementing regulations by
15 failing to ensure through consultation with the FWS that the registration and reregistration of pesticides
16 does not jeopardize the continued existence of the California red-legged frog or destroy or adversely
17 modify its critical habitat. 16 U.S.C. §§ 1536(a)(2) & 1540(g); 50 C.F.R. Part 402.

18 **SECOND CLAIM FOR RELIEF**

19 **Violation Of The Endangered Species Act**

20 **[16 U.S.C. § 1536(a)(1)]**

21 **(The EPA's Failure To Utilize Their Programs And Authorities To Conserve California Red-**
22 **Legged Frogs)**

23 92. Each and every allegation set forth above in this Complaint is incorporated herein by
24 reference.

25 93. The EPA is violating Section 7(a)(1) of the ESA by failing to, in consultation with and
26 with the assistance of the FWS, utilize its authorities in furtherance of the ESA, and by failing to carry
27 out programs for the conservation of the California red-legged frog. 16 U.S.C. §§ 1536(a)(1) &
28 1540(g).

THIRD CLAIM FOR RELIEF

1 **Violation Of The Endangered Species Act**
2 **[16 U.S.C. § 1536(d)]**
3 **(The EPA'S Irreversible And Irretrievable Commitment Of Resources Before Final**
4 **Resolution Of The Consultation Process)**

5 94. Each and every allegation set forth above in this Complaint is incorporated herein by
6 reference.

7 95. The EPA is violating Section 7(d) of the ESA and its implementing regulations by
8 making an irreversible and irretrievable commitment of resources in its registration and reregistration
9 of pesticides prior to completing consultation with the FWS on the impacts of the pesticides of the
10 California red-legged frog. 16 U.S.C. §§ 1536(d) & 1540(g).

11 **VIII. PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs respectfully request that the Court enter judgment providing the
13 following relief:

14 1. Declare that the EPA is violating ESA § 7(a)(2) by failing to undergo consultation
15 concerning effects of EPA pesticide registrations on the threatened California red-legged frog and its
16 critical habitat;

17 2. Declare that the EPA is violating ESA § 7(a)(1) by failing to review its programs and
18 consult with FWS to determine how to utilize its authorities to conserve the threatened California red-
19 legged frog;

20 3. Declare that the EPA is violating ESA § 7(d) by making irreversible and irretrievable
21 commitments of resources that foreclose the EPA's ability to implement reasonable and prudent
22 alternatives in light of the recent studies linking pesticide use and the decline of the California red-
23 legged frog;

24 4. Order the EPA to begin consultation pursuant to ESA §7(a)(2) on the effects of pesticide
25 registrations on threatened California red-legged frogs and their critical habitat;

26 5. Order the EPA to not register or reregister any pesticide that may affect the California
27 red-legged frog until the EPA has completed consultation on such pesticide;

28 6. Order the EPA to suspend the registration of any pesticide that may affect the California
red-legged frog until the EPA has completed consultation on such pesticide;

1 7. Order the EPA review its programs and authorities and to consult with the FWS to
2 determine how best to utilize its programs and authorities to promote the conservation of threatened
3 California red-legged frogs in compliance with ESA § 7(a)(1);

4 8. Award Plaintiffs' costs, including reasonable attorney's fees and expert witness fees; and

5 9. Provide such other relief as the court deems just and proper.

6 Respectfully submitted,

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8 DATED: June 28, 2002

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