UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*, and DOW AGROSCIENCES LLC, *Intervenor-Respondent*.	No. 14-73353
CENTER FOR FOOD SAFETY, *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*, and DOW AGROSCIENCES LLC, *Intervenor-Respondent*.	No. 14-73359

PETITIONERS CENTER FOR FOOD SAFETY ET AL.'S MOTION FOR STAY PENDING REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

PAGE(S)

FEDERAL CASES, CONT'D

STATUTES

FEDERAL AGENCY DOCUMENTS

PAGE(S)

FEDERAL AGENCY DOCUMENTS, CONT'D

FEDERAL RULES OF APPELLATE PROCEDURE

CODE OF FEDERAL REGULATIONS

PAGE(S)

OTHER AUTHORITIES

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 18 and Title 5, Section 705 of the United States Code, Petitioners Center for Food Safety, National Family Farm Coalition, Pesticide Action Network North America, Beyond Pesticides, Environmental Working Group, and Center for Biological Diversity (collectively Petitioners) hereby move to stay the final agency order at issue in this case to preserve the *status quo* pending this Court's resolution of these consolidated petitions for review.

Respondent U.S. Environmental Protection Agency (EPA) denied Petitioners' written request for a stay pending this Court's review on February 4, 2015. *See* Fed. R. App. P. 18(a)(2)(A); Kimbrell Decl. Ex. H. Petitioners notified all parties of their intention to move for a stay pending appeal. Respondent EPA and Respondent-Intervenor Dow AgroSciences LLC (Dow) oppose this motion. Petitioner Natural Resources Defense Council (NRDC) in consolidated case No. 14-73353 supports this motion.

BACKGROUND

At issue in these proceedings is EPA's October 15, 2014 decision to approve (or "register") a powerful new herbicide called "Enlist Duo" for use in six Midwestern states under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. Developed by Dow, Enlist Duo combines two

active ingredients: 2,4-dichlorophenoxyacetic acid (2,4-D) choline salt and glyphosate dimethylammonium salt (glyphosate). *See* Kimbrell Decl. Ex. B, at 1. The first of the "modern-era" herbicides, 2,4-D was developed during World War II, and gained notoriety during the Vietnam War as one of the two active ingredients in the defoliant Agent Orange.[1] Glyphosate was developed in the 1970s and is the active ingredient in Monsanto Corporation's "Roundup" brand herbicides.[2]

Enlist Duo is specifically designed and registered to be used on "Enlist" crops, which are new varieties of corn and soy that have been genetically engineered by Dow to withstand both 2,4-D and glyphosate. *Id.* The technology is marketed as a chemical means to rid fields planted with Enlist corn and soy of unwanted weeds, without damaging the crop itself.

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) "deregulated" the first glyphosate-resistant crop in 1994, and today glyphosate-resistant crops like Monsanto's "Roundup Ready" varieties are

[1] EPA, *Registration of Enlist Duo*, http://www2.epa.gov/ingredients-used-pesticide-products/registration-enlist-duo (last visited Feb. 6, 2015).

[2] Monsanto Co., *Backgrounder: History of Monsanto's Glyphosate Herbicides* (June 2005), *available at* http://www.monsanto.com/products/documents/glyphosate-background-materials/back_history.pdf.

nearly ubiquitous in commodity crops.[3] Unfortunately, the proliferation of crops genetically engineered to resist glyphosate and the attendant spike in glyphosate use, had a predicted result. Just as constant and careless use of antibiotics breeds bacteria that are resistant to antibiotics, overuse of glyphosate on glyphosate-resistant crops bred an abundance of resistant weeds that can no longer be killed with glyphosate.[4] Faced with the epidemic of glyphosate-resistant weeds, farmers are increasingly resorting to older and more toxic herbicides, including 2,4-D.

Enlist corn and soy are the first crops genetically engineered to be resistant to 2,4-D. APHIS' decision to deregulate Enlist corn and soy on September 16, 2014 and EPA's subsequent registration of Enlist Duo for use on those crops marks the beginning of a new era for 2,4-D. Indeed, APHIS' conservative estimate is that the approval of Enlist crops and Enlist Duo herbicide will result in a *200-600 percent increase* in the amount of 2,4-D used in agriculture by 2020 relative to

[3] Most genetically engineered crops must be "deregulated" by APHIS before they can be sold or grown commercially. *See generally Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 835 (9th Cir. 2013) (describing the deregulation process).

[4] Some individual weed plants are naturally resistant to the particular herbicide used. These will survive when all others are killed, and will proliferate without competition until the field is infested with the herbicide resistant weed. Enlist crops were engineered to allow application of 2,4-D to these now-abundant weeds without killing the crop. *See* USDA, *Final Environmental Impact Statement for Dow AgroSciences Petitions (09-233-01p, 09-349-01p, and 11-234-01p) for Determinations of Nonregulated Status for 2,4-D-Resistant Corn and Soybean Varieties, Appendix 6* (Aug. 2014) 6-3 to 6-5; *available at* http://www.aphis.usda.gov/brs/aphisdocs/24d_feis_appendices.pdf.

current use. Kimbrell Decl. Ex. I, at x. Moreover, APHIS predicts that "2,4-D use is expected to be used over a wider part of the growing season." *Id.*

EPA violated federal law in numerous respects in registering Enlist Duo. Because EPA's approval of Enlist Duo will have profound adverse impacts on human health and the environment, Petitioners seek relief from this Court.

ARGUMENT

In most cases, "[a] party seeking a stay must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip[s] in his favor, and that a stay is in the public interest." *Humane Soc'y of the U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). However, it is well established that "[t]he traditional preliminary injunction analysis *does not apply* to injunctions issued pursuant to the [Endangered Species Act (ESA)]." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (*NMFS I*), 422 F.3d 782, 793 (9th Cir. 2005) (emphasis added). This Court has explained:

> In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. As the Supreme Court has noted, Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. Accordingly, courts may not use equity's scales to strike a different balance.

Id. at 793-94 (internal citations and quotation marks omitted).

As set forth below, Petitioners are likely to succeed on the merits of their claim that EPA violated Section 7 of the Endangered Species Act (ESA) by failing to consult with the U.S. Fish and Wildlife Service (FWS) regarding the impact of registering Enlist Duo on the whooping crane *(Grus americana)* and the Indiana bat (*Myotis sodalis*). Because the resulting harm to the crane and the bat will cause irreparable harm to Petitioners, and because the balance of harms tips in favor of preventing such harm, this Court should grant the stay.[5]

I. Petitioners Are Likely to Succeed on the Merits of Their Claim That EPA Violated the ESA by Failing to Consult FWS Regarding the Impact of Enlist Duo on Whooping Cranes and Indiana Bats.

Under FIFRA, EPA may not register a pesticide if it determines that the pesticide would cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). By registering Enlist Duo, EPA violated this provision in numerous ways, including by failing to properly assess the impacts of the registration on human health as well as different aspects of the environment, including compliance with the ESA. For purposes of this motion for stay, and

[5] Petitioners have standing to challenge EPA's registration decision because (1) Petitioners' members have standing to sue in their own right, (2) the conservation and protection of sensitive species from the harms of pesticide use is germane to Petitioners' organizational purposes, and (3) there is no need for Petitioners' members to participate in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-343 (1977). Petitioners' members reside or recreate in areas where the whooping crane or Indiana bat can be found, have dedicated interests in the conservation of the species, and their aesthetic and recreational enjoyment of the species are adversely affected by EPA's registration decision. *See generally* Crouch Decl.; Giese Decl.; Buse Decl.; Limberg Decl. (filed concurrently).

without waiving their arguments concerning EPA's other violations, Petitioners focus here on EPA's failure to comply with Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). Prior to making a determination as to unreasonable adverse effects, EPA must comply with its obligations under the ESA, including the duty to consult it imposes. EPA's noncompliance is patent, and threatens imminent harm to imperiled species.

A. Section 7(a)(2) of the Endangered Species Act Requires EPA to Consult with Expert Wildlife Agencies Whenever Registration of a Pesticide May Affect a Listed Species.

"[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. The ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (*NMFS II*), 524 F.3d 917, 929 (9th Cir. 2008) ("ESA's no-jeopardy mandate applies to every discretionary agency action—regardless of the expense or burden its application might impose.") (quoting *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007)).

Section 7(a)(2) is a critical component of the ESA's scheme to conserve threatened and endangered species, and requires that every federal agency determine whether its actions "may affect" any such species or any designated critical habitat. If so, the action agency *must* consult with FWS and/or the National Marine Fisheries Service (NMFS)[6] to "insure" that the action is "not likely to jeopardize the continued existence" of that species, or "result in the destruction or adverse modification of habitat … determined … to be critical…." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); *see Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). The duty to "insure" against jeopardy is a "rigorous" one. *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987).[7]

Consultation may initially be informal. 50 C.F.R. § 402.13(a). If, after informal consultation, FWS *concurs in writing* that the agency's action is "not likely to adversely affect" any listed species or critical habitat, the process ends.

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[6] FWS is the expert agency designated to evaluate impacts on endangered terrestrial and fresh water species, while NMFS acts in that capacity regarding marine species. *See* FWS & NMFS, *Mem. of Understanding Regarding Jurisdictional Responsibilities & Listing Procedures Under the ESA of 1973* (1978), *available at* http://www.nmfs.noaa.gov/pr/laws/esa/mou_usfws.pdf.

[7] "Jeopardize the continued existence of" is defined as engaging in an action that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. A species' "critical habitat" includes those areas specifically identified as "essential to the conservation of the species" and "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

50 C.F.R. § 402.14(b); *see Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) ("The consulting agency [FWS] *must issue a written concurrence* in the determination….") (emphasis added). Otherwise, EPA must enter formal consultation. 50 C.F.R. § 402.14(a); *Pac. Rivers Council*, 30 F.3d at 1054 n.8. At the completion of formal consultation, FWS must issue a Biological Opinion, using the "best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8). The Biological Opinion provides FWS's opinion on whether the agency's action is likely to jeopardize the continued existence of the species or adversely modify critical habitat, and authorizes any incidental "take" (harm or mortality). *Id.* § 402.14(h)(3), (i). In making its assessment, FWS evaluates "the current status of the listed species or critical habitat," the "effects of the action," and "cumulative effects." *Id.* § 402.14(g)(2)-(3). If FWS concludes EPA's action will jeopardize a species or adversely modify any critical habitat, its Biological Opinion must determine that proceeding risks violating Section 7(a)(2)'s substantive prohibition on jeopardizing species.

Here, EPA did not consult, either formally or informally, with FWS or NMFS. Instead, after acknowledging that its registration of Enlist Duo "may affect" listed species, EPA relied entirely on its own internal assessments of the risks to conclude that the substantial increase in 2,4-D use ultimately will have "no effect" on any listed species or designated critical habitat. The manner in which

EPA came to this purported "no effect" determination flatly violates this Court's consistent interpretation of the ESA's requirements.

EPA may decline to undergo consultation with the expert agencies *only* if EPA legitimately determines its action will have *no effect* on any listed species or critical habitat. This means *none*; any effect, however minor in EPA's view, compels consultation. This Court has been clear: "The minimum threshold for an agency action to trigger consultation with FWS is low," and EPA "must initiate formal consultation if its proposed action 'may affect' listed species or critical habitat"; "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)); *id*. at 498 ("[T] he BLM's no effect finding and resulting failure to consult were arbitrary and capricious in violation of the BLM's obligations under the ESA."); *see also Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009) (noting "consultation is required whenever a federal action '*may affect* listed species or critical habitat'" and affirming injunction pending compliance with ESA) (quoting 50 C.F.R. § 402.14(a)).

EPA's "no effect" determination did not comply with this strict standard. Instead, EPA admitted its action may affect the whooping crane and Indiana bat,

but instead of consulting FWS as required, EPA engaged in a series of elaborate internal calculations that it unilaterally concluded showed that the affected species would not likely come to any substantial harm. This is not EPA's prerogative. If an action *may* affect any species or its critical habitat—"whether beneficial, benign, adverse, or of an undetermined character"—EPA *must*, at a minimum, seek FWS's expertise in informal consultation. *W. Watersheds*, 632 F.3d at 496. This Court has emphasized that "actions that have *any chance of affecting* listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Karuk Tribe*, 681 F.3d at 1027 (emphasis added). Only after FWS signs off on a conclusion that the action is not likely to adversely affect any such species or habitat may EPA forego formal consultation. 50 C.F.R. §§ 402.13(a), 402.14(b)(1).

B. EPA Acknowledged the Registration of Enlist Duo May Affect Endangered Species.

EPA first performed a screening level risk assessment examining the effects on endangered species of EPA's approval of Enlist Duo for use on herbicide-resistant corn and soybean. Kimbrell Decl. Ex. F, at 1. According to EPA, "53 species in the 6 states proposed for registration (Illinois, Indiana, Iowa, Ohio, South Dakota, and Wisconsin) were identified as within the action area … associated with the new herbicide-tolerant corn and soybean uses." *Id.* at 2. EPA acknowledged that "[p]otential direct risk concerns could not be excluded for

mammals (acute and chronic); birds, reptiles, and terrestrial-phase amphibians (acute); and terrestrial plants. Indirect effect risk concerns for all taxa were possible for any species that have dependencies (e.g., food, shelter, habitat) on mammals, birds, reptiles, terrestrial-phase amphibians, or terrestrial plants." *Id.* at 1-2.

After making this initial "may affect" determination, however, EPA did not consult FWS, but instead reexamined the potential for effects, after taking into account the mitigation EPA included in the pesticide's label directions, such as certain restrictions on the applicator nozzle to be used, timing, and wind direction. EPA assumed this mitigation would completely preclude any transport of any of the pesticide beyond the sprayed field, *i.e.*, that *all* spray drift, volatilization, and pesticide runoff would be eliminated. *See, e.g.*, *id.* at 3. ("[A]ssessment assumes that spray drift will remain confined to the field and that the action area is limited-to the 2,4-D choline treated field."). EPA therefore assumed that forty-nine of the fifty-three potentially at-risk listed species would not be affected at all, "based on the premise that they are not expected to occur on corn and soybean fields." *Id.*

Notably, EPA is well aware that pesticides *routinely travel and affect public health and wildlife beyond the fields* in which they are sprayed. *See, e.g.*, Kimbrell Decl. Ex. B, at 11 ("Spray drift is always a potential source of exposure to residents nearby to spraying operations. Off-target movement of pesticides can

occur via many types of pathways and it is governed by a variety of factors. Sprays that are released and do not deposit in the application area end up off-target and can lead to exposures to those it may directly contact."); *id.* at 10 ("The two main factors that bystander exposure depends on are the rate at which these chemicals come off of a treated field which is described as the off-gassing, emission or flux, and how those vapors are dispersed in the air over and around the treated field. Volatilization can occur during the application process or thereafter. It can result from aerosols evaporating during application, while deposited sprays are still drying or after as dried deposited residues volatilize."). Hence, EPA's assumption that only endangered plants and animals in the sprayed fields themselves, or those that feed on such plants and animals, may be affected by the spraying is arbitrary and capricious.

Petitioners will address in their merits briefing the impacts of this error on many endangered species and their critical habitats, and for simplicity and timeliness reason, do not base this motion on them; instead, this motion is based on EPA's gross failure to consult FWS concerning the threat to two of the endangered species EPA *admitted* may be affected, even after applying its arbitrary and capricious "no drift" assumption: the whooping crane and the Indiana bat. EPA acknowledged both "are reasonably expected to occur on treated corn and soybean fields." Kimbrell Decl. Ex. F, at 3. Instead of consulting FWS after this

second-level "may affect" finding, EPA's ESA procedure and analysis ran completely off the rails when the agency decided to perform its own re-analysis of the potential for harm to these particular species.

1. Whooping Crane (*Grus Americana*)

The whooping crane is one of the most endangered animals on earth. It was pushed to the brink of extinction by unregulated hunting and loss of habitat to just sixteen wild and two captive whooping cranes by 1941.[8] Conservation efforts over the past seventy years have led to only a limited recovery; as of 2006, there were only an estimated 338 whooping cranes in the wild[9] (less than a quarter of the number of wild giant pandas, for example). "The whooping crane is a flagship species for the North American wildlife conservation movement, symbolizing the struggle for survival that characterizes endangered species worldwide."[10]

EPA admitted that during their migration, whooping cranes "will stop to eat and may consume arthropod prey" that may have been exposed to 2,4-D in fields sprayed due to EPA's registration of Enlist Duo, and that in sufficient amounts,

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[8] N. Fla. Ecological Servs. Office, FWS, *Species Status and Fact Sheet: Whooping Crane (*Grus Americana*)*, http://www.fws.gov/northflorida/WhoopingCrane/whoopingcrane-fact-2001.htm (last updated Sep. 12, 2014).

[9] *See* FWS, *International Recovery Plan: Whooping Crane (*Grus americana*)* xi (Mar. 2007), *available at* http://www.fws.gov/uploadedFiles/WHCR%20RP%20Final%207-21-2006.pdf.

[10] *Id.* at 1.

such exposure is toxic to the cranes. Kimbrell Decl. Ex. F, at 4-5. Whether or not EPA characterizes it as such, *this is a finding under ESA § 7(a)(2) that EPA's registration of Enlist Duo "may affect" whooping cranes*, compelling consultation with FWS. *W. Watersheds*, 632 F.3d at 496 ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.").

But rather than consult, EPA went on to estimate the amount of 2,4-D in the prey a hypothetical crane might consume, the amount of such prey it was likely to consume, and the amount of 2,4-D it would take to have an unacceptably toxic effect on the crane. EPA concluded that because the total load of 2,4-D it estimated was less than the toxicity level it considered acceptable, there would be "no effect" on any whooping cranes. Kimbrell Decl. Ex. F, at 4-5. In fact, as defined by the ESA and its implementing regulations as this Court has interpreted them, EPA made a determination that while its action "may affect" whooping cranes, it is "not likely to adversely affect" them. However, *only FWS, the expert agency*, is entitled to make such a determination, during informal consultation. *Pac. Rivers Council*, 30 F.3d at 1054 n.8 ("The consulting agency [FWS] *must issue a written concurrence* in the determination….") (emphasis added). This ESA-required process and finding never occurred.

2. Indiana Bat (*Myotis sodalis*)

EPA went even further in its effort to evade consultation concerning the Indiana bat, listed as endangered since 1967.[11] Like all insect-eating bats, Indiana bats play a crucial role in maintaining the balance of an ecosystem. A significant source of natural insect control, Indiana bats typically consume up to half of their body weight in insects each night.[12] The population of Indiana bats has continued to decline despite conservation and recovery efforts; as of 2009, there were an estimated of 387,000 Indiana bats, less than half of the estimated population when the species was listed as endangered.[13] In addition to habitat loss and cave disturbance, scientists have attributed pesticide contamination of the Indiana bats' food supply as a reason for their continued decline.[14]

EPA's screening analysis revealed that the Indiana bat likely will suffer reproductive harm by consuming 2,4-D-tainted prey, as a direct result of EPA's approval of Enlist Duo:

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[11] FWS, *Threatened and Endangered Species: Indiana Bat (*Myotis sodalis*)* (Dec. 2006), *available at* http://www.fws.gov/Midwest/Endangered/mammals/inba/pdf/inbafctsht.pdf.

[12] *Id.*

[13] FWS, *Endangered Species: Indiana Bat (*Myotis sodalis*)*, http://www.fws.gov/Midwest/Endangered/mammals/inba/index.html. (last updated Nov. 20, 2014).

[14] *Supra* note 11.

> A daily dose of 74 mg/kg-bw/day places the daily exposure of the bat is *above the two-generation reproduction study (rat), [No Observable Effect Level]* of 5 mg/kg-by/day used in the screening risk assessment, even when scaled. Consequently, a *"no effect" determination cannot be concluded for the Indiana bat* using just the lines of evidence found in the screening level risk assessment screening level risk methods.

Kimbrell Decl. Ex. F, at 6 (emphases added).

Unwilling to take the ESA-compelled next step of consulting FWS to determine whether this "may effect" situation would in fact likely adversely affect the endangered species (in informal consultation), or jeopardize its continued existence (in formal consultation), EPA arrogated this determination to itself. It characterized the assumptions that underlay its screening analysis as "conservative," and then—despite lacking scientific expertise in bat biology, or legal authority to apply it in this situation—EPA purported to "explore[] the roles of various assumptions of bat biology and habitat use to evaluate the likelihood of exceeding the toxic thresholds for growth and survival of offspring in laboratory reproduction testing." *Id.*

In so doing, EPA made estimates of how often the bats were likely to visit sprayed fields, how much of their diet would likely come from those fields, and how much 2,4-D residue likely would be carried by prey, all without a word to or from FWS. *Id.* at 9. Its modeling predicted that the bats would, for a certain number of days, likely be exposed to levels of 2,4-D that laboratory tests showed "produced reduced pregnancies, and skeletal malformations and well as a reduction

in the survival of pups." *Id.* at 10. EPA observed: "There is considerable uncertainty, in the absence of any further lines of evidence as to the toxicological significance of these short-term exposures predicted in the probabilistic model." *Id.*

EPA did not turn to FWS to resolve that "uncertainty," as the ESA requires, but instead continued its unilateral quest for "no effect." EPA delved deeper into the studies performed on rats to determine the "toxicologically significant" dose of 2,4-D on the Indiana bat. It made more estimates of pesticide residues, the proportion of bat diet consisting of tainted insects, bat body weights, and amounts of pesticide likely to be applied, and ran more modeling runs, varying the assumptions. EPA concluded that bats would be unlikely to consume enough 2,4-D to "meet or exceed levels of toxicological concern for reproduction and development." *Id.* at 13. In other words, 2,4-D exposure "may affect" the bats, but is "not likely to adversely affect" them. This conclusion is FWS's prerogative alone; absent its written concurrence, EPA must enter formal consultation. 50 C.F.R. § 402.14(a), (b).

To be clear, whether the results predicated by EPA's calculations and models are correct is not before the Court, and has no relevance to whether Petitioners are entitled to a stay. Congress expressly mandated that EPA, *in consultation with FWS*, insure that its actions are not likely to jeopardize any

endangered species. 16 U.S.C. § 1546(a)(2). Congress mandated that EPA "shall consult" with FWS subject to FWS's guidelines. *Id.* § 1536 (a)(3). FWS's regulations require consultation if EPA's action "may affect" any endangered species. 50 C.F.R. § 402.14(a). EPA failed to consult, and thus Petitioners are likely to succeed on the merits of their claim that EPA violated the ESA.

II. Petitioners Will Suffer Irreparable Harm in the Absence of a Stay.

This Court has made clear that EPA bears the burden of demonstrating that its failure to adhere to the ESA's procedures will not result in irreparable harm. *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005). As the Court has explained:

> Placing the burden on the acting agency to prove the action is non-jeopardizing is consistent with the purpose of the ESA and what we have termed its institutionalized caution mandate…. It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.

Id. (internal citations omitted); *see also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 820 F. Supp. 2d 1029, 1038 (D. Ariz. 2011) ("Requiring [the plaintiff] to further 'prove' irreparable harm to the imperiled rattlesnake … would only reward the agency's own monitoring failures."). A substantial procedural violation of Section 7 justifies injunctive relief pending EPA's showing that its action will not violate Section 7's mandate to insure against jeopardy to listed species.

Absent a stay, sale and commercial use of Enlist Duo is slated to begin this spring in the six Midwestern states in which it is approved, *see* Palmer Decl. ¶ 8, ECF No. 8-2, placing dozens of protected yet already imperiled species at risk, including the Indiana bat and the whooping crane. EPA's unprecedented four-month extension to produce just the index to the administrative record (with the actual administrative record not yet promised until some still uncertain time after that) will cause significant delay in the final adjudication of this matter. Pet'r's Mot. Reconsider, ECF No. 18. During this time, Enlist Duo will be sprayed in commercial agriculture fields across the Midwest, exposing dozens of endangered species to harm, including the remaining populations of the whooping crane and the Indiana bat. In turn, Petitioners' members will be injured by the loss of these iconic species.

The nature of the irreparable harm Petitioners will suffer absent a stay is obvious. *See Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature … is often permanent or at least of long duration, i.e., irreparable."). Accordingly, a stay is warranted to prevent irreparable harm to protected species, and by extension, Petitioners' members.

CONCLUSION

This Court has "held that the appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA."

Wash. Toxics, 413 F.3d at 1035 (citing *Thomas*, 753 F.2d at 764); *Pac. Rivers Council*, 30 F.3d at 1056-57 (enjoining activities that "may affect" protected fish pending ESA compliance).

Nothing further is required for the Court to grant the stay, since, as explained, the ESA's legislative mandates preclude traditional equitable balancing. *Wash. Toxics*, 413 F.3d at 1035 ("Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species."); *NMFS I*, 422 F.3d at 793-94 ("[i]n cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests"). The Court should stay EPA's registration decision of Enlist Duo pending review.

Respectfully submitted this 6th day of February, 2015.

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