Protecting Endangered Species From Pesticides: Making the ESA Work or Finding Loopholes

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These materials address recent attempts by the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively "the Services") to streamline Endangered Species Act ("ESA") consultations by delegating authority to other agencies to undertake the consultations on their own, without direct review of the projects by the Services. The focus is primarily on the delegation of self-consultation authority to the Environmental Protection Agency ("EPA") for its authorizations of pesticide use. The materials describe the legal framework, the evolution of the pesticide self-consultation rule, and the litigation challenging that rule. The focus then turns to recent litigation challenging a similar rule delegating self-consultation authority to land management agencies with respect to activities under the national fire plan.

I. EPA'S AUTHORITY TO REGULATE PESTICIDE USE

EPA is charged with regulating the nationwide sale and use of pesticides. Under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, a pesticide may generally not be sold or used in the United States unless EPA has issued a registration and approved labeling authorizing that use. Id. § 136a(a). EPA may register a pesticide for a particular use only if it determines that the use will not cause unreasonable adverse effects on health or the environment. Id. § 136a(c)(5). The registration process culminates in EPA's approval of a label for uses of a particular pesticide on specific crops with constraints to prevent harm to the environment and human health. FIFRA makes it unlawful to use a pesticide in a manner inconsistent with the label. Id. § 136j(2)(G).

After approving a pesticide registration, EPA retains discretionary involvement and control over that registration. EPA has the authority, indeed the duty, to cancel pesticide registrations whenever it appears that "a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." Id. § 136d(b). EPA may immediately suspend a pesticide registration to prevent an imminent hazard during the time it takes to effectuate a cancellation. Id. § 136d(c). An EPA finding that a use is ineligible for registration often precipitates the pesticide registrant's agreement to cancel or constrain that use to forestall cancellation proceedings.

EPA is in the midst of a lengthy process of reregistering pesticides that have been on the market for years and often decades prior to enactment of current environmental registration requirements. Id. § 136a-1 (timetable for reregistration); see also id. § 136a(g)(1) (generally requiring review of registrations every 15 years). Congress added environmental standards to FIFRA in 1972, and strengthened those standards in subsequent amendments, yet EPA still has not reregistered thousands of pesticide products under these standards decades later. FIFRA requires registrants to submit to EPA any information about a registered pesticide's adverse effects, id. § 136d(a)(2), and EPA has exercised its authority to compel registrants to submit data necessary for reregistration under current standards. Id. § 136a(g)(2). As part of a reregistration determination, EPA is required to cancel or impose restrictions on uses of pesticides that cause unreasonable environmental effects, including those uses that harm threatened or endangered species.

II. THE ESA CONSULTATION FRAMEWORK

A. The ESA's Consultation Mandate

At the time it was passed, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Authority, v. Hill, 437 U.S. 153, 180 (1978). Section 7(a)(2), the heart of the ESA's protective regime, requires that each federal agency (called "action agencies") shall "insure that any action authorized, funded, or carried out by such agency" is not likely to jeopardize the continued existence of any listed species or result in the adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2). The action agency must discharge this duty "in consultation" with the Services, which are designated as the expert fish and wildlife agencies under the ESA, and consultations must use the best available scientific information. Id.

Section 7(a)(2) makes any agency action "authorized, funded, or carried out by" a federal agency subject to the consultation duty. Joint NMFS-FWS regulations define "action" broadly as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including, but not limited to, "the granting of licenses." 50 C.F.R. § 402.02. Because pesticide registrations are actions "authorized, funded, or carried out" by a federal agency, 50 C.F.R. § 402.02, EPA must "insure," in consultation with the Services, that the pesticide uses it authorizes are not likely to cause jeopardy to listed species or adverse modification to their habitat. See Washington Toxics Coalition v. EPA, 413 F.3d 1024, 1031 (9th Cir. 2005).

Section 7(a)(2) applies not only to new actions but also to ongoing actions over which the agency retains some "discretionary Federal involvement or control" or where such control is authorized by law. 50 C.F.R. §§ 402.03, 402.16. In Tennessee Valley Authority the Supreme Court applied § 7(a)(2) to a dam whose construction was well underway when Congress enacted the ESA because the § 7(a)(2) directive "admits of no exception." 437 U.S. at 173. In Washington Toxics Coalition, 413 F.3d at 1033, the Ninth Circuit held that "[b]ecause EPA has continuing authority over pesticide regulation, it has a continuing obligation to follow the requirements of the ESA," pointing to EPA's ongoing discretion to alter and even cancel pesticide registrations under FIFRA to prevent unreasonable adverse effects to the environment.

An action agency initiates consultation with the Services on an action, series of actions, or program. Formal consultation terminates when either NMFS or FWS issues a biological opinion assessing whether the action will jeopardize the listed species' survival and recovery. 16 U.S.C. § 1536(b). If the Service determines that the action is likely to jeopardize the species, the biological opinion must specify reasonable and prudent alternatives that will avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3). Not only does a § 7(a)(2) consultation assist the action agency in discharging its duty to avoid jeopardy, but the biological opinion often includes an incidental take statement, which insulates the federal agency from liability for take of listed species, provided the agency complies with the statement's terms and conditions. 16 U.S.C. § 1536(b)(4). An action undertaken by others in compliance with an incidental take statement, such as use of pesticides under an EPA registration or logging a federal timber sale, is insulated from liability under the ESA's take prohibition. Id. § 1536(o)(2). Under this framework, federal

actions that may affect a listed species may not proceed until the federal agency ensures, through completion of consultation and implementation of the results, that the action will not cause jeopardy. See id. § 1536(a); 50 C.F.R. §§ 402.13-402.14.

B. The Joint Consultation Regulations

In 1986, the Services jointly issued regulations that govern the ESA consultation process. 51 Fed. Reg. 19,926 (June 3, 1986). Under these rules, § 7 consultation is required for any action that "may affect" a listed species or critical habitat. See 50 C.F.R. § 402.14(a); FWS & NMFS, Endangered Species Consultation Handbook at xvi (March 1998) ("Handbook")[1] ("may affect" is "the appropriate conclusion where a proposed action may pose **any** effect on listed species or designated critical habitat") (emphasis in original). Conversely, no consultation is required for actions that have "no effect" on listed species.

The regulations further distinguish between actions that "may affect" species, providing for formal and informal consultation. If an action is likely to adversely affect ("LAA") a listed species or critical habitat, formal consultation is required, which as stated above, culminates in a Service biological opinion determining whether the action is likely to cause jeopardy or adverse modification. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g)-(h).

If an action is not likely to adversely affect ("NLAA") listed species or critical habitat, the regulations permit informal consultation, a streamlined, give-and-take process designed to provide a sufficient factual basis or changes to the action to enable the Service to concur in the NLAA determination. Id. § 402.13(b); Handbook at xv. An informal consultation consists of all discussions and communications between the agencies and culminates in the Service's written concurrence in the NLAA determination, which serves as a proxy and eliminates the need for a full biological opinion. 50 C.F.R. §§ 402.13(a); 402.14(b)(1). An NLAA finding is appropriate only where the effects are discountable (i.e., "extremely unlikely to occur"), insignificant (i.e., will "never reach the scale where take occurs"), incapable of being detected, or entirely beneficial. Handbook at xvi. A written concurrence does not include an incidental take statement. As a result, neither the federal agency nor any private licensee or the like is insulated from take liability should the action result in the take of a listed species. If NMFS does not concur in the NLAA determination, the action is deemed "likely to adversely affect" and the agencies must conduct a formal consultation. 50 C.F.R. §§ 402.02, 402.14(a). Utilization of informal consultation is optional in those instances where it is available.

The Services can adopt "counterpart" regulations that "fine tune" this general consultation framework to enhance efficiency in light of particular program responsibilities. 50 C.F.R. § 402.04; 51 Fed. Reg. at 19,937. "Such counterpart regulations must retain the overall degree of protection afforded listed species required by the Act and these regulations." Id.

[1] <http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>.

III. EPA'S PERVASIVE VIOLATIONS OF SECTION 7(A)(2) WITH RESPECT TO ITS PESTICIDE REGISTRATIONS

A. Past EPA Consultations With the Fish and Wildlife Service on Pesticide Registrations

In the 1980s and early 1990s, EPA conducted several Section 7 consultations on the impacts of dozens of pesticides on various listed species. These consultations produced several biological opinions that found that many pesticide uses would jeopardize the survival and recovery of listed species. Each time a biological opinion made a jeopardy call, it proposed a reasonable and prudent alternative ("RPA") to avoid jeopardy. Those RPAs generally prescribed no or reduced use or buffers around the species' habitat as mitigation measures. Even where the biological opinions found that a pesticide use would not jeopardize the species' survival, the opinion prescribed buffers or reduced use as mandatory measures to mitigate the take of the listed species in the incidental take statement.

EPA has not implemented the mitigation prescribed in these biological opinions. In 1989, EPA proposed an endangered species protection program, which it re-proposed in 2002 and ultimately finalized in late 2005. Under this program, EPA will include a statement on the pesticide label instructing users to follow county bulletins, making county bulletins enforceable FIFRA label requirements. The county bulletins will be designed to embody biological opinion prescriptions, contain maps that identify endangered species' habitat, and spell out the pertinent buffer and other restrictions that apply.

While EPA had conducted some consultations on pesticides in the 1980s and early 1990s, it had completely stopped consulting on pesticide registrations by 1994. Since that time, EPA has completed no ESA consultations on its pesticide registrations.

Meanwhile, EPA began to conduct pesticide re-registration reviews that include ecological risk assessments for pesticides. In those assessments, EPA regularly finds that particular pesticide uses may adversely affect various types of species. In the past, EPA has explicitly recognized that these findings necessitate further review in accordance with the ESA. However, rather than conduct such reviews and initiate ESA consultations, EPA routinely postpones compliance with the ESA until after it finalized the endangered species protection program, which languished in the agency for over 15 years. The boilerplate language typically inserted in EPA re-registration decisions explains:

> The Endangered Species Protection Program is expected to become final at sometime in the future. Limitations on the use of chlorothalonil may be required at that time to protect endangered and threatened species, but these limitations have not been defined and may be formulation-specific. EPA anticipates that a consultation . . . may be conducted in accordance with the species-based priority approach described in the Program. After completion of the consultation, registrants will be informed if any required label modifications are necessary.

Chlorothalonil Re-registration Eligibility Decision at 153 (April 1999).

EPA has re-registered many dozens of pesticides based on these assessments over the last 15 years. Each time, EPA completed the re-registrations without consulting on the pesticides' impacts on listed species that its risk assessments documented and without implementing the mitigation measures prescribed in the old biological opinions.

B. Litigation to Compel EPA to Consult With NMFS on Pesticides' Impacts on Listed Salmon

In January 2001, the Washington Toxics Coalition, Northwest Coalition for Alternatives to Pesticides, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit seeking to compel the Environmental Protection Agency ("EPA") to consult on the impacts of pesticides on listed salmon and steelhead. Washington Toxics Coalition v. EPA, No. C01-132C (W.D. Wash.). The environmental and commercial fishing group plaintiffs targeted 55 pesticides based on evidence that these pesticides are getting into salmon streams at levels that cause harm to salmon or their habitat. Specifically, the U.S. Geological Survey had found concentrations of more than a dozen of the pesticides in salmon streams at levels that are associated with negative impacts on fish or other aquatic life. In addition, EPA had concluded in its re-registration process that estimated environmental concentrations of the targeted pesticides from its authorized uses would exceed its levels of concern for salmon, their food supply, or their habitat.

On July 2, 2002, the district court found that "it is undisputed that EPA has not initiated, let alone completed, consultation with respect to the relevant 55 pesticide active ingredients" and that "EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat." Washington Toxics Coalition v. EPA, No. C01-132C, 2002 WL 34213031, at *9 & *9 n.25 (W.D. Wash. July 2, 2002). According to the Court:

> Despite competent scientific evidence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations. . . . Such consultation is mandatory and not subject to unbridled agency discretion. The Court declares, as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of 55 pesticide active ingredients and registration of pesticides containing those active ingredients.

Id. at *8.

The Court ordered EPA to initiate consultations on 55 pesticides according to a schedule that runs through December 1, 2004. However, the initiation of consultation with NMFS merely begins the Section 7 process. NMFS must review the pesticides' impacts and determine whether they will jeopardize salmon survival and recovery, and it must also determine whether mitigation is required to avoid harming salmon or their habitat. Finally, EPA must implement NMFS' recommendations or other measures to prevent jeopardy and avoid take of listed salmon. Even

though EPA made its initial effects determinations pursuant to the court order in July 2002, NMFS has yet to complete consultation on any of the 55 pesticides.[2]

Because the consultation process will take a long time, the district court issued an injunction in January 2004 imposing interim measures to protect salmon from these pesticides during the consultation process. Upon finding that pesticide-free buffer zones are "a common, simple, and effective strategy" that will "substantially contribute to the prevention of jeopardy," the court imposed 20-yard no-use buffers and 100-yard no aerial spray buffers for the pesticides at issue, unless they had received a "no effect" or "not likely to adversely affect" determination. Washington Toxics Coalition v. EPA, No. C01-132C, slip op. at 16, 18 (W.D. Wash. Aug. 8, 2003) (Order), id. (W.D. Wash. Jan. 22, 2004) (Injunction). The court exempted certain uses, such as spot treatments and mosquito abatement spraying. These buffers are drawn from the low end of the buffers prescribed in the Fish and Wildlife Service biological opinions for aquatic species.

The January 22, 2004 injunction also required EPA to develop and to notify retailers to post point-of-sale notifications on products containing any of seven pesticides that the U.S. Geological Survey detected frequently in urban salmon streams. The notification must contain a graphic and the following language:

> **SALMON HAZARD**
> **This product contains pesticides that may harm salmon or steelhead. Use of this product in urban areas can pollute salmon streams.**

The Ninth Circuit upheld the injunction in Washington Toxics Coalition v. EPA, 413 F.3d 1024, 1031 (9th Cir. 2005).

Several other cases have also sought to compel EPA to consult on its pesticide registrations. All of the cases have resulted in court orders or settlements establishing schedules for EPA to initiate consultations on certain pesticides with respect to their impacts on certain

[2] In April 2004, NMFS circulated a draft nonconcurrence letter, which disagreed with numerous "not likely to adversely affect" determinations, stating that the pesticide uses "may have greater than discountable or insignificant effects on listed species" and "determined that the proposed action is 'likely to adversely affect' the 26 ESUs [evolutionarily significant units comprising the listed salmon and steelhead] and thus, requires formal consultation." Draft Nonconcurrence Letter at 1. More specifically, the draft nonconcurrence letter concludes that EPA's risk assessments do not constitute the best available science because: (1) they are not based on the available peer reviewed scientific literature; (2) they focus on active ingredients to the exclusion of inert ingredients, additives, and the full range of uses of the products; (3) they are devoid of critical information about the locations and needs of the listed salmon species; (4) they lack information about critical exposures, such as those from residential uses and cumulative exposures; and (5) they fail to incorporate evidence of probable sublethal effects. Id. at 2-3. Without this information, the draft states that NMFS cannot evaluate the pesticides' impacts on listed salmon and can have no assurance that the pesticide uses will not cause serious risks and adverse effects. Id. at 3-4.

species. See NRDC v. EPA, No. RDB 03 CV 2444 (D. Md. March 28, 2006) (http://www.epa.gov/oppfead1/endanger/NRDCsettlement_fs.htm#agreement) (schedule for initiation of consultations on the herbicide atrazine's impacts on various threatened and endangered species, including the loggerhead turtle, leatherback turtle, green turtle, Kemp's ridley turtle, shortnose sturgeon, pallid sturgeon, and various freshwater mussels); Center for Biological Diversity v. Leavitt, No. 1:04-cv-00126-CKK (D.D.C. Aug. 22, 2005) (http://www.epa.gov/oppfead1/cb/csb_page/updates/bartons-agreemt.htm) (schedule for initiation of consultation on several pesticides affecting the endangered Barton Springs salamander); Californians for Alternatives to Toxics v. EPA, No. C00-3150 CW (N.D. Cal. Sept. 18, 2002) (schedule for EPA to consult on certain forest use pesticides that affect listed plants and salmonids).

Another case has put interim protections in place while EPA is discharging its ESA consultation obligations. A lawsuit seeking to compel EPA to ensure that its registration of numerous pesticides will not jeopardize the survival of the threatened California red-legged frog led to a stipulated injunction establishing a series of deadlines for EPA to make effects determinations for the 66 pesticides. The injunction also prohibits EPA from authorizing the use of the pesticides in certain core red-legged frog critical habitats and requires EPA to produce and disseminate a brochure in both English and Spanish on pesticides and the red-legged frog. Center for Biological Diversity v. Whitman, No. C-02-1580 JSW (N.D. Cal. Oct. 20, 2006) (http://www.epa.gov/oppfead1/endanger/stipulated-injunction.htm).

IV. THE COUNTERPART REGULATIONS AUTHORIZING EPA SELF-CONSULTATION FOR PESTICIDES

The 1986 joint NMFS-FWS consultation regulations allow alternative consultation procedures to be established by counterpart regulations adopted jointly by the action agency and the two expert agencies. 50 C.F.R. § 402.04. Such counterpart regulations "must retain the overall degree of protection afforded listed species by the Act and these regulations" and "changes in the general consultation process must be designed to enhance its efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7." 51 Fed. Reg. 19,926, 19,937 (1986).

A. The 2004 Pesticide Counterpart Regulations

In August 2004, the Services adopted counterpart regulations that provide optional, alternative approaches to streamline consultation by relying on EPA's risk assessments. 69 Fed. Reg. 47,732 (Aug. 5, 2004). These alternatives address informal consultation, formal consultation, and specific types of FIFRA registrations.

1. Eliminating informal consultation by delegating self-consultation authority to EPA for its NLAA determinations

The regulations authorized EPA to make "not likely to adversely affect" determinations without the Services' concurrence, if EPA and the Services entered into an Alternative Consultation Agreement ("ACA"). The ACA must describe how the Services would ensure that EPA will make effects determinations that are consistent with the ESA, the training required for

EPA personnel to make effects determinations, how new information and scientific advances would be incorporated into EPA's effects determinations, and recordkeeping and oversight measures to evaluate compliance with the ACA and the ESA. The ACA established procedures but not standards for effects determinations and imposed no limits on EPA's discretion in developing and applying scientific methods.

Following promulgation of the 2004 Pesticide Counterpart Regulations, the agencies entered into an ACA that allowed EPA staff that completed "appropriate ESA Section 7 training" to make NLAA determinations on pesticide registrations without any review or concurrence by the Services. Under the ACA, EPA agreed to review any new information and any changes to its risk assessments recommended by the Services. ACA at 4-5. EPA could make changes to its risk assessments by providing written notice to the Services. Id. at 5. The Services and EPA would conduct a joint, inter-agency review of a sampling of effects determination to assess how EPA has applied appropriate ESA standards. Id. at 6. The ACA established a dispute resolution process in which a panel consisting of personnel from the participating agencies would try to facilitate reaching a consensus on any issues that arise. Id. at 7. The Services and EPA could revise the ACA by mutual agreement without conducting notice and comment rulemaking. Id. The ACA could be terminated by mutual agreement, and a party could, after submitting the matter to dispute resolution, unilaterally terminate the ACA as to that party upon a reasonable belief that it has not or likely will not produce reliable or appropriate effects determinations or satisfy ESA or FIFRA requirements. Id. at 8-9. Termination or suspension of the ACA by any party did not create a need to consult informally or obtain a Service's concurrence in any NLAA determination made prior to the termination or suspension. Id. at 9.

2. Formal consultation alternatives

The regulations allowed EPA to pursue alternative formal consultation intending to have EPA's effects determinations become the Services' biological opinions. EPA could (1) ask the Services to appoint a Service representative to participate in EPA's process of making the effects determination; or (2) submit an effects determination that includes a jeopardy finding and incidental take statement for potential adoption by the Services. 69 Fed. Reg. at 4478-79.

If EPA utilized the option of having a Service representative participate in EPA's process of drafting the effects determination, the Services' ability to seek additional information from EPA after submission of EPA's effects determination for formal consultation was limited in some circumstances, even if EPA had not included the Service representative in all discussions or provided the representative access to all documentation. Id. at 4478-79.

Alternatively, if EPA submitted a draft jeopardy finding and incidental take statement, the regulations established procedures that made it relatively simple for the Services to adopt that effects determination as their biological opinion and take statement, while erecting additional procedural hurdles if the Services decided to deviate from the EPA draft. Id. at 4479. Upon receiving a draft jeopardy finding and take statement, the Services could: (1) issue a written statement adopting the effects determination as is; (2) provide EPA a draft written statement modifying the effects determination and providing a detailed explanation of the data and rationale for any modification; or (3) provide EPA a draft biological opinion making a jeopardy determination and proposing reasonable and prudent alternatives. Id. If a Service decided to

deviate from EPA's effects determination, EPA must share the Service's draft modified effects determination or jeopardy biological opinion with the registrant, on request, and must meet with EPA and the registrant at either's request to discuss the Service's review and basis for its findings. EPA and the registrant could submit written comments to the Service. Id.

Only high-level Service officials in Washington, D.C. could modify or reject EPA's effects determinations. There was no delegation to the regional offices or others who have typically issued biological opinions and concurrences in the past and who would continue to have the authority to adopt EPA's effects determinations without modification. Id.

3. Expanding the actions subject to truncated emergency consultation procedures

The regulations allowed EPA to utilize the emergency consultation process set out in the joint consultation regulations for all FIFRA Section 18 exemptions. Id. at 4477 (proposed 50 C.F.R. § 402.42(a)(6)). The joint consultation regulations allowed informal consultations "[w]here emergency circumstances mandate the need to consult in an expedited manner" for emergency situations "involving acts of God, disasters, casualties, national defense or security emergencies, etc." 50 C.F.R. § 402.05(a). Any required formal consultation must be initiated as soon as practicable after the emergency was brought into control. Id. § 402.05(b).

The preamble to the new regulations acknowledged that the Services' 1998 Joint Consultation Handbook states that FIFRA emergency exemptions would not qualify as emergencies "unless there is a significant unexpected human health risk." 69 Fed. Reg. at 4474-75. However, the proposed rule concluded that emergency consultation procedures should not be limited to FIFRA exemptions where an unexpected human health risk is present. Id.

The new regulations allowed EPA to invoke this authority for exemptions from the FIFRA registration requirements granted under 7 U.S.C. § 136p for particular pesticide uses. While such exemptions may be granted when emergency conditions exist, id., the FIFRA implementing regulations define "emergency conditions" far more broadly than the ESA joint consultation regulations. While some categories for such FIFRA exemptions involve public health emergencies, some are based solely on economic loss. 40 C.F.R. § 166.2 (identifying four exemption categories, one of which can be based on significant economic loss without any adverse health impact); id. § 166.3(d) (defining emergency condition to include a situation that will cause significant economic loss). And FIFRA emergency exemptions can be granted for pest outbreaks and environmental conditions that could be routine. Indeed, such emergency exemptions can be granted for three successive years or more while registration of the pesticide is being pursued. Id. § 166.25(b)(2).

B. The Lawsuit Challenging the Pesticide Counterpart Regulations

Environmental and fishing organizations challenged the pesticide counterpart regulations. In August 2006, the district court ruled on the legality of the pesticide counterpart regulations. Washington Toxics Coalition v. Dep't of Interior, 457 F. Supp. 2d 1158 (W.D. Wash. 2006). At the outset, the court found the case ripe and that plaintiffs had standing because the rules removed the Services from NLAA consultations even though the Services' had previously

criticized EPA's registrations for failing to protect species from harm and the EPA's risk assessments were less protective than the likely outcome of the Services' review given their past critiques. Id. at 1171-1175. The court then turned to the merits of the counterpart rules.

1. The court invalidated self-consultation authority for NLAA determinations.

The court invalidated the self-consultation authority on two independent grounds. First, the court held that the plain language of the ESA makes consultation mandatory through its use of the word "shall" in Section 7(a)(2), id. at 1177, and given the plain meaning of the term "consultation." Id. 1178. Specifically, the dictionary definition of the term "consultation" describes a meeting to confer or the act of seeking the advice of someone. Id. at 1179. The court rejected the government's assertion that the ESA does not provide any direction or criteria regarding how consultation is to be carried out, since "in consultation with" is paired with "with the assistance of the Secretary." Id. The court found further direction regarding the conduct of consultations in the ESA's requirement that the Secretary issue a written statement at the conclusion of consultation setting forth the Secretary's opinion and detailing how the action affects the species and its critical habitat, as well as in the direction that "each agency shall use the best scientific and commercial data available" in carrying out the requirements of Section 7. Id. Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the court held that permitting EPA to proceed without any Service concurrence on NLAA actions ran counter to the ESA (and thus failed Chevron step one) because "Congress did not leave it to the discretion of the Services to define *consultation* in a way that results in no consultation at all on NLAA actions." Id. at 1180.

Second, the court held that the promulgation of the counterpart regulations is an agency action subject to section 7(a)(2), meaning that the Services must, using the best available science, insure that the regulations are not likely to jeopardize the survival and recovery of listed species. Id. at 1181. The Court held that the Services acted arbitrarily and capriciously in deeming EPA's unilateral NLAA determinations equivalent to the no-jeopardy determinations reached through consultation and "failed to comply with their ESA mandate to 'insure' that their actions were 'not likely to jeopardize' listed species." Id. at 1181-82; 88. Specifically, upper-level Service personnel signed off on EPA's risk assessments as the basis for NLAA determinations despite voluminous technical and scientific evidence, including numerous critiques by the Services documenting that EPA's risk assessments failed to use the best science or to assess fully sublethal, synergistic, indirect, and cumulative effects from pesticides. Id. at 1183-84. The court explained: "it is not surprising that Service personnel identified significant gaps between the information generated during and by EPA's risk assessment process and the information generated during and by a Service effects determination. What is surprising is that, having acknowledged that these gaps exist, as well as the fact that Service analyses (because of the way they are framed) are more accurate and precise in terms of protecting listed species, the Services ultimately signed off on a largely unchanged EPA risk assessment as functionally equivalent to a Service effects determination." Id. at 1185. The court found "that the uncorrected deficiencies pointed out in EPA's process beg the question of how the Services justified finding that EPA's risk assessment *sans* Service concurrence would be as protective to listed species as the risk assessment accompanied by Service concurrence. EPA's risk assessment process is not only less protective than Service determinations, there is overwhelming evidence on the record that

without a Service check, EPA risk assessments (leading to pesticide registrations) would actually result in harm to listed species." Id. at 1184. After reviewing particular scientific criticisms left unaddressed in EPA's risk assessments, the Court concluded as follows:

> [I]n approving an effects determination process known to be deficient and unreliable in many ways, and in agreeing that determinations made pursuant to that process may not be disturbed once they have been made, the services failed to 'insure' that their actions were 'not likely to jeopardize'. . . . In sum, the Court finds that the Services acted arbitrarily and capriciously in deciding to promulgate counterpart regulations in their current state, knowing of the substantial flaws in EPA's methodologies and knowing that these flaws were highly likely (if not certain) to result in an overall under-protection of listed species as compared to the generation consultation regulations.

Id. at 1193

The court set aside the NLAA consultation provisions and enjoined EPA from implementing them. Both the industry intervenors and the Services appealed this ruling, but in May 2007, they dropped their appeals.

2. The court upheld optional formal consultation.

The court upheld the optional formal consultation counterpart regulations because "unlike the absolute recusal of the Services in the context of NLAA actions which plainly violated ESA section 7(a)(2)'s mandate to consult, the optional formal consultation procedure still preserves the Services' role. Id. at 1180. While the court recognized that the new procedure may make it easier for the Services to adopt EPA's conclusion and more difficult for the Services to disagree with an EPA assessment, it determined that "there is nothing in ESA section 7(a)(2) that prohibits the shifting of burdens in this way. . . . Id. The court concluded:

> Because the Services remain free to amend or altogether reject EPA's effects determination in favor of a Service-authored biological opinion, thereby preserving and retaining their consultative role, the Court does not find that the optional formal consultation procedure is inconsistent with ESA section 7(a)(2).

Id. This part of the district court's ruling has not been appealed.

3. The court upheld emergency consultation procedures but held that the counterpart regulations improperly applied such procedures to non-emergency situations.

With respect to emergency consultation procedures that permit action agencies to consult informally until the emergency is under control, the court held that the temporal shifting of consultation in emergencies is not inconsistent with section 7(a)(2). However, the regulations went too far by defining emergencies as repeat use of pesticides for non-routine pest problems, particularly where the impetus is predicted economic losses. Id. at 1195-96. The consultation regulations identify "emergencies" as "acts of God, disasters, casualties, national defense, or

security emergencies." Id. at 1195. "The overwhelming impression conveyed by the examples of 'emergency' and by the general-purpose ordinary language meaning of 'emergency' itself includes the element of surprise and unexpectedness." Id. By reaching the opposite conclusion, the Services adopted a less protective scheme and failed to meet its duty to "insure." Id. at 1196.

1. The Services violated NEPA.

The plaintiffs also challenged the environmental assessment prepared for the counterpart regulations, arguing that the Services erroneously found the regulations would have no significant environmental impacts and that they should have prepared a more comprehensive environmental impact statement ("EIS"). The Services defended by relying on their finding that EPA's risk assessments would produce NLAA determinations that would be the functional equivalent of Service consultations. Since the court had already found that finding arbitrary and capricious, and based on the litany of criticisms documenting the insufficiency of EPA's methods to protect listed species, the court held that EPA's finding of no significant environmental impacts was erroneous. Id. at 1200.

C. NMFS Finds That All Uses of 3 Pesticides (Including Ones EPA Found NLAA) Are Likely to Cause Jeopardy to Listed Salmon and Steelhead and Adversely Modify Their Critical Habitat.

In 2007, Earthjustice filed a lawsuit to follow-up on and enforce the results in the original series of WTC v. EPA cases because the court-ordered consultations regarding pesticide effects on species were never completed. As a result of a settlement reached in that second lawsuit, NMFS agreed to complete the long overdue assessments over a four-year period.

NMFS completed and issued a new draft biological opinion for three commonly-used agricultural pesticides on July 31, 2008. http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biological_opinion_draft.pdf. The draft biological opinion represents the first time NMFS has evaluated large-scale impacts of pesticides on salmon. In the draft biological opinion, NMFS found that three commonly-used agricultural pesticides – chlorpyrifos, diazinon, and malathion – are increasing the chance of extinction for 28 different threatened and endangered salmon and steelhead stocks. Specifically, NMFS found "overwhelming evidence" that these three pesticides interfere with the ability of salmon to find food, and also harm their ability to swim, reproduce and escape bigger fish trying to eat them. Id. at 281-302. If these pesticides are used as currently authorized, they are "likely to jeopardize the continued existence" of all 28 threatened and endangered salmon populations. Id. at 303.

The assessment by NMFS reverses earlier assurances from the EPA that many of the uses of the three insecticides pose either no or minimal threat to several protected salmon stocks, resulting in 14 not likely to adversely affect determinations and two no effect determinations. The fact that NMFS made jeopardy calls for these uses of the pesticides demonstrates the inadequacy of EPA's pesticide registration process as a substitute for consultation with the Services under the ESA.

V. THE NATIONAL FIRE PLAN SELF-CONSULTATION RULE

On December 5, 2003, various land management agencies (e.g., Forest Service, Bureau of Land Management), joined by NMFS and FWS, adopted counterpart regulations that would similarly eliminate expert agency oversight and approval of NLAA determinations for the national fire plan, which was adopted to accelerate logging by reducing regulatory obstacles. 68 Fed. Reg. 68,254 (Dec. 8, 2003); 68 Fed. Reg. 33,806 (June 5, 2003) (proposed rule). Under the rule, no NMFS and FWS review or concurrence would be required of such NLAA determinations if the action agencies have entered into an Alternative Consultation Agreement with the Services. The Alternative Consultation Agreement lists staff positions that will have authority to make such determinations, describes procedures for developing a joint training program, and describes the standards that will apply. NMFS and FWS are to monitor the Agreement and may terminate it in the event of noncompliance, but NLAA determinations made under the Agreement will remain valid and in place even if an agreement has been violated and is subsequently terminated. The fire plan counterpart rules do not contain optional formal consultation or emergency consultation procedures. However, the NLAA consultation process is analogous to the pesticide self-consultation process.

A. The Court Challenge

In Defenders of Wildlife v. Norton, No. 04-1230, 2006 WL 2844232, (D.D.C. Sept. 29, 2006), the district court upheld the fire plan counterpart regulations. The court held that the plaintiffs had standing to challenge the regulations because procedures designed to protect listed species were omitted in connection with national fire plan projects in lynx habitat, and that the case was ripe since the regulations had already been applied to authorize logging without the Services' concurrence. Id. at *14-16, *14 n.12.

Reaching the opposite conclusion from the court in Washington Toxics Coalition, the court upheld the delegation of unilateral NLAA authority. First, without discussing the ESA's description of the consultation process or the biological opinion that concludes that process, the court accepted the government's view that the ESA neither defines "consultation" nor provides direction or criteria as to how consultation is to be carried out. Id. at *17. More specifically, the court stated that "Section 7 is completely silent on both the mechanics and details of the 'consultation' it requires." Id. at *18. Finding that Congress has not spoken to the issue, the court believed Chevron step one was inapplicable, and that it had to defer to the Service's position, upon finding it permissible under the statute: "The ESA language at issue requires 'consultation' on projects that might affect a listed species, but leaves room for the Secretary to determine how, precisely, that consultation should occur." Id. at *19. Because the Services play a role in negotiating the ACA, periodically sampling actions taken pursuant to it, recommending changes, and retaining the power to terminate the ACA, id. at *18, the court "cannot find that the Counterpart Regulations are inconsistent with the ESA's 'consultation' requirement." Id. at *19; see also id. at *18-19 (the court disagreed with plaintiffs' contention that the action agencies can entirely bypass the Services, finding instead that the Services retain an ongoing role in evaluating the environmental consequences of the actions through the periodic ACA reviews). The court distinguished Washington Toxics in a footnote because the two cases concerned different counterpart regulations and because of different jurisprudence in the two Circuits, but the

opinion neither identifies the different Circuit precedents, nor explains how they compel opposite conclusions. Id. at *19 n.15.

Moreover, the court believed that plaintiffs' position that § 7(a)(2) mandates consultation on each and every federal project would require invalidation of the no effect provisions of the joint counterpart regulations. Under those regulations, "[t]he Services play no role whatsoever in that threshold determination; if an Action Agency concludes that a proposed action will have no effect on a listed species, it is under no obligation to consult with the Services." Id. at *19. The court believed that requiring the Service's review and concurrence on NLAA projects would render the no effect invalid because consultation would not be mandated on each and every federal action. Id. The court reached this conclusion even though it recognized that a no effect determination dictates whether any consultation is required in the first place, while the counterpart regulations prescribe what the form of a consultation that the action agency has found to be necessary.

The fire plan case did not present the same arguments regarding the Services' duty to "insure" using the best available science that the counterpart regulations are not likely to cause jeopardy. Instead, the plaintiffs challenged the basis for the regulations. The court rejected this challenge, finding that the agencies provided a sufficient rationale ground in their desire to accelerate logging projects and eliminate inefficiencies and delays. Id. at *20.

Finally, the court found the environmental assessment adequate since it considered and responded to comments that were critical of the counterpart regulations. Because the environmental assessment took a hard look at the critiques, the court held that it sufficed and the agencies did not need to prepare a more comprehensive EIS. Id. at *20-21.

In October 2006, the plaintiffs filed a motion for reconsideration on the self-consultation issue. The district court heard oral argument on that motion in August 2007, but has not yet ruled.

B. An Annual Review of the First Year of Self-Consultation Found it Deficient.

In January 2008, the Fish and Wildlife Service and National Marine Fisheries Service, (the "Services") completed the first annual review of the fire plan counterpart regulations and found the performance by the Bureau of Land Management ("BLM") and the U.S. Forest Service ("FS") wanting. http://nmfs.noaa.gov/pr/pdfs/laws/fireplanreview.pdf. The joint Report issued as a result of the review found that more than half of the evaluations conducted by the FS and BLM were inadequate to support the conclusion that the agency action in question was not likely to adversely affect a listed species or its habitat. Id. at 22.

Specifically, 100% (10 of 10) of the FS and BLM biological assessments reviewed by NMFS failed to adequately identify key considerations such as proper identification of the action's direct and indirect environmental effects, of all listed species and critical habitat that may be exposed to the action, and of the distribution of potential effects. Overall, NMFS found that in 10 of the 10 biological assessments evaluated, the determination by the FS or BLM that

the agency action was not likely to adversely affect listed species or habitat was not based on the best scientific and commercial information available, the applicable legal standard. Id. at 12, 14.

Of the assessments reviewed by FWS, 6 out of 7 of the BLM's assessments failed to meet one or more evaluation criteria. Id. at 18. Twenty-five out of 43 of the FS's assessments failed to meet one or more evaluation criteria. Id. Six of the FS's and 2 of the BLM's assessment failed to meet any of the evaluation criteria. Id. Again, because of the failure to adequately assess the agency action, the species and habitat within the action area, or the direct and indirect effects on the listed species and habitat, the FS and BLM's determinations that their actions were not likely to adversely affect listed species or their habitat were found by FWS to be inadequate because they were not based on the best scientific and commercial information available. Id. at 19, 20.

If questions arise regarding adequacy of information in an ordinary consultation, interaction and discussion between the action agencies and the Services usually identifies and corrects the shortcomings. Id. at 21. The fire plan counterpart regulations eliminate such interactions and checks on the action agencies. Id.

The report concludes with recommendations for more oversight by the Services, more assistance from the Services, and more training, including individualized feedback, for the action agencies. Id. at 22, 23. In other words, the annual review finds essential and calls for the type of Services' oversight and scrutiny that self-consultation seeks to eliminate.