



April 22, 2013

***Via Certified Mail
Return Receipt Requested***

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RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Sir or Madam:

This letter provides notice of intent to sue the U.S. Environmental Protection Agency (“EPA”) for ongoing violations of the Endangered Species Act (“ESA”), ESA § 7, 16 U.S.C. § 1536(a)(2). Specifically, EPA has failed to complete consultation with the National Marine Fisheries Service (“NMFS”) as required by Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), to ensure that registered pesticides that “may affect” listed species will not jeopardize the

survival and recovery of threatened and endangered salmon and steelhead. This letter hereby provides notice pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g), that we intend to bring legal action if the violations of the ESA described below are not corrected within 60 days.¹

I. LEGAL FRAMEWORK

Under ESA § 7(a)(2), “[e]ach federal agency *shall ... insure* that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2) (emphasis added). The obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed management action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by § 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); *Conner v. Burford*, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

The ESA’s substantive protections are implemented in part through the procedural consultation process, which Congress designed explicitly “to ensure compliance with the [ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). As the Ninth Circuit stated, “[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.” *Id.* (citing *TVA v. Hill*, 437 U.S. 153 (1978)). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency (NMFS, in the case of anadromous fish) and, if appropriate, obtain a biological opinion evaluating the effects of the federal agency action on listed species and their critical habitat. *Id.* If NMFS concludes that a proposed action is likely to jeopardize a listed salmon species or result in adverse modification of its critical habitat, NMFS must propose reasonable and prudent alternatives, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); *Idaho Dep’t of Fish & Game v. Nat’l Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995).

Compliance with the procedural provisions of the ESA—making the determination of the effects of the action through the consultation process—is integral to compliance with the substantive requirements of the Act. Under this statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency insures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining delivery of Klamath project water to irrigators until a valid

¹ This letter is sent by the undersigned on behalf of Northwest Center for Alternatives to Pesticides, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, Defenders of Wildlife, Joel Kawahara, Edward Deryckx, Northern California Council of the Federation of Fly Fishers, and Sacramento River Preservation Trust. This letter supplements the notice letters sent on September 17, 2010, and February 23, 2011.

consultation was complete); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); *Conner v. Burford*, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (“the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development.”).

Separately, ESA § 7(d) prohibits federal agencies, after the initiation of consultation under ESA § 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where BOR executed water service contracts prior to completion of formal consultation); *Marsh*, 816 F.2d at 1389 (construction of highway outside species habitat barred by § 7(d) pending completion of consultation). This prohibition is not an exception to the requirements of § 7(a)(2); it remains in effect until the procedural requirements of § 7(a)(2) are satisfied, 50 C.F.R. § 402.09; and it ensures that § 7(a)(2)'s substantive mandate is met. *See, e.g., Pac. Rivers Council*, 30 F.3d 1050; *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137 (W.D. Wash. 2000). Section 7(d) thus does not and cannot permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2); it does not grant permission to proceed with admittedly harmful activities while consultation is still ongoing. *See* 51 Fed. Reg. at 19,940 (“section 7(d) is strictly prohibitory in nature”). Additionally, harm to the protected resource itself is considered a violation of Section 7(d). *Pac. Rivers Council*, 30 F.3d at 1057 (“timber sales constitute ‘per se’ irreversible and irretrievable commitments of resources under § 7(d), and thus cannot go forward during the consultation process”); *Lane County Audubon v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

Section 9 of the ESA prohibits all activities that cause a “take” of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C); 50 C.F.R. § 17.11(h). Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. *See* S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995. “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NMFS has further defined “harm” as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687 (1995) (upholding similar definition used by Fish and Wildlife Service). Through regulation enacted under § 4(d) of the ESA, NMFS has applied the take prohibition to threatened species. 65 Fed. Reg. 42,422 (July 10, 2000). The take prohibition applies to listed anadromous fish species affected by EPA's actions here.

Federal actions that have completed a legally valid § 7(a)(2) consultation process and have a biological opinion generally obtain an “incidental take statement (“ITS”). 50 C.F.R. § 402.14(i). The ITS allows the agency, if in compliance with the terms and conditions of the

ITS, to “take” listed species without facing § 9 liability. *Id.* § (i)(5). 16 U.S.C. § 1538(a)(1)(B); *id.* §§ 1536(b)(4), (o)(2); *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir. 1996) (“[A] party . . . can take members of a listed species without violating the ESA, *provided* the actions in question are contemplated by an incidental take statement issued under Section 7 of the ESA and are conducted in compliance with the requirements of that statement.”) (emphasis added).

II. FACTUAL BACKGROUND

In 2002, a federal court found that EPA was in violation of section 7 of the Endangered Species Act (“ESA”) because it did not consult with NMFS to ensure that 54 registered pesticides would not jeopardize listed salmon species. *Wash. Toxics Coal. v. Env’tl. Prot. Agency*, No. C01-132C, slip op. at 20 (W.D. Wash. July 2, 2002), *aff’d*, 413 F.3d 1024 (9th Cir. 2005). The court enjoined use of these pesticides within prescribed distances of salmonid streams pending completion of the consultation process. Pursuant to court order, between August 2002 and December 2004, EPA initiated consultations with NMFS on 37 of those pesticides EPA determined “may affect” listed salmon. In 2007, the undersigned groups filed suit against NMFS for failing to complete those consultations. On July 31, 2008, NMFS and the plaintiffs entered into a consent decree whereby NMFS agreed to issue biological opinions on these 37 pesticides within approximately 4 years.

NMFS issued the first such biological opinion evaluating the effects of three organophosphate pesticides on November 18, 2008. That “OP BiOp” concluded that registration and continued use of the organophosphate pesticides diazinon, malathion, and chlorpyrifos would jeopardize the continued existence of 27 species of Pacific salmon and steelhead and would destroy or adversely modify the critical habitat for 25 of those species. In accordance with the ESA, the BiOp articulated a comprehensive Reasonable and Prudent Alternative (“RPA”) that required EPA to establish specific protections that would avoid jeopardy and adverse modification of critical habitat within one year of the receipt of the Opinion. Regardless, EPA failed to implement a single one of the requirements of NMFS’s RPAs for these three OP pesticides or to take any other equally effective action to protect listed species from the impacts of these chemicals.

In the meantime, Dow AgroSciences and several other entities challenged NMFS’s OP BiOp in the District of Maryland. The district court granted summary judgment in favor of NMFS and defendant-intervenors in October of 2011. *Dow AgroSciences v. NMFS*, 821 F. Supp. 2d 792 (D. Md. 2011). Dow AgroSciences appealed. On February 21, 2013, the Fourth Circuit Court of Appeals vacated the BiOp and remanded it to NMFS to prepare a revised biological opinion. *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013). The Court’s mandate issued on April 15, 2013.

On April 20, 2009, NMFS issued a second BiOp evaluating three carbamate pesticides—carbaryl, carbofuran, and methomyl (“Carbamate BiOp”). NMFS concluded that registration and continued use of pesticide products containing carbaryl and carbofuran jeopardize 22 listed Pacific salmonids and likely destroy or adversely modify the habitat of at least 20 listed Pacific salmonids. NMFS also found that registration and continued use of products containing methomyl jeopardize 18 listed Pacific salmonids and likely destroy or adversely modify the

habitat of at least 16 listed Pacific salmonids. The Carbamate BiOp includes an RPA which, among other things, requires EPA to:

- Prohibit aerial applications of the three pesticides within 600 to 1,000 feet of salmon waters, Carbamate BiOp at 491;
- Prohibit ground applications of the three pesticides within 50 to 600 feet of salmon waters, *id.*;
- Prohibit applications of the three pesticides when wind speeds are greater than or equal to 10 mph, *id.* at 493.²

The RPA in the Carbamate BiOp required these protective measures to be implemented within one year. *Id.* at 489. EPA has yet to implement a single one of the requirements of NMFS's RPAs for these pesticides, nor has it implemented any additional or alternative measures, nor any measures that would address the continued harm that this delay is causing the species. EPA's failure to take any action to protect salmonid species in response to NMFS's jeopardy and adverse modification findings in the OP BiOp or the Carbamate BiOp is at issue in *Nw. Ctr. for Alternatives to Pesticides v. Env'tl. Prot. Agency*, Civ. No. 10-01919-TSZ (W.D. Wash.).

III. EPA'S VIOLATIONS OF THE ESA

A. EPA Is Violating Section 7 of the ESA

Jeopardy is defined by regulation to mean an action that "reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. As explained above, the most certain way for an action agency like EPA to ensure that it is fulfilling its duty to avoid jeopardizing salmon and steelhead is to complete consultation and implement RPAs required in a valid biological opinion. *See Wash. Toxics Coal. v. Env'tl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005); *Village of False Pass v. Clark*, 565 F. Supp. 1123, 1160-61 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984) (agency deviates from RPA "subject to the risk that [it] has not satisfied the standard of section 7(a)(2)").

Completion of the consultation process is vital to compliance with the ESA's substantive mandates. "In the absence of a completed comprehensive biological opinion [the action agency] has not, and cannot, insure that [the action] will not result in harm to endangered [species]." *Greenpeace v. NMFS*, 106 F. Supp. 2d at 1078; *see also id.* at 1072 (failure to obtain a comprehensive biological opinion "constitutes a substantial violation of the procedural requirements of the ESA"); *Wash. Toxics Coal. v. Env'tl. Prot. Agency*, No. 01-132-C, Order on Injunctive Relief (Aug. 3, 2003), slip op. at 19 & n.30 (finding that "[t]he absence of a completed consultation does not grant EPA the license to do nothing in the interim."). The court in *Dow*

² Although it was included in the draft, the requirement to implement a non-crop vegetative buffer around salmon waters is absent from the final Carbamate BiOp's RPA. Several organizations submitted comments to NMFS and EPA objecting to this omission and outlining the science documenting both the necessity and effectiveness of this measure. *See* Letter Commenting on Draft Carbamate BiOp from NCAP, PCFFA, and IFR to James Lecky, NMFS and Debra Edwards, EPA (June 4, 2009).

AgroSciences v. NMFS vacated and remanded the OP BiOp to NMFS for further explanation. In the absence of a completed consultation and valid biological opinion for diazinon, chlorpyrifos, and malathion, EPA is violating its duty to consult in order to ensure that its continued authorization of the use of diazinon, malathion, and chlorpyrifos will avoid jeopardy, in violation of section 7(a)(2). *See, e.g., Wash. Toxics Coal.*, 413 F.3d 1024.

Moreover, NMFS has confirmed that the current authorized uses of carbaryl, carbofuran, and methomyl cause jeopardy and adverse modification to salmon and steelhead. NMFS in the Carbamate BiOp has promulgated RPAs that are required to avoid jeopardy and given EPA one year to implement these measures. While EPA is “technically free” to ignore NMFS’s RPAs—it “does so at its own peril,” *Bennett v. Spear*, 520 U.S. 154, 170 (1997), and carries a heavy burden to demonstrate that alternative actions provide equivalent protections. *See, e.g., Wash. Toxics Coal.*, 413 F.3d at 1034-35 (EPA bears the burden of demonstrating that its pesticide registrations do not jeopardize listed salmon). Here, EPA has not implemented the RPAs in the Carbamate BiOp, has not implemented any other protective measures or demonstrated that any such other measures would achieve the protection afforded by the RPAs, and has not demonstrated that it will implement any measures to compensate for the additional harm resulting from the continuing multi-year delay in implementing actions to avoid jeopardy and adverse modification of critical habitat. EPA—through its continued actions and inactions—has failed to ensure that its registration of carbaryl, carbofuran, and methomyl will avoid jeopardy, in violation of section 7(a)(2).

EPA has also failed to insure that its actions are not likely to destroy or adversely modify the designated critical habitat of listed species. *See* 50 C.F.R. § 402.02 (adverse modification defined as “direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species.”). The ESA defines critical habitat as those areas with the “physical or biological features essential to the conservation of the species....” 16 U.S.C. § 1532(5)(A)(i). The final rules designating critical habitat for listed salmon and steelhead describe many features of critical habitat essential for their recovery, including, among other things, adequate water quality and quantity. *See, e.g., 70 Fed. Reg.* 52488, 52521-22 (Sept. 2, 2006). EPA’s failure to complete consultation and/or implement RPAs or any equivalent protective measures for these six pesticides adversely impact these features of designated critical habitat and destroy and adversely modify the ability of the critical habitat to contribute to the recovery of the species. *See Gifford Pinchot Task Force*, 378 F.3d 1059; *NWF v. NMFS*, 524 F.3d 917, 933-936 (9th Cir. 2008). By implementing its action under these circumstances, EPA is violating section 7(a)(2).

B. EPA Is Violating Section 9 of the ESA.

Moreover, the current use of these six pesticides are killing and harming individual salmon and steelhead. All six of these insecticides act as neurotoxins by inhibiting the action of the enzyme acetylcholinesterase. Even in low concentrations, these pesticides can directly kill salmon, and even at levels that are not lethal, they can cause sublethal harm—impacts to olfactory (smell and homing) sense, growth and feeding, swimming, predator avoidance, and reproductive impairment—and can kill or harm salmon prey. Each of these effects falls within the definition of “harm” and accordingly constitutes prohibited take. *See* 50 C.F.R. § 222.102 (harm includes significant impairment of “essential behavioral patterns, including breeding,

feeding, or sheltering”). Extensive water monitoring data and exposure modeling both show that the registered uses of these six pesticides lead to levels of pesticides in salmon-bearing streams that cause these lethal and sublethal effects. Indeed, EPA’s own models used in its Biological Evaluations of the effects of each of these six pesticides show that these chemicals harm salmon and that salmon are likely exposed to harmful concentrations of these pesticides. The magnitude of this prohibited take is quite large; indeed, NMFS concluded that it is enough to jeopardize the continued existence of the species.

EPA has a duty to avoid “taking” Pacific salmon. Without the shield of compliance with an Incidental Take Statement, EPA is liable for all “take” that occurs as a result of the registered uses of diazinon, malathion, chlorpyrifos, carbaryl, carbofuran, and methomyl. 16 U.S.C. § 1538(a)(1)(B); *id.* at 1536(o)(2); 50 C.F.R. § 223.203(a); *id.* § 223.102(a); *id.* § 222.102. In the absence of a completed consultation, EPA lacks an ITS covering take from any use of diazinon, chlorpyrifos, and malathion. While the Carbamate BiOp provides an ITS for carbaryl, carbofuran, and methomyl, EPA has failed to implement the conditions required to qualify for protection under that ITS. EPA is violating Section 9 of the ESA by taking listed species without having completed consultation and having any ITS for diazinon, chlorpyrifos, and malathion and by taking listed salmon outside the terms of the ITS in the Carbamate BiOp.

IV. CONCLUSION

If EPA does not cure the violations of law described above immediately, upon expiration of the 60 days the parties to this notice intend to file suit against EPA pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). If you would like to discuss the significant ESA violations described herein and seek a mutually acceptable solution to them, please feel free to contact the undersigned.

Sincerely,

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