

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON TOXICS COALITION, )  
et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ENVIRONMENTAL PROTECTION )  
AGENCY, et al., )  
 )  
Defendants, )  
 )  
and )  
 )  
CROPLIFE AMERICA, et al., )  
 )  
Intervenor Defendants. )  
\_\_\_\_\_ )

NO. C01-0132 C

INTERVENORS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF DEFENDANTS'  
CROSS-MOTION FOR  
SUMMARY JUDGMENT AND IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT

1 **TABLE OF CONTENTS**

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

TABLE OF AUTHORITIES ..... iv

INTRODUCTION..... 1

STATUTORY AND REGULATORY BACKGROUND..... 2

ARGUMENT ..... 7

    I.    PLAINTIFFS’ ESA § 7(a)(2) CONSULTATION CLAIM  
          FAILS EITHER ON JURISDICTIONAL GROUNDS, DUE TO  
          ABSENCE OF THE ADMINISTRATIVE RECORD, OR ON  
          THE MERITS ..... 7

        A.    The ESA § 7(a)(2) Claim Is Not Justiciable..... 7

            1.    There Is No Ripe Controversy Or “Final Agency  
                  Action” ..... 7

            2.    Plaintiffs’ Claims Are Time-Barred ..... 8

            3.    This Is An Administrative Procedure Act Case  
                  That Should Be Dismissed On Several Grounds  
                  Under That Statute..... 8

            4.    If This Is An ESA § 11(g) Citizen Suit, The  
                  Complaint Should Be Dismissed ..... 10

                a.    FIFRA limits ESA citizen suits and  
                      precludes the relief contemplated here..... 10

                b.    Plaintiffs’ action is barred by  
                      considerations of ripeness and lack of  
                      finality..... 13

                c.    Plaintiffs have failed to provide 60 days’  
                      notice of intent to sue..... 13

        B.    Judicial Review Would Be Premature Before Plaintiffs  
                  Specify The Challenged “Agency Actions” And Before  
                  EPA Provides The Administrative Records On Those  
                  Actions ..... 14

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

C. The Claim That Formal ESA § 7(a)(2) Consultation Must Now Be Initiated Fails On the Merits ..... 15

1. Plaintiffs Do Not Challenge Any Imminent Agency Action..... 15

a. Plaintiffs have not established the factual predicate for formal consultation..... 16

b. The timing of formal consultation is within EPA’s discretion and is entitled to deference ..... 16

c. EPA’s decision on timing of formal consultation is reasonable and not arbitrary ..... 18

d. Plaintiffs have not demonstrated that authorized pesticide use is “likely to adversely affect” salmon..... 21

2. There Is No ESA § 7(a)(2) “Agency Action” Subject to ESA Consultation ..... 21

3. Plaintiffs Have Not Demonstrated That EPA “Unreasonably Delayed” Formal Consultation..... 23

II. THE ESA § 7(a)(1) CLAIM IS MOOT AND WITHOUT MERIT..... 24

CONCLUSION ..... 28

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Alaska Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748 (9th Cir. 2001) ..... 14

4 *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001), *stayed*

5 *pending intervenors' appeal*, No. 01-36071 (9th Cir. Dec. 14, 2001)..... 24

6 *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998)..... 12, 26

7 *American Rivers v. NMFS*, 126 F.3d 1118 (9th Cir. 1997)..... 13, 24

8 *Bennett v. Spear*, 520 U.S. 154 (1997) ..... 8, 9, 13

9 *Bettis v. Town of Ontario, N.Y.*, 800 F. Supp. 113 (W.D.N.Y. 1992) ..... 14

10 *Camp v. Pitts*, 411 U.S. 138 (1973) ..... 14

11 *Coalition for Sustainable Resources v. U.S. Forest Service*, 48 F. Supp. 2d

12 1303 (D. Wyo. 1999)..... 25, 26

13 *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989)..... 8, 12, 16

14 *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 135 (D.D.C. 2001)..... 26

15 *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334 (D. Minn. 1988) ..... 16, 26

16 *Ecology Center v. U.S. Forest Service*, 192 F.3d 922 (9th Cir. 1999)..... 7, 9, 10

17 *Environmental Protection Information Center v. The Simpson Timber Co.*, 255

18 F.3d 1073 (9th Cir. 2001) ..... 22, 23

19 *Environmental Protection Information Center v. Tuttle*, No. C 00-0713 SC,

20 2001 WL 114422 (N.D. Cal. Jan. 22, 2001) ..... 8

21 *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985)..... 9, 13

22 *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)..... 14

23 *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529 (D.V.I. 1998)..... 26

24 *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997) ..... 23

25 *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) ..... 17

26

1	<i>Kokkonen v. Guardian Life Ins. Co.</i> , 511 U.S. 375 (1994).....	7
2	<i>Loggerhead Turtle v. County Council of Volusia County, Florida</i> , 92 F. Supp.	
3	2d 1296 (M.D. Fla. 2000) .....	21
4	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	2, 17
5	<i>Lujan v. National Wildlife Fed'n</i> , 497 U.S. 871 (1990) .....	7, 9, 21
6	<i>National Wildlife Fed'n v. National Park Service</i> , 669 F. Supp. 384 (D. Wyo.	
7	1987) .....	21
8	<i>Natural Resources Defense Council v. Houston</i> , 146 F.3d 1118 (9th Cir. 1999) .....	16, 23
9	<i>Ohio Forestry Ass'n v. Sierra Club</i> , 523 U.S. 726 (1998).....	7
10	<i>Old Timer, Inc. v. Blackhawk-Central City Sanitation</i> , 51 F. Supp. 2d 1109 (D.	
11	Colo. 1999).....	14
12	<i>Pacific Coast Fed'n of Fishermen's Associations v. U.S. Bureau of</i>	
13	<i>Reclamation</i> , 138 F. Supp. 2d 1228 (N.D. Cal. 2001) .....	24
14	<i>Pacific Northwest Generating Cooperative v. Brown</i> , 822 F. Supp. 1479 (D. Or.	
15	1993) .....	14, 15
16	<i>Pacific Rivers Council v. Thomas</i> , 30 F.3d 150 (9th Cir. 1994) .....	22
17	<i>Platte River Whooping Crane Trust v. FERC</i> , 962 F.2d 27 (D.C. Cir. 1992).....	11, 26
18	<i>Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy</i> , 898 F.2d 1410 (9th Cir.	
19	1990) .....	26
20	<i>Ricci v. Chicago Mercantile Exch.</i> , 409 U.S. 289 (1973).....	14
21	<i>Riverside Irrigation Dist. v. Andrews</i> , 758 F.2d 508 (10th Cir. 1985) .....	11
22	<i>Save the Yaak Comm. v. Block</i> , 840 F.2d 714 (9th Cir. 1988) .....	14
23	<i>Sierra Club v. Glickman</i> , 67 F.3d 90 (5th Cir. 1995) .....	15, 26
24	<i>Sierra Club v. Peterson</i> , 228 F.3d 559 (5th Cir. 2000) (en banc).....	7
25	<i>Southern Utah Wilderness Alliance v. Smith</i> , 110 F.3d 724 (10th Cir. 1997) .....	14, 16
26	<i>Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation</i> , 143	
	F.3d 515 (9th Cir. 1998) .....	13, 14, 15

1	<i>Southwest Center for Biological Diversity v. U.S. Forest Service</i> , 100 F.3d 1443	
2	(9th Cir. 1996) .....	14, 17
3	<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	7
4	<i>Strahan v. Linnon</i> , 967 F. Supp. 581 (D. Mass. 1997) .....	10, 26
5	<i>Taylor AG Industries, Inc. v. Pure-Gro</i> , 54 F.3d 555 (9th Cir. 1995).....	10
6	<i>Telecommunications Research &amp; Action v. FCC</i> , 750 F.2d 70 (D.C. Cir. 1984).....	23
7	<i>TVA v. Hill</i> , 437 U.S. 153 (1978) .....	22, 26
8	<i>United States v. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	14
9	<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council</i> ,	
10	435 U.S. 519 (1978) .....	17
11	<i>Washington Env'tl. Council v. NMFS</i> , No. C00-1547R (W.D. Wash. Feb. 27,	
12	2002) .....	8
13	<i>Wind River Mining Corp. v. United States</i> , 946 F.2d 710 (9th Cir. 1991) .....	8
14	<b>Statutes</b>	
15	5 U.S.C. § 553(13) .....	10
16	5 U.S.C. § 559.....	12
17	5 U.S.C. § 706.....	23
18	5 U.S.C. §§ 701-706.....	7
19	Act of Dec. 5, 1969, Pub. L. No. 91-135, 83 Stat. 275 .....	11
20	ESA § 4, 16 U.S.C. § 1633.....	1
21	ESA § 11(g), 16 U.S.C. § 1540(g).....	8, 10, 13, 14
22	ESA § 2(c)(1), 16 U.S.C. § 1531(c)(1).....	11
23	ESA § 3(15), 16 U.S.C. § 1532(15).....	2
24	ESA § 3(3), 16 U.S.C. § 1532(3).....	4
25	ESA § 4, 16 U.S.C. § 1533.....	2, 21
26		

1	ESA § 7(b), 16 U.S.C. § 1536(b).....	3, 4, 19
2	ESA § 7(d), 16 U.S.C. § 1536(d).....	6, 14, 20, 22
3	ESA § 9, 16 U.S.C. § 1538.....	4, 21
4	FIFRA § 16, 7 U.S.C. § 136n .....	11
5	FIFRA § 2(bb), 7 U.S.C. § 136(bb) .....	5, 16
6	FIFRA § 2(l), 7 U.S.C. § 136(l).....	5, 6, 11, 16
7	FIFRA § 24, 7 U.S.C. § 136v .....	10
8	FIFRA § 3(a), 7 U.S.C. § 136a(a).....	4
9	FIFRA § 3(c), 7 U.S.C. § 136a(c).....	5, 16, 19
10	FIFRA § 6(b), 7 U.S.C. § 136d(b) .....	10
11	FIFRA § 6(c), 7 U.S.C. § 136d(c) .....	5, 10, 11
12	Pub. L. No. 100- 478 § 1010, 102 Stat. 2313 (1988), 7 U.S.C. § 136a note.....	5, 7, 26
13	Pub. L. No. 93-205 § 13(f), 87 Stat. 903 (1973) .....	11
14	Pub. L. No. 93-205 § 7, 87 Stat. 892 (1973).....	20
15	Pub. L. No. 96-159 § 4, 93 Stat. 1226 (1979).....	20
16		
17	<b>Regulations and Administrative Material</b>	
18	50 C.F.R. § 402.02 .....	1, 15
19	50 C.F.R. § 402.13 .....	1, 3
20	50 C.F.R. § 402.14 .....	passim
21	50 C.F.R. Part 402.....	2, 17
22	51 Fed. Reg. 19948 (June 3, 1986) .....	3, 17
23	51 Fed. Reg. 19948-49 (June 3, 1986).....	3
24	51 Fed. Reg. 19949 (June 3, 1986) .....	17
25		
26		

1	51 Fed. Reg. 19954 (June 3, 1986) .....	25
2	51 Fed. Reg. 19955 (June 3, 1986) .....	25
3	66 Fed. Reg. 11202 (Feb. 22, 2001).....	25
4	67 Fed. Reg. 6215 (Feb. 11, 2002) .....	24
5	<b>Legislative History</b>	
6	134 Cong. Rec. S12559 (Sept. 15, 1988).....	6
7	134 Cong. Rec. S9756 (July 25, 1988).....	6
8	134 Cong. Rec. S9761 (July 25, 1988).....	6
9	H.R. Conf. Rep. No. 100-928 (1988).....	6
10	H.R. Conf. Rep. No. 96-697 (1979).....	20
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

## INTRODUCTION

Plaintiffs Washington Toxics Coalition *et al.* (“Plaintiffs”) bring two claims against the Environmental Protection Agency (“EPA”) regarding consultation procedures under the Endangered Species Act (“ESA”). Those claims concern EPA’s program for registering pesticides for public use under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136, *et seq.* The Complaint alleges that EPA: (1) is procedurally violating ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to consult with the National Marine Fisheries Service (“NMFS”) regarding the possible effects of 48 pesticides on populations of salmon and steelhead which are currently listed as threatened or endangered species under ESA § 4, 16 U.S.C. § 1633 (“listed species”); and (2) has failed to consult with NMFS under ESA § 7(a)(1) on how it could use its FIFRA and Clean Water Act programs to provide “conservation benefits” for listed salmon. Complaint ¶¶ 39-46.

EPA’s Answer (at ¶ 42) announces that Plaintiffs have received some of their requested relief: “EPA is in the process of consulting with [NMFS] on the impact of pesticide registrations on all Pacific salmon and steelhead species.” Such consultation consists, at the very least, of discussions between the agencies and marshalling information before EPA makes a decision whether and when to initiate *formal* ESA consultation. *See* 50 C.F.R. §§ 402.02, 402.13, 402.14. EPA also denies Plaintiffs’ allegation that it has not undertaken review of its programs or consulted with NMFS under ESA § 7(a)(1), 16 U.S.C. § 1538(a)(1). EPA Ans. ¶ 46.

In their summary judgment motion, Plaintiffs have briefed different claims from those in their 60-day notice of an ESA citizen suit. On Claim One, Plaintiffs are now arguing that EPA is violating an enforceable duty to be in *formal* ESA § 7(a)(2) consultation *at this time* concerning the effects of 48 pesticides on listed species of salmon. Mem. in Support of Pls.’ Motion for Summ. J. at 12, 24 (May 4, 2001) (“Pl. Br.”); *see id.*

1 at 6-20.

2 Intervenor are a group of pesticide manufacturers, pesticide applicators, and  
3 farmers who rely on pesticides for their economic livelihood. Intervenor support Federal  
4 Defendants' motion for summary judgment.

5 **STATUTORY AND REGULATORY BACKGROUND**

6 **ESA** – The ESA, 16 U.S.C. §§ 1531-44, provides protections to species that have  
7 been listed as endangered or threatened species by NMFS (which has jurisdiction over  
8 certain marine species) or the U.S. Fish and Wildlife Service (“FWS”) (individually, the  
9 “Service”; collectively “Services”). *See* 16 U.S.C. §§ 1532(15), 1533. ESA § 7 creates  
10 procedural duties for federal agencies to consult with the Services concerning, and creates  
11 substantive constraints on, certain agency actions. In 1986, the Services issued rules  
12 implementing their ESA § 7 role at 50 C.F.R. Part 402. Since the Services have only an  
13 advisory “consultation” role under ESA § 7 and not a regulatory role, the Part 402 rules are  
14 not binding on other federal agencies, such as EPA. *Lujan v. Defenders of Wildlife*, 504  
15 U.S. 555, 568-69 (1992) (summarizing Solicitor General’s position). Accordingly, the  
16 claims that EPA has violated the Part 402 rules should be dismissed.

17 ESA § 7(a)(2) states in pertinent part:

18 Each Federal agency shall, in consultation with and with the assistance of the  
19 Secretary, insure that any action authorized, funded, or carried out by such  
20 agency (hereinafter in this section referred to as an “agency action”) is not  
21 likely to jeopardize the continued existence of any endangered species or  
threatened species or result in the destruction or adverse modification of  
[designated critical] habitat of such species.

22 16 U.S.C. § 1536(a)(2). Thus, the purpose of consultation is to obtain the Service’s  
23 biological view on whether the “agency action” complies with ESA § 7(a)(2)’s substantive  
24 constraints against jeopardizing the survival of a listed species and adversely modifying its  
25 critical habitat.

26 To avoid tying up scarce Service resources in evaluating in depth the hundreds of

1 innocuous “actions” federal agencies take each day, the Services created a triage system  
2 that provides three levels of possible ESA § 7(a)(2) review. First, no consultation process  
3 is required unless and until the “federal action agency” proposing the action (here, EPA)  
4 determines that its “action may affect listed species or critical habitat.” 50 C.F.R.  
5 § 402.14(a).

6 Second, if and when the federal action agency determines that its action “may  
7 affect” a listed species, the agency may invoke the “optional process” of “informal  
8 consultation” with the Service. 50 C.F.R. § 402.13. Informal consultation serves twin  
9 purposes: (1) it allows the action agency and Service to discuss what information is required  
10 by 50 C.F.R. § 402.14(c) and (d) to initiate and complete formal consultation within ESA-  
11 prescribed timeframes; and (2) it allows the Service and action agency to conclude that  
12 formal ESA consultation and a formal biological opinion are not warranted because the  
13 action is “not likely to adversely affect a listed species or critical habitat.” 50 C.F.R.  
14 § 402.13; *see* 51 Fed. Reg. 19948-49 (June 3, 1986).

15 Third, the more rigorous “formal consultation” is reserved for those federal actions  
16 that the action agency determines are “likely to adversely affect any listed species or critical  
17 habitat,” unless the action agency desires to proceed immediately to formal consultation  
18 after making a “may affect” finding. 50 C.F.R. § 402.14(a), (b). The ESA limits the time  
19 for formal consultation. Formal consultation must be concluded within “90 days” unless the  
20 applicant agrees to a time extension. 16 U.S.C. § 1536(b)(1). The Services have stated  
21 that they will deliver their biological opinion within 45 days of the completion of the 90-day  
22 consultation period. 50 C.F.R. § 402.14(e), (g)(5). Only formal consultation results in the  
23 Service’s issuance of a written “biological opinion” as to whether the proposed action  
24 complies with ESA § 7(a)(2)’s substantive constraints. *See* 16 U.S.C. § 1536(b); 50 C.F.R.  
25 § 402.14(h). Further, the Service issues an ESA § 7(b)(4) statement authorizing a limited  
26 amount of “incidental take” or unintentionally-caused deaths of listed species of wildlife

1 only following formal consultation. *See* 16 U.S.C. § 1536(b)(4), (o); 50 C.F.R. § 402.14(i).

2 Formal consultation cannot be initiated before considerable information is collected  
3 and provided in a written format acceptable to NMFS. *See* 16 U.S.C. § 1536(a)(2); 50  
4 C.F.R. § 402.14(c), (d). For an “agency action involving a permit or license applicant,”  
5 formal consultation must be concluded within “90 days” unless the applicant agrees to a  
6 time extension. 16 U.S.C. § 1536(b)(1); *see* 50 C.F.R. § 402.14(e), (g)(5). Thus,  
7 applicants for pesticide registrations can insist that formal consultation be completed in a  
8 timely fashion.

9 In contrast to ESA § 7(a)(2)’s federal action-by-action consultation to avoid  
10 jeopardizing the existence of listed species, Plaintiffs’ other ground for relief, ESA  
11 § 7(a)(1), envisions programmatic or agency-wide consultation with the Service to discuss  
12 possible programs the action agency could adopt to assist in the “conservation” of listed  
13 species. Section 7(a)(1) provides in pertinent part that “Federal agencies shall, in  
14 consultation with and with the assistance of the [Services], utilize their authorities in  
15 furtherance of the purposes of this chapter by carrying out programs for the conservation  
16 of” listed species. 16 U.S.C. § 1536(a)(1). The ESA defines “conservation” as the  
17 “methods and procedures to bring any [listed species]...to the point at which the measures  
18 provided in the ESA,” such as the ESA § 9 prohibition against “take” of listed wildlife, “are  
19 no longer necessary.” 16 U.S.C. § 1532(3). Thus, “conservation” is commonly used in the  
20 sense of actions which improve the status of a listed species.

21 **FIFRA** – FIFRA is the comprehensive statute that regulates the use of pesticides in  
22 the United States. Under FIFRA, pesticides must be registered with EPA through a  
23 rigorous process before they may be sold or distributed. 7 U.S.C. § 136a(a). Registration  
24 of a pesticide requires a determination by EPA that

25 (A) its composition is such as to warrant the proposed claims for it; (B) its  
26 labeling and other material required to be submitted comply with the  
requirements of this Act; (C) it will perform its intended function without

1 unreasonable adverse effects on the environment; and (D) when used in  
2 accordance with widespread and commonly recognized practice it will not  
generally cause *unreasonable* adverse effects on the environment.

3 7 U.S.C. § 136a(c)(5) (emphasis added). By statutory definition, determining the  
4 “unreasonable adverse effects on the environment” requires “taking into account” not just  
5 perceived environmental harm, but a broad range of “economic, social, and environmental  
6 costs and benefits of the use of [the] pesticide.” 7 U.S.C. § 136(bb).

7 Congress spoke directly and precisely on the relationship between FIFRA and  
8 temporary ESA constraints in the FIFRA provisions concerning suspension of use of a  
9 pesticide. FIFRA allows EPA to suspend registration of a pesticide *only* upon a showing  
10 that suspension “is necessary to prevent an imminent hazard during the time required for  
11 cancellation” and *only* if the registrant is accorded certain due process protections. 7  
12 U.S.C. § 136d(c). FIFRA defines an “imminent hazard” to mean where “continued use of  
13 the pesticide during the time required for a cancellation proceeding...will involve  
14 unreasonable hazard to the survival of a species declared endangered or  
15 threatened...pursuant to the Endangered Species Act.” 7 U.S.C. § 136(l). These FIFRA  
16 provisions mean that neither EPA nor the courts can suspend pesticide uses under ESA § 7  
17 except on a showing that the temporary continued use of the pesticide during ESA  
18 consultation would unreasonably jeopardize the “survival” of a listed salmon species.

19 In amendments to the ESA in 1988, Congress further addressed that statute’s  
20 relationship to FIFRA. Section 1010 of the 1988 ESA amendments directed that ESA  
21 compliance for EPA’s FIFRA program be designed “to minimize the impacts to persons  
22 engaged in agricultural food and fiber commodity production and other affected pesticide  
23 users and applicators.” Pub. L. No. 100- 478 § 1010, 102 Stat. 2313, 7 U.S.C. § 136a

1 note. The quoted language and its legislative history<sup>1</sup> reiterate the clear legislative intent to  
2 protect existing food and fiber uses of pesticides in the context of ESA consultation.

3 Congress's accommodation of the goals of the ESA to the needs of the nation's  
4 food producers and other pesticide users is critical in this case because Plaintiffs have  
5 signaled their intent "to seek further relief" if and when EPA initiates formal consultation.  
6 Pl. Br. at 20 n.7; Complaint Prayer for Relief ¶ E (seeking injunction against use of  
7 pesticides).<sup>2</sup> During formal consultation, ESA § 7(d) (16 U.S.C. § 1536(d)) prohibits  
8 federal agencies from making irretrievable resource commitments that would foreclose, for  
9 proposed actions that may cause jeopardy, the adoption of an alternative that would  
10 substantively comply with ESA § 7(a)(2). Section 1010 of the 1988 ESA amendments and  
11 7 U.S.C. § 136(l), however, reverse any arguable ESA § 7(d) presumption favoring  
12 prohibitions during consultation over pesticides. The legislative intent of those FIFRA and  
13 ESA provisions is that food and forage uses of pesticides should not be compromised  
14 during consultation, in the absence of proof that specific pesticide uses unreasonably  
15 jeopardize the survival of listed species. EPA and courts should exercise the ESA's  
16

---

17 <sup>1</sup> The Conference Report elaborates:

18 Agriculture is a major part of the U.S. economy and provides nutritional sustenance for our  
19 population and exports abroad.... The Conferees, therefore, anticipate that...[the federal agencies  
20 shall] implement the [ESA] in a way that protects endangered and threatened species *while*  
21 *minimizing, where possible, impacts on production of agricultural foods and fiber commodities.*

22 H.R. Conf. Rep. No. 100-928, at 24-25, *reprinted in* 1988 U.S.C.C.A.N. 2738, 2741-42 (emphasis added).  
23 *See also* 134 Cong. Rec. S12559 (Sept. 15, 1988) (Sen. Burdick's summary that the conference report  
24 "recognizes that protection of endangered species is important, but also that agriculture is a major part of  
25 our economy and provides sustenance for our population"); 134 Cong. Rec. S9761 (July 25, 1988) (remarks  
26 of Sen. Mitchell that "[a]lternatives are to be identified which would protect endangered or threatened  
species from pesticides and *which would minimize any adverse effect on the production of food and fiber,*"  
thereby "*minimizing impacts to the farmers, ranchers, and foresters who earn their living from food and  
fiber production*") (emphasis added); 134 Cong. Rec. S9756 (July 25, 1988) (similar remarks from Sen.  
Byrd).

<sup>2</sup> Intervenor reserve the right to address the appropriate nature and scope of relief in subsequent  
briefing if the Court were to rule in Plaintiffs' favor on liability.

1 supplemental authority consistent with FIFRA's balance of economic, social, and  
2 environmental costs and benefits and with § 1010's protection of registered pesticide uses  
3 and the protection of those in the pesticide supply chain.

#### 4 ARGUMENT

### 5 I. PLAINTIFFS' ESA § 7(A)(2) CONSULTATION CLAIM FAILS EITHER 6 ON JURISDICTIONAL GROUNDS, DUE TO ABSENCE OF THE 7 ADMINISTRATIVE RECORD, OR ON THE MERITS

#### 8 A. The ESA § 7(a)(2) Claim Is Not Justiciable

9 A court's first duty is to determine whether it has jurisdiction before reaching the  
10 merits or considering Art. III judicial relief. *Steel Co. v. Citizens for a Better Env't*, 523  
11 U.S. 83, 94 (1998). Federal courts must presume that they lack jurisdiction, and Plaintiffs  
12 bear the burden of proving that a justiciable controversy exists. *Kokkonen v. Guardian Life  
13 Ins. Co.*, 511 U.S. 375, 377 (1994). Plaintiffs' suit is nonjusticiable for several reasons:

#### 14 1. There Is No Ripe Controversy Or "Final Agency Action"

15 Plaintiffs' Complaint and brief present a programmatic ESA challenge to the FIFRA  
16 registration program, as it relates to listed salmon species. The programmatic challenge  
17 covers an unnamed set of EPA actions and inactions over the last 10 years with respect to  
18 at least 48 pesticides, instead of focusing on a discrete "final agency action" reviewable  
19 under the Administrative Procedure Act ("APA," 5 U.S.C. §§ 701-706). These broad  
20 challenges should be dismissed. An amorphous "program" that affects Plaintiffs only  
21 through later EPA actions and inactions on a particular pesticide is neither ripe nor a "final  
22 agency action," and judicial auditing of entire agency programs is improper under the  
23 separation of powers concerns which animate the ripeness doctrine. *See, e.g., Ohio  
24 Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733-37 (1998); *Lujan v. National Wildlife  
25 Fed'n*, 497 U.S. 871, 890-94, 899 (1990) (plaintiffs "cannot demand a general judicial  
26 review of [an agency's] day-to-day operations"); *Sierra Club v. Peterson*, 228 F.3d 559,  
565-70 (5th Cir. 2000) (en banc); *Ecology Center v. U.S. Forest Service*, 192 F.3d 922,

1 925-26 (9th Cir. 1999); *Washington Env'tl. Council v. NMFS*, No. C00-1547R, slip op. at  
2 7-14 (W.D. Wash. Feb. 27, 2002); *Environmental Protection Information Center v. Tuttle*,  
3 No. C 00-0713 SC, 2001 WL 114422 (N.D. Cal. Jan. 22, 2001) (dismissing ESA suit).

## 4 **2. Plaintiffs' Claims Are Time-Barred**

5 Challenges to EPA's registration actions that occurred more than 6 years ago are  
6 barred by the statute of limitations in 28 U.S.C. § 2401(a). *See Wind River Mining Corp. v.*  
7 *United States*, 946 F.2d 710, 712-13 (9th Cir. 1991). To the extent that the registration or  
8 reregistration actions for the pesticides at issue occurred more than 6 years before the  
9 commencement of this suit, those claims are time-barred and should be dismissed.

## 10 **3. This Is An Administrative Procedure Act Case That Should Be** 11 **Dismissed On Several Grounds Under That Statute**

12 The Complaint (¶¶ 3, 4) describes this case as an ESA citizen suit brought under 16  
13 U.S.C. § 1540(g). But the scope of permissible ESA citizen suits is limited to suits that  
14 allege "substantive" violations of the ESA by "regulated parties." It does not extend to  
15 claims that "federal...employees [have failed] to perform their duties in administering the  
16 ESA," as Plaintiffs allege here. *Bennett v. Spear*, 520 U.S. 154, 173-74 (1997). Just as the  
17 ESA § 7(a)(2) consultation claim against FWS was found not to be an ESA citizen suit in  
18 *Bennett v. Spear*, so too Plaintiffs' procedural ESA § 7(a)(2) claim that EPA has not  
19 performed its consultation duty cannot be maintained as an ESA citizen suit. Instead,  
20 Plaintiffs' suit is maintainable only if it meets the APA criteria for challenging a federal  
21 agency action. *Id.* at 174-77.

22 The absence of a true ESA citizen suit cause of action has jurisdictional  
23 ramifications. The Eighth Circuit has held that FIFRA bars the type of APA review sought  
24 here. FIFRA reflects a careful balance of "agricultural and environmental concerns" and  
25 prescribes "the procedure EPA must follow in granting, denying, or canceling registrations,  
26 and FIFRA provides for administrative and judicial review of those agency decisions."

1 *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1298-99 (8th Cir. 1989).  
2 “When Congress has established a special statutory review procedure,” “we generally treat  
3 that procedure as the exclusive means of review.” *Id.* at 1299. Consequently, Plaintiffs  
4 cannot bring their APA claims to “cancel pesticide registrations” except under the “FIFRA  
5 framework.” *Id.* at 1299, 1302-03 (dismissing APA and Migratory Bird Treaty Act claims  
6 on that ground).<sup>3</sup>

7 Moreover, to obtain judicial review under the APA, Plaintiffs must name the  
8 “identifiable...‘final agency action’” they seek to have the Court review. *Lujan v. National*  
9 *Wildlife Fed’n*, 497 U.S. at 890.<sup>4</sup> Since Plaintiffs have not identified the specific EPA  
10 actions with respect to the 48 pesticides and consultation that they believe violate the ESA,  
11 their ESA § 7(a)(2) claims must be dismissed. *Id.* at 890-94. A “final agency action” refers  
12 to the “consummation of the agency’s decisionmaking process” under which “rights or  
13 obligations have been determined.” *Bennett v. Spear*, 520 U.S. at 178; *see Ecology Center*,  
14 192 F.3d at 925 (9th Cir. 1999). This case bears none of the hallmarks of a “final agency  
15 action.” Instead: (1) EPA has begun the three-step consultation triage process – scheduling  
16 determinations of effects of any of the named pesticides; (2) that process has not yet  
17 determined the rights of any party; and (3) EPA apparently has not made any final decisions  
18 on whether formal ESA consultations on particular pesticides are warranted. Accordingly,  
19 the Court should dismiss Plaintiffs’ attempt to obtain judicial review in the midst of EPA’s  
20 deliberative process.

21 \_\_\_\_\_  
22 <sup>3</sup> The only exception the Eighth Circuit recognized was that the ESA § 11(g) “citizen suit  
23 provision permits Defenders to sue the EPA to enjoin any asserted violations of the ESA.” 882 F.2d at  
24 1300-01. There, the court held that EPA could be enjoined because Plaintiff had proven that “EPA’s  
25 registrations constituted [unlawful ESA § 9] takings of endangered species.” *Id.*

26 <sup>4</sup> The government then supplies the relevant administrative record for that specific action, which  
provides the sole basis for judicial review. “The task of the reviewing court is to apply the appropriate APA  
standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the  
reviewing court.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

1 If Plaintiffs (at 12) are asserting a reviewable “failure to act” under the APA (5  
2 U.S.C. § 553(13)), that claim should be dismissed as a jurisdictional matter. Since EPA *has*  
3 acted by initiating the consultation process and by taking registration actions, Plaintiffs  
4 cannot dress up ESA’s affirmative action as a failure to act in order to obtain judicial review  
5 in the midst of agency deliberations. *See Ecology Center*, 192 F.3d at 926; *Strahan v.*  
6 *Linnon*, 967 F. Supp. 581, 605-08 (D. Mass. 1997).

7 **4. If This Is An ESA § 11(g) Citizen Suit, The Complaint Should**  
8 **Be Dismissed**

9 If the Court were to find that Plaintiffs’ case is an ESA § 11(g) citizen suit, this case  
10 nonetheless should be dismissed for three reasons:

11 **a. FIFRA limits ESA citizen suits and precludes the relief**  
12 **contemplated here**

13 FIFRA is a “comprehensive federal statute which regulates pesticide use, sale, and  
14 labeling” and preempts State law, except as provided in 7 U.S.C. § 136v. *Taylor AG*  
15 *Industries, Inc. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995). After EPA has registered a  
16 pesticide for certain uses and in certain areas, FIFRA generally allows EPA to cancel a  
17 registration or to change its classification only: (1) under the substantive standard that it  
18 “generally causes unreasonable adverse risks on the environment” after taking “into account  
19 the impact of the action...on production and prices of agricultural commodities...and  
20 otherwise on the agricultural economy”; and (2) under procedures that include 60 days’  
21 advance notice to the registrant, advance consultation with the Secretary of Agriculture,  
22 and the opportunity for a hearing. 7 U.S.C. § 136d(b). FIFRA’s only exception is that, in  
23 an emergency situation, EPA can suspend registration of a pesticide upon a showing that  
24 suspension “is necessary to prevent an imminent hazard during the time required for  
25 cancellation” and if the registrant is accorded more limited due process protections. *Id.*  
26

1 § 136d(c).<sup>5</sup>

2 Under § 136d(c), *Congress specified the standard for enjoining the use of a*  
3 *pesticide due to impacts on ESA-listed species.* In 1973, Congress in the ESA amended the  
4 FIFRA term “imminent hazard” – to tie it expressly to “continued use of the pesticide  
5 during the time required for a cancellation proceeding...[that] will involve unreasonable  
6 hazard to the survival of a species declared endangered or threatened...pursuant to the  
7 Endangered Species Act.” Pub. L. No. 93-205 § 13(f), 87 Stat. 903 (1973) (codified at 7  
8 U.S.C. § 136(l)).

9 More generally, FIFRA would allow Plaintiffs to request that EPA issue an  
10 “imminent hazard” restriction or suspension – but in that instance would provide for judicial  
11 review only after EPA has taken final action on such an order. 7 U.S.C. § 136d(c)(4),  
12 136n. This FIFRA procedure should be exclusive, to the exclusion of an ESA citizen suit,  
13 because the ESA itself continued the practice under a prior statute<sup>6</sup> of deciding ESA issues  
14 in the context of FIFRA proceedings under a specific “imminent hazard” standard. Thus,  
15 there is a discernible legislative intent that FIFRA is not trumped by ESA citizen suit  
16 standards and procedures.

17 The ESA is a supplemental statute that directs federal agencies to “utilize their  
18 [existing] authorities in furtherance” of ESA purposes. 16 U.S.C. § 1531(c)(1). As a  
19 result, the ESA “does not *expand* the powers conferred on an agency by its enabling act” –  
20 the ESA does not supersede “limitations on [the agency’s] authority contained in the FPA.”

---

21  
22 <sup>5</sup> The only other possible FIFRA exception is that States have some authority to add use restrictions  
23 under 7 U.S.C. § 136v. However, § 136v only retains authority for *States* – not for local governments,  
24 environmental groups like Plaintiffs, or federal courts. Moreover, § 136v reinforces that: (1) FIFRA should  
be controlling, because it provides the only exception where an entity other than EPA can add use  
restrictions; and (2) Plaintiffs have an alternative remedy to their ESA citizen suit (i.e., petitioning a State  
to add use restrictions).

25 <sup>6</sup> Act of Dec. 5, 1969, Pub. L. No. 91-135, 83 Stat. 275 (concerning protection of endangered  
26 species of fish and wildlife).

1 *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); *see*  
2 *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) (“The  
3 Endangered Species Act does not, by its terms, enlarge the jurisdiction of the Corps of  
4 Engineers under the Clean Water Act”). Just as the ESA did not supersede or displace  
5 existing organic statutory standards and procedures in those cases, here the ESA does not  
6 supersede or displace FIFRA standards and procedures. As the Fifth Circuit phrased it in  
7 limiting EPA’s authority under the ESA and Clean Water Act § 402(b):

8 [Because] EPA lacks the power to add additional criteria to CWA § 402(b),  
9 *nothing in the ESA grants the agency the authority to do so*. Section 7 of  
10 the ESA merely required EPA to consult with FWS or NMFS before  
11 undertaking agency action; it confers no substantive powers.... We agree  
12 [with the D.C. Circuit in *Platte River*] that the ESA serves not as a font of  
13 new authority, but as something far more modest: a directive to agencies to  
14 channel their *existing* authority in a particular direction. *The upshot is that*  
15 *EPA cannot invoke the ESA as a means of creating and imposing*  
16 *requirements that are not authorized by the CWA*.

13 *American Forest & Paper Ass’n v. EPA*, 137 F.3d 291, 298-99 (5th Cir. 1998) (emphasis  
14 added).

15 Under all these cases, the United States’s interpretation of the relationship between  
16 FIFRA and the ESA was correct in *Defenders of Wildlife*, 882 F.2d 1294, despite being  
17 partially rejected by that court. *See* note 3 above. Intervenors believe that the Eighth  
18 Circuit was incorrect to find that an ESA citizen suit can be prosecuted in a way that  
19 negates FIFRA’s substantive “imminent hazard” standard and procedural protection of  
20 agriculture and registrants. As in the cases just discussed, this Court should find that  
21 FIFRA bars Plaintiffs from seeking to restrict use of a registered pesticide temporarily  
22 except under the standards (e.g., the “imminent hazard” standard) and procedures (initial  
23 EPA consideration, with some due process protection for registrants and agriculture  
24 interests) specified in FIFRA, particularly for an ESA § 7(a)(2) procedural claim.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**b. Plaintiffs’ action is barred by considerations of ripeness and lack of finality**

APA “final agency action” and ripeness constraints apply to ESA citizen suits against federal agencies. *See* 5 U.S.C. § 559 (APA continues to apply “except to the extent” a subsequent statute “expressly...supersede[s]” it); *Bennett v. Spear*, 520 U.S. at 174; *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998). Thus, the ripeness and “final agency action” bars discussed above apply even if Plaintiffs have stated an ESA citizen suit claim.

**c. Plaintiffs have failed to provide 60 days’ notice of intent to sue**

Plaintiffs have failed to provide the 60 days’ advance “written notice of the violation” they are arguing in their brief, as the ESA requires. *See* 16 U.S.C. § 1540(g)(2)(A)(i). The “sixty-day notice requirement is jurisdictional” – a “failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA.” *Southwest Center*, 143 F.3d at 520-21 (dismissing consultation claims against the action agency).

The ESA § 7(a)(2) claim in Plaintiffs’ 60-day notice letter was that, since pesticides allegedly “may affect” listed salmon, EPA was violating the ESA by not consulting with NMFS at all. *See* Complaint ¶¶ 4, 42; Plaintiffs’ letter at 1, 4-6 (July 25, 2000) (appended as exhibit to EPA’s cross-motion for summary judgment). That claim is moot, because the consultation process has begun. EPA Ans. ¶ 42; *see, e.g., American Rivers v. NMFS*, 126 F.3d 1118, 1123 (9th Cir. 1997) (“If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed”). In contrast, their present claim, which they did not notice or plead, is that EPA is violating the ESA by not currently engaging in *formal* consultation on 48 pesticides (which in substance is a claim that EPA has a duty to determine these pesticides are “likely to adversely affect” salmon). Further, Plaintiffs did not provide the requisite notice of the factual basis for their claims, as their

1 notice did not provide the Ewing and Code Declarations for EPA's consideration.<sup>7</sup> Thus,  
2 their current § 7(a)(2) claim must be dismissed for lack of notice. *See Hallstrom v.*  
3 *Tillamook County*, 493 U.S. 20 (1989); *Southwest Center*, 143 F.3d at 520-21.<sup>8</sup>

4 **B. Judicial Review Would Be Premature Before Plaintiffs Specify The**  
5 **Challenged "Agency Actions" And Before EPA Provides The**  
6 **Administrative Records On Those Actions**

7 Since EPA has entered into the consultation process, Plaintiffs only non-moot claim  
8 at this time is that EPA is violating a putative legal duty to initiate "formal consultations"  
9 now with respect to 48 named pesticides. Pl. Br. at 13; *see Southern Utah Wilderness*  
10 *Alliance v. Smith*, 110 F.3d 724, 727-30 (10th Cir. 1997). That claim cannot be reviewed  
11 at this time.

12 Because judicial review must be "based on the record the agency presents to the  
13 reviewing court" (*Lorion*, 470 U.S. at 743-44), review cannot occur until Plaintiffs specify  
14 which "agency actions" and inactions they are challenging and EPA provides the  
15 administrative records on those actions. *Alaska Dep't of Env'tl. Conservation v. EPA*, 244  
16 F.3d 748, 751 (9th Cir. 2001); *Pacific Northwest Generating Cooperative v. Brown*, 822 F.  
17 Supp. 1479, 1510 (D. Or. 1993). Review cannot be based on Plaintiffs' litigation affidavits  
18 or another "new record made initially in the reviewing court." *See Camp v. Pitts*, 411 U.S.  
19 at 142; *see also, e.g., Southwest Center for Biological Diversity v. U.S. Forest Service*, 100

---

20 <sup>7</sup> Plaintiffs also have violated APA concepts of review limited to facts first brought to the agency's  
21 attention and of review limited to the facts in the administrative record by relying on the extra-record facts  
22 in its litigation affidavits. *See Lorion*, 470 U.S. at 743-44; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Ricci*  
*v. Chicago Mercantile Exch.*, 409 U.S. 289, 305-06 (1973); *United States v. Tucker Truck Lines, Inc.*, 344  
23 U.S. 33, 37 (1952).

24 <sup>8</sup> We note (for any later relief purposes) that Plaintiffs have not provided 60 days' advance notice  
25 alleging that any pesticide maker, applicator, or end user is in violation of the ESA. As a result, ESA  
26 § 11(g) jurisdiction is lacking to award any injunctive relief that operates against such private parties (such  
as an ESA § 7(d) restriction on pesticide use). *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th  
Cir. 1988); *Old Timer, Inc. v. Blackhawk-Central City Sanitation*, 51 F. Supp. 2d 1109, 1119 (D. Colo.  
1999); *Bettis v. Town of Ontario, N.Y.*, 800 F. Supp. 113, 115-18 (W.D.N.Y. 1992).

1 F.3d 1443, 1450 (9th Cir. 1996).

2 For another reason as well, the Court cannot perform its judicial review function  
3 (and Intervenors cannot provide a full defense) until the administrative record facts are  
4 known. The applicability of ESA § 7(a)(2) consultation to each pesticide differs depending  
5 on where that particular pesticide is in the 15-year cycle between FIFRA registrations, and  
6 the salmon risk profile for that pesticide. There are two broad categories: (1) situations  
7 where EPA is about to take a final reregistration action on a given pesticide; and  
8 (2) situations within the 15-year horizon for registrations, where EPA has proposed no  
9 imminent agency action. Subsection C below will show that formal ESA consultation  
10 potentially applies only to category (1), and only if EPA determines that reregistration of a  
11 particular pesticide is likely to adversely affect listed salmon species.

12 Here, the significance of the pesticide-by-pesticide differences in ESA consultation  
13 duties is that the Court cannot grant generic relief based on an incomplete record and  
14 generic assertions by Plaintiffs. Accordingly, Plaintiffs' motion for summary judgment  
15 should be denied as premature until Plaintiffs identify the specific actions they are  
16 challenging (e.g., a final reregistration action for pesticide X without any ESA  
17 consultation), until EPA provides the record on those actions (e.g., a determination that  
18 reregistration of pesticide X is not likely to adversely affect salmon), and until briefing  
19 occurs based on the facts in that record. *Pacific Northwest*, 822 F. Supp. at 1510.

20 **C. The Claim That Formal ESA § 7(a)(2) Consultation Must Now Be**  
21 **Initiated Fails On the Merits**

22 ESA claims are reviewed under the deferential “arbitrary, capricious,...or otherwise  
23 not in accordance with law” standards provided by the APA. *See Southwest Center*, 143  
24 F.3d at 522; *Sierra Club v. Glickman*, 67 F.3d 90, 94-96 (5th Cir. 1995).

25 **1. Plaintiffs Do Not Challenge Any Imminent Agency Action**

26 When EPA is about to take an affirmative action to register or reregister a pesticide

1 or to exercise discretionary authority to restrict use of a pesticide, that would be an “agency  
2 action” within the meaning of ESA § 7(a)(2). As Plaintiffs say (at 9), a FIFRA registration  
3 is a “granting of [a] license[.]” under the definition of “action” in 50 C.F.R. § 402.02. EPA  
4 must comply “with ESA requirements *when the EPA registers pesticides.*” *Defenders of*  
5 *Wildlife*, 882 F.2d at 1299 (emphasis added).

6 However, ESA § 7(a)(2) compliance should not be difficult for most pesticides and  
7 often need not entail formal consultation. ESA and species concerns are already factored  
8 into FIFRA registration by FIFRA’s prohibition against registering a pesticide which  
9 “caus[es] an unreasonable adverse effect on the environment.” *Id.* at 1299; *see* 7 U.S.C.  
10 §§ 136(l), 136(bb), 136a(c)(5). Under the Services’ consultation triage system, depending  
11 on whether EPA reasonably concludes that its action with respect to a given pesticide  
12 would not affect, “may affect,” or is “likely to adversely affect” listed salmon, either no  
13 consultation at all, informal consultation, or formal consultation is required with respect to  
14 that pesticide.

15 **a. Plaintiffs have not established the factual predicate for**  
16 **formal consultation**

17 Formal consultation takes place only if EPA determines that its action is “likely to  
18 adversely affect any listed species or critical habitat.” 50 C.F.R. 402.14(b); *see Natural*  
19 *Resources Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1999); *Southern*  
20 *Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 728-29 (10th Cir. 1997). Plaintiffs’ brief  
21 does not assert, and certainly has not proven, that EPA has made or should have made this  
22 determination for any or all of the 48 pesticides they mention. Their claim fails for this  
23 reason alone.

24 **b. The timing of formal consultation is within EPA’s**  
25 **discretion and is entitled to deference**

26 Further, considerations of timing and agency discretion preclude judicial relief  
compelling formal consultation. ESA § 7 does not specify any timing for initiation of

1 consultation, beyond requiring it before the agency authorizes an action (here, reregistering  
2 a pesticide). *See Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1353 (D. Minn. 1988)  
3 (concluding, in a pesticide case, that the “ESA does not specify the time within which an  
4 agency must reinitiate consultation and the agency is entitled to deference” on its timing  
5 decision). Just as a court cannot dictate any earlier timing of a National Environmental  
6 Policy Act (“NEPA”) document where the statute only requires it at the time of a ripe  
7 proposal (*see Kleppe v. Sierra Club*, 427 U.S. 390, 404-06 (1976)), courts cannot dictate  
8 to EPA any pre-registration timing for ESA consultation. *See also Vermont Yankee*  
9 *Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-48 (1978)  
10 (courts cannot add procedures to statutes which they believe advance the public interest).

11 Plaintiffs rely on the 50 C.F.R. Part 402 rules to establish timing and other legal  
12 duties on EPA. However, the Part 402 rules are not binding on EPA and provide no  
13 judicially enforceable legal duties. *Lujan v. Defenders*, 504 U.S. at 568-69; 51 Fed. Reg.  
14 19928 (June 3, 1988); *Southwest Center*, 100 F.3d at 1450 (9th Cir. 1996). *See* p. 2 above.

15 Moreover, while the rules encourage an action agency to “review its actions at the  
16 earliest possible time to determine” when informal or formal consultation is appropriate,  
17 they do not specify a judicially-ascertainable standard on the timing for initiating formal  
18 consultation. 50 C.F.R. § 402.14(a). Instead, the rules: (1) create information prerequisites  
19 to formal ESA consultation that apparently have not been completed; and (2) only require  
20 formal consultation “[i]f...a determination is made” by the action agency that its action is  
21 “likely to adversely affect any listed species or critical habitat.” 50 C.F.R. § 402.14(a)-(d).

22 The “Service does not intend to mandate the timing of this [formal consultation]  
23 review, which is *solely at the discretion of the Federal agency*.” 51 Fed. Reg. 19949 (June  
24 3, 1986) (emphasis added). Further, “informal consultation is an optional process that is  
25 under *the control of the Federal agency as to its initiation and duration*.” *Id.* at 19948  
26 (emphasis added). Here, EPA already is in consultation and is moving towards determining

1 whether any pesticide registration is or is not likely to adversely affect and listed species.  
2 Hence, the Court should defer to EPA's view on the timing of the two permissible types of  
3 consultation.

4 **c. EPA's decision on timing of formal consultation is**  
5 **reasonable and not arbitrary**

6 EPA's apparent decision not to engage in formal consultation now is reasonable and  
7 not "arbitrary" within the meaning of the APA, for several reasons.

8 First, formal consultation is predicated on a finding that agency action is likely to  
9 adversely affect a listed species or its critical habitat. Considerable information is required  
10 before EPA can make that determination and initiate formal consultation. "[E]ach agency  
11 [the Services and the action agencies] shall use the best scientific and commercial data  
12 available." 16 U.S.C. § 1536(a)(2). The Services interpret this to mean the "Federal  
13 agency requesting formal consultation shall provide the Service with the best scientific and  
14 commercial data available," so that the Service can deliver a high-quality, sound biological  
15 opinion within 135 days. 50 C.F.R. § 402.14(d), (e). EPA cannot start formal consultation  
16 until it can provide NMFS with the best available "written" information on:

- 17 (1) A description of the action to be considered; (2) A description of  
18 the specific area that may be affected by the action; (3) A description of any  
19 listed species or critical habitat that may be affected by the action; (4) A  
20 description of the manner in which the action may affect any listed species or  
21 critical habitat and an analysis of any cumulative effects; (5) Relevant  
22 reports, including any environmental impact statement, environmental  
23 assessment, or biological assessment prepared; and (6) Any other relevant  
24 available information on the action, the affected listed species, or critical  
25 habitat.

26 Formal consultation shall not be initiated by the Federal agency until  
any required biological assessment has been completed and submitted to the  
Director in accordance with § 402.12.

50 C.F.R. § 402.14(c).

Neither Plaintiffs' Complaint nor their brief alleges that EPA has this quality of  
salmon-specific information now. Instead, Plaintiffs state that "research is needed into the

1 sublethal, synergistic, [and] cumulative effects of pesticides” on listed species of salmon,  
2 that salmon “may be adversely affected” in ways that have not yet been detected or studied,  
3 that EPA could “compel registrants to collect and submit information about the pesticide  
4 impacts on salmon habitat,” and that EPA’s “endangered species program is still in an  
5 embryonic stage.”<sup>9</sup> These are circumstances calling for continued effects determinations,  
6 research, and monitoring, not for precipitously starting a formal consultation process with  
7 highly compressed time limitations.

8 Second, the rules provide for formal consultation only if EPA determines that a  
9 particular pesticide is “likely to adversely affect any listed species or critical habitat.” 50  
10 C.F.R. § 402.14(a), (b). EPA apparently has not yet made that determination, and for good  
11 reasons. A pesticide can be registered only if studies show that the authorized uses “will  
12 not generally cause unreasonable adverse effects on the environment.” 7 U.S.C.  
13 § 136a(c)(5). Whether the types of “sublethal” effects and other uncertain effects of  
14 pesticides on listed species of salmon alleged by Plaintiffs (at 14-18) do actually exist  
15 presents difficult biological issues. This is why Plaintiffs request additional research, but  
16 provide no showing that each of the 48 named pesticides is likely to have “unreasonable  
17 adverse effects” on the salmon.

18 Third, the ESA limits the time for formal consultation. For an “agency action  
19 involving a permit or license applicant,” formal consultation must be concluded within “90  
20 days” unless the applicant agrees to a time extension. 16 U.S.C. § 1536(b)(1). The  
21 Services have stretched this to 135 days, by stating they will deliver their biological opinion  
22 within 45 days of the completion of the 90-day consultation period. 50 C.F.R. § 402.14(e),

---

23 <sup>9</sup> Pl. Br. at 2, 14-15, 22-23; *see* Pl. Dec. of Dr. Ewing at ¶¶ 21-22 (“much is unknown about the  
24 full range and extent of pesticide impacts on salmon” and “it is critical to conduct further studies,  
25 monitoring, and assessments of the impacts of pesticides on salmon”; “Unfortunately, there are few  
26 comprehensive monitoring programs that document the presence and concentrations of pesticides in  
salmon-bearing waters”).

1 (g)(5).

2 Historically, the prior attempts at ESA consultations on the effects of a pesticide on  
3 a wide variety of listed species “have been plagued by incessant delays.” Pl. Br. at 11.  
4 Such delays are intolerable to Intervenor, particularly if a federal agency or court were to  
5 impose ESA § 7(d) constraints on pesticide use during the formal consultation period.  
6 Since an ESA § 7(d) injunction is a risk during any formal consultation, Intervenor has a  
7 strong interest in limiting the length of that injunction risk by insisting that EPA and NMFS  
8 complete any formal consultation within the ESA-prescribed timeframe.

9 In sum, it is reasonable and not arbitrary for EPA to avoid initiating formal  
10 consultation precipitously and only to invoke the earlier steps in the consultation triage  
11 process at this time. EPA apparently does not have specific evidence that any or all of the  
12 48 pesticides are likely to adversely affect listed salmon, as is needed to trigger formal  
13 consultation legally. Forcing a time-constrained formal consultation in these circumstances  
14 is likely to produce a garbage-in, garbage-out biological opinion on a complex subject.<sup>10</sup>  
15 Instead, it is reasonable to initiate time-limited formal consultation only when good quality  
16 information demonstrates to EPA’s satisfaction that a particular pesticide is likely to  
17 adversely affect salmon.

18  
19 \_\_\_\_\_  
20 <sup>10</sup> Once formal consultation begins, an agency cannot string out formal consultation while more  
21 information is developed. At the time the Supreme Court decided *TVA v. Hill*, 437 U.S. 153 (1978), ESA  
22 § 7 allowed a federal action to go forward only if it had been affirmatively shown that the action would “not  
23 jeopardize” a listed species. Pub. L. No. 93-205 § 7, 87 Stat. 892 (1973). However, Congress subsequently  
24 *lowered* the ESA § 7 compliance standard so that an action is allowed if it “is not *likely* to jeopardize” a  
25 listed species. Pub. L. No. 96-159 § 4, 93 Stat. 1226 (1979) (emphasis added). The change was intended to  
26 prevent jeopardy conclusions or “negative biological opinions whenever the action agency cannot guarantee  
with certainty that the agency action will not jeopardize.” H.R. Conf. Rep. No. 96-697 at 12 (1979).  
Further, the agencies could not prolong formal consultation to obtain better information, as the biological  
opinion must be based on “the best evidence that is available or can be developed during [the] consultation”  
period and, if “the biological information is rendered on the basis of inadequate information” (e.g., it cannot  
be concluded based on indefinite evidence that the action is likely to jeopardize), then the Federal agency  
merely “has a continuing obligation to make a reasonable effort to develop that information.” *Id.*



1 times, there is an “ongoing” EPA action which may require formal consultation. The ESA  
2 speaks in terms of consultation before “irretrievable commitment[s]” are made at the time  
3 an “action [is] authorized, funded, or carried out by such [federal] agency.” 16 U.S.C.  
4 § 1536(a)(2), (d). Where the action is actually “carried out” over a period of time by a  
5 federal agency – such as the Forest Service’s implementation of national forest plans in  
6 Plaintiffs’ cited case of *Pacific Rivers Council v. Thomas*, 30 F.3d 150 (9th Cir. 1994), or  
7 the federal “clos[ing] the dam gates” in *TVA v. Hill*, 437 U.S. at 173 – arguably, there is an  
8 ongoing federal action subject to consultation.

9 But, where EPA has already “authorized” private uses of a pesticide through an  
10 EPA approval action that occurs only once every 15 years, there is no statutory basis for  
11 finding an “ongoing” federal agency action and for inferring a continuous EPA duty to  
12 engage in ESA consultation. Private land-use activities following FWS’s approval of an  
13 ESA § 10 incidental take permit have been found not to be an ongoing agency action and  
14 not to require an agency to consult merely because a private activity that the agency has  
15 previously approved may affect a species. *Environmental Protection Information Center v.*  
16 *The Simpson Timber Co.*, 255 F.3d 1073, 1080-82 (9th Cir. 2001) (FWS cannot be  
17 enjoined “to amend an ESA section 10 permit where the agency has not otherwise retained  
18 discretion under the [incidental take] permit to impose such an amendment”; distinguishing  
19 *Pacific Rivers* as case in which the federal agency had retained plenary control over the  
20 action). Similarly here, EPA’s prior approval of a pesticide does not create an EPA duty to  
21 consult every time a private use of that pesticide arguably affects listed species of salmon.

22 It is true that Congress awarded EPA discretionary authority to cancel or amend  
23 pesticide registrations in limited circumstances, including circumstances specifically  
24 addressed to endangered and threatened species. *See* Pl. Br. at 10. But, EPA has not  
25  
26

1 invoked such discretionary authority. A federal agency's inaction or declining to take  
2 discretionary action is not an "agency action" for either ESA § 7(a)(2) or NEPA purposes.<sup>12</sup>  
3 Only the agency's *exercise* of discretionary authority creates an "agency action" for ESA  
4 consultation purposes. *Compare Natural Resources Defense Council v. Houston*, 146 F.3d  
5 1118 (9th Cir. 1998) (renewal of water contracts is an action subject to the ESA), *with*  
6 *EPIC v. Simpson*, 255 F.3d at 1082 ("We did not suggest in *Houston* that once the renewed  
7 contracts were executed, the agency had continuing discretion to amend them at any time to  
8 address the needs of endangered or threatened species)."<sup>13</sup>

### 9 **3. Plaintiffs Have Not Demonstrated That EPA "Unreasonably** 10 **Delayed" Formal Consultation**

11 Finally, if Plaintiffs are asserting that EPA has "unreasonably delayed" (5 U.S.C.  
12 § 706) seeking formal consultation, that claim should be dismissed. To succeed on an  
13 unreasonable delay claim, Plaintiffs must satisfy the stringent six factor test laid out in  
14 *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507-12 (9th Cir. 1997).<sup>14</sup> Plaintiffs do

---

15 <sup>12</sup> *E.g., Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074-75 (9th Cir. 1996) (NEPA and ESA  
16 standards for agency action are "much the same"); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244-47  
17 (D.C. Cir. 1980) (a federal agency's failure to use its statutory authority to prevent a non-federal entity's  
18 action is not a federal action for NEPA purposes); *State of Alaska v. Andrus*, 591 F.2d 537, 540-42 (9th Cir.  
1979) (same); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 174-75 (D.D.C. 2000) (agency's  
maintenance of the status quo and failure to take further regulatory action is not an agency action for NEPA  
purposes).

19 <sup>13</sup> Even if EPA's discretionary FIFRA authority creates some ongoing duty to consult, where an  
20 agency has not yet proposed some definitive long-term action (such as reregistration with or without  
restrictions), it is appropriate to engage in informal, not formal, consultation. *Platte River*, 962 F.2d at 33  
at n.2.

21 <sup>14</sup> Those factors are:

22 (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where  
23 Congress has provided a timetable or other indication of the speed with which it expects the agency  
24 to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason  
25 [;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when  
26 human health and welfare are at stake [;] (4) the court should consider the effect of expediting  
delayed action on agency activities of a higher or competing priority[;] (5) the court should also  
take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court  
need not "find any impropriety lurking behind agency lassitude in order to hold that agency action  
is unreasonably delayed.

(footnote continued...)

1 not even attempt to show that they have satisfied those factors.

2 As described above, EPA's approach to consultation has been prudent and  
3 reasonable. Moreover, since many of the salmon species were only listed in the last three to  
4 four years (*see* Pl. Br. at 2 n.2), EPA has not unreasonably delayed any consultation action.  
5 Indeed, one of those listings, the 1998 listing of the Oregon Coast coho salmon, has been  
6 judicially invalidated. *Alesea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001),  
7 *stayed pending intervenors' appeal*, No. 01-36071 (9th Cir. Dec. 14, 2001). In the wake  
8 of that ruling, NMFS has announced that delistings may be warranted for fourteen listed  
9 salmon species and that it is reviewing the status of another ten currently listed as  
10 threatened or endangered – a notice that covers all but five of the salmon species identified  
11 in Plaintiffs' Complaint. *See* 67 Fed. Reg. 6215 (Feb. 11, 2002); Complaint ¶ 26.

12 Plaintiffs (at 12) do cite an opinion stating that an agency “cannot avoid formal  
13 consultation indefinitely.” *Pacific Coast Fed'n of Fishermen's Associations v. U.S. Bureau*  
14 *of Reclamation*, 138 F. Supp. 2d 1228, 1242-43 (N.D. Cal. 2001). But, an ESA violation  
15 was found in that case only because the agency had implemented a one-year operations plan  
16 without first completing consultation. As long as EPA takes no action registering a  
17 pesticide which is likely to adversely affect listed salmon without first completing formal  
18 consultation, ***there has been no ESA violation*** and the timing of consultation remains in  
19 EPA's discretion.

## 20 **II. THE ESA § 7(A)(1) CLAIM IS MOOT AND WITHOUT MERIT**

21 Plaintiffs argue (at 20-23) that EPA has violated a duty to engage in ESA § 7(a)(1)  
22 consultation with NMFS. Plaintiffs are mistaken. As EPA explains in its summary  
23 judgment brief, EPA is currently engaged in a proactive conservation review under

24 \_\_\_\_\_  
(continued from previous page)

25 *Independence Mining*, 105 F.3d at 507 n.7 (quoting *Telecommunications Research & Action v. FCC*, 750  
26 F.2d 70, 80 (D.C. Cir. 1984) (citations omitted)).

1 § 7(a)(1). See EPA Ans. ¶ 46 (denying factual bases of Plaintiffs' § 7(a)(1) allegation).  
2 Thus, Plaintiffs' § 7(a)(1) claim is moot. See *American Rivers*, 126 F.3d at 1123.

3 Beyond that, Intervenors would note that, as explained above, there likely is no  
4 reviewable "final agency action" at this time. Furthermore, the ESA leaves the timing,  
5 scope, and results of § 7(a)(1) consultation largely to agency discretion. E.g., *Coalition for*  
6 *Sustainable Resources v. U.S. Forest Service*, 48 F. Supp. 2d 1303, 1315-16 (D. Wyo.  
7 1999). As a result, the following combination of programmatic consultations satisfies  
8 § 7(a)(1): (1) EPA's and NMFS's agreement in a Memorandum of Understanding on using  
9 EPA's Clean Water Act authority to advance ESA conservation (66 Fed. Reg. 11202 (Feb.  
10 22, 2001)); and (2) the consultation process in which EPA and NMFS engaged on the  
11 FIFRA program.

12 Plaintiffs (at 23) argue further that ESA § 7(a)(1) requires EPA to "ensure that it  
13 utilizes its pesticide-related programs and authorities to conserve listed species." That claim  
14 should be dismissed, as it cannot be reconciled with the language and structure of the ESA.  
15 Unlike ESA § 7(a)(2)'s prohibition of *any* federal "agency action" which is likely to  
16 jeopardize the continued existence of a listed species, § 7(a)(1) does not purport to bar  
17 FIFRA actions which do not provide conservation benefits to listed species. Reading ESA  
18 § 7(a)(1) as requiring that every federal action or every federal program must advance  
19 "conservation" would improperly render the less-demanding "jeopardy" constraint in ESA  
20 § 7(a)(2) meaningless. As the House Committee with ESA jurisdiction stated:

21 [W]e do not believe that it was intended that section 7(a)(1) require  
22 developmental actions to be treated as conservation programs for  
23 endangered species.... Such an interpretation would render the much  
24 debated provisions of section 7(a)(2) redundant and essentially meaningless  
25 and bring about endless litigation. Accordingly, we suggest that any [of the  
26 Services'] conservation recommendations be transmitted to action agencies  
separate from biological opinions and that the regulations state plainly that  
failure to accept or implement the recommendations does not constitute a  
violation of section 7 of the Act.

51 Fed. Reg. 19954 (June 3, 1986) (quoting Committee's comment). The Services

1 “agree[d]” with the Committee’s interpretation, *id.*, and revised 50 C.F.R. § 402.14(j) “to  
2 emphasize the non-binding nature of conservation recommendations.” 51 Fed. Reg. 19955.  
3 The Services’ regulatory interpretation – that the action agency has considerable discretion  
4 on which, if any, “conservation” programs it wants to adopt – is entitled to judicial  
5 deference. Further, “development” actions – such as the application of pesticides to provide  
6 food and forage for the American public’s needs – should not be subject to any  
7 “conservation” constraints.

8 In light of the above, most courts have reached the correct result that ESA § 7(a)(1)  
9 creates no judicially-enforceable “conservation” standards and, instead, provides discretion  
10 to agencies like EPA. *E.g., Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 135  
11 (D.D.C. 2001); *Coalition for Sustainable Resources*, 48 F. Supp. 2d at 1315-16; *Hawksbill*  
12 *Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 542-43 (D.V.I. 1998); *Strahan v. Linnon*, 967 F.  
13 Supp. at 596; *Defenders of Wildlife v. EPA*, 688 F. Supp. at 1352 (dismissing an ESA  
14 § 7(a)(1) claim concerning pesticides). The cases cited by Plaintiffs have not held that ESA  
15 § 7(a)(1) creates broad substantive duties to conserve.<sup>15</sup>

16 Instead, any “conservation” actions contemplated by EPA should be consistent with  
17 EPA’s organic authorities. *American Forest & Paper Ass’n v. EPA*, 137 F.3d at 298-99;  
18 *Platte River*, 962 F.2d at 33-34; *Coalition for Sustainable Resources*, 48 F. Supp. 2d at  
19 1316. FIFRA and § 1010 of the 1988 ESA Amendments signify that pesticide uses for food  
20 and fiber production not be unduly constrained, and that the property rights of pesticide  
21

---

22 <sup>15</sup> The Ninth Circuit has recognized that agencies have “discretion in ascertaining how best to  
23 fulfill the mandate to conserve.” *Pyramid Lake Paiute Tribe v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1418  
24 (9th Cir. 1990). The only holding in *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998), concerned the  
25 duty to initiate *some* consultation process under ESA § 7(a)(1), though the case contains conflicting *dicta*  
26 on the scope of any conservation duty. *See* 156 F.3d at 614, 616 n.5, 617. Similarly, the Supreme Court’s  
paraphrasing of the ESA’s conservation language in *TVA v. Hill* was also *dicta*, as non-compliance with the  
no-jeopardy limitation of ESA § 7(a)(2) had been admitted and the issue was whether an injunction was  
automatic in such circumstances. *See* 437 U.S. at 171-72.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

manufacturers and end users be respected. Accordingly, EPA has no legal duty to use the pesticide program under FIFRA as an ESA “conservation” program, and may be unable to do so.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CONCLUSION**

The Court should either: (1) dismiss the Complaint at summary judgment; or (2) deny Plaintiffs' premature motion for summary judgment.

DATED this 22nd day of March, 2002.

**LEARY FRANKE DROPPERT PLLC**

---

J.J. Leary (WSBA No. 08776)  
Terrence L. Fredrickson (WSBA No. 15279)  
1500 Fourth Avenue, Suite 600  
Seattle, WA 9810  
(206) 343-8835

**CROWELL & MORING LLP**

Steven P. Quarles, pro hac vice  
J. Michael Klise, pro hac vice  
Thomas R. Lundquist (D.C. Bar No. 968123)  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 624-2500

Attorneys for Intervenor Defendants  
CropLife America, et al.