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23 **UNITED STATES DISTRICT COURT**
24 **NORTHERN DISTRICT OF CALIFORNIA**

25 CENTER FOR BIOLOGICAL DIVERSITY,)
26 a non-profit corporation,)
27)
28 Plaintiff,)
v.)
MIKE LEVITT, Administrator,)
Environmental Protection Agency, and)
WAYNE NASTRI, Region 9 Administrator,)
Environmental Protection Agency,)
Defendants.)

Case No.: 02-1580-JSW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S SECOND MOTION FOR
SUMMARY JUDGMENT**

DATE: January 30, 2004
TIME: 9:00 a.m.
PLACE: 17th Floor, Courtroom 2
JUDGE: Hon. Jeffrey S. White

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28

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STANDARD OF REVIEW 3

BACKGROUND 3

ARGUMENT 6

 I. THE “MAY AFFECT” EVIDENTIARY BURDEN PLACED ON THE CENTER IS
 LOW 7

 II. THE CENTER HAS PRESENTED EVIDENCE THAT 66 PESTICIDE
 REGISTRATIONS “MAY AFFECT” THE CALIFORNIA RED-LEGGED FROG 9

 A.EVIDENCE THAT THE 66 PESTICIDES ARE CURRENTLY REGISTERED FOR
 USE BY THE EPA IN THE STATE OF CALIFORNIA 10

 B.EVIDENCE THAT THE EPA’S ONGOING REGISTRATION AND
 REREGISTRATION PROCESS ACHIEVED SIGNIFICANT MILESTONES SINCE
 THE CALIFORNIA RED-LEGGED FROG WAS LISTED AS THREATENED
 UNDER THE ESA 11

 C.EVIDENCE THAT THE 66 PESTICIDES ARE ACTUALLY APPLIED ON OR
 UPWIND OF RED-LEGGED FROGS OR THEIR HABITAT 13

 D.EVIDENCE THAT EACH OF THE 66 PESTICIDES HAS THE POTENTIAL TO
 HARM RED-LEGGED FROGS 15

 III. ONCE THE COURT IS SATISFIED THAT THE CENTER HAS MET OR
 EXCEEDED THE “MAY AFFECT” THRESHOLD, THE EPA MUST BE ORDERED
 TO UNDERGO CONSULTATION UNLESS THE EPA CAN CONCLUSIVELY
 SHOW THAT A PESTICIDE HAS “NO EFFECT” ON THE CALIFORNIA RED-
 LEGGED FROG..... 16

 IV. THE CENTER HAS SHOWN THAT THE 66 REGISTRATIONS CONSTITUTE
 ONGOING AGENCY ACTION, AND THEREFORE THE EPA MUST SUBMIT
 BIOLOGICAL ASSESSMENTS TO FWS WITHIN 12 MONTHS 18

 A.THE ESA DOES NOT PROVIDE DISCRETION FOR THE AGENCY TO DELAY
 THE INITIATION OF CONSULTATION ONCE THE AGENCY BECOMES
 AWARE THAT AN ONGOING ACTION “MAY AFFECT” A LISTED SPECIES 18

 B.EVEN IF T.R.A.C. FACTORS APPLY, THE EPA MUST BE ORDERED TO
 SUBMIT BIOLOGICAL ASSESSMENTS TO THE FWS WITHIN 12 MONTHS . 20

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases

Chemical & Atomic Workers Int’l Union v. Zegeer, 768 F.2d 1480 (D.C. Cir. 1985)..... 25

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 3

Brower v. Evans, 257 F.2d 1058 (9th Cir. 2001)..... 24

Celotex Corporation v. Catrett, 477 U.S. 317 (1986) 3

Center for Biological Diversity v. Pirie, Civ. No. 00-3044 (D.D.C. 2002) 24

City of Sausalito v. O’Neill, 211 F. Supp. 2d 1175 (N.D. Cal. 2002) 8, 14

Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987) 21, 22, 23

In re Barr Labs, Inc., 930 F.2d 72 (D.C. Cir. 1991)..... 23

Independence Mining Co. v. Babbitt, 105 F.3d 502 (1997) 23

Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) passim

Potomac Elec. Power Co. v. ICC, 702 F.2d 1026 (1983) 21

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)..... 5, 6, 9, 24

Tennessee Valley Authority (“TVA”) v. Hill, 437 U.S. 153, 180 (1978) 3, 9, 13, 20

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)..... 5, 8, 14, 24

United States v. Oakland Cannabis Buyers, 532 U.S. at 483 (2001)..... 24

United Steelworkers v. Rubber Mfrs. Ass’n, 783 F.2d 11 (D.C. Cir. 1986) 25

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 24

Statutes

16 U.S.C. § 1536(b) 5

16 U.S.C. § 1536(c)(1)..... 8

50 C.F.R. § 402.14(b)(1)..... 8

7 U.S.C. § 136a(g)(1)(B) 18

7 U.S.C. § 136a-1..... 13

16 U.S.C. § 1536(a)(2)..... 1, 2, 4

50 C.F. R. § 402.16..... 1, 2, 6, 19

50 C.F.R. § 402.03 1, 2

1	7 U.S.C. § 136.....	1, 10
2		
3	Other Authorities	
4	Fed. R. Civ. P. 56(e)	3
5		
6	Rules	
7	51 Fed. Reg. at 19,949	7, 17
8	61 Fed. Reg. 25,813 (May 23, 1996)	1
9		
10	Regulations	
11	50 C.F.R. § 402.02	4, 5, 14
12	50 C.F.R. § 402.12(a).....	8
13	50 C.F.R. § 402.12(d)(2).....	8
14	50 C.F.R. § 402.13	5
15	50 C.F.R. § 402.14(a).....	4, 7, 18, 19
16	50 C.F.R. § 402.14(g)(4).....	8
17	50 C.F.R. §402.01(b)	4
18		
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1 **INTRODUCTION**

2 For over seven years, the Environmental Protection Agency (“Defendants” or “EPA”)
3 has registered and reregistered pesticides for use in California without assessing the impacts of
4 those pesticides on the federally listed California red-legged frog, *Rana aurora draytonii*. With
5 this motion, Plaintiff Center for Biological Diversity (“the Center”) renews its challenge to the
6 EPA’s failure to consult with the U.S. Fish and Wildlife Service (“FWS”) in order to assess and
7 mitigate these impacts pursuant to Section 7(a)(2) of the federal Endangered Species Act
8 (“ESA”).

9 The ESA requires federal agencies to insure that their actions are not likely to jeopardize
10 the continued existence of endangered or threatened species. 16 U.S.C. § 1536(a)(2). To insure
11 that agency actions are not likely to jeopardize listed species, “action agencies” such as the EPA
12 must consult with “expert agencies” such as the FWS in order to assess the action’s impacts on
13 endangered and threatened species. *Id.* The ESA’s implementing regulations require such
14 consultation to be initiated whenever it is shown that any ongoing action “in which there is
15 discretionary Federal involvement or control” “may affect” a listed species. 50 C.F.R. §§
16 402.03, 402.16.

17 The EPA registers and reregisters pesticides for use in the United States pursuant to the
18 Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). 7 U.S.C. §§ 136-136y. This
19 Court has determined that the EPA has “continuing discretion” to review, revoke, and alter
20 registrations to protect endangered and threatened species from pesticide impacts. Docket No.
21 80, p. 9, n.6. Thus, the registration of pesticides pursuant to FIFRA constitute “ongoing agency
22 action[s]” subject to Section 7(a)(2) consultation procedures. *Id.*

23 The California red-legged frog has been protected as a “threatened” species under the
24 federal ESA since May 23, 1996. 61 Fed. Reg. 25,813 (May 23, 1996) AR 8.¹ Since the
25 California red-legged frog was listed, biologists have determined that the use of pesticides in
26

27 ¹ Citations to the “administrative record” produced by Defendants are cited as “AR” followed by
28 the document number.

1 and near the frog's habitat may be affecting the frog and perpetuating the species' demise. See
2 Second Declaration of Susan E. Kegley (hereinafter "2nd Kegley Dec.") ¶ 6.

3 However, despite the fact that the EPA retains "discretionary Federal involvement or
4 control" over pesticides registered pursuant to FIFRA, and despite evidence that these pesticides
5 "may affect" the California-red legged frog, the EPA has never consulted with the FWS as
6 required by the ESA on any pesticide it has registered for use within frog's range. The EPA has
7 therefore failed to "insure" that the pesticides it registers and reregisters for use under FIFRA
8 are safe for the frog within the meaning of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§
9 402.03, 402.16.

10 As such, the Center moved this Court for summary judgment on December 20, 2002.
11 Docket No. 44. The EPA opposed this motion and filed a cross motion for summary judgment
12 on the claims. Docket No. 55. After oral argument, the Court issued an order on June 30, 2003
13 denying the parties' motions with respect to the Section 7(a)(2) claims.² Docket No. 80. In this
14 Order, the Court indicated that the evidence presented in this matter should be reorganized and
15 resubmitted to the Court to facilitate the Court's ruling on the Section 7(a)(2) claim. The
16 Center's Second Motion for Summary Judgment is submitted to address the concerns expressed
17 in the June 30 Order. More specifically, this motion (1) reduces the number of registrations
18 challenged in this matter to 66; (2) further explains the "may affect" threshold established by the
19 ESA and implementing regulations, clarifying for the Court the burden these regulations place
20 on both the Center and the EPA; (3) sets forth the Center's "may affect" evidence on a pesticide
21 by pesticide basis; (4) sets forth the date of the EPA's most recent registration or reregistration
22 action that post-dates the listing of the frog; and (5) explains why it is improper for this Court to
23 consider the TRAC factors in crafting injunctive relief. Because the evidence in this Motion
24 conclusively shows that the EPA has a mandatory duty to undergo interagency consultation

25 ² Pursuant to stipulation and previous orders from this Court, all other claims raised by Plaintiff
26 in its First Amended Complaint have been resolved. This motion only addresses the merits of
27 the Center's Section 7(a)(2) claim and the appropriate standard for setting a deadline for the
28 EPA to comply with the law. If this motion is resolved in favor of the Center, additional
briefing on the scope of interim injunctive relief will be provided.

1 pursuant to Section 7(a)(2) of the ESA and has failed to do so, the Center requests that the Court
2 order the EPA's to begin preparing the requisite biological assessments for each of the 66
3 pesticides discussed in this motion, and require the biological assessments to be completed and
4 submitted to the FWS within 12 months of the Court's order.

5 **STANDARD OF REVIEW**

6 A court shall render summary judgment when no genuine issue as to any material fact
7 exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
8 When the evidence is "so one-sided that one party must prevail as a matter of law," summary
9 judgment is appropriate. Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986). Where the
10 moving party has demonstrated that there is no material issue of fact for trial, the "adverse party
11 may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must
12 set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).
13 Summary judgment is not treated as "a disfavored procedural shortcut" but as "an integral part
14 of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive
15 determination of every action. Celotex Corporation v. Catrett, 477 U.S. 317 (1986) (quoting
16 Fed. R. Civ. P. 1). Accordingly, this Court should declare that the EPA is in violation of Section
17 7 of the ESA for failing to initiate and complete consultation regarding the impacts of pesticide
18 registration and reregistration on the California red-legged frog.

19 **BACKGROUND**

20 The Endangered Species Act "is the most comprehensive legislation for the preservation
21 of endangered species ever enacted by any nation." Tennessee Valley Authority ("TVA") v.
22 Hill, 437 U.S. 153, 180 (1978). The Supreme Court's review of the Act's "language, history,
23 and structure" convinced the Court "beyond a doubt" that "Congress intended endangered
24 species to be afforded the highest of priorities." Id. at 174. As the Court found, "Congress has
25 spoken in the plainest of words, making it abundantly clear that the balance has been struck in
26 favor of affording endangered species the highest of priorities, thereby adopting a policy which
27 [Congress] described as 'institutionalized caution.'" Id. at 194 (quoting H.R. Rep. No. 93-412,
28 at 4-5 (1973)). "[T]he plain intent of Congress in enacting this statute was to halt and reverse

1 the trend toward species extinction, whatever the cost,” Id. at 184, and this precautionary
2 approach to preserving species “is reflected not only in the stated policies of the Act, but in
3 literally every section of the statute.” Id. at 194.

4 The ESA vests primary responsibility for administering and enforcing the statute with
5 the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have
6 delegated this responsibility to the National Marine Fisheries Service (“NMFS”) and the U.S.
7 Fish and Wildlife Service (“FWS”) respectively. 50 C.F.R. §402.01(b). NMFS has primary
8 responsibility for administering the ESA with regards to most marine species, as well as
9 anadromous fish such as salmon, while FWS has responsibility for terrestrial species, such as
10 the California red-legged frog.

11 In order to fulfill the substantive purposes of the ESA, Federal agencies are required to
12 engage in consultation with NMFS or FWS to “insure that any action authorized, funded, or
13 carried out by such agency . . . is not likely to jeopardize the continued existence of any
14 endangered species or threatened species or result in the adverse modification of habitat of such
15 species . . . determined . . . to be critical” 16 U.S.C. § 1536(a)(2) (Section 7 consultation).

16 Because the ESA requires the consultation process to “insure” that agency actions do not
17 jeopardize listed species, Section 7 consultation must be initiated for “any action [that] may
18 affect listed species or critical habitat.” 50 C.F.R. § 402.14(a) (emphasis added). Agency
19 “action” is also defined broadly in the ESA’s implementing regulations so that Section 7’s
20 “insure” mandate is satisfied:

21 all activities or programs of any kind authorized, funded, or carried out,
22 in whole or in part, by Federal agencies in the United States or upon the
23 high seas. Examples include, but are not limited to: (a) actions intended
24 to conserve listed species or their habitat; (b) the promulgation of
25 regulations; (c) the granting of licenses, contracts, leases, easements,
26 rights-of-way, permits, or grants-in-aid; or (d) actions directly or
27 indirectly causing modifications to the land, water, or air.

28 50 C.F.R. § 402.02. (emphasis added). See also Pacific Rivers Council v. Thomas, 30 F.3d
1050, 1054-55 (9th Cir. 1994) (recognizing that Congress intended “agency action” to be
interpreted broadly, admitting of no limitations). Similarly, “action area” is defined as “all areas

1 to be affected directly or indirectly by the Federal action and not merely the immediate area
2 involved in the action.” 50 C.F.R. § 402.02 (emphasis added).

3 When a proposed action “may affect” a protected species, consultation must occur and
4 be completed before the federal action may take place. Pacific Rivers, 30 F.3d at 1056; Thomas
5 v. Peterson, 753 F.2d 754, 764-65 (9th Cir. 1985). Only if it can be determined that the proposed
6 action will have no effect on a listed species can the consultation process be avoided. Pacific
7 Rivers, 30 F.3d at 1054 n. 8.

8 A “may affect” determination triggers the action agency’s duty to prepare a biological
9 assessment, which determines whether the activity is “likely to adversely affect” the listed
10 species. If so, formal consultation must be initiated. If the biological assessment concludes that
11 the activity “is not likely to adversely affect” the listed species, the consultation process is over
12 if the FWS concurs in the assessment. However, if the FWS disagrees with the “not likely to
13 adversely affect” determination, formal consultation will be required.

14 During the course of consultation, FWS may “suggest modifications” to the action to
15 “avoid the likelihood of adverse effects” to the listed species. 50 C.F.R. § 402.13. At the
16 completion of consultation FWS issues a Biological Opinion (“BO”) that determines if the
17 agency action is likely to jeopardize the species or adversely modify its critical habitat. See 50
18 C.F.R. § 402.02. If so, the agency may not proceed with any program, permit, or decision that
19 would jeopardize a species’ survival unless the BO specifies reasonable and prudent alternatives
20 that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b).
21 See also Sierra Club v. Marsh, 816 F.2d 1376, 1384-86 (9th Cir. 1987) (enjoining highway
22 construction because agency could not meet burden of absolute assurance that mitigation
23 required to avoid jeopardy was possible).

24 If an agency fails to consult on an action that affects listed species, all activities that
25 “may affect” the species must be enjoined. Pacific Rivers, 30 F.3d at 1056-57. (“[the Forest
26 Service’s] conclusion that these activities “may affect” the protected salmon is sufficient reason
27 to enjoin these projects. Only after the Forest Service complies with § 7(a)(2) can any activity
28 that may affect the protected salmon go forward”).

1 An agency's duty to "insure" that its actions are not likely to jeopardize listed species is
2 continuing, and "where discretionary Federal involvement or control over the action has been
3 retained or is authorized by law," the agency must in certain circumstances undergo consultation
4 even after the action has been initiated. 50 C.F.R. § 402.16. One such circumstance is when "a
5 new species is listed . . . that may be affected by the identified action." Id.; see also Pacific
6 Rivers, 30 F.3d at 1056 (upholding lower court finding that an ongoing agency action that was
7 initiated before a species listing and therefore did not undergo initial consultation was
8 nonetheless subject to reinitiation of consultation once the species was listed.)

9 Although procedural, consultation is the backbone of the ESA. As the Ninth Circuit
10 recognized, "[o]nly by requiring substantial compliance with the act's procedures can we
11 effectuate" congressional intent to protect species. Sierra Club, 816 F.2d at 1384. Furthermore,
12 the Ninth Circuit has held that the traditional sliding scale test for injunctive relief, weighing
13 harms against the likelihood of success on the merits, is inapplicable for injunctions sought
14 under the ESA. Sierra Club v. Marsh, 816 F.2d at 1384. Instead, a plaintiff seeking redress for
15 violations of the ESA is entitled to injunctive relief upon a showing that the agency "violated a
16 substantive or procedural provision of the ESA," since Congress established both substantive
17 and procedural provisions to assure adequate protection of the listed species. Id. at 1384.

18 **ARGUMENT**

19 In previous filings in this matter, the Center has shown, and the Court has found, that the
20 registration and reregistration of pesticides constitute ongoing agency actions within the
21 meaning of the ESA. See Docket No. 80 p. 9 n. 6. The Center has also presented information
22 showing that these actions "may affect" the California red-legged frog, and reorganizes this
23 information for the Court on a pesticide-by-pesticide basis below. Therefore, the EPA is
24 required by statute to undergo consultation with the FWS pursuant to Section 7(a)(2) of the ESA
25 with regard to every pesticide it has registered for which the Center has presented evidence of
26 "may affect." Furthermore, because the Ninth Circuit has found that traditional equitable
27 balancing is inappropriate when assessing the propriety of injunctive relief upon a finding of a
28 procedural violation of the ESA, this Court must order the EPA to begin Section 7 consultation

1 and to submit a biological assessment for each of the 66 pesticides remaining in this action to
2 the FWS within 12 months of the Court’s order. But even if the Court were to undergo TRAC
3 factors analysis, the result would be the same because of the EPA’s extraordinary delay and
4 complete failure to comply with the mandatory Section 7 consultation procedures.

5 **I. THE “MAY AFFECT” EVIDENTIARY BURDEN PLACED ON THE CENTER**
6 **IS LOW**

7 The “may affect” threshold is a minimal standard, intended to insure that agencies begin
8 consultation at the earliest possible time in order to avoid jeopardizing the survival or recovery
9 of a species. Thus, when the FWS adopted the ESA’s consultation regulations, it explicitly
10 stated that the “may affect” standard is meant to be an extremely low hurdle:

11 [T]he threshold for formal consultation must be set sufficiently low to
12 allow Federal agencies to satisfy their duty to ‘insure’ under section
13 7(a)(2) [that species are not jeopardized.]

14 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added).

15 The FWS thus created, consistent with the “institutionalized caution” of the ESA and
16 Section 7(a)(2)’s requirement that agencies “insure” that their actions do not jeopardize listed
17 species, the avowedly “low” “may affect” threshold for initiating formal consultation with the
18 FWS.³ 50 C.F.R. § 402.14(a). The FWS defined “may affect” as “any possible effect, whether
19 beneficial, benign, adverse, or of an undetermined character . . .” 51 Fed. Reg. at 19,949
(emphasis added).

20 Because the “may affect” threshold is triggered by any agency action that may have any
21 effect on a listed species, the “may affect” standard has been interpreted by courts in this circuit
22 to be essentially coterminous with the question of whether a species “may be present” in the
23 “action area.” See e.g., Pacific Rivers Council v. Thomas, 30 F.3d at 1054 (Forest Service Land
24

25 ³ The low “may affect” threshold is also evident in the FWS’s ESA Consultation Handbook,
26 which is the agency’s official guide for federal agency consultation. In keeping with the
27 Federal Register rulemaking described above, the FWS Consultation Handbook declares that a
28 “may affect” finding is “the appropriate conclusion when a proposed action may pose any
effects on listed species or designated critical habitat.” See Docket No. 68, Ex. A at xvi
(emphasis in original).

1 Resource Management Plans “‘may affect’ protected salmon because the plans set forth criteria
2 for harvesting resources within the salmon’s habitat”); Thomas v. Peterson, 753 F.2d at 763
3 (“An agency proposing to take an action must inquire of the Fish & Wildlife Service (F&WS)
4 whether any threatened or endangered species ‘may be present’ in the area of the proposed
5 action”); City of Sausalito v. O’Neill, 211 F. Supp. 2d 1175, 1203 (N.D. Cal. 2002) (holding
6 that ESA requires initiation of consultation if listed species “are present in the area of proposed
7 action.”).

8 Indeed, the ESA itself states that when the FWS advises the action agency that an
9 endangered species “may be present” in the project area, the action exceeds the “may affect”
10 threshold and “such agency shall conduct a biological assessment” to determine whether any
11 species is “likely to be affected by such action.” 16 U.S.C. § 1536(c)(1); accord 50 C.F.R. §
12 402.12(d)(2); see also Docket No. 68, Ex. A at 310 (“A biological assessment is required if
13 listed species or critical habitat may be present in the action area.”).

14 Once the “may affect” threshold has been exceeded, the action agency and the FWS
15 must, through the Section 7 consultation process, determine if more severe levels of harm could
16 result from the agency action. First, the action agency is required, through the consultation
17 process, to determine whether or not the action is likely to “adversely affect” the listed species
18 through the creation of a biological assessment. 50 C.F.R. § 402.12(a); 16 U.S.C. § 1536(c)(1).
19 If a biological assessment determines that the action is not likely to adversely affect a species,
20 and FWS concurs, then Section 7 consultation is complete and the action can go forward. 50
21 C.F.R. § 402.14(b)(1). Second, if the biological assessment determines that the action is likely
22 to adversely affect a species, or if FWS disagrees with the action agency’s “not likely”
23 determination, then the FWS, through the Section 7 consultation process, must determine if the
24 action “is likely to jeopardize the continued existence of listed species or result in the
25 destruction or adverse modification of critical habitat” through the preparation of a biological
26 opinion. 50 C.F.R. § 402.14(g)(4).

27 The extremely low “may affect” threshold makes perfect sense when viewed in the
28 context of the consultation process and the institutionalized caution built into the ESA. See,

1 e.g., Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987) (citing TVA v. Hill, 437 U.S. at
2 194) (“Congress has spoken in the plainest of words, making it abundantly clear that the balance
3 has been struck in favor of affording endangered species the highest of priorities, thereby
4 adopting a policy which it described as ‘institutionalized caution.’”). The ESA and its
5 regulations embody a recognition that action agencies such as the EPA are under tremendous
6 pressure to approve and implement various actions, such as pesticide registrations, that they
7 administer. In order to insure that such activities do not harm imperiled species, the ESA gives
8 an important consultative role to the FWS because of its greater wildlife management expertise
9 and its overarching responsibility for wildlife protection. In order to insure that the FWS is
10 allowed to exercise its wildlife expertise, the “may affect” bar is set low enough that the FWS’s
11 consultative function is triggered early and in all but the most trivial of circumstances. Such a
12 low threshold is necessary in order to insure that the FWS, rather than the EPA, makes
13 important wildlife impact determinations. Whether an action is harmful to a species’ survival
14 and recovery, therefore, is a determination to be made by the FWS through the consultation
15 process.

16 **II. THE CENTER HAS PRESENTED EVIDENCE THAT 66⁴ PESTICIDE** 17 **REGISTRATIONS “MAY AFFECT” THE CALIFORNIA RED-LEGGED** 18 **FROG**

19 With this memorandum and accompanying exhibits, the Center has met this minimal
20 “may affect” burden for 66 pesticides⁵ registered for use within the range of the California red-

21 ⁴ The 66 pesticides are: 1,3-dichlorpropene; 2,4-D; acephate; alachlor; aldicarb; atrazine;
22 azinphos-methyl; bensulide; bromacil; captan; carbaryl; chloropicrin; chlorothalonil;
23 chlorpyrifos; chlorthal-dimethyl (DCPA); diazinon; dicofol; diflubenzuron; dimethoate;
24 disulfoton; diuron; endosulfan; EPTC; esfenvalerate; fenamiphos; glysofphate; hexazinone;
25 imazapyr; iprodione; linuron; malathion; mancozeb; maneb; metam sodium; methamidophos;
26 methidathion; methomyl; methoprene; methyl parathion; metolachlor; molinate;
27 myclobutanil; naled; norflurazon; oryzalin; oxamyl; oxydemeton-methyl; oxyfluoren;
28 paraquate dichloride; pendimethalin; permethrin; phorate; phosmet; prometryn; propanil;
propargite; propyzamide (pronamide); rotenone; simazine; SSS-tributyl phosphororithiolate
(DEF or Tribufos); strychnine; thiobencarb; triclopyr; trifluralin; vinclozolin; and ziram.

⁵ In registering pesticides pursuant to FIFRA, the EPA registers both “active ingredients” and
“formulated pesticide products” containing the active ingredients along with other “inert”
ingredients. See Second Declaration of Patricia M. Clary (hereinafter “2nd Clary Dec.”) ¶ 5.
Both “active ingredients” and formulated products fall within FIFRA’s definition of

1 legged frog. The Center has organized this “may affect” information as follows. First, the
2 Center has presented evidence that the 66 pesticides are currently registered by the EPA for use
3 in the state of California, and are thus ongoing agency actions within the range of the California
4 red-legged frog. See 2nd Clary Dec. ¶¶ 20-85. Second, the Center notes for each of the 66
5 pesticides important milestones in the EPA’s ongoing registration and reregistration process that
6 have occurred after the listing of the frog. Id. Third, the Center provides evidence that each of
7 the 66 pesticides is applied directly in California red-legged frog habitat or directly
8 upwind/upstream of the frog’s current and historic range. See 2nd Kegley Dec. ¶¶ 16-85.
9 Finally, the Center provides evidence that each of the 66 pesticides is potentially harmful to the
10 frog. Id. All of this information is summarized for the Court in Table 1, which is included in
11 both the Kegley and Clary declarations for ease of reference. Source materials that substantiate
12 the evidence presented by the Center are presented as exhibits to the Kegley and Clary
13 declarations as a courtesy to the Court.

14 **A. EVIDENCE THAT THE 66 PESTICIDES ARE CURRENTLY**
15 **REGISTERED FOR USE BY THE EPA IN THE STATE OF**
16 **CALIFORNIA**

17 Each of the 66 pesticides at issue here is currently registered for use in California and are
18 thus registered for use in the range of the California red-legged frog. The Center has submitted
19 documents created by the California Department of Pesticide Regulation that show that these
20 pesticides are currently registered by the EPA for use in California. See 2nd Clary Dec., Ex. 1-
21 66. These records are available on a website, which is updated weekly, that is maintained
22 jointly by the EPA’s Office of Pesticide Programs and the California Department of Pesticide
23 Regulation. These documents were downloaded in November of 2003. See id. ¶¶ 20-85. Thus,
24 there can be no dispute that these 66 pesticides are currently registered for use within the range

25 “pesticide.” 7 U.S.C. § 136(u) & 136(a). Each of the 66 pesticides for which the Center has
26 submitted “may affect” evidence is in fact an “active ingredient” that is independently
27 registered by the EPA for use in California. Thus, with this motion the Center only challenges
28 66 discrete ongoing agency actions, although it is likely that “may affect” evidence for an
active ingredient would also satisfy the “may affect” threshold for any registered pesticide
product containing that active ingredient.

1 of the California red-legged frog. Because the state of California is coterminous with the
2 historic range of the frog, this evidence alone proves that each of the 66 pesticide registrations
3 “may affect” the frog; the frog is within the “action area” of each registration.

4 **B. EVIDENCE THAT THE EPA’S ONGOING REGISTRATION AND**
5 **REREGISTRATION PROCESS ACHIEVED SIGNIFICANT**
6 **MILESTONES SINCE THE CALIFORNIA RED-LEGGED FROG WAS**
7 **LISTED AS THREATENED UNDER THE ESA⁶**

8 This Court has already determined that pesticide registrations are ongoing agency actions
9 subject to the ESA’s consultation procedures. Docket No. 80, p. 9 n. 6. However, the Court has
10 suggested that, at least for the limited purpose of assessing when the Court will order the EPA to
11 initiate consultation on the pesticides that the Center shows “may affect” the California red-
12 legged frog, the Court may set different deadlines for those pesticides whose registration and
13 reregistration actions occurred before the California red-legged frog was listed. *Id.* at p. 11.
14 The Center provides this information for the Court here, and shows that for 53 of the 66
15 pesticides major registration and/or reregistration actions have occurred since the listing of the
16 frog.

17 Pesticide registration and reregistration is described for the Court in the 2nd Clary Dec.
18 ¶¶ 5-13. Several documents created by the EPA are relevant here to show that significant
19 registration and/or reregistration milestones have been met since the listing of the California red-
20 legged frog. These documents are referred to by the EPA generally as “risk management
21 decision documents.” The completion of any of these risk management documents is followed
22 by a Notice of Availability in the Federal Register.

23 ⁶ The Center submits this information pursuant to the Court’s June 30 order, which stated that
24 the Court needed such information to assess the proper timing of consultation. Docket No. 80,
25 p. 11. The Center maintains that this information is not necessary to the Court’s determination
26 on the timing of consultation. As alluded above and as will be explained more fully below,
27 the ESA does not provide the Court with authority to assess TRAC factors in determining the
28 proper scope of injunctive relief, and the date an ongoing agency action was initiated cannot
serve as a basis for differentiating injunctive relief under the Act. *See Pacific Rivers*, 30 F.3d
at 1056 (“The fact that the Forest Service adopted these LRMPs before the listing of the Snake
River Chinook is, therefore, irrelevant.”).

1 First, when the EPA makes a final reregistration decision it issues a document known as
2 a Reregistration Eligibility Decision (“RED”). All active ingredients in a pesticide product must
3 be deemed eligible for registration through a RED before any product containing that active
4 ingredient can be reregistered. *Id.* at ¶ 8. For 30 of the pesticides challenged here, a RED has
5 been issued since the listing of the frog.⁷ The EPA has not undergone consultation for any of
6 these actions on the frog. Thus, for these 30 pesticides the Court should not engage in TRAC
7 factor balancing.

8 Second, the EPA also issues Interim Reregistration Eligibility Decisions (“IREDs”).
9 IREds, issued after the EPA completes the individual pesticide’s aggregate health and
10 ecological risk assessment, often contain restrictions on the use of that pesticide to reduce risks
11 to human health and the environment. IREds are issued where the EPA wishes to gain the
12 benefits of these changes before the final RED can be issued. *Id.* ¶ 9. For 19 of the pesticides
13 challenged here, the EPA has issued IREds since the listing of the frog.⁸ The EPA has not
14 undergone consultation for any of these actions on the frog. Thus, for these 19 pesticides the
15 Court should not engage in TRAC factor balancing.

16 Third, the EPA produces “chapters” written by its Environmental Fate and Effects
17 Division (“EFED”) which assesses the risk of harm to the environment based on environmental
18 fate and effect characterizations. These chapters form conclusions that are the basis of the
19 EPA’s REDs. For 4 of the pesticides challenged here, the EPA has published an EFED chapter
20 since the listing of the frog.⁹ The EPA has never undergone consultation for any of these
21

22 ⁷ The 30 pesticides are: 1,3-dichlorpropene; alachlor; bromacil; captan; chlorothalonil;
23 chlorthal-dimethyl (DCPA); dicofol; diflubenzuron; endosulfan; EPTC; glyphosate;
24 hexazinone; iprodione; linuron; methoprene; metolachlor; norflurazon; oryzalin; oxyfluoren;
25 paraquat dichloride; pendimethalin; prometryn; propanil; propargite; propyzamide
(pronamide); strychnine; thiobencarb; triclopyr; trifluralin; and vinclozolin.

26 ⁸ The 19 pesticides are: acephate; atrazine; azinphos-methyl; bensulide; carbaryl; chlorpyrifos;
27 diazinon; disulfoton; fenamiphos; methamidophos; methidathion; methomyl; methyl
28 parathion; naled; oxamyl; oxydemeton-methyl; phorate; phosmet; and SSS-tributyl
phosphororithiolate (DEF or Tribufos).

⁹ The 4 pesticides are: dimethoate; malathion; molinate; and ziram.

1 actions on the frog. Thus, for these 4 pesticides the Court should not engage in TRAC factor
2 balancing.

3 For the remaining 13 pesticides, the EPA is in an ongoing process known as “pre-RED
4 reregistration.” These 13 pesticides will eventually have risk management decision documents
5 created pursuant to the 1988 FIFRA amendments. 7 U.S.C. § 136a-1. However, even here it is
6 inappropriate for the Court to undertake traditional equitable balancing in determining when
7 consultation should be initiated. As the Ninth Circuit stated in Pacific Rivers, “§ 7(d) does not
8 serve as a basis for any governmental action unless and until consultation has been initiated.”
9 30 F.3d at 1056 (emphasis in original). Here, no consultation has ever occurred on any
10 pesticide to determine impacts on the California red-legged frog, and thus this Court should not
11 use traditional equitable balancing that the Ninth Circuit and the Supreme Court has explicitly
12 rejected in ESA Section 7 cases. Id.; see also TVA v. Hill, supra at 173.

13 **C. EVIDENCE THAT THE 66 PESTICIDES ARE ACTUALLY APPLIED**
14 **ON OR UPWIND OF RED-LEGGED FROGS OR THEIR HABITAT**

15 In addition to the evidence presented by the Center showing that each of the 66
16 pesticides are registered for use within the range of the California red-legged frog, the Center
17 has also submitted evidence showing that each pesticide is actually applied in or upwind of red-
18 legged frog habitat. Four kinds of evidence have been submitted by the Center to show that
19 each pesticide is being applied in or upwind/upstream of red-legged frogs and/or their habitat:
20 (1) the California Department of Pesticide Regulation’s determination that particular pesticides
21 are applied in the frog’s habitat; (2) the pesticide has been detected in surface water in
22 California; (3) the pesticide has been detected in the air in California; or (4) the pesticide has
23 been determined by the EPA, other scientists, and/or the Center’s expert declarant to have the
24 potential to contaminate frog habitat. See 2nd Kegley Dec., ¶¶ 6-9.

1 For 47 pesticides,¹⁰ evidence of application in red-legged frog habitat is derived from the
2 California Department of Pesticide Regulation report “Pesticides by Species.” Docket No. 46,
3 Ex. E. This report concludes that these 47 pesticides are applied within red-legged frog habitat,
4 and that therefore “further evaluation is warranted” of the effects these pesticides may have on
5 the frog. Id. at 2.

6 This evidence, standing alone, is sufficient to satisfy the Center’s “may affect” burden
7 for success on the merits and injunctive relief in this matter. As shown above, the ESA and the
8 implementing regulations define “may affect” broadly, and the Ninth Circuit has construed the
9 may affect determination to be coterminous with the question of whether a particular species
10 “may be present” in an action area. See e.g., Pacific Rivers Council v. Thomas, 30 F.3d at 1054
11 (Forest Service Land Resource Management Plans “‘may affect’ protected salmon because the
12 plans set forth criteria for harvesting resources within the salmon’s habitat”); Thomas v.
13 Peterson, 753 F.2d at 763 (“An agency proposing to take an action must inquire of the Fish &
14 Wildlife Service (F&WS) whether any threatened or endangered species ‘may be present’ in the
15 area of the proposed action”); City of Sausalito v. O’Neill, 211 F. Supp. 2d 1175, 1203 (N.D.
16 Cal. 2002) (holding that ESA requires initiation of consultation if listed species “are present in
17 the area of proposed action.”). Furthermore, “action area” is defined broadly under the ESA
18 implementing regulations to include “all areas to be affected directly or indirectly by the Federal
19 action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. Here, the
20 action area of the EPA’s registration decisions must at least include those areas where registered
21 pesticides are actually applied, and under the liberal construction of the term evident in the
22 Section 7 regulations, would also include all areas where a particular pesticide is registered for
23

24 ¹⁰ The 47 pesticides are: 2,4-D; acephate; azinphos-methyl; bensulide; captan; carbaryl;
25 chloropicrin; chlorothalonil; chlorpyrifos; chlorthal-dimethyl (DCPA); diazinon; dicofol;
26 diflubenzuron; dimethoate; disulfoton; endosulfan; EPTC; esfenvalerate; fenamiphos;
27 glyphosate; iprodione; malathion; mancozeb; maneb; metam sodium; methamidophos;
28 methidathion; methomyl; methoprene; myclobutanil; naled; oxamyl; oxydemeton-methyl;
oxyfluorene; paraquat dichloride; pendimethalin; permethrin; phosmet; prometryn;
propargite; propyzamide (pronamide); rotenone; simazine; strychnine; triclopyr; trifluralin;
and vinclozolin.

1 use. The Pesticides by Species report definitively shows that the frog is found in “areas to be
2 affected directly” by the EPA’s registration of these pesticides. This satisfies the Center’s may
3 affect burden, and therefore Section 7 consultation must be occur.

4 For the remaining 19 pesticides, the Center has submitted evidence (which was also
5 submitted for many of the above 47 pesticides) that these pesticides have been detected in air or
6 water in California, or if contamination surveys have not yet been conducted for a particular
7 pesticide, that the pesticide has the potential to contaminate frog habitat based on EPA
8 assessments. 2nd Kegley Dec. ¶¶ 6-9. The information that forms the basis of these conclusions
9 for specific pesticides includes evidence from county bulletins that indicate that the pesticide is
10 applied upwind or upstream of know red-legged frog habitat; findings by the California DPR
11 that a chemical has the potential to pollute the air or groundwater; and EPA determinations that
12 the pesticide has the potential to contaminate aquatic habitats through surface water runoff or
13 aerial drift. *Id.* ¶¶ 16-81. Again, due to the low threshold created by Congress through the ESA
14 and the FWS through the implementing regulations for showing “may affect” this evidence
15 exceeds the Center’s “may affect” burden.

16 **D. EVIDENCE THAT EACH OF THE 66 PESTICIDES HAS THE**
17 **POTENTIAL TO HARM RED-LEGGED FROGS**

18 The Center has also submitted evidence showing that, if any of the 66 pesticides were to
19 contaminate the California red-legged frog, the pesticides have the potential to “take” the frog
20 through sub-lethal effects, even at relatively low concentrations, at minimum. The toxicity of
21 these pesticides to the frog is determined by at least one of three methods. First, the EPA or
22 other regulatory body has determined that each of these pesticides is toxic to aquatic
23 environments and organisms. Second, the FWS has listed 22 of the 66 pesticides as a “pesticide
24 of concern” in the California red-legged frog recovery plan due to the potential toxicity of these
25 22 pesticides to the frog.¹¹ And finally, many of the pesticides have additional concerns based
26

27 ¹¹ The 22 pesticides are: acephate; azinphos-methyl; carbaryl; chlorpyrifos; diazinon; dicofol;
28 disulfoton; endosulfan; esfenvalerate; fenamiphos; glysofphate; malathion; mancozeb; maneb;

1 upon evidence that the pesticides is a developmental toxicant under Proposition 65 and/or
2 because the pesticide shares a toxicity mechanism with other chemicals known to be toxic to
3 amphibians or in the aquatic environment. See 2nd Kegley Dec. ¶¶ 16-81.

4 Thus, the Center has shown that each of the 66 pesticides may affect the frog because the
5 pesticides are found in the “action area” of the pesticide registrations as the term is defined by
6 the ESA, by showing the potential of the pesticides to enter the habitat of the frog, and/or
7 showing that the pesticide, once in the habitat of the frog, has the potential to harm the frog
8 and/or its habitat. The evidence presented goes far beyond the minimum “may affect” threshold
9 established by the ESA, and therefore the Center’s motion should be granted for each of the 66
10 pesticides.

11 **III. ONCE THE COURT IS SATISFIED THAT THE CENTER HAS MET OR**
12 **EXCEEDED THE “MAY AFFECT” THRESHOLD, THE EPA MUST BE**
13 **ORDERED TO UNDERGO CONSULTATION UNLESS THE EPA CAN**
14 **CONCLUSIVELY SHOW THAT A PESTICIDE HAS “NO EFFECT” ON THE**
15 **CALIFORNIA RED-LEGGED FROG**

16 In the Court’s opinion, the Court stated that:

17 Plaintiff suggests that at trial Defendants will bear the burden of
18 showing that registered pesticides do not affect the California red-
19 legged frog. This contention mischaracterizes Plaintiff’s burden of
20 proof. Plaintiff need only show that a pesticide may affect the frog, but
21 if there is no evidence at all regarding the possible effects of a particular
22 pesticide upon the frog, the Court cannot determine that EPA erred in
23 failing to initiate consultation. In other words, Plaintiff cannot prevail
24 without demonstrating that there is at least some question about whether
25 a pesticide registration would affect the frog.

26 Docket No. 80, p. 10 n. 8. In general, the Center agrees with the Court’s statement so long as
27 the Court recognizes that, under the ESA, a finding of “may affect” is coterminous with a
28 finding that the species “may be present” in the “action area” as defined by the ESA. Because
the Center has shown that the frog is found in areas that are directly and/or indirectly affected by
the registration of pesticides, the Center has met the “may affect” burden of proof, and therefore
the Court must order the EPA to initiate Section 7 consultation procedures.

methamidophos; methoprene; naled; paraquate dichloride; permethrin; phosmet; rotenone;
strychnine; triclopyr; and trifluralin.

1 Furthermore, because the Center has met this minimal threshold, the only evidence that
2 can provide a lawful justification for avoiding Section 7 consultation is evidence presented by
3 the EPA that shows “no effect” of a particular pesticide on the California red-legged frog. That
4 is, once the Center has provided the Court with evidence of “may affect”—which occurs as soon
5 as the Center has shown that the frog exists in any area directly or indirectly impacted by a
6 pesticide registration—the burden shifts to the EPA to show that, despite this initial showing of
7 “may affect,” the particular pesticide has no effects on the California red-legged frog. Absent
8 such an evidentiary showing from the EPA, the agency must begin the Section 7 consultation
9 process. See Pacific Rivers, 30 F.3d at 1054 n. 8 (“[T]he ESA and its implementing regulations
10 require [action agencies] to consult with [NMFS] whenever their actions ‘may affect’ an
11 endangered or threatened species. Thus, if the agency determines that a particular action will
12 have no effect on an endangered or threatened species, the consultation requirements are not
13 triggered.”) (internal citations omitted; emphasis added.).

14 What the Center intended to express at argument is that the EPA cannot rest its defense
15 on evidence that a particular pesticide “may not affect” the California red-legged frog, as it has
16 done so far in this litigation, because activities that “may not affect” the frog must still undergo
17 consultation. Assuming, arguendo, that the EPA is correct and particular pesticides “may not”
18 affect the frog, all they have done is prove the Center’s case, because a “may not affect”
19 determination still indicates that an affect on the species is in fact possible. As the applicable
20 regulations provide, whenever an effect is possible, indeed, even when the effect may be
21 “beneficial,” “benign,” or even of “undetermined character,” Section 7 procedures are triggered,
22 and the action agency is required to prepare a Biological Assessment.¹² 51 Fed. Reg. at 19,949.
23 The only way the EPA can avoid Section 7 consultation is to show conclusively that the
24

25 ¹² Of course, if an agency action that triggers the Section 7 consultation process is indeed
26 “beneficial” or “benign,” it is likely that the resulting Biological Assessment will conclude
27 that the action is “not likely” to adversely affect the listed species. However, the ESA still
28 requires the preparation of the Biological Assessment under these circumstances, because such
determinations are to ultimately be made with concurrence of the FWS, not unilaterally by the
action agency.

1 registration of a particular pesticide has “no effect” on the California red-legged frog, because
2 only actions that have “no effect” on a listed species are exempted from the Section 7
3 consultation procedures.

4 **IV. THE CENTER HAS SHOWN THAT THE 66 REGISTRATIONS CONSTITUTE**
5 **ONGOING AGENCY ACTION, AND THEREFORE THE EPA MUST SUBMIT**
6 **BIOLOGICAL ASSESSMENTS TO FWS WITHIN 12 MONTHS**

7 The Court has determined that:

8 “EPA has authority to review pesticide registrations at any time and
9 may revoke or alter registrations if it determines that pesticide use will
10 cause ‘unreasonable adverse effects on the environment.’ 7 U.S.C. §
11 136a(g)(1)(B); *id.* § 136a(d)(2); Defs.’ Opp. At 8 n. 9. Because of this
12 continuing discretion, pesticide registration constitutes ongoing agency
13 action under § 7(a)(2) of the ESA.”

14 Docket No. 80, Order, p. 9 n. 6. However, the Court has suggested that, despite the fact that
15 pesticide registrations are “ongoing” agency actions, for those registrations that precede the
16 listing of the California red-legged frog the EPA maintains “[s]ome agency discretion” for
17 initiating consultation. *Id.* at 11. This statement does not follow from the Court’s finding that
18 pesticide registrations constitute “ongoing” agency actions, and is contrary to the plain language
19 of the ESA and Ninth Circuit precedent. However, even if the Court were to undergo a
20 T.R.A.C. factor analysis, an identical result would ensue: the EPA must initiate consultation on
21 the 66 pesticides for which the Center has presented “may affect” evidence and submit
22 biological assessments to the FWS within 12 months.

23 **A. THE ESA DOES NOT PROVIDE DISCRETION FOR THE AGENCY TO**
24 **FORGO CONSULTATION ONCE THE AGENCY BECOMES AWARE**
25 **THAT AN ONGOING ACTION “MAY AFFECT” A LISTED SPECIES**

26 ESA Section 7 and implementing regulations are explicitly clear: agency actions,
27 including ongoing actions, must undergo consultation “at the earliest possible time” to insure
28 that any proposed action does not jeopardize the continued existence of listed species. In order
to capture the ESA’s mandate that agencies “insure” that their actions do not jeopardize listed
species, the FWS has promulgated regulations, which this Court—and every other court that has
considered the question—has found to be binding on the EPA, Docket No. 80, p. 3, n. 2, that

1 require action agencies to initiate Section 7 consultation procedures “at the earliest possible
2 time” for every action that “may affect” listed species. 50 C.F.R. § 402.14(a).

3 Nevertheless, amici have argued, without citing a single Section 7 ESA case from this
4 Circuit, that in instances where a species listing precedes the initiation of an ongoing agency
5 action that “may affect” the newly listed species, the action agency can initiate consultation at
6 its unbridled discretion. Amici Brf., p. 21. This argument stands the ESA consultation process
7 on its head, and simply makes no sense in light of the ESA’s statutory and regulatory scheme, a
8 scheme that has been upheld by the Ninth Circuit on numerous occasions across several
9 decades.

10 As a preliminary matter, this Court has found that the EPA’s pesticide registrations are
11 not “wholly past” actions, but are in fact “ongoing actions” in which the EPA retains
12 “continuing discretion” that “may be challenged” by the Center. Docket No. 80, p. 9 n. 6. Thus
13 the amici’s premise—that the listing of the California red-legged frog occurred after
14 registrations were completed—is simply false. The registration of a pesticide is not a static
15 enterprise. It is an ongoing enterprise in which the EPA retains significant discretion and
16 authority to review and revoke registrations at any time. *Id.* Under such circumstances, the
17 ESA and its implementing regulations are directly on point: whenever “a new species is listed,”
18 50 C.F.R. § 402.16(d), “formal consultation is required and shall be requested by the Federal
19 agency.” *Id.* at § 402.16. Such formal consultation is required to be initiated “at the earliest
20 possible time.” 50 C.F.R. § 402.14(a). The regulations simply leave no room for delay in the
21 initiation of consultation in the face of evidence that the action awaiting consultation may affect
22 a listed species.¹³

23
24 ¹³ Amici’s argument also fails because the ESA does not require the Center to await “final
25 agency action” before injunctive relief can be granted. Under the Administrative Procedure
26 Act (“APA”) review is limited to “final agency action.” 5 U.S.C. § 704; Lujan v. National
27 Wildlife Fed., 497 U.S. 871, 882 (1990). The same is not the case under the ESA. In Bennett
28 v. Spear, 520 U.S. 154 (1997), the Supreme Court rejected the notion that the ESA citizen suit
provision applied to the Services’ actions as administrators of the ESA, since it would “effect
a wholesale abrogation of the APA’s ‘final agency action’ requirement.” *Id.* at 174. In the
Supreme Court’s view, the ESA citizen suit provision does not contain a “final agency action”
requirement analogous to that in the APA. See also Greenpeace v. NMFS, 80 F. Supp.2d

1 The amici's argument, which has been presented by amici's numerous times before and
2 rejected by courts an equal number of times, would rip the mandatory nature of Section 7
3 consultations out of these regulations and the ESA. By arguing that Section 7 consultation is
4 mandatory while simultaneously arguing that the timing of these mandatory procedures is within
5 the discretion of the agency, amici are simply requesting that this Court ignore the multiple
6 "shall" statements in the ESA and implementing regulations and replace them with "may." But
7 that is not how the regulations or the statute was written. Indeed, Pacific Rivers is directly on
8 point and directly contrary to the amici's argument. There, the Ninth Circuit explicitly held that
9 ongoing agency actions that are initiated before a species is listed are subject to the ESA's
10 consultation procedures and mandatory injunctions. 30 F.3d at 1056.

11 The 66 ongoing agency actions challenged here have occurred for over 2,770
12 consecutive days since the California red-legged frog was listed, and yet the EPA has failed to
13 initiate the mandatory Section 7 consultation procedures for the frog. There can be no question
14 that under such circumstances and in light of the mandatory nature of the ESA, the EPA must
15 initiate consultation immediately.

16 **B. EVEN IF T.R.A.C. FACTORS APPLY, THE EPA MUST BE ORDERED**
17 **TO SUBMIT BIOLOGICAL ASSESSMENTS TO THE FWS WITHIN 12**
18 **MONTHS**

19 The Court held in its June 20, 2003 Order that the so-called "TRAC Factors"
20 apply to the pesticides whose registrations preceded the listing of the RLF as an endangered
21 species.¹⁴ The Court acknowledged that "Section 7(a)(2) normally requires that consultation
22 precede action." Op. at 11. The Court further acknowledged that "the ESA leaves no doubt that

23 1137, 1151 (W.D. Wash. 2000) ("The primary fallacy with NMFS' position is its
24 preoccupation with the APA's requirement of final agency action").

25 ¹⁴ Contrary to the statements in the Federal Defendant's Opp. To Summary Judgment and Cross-
26 Motion for Summary Judgment (at pages 26-27), the six "factors" are to be considered but are
27 not necessarily "balanced" against one another. The "factors" are more properly classified as
28 a non-exclusive list of criteria to which the courts have referred, in order to determine whether
there has been unreasonable delay under the APA. Some, such as a lack of a rule of reason,
are sufficient to end the inquiry rather than leading to further balancing. See
Telecommunications Research and Action Center v. F.C.C., 750 F.2d 70, 79-80 (D.C. Cir.
1984).

1 Congress intended to force abrupt changes to any course of action that might place a species at
2 risk.” Id., citing TVA v. Hill, 437 U.S. at 172-173. Nevertheless, it held that the TRAC factors
3 applied because “the statute itself does not set forth a specific timetable for initiating
4 consultation following a new listing or the availability of new information.” Id. However, in
5 addition to the urgency imparted by the Congressional intent behind the ESA, there is also the
6 provision in the Part 402 rules that the agency “review its actions at the earliest possible time to
7 determine” when informal or formal consultation is appropriate.” 50 C.F.R. § 402.14 (a).
8 Despite these clear exhortations to a speedy consultation, EPA has taken the position that it is
9 under no obligation whatsoever to initiate consultation. Given the unambiguous requirement
10 that consultation must take place, EPA’s position that it does not have to consult and its
11 complete failure to establish a timetable of any sort for formal consultation for all but a small
12 number of pesticides is an abuse of discretion and violates the ESA. While the TRAC factors
13 may apply in a situation where there is some sort of agency effort to comply with a mandatory
14 obligation under the ESA, here, the failure to even establish a timeframe for compliance means
15 that EPA has no “rule of reason.” The delay is therefore also unquestionably in bad faith. For
16 those reasons, the delay is presumptively unreasonable, and the Court should find that the ESA
17 has been violated as a result. While these basic, and uncontroverted, facts are sufficient to find
18 an unreasonable delay, a full analysis of the so-called “TRAC” factors also leads to the
19 inevitable conclusion that EPA has unreasonably delayed initiating consultation.

20 The Court of Appeals for the District of Columbia, originator of the TRAC factors
21 analysis, has held in a subsequent case involving a claim of unreasonable delay under the APA
22 that:

23 ‘There must be a rule of reason to govern the time limit to
24 administrative proceedings. Quite simply, excessive delay saps the
25 public confidence in an agency’s ability to discharge its responsibilities
26 and creates uncertainty for the parties’...Moreover, unjustifiable delay
may undermine the statutory scheme and could inflict harm on
individuals in need of final action.

27 Cutler v. Hayes, 818 F.2d 879, 896-97 (D.C. Cir. 1987), quoting Potomac Elec. Power Co. v.
28 ICC, 702 F.2d 1026, 1034(1983). Indeed, the Cutler court, citing to the TRAC factors case in a

1 footnote, went on to note the other “factors that aid in determining whether an agency’s foot-
2 dragging constitutes unreasonable delay.” Id. at 897. However, EPA’s action in this instance
3 fails to meet even the first factor, under either Cutler or TRAC: EPA does not have a “rule of
4 reason.” It has conceded that it has no specific timetable for complying with its obligation to
5 initiate formal consultation as to any pesticides upon the listing of a new species, including the
6 red-legged frog. Thus, EPA’s delay in action as to the pesticides that predated the listing of the
7 red-legged frog is per se unreasonable.

8 The opinion in Cutler undertakes a step-by-step procedure for determining whether an
9 agency has unreasonably delayed. It expands upon the factors listed in TRAC, noting that the
10 court should “ascertain the length of time that has elapsed since the agency came under a duty to
11 act, and should evaluate any prospect of early completion.” Cutler, 818 F.2d at 897. In this case,
12 the RLF was listed in 1996, and EPA knew from then on that it was obligated to consult. It has
13 not done so and refuses to even set a deadline for doing so, and so the “prospects” for any sort of
14 completion are virtually nonexistent.

15 Next, the Cutler court instructs that “[t]he reasonableness of the delay must be judged
16 ‘in the context of the statute’ which authorizes the agency’s action.” 818 F.2d at 897. As noted
17 above, the ESA and its legislative history counsel swift action to serve the purposes of the Act.
18 EPA’s eight years of inaction are contrary to any concept of speed in this context, and
19 completely unreasonable in light of the risks involved.¹⁵ This unreasonableness ties into the next
20 step:

21 Third, and perhaps most critically, the court will examine the
22 consequences of the agency’s delay. The deference traditionally
23 accorded an agency to develop its own schedule is sharply reduced
24 when injury likely will result from avoidable delay...Lack of alternative
25 means of eliminating or reducing the hazard necessarily adds to the
26 unreasonableness of a delay.

27 ¹⁵ Indeed, in MCI Telecommunications v. F.C.C., 627 F.2d 322, 340 (D.C. Cir. 1980), the
28 District of Columbia Circuit Court of Appeals found unreasonable delay to be “more than a
year or two,” in the context of the FCC rules, which “assume[] that rates will be finally
decided with a reasonable time encompassing months, occasionally a year or two, but not
several years or a decade.”

1 Cutler, 818 F.2d at 898. The consequences of unrestricted use of the “predated” pesticides in
2 areas populated by the RLF could be devastating to its chances for survival. Thus, EPA should
3 be afforded little if any deference in developing a schedule for compliance, particularly since it
4 has not begun to create one in the first place.

5 Next, Cutler teaches that “[t]he agency must justify its delay to the court’s satisfaction.
6 If the court determines that the agency delays in bad faith, it should conclude that the delay is
7 unreasonable.” 818 F.2d at 898. The Court of Appeals for the Ninth Circuit has noted this
8 language with approval. Independence Mining Co. v. Babbitt, 105 F.3d 502, 510 (1997). The
9 Ninth Circuit Court of Appeals further took note of the District of Columbia Circuit Court’s
10 statement that “[w]here an agency has manifested bad faith, as by singling someone out for bad
11 treatment or asserting utter indifference to a congressional deadline, the agency will have a hard
12 time claiming legitimacy for its priorities.” Id., quoting In re Barr Labs, Inc., 930 F.2d 72, 76
13 (D.C. Cir. 1991). EPA has done nothing for seven years in order to comply with the
14 congressionally mandated requirement to begin consultation, and even now refuses to engage in
15 Section 7 consultation. This is the very height of “utter indifference” and bad faith. Indeed, the
16 Court need only consider this “factor,” by itself, to hold that EPA has acted unreasonably.

17 It is only if this Court were to somehow ignore EPA’s inaction and intransigence that
18 further analysis under TRAC-type factors is necessary. The Cutler court goes on to note that:

19 [I]f the court finds an absence of bad faith, it should then consider the
20 agency’s explanation, such as administrative necessity, insufficient
21 resources, or the complexity of the task confronting the agency.
22 Although complexity bears on avoidance in ascertaining
23 reasonableness, it is not always sufficient to justify lengthy delays. And
24 if an agency’s failure to proceed expeditiously will result in harm or
25 substantial nullification of a right conferred by statute, ‘the courts must
26 act to make certain that what can be done is done.’ The court should
27 weigh any plea of administrative error, administrative convenience,
28 practical difficulty in carrying out a legislative mandate, or need to
prioritize in the face of limited resources. Of course, these justifications
become less persuasive as delay progresses, and must always be
balanced against the potential for harm.

818 F.2d at 898 (footnotes omitted). Of the listed possible explanations an agency may have,
EPA has chosen to rest its delay as to the other pesticides (as opposed to specifically the
predated ones) on the issue of complexity. However, it has made no effort to show that this is

1 the reason for the delay as to the predated pesticides. Nor, since it is able to come up with a
2 schedule for the post-listing pesticides, why it cannot come up with a similar plan for these. In
3 addition, given the eight-year, open-ended delay, complexity is clearly not the real reason why
4 no action has been taken. The potential for harm to the frog, of course, is substantial, and as the
5 Cutler court noted, the weak or non-existent excuses for the delay grow increasingly less
6 persuasive after so many years.

7 In Brower v. Evans, 257 F.2d 1058, 1071 (9th Cir. 2001), the Ninth Circuit Court of
8 Appeals applied the TRAC factors and held that a delay of commencing stress studies for
9 dolphins as required under a statute was unreasonable. The National Marine Fisheries Service
10 had been charged with starting the studies in 1997. Id. at 1062. The studies were to form the
11 basis for findings that the statute, the International Dolphin Conservation Program Act,
12 mandated to be completed in 1999, and which would determine whether certain fishing practices
13 harmful to dolphins could continue and whether “dolphin safe” labeling would change. Id. at
14 1060-62. The NMFS’ unexplained delay of two years in commencing the studies, and its failure
15 to rely on preliminary results to support the initial findings, persuaded the Ninth Circuit Court of
16 Appeals that despite claims of complexity, “it is clear that the Secretary [of Commerce]
17 unreasonably delayed the stress studies.” Id. at 1070. The Court affirmed summary judgment in
18 favor of the Plaintiff on its claimed violation of the IDCPA. Id. at 1071.

19 Given the clear violation of the procedural requirements of the ESA, an injunction must
20 issue to prevent further delay and irreparable harm. Sierra Club v. Marsh, 816 F.2d 1376, 1384
21 (9th Cir. 1987); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). In exercising its
22 discretion, in cases where Congress has made a policy choice, a court “may not consider the
23 advantages and disadvantages of enforcement, but only the advantages and disadvantages of
24 ‘employing the extraordinary remedy of injunction’ over the other methods of enforcement.”
25 United States v. Oakland Cannabis Buyers, 532 U.S. at 483, 497-98 (2001)(quoting Weinberger
26 v. Romero-Barcelo, 456 U.S. 305, 312 (1982). Thus, in a case involving the clear violation of
27 the Migratory Bird Treaty Act, the District Court for the District of Columbia issued an
28 injunction to stop the Navy from shelling an island. The Court held that it had no other choice

1 in view of the fact that an injunction was the only means to stop the violation. See Center for
2 Biological Diversity v. Pirie, Civ. No. 00-3044 (D.D.C. 2002). Similarly, here there is simply
3 no alternative means of enforcing the ESA but to order consultation by a date certain.

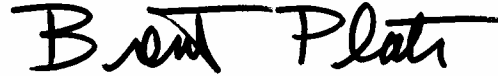
4 The cases cited by the Federal Defendants as to the permissibility of lengthy delays are
5 distinguishable. First, the delays involved were shorter: two of the cases involved delays of four
6 and two years; the other involved a delay of “five to seven” years. United Steelworkers v.
7 Rubber Mfrs. Ass’n, 783 F.2d 1117, 1120 (D.C. Cir. 1986)(four years); Oil, Chemical & Atomic
8 Workers Int’l Union Zegeer, 768 F.2d 1480, 1488 (D.C. Cir. 1985)(five to seven years);
9 Independence Mining Co., 105 F.3d at 507 (two to four years). Each of the cases also involved
10 case-specific facts that counseled against an injunction, and in each case there was at least a
11 timetable in place, or efforts made by the agency to act, by the time the case was decided. See
12 United Steelworkers, 783 F.2d at 1119(agency filed notice of proposed rulemaking and new
13 timetable for proposed rule on the eve of argument); Oil, Chemical & Atomic Workers, 769
14 F.2d at 1488 (agency made representations that it was engaged in effort to advance rulemaking
15 process, and Congress was aware of the delays); Independence Mining, 105 F.3d at 509 (newly
16 promulgated Act of Congress provided timeframe). Indeed, in Oil, Chemical & Atomic Workers
17 and United Steelworkers, the courts were simply unwilling to say “in advance” that the new
18 schedules would constitute an unreasonable delay. See 783 F.2d at 305; 768 F.2d at 1488. The
19 delay in this case has not ended, and has already surpassed eight years, nor is there even a
20 timetable in place that would indicate compliance will occur at some point. Plus, as noted
21 above, EPA has not introduced evidence as to why the examination of the pre-dated pesticides
22 would be complex or why they could not be assigned the same timetable as the post-listing
23 pesticides.

24 CONCLUSION

25 For the foregoing reasons, Plaintiffs Second Motion for Summary Judgment should be
26 granted, and the EPA should be ordered to enter into section 7 consultation within 12 months.

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Dated this 26th day of December, 2003



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