



June 20, 2007

Bob Lohn
Regional Administrator
National Marine Fisheries Service
Northwest Region
7600 Sand Point Way NE
Seattle, WA 98115

Re: Unreasonable Delay In Completing ESA Consultations on Pesticide Registrations

Dear Mr. Lohn:

This letter provides notice that Northwest Coalition for Alternatives to Pesticides, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources (hereinafter collectively referred to as "NCAP") are prepared to bring a lawsuit against National Marine Fisheries Service ("NMFS") for unreasonable delay under section 706(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). The lawsuit would seek an order compelling NMFS to promptly conclude consultations with the Environmental Protection Agency ("EPA") on its registrations of 37 pesticide active ingredients that EPA has determined "may affect" protected salmon and steelhead populations in the Pacific Northwest and California. A detailed discussion of the facts and legal arguments supporting NCAP's unreasonable delay claim is set forth below.

BACKGROUND

In 2002, NCAP and other public health and fishing groups brought a citizen suit alleging that EPA violated section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to consult with NMFS regarding the effects of its registrations of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The district court held that EPA violated section 7(a)(2) with respect to 54 specifically identified pesticide active ingredients.¹ Washington Toxics Coalition v. EPA, No. C01-132C, slip op. at 20 (W.D. Wash. July 2, 2002). The court ordered EPA to make effects determinations and initiate consultations with NMFS regarding these pesticides in accordance with a prescribed timetable. Id. at 17-18. In the interim, while EPA is taking steps to comply with the court order and while consultations are being conducted, the court prohibited EPA from authorizing certain uses of the pesticides along salmon-bearing streams. Washington Toxics Coalition v. EPA, No. C01-132C, slip op. at 2-4, 12 (W.D. Wash. Jan 22, 2004). In addition, with respect to seven pesticides frequently found in urban salmon streams, the district court ordered EPA to require point-of-sale warnings in home and garden stores indicating that use of these pesticides can harm salmon and steelhead.

¹ The district court, counting lindane twice, stated that its order encompassed 55 pesticide active ingredients. See Washington Toxics Coalition, No. C01-132C, slip op. at 14 n.22.

Id. at 10-11. The Ninth Circuit affirmed all aspects of the district court's orders. Washington Toxics Coalition v. EPA, 413 F.3d 1024, 1029 (9th Cir. 2005).

From August of 2002 until December of 2004, EPA made preliminary effects determinations for the 54 active pesticide ingredients, in accordance with the schedule established in Washington Toxics Coalition. EPA determined that 37 of the pesticides “may affect” one or more listed salmon or steelhead populations and further assessed whether the particular pesticide uses would be “likely to adversely affect” (“LAA”) or “not likely to adversely affect” (“NLAA”) each listed salmonid population. EPA concluded that the other 17 pesticides would have “no effect” on any of the listed salmon and steelhead. As EPA made these effect determinations, it transmitted them to NMFS and asked NMFS to conduct section 7(a)(2) consultations on the “may affect” pesticide uses. It generally requested formal consultation for each of the pesticide uses receiving LAA designations and informal consultation for each use receiving an NLAA designation. EPA, Endangered Species Effects Determinations and Consultations; An Interim Process for Public Input.²

By December 12, 2004, EPA had made preliminary effects determinations for all of the 54 pesticide active ingredients and had initiated consultations with NMFS on the 37 pesticides that it deemed “may affect” listed salmonids. Despite EPA's effects determinations and initiations of consultations beginning over four years ago, NMFS has not yet completed formal or informal consultation for even a single pesticide use. NMFS has failed to provide written concurrence in any of the NLAA findings and has produced no biological opinions for the LAA-designated pesticide uses. By failing to discharge its ESA consultation duties, NMFS has unreasonably delayed consultation in violation of the APA.

For example, EPA transmitted a consultation package for diazinon to NMFS in December 2002. Diazinon: Analysis of Risks to Endangered and Threatened Salmon and Steelhead, Nov. 29, 2002, at 1.³ Largely due to diazinon's “high toxicity to organisms that serve as food for threatened and endangered Pacific salmon and steelhead, and the potential effects on salmon olfaction,” EPA determined that diazinon may affect all listed salmonids and requested formal consultation on 25 ESUs. Id. at 1, 120-22; Diazinon Transmittal Letter at 1; Amended Formal Consultation Request at 1 (May 16, 2003). Soon after receiving the diazinon consultation request, NMFS prepared several drafts of comments raising concerns with the adequacy of EPA's diazinon effect determinations, but NMFS never finalized these draft comments. At one point, NMFS officials expressed concern that “the administrative record shows that EPA has fulfilled its obligations under law, but that [NMFS has] not fulfilled our obligations (for example, we have not told EPA whether their submittals fulfill their obligations to initiate formal consultation, nor have we asked them to extend the period for formal consultation, as required by law, despite requests for formal consultation that date back to July 2002).” Email Correspondence from Craig Johnson to Laurie Allen, Phil Williams, and Don Knowles, March 20, 2003, at 1.

² Available at <http://www.epa.gov/oppfead1/endorsement/effects/>.

³ Available at <http://www.epa.gov/oppfead1/endorsement/effects/diazinon-analysis-final.pdf>.

In April 2003, NMFS sent EPA a letter indicating that it would proceed with formal consultations and prepare biological opinions for diazinon and propargite, another pesticide for which EPA initiated consultation in 2002. Letter from Steven W. Landino to Arthur-Jean Williams, April 7, 2003. NMFS believed that biological opinions for these two pesticides could “serve as information and analysis templates for future biological assessments” because diazinon was a “relatively data-rich compound” whereas propargite was a “data-poor pesticide.” Letter from Don Knowles to Arthur-Jean Williams, February 2003. Despite the priority NMFS placed on the diazinon and propargite consultations, neither has been completed in the four and a half years that have passed since initiation of consultation.

Similarly, EPA made effects determinations and initiated consultation on carbaryl in April 2003. Letter from Arthur-Jean Williams to Don Knowles, Apr. 1, 2003.⁴ EPA determined that carbaryl may affect 22 salmon and steelhead ESUs, likely causing adverse effects to 20 of those ESUs. In making its effects determinations and risk assessments, EPA grossly underestimated the urban risks because it had “no model scenarios to predict aquatic concentrations from homeowner uses or from noncrop uses” Carbaryl: Analysis of Risks to Endangered and Threatened Salmon and Steelhead, Mar. 31, 2003, at 1;⁵ see also Letter from Larry Turner to Arthur-Jean Williams, Apr. 1, 2003, at 1-2. A USGS study detected concentrations of carbaryl in urban streams in King County at levels exceeding limits established to protect aquatic life. USGS, Pesticides Detected in Urban Streams During Rainstorms in King and Snohomish Counties, Washington, 1998, at 7.

On June 30, 2003, EPA issued its interim re-registration eligibility decision (“IRED”) for carbaryl.⁶ FWS expressed concern that EPA had underestimated the toxicity of carbaryl on aquatic organisms, that “[c]arbaryl use, under conditions proposed in the IRED, is not protective of wildlife, and potentially poses risks to threatened and endangered species,” and that the “IRED gives no indication that ecological mitigation was even explored.” Letter from Everett Wilson to Anthony Britten, February 2005, at 2-3. Because NMFS delayed completion of consultation, EPA’s re-registration decision for carbaryl was neither informed nor constrained by the biological opinion and incidental take statement that would have emerged if the overdue section 7(a)(2) consultation had been completed. Had NMFS completed this consultation, it would have been able to ensure that EPA adopted a sufficiently precautionary approach for dealing with scientific uncertainty, as mandated by the ESA. See Washington Toxics Coalition v. Dep’t of Interior, 457 F. Supp. 2d 1158, 1184-90 (W.D. Wash. 2006). Instead, NMFS’s delay resulted in EPA’s renewed authorization of carbaryl uses without mitigation and safeguards to prevent harm to listed salmon and steelhead.

Likewise, on July 31, 2003, EPA found that azinphos-methyl (“AZM”) is likely to adversely affect 25 salmon and steelhead ESUs and initiated formal consultations for AZM uses in these 25 ESUs. AZM: Analysis of Risks to Endangered and Threatened Salmon and Steelhead, at 1, 101-03 July 23, 2003;⁷ AZM Transmittal Letter.⁸ While, in 2001, EPA had re-

⁴ <http://www.epa.gov/oppfead1/endanger/effects/carbaryl-ltr.pdf>.

⁵ <http://www.epa.gov/oppfead1/endanger/effects/carbaryl-analysis.pdf>.

⁶ http://www.epa.gov/oppsrrd1/REDs/carbaryl_ired.pdf.

⁷ http://www.epa.gov/oppfead1/endanger/effects/azinphos_methyl_analysis_final.pdf.

registered several AZM uses despite risks of concern to workers and species, particularly aquatic species, it limited the registrations to four years because of the severity of the risks. In November 2006, EPA emphasized the unacceptable risks posed to workers and aquatic species and decided that AZM must be banned. However, rather than impose an immediate ban, it decided at the behest of growers to allow continued use of AZM on orchards for six more years. EPA, Final Decisions for the Remaining Uses of AZM, November 16, 2006, at 10.⁹ The largest AZM orchard uses are in the range of listed salmon and steelhead and will pose serious risks to imperiled ESUs. Due to NMFS's delay in completing consultation on AZM uses, EPA has allowed continued harmful AZM uses without the mitigation needed to protect salmon and steelhead. If NMFS's delay persists, the AZM phase-out may run its course before NMFS ensures that EPA's decision are informed and constrained by the consultation mandated under the ESA.

These are but three examples of how NMFS's delay in completing the salmon ESA consultations is allowing pesticide uses to continue to harm salmon and steelhead. It is imperative that NMFS remedy this delay so that EPA's pesticide registration decisions can be informed by the ESA consultations and can be brought into compliance with the ESA.

LEGAL VIOLATION

I. NMFS HAS A DUTY TO COMPLETE SECTION 7(a)(2) CONSULTATIONS IN A TIMELY FASHION.

NMFS and FWS are the expert fish and wildlife agencies for pesticides. Under ESA section 7(a)(2), each federal agency, including EPA, is required to consult with NMFS or FWS to "insure that any action authorized, funded, or carried out by such agency" is not likely to jeopardize the continued existence of any listed species or result in the adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2); see also Washington Toxics Coalition, 413 F.3d at 1031-32; In re American Rivers and Idaho Rivers, 372 F.3d 413, 415 (D.C. Cir. 2004). NMFS must complete consultations within 90 days after initiation. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

NMFS and FWS have promulgated joint regulations that govern the ESA consultation process. 51 Fed. Reg. 19,926 (June 3, 1986). Under these rules, section 7 consultation is required for any action that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a); FWS & NMFS, Endangered Species Consultation Handbook at xvi (March 1998) ("Handbook") ("may affect" is "the appropriate conclusion where a proposed action may pose **any** effect on listed species or designated critical habitat") (emphasis in original).¹⁰ The regulations further distinguish between actions that "may affect" species as either "likely to adversely affect" ("LAA") or "not likely to adversely affect" ("NLAA") listed species. If an action is designated LAA, formal consultation is required, and such a formal consultation

⁸ http://www.epa.gov/oppfead1/endanger/effects/azinphos_methyl_transmittal_letter.pdf.

⁹ http://www.epa.gov/pesticides/op/azm/azm_remaining_uses.pdf.

¹⁰ <http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>.

concludes when NMFS issues a “biological opinion” determining whether the action is likely to cause jeopardy or adverse modification. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g)-(h). If an action is designated NLAA, the regulations permit informal consultation, which is a streamlined process designed to provide a sufficient factual basis for changes to the action to enable NMFS to concur in the NLAA determination. 50 C.F.R. § 402.13(b); Handbook at xv. An informal consultation culminates in NMFS’s written concurrence in the NLAA determination. 50 C.F.R. §§ 402.13(a); 402.14(b)(1).

NMFS’s consultation obligations are both clear and straightforward. When EPA initiated consultation for the 37 pesticides, NMFS was required to conclude the consultation process promptly. For LAA determinations, NMFS had to issue a biological opinion within 90 days. For NLAA determinations, NMFS either had to issue a written concurrence or, if it was unable to concur, had to conduct formal consultation and issue a biological opinion within 90 days. NMFS has plainly failed to comply with these consultation timelines.

II. NMFS’S DELAY IS UNREASONABLE.

The ESA authorizes citizen suits against NMFS for violating the ESA’s listing mandates, but not to challenge the manner in which NMFS conducts its consultation duties. 16 U.S.C. § 1540(g). The APA, however, provides a cause of action for challenges to the way NMFS’s discharges (or fails to discharge) its section 7 duties. See Bennett v. Spear, 520 U.S. 154, 176-78 (1997).

Under the APA, each federal agency must “conclude a matter presented to it . . . within a reasonable time.” 5 U.S.C. § 555(b). The APA expressly authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The APA definition of “agency action” includes a “failure to act.” 5 U.S.C. § 551(13). Courts consider the following factors to determine whether an administrative delay is unreasonable under the APA:

- (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when 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 delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that the agency action is unreasonably delayed.

Telecomms. Research and Action Center v. FCC, 750 F.2d 70, 807 (D.C. Cir. 1984) (internal citations and quotation marks omitted) (“TRAC”). The Ninth Circuit has adopted the “TRAC factors” for reviewing APA unreasonable delay claims. See, e.g., Brower v. Evans, 257 F.3d 1058, 1068 (9th Cir. 2001).

Application of the TRAC factors demonstrates the unreasonableness of NMFS’s delay. First, the length of NMFS’s delay in this case is well beyond any “rule of reason.” As an example, EPA made its LAA determination for parpargite on August 1, 2002. NMFS has

delayed concluding the propargite consultation for over four and a half years. Even for EPA's most recent effects determinations—those made on December 1, 2004—NMFS has failed to complete the consultations despite the passage of over two and a half years. In American Rivers, the D.C. Circuit considered an APA unreasonable delay claim against the Federal Energy Regulatory Commission (“FERC”) for a failure to discharge its section 7 consultation obligations. 372 F.3d at 414. The American Rivers court held that FERC's six-year delay in responding to a petition to consult regarding the effect of hydropower operations on listed fish species was “nothing less than egregious.” Id. at 419 (footnote omitted). The court noted that while “[t]here is no *per se* rule as to how long is too long to wait for agency action . . . a reasonable time for agency action is typically counted in weeks or months, not years.” Id. (citations and quotation marks omitted); see also California Power Exch. Corp. v. Fed. Energy Regulatory Comm'n, 245 F.3d 1110, 1125 (9th Cir. 2001). Under this standard, NMFS's multiple-year delays are similarly egregious.

The ESA informs the timeline defining the APA duty to conclude a matter within a reasonable time and the TRAC rule of reason. The ESA compels NMFS to complete consultation “within the 90-day period beginning on the date on which initiated . . .” 16 U.S.C. § 1536(b)(1)(A); see also 50 C.F.R. § 402.14(e). It further requires NMFS to prepare a biological opinion “[p]romptly after conclusion of consultation . . .” 16 U.S.C. § 1536(b)(3)(A). These legislative timeframes underscore the grievousness of NMFS's multiple-year delay in concluding the consultations.

The importance of the interests injured by a delay is also a significant consideration in determining whether a delay is unreasonable. Id. Even a brief inquiry into “the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978). When NMFS reviews EPA's effects determinations, it will likely disagree with EPA's relatively rosy conclusions, as evidenced by NMFS's 2004 draft nonconurrence in the bulk of EPA's NLAA determinations and NMFS's persistent critiques of EPA's risk assessments as being laden with scientific deficiencies. Rather than complete section 7 consultations, which would force EPA to correct deficiencies in its risk assessments and restrict pesticides uses that harm salmon and steelhead, NMFS has taken no action. During this lengthy period of inaction, EPA has re-registered many of the pesticides at issue without the safeguards for listed salmon that would have been required through the stalled ESA consultations. In light of the importance Congress has assigned to the protection of endangered and threatened species, the delay at issue in this case is manifestly unreasonable.

CONCLUSION

NMFS has unreasonably delayed completing consultations for 37 pesticide active ingredients that were subject to the district court order to consult in Washington Toxics Coalition. A court reviewing this claim is likely to impose a timetable for NMFS to complete the consultations. However, rather than expend plaintiffs' and the government's resources in litigating this case, NCAP would like to negotiate an appropriate schedule with NMFS to clean up the backlog of overdue consultations on EPA's pesticide registrations. Toward that end, we hope that you will be interested in convening settlement talks at your earliest convenience.

Sincerely,

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Associations, and Institute for Fisheries Resources*