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11 UNITED STATES DISTRICT COURT  
12 FOR THE WESTERN DISTRICT OF WASHINGTON

13 NORTHWEST COALITION FOR )  
14 ALTERNATIVES TO PESTICIDES, ) Civ. No.  
15 PACIFIC COAST FEDERATION OF )  
16 FISHERMEN’S ASSOCIATIONS, and )  
17 INSTITUTE FOR FISHERIES RESOURCES, ) COMPLAINT FOR DECLARATORY AND  
18 ) INJUNCTIVE RELIEF  
19 Plaintiffs, )  
20 v. )  
21 NATIONAL MARINE FISHERIES )  
22 SERVICE, )  
23 Defendant. )

24 INTRODUCTION

25 1. Pesticides are toxic substances that can harm salmon and steelhead (collectively  
26 “salmon”) by causing death; adversely affecting salmon food supplies and habitat; and impairing  
salmon swimming, predator avoidance, and reproduction. Pesticides have been detected in each  
of the major salmon rivers in the Pacific Northwest and California, sometimes at levels unsafe

1 for aquatic life. Plaintiffs Northwest Coalition for Alternatives to Pesticides, Pacific Coast  
2 Federation of Fishermen's Associations, and Institute for Fisheries Resources (collectively  
3 "Salmon Advocates") seek to ensure that pesticides used in the Pacific Northwest and California  
4 will not jeopardize the continued existence of listed salmon, adversely affect their critical habitat,  
5 or cause harm to salmon that could be avoided with appropriate mitigation.

6 2. The Environmental Protection Agency ("EPA") has failed to ensure that  
7 pesticides registered under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")  
8 will not jeopardize the continued existence of listed salmon. On July 2, 2002, this Court  
9 declared that EPA is in violation of section 7 of the Endangered Species Act ("ESA") because it  
10 did not consult with defendant National Marine Fisheries Service ("NMFS") to ensure that 54  
11 registered pesticides would not jeopardize listed salmon species. Washington Toxics  
12 Coalition v. EPA, No. C01-132C, slip op. at 20 (W.D. Wash. July 2, 2002), aff'd, 413 F.3d 1024  
13 (9<sup>th</sup> Cir. 2005) ("WTC I"). Pursuant to this Court's order, between August 2002 and December  
14 2004, EPA initiated consultations with NMFS on 37 of those pesticides EPA determined "may  
15 affect" listed salmon.

16 3. Over five years have passed since EPA initiated the first of these consultations.  
17 Yet NMFS has not completed a single consultation or prescribed any permanent mitigation  
18 necessary to ensure that these 37 pesticides will not cause jeopardy to listed salmon or adversely  
19 modify their critical habitat. NMFS's delay in completing the required consultations and  
20 prescribing mitigation allows toxic pesticides to continue to contaminate the waters of  
21 Washington, Oregon, and California; harm listed salmon; and injure the commercial enterprises  
22 and communities that depend on salmon fishing for their livelihoods.

23 4. The Salmon Advocates seek a judgment declaring that NMFS's failure to  
24

1 complete the section 7(a)(2) consultations in a timely fashion violates section 7(b)(1) of the ESA  
2 and section 706(1) of the Administrative Procedure Act (“APA”). The Salmon Advocates seek  
3 an order compelling NMFS to complete the long overdue consultations within two years.

#### 4 PARTIES

5 5. Plaintiff Northwest Coalition for Alternatives to Pesticides (“NCAP”) is a non-  
6 profit organization that engages in public education and advocacy to promote alternatives to  
7 pesticides and to protect the environment from the harmful effects of pesticides. It works to  
8 ensure that pesticides registered in the United States will not harm threatened and endangered  
9 salmon. NCAP also conducts and compiles research on the effects of pesticides on salmon.  
10 NCAP’s principle place of business is in Eugene, Oregon. NCAP has approximately 1,900  
11 members, many of whom use the waters of California, Oregon, and Washington for recreational,  
12 commercial, and aesthetic pursuits including salmon fishing, boating, and wildlife photography.  
13 The inadequately mitigated use of the pesticides in the Pacific Northwest and California harms  
14 salmon and impairs the interests of NCAP and its members.

15 6. Plaintiff Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is an  
16 association of commercial fishermen that works to protect salmon habitat and promote  
17 restoration where salmon habitat is degraded. PCFFA’s principal place of business is in San  
18 Francisco, California. PCFFA is the largest organization of commercial fishermen on the west  
19 coast. It consists of a federation of 15 smaller commercial fishermen vessel owners’  
20 associations, trade associations, port associations and marketing associations with membership  
21 throughout Washington, Oregon, and California. PCFFA also has “at-large” members who are  
22 unaffiliated with any particular fishermen association but have become individual members of  
23 PCFFA. Collectively, PCFFA represents nearly 2,000 west coast commercial fishing families.  
24 Many of PCFFA’s members derive all or part of their income from the harvesting of Pacific

1 salmon. The continued use of pesticides without adequate protection for salmon impairs the  
2 commercial interests of PCFFA and its members.

3 7. Plaintiff Institute for Fisheries Resources (“IFR”) is a California non-profit  
4 organization that works to protect and restore fish populations and the human economies that  
5 depend on them by establishing alliances among fishing men and women, government agencies,  
6 and concerned citizens. IFR advocates for reforms in land use practices known to destroy  
7 salmon habitat and has successfully advocated for dam removals, improved pesticide controls,  
8 and enhanced conservation regulations to benefit salmon. IFR’s principle place of business is in  
9 San Francisco, California. Most of IFR’s at least 850 contributors are commercial fishermen.  
10 IFR and PCFFA have common Board members, general membership, and staff; however, IFR is  
11 a separate organization that focuses on marine resources protection and conservation. IFR and  
12 its members are directly and indirectly injured by the use of toxic pesticides that harm salmon  
13 populations and habitat in the Pacific Northwest and California.

14 8. The Salmon Advocates are organizations with members who use and enjoy  
15 salmon and salmon habitat in the Pacific Northwest and California for recreational, scientific,  
16 aesthetic, cultural, and commercial purposes. NMFS’s failure to complete the pesticide  
17 consultations that this Court ordered in WTC I within a reasonable time results in inadequate  
18 mitigation of pesticide uses and harms these members’ past, present, and future enjoyment of  
19 salmon resources.

20 9. Defendant NMFS is a federal agency within the Department of Commerce.  
21 Under the ESA, NMFS is responsible for consulting with federal agencies to ensure that agency  
22 actions do not jeopardize the survival and recovery of listed salmon species or adversely affect  
23 their critical habitat. See 16 U.S.C. § 1536(2)(a).

1 JURISDICTION

2 10. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 16 U.S.C.  
3 § 1540(g)(1)(A).

4 11. As required under the ESA, the Salmon Advocates provided 60 days’ notice of  
5 their intent to sue by letter sent to NMFS on June 20, 2007. NMFS has not remedied the  
6 violations set out in that 60-day notice. See 16 U.S.C. § 1540(g)(2)(A).

7 BACKGROUND

8 I. STATUTORY FRAMEWORK

9 A. FIFRA

10 12. FIFRA prohibits the use of a pesticide in the United States unless EPA has  
11 registered that particular use. 7 U.S.C. § 136a(a). EPA may only register a pesticide if it  
12 determines that “when used in accordance with widespread and commonly recognized practice it  
13 will not generally cause unreasonable adverse effects on the environment.” Id. at § 136a(c)(5);  
14 see also id. at § 136a-1(a)(2). FIFRA defines “unreasonable adverse effects on the environment”  
15 to mean “any unreasonable risk to man or the environment, taking into account the economic,  
16 social, and environmental costs and benefits of the use of any pesticide . . . .” Id. at § 136(bb).

17 13. EPA is currently at the end of a lengthy process of reregistering pesticides that  
18 have been on the market for decades prior to enactment of the environmental registration  
19 requirements currently in place. See 7 U.S.C. § 136a-1. As part of a reregistration  
20 determination, EPA is required to impose restrictions to prevent pesticide uses from causing  
21 unreasonable health or environmental effects, including those uses that cause harm to threatened  
22 or endangered species.

23 14. After registering or reregistering a pesticide use, EPA retains discretionary  
24 involvement and control over that registration. EPA has the authority to cancel pesticide

1 registrations whenever “a pesticide or its labeling or other material required to be submitted does  
2 not comply with the provisions of [FIFRA], when used in accordance with widespread and  
3 commonly recognized practice, generally causes unreasonable adverse effects on the  
4 environment.” 7 U.S.C. § 136d(b). EPA must periodically review pesticide registrations, and  
5 should strive to complete such reviews every 15 years. *Id.* at § 136a(g)(1).

6 B. ESA

7 15. When a species is listed as threatened or endangered under the ESA,  
8 section 7(a)(2) of the Act requires that all federal agencies “insure” that their actions “are not  
9 likely to jeopardize the continued existence of any endangered species or threatened species or  
10 result in the destruction or adverse modification of” their critical habitat. 16 U.S.C. § 1536(a)(2).  
11 NMFS and the action agency are required to consult to ensure that the agency actions comply  
12 with the substantive mandates of section 7(a)(2). *Id.*

13 16. NMFS and FWS have adopted joint regulations governing the section 7(a)(2)  
14 consultation process. Under the joint regulations, a federal agency must initiate a section 7(a)(2)  
15 consultation with NMFS or FWS whenever it undertakes an “action” that “may affect” a listed  
16 species or critical habitat. 50 C.F.R. § 402.14(a). An agency is relieved of the obligation to  
17 consult only if the action will have “no effect” on listed species or designated critical habitat.

18 17. The joint regulations broadly define the scope of agency actions subject to the  
19 ESA section 7(a)(2) mandates to include the granting of licenses and permits. 50 C.F.R.  
20 § 402.02. EPA’s pesticide registrations under FIFRA constitute agency “actions” under ESA  
21 section 7(a)(2). 50 C.F.R. §§ 402.02, 402.03; WTC I, slip op. at 7-9; see also WTC I, 413 F.3d  
22 at 1033.

23 18. If an agency determines that its action “may affect” but is “not likely to adversely  
24 affect” a listed species or its critical habitat, the ESA regulations permit “informal consultation,”

1 in which there is no requirement for a biological opinion so long as NMFS or FWS concurs in  
2 writing with the “not likely to adversely affect” determination. 50 C.F.R. § 402.13. If the  
3 wildlife agency does not concur in the “not likely to adversely affect” determination or if the  
4 action agency determines that the action is “likely to adversely affect” the listed species, the  
5 agencies must engage in “formal consultation.” 50 C.F.R. §§ 402.02, 402.14(a).

6 19. Formal consultation “is a process between [NMFS] and the Federal agency that  
7 commences with the Federal agency’s written request for consultation under section 7(a)(2) of  
8 the Act and concludes with [NMFS’s] issuance of the biological opinion under section 7(b)(3) of  
9 the Act.” 50 C.F.R. § 402.02.

10 20. In a biological opinion, NMFS must determine whether the federal action subject  
11 to the consultation will jeopardize the survival and recovery of listed species or will adversely  
12 modify critical habitat. 16 U.S.C. § 1536(b)(4). If NMFS determines that the action will  
13 jeopardize the species, the biological opinion must specify reasonable and prudent alternatives to  
14 avoid jeopardy. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h)(3). NMFS and the action  
15 agencies must use the best available science in its consultations, biological opinions, and  
16 jeopardy determinations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

17 21. Section 9 of the ESA prohibits the “take” of listed species, which Congress  
18 defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to  
19 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). As part of the consultation  
20 process, NMFS must determine whether to authorize the incidental take of listed species through  
21 the issuance of an incidental take statement (“ITS”). NMFS may issue an ITS only if it  
22 determines that the action can proceed without causing jeopardy to the species. 16 U.S.C.  
23 § 1536(b)(4). An ITS insulates actors from liability for taking threatened or endangered species,  
24

1 provided that the actor complies with the terms and conditions in the ITS. See 16 U.S.C.  
2 § 1536(o)(2).

3 22. The ESA contains strict time limits for completion of the section 7(a)(2)  
4 consultation process. NMFS is generally required to conclude such consultations “within the 90-  
5 day period beginning on the date on which it is initiated . . . .” 16 U.S.C. § 1536(b)(1)(A); see  
6 also 50 C.F.R. § 402.14(e). NMFS must “promptly” deliver a biological opinion “[w]ithin 45  
7 days after concluding formal consultation . . . .” 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R.  
8 § 402.14(e).

9 23. If a consultation involves a permit or license, NMFS may extend the consultation  
10 period an additional 60 days if “before the close of the 90th day” of the consultation period  
11 NMFS “submits to the applicant a written statement setting forth (I) the reasons why a longer  
12 period is required, (II) the information that is required to complete the consultation, and (III) the  
13 estimated date on which the consultation will be completed . . . .” 16 U.S.C. § 1536(b)(1)(B)(i);  
14 see also 50 C.F.R. § 402.14(e)(1)-(3). If NMFS wishes to extend the consultation period beyond  
15 150 days, it must also obtain the consent of the applicant. 16 U.S.C. § 1536(b)(1)(B)(ii);  
16 50 C.F.R. § 402.14(e).

## 17 II. EPA’S INITIATION OF CONSULTATION

18 24. In 2002, the Salmon Advocates and others brought a citizen suit alleging that EPA  
19 violated the ESA by failing to consult with NMFS regarding the effects of its FIFRA pesticide  
20 registrations. This Court held that EPA violated ESA section 7(a)(2) with respect to 54  
21 specifically identified pesticides. WTC I, slip op. at 20. The Court ordered EPA to make effects  
22 determinations and initiate consultations with NMFS regarding the 54 pesticides in accordance  
23 with a prescribed timetable ending in December 2004. Id. at 17-18. During the pendency of the  
24 consultations, the Court prohibited EPA from authorizing uses of the pesticides within prescribed

1 distances of salmon-bearing streams. Id. at 2-4, 12. Regarding seven pesticides frequently found  
2 in urban salmon streams, the Court ordered EPA to require point-of-sale warnings in home and  
3 garden stores indicating that use of these pesticides can harm salmon. Id. at 10-11. The Ninth  
4 Circuit affirmed all aspects of this Court’s orders. WTC I, 413 F.3d at 1029.

5           25.     Between August of 2002 and December of 2004, EPA made effects  
6 determinations for all 54 of the pesticides in accordance with the schedule this Court established  
7 in WTC I. EPA determined that 37 of those 54 pesticides “may affect” one or more listed  
8 salmon populations. EPA further concluded that 28 of those pesticide uses are “likely to  
9 adversely affect” at least one listed salmon population. The following is a chronological list of  
10 all 37 pesticides EPA determined “may affect” listed salmon:

- 11           molinate (consultation initiated on 8/1/2002);
- 12           thiobencarb (consultation initiated on 8/1/2002);
- 13           propargite (consultation initiated on 8/1/2002);
- 14           prometryn (consultation initiated on 11/29/2002);
- 15           fenbutatin oxide (consultation initiated on 11/29/2002);
- 16           metolachlor (consultation initiated on 11/29/2002);
- 17           bensulide (consultation initiated on 11/29/2002);
- 18           diazinon (consultation initiated on 11/29/2002);
- 19           carbaryl (consultation initiated on 4/1/2003);
- 20           methomyl (consultation initiated on 4/1/2003);
- 21           chlorpyrifos (consultation initiated on 4/1/2003);
- 22           oryzalin (consultation initiated on 4/1/2003);
- 23           azinphos-methyl (consultation initiated on 7/31/2003);
- 24           diuron (consultation initiated on 8/1/2003);
- phorate (consultation initiated on 8/1/2003);
- phosmet (consultation initiated on 12/1/2003);
- fenamiphos (consultation initiated on 12/1/2003);
- ethoprop (consultation initiated on 12/1/2003);
- disulfoton (consultation initiated on 12/1/2003);
- chlorothalonil (consultation initiated on 12/1/2003);
- captan (consultation initiated on 12/1/2003);
- methamidophos (consultation initiated on 3/31/2004);
- linuron (consultation initiated on 3/31/2004);
- trifluralin (consultation initiated on 4/1/2004);
- methyl parathion (consultation initiated on 4/1/2004);
- methidathion (consultation initiated on 4/1/2004);

1           naled (consultation initiated on 4/1/2004);  
2           1,3-dichloropropene (consultation initiated on 7/29/2004);  
3           diflubenzuron (consultation initiated on 7/29/2004);  
4           dimethoate (consultation initiated on 7/29/2004);  
5           carbofuran (consultation initiated on 12/1/2004);  
6           pendimethalin (consultation initiated on 12/1/2004);  
7           bromoxynil (consultation initiated on 12/1/2004);  
8           lindane (consultation initiated on 12/1/2004);  
9           malathion (consultation initiated on 12/1/2004);  
10          2,4-dichlorophenoxyacetic acid (consultation initiated on 12/1/2004);  
11          triclopyr BEE (consultation initiated on 12/1/2004).

12           26.     As EPA made the effects determinations for these 37 pesticides, it transmitted  
13           them to NMFS and requested NMFS to conduct section 7(a)(2) consultations. EPA generally  
14           requested formal consultation for each pesticide use receiving a “likely to adversely affect”  
15           designation and informal consultation for each use receiving “not likely to adversely affect”  
16           designations.

17           27.     By December 12, 2004, EPA had made effects determinations for all of the 54  
18           pesticides at issue in WTC I and had initiated consultations with NMFS on the 37 of those  
19           pesticides it deemed “may affect” listed salmon species.

20           28.     As of February 4, 2005, NMFS had not completed any of the required  
21           consultations for the 37 “may affect” pesticides. On that date, concerned that NMFS’s delay was  
22           due to flaws in EPA’s risk assessment methodologies, the Salmon Advocates asked this Court to  
23           modify its WTC I injunction to require EPA to make new effects determinations that incorporate  
24           the best available science that EPA has since acknowledged must be used in its pesticide risk  
25           assessments. The Court declined to modify its order, ruling that “[a]t this time, the question of  
26           whether EPA based those [effects] determinations on the best available science, as required by  
27           the Endangered Species Act, is not properly before the Court.” WTC I, No. C01-132C, at 2  
28           (W.D. Wash. Apr. 26, 2005) (Order Denying Motion to Modify July 2, 2002 Order).

1           29.     The Court subsequently reviewed the validity of EPA’s methodologies for  
2 assessing the risks of pesticides on listed species. In 2006, the Salmon Advocates and others  
3 brought a challenge to “counterpart regulations” that NMFS, FWS, and EPA adopted for the  
4 pesticide consultations. *WTC v. Dep’t of Interior*, 457 F. Supp. 2d 1158, 1193 (W.D. Wash.  
5 2006) (“WTC II”). The Court vacated the pesticide counterpart regulations, holding that NMFS  
6 and FWS “acted arbitrarily and capriciously in deciding to promulgate the counterpart  
7 regulations in their current state, knowing of the substantial flaws in EPA’s methodologies and  
8 knowing that these flaws were highly likely (if not certain) to result in an overall under-  
9 protection of listed species as compared to the general consultation regulations.” *Id.*

10           30.     Another 14 months have passed since the Court, in WTC II, confirmed that the  
11 agencies must adhere to the ESA section 7 consultation process for pesticides. Yet NMFS has  
12 still not completed a formal or informal consultation for a single pesticide subject to the WTC I  
13 injunction. Nor, upon information and belief, has NMFS ever agreed with EPA to extend the  
14 deadlines for completing the consultations on the 37 pesticides at issue in this case or provided  
15 written notice to or obtained written consent from the pesticide registrants to extend the  
16 consultation periods.

17           31.     On June 20, 2007, the Salmon Advocates sent a letter to Regional Director Lohn  
18 providing notice of the claims at issue in this case. In the notice letter, the Salmon Advocates  
19 offered to hold off on filing this lawsuit if NMFS agreed to discuss a schedule for completing the  
20 long delayed consultations. As of the date of this filing, neither Regional Director Lohn nor any  
21 other NMFS employee has responded to the Salmon Advocates’ June 2007 notice letter.

### 22 III.     SPECIFIC EXAMPLES OF DELIQUENT PESTICIDE CONSULTATIONS

#### 23 A.     Diazinon

24           32.     EPA transmitted a consultation package for diazinon, an organophosphate

1 pesticide, to NMFS in November 2002. Largely due to diazinon's "high toxicity to organisms  
2 that serve as food for threatened and endangered Pacific salmon and steelhead, and the potential  
3 effects on salmon olfaction," EPA determined that diazinon may affect all of the listed salmon  
4 populations, was likely to adversely affect 22 of those populations, and ultimately initiated  
5 formal consultations for 25 listed populations. Diazinon: Analysis of Risks to Endangered and  
6 Threatened Salmon and Steelhead, at 1, 120-22 (Nov. 29, 2002); Diazinon Transmittal Letter at 1  
7 (Nov. 29, 2002); Amended Formal Consultation Request at 1 (May 16, 2003).

8 33. Soon after EPA initiated the diazinon consultations, NMFS prepared several  
9 drafts of comments raising concerns about the adequacy of EPA's diazinon effects  
10 determinations. Because NMFS neither officially expressed its non-concurrence with EPA's  
11 diazinon effects determinations nor completed consultations with EPA on the diazinon  
12 determinations, NMFS officials were concerned that "the administrative record shows that EPA  
13 has fulfilled its obligations under law, but that [NMFS has] not fulfilled our obligations (for  
14 example, we have not told EPA whether their submittals fulfill their obligations to initiate formal  
15 consultation, nor have we asked them to extend the period for formal consultation, as required by  
16 law, despite requests for formal consultation that date back to July 2002)." Email  
17 Correspondence from Craig Johnson to Laurie Allen, Phil Williams, and Don Knowles at 1  
18 (Mar. 20, 2003).

19 34. In April 2003, NMFS sent EPA a letter indicating that it would proceed with  
20 formal consultations and prepare biological opinions for diazinon and propargite, another  
21 pesticide for which EPA initiated consultation in 2002. NMFS stated that its biological opinions  
22 for these two pesticides could "serve as information and analysis templates for future biological  
23 assessments" because diazinon was a "relatively data-rich compound" whereas propargite was a  
24

1 “data-poor pesticide.” Letter from Don Knowles to Arthur-Jean Williams (February 2003).

2 Despite the priority NMFS placed on the diazinon and propargite consultations, NMFS has  
3 completed neither consultation in the nearly five years that have passed since EPA’s initiation of  
4 consultations on these pesticides.

5 B. Carbaryl

6 35. EPA determined that carbaryl, a widely used carbamate insecticide known to be  
7 toxic to fish, “may affect” 22 listed salmon populations and was “likely to adversely affect” 20  
8 of those populations. EPA made these effects determinations and initiated consultations with  
9 NMFS on carbaryl in April 2003.

10 36. On June 30, 2003, EPA issued a FIFRA interim re-registration eligibility decision  
11 (“IREDD”) for carbaryl. FWS reviewed the IREDD and expressed concern that EPA had  
12 underestimated the toxicity of carbaryl on aquatic organisms, that “[c]arbaryl use, under  
13 conditions proposed in the IREDD, is not protective of wildlife, and potentially poses risks to  
14 threatened and endangered species,” and that the “IREDD gives no indication that ecological  
15 mitigation was even explored.” Letter from Everett Wilson to Anthony Britten at 2-3 (February  
16 2005).

17 37. Despite these concerns, NMFS has yet to complete the carbaryl consultations  
18 although more than four-and-a-half years have passed since EPA initiated the consultations.  
19 NMFS’s delay in completing the consultations resulted in EPA’s renewed authorization of  
20 carbaryl uses without the safeguards necessary to prevent harm to listed salmon.

21 C. Azinphos-methyl

22 38. On July 31, 2003, EPA found that azinphos-methyl (“AZM”), another pervasive  
23 organophosphate insecticide, is “likely to adversely affect” all of the listed salmon populations at  
24 issue in WTC I. EPA transmitted these effects determinations to NMFS and initiated formal

1 consultations for these AZM uses.

2 39. NMFS has not completed a single AZM consultation despite the passage of nearly  
3 four-and-a-half years since EPA initiated the consultations. Due to NMFS's delay, EPA has  
4 continued to allow harmful AZM uses without the mitigation needed to protect salmon. Indeed,  
5 in November 2006, EPA extended AZM registrations for an additional six years despite  
6 recognizing continued risk to listed salmon. If NMFS's delay persists, the AZM phase-out may  
7 run its course before NMFS ensures that EPA's AZM decisions are informed by the required  
8 ESA consultation process and are in compliance with the ESA's no-jeopardy mandate.

9 CAUSE OF ACTION

10 NMFS HAS UNLAWFULLY DELAYED COMPLETING  
11 CONSULTATIONS WITH EPA REGARDING THE EFFECTS  
12 OF PESTICIDE USES ON LISTED SALMON

13 40. Paragraphs 1 through 39 are hereby realleged as though set out in full.

14 41. FIFRA prohibits use of a pesticide in the United States unless EPA has registered  
15 that specific use after determining that it "will not generally cause unreasonable adverse effects  
16 on the environment." Id. at §136a(c)(5). EPA's pesticide registrations under FIFRA constitute  
17 agency "actions" under ESA section 7(a)(2). WTC I, 413 F.3d at 1033; WTC I, slip op. at 7-9.

18 42. ESA section 7(a)(2) requires NMFS to consult with EPA to "insure" that EPA's  
19 pesticide registrations are "not likely to jeopardize the continued existence of any endangered  
20 species or threatened species or result in the destruction or adverse modification of habitat of  
21 such species which is determined by [NMFS] . . . to be critical." See 16 U.S.C. § 1536(a)(2); see  
22 also 50 C.F.R. § 402.14; WTC I, 413 F.3d at 1031-32. Section 7(a)(2) consultation is required  
23 for any pesticide that EPA determines "may affect" a listed species or critical habitat. See  
24 50 C.F.R. § 402.14(a).

25 43. If EPA determines that a pesticide registration is "likely to adversely affect" a

1 listed salmon species, NMFS and EPA must engage in “formal consultation.” See 50 C.F.R.  
2 § 402.14(a). Formal consultation “commences with the Federal agency’s written request for  
3 consultation under section 7(a)(2) of the Act and concludes with [NMFS’s] issuance of a  
4 biological opinion under section 7(b)(3) of the Act.” 50 C.F.R. § 402.02.

5 44. If EPA determines that a pesticide registration is “not likely to adversely affect” a  
6 listed species, the ESA regulations permit NMFS and EPA to engage in “informal consultation.”  
7 See 50 C.F.R. § 402.13(b). Informal consultation concludes when NMFS issues written  
8 concurrence with EPA’s “not likely to adversely affect” determination. See 50 C.F.R.  
9 §§ 402.13(a); 402.14(b)(1).

10 45. The ESA compels NMFS to complete the consultation process “within the 90-day  
11 period beginning on the date on which initiated . . . .” 16 U.S.C. § 1536(b)(1)(A); see also  
12 50 C.F.R. § 402.14(e). It further requires NMFS to prepare a biological opinion “[p]romptly  
13 after conclusion of consultation . . . .” 16 U.S.C. § 1536(b)(3)(A); see also 50 C.F.R. § 402.14(e)  
14 (“within 45 days after concluding formal consultation, the Service shall deliver a biological  
15 opinion to the Federal agency and any applicant.”).

16 46. NMFS must provide written notice to pesticide registrants “before the close of the  
17 90<sup>th</sup> day” of the consultation period if it is to extend the consultation period beyond 90 days. See  
18 16 U.S.C. § 1536(b)(1)(B)(i); 50 C.F.R. § 402.14(e). Such written notice must explain the  
19 reasons for the delay and provide an “estimated date on which the consultation will be  
20 completed.” 16 U.S.C. § 1536(b)(1)(B)(i)(I)-(III); 50 C.F.R. § 402.14(e)(1)-(3). For any  
21 extension beyond 150 days, NMFS must also obtain the consent of the pesticide registrants.  
22 16 U.S.C. § 1536(b)(1)(B)(ii); 50 C.F.R. § 402.14(e).

23 47. Under the APA, each federal agency must “conclude a matter presented to it . . . .  
24

1 within a reasonable time.” 5 U.S.C. § 555(b). The APA definition of “agency action” includes a  
2 “failure to act.” 5 U.S.C. § 551(13). The APA authorizes reviewing courts to “compel agency  
3 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The schedule that  
4 Congress prescribed in the ESA for completing consultations informs the timeline for defining  
5 the APA duty to act within a reasonable time.

6 48. Between August 2002 and December 2004, EPA transmitted effects  
7 determinations and initiated consultations with NMFS for 37 pesticides that EPA determined  
8 “may affect” listed salmon in the Pacific Northwest and California. Despite the passage of over  
9 five years since EPA initiated the first of these consultations, NMFS has not completed a single  
10 consultation for any of the 37 pesticides. NMFS has issued no biological opinions for those  
11 pesticides EPA determined are “likely to adversely affect” listed salmon nor has it issued written  
12 concurrences with EPA’s “not likely to adversely affect” determinations for any of these  
13 pesticides.

14 49. Upon information and belief, NMFS has never agreed with EPA to extend the 90-  
15 day consultation period for the 37 pesticides at issue in this case. Nor, upon information and  
16 belief, has NMFS ever provided written notice to pesticide registrants explaining its multiple  
17 year delay in completing the consultations or obtained written consent to extend the consultation  
18 periods beyond 150 days.

19 50. NMFS’s multiple-year delay in completing consultations for the 37 pesticides that  
20 EPA determined “may affect” listed salmon violates ESA section 7(b)(1)(B), 16 U.S.C.  
21 § 1536(b)(1)(B).

22 51. NMFS’s multiple-year delay in completing consultations for the 37 pesticides that  
23 EPA determined “may affect” listed salmon constitutes unreasonable delay under APA section  
24

1 706(1), 5 U.S.C. § 706(1).

2 52. NMFS's unlawful delay in completing these consultations may allow pesticides to  
3 kill and impede the functioning of Pacific salmon and could result in the permanent extirpation  
4 of salmon species, fisheries, and fishing communities. In light of the importance Congress has  
5 assigned to the protection of endangered and threatened species, the delay at issue in this case is  
6 manifestly unreasonable.

7 PRAYER FOR RELIEF

8 WHEREFORE, the Salmon Advocates pray that the Court:

9 A. Declare that NMFS is in violation of section 7(b)(1) of the ESA, 16 U.S.C.  
10 § 1536(b)(1), by failing to complete the consultations that EPA initiated on 37 pesticides that  
11 "may affect" listed salmon species within 90 days;

12 B. Declare that NMFS is in violation of section 706(1) of the APA, 5 U.S.C.  
13 § 706(1), by unreasonably delaying its completion of the consultations on 37 pesticides that  
14 "may affect" listed salmon species despite the passage of over five years since EPA initiated the  
15 first of those consultations;

16 C. Order NMFS to complete all of the required consultations within two years in  
17 accordance with a schedule that first addresses those pesticides that are "likely to adversely  
18 affect" the greatest number of listed salmon species or is otherwise mutually agreed upon by the  
19 parties;

20 D. Award plaintiffs their attorneys' fees and costs in this action pursuant to  
21 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412; and

1 E. Grant such other and further relief as the Court deems just and proper.

2 Respectfully submitted this 5th day of November, 2007.

3  
4 /s/ Joshua Osborne-Klein  
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