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9 UNITED STATES DISTRICT COURT
10 FOR THE WESTERN DISTRICT OF WASHINGTON

11 NORTHWEST COALITION FOR)
12 ALTERNATIVES TO PESTICIDES, PACIFIC) Civ. No.
13 COAST FEDERATION OF FISHERMEN'S)
ASSOCIATIONS, INSTITUTE FOR FISHERIES)
14 RESOURCES, and DEFENDERS OF WILDLIFE,) COMPLAINT FOR DECLARATORY
Plaintiffs,) AND INJUNCTIVE RELIEF
15 v.)
16 UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
17)
Defendant.)
18)
19

20 INTRODUCTION

21 1. Pesticides are toxic substances that can harm salmon and steelhead (collectively
22 "salmonids") by causing death; adversely affecting salmonid food supplies and habitat; and
23 impairing salmonid swimming, predator avoidance, and reproduction. Pesticides have been
24 detected in each of the major salmonid rivers in the Pacific Northwest and California monitored
25 by the U.S. Geological Survey, sometimes at levels unsafe for aquatic life. Plaintiffs Northwest
26 Coalition for Alternatives to Pesticides, Pacific Coast Federation of Fishermen's Associations,

1 Institute for Fisheries Resources, and Defenders of Wildlife seek to ensure that pesticides used in
 2 the Pacific Northwest and California will not jeopardize the continued existence of listed
 3 salmonids, adversely affect their critical habitat, or cause harm to salmonids that could be
 4 avoided with appropriate mitigation.

5 2. This is the fourth time that some of the plaintiffs have returned to this Court
 6 because the Environmental Protection Agency (“EPA”) has failed to ensure that pesticides
 7 registered under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) will not
 8 jeopardize the continued existence of listed salmonids. On July 2, 2002, this Court declared that
 9 EPA was in violation of section 7 of the Endangered Species Act (“ESA”) because it did not
 10 consult with the National Marine Fisheries Service (“NMFS”) to ensure that 54 registered
 11 pesticides would not jeopardize listed salmonid species. Washington Toxics Coalition v. EPA,
 12 No. C01-132C, slip op. at 20 (W.D. Wash. July 2, 2002), aff’d, 413 F.3d 1024 (9th Cir. 2005)
 13 (“WTC I”). In a separate order, this Court granted injunctive relief preventing certain uses of
 14 those 54 pesticides to protect salmonids while the consultation process proceeded, and portions
 15 of that injunction are still in place. Washington Toxics Coalition v. EPA, No. C01-132C (W.D.
 16 Wash. Jan. 22, 2004), aff’d, 413 F.3d 1024. Pursuant to this Court’s order, between August 2002
 17 and December 2004, EPA initiated consultations with NMFS on 37 of those pesticides EPA
 18 determined “may affect” listed salmonids.

19 3. In the interim, NMFS and the U.S. Fish and Wildlife Service promulgated
 20 regulations that gave EPA authority to consider the effects of pesticides on salmonids and other
 21 threatened and endangered species without any consultation with the Services. WTC v. Dep’t of
 22 Interior, 457 F. Supp. 2d 1158 (W.D. Wash. 2006) (“WTC II”). This Court vacated these
 23 pesticide counterpart regulations, holding that NMFS and FWS “acted arbitrarily and
 24 capriciously in deciding to promulgate the counterpart regulations in their current state, knowing
 25 of the substantial flaws in EPA’s methodologies and knowing that these flaws were highly likely

1 (if not certain) to result in an overall under-protection of listed species as compared to the
 2 general consultation regulations.” *Id.* at 1193.

3 4. Over five years after EPA initiated the first of these consultations, NMFS had not
 4 completed a single consultation or prescribed any permanent mitigation necessary to ensure that
 5 these 37 pesticides will not cause jeopardy to listed salmonids or adversely modify their critical
 6 habitat. Accordingly, in 2007 some of the plaintiffs here filed suit in this Court against NMFS
 7 for failing to complete those consultations. NW Coalition for Alternatives to Pesticides v.
 8 NMFS, Civ. No. 07-01791 (W.D. Wash. filed Nov. 5, 2007). On July 31, 2008, NMFS and the
 9 plaintiffs entered into a consent decree whereby NMFS agreed to issue biological opinions on
 10 these 37 pesticides within approximately 4 years. Stipulated Settlement Agreement and Order of
 11 Dismissal, NW Coalition for Alternatives to Pesticides v. NMFS, Civ. No. 07-01791 (W.D.
 12 Wash. July 31, 2008).

13 5. NMFS issued the first such biological opinion evaluating the effects of three
 14 organophosphate pesticides on November 18, 2008. That “OP BiOp” concluded that continued
 15 use of the organophosphate pesticides diazinon, malathion, and chlorpyrifos would jeopardize
 16 the continued existence of 27 species of Pacific salmon and steelhead and would destroy or
 17 adversely modify the critical habitat for 25 of those species. The OP BiOp articulated a
 18 comprehensive Reasonable and Prudent Alternative (“RPA”) that required EPA to establish
 19 specific protections that would avoid jeopardy and adverse modification of critical habitat. The
 20 BiOp provided that the RPA “must be implemented in its entirety within one year of the receipt
 21 of the Opinion to ensure that the proposed registration of these pesticides is not likely to” cause
 22 jeopardy or adverse modification of critical habitat.

23 6. On April 20, 2009, NMFS issued a second BiOp evaluating three carbamate
 24 pesticides – carbaryl, carbofuran, and methomyl (“Carbamate BiOp”). NMFS concluded that
 25 EPA’s registration of pesticide products containing carbaryl and carbofuran jeopardize 22 listed
 26

1 Pacific salmonids and likely destroy or adversely modify the habitat of at least 20 listed Pacific
 2 salmonids. NMFS also found that methomyl registrations jeopardize 18 listed Pacific salmonids
 3 and likely destroy or adversely modify the habitat of at least 16 listed Pacific salmonids. Like
 4 the OP BiOp, the Carbamate BiOp articulated a comprehensive RPA with specific protections to
 5 avoid likely jeopardy and adverse modification of critical habitat, and provided that the RPA
 6 must be implemented in its entirety within one year to avoid jeopardy.¹

7 7. NMFS concluded in both the OP BiOp and the Carbamate BiOp that the current
 8 uses of the three OP pesticides and the three Carbamate pesticides are taking ESA-listed
 9 salmonids in a number of ways, including direct mortality and injury to adults and juveniles, and
 10 harm to olfactory (homing) sense, impaired growth and feeding, reproductive impairment and
 11 impacts to salmonid prey.

12 8. NMFS concluded in both the OP and Carbamate BiOps that entirely avoiding take
 13 of listed salmonids would likely entail cancelling the registrations for these six pesticides or
 14 entirely prohibiting their uses in watersheds inhabited by salmonids. NMFS included an
 15 Incidental Take Statement (“ITS”) authorizing some take from EPA’s authorization of uses of
 16 these six pesticides, so long as EPA’s use authorizations comply with the RPAs and the
 17 Reasonable and Prudent Measures (“RPMs”) articulated in the BiOps.

18 9. To date, EPA has not implemented a single one of the requirements of NMFS’s
 19 RPAs or RPMs for these six pesticides, nor has EPA taken steps to implement any alternative
 20 protective measures that would avoid jeopardy and adverse modification in response to the
 21 BiOps. EPA’s failure to implement the RPAs and RPMs is allowing toxic pesticides to continue
 22 to contaminate the waters of Washington, Oregon, Idaho, and California; harm listed salmonids;
 23 and injure the commercial enterprises and communities that depend on salmonid fishing for their

24
 25 ¹ Since the time that NMFS issued the Carbamate BiOp, EPA has cancelled all food uses for
 26 carbofuran, and may in the future cancel all remaining non-food uses as well. However, to the
 best of plaintiffs’ knowledge, at least two non-food uses are still authorized by the current labels.

livelihoods.

10. The plaintiffs seek a judgment declaring that EPA's failure to implement the OP and Carbamate BiOps violates section 7(a)(2) of the ESA, and a judgment declaring that EPA is taking listed salmonids in violation of section 9 of the ESA. The plaintiffs seek an order vacating and enjoining EPA's authorization of the uses of diazinon, malathion, chlorpyrifos, carbaryl, carbofuran, and methomyl that do not comply with the mitigation measures in the RPAs and RPMs until such time as EPA has put in place permanent measures that ensure against likely jeopardy to listed salmon and steelhead or adverse modification of their critical habitat, and an order compelling EPA to put in place such permanent measures within one year.

PARTIES

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

12. Plaintiff Pacific Coast Federation of Fishermen's Associations ("PCFFA") is an association of commercial fishermen that works to protect salmonid habitat and promote restoration where salmonid habitat is degraded. PCFFA's principal place of business is in San Francisco, California. PCFFA is the largest organization of commercial fishermen on the west coast. It consists of a federation of 15 smaller commercial fishermen vessel owners'

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1 associations, trade associations, port associations and marketing associations with membership
2 throughout Washington, Oregon, and California. PCFFA also has “at-large” members who are
3 unaffiliated with any particular fishermen association but have become individual members of
4 PCFFA. Collectively, PCFFA represents nearly 1,200 west coast commercial fishing families.
5 Many of PCFFA’s members derive all or part of their income from the harvesting of Pacific
6 salmonids. The continued use of pesticides without adequate protection for salmonids impairs
7 the commercial interests of PCFFA and its members.

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

19 14. Plaintiff Defenders of Wildlife is a non-profit organization with its principal
20 office in Washington, D.C. and field offices throughout the country. Defenders has over 950,000
21 members and supporters; Defenders’ primary mission is to further the protection of native
22 wildlife and plants in their natural communities. Many of Defenders of Wildlife’s members in
23 the Pacific Northwest use the waters of California, Oregon, and Washington for recreational,
24 commercial, and aesthetic pursuits including salmonid fishing, boating, and wildlife
25 photography. The inadequately mitigated use of the pesticides in the Pacific Northwest and

California harms salmonids and impairs the interests of Defenders of Wildlife and its members.

15. The plaintiffs are organizations with members who use and enjoy salmonids and salmonid habitat in the Pacific Northwest and California for recreational, scientific, aesthetic, cultural, and commercial purposes. EPA's failure to implement the RPAs in NMFS's OP and Carbamate BiOps results in inadequate mitigation of pesticide uses and harms these members' past, present, and future enjoyment of salmonids and salmonid habitat.

16. Defendant Environmental Protection Agency is the federal agency charged with registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). FIFRA, 7 U.S.C. §§ 136-136y. EPA’s regional headquarters for several of the States affected by the acts and omissions at issue in this case is located in Seattle, Washington. Under the ESA, EPA is responsible, in consultation with NMFS, for ensuring that its pesticide registrations do not jeopardize the survival and recovery of listed salmonid species or adversely affect their critical habitat. See 16 U.S.C. § 1536(2)(a).

JURISDICTION

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

18. As required under the ESA, the plaintiffs provided 60 days' notice of their intent to sue by letter sent to EPA and NMFS on September 17, 2010. A copy of that letter is appended as Attachment A. EPA has not remedied the violations set out in that 60-day notice. See 16 U.S.C. § 1540(g)(2)(A).

BACKGROUND

I. STATUTORY FRAMEWORK

A. FIFRA

19. FIFRA prohibits the use of a pesticide in the United States unless EPA has registered that particular use. 7 U.S.C. § 136a(a). EPA may only register a pesticide if it

1 determines that “when used in accordance with widespread and commonly recognized practice it
 2 will not generally cause unreasonable adverse effects on the environment.” Id. § 136a(c)(5); see
 3 also id. § 136a-1(a)(2). FIFRA defines “unreasonable adverse effects on the environment” to
 4 mean “any unreasonable risk to man or the environment, taking into account the economic,
 5 social, and environmental costs and benefits of the use of any pesticide” Id. at § 136(bb).

6 20. EPA has reregistered pesticides that have been on the market for decades prior to
 7 enactment of the environmental registration requirements currently in place. See 7 U.S.C.
 8 § 136a-1. Even after registering or reregistering a pesticide use, EPA retains discretionary
 9 involvement and control over that registration. EPA has the authority to cancel pesticide
 10 registrations whenever “a pesticide or its labeling or other material required to be submitted does
 11 not comply with the provisions of [FIFRA] or, when used in accordance with widespread and
 12 commonly recognized practice, generally causes unreasonable adverse effects on the
 13 environment.” 7 U.S.C. § 136d(b). EPA must periodically review pesticide registrations, and
 14 should strive to complete such reviews every 15 years. Id. at § 136a(g)(1).

15 B. ESA

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

22 22. NMFS and FWS have adopted joint regulations governing the section 7(a)(2)
 23 consultation process. Under the joint regulations, a federal agency must initiate a section 7(a)(2)
 24 consultation with NMFS or FWS whenever it undertakes an “action” that “may affect” a listed
 25 species or critical habitat. 50 C.F.R. § 402.14(a). An agency is relieved of the obligation to
 26

1 consult only if the action will have “no effect” on listed species or designated critical habitat.

2 23. The joint regulations broadly define the scope of agency actions subject to the
 3 ESA section 7(a)(2) mandates to include the granting of licenses and permits. 50 C.F.R.
 4 § 402.02. EPA’s pesticide registrations under FIFRA constitute agency “actions” under ESA
 5 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
 6 at 1033.

7 24. If an agency determines that its action “may affect” but is “not likely to adversely
 8 affect” a listed species or its critical habitat, the ESA regulations permit “informal consultation,”
 9 in which there is no requirement for a biological opinion so long as NMFS or FWS concurs in
 10 writing with the “not likely to adversely affect” determination. 50 C.F.R. § 402.13. If the
 11 wildlife agency does not concur in the “not likely to adversely affect” determination or if the
 12 action agency determines that the action is “likely to adversely affect” the listed species, the
 13 agencies must engage in “formal consultation.” 50 C.F.R. §§ 402.02, 402.14(a).

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

18 26. In a biological opinion, NMFS must determine whether the federal action subject
 19 to the consultation will jeopardize the survival and recovery of listed species or will destroy or
 20 adversely modify critical habitat. 16 U.S.C. § 1536(b)(4). If NMFS determines that the action
 21 will jeopardize the species or adversely modify its critical habitat, the biological opinion must
 22 specify any reasonable and prudent alternative (“RPA”) the action agency could take to avoid
 23 jeopardy or specify that there is no RPA. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h)(3).
 24 NMFS and the action agencies must use the best available science in consultations, biological
 25 opinions, and jeopardy and adverse modification determinations. 16 U.S.C. § 1536(a)(2);
 26

1 50 C.F.R. § 402.14(g)(8).

2 27. Even after the procedural requirements of a consultation are complete, the
 3 ultimate duty to ensure that an action will not likely jeopardize a listed species or adversely
 4 modify its critical habitat lies with the action agency. This substantive duty is most cleanly
 5 fulfilled by implementing a valid RPA that results from a properly completed consultation, but
 6 an action agency is technically free to choose another alternative course of action if it can
 7 independently ensure that the alternative will avoid jeopardy and adverse modification.

8 28. Not only does a § 7(a)(2) consultation assist the action agency in discharging its
 9 duty to avoid jeopardy, but the biological opinion also affects the agency's obligation to avoid
 10 the "take" of listed species. Under ESA Section 9, 16 U.S.C. § 1538(a)(1)(B), it is illegal for any
 11 person – whether a private or governmental entity – to "take" any endangered species of fish or
 12 wildlife listed under the ESA. By regulation, NMFS has made the take prohibition applicable to
 13 threatened salmon and steelhead. 50 C.F.R. § 223.203(a); id. § 223.102(a). "Take" is defined to
 14 mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to
 15 engage in such conduct. Id. § 1532(19). NMFS has defined "harm" to include "significant
 16 habitat modification or degradation which actually kills or injures fish or wildlife by significantly
 17 impairing essential behavioral patterns, including breeding, spawning, rearing, migrating,
 18 feeding or sheltering." 50 C.F.R. § 222.102.

19 29. As part of a consultation, NMFS determines whether to authorize the incidental
 20 take of listed species through the issuance of an incidental take statement. An incidental take
 21 statement may be issued only if the action can proceed without causing jeopardy. 16 U.S.C.
 22 § 1536(b)(4). An incidental take statement must: (1) specify the extent and impact of the
 23 incidental take on the listed species; (2) specify reasonable and prudent measures NMFS
 24 considers necessary to minimize that impact; and (3) set forth mandatory terms and conditions.

25 Id.

1 30. An incidental take statement insulates the federal agency from liability for a take
 2 of a threatened or endangered species, provided the agency implements the measures required to
 3 avoid jeopardy and the statement's terms and conditions. This insulation extends further to any
 4 entity receiving a federal permit, license, authorization, or funding subject to, and in compliance
 5 with, the statement. Thus, the Act provides that:

6 [A]ny taking that is in compliance with the terms and conditions specified in a
 7 written statement provided under subsection (b)(4)(iv) of this section shall not be
 considered to be a prohibited taking of the species concerned.

8 16 U.S.C. § 1536(o)(2).

9 II. THE CONSULTATION PROCESS FOR THE ORGANOPHOSPHATE AND
 10 CARBAMATE BIOPS

11 31. In 2002, the plaintiffs and others brought a citizen suit alleging that EPA violated
 12 the ESA by failing to consult with NMFS regarding the effects of its FIFRA pesticide
 13 registrations. This Court held that EPA violated ESA section 7(a)(2) with respect to 54
 14 specifically identified pesticides. WTC I, slip op. at 20. The Court ordered EPA to make effects
 15 determinations and initiate consultations with NMFS regarding the 54 pesticides in accordance
 16 with a prescribed timetable ending in December 2004. Id. at 17-18. During the pendency of the
 17 consultations, the Court prohibited EPA from authorizing uses of the pesticides within prescribed
 18 distances of salmonid-bearing streams. Id. at 2-4, 12. Regarding seven pesticides frequently
 19 found in urban salmonid streams, the Court ordered EPA to require point-of-sale warnings in
 20 home and garden stores indicating that use of these pesticides can harm salmonids. Id. at 10-11.
 21 The Ninth Circuit affirmed all aspects of this Court's orders, including the injunction. WTC I,
 22 413 F.3d at 1029.

23 32. Between August of 2002 and December of 2004, EPA made effects
 24 determinations for all 54 of the pesticides in accordance with the schedule this Court established
 25 in WTC I. EPA initiated consultations with NMFS on the 37 of those pesticides it deemed "may
 26 affect" listed salmonid species by December 12, 2004. By November 5, 2007, NMFS had not

1 completed a formal or informal consultation for a single pesticide subject to the WTC I
 2 injunction. On that date, some of the plaintiffs filed suit against NMFS for failing to complete
 3 those consultations. NW Coalition for Alternatives to Pesticides v. NMFS, Civ. No. 07-01791
 4 (W.D. Wash. filed Nov. 5, 2007).

5 33. On July 31, 2008, NMFS and the plaintiffs entered into a consent decree whereby
 6 NMFS agreed to issue biological opinions on these 37 pesticides within approximately 4 years.
 7 Stipulated Settlement Agreement and Order of Dismissal, NW Coalition for Alternatives to
 8 Pesticides v. NMFS, Civ. No. 07-01791 (W.D. Wash. July 31, 2008).

9 III. EPA'S FAILURE TO IMPLEMENT THE BIOPS

10 34. Pursuant to the consent decree, NMFS issued the first biological opinion
 11 evaluating the effects of three organophosphate pesticides on November 18, 2008. The OP BiOp
 12 concluded that continued use of the organophosphate pesticides diazinon, malathion, and
 13 chlorpyrifos would jeopardize the continued existence of 27 species of Pacific salmon and
 14 steelhead and would destroy or adversely modify the critical habitat for 25 of those species.

15 35. In accordance with the ESA, the BiOp articulated a comprehensive RPA that
 16 required EPA to establish specific protections that would avoid jeopardy and adverse
 17 modification of critical habitat. Those protections, in part, require EPA to:

- 18 • Prohibit aerial applications of the three pesticides within 1,000 feet of salmon
 waters, OP BiOp at 393;
- 19 • Prohibit ground applications of the three pesticides within 500 feet of salmon
 waters, id.;
- 20 • Require a 20 foot non-crop vegetative buffer around salmon waters and ditches
 that drain into salmon habitat, id. at 396;
- 21 • Prohibit applications of the three pesticides when wind speeds are greater than
 or equal to 10 mph, id.

23 36. In the OP BiOp, NMFS concluded that the current uses of the three OP pesticides
 24 are killing individual salmon and steelhead. As described in the OP BiOp, "take" occurs in a
 25 number of ways, including direct mortality and injury to adults and juveniles, and harm to
 26

1 olfactory (homing) sense, impaired growth and feeding, reproductive impairment and impacts to
 2 salmonid prey. The magnitude of this prohibited take is quite large; indeed, NMFS concluded
 3 that it is enough to jeopardize the continued existence of the species. OP BiOp at 391.

4 37. NMFS proposed an RPA that will reduce the amount of take and will avoid
 5 jeopardy and destruction or adverse modification of critical habitat. However,

6 [i]n the proposed RPA, NMFS does not attempt to ensure there is no take of listed
 7 species. NMFS believes take will occur, and has provided an incidental take
 8 statement exempting that take from the take prohibitions, so long as the action is
 conducted according to the RPA and reasonable and prudent measures (RPM).

9 OP BiOp at 392.

10 38. The OP BiOp provided that the RPA “must be implemented in its entirety within
 11 one year of the receipt of the Opinion to ensure that the proposed registration of these pesticides
 12 is not likely to” cause jeopardy or adverse modification of critical habitat. OP BiOp at 393.

13 39. On April 20, 2009, NMFS issued a second BiOp evaluating three carbamate
 14 pesticides – carbaryl, carbofuran, and methomyl (“Carbamate BiOp”). NMFS concluded that
 15 EPA’s registration of pesticide products containing carbaryl and carbofuran jeopardize 22 listed
 16 Pacific salmonids and likely destroy or adversely modify the habitat of at least 20 listed Pacific
 17 salmonids. NMFS also found that methomyl registrations jeopardize 18 listed Pacific salmonids
 18 and likely destroy or adversely modify the habitat of at least 16 listed Pacific salmonids.

19 40. The Carbamate BiOp includes an RPA which, among other things, requires EPA
 20 to:

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

25 ² Although it was included in the draft, the requirement to implement a non-crop vegetative
 26 buffer around salmon waters is absent from the final Carbamate BiOp’s RPA. NCAP, PCFFA,
 27 and IFR submitted comments to NMFS and EPA objecting to this omission and outlining the
 28

1 Like the OP BiOp, the RPA in the Carbamate BiOp required these protective measures to be
 2 implemented within one year. *Id.* at 489.

3 41. Like the OP BiOp, in the Carbamate BiOp NMFS concluded that the current uses
 4 of the three Carbamate pesticides are taking listed salmonids in a number of ways, including
 5 direct mortality and injury to adults and juveniles, and harm to olfactory (homing) sense,
 6 impaired growth and feeding, reproductive impairment and impacts to salmonid prey. NMFS
 7 proposed an RPA that will reduce the amount of take; because some take will still occur, NMFS
 8 also included an incidental take statement exempting that take “so long as the action is conducted
 9 according to the RPA and reasonable and prudent measures (RPM).” Carbamate BiOp at 488.

10 42. On September 10, 2009 – almost a year after NMFS issued the OP BiOp – EPA
 11 sent a letter to NMFS outlining its plan for changing the registrations for the three pesticides
 12 covered in the OP BiOp. On May 14, 2010, EPA sent a similar letter announcing its plan to
 13 implement the Carbamate BiOp. Many of the measures that EPA proposed to implement in
 14 these letters differ significantly from and are less protective of salmonids than the measures
 15 required by the RPAs and RPMs.

16 43. On April 29, 2010, EPA sent a letter to several manufacturers of the three
 17 pesticides addressed in the OP BiOp requesting that the manufacturers adopt several label
 18 changes “on a voluntary basis” as use limitations for the three OP pesticides. On May 7, 2010,
 19 the manufacturers replied that they were unwilling to make any of the label changes requested by
 20 EPA on a voluntary basis.

21 44. EPA has yet to implement a single one of the requirements of NMFS’s RPAs and
 22 RPMs for these six pesticides. Nor has EPA taken steps to implement any alternative protective
 23 measures or steps to implement any other changes to the uses of these pesticides that would
 24 avoid jeopardy and adverse modification in response to the BiOps. EPA has not implemented
 25

26 science documenting both the necessity and effectiveness of this measure.

1 any label changes or even begun the process of changing the labels to ensure that registrations
 2 for these pesticides comply with the ESA. 2010 marks the second growing season since issuance
 3 of the biological opinions and the eighth year since this Court first held that EPA's pesticide
 4 registrations must comply with the ESA—and to date EPA has not required any on-the-ground
 5 changes in use of these pesticides to protect salmonids. EPA has not addressed its failure to
 6 implement the RPA and RPM requirements, nor has it implemented adequate alternative
 7 measures to address the continued harm that this delay is causing the species.

8 CLAIMS FOR RELIEF

9 FIRST CLAIM FOR RELIEF

10 EPA Has Failed to Ensure That Its Registration of Six Pesticides Is Not Likely to 11 Jeopardize Listed Salmonids or Adversely Modify or Destroy Critical Habitat

12 45. Paragraphs 1 through 44 are hereby realleged as though set out in full.

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

17 47. ESA section 7(a)(2) requires EPA to “insure” that its pesticide registrations are
 18 “not likely to jeopardize the continued existence of any endangered species or threatened species
 19 or result in the destruction or adverse modification of habitat of such species which is determined
 20 by [NMFS] . . . to be critical.” See 16 U.S.C. § 1536(a)(2); see also 50 C.F.R. § 402.14; WTC I,
 21 413 F.3d at 1031-32.

22 48. On November 18, 2008 NMFS issued a biological opinion concluding that
 23 continued use of the organophosphate pesticides diazinon, malathion, and chlorpyrifos would
 24 jeopardize the continued existence of 27 species of Pacific salmon and steelhead and would
 25 destroy or adversely modify the critical habitat for 25 of those species.

26 49. On April 20, 2009, NMFS issued a second BiOp concluding that the continued

use of the carbamate pesticides carbaryl and carbofuran would jeopardize 22 listed Pacific salmonids and is likely destroy or adversely modify the habitat of at least 20 listed Pacific salmonids. NMFS found that methomyl registrations jeopardize 18 listed Pacific salmonids and likely destroy or adversely modify the habitat of at least 16 listed Pacific salmonids.

5 50. Both the OP BiOp and the Carbamate BiOp include reasonable and prudent
6 alternatives that require EPA to establish specific protections that NMFS has concluded would
7 avoid jeopardy and adverse modification of critical habitat. To date, EPA has not implemented
8 any of the measures in either RPA, nor has EPA taken adequate alternative steps to avoid
9 jeopardy to listed salmonids or adverse modification of critical habitat.

10 51. EPA has failed to insure that its pesticide registrations are not likely to jeopardize
11 listed salmonids or adversely modify their critical habitat, as required under ESA, § 7(a)(2).
12 EPA’s failure to implement the RPAs is allowing pesticides to continue to harm and kill Pacific
13 salmonids, jeopardizing their continued existence and adversely modifying their critical habitat.
14 EPA’s failure to implement the RPAs or take any other adequate steps to protect salmonids from
15 these six pesticides and avoid jeopardy or adverse modification violates section 7(a)(2) of the
16 ESA, 16 U.S.C. § 1536(a)(2), and is arbitrary, capricious, and not in accordance with law,
17 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

EPA Is Unlawfully Taking Listed Salmonids

52. Paragraphs 1 through 51 are hereby realleged as though set out in full.

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

54. ESA Section 9 prohibits EPA from taking listed salmonids by directly killing

1 individual salmonids or by significantly modifying or degrading salmonid habitat to the point
2 that salmonid breeding, spawning, rearing, migrating, feeding or sheltering are significantly
3 impaired. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 223.203(a); *id.* § 223.102(a); *id.* § 222.102.

4 55. On November 18, 2008 NMFS issued a biological opinion concluding that the
5 current uses of the organophosphate pesticides diazinon, malathion, and chlorpyrifos are taking
6 listed salmonids.

7 56. On April 20, 2009, NMFS issued a second BiOp concluding that the continued
8 use of three carbamate pesticides – carbaryl, carbofuran, and methomyl – are taking listed
9 salmonids.

10 57. Both the OP BiOp and the Carbamate BiOp include incidental take statements
11 authorizing limited take of listed salmonids so long as EPA complies with the RPAs and RPMs
12 in the BiOps.

13 58. The incidental take statements only insulate EPA from liability for the take of
14 listed salmonids if EPA complies with the measures to avoid likely jeopardy and the incidental
15 take statements' terms and conditions. 16 U.S.C. § 1536(o)(2); id. § 1536(b)(4).

16 59. To date, EPA has not implemented any of the measures in the RPAs, the RMPs,
17 or any of the terms and conditions of the incidental take statements. Accordingly, the incidental
18 take statements in the OP and Carbamate BiOps do not shield EPA from liability for take.

19 60. Without the protection provided by the ITS, EPA's take of listed salmonids
20 violates section 9 of the ESA, 16 U.S.C. § 1538, and is arbitrary, capricious, and not in
21 accordance with law. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray that the Court:

24 A. Declare that EPA is in violation of section 7(a)(2) of the ESA, 16 U.S.C.
25 § 1536(a)(2), by failing to ensure that the use of six pesticides (diazinon, malathion, chlorpyrifos

carbaryl, carbofuran, and methomyl) is not likely to jeopardize the continued existence of listed salmonids and destroy or adversely modify their critical habitat;

3 B. Declare that EPA is in violation of section 9 of the ESA, 16 U.S.C. § 1538, by taking
4 listed salmonids through authorization of the use of six pesticides (diazinon, malathion,
5 chlorpyrifos, carbaryl, carbofuran, and methomyl) without compliance with the RPAs and RPMs set
6 forth in the OP and Carbamate BiOps;

7 C. Enjoin, vacate, and set aside EPA's authorization of any use of diazinon, malathion,
8 chlorpyrifos, carbaryl, carbofuran, and methomyl that does not comply with the RPAs and RPMs
9 until such time as EPA has put in place adequate permanent measures that ensure against jeopardy
10 to listed salmon and steelhead or adverse modification of their critical habitat and has complied with
11 the terms and conditions of the incidental take statements;

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

14 E. Grant such other and further relief as plaintiffs may request and as the Court deems
15 just and proper.

Respectfully submitted this 29th day of November, 2010.

/s/ Stephen D. Mashuda
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**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF -18-**

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