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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

20 CENTER FOR BIOLOGICAL
DIVERSITY, *et al.*,

21 Plaintiffs,

22 v.

23 UNITED STATES ENVIRONMENTAL
24 PROTECTION AGENCY, *et al.*,

25 Defendants,

26 and

27 CROPLIFE AMERICA, *et al.*

28 Intervenor-Defendants.

CASE NO. 11-CV-293-JCS

**MOTION OF CROPLIFE AMERICA,
AMERICAN CHEMISTRY COUNCIL,
RECKITT BENCKISER LLC, AND
AMERICAN FARM BUREAU
FEDERATION FOR A MORE DEFINITE
STATEMENT**

(The Honorable Joseph C. Spero)

Date: October 4, 2013

Time: 1:30 pm

Place: Courtroom G - 15th Floor

1 **NOTICE OF MOTION AND MOTION FOR A MORE DEFINITE STATEMENT**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Notice is hereby given that on October 4, 2013, at 1:30 P.M., or as soon thereafter as the
4 case may be heard, in the Courtroom of the Honorable Joseph C. Spero (Courtroom G - 15th
5 Floor), Intervenor-Defendants CropLife America, Responsible Industry for a Sound
6 Environment, Southern Crop Production Association, Western Plant Health Association and Mid
7 America CropLife Association (collectively “CropLife”); American Chemistry Council
8 (“ACC”); Reckitt Benckiser LLC (“Reckitt”); and American Farm Bureau Federation, National
9 Agricultural Aviation Association, National Alliance of Forest Owners, National Association of
10 Corn Growers, National Cotton Council, National Council of Farmer Cooperatives, National
11 Potato Council, Oregonians for Food and Shelter, USA Rice Federation, and Washington Friends
12 of Farms and Forests (“User Groups”) (collectively “Intervenor-Defendants”) will and hereby do
13 respectfully move for a more definite statement pursuant to Federal Rule of Civil Procedure
14 12(e).

15 In support of this Motion for a More Definite Statement, Intervenor-Defendants rely on
16 the Memorandum in Support thereof, the Proposed Order, all pleadings and papers filed in this
17 action, and upon such other matters the Court may entertain.

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U.S. EPA, *Pesticides: Reregistration 1, 3-Dichloropropene*, <http://www.epa.gov/oppsrrd1/reregistration/telone/> (last visited Aug. 26, 2013) 6

U.S. Fish and Wildlife Service, U.S. EPA, *U.S. Fish and Wildlife Service Biological Opinion: On Selected Pesticides* (revised Sept. 14, 1989)..... 13

U.S. Fish and Wildlife Service, U.S. EPA, *U.S. Fish and Wildlife Service Species Profile, Higgins eye Lampsilis higginsii*, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=F009> (last visited Aug. 26, 2013) 13

INTRODUCTION

1
2 This Court's April 22, 2013 Order gave Plaintiffs unambiguous instructions on how to
3 revise their complaint alleging non-compliance by Defendant U.S. Environmental Protection
4 Agency ("EPA") with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*¹ Plaintiffs
5 have not complied.

6 Rather than adhering to the roadmap the Court provided, the Amended Complaint (ECF
7 No. 160) has ballooned to 2,129 repetitive and often-ambiguous paragraphs that render it
8 impossible for either Intervenor-Defendants or the Federal Defendants to respond. Thus, it is far
9 from the "short and plain statement" of Plaintiffs' claims required by Federal Rule of Civil
10 Procedure 8(a).

11 On August 15, the Federal Defendants filed a Motion for More Definite Statement (ECF
12 No. 168). The Intervenor-Defendants concur that, at the least, the new Amended Complaint is
13 inadequate and that, pursuant to Federal Rule of Civil Procedure 12(e), Plaintiffs should be
14 directed to try again.² Intervenor-Defendants have prepared this memorandum as a supplement
15 to the explanations in the Federal Defendants' Motion and to further document why both
16 Intervenor-Defendants' and the Federal Defendants' Motion for a More Definite Statement
17 should be granted.

BACKGROUND

18
19 In its April 22 Order, the Court ruled that the Ninth Circuit's 2012 *en banc* decision in
20 *Karuk Tribe of California v. United States Forest Service*, 681 F.3d 1006 (9th Cir. 2012), *cert.*
21 *denied*, 133 S. Ct. 1579 (2013), explicitly barred Plaintiffs' theory that EPA's "discretionary
22

23 ¹ Order Granting Motion to Intervene; Granting Motions to Dismiss and Dismissing Complaint
24 with Leave to Amend, ECF No. 157, 2013 U.S. Dist. Lexis 57436 (Apr. 22, 2013) ("Order"
or "April 22 Order").

25 ² Indeed, the Plaintiffs' failure to comply with the Court's Order is sufficiently egregious to
26 support involuntary dismissal of this case in its entirety pursuant to Federal Rule of Civil
27 Procedure 41(b). *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996) ("[N]o
28 attempt [was] made to match up the specific factual allegations and the specific legal claims
to a specific defendant. The result is that defendants and this court are literally guessing as to
what facts support the legal claims being asserted against certain defendants." (citation
omitted)).

1 control and involvement” over pesticides constituted “agency action” sufficient to trigger the
2 consultation requirements established by Section 7(a) of the ESA, 16 U.S.C. § 1536(a). Order at
3 14-15. It also provided Plaintiffs with a roadmap for how properly to replead their case. For
4 example, the Court directed:

- 5 • “Plaintiffs must bring a separate ESA claim in connection with the EPA’s
6 affirmative act with regard to each individual pesticide in order to invoke
7 Section 7’s consultation requirement.” *Id.* at 18.
- 8 • “Plaintiffs must show why each particular claim is governed by FIFRA § 16(a)
9 rather than § 16(b) to establish this Court’s jurisdiction.” *Id.* at 22.
- 10 • “Plaintiffs must also address the jurisdictional issue for a claim based on failure to
11 reinitiate consultation if the triggering event is regulated under FIFRA.” *Id.* at 32.
- 12 • “Plaintiffs must plead facts showing the specific affirmative acts or orders of the
13 EPA that they allege with respect to each pesticide.” *Id.*
- 14 • “[Plaintiffs] must allege with greater specificity the facts giving rise to the EPA’s
15 duty to reinitiate consultation regarding each of the pesticides and species
16 addressed in the 1989 and 1993 Biological Opinions, and must address the factors
17 as written in 50 C.F.R. § 402.16.” *Id.* at 17.

16 The Court further granted Plaintiffs thirty days (later extended to forty-five days) to file
17 an amended complaint, if they chose to do so.

18 In their 437-page Amended Complaint, Plaintiffs have gone from failing to cite a single
19 affirmative act for any active ingredient to citing virtually every activity EPA has ever
20 undertaken with respect to each active ingredient—including such things as voluntary
21 cancellation orders and typographical corrections. Plaintiffs then go on to reference EPA
22 websites for additional, *unspecified* acts—and allege that *all* of these are “actions” that trigger a
23 duty to consult, while continuing to assert that EPA’s “continuing jurisdiction” triggers
24 consultation requirements.³

25 ³ In their claims for relief, Plaintiffs state that they are relying on every act cited in the
26 Amended Complaint to support their duty to consult claims. *See, e.g.,* Am. Comp. ¶ 1510
27 (“The actions subsequent to the registration, including product registration, as set forth
28 above, constitute additional ‘affirmative agency actions’ subject to consultation under
Section 7(a)(2) of the ESA.”).

LEGAL STANDARD

Federal Rule of Civil Procedure 12(e) authorizes a motion for a more definite statement where “the complaint is so indefinite that [the] defendant cannot ascertain the nature of the claim being asserted and therefore cannot reasonably be expected to frame an appropriate response.” *City of Oakland v. Keep on Trucking Co.*, No. C 95–03721 CRB, 1998 WL 470465, at *1 (N.D. Cal. July 30, 1998); *cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, (2007) (complaint must “give the defendant fair notice of what the ... claim is and the grounds upon which it rests” (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Kazemi v. Payless Shoesource Inc.*, No. C 09-5142 MHP, 2010 WL 963225, at *4 (N.D. Cal. Mar. 16, 2010) (Spero, M.J.).

Courts are to consider the requirements of Rule 12(e) in conjunction with Rule 8(a)’s “simplified pleading standard [which] applies to all civil actions, with limited exceptions.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). “Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud.” *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003) (Easterbrook, J.).⁴ Thus, Rule 12(e) also is the appropriate vehicle for seeking clarification of pleadings which fail to meet Rule 8(a)’s requirements.

ARGUMENT

I. PLAINTIFFS’ FAILURE TO CONSULT CLAIMS ARE SO VAGUE AND AMBIGUOUS THAT INTERVENOR-DEFENDANTS CANNOT REASONABLY PREPARE A RESPONSE.

Plaintiffs allege a failure to consult with respect to 31 active ingredients. The claims—to which Plaintiffs devote a staggering 956 paragraphs—are formulaic, with much of the language from one claim being repeated verbatim in the next. *See* Am. Compl. ¶¶ 108-786, 1507-1785. Yet Plaintiffs still fail to comply with the Court’s April 22 Order.

This Court unambiguously instructed Plaintiffs to “allege a separate ESA claim

⁴ *See also, e.g., Mann v. Boatwright*, 477 F.3d 1140, 1148 (10th Cir. 2007) (“It was not the district court’s job to stitch together cognizable claims for relief from the wholly deficient pleading”).

1 corresponding to an affirmative act with respect to each” individual pesticide, and to “show why
2 each particular claim is governed by FIFRA § 16(a) rather than § 16(b) to establish this Court’s
3 jurisdiction.” Order at 15, 22. The Court described the desired result: “if properly pleaded, each
4 pesticide corresponds to an individual agency affirmative act which triggers the EPA’s duty to
5 consult with the Services.” *Id.* at 19.

6 Rather than alleging an “individual agency affirmative act” that corresponds to each
7 pesticide, however, Plaintiffs now indiscriminately identify the initial registration decisions and
8 any and all acts related to the products that EPA has taken since the initial registration decisions,
9 without identifying which act or acts allegedly triggers a duty to consult, or why. The cited
10 activities include ministerial acts that Plaintiffs’ counsel previously has acknowledged would
11 never trigger a duty to consult,⁵ registration and reregistration decisions the Court has already
12 ruled are barred,⁶ and tolerance decisions that are subject to the exclusive jurisdiction of the court
13 of appeals under provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(h).
14 And Plaintiffs continue to allege that EPA’s ongoing oversight and control over registrations is
15 sufficient to trigger a duty to consult,⁷ notwithstanding the Court’s express holding to the
16 contrary. Order at 14.

17 For example, for 1,3-dichloropropene, the Amended Complaint mentions EPA’s 1998
18 Reregistration Eligibility Decision (“RED”), several April 2010 “Soil Fumigant Risk
19 Assessments,” an Updated Reregistration Eligibility Decision Fact Sheet from 2008, and EPA’s
20 completion of various product reregistrations implementing the RED. But the Amended
21 Complaint never indicates how or why Plaintiffs believe any of these acts triggered a duty to
22 consult under the ESA—let alone whether those claims are governed by FIFRA § 16(a) or
23

24 ⁵ See *infra* at 5 and n. 12.

25 ⁶ Order at 26.

26 ⁷ See Am. Compl. ¶¶ 116, 141, 161, 183, 206, 226, 246, 266, 287, 310, 331, 353, 376, 398,
27 419, 441, 462, 487, 507, 528, 550, 571, 592, 615, 635, 657, 680, 703, 726, 748, 771, 1509,
28 1518, 1536, 1545, 1554, 1563, 1572, 1581, 1590, 1599, 1608, 1617, 1626, 1635, 1644, 1653,
1662, 1671, 1680, 1689, 1698, 1707, 1716, 1725, 1734, 1743, 1752, 1761, 1770.

1 § 16(b). *See* Am. Compl. ¶¶ 113, 117-19.

2 This pattern is repeated as to many other products. Plaintiffs list a host of activities, such
 3 as the issuance of tolerances that restrict product usage,⁸ cancellation orders or proceedings that
 4 do the same,⁹ and fact sheets¹⁰ without specifying whether or why any of these acts would trigger
 5 a duty to consult or cause the Plaintiffs harm. Indeed, Plaintiffs even cite as triggering
 6 consultation a one page memorandum “correct[ing] a typographical error” in the dicamba
 7 RED.¹¹ *See* Am. Compl. ¶ 377; EPA, Correction to the Amendments to the Dicamba RED (June
 8 17, 2009). This is both ludicrous and contradicts Plaintiffs’ counsel’s statement to the Court,
 9 “[t]here’s no way they would consult on each of these, you know, daily events when they carry
 10 out their registration. That’s not where they consult. They consult on the actual registration.” Tr.
 11 at 16:13-16, Mar. 15, 2013, ECF No. 156 (“Mar. 15, 2013 Tr.”).¹²

12 Similarly, the Amended Complaint makes 31 separate references¹³ to EPA’s “Chemical
 13

14 ⁸ *See, e.g.*, Am. Compl. ¶ 207. The Federal Food, Drug, and Cosmetic Act expressly provides
 15 that challenges to tolerances must be brought in the courts of appeals and thus are similarly
 outside the jurisdiction of this court. *See* 21 U.S.C. § 346a(h).

16 ⁹ *See, e.g.*, Am. Compl. ¶¶ 162, 248, 289, 355, 399, 464. Another problem with Plaintiffs’
 17 allegations is that, to the extent they raise EPA actions that are not yet final as potential
 18 triggers for consultation, their claims are not yet ripe for adjudication. *See, e.g.*, ¶¶ 248, 892,
 897, 909, 1478 (raising allegations related to EPA’s 2008 risk mitigation and subsequent, but
 19 not-yet-final, 2013 Notice of Intent to Cancel affecting registrations for certain rodenticide
 bait products).

20 ¹⁰ *See, e.g.*, Am. Compl. ¶ 118.

21 ¹¹ In another example, among the “actions” Plaintiffs reference by date for 1,3-dichloropropene
 22 is an October 16, 2008 rejection of a label change notification, whereby EPA requested the
 label change be submitted under a different process. In other words, no ultimate decision on
 23 the change was reached and no change to the product was made. *See* Am. Compl. ¶ 120. It
 appears that the Amended Complaint simply includes the first entry listed in EPA’s Pesticide
 Product Label System for that product without a meaningful analysis.

24 ¹² Similarly, the Amended Complaint lists product registrations, which typically merely
 25 conform product labels to the restrictions set forth in the reregistration decisions, without
 26 alleging in any claim any specific facts to explain why any of these activities allegedly
 triggered consultation requirements. *See* Mar. 15, 2013 Tr. at 19:9-10 (“It reregisters all the
 products, and maybe it’s a perfunctory action.”).

27 ¹³ *See* Am. Compl. ¶¶ 115, 140, 160, 182, 205, 225, 245, 265, 286, 309, 330, 352, 375, 397,
 28 418, 440, 461, 486, 506, 527, 549, 570, 591, 614, 634, 656, 679, 702, 725, 747, 770.

1 Search” Internet tool and 25 references to pesticide specific Internet pages.¹⁴ Plaintiffs claim
 2 that “subsequent actions ... are summarized on these webpages.” *See e.g.* Am. Compl. ¶ 115.
 3 But the Chemical Search database can contain hundreds of documents per chemical and each
 4 pesticide-specific Internet page contains dozens of documents and links to additional
 5 webpages.¹⁵ Nowhere in the Amended Complaint do Plaintiffs designate which of these
 6 references they allege to be a specific “agency action.” Instead, Plaintiffs simply purport,
 7 through identical language repeated in every claim for relief, to rely on every act or allegation
 8 mentioned earlier in the Amended Complaint as an affirmative act that triggers a duty to
 9 consult.¹⁶

10 Plaintiffs cannot assert that every single activity by EPA pertaining to the registration or
 11 reregistration of an active ingredient or a registration containing that ingredient triggers a duty to
 12 consult or causes them harm, but it also is impossible to determine from the Amended Complaint
 13 which acts Plaintiffs *do* believe trigger a duty to consult. As a consequence, Intervenor-
 14 Defendants cannot respond.

15 As a further example, Plaintiffs’ allegations regarding the herbicide dicamba cite EPA’s
 16 Office of Pesticide Programs’ Chemical Search website. Am. Compl. ¶ 375. That site, in turn,
 17 includes a number of sections with different categories of information regarding dicamba. But
 18 Plaintiffs do not specify which section contains the relevant information. Perhaps Plaintiffs are
 19 referring to the dicamba website’s “Regulatory Actions” section, which has two listings: a RED
 20 and a tolerance decision. But the dicamba RED was issued after an opportunity for public
 21

22 ¹⁴ *See* Am. Compl. ¶¶ 115, 140, 160, 205, 225, 265, 286, 309, 330, 352, 375, 397, 418, 440,
 23 461, 486, 527, 549, 570, 634, 656, 679, 702, 725, 770.

24 ¹⁵ The pages also consistently note that “EPA no longer updates this page.” *See, e.g.*, Am.
 25 Compl. ¶ 115; EPA, Pesticides: Reregistration 1, 3-Dichloropropene,
 26 <http://www.epa.gov/oppsrrd1/reregistration/telone/> (last visited Aug. 26, 2013).

27 ¹⁶ For instance, in the First Claim for Relief for 1,3-dichloropropene Plaintiffs assert that all
 28 actions “set forth above, constitute additional ‘affirmative agency actions’ subject to
 consultation.” Plaintiffs repeat this assertion verbatim 31 times: *see* Am. Compl. ¶¶ 1510,
 1519, 1528, 1537, 1546, 1555, 1564, 1573, 1582, 1591, 1600, 1609, 1618, 1627, 1636, 1645,
 1654, 1663, 1672, 1681, 1690, 1699, 1708, 1717, 1726, 1735, 1744, 1753, 1762, 1771, 1780.

1 hearing, so this Court lacks jurisdiction pursuant to FIFRA § 16(b).¹⁷ Nor does this Court have
2 jurisdiction over tolerances, since (like REDs) such decisions occur under an organic statute that
3 provides for Court of Appeals review.¹⁸

4 Or perhaps Plaintiffs are referring to the dicamba website’s “science reviews” section,
5 which lists science reviews from 1990; or the “chemical details” section, which lists general
6 information about the chemical structure of dicamba; or the “dockets” section, a link to the
7 reregistration docket which, in turn, lists various events; or, finally, the “emergency exemptions”
8 section, listing a single emergency exemption request that was filed and *withdrawn* in 2010.¹⁹
9 Intervenor-Defendants (like the Federal Defendants and the Court) can only guess which entry is
10 believed by Plaintiffs to be an “action” triggering EPA’s ESA responsibilities—and why.
11 Plaintiffs have not met their responsibility under Rule 8 to plainly state their claims.

12 These issues are not unique to dicamba. Plaintiffs cite EPA’s Chemical Search webpage
13 for *every* active ingredient covered by their amended consultation claims.²⁰ But nowhere do
14 Plaintiffs identify what the affirmative agency act is that allegedly triggers a duty to consult. The
15 Intervenor-Defendants, Federal Defendants and the Court are left to roam through websites and
16 speculate as to what Plaintiffs intend to allege.

17 Similarly, in many cases, Plaintiffs cite a website that requires the user to input search
18 terms to generate information – without providing the terms upon which Plaintiffs rely. Again
19 using dicamba as an example, Plaintiffs cite the Pesticide Product Label System (“PPLS”) and
20 allege that “[a]ctive product registrations for this pesticide can be found” on this website. *See*
21

22 ¹⁷ *See* Order at 27.

23 ¹⁸ As noted above, challenges to tolerances must be brought in the courts of appeals. *See* 21
24 U.S.C. § 346a(h).

25 ¹⁹ As another example, there are nineteen distinct listings on one of the tabs on one of the
26 pages that Plaintiffs cite for atrazine. *See* Am. Compl. ¶ 205. It is impossible to determine
27 whether, by citing this website, Plaintiffs allege that items listed thereon, such as the 2010
28 publication of a fact sheet and a 2007 document specifying locations for monitoring sites,
trigger a duty to consult.

²⁰ *See supra* at 5, n.13.

1 Am. Compl. ¶ 379.²¹ However, the system is only searchable by product name, company name,
 2 or EPA registration number, and different search terms yield different results. (Examples
 3 include: “Dicamba,” “Dicamba and salts,” specific company names, or specific registration
 4 numbers assigned to different products.) Plaintiffs have not explained what search terms to use
 5 or how otherwise to extract information that they believe is pertinent. 1,3-dichloropropene
 6 provides another example: there, a search of PPLS for the search term “1,3-dichloropropene”
 7 returns no results in any of three available fields.

8 Plaintiffs’ repeated assertion, made for 38 pesticide claims, that the pesticide is found “in
 9 watersheds where susceptible species exist” or that certain watersheds “overlap the range of
 10 species that may be affected by this pesticide,” as shown in Exhibit B, provides another example
 11 of the Amended Complaint’s flaws.²² Exhibit B merely lists scores of watersheds nationwide in
 12 which various pesticides are alleged to have been found, at some unspecified level and point in
 13 time. It does not address all of the pesticides for which Plaintiffs bring failure-to-consult claims,
 14 and it says nothing about what species occur in which watersheds – let alone whether any
 15 pesticide levels may be high enough to potentially impact a species. Thus, it is impossible to tell
 16 which of the species listed in the Amended Complaint and Exhibit A Plaintiffs allege live in each
 17 watershed, or which of those species in each watershed Plaintiffs allege support each claim. This
 18 pleading failure is particularly appropriate for correction under Rule 12(e). *GNI Waterman LLC*
 19 *v. A/M Valve Co.*, No. CVF 07-0863 LJO TAG, 2007 WL 2669503, at *12 (E.D. Cal. Sept. 7,
 20 2007) (granting Rule 12(e) motion where Plaintiff failed to identify which specific products,
 21 among company’s large catalog of products, were at issue).

22 In sum, Plaintiffs moved from citing no acts in their initial complaint to referencing
 23

24
 25 ²¹ Plaintiffs repeat this reference to PPLS verbatim 31 times: Am. Compl. ¶¶ 119, 143, 164,
 184, 208, 227, 249, 268, 290, 312, 334, 356, 379, 401, 421, 443, 466, 489, 509, 531, 552,
 573, 594, 617, 638, 659, 683, 707, 728, 750, 775.

26
 27 ²² See Am. Compl. ¶¶ 137, 179, 201, 284, 306, 328, 350, 373, 395, 416, 438, 459, 484, 504,
 612, 632, 677, 700, 745, 768, 804, 838, 859, 956, 996, 1015, 1065, 1083, 1145, 1162, 1184,
 1215, 1308, 1323, 1370, 1386, 1417, 1464.

1 everything EPA does in their Amended Complaint, including undisclosed and ministerial acts.
 2 But Plaintiffs fail to identify which, among all of these acts, they rely on to support their
 3 consultation claims or their allegations of injury – or why this Court has jurisdiction – the
 4 proverbial “gold coin in a bucket of mud.” The Amended Complaint does not comply with the
 5 Court’s April 22 Order, and does not meet the minimum requirements set forth in Rule 8(a) to
 6 provide a short and plain statement of the claims.

7
 8 **II. PLAINTIFFS HAVE FAILED TO COMPLY WITH THE COURT’S ORDER TO**
 9 **ALLEGE “WITH GREATER SPECIFICITY THE FACTS GIVING RISE” TO A**
 10 **DUTY REINITIATE CONSULTATION CORRESPONDING TO EACH**
 11 **PESTICIDE.**

12 The Amended Complaint alleges a failure to reinitiate consultation with respect to 42
 13 active ingredients. Again, the claims are largely formulaic and repetitive. Notwithstanding
 14 having devoted 1,064 paragraphs to these claims, *see* Am. Comp. ¶¶ 787-1506, 1786-2129,
 15 Plaintiffs still fail to comply with the Court’s Order and the pleading standards of Rule 8.

16 The Court’s April 22 Order instructed Plaintiffs to plead, with respect to each “specific
 17 pesticide, that the agency had prior consultation, and facts showing that one or more of the
 18 triggering events occurred.” Order at 16. Although the Amended Complaint includes
 19 voluminous lists of events and information, it does not cure this flaw. Rather than stating what
 20 *specific* events or information on which Plaintiffs rely, the Amended Complaint describes or
 21 incorporates by reference every single regulatory-related event that has occurred since the
 22 relevant Biological Opinion and every piece of information currently in EPA’s possession. The
 23 Amended Complaint thus is anything but “specific.”²³

For their reinitiation claims, Plaintiffs cite to the same EPA websites and databases that

24 ²³ Plaintiffs still include the kinds of speculative and conclusory allegations the Court found
 25 unacceptable in the original Complaint. For example, Plaintiffs generally allege that
 26 “information likely exists in the possession of the EPA, or the Services” without providing
 27 any direction on how to identify such information or whether Plaintiffs intend to rely on such
 28 information. Plaintiffs repeat this unspecific allegation verbatim 43 times: Am. Compl.
 ¶¶ 810, 826, 842, 866, 881, 897, 913, 926, 942, 968, 983, 1000, 1024, 1038, 1053, 1072,
 1088, 1101, 1117, 1134, 1151, 1167, 1187, 1202, 1219, 1234, 1249, 1265, 1280, 1297, 1311,
 1327, 1342, 1357, 1374, 1389, 1404, 1421, 1436, 1451, 1468, 1483, 1498.

1 they rely on in their failure-to-consult claims. Furthermore, Plaintiffs provide long lists of
2 species listed since the Biological Opinion, which Plaintiffs allege “may” have been affected,
3 without making any allegations as to how any of the species could be impacted by the active
4 ingredient. Plaintiffs also rely (again) on Exhibit B to identify “watersheds where susceptible
5 species exist” but, as explained above, provide no information as to which species Plaintiffs
6 believe exist in each watershed. *See supra* at 8.

7
8 Similarly, the Amended Complaint asserts – no less than 69 times – that there is
9 unidentified, but allegedly relevant, information “in one or more of three databases that the EPA
10 maintains: AQUIRE, Terretox” and an unspecified “EPA database of ecotoxicity studies used in
11 registration decisions,” that allegedly triggers reinitiation obligations.²⁴ In fact, “AQUIRE” and
12 “TERRETOX” no longer exist as separate databases, and the Amended Complaint provides no
13 indication as to where the third, unspecified, “EPA database” might be found, how to access its
14 information, or what material information it contains. Furthermore, the databases EPA currently
15 maintains contain hundreds of documents per pesticide. The Amended Complaint never
16 specifies which documents within these databases Plaintiffs believe contain pertinent new
17 information.

18 Based on these conclusory citations to websites and databases, Plaintiffs allege, without
19 further specification, that “[t]he above information reveals that triggers for reinitiation of formal
20 consultation have occurred.” *See, e.g.*, Am. Compl. ¶ 809.²⁵ But Plaintiffs never actually
21 identify *which* specific events or pieces of information, among the hundreds listed or referenced,
22 are the alleged reinitiation trigger.

23 ²⁴ *See* Am. Compl. ¶¶ 97, 112, 136, 157, 178, 200, 222, 243, 263, 283, 305, 327, 349, 372, 394,
24 415, 437, 458, 483, 525, 547, 568, 589, 611, 631, 654, 676, 699, 723, 744, 767, 803, 822,
25 837, 855, 877, 908, 937, 954, 995, 1020, 1035, 1050, 1068, 1084, 1114, 1130, 1147, 1163,
1178, 1198, 1214, 1230, 1245, 1260, 1276, 1292, 1322, 1338, 1353, 1369, 1385, 1400, 1416,
1432, 1447, 1463, 1480, 1495.

26 ²⁵ Plaintiffs repeat this broad incorporation statement verbatim (except for the pesticide name)
27 43 times: Am. Compl. ¶¶ 809, 825, 841, 865, 880, 894, 912, 925, 941, 967, 982, 999, 1023,
28 1037, 1052, 1071, 1087, 1101, 1116, 1133, 1150, 1166, 1186, 1201, 1218, 1233, 1248, 1264,
1279, 1296, 1310, 1326, 1341, 1356, 1373, 1388, 1403, 1420, 1435, 1450, 1467, 1482, 1467.

1 Further, for all the EPA actions that Plaintiffs do discuss—without ever identifying *which*
2 specific actions triggered a consultation or reinitiation obligation—the Amended Complaint does
3 not cite or acknowledge work EPA has done to complete certain effects determinations and
4 consult with the Services. For example, Plaintiffs ignore the fact that an effects determination
5 addressing the risks of brodifacoum to the San Joaquin kit fox (and other species) was completed
6 just last year.²⁶ They nevertheless assert an obligation for EPA to reinitiate consultation
7 regarding the effects of brodifacoum on the same species, *see id.* ¶¶ 890-905, Ex. B at 15-16,
8 claiming that some unspecified “trigger[s] for reinitiation of consultation [have] occurred,”
9 perhaps even since the effects determination was completed last year, *id.* ¶¶ 894, 1829.
10 Plaintiffs’ discussion of EPA actions that might require reinitiation ignores relevant actions that
11 may moot their claims (because the relief sought is already completed or underway), further
12 highlighting why Defendants cannot respond to Plaintiffs’ claims until Plaintiffs allege *which*
13 particular action(s), at what times, triggered obligations to reinitiate consultation.

14 Whether Plaintiffs allege that some individual fact, some combination of facts, or some
15 alternative permutation constitutes a trigger for consultation is unstated. Thus, to respond to the
16 Amended Complaint, Intervenor-Defendants (and the Federal Defendants) would (among other
17 things) first need to guess to which “EPA database of ecotoxicity studies” the Plaintiffs refer,
18 then comb through the thousands of database entries in an attempt to divine which of the data
19 Plaintiffs are attempting to rely on for their claims, and only then turn to addressing whether
20 those data might justify reinitiation. But only the last of these burdens is legitimately placed on
21 any of the defendants. First, Plaintiffs must meet their obligations under Rule 8(a). *Cf. McHenry*
22

23 ²⁶ See U.S. EPA, Office of Pesticide Programs, *Risks of Brodifacoum Use to the Federally*
24 *Threatened Alameda Whipsnake, and the Federally Endangered Salt Marsh Harvest Mouse*
25 *and San Joaquin Kit Fox* (Mar. 30, 2012), available at
26 <http://www.epa.gov/espp/litstatus/effects/redleg-frog/2012/brodifacoum/analysis.pdf>. Other
27 completed effects determinations and related documents are found at U.S. EPA, *Endangered*
28 *Species Effects Determinations and Consultations and Biological Opinions*,
<http://www.epa.gov/espp/litstatus/effects/> (last visited Aug. 26, 2013), and U.S. EPA, *Effects*
Determinations for the California Red-legged Frog and other California Listed Species,
<http://www.epa.gov/espp/litstatus/effects/redleg-frog/index.html> (last visited Aug. 26, 2013).

1 v. *Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996).

2 **III. PLAINTIFFS SHOULD BE REQUIRED TO REPLEAD STANDING TO**
 3 **CONFORM TO THEIR MORE DEFINITE STATEMENT OF EACH CLAIM.**

4 In its Order, the Court noted that Plaintiffs’ failure to state proper claims for each
 5 pesticide “has far-reaching implications with regard to Plaintiffs’ allegations of standing.” *See*
 6 Order at 15-16. The Court found that Plaintiffs had not “allege[d] any facts in connection to
 7 Plaintiffs’ or the members’ injury with regard to their interests in any particular species or
 8 geographical area affected by any particular pesticide.” *Id.* at 18. The Amended Complaint does
 9 not correct this flaw.

10 Instead, Plaintiffs principally repeat general and vague boilerplate language to allege
 11 standing—much of which is copied from the initial complaint.²⁷ But these claims of general
 12 interest in unspecified endangered species have already been found insufficient. *See id.*

13 In Exhibit A Plaintiffs purport to provide “the list of species that may be affected” by
 14 each active ingredient—and state, in a conclusory manner, that their members have cognizable
 15 interests in these species. *See, e.g.,* Am. Compl. ¶ 146 (and repeated for every active ingredient).
 16 But Exhibit A provides nothing more than what was filed in the initial complaint. Plaintiffs still
 17 fail to allege specific linkages between the endangered species on Exhibit A and any particular
 18 injury.

19 Even allegations that, at first blush, appear to be well pleaded, fail to withstand minimal
 20 scrutiny. For example, Plaintiffs’ failure to reinitiate claim for dicamba relies upon a member’s
 21 interest in the bonytail chub, which was part of the 1989 Biological Opinion. *Id.* ¶ 1090.
 22 However, the Biological Opinion cited only *plant* species as being potentially affected by
 23 dicamba, and it expressly identified the bonytail chub as an animal species for which “it has been
 24

25 ²⁷ As an example, *compare* Am. Compl. ¶¶ 127, 149, 170, 192, 214, 235, 255, 274, 318, 340,
 26 364, 385, 407, 429, 449, 474, 495, 517, 539, 560, 581, 602, 623, 646, 667, 691, 715, 736,
 27 758, 781, 813, 829, 845, 869, 884, 900, 916, 929, 945, 971, 986, 1003, 1027, 1041, 1056,
 28 1075, 1091, 1105, 1120, 1137, 1154, 1170, 1190, 1205, 1222, 1237, 1252, 1268, 1283, 1300,
 1314, 1330, 1345, 1360, 1377, 1392, 1407, 1424, 1439, 1454, 1471, 1486, 1501, *with* Initial
 Complaint ¶ 11(third and fifth sentences).

1 determined that they are not likely to be affected by any of the pesticides” considered in the
2 Opinion.²⁸ Plaintiffs’ reliance on the bonytail chub to allege standing for profenofos (¶ 1359),
3 another pesticide evaluated in the 1989 Opinion, is similarly unsupportable.

4 Elsewhere, Plaintiffs rely on the alleged presence of certain active ingredients in
5 watersheds listed in Exhibit B to allege harm.²⁹ But Plaintiffs fail to allege what species may be
6 in those watersheds, much less why they have an interest in each such species. *See supra* at 8.
7 For example, Plaintiffs allege potential injury to the Higgins eye pearl mussel to support
8 standing for aldicarb. Am. Compl. ¶ 844. But this species is known or believed to be present
9 only in Illinois, Iowa, Minnesota, Missouri, South Dakota, and Wisconsin.³⁰ The watersheds
10 listed for aldicarb in Exhibit B (at p. 5) are not found in any of those states.

11 Plaintiffs also fail to provide any information regarding the *levels* at which the active
12 ingredients were detected, how those levels compare to potential adverse effect levels in any
13 species, or *when* the sampling was conducted. Such information is necessary to support
14 allegations about actual or potential injury. These vague allegations are entirely insufficient to
15 support standing.

16 Two and a half years into this case, it is reasonable to expect Plaintiffs to do better.
17 Plaintiffs should be required to demonstrate that they have standing with respect to each claim
18 they assert. They should be directed to allege specific facts to establish the necessary linkages to
19 support standing with respect to each claim. The vague, conclusory allegations and simple lists
20 of species and watersheds in the Amended Complaint are insufficient to provide a basis for
21 Intervenor-Defendants (or the Federal Defendants) to respond.

22 _____
23 ²⁸ U.S. Fish and Wildlife Service, U.S. EPA, *U.S. Fish and Wildlife Service Biological
Opinion: On Selected Pesticides* at 84, 246 (revised Sept. 14, 1989).

24 ²⁹ Am. Compl. ¶¶ 137, 179, 201, 284, 306, 328, 350, 373, 395, 416, 438, 459, 484, 504, 612,
25 632, 677, 700, 745, 768, 804, 838, 859, 956, 996, 1015, 1065, 1083, 1145, 1162, 1184, 1215,
1308, 1323, 1370, 1386, 1417, 1464.

26 ³⁰ U.S. Fish and Wildlife Service, U.S. EPA, *U.S. Fish and Wildlife Service Species Profile,
Higgins eye Lampsilis higginsii*,
27 <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=F009> (last visited
28 Aug. 26, 2013).

CONCLUSION

Intervenor-Defendants concur with the Federal Defendants that the deficiencies of the Amended Complaint render the claims so vague and ambiguous that neither the Intervenor-Defendants nor the Federal Defendants could possibly frame a response. Plaintiffs' indiscriminate listings of alleged actions and websites are just as problematic as the complete absence of any alleged action in the original complaint. None of the Amended Complaint's listings complies with this Court's order to allege an "individual agency affirmative act" that corresponds to each pesticide for their consultation claims. *See* Order at 19. None describes specific "facts giving rise to the EPA's duty to reinitiate consultation regarding each of the pesticides and species." *Id.* at 17. Even after the filing of this Amended Complaint, only Plaintiffs can know what act, events, and information on which they intend to rely, if any.

The Amended Complaint's shotgun style does not satisfy minimum pleading requirements. It is not a "short and plain statement of the claim." *See* Fed. R. Civ. P. 8(a)(2). It is in all parties' interests and the interests of judicial economy to clarify the nature of Plaintiffs' claims before proceeding. "Motions for a more definite statement are ... an appropriate vehicle to pare down "shotgun" pleadings." *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 233 (D.N.J. 2003).

At the very least, therefore, Plaintiffs should be required to state clearly the allegations on which they purport to rely and set forth precisely which affirmative acts they allege triggered a duty to consult and reinitiate consultations—and why—so that Intervenor-Defendants can appropriately respond.³¹

³¹ As noted above, it would alternatively be within this Court's power to dismiss the Amended Complaint with prejudice pursuant to Rule 41. *See supra* at 1 n2.

1 Dated: August 27, 2013

Respectfully submitted,

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26 **In accord with Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has
27 been obtained from the other signatories who are listed on this signature page.
28