

STEPHEN D. MASHUDA (WSB #36968)
AMANDA W. GOODIN (WSB #41312)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
smashuda@earthjustice.org
agoodin@earthjustice.org

THE HONORABLE THOMAS S. ZILLY

*Attorneys for Plaintiffs, Northwest Center for
Alternatives to Pesticides, Pacific Coast
Federation of Fishermen’s Associations,
Institute for Fisheries Resources, Defenders
of Wildlife, Joel Kawahara, Edward Deryckx,
Northern California Council of the Federation
of Fly Fishers, and Turtle Island Restoration Network*

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHWEST CENTER FOR ALTERNATIVES TO)
PESTICIDES, PACIFIC COAST FEDERATION OF)
FISHERMEN’S ASSOCIATIONS, INSTITUTE FOR)
FISHERIES RESOURCES, DEFENDERS OF)
WILDLIFE, JOEL KAWAHARA, EDWARD)
DERYCKX, NORTHERN CALIFORNIA COUNCIL)
OF THE FEDERATION OF FLY FISHERS,)
and TURTLE ISLAND RESTORATION NETWORK,)

Civ. No. 10-01919-TSZ

SUPPLEMENTAL COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendant,

v.

CROPLIFE AMERICA, RISE, OREGONIANS FOR
FOOD AND SHELTER, WASHINGTON FRIENDS

OF FARMS AND FORESTS; DOW AGROSCIENCES)
1 LLC; and WILLAPA/GRAYS HARBOR OYSTER)
2 GROWERS ASSOCIATION,)
3 Intervenor-Defendants.)
_____)

5 INTRODUCTION

6 1. Plaintiffs hereby supplement their Amended Complaint for Declaratory and
7 Injunctive Relief (filed May 3, 2011) to add additional claims that have arisen since the time that
8 plaintiffs filed their Amended Complaint. Plaintiffs are also adding as parties two additional
9 organizational plaintiffs.

10 2. Pesticides are toxic substances that can harm salmon and steelhead (collectively
11 “salmonids”) by causing death; adversely affecting salmonid food supplies and habitat; and
12 impairing salmonid swimming, predator avoidance, and reproduction. Pesticides have been
13 detected in each of the major salmonid rivers in the Pacific Northwest and California monitored
14 by the U.S. Geological Survey, sometimes at levels unsafe for aquatic life. Plaintiffs Northwest
15 Center for Alternatives to Pesticides, Pacific Coast Federation of Fishermen’s Associations,
16 Institute for Fisheries Resources, Defenders of Wildlife, Joel Kawahara, Edward Deryckx,
17 Northern California Council of the Federation of Fly Fishers, and Turtle Island Restoration
18 Network seek to ensure that pesticides used in the Pacific Northwest and California will not
19 jeopardize the continued existence of listed salmonids, adversely affect their critical habitat, or
20 cause harm to salmonids that could be avoided with appropriate mitigation.

21 3. This is the fourth time that some of the plaintiffs have returned to this Court
22 because the Environmental Protection Agency (“EPA”) has failed to ensure that pesticides
23 regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) will not
24 jeopardize the continued existence of listed salmonids. On July 2, 2002, this Court declared that
25 EPA was in violation of section 7 of the Endangered Species Act (“ESA”) because it did not
26 consult with the National Marine Fisheries Service (“NMFS”) to ensure that 54 registered

1 pesticides—including the six pesticides at issue here—would not jeopardize listed salmonid
2 species. *Wash. Toxics Coal. v. EPA*, No. C01-132C, slip op. at 20 (W.D. Wash. July 2, 2002),
3 *aff'd*, 413 F.3d 1024 (9th Cir. 2005) (“*WTC I*”). In a separate order, this Court granted injunctive
4 relief preventing certain uses of those 54 pesticides to protect salmonids while the consultation
5 process proceeded, and portions of that injunction are still in place. *Wash. Toxics Coal. v. EPA*,
6 No. C01-132C (W.D. Wash. Jan. 22, 2004), *aff'd*, 413 F.3d 1024. Pursuant to this Court’s order,
7 between August 2002 and December 2004, EPA initiated consultations with NMFS on 37 of
8 those pesticides EPA determined “may affect” listed salmonids.

9 4. In the interim, NMFS and the U.S. Fish and Wildlife Service promulgated
10 regulations that gave EPA authority to consider the effects of pesticides on salmonids and other
11 threatened and endangered species without any consultation with the Services. *Washington*
12 *Toxics Coalition v. Dep’t of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006) (“*WTC II*”).
13 This Court vacated these pesticide counterpart regulations, holding that NMFS and FWS “acted
14 arbitrarily and capriciously in deciding to promulgate the counterpart regulations in their current
15 state, knowing of the substantial flaws in EPA’s methodologies and knowing that these flaws
16 were highly likely (if not certain) to result in an overall under-protection of listed species as
17 compared to the general consultation regulations.” *Id.* at 1193.

18 5. Over five years after EPA initiated the first of these consultations, NMFS had not
19 completed a single consultation or prescribed any permanent mitigation necessary to ensure that
20 these 37 pesticides will not cause jeopardy to listed salmonids or adversely modify their critical
21 habitat. Accordingly, in 2007 some of the plaintiffs here filed suit in this Court against NMFS
22 for failing to complete those consultations. *Nw Coal. for Alternatives to Pesticides v. NMFS*,
23 Civ. No. 07-01791 (W.D. Wash. filed Nov. 5, 2007). On July 31, 2008, NMFS and the plaintiffs
24 entered into a consent decree whereby NMFS agreed to issue biological opinions on these 37
25 pesticides within approximately 4 years. Stipulated Settlement Agreement and Order of
26

1 Dismissal, *Nw Coal. for Alternatives to Pesticides v. NMFS*, Civ. No. 07-01791 (W.D. Wash.
2 July 31, 2008).

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

13 7. On April 20, 2009, NMFS issued a second BiOp evaluating three carbamate
14 pesticides—carbaryl, carbofuran, and methomyl (“Carbamate BiOp”). NMFS concluded that
15 continued use of carbaryl and carbofuran would jeopardize 22 listed Pacific salmonids and likely
16 destroy or adversely modify the habitat of at least 20 listed Pacific salmonids. NMFS also found
17 that continued use of methomyl would jeopardize 18 listed Pacific salmonids and likely destroy
18 or adversely modify the habitat of at least 16 listed Pacific salmonids. Like the OP BiOp, the
19 Carbamate BiOp articulated a comprehensive RPA with specific protections to avoid likely
20 jeopardy and adverse modification of critical habitat, and provided that the RPA must be
21 implemented in its entirety within one year to avoid jeopardy.¹

22 8. The current uses of the diazinon, chlorpyrifos, and malathion (the “OP
23

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

1 pesticides”), and the three Carbamate pesticides are harming ESA-listed salmonids in a number
2 of ways, including direct mortality and injury to adults and juveniles, and harm to olfactory
3 (homing) sense, impaired growth and feeding, reproductive impairment and impacts to salmonid
4 prey.

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

11 10. To date, EPA has not implemented a single one of the requirements of NMFS’s
12 RPAs or RPMs for these six pesticides, nor has EPA taken steps to implement any alternative
13 protective measures that would avoid jeopardy and adverse modification in response to the
14 BiOps.

15 11. By its terms, the *WTC I* injunction imposing temporary protective measures on
16 the uses of these six pesticides ceased to apply once NMFS completed the BiOps for these six
17 pesticides. Despite the fact that NMFS concluded in the BiOps that measures stronger than the
18 interim protections required by *WTC I* were necessary, currently neither those minimal interim
19 measures, nor the more protective measures in the RPAs and RPMs, nor any alternative
20 equivalent protective measures are in place for the uses of these six pesticides.

21 12. On February 21, 2013, the Fourth Circuit Court of Appeals vacated the OP BiOp
22 and remanded it to NMFS for additional explanation of several of NMFS’s assumptions. *Dow*
23 *AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013). The mandate
24 issued on April 15, 2013. In the absence of a valid, completed Biological Opinion, EPA lacks a
25 completed consultation for its ongoing authorization of the uses of the three OP pesticides, and
26

1 lacks a valid Incidental Take Statement that would authorize any take of listed salmonids.

2 13. To date, EPA has not halted, limited, or taken any steps to halt or limit its ongoing
3 authorization of the uses of the three OP pesticides following the vacatur of the OP BiOp. Nor
4 has EPA taken any steps to reinstate the interim protective measures found in *WTC I* to be
5 necessary until consultation is complete.

6 14. On April 30, 2013, a committee of the National Research Council of the National
7 Academy of Sciences issued a report recommending the best available scientific approaches and
8 data to be used in ESA consultations on pesticide uses. See *Assessing Risks to Endangered and*
9 *Threatened Species from Pesticides* (“NAS Study”) available at [http://www.nap.edu/openbook.](http://www.nap.edu/openbook.php?record_id=18344&page=1)
10 [http://www.nap.edu/openbook.](http://www.nap.edu/openbook.php?record_id=18344&page=1)
11 [php?record_id=18344&page=1](http://www.nap.edu/openbook.php?record_id=18344&page=1) (last visited Aug. 1, 2013). The NAS Study used the
12 consultations that produced the OP, Carbamate, and several other BiOps as examples in
13 evaluating scientific approaches appropriate in ESA consultations. The NAS Report largely
14 validates the general approaches, data, modeling, and underlying science relied on by NMFS in
15 the OP and Carbamate BiOps. While the OP BiOp has been vacated and remanded for
16 additional explanation, the NAS study confirms that the general underlying methodologies and
17 data that NMFS relied on to conclude that the three OP pesticides are harming and jeopardizing
18 listed salmonids are relevant, appropriate, and valid.

19 15. EPA’s failure to implement any protective measures to limit the uses of these six
20 pesticides, and EPA’s failure to complete consultation for its ongoing authorization of the uses of
21 the OP pesticides, is allowing toxic pesticides to continue to contaminate the waters of
22 Washington, Oregon, Idaho, and California; harm listed salmonids; and injure the plaintiffs’
23 aesthetic and recreational interests and the commercial enterprises and communities that depend
24 on salmonid fishing for their livelihoods.

25 16. The plaintiffs seek a judgment declaring that the lack of a completed consultation
26 for EPA’s ongoing authorization of uses of the OP pesticides and the agency’s failure to

1 implement the Carbamate BiOp or any other alternative equally effective protections violates
2 section 7(a)(2) of the ESA, and a judgment declaring that EPA is taking listed salmonids in
3 violation of section 9 of the ESA. The plaintiffs seek an order vacating, setting aside, and
4 enjoining EPA's ongoing authorization of the uses of diazinon, malathion, and chlorpyrifos that
5 do not include the protections necessary to avoid harm to listed salmonids, and setting aside,
6 vacating, and enjoining EPA's ongoing authorization of the uses of carbaryl, carbofuran, and
7 methomyl that do not comply with or provide protection equivalent to the mitigation measures in
8 the RPAs and RPMs in the Carbamate BiOp until such time as EPA has put in place permanent
9 measures that ensure against likely jeopardy to listed salmonids or adverse modification of their
10 critical habitat, and an order compelling EPA to put in place such permanent measures within
11 one year.

12 PARTIES

13 17. Plaintiff Northwest Center for Alternatives to Pesticides ("NCAP") is a non-profit
14 organization that engages in public education and advocacy to promote alternatives to pesticides
15 and to protect the environment from the harmful effects of pesticides. It works to ensure that
16 pesticides registered in the United States will not harm threatened and endangered salmonids.
17 NCAP also compiles research on the effects of pesticides on salmonids. NCAP's principal place
18 of business is in Eugene, Oregon. NCAP has approximately 13,000 supporters and 1,100
19 donors, many of whom use the waters of California, Oregon, and Washington for recreational,
20 commercial, and aesthetic pursuits including salmonid fishing, boating, and wildlife
21 photography. The inadequately mitigated use of these pesticides in the Pacific Northwest and
22 California harms salmonids and impairs the interests of NCAP and its members and supporters.

23 18. Plaintiff Pacific Coast Federation of Fishermen's Associations ("PCFFA") is an
24 association of commercial fishermen that works to protect salmonid habitat and promote
25 restoration where salmonid habitat is degraded. PCFFA's principal place of business is in San
26

1 Francisco, California. PCFFA is the largest organization of commercial fishermen on the west
2 coast. It consists of a federation of 15 smaller commercial fishermen vessel owners'
3 associations, trade associations, port associations, and marketing associations with membership
4 throughout Washington, Oregon, and California. PCFFA also has "at-large" members who are
5 unaffiliated with any particular fishermen association but have become individual members of
6 PCFFA. Collectively, PCFFA represents nearly 1,200 west coast commercial fishing families.
7 Many of PCFFA's members derive all or part of their income from the harvesting of Pacific
8 salmonids. The continued use of these pesticides without adequate protection for salmonids
9 impairs the commercial interests of PCFFA and its members.

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

21 20. Plaintiff Defenders of Wildlife is a non-profit organization with its principal
22 office in Washington, D.C. and field offices throughout the country. Defenders has over 950,000
23 members and supporters; Defenders' primary mission is to further the protection of native
24 wildlife and plants in their natural communities. Many of Defenders of Wildlife's members in
25 the Pacific Northwest use the waters of California, Oregon, and Washington for recreational,
26

1 commercial, and aesthetic pursuits including salmonid fishing, boating, and wildlife
2 photography. The inadequately mitigated use of these pesticides in the Pacific Northwest and
3 California harms salmonids and impairs the interests of Defenders of Wildlife and its members.

4 21. Plaintiff Joel Kawahara is a commercial salmon troller (a fishing method that uses
5 hook and line gear as opposed to nets) who lives in Quilcene, Washington. Mr. Kawahara has
6 been fishing for salmon in the waters of Washington, Oregon, California, and Alaska since 1978.
7 Mr. Kawahara was, for many years, a member of the Board of Directors of the Washington
8 Trollers Association, which is a PCFFA member organization, and in that capacity was a
9 member of the Boards of Directors of both PCFFA and IFR. Mr. Kawahara is currently a
10 member of the Board of Directors of the Coastal Trollers Association, which represents the
11 interests of many Northwest commercial salmon fishing members. Mr. Kawahara derives
12 commercial and aesthetic benefits from salmonids in the waters of the Pacific Northwest,
13 California, and Alaska. The continued use of these pesticides without adequate protection for
14 salmonids in the Pacific Northwest and California harms these fish and impairs these interests.

15 22. Plaintiff Edward Deryckx is an organic seed farmer in the Skagit Valley in
16 Concrete, Washington, where he has been farming for the past six years. He has farmed in
17 Washington and Oregon for the past 30 years, most of that time in Washington. Mr. Deryckx is
18 currently a member of the Northwest Center for Alternatives to Pesticides, and was a member of
19 that organization's Board of Directors for many years. Mr. Deryckx believes that salmon are a
20 keystone species for biological diversity and ecosystem health, and is therefore actively engaged
21 in numerous stewardship efforts to promote sustainable farming and alternatives to pesticides,
22 and to assist in the recovery of wild salmon and steelhead populations in Washington.
23 Mr. Deryckx uses the waters of the Pacific Northwest for aesthetic and recreational pursuits
24 including fishing, hiking, and boating. The inadequately mitigated use of the pesticides in the
25 Pacific Northwest harms salmonids and impairs these interests.

1 23. The Northern California Council of the Federation of Fly Fishers, Inc. (“the
2 Council”) is a non-profit public benefit corporation incorporated under the laws of the State of
3 California. The Council does not have a central office, and its mailing address moves with its
4 elected President, currently in Hayward, California. The Council is affiliated with the Federation
5 of Fly Fishers (“Federation”) as a regional council representing the areas of northern California
6 and northern Nevada. The Federation is an international organization headquartered in
7 Bozeman, Montana, dedicated to promoting fly fishing as a recreational use of aquatic resources
8 and to preserving, protecting, and restoring aquatic resources, including water, fauna, and
9 riparian lands. All members of the Council are also members of the Federation of Fly Fishers. It
10 has approximately 10,500 members, of whom about 1,200 are in the Council. The mission of the
11 Council is to promote the sport of fly fishing, and the conservation, preservation, and restoration
12 of fishery resources in northern California and northern Nevada. The Council achieves these
13 purposes through advocacy, research support, education and litigation efforts to ensure the
14 implementation of environmentally sound resource management policy and laws. The Council’s
15 members regularly use the waters of California, and the Pacific Northwest for recreational,
16 commercial, and aesthetic pursuits including salmonid fishing, boating, and wildlife
17 photography. The inadequately mitigated use of the six pesticides in the Pacific Northwest and
18 California harms salmonids and impairs the interests of the Council and its members.

19 24. Plaintiff Turtle Island Restoration Network (“TIRN”) is a non-profit 501(c)(3)
20 corporation with its principal place of business in Forest Knolls, California. Turtle Island
21 Restoration Network is an environmental organization with approximately 10,000 members and
22 more than 70,000 online activists and supporters throughout the United States and the world,
23 each of whom shares a commitment to the study, protection, enhancement, conservation, and
24 preservation of the world’s marine and terrestrial ecosystems. Turtle Island has worked
25 extensively to conserve and protect listed salmonids, in part through the Salmon Protection and
26

1 Watershed Network (SPAWN). SPAWN is an initiative of TIRN that is specifically dedicated to
2 the protection and restoration of endangered and threatened species, especially salmonids and
3 other sensitive watershed species. SPAWN has approximately 3,000 members, including fishery
4 and wildlife biologists who are engaged in the study, protection, enhancement, conservation, and
5 preservation of endangered and threatened salmonid species, as well as professional wildlife
6 photographers whose livelihood depends in part on their continued ability to photograph salmon
7 and other wildlife species. TIRN's and SPAWN's members spend time in a number of wildlife-
8 viewing activities such as swimming, snorkeling, kayaking, scuba, birdwatching, spawning fish
9 viewing, nature hikes, and volunteering on a number of SPAWN sponsored restoration projects
10 and educational workshops and forums. The inadequately mitigated use of these pesticides in
11 the Pacific Northwest and California harms salmonids and impairs the interests of TIRN,
12 SPAWN, and their members.

13 25. These individuals and members of the plaintiff organizations use and enjoy
14 salmonids and salmonid habitat in the Pacific Northwest and California for recreational,
15 scientific, aesthetic, cultural, and commercial purposes. EPA's failure to implement the RPAs in
16 NMFS's Carbamate BiOp or any equally effective protective measures, and EPA's failure to
17 complete consultation for its ongoing authorization of the uses of the OP pesticides, results in
18 inadequate mitigation of pesticide uses that harms salmonids and these individuals' and
19 members' past, present, and future enjoyment of salmonids and salmonid habitat.

20 26. Defendant Environmental Protection Agency is the federal agency with authority
21 to register, regulate, and authorize pesticide use under the Federal Insecticide, Fungicide, and
22 Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. EPA's regional headquarters for several of
23 the States affected by the acts and omissions at issue in this case is located in Seattle,
24 Washington. Under the ESA, EPA is responsible, in consultation with NMFS, for ensuring that
25 its authorization of pesticide uses do not jeopardize the survival and recovery of listed salmonid
26

1 species or adversely affect their critical habitat. *See* 16 U.S.C. § 1536(2)(a).

2 JURISDICTION

3 27. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 16 U.S.C.
4 § 1540(g)(1)(A). Venue is proper under 28 U.S.C. § 1391(e) because plaintiffs reside in the
5 Western District of Washington, defendant resides in this district, and because a substantial part
6 of the events or omissions giving rise to the claims occurred in this district.

7 28. As required under the ESA, the plaintiffs provided 60 days' notice of their intent
8 to sue by letters sent to EPA and NMFS on April 22, 2013 and June 6, 2013. Copies of those
9 supplemental letters are appended as Exhibits A-1 and A-2 respectively. EPA has not remedied
10 the violations set out in those 60-day notices. *See* 16 U.S.C. § 1540(g)(2)(A).

11 BACKGROUND

12 I. STATUTORY FRAMEWORK

13 A. FIFRA

14 29. FIFRA prohibits the use of a pesticide in the United States unless EPA has
15 registered that particular use. 7 U.S.C. § 136a(a). EPA may only register a pesticide if it
16 determines that “when used in accordance with widespread and commonly recognized practice it
17 will not generally cause unreasonable adverse effects on the environment.” *Id.* § 136a(c)(5); *see*
18 *also id.* § 136a-1(a)(2). FIFRA defines “unreasonable adverse effects on the environment” to
19 mean “any unreasonable risk to man or the environment, taking into account the economic,
20 social, and environmental costs and benefits of the use of any pesticide” *Id.* at § 136(bb).
21 EPA has reregistered pesticides that have been on the market for decades prior to enactment of
22 the environmental registration requirements currently in place. *See* 7 U.S.C. § 136a-1.

23 30. In 1996, Congress amended FIFRA with the Federal Food, Drug, and Cosmetic
24 Act (“FFDCA”), 21 U.S.C. § 346a, as amended by the Food Quality Protection Act (“FQPA”),
25 to grant EPA additional ongoing authority to establish, modify, or revoke “tolerances”—

1 acceptable levels of pesticide residue in food—as necessary to protect aggregate exposure to
2 pesticide residues. EPA may modify or revoke a tolerance at any time. *See id.* §§ 346a(e),
3 346a(b)(1)(B). EPA may also require submission of additional data to evaluate ongoing
4 tolerances or exemptions. *Id.* § 346a(f).

5 31. Even after registering or reregistering a pesticide use, EPA retains discretionary
6 involvement and control over that registration. EPA must periodically review pesticide
7 registrations, and should complete such reviews every 15 years. 7 U.S.C. § 136a(g)(1). EPA has
8 the authority to compel registrants to submit data necessary for registration or reregistration
9 review. *Id.* § 136a(g)(2). EPA may also determine that additional data is required to maintain an
10 existing pesticide registration and require a registrant to submit that information. *Id.*
11 § 136a(c)(2)(B)(i). Pesticide registrants must also submit to EPA any information about a
12 registered pesticide’s unreasonable adverse effects on the environment. *Id.* § 136d(a)(2). EPA
13 has the authority to reclassify pesticides as “restricted use” rather than “general use” at any time
14 following their registration or reregistration (after notice to the registrant) if it determines that
15 limiting uses is necessary to avoid unreasonable adverse effects on the environment. *Id.*
16 § 136a(d). Further, EPA has the authority to cancel pesticide registrations, uses, or labels
17 whenever “a pesticide or its labeling or other material required to be submitted does not comply
18 with the provisions of [FIFRA] or, when used in accordance with widespread and commonly
19 recognized practice, generally causes unreasonable adverse effects on the environment.” *Id.*
20 § 136d(b). EPA may suspend the registration of a pesticide while a cancellation proceeding is
21 pending. *Id.* § 136d(c).

22 32. After EPA has determined that a pesticide active ingredient is eligible for
23 registration or reregistration, the individual end-use products that contain those pesticide active
24 ingredients are also registered or reregistered. U.S. EPA, Evaluation of the U.S. Pesticide
25 Product Reregistration Process: Opportunities for Efficiency and Innovation at 1-1 to 1-5,
26

1 *available at* <http://www.epa.gov/evaluate/pdf/pesticides/eval-epa-pesticide-product->
2 [reregistration-process.pdf](http://www.epa.gov/evaluate/pdf/pesticides/eval-epa-pesticide-product-reregistration-process.pdf) (last visited July 31, 2013). In this product registration process, EPA
3 collects and evaluates additional information regarding the effects of individual pesticide
4 products and may register that product only after finding, among other things, that it complies
5 with the FFDCA and FIFRA, including the requirement that the product does not cause
6 “unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5). As with registration
7 of pesticide active ingredients, EPA has the authority to subsequently “cancel, deny, or reclassify
8 registration of a pesticide product because uses of that product may cause unreasonable adverse
9 effects on the environment” 40 C.F.R. § 154.1(a).

10 33. EPA issued Registration Eligibility Determinations (“REDs”) for diazinon,
11 chlorpyrifos, and malathion between 2006 and 2009. Since the issuance of the REDs, EPA has
12 continued to exercise its ongoing authority over the uses of these pesticides in accordance with
13 FIFRA and the FFDCA. For example, EPA has revoked and/or modified tolerances for each of
14 these three pesticides, and has registered multiple pesticide products containing these pesticides.
15 *See, e.g.*, [http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICALSEARCH:31:0::NO:1,3,31,7,](http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICALSEARCH:31:0::NO:1,3,31,7,12,25:P3_XCHEMICAL_ID:2086)
16 [12,25:P3_XCHEMICAL_ID:2086; http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICAL](http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICALSEARCH:31:0::NO:1,3,31,7,12,25:P3_XCHEMICAL_ID:1822)
17 [SEARCH:31:0::NO:1,3,31,7,12,25:P3_XCHEMICAL_ID:1822; http://iaspub.epa.gov/apex/](http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICALSEARCH:31:0::NO:1,3,31,7,12,25:P3_XCHEMICAL_ID:1822)
18 [pesticides/f?p=CHEMICALSEARCH:31:0::NO:1,3,31,7,12,25:P3_XCHEMICAL_ID:2729.](http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICALSEARCH:31:0::NO:1,3,31,7,12,25:P3_XCHEMICAL_ID:2729)

19 34. EPA retains, but to date has chosen not to exercise, the authority to reclassify
20 and/or cancel the registrations or product registrations for diazinon, chlorpyrifos, and malathion
21 based on the adverse effects those pesticides cause to the environment, including their effects on
22 listed salmonids.

23 35. EPA’s authorization of continued use of diazinon, chlorpyrifos, and malathion are
24 ongoing agency actions subject to the ESA’s consultation requirement. *WTC I*, 413 F.3d at
25 1033; *WTC I*, slip op. at 7-9.

1 B. ESA

2 36. When a species is listed as threatened or endangered under the ESA,
3 section 7(a)(2) of the Act requires that all federal agencies “insure” that their actions “are not
4 likely to jeopardize the continued existence of any endangered species or threatened species or
5 result in the destruction or adverse modification of” their critical habitat. 16 U.S.C. § 1536(a)(2).

6 37. The Act establishes an interagency consultation process to assist federal agencies
7 in complying with their substantive section 7(a)(2) duty to guard against jeopardy to listed
8 species or destruction or adverse modification of critical habitat. Under section 7(a)(2), federal
9 agencies must consult with the appropriate expert fish and wildlife agency to determine whether
10 their actions will jeopardize listed species’ survival or adversely modify designated critical
11 habitat and if so, to identify ways to modify the action to avoid that result. *See* 50 C.F.R.
12 § 402.14. The National Marine Fisheries Service is the expert fish and wildlife agency with
13 respect to anadromous fish, including salmon and steelhead.

14 38. NMFS and FWS have adopted joint regulations governing the section 7(a)(2)
15 consultation process. Under the joint regulations, a federal agency must initiate a section 7(a)(2)
16 consultation with NMFS or FWS whenever it undertakes an “action” that “may affect” a listed
17 species or critical habitat. 50 C.F.R. § 402.14(a). The threshold for a “may affect”
18 determination and the required ESA Section 7(a)(2) consultation is low. *See* 51 Fed. Reg.
19 19926, 19949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an
20 undetermined character, triggers the formal consultation requirement.”). An agency is relieved
21 of the obligation to consult only if the action will have “no effect” on listed species or designated
22 critical habitat.

23 39. The joint regulations broadly define the scope of agency actions subject to the
24 ESA section 7(a)(2) mandates to encompass “all activities or programs of any kind authorized,
25 funded, or carried out, in whole or in part, by Federal agencies,” including the promulgation of
26 regulations and the granting of licenses. *See* 50 C.F.R. § 402.02 (definition of “action”).

1 50 C.F.R. § 402.02.

2 40. Agencies must consult on ongoing agency actions over which the federal agency
3 retains, or is authorized to exercise, discretionary involvement or control. EPA’s ongoing
4 authorizations of pesticide use under FIFRA constitute agency “actions” under ESA section
5 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 at 1033.

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

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

17 43. In a biological opinion, NMFS must determine whether the federal action subject
18 to the consultation will jeopardize the survival and recovery of listed species or will destroy or
19 adversely modify critical habitat. 16 U.S.C. § 1536(b)(4). If NMFS determines that the action
20 will jeopardize the species or adversely modify its critical habitat, the biological opinion must
21 specify any reasonable and prudent alternative (“RPA”) the action agency could take to avoid
22 jeopardy or specify that there is no RPA. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h)(3).
23 NMFS and the action agencies must use the best available science in consultations, biological
24 opinions, and jeopardy and adverse modification determinations. 16 U.S.C. § 1536(a)(2);
25 50 C.F.R. § 402.14(g)(8).

1 44. Compliance with the procedural provisions of the ESA—making the
2 determination of the effects of the action through the consultation process—is integral to
3 compliance with the substantive requirements of the Act. Under this statutory framework,
4 federal actions that “may affect” a listed species or critical habitat may not proceed unless and
5 until the federal agency ensures, through completion of the consultation process, that the action
6 is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a);
7 50 C.F.R. §§ 402.14, 402.13; *see also* 16 U.S.C. § 1536(d).

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

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

25 47. As part of a consultation, NMFS determines whether to authorize the incidental
26

1 take of listed species through the issuance of an incidental take statement. An incidental take
 2 statement may be issued only if the action can proceed without causing jeopardy. 16 U.S.C.
 3 § 1536(b)(4). An incidental take statement must: (1) specify the extent and impact of the
 4 incidental take on the listed species; (2) specify reasonable and prudent measures NMFS
 5 considers necessary to minimize that impact; and (3) set forth mandatory terms and conditions.

6 *Id.*

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

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

15 16 U.S.C. § 1536(o)(2).

16 49. An incidental take statement may only be issued as part of a valid, completed
 17 consultation. Without a completed consultation, any and all take is prohibited. 16 U.S.C.
 18 § 1538(a)(1)(B).

19 II. THE CONSULTATION PROCESS FOR THE ORGANOPHOSPHATE AND 20 CARBAMATE BIOPS

21 50. In 2002, some of the plaintiffs here and others brought a citizen suit alleging that
 22 EPA violated the ESA by failing to consult with NMFS regarding the effects of its FIFRA
 23 pesticide registrations. This Court held that EPA violated ESA section 7(a)(2) with respect to 54
 24 specifically identified pesticides, including the six at issue here (diazinon, malathion,
 25 chlorpyrifos, carbaryl, carbofuran, and methomyl). *WTC I*, slip op. at 20. The Court ordered
 26 EPA to make effects determinations and initiate consultations with NMFS regarding the 54
 27 pesticides in accordance with a prescribed timetable ending in December 2004. *Id.* at 17-18.

1 During the pendency of the consultations, the Court prohibited EPA from authorizing uses of the
 2 pesticides within prescribed distances of salmonid-bearing streams. *Id.* at 2-4, 12. Regarding
 3 seven pesticides frequently found in urban salmonid streams, the Court ordered EPA to require
 4 point-of-sale warnings in home and garden stores indicating that use of these pesticides can harm
 5 salmonids. *Id.* at 10-11. The Ninth Circuit affirmed all aspects of this Court’s orders, including
 6 the injunction. *WTC I*, 413 F.3d at 1029.

7 51. Between August of 2002 and December of 2004, EPA made effects
 8 determinations for all 54 of the pesticides in accordance with the schedule this Court established
 9 in *WTC I*. EPA initiated consultations with NMFS on 37 of those pesticides it deemed “may
 10 affect” listed salmonid species by December 12, 2004. By November 5, 2007, NMFS had not
 11 completed a formal or informal consultation for a single pesticide subject to the *WTC I*
 12 injunction. On that date, some of the plaintiffs filed suit against NMFS for failing to complete
 13 those consultations. *Nw Coal. for Alternatives to Pesticides v. NMFS*, Civ. No. 07-01791 (W.D.
 14 Wash. filed Nov. 5, 2007).

15 52. On July 31, 2008, NMFS and the plaintiffs entered into a consent decree whereby
 16 NMFS agreed to issue biological opinions on these 37 pesticides within approximately 4 years.
 17 Stipulated Settlement Agreement and Order of Dismissal, *Nw Coal. for Alternatives to Pesticides*
 18 *v. NMFS*, Civ. No. 07-01791 (W.D. Wash. July 31, 2008).

19 III. THE SIX ORGANOPHOSPHATE AND CARBAMATE PESTICIDES HARM 20 SALMON AND STEELHEAD.

21 53. EPA’s authorization of ongoing uses of diazinon, malathion, chlorpyrifos,
 22 carbofuran, carbaryl, and methomyl harm and kill salmon and steelhead in 28 Evolutionarily
 23 Significant Units (“ESUs”)/Distinct Population Segments (“DPSs”) in Washington, Oregon,
 24 California, and Idaho.²

25 ² The OP pesticides are used throughout the range of the listed salmonids. The following listed
 26 salmonid species are exposed to concentrations of the OP pesticides that cause lethal, sublethal,

1 54. All six of these insecticides act as neurotoxins by inhibiting the action of the
2 enzyme acetylcholinesterase. Insufficient levels of acetylcholinesterase cause nerve cells to
3 continually transmit, overloading an organism's nervous system, leading to heart failure and
4 death.

5 55. These six acetylcholinesterase-inhibiting pesticides affect salmon in both direct
6 and indirect ways. First, even in low concentrations, these pesticides can directly kill salmon,
7 and at levels that are not lethal, they can cause sublethal harm—impacts to olfactory (smell)
8 sense used for migration and spawning, impacts to growth and feeding, swimming, predator
9 avoidance, and reproductive impairment. Second, these insecticides kill or harm the insects and
10 other organisms that salmonids rely upon for prey. Disrupted or diminished food supply
11 adversely affects salmonid growth and survival. These effects are magnified when more than
12 one of these chemicals is present in the same waterbody, or when they are applied together or
13 with other ingredients toxic to fish that may be included in pesticide products.

14 56. These lethal and sublethal harmful effects on individual salmonids and their prey,
15 in the aggregate, negatively affect entire populations of these fish. These population-level
16 effects are significant enough to jeopardize many of the defined listed species. These chemicals
17

18 and indirect harm to salmonids and their habitat: California coastal chinook salmon, Central
19 Valley spring-run chinook salmon, Lower Columbia River chinook salmon, Puget Sound
20 chinook salmon, Sacramento River winter-run chinook salmon, Snake River fall-run chinook
21 salmon, Snake River spring/summer-run chinook salmon, Upper Columbia River spring-run
22 chinook salmon, Upper Willamette River chinook salmon, Columbia River chum salmon, Hood
23 Canal summer run chum salmon, Central California Coast coho salmon, Lower Columbia River
24 coho salmon, Southern Oregon and Northern Coastal California coho salmon, Oregon Coast
25 coho salmon, Snake River sockeye salmon, California Central Valley steelhead, Central
26 California Coast steelhead, Lower Columbia River steelhead, Middle Columbia River steelhead,
27 Northern California steelhead, Puget Sound steelhead, Snake River Basin steelhead, South
28 Central California Coast steelhead, Southern California steelhead, Upper Columbia River
steelhead, Upper Willamette River steelhead, and Ozette Lake sockeye. The salmonid species
and habitats harmed, adversely modified, and jeopardized by the use of the Carbamate Pesticides
are detailed in the Carbamate BiOp at 481-486.

1 also reduce the value of critical habitat by affecting salmon prey and water quality in freshwater
2 rearing, feeding, migration, and spawning habitat.

3 57. Scientific evidence generated, compiled, and analyzed by NMFS and independent
4 scientists demonstrates that current uses of each of the six pesticides are causing harm or death to
5 one or more members of the 28 listed salmonid species.

6 58. EPA itself has also determined that each of these six pesticides harm nearly all of
7 these salmonid species. For example, in requesting consultation on each of these chemicals’
8 effects on the listed salmoid species, EPA determined that diazinon “may affect” 26 ESUs/DPSs,
9 chlorpyrifos “may affect” 25 ESUs/DPSs, and that malathion “may affect” 24 ESUs/DPSs.
10 Moreover, EPA’s analysis and the models used in its Biological Evaluations of the effects of
11 each of these six pesticides show that these chemicals harm salmonids and that salmonids are
12 likely exposed to harmful concentrations of these pesticides.

13 59. These six pesticides are present in salmonid watersheds in the Pacific Northwest
14 at levels that harm individual fish. Monitoring and modeling data collected and/or developed by
15 EPA, NMFS, and other federal and state agencies show that current authorized uses of these
16 pesticides result in concentrations in streams above levels that cause lethal and sublethal effects
17 to salmonids.

18 IV. EPA’S FAILURE TO IMPLEMENT MEASURES NECESASARY TO AVOID HARM,
19 TAKE, AND JEOPARDY TO SALMON AND STEELHEAD

20 60. Pursuant to the consent decree in *Nw Coal. for Alternatives to Pesticides v.*
21 *NMFS*, Civ. No. 07-01791 (W.D. Wash. July 31, 2008), NMFS issued the first biological opinion
22 evaluating the effects of three organophosphate pesticides on November 18, 2008. The OP BiOp
23 concluded that continued use of the organophosphate pesticides diazinon, malathion, and
24 chlorpyrifos would jeopardize the continued existence of 27 species of Pacific salmon and
25 steelhead and would destroy or adversely modify the critical habitat for 25 of those species.

26 61. In accordance with the ESA, the BiOp articulated a comprehensive RPA that

1 required EPA to establish specific protections that would avoid jeopardy and adverse
2 modification of critical habitat. Those protections, in part, require EPA to:

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

11 62. In the OP BiOp, NMFS concluded that the current uses of the three OP pesticides
12 are killing individual salmon and steelhead. As described in the OP BiOp, “take” occurs in a
13 number of ways, including direct mortality and injury to adults and juveniles, and harm to
14 olfactory (homing) sense, impaired growth and feeding, reproductive impairment and impacts to
15 salmonid prey. The magnitude of this prohibited take is quite large; indeed, NMFS concluded
16 that it is enough to jeopardize the continued existence of the species. OP BiOp at 391.

17 63. NMFS proposed an RPA that will reduce the amount of take and will avoid
18 jeopardy and destruction or adverse modification of critical habitat. However,

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

23 OP BiOp at 392.

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

27 65. On February 21, 2013, the Fourth Circuit Court of Appeals vacated the OP BiOp
28 and remanded it to NMFS to prepare a revised biological opinion. *Dow AgroSciences LLC v.*

1 *Nat'l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013) (“*Dow v. NMFS*”). The Court’s
2 mandate issued on April 15, 2013.

3 66. The *Dow v. NMFS* opinion remanded the OP BiOp on limited grounds for
4 additional explanation from the agency, and noted that the agency may support its choices with a
5 more detailed explanation on remand. *See Dow v. NMFS*, 707 F.3d at 475 (“While the Service
6 may have had good and satisfactory explanations for its choices, the BiOp did not explain them
7 with sufficient clarity to enable us to review their reasonableness.”). The Court did not call into
8 question the scientific information underlying the BiOp, including the numerous studies
9 demonstrating that the three OP pesticides harm salmonids and their habitat in numerous ways,
10 that these pesticides are present in salmonid waters in harmful concentrations, and that the
11 currently authorized uses of these three pesticides are harming listed salmonids.

12 67. The recent NAS Report evaluating the scientific approaches used in the BiOps at
13 issue here found that the models, assumptions, and underlying science relied on by NMFS in
14 concluding that these six pesticides jeopardize listed salmonids are largely appropriate, relevant,
15 and constitute the best available science for ESA consultations. Accordingly, while the OP BiOp
16 has been vacated and lacks legal effect as a regulatory document, the underlying science remains
17 highly relevant in assessing the effects of the three OP pesticides on salmonids. Moreover,
18 independent analysis confirms that the underlying science and data in the OP BiOp demonstrate
19 that the three OP pesticides are harming salmonids and their habitat in numerous ways.

20 68. After the vacatur of the OP BiOp, EPA lacks a completed consultation for the
21 three OP pesticides. EPA has not suspended its ongoing authorization of the uses of the three
22 OPs until consultation is complete. EPA has not reinstated the interim protective measures
23 found in *WTC I* to be necessary during the pendency of consultation, nor taken any steps to
24 implement any alternative protective measures to prevent take and harm to listed salmonids until
25 consultation is completed.

1 69. On April 20, 2009, NMFS issued a second BiOp evaluating three carbamate
 2 pesticides—carbaryl, carbofuran, and methomyl (“Carbamate BiOp”). NMFS concluded that
 3 EPA’s authorized uses of carbaryl and carbofuran jeopardize 22 listed Pacific salmonids and
 4 likely destroy or adversely modify the habitat of at least 20 listed Pacific salmonids. NMFS also
 5 found that EPA’s authorized uses of methomyl jeopardizes 18 listed Pacific salmonids and likely
 6 destroys or adversely modifies the habitat of at least 16 listed Pacific salmonids.

7 70. The Carbamate BiOp includes an RPA which, among other things, requires EPA
 8 to:

- 9 • Prohibit aerial applications of the three pesticides within 600 to 1,000 feet of
 10 salmon waters, Carbamate BiOp at 491;
- 11 • Prohibit ground applications of the three pesticides within 50 to 600 feet of
 12 salmon waters, *id.*;
- 13 • Prohibit applications of the three pesticides when wind speeds are greater than
 14 or equal to 10 mph, *id.* at 493.³

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

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

24 ³ Although it was included in the draft, the requirement to implement a non-crop vegetative
 25 buffer around salmon waters is absent from the final Carbamate BiOp’s RPA. NCAP, PCFFA,
 26 and IFR submitted comments to NMFS and EPA objecting to this omission and outlining the
 27 science documenting both the necessity and effectiveness of this measure.

1 72. On September 10, 2009—almost a year after NMFS issued the OP BiOp—EPA
2 sent a letter to NMFS agreeing that changes in the uses of the OP pesticides were necessary to
3 comply with the ESA and outlining its plan for changing the registrations for the three pesticides
4 covered in the OP BiOp. On May 14, 2010, EPA sent a similar letter announcing its plan to
5 implement the Carbamate BiOp. Many of the measures that EPA proposed to implement in
6 these letters differ significantly from and are less protective of salmonids than the measures
7 required by the RPAs and RPMs.

8 73. On April 29, 2010, EPA sent a letter to several manufacturers of the three OP
9 pesticides requesting that the manufacturers adopt several pesticide label changes “on a
10 voluntary basis” as use limitations for those three pesticides. On May 7, 2010, the manufacturers
11 replied that they were unwilling to make any of the label changes requested by EPA on a
12 voluntary basis.

13 74. Upon issuance of the OP and Carbamate BiOps, the interim protective measures
14 required by the court’s injunction in *WTC I* ceased to apply. NMFS found in both BiOps that the
15 measures needed to avoid jeopardy and adverse modification of critical habitat—embodied in the
16 RPAs and RPMs—were much more substantial than the limited interim measures ordered in
17 *WTC I*. See *WTC I*, slip op. at 2-4, 10-12.

18 75. EPA has yet to implement a single one of the requirements of NMFS’s RPAs and
19 RPMs for these six pesticides. Nor has EPA taken steps to implement any alternative protective
20 measures or steps to implement any other changes to the uses of these pesticides that would
21 avoid jeopardy, adverse modification, and take. EPA has not suspended, limited, or taken any
22 steps to suspend or limit uses of the OP pesticides until consultation can be completed. EPA has
23 not implemented any label changes or even begun the process of changing the labels to ensure
24 that registrations for these pesticides comply with the ESA. 2013 marks the fifth growing season
25 since issuance of the biological opinions and the eleventh year since this Court first held that
26

1 EPA’s authorizations of pesticide use must comply with the ESA—and to date EPA has not
2 required any on-the-ground changes in use of these pesticides to protect salmonids. EPA has not
3 implemented adequate protective measures to address the continued harm that this delay is
4 causing the species.

5 CLAIMS FOR RELIEF

6 FIRST CLAIM FOR RELIEF

7 EPA Has Failed to Complete Consultation for Its Ongoing Authorization
8 of Uses of Three Organophosphate Pesticides That “May Affect”
9 Listed Salmonids and Adversely Modify Critical Habitat

10 76. Paragraphs 1 through 75 are hereby realleged as though set out in full.

11 77. Section 7(a)(2) of the ESA prohibits agency actions that jeopardize the survival of
12 listed species or that destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2).
13 To assist in complying with this duty, federal agencies, like EPA, must consult with NMFS
14 whenever they take an action that “may affect” a listed salmonid species or the species’ critical
15 habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The ESA and its implementing
16 regulations broadly define agency action. 50 C.F.R. §§ 402.02, 402.03.

17 78. Under the ESA, federal actions that “may affect” a listed species or critical habitat
18 may not proceed unless and until the federal agency first ensures, through completion of the
19 consultation process, that the action is not likely to cause jeopardy or adverse modification of
20 critical habitat. 16 U.S.C. § 1536(a), (d); 50 C.F.R. §§ 402.14, 402.13.

21 79. 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.” 7 U.S.C. § 136a(c)(5). FIFRA requires EPA to exercise ongoing authority
24 over pesticide uses and pesticide products after their initial registration. EPA can exercise its
25 involvement and control, *inter alia*, through registration reviews and determinations for
26 pesticides and pesticide products, through the call-in of new data, through reclassification of

1 pesticides and their formulations as restricted use pesticides, through cancellation notices and
 2 suspension actions, and the establishment, revocation, and/or modification of tolerances, among
 3 other actions. EPA's ongoing authorization of uses of pesticides under FIFRA constitutes
 4 agency "action" under ESA section 7(a)(2). *WTC I*, 413 F.3d at 1033; *WTC I*, slip op. at 7-9;
 5 50 C.F.R. §§ 402.02, 402.03.

6 80. Uses of diazinon, malathion, and chlorpyrifos in accordance with current EPA
 7 authorized labels "may affect" listed salmonids and/or their critical habitat by, *inter alia*, causing
 8 lethal, sublethal, and indirect harm to salmonids and their prey, and by harming and altering their
 9 habitat.

10 81. On February 21, 2013, the Fourth Circuit Court of Appeals vacated the OP BiOp
 11 and remanded it to NMFS to prepare a revised biological opinion. *Dow v. NMFS*, 707 F.3d 462
 12 (4th Cir. 2013). The Court's mandate issued on April 15, 2013. After the vacatur of the OP
 13 BiOp, EPA lacks a completed consultation for the three OP pesticides.

14 82. EPA is violating the ESA by continuing to authorize uses of diazinon,
 15 chlorpyrifos, and malathion without first completing consultation with NMFS regarding the
 16 effects of the uses of these pesticides that "may affect" endangered and threatened salmon and
 17 steelhead and/or their critical habitat. EPA's failure to complete consultation on an action that
 18 "may affect" all 28 ESUs/DPSs of ESA-listed salmonids violates section 7(a)(2) of the ESA,
 19 16 U.S.C. § 1536(a)(2), its implementing regulations, and the APA, 5 U.S.C. §§ 701-706.

20 SECOND CLAIM FOR RELIEF

21 EPA Has Failed to Ensure That Its Ongoing Authorization of Uses 22 of Three Carbamate Pesticides Are Not Likely to Jeopardize Listed 23 Salmonids or Adversely Modify or Destroy Critical Habitat

24 83. Paragraphs 1 through 75 are hereby realleged as though set out in full.

25 84. FIFRA prohibits use of a pesticide in the United States unless EPA has registered
 26 that specific use after determining that it "will not generally cause unreasonable adverse effects

1 on the environment.” 7 U.S.C. § 136a(c)(5). FIFRA also grants EPA ongoing authority to
2 cancel and/or modify pesticide uses after their initial registration. *Id.* §§ 136d(b) (cancellation);
3 136a(g)(1) (reregistration). EPA’s ongoing authorization of uses of pesticides under FIFRA
4 constitutes agency “action” under ESA section 7(a)(2). *WTC I*, 413 F.3d at 1033; *WTC I*, slip op.
5 at 7-9.

6 85. ESA section 7(a)(2) requires EPA to “insure” that its ongoing authorization of
7 uses of pesticides is “not likely to jeopardize the continued existence of any endangered species
8 or threatened species or result in the destruction or adverse modification of habitat of such
9 species which is determined by [NMFS] . . . to be critical.” *See* 16 U.S.C. § 1536(a)(2); *see also*
10 50 C.F.R. § 402.14; *WTC I*, 413 F.3d at 1031-32.

11 86. On April 20, 2009, NMFS issued a BiOp concluding that the continued use of the
12 carbamate pesticides carbaryl and carbofuran would jeopardize 22 listed Pacific salmonids and is
13 likely to destroy or adversely modify the habitat of at least 20 listed Pacific salmonids. NMFS
14 found that continued use of methomyl jeopardizes 18 listed Pacific salmonids and likely destroys
15 or adversely modifies the habitat of at least 16 listed Pacific salmonids.

16 87. The Carbamate BiOp includes reasonable and prudent alternatives that require
17 EPA to establish specific protections that NMFS has concluded would avoid jeopardy and
18 adverse modification of critical habitat. To date, EPA has not implemented any of the measures
19 in the RPA, nor has EPA taken adequate alternative steps to avoid jeopardy to listed salmonids
20 or adverse modification of critical habitat.

21 88. EPA has failed to ensure that its ongoing authorizations of pesticide uses are not
22 likely to jeopardize listed salmonids or adversely modify their critical habitat, as required under
23 ESA § 7(a)(2). EPA’s failure to implement the RPAs or any equally effective alternative
24 protective measures is allowing pesticides to continue to harm and kill Pacific salmonids,
25 jeopardizing their continued existence and adversely modifying their critical habitat. EPA’s
26

1 failure to implement the RPAs or take any other adequate steps to protect salmonids from these
 2 three pesticides and avoid jeopardy or adverse modification violates section 7(a)(2) of the ESA,
 3 16 U.S.C. § 1536(a)(2), and is arbitrary, capricious, and not in accordance with law, 5 U.S.C.
 4 § 706(2)(A).

5 THIRD CLAIM FOR RELIEF

6 EPA Is Unlawfully Taking Listed Salmonids

7 89. Paragraphs 1 through 75 are hereby realleged as though set out in full.

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

13 91. ESA Section 9 prohibits EPA from taking listed salmonids by directly killing
 14 individual salmonids or by significantly modifying or degrading salmonid habitat to the point
 15 that salmonid breeding, spawning, rearing, migrating, feeding or sheltering are significantly
 16 impaired. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 223.203(a); *id.* § 223.102(a); *id.* § 222.102.

17 92. The current uses of the organophosphate pesticides diazinon, malathion, and
 18 chlorpyrifos are taking listed salmonids.

19 93. On April 20, 2009, NMFS issued a BiOp concluding that the continued use of
 20 three carbamate pesticides—carbaryl, carbofuran, and methomyl—are taking listed salmonids.
 21 The Carbamate BiOp includes an incidental take statement authorizing limited take of listed
 22 salmonids so long as EPA complies with the RPAs and RPMs in the BiOp.

23 94. The incidental take statement in the Carbamate BiOp only insulates EPA from
 24 liability for the take of listed salmonids if EPA complies with the measures to avoid likely
 25 jeopardy and the incidental take statement’s terms and conditions. 16 U.S.C. § 1536(o)(2); *id.*

1 § 1536(b)(4).

2 95. To date, EPA has not implemented any of the measures in the RPA, the RMP, or
3 any of the terms and conditions of the incidental take statement in the Carbamate BiOp.

4 Accordingly, the incidental take statement in the Carbamate BiOp does not shield EPA from
5 liability for take.

6 96. After the Fourth Circuit's vacatur of the OP BiOp, there is no valid incidental take
7 statement authorizing any level of take of listed salmonids from currently authorized uses of
8 three OP pesticides—diazinon, chlorpyrifos, and malathion. Accordingly, any and all take is
9 prohibited.

10 97. Without the protection provided by an incidental take statement, EPA's take of
11 listed salmonids violates section 9 of the ESA, 16 U.S.C. § 1538, and is arbitrary, capricious, and
12 not in accordance with law, 5 U.S.C. § 706(2)(A).

13 PRAYER FOR RELIEF

14 WHEREFORE, the plaintiffs pray that the Court:

15 A. Declare that EPA is in violation of section 7(a)(2) of the ESA, 16 U.S.C.
16 § 1536(a)(2), by failing to complete consultation necessary to ensure that use of three pesticides
17 (diazinon, chlorpyrifos, and malathion) is not likely to jeopardize the continued existence of
18 listed salmonids and destroy or adversely modify their critical habitat;

19 B. Declare that EPA is in violation of section 7(a)(2) of the ESA, 16 U.S.C.
20 § 1536(a)(2), by failing to ensure that the use of three pesticides (carbaryl, carbofuran, and
21 methomyl) is not likely to jeopardize the continued existence of listed salmonids and destroy or
22 adversely modify their critical habitat;

23 C. Declare that EPA is in violation of section 9 of the ESA, 16 U.S.C. § 1538, by
24 taking listed salmonids through authorization of the use of six pesticides (diazinon, malathion,
25 chlorpyrifos, carbaryl, carbofuran, and methomyl) without compliance with a valid incidental
26

1 take statement or valid RPAs and RPMs;

2 D. Enjoin, vacate, and set aside EPA's authorization of any use of diazinon,
3 malathion, or chlorpyrifos that does not include protections necessary to avoid harm to listed
4 salmonids, and EPA's authorization of carbaryl, carbofuran, and methomyl that does not comply
5 with the RPAs and RPMs in the Carbamate BiOp, until such time as EPA has put in place
6 adequate permanent measures that ensure against jeopardy to listed salmonids or adverse
7 modification of their critical habitat and has complied with the terms and conditions of the
8 incidental take statement in the Carbamate BiOp and the OP BiOp issued following the remand
9 from the Fourth Circuit Court of Appeals;

10 E. Award plaintiffs their attorneys' fees and costs in this action pursuant to
11 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412; and

12 F. Grant such other and further relief as plaintiffs may request and as the Court
13 deems just and proper.

14 Respectfully submitted this 17th day of September, 2013.

15
16 s/ Stephen D. Mashuda
17 STEPHEN D. MASHUDA (WSB #36968)
18 AMANDA W. GOODIN (WSB #41312)
19 Earthjustice
20 705 Second Avenue, Suite 203
21 Seattle, WA 98104
22 (206) 343-7340 | Phone
23 (206) 343-1526 | Fax
24 smashuda@earthjustice.org
25 agoodin@earthjustice.org

26 *Attorneys for Plaintiffs, Northwest Center for
27 Alternatives to Pesticides, Pacific Coast Federation
28 of Fishermen's Associations, Institute for Fisheries
Resources, Defenders of Wildlife, Joel Kawahara,
Edward Deryckx, Northern California Council of
the Federation of Fly Fishers, and Turtle Island
Restoration Network*

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I HEREBY CERTIFY that on September 17, 2013, I electronically filed the following documents:

1. Supplemental Complaint for Declaratory and Injunctive Relief. with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Meredith L. Flax
J. Brett Grosko
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

- via facsimile
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Court ECF system
- via email

Street Address:
601 D Street, N.W., Room 3712
Washington, D.C. 20004
(202) 305-0404 | Phone (Meredith)
(202) 305-0342 | Phone (Brett)
(202) 305-0275 | Fax
meredith.flax@usdoj.gov
brett.grosko@usdoj.gov
Attorney for Federal Defendants

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27
28

J. Michael Klise
Amy Chasanov
Steven P. Quarles
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2629 | Phone
(202) 624-2690 | Phone
(202) 628-5116 | Fax
jmklise@crowell.com
achasanov@crowell.com
squarles@crowell.com
*Attorney for Intervenor-Defendant CropLife America, RISE,
Oregonians for Food and Shelter, and Washington Friends of
Farms and Forests*

- via facsimile
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Court ECF system
- via email

Roy A. Umlauf
Kenneth M. Roessler
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2050
(206) 689-8500 | Phone
(206) 689-8501 | Fax
rumlauf@forsberg-umlau.com
kroessler@forsberg-umlau.com
Attorneys for Intervenor-Defendant Dow AgroSciences LLC

- via facsimile
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Court ECF system
- via email

David B. Weinberg
Cori Lombard
Joseph S. Kakesh
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000 | Phone
(202) 719-7049 | Fax
dweinberg@wileyrein.com
clombard@wileyrein.com
jkakesh@wileyrein.com
Attorneys for Intervenor-Defendant Dow AgroSciences LLC

- via facsimile
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Court ECF system
- via email

1 Samuel W. Plauché
Amanda M. Carr
2 Plauché & Carr LLP
811 First Avenue, Suite 630
3 Seattle, WA 98104
(206) 588-4188 | Phone
4 billy@plauchecarr.com
amanda@plauchecarr.com
5 *Attorneys for Intervenor-Defendant Willapa/Grays Harbor Oyster
Growers Association*
6

- via facsimile
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via Court ECF system
- via email

7 AND I FURTHER CERTIFY that I have mailed by United States Postal Service the
8 documents to the following non-CM/ECF participants:

9 None

10 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct.

11 Executed this 17th day of September, 2013, at Seattle, Washington.

12
13 
14 Catherine Hamborg