01-CV-00132-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY, and CHRISTINE TODD WHITMAN, ADMINISTRATOR,

Defendants,

AMERICAN CROP PROTECTION ASSOCIATION, et al.,

Intervenor-Defendants.

CASE NO. C01-132C

ORDER

This matter comes before the Court on plaintiffs' motion for further injunctive relief (Dkt. No. 94). The Court has considered the papers submitted by all parties and scheduled oral argument for August 14, 2003 at 9:00 a.m. This order more fully details the reasoning and conclusions outlined by the Court in its July 16, 2003 order (Dkt. No. 151). The Court hereby finds and rules as follows.[1]

[1] The Court hereby DENIES as moot plaintiffs' motion to strike (Dkt. No. 126). The potential economic impacts proffered by CropLife are not relevant to the issues presently before the Court. See, e.g., Southwest Ctr. for Biological Diversity v. United States Forest Serv., 307 F.3d 964, 974 (9th Cir. 2002). The Court has disregarded them accordingly.

I. THRESHOLD CHALLENGES TO PLAINTIFFS' MOTION

A. Section 7(a)(2) Provides an Independent Basis for Further Injunctive Relief

Previously, the Court determined "as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients." The Court ordered EPA "to initiate and complete section 7(a)(2) consultation with NMFS regarding the effects of pesticide-registrations on threatened and endangered salmonids" per a schedule proposed by EPA and endorsed by plaintiffs. EPA's failure to initiate section 7(a)(2) consultation constitutes a substantial procedural violation of the ESA. See Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).[2]

Generally, the remedy for a substantial procedural violation of section 7(a)(2) must be injunctive relief pending completion of the consultation process. See Southwest Ctr. for Biological Diversity v. United States Forest Serv., 307 F.3d 964, 972 (9th Cir. 2002); Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1057 (9th Cir. 2002); Thomas, 753 F.2d at 764. Thus, given EPA's substantial procedural violation of section 7(a)(2), plaintiffs are generally entitled to some form of injunctive relief with respect to EPA's ongoing approval and registration of the 54 pesticide active ingredients pending compliance with section 7(a)(2).

However, Croplife argues that injunctive relief is not appropriate with respect to *ongoing* agency actions, such as those at issue here. The Ninth Circuit squarely rejected this argument in Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994). There, the district court denied plaintiffs' motion to enjoin ongoing timber, range, and road projects despite the Forest Service's failure to initiate section 7(a)(2) consultation with respect to the projects and the Snake River chinook salmon. Id. at 1056. The projects were outlined in land resource management plans ("LRMPs"), which the Ninth Circuit

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[2] An agency's total failure to engage in section 7(a)(2) consultation does not constitute, as Croplife suggests, a *de minimis* violation of the ESA when it is undisputed that an endangered species may be present. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).

concluded were ongoing agency actions requiring section 7(a)(2) consultation. Id. at 1055-56. The Ninth Circuit held:

> Section 7(a)(2) mandates that the Forest Service enter into consultation [with NMFS] on the LRMPs. Its conclusion that these activities "may affect" the protected salmon is sufficient reason to enjoin these projects. Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected salmon go forward. Accordingly, we reverse the district court's denial of an injunction barring all ongoing and announced activities that may affect the Snake River chinook from going forward. The Forest Service cannot go forward with these activities without first complying with the consultation requirements of the ESA.

Id. at 1056-57 (footnote omitted).[3]

B. No Administrative Exhaustion Requirement Bars Plaintiffs' Motion

EPA and Croplife argue that plaintiffs must first pursue, before requesting interim injunctive relief from this Court, administrative remedies available pursuant to FIFRA with respect to the 54 pesticide active ingredients. That is, EPA and Croplife contend that, although EPA wholly abrogated its mandatory section 7(a)(2) consultation obligations, plaintiffs must initiate a collateral administrative proceeding to request suspension or cancellation of pesticide active ingredients if they wish to protect threatened and endangered salmonids from jeopardy during the consultation process. For numerous reasons, this argument lacks merit.

As discussed above, the ESA provides an independent statutory basis for injunctive relief with respect to ongoing agency actions given a substantial procedural violation of section 7(a)(2). EPA cites no authority to the contrary.[4] In addition, regardless of whether plaintiffs *could* pursue suspension or cancellation proceedings via the APA and FIFRA, this Court held over one year ago that plaintiffs'

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[3] The Ninth Circuit noted that under such circumstances section 7(d) was "of no moment." Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994). Here, all parties agree that section 7(d) does not govern plaintiffs' motion for further injunctive relief. The Court shall not further address it.

[4] EPA argues that exhaustion of administrative remedies is appropriate because it "has not had the opportunity to generate a scientific record examining the merits or lack thereof of plaintiffs' request." However, it is the section 7(a)(2) consultation process that serves to generate this scientific record. Thus, the absence of any record is a result of EPA's own failure to initiate timely consultation with NMFS. EPA's own failure to comply with its legal obligations cannot logically serve as the basis for denying plaintiffs' request for interim injunctive relief.

claims do not arise under the APA and FIFRA. Likewise, plaintiffs' claims are not governed by FIFRA standards.[5] Therefore, the body of case law cited by EPA is inapposite. EPA cites absolutely no case arising under the ESA in which a court required plaintiffs to initiate a collateral administrative proceeding to seek injunctive relief after concluding that the agency had substantially abrogated its mandatory section 7(a)(2) obligations.

In Defenders of Wildlife v. Adm'r, Envtl. Protection Agency, the Eighth Circuit affirmed the district court's conclusion that plaintiffs need not, under the ESA, first exhaust administrative remedies pursuant to FIFRA. 882 F.2d 1294, 1298-1301 (8th Cir. 1989).[6] Defendants argued that plaintiffs effectively sought cancellation of three ongoing strychnine registrations and must proceed under FIFRA. Id. Plaintiffs responded that any cancellation would be the "indirect effect" of compelling EPA to fulfill its mandatory ESA obligations with respect to pesticide registrations. Id. at 1299. The Eighth Circuit affirmed the district court's order enjoining the strychnine registrations, as then defined, pending EPA's compliance with the ESA. Id. at 1301. The court reasoned: "FIFRA does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides. . . . [T]he citizen suit provision permits [plaintiffs] to sue the EPA in an effort to enjoin any asserted violations of the ESA." Id. at 1299-1300.

The Ninth Circuit reached a similar conclusion in Headwaters, Inc. v. Talent Irrigation Dist., 243

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[5] FIFRA standards would govern any administrative proceeding initiated by plaintiffs pursuant to the APA. However, this action represents plaintiffs' belief that EPA has failed to satisfy ESA standards, not FIFRA standards. Nevertheless, EPA argues that the "imminent hazard" standard of 7 U.S.C. § 136(1) – "unreasonable hazard to the survival of a species declared endangered or threatened" – subsumes the no-jeopardy standard of 50 C.F.R. § 402.02 – "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." The Court disagrees. The plain language of the ESA standard offers more protection to threatened and endangered species that the FIFRA standard. Further, the mere fact that FIFRA authorizes EPA to suspend registered pesticides during cancellation proceedings in order to protect listed species does not demand that FIFRA remedies trump those independently available under the ESA.

[6] The court also rejected the suggestion that FIFRA provided the exclusive remedy for plaintiffs.

F.3d 526 (9th Cir. 2001).[7] There, the Court held that FIFRA subsumes neither NEPA nor Clean Water Act standards. Id. at 532 (proper FIFRA registration and labeling does not prevent independent application of Clean Water Act standards to authorized uses). The Court also noted that FIFRA employs a cost-benefit analysis of economic, social, and environmental factors. Id. In sharp contrast, the ESA and its substantive standards preclude any such cost-benefit analysis. In sum, the ESA contains no administrative exhaustion requirement.

C. Court-Ordered Consultation is Not the Sole Remedy Appropriate for Section 7(a)(2) Violations

Without citation, Croplife argues that this Court's prior order, directing EPA to initiate section 7(a)(2) consultation with respect to 54 pesticide active ingredients, fully remedies any and all violations of the ESA. Croplife suggests that because the Court found no *substantive* violation of the ESA, no substantive relief is necessary to protect threatened and endangered salmonids. However, the Court did find a substantial procedural violation of the ESA. Given this conclusion, interim injunctive relief is necessary to fulfill the substantive, institutionalized caution mandate of the ESA. In an analogous NEPA case, the Ninth Circuit reasoned as follows:[8]

> [T]he point of the environmental review is to determine what measures are needed to protect the environment from harm due to cattle grazing. If grazing is to continue (as the Ranchers insist it should) while the environmental studies necessary to determine the long term protective measures are underway, some 'best estimate' of interim environmental protections is required to remedy the violation. . . . [S]imply ordering completion of the required environmental studies would not provide an adequate remedy because environmental harm from grazing would continue during the six years required (under the district court's expedited timetable) to complete the environmental studies.

Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833 (9th Cir. 2002). For similar reasons, Croplife's argument that the FIFRA regulatory status quo trumps ESA standards with respect to ongoing agency actions is without merit.

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[7] See also Merrell v. Thomas, 807 F.2d 776, 782 n.3 (9th Cir. 1998).

[8] This reasoning is even more forceful in the ESA context because, unlike NEPA, the ESA embodies a specific substantive congressional policy to afford the highest priority to threatened and endangered species. Southwest Ctr., 307 F.3d at 971

II. STANDARDS AND BURDENS FOR INJUNCTIVE RELIEF

A. Traditional Standards for Injunctive Relief Do Not Govern

EPA and Croplife argue that plaintiffs bear the burden to demonstrate "imminent irreparable harm" or "substantial and immediate irreparable injury" with respect to each of the 54 pesticide active ingredients and each ESU of threatened and endangered salmonids.[9] This argument, however, does not comport with twenty-five years of precedent. In the face of a substantial procedural violation of section 7(a)(2), traditional standards for injunctive relief do not govern. See, e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978); Sierra Club v. Marsh, 816 F.2d 1376, 1382-83 (9th Cir. 1997). The language, history, and structure of the ESA demonstrate Congress' determination that the balance of hardships and public interest tips heavily in favor of protected species. Southwest Ctr., 307 F.3d at 971. Irreparable injury is presumed to flow from a substantial procedural violation. Thomas, 753 F.2d at 764. These rules fulfill the institutionalized caution mandate of the ESA. Tennessee Valley Auth., 437 U.S. at 194.

Although the majority of cases on which EPA and Croplife rely are irrelevant in the ESA context, two cases demand attention. In Nat'l Wildlife Fed. v. Burlington N. R.R., Inc., plaintiff alleged that Burlington Northern violated the ESA "no-take" provision when its trains spilled corn along Montana tracks and subsequently struck seven endangered grizzly bears. 23 F.3d 1508, 1509-10 (9th Cir. 1994). The Ninth Circuit denied plaintiff's request for an injunction because plaintiff could not demonstrate a reasonable likelihood of future grain spills and subsequent "takes." Id. at 1511. However, Burlington Northern had no obligation, as a private entity, to engage in section 7(a)(2) consultation or to ensure that its actions did not jeopardize the continued existence of endangered grizzly bears. Such cases – defining burdens under the ESA "no-take" provision – simply do not apply to

[9] Croplife also suggests that plaintiffs cannot satisfy FIFRA's "imminent hazard" standard. However, as discussed above, plaintiffs' request for further injunctive relief is governed by ESA standards, not FIFRA standards.

violations of section 7 procedural requirements. Thomas, 753 F.2d at 765.

Similarly, reliance on Water Keeper Alliance v. United States Dept. of Defense is misplaced. 271 F.3d 21 (9th Cir. 2001). There, plaintiffs alleged that the acting agency had an obligation to prepare a biological assessment because its actions constituted a "major construction activity" per statute. Id. at 24-32.[10] In denying plaintiffs' request for a *preliminary* injunction, the Ninth Circuit reasoned: "We cannot say that Water Keeper has shown a probability [of success on the merits] at this stage that the Navy violated the ESA because it concluded that the interim activities . . . did not constitute a major construction activity necessitating a biological assessment." Id. at 33. However, the court specifically noted that the case did not fall within those that "restrict the equity power of the court as to findings of irreparable injury" because plaintiffs could *not* persuasively demonstrate a procedural violation of section 7(a)(2). Id. at 34. In sharp contrast, this Court previously ruled on the merits of plaintiffs' section 7(a)(2) claims: EPA's failure to consult with NMFS regarding 54 pesticide active ingredients is a substantial procedural violation of the ESA.

B. The Narrow Exception

Moreover, EPA and Croplife misconstrue the "narrow exception" outlined by Southwest Ctr. for Biological Diversity v. United States Forest Serv.. 307 F.3d 964. In Southwest Ctr., plaintiffs sued the Forest Service – the agency administering the relevant grazing and public lands laws – alleging impacts of livestock-grazing on the critical habitat of the threatened loach minnow. Id. at 968-70. In response to plaintiffs' lawsuit, the Forest Service reinitiated section 7(a)(2) consultation with respect to the particular grazing allotments at issue. Id. at 970. Although plaintiffs prevailed on the merits of their section 7 claims, the district court denied plaintiffs' motion to enjoin all livestock-grazing in areas for which consultation was not yet complete. Id. at 970.

On appeal, the Ninth Circuit reviewed the relevant standards for injunctive relief, discussed above. It reasoned: "While courts must generally impose an injunction given a procedural violation of

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[10] The acting agency had initiated some form of section 7(a)(2) consultation.

the ESA, this case fits a narrow exception." Id. at 973. The Court noted that the case did *not* present a "substantial procedural violation" of the ESA. Id.[11] The Ninth Circuit held that agency actions may continue during the section 7(a)(2) consultation process so long as the actions are *non-jeopardizing* to the protected species and will not result in a substantive violation of the ESA. Id.[12] The Ninth Circuit's reasoning merits extended quotation:

> [B]oth the present case and *Marsh* are distinguishable from *Thomas* on one important point – in *Thomas* the procedural violation included nothing from which the agency, nor the court, could make any determination of how the action impacted the species or whether the action put the endangered species in jeopardy. In the case at hand, as in *Marsh*, there was evidence in the record for the court to review the impact of the species during the consultation period. The district court noted that the Forest Service was taking mitigating measures to ensure that the cattle grazing would have little, if any, impact on the loach minnow while formal consultation was taking place. Cattle were excluded from riparian areas, and these areas were being monitored. The consultation was ongoing and was nearing completion. The district court also found that the record supported a finding that the conditions were actually improving given the protective measures that had already been undertaken. These measures do fulfill the purpose of the act as required under *Badgley*, which is to provide protection to endangered and threatened species.

Id. In sum, the Ninth Circuit found that "[t]he record supports the district court's conclusion that the loach minnow is not likely to be harmed during the consultation period." Id.

Although the Ninth Circuit did not explicitly address the issue, Southwest Ctr. indicates that the acting agency bears the burden to demonstrate that its ongoing actions are *non-jeopardizing*. First, the court held that "non-jeopardizing action may take place," *not* that any action may take place absent a

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[11] In contrast, EPA's total failure to initiate section 7(a)(2) consultation in the FIFRA context with respect to any threatened or endangered salmonid constitutes a substantial procedural violation.

[12] Pursuant to section 7(a)(2), an agency must insure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (2003). "Jeopardize the continued existence of" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02 (2002). "Adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat critical. 50 C.F.R. § 402.02 (2002).

showing of jeopardy. This word choice recognizes the longstanding rule that the benefit of the doubt must go to protected species; the agency, not the species, must bear the risk via institutionalized caution. See Sierra Club, 816 F.2d at 1386-89.[13] Second, as the quotation above demonstrates, the Ninth Circuit premised its conclusion on the evidence of no-jeopardy *affirmatively produced* by the Forest Service, including the voluntary imposition of mitigation measures, ongoing monitoring, and evidence of habitat improvement. That is, the court did not premise its conclusion on the absence of or deficiencies in any evidence submitted by plaintiffs.

Third, the only party capable of demonstrating that the agency's actions are non-jeopardizing is the agency itself.[14] Certainly, Southwest Ctr. does not stand for the proposition that no injunctive relief is warranted absent plaintiff's ability to demonstrate that the ongoing agency action is *not* non-jeopardizing. Finally, EPA's and Croplife's interpretation of this "narrow exception" – that, given a substantial procedural violation, plaintiffs nevertheless bear the burden to demonstrate irreparable harm with respect to each pesticide active ingredient and each ESU of threatened and endangered salmon at issue – defined by a case *not* involving a substantial procedural violation, would necessarily overrule repeatedly affirmed Ninth Circuit precedent. See, e.g., Thomas, 753 F.2d at 765.[15]

C. Other Relevant Standards

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[13] To hold otherwise would allow an agency to use its failure to initiate section 7(a)(2) consultation as a sword of scientific ignorance to avoid injunctive relief.

[14] The Court recognizes that it may be appropriate, as in this case, for intervenor-defendants to assist in demonstrating that an agency's actions are non-jeopardizing.

[15] "The Forest Service would require the district court, absent proof by the plaintiffs to the contrary, to make a finding that the Jersey Jack road is not likely to affect the Rocky Mountain Gray Wolf, and that therefore any failure to comply with ESA procedures is harmless. This is not a finding appropriate to the district court at the present time. Congress has assigned to the agencies and to the Fish & Wildlife Service the responsibility for evaluation of the impact of agency actions on endangered species, and has prescribed procedures for such evaluation. Only by following the procedures can proper evaluations be made. It is not responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed."

Finally, both plaintiffs and EPA reference Judge Zilly's opinion in Greeenpeace v. Nat'l Marine Fisheries Serv., 106 F. Supp. 2d 1066 (W.D. Wash. 2000). The Ninth Circuit cited Greenpeace with approval in Southwest Ctr.. 307 F.3d at 972. As an initial matter, it is important to highlight some important distinctions between Greenpeace and the instant action. In Greenpeace, NMFS had, in fact, consulted pursuant to section 7(a)(2) regarding the impacts of groundfish fisheries on the Steller sea lion. Id. at 1069. Thus, Judge Zilly had the benefit of reviewing an administrative record and biological opinions analyzing the fisheries' impacts on Steller sea lion critical habitat. Id. at 1076-77. Here, because EPA wholly failed to initiate any consultation with respect to pesticide active ingredients, the Court enjoys the benefit of no such record.

The Greenpeace opinion does, however, reflect some ambiguity regarding the appropriate standard for interim injunctive relief. The court first concluded:

> In the present case NMFS's procedural violation directly implicates its duty to insure against jeopardy and adverse modification. By authorizing the yearly fisheries in the absence of an adequate, comprehensive biological opinion, NMFS has failed to "insure" that these fisheries will not likely jeopardize the Steller sea lion or adversely modify its critical habitat. . . . NMFS is unable at present to conclude that the overall effects of these numerous fisheries, or its core management scheme, are not likely to adversely affect Steller sea lions. NMFS cannot validly authorize continued fishing within Steller sea lion critical habitat until it meets its substantive obligations under the ESA. Under *Thomas*, an injunction pending compliance must be the remedy.

Id. at 1075-76. Next, the court noted that *even if* plaintiffs bore the burden of proof, injunctive relief was warranted. The court reasoned:

> Based on the Administrative Record, the Court concludes the potential negative effects of the fisheries on the Steller sea lion have been demonstrated with reasonable scientific certainty. Thus, although the actual effects of the fisheries and the efficacy of mitigation measures are uncertain, the significant and demonstrated potential negative effects of these large fisheries constitute a clear threat to appreciably diminish the value of critical habitat for Steller sea lions.

Id. at 1077. Judge Zilly expressly acknowledged the Thomas rule but recognized that injunctive relief need not mechanistically follow from every violation of section 7(a)(2). Consistent with the Ninth Circuit's subsequent opinion in Southwest Ctr., he evaluated the factual record and resolved doubts in favor of the protected species. Id. at 1077. Ultimately, Judge Zilly concluded that the parties' expert

declarations "raise material issues of fact regarding the potential harm posed by the fisheries" and that "significant, potentially harmful activity is presently on-going in the face of a substantial unremedied procedural violation of the ESA." Id. at 1080.[16] Stated another way, the court could not determine that the ongoing fisheries, as defined, were *non-jeopardizing*.

III. PLAINTIFFS ARE ENTITLED TO INTERIM INJUNCTIVE RELIEF

A. EPA and Croplife Fail to Demonstrate that EPA's Ongoing Actions are Non-Jeopardizing

In light of the legal standards and burdens outlined above, the Court must determine whether interim injunctive relief is warranted to protect threatened and endangered salmonids from EPA's registration of pesticide active ingredients, as presently defined, pending consultation. Given EPA's substantial procedural violation of section 7(a)(2), interim injunctive relief is generally necessary to fulfill the institutionalized caution mandate of the ESA. Further, as discussed below, EPA and Croplife fail to demonstrate that EPA's ongoing actions with respect to pesticide active ingredients are non-jeopardizing to threatened and endangered salmonids.[17] That is, the Court cannot conclude, on the factual record before it, that EPA's ongoing actions, as presently defined, will not jeopardize the continued existence of threatened and endangered salmonids and will not lead to the adverse modification of critical habitat.

In contrast to the Forest Service in Southwest Ctr., EPA makes no discernable effort to demonstrate no-jeopardy.[18] The bright-line position adopted by EPA in this litigation is inconsistent

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[16] The court noted that NMFS, by opposing plaintiffs' motion for injunctive relief, was urging the court to make a finding of no-jeopardy when NMFS itself had not reached that conclusion via the formal consultation process. Id. at 1078.

[17] This *does not* include any ESUs of threatened and endangered salmonids for which EPA has made a corresponding "no-effect" determination with respect to one of the 54 pesticide active ingredients, such as alachlor (all 26 ESUs) or propargite (7 ESUs). Plaintiffs seek no injunctive relief vis-a-vis these specific ESUs and these specific pesticide active ingredients, which are outlined in the declarations of Arthur Jean B. Williams.

[18] Thus, although the Court agrees with Croplife that the pesticide registrations here and grazing allotments in Southwest Ctr. are generally "indistinguishable," EPA's response to plaintiffs' lawsuit and

with the voluntary efforts to prevent jeopardy demonstrated by the Forest Service in Southwest Ctr. and the affirmative evidence of habitat improvement submitted in that case. Further, EPA's own "may affect" determinations generally preclude any conclusion of no-jeopardy. See Pac. Rivers Council, 30 F.3d at 1056-57. For example, EPA expert Arthur Jean B. Williams describes how pesticide products containing fenbutatin oxide, which is highly toxic to fish, were found to result in the potential for negative effects on 23 of 26 ESUs because the crops for which these products are registered are grown more widely in areas where the pesticide could move into critical habitat and salmon-bearing waters. Such statements foreclose any conclusion of no-jeopardy.

In addition, EPA's expert declarations do not support the conclusion that EPA's ongoing actions are non-jeopardizing to threatened and endangered salmonids. Dr. Norman Birchfield devotes his declaration to addressing the myriad factors – including each pesticide's peculiar toxicity, chemical properties, application methods, exposure levels, and area weather patterns – relevant to tailoring mitigation measures to avoid pesticide exposure to threatened and endangered salmonids.[19] Dr. Robert Lackey opines:

> Pesticides are one broad class of toxicants that likely have some adverse effect on salmon, but compared to many of the other causes that adversely affect salmon, the effect of pesticides appears to be relatively less important as a cause of the long-term decline on a broad, regional scale. There may be exceptions in certain locations with relatively high levels of pesticides and/or in areas where salmon runs are very low and under severe risk of extinction . . . .

These declarations demonstrate neither a conclusion of, nor confidence in, no-jeopardy.

Next, EPA's current effects determinations further illuminate EPA's inability to demonstrate no-jeopardy with respect to the pesticide active ingredients at issue. For example, for propargite, EPA has requested formal consultation on 7 ESUs and informal consultation on 12 ESUs. In a July 23, 2002

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the factual record before the Court are quite distinguishable.

[19] The Declaration of Arthur Jean B. Williams also includes a very intelligent discussion of the myriad factors that influence EPA's "no-effect" and "may affect" analyses with respect to particular pesticide active ingredients and particular ESUs.

letter, Dr. Larry Turner of EPA's Office of Pesticide Programs discusses the underlying analysis: "With the new restricted use classification and the provisions of the California [county] bulletins, especially the [40-yard ground and 200-yard aerial] no-spray buffer, I conclude that propargite [may affect but] is not likely to adversely affect" 9 ESUs in California. Dr. Turner also provides recommendations for Pacific Northwest ESUs:

> [A] 100-yard buffer for aerial applications would prevent jeopardy and most likely avoid any incidental take if applied to mint, seed alfalfa, potatoes, and hops . . . [and] a 100-yard buffer should be applied to all uses of propargite within all counties upstream of the confluence of the Snake River and Columbia River.

Thus, Dr. Turner's opinions explicitly rely upon and recommend the employment of buffer zones; they belie any conclusion of no-jeopardy.[20]

Croplife and *amicus curiae* do attempt to demonstrate no-jeopardy. They uniformly argue that no buffer zones are necessary to ensure that the pesticide active ingredients at issue do not jeopardize or threaten substantial harm to threatened and endangered salmonids pending consultation. However, the arguments do not comport with the evidence submitted and the standards outlined above. For example, the lindane Reregistration Eligibility Decision notes that "possibly [endangered] fish may be at risk due to the endocrine disrupting properties of lindane" and that EPA will reassess risks to endangered aquatic species with additional data. Likewise, the diflubenzuron Reregistration Eligibility Decision notes: "Endangered species LOCs [levels of concerns] have been exceeded for both acute and chronic effects for freshwater and estuarine/marine aquatic invertebrates. . . . [S]ubstantial amounts of diflubenzuron could be available for runoff to surface waters for several days to weeks post-application." With respect

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[20] The expert recommendations of Dr. Turner constitute precisely the exercise of agency expertise to which it is appropriate for the Court to defer. See generally Idaho Watersheds Project v. Hahn, 307 F.3d 815, 831 (9th Cir. 2002). The Court intends to craft interim injunctive relief, when possible, specific to particular pesticide active ingredients and particular ESUs when the record reflects the exercise of agency expertise. Therefore, absent persuasive arguments to the contrary, the Court shall, for propargite, adopt the buffer zones recommended and relied upon by Dr. Turner in his analysis. Similarly, to the extent Dr. Turner or another agency expert has exercised agency expertise with respect to other pesticide active ingredients, the Court shall afford such recommendations great weight.

to chlorothalonil, Croplife expert Dr. Jennifer Shaw acknowledges that "the ecological risk assessment prepared by EPA and published . . . in 1999 shows that levels of concern are exceeded for endangered aquatic animals." Although she cites subsequent mitigation measures – 25-foot ground and 150-foot aerial application buffer zones – the measures only apply to "marine/estuarine water bodies," thereby excluding salmonid-bearing lakes, rivers, and streams.[21]

Arguments regarding the necessity of interim buffer zones for atrazine further demonstrate the inability of Croplife and *amicus curiae* to demonstrate no-jeopardy. They argue that current mandatory label restrictions – prohibiting applications of atrazine within 66 feet of streams and rivers and within 200 feet of lakes and reservoirs – are sufficient. However, the April 2002 Reregistration Eligibility Decision explains:

> The potential adverse effects of atrazine on homing and reproduction in endangered salmon and other anadromous fish species is currently uncertain. The laboratory study of olfactory function in mature Atlantic salmon parr and the effect of atrazine . . . for sensing female hormones in urine and behavior to ground salmon skin is notable. This is so especially if the effects are significant on salmon reproduction at such a low atrazine concentration, because existing concentrations in streams inhabited by endangered salmonids may exceed this level for prolonged periods. Atrazine concentrations are likely to be their highest in the later spring and early summer following applications, at a time when salmon are returning from the ocean to spawn. It is unclear . . . whether the effect on olfactory function is manifested in mature adult salmon and what effect if might have on reproduction and recruitment. These data are preliminary and additional studies are necessary to determine if there are adverse atrazine effects on adult salmon homing and adult male milt production responses to female hormones in ovulating female urine. Further study is also needed on whether those effects could be significant to reproduction and recruitment.

Further, plaintiffs submit comments by FWS on the Eligibility Decision:

> [S]etting protective levels for pesticides in the environment based on their ability to prevent increased acute lethality is an inadequate level of protections. Certainly, the use of registered pesticides should not result in the death or non-target organisms, but such use should also not cause other impacts in these organisms, such as altered reproductive capacity. . . . Finally, due to an inability to fully characterize and assess the ecological risks posed by atrazine, it does not appear that EPA will be able to fulfill its legal responsibilities under section 7(a)(2) of the Endangered Species Act to ensure that its proposed re-registration action is not likely to jeopardize the continued existence of listed species or

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[21] The Court notes that current mandatory buffer zones were set without any particular reference to threatened and endangered salmonids and the institutionalized caution mandate of the ESA.

> destroy or adversely modify designated critical habitat. For this reason the Service strongly recommends that prior to attempting to re-register atrazine and entering into a section 7 consultation, that EPA work with the Service to develop sufficient information to adequately evaluate atrazine's effects on listed species.

Plaintiffs submit analogous comments from FWS regarding diazinon.[22]

B. Plaintiffs Satisfy Any Relevant Burden for Interim Injunctive Relief

Moreover, plaintiffs satisfy any burden they may have by demonstrating that EPA's ongoing actions, as presently defined, present a significant threat of harm and potential negative effects to threatened and endangered salmonids and their critical habitat. See Greenpeace, 106 F. Supp. 2d at 1076-80. Plaintiffs submit Reregistration Eligibility Decisions for several pesticide active ingredients that demonstrate these threats.[23] Plaintiffs also direct the Court's attention to several NMFS statements in July 2000 addressing the threats posed by pesticides to salmonids and the fact that current EPA label requirements were developed without adequate information regarding sublethal impacts on salmonids.

Consistent with this concern, a June 2000 letter from FWS notes that EPA had not implemented mandatory use restrictions outlined in a 1989 biological opinion. The letter continues:

> Unless EPA requires mandatory compliance with FIFRA-enforceable pesticide use limitations, there will be no certainty that our consultations on pesticides will result in protective measures for threatened and endangered species. Unless the pesticide applicatory is required to implement the use limitations necessary to protect listed species, we cannot assume that the alternatives to avoid jeopardy or the measures to minimize take will be effective.

In addition, a September 2002 biological opinion issued by NMFS, pertaining to noxious weed control in national forests, illustrates the significant sublethal threats posed by pesticides:

> First, there is little data that documents the effects of the proposed herbicide products on

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[22] The July 2000 comments cite EPA's failure to fully implement reasonable and prudent alternatives and measures (to avoid jeopardy) identified in a 1989 biological opinion and EPA's determination that all registered applications of diazinon exceeded the endangered species level of concern for wildlife, aquatic life, and terrestrial plants in semi-aquatic areas.

[23] These include atrazine, azinphos-methyl, carbaryl, chlorpyrifos, diazinon, disulfoton, ethoprop, malathion, methamidophos, methidathion, metribuzin, oxyfluoren, phorate, phosmet, propargite, trifluralin, and fenbutatin-oxide.

> aquatic ecosystems and the specific invertebrate prey of listed salmonids. Second, the scientific studies that have been conducted on fish are largely limited to measures of acute mortality i.e., the concentrations at which short-term exposures to a pesticide will kill fish outright (LC50subscript). In many cases, acute mortality data may not be appropriate for estimating whether a pesticide will have adverse, non-lethal effects on the essential behavior patterns of salmonids (e.g., feeding, spawning, or migration) . . . . Sub-lethal effects of chemicals and pesticides do play a significant role in reducing the fitness of natural salmonid populations.
>
> Most direct effects of herbicides on listed salmon and steelhead are likely to be from sublethal effects, rather than outright mortality from herbicide exposure.
>
> The lethality endpoint has little predictive value for assessing whether real world pesticide exposure will cause sublethal neurological and behavioral disorders in wild salmon.
>
> Although lethal effects are not expected to occur under most circumstances, listed fish are likely to be exposed to herbicide concentrations where sublethal effects could occur. Potential sublethal effects, such as those leading to a shortened lifespan, reduced reproductive output, other types of "ecological death" or other deleterious biological outcomes is a threat to listed species from the proposed action.

In sum, the expert declarations raise material issues of fact with respect to the substantial potential harm posed by EPA's ongoing actions, as presently defined. That is, significant, potentially harmful activity is presently ongoing in the face of a substantial unremedied procedural violation of the ESA.

IV. PLAINTIFFS' REQUESTED BUFFER ZONES WILL PREVENT JEOPARDY

The evidence submitted – including the declarations of *all* parties' experts, reregistration eligibility decisions, EPA risk assessments, prior EPA consultations with the Fish and Wildlife Service, EPA's reliance on California's county bulletin buffer zones, and an EPA expert's current section 7(a)(2) recommendations – demonstrates that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids. Plaintiffs' experts sufficiently articulate the general efficacy of buffer zones in preventing the migration of pesticides, via spray drift, surface runoff, or erosion, into salmonid-bearing waters.[24] Neither EPA nor Croplife dispute these basic principles.

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[24] For example, in the Yakima River Basin the highest frequency and concentrations of pesticides occur in irrigation season as a result of excess irrigation water runoff.

EPA expert Dr. Norman Birchfield opines that, although other mitigation measures may be equally or more effective based on peculiar pesticide characteristics and application methods, buffer zones are a "simple and relatively effective option in instances where spray drift is a major route of off-target movement." As discussed above with respect to propargite, current EPA effects determinations and expert recommendations hinge on the employment of buffer zones, such as those outlined by California county bulletins, to prevent jeopardy to threatened and endangered salmonids.[25] Similarly, EPA expert Dr. Turner recommends: "We propose that if [EPA] adopts a no-spray buffer and vegetative filter strip between sites where oryzalin may be used and sites where salmon and steelhead occur, jeopardy would be avoided and take would likely be eliminated."[26] Likewise, Croplife acknowledges the efficacy of buffer zones imposed by the most recent Reregistration Eligibility Decisions for several pesticides.[27] For example, Croplife trumpets the 21% aerial and 96% ground spray-drift reductions resulting from existing 150-foot aerial and 25-foot ground diflubenzuron buffer zones.

Further, the above-referenced 1989 FWS biological opinion strongly supports the efficacy of buffer zones to prevent jeopardy. This biological opinion concluded EPA's formal consultation regarding the impacts of pesticides on listed aquatic species from certain crop uses, forestry uses, and rangeland uses. In every instance that the opinion found jeopardy to an aquatic species from a pesticide at issue in this case, such as diazinon and diflubenzuron, the opinion employed buffer zones as a reasonable and prudent alternative to avoid jeopardy. These buffer zones, like those requested by

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[25] According to a 1985 draft submitted by plaintiffs, the California bulletins provide "a form of supplemental pesticide labeling for certain pesticides that specifies additional use limitations for protection of endangered species." The State of California premised these county-bulletin buffer zones on strategies to avoid jeopardy outlined in existing biological opinions. Also, the State of Washington Department of Natural Resources recommends a 200-foot vegetated riparian buffer in agricultural lands to slow runoff and filter pesticides.

[26] Dr. Turner makes a similar recommendation for chlorpyrifos.

[27] The Court notes, however, that these buffer zones did not purport to bring the registrations in line with the substantive standards of the ESA.

plaintiffs here, were two-tiered for ground and aerial applications.

Moreover, plaintiffs demonstrate, with reasonable scientific certainty, that the requested buffer zones[28] – 20 yards for ground applications, 100 yards for aerial applications – will, unlike the status quo, substantially contribute to the prevention of jeopardy. For example, plaintiffs' expert Dr. Ken Giles recognizes that long-term solutions should be "tailored to particular pesticide applications" but concludes that "spray drift buffers offer an easily workable and effective mitigation." He opines that the "100yd (92m) and 20yd (18.5m) buffer zones for aerial and ground applications, respectively, should reduce deposition caused by fallout drift by 99% or more as compared to intentional deposition in the normally-sprayed field boundary." Also, plaintiffs' expert Dr. David Zaber analyzes various EPA sources that specify safeguards to prevent adverse effects on threatened and endangered species. He concludes that a substantial number of such safeguards employ no-spray buffer zones of 20 yards and 100 yards, respectively, for ground and aerial applications. Finally, the Court notes that the 20-yard and 100-yard buffer zones requested by plaintiffs are generally consistent with those recommended by EPA.

V. A FULL-BLOWN EVIDENTIARY HEARING IS NOT APPROPRIATE

In its opposition, EPA requests that the Court hold an evidentiary hearing to ascertain appropriate injunctive relief *if* it determines that such relief is warranted. That is, EPA seeks to bifurcate the threshold legal arguments upon which it principally relies from factual arguments it may raise regarding specific relief. The Court denies EPA's request. Plaintiffs filed the instant motion on November 26, 2002. Following a period of expert discovery, EPA and Croplife respectively filed thirty-five page opposition briefs approximately four months later. EPA made no timely request to bifurcate the relevant legal and factual issues, both of which plaintiffs fully presented. The Court finds that EPA had sufficient time to prepare both legal and factual arguments.

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[28] The EPA defines a "buffer zone" or "no-spray zone" as "an area in which direct application of the pesticide is prohibited; this area is a specified distance between the closest point of direct pesticide application and the nearest boundary of a site to be protected, unless otherwise specified . . . ."

Indeed, EPA submits extensive expert declarations, generally directed to discrediting the uniform buffer zones requested by plaintiffs. However, as evidenced above, these declarations simply do not address the essential question: What interim injunctive measures, if any, are necessary to avoid jeopardy (and adverse modification of critical habitat) to threatened and endangered salmonids pending consultation with NMFS with respect to each pesticide active ingredient?[29] Rather, the expert declarations appear premised on EPA's erroneous legal conclusions: 1) that plaintiffs must affirmatively demonstrate irreparable harm with respect to each pesticide active ingredient and each ESU of threatened and endangered salmonids; and 2) that plaintiffs must affirmatively demonstrate that the requested buffer zones will prevent jeopardy given each pesticide active ingredient's peculiar properties and application methods.[30]

Further, relevant case law does not support EPA's request for a full-blown evidentiary hearing. It is the responsibility of neither plaintiffs nor the Court to determine the precise effects of EPA-registered pesticide active ingredients on threatened and endangered salmonids. Rather, EPA and NFMS shall make these determinations via the fact-intensive inquiry of the section 7(a)(2) consultation process. See Thomas, 753 F.2d at 765; see also Idaho Watersheds Project, 307 F.3d at 831-33.[31] Only

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[29] It is difficult for the Court to do what Judge Winmill did in Idaho Watersheds Project. 307 F.3d 815. There, in the NEPA context, faced with plaintiffs' request to enjoin all livestock-grazing and intervenor-defendants' opposite request to permit all grazing, the court requested recommendations from the BLM, the defendant agency. Id. at 823. The BLM itself proposed the terms of the interim protective measures – livestock-grazing buffer zones – and the district court deferred to the agency's substantial expertise. Id. at 831. The Ninth Circuit approved this process. Id. Here, however, EPA has placed the Court in a difficult position by adopting a generally absolutist legal position.

[30] Neither plaintiffs nor the Court dispute EPA's contention that, ultimately, buffer zones (or any other steps to prevent jeopardy) should not be generic but should be specifically tailored to each pesticide active ingredient and each ESU of threatened and endangered salmonids. However, it is the burden of EPA and NFMS, not plaintiffs, to do so. The absence of complete consultation does not grant EPA the license to do nothing in the interim.

[31] "It would be odd to require the district court to conduct an extensive inquiry, which would by nature involve scientific determinations, in order to support interim measures that are designed to temporarily protect the environment while the BLM conducts studies in order to make the very same

this process itself can determine the long-term measures necessary to prevent jeopardy, adverse impacts, or irreparable harm to threatened and endangered salmonids. See Thomas, 753 F.2d at 763.

However, because EPA failed to either propose interim mitigation measures itself or make counter-recommendations with respect to plaintiffs' requested buffer zones, the Court will entertain limited argument regarding those buffer zones.[32] That is, EPA and Croplife may present arguments with respect to *the specific size* of the ground and aerial buffer zones requested by plaintiffs. These arguments shall be specific to particular pesticide active ingredients and particular ESUs of threatened and endangered salmonids. Where an EPA expert has already recommended specific buffer zones or relied upon existing voluntary buffer zones in the course of section 7(a)(2) consultation – such as Dr. Turner with respect to propargite – the Court shall likely adopt those buffer zones as appropriate interim injunctive relief.[33] Absent an EPA "no-effect" determination or stipulation from plaintiffs, the Court shall not entertain arguments that *no* buffer zones are appropriate. In addition, the Court will entertain arguments regarding the additional urban-use restrictions requested for 13 pesticide active ingredients.[34]

Finally, the Court reiterates that, at oral argument, it would welcome any voluntary input or recommendations regarding the requested buffer zones and urban-use restrictions from NMFS, the agency ultimately responsible for the protection of salmonids. See generally 50 C.F.R. §§ 402.13(b), .14(g)-(h) (2002). NMFS's participation is contingent on its cooperation with all parties. That is,

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scientific determinations. . . . Because these are interim measures designed to allow for a process to take place which will determine permanent measures, and all parties will have adequate opportunity to participate in the determination of permanent measures (and if need be challenge the outcome in court), we hold that an evidentiary hearing was not required on the facts of this case." Idaho Watersheds Project, 307 F.3d at 831.

[32] As discussed above, plaintiffs have satisfied their burden to demonstrate the efficacy of buffer zones to prevent jeopardy pending completion of section 7(a)(2) consultation.

[33] Although Dr. Turner also recommended buffer zones for oryzalin and chlorpyrifos, he did not specify the specific sizes of these buffer zones.

[34] At oral argument, plaintiffs should provide the Court clear and concise definitions and maps of all urban watersheds within the geographic scope of this litigation.

NMFS shall not participate as a witness for any particular party, but may act akin to an informal Court-appointed expert. Even following oral argument and the imposition of interim injunctive relief, the Court shall consider any jeopardy-prevention recommendations from NMFS that may warrant the modification of such relief prior to an EPA "no-effect" determination, NMFS written concurrence, or biological opinion.

VI. CONCLUSION

It is important to note the precise nature of the interim injunctive relief to be ordered by the Court. Plaintiffs do not challenge any pesticide registrant's FIFRA registrations; plaintiffs "merely seek[] to enforce the public right to administrative compliance with the environmental protection standards of . . . the ESA." Conner v. Buford, 848 F.2d 1441, 1460 (9th Cir. 1988); see also Defenders of Wildlife, 882 F.2d at 1298-99. Thus, in granting relief, the Court will be setting aside ongoing EPA actions with respect to particular pesticide active ingredients to the extent those actions authorize ground and aerial applications of such ingredients within specific distances of threatened and endangered salmonid-bearing waters. See Conner, 848 F.2d at 1460-61. The Court is not ordering EPA to take action. Rather, it is setting aside a limited class of agency actions – for the explicit purpose of preventing jeopardy and ensuring compliance with the ESA – due to EPA's failure to comply with section 7(a)(2).[35] The Court is cognizant of the practical implications of this ruling. However, the Court is not, as suggested by EPA and Croplife, suspending the FIFRA registrations of pesticide active ingredients.[36] See Defenders of Wildlife, 882 F.2d at 1299-1301.

Accordingly, the Court hereby GRANTS plaintiffs' motion for further injunctive relief, to the extent outlined by this order. Following oral argument, the Court shall issue an order defining the

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[35] See Southwest Ctr., 307 F.3d at 971-72 (citations omitted) (court must determine whether injunction necessary to effectuate congressional purpose behind statute).

[36] In reply, plaintiffs note that EPA possesses regulatory authority – for example, via Pesticide Regulation ("PR") Notices – to alter pesticide uses without actually cancelling or suspending FIFRA pesticide registrations. Croplife confirms this authority and the various regulatory avenues available.

specific size of ground and aerial buffer zones with respect to each pesticide active ingredient and each ESU of threatened and endangered salmonids.[37] This order shall also address plaintiffs' request for additional urban-use restrictions with respect to 13 pesticide active ingredients. The Court's temporary injunction shall last only so long as it takes EPA to fulfill its section 7(a)(2) consultation obligations. That is, any interim injunctive relief imposed by the Court shall terminate upon an EPA "no-effect" determination,[38] a NFMS written concurrence following informal consultation,[39] or the issuance of a NMFS biological opinion.[40] Finally, as previously stated, the Court shall consider any interim jeopardy-prevention recommendations from NMFS that may warrant the modification or termination of such relief.

SO ORDERED this 8th day of August, 2003.

CHIEF UNITED STATES DISTRICT JUDGE

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[37] The Court requests that plaintiffs submit at oral argument a chart outlining, on a per pesticide active ingredient and per ESU basis, any specific buffer zones recommended by Dr. Turner or other EPA expert, including existing buffer zones or state programs on which EPA effects determinations may rely. See supra note 20.

[38] The Court requests that the parties submit at oral argument an updated list of all pesticide active ingredients and ESUs for which EPA has made a corresponding "no-effect" determination.

[39] See 50 C.F.R. § 402.13(a) (2002).

[40] The five alternative "shifting statuses" proposed by Croplife are unwarranted.