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9  
 10 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 11 **SAN FRANCISCO DIVISION**

12 **CENTER FOR BIOLOGICAL** )  
**DIVERSITY;** )  
 13 )  
*Plaintiff,* )  
 14 )  
 v. )  
 15 )  
**U.S. DEPARTMENT OF THE INTERIOR;** )  
**S.M.R. JEWELL,** Secretary of the Interior; )  
 16 **U.S. FISH AND WILDLIFE SERVICE;** and )  
**DAN ASHE,** U.S. Fish and Wildlife Service )  
 17 Director; )  
 18 )  
*Federal Defendants,* )  
 19 )  
**CROPLIFE AMERICA,** )  
 20 )  
*Proposed Defendant-* )  
 21 *Intervenor.* )

Case No. 3:15-cv-00658-JCS

**RULE 26(f) REPORT**

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 23  
 24 The parties/counsel identified below participated in the meeting required by Fed. R. Civ.  
 25 P. 26(f) on April 21, 2015, and prepared the following report. The case management conference  
 26 in this matter is scheduled for May 15, 2015, at 2:00 p.m. before United States Magistrate Judge  
 27 Joseph C. Spero.  
 28

1           1.       Jurisdiction and Service: Plaintiff alleges that this Court has jurisdiction pursuant  
2 to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. §§ 2201-2202 (declaratory and  
3 further relief), 16 U.S.C. §§ 1540(c) and (g)(1)(C) (action arising under the Endangered Species  
4 Act (“ESA”) and citizen suit provision), and 5 U.S.C. § 702 (Administrative Procedure Act  
5 (“APA”). Federal Defendants assert that the Court lacks subject matter jurisdiction over one or  
6 more of Plaintiff’s claims. All process has been served.

7           2.       Facts: Plaintiff Center for Biological Diversity brought this action against  
8 defendants U.S. Department of the Interior; S.M.R. Jewell, Secretary of the Interior; the U.S.  
9 Fish and Wildlife Service; and its Director, Dan Ashe, (collectively, “FWS”). The Center alleges  
10 that FWS has failed to comply with section 7 of the Endangered Species Act (“ESA”) and its  
11 implementing regulations, as well as section 706 of the APA. Specifically, FWS has failed to  
12 complete interagency consultation with the U.S. Environmental Protection Agency (“EPA”)   
13 regarding the effects of three pesticides on two endangered species in the California Bay Delta  
14 within the timelines required under the ESA and its implementing regulations. Federal  
15 Defendants dispute Plaintiff’s characterization of the facts, the APA, the ESA, the regulations  
16 implementing the ESA, and further deny that they have violated ESA § 7 or the APA.

17           3.       Legal Issues: Plaintiff alleges that the ESA requires that consultation occur at the  
18 earliest possible time and be conducted according to a strict timeline in order to ensure that the  
19 agency action is not causing jeopardy to listed species and their critical habitat, or otherwise  
20 harming the species. *See* 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1). To  
21 that end, FWS and EPA are required to conclude consultations within 90 days. 16 U.S.C. §  
22 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1).  
23  
24  
25

26           Plaintiff alleges that the legal issue in this case is whether FWS’s failure to complete  
27 consultation within 90 days violates section 7 of the ESA and its implementing regulations or  
28

1 constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the  
2 APA. 5 U.S.C. § 706(1).

3 Federal Defendants dispute Plaintiff's characterization of the legal issues in this case and  
4 further deny that they have violated ESA § 7 or the APA. They additionally assert that the Court  
5 lack subject matter jurisdiction over one or more of Plaintiff's claims, and Plaintiff lacks  
6 standing and fails to state a claim upon which relief can be granted. Additionally, Federal  
7 Defendants' position is that Plaintiff's entry into a settlement with the United States in *Center for*  
8 *Biological Diversity v. Environmental Protection Agency*, No. 07-cv-2974 (N.D. Cal.) bars the  
9 claims Plaintiff attempts to bring here. Federal Defendants further assert that some or all of  
10 Plaintiff's claims are barred by waiver, collateral estoppel, and/or the doctrines of res judicata  
11 and/or claim preclusion.  
12

13 4. Motions: No motions are pending. Federal Defendants intend to file a motion for  
14 judgment on the pleadings on or before May 15, 2015. Should the motion for judgment on the  
15 pleadings not fully resolve the case, Federal Defendants additionally intend to file a motion to  
16 determine the scope of the Court's review within 15 days of the Court's decision on the motion  
17 for judgment on the pleadings, and if the case has not been fully resolved by Federal Defendants'  
18 motion, the parties would ultimately file cross motions for summary judgment.  
19

20 5. Amendment of Pleadings: Amendment of the pleadings is not expected. The  
21 deadline for amending the pleadings is May 28, 2015, which is 21 days after service of the  
22 responsive pleading (as specified by Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure).  
23

24 6. Evidence Preservation: Plaintiff has taken steps to preserve evidence by ensuring  
25 that relevant electronic documents are not subject to ongoing erasures or destruction.

26 Federal Defendants' position is that because this is an action for review on an  
27 administrative record that is governed by the APA standard of review, 5 U.S.C. § 706, the basis  
28

1 for this Court’s review will be the administrative record compiled by the Federal Defendants, not  
2 fact-finding by the Court. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44  
3 (1985). The administrative record will contain a certification from an agency official that the  
4 documents contained therein constitute the administrative record. There is therefore no need for  
5 an evidentiary preservation order.

6 To the extent discovery is permitted, the Parties request the following language in the  
7 litigation plan as to electronically stored information:  
8

9 **A. Definitions**

10 1. “Parties” means the parties to this litigation, including their employees and  
11 agents.

12 2. “Policy” means a regular practice at an entity that managers know about and  
13 expect to be carried out.

14 **B. Electronically Stored Information.**

15 1. Preservation Not Required for Electronically Stored Information (“ESI”) That Is  
16 Not Reasonably Accessible.  
17

18 a. Except as provided in subparagraph b below, the Parties need not preserve  
19 the following categories of electronically stored information for this litigation:

20 i. Data stored in a backup system for the purpose of system recovery  
21 or information restoration, including but not limited to, disaster recovery backup tapes,  
22 continuity of operations systems, and data or system mirrors or shadows, if such data are  
23 routinely deleted or written over in accordance with an established routine system maintenance  
24 practice;

25 ii. Voicemail messages;

26 iii. Instant messages, such as messages sent on AOL Instant  
27 Messenger or Microsoft Communicator;  
28

1           iv.       Text messages, such as cell phone to cell phone SMS messages;

2           v.       Electronic mail sent to or from a personal digital assistant  
3 (“PDA”), smartphone (e.g., BlackBerry, iPhone), or tablet (e.g., iPad) provided that a copy of  
4 such email is routinely saved elsewhere;

5           vi.       Other electronic data stored on a PDA, smartphone, or tablet, such  
6 as calendar or contact data or notes, provided that a copy of such information is routinely saved  
7 elsewhere;

8           vii.       Logs of calls made from cellular phones;

9           viii.       Deleted computer files, whether fragmented or whole (nothing in  
10 this order authorizes the intentional deletion of ESI after the duty arose to preserve such ESI);

11           ix.       Data stored in random access memory (“RAM”), cache memory,  
12 or in temporary or cache files, including internet history, web browser cache and cookie files,  
13 wherever located;

14           x.       Data stored on photocopiers, scanners, and fax machines;

15           xi.       Server, system, or network logs;

16           xii.       Electronic data temporarily stored by scientific equipment or  
17 attached devices, provided that the data that is ordinarily preserved as part of a laboratory report  
18 is, in fact, preserved in its ordinary location and form; and

19           xiii.       Data stored on legacy systems that were no longer in use five years  
20 before the complaint was filed.

21           b.       Notwithstanding subparagraph a. above, if on the date of this agreement  
22 either Party has a Policy that results in the routine preservation of any of the categories of  
23 information identified in subparagraph a, such Party shall continue to preserve such information  
24 in accordance with its Policy.  
25  
26  
27  
28

1           7.     Disclosures: Plaintiff's position is that all initial disclosures required by Rule  
2 26(a)(1) shall be completed on or before May 8, 2015, which is the date set by court order.

3           Federal Defendants' position is that this case is exempt from initial disclosures under  
4 Federal Rule of Civil Procedure 26(a)(1)(B)(I) because it is an action for review on an  
5 administrative record, and Federal Defendants object to initial disclosures on that basis. Federal  
6 Defendants propose that the parties make their disclosures 21 days after the Court's decision on  
7 the Federal Defendants' motion to determine scope of review.

8           8.     Discovery: No discovery has been taken to date. Plaintiff's position is that  
9 discovery is permissible as to Plaintiff's ESA cause of action, the scope of discovery will be  
10 governed by Rule 26(b)(1), and that discovery is likely to focus on the agency's delay in  
11 completing interagency consultation.

12           Federal Defendants' position is that the requirement of a discovery plan is inapplicable to  
13 this action for review on an administrative record. Fed. R. Civ. P. 26(a)(1)(B)(I); Fed. R. Civ. P.  
14 26(f)(1). The Federal Defendants propose that all discovery, including initial disclosures under  
15 Rule 26(a), be stayed until the Court's decision on the Federal Defendants' motion to determine  
16 the scope of review. The discovery plan proposed below would apply only if the Court denies  
17 Federal Defendants' motion. If the Federal Defendants' motion for judgment on the pleadings is  
18 denied, and their motion to limit the scope of review to the administrative record granted,  
19 Federal Defendants will lodge and serve the administrative record by October 15, 2015.  
20  
21

22           Should the Court determine that discovery is appropriate, the parties agree to the  
23 following conditions. The parties will work towards mutually acceptable production  
24 specifications. The parties do not plan to utilize expert witnesses. The parties agree to limit  
25 discovery as follows:  
26

27           a.     No more than a total of 25 interrogatories, counted in accordance with  
28 Rule 33(a), shall be served by each side.

1           b.       No more than 20 document requests and no more than 20 requests for  
2 admissions shall be served by each side.

3           c.       No more than three depositions shall be taken by either side.

4           9.       Class Actions: Not applicable.

5           10.      Related Cases: None.

6           11.      Relief: Plaintiff has requested that the Court enter judgment providing the  
7 following relief: (1) Declare that FWS is in violation of section 7 of the ESA, 16 U.S.C. § 1536,  
8 and its implementing regulations, 50 C.F.R. §§ 402.14(e), 402.46(c)(1), by failing to timely  
9 complete the consultations for atrazine, alachlor, and 2,4-D, which EPA determined were likely  
10 to adversely affect the Alameda whipsnake and Delta smelt; (2) Declare that FWS is in violation  
11 of Section 706(1) of the APA by failing to complete the consultations within a reasonable time;  
12 (3) Order FWS to complete the required consultations; (4) Order restrictions on, or prohibit the  
13 use of, atrazine, alachlor, and 2,4-D where they may affect the Alameda whipsnake and Delta  
14 smelt or their habitats until the consultation processes have been completed; (5) Award Plaintiff  
15 its attorneys' fees and costs in this action pursuant to 16 U.S.C. § 1540(g)(4) and 28 U.S.C. §  
16 2412; and (6) Grant such other and further relief as the Court deems just and proper. Federal  
17 Defendants' position is that there is no legal violation and that Plaintiff is not entitled to the relief  
18 requested or to any relief.

19           12.      Settlement and ADR: The parties believe that settlement negotiations could be  
20 productive and have requested mediation.

21           13.      Consent to Magistrate Judge For All Purposes: All parties have consented to have  
22 a magistrate judge conduct all further proceedings including entry of judgment.

23           14.      Other References: The parties do not believe that the case is suitable for reference  
24 to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

25           15.      Narrowing of Issues: The Plaintiff does not believe the issues can be narrowed  
26 and have no requests to bifurcate issues. Federal Defendants intend to file a motion for judgment  
27 on the pleadings on or before May 15, 2015, which may narrow the issues presented.

28           16.      Expedited Trial Procedure: Not applicable.

1           17.    Scheduling: Because the Plaintiff does not plan to utilize experts and expects that  
2 the case can be resolved on cross-motions for summary judgment, proposed dates for the  
3 designation of experts, pretrial conference and trial are not provided. Federal Defendants expect  
4 to file a motion for judgment on the pleadings on or before May 15, 2015. Should the motion for  
5 judgment on the pleadings be denied, Federal Defendants expect that this case can be resolved on  
6 the parties' cross-motions for summary judgment.

7           As noted above, Federal Defendants' position is that discovery is not proper in this  
8 administrative record review case. If the Federal Defendants' motion for judgment on the  
9 pleadings is denied, and their motion to limit the scope of review to the administrative record  
10 granted, Federal Defendants will lodge and serve the administrative record by October 15, 2015.  
11 The parties agree that any motion to augment or supplement that record will be due 30 days after  
12 Federal Defendants lodge and serve the administrative record.

13           Should the Court find that discovery is appropriate in this case, the parties have agreed to  
14 the following deadlines:

15           a.       Fact discovery should be commenced in time to be completed on or before  
16 December 15, 2015.

17           b.       All non-dispositive motions, including those relating to fact discovery,  
18 shall be filed and served on or before January 15, 2016.

19           c.       All dispositive motions shall be filed and served by March 15, 2016.

20           18.    Trial: The parties expect that the case can be resolved on cross motions for  
21 summary judgment.

22           19.    Disclosure of Non-party Interested Entities or Persons: Pursuant to Civil L.R. 3-  
23 16, Plaintiff has filed a "Certification of Interested Entities or Persons," reporting that as of the  
24 reporting date, other than the named party, there is no such interest to report. The Rule does not  
25 apply to any governmental entity or its agencies.

26           20.    No other matters need be considered.

27           Respectfully submitted this 8th day of May, 2015,  
28



1 */s/ Collette L. Adkins*

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