

1 JOHN C. CRUDEN
 Assistant Attorney General
 2 SETH M. BARSKY, Chief
 S. JAY GOVINDAN, Assistant Chief
 3 J. BRETT GROSKO, Trial Attorney (Maryland Bar)
 U.S. Department of Justice
 4 Environment & Natural Resources Division
 Wildlife & Marine Resources Section
 5 Ben Franklin Station, P.O. Box 7611
 Washington, DC 20044-7611
 6 Phone: (202) 305-0342 / Fax: (202) 305-0275
 7 Email: brett.grosko@usdoj.gov
 8 *Counsel for Federal Defendants*

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)
 Director,)
 18)
Federal Defendants,)
 19)
CROPLIFE AMERICA,)
 20)
Proposed Defendant-)
Intervenor.)
 21)
 22 _____)

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

**NOTICE OF MOTION AND FEDERAL
 DEFENDANTS' MOTION FOR
 JUDGMENT ON THE PLEADINGS
 AND MEMORANDUM IN SUPPORT**

(Hon. Joseph C. Spero)

Date: June 26, 2015

Time: 9:30 am

Place: Courtroom G, 15th Floor

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION

1
2 Please take notice that on June 22, 2015, or as soon thereafter as this matter may be
3 heard, in the Courtroom of the Honorable Joseph C. Spero (Courtroom G, 15th Floor), Federal
4 Defendants the U.S. Department of the Interior; S.M.R. Jewell, in her official capacity as
5 Secretary of the Interior; U.S. Fish and Wildlife Service (“FWS”); and Dan Ashe, in his official
6 capacity as the Director of the U.S. Fish and Wildlife Service, will and hereby do respectfully
7 move for judgment on the pleadings pursuant to Federal Rules of Civil Procedure 12(b)(1),
8 12(b)(6), and 12(c). This Motion is based upon this Notice of Motion and Motion for Judgment
9 on the Pleadings, the Memorandum of Points and Authorities in support thereof, Exhibit “A”,
10 and the Proposed Order, all pleadings and papers filed in this action, and upon such other matters
11 the Court may entertain.
12

13 **STATEMENT OF RELIEF SOUGHT**

14 As explained in the accompanying memorandum of points and authorities, because the
15 Plaintiff’s interest in the timing of FWS’s consultation does not fall within the “zone of interests”
16 expressly protected by the ESA, Plaintiff lacks “prudential standing” to pursue its Administrative
17 Procedure Act unreasonable delay claim, Count 2. The Court should dismiss Count 2 for lack of
18 subject matter jurisdiction. Moreover, the Plaintiff signed a settlement agreement in 2010 with
19 the federal government. That settlement agreement waived and released all challenges
20 concerning alleged violations of ESA Section 7 of the ESA (Count 1). Plaintiff is therefore
21 barred from filing any such suit until the Environmental Protection Agency and FWS complete
22 their ESA consultations on the three pesticide components at issue here. Additionally, Plaintiff’s
23 APA claim improperly seeks to repackage its ESA claim and circumvent the Settlement
24 Agreement. The Court should dismiss Counts 1 and 2 for failure to state a claim.
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>PAGE</u>
INTRODUCTION	1
BACKGROUND	2
I. STATUTORY AND REGULATORY FRAMEWORK	2
A. ENDANGERED SPECIES ACT	2
B. THE ADMINISTRATIVE PROCEDURE ACT	4
II. FACTUAL BACKGROUND	5
III. STANDARD OF REVIEW	6
ARGUMENT	7
I. PLAINTIFF LACKS STANDING TO BRING ITS APA CLAIM.	7
II. THE SETTLEMENT AGREEMENT BARS PLAINTIFF’S CLAIMS.	9
A. THE SETTLEMENT AGREEMENT IS PROPERLY BEFORE THE COURT.....	9
B. THE PLAIN LANGUAGE OF THE SETTLEMENT AGREEMENT PRECLUDES PLAINTIFF FROM ADVANCING ITS ESA AND APA CLAIMS.....	11
1. The Settlement Agreement Bars Plaintiff’s ESA Claim.	11
2. The Settlement Agreement Bars Plaintiff’s APA Unreasonable Delay Claim.	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	7, 12
<i>City of Roseville Employees' Retirement System v. Sterling Financial Corp.</i> , 963 F. Supp. 2d 1092 (E.D. Wash. 2013)	10
<i>Cnty. Nutrition Inst. v. Young</i> , 773 F.3d 1356 (D.C. Cir. 1985)	4
<i>Cobell v. Norton</i> , 240 F.3d 1081 (D.C. Cir. 2001)	4
<i>Dworkin v. Hustler Magazine, Inc.</i> , 867 F.2d 1188 (9th Cir. 1989)	7
<i>Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy</i> , 383 F.3d 1082 (9th Cir. 2004)	3
<i>Kennewick Irr. Dist. v. U.S.</i> , 880 F.2d 1018 (9th Cir. 1989)	11, 13
<i>Larsen v. Trader Joe's Co.</i> , 917 F. Supp. 2d 1019 (N.D. Cal. 2013)	7
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	8
<i>MedCath Inc. Employee Health Care Plan v. Stratton</i> , -- F. Supp. 3d --, 2015 WL 225414 (D. Ariz. 2015)	6
<i>Miller v. Lifestyle Creations, Inc.</i> , 993 F.2d 883 (9th Cir. 1993)	6
<i>National Ass'n of Home Builders v. United States Army Corps of Eng'rs</i> , 417 F.3d 1272 (D.C. Cir. 2005)	9
<i>Navarro v. Block</i> , 250 F.3d 729 (9th Cir. 2001)	7
<i>Papasan v. Allain</i> , 478 U.S. 265, (1986)	10
<i>Reese v. BP Exploration (Alaska), Inc.</i> , 643 F.3d 681 (9th Cir. 2011)	7
<i>Saavedra v. Donovan</i> , 700 F.2d 496 (9th Cir. 1983)	11
<i>Shakey's Inc. v. Covalt</i> , 704 F.2d 426 (9th Cir. 1983)	11
<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> , 551 U.S. 308 (2007)	10
<i>U.S. v. Seckinger</i> , 397 U.S. 203 (1970)	11
<u>STATUTES</u>	
5 U.S.C. § 555(b)	4
5 U.S.C. § 704	14

1 5 U.S.C. § 706(1) 4
2 16 U.S.C. § 1531 2
3 16 U.S.C. § 1532(19) 3
4 16 U.S.C. § 1533 2
5 16 U.S.C. § 1536 *passim*
6 16 U.S.C. § 1538(a)(1)(B) 2, 3
7 16 U.S.C. § 1540(g) 12, 13, 14

8 **FEDERAL REGULATIONS**

9 50 C.F.R. § 402.02 3, 5, 9
10 50 C.F.R. § 402.13(a) 3
11 50 C.F.R. § 402.14 4, 9
12 50 C.F.R. § 402.16 4
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS OF AUTHORITIES

INTRODUCTION

1
2
3 Plaintiff challenges the U.S. Fish and Wildlife Service’s (“FWS”) alleged failure to
4 complete consultation on the effects of the pesticide components alachlor, atrazine, and 2,4-D on
5 the Alameda whipsnake (*Masticophis lateralis euryxanthus*) and Delta smelt (*Hypomesus*
6 *transpacificus*) under the Endangered Species Act (“ESA”) and Administrative Procedure Act
7 (“APA”) with sufficient alacrity. As set forth below, Plaintiff’s claims fail for several reasons.
8 First, Plaintiff lacks standing to bring this APA unreasonable delay claim. Plaintiff’s alleged
9 interest in the timing of FWS’s consultation falls outside the “zone of interests” expressly
10 protected by the ESA, and as such, Plaintiff lacks prudential standing to pursue its APA claim
11 (Count 2). Accordingly, the Court should dismiss this claim.
12

13 Second, Plaintiff is barred by the terms of a prior settlement agreement from bringing this
14 suit until the Environmental Protection Agency (“EPA”) and FWS complete their ESA
15 consultations on the three pesticide components at issue here. Plaintiff entered into a settlement
16 agreement in 2010 with the United States, whereby it waived and released all challenges
17 concerning alleged violations of ESA Section 7 in connection with the pesticide consultations at
18 the heart of the instant complaint. In exchange for the litigation-free certainty, EPA agreed to the
19 vacatur of its authorization of these same components. Despite signing that Settlement
20 Agreement containing those conditions, on February 12, 2015, Plaintiff commenced the instant
21 lawsuit. By filing and proceeding with this case, Plaintiff ignores the provisions barring its
22 current claims, while still reaping the benefits of those provisions favorable to them.
23
24

25 Finally, to the extent that Plaintiff’s APA claim is simply an effort to repackage its barred
26 ESA claim, it must fail. Thus, for the reasons explained below, the U.S. Department of the
27 Interior, S.M.R. Jewell, Secretary of the Interior, the U.S. Fish and Wildlife Service, and Dan
28

1 Ashe, Director of the U.S. Fish and Wildlife Service (“Federal Defendants”) respectfully request
2 that the Court find that Plaintiff lacks standing and, alternatively, enforce the waiver and release
3 provision of the Settlement Agreement by dismissing Plaintiff’s claims with prejudice under
4 Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(c).

5 **BACKGROUND**

6 **I. STATUTORY AND REGULATORY FRAMEWORK**

7 **A. ENDANGERED SPECIES ACT**

8 Each federal agency must insure that “any action authorized, funded, or carried out” by
9 such agency is not likely to jeopardize the continued existence of species listed as endangered or
10 threatened under the ESA, or result in the destruction or adverse modification of designated
11 critical habitat. 16 U.S.C. § 1536(a)(2). “Jeopardize the continued existence of” means “to
12 engage in an action that reasonably would be expected, directly or indirectly, to reduce
13 appreciably the likelihood of both the survival and recovery of a listed species in the wild by
14 reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

15 “Destruction or adverse modification” means “a direct or indirect alteration that appreciably
16 diminishes the value of critical habitat for both the survival and recovery of a listed species”
17 50 C.F.R. § 402.02.

18 To facilitate this inquiry, ESA Section 7 and its implementing regulations set forth a
19 detailed consultation process for determining the biological impacts of a proposed federal action.
20 16 U.S.C. § 1536; 50 C.F.R. Part 402. An action agency may meet its procedural obligations
21 under ESA § 7(a)(2) by conducting “informal consultation” or “formal consultation” as
22 appropriate. The implementing regulations provide for “informal consultation” to assist an action
23 agency in determining whether and when further consultation is necessary. Informal consultation
24 is “an optional process that includes all discussions, correspondence, etc., between [NMFS or
25
26
27
28

1 FWS¹] and the Federal agency . . . designed to assist the [action agency] in determining whether
2 formal consultation . . . is required.” 50 C.F.R. § 402.13(a). “If during informal consultation it is
3 determined by the [action agency], with the written concurrence of the Service, that the action is
4 not likely to adversely affect listed species or critical habitat, the consultation process is
5 terminated, and no further action is necessary.” *Id.* Therefore, even where an agency determines
6 that an action “may affect” species, thus triggering the need to initiate some form of consultation,
7 but the action agency determines (and the Service concurs) that the action is “not likely to
8 adversely affect” a listed species, formal consultation is not required. *Ground Zero Ctr. for Non-*
9 *Violent Action v. U.S. Dep’t of Navy*, 383 F.3d 1082, 1091-92 (9th Cir. 2004).

11 On the other hand, if the action agency determines that the project is likely to adversely
12 affect a listed species or adversely modify critical habitat, the agencies undertake a more robust
13 “formal” consultation process. In formal consultation, FWS must, *inter alia*: (a) evaluate the
14 current status of the listed species; (b) evaluate the effects of the action and cumulative effects on
15 the listed species or critical habitat; (c) formulate its biological opinion as to whether the action,
16 taken together with cumulative effects, is likely to jeopardize the continued existence of listed
17 species or result in the destruction or adverse modification of critical habitat; and (d) formulate a
18 statement concerning incidental take, if such take may occur.² 50 C.F.R. § 402.14. At the end of
19 its review, FWS provides the action agency with a biological opinion, which includes FWS’s
20 opinion on whether the action is likely to jeopardize the continued existence of a listed species or
21
22
23
24

25 ¹ In general, FWS has authority over terrestrial and freshwater species, and the National
26 Marine Fisheries Service (“NMFS”)—an entity within the Department of Commerce—has
27 authority over marine species.

28 ² The ESA prohibits the “taking” of designated endangered species. 16 U.S.C. §
1538(a)(1)(B). The term “take” is defined as to “harass, harm . . . or to attempt to engage in any
such conduct.” 16 U.S.C. § 1532(19).

1 destroy or adversely modify critical habitat. Even after ESA Section 7 is completed, an agency
2 may be required to reinitiate consultation under certain circumstances. 50 C.F.R. § 402.16.

3 The ESA provides that formal consultation “shall be concluded within the 90-day period
4 beginning on the date on which initiated or...within such other period of time as is mutually
5 agreeable to [FWS] and the Federal agency.” 16 U.S.C. § 1536(b)(1)(A). The ESA also states
6 that “[i]n the case of an agency action involving a permit or license applicant,” the agencies
7 “may not mutually agree to conclude consultation within a period exceeding 90 days unless”
8 they either have the applicant’s consent or, if the consultation will still be completed within 150
9 days, FWS provides a detailed written statement to the applicant explaining, *inter alia*, “the
10 reasons why a longer period is required.” 16 U.S.C. §§ 1536(b)(1)(B)(i), (ii); *see also* 50 C.F.R.
11 § 402.02 (defining “applicant”); § 402.14(e) (same).
12

13 **B. THE ADMINISTRATIVE PROCEDURE ACT**

14 The APA empowers reviewing courts to “compel agency action unlawfully withheld or
15 unreasonably delayed[.]” 5 U.S.C. §§ 555(b); 706(1). The issuance of equitable relief under
16 Section 706 of the APA “is an extraordinary remedy and [the Court] require[s] similarly
17 extraordinary circumstances to be present before [it] will interfere with an ongoing agency
18 process.” *Cnty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985). A finding of
19 unreasonable delay is appropriate “when the delay is ‘egregious[.]’ ” *Cobell v. Norton*, 240 F.3d
20 1081, 1096 (D.C. Cir. 2001), and even then a court order to direct agency action should issue
21 only in “exceptionally rare cases[.]” *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991).
22 “[R]espect for the autonomy and comparative institutional advantage of the executive branch has
23 traditionally made courts slow to assume command over an agency's choice of priorities.” *Id.* at
24 74.
25
26
27
28

II. FACTUAL BACKGROUND

1
2 On May 30, 2007, Plaintiff filed a complaint in this Court alleging that the EPA had
3 failed to comply with ESA § 7, 16 U.S.C. § 1536, regarding the potential impacts of forty-three
4 pesticide active ingredients upon eleven ESA-protected species, including the Delta smelt and
5 Alameda whipsnake. *Ctr. for Biological Diversity v. EPA*, No. 07-2794 (N.D. Cal.) (Dkt. 1); *see*
6 *also* Dkt. 1 ¶ 35. CBD subsequently amended its complaint to include an additional thirty-two
7 pesticide active ingredients, for a total of seventy-five active ingredients. *Id.* (Dkt. 103).

8
9 After conducting settlement negotiations, on January 12, 2010, EPA and CBD filed a
10 proposed stipulated injunction. *Id.* (Dkt. 104) (“Settlement Agreement”); *see also* Dkt. 1
11 (Plaintiff’s Complaint in the instant lawsuit) ¶ 35. After considering the views of all of the
12 parties, this Court entered that stipulated injunction on March 17, 2010. *Ctr. for Biological*
13 *Diversity v. EPA*, No. 07-2794 (N.D. Cal.) (Dkt. 121). The Settlement Agreement required EPA
14 to make effects determinations on many active pesticide ingredients by dates certain. Settlement
15 Agreement at 2-7. In the interim, the Court enjoined, vacated, and set aside EPA’s authorization
16 of those same pesticide active ingredients, except as provided in certain exclusions, exemptions,
17 and termination provisions. *Id.* at 7-22; *see also* Dkt. 1 (Plaintiff’s Complaint in the instant
18 lawsuit) ¶ 35. The Settlement Agreement specifically stated that the interim injunction would not
19 terminate until EPA and FWS completed “the consultation obligation imposed under Section
20 7(a)(2) of the ESA and the implementing ESA consultation regulations.” Settlement Agreement
21 at 20-21. In exchange for this interim relief, Plaintiff agreed to dismiss its lawsuit with prejudice.
22 *Id.* ¶ 27. It also expressly agreed:

23
24
25 [N]ot to bring, assist any other party in bringing, or join EPA or any other party in
26 any court proceeding that concerns an alleged violation of Section 7 of the ESA
27 pertaining to the effects of any of the Pesticides on any of the eleven species
28 identified in Section 3 in the eight Bay Area counties subject to this Stipulated
Injunction until after the completion of any Terminating Event for that pesticide
as set forth in Section 4 of this Stipulated Injunction.

1 Settlement Agreement ¶ 27.

2 Notwithstanding this commitment, on February 12, 2015, Plaintiff filed its Complaint in
3 the instant case. Dkt. 1. Plaintiff acknowledges that EPA has submitted its biological evaluations
4 concerning the effects of alachlor, atrazine, and 2,4-D on the Alameda whipsnake and Delta
5 smelt. Dkt. No. 1 ¶¶ 4, 24-37. Plaintiff alleges that FWS has failed to complete its consultation
6 with EPA within the period prescribed in the ESA. *Id.* ¶ 43 (Count 1). Plaintiff also argues that
7 FWS’s alleged failure to complete consultation within the times prescribed by the ESA
8 constitutes an unreasonable delay under the APA (Count 2). *Id.* ¶ 46.

10 **III. STANDARD OF REVIEW**

11 Rule 12(c) of the Federal Rules of Civil Procedure allows a party to move for judgment
12 on the pleadings “[a]fter the pleadings are closed—but early enough not to delay trial.” A
13 defendant may move for judgment on a claim for lack of subject-matter jurisdiction. Fed. R. Civ.
14 P. 12(b)(1). Where such a motion is filed, the “plaintiff [must] bear the burden of establishing by
15 a preponderance of the evidence that the court has jurisdiction to entertain his claims.” *Miller v.*
16 *Lifestyle Creations, Inc.*, 993 F.2d 883, 1993 WL 173724, *1 (9th Cir. 1993); *see also MedCath*
17 *Inc. Emp. Health Care Plan v. Stratton*, -- F. Supp. 3d --, No. 14-cv-8099, 2015 WL 225414, at
18 *2 (D. Ariz. Jan. 16, 2015).

19 A motion for judgment on the pleadings may also be brought under Federal Rule of Civil
20 Procedure 12(b)(6) to test the legal sufficiency of the plaintiff’s claims. *Navarro v. Block*, 250
21 F.3d 729, 732 (9th Cir. 2001). When determining whether a claim has been stated, the court
22 accepts as true all well-pled factual allegations and construes them in the light most favorable to
23 the plaintiff. *Reese v. BP Exploration (Alaska), Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

24 However, the court need not “accept as true allegations that contradict matters properly subject
25 to judicial notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or
26
27
28

1 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
2 (citation omitted). The standard to be applied on a motion for judgment on the pleadings under
3 Federal Rule of Civil Procedure 12(c) is “virtually identical” to the standard for evaluating a
4 motion to dismiss under Rule 12(b)(6). *Larsen v. Trader Joe’s Co.*, 917 F. Supp. 2d 1019, 1021-
5 22 (N.D. Cal. 2013) (citing *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir.
6 1989)).

7 8 **ARGUMENT**

9 Plaintiff’s claims fail for at least three reasons: (1) Plaintiff lacks the requisite prudential
10 standing to bring its APA claim; (2) the 2010 Settlement Agreement precludes Plaintiff’s ESA
11 claim; and (3) the Settlement Agreement encompasses all claims that “concern” a violation of
12 Section 7 of the ESA, including Plaintiff’s APA claim.

13 **I. PLAINTIFF LACKS STANDING TO BRING ITS APA CLAIM.**

14 The Plaintiff lacks the prudential standing necessary to bring its APA claim against FWS.
15 Standing involves not only “constitutional limitations on federal-court jurisdiction,” but also
16 “prudential limitations on its exercise.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation
17 omitted). These “prudential limitations”—generally referred to as “prudential standing”—are
18 “founded in concern about the proper—and properly limited—role of the courts in a democratic
19 society” *Id.* (citations omitted). One of the limitations of “prudential standing” is that “a
20 plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the
21 statutory provision or constitutional guarantee invoked in the suit.” *Id.*; *see also Lujan v.*
22 *Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992) (holding that an individual can seek to
23 enforce procedural rights only “so long as the procedures in question are designed to protect
24 some threatened concrete interest of his that is the ultimate basis of his standing”).
25
26
27
28

1 The issue here is whether the interest sought to be protected by this Plaintiff is
2 “arguably within the zone of interests to be protected or regulated by the statute . . . in question.”
3 *Bennett v. Spear*, 520 U.S. at 175 (citation omitted). Importantly, the Supreme Court has held
4 that this question is to be decided “not by reference to the overall purpose of the Act in question
5 (here, species preservation),” but rather “*by reference to the particular provision of law upon*
6 *which the plaintiff relies*”—that is, by reference to “the statutory provision whose violation forms
7 the legal basis for [its] complaint.” *Id.* at 175-76 (citations omitted) (emphasis added).
8

9 Plaintiff may have a general interest in the “overall purpose” of the ESA, which is
10 “species preservation.” *See id.* But that general interest is not sufficient to satisfy the
11 requirements of prudential standing. *Id.* Instead, the Plaintiff is required to show that its interest
12 in a timely consultation is within the “zone of interests” protected by the “particular
13 provision[s]” of the ESA that define the schedule for consultation.
14

15 Here, Plaintiff cannot make that showing because the provisions of the ESA that define
16 the schedule for consultation expressly identify the parties that those provisions are meant to
17 protect, and the Plaintiff is not among them. As discussed above, the ESA provides that
18 consultation “shall be concluded within the 90-day period beginning on the date on which
19 initiated or . . . within such other period of time as is mutually agreeable to [FWS] and the Federal
20 agency.” 16 U.S.C. § 1536(b)(1)(A). But the ESA also expressly limits the agencies’ discretion
21 to extend the period of the consultation “[i]n the case of an agency action involving a permit or
22 license applicant” 16 U.S.C. § 1536(b)(1)(B); *see also* 50 C.F.R. § 402.02 (definition of
23 “applicant”). Where there is an applicant involved, the agencies “may not mutually agree to
24 conclude consultation within a period exceeding 90 days unless” they either have the applicant’s
25 consent or, if the consultation will still be completed within 150 days, FWS provides a detailed
26
27
28

1 written statement to the applicant explaining, *inter alia*, “the reasons why a longer period is
2 required.” 16 U.S.C. §§ 1536(b)(1)(B)(i), (ii); *see also* 50 C.F.R. § 402.14(e) (same).

3 Permit and license applicants have an interest in a timely consultation, and through these
4 “particular provision[s]” of the ESA, Congress protected that interest by expressly limiting the
5 discretion of the agencies to extend consultations where applicants are involved. But the Plaintiff
6 here is not an applicant, and its general interest in “species preservation” does not fall within that
7 “zone of interests.” Instead, this Plaintiff’s interests in these species are protected by other
8 provisions of the ESA (including Section 7(a)(2)’s prohibition against “jeopardy” and Section
9 9’s prohibition against the “take” of listed species). Because the Plaintiff’s interest in the timing
10 of this consultation does not fall within the “zone of interests” expressly protected by the ESA, it
11 does not have prudential standing to pursue its APA claim for unreasonable delay against FWS,
12 and the Court should dismiss Count 2 under Federal Rule of Civil Procedure 12(b)(1).³

14 **II. THE SETTLEMENT AGREEMENT BARS PLAINTIFF’S CLAIMS.**

15 **A. THE SETTLEMENT AGREEMENT IS PROPERLY BEFORE THE COURT.**

16 In making a determination on a motion for judgment on the pleadings, a court must
17 consider “the complaint in its entirety, as well as other sources courts ordinarily examine when
18 ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the
19 complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v.*
20

21
22
23
24
25 ³ As the D.C. Circuit has noted, this “zone of interest” test is “intended to ‘exclude only
26 those whose interests are so marginally related to or inconsistent with the purposes implicit in the
27 statute that it cannot reasonably be assumed that Congress intended to permit the suit.’” *Nat’l*
28 *Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005)
(citation omitted). Here, it “cannot reasonably be assumed that Congress intended to permit” the
Plaintiff’s claims against FWS. The plain language of the ESA shows that Congress intended
only permit and license applicants to fall within the “zone of interests” of these provisions.

1 *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, (2007). Here, the Settlement Agreement is
2 incorporated by reference in Plaintiff's Complaint.⁴

3 The doctrine of incorporation by reference allows "a district court to consider documents
4 whose contents are alleged in a complaint and whose authenticity no party questions, but which
5 are not physically attached to the plaintiff's pleading." *In re Silicon Graphics, Inc. Sec. Litig.*,
6 183 F.3d 970, 986 (9th Cir. 1999) (citation omitted). Once incorporated by reference, the Court
7 may consider them without converting the motion for judgment on the pleadings into a motion
8 for summary judgment. *Id.* Once a document is deemed incorporated by reference, the entire
9 document is assumed to be true for purposes of a motion for judgment on the pleadings. *City of*
10 *Roseville Emps' Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1107 (E.D. Wash. 2013).

11
12 Plaintiff has clearly incorporated the Settlement Agreement into the Complaint by
13 directly referring to it in its Complaint. Plaintiff states:

14 As a result of previous litigation and a court-approved settlement, [EPA]
15 determined that dozens of registered pesticides are likely to adversely affect listed
16 species in the California Bay Delta and requested consultation with FWS on the
17 impacts of these pesticides. Three of these pesticides—atrazine, alachlor and 2,4-
18 D—and two listed species—the Delta smelt and Alameda whipsnake—are at issue in
19 this Complaint.

20 Dkt. 1 ¶ 3. CBD later alleges that:

21 In 2007, the Center sued EPA for failing to consult with FWS regarding the
22 pesticide impacts on 11 San Francisco Bay Area species with respect to 77
23 pesticide active ingredients. In 2010, the Center and EPA reached a settlement
24 and the Federal Court entered a Stipulated Injunction requiring the EPA complete
25 effects determinations for these 11 species and imposing spray-limitation buffers
26 around defined habitats. In compliance with these settlements, EPA began to
27 analyze the impacts of different pesticides on the listed species.

28 ⁴ The Court may alternatively take judicial notice of the Settlement Agreement. The Settlement Agreement is "not subject to reasonable dispute" because it is "capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned." Fed. R. Evid. 201(b); *Papasan v. Allain*, 478 U.S. 265, 269 n.1, (1986) (stating that the court was not precluded, in considering a motion to dismiss, from taking notice of items in the public record).

1 *Id.* ¶ 35. Therefore, the Settlement Agreement has been sufficiently incorporated by reference for
2 the purposes of a motion for judgment on the pleadings, and the Court may properly consider it.

3 **B. THE PLAIN LANGUAGE OF THE SETTLEMENT AGREEMENT PRECLUDES**
4 **PLAINTIFF FROM ADVANCING ITS ESA AND APA CLAIMS.**

5 A complaint is subject to dismissal for failure to state a claim when its allegations “show
6 that an affirmative defense bars recovery on the claim.” Fed. R. Civ. P. 8(c) (listing “waiver” and
7 “release” as affirmative defenses). Federal law controls the interpretation of contracts, such as
8 the Settlement Agreement, entered into pursuant to federal law when the United States is a party.
9 *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989), citing *United*
10 *States v. Seckinger*, 397 U.S. 203, 209-10 (1970). For guidance, the court may look to general
11 principles for interpreting contracts. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983). “A
12 written contract must be read as a whole and every part interpreted with reference to the whole.”
13 *Kennewick Irrigation Dist.*, 880 F.2d at 1032, citing *Shakey’s, Inc. v. Covalt*, 704 F.2d 426, 434
14 (9th Cir. 1983). “Preference must be given to reasonable interpretations as opposed to those that
15 are unreasonable, or that would make the contract illusory.” *Id.*

16
17 1. The Settlement Agreement Bars Plaintiff’s ESA Claim.

18 Here, the Settlement Agreement bars Plaintiff’s ESA and APA claims. As to Count 1, the
19 ESA claim, the plain language of the Settlement Agreement demonstrates that the Plaintiff
20 waived and released all ESA Section 7 challenges and objections relating in any way to the
21 consultations at issue. The Settlement Agreement set aside EPA’s registrations for the pesticide
22 ingredients at issue and also precluded Plaintiff from bringing “EPA or any other party in any
23 court proceeding that concerns an alleged violation of Section 7 of the ESA . . .” Settlement
24 Agreement ¶ 27. Thus, the plain language of the Settlement Agreement necessarily includes
25 FWS. *Id.* Count 1, moreover, expressly alleges a violation of ESA § 7 involving the very same
26 consultations addressed in the Settlement Agreement. It therefore is a suit against a covered party
27
28

1 that “concerns” an alleged violation of Section 7 of the ESA. The Court should accordingly
2 dismiss Count 1 with prejudice.⁵

3 2. The Settlement Agreement Bars Plaintiff’s APA Unreasonable Delay Claim.

4 The Settlement Agreement similarly precludes Plaintiff from asserting Count 2. CBD
5 agreed not to assert a cause of action in any “proceeding that *concerns* an alleged violation of
6 Section 7 of the ESA” Settlement Agreement ¶ 27 (emphasis added). The plain language of
7 the Settlement Agreement is not limited to causes of action under “Section 7 of the ESA.”
8 Rather, it includes all lawsuits that *concern* an alleged violation of Section 7 of the ESA. *Id.*
9

10 Indeed, the parties cannot have intended to limit the scope of paragraph 27 to ESA § 7
11 violations. Neither of the two subsections of the ESA citizen suit provision that Plaintiff cites—16
12 U.S.C. § 1540(g)(1)(A) and (g)(1)(C)—pertains to alleged violations of 16 U.S.C. § 1536(b)(1)
13 (A) or (B). Dkt. Nos. 1 ¶ 6, 26 ¶ 1; *Bennett v. Spear*, 520 U.S. 154 (1997). 16 U.S.C. § 1540(g)
14 (1)(C), which permits any person to commence a civil suit against a federal agency where there
15 is alleged a failure by that agency to perform a non-discretionary duty, covers only duties found
16 in the ESA listing provision, ESA § 4. It does not cover alleged violations of ESA § 7. *Id.* at 171-
17 72 (“Petitioners’ first and second claims, which assert that the Secretary has violated [ESA § 7],
18 are obviously not reviewable under this provision.”). Nor, as *Bennett* makes clear, is FWS’s
19 alleged violation of ESA § 7 reviewable under 16 U.S.C. § 1540(g)(1)(A), which permits any
20 person to commence a civil suit to a federal agency who is alleged to be “in violation” of the
21 ESA. *Id.* at 174. That provision does not permit parties to sue FWS concerning its administration
22 of ESA Section 7. *Id.* (“Viewed in the context of the entire statute, [16 U.S.C. § 1540(g)(1)(A)]’s
23
24

25
26
27 ⁵ Count 1 additionally fails because neither of the two subsections of the ESA citizen suit
28 provision that Plaintiff cites—16 U.S.C. § 1540(g)(1)(A) and (g)(1)(C)—provides a waiver of
sovereign immunity concerning alleged violations of 16 U.S.C. § 1536(b)(1)(A) or (B). *See*
infra.

1 reference to any ‘violation’ of the ESA cannot be interpreted to include [FWS’s]
2 maladministration of the ESA”). Viewed as a whole, the plain language of the Settlement
3 Agreement precludes Plaintiff from asserting an APA unreasonable delay claim against FWS.
4 *Kennewick Irrigation Dist.*, 880 F.2d at 1032 (“Preference must be given to reasonable
5 interpretations as opposed to those that are unreasonable, or that would make the contract
6 illusory.”) (citation omitted). It therefore includes claims that FWS has violated the APA by not
7 complying with the deadlines set out at 16 U.S.C. § 1536(b)(1)(A) and (B).⁶ The Settlement
8 Agreement’s structure demonstrates that it was meant to provide EPA and FWS with a litigation-
9 free window within which to complete consultation on a host of pesticide agreements on a
10 multitude of species. Settlement Agreement at 3-7; *see also Kennewick Irrigation Dist.*, 880 F.2d
11 at 1032 (“A written contract must be read as a whole and every part interpreted with reference to
12 the whole.”) (citation omitted).
13

14 Plaintiff’s Complaint further confirms that its lawsuit “concerns” an alleged violation of
15 Section 7. The Complaint requests the same remedy for Count 1 (ESA) as for Count 2 (APA)—to
16 “[o]rder FWS to complete the required consultations” by a date certain. Dkt. 1 at 11. It also links
17 its APA claim to the allegation that FWS “has failed to complete interagency consultation
18 regarding the effects of three pesticides on two endangered species . . . within the timelines
19 required under the ESA and its implementing regulations.” Dkt. 1 ¶ 1; *see also id.* ¶¶ 4
20 (“Through this ongoing delay, FWS has failed to comply with the ESA’s strict time limits for
21 completion of the Section 7(a)(2) consultation process.”); 16 (citing ESA § 7 as the source of
22 FWS’s alleged duty to act); 23 (citing 16 U.S.C. § 1536(b)(1)(A) as source of FWS’s alleged
23
24
25
26

27 ⁶ 16 U.S.C. § 1536(b)(1) requires FWS to conclude consultations within ninety days of
28 their initiation, or “within such other period of time as is mutually agreeable to [FWS] and the
[EPA].”

1 violation); 37 (“The process has been stalled for years despite the mandatory deadlines in the
2 ESA and its applicable regulations.”).

3 In sum, Paragraph 27 clearly precludes Plaintiff from bringing Count 2, challenging the
4 very same pesticide consultations addressed in the Settlement Agreement, reconfigured as an
5 APA unreasonable delay claim against FWS. The Court should accordingly reject Plaintiff’s
6 attempt to repackage its ESA Section 7 claim as an APA claim and circumvent the Settlement
7 Agreement.⁷

8
9 **CONCLUSION**

10 For the foregoing reasons, the Court should dismiss Plaintiff’s Complaint under Federal
11 Rules of Procedure 12(b)(1), 12(b)(6), and 12(c) with prejudice.

12 //
13 //
14 //
15 //
16 //
17 //
18 //
19 //
20 //
21 //

22
23
24 ⁷ Indeed, to the extent a party has an adequate remedy under the ESA, it may not
25 simultaneously assert an APA claim for the same alleged conduct. 5 U.S.C. § 704 (APA only
26 subjects to judicial review “[a]gency action made reviewable by statute and final agency action
27 for which there is *no other adequate remedy in a court . . .*”) (emphasis added); *see also* Dkt.
28 Nos. 1 ¶ 6 (Plaintiff contending that the “Court has jurisdiction . . . pursuant to 16 U.S.C. §
1540(g)(1)(A) (ESA citizen suit provision”); *but see* Dkt. No. 26 ¶ 1 (Plaintiff asserting the
Court has jurisdiction under 16 U.S.C. § 1540(g)(1)(C), *not* 16 U.S.C. § 1540(g)(1)(A)). Here,
Plaintiff has no ESA remedy against FWS, and its APA remedies must fail for the reasons set
forth above.

1 Respectfully submitted this 15th day of May, 2015,

2 JOHN C. CRUDEN
3 Assistant Attorney General
4 SETH M. BARSKY, Chief
5 S. JAY GOVINDAN, Asst. Chief

6 /s/ J. Brett Grosko
7 J. BRETT GROSKO, Trial Attorney
8 U.S. Department of Justice
9 Environment & Natural Resources Division
10 Wildlife & Marine Resources Section
11 Ben Franklin Station, P.O. Box 7611
12 Washington, DC 20044-7611
13 Phone: (202) 305-0342
14 Fax: (202) 305-0275
15 Email: brett.grosko@usdoj.gov

Counsel for Federal Defendants

12 James A. Monroe
13 U.S. Department of the Interior
14 Office of the Solicitor
15 Pacific Southwest Region
16 Sacramento, California 95825

Of Counsel

17
18
19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on May 15, 2015, I electronically filed the foregoing with the Clerk
21 of the Court using the CM/ECF System which will send notification of such filing to the
22 attorneys of record.
23

24
25 /s/ J. Brett Grosko
26 J. BRETT GROSKO
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL
DIVERSITY;

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR;
S.M.R. JEWELL, Secretary of the Interior;
U.S. FISH AND WILDLIFE SERVICE; and
DAN ASHE, U.S. Fish and Wildlife Service
Director;

Federal Defendants,

CROPLIFE AMERICA,

*Proposed Defendant-
Intervenor.*

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

[PROPOSED] ORDER

Pending before the Court is the Federal Defendants’ Motion for Judgment on the Pleadings. For reasons appearing before the Court, the Court **GRANTS** the motion and **DIRECTS** that Plaintiff’s Complaint is dismissed.

JOSEPH C. SPERO
UNITED STATES MAGISTRATE JUDGE

1 Justin Augustine (CA Bar # 235561)
CENTER FOR BIOLOGICAL DIVERSITY
2 351 California Street, Suite 600
San Francisco, CA 94104
3 Telephone: (415) 436-9682
Facsimile: (415) 436-9683
4 jaugustine@biologicaldiversity.org

5 Michael W. Graf (CA Bar # 136172)
Law Offices
6 227 Behrens Street
El Cerrito, CA 94530
7 Telephone: (510) 525-7222
Facsimile: (510) 525-1208
8 mwgraf@aol.com

9 Attorneys for Plaintiff

10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 CENTER FOR BIOLOGICAL DIVERSITY,)
15 a non-profit corporation,)
16 Plaintiff,)

17 v.)

18 ENVIRONMENTAL PROTECTION)
19 AGENCY *et al.*,)
20 Defendants, and)

21 CROPLIFE AMERICA, RISE, AND)
22 RECKITT BENCKISER, INC.,)
23 Intervenor-Defendants.)
24 _____)
25
26
27
28

Case No. 07-2794-JCS
JOINT MOTION FOR ENTRY OF
STIPULATED INJUNCTION
Hearing Date: March 26, 2010
Time: 9:30 AM
Courtroom: A, 15th Floor

NOTICE OF MOTION

PLEASE TAKE NOTICE that at 9:30 AM on March 26, 2010, or as soon thereafter as the matter may be heard in the Honorable Judge Spero's courtroom of the United States District Court for the Northern District of California, 450 Golden Gate Ave., San Francisco, California, Plaintiff, Center for Biological Diversity, and Federal Defendants will move this Court to approve the Stipulated Injunction submitted jointly by Plaintiff and Defendants.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT MOTION FOR ENTRY OF STIPULATED INJUNCTION

1
2 Plaintiff and Federal Defendants hereby jointly move this Court for entry of the attached
3 proposed Stipulated Injunction, which would resolve Plaintiff’s Endangered Species Act (“ESA”) claims
4 against Federal Defendants. This motion is based on the pleadings, the proposed Joint Stipulated
5 Injunction, and any accompanying Memorandum of Points and Authorities or Reply Memorandum
6 (which may be filed separately by Plaintiff or Federal Defendants), records and files in this action, and
7 other such documentary and oral evidence that may be supplied at the hearing.

8
9 Respectfully submitted this 12th day of January, 2010,

10 /s/ Justin Augustine
11 Justin Augustine (CA Bar # 235561)
12 CENTER FOR BIOLOGICAL DIVERSITY
13 351 California Street, Suite 600
14 San Francisco, CA 94104
15 Telephone: (415) 436-9682
16 Facsimile: (415) 436-9683
17 jaugustine@biologicaldiversity.org

18 Michael W. Graf (CA Bar # 136172)
19 Law Offices
20 227 Behrens Street
21 El Cerrito, CA 94530
22 Telephone: (510) 525-7222
23 Facsimile: (510) 525-1208
24 mwgraf@aol.com

25 Attorneys for Plaintiff

26 IGNACIA MORENO
27 Assistant Attorney General
28 JEAN E. WILLIAMS, Chief
SETH M. BARSJY, Assistant Chief
/s/ Erik E. Petersen

ERIK E. PETERSEN, Trial Attorney
DC Bar No. 489073
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Telephone: (202) 305-0339
Facsimile: (202) 305-0275

Attorneys for Federal Defendants

1 Justin Augustine (CA Bar # 235561)
2 CENTER FOR BIOLOGICAL DIVERSITY
3 351 California Street, Suite 600
4 San Francisco, CA 94104
5 Telephone: (415) 436-9682
6 Facsimile: (415) 436-9683
7 jaugustine@biologicaldiversity.org

8 Michael W. Graf (CA Bar # 136172)
9 Law Offices
10 227 Behrens Street
11 El Cerrito, CA 94530
12 Telephone: (510) 525-7222
13 Facsimile: (510) 525-1208
14 mwgraf@aol.com

15 Attorneys for Plaintiff

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 CENTER FOR BIOLOGICAL DIVERSITY,)
20 a non-profit corporation,)
21 Plaintiff,)

22 v.)

23 ENVIRONMENTAL PROTECTION)
24 AGENCY *et al.*,)
25 Defendants, and)

26 CROPLIFE AMERICA, RISE, AND)
27 RECKITT BENCKISER, INC.,)
28 Intervenor-Defendants.)

Case No.: 07-2794-JCS

**STIPULATED INJUNCTION AND
[PROPOSED] ORDER**

1 Plaintiff Center for Biological Diversity (hereinafter “CBD”); and Defendant
2 Environmental Protection Agency and Lisa Jackson (hereinafter “EPA”), by and through the
3 undersigned counsel, state as follows:

4 WHEREAS, on May 30, 2007, CBD filed a complaint for declaratory and injunctive
5 relief pursuant to Section 7 of the Endangered Species Act (“ESA”) in the Northern District of
6 California, which alleged that the EPA had failed to comply with Section 7 regarding the
7 potential impacts of 43 pesticide active ingredients upon the tidewater goby, delta smelt,
8 California clapper rail, salt marsh harvest mouse, California tiger salamander, San Francisco
9 garter snake, California freshwater shrimp, San Joaquin kit fox, Alameda whipsnake, valley
10 elderberry longhorn beetle, and Bay checkerspot butterfly, federally protected species listed as
11 endangered or threatened under the ESA;

12 WHEREAS, CBD filed amended complaints to include an additional 32 pesticide active
13 ingredients for which CBD similarly alleges that EPA has failed to comply with Section 7 of the
14 ESA regarding their potential impacts on the species listed immediately above (hereinafter, all
15 75 pesticide active ingredients at issue will collectively be referred to as “Pesticides”);

16 WHEREAS, CBD maintains that the Pesticides can adversely affect the tidewater goby,
17 delta smelt, California clapper rail, salt marsh harvest mouse, California tiger salamander, San
18 Francisco garter snake, California freshwater shrimp, San Joaquin kit fox, Alameda whipsnake,
19 valley elderberry longhorn beetle, and Bay checkerspot butterfly and their habitats in the greater
20 San Francisco Bay Area, including the Bay Delta, specifically covering the following California
21 counties — Marin, Sonoma, Napa, Solano, Contra Costa, Alameda, Santa Clara, and San Mateo;

22 WHEREAS, the ESA implementing regulations provide that before any need to engage
23 in consultation might arise, an agency must first make an “effects determination;”

24 WHEREAS, EPA maintains that it cannot determine the effects, if any, of the Pesticides
25 on the tidewater goby, delta smelt, California clapper rail, salt marsh harvest mouse, California
26 tiger salamander, San Francisco garter snake, California freshwater shrimp, San Joaquin kit fox,
27 Alameda whipsnake, valley elderberry longhorn beetle, and Bay checkerspot butterfly, and
28 define appropriate protective measures, if any, until they have completed further scientific

1 analyses, which may include, but are not limited to, further review under the Federal Insecticide,
2 Fungicide, and Rodenticide Act (“FIFRA”), §§ 7 U.S.C. 136-136(y), effects determinations
3 made pursuant to the ESA, or consultation with the United States Fish and Wildlife Service
4 (“FWS”) under the ESA, as appropriate;

5 WHEREAS, CBD and EPA, through their authorized representatives, have reached
6 agreement on the terms of a settlement, which is captured in the form of this Stipulated
7 Injunction, that they consider to be a just, fair, adequate, and equitable resolution of the issues in
8 this case;

9 WHEREAS, CBD and EPA agree that this Stipulated Injunction is in the public interest
10 and is an appropriate way to resolve the remaining disputed issues;

11 WHEREAS, the EPA published in the Federal Register a request for public comment on
12 the terms of this Stipulated Injunction, subsequently reviewed all comments received, and
13 thereafter conferred with CBD and Intervenor-Defendants with respect to any comments that
14 EPA felt warranted reconsideration or revision of any provision in this Stipulated Injunction,
15 with any resulting changes reflected herein;

16 NOW, THEREFORE, CBD AND EPA STIPULATE AS FOLLOWS:

17
18 **SECTION 7 CONSULTATION SCHEDULE**

19 **1. Compliance with Section 7(a)(2) of the Endangered Species Act.**

20 Pursuant to the schedule delineated in Section 2, the EPA shall make effects
21 determinations and initiate consultation, as appropriate, with the United States Fish and Wildlife
22 Service, pursuant to applicable regulations in effect at the time when the determination is made,
23 regarding the potential effects of the Pesticides on the tidewater goby, delta smelt, California
24 clapper rail, salt marsh harvest mouse, California tiger salamander, San Francisco garter snake,
25 California freshwater shrimp, San Joaquin kit fox, Alameda whipsnake, valley elderberry
26 longhorn beetle, and Bay checkerspot butterfly in the greater San Francisco Bay Area, including
27 the Bay Delta, specifically covering the following California counties — Marin, Sonoma, Napa,
28 Solano, Contra Costa, Alameda, Santa Clara, and San Mateo.

1 **2. Effects Determinations**

2 **a. Schedule for Compliance for 43 Pesticides in Original Complaint Plus Two**
 3 **of the Pesticides Added via Amended Complaint**

4 EPA shall make effects determinations for the following active ingredients for the
 5 specific species listed at a minimum rate of four per quarter, with the first quarter ending on
 6 March 31, 2010 so that EPA completes these effects determinations by March 31, 2012.¹

<u>Pesticide</u>	<u>Species</u>
Acephate	California clapper rail, salt marsh harvest mouse, California tiger salamander, San Francisco garter snake, California freshwater shrimp, San Joaquin kit fox, valley elderberry longhorn beetle, Bay checkerspot butterfly
Acrolein	Alameda whipsnake
Aldicarb	San Joaquin kit fox, valley elderberry longhorn beetle
Aluminum phosphide	California tiger salamander, San Francisco garter snake, San Joaquin kit fox, Alameda whipsnake
Azinphos-methyl	California clapper rail, California tiger salamander, San Francisco garter snake, San Joaquin kit fox, valley elderberry longhorn beetle, Bay checkerspot butterfly

23 ¹ EPA has already made effects determinations for ten of the 43 Pesticides in Plaintiff's original complaint. On
 24 October 20, 2008, EPA completed effect determinations for permethrin for the California clapper rail, the salt
 25 marsh harvest mouse, the San Francisco garter snake, and the Bay checkerspot butterfly; and for phorate for the San
 26 Joaquin kit fox, valley elderberry-longhorn beetle, and the Bay checkerspot butterfly. On February 20, 2009, EPA
 27 completed effect determinations for 2,4-D for the Alameda whipsnake, and for atrazine for the delta smelt. On June
 28 20, 2009 EPA completed effect determinations for alachlor for the delta smelt; and for endosulfan for the salt marsh
 harvest mouse, California tiger salamander, San Francisco garter snake, San Joaquin kit fox, valley elderberry
 longhorn beetle, and the Bay checkerspot butterfly. On October 20, 2009, EPA completed effect determinations for
 chlorpyrifos for the delta smelt, California clapper rail, salt marsh harvest mouse, California tiger salamander, San
 Francisco garter snake, California freshwater shrimp, San Joaquin kit fox, valley elderberry longhorn beetle, and
 Bay checkerspot butterfly; for strychnine for the California tiger salamander, and San Joaquin kit fox; for
 thiobencarb for the delta smelt; and for trifluralin for the delta smelt, San Francisco garter snake, and San Joaquin
 kit fox.

1	Brodifacoum	salt marsh harvest mouse, San Joaquin kit fox,
2		Alameda whipsnake
3	Bromadiolone	salt marsh harvest mouse, San Joaquin kit fox,
4		Alameda whipsnake
5	Bromethalin	salt marsh harvest mouse, Alameda whipsnake
6	Carbaryl	delta smelt
7	Carbofuran	delta smelt, San Francisco garter snake, San
8		Joaquin kit fox, valley elderberry longhorn beetle
9	Chlorophacinone	salt marsh harvest mouse, California tiger
10		salamander, San Joaquin kit fox, Alameda
11		whipsnake
12	Cholecalciferol	salt marsh harvest mouse
13	Diazinon	tidewater goby, delta smelt
14	Difenacoum	salt marsh harvest mouse, San Joaquin kit fox,
15		Alameda whipsnake
16	Difethialone	salt marsh harvest mouse, San Joaquin kit fox,
17		Alameda whipsnake
18	Diphacinone	salt marsh harvest mouse, California tiger
19		salamander, San Joaquin kit fox, Alameda
20		whipsnake
21	Diquat dibromide	delta smelt
22	EPTC (eptam)	delta smelt
23	Magnesium phosphide	San Francisco garter snake, San Joaquin kit fox,
24		Alameda whipsnake
25	Malathion	delta smelt, California tiger salamander
26	Maneb	California tiger salamander
27	Mancozeb	California tiger salamander
28	Metam sodium	California tiger salamander

1	Methoprene	California tiger salamander
2	Methyl bromide	California tiger salamander
3	Metolachlor	delta smelt
4	Naled	California clapper rail, San Francisco garter snake,
5		San Joaquin kit fox, valley elderberry longhorn
6		beetle, Bay checkerspot butterfly
7	Oryzalin	California tiger salamander
8	Permethrin	Valley elderberry longhorn beetle
9	Phosmet	California tiger salamander
10	Potassium nitrate	San Francisco garter snake, San Joaquin kit fox,
11		Alameda whipsnake
12	S-metolachlor	delta smelt, California tiger salamander
13	Simazine	delta smelt
14	Sodium nitrate	San Francisco garter snake, San Joaquin kit fox,
15		Alameda whipsnake
16	Warfarin	salt marsh harvest mouse, Alameda whipsnake
17	Zinc phosphide	salt marsh harvest mouse, Alameda whipsnake

18
 19 Upon completion of an effects determination in accordance with the preceding effects
 20 determination schedule, EPA will within seven business days proceed to initiate, if necessary,
 21 consultation in accordance with Section 7(a)(2) of the ESA and the implementing ESA
 22 consultation regulations.

23 **b. Schedule for Compliance for Remaining Pesticides Added via Amended**
 24 **Complaint**

25 EPA shall make effects determinations for the following pesticides for the specific
 26 species listed at a minimum rate of no less than three per quarter, with the first quarter ending
 27 June 30, 2012, so that EPA completes all effects determinations by September 30, 2014.
 28

<u>Pesticide</u>	<u>Species</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

Bensulide, Beta-cyfluthrin, Bifenthrin, Cyfluthrin, Cyhalothrin (lambda), Cypermethrin, Deltamethrin, Dimethoate, Disulfoton, Esfenvalerate, Ethoprop, Fenpropathrin, Fluvalinate, Imidacloprid, Methamidophos, Methidathion, Methomyl, Oxydemeton-methyl, Oxyfluorfen, Phenothrin, Propargite, Resmethrin, Tetramethrin, Tralomethrin, and Zeta-cypermethrin

Chlorothalonil: San Francisco garter snake, California tiger salamander, tidewater goby, California clapper rail, California freshwater shrimp, delta smelt, Bay checkerspot butterfly

Fipronil: San Francisco garter snake, California tiger salamander, tidewater goby, California clapper rail, California freshwater shrimp, delta smelt, Bay checkerspot butterfly

PCNB: San Francisco garter snake, California tiger salamander, tidewater goby, California clapper rail, California freshwater shrimp, delta smelt, Bay checkerspot butterfly

1	Pendimethalin:	Bay checkerspot butterfly
2	Sodium cyanide:	San Joaquin kit fox
3	Strychnine:	Alameda whipsnake, salt marsh harvest mouse, San
4		Francisco garter snake

c. Urban Pesticides

6 In making effects determinations for the Pesticides, EPA specifically shall consider the
7 contribution to effects, arising from the use of the urban pesticides subject to this Order, when
8 used in areas with impervious surfaces. Urban pesticides subject to this Stipulated Injunction
9 are: Acephate, Alachlor, Atrazine, Bensulide, Beta-cyfluthrin, Bifenthrin, Bromethalin,
10 Carbaryl, Chlorophacinone, Chlorothalonil, Cholecalciferol, Cyfluthrin, Cyhalothrin (lambda),
11 Cypermethrin, Deltamethrin, Diphacinone, Diquat dibromide, Disulfoton, Esfenvalerate,
12 Fenpropathrin, Fipronil, Imidacloprid, Malathion, Methoprene, Naled, Oryzalin, Oxyfluorfen,
13 PCNB, Pendimethalin, Permethrin, Phenothrin, Potassium nitrate, Resmethrin, Simazine,
14 Sodium nitrate, Strychnine, Tetramethrin, Tralomethrin, Trifluralin, Warfarin, and Zeta-
15 cypermethrin.

INTERIM INJUNCTIVE RELIEF

3. Use Authorizations Enjoined, Vacated, and Set Aside.

19 The EPA’s authorization of any of the Pesticides identified below on a species-by-
20 species basis is hereby ENJOINED, VACATED and SET ASIDE as follows, except as provided
21 by the exclusions, exemptions, and termination provisions set forth in paragraphs 4, 5, 6, and 7:
22

Tidewater Goby

24 EPA’s authorization of any use of Bensulide, Beta-cyfluthrin, Bifenthrin, Chlorothalonil,
25 Cyfluthrin, Cyhalothrin (lambda), Cypermethrin, Deltamethrin, Diazinon, Dimethoate,
26 Disulfoton, Esfenvalerate, Ethoprop, Fenpropathrin, Fipronil, Fluvalinate, Imidacloprid,
27 Methamidophos, Methidathion, Methomyl, Oxydemeton-methyl, Oxyfluorfen, PCNB,
28 Phenothrin, Propargite, Resmethrin, Tetramethrin, Tralomethrin, and Zeta-cypermethrin is

1 hereby ENJOINED, VACATED, and SET ASIDE in

- 2 1. all areas within 100 feet of the habitat described below if applied by ground; and
- 3 2. all areas within 400 feet of the habitat described below if applied by air.

4 **Applicable Habitat.** For the tidewater goby, “habitat” means lagoons, estuaries, and
 5 backwater marshes that are adjacent to the Pacific Ocean, and freshwater streams
 6 upgradient and tributary to brackish habitats, but only to the extent that any such
 7 ecological features are found within the eight counties specifically identified in the
 8 Complaint (and in this Stipulated Injunction) in the following sections of California:²
 9 M01S06W21, M07S05W33, M05N10W02, M05N10W03, M05N10W14, M05N10W15,
 10 M05N10W23, M06N10W35, M06N11W14, M06N11W15, M06N11W22, M07S05W15,
 11 M07S05W16, M08S05W04, M08S05W05, M08S05W09, M08S05W21.

12
13 **Delta Smelt**

14 EPA’s authorization of any use of Alachlor, Atrazine, Bensulide, Beta-cyfluthrin,
 15 Bifenthrin, Carbaryl, Carbofuran, Chlorothalonil, Chlorpyrifos, Cyfluthrin, Cyhalothrin
 16 (lambda), Cypermethrin, Deltamethrin, Diazinon, Dimethoate, Diquat dibromide, Disulfoton,
 17 EPTC (eptam), Esfenvalerate, Ethoprop, Fenpropathrin, Fipronil, Fluvalinate, Imidacloprid,
 18 Malathion, Methamidophos, Methidathion, Methomyl, Metolachlor, Oxydemeton-methyl,
 19 Oxyfluorfen, PCNB, Phenothrin, Propargite, Resmethrin, S-metolachlor, Simazine,
 20 Tetramethrin, Thiobencarb, Tralomethrin, Trifluralin and Zeta-cypermethrin is hereby
 21 ENJOINED, VACATED, and SET ASIDE in

- 22 1. all areas within 100 feet of the habitat described below if applied by ground, and
- 23 2. all areas within 400 feet of the habitat described below if applied by air, unless
- 24 application is made in compliance with the Dormant Spray Regulations developed
- 25 by the California Department of Pesticide Regulations, 3 Cal. Code Reg. § 6960,
- 26 in which case a 100- foot buffer would apply.

28 ² All section numbers in this document are based on the California Department of Pesticides Regulation PLSNET coverage.

1 **Applicable habitat.** For the delta smelt, “habitat” means all water and all
2 submerged lands below ordinary high water, freshwater streams that drain into the
3 Bay, and channels with tidal influence, but only to the extent that any such
4 ecological features are found within the eight counties specifically identified in the
5 Complaint (and in this Stipulated Injunction) in either (1) critical habitat designated
6 for the delta smelt by the FWS (59 Fed. Reg. 65256), as depicted by the FWS at
7 <http://crithab.fws.gov/>, or (2) in the following sections of California: M03N04W02,
8 M03N04W06, M03N04W09, M03N04W16, M04N04W32.

9
10 **California Clapper Rail**

11 EPA’s authorization of any use of Acephate, Azinphos-Methyl, Bensulide, Beta-
12 cyfluthrin, Bifenthrin, Chlorothalonil, Chlorpyrifos, Cyfluthrin, Cyhalothrin (lambda),
13 Cypermethrin, Deltamethrin, Dimethoate, Disulfoton, Esfenvalerate, Ethoprop, Fenpropathrin,
14 Fipronil, Fluvalinate, Imidacloprid, Methamidophos, Methidathion, Methomyl, Naled,
15 Oxydemeton-methyl, Oxyfluorfen, PCNB, Permethrin, Phenothrin, Propargite, Resmethrin,
16 Tetramethrin, Tralomethrin, and Zeta-cypermethrin applied either aerially or by ground is
17 hereby ENJOINED, VACATED, and SET ASIDE in the following **Applicable Habitat:**

- 18 1. all areas within 300 feet of the high water line for tidal flow of salt and brackish
19 water marshes ; and
20 2. all areas within 200 feet of a cordgrass/pickleweed stand, as shown in
21 Attachment A, if any part of such stand occurs within 100 feet of the high water
22 line of a salt or brackish water marsh.

23 The provisions in 1 and 2 above apply only to the extent that any such ecological features
24 are found within the eight counties specifically identified in the Complaint (and in this
25 Stipulated Injunction) in the following sections of California: M01N04W19,
26 M01N04W20, M01N04W29, M01N04W30, M01N06W10, M01N06W11, M01N06W14,
27 M01N06W15, M01N06W22, M01N06W23, M01S04W15, M01S04W16, M01S04W20,
28 M01S04W21, M01S04W22, M02N01W05, M02N01W06, M02N02W01, M02N02W02,

1 M02N02W03, M02N02W04, M02N02W09, M02N02W10, M02N04W20, M02N05W19,
2 M02N06W02, M02N06W03, M02N06W10, M02N06W11, M02N06W14, M02N06W15,
3 M02N06W16, M02N06W21, M02N06W23, M02N06W24, M02S03W17, M02S03W18,
4 M02S03W19, M02S03W20, M02S03W21, M02S03W28, M02S03W29, M02S04W13,
5 M02S04W14, M02S04W24, M03N06W03, M03N06W04, M03N06W09, M03N06W10,
6 M03N06W19, M03N06W20, M03N06W21, M03N06W22, M03N06W26, M03N06W28,
7 M03N06W35, M03N01W19, M03N01W30, M03N01W31, M03N02W03, M03N02W04,
8 M03N02W10, M03N02W21, M03N02W24, M03N02W28, M03N02W29, M03N02W31,
9 M03N02W32, M03N03W27, M03N03W28, M03N03W33, M03N03W34, M03N04W01,
10 M03N04W02, M03N04W11, M03N04W25, M03N04W26, M03N04W35, M03N04W36,
11 M03S03W10, M03S03W11, M03S03W14, M03S03W15, M03S03W23, M03S03W24,
12 M03S03W25, M03S03W26, M03S03W35, M03S03W36, M03S05W27, M04N01W04,
13 M04N01W05, M04N01W06, M04N01W16, M04N01W17, M04N01W18, M04N01W19,
14 M04N01W20, M04N01W21, M04N02W12, M04N02W13, M04N02W14, M04N02W26,
15 M04N04W03, M04N04W04, M04N04W08, M04N04W09, M04N04W10, M04N04W16,
16 M04N04W17, M04N04W20, M04N04W34, M04N04W35, M04N05W08, M04N05W09,
17 M04N05W15, M04N05W16, M04N05W17, M04N05W21, M04N05W23, M04N05W24,
18 M04N05W27, M04N05W28, M04N05W33, M04N05W34, M04N10W11, M04S03W01,
19 M04S03W31, M04S03W32, M04S03W33, M04S04W16, M04S04W17, M04S04W22,
20 M05N01W32, M05N01W33, M05S02W02, M05S02W03, M05S02W04, M05S02W08,
21 M05S02W09, M05S02W10, M05S02W13, M05S02W14, M05S02W15, M05S02W16,
22 M05S02W17, M05S02W23, M05S02W24, M05S02W29, M05S02W30, M05S02W31,
23 M05S02W32, M05S03W03, M05S03W04, M05S03W05, M05S03W06, M05S03W07,
24 M05S03W08, M05S03W09, M05S03W10, M05S03W14, M05S03W15, M05S03W16,
25 M05S03W22, M05S04W01, M05S04W12, M06S02W04, M06S02W09.

26
27
28

1 **Salt Marsh Harvest Mouse**

2 EPA’s authorization of any use of Acephate, Brodifacoum, Bromadiolone, Bromethalin,
3 Chlorophacinone, Chlorpyrifos, Cholecalciferol, Difenacoum, Difethialone, Diphacinone,
4 Endosulfan, Permethrin, Strychnine, Warfarin, and Zinc phosphide applied either aerially or by
5 ground is hereby ENJOINED, VACATED, and SET ASIDE in the following **Applicable**

6 **Habitat:**

- 7 1. all areas within 300 feet of the high water line for tidal flow of salt and brackish
- 8 water marshes; and
- 9 2. all areas within 200 feet of a cordgrass/pickleweed stand, as shown in
- 10 Attachment A, if any part of such stand occurs within 100 feet of the high water
- 11 line of a salt or brackish water marsh.

12 The provisions in 1 and 2 above apply only to the extent that any such ecological features
13 are found within the eight counties specifically identified in the Complaint (and in this
14 Stipulated Injunction) in the following sections of California: M01N06W02,
15 M01N06W10, M01N06W11, M01N06W14, M01N06W15, M01N06W22, M01N06W23,
16 M02N01E05, M02N01E07, M02N01W01, M02N01W05, M02N01W06, M02N01W12,
17 M02N02W01, M02N02W02, M02N02W03, M02N02W04, M02N02W09, M02N02W10,
18 M02N02W11, M02N02W15, M02N02W16, M02N02W17, M02N05W25, M03N01E05,
19 M03N01E06, M03N01E07, M03N01E08, M03N01E17, M03N01E18, M03N01E20,
20 M03N01E21, M03N01E22, M03N01E25, M03N01E26, M03N01E27, M03N01E28,
21 M03N01E29, M03N01E30, M03N01E31, M03N01E32, M03N01E33, M03N06W03,
22 M03N06W04, M03N06W05, M03N06W09, M03N06W10, M03N01W02, M03N01W03,
23 M03N01W04, M03N01W09, M03N01W10, M03N01W11, M03N01W12, M03N01W13,
24 M03N01W14, M03N01W15, M03N01W16, M03N01W30, M03N01W31, M03N02W03,
25 M03N02W10, M03N02W15, M03N02W25, M03N02W26, M03N02W29, M03N02W30,
26 M03N02W31, M03N02W32, M03N02W35, M03N02W36, M03N03W28, M03N04W01,
27 M03N04W02, M03N04W05, M03N04W06, M03N04W08, M03N04W09, M03N04W10,
28 M03N04W11, M03N04W14, M03N04W15, M03N04W16, M03N04W22, M03N04W23,

1 M03N04W24, M03N04W25, M03N04W26, M03N04W27, M03N04W35, M03N04W36,
2 M03N05W01, M03N05W05, M03N05W06, M03N05W07, M03N05W08, M03S02W31,
3 M03S03W10, M03S03W11, M03S03W14, M03S03W15, M03S03W36, M04N01E19,
4 M04N01W04, M04N01W05, M04N01W06, M04N01W07, M04N01W16, M04N01W17,
5 M04N01W18, M04N01W19, M04N01W21, M04N01W22, M04N01W24, M04N01W27,
6 M04N01W28, M04N01W29, M04N01W32, M04N01W33, M04N02W01, M04N02W02,
7 M04N02W12, M04N02W13, M04N02W14, M04N02W19, M04N02W22, M04N02W27,
8 M04N02W28, M04N04W04, M04N04W08, M04N04W09, M04N04W16, M04N04W17,
9 M04N04W20, M04N04W32, M04N04W35, M04N05W15, M04N05W16, M04N05W21,
10 M04N05W24, M04N05W28, M04N05W32, M04N05W33, M04N05W34, M04N05W35,
11 M04N05W36, M04N06W06, M04N06W07, M04N06W08, M04N06W17, M04N06W18,
12 M04N06W19, M04N06W20, M04N06W21, M04N06W28, M04N06W29, M04N06W30,
13 M04N06W32, M04N06W33, M04N07W01, M04N07W02, M04N07W03, M04N07W12,
14 M04N07W13, M04N07W24, M04S02W27, M04S02W28, M04S03W31, M04S03W32,
15 M04S03W33, M05N01W31, M05N01W32, M05N01W33, M05N02W25, M05N02W35,
16 M05N02W36, M05N04W33, M05N07W34, M05N07W35, M05S01W25, M05S01W26,
17 M05S01W33, M05S01W34, M05S01W35, M05S01W36, M05S02W02, M05S02W03,
18 M05S02W04, M05S02W08, M05S02W09, M05S02W10, M05S02W16, M05S02W17,
19 M05S02W19, M05S02W25, M05S02W26, M05S02W29, M05S02W30, M05S02W32,
20 M05S03W04, M05S03W05, M05S03W06, M05S03W07, M05S03W08, M05S03W15,
21 M05S03W17, M05S03W18, M05S03W22, M05S03W24, M05S04W01, M05S04W12,
22 M06S01W02, M06S01W03, M06S01W04, M06S01W06, M06S01W07, M06S01W09,
23 M06S01W10, M06S02W01, M06S02W02, M06S02W03, M06S02W05, M06S02W10,
24 M06S02W11.

25
26 **California Tiger Salamander**

27 EPA's authorization of any use of Acephate, Aluminum Phosphide, Azinphos-methyl,
28 Bensulide, Beta-cyfluthrin, Bifenthrin, Chlorophacinone, Chlorothalonil, Chlorpyrifos,

1 Cyfluthrin, Cyhalothrin (lambda), Cypermethrin, Deltamethrin, Dimethoate, Diphacinone,
2 Disulfoton, Endosulfan, Esfenvalerate, Ethoprop, Fenpropathrin, Fipronil, Fluvalinate,
3 Imidacloprid, Malathion, Maneb, Mancozeb, Metam sodium, Methamidophos, Methidathion,
4 Methomyl, Methoprene, Methyl Bromide, Oryzalin, Oxydemeton-methyl, Oxyfluorfen, PCNB,
5 Phenothrin, Phosmet, Propargite, Resmethrin, S-metolachlor, Strychnine, Tetramethrin,
6 Tralomethrin, and Zeta-cypermethrin is hereby ENJOINED, VACATED, and SET ASIDE in

- 7 1. all areas within 200 feet of the habitat described below if applied by ground; and
- 8 2. all areas within 400 feet of the habitat described below if applied by air.

9 **Applicable Habitat.** For the California tiger salamander, “habitat” means fresh-water
10 (including natural or manmade (e.g., stock) ponds, slow-moving streams or pools within
11 streams, vernal pools, and other ephemeral or permanent water bodies which typically
12 support inundation during winter rains and hold water for a minimum of 12 weeks in a
13 year of average rainfall, but only to the extent that any such ecological features are found
14 within the eight counties specifically identified in the Complaint (and in this Stipulated
15 Injunction) in either (1) critical habitat designated for the California tiger salamander by
16 the FWS (70 Fed. Reg. 49380), as depicted by the FWS at <http://crithab.fws.gov/>, or (2) in
17 the following sections of California: M01N01E01, M01N01E02, M01N01E03,
18 M01N01E04, M01N01E12, M01N01E13, M01N01E20, M01N01E23, M01N01E24,
19 M01N01E28, M01N01W02, M01N02E05, M01N02E06, M01N02E07, M01N02E08,
20 M01N02E16, M01N02E17, M01N02E18, M01N02E26, M01N02E27, M01N02E28,
21 M01N02E33, M01N02E34, M01N02E35, M01N02E36, M01S01E15, M01S01E16,
22 M01S02E01, M01S02E02, M01S02E03, M01S02E10, M01S02E11, M01S02E12,
23 M01S02E13, M01S02E14, M01S02E15, M01S02E16, M01S02E17, M01S02E20,
24 M01S02E21, M01S02E22, M01S02E23, M01S02E24, M01S02E25, M01S02E26,
25 M01S02E27, M01S02E29, M01S02E33, M01S02E34, M01S02E35, M01S02E36,
26 M01S03E04, M01S03E05, M01S03E06, M01S03E07, M01S03E08, M01S03E09,
27 M01S03E17, M01S03E18, M01S03E19, M01S03E20, M01S03E21, M01S03E22,
28 M01S03E23, M01S03E26, M01S03E27, M01S03E28, M01S03E29, M01S03E30,

1 M01S03E31, M01S03E32, M01S03E35, M01S03E36, M02N01E28, M02N01E30,
2 M02N01E33, M02N01W21, M02N01W22, M02N01W25, M02N01W26, M02N01W27,
3 M02N01W28, M02N01W33, M02N01W34, M02N01W35, M02N01W36, M02S01E04,
4 M02S01E08, M02S01E09, M02S01E16, M02S01E17, M02S01E20, M02S01E21,
5 M02S01E22, M02S01E24, M02S01E25, M02S01E26, M02S01E27, M02S01E28,
6 M02S01E33, M02S01E34, M02S01E35, M02S01E36, M02S02E01, M02S02E02,
7 M02S02E03, M02S02E04, M02S02E09, M02S02E10, M02S02E11, M02S02E12,
8 M02S02E13, M02S02E14, M02S02E15, M02S02E25, M02S02E26, M02S02E27,
9 M02S02E28, M02S02E31, M02S02E33, M02S02E34, M02S02E35, M02S02E36,
10 M02S03E01, M02S03E02, M02S03E06, M02S03E08, M02S03E09, M02S03E10,
11 M02S03E16, M02S03E17, M02S03E18, M02S03E19, M02S03E20, M02S03E21,
12 M02S03E22, M02S03E23, M02S03E24, M02S03E26, M02S03E29, M02S03E30,
13 M02S03E31, M02S03E32, M02S03E33, M02S03E34, M02S03E35, M02S04E19,
14 M03S01E01, M03S01E02, M03S01E03, M03S01E14, M03S01E15, M03S01E22,
15 M03S01E23, M03S01E24, M03S01E25, M03S01E27, M03S01E28, M03S01E34,
16 M03S01E35, M03S01E36, M03S02E01, M03S02E04, M03S02E05, M03S02E12,
17 M03S02E13, M03S02E15, M03S02E16, M03S02E19, M03S02E21, M03S02E22,
18 M03S02E24, M03S02E30, M03S02E31, M03S02E32, M03S02E35, M03S03E04,
19 M03S03E05, M03S03E06, M03S03E07, M03S03E08, M03S03E10, M03S03E12,
20 M03S03E18, M03S03E19, M03S03E20, M03S03E21, M03S03E23, M03S03E25,
21 M03S03E26, M03S03E27, M03S03E28, M03S03E29, M03S03E30, M03S03E35,
22 M03S03E36, M03S04E17, M03S04E29, M03S04E30, M03S04E31, M03S04E32,
23 M04N01E34, M04N01W10, M04N01W11, M04S01E01, M04S01E02, M04S01E03,
24 M04S01E04, M04S01E09, M04S01E10, M04S01E11, M04S01E14, M04S01E16,
25 M04S01E17, M04S01E18, M04S01E22, M04S01E24, M04S01E27, M04S01E28,
26 M04S01E29, M04S01E33, M04S01E34, M04S01E35, M04S01W13, M04S01W24,
27 M04S02E07, M04S02E12, M04S02E13, M04S02E17, M04S02E18, M04S02E27,
28 M04S02E35, M04S02E36, M04S03E01, M04S03E07, M04S03E18, M05N01E07,

1 M05N01E14, M05N01E16, M05N01E17, M05N01E18, M05N01E19, M05N01E20,
2 M05N01E21, M05N01E28, M05N01E29, M05N01E30, M05N01W10, M05N01W12,
3 M05N01W13, M05N01W14, M05N01W15, M05N08W03, M05N08W04, M05N08W11,
4 M05S01E02, M05S01E12, M05S01E19, M05S01E20, M05S01E23, M05S01E30,
5 M05S01W03, M05S01W15, M05S01W16, M05S01W21, M05S01W22, M05S02E01,
6 M05S02E08, M05S02E09, M05S02E10, M05S02E11, M05S03E06, M05S03W34,
7 M06N07W31, M06N08W03, M06N08W04, M06N08W05, M06N08W06, M06N08W07,
8 M06N08W08, M06N08W09, M06N08W10, M06N08W11, M06N08W14, M06N08W15,
9 M06N08W16, M06N08W22, M06N08W26, M06N08W27, M06N08W32, M06N08W34,
10 M06N08W35, M06N08W36, M06S02E22, M06S02E23, M06S02E24, M06S02E25,
11 M06S02E26, M06S02E27, M06S02E35, M06S02E36, M06S03E31, M06S03W03,
12 M06S03W04, M06S03W09, M06S03W10, M06S03W15, M06S03W16, M07N09W36,
13 M07N08W05, M07N08W08, M07N08W19, M07N08W20, M07N08W28, M07N08W29,
14 M07N08W30, M07N08W31, M07N08W32, M07N08W33, M07N08W34, M07N09W25,
15 M07S01E25, M07S01E27, M07S01E28, M07S01E36, M07S02E03, M07S02E10,
16 M07S02E11, M07S02E13, M07S02E14, M07S02E19, M07S02E24, M07S02E25,
17 M07S02E28, M07S02E30, M07S02E31, M07S02E33, M07S03E19, M07S03E20,
18 M08S02E15, M08S02E16, M08S02E34, M08S02E36, M09S02E03, M09S02E04,
19 M09S02E09, M09S03E10, M09S03E11, M09S03E36, M09S04E15, M09S04E16,
20 M09S04E21, M09S04E22, M10S03E08, M10S03E09, M10S03E10, M10S03E15,
21 M10S03E16, M10S03E17, M10S03E22, M10S03E27, M10S03E28, M10S03E34,
22 M10S05E10, M11S04E07, M11S04E12, M11S04E18, M11S04E29, M11S04E30.

23
24 **San Francisco Garter Snake**

25 EPA's authorization of any use of Acephate, Aluminum Phosphide, Azinphos-methyl,
26 Bensulide, Beta-Cyfluthrin, Bifenthrin, Carbofuran, Chlorothalonil, Chlorpyrifos, Cyfluthrin,
27 Cyhalothrin (lambda), Cypermethrin, Deltamethrin, Dimethoate, Disulfoton, Endosulfan,
28 Esfenvalerate, Ethoprop, Fenpropathrin, Fipronil, Fluvalinate, Imidacloprid, Magnesium

1 phosphide, Methamidophos, Methidathion, Methomyl, Naled, Oxydemeton-methyl,
2 Oxyfluorfen, PCNB, Phenothrin, Permethrin, Potassium nitrate, Propargite, Resmethrin, Sodium
3 nitrate, Strychnine, Tetramethrin, Tralomethrin, Trifluralin, and Zeta-cypermethrin is hereby
4 ENJOINED, VACATED, and SET ASIDE in

- 5 1. all areas within 200 feet of the habitat described below if applied by ground; and
- 6 2. all areas within 400 feet of the habitat described below if applied by air.

7 **Applicable Habitat.** For the San Francisco garter snake, “habitat” means fresh-water
8 (including natural or manmade (e.g., stock) ponds, slow-moving streams or pools within
9 streams, vernal pools, and other ephemeral or permanent water bodies which typically
10 support inundation during winter rains and hold water for a minimum of 12 weeks in a
11 year of average rainfall, but only to the extent that any such ecological features are found
12 within the eight counties specifically identified in the Complaint (and in this Stipulated
13 Injunction) in the following sections of California: M03S05W31, M04S05W03,
14 M04S05W05, M04S05W06, M04S05W08, M04S05W09, M04S05W16, M05S04W07,
15 M05S04W17, M05S04W18, M05S04W19, M05S04W20, M05S04W21, M05S04W28,
16 M05S05W01, M05S05W12, M05S05W29, M08S05W04, M08S05W09, M08S05W16,
17 M08S05W25, M08S05W26, M09S04W07, M09S04W08, M09S04W17, M09S04W18,
18 M09S04W28.

19
20 **California Freshwater Shrimp**

21 EPA’s authorization of any use of Acephate, Bensulide, Beta-cyfluthrin, Bifenthrin,
22 Chlorothalonil, Chlorpyrifos, Cyfluthrin, Cyhalothrin (lambda), Cypermethrin, Deltamethrin,
23 Dimethoate, Disulfoton, Esfenvalerate, Ethoprop, Fenpropathrin, Fipronil, Fluvalinate,
24 Imidacloprid, Methamidophos, Methidathion, Methomyl, Oxydemeton-methyl, Oxyfluorfen,
25 PCNB, Phenothrin, Propargite, Resmethrin, Tetramethrin, Tralomethrin, and Zeta-cypermethrin
26 is hereby ENJOINED, VACATED, and SET ASIDE in

- 27 1. all areas within 100 feet of the habitat described below if applied by ground; and
- 28 2. all areas within 400 feet of the habitat described below if applied by air.

1 **Applicable Habitat.** For the California freshwater shrimp, “habitat” means all perennial
 2 streams or intermittent streams with perennial pools, but only to the extent that any such
 3 ecological features are found within the eight counties specifically identified in the
 4 Complaint (and in this Stipulated Injunction) in the following sections of California:
 5 M02N08W04, M02N08W05, M02N08W09, M02N08W10, M02N08W14, M02N08W15,
 6 M02N08W16, M02N08W23, M07N11W11, M03N08W19, M03N08W29, M03N08W30,
 7 M03N08W31, M03N08W32, M03N09W35, M03N09W36, M05N05W23, M05N05W24,
 8 M05N05W25, M05N05W26, M05N06W02, M05N09W18, M05N09W19, M05N10W13,
 9 M05N10W24, M06N06W05, M06N06W06, M06N06W07, M06N06W08, M06N06W16,
 10 M06N06W17, M06N06W21, M06N06W27, M06N06W35, M06N09W04, M06N09W05,
 11 M06N09W22, M06N09W23, M06N09W24, M06N10W12, M06N10W13, M06N10W14,
 12 M06N10W17, M06N10W18, M06N10W19, M06N10W20, M06N10W21, M06N10W22,
 13 M06N10W23, M06N10W24, M06N10W25, M06N10W27, M06N10W28, M06N11W13,
 14 M06N11W14, M06N11W23, M07N09W33, M07N10W13, M07N10W14, M07N10W24,
 15 M07N11W02, M07N11W03, M07N06W32, M07N09W17, M07N09W19, M07N09W20,
 16 M08N07W01, M08N07W06, M08N11W15, M08N11W22, M08N11W27, M08N11W34,
 17 M09N07W25, M09N07W31, M09N07W36.

18
 19 **San Joaquin Kit Fox**

20 EPA’s authorization of any use of Acephate, Aldicarb, Aluminum phosphide, Azinphos-
 21 methyl, Brodifacoum, Bromadiolone, Carbofuran, Chlorophacinone, Chlorpyrifos, Difenacoum,
 22 Difethialone, Diphacinone, Endosulfan, Magnesium phosphide, Naled, Phorate, Potassium
 23 nitrate, Sodium cyanide, Sodium nitrate, Strychnine, and Trufuralin is hereby ENJOINED,
 24 VACATED, and SET ASIDE in

- 25 1. all areas within 600 feet of the habitat described below if applied by ground or
- 26 air.

27 **Applicable Habitat.** For the San Joaquin kit fox, “habitat” means all denning areas,
 28 defined as the 100 foot circular radius around the set of holes in the ground forming the

1 surface of the den, as depicted in the Department of Pesticide Regulation Endangered
2 Species Project, San Joaquin kit fox, denning characteristics, attached hereto as
3 Attachment B, but only to the extent that any such ecological features are found within the
4 eight counties specifically identified in the Complaint (and in this Stipulated Injunction) in
5 the following sections of California: M01N01E01, M01N01E02, M01N01E03,
6 M01N01E04, M01N01E05, M01N01E34, M01N01E35, M01S01E02, M01S01E03,
7 M01S01W25, M01S01W36, M01S02E16, M01S02E17, M01S02E21, M01S03E03,
8 M01S03E04, M01S03E09, M01S03E10, M01S03E15, M01S03E16, M01S03E19,
9 M01S03E21, M01S03E22, M01S03E23, M01S03E31, M01S03E32, M01S03E33,
10 M01S03E35, M01S03E36, M01S04E31, M02N01E28, M02N01E32, M02N01E33,
11 M02N01E35, M02N01E36, M02S01W01, M02S03E02, M02S03E03, M02S03E04,
12 M02S03E05, M02S03E07, M02S03E10, M02S03E11, M02S04E07, M02S04E32,
13 M03S03E04, M03S03E05, M03S04E06, M04S01E07, M04S01E18, M10S06E21,
14 M10S06E22, M10S06E27, M10S06E28.

15
16 **Alameda Whipsnake**

17 EPA’s authorization of any use of 2,4-D, Acrolein, Aluminum phosphide, Brodifacoum,
18 Bromadiolone, Bromethalin, Chlorophacinone, Difenacoum, Difethialone, Diphacinone,
19 Magnesium phosphide, Potassium nitrate, Sodium nitrate, Strychnine, Warfarin, and Zinc
20 phosphide is hereby ENJOINED, VACATED, and SET ASIDE in

- 21 1. all areas within 100 feet of the habitat described below if applied by ground; and
22 2. all areas within 400 feet of the habitat described below if applied by air.

23 **Applicable Habitat.** For the Alameda whipsnake, “habitat” means all areas described as
24 shrub communities known as chaparral consisting of northern coastal sage scrub and
25 coastal sage, and in open grasslands, oak savanna, and oak-bay woodland occurring within
26 500 feet of such shrub communities, but only to the extent that any such ecological features
27 are found within the eight counties specifically identified in the Complaint (and in this
28 Stipulated Injunction) in either (1) critical habitat designated for the Alameda whipsnake

1 by the FWS (71 Fed. Reg. 58176), as depicted by the FWS at <http://crithab.fws.gov/>, or (2)
2 in the following sections of California: M01N01E04, M01N01E08, M01N01E11,
3 M01N01E12, M01N01E20, M01N01E21, M01N01E33, M01N02W17, M01N02W19,
4 M01N02W20, M01N03W33, M01N04W36, M01S01E04, M01S01E05, M01S01E08,
5 M01S01W17, M01S01W18, M01S01W30, M01S01W31, M01S02E28, M01S02E29,
6 M01S02E32, M01S02E33, M01S02E34, M01S02W02, M01S02W03, M01S02W10,
7 M01S02W11, M01S02W12, M01S02W14, M02N01E33, M02S02W07, M02S02W17,
8 M02S02W28, M03S01W11, M03S01W19, M03S01W20, M03S01W29, M03S01W30,
9 M03S01W32, M03S02W12, M04S01W05, M05S04E04.

10
11 **Valley Elderberry Longhorn Beetle**

12 EPA's authorization of any use of Acephate, Aldicarb, Azinphos-methyl, Bensulide,
13 Beta-cyfluthrin, Bifenthrin, Carbofuran, Chlorpyrifos, Cyfluthrin, Cyhalothrin (lambda),
14 Cypermethrin, Deltamethrin, Dimethoate, Disulfoton, Endosulfan, Esfenvalerate, Ethoprop,
15 Fenpropathrin, Fluvalinate, Imidacloprid, Methamidophos, Methidathion, Methomyl, Naled,
16 Oxydemeton-methyl, Oxyfluorfen, Permethrin, Phenothrin, Phorate, Propargite, Resmethrin,
17 Tetramethrin, Tralomethrin, and Zeta-cypermethrin is hereby ENJOINED, VACATED, and
18 SET ASIDE in

- 19 1. all areas within 100 feet of the habitat described below if applied by ground; and
20 2. all areas within 400 feet of the habitat described below if applied by air.

21 **Applicable Habitat.** For the valley elderberry longhorn beetle, "habitat" means riparian
22 habitat containing elderberry, but only to the extent that any such ecological features are
23 found within the eight counties specifically identified in the Complaint (and in this
24 Stipulated Injunction) in the following sections of California: M08N01W28,
25 M08N01W31, M08N01W32, M05N02W05, M05N02W08, M05N02W11, M05N02W12,
26 M05N02W32, M06N02W19, M06N03W25, M06N03W36, M07N01E13, M07N01W06,
27 M07N02E18, M07N02E19, M07N02W12, M08N02W25, M08N02W26, M08N02W27,
28 M08N02W28, M08N02W29, M08N02W35, M08N02W36.

1 **Bay Checkerspot Butterfly**

2 EPA’s authorization of any use of Acephate, Azinphos-methyl, Bensulide, Beta-
3 cyfluthrin, Bifenthrin, Chlorothalonil, Chlorpyrifos, Cyfluthrin, Cyhalothrin (lambda),
4 Cypermethrin, Deltamethrin, Dimethoate, Disulfoton, Endosulfan, Esfenvalerate, Ethoprop,
5 Fenpropathrin, Fipronil, Fluvalinate, Imidacloprid, Methamidophos, Methidathion, Methomyl,
6 Naled, Oxydemeton-methyl, Oxyfluorfen, PCNB, Pendimethalin, Permethrin, Phenothrin,
7 Phorate, Propargite, Resmethrin, Tetramethrin, Tralomethrin, and Zeta-cypermethrin is hereby
8 ENJOINED, VACATED, and SET ASIDE in

- 9 1. all areas within 100 feet of the habitat described below if applied by ground; and
10 2. all areas within 400 feet of the habitat described below if applied by air.

11 **Applicable Habitat.** For the Bay checkerspot butterfly, “habitat” means all grasslands
12 depicted in red on the detailed GIS maps included at Attachment C, but only to the extent
13 that any such ecological features are found within the 8 counties specifically identified in
14 the Complaint (and in this Stipulated Injunction) in either (1) critical habitat designated for
15 the Bay checkerspot butterfly by the FWS (66 Fed. Reg. 21449), as depicted by the FWS
16 at <http://crithab.fws.gov/>, or (2) in the following sections of California: M05S04W26,
17 M05S04W27, M05S04W34, M07S01E25, M07S01E36, M07S02E29, M07S02E30,
18 M07S02E31, M07S02E32, M08S01E36, M08S02E02, M08S02E03, M08S02E10,
19 M08S02E11, M08S02E13, M08S02E14, M08S02E15, M08S02E22, M08S02E23,
20 M08S02E24, M08S02E25, M08S02E26, M08S02E36, M08S03E19, M08S03E29,
21 M08S03E30, M08S03E31, M08S03E32, M08S03E33, M09S01E01, M09S02E02,
22 M09S02E03, M09S02E06, M09S02E10, M09S02E11, M09S03E03, M09S03E04,
23 M09S03E05, M09S03E06, M09S03E08, M09S03E09, M09S03E10, M09S03E17,
24 M09S03E18, M09S03E19, M09S03E20.

25 **4. Terminating Events.**

26 The interim injunctive relief set forth above in Section 3 will terminate automatically for
27 a FIFRA authorization for a particular use of any of the Pesticides covered under Section 2
28 (including those Pesticides identified in footnote 1) upon the completion of the consultation

1 obligation imposed under Section 7(a)(2) of the ESA and the implementing ESA consultation
2 regulations. The EPA shall provide Plaintiff with notice of completion of Section 7(a)(2)
3 consultation obligations made pursuant to this paragraph within 14 days of such determination,
4 by facsimile or electronic mail, addressed to Plaintiff's Counsel of Record in this matter.

5
6 **ACTIVITIES EXEMPTED FROM INTERIM INJUNCTIVE RELIEF**

7 **5. Particular Pesticide Programs Excluded.**

8 Notwithstanding Section 3, CBD and EPA agree that the use of the Pesticides specified
9 below is NOT ENJOINED, VACATED, OR SET ASIDE:

10 a. **Public Health Vector Control Programs.** The use of the Pesticides covered
11 under Section 3 above for:

- 12 1. the purpose of public health vector control when such program is
- 13 administered by public entities; or
- 14 2. use by certified applicators for control of a vector pest when such
- 15 control is necessary to respond to a federally or state declared public
- 16 health emergency.

17 b. **Invasive Species and Noxious Weed Programs.** Aquatic and non-aquatic uses
18 of the Pesticides covered under Section 3 above for control of state or federally
19 designated invasive species and noxious weeds when such program is
20 administered by public entities, so long as the following restrictions are
21 implemented:

- 22 1. application of the Pesticides shall be limited to localized spot treatments
- 23 using hand held devices and may not occur within 20 feet of protected
- 24 habitat areas for the 11 species as set forth in Section 3 above;
- 25 2. the Pesticides cannot be used when precipitation is occurring or is
- 26 forecast to occur within 24 hours;
- 27 3. all spraying must be overseen by a certified applicator; and
- 28 4. for 2, 4-D, only the amine formulation can be used.

1 **6. Endangered Species Act Approved Uses.**

2 Notwithstanding Section 3, CBD and EPA agree that the use of the Pesticides covered
3 under Section 3 above is NOT ENJOINED, VACATED, OR SET ASIDE where such use is
4 permissible under one or more of the following:

- 5 a. a “no jeopardy” biological opinion issued under ESA Section 7(a)(2) by the FWS
6 that addresses the use of the Pesticide and effects on any one or more of the
7 eleven species subject to this Stipulated Injunction, provided that such use
8 follows any “reasonable and prudent measures” established in connection with an
9 incidental take statement included with the FWS’s opinion;
- 10 b. a “reasonable and prudent alternative” identified in a “jeopardy” biological
11 opinion issued under ESA Section 7(a)(2) by the FWS that addresses the use of
12 the Pesticide and effects on any one or more of the eleven species subject to this
13 Stipulated Injunction provided that such use follows the “reasonable and prudent
14 alternatives,” and any “reasonable and prudent measures” established in
15 connection with an incidental take statement, included with the FWS’s opinion;
- 16 c. a written concurrence by the FWS in a “not likely to adversely affect”
17 determination made under ESA Section 7(a)(2) that addresses the use of the
18 Pesticide and effects on any of the eleven species subject to this Stipulated
19 Injunction;
- 20 d. an incidental take permit issued by the FWS under ESA Section 10(a) that
21 authorizes the take of any of the eleven species subject to this Stipulated
22 Injunction from application or use of the Pesticide.

23 **7. Specific Pesticide Product or Use Exceptions.**

24 Notwithstanding Section 3, CBD and EPA agree that the following uses of the Pesticides
25 covered under Section 3 above are NOT ENJOINED, VACATED, OR SET ASIDE:

- 26 a. use of the Pesticides in cattle ear tags;
- 27 b. indoor uses of the Pesticides;
- 28

- 1 c. tree injection applications of the Pesticides. However, the injection of the
- 2 pesticides acephate, aldicarb, azinphos-methyl, carbofuran, chlorpyrifos,
- 3 endosulfan, and phorate into elderberry trees occurring within the sections of land
- 4 identified in Section 3 relative to the valley elderberry longhorn beetle is not
- 5 permitted;
- 6 d. homeowner applications of the Pesticides to household potted plants;
- 7 e. use of the Pesticides in flea and tick collars for dogs and cats;
- 8 f. use of the Pesticides for spot treatments of wasp and hornet nests, provided that
- 9 such use occurs at least sixty feet from protected habitat areas for the 11 species
- 10 identified in Section 3 above;
- 11 g. individual tree removal using cut stump application of the Pesticides, provided
- 12 that such use occurs at least sixty feet from protected habitat areas for the 11
- 13 species identified in Section 3 above;
- 14 h. basal bark application of the Pesticides to individual plants, provided that such
- 15 use occurs at least sixty feet from protected habitat areas for the 11 species
- 16 identified in Section above;
- 17 i. use of the Pesticides (except brodifacoum, bromadiolone, difenacoum, and
- 18 difethialone) for control of rodents adjacent to residential buildings (e.g., houses,
- 19 apartment buildings, nursing homes, hospitals) or food handling, processing or
- 20 serving establishments, provided: (1) the pesticide is applied by a certified
- 21 applicator certified in a category that includes the use of rodenticides; and (2) the
- 22 pesticide is used in a tamper resistant bait station deemed to be a Tier 1 bait
- 23 station according to the standards described in the “Risk Mitigation Decision for
- 24 Ten Rodenticides” (EPA May 2008); and (3) the bait stations are placed within
- 25 10 feet of the structure;
- 26 j. use of the Pesticides for subterranean termite control, provided: (1) the pesticide
- 27 is applied by a certified applicator certified in a category that includes the use of
- 28

1 subterranean termite control products; and (2) the product is used within 10 feet
2 of the structure being treated for termites.

3
4 **NOTIFICATION REQUIREMENTS**

5 **8. Brochure Content**

6 EPA agrees to develop a bilingual (English & Spanish) brochure.

- 7 a. The brochure shall 1) state that CBD and EPA have reached a Stipulated
- 8 Injunction setting forth a schedule for effect determinations and interim relief
- 9 pending completion of consultation, if appropriate, with respect to EPA’s
- 10 registration of certain pesticides within certain areas of California, 2) list those
- 11 eight counties in the greater San Francisco Bay Area, including the Bay Delta,
- 12 impacted by the agreed-upon relief in this Stipulated Injunction, and identify the
- 13 affected species relative to each county,³ 3) provide tips for reducing off-site
- 14 movement of pesticides, and 4) refer the reader to EPA’s website for further
- 15 information as noted below in Section 10.
- 16 b. The front cover of the brochure will incorporate the following heading and
- 17 statement and shall be in a large font and highly visible.

18 **WILDLIFE AND PESTICIDE HAZARDS**

19 **Some pesticide products may harm wildlife or their habitat.**

20 **9. Brochure Distribution**

21 The EPA shall distribute a copy of this brochure to all commercial certified applicators
22 of the Pesticides covered by Section 3 above that reasonably can be identified and located within
23

24 ³ tidewater goby: San Mateo
 25 delta smelt: Contra Costa, Solano
 26 clapper rail: San Mateo, Contra Costa, Solano, Sonoma, Marin, Napa, Alameda, Santa Clara
 27 salt marsh harvest mouse: San Mateo, Contra Costa, Solano, Sonoma, Marin, Napa, Alameda, Santa Clara
 28 tiger salamander: Contra Costa, Solano, Sonoma, Alameda, Santa Clara
San Francisco garter snake: San Mateo
freshwater shrimp: Sonoma, Marin, Napa
San Joaquin kit fox: Contra Costa, Alameda
Alameda whipsnake: Contra Costa, Alameda
valley elderberry Longhorn beetle: Solano
Bay checkerspot butterfly: San Mateo, Alameda

1 the state of California; to all private certified applicators that reasonably can be identified and
2 located as residing in the eight California counties where EPA’s authorization of use of the
3 Pesticides covered under Section 3 are Enjoined, Vacated, and Set Aside by this Stipulated
4 Injunction; to all registrants of the Pesticides covered by Section 3 above; and to the California
5 Department of Pesticide Regulation, California Department of Fish and Game, and Pacific
6 Region of the United States Fish and Wildlife Service. In addition, EPA shall distribute two-
7 hundred and fifty (250) copies of this brochure to each of the County Agricultural
8 Commissioner and Cooperative Extension Agent offices in the eight California counties where
9 EPA’s authorization of use of the Pesticides covered under Section 3 are Enjoined, Vacated, and
10 Set Aside by this Stipulated Injunction.

11 Finally, EPA shall mail the brochure described above to the pesticide user groups
12 identified in Attachment D to this Stipulated Injunction entitled “Pesticide User Groups In The
13 Bay Area.” EPA shall provide annual notices to such user groups informing them that the
14 Stipulated Injunction is still in effect and referring them to EPA’s website for further
15 information (including an electronic file of the brochure) until such time as EPA has completed
16 the consultations for the Pesticides covered by Section 3 above, or has otherwise fulfilled its
17 consultation obligations for such Pesticides relative to the 11 species at issue in this case.

18 **10. Web-site Content**

19 EPA shall display on its website the following:

20 1) The full text of the Stipulated Injunction, 2) maps identifying the areas in the eight
21 California counties identified in this Stipulated Injunction where the interim injunction relief
22 applies, and 3) fact sheets for the 11 species identified in Section 3 that shall include, at a
23 minimum, the biology, habitat needs, and status under the Endangered Species Act for each such
24 species.

25 CBD and EPA agree that the maps provided by EPA on its website pursuant to this
26 Section may be relied on to determine where the interim injunctive relief applies under this
27 Stipulated Injunction.
28

1 **11. Point of Sale Notice Content**

2 EPA shall develop a point of sale notification for the Urban Pesticides in the form of a
3 shelf tag that incorporates the following written and graphic information:

- 4 a. The heading “Wildlife Hazard” in a large and visible font followed by the statement
5 that:

6 This product contains pesticides that may harm some wildlife species. Use of
7 this product in urban areas may pollute streams and downstream waters such as
8 the Bay and Delta.

9 Both the heading and the statement shall be highly visible to purchasers.

- 10 b. The notification shall also contain a prominent graphic.

11 **12. Point of Sale Distribution**

12 Within 120 days of the effective date of this Stipulated Injunction, EPA must contact the
13 retailers identified in Attachment E to this Stipulated Injunction entitled “Retailers Who Will Be
14 Provided Shelf Tags,” which shall be supplied by CBD, and inform them of the Stipulated
15 Injunction and request that they post the point of sale shelf tags described above wherever they
16 have for sale products containing the Urban Pesticides. EPA shall provide annual notices to
17 such retailers informing them that the Stipulated Injunction is still in effect and referring them to
18 EPA’s website for further information (including an electronic file of the point of sale shelf tags)
19 until such time as EPA has completed the consultations for the Urban Pesticides, as defined in
20 Section 2.c above, or has otherwise fulfilled its consultation obligations for the Urban
21 Pesticides.

22 **13. Notification of Stipulated Injunction.**

23 The EPA is directed to mail copies of this Stipulated Injunction directly to all registrants
24 of the Pesticides covered by Section 3. The EPA also is directed to display the terms of this
25 Stipulated Injunction on EPA’s website.
26
27
28

1 **MODIFICATIONS TO INJUNCTIVE RELIEF**

2 **14. Modifications to INJUNCTIVE RELIEF.**

3 CBD and EPA reserve the right to seek to have this Court modify this Stipulated
4 Injunction because of EPA's and the FWS's ongoing actions to comply with the ESA, to meet
5 the requirements of other federal agencies or departments, or to deal with circumstances not
6 presently anticipated. The Court will consider such future requests as it deems appropriate.
7

8 **DISPUTE RESOLUTION**

9 **15.** In the event of a disagreement between CBD and EPA concerning the interpretation or
10 performance of any aspect of this Stipulated Injunction, the dissatisfied party shall provide the
11 other party with written notice of the dispute and a request for negotiations. CBD and EPA shall
12 confer in order to attempt to resolve the dispute within 14 days after receipt of the notice, or
13 such time thereafter as is mutually agreed upon. If CBD and EPA are unable to resolve the
14 dispute within 21 days after receipt of the notice, or such time thereafter as is mutually agreed
15 upon, then either party may petition the Court to resolve the dispute. The Court will consider
16 such future requests as it deems appropriate.
17

18 **ATTORNEYS' FEES**

19 **16.** EPA agrees that CBD is entitled to reimbursement of reasonable attorneys' fees and
20 costs, as provided in 16 U.S.C. § 1540(g). CBD and EPA agree to attempt to resolve CBD's
21 claim for fees and costs for all claims in this action expeditiously, without the need for Court
22 intervention. CBD and EPA recognize that Federal Defendants have not waived any defense to
23 and preserve their right to challenge the reasonableness of the amount of attorneys' fees and
24 costs requested by CBD in the event that CBD and Federal Defendants are unable to resolve
25 CBD's claim for fees and costs. CBD and EPA further recognize that CBD reserves the right to
26 seek additional fees and costs incurred arising from a need to enforce or defend against efforts to
27 modify this Stipulated Injunction or for any other unforeseen continuation of this action.
28

1 **17.** If CBD and EPA cannot agree on the amount of such fees within 60 days of the Court
2 approving this Stipulated Injunction, CBD shall file a motion for attorneys’ fees and costs with
3 the Court in this matter. This 60 day period shall supersede the 14 day time period otherwise
4 applicable pursuant to Federal Rules of Civil Procedure Section 54(d)(2)(B) and the court order
5 approving the Stipulated Injunction will accordingly operate as an enlargement of time pursuant
6 to Federal Rule of Civil Procedure Section 6(b)(1) for Plaintiff to file a fee motion.

7
8 **SCOPE OF THE STIPULATED INJUNCTION**

9 **18.** CBD and EPA recognize that, with respect to certain of the pesticides and species
10 subject to this Stipulated Injunction, EPA has concluded consultation with the FWS that resulted
11 in either a concurrence from the FWS or a biological opinion. It is the expectation and
12 understanding of the parties that EPA may use the information in an existing concurrence or
13 biological opinion in making its effects determination for a particular species if that information
14 is still applicable to the current formulation and use of such pesticide.

15 **19.** No provision of this Stipulated Injunction shall be construed to require EPA to take, or to
16 preclude EPA from taking, any action under FIFRA to implement the use authorizations
17 contained herein. If CBD believes the Stipulated Injunction has not been effective in promoting
18 pesticide user adherence to the use authorizations, Plaintiff may seek modification of this
19 stipulated injunction. EPA waives no defense it may have with respect to the terms of any such
20 requested modification.

21 **20.** No provision of this Stipulated Injunction shall be interpreted as or constitute a
22 commitment or requirement that the EPA take action in contravention of the ESA, the
23 Administrative Procedure Act (“APA”), or any other law or regulation, either substantive or
24 procedural. Nothing in this Stipulated Injunction shall be construed to limit or modify the
25 discretion accorded to EPA by the ESA, the APA, or general principles of administrative law
26 with respect to the procedures to be followed in making the effects determinations described
27 above in Sections 1 and 2, or as to the substance of any such determinations.

1 **21.** Neither EPA’s act of entering into this Stipulated Injunction, nor anything contained in
2 this Stipulated Injunction, shall be interpreted as an acknowledgement, endorsement, and/or
3 agreement by EPA as to the necessity and/or appropriateness of the buffers agreed to in
4 connection with the interim restrictions set forth in Section 3.

5 **22.** Neither CBD’s act of entering into this Stipulated Injunction, nor anything contained in
6 this Stipulated Injunction, shall be interpreted as an acknowledgement, endorsement, and/or
7 agreement by CBD that the interim restrictions set forth in Section 3 constitute adequate long
8 term protections to avoid jeopardy to species from pesticide impacts.

9 **23.** Nothing in this Stipulated Injunction shall bar EPA from acting on any matters covered
10 herein in a time frame earlier than required by this Stipulated Injunction, or from taking
11 additional actions not specified herein if EPA determines such actions are appropriate under
12 applicable law.

13 **24.** EPA asserts that no provision of this Stipulated Injunction shall be interpreted as, or
14 constitute, a commitment or requirement that EPA is obligated to spend funds in violation of the
15 Anti-Deficiency Act, 31 U.S.C. Section 1341, or any other provisions of law. In response, CBD
16 asserts that this Stipulated Injunction does not create a conflict with the Anti-Deficiency Act
17 because the duty to make Section 7(a)(2) consultations is required in non-discretionary terms by
18 the ESA and because the Anti-Deficiency Act would not excuse compliance with a pre-existing
19 court-approved Stipulated Injunction. CBD intends to assert this position if EPA fails to comply
20 with the terms of this Stipulated Injunction for reasons of insufficient appropriations. The EPA
21 reserves all legal and equitable defenses to such a claim.

22 **25.** CBD and EPA agree that this Stipulated Injunction was negotiated in good faith and that
23 entry of this Stipulated Injunction constitutes a settlement of claims that were vigorously
24 contested, denied, and disputed by CBD and EPA. By entering into this Stipulated Injunction,
25 CBD and EPA do not waive any claim or defense.

26 **26.** The undersigned representatives of CBD and EPA certify that they are fully authorized
27 by the party (or parties) they represent to agree to the terms and conditions of this Stipulated
28 Injunction and do hereby agree to the terms herein.

1 **27.** Upon entry of this Stipulated Injunction, CBD’s Complaint shall be dismissed with
2 prejudice. The dismissal shall apply to and be binding upon CBD and EPA hereto and anyone
3 acting on their behalf, including successors, employees, agents, elected and appointed officers,
4 and assigns. CBD agrees not to bring, assist any other party in bringing, or join EPA or any
5 other party in any court proceeding that concerns an alleged violation of Section 7 of the ESA
6 pertaining to the effects of any of the Pesticides on any of the eleven species identified in
7 Section 3 in the eight Bay Area counties subject to this Stipulated Injunction until after the
8 completion of any Terminating Event for that pesticide as set forth in Section 4 of this
9 Stipulated Injunction.

10 **28.** This Stipulated Injunction does not constitute an admission or evidence of any fact,
11 wrongdoing, misconduct, or liability on the part of the United States, including without
12 limitation, EPA, its officers, or any other person affiliated with it, or any interpretation of any
13 applicable provision of law. This Stipulated Injunction has no precedential value and shall not
14 be used as evidence in any other court proceeding or in any other settlement discussions.

15 **29.** CBD’s sole judicial remedy to address the merits of any final action that may ensue from
16 EPA’s performance of its obligations under this Stipulated Injunction is to file a separate lawsuit
17 challenging such final action. EPA reserves all defenses to any such suit. Nothing in this
18 Stipulated Injunction alters or affects the standards for review of final EPA action, or creates
19 jurisdiction that otherwise would not exist to review EPA action.

20 **30.** Notwithstanding the dismissal of this action, CBD and EPA have agreed and requested
21 that this Court retain jurisdiction to oversee compliance with the terms of this Stipulated
22 Injunction and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life*
23 *Ins. Co. of America*, 511 U.S. 375 (1994).

24 **31.** The terms of this Stipulated Injunction constitute the entire agreement of CBD and EPA,
25 and no statement, agreement or understanding, oral or written, which is not contained herein,
26 shall be recognized or enforced.
27
28

1 32. The terms of this Stipulated Injunction shall become effective upon entry of an order by
2 the Court ratifying this Stipulated Injunction

3
4 SO ORDERED this _____ day of _____, 2010.

5
6 _____
7 United States District Judge

8
9 Presented by:

10 /s/ Justin Augustine

11 _____
12 Justin Augustine (CA Bar # 235561)
13 CENTER FOR BIOLOGICAL DIVERSITY
14 SAN FRANCISCO BAY AREA OFFICE
15 351 California Street, Suite 600
16 San Francisco, CA 94104
17 Telephone: (415) 436-9682
18 Facsimile: (415) 436-9683
19 jaugustine@biologicaldiversity.org

20 Michael W. Graf (CA Bar # 136172)
21 Law Offices
22 227 Behrens Street
23 El Cerrito, CA 94530
24 Telephone: (510) 525-7222
25 Facsimile: (510) 525-1208
26 mwgraf@aol.com

27 Attorneys for Plaintiff

28 IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division
JEAN E. WILLIAMS, Chief
SETH M. BARSKY, Assistant Chief

/s/ Erik Petersen

Erik E. Petersen, Trial Attorney
Wildlife and Marine Resources Section
United States Department of Justice
Tel: (202) 305-0339 || Fax: (202) 305-0275

Attorneys for Defendants

Native California Cordgrass – *Spartina foliosa*



Pickleweed - *Salicornia virginica*





Kit Foxes prefer to dig their dens in friable soils. In hard clay soils they create dens by enlarging holes started by ground squirrels or badgers.

Their dens have several chambers and entrances.

Photos: Ken Sanger



The main entrance is large and shaped like a keyhole.

Active dens may be littered with prey remains, scat, matted vegetation, and fresh pawprints.

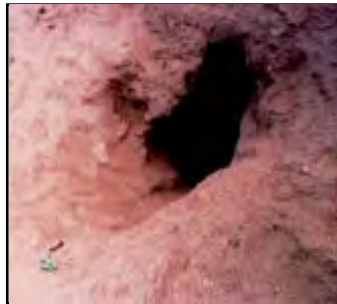
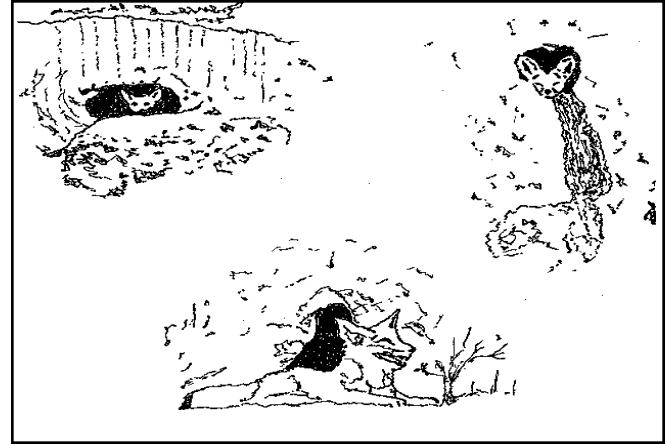


Photo: Rosalie Faubion, USBR

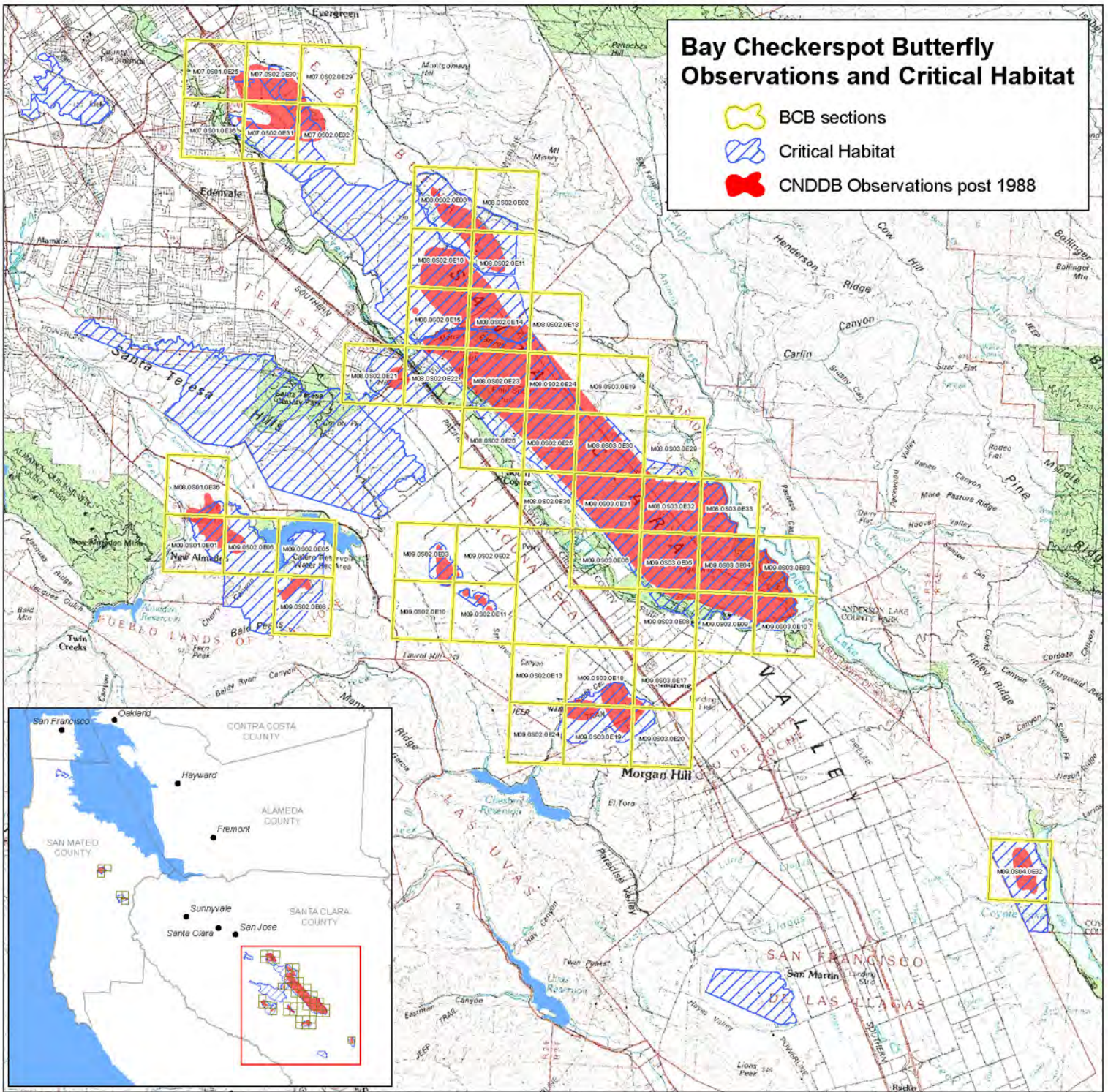


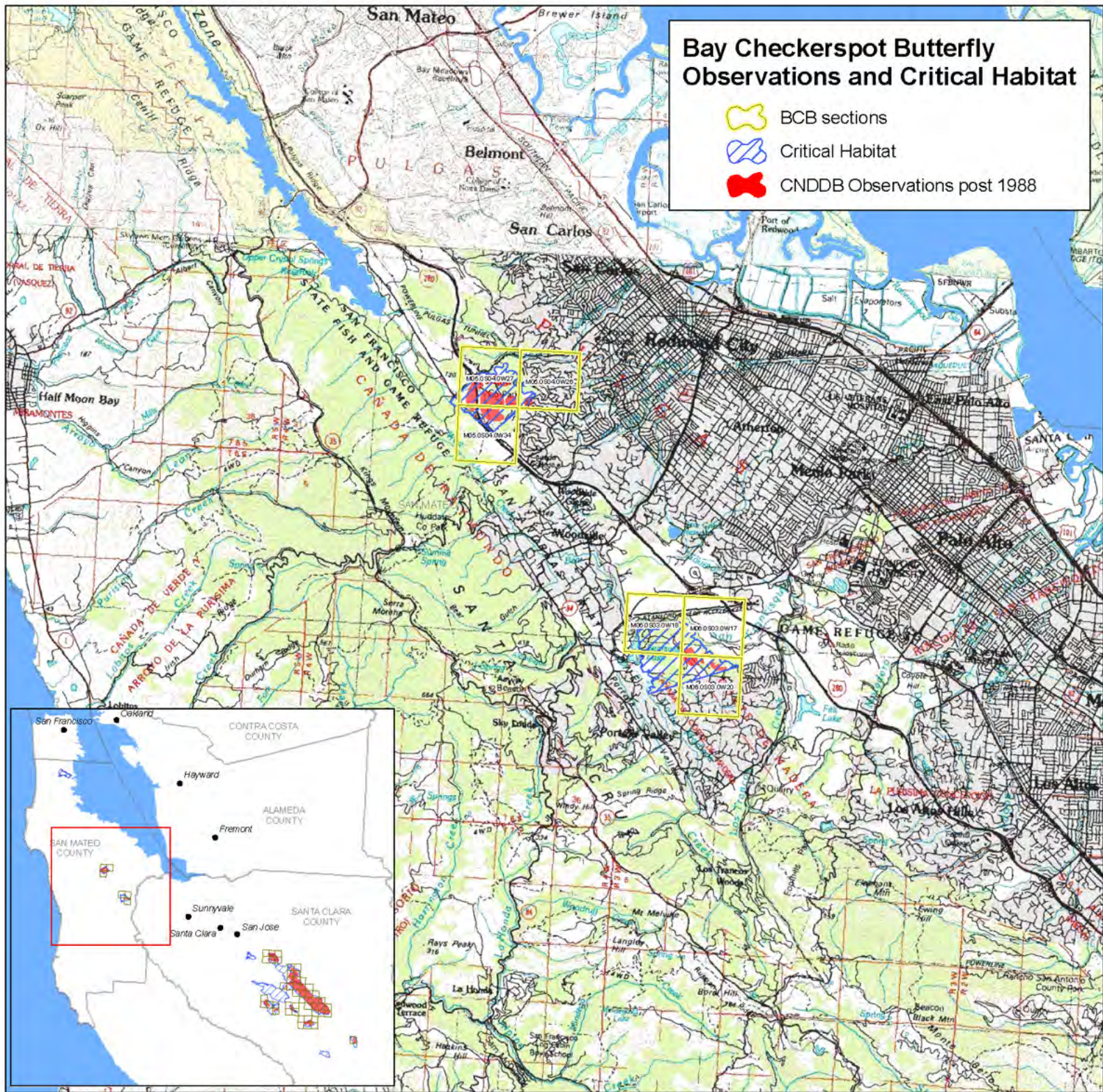
The availability of suitable den sites is a crucial habitat requirement for San Joaquin Kit Foxes: they need dens throughout the year for shelter and to escape predators.

Kit Fox dens are typically located in flat terrain or gently sloping hills, in washes, drainages and roadside berms. The dens may have several entrances, measuring approximately 8 inches in diameter, or larger.

These foxes often reuse old dens or use man-made structures, such as culverts and pipes, that are small enough in diameter to exclude Coyotes.

Pupping dens are larger than others and the entrances to these natal dens are often conspicuous. In contrast, nonnatal dens may be easily overlooked, since there is less activity around them.





Pesticide User Groups In The Bay Area

Name	Address	City	State	Zip
Sonoma County Winegrape Commission	420 Aviation Blvd, Suite 106	Santa Rosa	CA	95403
Sonoma County Wineries Association	420 Aviation Boulevard, Suite 106	Santa Rosa	CA	95403
Napa Valley Grape Growers Association	811 Jefferson St	Napa	CA	94559
California Association of Wine and Grape Growers	1325 J St Suite 1560	Sacramento	CA	95814
Lodi-Woodbridge Winegrape Commission	2545 W. Turner Rd	Lodi	CA	95242
Livermore Valley Winegrowers Association	3585 Greenville Rd, Suite 4	Livermore	CA	94550
Napa Valley Vintners	PO Box 141	St Helena	CA	94574
Santa Cruz Mountains Winegrowers Association	7605-A Old Dominion Ct.	Aptos	CA	95003
California Tomato Growers Association	2300 River Plaza Dr, Suite 100	Sacramento	CA	95833
California Dried Plum Board	3840 Rosin Court, Suite 170	Sacramento	CA	95834
California Cling Peach Board, Jim Melban	531-D North Alta Ave	Dinuba	CA	93618
California Canning Peach Association	2300 River Plaza Drive, Suite 110	Sacramento	CA	95833
California Alfalfa and Forage Association	36 Grande Vista	Novato	CA	94947
California Specialty Crops Council	4500 S Laspina, Suite 214	Tulare	CA	93274
California League of Food Processors	1755 Creekside Oaks Dr., Suite 250	Sacramento	CA	95833
California Tree Fruit Agreement	975 I Street, PO Box 968	Reedley	CA	93654
California Grape and Fruit League	W. Alluvial, Suite 107	Fresno	CA	93711
California Wild Rice Growers Association, Inc.	Fall River Wild Rice, 41577 Osprey Dr.	Fall River Mills	CA	96028
Butte County Rice Growers Association	PO Box 128	Richvale	CA	95974
The Almond Board of California	1150 Ninth St, Suite 1500	Modesto	CA	95354
California Walnut Commission	101 Parkshore Dr, Suite 250	Folsom	CA	95630
California Pistachio Board	PO Box 2077	Folsom	CA	95763
Rodoni Farms	235 West Ave.	Santa Cruz	CA	95060
Pfyffer Associates	2611 Mission St	Santa Cruz	CA	95060
Ocean mist Farms, Castroville Headquarters	10855 Ocean Mist Parkway	Castroville	CA	95012

Retailers Who Will Be Provided Shelf Tags

Name	Address	City	State	Zip
West Berkeley True Value Hardware	2043 San Pablo Ave	Berkeley	CA	94702-1613
True Value Eastern Supplies	2900 Shattuck Ave	Berkeley	CA	94705-1809
Telegraph Hardware	6640 Telegraph Ave	Oakland	CA	94609
Orinda Hardware	56 Moraga Way	Orinda	CA	94563
Montclair Village Hardware	2011 Mountain Blvd	Oakland	CA	94611-2806
Glenview True Value Hardware	218 Park Blvd	Oakland	CA	94602-1312
Encinal True Value Hardware	2801 Encinal Ave	Alameda	CA	94501-4726
Rodeo True Value Hardware	670 Parker Ave	Rodeo	CA	94572-1435
Polk Home Hardware True Value	1630 Polk Street	San Francisco	CA	94109
Pacific Heights True Value Hardware	2828 California Street	San Francisco	CA	94115
Safeco Electric and True Value	301 Toland St	San Francisco	CA	94124
Home Hardware True Value	335 Clement St	San Francisco	CA	94118-2315
Creative Paint & True Value	5435 Geary Blvd	San Francisco	CA	94121-2306
Win Long True Value Hardware & Supply	2244 Irving St	San Francisco	CA	94122-1619
Mill Valley True Value	129 Miller Ave	Mill Valley	CA	94941-5502
J&J True Value	29 Geneva Ave	San Francisco	CA	94112-3402
Sunset True Value	3126 Noriega St	San Francisco	CA	94122-4046
Workbench True Value	19640 Center St	Castro Valley	CA	94546-4702
Pacific Lumber & True Value Hardware	4222 Redwood Hwy	San Rafael	CA	94903-2612
A & Foothill True Value Hardware	22500 Foothill Blvd	Hayward	CA	94541-4110
Novato True Value Builders Supply	800 Sweetser Ave	Novato	CA	94945-2461
Bolinas Bay Lumber Hardware & Landscaping Supply	1 Olema Bolinas Rd	Bolinas	CA	94924
Belmont True Value Hardware	940 El Camino Real	Belmont	CA	94002-2306
Workbench True Value Hardware	1807 Santa Rita Rd	Pleasanton	CA	94566-4744
Richert True Value Lumber & Hardware	5505 Sunol Blvd	Pleasanton	CA	94566-7765
Hulbert True Value Lumber	37500 Cedar Blvd	Newark	CA	94560-4136

Napa True Value Builders Supply	2590 Jefferson St	Napa	CA	94558-4933
Bruce Bauer True Value Lumber	134 San Antonio Cir	Mountain View	CA	94040-1207
Mintons True Value Lumber & Supply	455 W Evelyn Ave	Mountain View	CA	94041-1313
Blossom True Value Hardware	1297 West El Camino Real	Mountain View	CA	94040-2701
Monument True Value Hardware & Lumber	2111 Freedom Blvd	Freedom	CA	95019-2722
Walmart	1400 Hilltop Mall Road	Richmond	CA	94806
Walmart	1021 Arnold Dr	Martinez	CA	94553
Walmart	8400 Edgewater Drive	Oakland	CA	94621
Walmart	1919 Davis Street	San Leandro	CA	94577
Walmart	7011 Main Street	American Canyon	CA	94503
Walmart	30600 Dyer Street	Union City	CA	94587
Walmart	2203 Loveridge Road	Pittsburg	CA	94565
Walmart	4501 Rosewood Drive	Pleasanton	CA	94588
Walmart	300 Chadbourne Road	Fairfield	CA	94534
Walmart	4893 Lone Tree Way	Antioch	CA	94509
Walmart	681 Lincoln Avenue	Napa	CA	94559
Walmart	40580 Albrae Street	Fremont	CA	94538
Walmart	2700 Las Positas Road	Livermore	CA	94550
Walmart	44009 Osgood Road	Fremont	CA	94539
Walmart	600 Showers Drive	Mountain View	CA	94040
Walmart	1501 Helen Power Drive	Vacaville	CA	95687
Walmart	301 Ranch Drive	Milpitas	CA	95035
Walmart	4625 Redwood Drive	Rohnert Park	CA	94928
Walmart	777 Story Road	San Jose	CA	95122
Arlington Ace Hardware	303 Arlington Ave	Kensington	CA	94707
Berkeley Ace Hardware	2145 University Ave	Berkeley	CA	94704
Pastime Hardware	10057 San Pablo Ave	El Cerrito	CA	94530
Ellis Ace Hardware	5424 Martin Luther King Jr Way # J	Oakland	CA	94609
Ace Hardware	4920 McBryde Ave	Richmond	CA	9480
Oliver's Ace Hardware	4071 San Pablo Dam Rd	El Sobrante	CA	94803

Whale Point Marine & Hardware	205 Cutting Blvd	Richmond	CA	94804
Markus Supply Ace Hardware	625 3rd St	Oakland	CA	94607
Laurel Ace Hardware	4024 Macarthur Blvd	Oakland	CA	94619
Moraga Ace Hardware & Lumber	1409 Moraga Way	Moraga	CA	94556
Lafayette Ace Hardware	3311 Mt Diablo Blvd	Lafayette	CA	94549
Pagano's Ace Hardware Mart	1100 Lincoln Ave	Alameda	CA	94501
Financial District Hardware	140 Pine St	San Francisco	CA	94111
Cole Hardware	70 4th St	San Francisco	CA	94103
Cole Hardware	2254 Polk St	San Francisco	CA	94109
Brownies Ace Hardware	1563 Polk St	San Francisco	CA	94109
Bill's Ace Hardware	3610 Pacheco Blvd	Martinez	CA	94553
Bill's Ace Hardware	1530 Contra Costa Blvd	Pleasant Hill	CA	94523
Center Hardware And Supply Co	999 Mariposa St	San Francisco	CA	94107
Central Ace Hardware	1949 Post St	San Francisco	CA	94115
Pedrotti Ace Hardware	830 Southampton Rd	Benicia	CA	94510
Handy Handyman Hardware	2075 Market St	San Francisco	CA	94114
Standard 5 & 10 Ace	3545 California St	San Francisco	CA	94118
Dutton Hardware	595 Dutton Ave	San Leandro	CA	94577
Walnut Creek Ace Hardware	2967 Ygnacio Valley Rd	Walnut Creek	CA	94598
Goodman Building Sply Co	775 Redwood Hwy	Mill Valley	CA	94941
Cole Hardware	956 Cole St	San Francisco	CA	94117
Cole Hardware	3312 Mission St	San Francisco	CA	94110
Standard Plumbing Ace Hardware	1019 Clement St	San Francisco	CA	94118
Bill's Ace Hardware	3375 Port Chicago Hwy	Concord	CA	94520
Ace Hardware of San Leandro	14315 E 14th St	San Leandro	CA	94578
Standard Plumbing Ace Hardware	6122 Geary Blvd	San Francisco	CA	94121
General Hardware Company	401 Miller Ave	Mill Valley	CA	94941
Bill's Ace Hardware	4451 Clayton Rd	Concord	CA	94521
Jim Corbet's Store	1155 Magnolia Ave	Larkspur	CA	94939
9 Pm Ace Hardware	2526 Noriega St	San Francisco	CA	94122

O'Connor Lumber Co	4310 Sonoma Blvd	Vallejo	CA	94589
Brisbane Hardware & Sply Inc	1 Visitacion Ave	Brisbane	CA	94005
Pete's Ace Hardware	2569 Castro Valley Blvd	Castro Valley	CA	94546
South City Lumber & Supply	499 Railroad Ave	South San	CA	94080
Fairfax Lumber Company	109 Broadway Blvd	Fairfax	CA	94930
Hayward Ace	808 B St	Hayward	CA	94541
Pini Ace Hardware	1535 S Novato Blvd Ste A	Novato	CA	94947
Pittsburg Ace Hardware	125 E Leland Rd	Pittsburg	CA	94565
Millbrae Lumber Company	200 El Camino Real	Millbrae	CA	94030
Linda Mar Ace Home Center	560 San Pedro Ave	Pacifica	CA	94044
Antioch Ace Hardware	501 Sunset Dr	Antioch	CA	94509
Carlmont Ace Hardware	1029 Alameda	Belmont	CA	94002
Dale Hardware Inc	37100 Post St	Fremont	CA	94536
Suisun Ace Hardware	252 Sunset Ave	Suisun City	CA	94585
Zeller's Ace Hardware	819 Randolph St	Napa	CA	94559
Clark's Ace Hardware	325 Lincoln Ave	Napa	CA	94558
Redwood City Hardware	2163 Roosevelt Ave	Redwood City	CA	94061
Oakley Ace Hardware	305 5th St	Oakley	CA	94561
Big B Lumber	6600 Brentwood Blvd	Brentwood	CA	94513
Parsons Lumber & Hardware	17800 Sonoma Highway	Boyes Hot Sprgs	CA	95416
Menlo Park Hardware	700 Santa Cruz Ave	Menlo Park	CA	94025
Brentwood Ace Hardware	8900 Brentwood Blvd Ste J	Brentwood	CA	94513
Mc Ivors Ace Hardware	43350 Ellsworth St	Fremont	CA	94539
Ocean Shore Hardware	111 Main St	Half Moon Bay	CA	94019
Ace Building Supply Center	11280 State Route 1	Pt Reyes Sta	CA	94956
Palo Alto Hardware	875 Alma St	Palo Alto	CA	94301
Rex Ace Hardware	313 B St	Petaluma	CA	94952
Pacific Ace Hardware	627 Merchant St	Vacaville	CA	95688
Oilwell Materials/Hardware Co	506 State Highway 12	Rio Vista	CA	94571-1424
Bennett Valley Ace Hardware	2739 Yulupa Ave	Santa Rosa	CA	95405

Steves Hardware Inc	1370 Main St	St Helena	CA	94574
Alum Rock Hardware	2243 Alum Rock Ave	San Jose	CA	95116
Mission Ace Hardware & Lumber	4310 Sonoma Hwy	Santa Rosa	CA	95409
Campbell Ace Hdw	148 N San Tomas Aquino Rd	Campbell	CA	95008
Southern Lumber	1402 S First St	San Jose	CA	95110
Willow Glen Ace Hardware	2253 Lincoln Ave	San Jose	CA	95125
College Hardware	15 Angwin Plz	Angwin	CA	94508
Guerneville Fulton Ace	2551 Guerneville Rd	Santa Rosa	CA	95401
Sebastopol Hardware Ctr	660 Gravenstein Hwy N	Sebastopol	CA	95472
Ace Los Gatos Hardware	15300 Los Gatos Blvd	Los Gatos	CA	95032
Rural Supply Hardware	110 S Santa Cruz Ave	Los Gatos	CA	95030
Ace Hardware of Gilroy	1260 B First St	Gilroy	CA	95020
Johnson Lumber Company	600 Tennant Ave	Morgan Hill	CA	95037
Orchard Supply Hardware	1025 Ashby Avenue	Berkeley	CA	94710
Orchard Supply Hardware	2245 Gellert Boulevard	South San	CA	94080
Orchard Supply Hardware	1751 Eastshore Boulevard	El Cerrito	CA	94530
Orchard Supply Hardware	900 El Camino Real	Millbrae	CA	94030
Orchard Supply Hardware	1151 Andersen Drive	San Rafael	CA	94901
Orchard Supply Hardware	1440 Fitzgerald Drive	Pinole	CA	94564
Orchard Supply Hardware	1550 Canyon Road	Moraga	CA	94556
Orchard Supply Hardware	300 Floresta Boulevard	San Leandro	CA	94578
Orchard Supply Hardware	1010 Metro Center Boulevard	Foster City	CA	94404
Orchard Supply Hardware	177 Lewelling Boulevard	San Lorenzo	CA	94580
Orchard Supply Hardware	3980 Bel Aire Plaza	Napa	CA	94558
Orchard Supply Hardware	220 Peabody Road	Vacaville	CA	95687
Orchard Supply Hardware	1390 N. McDowell Blvd.	Petaluma	CA	94954
Orchard Supply Hardware	1440 Fitzgerald Drive	Pinole	CA	94564
Orchard Supply Hardware	1151 Andersen Drive	San Rafael	CA	94901
Home Depot	303 E Lake Merced Blvd	Daly City	CA	94015
Home Depot	91 Colma Blvd	Colma	CA	94014

Home Depot	2 Colma Blvd	Colma	CA	94014
Home Depot	3838 Hollis Avenue	Emeryville	CA	94608
Home Depot	4000 Alameda Avenue	Oakland	CA	94601
Home Depot	11939 San Pablo Ave	El Cerrito	CA	94530
Home Depot	111 Shoreline Pkwy	San Rafael	CA	94901
Home Depot	13901 San Pablo Avenue	San Pablo	CA	94806
Home Depot	1933 Davis St	San Leandro	CA	94577
Home Depot	1801 Fourth Street	San Rafael	CA	94901
Home Depot	2001 Chess Dr	San Mateo	CA	94404
Home Depot	1625 Sycamore Avenue	Hercules	CA	94547
Home Depot	21787 Hesperian Blvd	Hayward	CA	94541
Home Depot	1125 Old County Rd	San Carlos	CA	94070
Home Depot	3211 Danville Blvd	Alamo	CA	94507
Home Depot	1037 Arnold Drive	Martinez	CA	94553
Home Depot	30055 Industrial Pkwy W	Union City	CA	94587
Home Depot	2750 Crow Canyon Rd	San Ramon	CA	94583
Home Depot	2090 Meridian Park Blvd	Concord	CA	94520
Home Depot	1461 Concord Avenue	Concord	CA	94520
Home Depot	225 Soscol Ave	Napa	CA	94559
Home Depot	2121 Cadenasso Dr	Fairfield	CA	94533
Home Depot	1175 Admiral Callaghan Ln	Vallejo	CA	94591
Home Depot	2000 Lakeville Highway	Petaluma	CA	94594
Home Depot	510 Orange Drive	Vacaville	CA	95687
Home Depot	4825 Redwood Dr	Rohnert Park	CA	94928
Home Depot	1625 Sycamore Avenue	Hercules	CA	94547
Home Depot	100 Bicentennial Way	Santa Rosa	CA	95403
Home Depot	1037 Arnold Drive	Martinez	CA	94553
Home Depot	13901 San Pablo Avenue	San Pablo	CA	94806
Home Depot	11939 San Pablo Ave	El Cerrito	CA	94530
Home Depot	2090 Meridian Park Blvd	Concord	CA	94520

Home Depot	1461 Concord Avenue	Concord	CA	94520
Home Depot	1801 Fourth Street	San Rafael	CA	94901
Home Depot	111 Shoreline Pkwy	San Rafael	CA	94901
Home Depot	6280 Hembree Lane	Windsor	CA	95492
Home Depot	5424 Ygnacio Valley Rd	Concord	CA	94521
Home Depot	2300 N Park Blvd	Pittsburg	CA	94565
Home Depot	3838 Hollis Avenue	Emeryville	CA	94608
Home Depot	3211 Danville Blvd	Alamo	CA	94507
Home Depot	2181 Monterey Road	San Jose	CA	95112
Home Depot	2435 Lafayette	Santa Clara	CA	95050
Home Depot	2855 Story Road	San Jose	CA	95127
Home Depot	480 E Hamilton Ave	Campbell	CA	95008
Home Depot	635 W Capitol Expressway	San Jose	CA	95136
Home Depot	1177 Great Mall Drive	Milpitas	CA	95035
Home Depot	1855 Hillsdale Avenue	San Jose	CA	95124
Home Depot	920 Blossom Hill Rd	San Jose	CA	95123
Home Depot	680 Kifer Rd	Sunnyvale	CA	94086
Home Depot	975 DE Anza Blvd	San Jose	CA	95129
Home Depot	43900 Icehouse Terrace	Fremont	CA	94538
Home Depot	1781 E Bayshore Rd	East Palo Alto	CA	94303
Home Depot	5401 Thornton Ave	Newark	CA	94560
Home Depot	860 E Dunne Avenue	Morgan Hill	CA	95037
Home Depot	30055 Industrial Pkwy W	Union City	CA	94587
Home Depot	1125 Old County Rd	San Carlos	CA	94070
Home Depot	2600 41st Avenue	Soquel	CA	95073
Home Depot	6000 Johnson Dr	Pleasanton	CA	94588
Home Depot	21787 Hesperian Blvd	Hayward	CA	94541
Home Depot	2500 Las Positas Rd	Livermore	CA	94550
		SOUTH SAN		
Lowe's	720 DUBUQUE AVENUE	FRANCISCO	CA	94080

Lowe's	1340 EL CAMINO REAL	SAN BRUNO	CA	94066
Lowe's	32040 UNION LANDING BLVD.	UNION CITY	CA	94587
Lowe's	1951 AUTO CENTER DRIVE	ANTIOCH	CA	94509
Lowe's	3750 DUBLIN BOULEVARD	DUBLIN	CA	94568
Lowe's	5503 LONE TREE WAY	ANTIOCH	CA	94531
Lowe's	43612 PACIFIC COMMONS BLVD	FREMONT	CA	94538
Lowe's	4255 FIRST STREET	LIVERMORE	CA	94551
Lowe's	1751 EAST MONTE VISTA AVENUE	VACAVILLE	CA	95668
Lowe's	811 EAST ARQUES AVENUE	SUNNYVALE	CA	94085
Lowe's	7921 REDWOOD DRIVE	COTATI	CA	94931