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

20 **CENTER FOR BIOLOGICAL  
21 DIVERSITY,**

22 Plaintiff,

23 v.

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

Federal Defendants,

and

**CROPLIFE AMERICA,**

Proposed Defendant-Intervenor.

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

) **PLAINTIFF’S COMBINED RESPONSE  
) TO MOTION FOR JUDGMENT ON THE  
) PLEADINGS**

) **Hon. Joseph C. Spero**

) **Hearing Date: July 24, 2015  
) Time: 9:30 am  
) Courtroom G – 15<sup>th</sup> Floor**

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## INTRODUCTION

1  
2 Plaintiff Center for Biological Diversity (“the Center”) challenges the failure of Federal  
3 Defendants U.S. Dept. of the Interior, S.M.R. Jewell, U.S. Fish and Wildlife Service, and Dan Ashe  
4 (collectively “FWS”) to comply with Section 7 of the Endangered Species Act (“ESA”) and its  
5 implementing regulations, as well as section 706 of the Administrative Procedure Act (“APA”).  
6 Specifically, FWS has failed to complete consultation – within the timelines required under the ESA and  
7 its implementing regulations – on three pesticides that may affect two endangered species in the  
8 California Bay Delta, namely, the Delta smelt and Alameda whipsnake.

9 Through the present motion, Federal Defendants and CropLife misconstrue Supreme Court and  
10 Ninth Circuit precedent to argue that the interests of the Center – a national, nonprofit focused on  
11 endangered species conservation – do not fall within the “zone of interests” of Section 7 of the ESA. Yet  
12 undoubtedly Congress intended that timely consultations would serve the purpose of species  
13 conservation, which is exactly the interest the Center intends to protect through this litigation.  
14 CropLife’s argument that the Center lacks standing must also be rejected because the Center’s interests  
15 in the Delta smelt and Alameda whipsnake and their habitats cannot be fully protected without  
16 completion of consultation by FWS. Moreover, the argument that the claims brought in this case were  
17 waived in a settlement between the Center and EPA is completely without merit. This case falls outside  
18 the plain language of the settlement, and another Judge in this District has already rejected the exact  
19 same argument made by CropLife in similar litigation brought by the Center to ensure timely  
20 consultation on pesticide impacts. For these reasons and those explained below, the Center respectfully  
21 requests that the Court deny Federal Defendants’ motion for judgment on the pleadings.

## BACKGROUND

### The Endangered Species Act

24 The ESA declares that endangered and threatened species are of “esthetic, ecological,  
25 educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. §  
26 1531(a)(3). Accordingly, the ESA establishes the “means whereby the ecosystems upon which  
27 endangered species and threatened species depend may be conserved” and “a program for the  
28

1 conservation of such endangered species and threatened species . . . .” *Id.* § 1531(b); *see id.* §§ 1531-  
2 1544.

3 To fulfill the substantive purposes of the ESA, federal agencies are required under Section  
4 7(a)(2) to engage in consultation with FWS or National Marine Fisheries Service (“NMFS”) before  
5 authorizing, funding, or engaging in any “action” that could “jeopardize the continued existence” of any  
6 listed species or “result in the destruction or adverse modification of habitat of such species . . .  
7 determined . . . to be critical.” *Id.* § 1536(a)(2). Under the regulations FWS and NMFS jointly adopted to  
8 govern Section 7 consultations, EPA’s ongoing oversight of pesticides under the Federal Insecticide,  
9 Fungicide, and Rodenticide Act (“FIFRA”) constitutes agency “action” subject to ESA Section 7(a)(2).  
10 50 C.F.R. §§ 402.02, 402.03.

11 A federal agency is relieved of the obligation to consult only if its action will have “no effect” on  
12 any listed species or designated critical habitat. *Id.* § 402.14(a)-(b). If an agency determines that its  
13 action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the  
14 regulations permit “informal consultation,” during which FWS must concur in writing with the agency’s  
15 determination. *Id.* § 402.13(a). If the agency determines that its action is “likely to adversely affect” a  
16 listed species or critical habitat, or if FWS does not concur with the agency’s “not likely to adversely  
17 affect” determination, the agency must engage in “formal consultation,” as outlined in 50 C.F.R. §  
18 402.14 (“Formal Consultation”). *Id.* § 402.14; *see also id.* § 402.02. Through consultation, FWS details  
19 how the agency action affects the listed species and their habitats and, if necessary, suggests reasonable  
20 and prudent alternatives to protect the species. 16 U.S.C. § 1536(b)(3).

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

### 26 **The Administrative Procedures Act**

27 The APA empowers a reviewing court to “compel agency action unlawfully withheld or  
28 unreasonably delayed.” 5 U.S.C. § 706(1). “[A] claim under § 706(1) can proceed only where a plaintiff

1 asserts that an agency failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah*  
2 *Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis omitted).

### 3 **FWS Has Failed to Complete Required Section 7 Consultation**

4 In 2007, the Center sued EPA for failing to consult with FWS regarding the impacts of 77  
5 pesticide active ingredients on 11 San Francisco Bay Area species. In response to that litigation, in  
6 February 2009, EPA requested formal consultation from FWS for atrazine, alachlor, and 2,4-D after  
7 determining that these pesticides were likely to adversely affect the Delta smelt and the Alameda  
8 whipsnake (as well the California red-legged frog, which is not at issue in the present litigation). In  
9 2010, the Center and EPA reached a settlement, and the Court entered a Stipulated Injunction imposing  
10 spray-limitation buffers around defined habitats and requiring the EPA complete effects determinations  
11 for these 11 species. *See* Stipulated Injunction and Proposed Order, *Ctr. for Biological Diversity v. EPA*,  
12 No. 07-02794 (N.D. Cal. Jan. 12, 2010), Docket No. 104-1; Order Approving Stipulated Injunction and  
13 Order, *Ctr. for Biological Diversity v. EPA*, No. 07-02794 (N.D. Cal. May 17, 2010), Docket No. 121  
14 (hereinafter, “2010 Settlement Agreement”).

15 Nearly six years have passed since EPA requested that FWS engage in the consultations initiated  
16 by EPA as required under the 2010 Settlement Agreement. In that time, FWS has not completed any of  
17 the consultations or recommended any mitigation measures necessary to ensure that atrazine, alachlor,  
18 and 2,4-D will not harm the Delta smelt or the Alameda whipsnake, or adversely modify their critical  
19 habitat. The process has been stalled for years despite the mandatory deadlines in the ESA and its  
20 applicable regulations. The agency’s delay in completing the consultations and prescribing mitigation  
21 allows toxic pesticides to continue to harm wildlife species, in violation of the ESA and the APA.

### 22 **STANDARD OF REVIEW**

23 Under Federal Rule of Civil Procedure 12(c), “a party may move for judgment on the pleadings.”  
24 The legal standard for Rule 12(c) is virtually identical to the standard for a motion to dismiss under Rule  
25 12(b)(6). *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989), *cert. denied*, 493  
26 U.S. 812 (1989). For a motion under either rule, the Court must assume that the plaintiff’s allegations are  
27 true and must draw all reasonable inferences in the plaintiff’s favor. *Usher v. City of L.A.*, 828 F.2d 556,  
28 561 (9th Cir. 1987).

**ANALYSIS**

**I. THE CENTER’S INTEREST IN CONSERVING ENDANGERED SPECIES IS WITHIN THE “ZONE OF INTERESTS” PROTECTED BY SECTION 7 OF THE ESA**

Federal Defendants contend that the Center lacks the “prudential standing” necessary to bring its APA claim by arguing that the Center does not fall within the “zone of interests” of Section 7 of the ESA, which is the law underlying the Center’s APA claim in the Second Cause of Action.<sup>1</sup> The Court should reject this argument because the Center – a nonprofit environmental organization focused on conservation of endangered species – falls within the class of plaintiffs whom Congress has authorized to sue under Section 7 of the ESA.

The APA provides a cause of action for persons “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. This provision requires that a plaintiff “assert an interest ‘arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’” *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (quoting *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). For claims brought under the APA, the zone of interests test “is not meant to be especially demanding” and “the benefit of any doubt goes to the plaintiff.” *Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 399, 400, n.16 (1987); see *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012). The purpose of the zone of interests test is “to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.” *Nev. Land Action Ass’n*, 8 F.3d at 716 (quoting *Clarke*, 479 U.S. at 397).

The mission of the Center is to “work to secure a future for all species, great and small, hovering on the brink of extinction.” Declaration of Justin Augustine (“Augustine Decl.”) ¶ 2. The Center’s interest in conserving endangered species – here, through timely consultation – squarely falls within the interests protected by Section 7 of the ESA, which is the law underlying the APA claim. As the Ninth

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<sup>1</sup> As an initial matter, the agency’s argument is couched incorrectly as a standing issue. See *Lexmark v. Static Control*, 134 S.Ct. 1377, 1387 (2014) (clarifying that the zone of interest test does not belong under the “prudential rubric” but instead asks “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim”). Consequently, the zone of interest test does not implicate a court’s jurisdiction. *Id.* at 1388 n.4.



1 Circuit explained, “Section 7 of the ESA ‘addresses the obligations of federal agencies with respect to  
2 conservation and protection of species listed as either endangered or threatened under the ESA.’” *San*  
3 *Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9th Cir. 2014) (quoting Lawrence R.  
4 Liebesman & Rafe Petersen, *Endangered Species Deskbook* 39 (2d ed. 2010)). “The purpose of [Section  
5 7] consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is  
6 likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify  
7 reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.” *Karuk Tribe of*  
8 *Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc), *cert. denied*, 133 S.Ct. 1579  
9 (2013). Section 7 is the “heart of the ESA.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495  
10 (9th Cir. 2011), *cert. denied*, 132 S.Ct 366 (2011). And the ESA is “a comprehensive scheme with the  
11 ‘broad purpose’ of protecting endangered and threatened species.” *Ctr. for Biological Diversity v. U.S.*  
12 *Bureau of Land Mgmt.*, 698 F.3d 1101, 1106 (9th Cir. 2012) (quoting *Babbitt v. Sweet Home Chapter of*  
13 *Cmntys. for a Great Or.*, 515 U.S. 687, 698 (1995)).

14 Section 7 requires consultation to “be concluded within the 90-day period beginning on the date  
15 on which initiated or, subject to subparagraph (B), within such other period of time as is mutually  
16 agreeable to the Secretary and the Federal agency.” 16 U.S.C. § 1636(b)(1)(A). Thus, even under  
17 Federal Defendants’ narrow framing of the issue, the key question is whether the Center’s interests in  
18 species conservation are protected through timely consultation, as provided in Section 7. Contrary to  
19 Federal Defendants’ assertion, timely consultation is absolutely essential to species conservation. In  
20 discussing Section 7 of the ESA, the Ninth Circuit has explained: “Congress has established procedures  
21 to further its policy of protecting endangered species. The substantive and procedural provisions of the  
22 ESA are the means determined by Congress to assure adequate protection. Only by requiring substantial  
23 compliance with the act’s procedures can we effectuate the intent of the legislature.” *Sierra Club v.*  
24 *Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987); *see also Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir.  
25 1985) (“If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its  
26 procedural requirements, because the procedural requirements are designed to ensure compliance with  
27 the substantive provisions.” (emphasis in original)). Without timely consultation, the action agency  
28 would lack the benefit of FWS’s wildlife expertise and thus the conservation purposes of Section 7 and

1 the ESA as a whole would be precluded. *See Karuk Tribe of Cal.*, 681 F.3d at 1020 (explaining the  
2 purposes of the consultation requirement). Here, almost six years have passed and the pesticides at issue  
3 continue to be used near key habitats of the Delta smelt and Alameda whipsnake. But because FWS  
4 refuses to comply with the timing requirements of Section 7, these endangered species are not receiving  
5 the benefit of mitigation and other protections that FWS could find are needed through consultation. In  
6 short, timeliness cannot be disconnected from the conservation aspects of the ESA because timeliness  
7 ensures that ESA-listed species receive necessary protections.

8 Federal Defendants further argue that the Center does not fall within Section 7's zone of interests  
9 because the statute does not "expressly identify" the Center. Docket No. 29 at 8. This argument is  
10 meritless. The zone of interests test does not ask whether the applicable underlying law expressly  
11 protects a plaintiff's interests. *Patchak*, 132 S.Ct. at 2210, n.7 ("The question is not whether § 465 seeks  
12 to benefit Patchak; everyone can agree it does not."). Indeed, the Supreme Court has explained the low  
13 bar in applying the zone of interests test to APA claims:

14 We apply the [zone of interest] test in keeping with Congress's evident intent  
15 when enacting the APA to make agency action presumptively reviewable. We do  
16 not require any indication of congressional purpose to benefit the would-be  
17 plaintiff. And we have always conspicuously included the word 'arguably' in the  
18 test to indicate that the benefit of any doubt goes to the plaintiff. The test  
19 forecloses suit only when a plaintiff's interests are so marginally related to or  
20 inconsistent with the purposes implicit in the statute that it cannot reasonably be  
21 assumed that Congress intended to permit the suit.

19 *Patchak*, 132 S.Ct. at 2210 (citations and quotations omitted, emphasis added). Moreover, the Ninth  
20 Circuit has explained that "all that is required is a rough correspondence of the plaintiff's interests with  
21 the statutory purpose." *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 954  
22 (9th Cir. 2013); 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 16.9, at 1521 (5th ed. 2010) ("An  
23 injured plaintiff has standing under the APA unless Congress intended to preclude judicial review at the  
24 behest of parties in plaintiff's class.")<sup>2</sup> Federal Defendants and CropLife can point to no cases holding

25 \_\_\_\_\_  
26 <sup>2</sup> *Patchak* illustrates these principles. There, the underlying Indian Reorganization Act was intended to  
27 serve tribal economic interests, and not benefit the plaintiff – a property owner asserting that a proposed  
28 casino would injure his economic, environmental, and aesthetic interests. *Patchak*, 132 S.Ct. at 2210 &  
n.7. Nonetheless, the court found that plaintiff's interests were related to the underlying law based on the  
Act's purpose, its implementing regulations and legislative history, and its application in the case. *Id.* at

1 that the Center (or any other environmental nonprofit) falls outside the zone of interests of Section 7. To  
2 be sure, the Center's mission to conserve endangered species is directly furthered by agency compliance  
3 with the mandatory deadlines for consultation in Section 7 of the ESA.

4 Furthermore, there is no merit to CropLife's assertion that the Center must fall outside Section  
5 7's zone of interests because otherwise "a third party" could "override" extensions for completion of  
6 consultation negotiated by the applicant and the agencies. Docket No. 44 at 5. Such extensions are not  
7 even at issue here because EPA, FWS and the applicants have not agreed upon any extension beyond the  
8 90-day deadline imposed by statute. Thus, CropLife presents an irrelevant hypothetical as the Center is  
9 not seeking to "override" any extension and is instead merely seeking to ensure that endangered wildlife  
10 receives the benefits of Section 7 consultation required under the law. Here, it is has been almost six  
11 years since EPA initiated consultation and still FWS refuses to fulfill its statutory mandate to protect  
12 endangered wildlife from harmful pesticides through consultation.

13 For all these reasons, the Court should reject the argument that the Center's Second Cause of  
14 Action fails the zone of interests test.

## 15 **II. THE COMPLAINT PLEADS FACTS DEMONSTRATING STANDING**

16 CropLife further challenges the Center's Article III standing by arguing that the interim  
17 restrictions on pesticide use (provided by the 2010 Settlement Agreement) prevent all harm from FWS's  
18 delay in completing consultations. CropLife's argument must be rejected. The facts alleged in the  
19 Complaint, which taken as true as they must at this stage, establish each of the three elements of Article  
20 III standing. Specifically, the Center alleges facts establishing that FWS's failure to complete the  
21 pesticide consultations is causing harm to the Center's members' interests in the Delta smelt and  
22 Alameda whipsnake and their habitats and that this injury can be redressed by the Court. *See generally*  
23 *Compl. ¶¶ 11-13.*

24  
25  
26  
27 2210-2212; *see also Bennett v. Spear*, 520 U.S. 154, 176 (1997) (finding irrigation district within the  
28 zone of interests of Section 7); *Presidio Golf Club v. NPS*, 155 F.3d 1153, 1158-59 (9th Cir. 1998)  
(finding golf club's interests not inconsistent with underlying statute).

1 To begin, the Complaint sufficiently pleads an “injury in fact” by alleging that the Center’s  
2 members have interests in the Delta smelt and Alameda whipsnake and visit areas in which the species  
3 live that are harmed by the pesticides at issue. Compl. ¶ 11. Specifically, the Center’s members “have  
4 visited areas where the Alameda whipsnake and Delta smelt are known to occur” and “use these areas  
5 for observation of these listed species and other wildlife; research; nature photography; aesthetic  
6 enjoyment; and recreational, educational, and other activities.” *Id.* Furthermore, the Center’s members  
7 “derive professional, aesthetic, spiritual, recreational, economic, and educational benefits from these  
8 listed species and their habitats.” “Those members have concrete plans to continue to travel to and  
9 recreate in areas where they can observe the Alameda whipsnake and Delta smelt and will continue to  
10 maintain an interest in these species and their habitats in the future.” *Id.*

11 The Complaint establishes that these interests in the species are being harmed by each of the  
12 pesticides at issue through detailed allegations of pesticide impacts. *See generally* Compl. ¶¶ 29-34. For  
13 example, the Complaint alleges that the “2005 reregistration eligibility decision for 2,4-D acknowledges  
14 the significant harms that 2,4-D can have on endangered species like the Delta smelt, concluding that the  
15 use of 2,4-D ‘exceed the acute risk level of concern (LOC) for freshwater fish and invertebrates and  
16 chronic risk LOC for freshwater and estuarine fish and freshwater invertebrates.’” *Id.* ¶ 34. In short, as  
17 the Complaint explains, “[o]nce in the environment, pesticides impact listed species through acute and  
18 chronic effects and contamination of habitats.” *Id.* ¶ 12.

19 The Complaint also adequately alleges that FWS is the cause of the injuries suffered by the  
20 Center’s members. As the Complaint explains, “[i]f FWS completed consultation as required, FWS  
21 would detail how the pesticides are affecting the Alameda whipsnake and Delta smelt and their habitats  
22 and, if necessary, would suggest reasonable and prudent alternatives to protect the species.” *Id.* ¶ 12.<sup>3</sup>

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25 <sup>3</sup> In addition to injury and causation, the Center must also establish redressibility. Yet Croplife does not  
26 appear to seriously question this remaining element of standing, as it is beyond dispute that the  
27 Complaint adequately alleges that the Center’s injuries are likely to be redressed by a favorable  
28 decision: “The relief sought herein – an order compelling completion of consultation and placing  
restrictions on pesticide use in habitats of the Alameda whipsnake and Delta smelt until the agency  
brings itself into compliance with law – would redress the Center’s injuries.” Compl. ¶ 13.

1 The Court should reject CropLife’s argument that the “interim restrictions” in the 2010  
2 Settlement Agreement somehow prevents all harm that results from FWS’s failure to complete  
3 consultation. While the Center does not dispute that such restrictions on pesticide use likely provide  
4 some benefit to the listed species, it is not an adequate substitute for consultation with FWS, which is the  
5 expert wildlife agency. The interim restrictions in that Settlement Agreement are the result of a  
6 compromise reached between the Center and the EPA. In contrast, through Section 7 consultation,  
7 biologists and other experts at FWS would utilize their expertise to craft “reasonable and prudent  
8 measures” to mitigate harm to the species, or if necessary, to suggest “reasonable and prudent  
9 alternatives.” 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14. In short, the Delta smelt and the Alameda  
10 whipsnake – and the Center’s members’ interests in these species – cannot be fully protected without the  
11 expert consultation that the ESA requires.

12 The cases upon which CropLife relies provide no support for its argument. In *Center for*  
13 *Biological Diversity v. EPA*, No. 11-cv-293-JCS, 2013 WL 1729573 (N.D. Cal. Apr. 22, 2013), the  
14 Court granted the motion to dismiss because the Center failed to “bring a separate ESA claim in  
15 connection with the EPA’s affirmative act with regard to each individual pesticide in order to invoke  
16 Section 7’s consultation requirement,” and therefore the Court found that the Center “must also allege  
17 facts supporting standing for each individual claim.” *Id.* at \*12. In response to the Order, the Center  
18 revised its Complaint and alleged facts in support of standing similar to those in the present Complaint;  
19 standing was not an issue in the subsequent proceedings.

20 CropLife also relies upon *Wash. Toxics Coal. v. EPA*, No. C01-132C, 2002 WL 34213031 (W.D.  
21 Wash. July 2, 2002), but that case is distinguishable because that standing challenge came in the context  
22 of a motion for summary judgment, where evidence – not mere allegations – must be relied upon.  
23 Because the legal standard for Rule 12(c) is virtually identical to the standard for a motion to dismiss  
24 under Rule 12(b)(6), general factual allegations can now suffice as the Court must “presum[e] that  
25 general allegations embrace those specific facts that are necessary to support the claim.” *Maya v. Centex*  
26 *Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561  
27 (1992)).

1           Moreover, FWS’s failure to complete consultation gives rise to a cognizable procedural injury  
 2 for the Center and its members. Despite CropLife’s conclusory assertion to the contrary, the Supreme  
 3 Court makes clear that a “person who has been accorded a procedural right to protect his concrete  
 4 interests can assert that right without meeting all the normal standards for redressability and  
 5 immediacy.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). As explained above, the Center  
 6 and its members have concrete interests in the Delta smelt and Alameda whipsnake and their habitats,  
 7 and FWS’s failure to complete consultation is a procedural injury that impacts these concrete interests.

8           As such, the Court must find that the Center adequately alleged standing to bring this action.

9           **III. THE CENTER’S PROCEDURAL CLAIMS ABOUT TIMING OF CONSULTATION**  
 10           **ARE NOT BARRED BY THE 2010 SETTLEMENT AGREEMENT**

11           Based on an interpretation of the 2010 Settlement Agreement that its plain language cannot  
 12 support, Federal Defendants and CropLife argue that the Center waived its claims through Paragraph 27  
 13 of the 2010 Settlement Agreement. These waiver arguments cannot succeed because the Center’s claims  
 14 are procedural and do not fall within Paragraph 27’s bar on claims based “on the effects of” pesticides.  
 15 Furthermore, acceptance of Defendants’ position would create an unreasonable result that would impede  
 16 the overall goal of the 2010 Settlement Agreement, which was to compel agency compliance with  
 17 Section 7 of the ESA.

18           In this case, the Center has brought two claims addressing the failure of FWS to abide by the  
 19 ESA’s mandatory consultation deadline. The First Cause of Action alleges that the failure to complete  
 20 consultation within 90 days violates the ESA and its consultation regulations. Complaint ¶¶ 38-43. The  
 21 Second Cause of Action alleges that the failure to complete consultation constitutes agency action  
 22 “unlawfully withheld or unreasonably delayed” in violation of the APA. Complaint ¶¶ 44-46. These  
 23 claims are wholly procedural and arise from ESA deadlines that apply as a matter of law to FWS.

24           Neither of these deadline claims fall within Paragraph 27 of the 2010 Settlement Agreement,  
 25 which bars any claim “that concerns an alleged violation of Section 7 of the ESA pertaining to the  
 26 effects of any of the Pesticides on any of the eleven species identified in Section 3 in the eight Bay Area  
 27 counties subject to this Stipulated Injunction . . . .” 2010 Settlement Agreement ¶ 27 (emphasis added).  
 28

1 Federal Defendants' quotation of Paragraph 27 in their brief leaves out the key language limiting the bar  
2 on claims pertaining to "the effects of" pesticides. Paragraph 27 states in full:

3       Upon entry of this Stipulated Injunction, CBD's Complaint shall be dismissed with  
4 prejudice. The dismissal shall apply to and be binding upon CBD and EPA hereto and  
5 anyone acting on their behalf, including successors, employees, agents, elected and  
6 appointed officers, and assigns. CBD agrees not to bring, assist any other party in  
7 bringing, or join EPA or any other party in any court proceeding that concerns an alleged  
8 violation of Section 7 of the ESA pertaining to the effects of any of the Pesticides on any  
of the eleven species 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.

9 *Id.* (emphasis added).

10       In speaking to "the effects of" pesticides, Paragraph 27 covers challenges to the substance of the  
11 EPA's determinations but not the timeliness of the process. The goal of Paragraph 27 is to allow the  
12 entire consultation process to be completed before the Center could litigate how EPA performed its  
13 effects determinations. For example, if the Center believed that EPA's determinations that certain  
14 pesticides were "not likely to adversely affect" endangered wildlife in the Bay Area were the result of  
15 the agency's illegal failure to analyze cumulative pesticide impacts, the Center nonetheless could not,  
16 under Paragraph 27, challenge that determination until after completion of the consultation process.  
17 (Such an approach makes sense because FWS might cure the problem through its own analysis.)  
18 Because the 2010 Settlement Agreement bars only claims concerning "the effects of" pesticides, the  
19 causes of action in the Complaint – procedural claims that address only deadline violations – are not  
20 barred.

21       Additionally, the Second Cause of Action is not barred because it is brought under the APA and  
22 therefore does not "concern[ ] an alleged violation of Section 7 of the ESA." 2010 Settlement  
23 Agreement ¶ 27. Federal Defendants argue that the bar on ESA claims must also encompass APA claims  
24 because *Bennett v. Spear* holds that the APA's judicial review provision must be used for the Center to  
25 assert a Section 7 claim against FWS. But the 2010 Settlement Agreement explicitly applies to lawsuits  
26 between the Center and EPA, and the ESA's citizen suit provision – not the APA – provides for judicial  
27 review against EPA. 16 U.S.C. § 1540(g)(1)(A). As such, Paragraph 27 meaningfully restricts the scope  
28 of the Center's litigation even without stretching it so far as to include APA claims that are never even

1 mentioned in the Agreement. The plain language of the 2010 Settlement Agreement controls. *Tehama-*  
2 *Colusa Canal Auth. v. U.S. Dep't. of Interior*, 721 F.3d 1086, 1093 (9th Cir. 2013) (“When the contract  
3 terms are clear, the parties’ intent must be ascertained from the contract, and the contract terms connote  
4 their ordinary meaning.”).

5       Importantly, under Federal Defendants’ overly broad interpretation of Paragraph 27, the Center  
6 would have no way to compel FWS to complete consultation and issue the biological opinions because  
7 the “Terminating Event” that would allow the Center to bring this litigation is exactly what the Center  
8 lacks: FWS’s completion of the biological opinions. *See* 2010 Settlement Agreement ¶¶ 4, 27. In other  
9 words, under Defendants’ interpretation, FWS’s failure to take the very action required to release the bar  
10 on future litigation is protected from all judicial oversight. This would be an absurd result of the 2010  
11 Settlement Agreement, which required EPA to prepare effects determinations precisely so that  
12 endangered wildlife in the Bay Area could in turn receive the benefit of biological opinions prepared by  
13 FWS. *See* Augustine Decl. ¶ 3.

14       Under well-established rules of contract interpretation, the Court must reject an interpretation  
15 that would lead to an unreasonable result that nullifies the ultimate purpose of the agreement. *Kennewick*  
16 *Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989) (“Preference must be given to  
17 reasonable interpretations as opposed to those that are unreasonable . . . .”); *Miller v. Glenn Miller*  
18 *Prods.*, 454 F.3d 975, 989 (9th Cir. 2006) (“[T]he fundamental goal of contract interpretation is to give  
19 effect to the mutual intent of the parties as it existed at the time of contracting.”). The goal of the 2010  
20 Settlement Agreement was to conserve endangered species by promoting agency compliance with  
21 Section 7 of the ESA. Augustine Decl. ¶ 3. The Center must have a way to compel FWS to prepare  
22 biological opinions if the 2010 Settlement Agreement is to have its intended effect of promoting agency  
23 compliance with Section 7 of the ESA.

24       To be sure, the 2010 Settlement Agreement should be interpreted in a way that promotes  
25 compliance with the law, rather than create a loophole for FWS, especially considering that FWS was  
26 not even a party to the 2010 Settlement Agreement and took no action under it. Almost six years have  
27 passed since EPA attempted to initiate the first of these consultations, and FWS has not completed a  
28 single consultation to ensure that pesticides will not cause jeopardy to listed species in the California



1 Bay Delta or adversely modify their habitats. The agency's delay in completing the required  
2 consultations allows toxic pesticides to continue to harm the species and contaminate their habitats.

3 Furthermore, another Judge in this District (the Honorable Judge White) – in similar litigation  
4 involving FWS's duty to timely complete pesticide consultation under the ESA – already rejected the  
5 exact waiver argument that Federal Defendants and CropLife are making here. Specifically, after the  
6 Center sued EPA for failing to consult on pesticide impacts to the California red-legged frog, Judge  
7 White entered a Stipulated Injunction and Order requiring the EPA to complete effects determinations  
8 and initiate consultation, as appropriate, for 66 pesticides that may affect the frog. Stipulated Injunction  
9 and Order, *Ctr. for Biological Diversity v. Johnson*, No. 02-1580 (N.D. Cal. Oct. 20, 2006), Docket No.  
10 242 (hereinafter "2006 Stipulation"). In the 2006 Stipulation, as here, the Center agreed "not to bring,  
11 assist any other Party in bringing, or join EPA or any other Party in any court proceeding that concerns  
12 an alleged violation of Section 7 of the ESA on the effects of any of the 66 Pesticides" at issue in that  
13 litigation. *Id.* ¶ 20 (emphasis added). Thereafter, when the Center sued FWS for failing to complete  
14 consultation on the frog, CropLife (but not the Federal Defendants) asked Judge White to dismiss the  
15 Center's complaint, arguing – just as Federal Defendants and CropLife do here – that the Center waived  
16 its claims through the 2006 Stipulation. *See* Motion to Dismiss and Opposition to Joint Motion to Enter  
17 Settlement, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 11-05108 (N.D. Cal. May 17,  
18 2013), Docket No. 64. After the parties fully briefed the motion and Judge White heard oral argument,  
19 he summarily denied the motion, stating: "The Court finds the claims settled in this action broader than  
20 those settled in the Stipulated Injunction issued in case no. 02-1580 JSW dated October 20, 2006 and  
21 thereby DENIES CropLife's motion to dismiss as not well-taken." Stipulated Settlement and Order, *Ctr.*  
22 *for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 11-05108 (N.D. Cal. Nov. 4, 2013), Docket  
23 No. 76 (attached as Exh. 1 to the Augustine Decl). Given that the present motion makes the exact same  
24 argument that Judge White already rejected, this Court should likewise find this argument is "not well  
25 taken."

26 For all these reasons, Paragraph 27 of the 2010 Settlement Agreement should not be interpreted  
27 to bar the claims against FWS in this case.

**CONCLUSION**

The Center respectfully requests that the Court deny Federal Defendants’ Motion for Judgment on the Pleadings for all the reasons explained above.

Respectfully submitted this 17th day of June, 2015,

*/s/ Collette L. Adkins*

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