

1 JOHN C. CRUDEN  
 2 Assistant Attorney General  
 3 Environment & Natural Resources Division  
 4 SETH M. BARSKY, Chief  
 5 S. JAY GOVINDAN, Assistant Chief  
 6 J. BRETT GROSKO, Trial Attorney  
 7 U.S. Department of Justice  
 8 Environment & Natural Resources Division  
 9 Wildlife and Marine Resources Section  
 10 Ben Franklin Station P.O. Box 7611  
 11 Washington, D.C. 20044-7611  
 12 Telephone: (202) 305-0342  
 13 Facsimile: (202) 305-0275  
 14 Email: [brett.grosko@usdoj.gov](mailto:brett.grosko@usdoj.gov)

15 *Counsel for Federal Defendants*

16 **IN THE UNITED STATES DISTRICT COURT**  
 17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18	CENTER FOR BIOLOGICAL	)	
19	DIVERSITY,	)	CASE NO. 3:15-cv-658-JCS
20		)	
21	<i>Plaintiff,</i>	)	
22		)	
23	v.	)	
24		)	
25	U.S. DEPARTMENT OF THE	)	
26	INTERIOR; S.M.R. JEWELL, in her	)	
27	official capacity as Secretary of the	)	
28	Interior; U.S. FISH AND WILDLIFE	)	
	SERVICE; and DAN ASHE, in his	)	
	official capacity as Director of the U.S.	)	
	Fish and Wildlife Service,	)	
		)	
	<i>Federal Defendants.</i>	)	

29 **FEDERAL DEFENDANTS’ AMENDED ANSWER**

30 The Federal Defendants, United States Department of Interior; S.M.R. Jewell, in her  
 31 official capacity as Secretary of the Interior; U.S. Fish and Wildlife Service (“FWS”); and Dan  
 32 Ashe, in his official capacity as Director of FWS (collectively, “Federal Defendants”), by and

1 through the undersigned counsel, in response to the like-numbered paragraphs contained within  
2 Plaintiff's Complaint (ECF 1), do hereby respond as follows:

3           1.       The allegations contained in the first sentence of paragraph 1 purport to  
4 characterize the Plaintiff's case, to which no response is required. The allegations contained in  
5 the second sentence of paragraph 1 consist of legal conclusions, to which no response is  
6 required.  
7

8           2.       The allegations contained in the first and second sentences of paragraph 2  
9 purport to characterize the Endangered Species Act ("ESA"), which speaks for itself and  
10 provides the best evidence of its contents. Any allegations contrary to the plain language,  
11 meaning, and context of the ESA are denied.  
12

13           3.       The allegations contained in the first sentence of paragraph 3 purport to  
14 characterize an unspecified settlement agreement and EPA document or documents, which  
15 speak for themselves and provide the best evidence of their contents. Any allegations contrary  
16 to the plain language, meaning, and context of that settlement agreement and EPA document or  
17 documents are denied. The allegations contained in the second sentence of paragraph 3 purport  
18 to characterize the Plaintiff's case, to which no response is required.  
19

20           4.       The allegations contained in the first sentence of paragraph 4 are vague and  
21 ambiguous, and are therefore denied. The allegations contained in the second and third  
22 sentences of paragraph 4 consist of legal conclusions, to which no response is required.  
23

24           5.       The allegations contained in paragraph 5 purport to characterize the Plaintiff's  
25 case, to which no response is required.  
26

27           6.       The allegations contained in paragraph 6 consist of legal conclusions, to which  
28 no response is required.

1           7.       Federal Defendants admit the allegations contained in the first sentence of  
2 paragraph 7 that Plaintiff sent a letter to FWS dated December 9, 2014, which purports to  
3 provide notice of Plaintiff's intent to sue. This letter speaks for itself and provides the best  
4 evidence of its contents. Any allegations contrary to the plain language, meaning, and context of  
5 the December 9, 2014, letter are denied. The allegations contained in the second sentence of  
6 paragraph 7 purport to characterize the Plaintiff's case, to which no response is required.

8           8.       The allegations contained in paragraph 8 consist of legal conclusions, to which  
9 no response is required.

11          9.       The allegations contained in paragraph 9 consist of legal conclusions, to which  
12 no response is required.

13          10.      Federal Defendants lack information or knowledge sufficient to formulate an  
14 opinion as to the truth of allegations contained in paragraph 10, and deny them on that basis.

15          11.      Federal Defendants lack information or knowledge sufficient to formulate an  
16 opinion as to the truth of the allegations contained in paragraph 11, and deny them on that basis.

17          12.      The allegations contained in the first sentence of paragraph 12 purport to  
18 characterize the Plaintiff's case, to which no response is required. Federal Defendants admit the  
19 allegations contained in the second sentence of paragraph 12 that some pesticides can adversely  
20 impact some ESA-listed species, but aver that the remaining allegations are vague and  
21 ambiguous and are therefore denied. The allegations contained in the third sentence of  
22 paragraph 12 purport to characterize the Plaintiff's case, to which no response is required.

23          13.      The allegations contained in paragraph 13 consist of legal conclusions, to which  
24 no response is required.

1           14. Federal Defendants admit the allegations contained in paragraph 14 that the U.S.  
2 Department of the Interior is a federal agency. The remaining allegations contained in paragraph  
3 14 consist of legal conclusions, to which no response is required.

4           15. Federal Defendants admit the allegations contained in the first sentence of  
5 paragraph 15 that S.M.R. Jewell is the Secretary of the Interior. The allegations contained in the  
6 second sentence of paragraph 15 purport to characterize the Plaintiff's case, to which no  
7 response is required. The allegations contained in the third and fourth sentences of paragraph 15  
8 consist of legal conclusions, to which no response is required.

9           16. Federal Defendants admit the allegations contained in the first sentence of  
10 paragraph 16. The allegations contained in the second sentence of paragraph 16 purport to  
11 characterize the ESA, which speaks for itself and provides the best evidence of its contents. Any  
12 allegations contrary to the plain language, meaning, and context of the ESA are denied.

13           17. Federal Defendants admit the allegations contained in the first sentence of  
14 paragraph 17. The allegations contained in the second sentence of paragraph 17 purport to  
15 characterize the Plaintiff's case, to which no response is required.

16           18. The allegations contained in the first and second sentences of paragraph 18  
17 purport to characterize the ESA, which speaks for itself and provides the best evidence of its  
18 contents. Any allegations contrary to the plain language, meaning, and context of the ESA are  
19 denied.

20           19. The allegations contained in paragraph 19 purport to characterize 50 C.F.R. §  
21 402.01(b), which speaks for itself and provides the best evidence of its contents. Any  
22 allegations contrary to the plain language, meaning, and context of 50 C.F.R. § 402.01(b) are  
23 denied.

1           20.     The allegations contained in the first and second sentences of paragraph 20  
2 purport to characterize the ESA, which speaks for itself and provides the best evidence of its  
3 contents. Any allegations contrary to the plain language, meaning, and context of the ESA are  
4 denied.  
5

6           21.     The allegations contained in the first sentence of paragraph 21 purport to  
7 characterize the ESA, which speaks for itself and provides the best evidence of its contents. Any  
8 allegations contrary to the plain language, meaning, and context of the ESA are denied. The  
9 allegations contained in the second sentence of paragraph 21 purport to characterize 50 C.F.R.  
10 §§ 402.02, 402.03, and *Washington Toxics Coalition v. Environmental Protection Agency*, 413  
11 F.3d 1024 (9th Cir. 2005), which speak for themselves and provide the best evidence of their  
12 contents. Any allegations contrary to the plain language, meaning, and context of those  
13 materials are denied.  
14

15           22.     The allegations contained in the first sentence of paragraph 22 purport to  
16 characterize 50 C.F.R. § 402.14(a)-(b), which speaks for itself and provides the best evidence of  
17 its contents. Any allegations contrary to the plain language, meaning, and context of 50 C.F.R. §  
18 402.14(a)-(b) are denied. The allegations contained in the second sentence of paragraph 22  
19 purport to characterize 50 C.F.R. § 402.13(a), which speaks for itself and provides the best  
20 evidence of its contents. Any allegations contrary to the plain language, meaning, and context of  
21 50 C.F.R. § 402.13(a) are denied. The allegations contained in the third sentence of paragraph  
22 22 purport to characterize 50 C.F.R. §§ 402.14, 402.02, which speak for themselves and provide  
23 the best evidence of their contents. Any allegations contrary to the plain language, meaning, and  
24 context of 50 C.F.R. §§ 402.14, 402.02 are denied. The allegations contained in the fourth  
25 sentence of paragraph 22 purport to characterize the ESA, which speaks for itself and provides  
26  
27  
28

1 the best evidence of its contents. Any allegations contrary to the plain language, meaning, and  
2 context of the ESA are denied.

3         23. The allegations contained in paragraph 23 purport to characterize the ESA, 50  
4 C.F.R. § 402.14(e), and 50 C.F.R. § 402.46(c)(1), which speak for themselves and provide the  
5 best evidence of their contents. Any allegations contrary to the plain language, meaning, and  
6 context of the ESA, 50 C.F.R. § 402.14(e), and 50 C.F.R. § 402.46(c)(1) are denied.

7  
8         24. Federal Defendants admit the allegations contained in the first sentence of  
9 paragraph 24 that the Delta smelt (*Hypomesus transpacificus*) is a fish species found in  
10 California, but deny the remaining allegations contained in the first sentence of paragraph 24.  
11 Federal Defendants admit the allegations contained in the second sentence of paragraph 24 that  
12 Delta smelt feed on certain small planktonic crustaceans, insect larvae, and copepods, but deny  
13 the remaining allegations contained in the second sentence of paragraph 24.

14  
15         25. The allegations contained in the first sentence of paragraph 25 are vague and  
16 ambiguous, and are therefore denied. The allegations contained in the first clause of the second  
17 sentence of paragraph 25 purport to characterize an unidentified scientific document or  
18 documents, which speak for themselves and provide the best evidence of their contents. Any  
19 allegations contrary to the plain language, meaning, and context of that unspecified scientific  
20 document or documents are denied. The allegations contained in the second clause of the  
21 second sentence of paragraph 25 purport to characterize an unspecified 2013 FWS document,  
22 which speaks for itself and provides the best evidence of its contents. Any allegations contrary  
23 to the plain language, meaning, and context of that unspecified 2013 FWS document are denied.

24  
25         26. The allegations contained in the first and third sentences of paragraph 26 are  
26 vague and ambiguous, and are therefore denied. The allegations contained in the second  
27  
28

1 sentence of paragraph 26 purport to characterize an unspecified scientific document or  
2 documents, which speak for themselves and provide the best evidence of their contents. Any  
3 allegations contrary to the plain language, meaning, and context of those unspecified scientific  
4 document or documents are denied.  
5

6         27. Federal Defendants admit the allegations contained in the first sentence of  
7 paragraph 27 that the Alameda whipsnake (*Masticophis lateralis euryxanthus*) is a diurnal  
8 snake, but deny the remaining allegations contained in the first sentence of paragraph 27.

9 Federal Defendants admit the allegations contained in the second sentence of paragraph 27 that  
10 the Alameda whipsnake feeds on lizards, frogs, snakes, small birds, small mammals, and  
11 insects, but deny the remaining allegations contained in the second sentence of paragraph 27.

12 Federal Defendants admit the allegations contained in the third sentence of paragraph 27 that  
13 the Alameda whipsnake can be found in the eastern San Francisco Bay area, but deny the  
14 remaining allegations contained in the third sentence of paragraph 27.  
15

16         28. The allegations contained in the first sentence of paragraph 28 are vague and  
17 ambiguous, and are therefore denied. The allegations contained in the second sentence of  
18 paragraph 28 purport to characterize a *Federal Register* document found at 59 Fed. Reg. 5377,  
19 5380 (Feb. 4, 1994), which speaks for itself and provides the best evidence of its contents. Any  
20 allegations contrary to the plain language, meaning, and context of that *Federal Register*  
21 document are denied. The allegations in the third sentence of paragraph 28 purport to  
22 characterize the draft FWS recovery plan for the Alameda whipsnake, which speaks for itself  
23 and provides the best evidence of its contents. Any allegations contrary to the plain language,  
24 meaning, and context of the draft FWS recovery plan for the Alameda whipsnake are denied.  
25  
26  
27  
28

1           29.     The allegations contained in the first and second sentences of paragraph 29 are  
2 vague and ambiguous, and are therefore denied. The allegations contained in the third sentence  
3 of paragraph 29 purport to characterize an unspecified U.S. Geological Survey study, which  
4 speaks for itself and provides the best evidence of its contents. Any allegations contrary to the  
5 plain language, meaning, and context of that unspecified U.S. Geological Survey study are  
6 denied.  
7

8           30.     The allegations contained in the first, second, and third sentences of paragraph  
9 30 purport to characterize an unspecified scientific document or documents, which speak for  
10 themselves and provide the best evidence of their contents. Any allegations contrary to the plain  
11 language, meaning, and context of those unspecified scientific document or documents are  
12 denied.  
13

14           31.     The allegations contained in the first, second, and third sentences of paragraph  
15 31 are vague and ambiguous, and are therefore denied.  
16

17           32.     The allegations contained in the first sentence of paragraph 32 purport to  
18 characterize an unspecified 1998 EPA document, which speaks for itself and provides the best  
19 evidence of its contents. Any allegations contrary to the plain language, meaning, and context of  
20 that unspecified 1998 EPA document are denied. The allegations contained in the second  
21 sentence of paragraph 32 purport to characterize an unspecified EPA document, which speaks  
22 for itself and provides the best evidence of its contents. Any allegations contrary to the plain  
23 language, meaning, and context of that unspecified EPA document are denied. The allegations  
24 contained in the third sentence of paragraph 32 are vague and ambiguous, and are therefore  
25 denied.  
26  
27  
28



1           33.     The allegations contained in paragraph 33 are vague and ambiguous, and are  
2 therefore denied.

3           34.     The allegations contained in the first and third sentences of paragraph 34  
4 purports to characterize an unspecified 2005 EPA reregistration eligibility decision concerning  
5 the pesticide 2,4-D, which speaks for itself and provides the best evidence of its contents. Any  
6 allegations contrary to the plain language, meaning, and context of that unspecified 2005 EPA  
7 reregistration eligibility decision are denied. The allegations contained in the second sentence of  
8 paragraph 34 purport to characterize an unspecified NMFS document, which speaks for itself  
9 and provides the best evidence of its contents. Any allegations contrary to the plain language,  
10 meaning, and context of that unspecified NMFS document are denied.  
11

12           35.     The allegations contained in the first sentence of paragraph 35 purport to  
13 characterize an unspecified 2007 complaint, which speaks for itself and provides the best  
14 evidence of its contents. Any allegations contrary to the plain language, meaning, and context of  
15 that unspecified 2007 complaint are denied. The allegations contained in the second sentence of  
16 paragraph 35 purport to characterize an unspecified 2010 settlement agreement, which speaks  
17 for itself and provides the best evidence of its contents. Any allegations contrary to the plain  
18 language, meaning, and context of that unspecified 2010 settlement agreement are denied. The  
19 allegations contained in the third sentence of paragraph 35 are vague and ambiguous, and are  
20 therefore denied.  
21

22           36.     The allegations contained in the first sentence of paragraph 36 purport to  
23 characterize certain February 2009 EPA correspondence with FWS, which speaks for itself and  
24 provides the best evidence of its contents. Any allegations contrary to the plain language,  
25  
26  
27  
28



1 contents. Any allegations contrary to the plain language, meaning, and context of that 2009  
2 EPA correspondence with FWS are denied.

3 41. Federal Defendants deny the allegations contained in paragraph 41.

4 42. The allegations contained in paragraph 42 purport to characterize 16 U.S.C. §  
5 1536(b)(1), 50 C.F.R. § 402.14(e), and 50 C.F.R. § 402.46(c)(1), which speak for themselves  
6 and provide the best evidence of their contents. Any allegations contrary to the plain language,  
7 meaning, and context of 16 U.S.C. § 1536(b)(1), 50 C.F.R. § 402.14(e), and 50 C.F.R. §  
8 402.46(c)(1) are denied.  
9

10 43. The allegations contained in paragraph 43 consist of legal conclusions, to which  
11 no response is required.  
12

13 44. Federal Defendants incorporate by reference their responses to paragraphs 1-43.

14 45. The allegations contained in the first and second sentences of paragraph 45  
15 purport to characterize the Administrative Procedure Act (“APA”), which speaks for itself and  
16 provides the best evidence of its contents. Any allegations contrary to the plain language,  
17 meaning, and context of the APA are denied.  
18

19 46. The allegations contained in the first sentence of paragraph 46 purport to  
20 characterize certain February 2009 EPA correspondence with FWS, which speaks for itself and  
21 provides the best evidence of its contents. Any allegations contrary to the plain language,  
22 meaning, and context of that February 2009 EPA correspondence with FWS are denied. The  
23 allegations contained in the second sentence of paragraph 46 are vague and ambiguous, and  
24 therefore denied. The allegations contained in the third sentence of paragraph 46 consist of legal  
25 conclusions, to which no response is required.  
26  
27  
28

1 **PRAYER FOR RELIEF**

2 The remainder of the Complaint constitutes Plaintiff's request for relief, to which no  
3 response is required. To the extent a response may be deemed required, Federal Defendants  
4 deny that Plaintiff is entitled to the requested relief or any relief whatsoever.  
5

6 **GENERAL DENIAL**

7 Federal Defendants deny any allegations of the Complaint, whether express or  
8 implied, that are not specifically admitted, denied, or qualified herein.  
9

10 **AFFIRMATIVE DEFENSES**

11 (1) The Court may lack subject matter jurisdiction over one or more of Plaintiff's  
12 claims.

13 (2) Plaintiff lacks standing.

14 (3) Plaintiff fails to state a claim upon which relief can be granted.

15 (4) The United States has previously entered into a settlement agreement with the  
16 Plaintiff in *Center for Biological Diversity v. Environmental Protection Agency*, No. 07-cv-  
17 2974 (N.D. Cal.), which bars Plaintiff's claims.  
18

19 (5) Some or all of Plaintiff's claims are barred by waiver.

20 (6) Some or all of Plaintiff's claims are barred by release.

21 (7) Some or all of Plaintiff's claims are barred by collateral estoppel.  
22

23 (8) Some or all of Plaintiff's claims are barred by the doctrines of res judicata and/or  
24 claim preclusion.

25 Dated: May 28, 2015.

26 //

27 //

28 //

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

Respectfully Submitted,

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

/s/ J. Brett Grosko  
J. BRETT GRSKO  
Trial Attorney  
U.S. Department of Justice  
Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
Ben Franklin Station  
P.O. Box 7611  
Washington, DC 20044-7611  
Phone: (202) 305-0342  
Fax: (202) 305-0275  
Email: [brett.grosko@usdoj.gov](mailto:brett.grosko@usdoj.gov)

*Counsel for Federal Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 28, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorneys of record.

/s/ J. Brett Grosko  
J. BRETT GRSKO