

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEVE ELLIS, ET AL.,  
Plaintiffs,  
v.  
JACK HOUSENGER, et al.,  
Defendants,  
and  
BAYER CROPSCIENCE, LP, et al.,  
Defendant-Intervenors.

Case No. [13-cv-01266-MMC](#)

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DIRECTIONS TO PARTIES**

United States District Court  
Northern District of California

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Before the Court are three motions: (1) "Motion for Summary Judgment," filed April 14, 2016, by plaintiffs Steve Ellis, Tom Theobald, Jim Doan, Bill Rhodes, Center for Food Safety, Beyond Pesticides, Sierra Club and Center for Environmental Health; (2) "Cross-Motion for Summary Judgment," filed June 7, 2016, by defendants Gina McCarthy, Administrator of the United States Environmental Protection Agency, and Jack Housenger, Director of the Office of Pesticide Programs of EPA (collectively, "EPA"); and (3) "Cross-Motion for Summary Judgment," filed June 20, 2016, by defendant-intervenors Bayer CropScience LP, Syngenta Crop Protection, LLC, Valent U.S.A. Corporation, and CropLife America (collectively, "Intervenors"). The motions have been fully briefed. Having read and considered the papers filed in support of and in opposition to the motions, the Court hereby rules as follows.<sup>1</sup>

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<sup>1</sup>By order filed October 25, 2016, the Court took the matters under submission.

**BACKGROUND**

1  
2 By the instant action, plaintiffs, comprising four individuals and four public interest  
3 groups, "challenge the actions of [the EPA] to allow the ongoing use of pesticide products  
4 containing the active ingredients clothianidin and thiamethoxam." (See Second  
5 Amended Complaint ("SAC") ¶ 1.) Plaintiffs allege the subject pesticides "have been  
6 shown to adversely impact the survival, growth, and health of honey bees and other  
7 pollinators vital to U.S. agriculture" and have "harmful effects on other animals, including  
8 threatened and endangered species." (See SAC ¶ 2.)

9 More specifically, plaintiffs allege that the EPA failed to comply with the Federal  
10 Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by denying plaintiffs' request, made  
11 in a petition submitted to the EPA, to suspend the registration of products containing  
12 clothianidin (see SAC ¶¶ 82, 104, 110), and by approving applications to register certain  
13 products containing clothianidin or thiamethoxam without first providing notice in the  
14 Federal Register (see SAC ¶¶ 37, 114, 121). Additionally, plaintiffs allege that the EPA  
15 violated the Endangered Species Act ("ESA") by failing to consult with the Fish and  
16 Wildlife Service ("FWS") prior to approving certain applications to register products  
17 containing clothianidin and thiamethoxam. (See SAC ¶¶ 49-50, 128, 132.)

**LEGAL STANDARD**

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19 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a "court shall grant  
20 summary judgment if the movant shows that there is no genuine issue as to any material  
21 fact and that the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P.  
22 56(a).

23 The Supreme Court's 1986 "trilogy" of Celotex Corp. v. Catrett, 477 U.S. 317  
24 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric  
25 Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), requires that a party seeking  
26 summary judgment show the absence of a genuine issue of material fact. Once the  
27 moving party has done so, the nonmoving party must "go beyond the pleadings and by  
28 [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on

1 file, designate specific facts showing that there is a genuine issue for trial." See Celotex,  
 2 477 U.S. at 324 (internal quotation and citation omitted). "When the moving party has  
 3 carried its burden under Rule 56[ ], its opponent must do more than simply show that  
 4 there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.  
 5 "If the [opposing party's] evidence is merely colorable, or is not significantly probative,  
 6 summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations  
 7 omitted). "[I]nferences to be drawn from the underlying facts," however, "must be viewed  
 8 in the light most favorable to the party opposing the motion." See Matsushita, 475 U.S. at  
 9 587 (internal quotation and citation omitted).

## 10 DISCUSSION

11 All parties seek summary judgment on the issue of liability as to the six claims  
 12 alleged in the SAC.<sup>2</sup>

### 13 A. First and Second Claims

14 The First and Second Claims challenge the EPA's denial of a request made in a  
 15 petition that was submitted to the EPA by four of the plaintiffs, specifically, a request to  
 16 immediately suspend the registration of products containing clothianidin.

#### 17 1. Applicable Statutory and Regulatory Framework

18 Under FIFRA, no pesticide may be distributed or sold unless it has been registered  
 19 by the EPA. See 7 U.S.C. § 136a(a). If, after the EPA registers a pesticide, it "appears  
 20 to the [EPA] that a pesticide . . . generally causes unreasonable adverse effects on the  
 21 environment," the EPA may issue a notice of intention "to cancel its registration or to  
 22 change its classification." See 7 U.S.C. § 136d(b). If the EPA issues a notice of intention  
 23 to cancel or change the classification of a registration, "a person adversely affected by  
 24 the notice" may request a hearing, see 7 U.S.C. § 136d(b)(2), which hearing is conducted

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25  
 26 <sup>2</sup>In their cross-motion for summary judgment, the Intervenors join in the EPA's  
 27 cross-motion for summary judgment (see Intervenors' Cross-Mot. at 1:2-3); accordingly,  
 28 the Court's rulings on the arguments made by the EPA pertain equally to the Intervenors.  
 Where the Intervenors have made arguments in addition to those made by the EPA, the  
 Court has separately addressed those arguments herein.

1 by an administrative law judge, see 40 C.F.R. § 164.20(c). "[C]ancellation or  
2 reclassification proceedings may take one or two years to complete." Love v. Thomas,  
3 858 F.2d 1347, 1350 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989)

4 "If the [EPA] determines that action is necessary to prevent an imminent hazard  
5 during the time required for cancellation or change in classification proceedings, the  
6 [EPA] may, by order, suspend the registration of the pesticide immediately." 7 U.S.C.  
7 § 136d(c)(1). The term "imminent hazard" is defined as "a situation which exists when  
8 the continued use of a pesticide during the time required for [a] cancellation proceeding  
9 would be likely to result in unreasonable adverse effects on the environment or will  
10 involve unreasonable hazard to the survival of a species declared endangered or  
11 threatened." See 7 U.S.C. § 136(l). The term "unreasonable adverse effects on the  
12 environment" is defined as "any unreasonable risk to man or the environment, taking into  
13 account the economic, social, and environmental costs and benefits of the use of any  
14 pesticide." See 7 U.S.C. § 136(bb).

15 Subject to one exception, discussed below, the EPA may not issue an order of  
16 suspension unless it has "issued, or at the same time issues, a notice of intention to  
17 cancel the registration or change the classification of the pesticide" and "notif[ies] the  
18 registrant prior to issuing any suspension order." See 7 U.S.C. § 136d(c)(1). If the  
19 registrant does not request a hearing within five days, the "suspension order may be  
20 issued and shall take effect." See 7 U.S.C. § 136d(c)(2). If the registrant timely requests  
21 a hearing, the EPA conducts an "expedited hearing . . . on the question of whether an  
22 imminent hazard exists." See 7 U.S.C. §§ 136d(c)(1). Following the expedited hearing,  
23 the EPA "shall issue a final decision and order" addressing the issue of suspension. See  
24 40 C.F.R. § 164.122(a). The "administrative suspension process" may take three to four  
25 months to complete. See Dow Chemical Co. v. Blum, 469 F. Supp. 892, 899, 902 (E.D.  
26 Mich. 1979); see also Love, 858 F.2d at 1353 n.10 (noting "suspension hearing would  
27 require approximately four months").

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1 The one instance in which the EPA may suspend a registration prior to issuing a  
 2 notice of intention to cancel and prior to notifying the registrant is where "the [EPA]  
 3 determines that an emergency exists that does not permit the [EPA] to hold a hearing  
 4 before suspending." See 7 U.S.C. § 136d(c)(3). Upon issuing an "emergency" order of  
 5 suspension, see 40 C.F.R. § 164.123(a), the EPA must, however, "immediately notify the  
 6 registrant," who, in turn, may request an expedited hearing on the question of whether an  
 7 imminent hazard exists, see 40 C.F.R. § 164.123(b). Such "emergency order" of  
 8 suspension remains in place pending the conclusion of the administrative suspension  
 9 process. See 7 C.F.R. § 136d(c)(3); 40 C.F.R. § 164.123(b); see also National Coalition  
 10 Against the Misuse of Pesticides v. EPA, 867 F.2d 636, 644 (D.C. Cir. 1989) (holding  
 11 "[t]he extraordinary step of emergency suspension is available only if the requisite  
 12 unreasonable harm would be likely to materialize during the pendency of ordinary  
 13 suspension proceedings").

## 14 **2. Administrative Proceedings Conducted on Plaintiffs' Petition**

15 On March 20, 2012, plaintiffs Steve Ellis, Tom Theobald, the Center For Food  
 16 Safety, and Beyond Pesticides, along with other individuals and entities who are not  
 17 parties to the instant action, jointly submitted to the EPA an "Emergency Citizen Petition"  
 18 ("Petition"). (See Administrative Record ("AR") 44323-44370.) In the Petition, plaintiffs  
 19 requested that the EPA, inter alia, suspend clothianidin's registration "on an emergency  
 20 basis," or, alternatively, "promptly initiate Special Review and cancellation procedures for  
 21 clothianidin pursuant to 7 U.S.C. § 136d[,] and then suspend its registration pending  
 22 completion of the cancellation procedures based on the ongoing and imminent harm  
 23 posed." (See AR 44327.)<sup>3</sup> Thereafter, in support of the Petition, plaintiffs submitted  
 24

25 <sup>3</sup>The EPA may institute a "Special Review" to "help the [EPA] determine whether  
 26 to initiate procedures to cancel . . . or reclassify registration of a pesticide product." See  
 27 40 C.F.R. § 154.1(a). The EPA may initiate a Special Review "on [its] own initiative" or  
 28 "at the suggestion of any interested party" who submits a "petition[ ] to begin the Special  
 Review process." See 40 C.F.R. § 154.10; see also 40 C.F.R. § 154.7 (identifying  
 "criteria for initiation of Special Review"). During the Special Review process, the EPA  
 creates a "docket," provides an opportunity for the registrant and others to submit  
 comments, and conducts, if it deems such proceedings appropriate, "informal public

1 supplemental filings dated, respectively, May 3, 2012, and June 18, 2012. (See AR  
2 44598-618.)

3 On July 17, 2012, the EPA issued a responsive letter, denominated a "partial  
4 response" ("Partial Response"). (See AR 44419-30.) The EPA explained therein that it  
5 was posting on its website for public comment "the [P]etition (including the [P]etition  
6 exhibits and supplemental filings)," its Partial Response thereto (see AR 44419), and  
7 "additional materials from other sources" (see AR 44420). The EPA then denied the  
8 request for an emergency order of suspension and stated it would respond to the other  
9 requests made in the Petition "[a]fter reviewing the public comments submitted." (See  
10 AR 44419.)

11 In denying an immediate suspension, the EPA found the Petition suffered from a  
12 "facial inadequacy," specifically, the lack of "an explanation as to how the harm identified  
13 outweigh[ed] the benefits to growers and the agricultural economy from the use of the  
14 pesticide" (see AR 44423-24), and that, in any event, "nowhere in the [P]etition [did]  
15 [plaintiffs] explain how the use of clothianidin rises to the level of the FIFRA imminent  
16 hazard standard" (see AR 44424; see also AR 44425-30).<sup>4</sup> In setting forth said findings,  
17 the EPA stated that, "due to the emergency nature of [the] request," it had only  
18 considered the materials "received prior to May 4, 2012" (see AR 44420), and that it  
19 would consider plaintiffs' supplemental filings, namely, those dated May 3, 2012, and  
20 June 18, 2012, along with the "additional materials from other sources," once it had  
21 received the public comments, and thereafter would determine whether reconsideration  
22 was warranted (see AR 44419).<sup>5</sup>

23  
24 hearings." See 40 C.F.R. §§ 154.15, 154.26, 154.29. At the conclusion of a Special  
25 Review, the EPA may, *inter alia*, issue notice of its intention to cancel a registration or to  
change the classification of a registration. See 40 C.F.R. § 154.33(a).

26 <sup>4</sup>With respect to the latter basis for its denial, the EPA attached to the Partial  
27 Response a 30-page "Technical Support Document" in which it set forth a detailed  
analysis of the studies cited in the Petition. (See AR 44431-60.)

28 <sup>5</sup>The administrative record does not indicate whether, and if so when, the EPA  
ruled on the remaining requests in the Petition.

1                   **3. Merits of First and Second Claims**

2                   In the First Claim, plaintiffs allege it was "arbitrary and capricious" for the EPA,  
3 when ruling on plaintiffs' request for an immediate suspension, not to consider plaintiffs'  
4 "supplemental filings." (See SAC ¶ 104.) In the Second Claim, plaintiffs allege the  
5 "EPA's failure to suspend the registrations of [clothianidin] products in view of their  
6 unreasonable adverse effects violates FIFRA." (See SAC ¶ 110.)

7                   District courts have jurisdiction to review "the refusal of the [EPA] to cancel or  
8 suspend a registration or change a classification not following a hearing." See 7 U.S.C.  
9 § 136n(a). Where a federal statute providing for judicial review of an agency's action  
10 does not itself provide a standard of review, the "general standard of review of agency  
11 action established in the Administrative Procedure Act ('APA')" applies. See Oregon  
12 Natural Resources Council v. Allen, 476 F.3d 1031, 1036 (2007). Here, FIFRA does not  
13 provide a standard of review for the denial of a request to immediately suspend a  
14 pesticide product, and, consequently, the standard set forth in the APA applies. Under  
15 the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and  
16 conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not  
17 in accordance with law." See 5 U.S.C. § 706(2). A plaintiff has the burden to show the  
18 agency's decision was improper, and, "[a]bsent a showing of arbitrary action, [courts]  
19 must assume that the [agency has] exercised [its] discretion appropriately." See Kleppe  
20 v. Sierra Club, 427 U.S. 390, 412 (1976).

21                   **a. Imminent Hazard: Harm to Endangered/Threatened Species**

22                   As discussed above, the EPA has the authority to immediately suspend the  
23 registration of a pesticide "to prevent an imminent hazard." See 7 U.S.C. § 136d(c)(1).  
24 An "imminent hazard" is "a situation which exists when the continued use of a pesticide  
25 during the time required for [a] cancellation proceeding [1] would be likely to result in  
26 unreasonable adverse effects on the environment or [2] will involve unreasonable hazard  
27 to the survival of a species declared endangered or threatened . . . pursuant to the  
28 [ESA]." See 7 U.S.C. § 136(l).

1 Plaintiffs argue the denial of their request for an immediate suspension was  
2 arbitrary and capricious for the reason that the Partial Response did not address the  
3 second of the two alternative definitions of "imminent hazard," specifically, whether  
4 continued use of clothianidin would "involve unreasonable hazard to the survival of a  
5 species declared endangered or threatened." See id.

6 In their Petition, plaintiffs cited to studies, articles and other publications  
7 addressing whether clothianidin causes harm to bees. Plaintiffs did not, however, cite to  
8 a study or article, or otherwise reference any evidence, to show the continued use of  
9 clothianidin would pose an unreasonable hazard to the survival of an endangered or  
10 threatened species.<sup>6</sup> Plaintiffs argue that the EPA nonetheless was required to address  
11 the second of the two alternative definitions of imminent harm. As the Petition referenced  
12 no evidence that could support such a finding, plaintiffs are arguing, in essence, that the  
13 EPA was itself required to locate any evidence that might support a showing that  
14 continued use of clothianidin would pose an unreasonable hazard to the survival of an  
15 endangered or threatened species and then to determine whether such evidence would  
16 suffice to support an immediate suspension.

17 The issue presented is one of burden. Neither FIFRA nor its implementing  
18 regulations directly address the showing a party must make when it requests that the  
19 EPA immediately suspend the registration of a pesticide product on account of an  
20 asserted imminent hazard. As the EPA points out, however, the Code of Federal  
21 Regulations does provide that, at a contested hearing on the issue of whether an order of  
22 immediate suspension is proper, although "the ultimate burden of persuasion shall rest  
23 with the proponent of the registration," the "proponent of suspension shall have the  
24 burden of going forward to present an affirmative case for the suspension." See 40  
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26 <sup>6</sup>Although the Petition did state that "[n]umerous native Federally-listed insects  
27 may be directly impacted and non-insect species, such as insectivorous birds, may be  
28 indirectly affected [by clothianidin]" (see AR 44328), plaintiffs cited no evidence in support  
of such assertion.



1 C.F.R. § 164.121(g). The Court finds the principle underlying said regulation, specifically,  
 2 that the party who proposes a suspension bears the initial burden of coming forward with  
 3 evidence in support thereof, is properly applied to any procedure by which a party seeks  
 4 an immediate suspension.<sup>7</sup>

5 As plaintiffs' Petition did not identify any evidence that might show an imminent  
 6 hazard existed under the second of the two statutory definitions, plaintiffs did not meet  
 7 their initial burden of presenting an "affirmative case," see 40 C.F.R. § 164.121(g), for the  
 8 suspension. Under such circumstances, the Court finds plaintiffs have not met their  
 9 burden to show the EPA acted arbitrarily and capriciously when it did not address in the  
 10 Partial Response whether an immediate suspension was necessary to prevent an  
 11 unreasonable hazard to the survival of an endangered or threatened species.

12 **b. Imminent Harm: Unreasonable Adverse Effects on Environment**

13 Plaintiffs also argue that the EPA's failure to immediately suspend the petition,  
 14 under the "unreasonable adverse effects on the environment" definition of "imminent  
 15 harm," see 7 U.S.C. § 136(l), was arbitrary and capricious.

16 As noted above, the term "unreasonable adverse effects on the environment" is  
 17 defined as "any unreasonable risk to man or the environment, taking into account the  
 18 economic, social, and environmental costs and benefits of the use of any pesticide." See  
 19 7 U.S.C. § 136(bb). "[T]he statute thus requires the EPA to consider the benefits as well  
 20 as the risks of its use, including the economic consequences of suspension." See Love,  
 21 858 F.2d at 1357; see also id. at 1350, 1358, 1361-62 (holding, although evidence  
 22 supported EPA's finding that challenged pesticide "may cause serious health risks to  
 23 persons exposed to it, including sterility in men and birth defects in the unborn children of

24 \_\_\_\_\_  
 25 <sup>7</sup>Although, as the Supreme Court has observed, "the ordinary rule, based on  
 26 considerations of fairness, does not place the burden upon a litigant of establishing facts  
 27 peculiarly within the knowledge of his adversary," see Campbell v. United States, 365  
 28 U.S. 85, 96 (1961), plaintiffs did not assert during the administrative process and have  
 not argued in the instant action that the facts pertinent to any effects clothianidin might  
 have on endangered or threatened species are peculiarly within the knowledge of the  
 EPA.

1 pregnant women," issuing order of immediate suspension was "arbitrary and capricious"  
 2 where EPA had not balanced risk of such harm against "economic impact of  
 3 suspension").

4 Here, plaintiffs argue, the denial was arbitrary and capricious for the asserted  
 5 reason that the "EPA failed to assess any alleged benefits from clothianidin's continued  
 6 use." (See Pls.' Mot. at 30:8.) As noted above, the EPA found plaintiffs' request for an  
 7 immediate suspension to be facially inadequate as it did not include "an explanation as to  
 8 how the harm identified outweighs the benefits to growers and the agricultural economy  
 9 from the use of the pesticide." (See AR 44423-24; see also AR 44429.) As the Petition  
 10 in fact included no such explanation, the issue presented is, again, one of burden.

11 In that regard, plaintiffs cite no authority to support their implicit argument that  
 12 where a party seeks an immediate suspension under the first of the two alternative  
 13 definitions of imminent harm, such party, to meet its initial burden, need do no more than  
 14 identify a harm,<sup>8</sup> and, for the reasons discussed above, the Court finds a petitioner who  
 15 proposes an immediate suspension bears the initial burden of making an "affirmative  
 16 case" for such relief. See 40 C.F.R. § 164.121(g). As the Petition lacked any showing  
 17 that the asserted harm outweighed the pesticide's benefits, plaintiffs did not meet their  
 18 initial burden of presenting a case for an immediate suspension.<sup>9</sup>

19 Under such circumstances, the Court finds plaintiffs have not met their burden to  
 20 show the EPA, based on a finding of facial inadequacy, acted arbitrarily and capriciously

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22 <sup>8</sup>Plaintiffs rely on two cases holding the EPA, before suspending a pesticide  
 23 registration, must consider both "benefits" and "risks." See Love, 858 F.2d at 1357;  
 24 Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528 (D.C. Cir. 1972). The cited  
 25 cases, however, do not address the burden placed on a party petitioning the EPA for a  
 26 suspension. In one of the cases, the EPA issued the suspension order on its own  
 initiative, see Love, 858 F.2d at 1350-51, and, in the other, the party petitioning for a  
 suspension did offer evidence it contended showed the harm outweighed the benefits,  
see Environmental Defense Fund, 465 F.2d at 539 (noting petitioner's "submission" to  
 EPA showing "alternative pest control mechanisms [were] available").

27 <sup>9</sup>Plaintiffs did not assert during the administrative process and have not argued in  
 28 the instant action that facts pertinent to balancing the risks and benefits of clothianidin are  
 peculiarly within the knowledge of the EPA.

1 in denying the request for an immediate suspension.<sup>10</sup>

2 **c. Supplemental Filings**

3 As noted above, the EPA did not consider, at the time it issued the Partial  
4 Response, two supplemental filings plaintiffs had submitted to the EPA in support of the  
5 Petition. Rather, as also noted, the EPA indicated it would consider those submissions  
6 later in the administrative proceedings, specifically, after it had reviewed public comments  
7 received in response to the Petition.

8 Under the APA, "due account shall be taken of the rule of prejudicial error," see 5  
9 U.S.C. § 706; in other words, to be entitled to an order setting aside an agency decision  
10 due to an error on the part of that agency, the plaintiff must show such error "was  
11 harmful," see Shinseki v. Sanders, 556 U.S. 396, 406, 409-10 (2009) (holding § 706 is  
12 codification of "harmless error rule"). Here, even assuming the EPA acted arbitrarily in  
13 not considering plaintiffs' supplemental filings before it denied the request for an  
14 immediate suspension, plaintiffs suffered no prejudice thereby, as none of the  
15 supplemental filings addressed whether a suspension was necessary to prevent an  
16 unreasonable hazard to the survival of a species declared endangered or threatened  
17 under the ESA or whether the economic, social, and environmental benefits of  
18 clothianidin were outweighed by the risks of its continued use.

19 Accordingly, plaintiffs have not shown they are entitled to relief based on the  
20 EPA's determination not to review plaintiffs' supplemental filings prior to ruling on the  
21 request for an immediate suspension.

22 **B. Third and Fourth Claims**

23 In the Third Claim, titled "EPA's Failure to Publish Notices of Pesticide  
24 Applications for Clothianidin Products Violated FIFRA and the APA," plaintiffs allege the

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25  
26 <sup>10</sup>Plaintiffs also challenge as arbitrary and capricious the EPA's denial to the extent  
27 the EPA relied on the additional ground that plaintiffs had not shown a "substantial  
28 likelihood of serious imminent harm." (See AR 44424.) The Court has not considered  
herein such claimed error as, for the reasons stated above, plaintiffs have not shown the  
EPA acted arbitrarily and capriciously in finding the Petition was facially inadequate.

1 EPA registered seven products containing clothianidin without first providing in the  
 2 Federal Register notice of the applications to register such products, and that, when the  
 3 EPA approved said applications, it approved "new uses" for clothianidin, e.g., for use on  
 4 lawns. (See SAC ¶¶ 114-16.)<sup>11</sup> In the similarly titled Fourth Claim, plaintiffs allege the  
 5 EPA registered nineteen products containing thiamethoxam without first providing in the  
 6 Federal Register notice of the applications to register those products, and, that when the  
 7 EPA approved said applications, it approved "new uses" for thiamethoxam, e.g., for use  
 8 on apples. (See SAC ¶¶ 121-23.)<sup>12</sup> Plaintiffs argue that, in light of the alleged failures by  
 9 the EPA to provide notice to the public prior to registering the subject products, plaintiffs  
 10 are entitled to an order vacating the subject registrations. (See SAC ¶ 137.)

### 11 **1. Applicable Statutory and Regulatory Framework**

12 As noted, no pesticide may be distributed or sold, unless the pesticide has been  
 13 registered by the EPA. See 7 U.S.C. § 136a(a). To register a pesticide, an applicant  
 14 must file with the EPA an application that includes certain information, such as "the  
 15 complete formula of the pesticide" and "a request that the pesticide be classified for  
 16 general use or for restricted use, or for both." See 7 U.S.C. § 136a(c)(1). The EPA "shall  
 17 publish in the Federal Register . . . a notice of each application for registration of any  
 18 pesticide if it contains any new ingredient," see 7 U.S.C § 136a(c)(4), or, alternatively, "if  
 19 it would entail a changed use pattern," see id., which alternative pertains when the  
 20 application "proposes a new use" for the pesticide, see 40 C.F.R. § 152.102. When it  
 21 publishes such a notice in the Federal Register, the EPA must "provide for a period of 30  
 22 days in which any Federal agency or any other interested person may comment," see 7

23 \_\_\_\_\_  
 24 <sup>11</sup>Although the SAC alleges the EPA, without notice to the public, approved twenty-  
 25 four applications that sought new uses for clothianidin (see SAC ¶¶ 114-16), plaintiffs  
 26 clarify in their motion for summary judgment that only seven product registrations are  
 27 challenged by the Third Claim (see Wu Decl., filed April 14, 2016, Ex. V).

28 <sup>12</sup>Although the SAC alleges the EPA, without notice to the public, approved forty-  
 one applications that sought new uses for thiamethoxam (see SAC ¶¶ 121-23), plaintiffs  
 clarify in their motion for summary judgment that only nineteen product registrations are  
 challenged by the Fourth Claim (see Wu Decl., filed April 14, 2016, Ex. V).

1 U.S.C. § 136a(c)(4), and, in the event the EPA subsequently grants the application, it  
 2 must "issue in the Federal Register a notice of issuance" and, inter alia, must "respond  
 3 [therein] to comments received on the notice of application," see 40 C.F.R. § 152.102.

## 4 **2. Standing**

5 At the outset, the EPA challenges plaintiffs' standing to bring the Third and Fourth  
 6 Claims.

7 "To satisfy Article III's standing requirements, a plaintiff must show (1) it has  
 8 suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent,  
 9 not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of  
 10 the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be  
 11 redressed by a favorable decision." Citizens for Better Forestry v. U.S. Dep't of  
 12 Agriculture, 341 F.3d 961, 969 (9th Cir. 2003) (internal quotation and citation omitted).  
 13 Where, as here, a plaintiff asserts a "procedural injury," see id. at 969-70 (holding  
 14 complaint alleging agency failed to provide "public notice" of proposed action and to  
 15 "solicit appropriate information from the public" asserted "procedural injury"), such plaintiff  
 16 establishes an injury in fact by showing "the procedures in question are designed to  
 17 protect some threatened concrete interest of his that is the ultimate basis of his standing,"  
 18 see Cantrell v. City of Long Beach, 241 F.3d 674, 679 (9th Cir. 2001) (internal quotation  
 19 and citation omitted), and establishes causation and redressibility by showing the  
 20 asserted procedural right, "if exercised, could protect [his] concrete interests," see  
 21 Defenders of Wildlife v. EPA, 420 F.3d 946, 957 (9th Cir. 2005) (emphasis omitted), rev'd  
 22 on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644  
 23 (2007).

24 In its cross-motion for summary judgment, the EPA first notes that plaintiffs' motion  
 25 for summary judgment does not address plaintiffs' standing to bring the Third and Fourth  
 26 Claims. Under such circumstances, the EPA argues, the EPA is entitled to summary  
 27 judgment on the Third and Fourth Claims "because [p]laintiffs are now precluded from  
 28 submitting new arguments and evidence with their reply brief." (See EPA's Cross-Mot. at

1 5:12-14.) The Court disagrees.

2 The purpose of the general rule against a moving party's making new arguments  
3 in a reply is to avoid putting the non-moving party in a position where he/she is deprived  
4 of an opportunity to respond. Here, however, the EPA has not been deprived of such an  
5 opportunity. Indeed, the Supreme Court has observed that, where, as here, the issue of  
6 standing is raised in a motion for summary judgment filed by the defendant, the plaintiff,  
7 in its opposition, may offer evidence to establish its standing at that time. See Lujan v.  
8 Defenders of Wildlife, 504 U.S. 555, 561 (1992). In opposing the EPA's cross-motion,  
9 plaintiffs have offered evidence they argue supports their standing to bring the Third and  
10 Fourth Claims, thus affording the EPA an opportunity to respond thereto in its reply.

11 Accordingly, the Court finds the EPA is not entitled to summary judgment on the  
12 above-discussed procedural ground.

13 In their respective replies, neither the EPA nor the Intervenors challenge plaintiffs'  
14 evidentiary showing as to standing with respect to the Third and Fourth Claims. The  
15 Court nonetheless finds it appropriate to consider the issue. See D'Lil v. Best Western  
16 Encina Lodge & Suites, 538 F.3d 1031, 1035 (9th Cir. 2008) (holding "[a] district court  
17 [has] the authority to raise the issue [of standing] sua sponte").

18 Plaintiffs rely on declarations from plaintiffs Steve Ellis, Tom Theobald, Jim Doan  
19 and Bill Rhodes, the individuals identified in the SAC as "Beekeeper and Honey Producer  
20 Plaintiffs." (See SAC ¶ 15.) Each of these four plaintiffs avers he owns and operates a  
21 beekeeping company, that large numbers of his bees have been killed due to what he  
22 believes was the bees' exposure to clothianidin and thiamethoxam, that he has incurred  
23 economic loss due to the deaths of his bees, and that his remaining bees forage on the  
24 types of crops, trees and other plants on which the products allegedly approved without  
25 notice are to be used, e.g., "lawns" and "apples." (See Ellis Decl. ¶¶ 2-6, 11, 13, 15;  
26 Theobald Decl. ¶¶ 2-5, 13-14, 17; Doan Decl. ¶¶ 2-6, 12, 16-17; Rhodes Decl. ¶¶ 2-4, 10,  
27 15.) Each such plaintiff also avers that, had the EPA provided notice to the public of the  
28 challenged applications, he would have submitted comments to the EPA. (See Ellis Decl.

1 ¶ 11; Theobald Decl. ¶ 19; Doan Decl. ¶ 18; Rhodes Decl. ¶ 16.)

2 The Court finds the above-referenced plaintiffs, in their respective declarations,  
 3 have sufficiently demonstrated they have an economic interest in their respective  
 4 businesses that may be adversely affected by use of clothianidin and thiamethoxam,  
 5 which pesticides the EPA has acknowledged are "toxic to honey bees" (see AR 43254,  
 6 43634, 43748), and that said plaintiffs would have submitted comments to the EPA had  
 7 they been afforded the opportunity to do so. See Summers v. Earth Island Institute, 555  
 8 U.S. 488, 497 (2009) (holding plaintiff who asserted cognizable interest in area affected  
 9 by agency action had standing to challenge failure to provide notice of agency action that  
 10 could adversely affect his interest "despite the possibility" that plaintiff's "right to comment  
 11 would not be successful in persuading [the agency] to avoid impairment of [plaintiff's]  
 12 concrete interests"); Citizens for Better Forestry, 341 F.3d at 971-72 (holding plaintiffs,  
 13 who had aesthetic and recreational interests in forests, were injured by government's  
 14 failure to afford them opportunity to be heard prior to its taking action with respect to  
 15 forests; explaining, "the harm consists of added risk to the environment that takes place  
 16 when government decisionmakers make up their minds without having before them an  
 17 analysis (with public comment) on the likely effects on their decision on the environment")  
 18 (internal quotation and citation omitted).

19 Accordingly, the Court finds plaintiffs Steve Ellis, Tom Theobald, Jim Doan and Bill  
 20 Rhodes have standing to assert the Third and Fourth Claims.<sup>13</sup>

21 //

22 //

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24 <sup>13</sup>In light of the Court's finding that the above-referenced four plaintiffs have  
 25 standing to assert the Third and Fourth Claims, the Court does not consider herein  
 26 whether other declarants, who are members of the organizational plaintiffs and who aver  
 27 they were denied an opportunity to submit comments in response to the subject  
 28 applications (see Carman Decl. ¶¶ 7, 19-23; Cox Decl. ¶¶ 2, 10-11; Feldman Decl. ¶¶ 2,  
 15-19; Kimbrell Decl. ¶¶ 2, 12-14, 16), also have standing. See Carey v. Population  
 Services Int'l, 431 U.S. 678, 682 (1977) (holding that when court finds one plaintiff has  
 standing to bring claim, it has "no occasion" to determine if other plaintiffs have standing).

1           **3. Merits**

2           The alleged procedural deficiency on which plaintiffs base the Third and Fourth  
3 Claims is that, without first affording notice to the public and an opportunity for the public  
4 to be heard, the EPA registered products containing clothianidin and thiamethoxam for  
5 new uses.

6           The EPA argues it is entitled to judgment, on the asserted ground that when it  
7 registered the subject products, it did not approve a new use. In support of its argument,  
8 the EPA cites to evidence in the administrative record that, with respect to each  
9 registration challenged in the Third and Fourth Claims, shows the use or uses for which  
10 the EPA gave its approval were uses for which the EPA had previously given approval  
11 when it had earlier registered a different product. (See EPA's Cross-Mot. Exs. 3, 4.)<sup>14</sup>  
12 Plaintiffs offer no evidence to the contrary. Rather, plaintiffs argue the EPA has not  
13 shown it gave the public notice before it registered the earlier products and,  
14 consequently, has not shown the prior approvals are "precedential 'new uses.'" (See Pls.  
15 Opp. at 34:1-16.)

16           As discussed above, the EPA is required to give public notice when an applicant  
17 seeking to register a pesticide product "proposes a new use" for the pesticide. See 40  
18 C.F.R. § 152.102. Here, it is undisputed that the EPA, when it registered the products  
19 challenged by plaintiffs in the Third and Fourth Claims, approved uses for which it  
20 previously had given approval. Assuming, arguendo, the prior registrations approving  
21 new uses were issued without notice to the public, such registrations were subject to  
22 challenge at that time. See 7 U.S.C. § 136n. Nothing in FIFRA nor the implementing  
23 regulations, however, provides that a proposed use is "new" if the EPA previously  
24 approved the same use in a manner that violated FIFRA's notice provisions.  
25 Consequently, even assuming the prior approvals on which the EPA relies were issued in

26  
27  
28           <sup>14</sup>The cited exhibits identify the portions of the administrative record in which the  
prior approvals are located.



1 violation of FIFRA's notice provisions, plaintiffs have failed to show the EPA violated  
 2 FIFRA's notice provisions when it registered the products challenged in the Third and  
 3 Fourth Claims.

4 Accordingly, defendants are entitled to summary judgment as to the Third and  
 5 Fourth Claims.

### 6 **C. Fifth and Sixth Claims**

7 In the Fifth Claim, titled "EPA's Actions in Approving Clothianidin Products and  
 8 Labels Violated the ESA," plaintiffs allege the EPA violated the ESA by "approving  
 9 registrations or use approvals" of twenty-four "clothianidin product registrations" without  
 10 first consulting with the FWS "regarding the potential adverse effects of clothianidin on  
 11 threatened and endangered species and critical habitat." (See SAC ¶ 128.)<sup>15</sup> In the Sixth  
 12 Claim, titled "EPA's Actions in Approving Thiamethoxam Products and Labels Violated  
 13 the ESA," plaintiffs allege the EPA "took agency action" forty-nine times with respect to  
 14 forty-three "thiamethoxam product registrations." (See SAC ¶ 132.) In sum, plaintiffs  
 15 challenge seventy-three actions by said two Claims.

#### 16 **1. Applicable Statutory Framework**

17 Under the ESA, the FWS and the National Marine Fisheries Service ("NMFS") are  
 18 required to determine which species are "endangered" or "threatened," see 16 U.S.C.  
 19 § 1533(a),<sup>16</sup> and all other federal agencies "shall, in consultation with and with the  
 20 assistance of [the FWS and the NMFS], insure that any . . . agency action . . . is not likely  
 21 to jeopardize the continued existence of any endangered species or threatened species,"  
 22 see 16 U.S.C. § 1536(a)(2). In particular, "[e]ach federal agency" is required to "review  
 23

24  
 25 <sup>15</sup>Although the Fifth Claim challenges twenty-eight registrations (see id.), the  
 26 Court, on June 8, 2016, approved the parties' stipulation to dismiss the Fifth Claim to the  
 extent it is based on the EPA's registration of Titan FL, Three-Way VAP, Proceed Plus,  
 and AE 1283742.

27  
 28 <sup>16</sup>The FWS administers the ESA "with respect to terrestrial and freshwater  
 species," while the NMFS administers the ESA "with respect to marine species." See  
National Wildlife Federation v. FEMA, 345 F. Supp. 2d 1151, 1167 (W.D. Wash. 2004).

1 its actions at the earliest possible time to determine whether any action may affect listed  
 2 species or critical habitat," and, if it makes such determination, "formal consultation [with  
 3 the FWS or NMFS] is required." See 50 C.F.R. § 402.14(a).

## 4 **2. Lack of Jurisdiction Under 7 U.S.C. § 136n(b)**

5 Relying on 7 U.S.C. § 136n(b), the Intervenor contend the Court lacks jurisdiction  
 6 to consider whether the EPA violated the ESA with respect to three of the actions  
 7 challenged in the Fifth Claim and two of the actions challenged in the Sixth Claim.  
 8 Specifically, the Intervenor argue, the Court lacks jurisdiction to consider, with respect to  
 9 the Fifth Claim, the registrations of Darlex Insecticide, Sepresto 75 WS and Prosper  
 10 Evergol, and, with respect to the Sixth Claim, the registrations of Agita 1GB Fly Bait and  
 11 Agita 10 WG.

12 Plaintiffs argue that the Court has jurisdiction to consider the entirety of the Fifth  
 13 and Sixth Claims pursuant to the jurisdictional provisions of the ESA, which allow a  
 14 plaintiff to file in district court a claim "to enjoin any person, including the United States  
 15 . . . who is alleged to be in violation of any provision of [the ESA]," see 16 U.S.C.  
 16 § 1540(g)(1), whereas the Intervenor argue that, with respect to the five actions  
 17 identified above, the jurisdictional provisions of FIFRA, not the ESA, apply.

18 Under FIFRA, in particular, 7 U.S.C. § 136n, if a plaintiff challenges "the validity of  
 19 any order issued by the [EPA] following a public hearing," the claim must be filed in "the  
 20 United States court of appeals for the circuit wherein [the plaintiff] resides or has a place  
 21 of business," see 7 U.S.C. § 136n(b); a plaintiff challenging "other final actions of the  
 22 [EPA]" must file the claim in a district court, see 7 U.S.C. § 136n(a). The Intervenor  
 23 argue that the EPA, prior to registering Darlex Insecticide, Sepresto 75 WS, Prosper  
 24 Evergol, Agita 1GB Fly Bait and Agita 10 WG, conducted a "public hearing" within the  
 25 meaning of § 136n(b). In support thereof, the Intervenor offer evidence showing the  
 26 EPA published in the Federal Register notice of the applications for registration of those  
 27 five products and afforded the public an opportunity to submit comments, and that the  
 28 EPA's registration of the five products occurred after the expiration of the deadline to

1 submit comments. (See Schulson Decl. Exs. 1-7.)

2 Where an agency issues a decision following its having published in the Federal  
3 Register a notice inviting public comment on the subject, the agency has conducted a  
4 "public hearing" for purposes of § 136n(b). See Center for Biological Diversity v. U.S.  
5 EPA, 847 F.3d 1075, 1090 (9th Cir. 2017) (citing United Farm Workers of America, AFL-  
6 CIO v. EPA, 592 F.3d 1080, 1082-84 (9th Cir. 2010)); see also United Farm Workers,  
7 592 F.3d at 1082 (noting "'hearing' includes proceedings in which there is no presentation  
8 of public argument"). Consequently, where, as here, a plaintiff challenges the EPA's  
9 failure to consult with the FWS prior to registering a pesticide product, a conflict exists  
10 between the ESA and FIFRA when that registration is "preceded by a public comment  
11 and notice period published in the Federal Register." See Center for Biological Diversity,  
12 847 F.3d at 1090. In such situations, the jurisdictional limitations of FIFRA apply, as  
13 § 136n(b) is the "more specific legislation." See id. at 1089-90. Thus, only a court of  
14 appeals has jurisdiction to hear a claim brought under the ESA for failure to consult,  
15 where the challenged action was taken following "a public comment and notice period."  
16 See id. at 1090.

17 Here, as the EPA's decisions to register the above-referenced five products  
18 occurred after a "public hearing" within the meaning of § 136n(b), the Court lacks  
19 jurisdiction to review the propriety of those five registrations. See id.

20 Accordingly, defendants are entitled to judgment on the Fifth Claim, to the extent it  
21 is based on the EPA's registrations of Darlex Insecticide, Sepresto 75 WS and Prosper  
22 Evergol, and are entitled to judgment on the Sixth Claim, to the extent is based on the  
23 EPA's registrations of Agita 1GB Fly Bait and Agita 10 WG.

### 24 **3. Standing**

25 As to the remaining sixty-eight actions challenged in the Fifth and Sixth Claims,  
26 the Court next considers defendants' argument that plaintiffs lack standing to challenge  
27 the EPA's alleged failure to consult with the FWS before approving the subject

28 //

1 applications.<sup>17</sup>

2 "[A]lleged violations of [the ESA's] consultation requirement constitute a  
3 procedural injury for standing purposes." Natural Resources Defense Council v. Jewell,  
4 749 F.3d 776, 783 (9th Cir.), cert. denied, 135 S. Ct. 676 (2014). Consequently, as set  
5 forth above, to establish standing, a plaintiff must show the ESA consultation procedures  
6 "are designed to protect some threatened concrete interest of his that is the ultimate  
7 basis of his standing," see Cantrell, 241 F.3d at 679 (internal quotation and citation  
8 omitted), and that compliance with those procedures "could protect [his] concrete  
9 interests," see Natural Resources Defense Council, 749 F.3d at 783 (emphasis in  
10 original).

11 The "desire to use or observe an animal species" is "undeniably a cognizable  
12 interest for purposes of standing." See Lujan, 504 U.S. at 562-63. Here, plaintiffs argue  
13 the "ultimate basis" of their standing, see Cantrell, 241 F.3d at 679, is their interest in  
14 viewing certain threatened or endangered species.

15 Specifically, plaintiffs offer declarations from members of plaintiff Sierra Club and  
16 plaintiff Center for Food Safety, in which the declarants identify particular threatened or  
17 endangered species they have viewed or have attempted to view at specific locales,  
18 which locales they intend to visit in the future at specified times to view the species. (See  
19 Sekura Decl. ¶ 16 (averring she visits Conneaut Sandspit in Northeastern Ohio "several  
20 times a year," and will visit "for the coming fall migration," to observe "piping plover" and  
21 "red knots"); id. ¶¶ 17-18, 20 (averring she regularly visits Magee Marsh in western Ohio  
22 to view "Kirtland's warbler," Sheldon Marsh in Huron, Ohio to view "piping plovers," and  
23 Cuyahoga Valley National Park, as well as Cleveland Metro-parks, to view "Indiana bat  
24 habitat")); Hinerfeld Decl. ¶¶ 22-23 (averring he regularly visits Tryon Creek State Park  
25

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26 <sup>17</sup>To the extent the EPA asserts it is entitled to judgment for the reason that  
27 plaintiffs first address the issue of standing in their opposition to defendants' cross-  
28 motions rather than in plaintiffs' motion, the Court, for the reasons stated above with  
respect to the Third and Fourth Claims, disagrees.

1 and Springwater Trail in Oregon, where he looks for "northern spotted owl," and regularly  
 2 visits Willamette Valley in Oregon, where he looks for "Fender's blue butterfly"); Ferrato  
 3 Decl. ¶¶ 14, 16-17 (averring she "frequently and routinely" visits Cleveland Lakefront  
 4 Nature Preserve to view "piping plover," and "frequently visits" Cuyahoga Valley National  
 5 Park, as well as Cleveland Metro-parks, to view "habitat for piping plover" and "Indiana  
 6 bat"); Hess Decl. ¶¶ 11, 13-19 (averring he regularly visits and will continue to visit  
 7 Central Texas, Ding Darling National Wildlife Refuge in Florida, the Ochlocknee River in  
 8 Florida, and Sarasota, Florida, to look for, view and photograph "black-capped vireo,"  
 9 "golden-cheeked warbler," "Audubon's crested caracara," "piping plover," "red-cockaded  
 10 woodpecker," "wood stork," and "Florida scrub jay"); Zaber Decl. ¶¶ 10-12, 14 (averring  
 11 he regularly visits and will continue to visit specified sites in Wisconsin, Michigan and  
 12 Illinois to view habitat of "Karner blue butterfly," "Hine's emerald dragonfly" and "northern  
 13 long-eared bat"); Goller Decl. ¶¶ 2, 8 (averring she visits "two times each week"  
 14 Cuyahoga Valley National Park and Cleveland Metro-parks to "look[ ] for the piping  
 15 plover" and will continue to do so); Owens Decl. ¶¶ 12-13 (averring she regularly visits  
 16 specified rivers, parks, forests, lakes, estuaries, and preserves in San Diego and Imperial  
 17 Counties in California, to look for "Coastal California gnatcatcher," "California least tern,"  
 18 "western snowy plover," "light-footed clapper rail," "Least Bell's vireo," "Quino  
 19 checkerspot butterfly," "southwestern willow flycatcher," "arroyo toad," "San Diego fairy  
 20 shrimp," "desert kit fox," "peninsular bighorn sheep" and "Yuma clapper rail"); Markham  
 21 Decl. ¶¶ 7-8 (averring she has planted lupine in her garden in Stevens Point, Wisconsin,  
 22 to attract "Karner blue butterfly," which species she desires to view); Crouch Decl. ¶ 14  
 23 (averring she regularly hikes and plans to continue hiking in Monroe County, Indiana,  
 24 where she looks for "American burying beetle"); see also id. ¶ 20 (averring she intends in  
 25 "summer of 2017" to visit Sarett Nature Center in Indiana to view "Mitchells' satyr  
 26 butterfly".)

27 The Court finds, and defendants have not disputed, the above-identified  
 28 declarations suffice to identity the "ultimate basis" of plaintiffs' standing, see Cantrell, 241

1 F.3d at 679, as they establish the declarants' interests in viewing specific endangered or  
2 threatened species at particular locales in the United States. Consequently, to establish  
3 the EPA's alleged lack of compliance with the ESA's consultation requirements caused  
4 the declarants to incur an injury in fact, plaintiffs must show such consultation  
5 requirements protect the declarants' interests in the threatened and endangered species  
6 they have identified. See Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d  
7 1220, 1229 (9th Cir. 2008).

8 The next question is whether plaintiffs have sufficiently shown they have a  
9 "threatened concrete interest," see Cantrell, 241 F.3d at 679, i.e., an "injury in fact," see  
10 id. In that regard, the Court first notes, the purpose of the ESA's consultation  
11 requirement is "avoidance of harm to listed species." See Salmon Spawning & Recovery  
12 Alliance, 545 F.3d at 1229. Here, plaintiffs offer evidence that the types of crops and  
13 plants for which clothianidin and thiamethoxam have been approved for use, e.g., corn  
14 and lawns, are located in or in the near vicinity of the locales in which the declarants view  
15 or seek to view endangered and threatened species (see Wu Decl. ¶¶ 3-4, Exs. A, B;  
16 Sekura Decl. ¶¶ 16-18; Hess Decl. ¶¶ 22, 24; Ferrato Decl. ¶ 18; Hess ¶¶ 13-16; Zaber  
17 Decl. ¶¶ 13-16; Owens Decl. ¶¶ 12-13; Markham Decl. ¶¶ 3, 8; Crouch Decl. ¶¶ 12, 14),  
18 and that the use of clothianidin and thiamethoxam may increase the risk of harm to those  
19 species (see, e.g., Wu Decl. Ex. L at 2 (AR 75065) (statement by EPA in "Pesticide Fact  
20 Sheet" that, with respect to clothianidin, "exposure to treated seeds through ingestion  
21 may result in chronic toxic risk to . . . endangered small birds (e.g., songbirds) and  
22 acute/chronic toxicity risk to . . . endangered mammals"); id. Ex. L at 16 (statement by  
23 EPA that "[c]lothianidin is expected to present acute and/or chronic toxic risk to  
24 endangered/threatened birds and mammals via possible ingestion of treated corn and  
25 canola seeds" and "[e]ndangered/threatened non-target insects may be impacted via  
26 residue laden pollen and nectar"); AR 43539-40 (assessment by EPA that "only a few  
27 seeds" of corn or canola treated with clothianidin "may be necessary to cause  
28 reproductive and/or development effects" on endangered "small birds" and "mammals");

1 AR 42673, 42787-830 (EPA document identifying over eight hundred "federally listed and  
 2 endangered species that will potentially be affected from thiamethoxam usage" on  
 3 blackberries, broccoli, collards, grapes, lettuce, and other specified crops, as well as on  
 4 turf grass); AR 43280 (assessment by EPA that, when thiamethoxam is used on "dry bulb  
 5 onions and peanuts as a seed treatment" and on "corn, carrots, leafy vegetables, and  
 6 brassica (cole) leafy vegetables," it has "potential direct effects" and/or "indirect effects"  
 7 on "federally listed taxa," such as "birds," "terrestrial-phase amphibians" and "mammals");  
 8 see also AR 42404, 43005-12, 43025, 43059-61, 43086-88, 43432-33, 43634, 43675-80;  
 9 43748, 43789-93.)

10 The EPA argues plaintiffs' showing is insufficient to establish an injury in fact, as  
 11 the evidence cited by plaintiffs does not, according to the EPA, "prove that some  
 12 concrete injury will imminently result from the specific EPA decisions at issue." (See  
 13 EPA's Reply at 3:13-14.) Plaintiffs, however, "need not assert any specific injury will  
 14 occur," but only that "environmental consequences might be overlooked as a result of  
 15 deficiencies in the government's analysis under [the ESA]." See Citizens for Better  
 16 Forestry, 341 F.3d at 971-72 & n.6 (internal quotation and citation omitted); Cantrell, 241  
 17 F.3d at 679 (holding plaintiff alleging procedural injury "need not show the substantive  
 18 environmental harm is imminent"); see also Summers, 555 U.S. at 497 (observing party  
 19 alleging procedural injury caused by agency's failure to provide public notice of proposed  
 20 action would have standing "despite the possibility" such agency, if it afforded plaintiff  
 21 right to comment, might not be "persuad[ed]" thereby).<sup>18</sup> Put another way, a plaintiff, for  
 22 purposes of standing, need only show the EPA's decision to register a challenged  
 23 product "arguably may affect" endangered or threatened species. See Defenders of  
 24 Wildlife v. Flowers, 414 F.3d 1066, 1069 (9th Cir. 2005) (holding, where plaintiffs  
 25 challenged agency's failure to consult, plaintiffs established standing by showing

26 \_\_\_\_\_  
 27 <sup>18</sup>Indeed, to accept the EPA's argument would, in essence, require plaintiffs to  
 28 "conduct the same environmental investigation [they] seek[ ] . . . to compel the agency to  
 undertake." See Citizens for Better Forestry, 341 F.3d at 971 n.6, 972.

1 "agency's decisions arguably may affect" specific endangered species in which plaintiffs  
2 had cognizable interest); see also Natural Resource Defense Council, 749 F.3d at 776,  
3 780, 783-84 (holding, where plaintiffs alleged EPA failed to comply with ESA prior to  
4 approving water supply contracts, plaintiffs established standing by showing that "if the  
5 [agency] engage[d] in adequate consultation, the [contracts] could better protect  
6 [p]laintiffs' concrete interest in [endangered species] than the contracts [did] currently").

7 The Intervenor's argue plaintiffs have not, however, shown a "causal link between  
8 any product approved by the EPA in any of the challenged agency actions . . . and [the  
9 declarants'] interest in a listed species" (see Intervenor's Reply at 4:13-17), as, according  
10 to the Intervenor's, plaintiffs have not shown the particular geographic locales identified by  
11 the declarants could be affected by the registered clothianidin and thiamethoxam  
12 products challenged in the Fifth and Sixth Claims. As set forth below, the Court  
13 disagrees.

14 None of the challenged registrations issued by the EPA limit the use of the  
15 products to any geographic locale, and the administrative record includes numerous  
16 statements by the EPA confirming the pesticides at issue are used throughout the United  
17 States. (See AR 43633 (statement by EPA that "there are no apparent geographic  
18 limitations for the use of [clothianidin] within the United States"); Wu Decl., filed April 14,  
19 2016, Ex. L at 16 (AR 75066) (statement by EPA that "potential use sites" for clothianidin  
20 "cover the entire U.S."); AR 43252, 43280, 43312-410 (assessment by EPA "identif[y]ing"  
21 potential direct effects" and "indirect effects" on listed species in all 50 states as result of  
22 use of thiamethoxam on dry bulb onions, peanut seeds, carrots, brassica (cole) leafy  
23 vegetables, corn, and leafy vegetable seeds); AR 43061 (table by EPA identifying 41  
24 states with listed species "directly/indirectly affected" by use of thiamethoxam on citrus  
25 fruits and tree nuts).)

26 Under such circumstances, the Court finds the declarants' interests in viewing  
27 listed species at the particular parks, rivers, marshes and other geographic locations  
28 identified in their respective declarations suffice to establish the requisite causal link. See



1 United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669,  
2 686-88 (1973) (holding plaintiffs, who alleged their recreational interests in "forests,  
3 streams, mountains and other resources in the Washington metropolitan area" were  
4 adversely affected by agency action, sufficiently established injury in fact, where  
5 challenged action "allegedly ha[d] an adverse environmental impact on all the natural  
6 resources of the country").

7 Accordingly, the Court finds plaintiffs have adequately demonstrated an injury in  
8 fact.

9 The remaining issue as to standing is whether, if the EPA were to comply with the  
10 ESA, such action "could protect [plaintiffs'] concrete interests." See Natural Defenders  
11 Defense Council, 749 F.3d at 783 (emphasis in original). In that regard, the EPA argues,  
12 were the Court to direct the EPA to comply with the ESA's consultation requirements, no  
13 action thereafter taken by the EPA could protect plaintiffs' interests in any listed species,  
14 because, according to the EPA, not all products containing clothianidin and  
15 thiamethoxam are challenged by the Fifth and Sixth Claims, and, consequently, "growers  
16 and other pesticide users . . . could simply substitute other existing clothianidin and  
17 thiamethoxam products" if the EPA did not allow the products challenged by plaintiffs to  
18 continue to be sold. (See EPA's Reply at 6:12-15.)

19 Plaintiffs, however, are required to show only that "the relief requested -- that the  
20 agency follow the correct procedure -- may influence the agency's ultimate decision of  
21 whether to take or refrain from taking a certain action." See Salmon Spawning &  
22 Recovery Alliance, 545 F.3d at 1226-27. As discussed above in connection with the First  
23 and Second Claims, the EPA has the power to give notice of its intention to cancel a  
24 registered pesticide when it appears the pesticide "generally causes unreasonable  
25 adverse effects on the environment," see 7 U.S.C. § 136d(b), and to suspend use of the  
26 pesticide during cancellation proceedings, see 7 U.S.C. § 136d(c)(1). Consequently,  
27 were plaintiffs to prevail on the remaining portions of the Fifth and Sixth Claims and if the  
28 EPA, after consultation with the NWS, were to find use of the challenged clothianidin and

1 thiamethoxam products may adversely affect listed species, the EPA could find the non-  
 2 challenged clothianidin and thiamethoxam products likewise pose a sufficient threat to  
 3 listed species to warrant its taking action as to those products as well, particularly given  
 4 that the uses for many of the challenged products, as discussed above, had been  
 5 approved previously for unchallenged products.

6 Accordingly, the Court finds plaintiffs have standing to assert the remaining  
 7 portions of the Fifth and Sixth Claims.

#### 8 **4. Merits**

9 As set forth above, the ESA requires federal agencies to consult with the FWS or  
 10 the NMFS to insure "agency action . . . is not likely to jeopardize the continued existence  
 11 of any endangered species or threatened species." See 16 U.S.C. § 1536(a)(2). "An  
 12 agency may avoid the consultation requirement only if it determines that its action will  
 13 have 'no effect' on a listed species or critical habitat." Karuk Tribe v. United States  
 14 Forestry Service, 681 F.3d 1006, 1027 (9th Cir. 2012), cert. denied, 133 S. Ct. 1579  
 15 (2013).

16 Here, the EPA concedes it has not consulted either said agency nor made a "no  
 17 effect" determination with respect to the actions challenged in the Fifth and Sixth Claims.  
 18 (See EPA's Cross-Mot. at 21:5-7.) Accordingly, in the absence of a showing that the  
 19 ESA's consultation requirements do not apply to the remaining sixty-eight alleged agency  
 20 actions identified in the Fifth and Sixth Claims, plaintiffs, with respect to those agency  
 21 actions, are entitled to a finding in their favor on the issue of liability.<sup>19</sup>

22 The Court next considers the Intervenors' argument that the ESA's consultation  
 23 requirements apply to none of the remaining agency actions, as well as the EPA's

24 \_\_\_\_\_  
 25 <sup>19</sup>In their respective briefs, the parties disagree as to directions the Court should  
 26 give the EPA in an order of remand. In particular, the parties disagree as to whether, in  
 27 the event judgment is entered in favor of plaintiffs, the Court should direct the EPA to  
 28 engage in consultation or only direct the EPA to determine whether it should engage in  
 consultation. As the sole issue before the Court at the present time is the issue of  
 liability, the Court does not address herein what directions should be included in any  
 order of remand.

1 argument that the ESA's consultation requirements do not apply to the majority of those  
2 actions.

3 **a. Lack of Agency Action**

4 The EPA argues that eleven of the remaining sixty-eight challenged actions are  
5 not "agency actions" within the meaning of the ESA, and, consequently, that plaintiffs  
6 cannot show the EPA had a duty to consult prior to taking those eleven actions.

7 The duty to consult is "trigger[ed]" only if the agency engages in "agency action."  
8 See Karuk Tribe, 681 F.3d at 1021 (internal quotation and citation omitted). To  
9 determine whether an agency, for purposes of the ESA, has engaged in an "agency  
10 action," courts apply a "two-fold" test. See id. The court first determines "whether [the]  
11 agency affirmatively authorized, funded, or carried out the underlying activity," and,  
12 second, "whether the agency had some discretion to influence or change the activity for  
13 the benefit of a protected species." See id.

14 **(1) Converting Registrations from Conditional to Unconditional**

15 Two of the above-referenced eleven actions concern conversions from conditional  
16 to unconditional registrations.

17 In May 2003, the EPA issued notices "conditionally" registering Poncho 600 and  
18 Clothianidin Technical Insecticide for a period of three years. (See AR 67402-03, 67632-  
19 34.) At that time, the EPA imposed certain conditions on the registrants, including  
20 requiring them to submit seven studies "to satisfy the data gaps in the data base for  
21 clothianidin." (See AR 67402-03, 67632-34.) Thereafter, in May 2008, the EPA issued  
22 notices conditionally registering the two products for an additional year,<sup>20</sup> and requiring  
23 the registrants to submit, within the one-year period, one of the seven studies identified in

24 //

25 //

26 \_\_\_\_\_  
27 <sup>20</sup>No party has cited a document in the administrative record indicating whether  
28 Poncho 600 and Clothianidin Technical were conditionally registered between May 2006  
and May 2008, and, if so, what conditions were imposed on any such registration.

1 the 2003 notices. (See AR 75102-03, 75121-22.)<sup>21</sup> In April 2009, the EPA issued notices  
 2 conditionally registering the two products for another one-year period, in which notices  
 3 the EPA stated it had received and was reviewing all the studies. (See AR 75119-20;  
 4 see also AR 75109.) Lastly, in April 2010, the EPA issued an "unconditional" registration  
 5 for each of the two products. (See AR 67408, 67649.)

6 Plaintiffs, as part of the Fifth Claim, allege the two unconditional registrations  
 7 issued in 2010 were "agency actions triggering [a] duty to consult." (See SAC ¶ 128.)  
 8 The EPA argues plaintiffs cannot establish a duty to consult existed because, the EPA  
 9 asserts, its "decisions to convert these registrations from conditional to unconditional  
 10 [were] non-discretionary." (See EPA's Cross-Mot. at 15:23-28.)

11 A registration under FIFRA may be "unconditional," see 7 U.S.C. § 136a(c)(5), 40  
 12 C.F.R. § 152.115(a), or "conditional," see 7 U.S.C. § 136a(c)(7). Here, in 2003, the EPA  
 13 issued conditional registrations for Poncho 600 and Clothianidin Technical Insecticide  
 14 under § 136(c)(7)(C), which provides as follows:

15 The [EPA] may conditionally register a pesticide containing an active  
 16 ingredient not contained in any currently registered pesticide for a period  
 17 reasonably sufficient for the generation and submission of required data  
 18 (which are lacking because a period reasonably sufficient for generation of  
 19 the data has not elapsed since the [EPA] first imposed the data  
 20 requirement) on the condition that by the end of such period the [EPA]  
 21 receives such data and the data do not meet or exceed risk criteria  
 22 enumerated in regulations issued under [FIFRA], and on such other  
 23 conditions as the [EPA] may prescribe. A conditional registration under this  
 24 subparagraph shall be granted only if the [EPA] determines that use of the  
 25 pesticide during such period will not cause any unreasonable adverse effect  
 26 on the environment, and that use of the pesticide is in the public interest.

27 See 7 U.S.C. § 136a(c)(7)(C). The 2008 and 2009 conditional registrations were issued  
 28 under § 136a(c)(7)(A), which provides as follows:

The [EPA] may conditionally register . . . a pesticide if the [EPA] determines  
 that (i) the pesticide and proposed use are identical or substantially similar  
 to any currently registered pesticide and use thereof, or differ only in ways  
 that would not significantly increase the risk of unreasonable adverse

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<sup>21</sup>In the May 2008 notices, the EPA acknowledged the registrants' submission of  
 other studies identified in the 2003 notices and stated the submitted studies were "under  
 review." (See id.)

1 effects on the environment, and (ii) approving the registration . . . in the  
 2 manner proposed by the applicant would not significantly increase the risk  
 3 of any unreasonable adverse effect on the environment. An applicant  
 4 seeking conditional registration . . . under [§ (c)(7)(A)] shall submit such  
 5 data as would be required to obtain [unconditional] registration of a similar  
 6 pesticide under [§ 136a(c)(5)]. If the applicant is unable to submit an item  
 of data because it has not yet been generated, the Administrator may  
 register . . . the pesticide under such conditions as will require the  
 submission of such data not later than the time such data are required to be  
 submitted with respect to similar pesticides already registered under  
 [FIFRA].

7 See 7 U.S.C. § 136a(c)(7)(A). Thereafter, as noted, the EPA, in 2010, unconditionally  
 8 registered Poncho 600 and Clothianidin Technical under § 136a(c)(5), which, in relevant  
 9 part, provides as follows:

10 The [EPA] shall register a pesticide if the [EPA] determines that . . . (A) its  
 11 composition is such as to warrant the proposed claims for it; (B) its labeling  
 and other material required to be submitted comply with the requirements of  
 [FIFRA]; (C) it will perform its intended function without unreasonable  
 12 adverse effects on the environment; and (D) when used in accordance with  
 widespread and commonly recognized practice it will not generally cause  
 13 unreasonable adverse effects on the environment.

14 See 7 U.S.C. § 136a(c)(5).

15 The EPA argues that its decisions to convert the two registrations from conditional  
 16 to unconditional were "non-discretionary" because its decisions in 2010 were "based  
 17 solely on the registrants' submission of specific studies the EPA had required in 2003."  
 18 (See EPA's Cross-Mot. at 15:26 - 16:1.) By way of further explanation, the EPA states  
 19 "[t]he only thing the [EPA] may consider is determining whether the registrant met the  
 20 dat[a] submission deadline and that its submission is acceptable under the applicable  
 21 data sufficiency criteria or 'such other conditions as the [EPA] may prescribe.'" (See id. at  
 22 16:14-16 (quoting 7 U.S.C. § 136a(c)(7)(C).) The Court is not persuaded.

23 At the outset, the Court notes that the authority the EPA cites for the above  
 24 proposition is § 136a(c)(7)(C), a statute governing conditional registrations. Before the  
 25 EPA may register a pesticide product on an unconditional basis, however, it must, as set  
 26 forth above, determine the product "will perform its intended function without  
 27 unreasonable adverse effects on the environment" and that "when used in accordance  
 28 with widespread and commonly recognized practice it will not generally cause

1 unreasonable adverse effects on the environment." See 7 U.S.C. § 136a(c)(5). An  
2 unconditional registration, unlike a conditional registration, has no temporal limitation, and  
3 nothing in § 136a(c)(5) suggests that any of its requirements are inapplicable to products  
4 that previously have been registered on a conditional basis.

5 Moreover, the regulations governing FIFRA registrations point up the differing  
6 decisions the EPA must make when it registers a pesticide on an unconditional as  
7 opposed to a conditional basis. The regulation pertaining to unconditional registrations,  
8 specifically, 40 C.F.R. § 152.112, provides, in keeping with the above-referenced statute,  
9 that before the EPA may issue an unconditional registration, it must make a number of  
10 findings, including, as set forth in § 152.112(e), that "the product will perform its intended  
11 function without unreasonable adverse effects on the environment, and that, when used  
12 in accordance with widespread and commonly recognized practice, the product will not  
13 generally cause unreasonable adverse effects on the environment." See 40 C.F.R.  
14 § 152.112(e).

15 By contrast, the regulations pertaining to the issuance of conditional registrations,  
16 specifically, 40 C.F.R. §§ 152.113 and 152.114, while requiring the EPA to determine  
17 certain of the "criteria in § 152.112 . . . have been satisfied," do not require at that time a  
18 determination as to the criteria set forth in § 152.112(e), i.e., a determination that use of  
19 the product for an unlimited period of time will not adversely affect the environment. See  
20 40 C.F.R. §§ 152.113(a)(3), 152.114(c) (listing by subsection all criteria that "must have  
21 been satisfied"; omitting subsection (e)). Rather, as the Ninth Circuit has observed, "[t]he  
22 EPA conditionally registers a pesticide when there is insufficient data to evaluate the  
23 environmental effects of a new pesticide." See Pollinator Stewardship Council v. EPA,  
24 806 F.3d 520, 523 (9th Cir. 2015). A conditional registration thus provides for what is, in  
25 effect, a trial period during which the product can be used while the registrant obtains  
26 additional data required by the EPA, which the EPA then reviews to determine whether  
27 issuance of an unconditional registration is appropriate.

28 //

1 Here, consistent with the above-described procedure, the EPA initially registered  
2 Poncho 600 and Clothianidin Technical on a conditional basis in light of its finding that it  
3 lacked sufficient data to determine whether issuance of unconditional registrations was  
4 proper, see Pollinator Stewardship Council, 806 F.3d at 523 (holding "[u]conditional  
5 registration necessarily requires sufficient data to evaluate the environmental risks"), and,  
6 as discussed above, required the registrants to provide seven specified studies to assist  
7 the EPA in making such a determination, including "an acceptable Seed Leaching study,"  
8 as well as "additional analysis of . . . the materials used in the previously submitted  
9 mutagenicity studies," and "an acceptable Aerobic Aquatic Metabolism study" (see AR  
10 67402-03, 67632-34). "[S]tudies . . . pertain[ing] to leaching" are used by the EPA to  
11 assess, inter alia, "potential environmental hazards related to . . . habitat loss of wildlife  
12 resulting from pesticide residue movement or transport in the environment," see 40  
13 C.F.R. § 161.202(d)(4) (2010), "mutagenicity studies" are used by the EPA to assess,  
14 inter alia, "hazards to . . . domestic animals," see 40 C.F.R. § 161.202(e)(5) (2010), and  
15 "aerobic . . . metabolism studies" are used by the EPA to assess, inter alia, "the  
16 persistence of [the] pesticide" in the environment, see 40 C.F.R. § 161.202(d)(3) (2010).

17 As set forth above, the test applicable to the "agency action inquiry," see Karuk  
18 Tribe, 681 F.3d at 1021, is "whether the agency had some discretion to influence or  
19 change the activity for the benefit of a protected species," id. Here, when the EPA  
20 ordered studies to be submitted by the registrants, it did so for the purpose of determining  
21 whether the conditional registrations should be converted to unconditional registrations  
22 under § 136a(c)(5), which determination, as set forth above, required the EPA to review  
23 and assess the results of those studies, in order to determine whether Poncho 600 and  
24 Clothianidin would "perform [their] intended function without unreasonable adverse  
25 effects on the environment" and would "not generally cause unreasonable adverse  
26 effects on the environment." See 7 U.S.C. § 136a(c)(5). Conducting such an  
27 assessment and making such a determination cannot be equated with the wholly non-  
28 discretionary task of stamping the materials "Received."





1 notice, on July 6, 2011, of application to register new use for both Thiamethoxam  
2 Technical and Cruiser Insecticide).

3 Plaintiffs, although appearing to "concede" in their opposition that the nine subject  
4 actions were not approvals of applications to register pesticide products (see Pls.' Opp. at  
5 10:24-26), offer no explanation as to how the act of giving the public notice of a pending  
6 application constitutes "agency action" within the meaning of the ESA, nor is any such  
7 explanation otherwise apparent. Rather, the Court agrees with the EPA that giving notice  
8 is not "agency action," as the EPA did not, by providing such notice, take any "affirmative  
9 action" or provide any "federal authorization" with respect to any application. See Karuk  
10 Tribe, 681 F.3d at 1021 (internal quotation and citation omitted).

11 Accordingly, defendants are entitled to judgment on the Sixth Claim to the extent it  
12 is based on the nine alleged "new use approvals."

### 13 **b. Collateral Attack Doctrine**

14 The Intervenors argue that all remaining agency actions challenged in the Fifth  
15 and Sixth Claims are barred by the collateral attack doctrine, and the EPA argues that all  
16 but two of the remaining agency actions are so barred.<sup>22</sup>

17 "The collateral attack doctrine prevents litigants from relitigating the merits of  
18 previous administrative proceedings or evading established administrative procedures by  
19 raising a claim that is inescapably intertwined with a review of the procedures and merits  
20 surrounding an underlying agency order." Center for Biological Diversity, 847 F.3d at  
21 1092 (internal quotation, alterations and citation omitted). "At its core, the doctrine  
22 prohibits a plaintiff from using a later order that implements a prior agency action as a  
23 vehicle to undo the underlying action or order." Id.

24 All of the remaining agency actions are conditional or unconditional registrations of  
25 specific products containing either clothianidin or thiamethoxam, which pesticides appear  
26

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27 <sup>22</sup>The EPA does not contend its conditional registrations of Poncho Beta and  
28 Cruise PD Insecticide are barred by the collateral attack doctrine.

1 in products previously registered in, respectively, 2003 and 2000. (See Schulman Decl.  
2 Exs. 21, 24; Intervenor's Req. for Judicial Notice Exs. 1-2.) The Intervenor's argue  
3 plaintiff's challenges to the current registrations are, in effect, challenges to the earlier  
4 registrations and, as such, are barred by the collateral attack doctrine. The EPA takes a  
5 similar but slightly narrower position, in confining its argument to the challenges that  
6 concern current registrations for products that not only contain clothianidin or  
7 thiamethoxam, but are identical or substantially similar to earlier-registered products.  
8 (See EPA's Cross-Mot. Exs. 1, 2.) In response, plaintiff's argue that the EPA's duty to  
9 consult as to "every discretionary agency action," see National Wildlife Federation v.  
10 National Marine Fisheries Service, 524 F.3d 917, 929 (9th Cir. 2008), encompasses its  
11 determinations whether to register pesticide products containing a pesticide that has  
12 been approved for use in other products, even if the newer products are identical or  
13 substantially similar to products whose registrations are not challenged.

14 As the Ninth Circuit has explained, the collateral attack doctrine does not bar a  
15 claim that the EPA failed to consult when it registered a pesticide product, provided the  
16 EPA has not merely "rubber stamp[ed]" the application in light of an earlier decision not  
17 challenged by the plaintiff. See Center for Biological Diversity, 847 F.3d at 1093. Put  
18 another way, where the EPA, in deciding whether to approve a new application, does  
19 more than simply adopt its decision as to an earlier application, a plaintiff who challenges  
20 the new registration "does not seek to unravel a prior agency order." See id.

21 Here, there is no showing by defendant's that the EPA, when it registered any  
22 product that is the subject of the remaining portions of the Fifth and Sixth Claims, did  
23 nothing other than adopt a prior decision. Nor does it appear such a showing could be  
24 made, as even where an applicant seeks to register a pesticide for uses that are  
25 "identical or substantially similar to any currently registered pesticide," the EPA  
26 nonetheless is required to make at that time a finding that "approving the registration . . .  
27 in the manner proposed by the applicant would not significantly increase the risk of any  
28 unreasonable adverse effect on the environment." See 7 U.S.C. § 136a(c)(7)(A).

1           Accordingly, the Court finds the collateral attack doctrine does not bar any of the  
2 remaining portions of the Fifth and Sixth Claims.

3                           **c. Conclusion as to Fifth and Sixth Claims**

4           As to the Fifth Claim, defendants are entitled to summary judgment to the extent  
5 the claim challenges the registration of the following three products:

- 6                           (1) Darlex Insecticide on March 18, 2010;
- 7                           (2) Sepresto 75 WS on April 28, 2010; and
- 8                           (3) Prosper Evergol on May 11, 2012.

9           As to the Fifth Claim, plaintiffs are entitled to summary judgment on the issue of  
10 liability to the extent the claim challenges the registration of the following twenty-one  
11 products:

- 12                           (1) Aloft GC SC Insecticide on October 18, 2007;
- 13                           (2) Aloft LC SC Insecticide on October 18, 2007;
- 14                           (3) Aloft GC G Insecticide on October 18, 2007;
- 15                           (4) Aloft LC G Insecticide on October 18, 2007;
- 16                           (5) V-10170 2.13SC Insecticide on January 4, 2008;
- 17                           (6) Insecticide TD Concentrate on January 28, 2008;
- 18                           (7) V-10170 5 FS Insecticide on February 28, 2008;
- 19                           (8) Poncho Beta on March 7, 2008;
- 20                           (9) V-10170 0.25G GL Insecticide on January 27, 2009;
- 21                           (10) Flower, Rose, and Shrub Care III on July 30, 2009;
- 22                           (11) Flower, Rose, and Shrub Care II on August 24, 2009;
- 23                           (12) Insecticide TD Granule on December 28, 2009;
- 24                           (13) Poncho/Votivo on March 16, 2010;
- 25                           (14) Poncho 600 on April 22, 2010;
- 26                           (15) Clothianidin Technical Insecticide on April 22, 2010;
- 27                           (16) Poncho/GB 126 on April 29, 2011;
- 28                           (17) Inovate Seed Protectant on June 21, 2011;

United States District Court  
Northern District of California

- 1 (18) NipsIt Suite Cereals of Seed Protectant on December 21, 2011;
- 2 (19) NipsIt Suite Canola Seed Protectant on January 6, 2012;
- 3 (20) Inovate Neutral Seed Protectant on January 25, 2012; and
- 4 (21) Ernesto Quantum on May 11, 2012.

5 As to the Sixth Claim, defendants are entitled to summary judgment to the extent  
6 the claim challenges the following eleven actions:

- 7 (1) registration of Agita 1GB Fly Bait on December 8, 2010;
- 8 (2) registration of Agita 10 WG on December 8, 2010;
- 9 (3) alleged new use approval of Cruise 70 WS Insecticide on October 26,  
10 2009;
- 11 (4) alleged new use approval of Thiamethoxam Technical on March 19,  
12 2010;
- 13 (5) alleged new use approval of Thiamethoxam Technical on May 5, 2010;
- 14 (6) alleged new use approval of Thiamethoxam Technical on July 6, 2011;
- 15 (7) alleged new use approval of Cruiser Insecticide on March 19, 2010;
- 16 (8) alleged new use approval of Cruiser Insecticide on May 5, 2010;
- 17 (9) alleged new use approval of Cruiser Insecticide on July 6, 2011;
- 18 (10) alleged new use approval of Optigard ZT Insecticide on August 18,  
19 2010; and
- 20 (11) alleged new use approval of Optigard Flex Liquid on August 18, 2010.

21 As to the Sixth Claim, plaintiffs are entitled to summary judgment on the issue of  
22 liability to the extent the claim challenges the registration of the following thirty-eight  
23 products:

- 24 (1) Optigard Ant Gel Bait on April 4, 2007;
- 25 (2) Thiamethoxam Ant Killer Gel on April 4, 2007;
- 26 (3) Endigo ZC on August 21, 2007;
- 27 (4) THX/MXM/FDL CZ on September 20, 2007;
- 28 (5) Thiamethoxam Lawn & Landscape 0.33G on November 2, 2007;

United States District Court  
Northern District of California

- 1 (6) Thiamethoxam Lawn & Landscape 0.22G on November 2, 2007;
- 2 (7) Platinum 75 SG Insecticide on January 17, 2008;
- 3 (8) Optigard Flex Liquid on March 28, 2008;
- 4 (9) Thiamethoxam 0.02/Lambda-cyhalothrin on April 4, 2008;
- 5 (10) CruiserMaxx Cereals on April 16, 2008;
- 6 (11) Voliam Flexi Insecticide on August 25, 2008;
- 7 (12) Durivo on August 26, 2008;
- 8 (13) Avicta Duo on October 31, 2008;
- 9 (14) Cruiser 70 WS Insecticide on November 20, 2008;
- 10 (15) Thiamethoxam 0.40/Lambda-cyhalothrin 0.16 ME Concentrate
- 11 on May 12, 2009;
- 12 (16) Thiamethoxam 0.010/Lambda-cyhalothrin 0.004 ME RTU on May 12,
- 13 2009;
- 14 (17) Meridian 0.20G on June 22, 2009;
- 15 (18) Meridian 0.14G on July 1, 2009;
- 16 (19) Avicta Duo 250 on October 27, 2009;
- 17 (20) Agri-Flex Miticide/Insecticide on April 6, 2010;
- 18 (21) CruiserMaxx Vibrance Cereals on June 20, 2010;
- 19 (22) CruiserMaxx Rice on July 20, 2010;
- 20 (23) Optigard Liquid Ant Bait on August 2, 2010;
- 21 (24) Four-Way VAP on October 29, 2010;
- 22 (25) Avicta Complete Corn 500 on June 15, 2011;
- 23 (26) Cruiser PD Insecticide on August 5, 2011;
- 24 (27) Difenconazole 0.170/Thiamethoxam 0.010/Lambda-cyhalothrin 0.004
- 25 ME RTU on August 5, 2011;
- 26 (28) Difenconazole 0.66/Thiamethoxam 0.40/Lambda-cyhalothrin 0.16 ME
- 27 Concentrate on August 5, 2011;
- 28 (29) Avicta Complete Corn 250 on October 19, 2011;

- 1 (30) Caravan G on January 11, 2012;
- 2 (31) THX\_MXM\_FDL\_TBZ FS on February 2, 2012;
- 3 (32) CruiserMaxx EZ on February 2, 2012;
- 4 (33) Derby on April 23, 2012;
- 5 (34) Tandem on April 23, 2012;
- 6 (35) CruiserMaxx Peanuts on April 30, 2012;
- 7 (36) Solvigo Miticide/Insecticide on June 21, 2012;
- 8 (37) Adage Delux on August 23, 2012; and
- 9 (38) Adage Premier on August 23, 2012.

10 **CONCLUSION**

11 For the reasons stated above:

12 1. Plaintiffs' motion for summary judgment is hereby GRANTED in part and  
13 DENIED in part as follows:

14 a. As to the Fifth Claim, plaintiffs are entitled to summary judgment on the  
15 issue of liability to the extent such claim challenges the registrations of the twenty-one  
16 products identified above at page 35, line 9, through page 36, line 4.

17 b. As to the Sixth Claim, plaintiffs are entitled to summary judgment on the  
18 issue of liability to the extent such claim challenges the registrations of the thirty-eight  
19 products identified above at page 36, line 21, through page 38, line 9.

20 c. In all other respects, plaintiffs' motion is DENIED.

21 2. Defendants' motions for summary judgment are hereby GRANTED in part and  
22 DENIED in part, as follows:

23 a. As to the First, Second, Third and Fourth Claims, defendants are entitled  
24 to summary judgment.

25 b. As to the Fifth Claim, defendants are entitled to summary judgment to  
26 the extent the claim challenges the registrations of the three products identified above at  
27 page 35, lines 4 through 8.

28 c. As to the Sixth Claim, defendants are entitled to summary judgment to

United States District Court  
Northern District of California

1 the extent such claim challenges the eleven actions identified above at page 36, lines 5  
2 through 20.

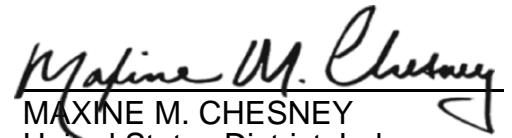
3 d. In all other respects, defendants' motions are DENIED.

4 3. As to the Fifth and Sixth Claims, to the extent plaintiffs have established the  
5 EPA's liability, the parties are hereby DIRECTED to meet and confer, and to thereafter  
6 file, no later than May 26, 2017, a jointly proposed briefing schedule and hearing date, or,  
7 if the parties are unable to agree on a schedule, a joint filing in which they set forth their  
8 respective proposals.

9 4. In light of the above rulings on the issue of liability, and the amount of time that  
10 has passed since the parties last participated in any form of court-sponsored ADR, the  
11 parties are hereby REFERRED back to Magistrate Judge Jacqueline Scott Corley and  
12 are hereby DIRECTED to contact her chambers forthwith to schedule a settlement  
13 conference, which, at the parties' election, may be conducted in advance of the above-  
14 referenced briefing.

15 **IT IS SO ORDERED.**

16  
17 Dated: May 8, 2017

18   
19 MAXINE M. CHESNEY  
20 United States District Judge

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