



**ADVOCATES for the WEST**

3701 SE Milwaukie Ave. Ste. B

Portland, OR 97202

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May 24, 2022

**VIA EMAIL AND U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Mr. Kevin Shea  
Administrator, Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
4700 River Road  
Riverdale, MD 20737

**Re: Notice of Intent to Sue for Violations of the Endangered Species Act Regarding Impacts of APHIS' Grasshopper Suppression Program.**

Dear Administrator Shea:

In accordance with the 60-day notice requirement for citizen suits under the Endangered Species Act (“ESA”), you are hereby notified that the Xerces Society for Invertebrate Conservation (“Xerces Society”) and the Center for Biological Diversity (“Center”) intend to bring a civil action against the Animal and Plant Health Inspection Service and you, in your official capacity (collectively, “APHIS”), for violating the ESA, 16 U.S.C. § 1536 *et seq.*, in connection with APHIS’s Grasshopper Suppression Program. Under that program—hereinafter referred to as APHIS’s “rangeland pesticides” program—APHIS applies insecticides to hundreds of thousands or even millions of acres of land across the western United States each year, including many areas inhabited by species listed as threatened or endangered under the ESA.

As described below, APHIS has violated and is violating the ESA by failing to consult with the U.S. Fish and Wildlife Service (“FWS”) on a programmatic basis and/or failing to reinstate programmatic consultation with FWS over the impacts of its rangeland pesticides program on ESA-listed species and their critical habitats. APHIS is carrying out its rangeland pesticides program despite the absence of an existing programmatic biological opinion (“BiOp”) or letter of concurrence from FWS covering key aspects of the program. APHIS should have completed a new programmatic consultation with FWS before re-authorizing its rangeland pesticides program in 2019. Moreover, APHIS should have reinstated programmatic consultation with FWS due to new species listings and changed circumstances since the last programmatic consultation was completed in 1995.

Unless the violations described in this notice are remedied—*i.e.*, unless APHIS and FWS complete programmatic consultation over the rangeland pesticides program—the Xerces Society and the Center intend to sue APHIS in federal court.



## FACTUAL BACKGROUND

Under the rangeland pesticides program, APHIS authorizes and funds the application of toxic pesticides to millions of acres of public and private lands across 17 Western states—Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. Many species listed as threatened or endangered under the ESA have occupied habitat, potential habitat, and/or ESA-designated critical habitat in areas that may be affected by the rangeland pesticides program. Some of these species have habitat and ranges that span across multiple Western states that are treated under the program, including the yellow-billed cuckoo, black-footed ferret, bull trout, Ute ladies'-tresses, and Spalding's catchfly.

The last time APHIS and FWS completed programmatic consultation over the rangeland pesticides program was in 1995. Since then, several species potentially affected by the program have been listed under the ESA, including the yellow-billed cuckoo, red knot, bull trout, slickspot peppergrass, Spalding's catchfly, desert yellowhead, Western glacier stonefly, Northern Idaho ground squirrel, Northern long-eared bat, Preble's meadow jumping mouse, and Oregon spotted frog. In addition, the program has changed in substantial ways since 1995. For instance, in 2002, APHIS began using the insecticide diflubenzuron (Dimilin), a broad-spectrum chitin inhibitor, as part of the program; it is now the most commonly used pesticide in the program.

In 2019, APHIS issued a programmatic Environmental Impact Statement ("EIS") and Record of Decision ("ROD") re-authorizing its rangeland pesticides program. At that time, APHIS made two notable changes to the program: first, it added chlorantraniliprole, a new insecticide, to the program; second, it adopted an adaptive management approach to determining how to apply pesticide treatments.

Though APHIS sent a programmatic biological assessment ("BA") for the program to FWS in 2015, the agencies did not complete programmatic consultation prior to APHIS's re-authorization of the program in 2019. Since then, APHIS has been conducting its program without any up-to-date programmatic BiOp or letter of concurrence from FWS; the 1995 BiOp does not analyze the effects of the program on any species listed since then, nor does it include an analysis of the effects of diflubenzuron or chlorantraniliprole on any listed species.

Each year, APHIS submits state-level BAs or requests for concurrence to the various FWS regional offices, and FWS issues letters concurring with APHIS's effects determinations. FWS's concurrences are contingent on APHIS implementing mitigation measures such as buffers and other treatment restrictions. But these mitigation measures can vary from state to state, even for the same species. For instance, in Montana and Idaho, a three-mile buffer is required for aerial treatments near Ute ladies'-tresses habitat, but in Wyoming, no buffer is required for aerial treatments of diflubenzuron near Ute ladies'-tresses habitat or occupied locations. As another example, the 2021 Oregon letter of concurrence from FWS instructed APHIS to avoid conducting pesticide treatments in known *or potentially occupied* habitat areas,



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whereas the 2021 Idaho letter of concurrence instructed APHIS only to avoid *known occurrences* of species or critical habitat.

## LEGAL BACKGROUND

Section 7 of the ESA imposes a substantive obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species. *See* 16 U.S.C. § 1536(a)(2); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). The ESA also prohibits “take” of listed species. 16 U.S.C. § 1538. “Take” is defined to include harassing, harming, wounding, killing, trapping, capturing, or collecting a listed species, and “harm” includes significant habitat modification or degradation. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

The ESA includes an important procedural requirement—the “consultation” requirement—that helps ensure that its substantive mandates are followed. Under section 7(a)(2) of the ESA, federal agencies must consult with an expert agency (FWS or NMFS, depending on the species at issue) before undertaking actions that may affect listed species or their habitat. The ESA’s implementing regulations allow an agency to enter into informal consultation with the relevant expert agency to determine whether the action at issue is likely to adversely affect threatened or endangered species or their critical habitats. *See* 50 C.F.R. § 402.13. Usually this is done by completing a biological assessment and submitting it for the expert agency’s concurrence. *Id.* § 402.12(j), (k). If the action agency determines that its proposed action is “not likely to adversely affect” listed species and their habitats and the expert agency issues a letter concurring in that determination, no further consultation is necessary. *Id.* §§ 402.13, 402.14(b). But if either agency determines that the action is “likely to adversely affect” any listed species or critical habitat, the agencies must engage in formal consultation, resulting in a BiOp.

After consultation is completed, the action agency must re-initiate consultation under certain conditions. Consultation must be reinitiated “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence.” 50 C.F.R. § 402.16(a)(3). And consultation must be reinitiated “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *Id.* § 402.16(a)(4). The duty to reinitiate consultation lies with both the action agency and the consulting agency. *Id.* § 402.16(a); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).



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## ESA VIOLATIONS

### **I. APHIS Violated the ESA by Re-Authorizing Its Rangeland Pesticides Program Without First Completing Programmatic Consultation With FWS, and It Continues to Violate the ESA by Carrying Out Its Rangeland Pesticides Program Without a Valid Programmatic BiOp or Letter of Concurrence.**

APHIS’s decision to re-authorize its rangeland pesticides program in 2019, memorialized in the 2019 EIS and ROD, was an “agency action” within the meaning of the ESA. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020–21 (9th Cir. 2012) (en banc) (explaining that “Congress intended agency action to have a broad definition in the ESA” and discussing examples of agency actions). Furthermore, APHIS had discretion to shape its program “to inure to the benefit of . . . protected species.” *Id.* at 1024–25. For instance, APHIS could have elected to employ different, less toxic pesticides in its program, or it could have chosen to incorporate more robust survey and notification requirements or stronger mitigation measures into the program to reduce the likelihood of adverse effects to listed species or critical habitat. For these reasons, APHIS violated its duties under § 7(a)(2) by failing to complete programmatic consultation before issuing the ROD. *See id.* at 1026–27.

Moreover, APHIS continues to take affirmative “agency action” by carrying out its rangeland pesticides program: each year, APHIS treats hundreds of thousands—or even millions—of acres with pesticides or contracts with private parties to conduct such treatments. APHIS plans to carry out or authorize treatments this summer across the West. These activities, taken together or individually, trigger the duty to consult under the ESA. *See Ctr. for Biological Diversity v. Env’tl Protection Agency*, 847 F.3d 1075, 1090–91 (9th Cir. 2017).

APHIS’s annual state-level consultations with FWS do not satisfy APHIS’s duty to consult over the rangeland pesticides program as a whole, because they do not involve analysis of the collective, cumulative effects of the program across space and time. Nor does the existence of the 1995 programmatic BiOp satisfy APHIS’s consultation duty, because it does not analyze, among other things, (1) effects related to the use of diflubenzuron, (2) effects related to the use of chlorantraniliprole, and (3) effects to species and/or critical habitat listed after 1995.

Both APHIS’s re-authorization of its rangeland pesticides program in 2019 and its continued execution of that program require APHIS to consult with FWS at the programmatic level under the ESA. Because APHIS and FWS have not completed a programmatic consultation, APHIS’s actions have violated and continue to violate the statute.



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## **II. APHIS Has Violated the ESA by Failing to Reinitiate Consultation at the Programmatic Level Due to New Species Listings and Changes to the Rangeland Pesticides Program.**

Since programmatic consultation was last completed in 1995, several events have occurred that have triggered APHIS's duty to reinitiate programmatic consultation with FWS. First, many species potentially affected by the rangeland pesticides program have been listed under the ESA, as discussed *supra* p. 2, and critical habitat has been designated for species in areas potentially affected by the program, as well. APHIS violated the ESA by failing to reinitiate programmatic consultation with FWS following these listings and designations, and it continues to violate its duties under the ESA by failing to reinitiate and complete programmatic consultation. 50 C.F.R. § 402.16(a)(4).

Second, APHIS has added two new pesticides, diflubenzuron and chlorantraniliprole, to the rangeland pesticides program. APHIS's decisions to add these pesticides to the rangeland pesticides program triggered a duty to reinitiate consultation at the programmatic level with FWS, because the addition of these pesticides represent a "modifi[cation]" of the program resulting in "an effect to . . . listed species or critical habitat that was not considered in the" previous consultation. 50 C.F.R. § 402.16(a)(3). APHIS violated this duty and continues to violate this duty by failing to reinitiate and complete programmatic consultation with FWS. *Cf. Idaho Conservation League v. U.S. Forest Serv.*, Case No. 1:18-CV-044-BLW, 2019 WL 2505031, at \*3–4 (D. Idaho June 17, 2019) ("The Ninth Circuit has made clear in a long line of cases that if an agency determines that an action may affect a listed species or habitat, Section 7(a)(2) requires that the agency consult with the FWS or [NMFS] *before* engaging in the action." (cleaned up)), *appeal dismissed*, No. 20-35041 (9th Cir. May 6, 2020).

APHIS's annual state-level consultations with FWS do not fully satisfy APHIS's duty to reinitiate consultation, because they do not involve analysis of the cumulative effects of the rangeland pesticides program across space and time. APHIS must reinitiate and complete consultation at the *programmatic* level to satisfy the ESA.

### **CONCLUSION**

As set forth above, Xerces Society and the Center intend to pursue litigation in federal court for these ESA violations 60 days after this notice and will seek injunctive, declaratory, and other relief, including an award of attorneys' fees.

If you have any questions, wish to discuss the matter further, or believe this notice is in error, please feel free to contact me at the address on the letterhead.



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Sincerely,

*/s/ Andrew R. Missel*

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