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12 *to Pesticides, Defenders of Wildlife, Natural*
13 *Resources Defense Council, and Center for*
14 *Biological Diversity*

15 UNITED STATES DISTRICT COURT
16 FOR THE WESTERN DISTRICT OF WASHINGTON

17 WASHINGTON TOXICS COALITION,) Civ. No. CV04-0113C
18 NORTHWEST COALITION FOR)
19 ALTERNATIVES TO PESTICIDES,)
20 DEFENDERS OF WILDLIFE, NATURAL) COMPLAINT FOR DECLARATORY AND
21 RESOURCES DEFENSE COUNCIL, AND) INJUNCTIVE RELIEF
22 CENTER FOR BIOLOGICAL DIVERSITY,)
23)
24 Plaintiffs,)
25)
26 v.)
27)
28 U.S. ENVIRONMENTAL PROTECTION)
29 AGENCY,)
30)
31 Defendant.)
32)

33 INTRODUCTION

34 1. This action seeks to remedy violations of the Federal Advisory Committee Act
35 (“FACA”), 5 U.S.C. App. 2, arising from defendant Environmental Protection Agency’s
36 (“EPA’s”) establishment and utilization of a federal advisory committee as a preferred source of
37 advice on pesticides and endangered species policy matters. The advisory committee, called the

1 FIFRA Endangered Species Task Force, is composed entirely of agro-chemical companies and
2 was originally established and utilized by EPA to develop a database on the location of
3 endangered species. EPA meets with the Task Force in secret and provides the Task Force
4 regular opportunities to meet with and influence EPA officials. Over at least the past year, the
5 Task Force has deviated from its data generation mandate and advocated for EPA to weaken
6 endangered species protection from pesticides. Even though the Task Force is using its special
7 access to EPA officials to provide advice to EPA in secret about pesticides and endangered
8 species matters, EPA has taken no steps to bring its relationship with the Task Force into
9 compliance with FACA's standards for accountability and public access.

10 2. Plaintiffs, environmental groups that seek to protect endangered species from
11 pesticides, seek a declaration from this Court that EPA is violating FACA by allowing the Task
12 Force to use its special access to EPA to offer advice on policy matters. In particular, EPA has
13 not chartered the Task Force under FACA, ensured that Task Force meetings are open to the
14 public, made Task Force records available for public inspection, kept public minutes of Task
15 Force proceedings, and/or ensured that the Task Force is "fairly balanced in terms of the points
16 of view represented." 5 U.S.C. App. 2, §§ 5(b)(2), (c), 9(c), 10(a), (b), (c). Plaintiffs seek an
17 order enjoining EPA from utilizing, consulting, or obtaining information or advice from the Task
18 Force on policy matters until EPA has ensured that its utilization of the Task Force is in
19 compliance with FACA, including FACA's open meetings, public records, and balanced
20 membership requirements.

21 JURISDICTION

22 3. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (action arising
23 under the laws of the United States).

1 VENUE

2 4. Venue lies in this judicial district under 28 U.S.C. § 1391(e) because plaintiff
3 Washington Toxics Coalition resides in this district.

4 PARTIES

5 5. Plaintiff Washington Toxics Coalition (“WTC”) is a non-profit organization
6 incorporated in and has its place of business in Washington. WTC protects public health and the
7 environment by eliminating toxic pollution. WTC promotes alternatives to toxic chemicals in
8 homes, schools, workplaces, agriculture, and industry. WTC advocates policies, empowers
9 communities, and educates people to create a healthy environment. It works to ensure that uses
10 of pesticides authorized by EPA will not harm threatened and endangered wildlife, including,
11 birds, salmon, and steelhead. WTC has approximately 1,300 members. WTC members use the
12 waters of Washington for recreation, fishing, and aesthetic pursuits. Their interests are currently
13 impaired and will continue to be impaired by uses of pesticides that harm threatened and
14 endangered salmon and steelhead.

15 6. Plaintiff Northwest Coalition for Alternatives to Pesticides (“NCAP”) is a non-
16 profit organization that engages in public education and advocacy to promote alternatives to
17 toxic pesticides and to protect the environment from the harmful effect of such pesticides.
18 NCAP is incorporated in Oregon and has its principal place of business in Oregon. It works to
19 ensure that uses of pesticides authorized by EPA will not harm threatened and endangered
20 salmon and steelhead. NCAP has conducted and compiled research on the effects of pesticides
21 on salmonids. NCAP has over 1,800 members. NCAP members use the waters of California,
22 Oregon, Washington, and Idaho for recreation, fishing, and aesthetic pursuits. Their interests are
23 currently impaired and will continue to be impaired by uses of pesticides that harm threatened
24 and endangered salmon and steelhead.

1 7. Plaintiff Defenders of Wildlife (“Defenders”) is a nonprofit wildlife conservation
2 organization, incorporated and with its principal place of business in Washington, D.C.
3 Defenders works to protect wildlife in natural habitats throughout the world and its activities
4 include protecting endangered species from pesticides. In the late 1980s, Defenders brought a
5 lawsuit to compel EPA to protect black-footed ferrets from strychnine. In 2003, Defenders sued
6 EPA for failing to bring its registration of fenthion, which has resulted in the deaths of numerous
7 threatened and endangered birds, into compliance with the ESA and other statutes. Defenders of
8 Wildlife v. Whitman, No. 02-02089 (ESH) (D.D.C. filed 2002). Defenders has approximately
9 one million members and supporters throughout the United States and the world. Defenders’
10 members engage in and obtain great enjoyment and benefit from observing, studying, and
11 photographing wildlife, including threatened and endangered species, throughout the United
12 States.

13 8. Plaintiff Natural Resources Defense Council (“NRDC”) is a non-profit
14 environmental membership organization with more than 465,000 members nationwide. NRDC
15 maintains its headquarters in New York City and has additional offices in Washington D.C., Los
16 Angeles, and San Francisco. NRDC works to protect endangered species from pesticides and to
17 improve regulation of pesticides to protect species and public health. NRDC’s members derive
18 recreational, scientific, aesthetic, and cultural benefits from the existence of species in the wild
19 and their interests are impaired when such species decline and become endangered or threatened.
20 Recently, NRDC brought a lawsuit seeking to compel EPA to comply with the ESA in
21 connection with its registration of the herbicide atrazine and to ensure that atrazine will not
22 jeopardize the survival of various threatened and endangered species, including the loggerhead
23 turtle, leatherback turtle, green turtle, Kemp’s ridley turtle, shortnose sturgeon, and pallid
24

1 sturgeon. NRDC v. EPA, No. RDB 03 CV 2444 (D. Md. filed 2003).

2 9. Plaintiff Center for Biological Diversity (the “Center”) is a non-profit corporation
3 with over 8,000 members and offices in San Diego, Idyllwild, and Berkeley, California; Sitka,
4 Alaska; Tucson and Phoenix, Arizona; and Silver City, New Mexico. The Center is dedicated to
5 the preservation, protection, and restoration of biodiversity, native species, and ecosystems,
6 including through enforcement of the ESA against EPA with respect to pesticides. In 2002, the
7 Center brought a lawsuit seeking to compel EPA to ensure that its registration of numerous
8 pesticides will not jeopardize the survival of the red-legged frog, as required under the ESA.
9 Center for Biological Diversity v. Whitman, No. C-02-1580 JSW (N.D. Cal. filed 2002). The
10 Center’s members and staff obtain educational, scientific research, moral, spiritual, and
11 recreational benefits from the existence of threatened and endangered species.

12 10. The past, present, and future enjoyment of threatened and endangered species by
13 members of the plaintiff organizations has been and will continue to be irreparably harmed by
14 EPA’s disregard of its statutory obligations under the ESA.

15 11. Defendant Environmental Protection Agency (“EPA”) is a federal agency under
16 FACA. EPA is the federal agency charged with registering pesticides under the Federal
17 Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and with ensuring that the pesticide uses
18 it authorizes will not have unreasonable adverse effects on the environment, including on
19 threatened and endangered species and their habitat. FIFRA, 7 U.S.C. §§ 136-136y. EPA is
20 further charged with complying with the ESA with respect to its programs, authorities, and
21 actions. ESA, 16 U.S.C. § 1536.

22 BACKGROUND

23 12. In 2000, EPA issued a Pesticide Registration Notice (“PR-Notice”) announcing
24 the formation of a chemical industry task force called the FIFRA Endangered Species Task

1 Force, which is referred to by the acronym “FESTF.” EPA defined mandates for FESTF in the
2 2000 PR Notice. Specifically, the Task Force has been organized to develop and test an
3 information management system to locate threatened and endangered species affected by
4 pesticides for use in EPA registration decisions. Pesticide Registration Notice 2000-2 (April 17,
5 2000).

6 13. EPA committed to provide guidance and assistance to FESTF. EPA has
7 established an ongoing relationship in which EPA representatives attend FESTF meetings and
8 workshops. EPA and FESTF officials meet regularly in what are called “critical interaction
9 meetings.” FESTF has established subcommittees, and EPA has assigned liaisons to meet with
10 those subcommittees. FESTF has conducted workshops that EPA representatives have attended.

11 14. On information and belief, FESTF has not developed an information management
12 system as envisioned in the PR Notice. Nor has FESTF tested such an information management
13 system.

14 15. Over at least the past year, FESTF has become a vocal proponent of weakening
15 endangered species protections from pesticides. FESTF has become a persistent advocate for a
16 new model of self-consultation that would eliminate expert agency oversight and involvement in
17 the ESA Section 7 process for numerous pesticide uses. Under ESA § 7, EPA must consult with
18 the expert fish and wildlife agencies on the impacts of pesticide registrations on threatened and
19 endangered species. 16 U.S.C. § 1536(a)(2). FESTF has lobbied for EPA to be designated the
20 “expert agency” for determining the impacts of pesticides on endangered species, and to exclude
21 the Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) from
22 the ESA compliance process for a large segment of pesticide uses. Similarly, FESTF has
23 supported a specific risk assessment process that uses methods that are less precautionary than
24

1 those supported by the expert fish and wildlife agencies and the environmental community. As
2 FESTF explains, it has “developed a program by which FIFRA and ESA requirements will be
3 met by pesticide registrants with minimal impact on the pesticide user community while still
4 providing the necessary species benefits.” FESTF Overview (March 10, 2003) (emphasis
5 added). In addition, FESTF has urged EPA to adopt special opportunities for input from
6 registrants and pesticides users in developing endangered species protections that would not be
7 available to the public.

8 16. In January 2003, EPA published an advance notice of proposed rulemaking
9 (“ANPR”) to allow EPA to engage in self-consultation with respect to pesticides that EPA
10 determines are “not likely to adversely affect” threatened or endangered species. Under current
11 regulations, FWS and NMFS must concur in any “not likely to adversely affect” determination
12 before it is final and definitive. Under a self-consultation scheme, EPA would make such
13 determinations unilaterally, eliminating any expert agency oversight. The ANPR also discusses
14 deferring to or utilizing EPA’s risk assessments for ESA consultation purposes. EPA is also
15 considering giving chemical companies special avenues for participation in the ESA compliance
16 process that are not available to the general public.

17 17. The purported rationale for such an approach is that EPA already assesses the
18 impacts of pesticides on species as part of the FIFRA process. However, EPA’s risk assessments
19 are based on science that conflicts and lags behind with the current and emerging scientific
20 literature. For example, EPA bases its assessments principally on lethal doses, but the scientific
21 literature documents significant and numerous sublethal effects at a fraction of the lethal dose.
22 Similarly, EPA’s assessments focus on a single pesticide on a crop-by-crop basis. EPA does not
23 assess the combined impacts of numerous pesticides used on a crop or the cumulative effects of
24

1 multiple applications of the same pesticides in the impacted area. EPA also lacks credible
2 methods for assessing the migration and impacts of pesticides in the urban environment where
3 runoff patterns have been drastically altered by storm drain systems and urbanization. In
4 addition, EPA rarely assesses the impacts of inert ingredients and other additives to pesticide
5 products. EPA also does not have the scientific information that FWS and NMFS have about the
6 status of threatened and endangered species, baseline conditions impacting such species, and
7 other threats to such species' survival. Both FWS and NMFS have criticized EPA's methods,
8 questioning their soundness and adequacy for these and other reasons.

9 18. FESTF has submitted written comments on EPA's ANPR forcefully endorsing the
10 relaxation of ESA consultation requirements and the oversight role of FWS and NMFS as the
11 expert fish and wildlife agencies. FESTF has had numerous opportunities to repeat these views
12 in its many secret, behind-the-scenes meetings that are neither recorded in the rulemaking docket
13 nor made public through EPA oversight of FESTF as a federal advisory committee.

14 19. EPA has established a system in which the Task Force has numerous
15 opportunities to provide its advice to and influence EPA. While EPA established these
16 arrangements for the Task Force to develop a database, EPA has failed to ensure that the Task
17 Force limits itself to technical, nonpolicy matters. Since the Task Force has begun to engage in
18 policy advocacy on endangered species and pesticide issues, EPA has taken no steps to ensure
19 that the Task Force is abiding by FACA's accountability and openness standards.

20 20. On December 2, 2003, plaintiffs sent a letter to the Administrator of EPA
21 requesting that EPA stop using the task force as a preferred source of advice on endangered
22 species policy matters. Plaintiffs have received no response from EPA to their letter. By letter
23 to EPA dated December 11, 2003, the Task Force has denied that it is a task force subject to
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1 FACA.

2 CLAIM FOR RELIEF: VIOLATION OF FACA

3 21. Plaintiffs incorporate by reference all preceding paragraphs.

4 22. The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, requires
5 agencies, like EPA, to comply with FACA when establishing or utilizing a federal advisory
6 committee.

7 23. FACA defines “advisory committee” to include a task force that is established or
8 utilized by a federal agencies in the interest of obtaining advice or recommendations for one or
9 more agencies. 5 U.S.C. App. 2, § 3(2).

10 24. EPA is an agency under FACA. 5 U.S.C. App. 2, § 3(3).

11 25. EPA established a special arrangement with the Task Force based on the Task
12 Force’s commitment to develop an information management system containing endangered
13 species data. Over at least the past year, the Task Force has rendered advice to EPA and other
14 federal agencies on endangered species and pesticide policy matters. Environmental groups,
15 such as plaintiffs, have a direct interest in and would be adversely affected by such weakening of
16 endangered species protections. Once the Task Force began advocating for particular
17 endangered species and pesticide policies, EPA had an obligation to bring its utilization of the
18 Task Force into compliance with FACA.

19 26. Under FACA, an advisory committee cannot meet or take any action until an
20 advisory committee charter defining, inter alia, the committee’s objective, activities, and duties,
21 has been prepared and filed as set out in FACA § 9(c). EPA has not filed a charter authorizing
22 the Task Force to use its special access to EPA in order to render policy advice.

23 27. Under FACA, advisory committee meetings must be open to the public subject to
24 limited exemptions, interested persons must be permitted to attend and file statements with an

1 advisory committee, minutes must be kept of each advisory committee meeting, advisory
2 committee records must be available for public inspection and copying, and a designated federal
3 official must approve the convening and attend each advisory committee meeting. FACA, 5
4 U.S.C. App. 2, § 10(a), (b), (c), (e), and (f). EPA has taken no steps to ensure that the Task
5 Force’s proceedings and records comply with these public participation requirements of FACA.

6 28. Under FACA, federal agencies, like EPA, have an obligation to ensure that “the
7 membership of the advisory committee . . . be fairly balanced in terms of the points of view
8 represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, §
9 5(b)(2), (c). Federal agencies must also takes steps to ensure that “the advice and
10 recommendations of the advisory committee will not be inappropriately influenced by . . . any
11 special interest.” Id. § 5(b)(3), (c).

12 29. Every member of the Task Force is a representative of an agro-chemical
13 company. Every member of the Task Force has an economic interest in the sale of pesticides
14 that may harm threatened or endangered species. The Task Force has no representatives of
15 environmental organizations or others who advocate for protection of endangered species from
16 pesticides. Because the Task Force lacks representatives of environmental organizations that
17 seek to promote endangered species protection, it lacks the balance required by FACA, 5 U.S.C.
18 App. 2, § 5(b)-(c), to render advice on endangered species and pesticide policy matters.

19 30. By allowing the Task Force to use its special access to EPA to render advice on
20 endangered species and pesticide policy matters, EPA has acted and is acting arbitrarily,
21 capriciously, and not in accordance with FACA, 5 U.S.C. App. 2, § 5(b)-(c), in violation of the
22 Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

23 PRAYER FOR RELIEF

24 WHEREFORE, plaintiffs request that this Court:

1 A. Declare that the EPA has acted arbitrarily and capriciously and in violation of
2 FACA by utilizing the Task Force for policy advice on endangered species and pesticide policy
3 matters without chartering the Task Force under FACA, without ensuring that the Task Force’s
4 meetings are open to the public, that its records are available for public inspection, and that
5 minutes are kept of Task Force meetings, and without ensuring that “the membership of the
6 federal advisory committee . . . be fairly balanced in terms of the points of view represented and
7 the functions to be performed.” 5 U.S.C. App. 2, § 5(b)(2), (c).

8 B. Enjoin EPA from providing nonpublic information to or meeting with the Task
9 Force on endangered species or pesticide policy matters until EPA has chartered the Task Force
10 under FACA and complied with FACA’s open meeting, public record, and balanced
11 representation requirements.

12 C. Direct EPA to remedy its past violations of FACA by: (1) providing to plaintiffs
13 all otherwise nonpublic information provided to the Task Force pertaining to endangered species
14 and pesticide policy matters; (2) informing plaintiffs of the advice provided by the Task Force on
15 endangered species and pesticide policy matters; and (3) affording plaintiffs an opportunity to
16 evaluate such advice and offer their own advice on such matters.

17 D. Award plaintiffs their costs of litigation, including reasonable attorney and expert
18 witness fees.

19 E. Grant plaintiffs such further and additional relief as the Court may deem just and
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23
24

1 proper.

2 Respectfully submitted this 15th day of January, 2004.

3
4 /s/ Patti Goldman

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