

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Center for Biological Diversity,

No. CV-22-00090-TUC-JCH

10 Plaintiff,

ORDER

11 v.

12 United States Fish and Wildlife Service, et
13 al.,

14 Defendants.

15 In this case, Plaintiff Center for Biological Diversity (the "Center") is suing
16 Defendants United States Fish & Wildlife Service ("FWS" or the "Service") and Debra
17 Haaland in her official capacity as Secretary of the United States Department of the
18 Interior.¹ Plaintiff alleges Defendants have unreasonably delayed completing interagency
19 consultations on the pesticides chlorpyrifos, diazinon, carbaryl, methomyl,² atrazine, and
20 simazine in violation of the Endangered Species Act ("ESA") and the Administrative
21 Procedure Act ("APA"). Before the Court are the parties' cross-motions for summary
22 judgment (Docs. 34, 38). The issues are fully briefed (Docs. 41, 42), and oral argument
23 occurred on December 12, 2024, *see* Doc. 46.

24 Plaintiff's Motion for Summary Judgment asked the Court to impose a January 15,
25 2025 deadline for FWS to complete consultation on all six pesticides. Defendants' Cross-

26 ¹ Debra Haaland is no longer the Secretary of the Interior. Pursuant to Federal Rule of Civil
27 Procedure 25(d), Doug Burgum is automatically substituted in her place.

28 ² FWS completed interagency consultation on methomyl on December 30, 2024, according
to its estimated timeline. *See* Doc. 47. Plaintiff's request for a court-imposed deadline for
the methomyl consultation is now moot. The Court includes references to the methomyl
timeline for context only.

1 Motion for Summary Judgment offers a series of dates by which they estimate FWS could
2 realistically complete the consultations: March 31, 2025, for carbaryl; March 31, 2026, for
3 atrazine and simazine; and September 30, 2028, for chlorpyrifos and diazinon. Plaintiff's
4 Response and Reply asks the Court to order FWS to adhere to its estimated timelines for
5 carbaryl, atrazine, and simazine. But Plaintiff disagrees with Defendants' September 30,
6 2028 completion date for the chlorpyrifos and diazinon consultations. Plaintiff asks the
7 Court to instead order FWS to complete the chlorpyrifos and diazinon consultations by
8 June 30, 2027. For the reasons set forth below, the Court will grant in part Plaintiff's Motion
9 for Summary Judgment, deny Defendants' Cross-Motion for Summary Judgment, and
10 order FWS to complete consultation on each pesticide according to Defendants' proposed
11 timelines.

12 **I. Background**

13 **A. Statutory and Regulatory Framework**

14 This case arises out of FWS's obligations under Section 7 of the ESA. The ESA is
15 "the most comprehensive legislation for the preservation of endangered species ever
16 enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). It was enacted
17 to "halt and reverse the trend towards species extinction, whatever the cost." *Id.* at 184.
18 Pertinent here is Section 7(a)(2), which requires federal agencies to,

19 in consultation with and with the assistance of the Secretary, insure that any
20 action authorized, funded, or carried out by such agency . . . is not likely to
21 jeopardize the continued existence of any endangered species or threatened
22 species or result in the destruction or adverse modification of [critical] habitat
23 of such species

24 16 U.S.C. § 1536(a)(2). FWS and National Marine and Fisheries Service ("NMFS") share
25 responsibility for administering the ESA and serve as the consulting agencies for
26 endangered or threatened species under their respective jurisdictions. *See* 50 C.F.R.
27 § 401.02.

28 Relevant here, if a federal agency determines a prospective agency action "may
affect a listed species or habitat" within FWS's jurisdiction, the agency must initiate formal
consultation with FWS. *See* 50 C.F.R. § 402.14(a). The agency, here the Environmental

1 Protection Agency ("EPA"), makes this determination by conducting a biological
2 evaluation ("BE").³ To complete formal consultation, FWS responds to the BE with a
3 biological opinion ("BO") establishing the likelihood of jeopardy to protected species and
4 habitats and suggesting reasonable alternatives or cautionary measures to reduce adverse
5 impact. 16 U.S.C. § 1536(b)(3)(A).

6 When an agency initiates formal consultation, it must include a description of the
7 proposed action, providing sufficient detail to allow FWS to "assess the effects of the action
8 on listed species and critical habitat." 50 C.F.R. § 402.14(c)(1)(i). The "effects of the
9 action" are those consequences that are "reasonably certain to occur." 50 C.F.R. § 402.02.
10 The agency must provide FWS with "the best scientific and commercial data available or
11 which can be obtained during the consultation for an adequate review of the effects that an
12 action may have upon listed species or critical habitat." 50 C.F.R. § 402.14(d); *see also* 16
13 U.S.C. § 1536(a)(2) ("In fulfilling the requirements of this paragraph each agency shall use
14 the best scientific and commercial data available.").

15 Section 7 requires consultations to conclude within 90 days of initiation or "within
16 such other period of time as is mutually agreeable" between the agency and FWS.
17 16 U.S.C. § 1536(b)(1)(A). If the prospective action involves a permit or license applicant,
18 the extension cannot exceed 150 days from the consultation's initiation unless FWS and
19 the agency obtain the applicant's consent for the extension. 16 U.S.C. § 1536(b)(1)(B).
20 FWS can request an extension when it "determines that additional data would provide a
21 better information base from which to formulate a biological opinion." *Id.*

22 If the parties agree to extend formal consultation,

23 the Federal agency shall obtain, to the extent practicable, that data which can
24 be developed within the scope of the extension. . . . The Service's request for
25 additional data is not to be construed as the Service's opinion that the Federal
26 agency has failed to satisfy the information standard of section 7(a)(2) of the
Act. If no extension of formal consultation is agreed to, the Director will
issue a biological opinion using the best scientific and commercial data
available.

27
28 ³ U.S. Env't Prot. Agency, *Revised Method for National Level Listed Species Biological
Evaluations of Conventional Pesticides*, 6 (Mar. 12, 2020), [https://www3.epa.gov/
pesticides/nas/revised/revised-method-march2020.pdf](https://www3.epa.gov/pesticides/nas/revised/revised-method-march2020.pdf).

1 *Id.*

2 **B. Factual Background⁴**

3 This dispute involves Defendants' completion (or lack thereof) of BOs for six
 4 pesticides: chlorpyrifos, diazinon, carbaryl, methomyl, atrazine, and simazine. Doc. 34
 5 at 2.⁵ Chlorpyrifos, diazinon, carbaryl, and methomyl are insecticides used as active
 6 ingredients in pesticide products. Doc. 35 ¶¶ 4, 34; Doc. 39 ¶¶ 4, 34. Atrazine and simazine
 7 are herbicides used as active ingredients in pesticide products. Doc. 35 ¶ 53; Doc. 39 ¶ 53.
 8 Chlorpyrifos, diazinon, carbaryl, and methomyl can be neurotoxic to animals. *See* Doc. 35
 9 ¶¶ 6, 35; Doc. 39 ¶¶ 6, 35. Atrazine and simazine can "vary from slightly to highly toxic to
 10 animals," Doc. 35 ¶ 54, though additional factors (e.g., level of exposure) impact whether
 11 an animal may experience toxic effects, Doc. 39 ¶ 54. Consequences of animal exposure
 12 to these pesticides can include impairment of behaviors, reproduction, and growth;
 13 inhibition of normal brain and muscle function; loss of food sources and symbiotic
 14 partners; and eventually, mortality. Doc. 35 ¶¶ 7, 35, 54; Doc. 39 ¶¶ 7, 35, 54. Though their
 15 authorized uses vary, these pesticides are often applied on agricultural crops, golf courses
 16 and other turf, and feed and food crops, among other surfaces. Doc. 35 ¶¶ 42–43, 50, 59,
 17 62; Doc. 39 ¶¶ 42–43, 50, 59, 62. In its BEs initiating consultation, the EPA found that,
 18 based on the then-current pesticide registrations, thousands of ESA-protected species and
 19 habitats may be susceptible to harm from these pesticides. *See* Doc. 35 ¶¶ 9, 13, 36, 39, 55,
 20 57; Doc. 39 ¶¶ 9, 13, 36, 39, 55, 57; *see also* AR 0011815–16, 0012140–41, 0012322,
 21 0012374, 0012577, 0012684.

22 The EPA initiated registration review⁶ for diazinon in June 2008, Doc. 35 ¶ 87;

23 ⁴ The parties agree on the material facts. *Compare* Doc. 35, *with* Doc. 39. Prior to filing
 24 cross motions for summary judgment, the parties cooperated in filing an administrative
 25 record. *See* Doc. 40. Plaintiff's Motion for Summary Judgment preemptively argues that
 26 because there has been no final agency action, the Court's review of Plaintiff's unreasonable
 27 delay claims is not limited to the administrative record. Doc. 34 at 24–25. Defendants do
 28 not object to any of Plaintiff's evidence, *see generally* Docs. 38, 39. At oral argument, the
 parties agreed the facts are undisputed and the Court has everything it needs to issue a
 ruling. Dec. 12, 2024 Oral Arg. Tr. 4:21–6:1. As such, the Court will base its review on
 both the administrative record and the declarations attached to the motions for summary
 judgment.

⁵ All citations are to the ECF document page numbers unless otherwise specified.

⁶ Registration review is a process required under the Federal Insecticide, Fungicide, and

1 Doc. 39 ¶ 87, chlorpyrifos in March 2009, Doc. 35 ¶ 89; Doc. 39 ¶ 89, carbaryl and
2 methomyl in September 2010, Doc. 35 ¶¶ 128, 130; Doc. 39 ¶¶ 128, 130, and atrazine and
3 simazine in June 2013, Doc. 35 ¶¶ 150, 152, Doc. 39 ¶¶ 150, 152; *see also* AR 0021709–
4 12, 0021720–22, 0022344–47, 0022376–78. In July 2014, the EPA, FWS, and NMFS
5 agreed to complete pilot nation-wide consultations⁷ on chlorpyrifos and diazinon
6 tentatively by December 2017 and carbaryl and methomyl tentatively by December 2018.
7 Doc. 35 ¶ 78; Doc. 39 ¶ 78; *see also* AR 0022426–27. In February 2016, the agencies
8 reaffirmed these deadlines and agreed to complete consultations on atrazine and simazine
9 by December 2022. Doc. 35 ¶ 80; Doc. 39 ¶ 80; *see also* AR 0022474, 0022488.

10 FWS transmitted its final BO and completed consultation on methomyl on
11 December 30, 2024. *See* Doc. 47. FWS has yet to complete formal consultation on
12 chlorpyrifos, diazinon, carbaryl, atrazine, or simazine. To analyze the progression of each
13 consultation, the Court will group the pesticides into three categories: chlorpyrifos and
14 diazinon, carbaryl and methomyl, and atrazine and simazine.

15 Chlorpyrifos and Diazinon

16 In January 2017, the EPA initiated formal consultation with FWS by transmitting
17 BEs on chlorpyrifos and diazinon. Doc. 35 ¶¶ 9, 13; Doc. 39 ¶¶ 9, 13; *see also*
18 AR 0011815–16, 0012140–41. In the BEs, the EPA found the then-registered uses for
19 chlorpyrifos were "likely to adversely affect" 97% of ESA-protected species and 98% of
20 ESA critical habitats. Doc. 35 ¶ 9; Doc. 39 ¶ 9; *see also* AR 0011815–16. The EPA also
21 found the then-registered uses of diazinon were "likely to adversely affect" 78% of ESA-
22 protected species and 48% of critical habitats. Doc. 35 ¶ 13; Doc. 39 ¶ 13; *see also*
23 AR 0012140–41. These effects determinations were based on the pesticides' maximum
24 use authorized by the EPA and do not necessarily reflect how the pesticides are used in

25 _____
26 Rodenticide Act ("FIFRA") during which the EPA reevaluates a pesticide's authorization to
27 be sold or distributed in the United States. *See* 7 U.S.C. § 136a(a), (g). The initiation of
28 registration review signals a prospective agency action triggering the EPA's duties under
the ESA. *See* Doc. 34 at 20.

⁷ Prior to this agreement, formal consultation under the ESA had been limited to evaluating
impact of prospective agency action on a species-by-species basis. *See* Doc. 39 ¶ 78. The
consultations here involve all species and geographical areas under FWS's jurisdiction.

1 practice. *See* Doc. 39 ¶¶ 11, 15; *see also* AR 0014883.

2 In an October 2017 draft BO on chlorpyrifos, FWS preliminarily concluded the
3 uses described in the chlorpyrifos BE would jeopardize 88% of ESA-protected species and
4 adversely modify 23% of critical habitats. Doc. 35 ¶ 11; Doc. 39 ¶ 11; AR 0022546. In an
5 October 2017 draft BO on diazinon, FWS preliminarily concluded the uses described in
6 the diazinon BE would jeopardize 12% of ESA-protected species and adversely modify
7 3% of critical habitats. Doc. 35 ¶ 15; Doc. 39 ¶ 15; AR 0022546. During internal review,
8 FWS became concerned about the legal consequences of issuing BOs analyzing the
9 pesticides' maximum authorized use and not their actual use. Doc. 39 ¶¶ 11, 15. Because
10 the ESA implementing regulations require FWS to analyze those effects that are
11 "reasonably certain to occur," FWS determined it needed additional usage data from the
12 EPA. *Id.* (quoting 50 C.F.R. § 402.02); *see also* Doc. 38 at 12. In December 2017, pursuant
13 to a court-ordered deadline, NMFS issued a final BO on chlorpyrifos and diazinon. Doc. 35
14 ¶ 109; Doc. 39 ¶ 109. The EPA provided FWS with updated usage information on
15 chlorpyrifos and diazinon in 2018. Doc. 38-1 ¶ 14. FWS has not issued final BOs on
16 chlorpyrifos or diazinon to date. Doc. 35 ¶ 127; Doc. 39 ¶ 127.

17 There have been several updates to how chlorpyrifos and diazinon are used in
18 practice since the EPA initiated consultation in 2017. *See generally* Doc. 39 ¶¶ 10–33. In
19 August 2021, the EPA issued a final rule revoking all use of chlorpyrifos on food.⁸ Doc. 35
20 ¶ 114; Doc. 39 ¶ 114. In June 2022, NMFS updated its BO on chlorpyrifos and diazinon,
21 Doc. 35 ¶ 119; Doc. 39 ¶ 119; *see also* AR 0012960–4344, resulting in changed
22 registrations for the pesticides, Doc. 38-1 ¶ 20. In October 2022, diazinon registrants
23 voluntarily cancelled registrations for nine products. Doc. 35 ¶ 122; Doc. 39 ¶ 122. In 2023,

24 _____
25 ⁸ In response to this rule, FWS "suspend[ed] work on development of the chlorpyrifos
26 biological opinion" pending the EPA's final decision on approved uses. AR 0012959. The
27 memorandum announcing the suspension stated FWS expected that "with the announced
28 changes, EPA will complete a new risk assessment with the revised uses and subsequently
reinitiate consultation at which point [FWS] would resume work on the biological opinion
using EPA's revised risk assessment." *Id.* The rule was subsequently vacated by court order
in November 2023. Doc. 35 ¶ 123; Doc. 39 ¶ 123. In response, the EPA confirmed in
December 2023 that all chlorpyrifos tolerances would automatically resume effect. Doc. 35
¶ 124; Doc. 39 ¶ 124.

1 diazinon registrants and the EPA reached an agreement for additional mitigation measures.
2 Doc. 8-1 ¶ 29; *see also* AR 0014345–436, 0014458, 0014472–76.

3 In March 2020, the EPA revised the methodology used for its BEs to analyze the
4 effects of the action reasonably certain to occur. *See* Doc. 39 ¶ 3; Doc. 38-1 ¶ 13. FWS
5 plans to use information produced by this new methodology in its chlorpyrifos and diazinon
6 BOs. Doc. 39 ¶ 3. Pursuant to a court order in another case with Plaintiff, the EPA expects
7 to update its strategies to address vulnerable species that may be affected by insecticides
8 ("insecticide strategies") by March 31, 2025. Doc. 38-1 ¶¶ 34–35; *see also* AR 0021511–
9 22. The EPA is also currently completing a new risk assessment for diazinon, the results
10 of which are expected in summer 2026. Doc. 38-1 ¶ 26. Accordingly, the EPA expects to
11 provide FWS with supplemental information to its chlorpyrifos and diazinon BEs by March
12 31, 2027. *See, e.g.*, Doc. 39 ¶ 3. Based on the EPA's timeline, FWS expects to complete
13 the chlorpyrifos and diazinon consultations by September 30, 2028. Doc. 38-1 ¶¶ 35, 57.

14 Carbaryl and Methomyl

15 In March 2021, the EPA initiated formal consultation with FWS with BEs on
16 carbaryl and methomyl. Doc. 35 ¶¶ 36, 39; Doc. 39 ¶¶ 36, 39; *see also* AR 0012322,
17 0012374. The carbaryl BE reported that carbaryl was "likely to adversely affect" 91% of
18 ESA-protected species and 93% of critical habitats. Doc. 35 ¶ 36; Doc. 39 ¶ 36; *see also*
19 AR 0012322. The methomyl BE determined that methomyl was "likely to adversely affect"
20 61% of ESA-protected species and 36% of critical habitats. Doc. 35 ¶ 39; Doc. 39 ¶ 39;
21 *see also* AR 0012374.⁹ In ESA Section 7(b) letters to extend formal consultation, FWS
22 requested the EPA provide it with additional usage data among other information.
23 Doc. 38-1 ¶¶ 47–48; AR 0012723–24, 0024353–54. The EPA agreed to the extension, and
24 the agencies obtained the required consent from the registrants. *Id.*

25 NMFS issued a BO for carbaryl and methomyl in January 2024, resulting in changed
26 registrations for both pesticides that are likely to have mitigated their effects.¹⁰ Doc. 35

27 ⁹ Updated information resulted in "likely to adversely affect" determinations for 1,020
28 species and 281 critical habitats, slightly less than the number of "likely to adversely affect"
determinations in the original 2021 BE. Doc. 39 ¶ 39.

¹⁰ Additional label changes to both pesticides since 2021 have also likely contributed to

1 ¶ 147; Doc. 39 ¶ 147; *see also* AR 0023558–73, 0024089–96. In July 2024, FWS released
 2 its draft methomyl BO. Doc. 39 ¶ 84; *see also* AR 0040181–402. On December 30, 2024,
 3 FWS transmitted its final methomyl BO to the EPA. Doc. 47. On December 26, 2024, FWS
 4 issued its draft carbaryl BO. *Id.* FWS now expects to complete consultation on carbaryl by
 5 March 31, 2025.¹¹ Doc. 38-1 ¶¶ 53, 57.

6 Atrazine and Simazine

7 In November 2021, the EPA initiated consultation with FWS with BEs on atrazine
 8 and simazine, finding atrazine was "likely to adversely affect" 56% of ESA-protected
 9 species and 41% of critical habitats,¹² and simazine was "likely to adversely affect" 55%
 10 of ESA-protected species and 40% of critical habitats. Doc. 35 ¶¶ 55, 57; Doc. 39 ¶¶ 55,
 11 57; *see also* AR 0012577, 0012684. In ESA Section 7(b) letters to extend formal
 12 consultation, FWS requested the EPA provide it with additional usage data among other
 13 information. Doc. 38-1 ¶¶ 47, 54; *see also* AR 0012756–68. The EPA agreed to the
 14 extension, and the agencies obtained the required consent of the pesticide registrants. *Id.*
 15 The EPA is currently providing the updated information on a rolling basis, Doc. 38-1 ¶ 49,
 16 and FWS expects to complete consultation on atrazine and simazine by March 31, 2026.¹³
 17 Doc. 38-1 ¶¶ 56, 57.

18 Relevant Context

19 While the formal consultations on these six pesticides have been pending, FWS has
 20 concluded consultation on three other pesticides. *See* Doc. 35 ¶ 84; Doc. 39 ¶ 84; *see also*
 21 AR 0014883–5213, 0015709–877. Along with chlorpyrifos and diazinon, the EPA also
 22 initiated consultation on malathion, another similar pesticide, in January 2017. Doc. 35
 23 ¶¶ 93–94; Doc. 39 ¶¶ 93–94. After its initial BE, the EPA updated the usage information
 24 on malathion in 2018 and started to provide additional information pursuant to its revised

25 _____
 mitigation. *See* Doc. 39 ¶ 40; Doc. 38-1 ¶¶ 49–51.

26 ¹¹ The EPA and the respective pesticide registrants have agreed to these deadlines. *See*
 Doc. 35 ¶¶ 137–39; Doc. 39 ¶¶ 137–39.

27 ¹² Since the EPA transmitted its BE, there have been label changes for atrazine, likely
 resulting in some mitigation. Doc. 39 ¶ 55.

28 ¹³ The EPA and the respective pesticide registrants have agreed to this deadline. *See*
 Doc. 35 ¶¶ 165–66; Doc. 39 ¶¶ 165–66.

1 methodology in 2020. *See* Doc. 38-1 ¶ 14; *see also* AR 0014792–828, 0014898–99,
2 0021347–405. In 2018, malathion became the subject of litigation between the parties in
3 another case, resulting in FWS stipulating to a deadline and issuing its malathion BO in
4 February 2022. *See* Doc. 35 ¶ 116; Doc. 39 ¶ 116; *see also* *Ctr. for Env't Health v. Regan*,
5 No. 4:18-cv-03197-SBA (N.D. Cal. Jan. 4, 2022). The malathion BO contained 19,000
6 pages of analysis. Doc. 38-1 ¶ 14. FWS also issued BOs for herbicides Enlist and Enlist
7 Duo in November 2023. Doc. 35 ¶ 84; Doc. 39 ¶ 84; *see also* AR 0014883–5213,
8 0015709–877.

9 **II. Legal Standards**

10 **A. Review Under the APA**

11 The APA provides that all federal agencies must conclude matters presented to them
12 "within a reasonable time." 5 U.S.C. § 555(b). Federal courts have jurisdiction to review
13 mandatory agency action and "compel agency action unlawfully withheld or unreasonably
14 delayed." 5 U.S.C. § 706(1). Under the APA, a court may compel delayed agency action
15 when the agency "(1) has 'a clear, certain, and mandatory duty' and (2) has unreasonably
16 delayed in performing such duty." *Vaz v. Neal*, 33 F.4th 1131, 1136 (9th Cir. 2022)
17 (citations omitted) (quoting *Plaskett v. Wormuth*, 18 F.4th 1072, 1082 (9th Cir. 2021)).¹⁴
18 The issuance of equitable relief under section 706 of the APA "is an extraordinary remedy
19 and [the Court] require[s] similarly extraordinary circumstances to be present before [it]
20 will interfere with an ongoing agency process." *Biodiversity Legal Found. v. Norton*, 285
21 F. Supp. 2d 1, 12 (D.C. Cir. 2003) (alterations in original) (quoting *Cnty. Nutrition Inst.*
22 *v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985)).

23 **B. Summary Judgment**

24 Summary judgment is required if "the pleadings, depositions, answers to
25 interrogatories, and admissions on file, together with the affidavits, if any, show that there
26 is no genuine issue as to any material fact and that the moving party is entitled to judgment

27 _____
28 ¹⁴ Defendants did not contest that FWS has a clear and certain duty to complete the
pesticide consultations under 16 U.S.C. § 1536. Accordingly, the Court will only analyze
unreasonable delay.

1 as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is a particularly appropriate
 2 tool for resolving claims challenging agency action. *See Occidental Eng'g Co. v. INS*, 753
 3 F.2d 766, 770 (9th Cir. 1985).

4 **III. Analysis**

5 Plaintiff brings six counts alleging FWS has violated Section 555(b) of the APA by
 6 unreasonably delaying completing consultation on six pesticides, justifying judicial
 7 intervention under APA Section 706(1). "[T]here is no *per se* rule as to what amount of
 8 time constitutes undue delay." *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d
 9 147, 184–85 (D.C. Cir. 2014). Instead, the Court engages in a fact-specific inquiry to
 10 determine if agency action has been unreasonably delayed. *See Al Otro Lado v. Exec. Off.*
 11 *for Immigr. Rev.*, 120 F.4th 606, 622 (9th Cir. 2024). To aid in this determination, the Ninth
 12 Circuit has adopted the "TRAC" balancing test. *Telecomms. Rsch. & Action Ctr. v. FCC*,
 13 750 F.2d 70, 79–80 (D.C. Cir. 1984) ("TRAC"); *see Vaz*, 33 F.4th at 1137 (9th Cir. 2022).

14 The test looks at six factors ("the TRAC Factors"):

- 15 (1) the time agencies take to make decisions must be governed by a "rule of
 reason";
- 16 (2) where Congress has provided a timetable or other indication of the speed
 17 with which it expects the agency to proceed in the enabling statute, that
 statutory scheme may supply content for this rule of reason;
- 18 (3) delays that might be reasonable in the sphere of economic regulation are
 19 less tolerable when human health and welfare are at stake;
- 20 (4) the court should consider the effect of expediting delayed action on
 agency activities of a higher or competing priority;
- 21 (5) the court should also take into account the nature and extent of the
 interests prejudiced by delay; and
- 22 (6) the court need not find any impropriety lurking behind agency lassitude
 in order to hold that agency action is "unreasonably delayed."

23 *TRAC*, 750 F.2d at 80 (citations and quotations omitted).¹⁵

24 The relevant factors here inform three core considerations: first, whether FWS's
 25 delay in completing consultation on the pesticides violates the rule of reason; second, the
 26 extent of the potential harm caused and interests prejudiced by the delay; and third, the

27
 28 ¹⁵ Because the D.C. Circuit has "more frequently dealt with unreasonably delayed
 rulemakings," the Court will look to D. C. Circuit authority in explaining and applying the
TRAC factors. *See Cmty. Voice v. EPA*, 878 F.3d 779, 788 (9th Cir. 2017).

1 impact of compelling agency action on other agency priorities. *See Milligan v. Pompeo*,
2 502 F. Supp. 3d 302, 317 (D.D.C. 2020) (first and second factors often considered
3 together); *In re Ctr. for Biological Diversity*, 53 F.4th 665, 671 (D. C. Cir. 2022) (third and
4 fifth factors often considered together). The Court will address these three inquiries in turn.

5 **A. The Rule of Reason**

6 The first *TRAC* factor, which provides that the time it takes for an agency to act
7 must be governed by a "rule of reason," is the "'most important' factor." *Vaz*, 33 F.4th
8 at 1138 (quoting *Cnty. Voice*, 878 F.3d at 786). There is no per se rule on what is
9 reasonable, but courts have repeatedly emphasized "a reasonable time for agency action is
10 typically counted in weeks or months, not years." *Id.* (internal quotations omitted) (quoting
11 *Nat. Res. Def. Council v. EPA*, 956 F.3d 1134, 1139 (9th Cir. 2020)). The second *TRAC*
12 factor, whether Congress has provided a timetable for action, can also inform a
13 reasonability inquiry. *TRAC*, 750 F.2d at 80. Accordingly, these factors are typically
14 considered together. *Milligan*, 502 F. Supp. at 317.

15 *1. Years-Long Delay*

16 Plaintiff argues FWS's years-long delay in completing consultation on each of the
17 pesticides is unreasonable given FWS's informal involvement years before the EPA
18 initiated formal consultation, its failure to release draft opinions created over seven years
19 ago, and that its sister agency, NMFS, has already completed consultation on four of the
20 six pesticides at issue. Doc. 34 at 28–29. The EPA initiated registration review under
21 FIFRA for diazinon and chlorpyrifos in 2008 and 2009 respectively, carbaryl and
22 methomyl in 2010, and atrazine and simazine in 2013. Doc. 35 ¶¶ 87, 89, 128, 130, 150,
23 152. Registering a pesticide is an agency action subject to the ESA consultation process.¹⁶
24 This means FWS has been or should have been aware of the potential need for formal
25 consultation on each of these pesticides for over 10 years but has yet to act. *See* Doc. 35
26 ¶ 86. This is despite the EPA and FWS's 2014 and 2016 agreements to complete the

27
28 ¹⁶ *See Pesticide Registration and Endangered Species Consultation*, U.S. Fish & Wildlife
Service, <https://www.fws.gov/library/collections/pesticide-registration-and-endangered-species-act-consultations>.

1 consultations for chlorpyrifos and diazinon, carbaryl and methomyl, and atrazine and
2 simazine by the end of 2017, 2018, and 2022 respectively.¹⁷ Doc. 35 ¶¶ 78, 80.

3 Even disregarding the informal notice, formal consultation has been pending before
4 FWS on these pesticides for at least three and a half years.¹⁸ See Doc. 35 ¶¶ 9, 13, 55, 57;
5 Doc. 39 ¶¶ 9, 13, 55, 57. FWS gives various reasons these consultations have not been
6 completed, including changes to pesticide labels, a need for updated or additional
7 information, and a lack of resources in the face of other priorities. See generally Doc. 38
8 at 20–28. It seems certain circumstances beyond Defendants' control have contributed to
9 FWS's failure to complete these consultations. But these circumstances do not excuse the
10 lengthy delays presented here.

11 Defendants cite several cases where courts have declined to find similarly lengthy
12 timelines unreasonable, but none justify endorsing the years-long delay here. See *In re*
13 *UMW Int'l Union*, 190 F.3d 545, 546, 556 (D. C. Cir. 1999) (finding that ordering an
14 agency to conclude a rulemaking could "do more harm than good" where it would displace
15 other rulemakings the parties agreed were of greater significance to health and safety);
16 *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099, 1101–02
17 (D. C. Cir. 2003) (reversing an order directing agency action because the district court did
18 not consider "'competing priorities' for limited resources," and there was no reason to upset
19 the BIA's "first-come procedure"); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455
20 (D. C. Cir. 1998) (declining to find unreasonable delay and order the "immediate
21 imposition" of a drastic remedy that may have unintended consequences where Congress
22 contemplated the development rather than implementation of a plan within the statutory
23 timeframe); *Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1 (D.D.C. 2003)
24 (declining to find a four-year delay unreasonable where there was no express statutory

25 ¹⁷ Completion of formal consultation requires the EPA to complete initiating BEs. The
26 EPA did not release its BE for carbaryl and methomyl until years after the agencies had
27 agreed to complete consultation, but the BEs for chlorpyrifos, diazinon, atrazine and
28 simazine were released a year or more prior to the dates by which the agencies had agreed
to complete consultation. See Doc. 35 ¶¶ 11, 13, 36, 39, 55, 57.

¹⁸ EPA initiated formal consultation on atrazine and simazine about three and a half years
ago, carbaryl and methomyl about four years ago, and chlorpyrifos and diazinon about
eight years ago.

1 deadline, "reflect[ing] a general congressional priority" for other duties towards which the
2 agency was directing resources); *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp.
3 3d 147, 178, 186 (D.C. Cir. 2014) (declining to find NMFS's delay in updating BOs on
4 lease sales after the Deep Water Horizon oil spill unreasonable because they were a
5 "narrow, circumscribed event in the [statutory scheme] that [would] have minimal impact
6 on endangered species," and it was "unclear how any delay in NMFS's BO would harm the
7 human environment").

8 This case is distinguishable from the cases above. These BOs involve nationwide
9 consultations on pesticides with the potential to cause extensive harm. The Section 7
10 consultations are the "heart of the ESA," *W. Watersheds Project v. Kraayenbrink*, 632 F.3d
11 472, 495 (9th Cir. 2011), and FWS does not allege other consultations of greater
12 significance are pending. There seem to be few competing priorities that would justify
13 letting nationwide consultations that, based on the only data available could impact most
14 protected species and habitats, languish for around eight years. Further, as discussed more
15 extensively below, the Court is not reordering agency priorities or requiring FWS to act
16 any sooner than Defendants believe is necessary to produce sound BOs. The Court is
17 simply directing FWS to abide by its own proffered timelines.

18 2. *Best Available Evidence*

19 Defendants justify FWS's delay by detailing the ways the registrations and usage
20 information have changed for chlorpyrifos and diazinon since the EPA initiated
21 consultation, necessitating updated information. *See* Doc. 38 at 20–21.¹⁹ For carbaryl,

22 ¹⁹ At oral argument, Defendants argued "the clock has reset" on the chlorpyrifos and
23 diazinon consultation timelines. *See* Dec. 12, 2024, Oral Arg. Tr. 36:15–19. According to
24 Defendants, because chlorpyrifos and diazinon have new proposed actions, FWS's
25 deadlines "are not triggered until [it] knows what [it] is consulting on." *Id.* Defendants cite
26 no case law or statute to support their argument that registration changes over the eight
27 years they have failed to complete consultation abrogates their statutory duty to perform
28 those consultations. Defendants further fail to pinpoint a specific event that triggered a
reset. The only evidence the Court has found is a 2021 FWS internal memorandum
suspending development of the chlorpyrifos BO. *See* AR 0012959. The memorandum was
issued in response to an EPA rule revoking all tolerance for use of chlorpyrifos on food.
See id. Per the memorandum, FWS anticipated the EPA would "complete a new risk
assessment with the revised [chlorpyrifos] uses and subsequently reinstate consultation."
Id. The EPA's rule revoking all tolerance for use of chlorpyrifos on food was overturned
by court order in November 2023. *See* Doc. 35 ¶¶ 123–24; Doc. 39 ¶¶ 123–24. It is unclear

1 atrazine, and simazine, FWS emphasizes its need for "essential" additional information.
2 Doc. 38 at 21–22. Defendants are correct that the ESA's implementing regulations provide
3 that "[t]he Federal agency requesting formal consultation shall provide the Service with the
4 best scientific and commercial data available or which can be obtained during
5 consultation." 50 C.F.R. § 402.14(d). Further, "[w]hen the Service determines that
6 additional data would provide a better information base from which to formulate a
7 biological opinion, the Director may request an extension of formal consultation and
8 request that the federal agency obtain additional data to determine how or to what extent
9 the action may affect the listed species or critical habitat." 50 C.F.R. § 402.14(f).

10 The "best available evidence" requirement does not, however, require or authorize
11 unlimited delay in pursuit of the most up-to-date data. "The purpose of the best available
12 evidence standard is to prevent an agency from basing its action on speculation and
13 surmise." *San-Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 995 (9th
14 Cir. 2015). This does not mean an agency must "conduct new tests or make decisions on
15 data that does not yet exist." *Id.* Instead, an agency complies with the standard "so long as
16 it does not ignore available studies." *Id.*; *see also Desert Survivors v. U.S. Dep't of Interior*,
17 321 F. Supp. 3d 1011, 1041–41 (N.D. Cal. 2018) ("[W]here superior information is not
18 readily available, the 'best available science' requirement of the ESA does not 'insist on
19 perfection' and does not require the 'best scientific data possible.'") (quoting *Building Indus.*
20 *Ass'n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001)). Scientific findings in conservation
21 are "often necessarily made from incomplete or imperfect information." *Brower v. Evans*,

22 _____
23 if FWS ever resumed work on the BO.

24 Regardless of FWS's internal decision to suspend consultation, the need for
25 additional information does not dispense with the duty to complete consultation. *See* 50
26 C.F.R. § 402.14(f) (If the agencies agree to an extension for additional data "the Federal
27 agency shall obtain, to the extent practicable, the data which can be developed *within the*
28 *scope of the extension* The Service's request for additional data is not to be construed
as the Service's opinion that the Federal agency has failed to satisfy the information
standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to,
the Director will issue a biological opinion using the best scientific and commercial data
available."). Here, FWS has not obtained an extension for the chlorpyrifos and diazinon
consultations. Even if it had, the ability to delay consultation to await additional data is not
unlimited, and formal consultation must eventually be completed with the "best scientific
or commercial data available."

1 257 F.3d 1058, 1070 (9th Cir. 2001); *see also id.* at 1071 ("Given the best available
2 evidence standard . . . the Secretary cannot use insufficient evidence as an excuse for failing
3 to comply with the statutory requirement.").

4 Courts have previously found "arbitrary and capricious" reliance on outdated data
5 to form a BO. *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 472
6 (4th Cir. 2013) (finding an NMFS BO to be "arbitrary and capricious" where NMFS
7 "recognized that it was relying on outdated data and that it had been presented with more
8 recent data, but it chose to continue relying on the outdated data without explaining why").
9 Courts have also recognized "that an agency need not revise its action every time new data
10 or a new model is announced because doing so 'would lead to significant costs and
11 potentially endless delays in the approval process.'" *Id.* at 473 (quoting *Sierra Club v. EPA*,
12 356 F.3d 296, 308 (D.C. Cir. 2004)).

13 Defendants' claim that FWS's timeline for issuing each BO is "entirely dependent
14 on when the EPA provides the necessary supplemental information" is exaggerated. *See*
15 Doc. 42 at 20. NMFS receives the same information and BEs as FWS, *see* Dec. 12, 2024,
16 Oral Arg. Tr. 51:25–52:19, and NMFS has completed consultation on chlorpyrifos,
17 carbaryl, and methomyl, and updated its BOs on chlorpyrifos and diazinon. Doc. 35 ¶¶ 109,
18 119, 147; Doc. 39 ¶¶ 109, 119, 147. If NMFS can use the existing information to complete
19 BOs without violating the best available evidence requirement, there seems to be no reason
20 FWS cannot do the same. Section 7 provides FWS can request additional data that "*to the*
21 *extent practicable . . . can be developed within the scope of the extension.*" 50 C.F.R.
22 § 402.14(f) (emphasis added). Accordingly, the argument that FWS *must* wait for data that
23 has not yet been developed (or that might result from pending mitigation efforts and
24 updated EPA methodology) is inconsistent with the statutory requirements. It is *because*
25 Defendants have delayed action for so long that the EPA's original BEs may now be
26 obsolete. That mitigation has occurred even without consultation is no excuse for FWS's
27 continued failure to act.

28 ///

1 3. *Congressional Timetable*

2 Plaintiff points to the ESA's provision setting a default timeline and intention for
3 consultation to be completed prior to agency action as further evidence that FWS's delay
4 is unreasonable. *See* Doc. 34 at 29–33. The ESA contemplates a 90-day timeline for FWS
5 to conclude formal consultation. 16 U.S.C. § 1536(b)(1)(A). Some courts have interpreted
6 Section 7's extension provision to mean the agencies "have a great deal of discretion in
7 mutually setting their own timelines." *Oceana*, 37 F. Supp. 3d at 186. But "[t]he fact that
8 the ESA allows for extension of the consultation timeline does not mean that any and all
9 delay is reasonable." *Center for Environmental Health v. Wheeler*, 429 F. Supp. 3d 702,
10 716 (N.D. Cal. 2019). Otherwise, "delay in completing consultation [could] never be
11 unreasonable." *Id.* "To so hold would be to sanction the perpetual delay of governmental
12 obligations that are clearly mandated by law." *Id.* Here, FWS has followed the statutory
13 requirements and extended its consultations on carbaryl, atrazine, and simazine. Doc. 35
14 ¶¶ 137–39, 165–66; Doc. 39 ¶¶ 137–39; 165–66. But these pesticides have already been
15 registered, and the applicants have no incentive to expedite consultation. *See* Doc. 34 at 23
16 n. 6. This is not enough to make FWS's delay reasonable where originally three- to five-
17 month timelines have now dragged on for years.

18 Even though the ESA does not mandate consultation always be completed in 90
19 days, the timetable provides an "indication of the speed with which it expects the agency
20 to proceed." *TRAC*, 750 F.2d at 80. For EPA Section 7 consultations, that speed is months,
21 not years. The purpose of these consultations further informs a reasonable timeline.
22 Congress intended Section 7 consultations to evaluate agency action prospectively. 16
23 U.S.C. § 1536(a)(3) ("[A] Federal agency shall consult with the Secretary on any
24 *prospective* agency action . . ."); *In re Ctr. for Biological Diversity & Ctr. for Food Safety*,
25 53 F.4th 665, 671 (D.C. Cir. 2022) ("The ESA required EPA to issue an effects
26 determination and engage in any required consulting *before* registering [the pesticide]").
27 Given this, it makes little sense that Congress would have contemplated that agencies
28 should wait multiple years to act pending a consultation's conclusion.

1 Defendants correctly argue that when the current version of Section 7(b) came into
2 effect, formal consultation was limited to assessing the impact of agency action on singular
3 species.²⁰ See AR 0022426–27. The consultations here are "complex nationwide
4 consultations" rather than "discrete, geographically-confined action[s]." Doc. 38 at 20–21.
5 Given the resources required to complete a nationwide consultation, it is arguably
6 infeasible for FWS to complete them within 90 days. Still, as illustrated by the draft BOs
7 on chlorpyrifos and diazinon released for public comment nine months after the EPA
8 initiated consultation, FWS has shown it can complete consultation within a year. See
9 Doc. 35 ¶¶ 11, 15; Doc. 39 ¶¶ 11,15.

10 **B. Effects of Delay**

11 *TRAC* factors three and five often overlap and direct the Court to consider the effect
12 of agency delay. *In re Ctr. for Biological Diversity*, 53 F.4th at 671 (citing *In re Barr*
13 *Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991)). Factor three instructs delay is "less
14 tolerable when human health and welfare" are at stake, *TRAC*, 750 F.2d at 80, and courts
15 have acknowledged ESA-protected species are "valuable to the health and welfare of the
16 nation," *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 414 (D.C. Cir. 2004); see
17 also *Tenn. Valley Auth.*, 437 U.S. at 178 ("[I]t is in the best interests of mankind to
18 minimize the losses of genetic variations.").

19 The parties contest the extent to which delay in completing consultation is adversely
20 impacting ESA species and habitats under FWS jurisdiction. Plaintiff cites to data in the
21 EPA's original BEs and FWS's draft BOs, all of which are over three and a half years old.
22 See, e.g., Doc. 34 at 33 ("EPA determined that a substantial number of threatened and
23 endangered species and critical habitats are likely to be adversely affected by uses of these
24 pesticides."); Doc. 34 at 35 (citing to EPA BEs and FWS draft BOs completed in 2017 and
25 2021 for data on the percentage of studied species and critical habitats likely to be adversely
26 affected by each pesticide). Defendants argue these figures do not accurately represent

27
28 ²⁰ The agencies agreed to pilot the nation-wide consultations in 2014, over 20 years after
the current version of 16 U.S.C. § 1536(b)(1)(A) was enacted. See Act of Nov. 23, 1988,
Pub. L. No. 100-707, 102 Stat. 4689.

1 harm because the cited analyses "assessed a scope of actions under FIFRA that have now
2 significantly changed and no longer reflect the registered uses or other restrictions
3 contained in the label." Doc. 42 at 14.

4 It is true that without current usage information for each pesticide, it is impossible
5 to know the exact extent of the harm they are causing to ESA-protected species and
6 habitats. It is also true that given the mitigation efforts that have occurred in the absence of
7 FWS's Section 7 action, the harm is likely less than predicted by the initiating BEs. But,
8 given the nature of the pesticides' impact on animals and that they are often used
9 concurrently, the harm is more than zero. *See* Doc. 38 at 31 ("The impacts on listed species
10 and/or designated critical habitats are *likely narrower* now." (emphasis added)). The
11 prejudice comes from FWS not fulfilling its obligations in the face of unknown harm.
12 Further, as Defendants' arguments show, the pesticides' uses are constantly changing.
13 *See, e.g.*, Doc. 38 at 24 ("Given the fact that the proposed registration actions for
14 chlorpyrifos and diazinon changed (and continued to change)"); Doc. 42 at 8 ("Given
15 EPA's ongoing registration reviews for these pesticides, there may be more changes to the
16 labels."). The lack of current data and speculation that the BEs overestimated the harm is
17 not enough to balance this factor in FWS's favor. Were the Court to so hold, it would be
18 nearly impossible to ever conclude that the effects of an agency's delay support
19 intervention.

20 Defendants also argue requiring rushed consultations will produce "inferior and
21 indefensible biological opinions that will likely be challenged, resulting in an even further
22 delay" in issuing operative BOs, which is ultimately contrary to Plaintiff's interests.
23 Doc. 38 at 32. This could be true were the Court to grant Plaintiff's initial request and order
24 FWS to complete all the remaining consultations within six months. But Plaintiff no longer
25 seeks a six-month deadline. Defendants have presented the Court with specific dates by
26 which FWS estimates it can complete each BO. By directing FWS to abide by its own
27 timelines, the Court is not ordering rushed opinions but instead ensuring external factors
28 do not further derail the completion of already overdue consultations.

1 **C. Impact on Other Agency Priorities**

2 *TRAC* factor four instructs the Court to consider the impact of judicial interference
3 on higher or competing agency priorities. *TRAC*, 750 F.2d at 80. Courts are "generally
4 cautious against facilitating line-jumping and reordering agency priorities." *In re Ctr. for*
5 *Biological Diversity*, 53 F.4th at 672 (citation omitted). Ordering FWS to complete six
6 complex, nation-wide consultations by Plaintiff's initial six-month deadline would be
7 unreasonable and would disrupt FWS's other functions and priorities. *See* Doc. 38 at
8 29–30; *see also Oceana*, 37 F. Supp. 3d at 186 ("[A]n order compelling the agency to issue
9 its BO immediately might undermine the entire process, and arguably have even harsher
10 consequences than any delay."). But Plaintiff is no longer asking for this. Aside from the
11 deadlines for the chlorpyrifos and diazinon consultations, Plaintiff asks the Court to enforce
12 Defendants' own proposed timelines.

13 1. *Carbaryl, Atrazine, and Simazine*

14 As to the pesticides on which the parties agree to the consultation timeline, Plaintiff
15 is not asking to "cut the line" or force FWS to rearrange its priorities in Plaintiff's favor.
16 Instead, Plaintiff seeks to compel FWS to complete consultation according to its own
17 schedule. *See In re Ctr. for Biological Diversity*, 53 F.4th at 671 (finding the EPA had
18 unreasonably delayed an effects determination and imposing a deadline "according to [the
19 EPA's] own schedule"). Defendants allege enforcement is unwarranted, in part because the
20 estimated schedule is "ultimately out of its control." Doc. 42 at 5.

21 Defendants' argument is flawed. FWS's unwillingness to commit to a firm deadline
22 is the problem. When asked at oral argument whether their proposed schedule was
23 speculative, Defendants could not assure the Court FWS would meet its deadlines,
24 emphasizing that they were dependent on the EPA and out of FWS's control. Dec. 12, 2024,
25 Oral Arg. Tr. 31:12–32:17. FWS has a history of not abiding by its self-imposed timelines.
26 It has failed to abide by previously agreed to "estimated schedules" for these pesticides,
27 missing some anticipated deadlines by as long as eight years. *See* Doc. 25 ¶¶ 78, 80;

28

1 Doc. 39 ¶¶ 78, 80.²¹ Courts have previously found similar patterns to weigh in favor of
2 intervention. *See NRDC v. U.S. Env'tl. Prot. Agency*, 798 F.3d 809, 814 (9th Cir. 2015)
3 (granting a plaintiff's petition for mandamus against the EPA in part because "the agency
4 has a significant history of missing the deadlines it has set in these proceedings"); *In re*
5 *Ctr. for Biological Diversity*, 53 F.4th at 672 (ordering the EPA to abide by its proposed
6 deadline and explaining the Court had "reason to doubt whether EPA will meet its own
7 deadline" because the EPA did not commit to a deadline until after the plaintiff sought
8 mandamus, the proposed timeline carried a caveat, and the EPA had no statutory obligation
9 to make the effects determination). FWS has received permission to extend consultation
10 from the EPA and the carbaryl, atrazine, and simazine registrants. With continued
11 permission, FWS has no statutory obligation to meet the proposed deadline.²² Were the
12 Court not to order FWS to abide by its estimated dates, there would be no enforcement
13 mechanism to ensure FWS does not ignore its anticipated completion dates indefinitely.

14 Although FWS surely intends to comply with its estimated timelines in good faith,
15 the Court need not find bad faith to find unreasonable delay. *TRAC*, 750 F.2d at 80. The
16 Court is aware FWS must balance competing priorities and duties, and circumstances may
17 arise that impact FWS's prioritization of its Section 7 consultations. Still, "[t]he existence
18 and completion of competing priorities does not relieve an agency from progressing with
19 other clearly mandated duties." *Brower*, 257 F.3d at 1070. "[T]here is a limit to how long
20 [an agency] may use these justifications to excuse inaction." *Am. Hosp. Ass'n v. Burwell*,
21 812 F.3d 183, 191 (D.C. Cir. 2016) (internal quotation omitted); *see also Ctr. For Food*
22 *Safety v. Regan*, 56 F.4th 648, 652 (9th Cir. 2022) (rejecting the EPA's justification for
23 failing to comply with the ESA that it "lacked the resources to do so"). Given Section 7's
24 importance to the ESA's statutory scheme, ordering compliance with FWS's self-imposed

25 ²¹ FWS issued its final methomyl BO and draft carbaryl BO in compliance with the
26 estimated timelines set forth in this case. Given that this compliance occurred while
27 litigation was pending, the Court still finds it appropriate to enforce the remaining
28 deadlines.

²² As discussed in Section III.A.3, the registrants for the various pesticides are unlikely to
oppose further extending the consultation because the EPA has already registered these
pesticides, providing the registrants no incentive to push FWS to complete consultation.
See Doc. 34 at 23 n. 6.

1 dates best accomplishes the ESA's goals.

2 2. *Chlorpyrifos and Diazinon*

3 That judicial enforcement of anticipated deadlines may be necessary does not mean
4 the Court should substitute Plaintiff's judgment for Defendants' expertise on when these
5 consultations can reasonably be completed. *See Sierra Club v. Thomas*, 828 F.2d 783, 797
6 (D.C. Cir. 1987), superseded by statute on other grounds, Pub. L. No. 101-549, § 707(f),
7 104 Stat. 2399, *as recognized in Humane Soc'y v. McCarthy*, 209 F. Supp. 3d 280
8 (D.D.C. 2016) ("[A]n agency's control over the timetable of a . . . proceeding is entitled to
9 considerable deference." (internal quotation omitted)). Defendants estimate FWS can
10 complete consultation on chlorpyrifos and diazinon by September 30, 2028. Doc. 38 at 8.
11 The Center seeks to order FWS to complete the consultations by June 30, 2027. Doc. 41
12 at 7. Both parties justify their proposed deadlines based on when the EPA estimates it will
13 complete its supplemental BEs on chlorpyrifos and diazinon: March 31, 2027. *See* Doc. 38
14 at 16; Doc. 41 at 7. Defendants' timeline is based on their argument that FWS must
15 essentially draft BOs from scratch once it receives the updated information. "[T]he
16 substantial amount of work required to complete these two consultations, the Service's
17 overall anticipated workload in the next four to five years, and its limited budget and staff"
18 explain the longer timeline. Doc. 38 at 16. Plaintiff suggests a date 90 days after the EPA
19 plans to supplement its BEs: the timeline contemplated by 16 U.S.C. § 1536(b)(1)(A). *See*
20 Doc. 41 at 7. Plaintiff argues that even without the updated BEs, its deadline gives FWS
21 more than two years to consider the EPA's updated insecticide strategy in addition to the
22 years of time already passed. Doc. 41 at 13–14.

23 The Court will defer to FWS's experience on what is a reasonable timeline for
24 issuing the chlorpyrifos and diazinon BOs. *See Biodiversity Legal Found.*, 285 F. Supp.
25 2d at 12 ("[R]espect for the autonomy and comparative institutional advantage of the
26 executive branch has traditionally made courts slow to assume command over an agency's
27 choice of priorities." (quotations omitted)); *Grand Canyon Air Tour Coal.*, 154 F.3d at 460
28 ("We defer to the agency's reasonable exercise of its judgment and technical expertise.").

1 The Court agrees the eight-year delay in completing consultation is unreasonable.
2 But Section 7 does call for use of the "best available" data, 50 C.F.R. § 402.14(d), and the
3 EPA has represented that updated data reflecting the actual usage of chlorpyrifos and
4 diazinon is forthcoming, *see* Doc. 39 ¶ 3. If FWS, in its expertise, estimates it requires 18
5 months to adequately process and reflect that data in its BOs, the Court will defer to its
6 timeline. *See Oceana*, 37 F. Supp. 3d at 186 (declining to order NMFS to issue a BO on a
7 condensed timeline in part because "critical new data is being analyzed and a premature
8 decision could undermine the time already put in and only threaten NMFS's ability to
9 conduct a thorough and searching analysis") (internal quotations omitted)).

10 **V. CONCLUSION**

11 Defendants have unreasonably delayed completing ESA Section 7 consultations on
12 the pesticides chlorpyrifos, diazinon, carbaryl, atrazine, and simazine in violation of
13 Section 555(b) of the ESA. The Court will order FWS to issue biological opinions on
14 carbaryl, atrazine, and simazine by the parties' mutually agreed upon deadlines provided in
15 Defendants' Motion for Summary Judgment (Doc. 38). The Court will further order FWS
16 to complete consultation and issue biological opinions on chlorpyrifos and diazinon by
17 Defendants' proposed date of September 30, 2028. If FWS is unable to abide by these
18 deadlines, Defendants may petition the Court for modification. The Court will consider
19 modification of these deadlines if FWS documents that extraordinary circumstances not
20 already presented to the court will prevent its compliance. On April 30, 2025, and every
21 180 days thereafter, Defendants shall advise the Court of FWS's progress on these matters.
22 In these status reports, Defendants shall inform the Court whether the EPA is on schedule
23 to provide the information FWS plans to use to inform its BOs.

24 **VI. Order**


25 Accordingly,

26 **IT IS ORDERED:**

- 27 **1. Granting in part** Plaintiff Center for Biological Diversity's Motion for
28 Summary Judgment (Doc. 34).

- 1 2. **Denying as moot** Plaintiff Center for Biological Diversity's Motion for
2 Summary Judgment (Doc. 34) as it relates to **methomyl** because FWS issued
3 the biological opinion on December 30, 2024.
- 4 3. **Denying** Defendants U.S. Fish and Wildlife Service and Doug Burgum's Cross-
5 Motion for Summary Judgment (Doc. 38).
- 6 4. **Declaring** Defendants have unreasonably delayed in completing ESA Section 7
7 consultations on chlorpyrifos, diazinon, carbaryl, atrazine, and simazine and are
8 in violation of Section 555(b) of the APA.
- 9 5. **Directing** FWS to complete consultation on **carbaryl** and issue a biological
10 opinion on or before **March 31, 2025**.
- 11 6. **Directing** FWS to complete consultation on **atrazine** and issue a biological
12 opinion on or before **March 31, 2026**.
- 13 7. **Directing** FWS to complete consultation on **simazine** and issue a biological
14 opinion on or before **March 31, 2026**.
- 15 8. **Directing** FWS to complete consultation on **chlorpyrifos** and issue a biological
16 opinion on or before **September 30, 2028**.
- 17 9. **Directing** FWS to complete consultation on **diazinon** and issue a biological
18 opinion on or before **September 30, 2028**.
- 19 10. **Directing** Defendants to provide the Court with status updates on the EPA's
20 progress in providing updated information and FWS's progress in issuing the
21 above-named final biological opinions on April 30, 2025, and every 180 days
22 thereafter.

23 Dated this 12th day of March, 2025.

24
25
26 
27 _____
28 John C. Hinderaker
United States District Judge