

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Pesticide Action Network North America v. Williams

No. 24-cv-06324-JSC (N.D. Cal. July 11, 2025) · No. 24-cv-06324-JSC · Decided July 11, 2025

SUMMARY

The United States District Court for the Northern District of California denied Plaintiffs’ motion to admit extra-record evidence in their challenge to a 2022 U.S. Fish and Wildlife Service biological opinion concerning malathion. The court found some exhibits were already part of the administrative record, while others did not satisfy the narrow exceptions for extra-record evidence or were barred as post-decisional materials. The denial was without prejudice as to certain exhibits that may be relevant during a later remedy phase, and the court limited possible consideration of the Clauser declaration to standing.

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
PESTICIDE ACTION NETWORK NORTH Case No. 24-cv-06324-JSC AMERICA,, et al., 8
Plaintiffs, ORDER RE: MOTION TO ADMIT 9 EXTRA-RECORD EVIDENCE v. 10 Re: Dkt.
No. 59 PAUL SOUZA, et al., 11 Defendants. 12 13 Pesticide Action Network North America,
Center for Biological Diversity, and Center for 14 Food Safety (“Plaintiffs”) challenge a 2022
biological opinion issued by U.S. Fish and Wildlife 15 Service (“FWS”) regarding malathion, a
pesticide active ingredient.

In May 2025, Plaintiffs 16 moved for summary judgment, arguing FWS’s biological opinion is
arbitrary and capricious. 17 (Dkt. No. 59.)¹ That motion will be argued in January 2026. Plaintiffs
simultaneously moved to 18 admit extra-record evidence to supplement the administrative record
(Dkt. No. 59), which is now 19 pending before the Court. FWS and Paul Souza (“Federal
Defendants”) oppose admission of 20 certain exhibits, and CropLife America—who intervened in
this action—“opposes admission of 21 the same documents that are opposed by” Federal
Defendants.

(Dkt. No. 63 at 2.) Having 22 carefully considered the parties’ submissions, and with the benefit
of oral argument on July 10, 23 2025, the Court DENIES Plaintiffs’ motion. For some exhibits,
Plaintiffs’ motion is moot because 24 the exhibits are already part of the administrative record.

For other exhibits, Plaintiffs fail to 25 satisfy the narrow criteria for admission of extra-record
evidence. For the exhibits that are 26 27 1 Record citations are to material in the Electronic Case
File (“ECF”); pinpoint citations are to the 1 inadmissible as extra-record evidence but may be

relevant to remedy, the Court’s denial is without 2 prejudice to Plaintiffs seeking their admission during the remedy phase in this matter.

3 LEGAL STANDARD 4 Cases challenging biological opinions are reviewed under the Administrative Procedures 5 Act (“APA”). See, e.g., *Bennett v. Spear*, 520 U.S. 154, 177 (1997). “The task of the reviewing 6 court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision 7 based on the record the agency presents to the reviewing court.” *Fla. Power & Light Co. v. 8 Lorion*, 470 U.S. 729, 743-44 (1985).

Generally, “courts reviewing an agency decision are limited 9 to the administrative record.” *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) 10 (quoting *Lorion*, 470 U.S. at 743-44). “This rule ensures that the reviewing court affords 11 sufficient deference to the agency’s action.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 12 776 F.3d 971, 992 (9th Cir.

2014). There are “narrow exceptions to this general rule.” *Id.* at 13 1030. A district court may permit admission of extra-record evidence: 14 (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, 15 (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical 16 terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

17 18 *Id.* (quotation marks omitted). Under the first exception—called the “relevant factors” 19 exception—a district court may “consider extra-record evidence to develop a background against 20 which it can evaluate the integrity of the agency’s analysis.” *Locke*, 776 F.3d at 993. That is, the 21 district court may consider evidence “to help [it] understand whether the agency complied with the 22 APA’s requirement that the agency’s decision be neither arbitrary nor capricious.” *Id.* But under 23 this exception, the district court cannot admit extra-record evidence for the purpose of “judg[ing] 24 the wisdom of the agency’s action” or “questioning the agency’s scientific analyses or 25 conclusions.” *Id.* 26 The four exceptions—which “operate to identify and plug holes in the administrative 27 record”—are “narrowly construed and applied.” *Id.* “[T]he party seeking to admit extra-record 1 F.3d at 993.

2 DISCUSSION 3 Plaintiffs seek to admit 19 documents and portions of the declaration of Brett Hartl under 4 the “relevant factors” exception. (Dkt. No. 59.) The Court begins with the exhibits on which the 5 parties agree, then turns to the disputed exhibits.

Finally, the Court addresses Federal Defendants’ 6 request to disregard the declaration of Kara Clauser, which Plaintiffs submitted with their 7 summary judgment motion. 8 I. NON-DISPUTED EXHIBITS 9 Federal Defendants contend 12 of the exhibits Plaintiffs seek to admit are already part of 10 the administrative record. Specifically, Federal Defendants state Exhibits 8-14 and 16-19 were 11 directly referenced in the biological opinion and therefore incorporated by reference.

Federal 12 Defendants also state Exhibit 3 was included in the record. CropLife agrees Plaintiffs' motion 13 "should be denied as moot with respect to these documents." (Dkt. No. 63 at 2.) Given the 14 parties' agreement that Exhibits 3, 8-14, and 16-19 are part of the administrative record, the Court 15 DENIES as moot Plaintiffs' request to admit these 12 exhibits.

16 II. DISPUTED EXHIBITS 17 A. Exhibit 6 18 Exhibit 6 is a National Wildlife Health Center report about the death of a whooping crane 19 chick and related emails, (Dkt. No. 60-1 at 59-64), which Plaintiffs obtained through a FOIA 20 request. While "predation [was] the suspected cause of death" of the chick, the report notes 21 exposure to organophosphates, which are "broadly used as insecticides for agricultural or pest 22 control purposes" and "can be ingested or topically absorbed by birds causing severe 23 neuromuscular and cardiovascular signs." (Id. at 62.)

The report continues: "The levels of 24 inhibition were close to those considered lethal for birds (50% or higher) and therefore should be 25 considered as a potential contributor to the death of this crane." (Id.) In an email discussing the 26 report, an FWS employee states "I understand that this is not an isolated case either." (Id. at 59.) 27 Plaintiffs assert Exhibit 6 "is necessary to evaluate whether FWS adequately explained its 1 at 8 (that a whooping crane was "suspected to have been poisoned by an organophosphate like 2 malathion shows that FWS's conclusion that it did not anticipate mortality from malathion use is 3 off base").)

Federal Defendants respond "FWS expressly considered this mortality event in the 4 [biological opinion]." (Dkt. No. 62 at 11.) Federal Defendants refer to the opinion's species- 5 specific analysis: 6 There is no evidence that pesticide contamination has ever been a significant threat to whooping cranes. Whooping crane egg and tissue 7 specimens examined for pesticide residues have shown concentrations well below those encountered in most other migratory 8 birds (Robinson et al. 1965, Lamont and Reichel 1970, Anderson and Kreitzer 1971, Lewis et al. 1992b).

Eggshell thickness, a measure of 9 contaminant exposure, has been measured in eggs taken from the wild and those in captivity from the 1970s to the present; no evidence of 10 shell thinning has been detected. In recent years, one confirmed whooping crane chick and potentially other cases of 11 acetylcholinesterase inhibition were associated with the experimental Eastern Migratory Population on Necedah National Wildlife Refuge.

12 Acetylcholinesterase inhibition is suggestive of organophosphate exposure, though pesticides were not tested for in these cases. The 13 refuge is downstream of cranberry bogs, and runoff from these sites is a suspected cause of any pesticide exposure.

As malathion is not 14 registered for use on cranberry bogs, we do not suspect malathion exposure in these cases (Pers. comm. 2020 with Sarah Warner, 15 USFWS). 16 AR-27648. 17 The Court DENIES Plaintiffs' request to admit Exhibit 6 under the "relevant factors" 18 exception.

The discussion of the death of a whooping crane in Exhibit 6—including the email 19 stating “this is not an isolated case,” (Dkt. No. 60-1 at 59, 62)—is consistent with the biological 20 opinion’s discussion of “one confirmed whooping crane chick and potentially other cases of 21 acetylcholinesterase inhibition,” see AR-27648. So, Exhibit 6 does not contain a relevant factor 22 FWS failed to consider.

And while Plaintiffs asserted at oral argument that Exhibit 6 shows FWS 23 didn’t explain its decision “well enough,” the standard for admitting extra-record evidence does 24 not turn on how well the agency explained its decision.

The question is whether the agency “has 25 explained its decision” about the threat of pesticide contamination to whooping cranes—and as the 26 excerpt above illustrates, it has. See *Locke*, 776 F.3d at 992. Plaintiffs disagree with FWS’s 27 conclusion “[t]here is no evidence that pesticide contamination has ever been a significant threat to 1 crane] cases.” See AR-27648.

But in requesting admission of Exhibit 6 to challenge these 2 conclusions, Plaintiffs seek to do what Ninth Circuit precedent prohibits: “questioning the 3 agency’s scientific analyses or conclusions.” See *Locke*, 776 F.3d at 993; see also *Pinnacle 4 Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013) (“[T]he document in 5 question must do more than raise nuanced points about a particular issue; it must point out an 6 entirely new general subject matter that the defendant agency failed to consider.”) (cleaned up).

7 B. Exhibits 2 and 5 8 Plaintiffs assert Exhibits 2 and 5 illustrate FWS’s change in position with respect to using 9 pesticide “usage data.” As context, pursuant to 16 U.S.C. § 1536, the EPA was required to consult 10 with FWS to ensure its authorization of malathion for distribution and sale was “not likely to 11 jeopardize the continued existence of any endangered species or threatened species or result in the 12 destruction or adverse modification of habitat of such species.” Plaintiffs’ summary judgment 13 motion contends FWS adopted a position in 2013 with respect to these consultations, which it 14 changed in late 2017.

That is, in 2013, “FWS, EPA, and the National Marine Fisheries Service 15 (‘NMFS’) agreed to work on a ‘shared’ consultation approach” involving a “weight-of-evidence” 16 approach in which “pesticide ‘usage data’ was rarely mentioned.” (Dkt. No. 58 at 15.) This 17 approach was informed by a 2013 National Academy of Sciences report stating “FWS cannot 18 reasonably rely on usage data to assume sub-maximum rates of malathion use without ‘supporting 19 data.’” (Dkt.

No. 64 at 3 (quoting AR-249).) According to Plaintiffs, FWS changed this position 20 by collecting and relying on usage data for purposes of the malathion biological opinion. 21 In the present motion, Plaintiffs seek to admit Exhibits 2 and 5 as extra-record evidence to 22 “show, in part, how this change in position unfolded.” (Dkt. No. 59 at 9.) Exhibit 2 is an April 23 2017 letter sent by registrants of products containing malathion to the Secretaries of Interior and 24

Commerce “asking them to direct FWS and [National Marine Fisheries Service] to set aside their 25 efforts to prepare biological opinions on the effects of malathion.” (Dkt.

No. 60-1 at 5-14.) 26 Exhibit 5 is part of National Marine Fisheries Service’s biological opinion. (Dkt. No. 60-1 at 41- 27 57.) 1 “crucial to understand and evaluate FWS’s subsequent decisions to delay the [biological opinion] 2 for years while seeking usage data from the EPA.” (Dkt. No. 64 at 4.) But the administrative 3 record contains documents explaining FWS’s decision to delay the biological opinion while 4 seeking usage data.

For example, a January 2020 memo on the malathion consultation states: 5 Specific to the extension the [Fish and Wildlife] Service sought and obtained in 2017-2018, the Service sought additional information on 6 “use” and “usage” of malathion.

In our analyses, “use” refers to allowable malathion uses as described on its label (e.g., agricultural, 7 mosquito control, home and garden). By mapping where these uses may occur on the landscape, we form the basis of the geographic 8 extent of the effects of the action. “Usage” refers to the likelihood of application within these use sites. When the Service relies on more 9 refined information for each of these factors, its determination of the effects to listed species and critical habitat that are reasonably certain 10 to occur is likely to be more accurate.

11 One of the difficulties with consulting on EPA’s registration review of malathion is that the uses authorized on the label do not necessarily 12 reflect how and where the product will be used on the landscape. As a result, the Service determined it was necessary to search for, gather, 13 and compile data to inform both use and usage from a variety of different sources throughout the country and territories.

The Service 14 lacked data for several types of uses (e.g., mosquito control, home and garden), as well as data for certain geographic regions (e.g., Pacific 15 and Caribbean Islands). These data gaps are significant, and without such information, the Service has found it difficult to adequately 16 estimate usage in our analyses and determine usage that is reasonably certain to occur.

Furthermore, while agricultural (as opposed to other 17 uses, such as residential) usage data was available at the state-level, more refined data was needed for our analyses. Thus, the Service has 18 worked to identify additional available data at a more refined spatial scale that will meaningfully inform our analysis of exposure to listed 19 species, which generally occur in more narrow geographic ranges.

20 Thus, from approximately February 2018 through November 2018, and in coordination with EPA, NMFS, and the USDA, the Service 21 compiled a list of numerous sources of potential data, creating a “Usage Data Catalogue” based on the expertise of the four agencies 22 and including consideration of any uncertainties and limitations associated with the data.

After a thorough review of the suitability, availability, and robustness of each potential source, the scope was narrowed to those the Service believes could meaningfully inform the consultation, and serve as the best available scientific and commercial data for our analyses. AR-1522-23.

Because the record describes FWS's decision to use and collect usage data, Plaintiffs "fail[] to show any... gaps or holes" on this issue that need plugging. See Fence Creek 1 record explains FWS's decision to use usage data, Exhibit 2 neither demonstrates FWS's failure to consider a relevant factor nor demonstrate FWS's failure to explain its decision.

3 On reply, Plaintiffs argue they "are not objecting to FWS's efforts to collect and consider 4 relevant usage data altogether" but instead are objecting "to how FWS relied on those usage data 5 despite their lack of the necessary statistical support, in contravention of its established scientific 6 approach." (Dkt. No. 64 at 3.)

The letters from registrants do not bear on the reliability of usage 7 data, so Exhibit 2 does not fulfill the purpose for which Plaintiffs seek to admit it. 8 The Court also DENIES Plaintiff's request to admit Exhibit 5. Exhibit 5 was issued after 9 the FWS biological opinion at issue and therefore cannot be admitted as extra-record evidence 10 under the "relevant factors" exception.

See Cachil Dehe Band of Wintun Indians of Colusa Indian 11 Cmty. v. Zinke, 889 F.3d 584, 600 (9th Cir. 2018) (citation omitted) ("[E]xceptions to the normal 12 rule regarding consideration of extra-record materials only apply to information available at the 13 time, not post-decisional information."); Tri-Valley CAREs v. U.S. Dep't of Energy, 671 F.3d 14 1113, 1131 (9th Cir.

2012) ("[T]he post-decision bar may not be applied to require augmentation 15 of information used to rationalize, attack, or even analyze an agency decision post hoc.") (citation 16 omitted). Given the post-decision bar, Plaintiffs request admission of Exhibit 5 "for the narrow 17 proposition that it establishes the pre-decisional fact that, at the time FWS published its [biological 18 opinion], it knew [National Marine Fisheries Service's] did not share its view that the usage data 19 could bear the weight FWS placed on them." (Dkt.

No. 64 at 5.) Even accepting the inference 20 Plaintiffs ask the Court to draw—that FWS knew of National Marine Fisheries Service's 21 position—Plaintiffs fail to demonstrate such knowledge falls within the narrow "relevant factors" 22 exception. That FWS knew of another agency's position regarding usage data does not 23 demonstrate FWS failed to consider a relevant factor or failed to explain its decision—particularly 24 when, as discussed above, the administrative record explains FWS's decision to collect and use 25 usage data.

26 C. Exhibit 7 27 Exhibit 7 contains June 2024 and May 2025 malathion usage reports, which Plaintiffs 1 10; Dkt. No. 60-1 at 65-89.) It is undisputed both reports postdate the biological opinion at issue. 2 So, the Court cannot admit Exhibit 7 under the "relevant factors" exception.

See Zinke, 889 F.3d 3 at 600. 4 Plaintiffs assert “Exhibit 7 is properly before the Court for purposes of remedy.” (Dkt.

No. 5 64 at 6.) Specifically, Plaintiffs argue the Exhibit 7 reports are relevant to the requested remedy— 6 tailored vacatur of the malathion incidental take statement—because they demonstrate that usage 7 data does not reliably predict future malathion use and thus the “incidental take statement, which 8 relies heavily on such data for its predictions of harm, may put species at grave risk if left in 9 place.” (Dkt.

No. 64 at 7.) “Plaintiffs submitted Exhibit 7 with the motion to admit extra-record 10 evidence in an abundance of caution to ensure against any party arguing that Plaintiffs had waived 11 any argument that it should be admitted for remedy purposes.” (Id.) 12 Given the post-decision bar, the Court DENIES without prejudice Plaintiffs’ request to 13 admit Exhibit 7 as extra-record evidence.

If the Court determines it is appropriate to set aside the 14 biological opinion as arbitrary or capricious, it will proceed to consideration of the proper remedy, 15 and at that time, Plaintiffs may move to admit Exhibit 7.

As Federal Defendants acknowledge 16 “[t]he Court’s consideration of the proper remedy is not limited to the administrative record.” 17 (Dkt. No. 62 at 14.) And while CropLife “does not concede that there is an unqualified exception 18 permitting submission of extra-record documents allegedly relevant to remedy,” it acknowledges a 19 “small number of cases” in which courts permitted extra-record evidence in considering whether 20 an unlawful agency decision should be vacated.

(Dkt. No. 63 at 2.) So, the parties agree (1) 21 Exhibit 7 is not relevant for the merits of Plaintiffs’ summary judgment motion, and (2) there is 22 precedent for admitting extra-record exhibits for remedy purposes. Plaintiffs have not waived 23 their argument that Exhibit 7 should be admitted for remedy purposes, should the Court reach the 24 issue. 25 Paragraphs 53 and 54 of the Hartl declaration describe the Exhibit 7 reports, (Dkt.

No. 60 26 ¶¶ 53-54), so the same conclusion applies. The Court declines to admit these paragraphs for 27 purposes of determining whether FWS’s biological opinion is arbitrary and capricious. If the D. Exhibit 15 1 Exhibit 15 is a 5-Year Review of a species analyzed in the biological opinion. (Dkt. No. 2 60-1 at 118-121.)

Because is undisputed Exhibit 15, issued in August 2024, postdates the 3 biological opinion at issue, the post-decision bar applies. On reply, “Plaintiffs agree that Exhibit 4 15 should not be considered on the merits because it was a post-decisional document that was not 5 cited to show pre-decisional information.” (Dkt. No. 64 at 9.)

However, Plaintiffs “believe it 6 may be used to evaluate the consequences of vacatur in considering remedy.” (Id.) 7 Given the post-decision bar, the Court DENIES without prejudice Plaintiffs’ request to 8 admit Exhibit 15 as extra-record evidence. See Zinke, 889 F.3d at 600. Plaintiffs may move for 9 admission of Exhibit 15 if the Court reaches the remedy phase.

10 E. Exhibits 1 and 4 11 Plaintiffs’ motion seeks admission of Exhibits 1 and 4 as additional documents illustrating 12 FWS’s change in position with respect to usage data. Federal Defendants argue “Plaintiffs cannot 13 show that Exhibits 1 and 4 are necessary for judicial review when they fail to even cite or rely on 14 the exhibits in their summary judgment motion.” (Dkt.

No. 62 at 12.) See Powell, 395 F.3d at 15 1030 (“[D]istrict courts are permitted to admit extra-record evidence... if admission is necessary 16 to determine whether the agency has considered all relevant factors and has explained its 17 decision.”) (emphasis added) (cleaned up).

On reply, Plaintiffs “agree that Exhibits 1 and 4... 18 should not be considered on the merits but... maintain that they may be considered for other 19 proper purposes such as standing, remedy, or authenticating documents.” (Dkt. No. 64 at 2.) 20 Given Plaintiffs’ admission, the Court DENIES the request to admit Exhibits 1 and 4 as 21 extra-record evidence.

Any consideration of these documents is limited to non-merit purposes. 22 III. HARTL DECLARATION 23 Plaintiffs’ motion seeks to admit “portions of the Declaration of Brett Hartl, specifically, 24 paragraphs 13-35 and 53-54.” (Dkt. No. 59 at 5.)

As discussed above, Plaintiffs concede ¶¶ 53-54 25 are only relevant to remedy and therefore inadmissible as extra-record evidence. As to ¶¶10-35, 26 Federal Defendants oppose admission because Plaintiffs “do not rely on any of these paragraphs in 27 the merits portion of their summary judgment brief.” (Dkt. No. 62 at 15.)

On reply, Plaintiffs 1 “agree that... Hartl Declaration ¶¶ 10–35 should not be considered on the merits because they 2 were not cited in support of Plaintiffs’ merits arguments.” (Dkt. No. 64 at 9.) So, Plaintiffs’ 3 request to admit ¶¶10-35 and ¶¶ 53-54 as extra-record evidence is DENIED. If the Court 4 considers the remaining paragraphs in the Hartl declaration, such consideration will be limited to 5 assessing standing.

6 IV. CLAUSER DECLARATION 7 Federal Defendants ask the Court to “strike or otherwise not consider the Clauser 8 Declaration as extra-record evidence.” (Dkt. No. 62 at 19.) The declaration of Kara Clauser, “a 9 Geographic Information System (‘GIS’) specialist at the Center for Biological Diversity,” is 10 among the declarations Plaintiffs submitted “demonstrating Plaintiffs’ interests” for standing 11 purposes.

(Dkt. No. 58 at 18 n.3; Dkt. No. 58-1 at 35.) Ms. Clauser prepared maps “concerning 12 the U.S. Fish and Wildlife Service’s biological opinion assessing the insecticide Malathion and its 13 products, and related data concerning ESA-protected species and the potential use of malathion.” 14 (Dkt. No. 58-1 at 35.) Federal Defendants assert the Clauser declaration is irrelevant to establish 15 standing and is instead used by Plaintiffs to support their merits arguments.

Plaintiffs disagree 16 with this characterization and state the maps Ms. Clauser prepared “solely serve as visual aids for 17 some declarants.” (Dkt. No. 64 at 8.) According to Plaintiffs, “given the parties’ agreement that 18 the maps are not necessary to demonstrate standing, the Court may... disregard them.” (Id.; id. 19 (“The Court should disregard the declaration for any purpose other than illustrative exhibits 20 related to standing.”).)

21 The Court therefore disregards the Clauser declaration for any purpose other than as an 22 illustrative exhibit to assess standing. That is, if the Court considers the Clauser declaration, it 23 will do so only as part of reviewing the standing declarations at Docket No. 58-1.

Because the 24 Court’s consideration of the maps—if at all—will be limited to the issue of standing, Federal 25 Defendants’ request to submit a rebuttal declaration is denied. 26 CONCLUSION 27 The Court DENIES as moot Plaintiffs’ request to admit Exhibits 3, 8-14, and 16-19. And 1 exhibits relevant to the remedy issue, Plaintiffs may move to admit those documents if the Court 2 || determines the biological opinion is arbitrary and capricious.

3 This Order disposes of Docket No. 59. 4 IT IS SO ORDERED. 5 || Dated: July 11, 2025 6 7 ne CQWELINE SCOTT CORLEY, 8 United States District Judge 9 10 11 12 13 © 15 16 = 17 Z 18 19 20 21 22 23 24 25 26 27 28