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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY; CALIFORNIA NATIVE PLANT SOCIETY, Plaintiff, vs. BRUCE BABBITT, Secretary, Department of the Interior; JAMIE RAPPAPORT CLARK, Director, U.S. Fish and Wildlife Service, Defendant.	CASE NO. 98-CV-1785-J (RBB) ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ORDER DENYING DEFENDANT'S MOTION FOR STAY [Docket #s 14, 19]

This action is brought by the Southwest Center for Biological Diversity ("Southwest") and the California Native Plant Society ("Society") (collectively "Plaintiffs") against the Secretary of the Interior ("Secretary") and the Director of the Fish and Wildlife Service ("Director") (collectively "Defendants") under the Endangered Species Act ("ESA"), U.S.C. § 1531 et. seq. Plaintiffs seek: (1) a declaratory judgment that Defendants are violating their statutory duties under the ESA; (2) an injunction compelling Defendants to complete a pending 12-month finding on an herb, the San Diego ambrosia, and (3) payment of reasonable costs and attorney's fees.

Defendants admit that they have not taken final action on the 12-month finding, but deny that Plaintiffs are entitled to relief. Plaintiffs and Defendants have filed cross-motions for summary

judgment under Fed. R. Civ. P. 56. In addition, Defendants have moved for a stay until January 19, 2000 to allow them to complete the 12-month finding.

I. BACKGROUND

A. The Endangered Species Act

In 1973, Congress enacted the Endangered Species Act ("ESA") which is designed to conserve threatened and endangered species and the ecosystem upon which these species depend. 16 U.S.C. §1531(b). To this end, the ESA requires the Secretary of the Interior to list species of plants and animals that are facing extinction as threatened or endangered. 16 U.S.C. §1533(a). The Secretary, in turn, has delegated the implementing authority to the United States Fish and Wildlife Service ("FWS").

Section 4 of the ESA provides the guidelines for listing a species as threatened or endangered. The listing process is the first step under the ESA to protect a species; a species that has not been listed cannot be protected. 16 U.S.C. §1533(a), (d). Once a species is listed, the ESA requires the Secretary, in his discretion, to promulgate regulations protecting it and to designate its "critical habitat." 16 U.S.C. §1533(d), 16 U.S.C. §1533(a)(3)(A), 16 U.S.C. §1533(b)(6)(C).

Any "interested person" may petition the Secretary to list a species. 16 U.S.C. §1533(b)(3)(A). Within 90 days after a petition is made, *or as soon thereafter as is practicable*, "the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted" ("the 90-day finding"). Id. Pursuant to the Secretary's implementing regulations, "substantial information" means information that would lead a reasonable person to believe that listing may be warranted. 50 C.F.R. § 424.14(b)(1).

If the Secretary finds that the petition presents substantial information, he must promptly undertake a review of the subject species' status. 16 U.S.C. §1533(b)(2)(A). *Within 12 months of the receipt of the original petition*, the Secretary must make one of the following findings ("the 12-month finding"): (1) the petitioned action is not warranted; (2) the petitioned action is warranted — in which case he must publish in the Federal Register a general notice and the text of the proposed regulation listing the species as endangered or threatened; or (3) the petitioned action is warranted, but promulgation of the proposed and final regulations to list the species is precluded by pending proposals

to list other species. 16 U.S.C. §1533(b)(3)(B); see also Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1129 (D. Or. 1998). Within one year after publication of the proposed rule, the Secretary must make a final decision whether to place the species on the endangered or threatened species list. 16 U.S.C. §1533(b)(6)(A).

B. **Statement of Facts**

On January 9, 1997, the FWS received Plaintiffs' petition, dated November 12, 1996, to list the San Diego ambrosia as an endangered species pursuant to Section 4 of the ESA. (Compl. at ¶ 22). The San Diego ambrosia or *ambrosia pumila* ("ambrosia") is a low-growing, perennial herb with woolly gray-green leaves. (Compl. at ¶ 19). Populations of ambrosia occur on federal, state and private lands located in southwestern Riverside and San Diego counties, California, and Baja California, Mexico. (Compl. at ¶ 20). Plaintiffs assert that development of these regions threatens the future of the ambrosia. Id. Plaintiffs' petition also included a request to employ the emergency listing provisions of ESA §4(b)(7) and 50 C.F.R. 424.20 in order to protect the species from significant risk until a final decision could be taken. (Compl. at ¶ 22). On or about January 23, 1997, the FWS sent Southwest a letter, acknowledging receipt of the petition and recognizing certain statutory and regulatory procedures to be followed in making findings related to the petition. (Compl. at ¶ 23.)

On October 1, 1998, Plaintiffs filed a complaint against Defendants seeking injunctive and declaratory relief. The complaint alleged, *inter alia*, that the Defendants had failed to meet the ESA statutory deadline to make a determination whether the ambrosia should be listed as endangered or threatened. (Compl. at ¶ 2). On November 30, 1998, in response to Plaintiffs' complaint, Defendants filed an answer in which they conceded that Plaintiffs' account of the agency's action with respect to the ambrosia petition was accurate. (Answer at ¶ 2). At that time, almost two years after Defendants received Plaintiffs' petition, Defendants had not completed either the 90-day or 12-month finding on the status of the ambrosia.

On April 19, 1999, Defendants published a 90-day finding in the Federal Register, concluding that the November 1996 petition "presents substantial scientific or commercial information indicating that listing Ambrosia pumila as endangered may be warranted." 90-day Finding for a Petition to List the Ambrosia, 64 Fed. Reg. 19108, 19109 (1999). This 90-day finding was published approximately

730 days after the petition was received by FWS and approximately 780 days from the date of the petition itself.

Defendants admit there was a long delay in completing the 90-day finding. (Answer at ¶ 26). However, they argue that they have been restricted by the legacy of congressional budgetary restrictions. (Def.'s Opp. at 16:3-6). Defendants argue that Public Law 104-6, which took effect on April 10, 1995, prevented them from complying with the 90-day and 12-month deadlines for the ambrosia. Public Law 104-6 prohibited the use of any "remaining [fiscal year] 1995 funds ... for making a final determination that a species is threatened or endangered or that a habitat constitutes critical habitat." Emergency Supplemental Appropriations and Rescissions for the Dept. of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86 (Apr. 10, 1995). The agencies responsible for implementing the ESA remained under this moratorium until April 26, 1996. (Def.'s Opp. at 6:17-18). When the moratorium was lifted, 243 proposed listings were pending. See Def.'s Exh. 1, Decl. of Gary Frazer at 6.

Defendants claim that, when the initial petition was received in January 1997, the FWS was operating under its final listing priority guidance ("LPG") for fiscal year 1997. See 61 Fed. Reg. 64475 (1996); Def.'s Opp. at 6:13-14. The LPG guided the FWS on how to clear a backlog that had developed during a period of congressional cutbacks and budgetary withholdings. When the ambrosia petition was received, the FWS faced a daunting task, namely catching up on the long list of pending petitions. (Def.'s Opp. at 4:20-22). In January 1997, the FWS had petitions which had been waiting for action for more than two years; many others were only midway through the review process. Id.

The FWS developed the LPG to streamline its review of cases by prioritizing all pending and incoming matters. The LPG established a "multi-tiered approach that assign[ed] relative priorities, on a descending basis, to actions carried out under Section 4 of the Act...." LPG for Fiscal Year 1997, 61 Fed. Reg. 64475, 64479 (1996). The LPG called for giving highest priority (Tier 1) to emergency situations, second priority (Tier 2) to resolving the listing status of the outstanding proposed listings, third priority (Tier 3) to resolving the conservation status of candidate species and processing administrative findings on petitions, and lowest priority (Tier 4) to preparation of proposed or final, critical habitat designations and processing delistings and reclassifications from endangered to

threatened status. See 90-Day Finding for a Petition to List the Ambrosia, 64 Fed. Reg. 19108, 19109 (1999).

On January 23, 1997, two weeks after receiving plaintiffs' petition, the FWS notified Southwest that, based on the LPG, the FWS would conduct a preliminary review of the petition to determine whether the ambrosia fell within the Tier 1 emergency cases. (Def.'s Opp. at 7:1-4). On July 15, 1997, nearly six months after receiving the petition, the Service made a determination that an emergency did not exist. (Def.'s Opp. at 7:7-8). Because this was a new, non-emergency listing, the petition fell into Tier 3. See 64 Fed. Reg.19109. The FWS pushed forward with the LPG, fulfilling the needs of Tier 1 and Tier 2 cases.

In May 1998, a final LPG for 1998 and 1999 was published. See Final LPG for Fiscal Years 1998, 1999, 63 Fed. Reg. 25502 (1998). The 90-day and 12-month determinations had still not been made on the ambrosia. The new LPG reduced the number of tiers from four to three, and the processing of 90-day and 12-month determinations was placed in Tier 2 (below only the completion of emergency petitions). Nonetheless, another eleven months passed before the FWS issued its 90-day determination on the ambrosia. "On April 19, 1999, after reviewing the petition, supporting documentation, and other information available in the [FWS] files to determine if substantial information is available to indicate that the requested action may be warranted, the [FWS] published a preliminary (90-day) finding on a petition to list the San Diego ambrosia." (Def.'s Opp. at 7:27-8:2).

Upon completion of the 90-day review, biologists in the FWS' Carlsbad Field Office undertook a status review of the ambrosia. (Def. Opp. at 8:6-7). Defendants claim that the Carlsbad office will complete its review by mid-October and that approval of the field office report will require an additional 12 weeks. Therefore, the FWS predicts that it will complete its 12-month petition finding for the ambrosia on January 19, 2000.

II. STANDARD OF REVIEW

Summary judgment is properly granted to a moving party when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); See also Celotex v. Catrett, 477 U.S. 317 (1988). The "mere existence of some alleged

factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material facts." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1985). Moreover, "as to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248.

III. DISCUSSION

This action is aptly suited for summary disposition. The only facts at issue are those associated with the chronology of the administrative proceeding for the San Diego ambrosia, but there is no dispute of material fact as to the chain of events; Defendants admit it took over 730 days to issue a "90-day finding" and that it will take over 36 months to complete the "12-month finding." What is at issue is whether these delays constitute violations of the time requirements codified in the Endangered Species Act ("ESA"). Defendants argue that these delays are permissible under the statute, albeit undesirable. Plaintiffs counter that the plain language of the ESA statute countenances a strict time requirement, especially with respect to the 12-month finding. The question before the Court is therefore one of statutory construction — a question of law for which the Court is uniquely suited.

Section 4 of the ESA

At the heart of this controversy are the statutory provisions for agency action when a petition to protect an endangered species has been filed under Section 4 of the ESA. Section 4 sets forth the requirements for the "90-day finding" thusly:

> *To the maximum extent practicable*, within 90 days after receiving the petition of an interested person ... to add a species to, or remove a species from, either of the lists published under subsection (c) of [Section 4 of the ESA], the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information that the petition may be warranted.

16 U.S.C. § 1533(b)(3)(A)(emphasis added). The plain meaning of this language is that the 90-day finding is subject to consideration of "practicability." See Biodiversity Legal Foundation v. Babbitt, 146 F.3d 1249 (10th Cir. 1998). The legislative history of the ESA also supports the interpretation that the FWS has statutory flexibility regarding the timing for listing petitions in the course of 90-day findings:

> The phrase "to the maximum extent practicable" addresses the concern that a large influx of petitions coupled with an absolute requirement to act within 90 days would force the devotion of staff resources to petitions and deprive the Secretary of the use of those resources to list a species that might be in greater need of protection. This phrase is not intended to allow the Secretary to delay commencing the rule-making process for any reason other than the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition unwise.

1982 U.S.C.C.A.N. 2860, 2962 (H.C.R. No. 97-835).

By contrast, the ESA guidelines for the 12-month finding are as follows:

> Within 12 months *after receiving a petition* that is found under subparagraph (A) [the 90-day finding] to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make [one of the three findings on actions to be taken and, if required, publish the proposed regulation].

16 U.S.C. §1533(b)(3)(B)(emphasis added).

Plaintiffs argue that 12-month finding, unlike the 90-day finding, has a nondiscretionary time limit of one year under the plain meaning of § 1533(b)(3)(B). Defendants, on the other hand, argue that the 12-month finding period is not intended to be restricted to twelve months; instead, they urge that they have nine months from the completion of the 90-day finding to complete the 12-month finding. Thus, the Court must determine whether the Defendants' construction and application of Section 4 of the ESA in this instance conforms with the requirements contained therein.

Scope of Review of Agency Statutory Interpretations

Under Chevron and its progeny, agency interpretations of the statutes that govern their administrative functioning are entitled to a significant degree of deference. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); see also Pyramid Lake Paiute Tribe v. U.S. Dept. Of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990) ("An agency's construction of the laws it administers is accorded considerable weight.")(citing Chevron). However, this deference is limited to an agency's reasonable interpretations of an *ambiguous* statute. If the intent of Congress is clear and the plain meaning of the statute evident, courts are not obligated to defer to agency interpretations. In Chevron, the Supreme Court spelled out the inquiry as follows:

> [W]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Chevron U.S.A., Inc., 467 U.S. at 842-43.

Hence, the Court's first inquiry must be whether Congress has directly spoken as to the time requirement for the 12-month finding in Section 4. Is there any ambiguity in the express language of the statute or is the plain meaning, and hence, Congress' intent clear? The Court finds that there is no ambiguity in the statute and that the meaning of the statute is plain on its face. The provisions of 16 U.S.C. §1533(b)(3)(B) are crystal clear: Defendants are required to complete the 12-month finding within twelve months of *receiving the petition.*

Defendants reject this plain meaning of the provision, arguing that the provision also requires that the petition be one which is "found under subparagraph (A) [the 90-day finding] to present substantial information." Since the 90-day finding includes a discretionary provision to exceed the 90 days if it is not "practicable" to render a finding within 90 days, they argue that it follows that the 12-month finding must be fungible as well. Certainly, they argue, Congress could not have intended to build in discretion at the first step with the preliminary finding and then require a strict deadline with the more advanced and time-intensive finding at the second step. Therefore, Defendants conclude that Congress did not really mean to start the clock upon receipt of the petition as the statute explicitly states, but rather it meant to start the clock when the 90-day finding was completed.

Defendants' construction is problematic in several respects. First, it clearly ignores the salient language "after receiving the petition." Second, taken to its logical conclusion, it eviscerates all the time requirements existent in the statute as a whole. And, finally, it contravenes the clear intent of Congress in enacting the ESA.

1. Plain Meaning

As the 9th Circuit pointed out in Oregon Natural Resources Council v. Kantor (ONRC), 99 F.3d 334 (9th Cir. 1996), "[t]he language of the ESA regarding the deadlines for action could hardly be more clear." ONRC at 338-39. The statute explicitly distinguishes between those deadlines tied to the filing of a petition and those that are contingent upon some other action:

> "The deadlines for determining whether action on a petition is warranted and for publishing a proposed regulation are expressly tied to the filing of the petition. In contrast, the deadline for publishing a final regulation does not mention the filing of the petition, but rather expressly makes the deadline dependent on the publishing of the proposed regulation."

Id. at 339. Hence, it is improper for Defendants to effectively ignore the requirement that the tolling

of the 12-month period commences "after receiving the petition." "Congress is presumed to act intentionally and purposefully when it includes language in one section but omits it in another." Estate of Bell v. Commissioner, 928 F.2d 901, 904 (9th Cir. 1991).

2. Time Requirements & Congressional Intent

Defendants' open-ended requirement for the 12-month finding would also effectively obviate all time requirements in the listing process as a whole. If the discretion inherent in the 90-day finding is permitted to unleash the second requirement of a mandatory 12-month finding, the rest of the statute which rests, not on definitive time lines but on the completion of subsequent steps, would be subject to the complete discretion of the agency. Such a result is at express odds with the time-sensitive purpose of the ESA to protect endangered species. In the joint explanatory statement to the 1982 Amendments to ESA, the Conference Committee expressly noted that "these amendments are intended to expedite the decisionmaking process and to ensure prompt action in determining the status of the many species which may require the protections of the Act." H.R. Conf. Rep. No. 97-835 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2861-62; see also Biodiversity Legal Foundation, 146 F.3d at 1253 ("Congress' 1982 amendments to the ESA were enacted to force the Service to act more quickly on petitions to list."). Furthermore, the Conference Committee pointedly acknowledged that prior to the amendments, the statute imposed no deadlines, and status reviews had "continued indefinitely, sometimes for many years." Id. The amendments were, therefore, designed to "force action on listing and delisting proposals" and to "replace the Secretary's discretion with mandatory, nondiscretionary duties." Id.

In light of the Congressional purpose to expedite the processing of petitions, the only internally consistent interpretation of the plain language of the 90-day finding and the 12-month finding is that Congress intended to give some room in the initial processing of the amendments, but intended to cap that discretion by imposing a 12-month requirement. In other words, Congress did not intend the "to the maximum extent practicable" language governing 90-day findings to imply a period of time in excess of the year mandated for completion of the 12-month finding. Congress clearly imposed some rigid time-limits, some "mandatory, nondiscretionary duties" on the processing of petitions, and to effectuate these limits, the discretion inherent in the 90-day finding must be curtailed to accord with

1 the ultimate time-limit imposed by the 12-month finding.
2 Summary
3 Since there is no ambiguity in the statutory language governing the 12-month finding, the Court
4 need not employ a deferential scope of review when evaluating Defendants' construction of the statute
5 and the Court need not assess whether Defendants' interpretation is "reasonable." Chevron, 467 U.S.
6 at 842-43. The Court is sympathetic to the funding issues that triggered the implementation of the
7 listing priority guidelines ("LPG") by Defendants. However, the Court cannot uphold a process which
8 expressly contravenes the plain statutory provisions of the ESA. The Court recognizes that the 10th
9 Circuit has determined that "the LPG is a reasonable interpretation of section 4(b)(3)(A) [the 90-day
10 finding] in the light of the entire statutory scheme." Biodiversity Legal Foundation v. Babbitt, 146
11 F.3d at 1256. However, the 10th Circuit itself acknowledged that its review was "limited" and that
12 "the question of the 1997 LPG's validity where a violation of a mandatory provision of the ESA is
13 alleged is not before us." Id. The 12-month ruling is such a mandatory provision; the 10th Circuit
14 itself characterized the 12-month ruling as a "non-discretionary mandate." Id. at 1255. Hence, the
15 10th Circuit did not expressly consider the issue before this Court, but rather considered whether the
16 LPG fit within the discretion left to the agency under the 90-day rule. As such, the Court does not find
17 Biodiversity's conclusions persuasive authority for this determination.
18 In light of the plain language of the statute and the clear intent of Congress, the Court
19 GRANTS Plaintiff's motion for summary judgment. The Court finds that Defendants have violated
20 the ESA's provisions by failing to make a 12-month finding on the San Diego ambrosia within twelve
21 months of having received the petition.
22 Defendants' Motion for Stay of All Proceedings
23 Defendants also present an alternative argument to the Court, arguing that, if they are not
24 entitled to summary judgment, a stay would be the most appropriate means of ensuring that they
25 complete the 12-month finding in the time frame they have allotted. Defendants contend that their
26 inability to comply with the listing requirements of the ESA is a function of restrictive congressional
27 action in 1995. Defendants argue that Public Law 104-6, which took effect on April 10, 1995,
28 prevented them from complying with the 12-month deadline. See Public Law 104-6. The agencies

1 responsible for implementing the ESA remained under this moratorium until April 26, 1996. Thus,
2 Defendants allege that they were precluded from complying with ESA deadlines during that period
3 and in its aftermath.

4 Given the time and budgetary constraints they faced, Defendants argue that they lacked the
5 resources to expedite the processing of the ambrosia. Therefore, Defendants urge this Court to find
6 that, even if summary judgment is not appropriate, a stay should be granted to allow them to complete
7 the 12-month review on their planned schedule. Defendants, however, have presented no evidence
8 that they cannot complete their review of the Carlsbad Field Office report in less than 12 weeks.
9 Moreover, Defendants have failed to demonstrate that they could not have undertaken the field
10 research more expeditiously, without sacrificing the quality of their review. In fact, Defendants' delay
11 in completing the review process continues to threaten the ambrosia.

12 Thirty-three months have passed since the petition was filed, and the 12-month finding still has
13 not been completed. Defendants claim they require an additional three months to complete the
14 approval process for the 12-month finding. The Court notes that, even after the proposed regulation
15 has been published, the Secretary will have one more year before a final regulation must be
16 implemented. Thus, time is of the essence in moving to that next stage of the listing process. Of
17 course, it is possible that the Secretary will not find that the ambrosia is threatened or endangered, but,
18 based on the 90-day finding published by the FWS, the ambrosia faces an ominous future. See 61 Fed.
19 Reg. 64475 at 19109. The Court recognizes the backlog faced by all of the agencies charged with
20 implementing the ESA. The Court further notes that this backlog was the result of external constraints
21 on the agencies — namely congressional budgetary restrictions — and that the agencies are not the
22 direct cause of their own backlog. Even as the agencies are busy catching up, new cases continue to
23 roll in, some requiring immediate review. Nevertheless, as discussed above, Defendants' argument
24 that they have nine months from the completion of the 90-day finding to complete their 12-month
25 finding is, simply put, incorrect. Moreover, a stay is inappropriate here because defendants have failed
26 to (1) make any effort to expedite the status review in light of the positive 90-day finding; (2) provide
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evidence that the 12-month finding could not have been conducted more quickly;[1] or (3) justify the need for an additional twelve weeks to review the Carlsbad Field Office report.

CONCLUSION

For the reasons set forth above, the Court **GRANTS** Plaintiffs' motion for summary judgment and **DENIES** Defendants' motion for summary judgment and request for a stay. Defendants are **ORDERED** to complete the 12-month finding required by Section 4 of the ESA no later than December 10, 1999. Until then, the Court shall retain jurisdiction over this matter. Plaintiffs may file a separate motion requesting reasonable costs and attorney's fees.

IT IS SO ORDERED.

DATED: [illegible] 27, 1999

NAPOLEON A. JONES, JR.
United States District Judge

cc: All Parties
Magistrate Brooks

[1] For example, in crafting its 12-month finding, the FWS might have relied on the August 1996 Multiple Species Conservation Program prepared in a separate matter by the FWS on the basis of the "best scientific and commercial data available." That Program listed the ambrosia's risk of survival as "high." See Plaintiffs' Exhibit 6, Multiple Species Conservation Program, Vol. I, Table 3-5. While the results of that report may not be conclusive, they certainly should have assisted in expediting the status review process.