

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF THE
INTERIOR; SALLY JEWELL, in her
official capacity as Secretary of the
Interior; U.S. FISH AND WILDLIFE
SERVICE; DAN ASHE, Director of the
U.S. Fish and Wildlife Service,

Defendants,

CROPLIFE AMERICA,

Defendant-Intervenor.

CASE NO. 3:15-cv-658-JCS

**STIPULATED SETTLEMENT AND
[PROPOSED] ORDER**

Plaintiff Center for Biological Diversity (“the Center”); Sally Jewell, in her official capacity as the Secretary of the Interior, the U.S. Fish and Wildlife Service (the “FWS”), and Dan Ashe, in his official capacity as Director of the Fish and Wildlife Service (“Federal Defendants”) (collectively, “the Parties”) by and through the undersigned counsel, state as follows:

WHEREAS, under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), the U.S. Environmental Protection Agency (“EPA”) is responsible for registering pesticides and ensuring that pesticides do not cause unreasonable adverse effects on the environment, which includes species listed as threatened or endangered (“listed species”) under the Federal Endangered Species Act (“ESA”);

1 WHEREAS, pursuant to Section 7 of the ESA, EPA and all federal agencies must, in
2 consultation with and with the assistance of FWS and NMFS, insure that any action authorized,
3 funded, or carried out by such agency is not likely to jeopardize the continued existence of any
4 endangered or threatened species or result in the destruction or adverse modification of their
5 critical habitat;
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7 WHEREAS, over the years, EPA, FWS, and NMFS have used different risk assessment
8 approaches to identify the potential effects of pesticides on threatened and endangered species
9 and were unable to reach a consensus on an approach for assessing the risks to listed species;
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11 WHEREAS, these different approaches to risk assessment have impacted the ability of
12 EPA, FWS and NMFS to complete consultation under the ESA;

13 WHEREAS, in order to resolve these differences, EPA, FWS, NMFS, and the United
14 States Department of Agriculture (“USDA”) asked the National Academy of Sciences (“NAS”)
15 to evaluate the differing risk assessment approaches used by these agencies to identify the
16 potential effects of pesticides on threatened and endangered species;
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18 WHEREAS, the NAS responded to that request on April 30, 2013, by issuing a report
19 entitled “Assessing Risks to Endangered and Threatened Species from Pesticides” (the “NAS
20 report”);
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22 WHEREAS, the NAS report suggests, *inter alia*, that EPA, FWS, and NMFS take a
23 common approach to assessing the potential effects of pesticides on listed species to facilitate
24 coordination among federal agencies;

25 WHEREAS, EPA, FWS, and NMFS are now working in close cooperation to evaluate
26 and implement recommendations made by the NAS report;
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1 WHEREAS, FWS, EPA and NMFS are now working collaboratively on the ESA § 7
2 consultation process for the registration review of certain pesticides under section 3(g) of FIFRA
3 with recommendations provided in the NAS report;
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5 WHEREAS, based on the findings in the NAS report, the work done so far by the
6 agencies to implement recommendations in that report, and the need to align the consultation
7 process with EPA's registration review of pesticides, the Parties agree that when consultation is
8 required, it would be more efficient for EPA and FWS to consult on the potential effects of
9 pesticides on listed species nationwide; the Parties further agree that the agencies still face
10 significant challenges in implementing recommendations of the NAS report and completing such
11 nationwide consultations; accordingly, the Parties acknowledge that the Agencies intend to
12 proceed with nationwide ESA evaluations in a phased, iterative process, taking into account
13 input received and lessons learned from initial efforts to implement NAS recommendations, and
14 maintaining flexibility to pursue processes or methodologies not part of such initial efforts;
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17 WHEREAS, the Center filed a complaint on October 19, 2011 in *Center for Biological*
18 *Diversity v. U.S. Fish and Wildlife Service et al.*, No. 3:11-cv-5108-JSW (N.D. Cal.) ("CRLF
19 II"), alleging that the FWS and EPA violated Section 7 of the ESA, the ESA's implementing
20 regulations, and the Administrative Procedure Act ("APA"), with regard to the alleged failure to
21 complete consultation as to the effects of 64 pesticide ingredients for which EPA determined in
22 2009 were likely to affect the California red-legged frog (*Rana draytonii*);
23

24 WHEREAS, on November 4, 2013, the Center, FWS and EPA entered into a settlement
25 agreement in CRLF II requiring completion of ESA consultations on the effects of seven (7)
26 chemicals on the California red-legged frog by November 4, 2015 (CRLF II, Dkt. 76).
27 ("November 4, 2013 Agreement");
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1 WHEREAS, on July 28, 2014, the Center, FWS and EPA entered into a stipulation
2 amending the CRLF II November 4, 2013 Agreement to provide that if FWS completes
3 nationwide consultation on five chemicals (carbaryl, chlorpyrifos, diazinon, malathion, and
4 methomyl) by December 31, 2018, FWS shall be deemed to have discharged its obligations
5 under the terms of the original settlement in full (CRLF II, Dkt. 87) (“July 28, 2014
6 Agreement”);

8 WHEREAS, EPA and FWS are working to complete such nationwide consultations on
9 carbaryl, chlorpyrifos, diazinon, malathion, and methomyl;

11 WHEREAS, EPA and FWS currently expect to complete nationwide ESA consultations
12 for three of the five pesticides listed above (chlorpyrifos, diazinon, and malathion) by December
13 31, 2017, and for the remaining two pesticides (carbaryl and methomyl) by December 31, 2018;

14 WHEREAS, the Center filed a separate complaint on February 12, 2015 in the case at
15 bar, alleging that the FWS has violated Section 7 of the ESA and the APA, with regard to the
16 alleged failure to complete consultation and the effects of atrazine and alachlor on the Delta
17 smelt (*Hypomesus transpacificus*) (“smelt”) and 2, 4-D upon the Alameda whipsnake
18 (*Masticophis lateralis euryxanthus*) (“whipsnake”) (Dkt. 1);

20 WHEREAS, based on the findings in the NAS report and the work done so far by the
21 agencies to address recommendations in that report, the Parties now agree that it would be more
22 efficient for FWS to consult on the potential effects that one pesticide at issue in this case
23 (atrazine) as well as three other priority pesticides not at issue in this case (simazine, propazine,
24 and glyphosate) have on listed species on a nationwide basis (if EPA initiates nationwide
25 consultation with FWS on atrazine, simazine, propazine, and glyphosate), instead of completing
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1 consultation on the effects of atrazine and alachlor on only the smelt and 2,4-D on only the
2 whipsnake;

3 WHEREAS, EPA expects to complete a nationwide evaluation of the effects of four
4 pesticides—atrazine, simazine, propazine and glyphosate—on listed species in connection with
5 registration review under FIFRA and initiate any necessary nationwide ESA consultations for
6 these four pesticides by June 30, 2020 (*Center for Biological Diversity v. Environmental*
7 *Protection Agency*, No. 3:07-cv-02794-JCS (N.D. Cal.) (Dkt. 154 at 3);
8

9 WHEREAS, if EPA initiates nationwide consultation with FWS on atrazine, simazine,
10 propazine, and/or glyphosate, EPA and FWS currently expect to complete such nationwide ESA
11 consultations by December 30, 2022;
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13 WHEREAS, these four pesticides, together with the five pesticides addressed in the
14 CRLF II July 28, 2014 Agreement, constitute a substantial portion of pesticide use in the U.S. by
15 weight annually;
16

17 WHEREAS, EPA, FWS, and NMFS are exploring the feasibility of a comprehensive
18 pesticide ESA consultation workplan addressing the registration and registration review of
19 pesticide ingredients under FIFRA;
20

21 WHEREAS, the Parties enter into the instant Stipulated Settlement so that FWS will have
22 an opportunity to attempt to complete the potential nationwide consultations described above,
23 while acknowledging that FWS may still be required to complete consultations on the effects of
24 atrazine and alachlor on the smelt and 2,4-D on the whipsnake if it is not able to complete the
25 potential nationwide consultations (although any applicable deadline for such whipsnake and
26 smelt consultation would be determined by the Parties after the mechanism described in
27 paragraph 4, *infra*, is triggered);
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1 WHEREAS, the Center and the Federal Defendants, through their authorized
2 representatives, have reached agreement on the terms of a settlement, which is captured in this
3 Stipulated Settlement, that they consider to be a just, fair, adequate, and equitable resolution of
4 the issues in this case;

5
6 WHEREAS, the parties agree that this Stipulated Settlement is in the public interest and
7 is an appropriate way to resolve the remaining disputed issues;

8 WHEREAS Defendant-Intervenor CropLife America takes no position on this proposed
9 Stipulated Settlement;

10 NOW, THEREFORE, THE PARTIES STIPULATE AS FOLLOWS:

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12 1. As to the FWS's completion of consultation and delivery to EPA of a final
13 biological opinion on the effects of atrazine and alachlor on the smelt and 2-4,D on the
14 whipsnake, any applicable deadline is hereby suspended to allow the Federal agencies to engage
15 in the potential nationwide consultations described in the above "whereas" clauses.

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17 2. No provision of this Stipulation requires (or shall be construed to require) FWS to
18 conduct the nationwide consultations described above in the "whereas" clauses, and no provision
19 of this Stipulation requires (or shall be construed to require) FWS to complete any such
20 nationwide consultations on the schedule set out in the above "whereas" clauses.

21 3. While it is not obligated to do so, if EPA initiates and FWS completes nationwide
22 consultation on atrazine, simazine, propazine, and glyphosate on the schedule set out above in
23 the "whereas" clauses, then FWS shall be deemed to have discharged its obligations to complete
24 consultation on the effects of atrazine and alachlor on the smelt and 2,4-D on the whipsnake in
25 full.

26 4. Alternatively, if
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1 (a) FWS does not complete an EPA-initiated nationwide consultation on atrazine,
2 simazine, propazine and glyphosate on the schedule set out above in the “whereas”
3 clauses;

4 (b) FWS concludes (based on further review of these issues) that nationwide
5 consultations are no longer appropriate or required; or,

6 (c) FWS does not complete the interim benchmarks on the estimated schedule
7 described below in Paragraph 5, then:

8 (1) at the request of either the Center or the Federal Defendants, the Parties shall
9 meet and confer at the earliest available opportunity to discuss whether it is appropriate
10 for FWS to complete the consultations on the effects of atrazine and alachlor on the smelt
11 and 2,4-D on whipsnake described in Paragraph 1, *supra*, and, if so, to discuss an
12 appropriate revised schedule for those consultations; and,

13 (2) if the Parties are unable to reach agreement on that revised schedule within
14 thirty (30) days of any such meeting and conference, either party may petition the Court
15 to resolve the dispute and set a schedule for the remaining consultations on the effects of
16 atrazine and alachlor on the smelt and 2,4-D on the whipsnake described in Paragraph 1,
17 *supra*.

18
19 5. Within 30 days of the Court’s approval of this Stipulated Settlement, FWS shall
20 provide the Center (and Intervenor-Defendant) with an estimated schedule, including interim
21 benchmarks, for completing the potential nationwide consultations described above in the
22 “whereas” clauses. That schedule will include estimated dates for FWS’s draft biological
23 opinions and FWS’s final biological opinions for each of these pesticides, where applicable. The
24 Parties recognize that this schedule will be a good faith estimate as of the date that it is provided,
25 but that the schedule may be subject to change (based on factors including, but not limited to,
26 variations in the estimated dates for data submission, the volume of public comments, and
27 unanticipated legal obligations), and that, as stated above in Paragraph 3, this schedule will not
28 be binding or enforceable by the Court.

1 6. FWS shall provide the Center (and Intervenor-Defendant) with an update by
2 conference call every four (4) months describing the status of these consultations.

3 7. Upon entry of this Stipulated Settlement, Plaintiff's complaint shall be dismissed
4 with prejudice.

5 8. This Stipulation has no precedential value and shall not be used as evidence in
6 litigation or any other court proceeding (other than to enforce this Stipulated Settlement).

7 9. Within 30 days of the Court's approval of this Stipulated Settlement, the FWS
8 shall post the following on its Pesticide Registrations and ESA Consultations webpage, which is
9 found at <http://www.fws.gov/endangered/what-we-do/pesticide-consultation.html> : (i) a
10 summary of the principal terms of this Stipulated Settlement, including the schedule discussed in
11 the "whereas" clauses; (ii) a hyperlink to the full text of the Stipulated Settlement; and (iii) a
12 hyperlink to the EPA's webpage covering the stipulated injunction entered in *Center for*
13 *Biological Diversity v. EPA*, 07-2794 (N.D. Cal., May 17, 2010) (Dkt. 121) ("Order Approving
14 Stipulated Injunction and Order"), which is found at: [http://www.epa.gov/endangered-](http://www.epa.gov/endangered-species/original-2010-court-order-cbd-v-epa)
15 [species/original-2010-court-order-cbd-v-epa](http://www.epa.gov/endangered-species/original-2010-court-order-cbd-v-epa).

16 10. The Parties reserve the right to seek to have this Court modify this Stipulated
17 Settlement because of the FWS's ongoing actions to comply with the ESA, to meet the
18 requirements of other federal agencies or departments, or to contend with other circumstances
19 not presently anticipated, including completion of FWS's, NMFS's, and EPA's comprehensive
20 ESA pesticide consultation workplan discussed above in the "whereas" clauses. The Court will
21 consider such future requests as it deems appropriate.

22 11. In the event of a disagreement between the Parties concerning the interpretation or
23 performance of any aspect of this Stipulated Settlement, the dissatisfied Party shall provide
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1 the other Party with written notice of the dispute and a request for negotiations. The Parties shall
2 confer in order to attempt to resolve the dispute within 14 days after receipt of the notice, or such
3 time thereafter as is mutually agreed upon. If the Parties are unable to resolve the dispute within
4 21 days after receipt of the notice, or such time thereafter as is mutually agreed upon, then any
5 Party may petition the Court to resolve the dispute.
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7 12. The Federal Defendants agree that Plaintiff is entitled to reimbursement of
8 reasonable attorneys' fees and costs. Federal Defendants and Plaintiff agree to attempt to resolve
9 Plaintiff's claim for fees and costs for all claims in this action expeditiously, without the
10 need for Court intervention. The Parties recognize that Federal Defendants have not waived any
11 defense to and preserve their right to challenge the reasonableness of the amount of
12 attorneys' fees and costs requested by Plaintiff in the event that Plaintiff and Federal
13 Defendants are unable to resolve Plaintiff's claim for fees and costs. The Parties further
14 recognize that Plaintiff reserves the right to seek additional fees and costs incurred arising
15 from a need to enforce or defend against efforts to modify this Stipulated Settlement, to litigate a
16 reasonable award of attorneys' fees and costs, or for any other unforeseen continuation of this
17 action.
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19 13. If the Federal Defendants and Plaintiff cannot agree on the amount of such fees
20 within 60 days of the Court approving this Stipulated Settlement, Plaintiff shall file a motion for
21 attorneys' fees and costs with the Court in this matter. This 60 day period shall supersede the
22 14 day time period otherwise applicable pursuant to Federal Rules of Civil Procedure
23 Section 54(d)(2)(B) and the court order approving the Stipulated Settlement will accordingly
24 operate as an enlargement of time pursuant to Federal Rules of Civil Procedure Section
25 6(b)(1) for Plaintiffs to file a fee motion.
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1 14. It is the expectation and understanding of the Parties that if EPA cancels the
2 remaining pesticide registrations containing any of the active ingredients listed in Paragraph 1,
3 FWS shall not be required to complete consultation with regard to that active ingredient.
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5 15. It is furthermore the expectation and understanding of the Parties that if EPA
6 cancels the remaining pesticide registrations containing any of the active ingredients listed in
7 Paragraph 3, FWS shall be deemed to have discharged its consultation commitments for the
8 purposes of Paragraph 3 with regard to that active ingredient.
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10 16. No provision of this Stipulated Settlement shall be interpreted as or constitute a
11 commitment or requirement that the Federal Defendants take action in contravention of the
12 ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing in
13 this Stipulated Settlement shall be construed to limit or modify the discretion accorded to the
14 Federal Defendants by the ESA, the APA, or general principles of administrative law with
15 respect to the procedures to be followed in conducting the ESA consultation described
16 above, or as to the substance of any such determinations.
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18 17. Nothing in this Stipulated Settlement shall bar the Federal Defendants from acting
19 on any matters covered herein in a time frame earlier than required by this Stipulated Settlement,
20 or from taking additional actions not specified herein if the Federal Defendants determines such
21 actions are appropriate under applicable law.
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23 18. Nothing in this Agreement shall be interpreted as, or shall constitute, a
24 requirement that Federal Defendants are obligated to pay any funds exceeding those available, or
25 take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
26 appropriations law.
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1 19. The Parties agree that this Stipulated Settlement was negotiated in good faith and
2 that entry of this Stipulated Settlement constitutes a settlement of claims that were vigorously
3 contested, denied, and disputed by the Parties. By entering into this Stipulated Settlement,
4 the Parties do not waive any claim or defense.
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6 20. The undersigned representatives of each Party certify that they are fully
7 authorized by the Party (or Parties) they represent to agree to the terms and conditions of this
8 Stipulated Settlement and do hereby agree to the terms herein.
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10 21. This Stipulated Settlement does not constitute an admission or evidence of any
11 fact, wrongdoing, misconduct, or liability on the part of the United States, including without
12 limitation, the Federal Defendants, their officers, or any other person affiliated with the FWS, or
13 any interpretation of any applicable provision of law.

14 22. Plaintiff's sole judicial remedy to address the merits of any final action that may
15 ensue from FWS's performance of its obligations under this Stipulated Settlement is to file a
16 separate lawsuit challenging such final action. The Federal Defendants reserve all defenses to
17 any such suit. Nothing in this Stipulated Settlement alters or affects the standards for review of
18 final agency action, or creates jurisdiction that otherwise would not exist to review agency
19 action.
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21 23. Notwithstanding the dismissal of this action, the Parties have agreed and
22 requested that this Court retain jurisdiction to oversee compliance with the terms of this
23 Stipulated Settlement and to resolve any motions to modify such terms. *See Kokkonen v.*
24 *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).
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PURSUANT TO STIPULATION, IT IS ORDERED that the Settlement Agreement executed by the Parties is hereby incorporated into this Order; and

IT IS FURTHER ORDERED that this Court shall have continuing jurisdiction to enforce this Order and the terms of the Settlement Agreement.

DATED: 2/19/16



Joseph C. Spero
United States Magistrate Judge