

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,) Case No. 3:11-cv-5108-JSW
) Case No. 3:02-cv-1580-JSW (related case)

Plaintiff,)

v.)

**UNITED STATES FISH AND WILDLIFE)
SERVICE; DAN ASHE,** in his official capacity)
as Director of the Fish and Wildlife Service;)
**UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY;** and **ROBERT)
PERCIASEPE,** in his official capacity as Acting)
Administrator of EPA,)

**STIPULATED SETTLEMENT AND
[PROPOSED] ORDER**

Defendants,)

CROP LIFE AMERICA;)

Defendant-Intervenor.)

1 Plaintiff Center for Biological Diversity (“the Center”), the United States Fish and
2 Wildlife Service (the “Service”), Dan Ashe, in his official capacity as Director of the Fish and
3 Wildlife Service, the United States Environmental Protection Agency (“EPA”), and Robert
4 Perciasepe, in his official capacity as Acting Administrator of EPA,¹ (collectively “the Parties”)
5 by and through the undersigned counsel, state as follows:

6 WHEREAS, the EPA determined that 64 pesticides “may affect” the California red-
7 legged frog (*Rana draytonii*), which is a federally protected species under the ESA;

8 WHEREAS, the EPA requested formal consultation on the frog with the Service for
9 these pesticides but the agencies have not yet completed these consultations;

10 WHEREAS, the Center filed a complaint on October 19, 2011, alleging that the Service
11 and the EPA have violated Section 7 of the Endangered Species Act (“ESA”), the ESA’s
12 implementing regulations, and the Administrative Procedure Act (“APA”), with regard to the
13 alleged failure to complete consultation and the potential impacts of these 64 pesticide
14 ingredients upon the California red-legged frog;

15 WHEREAS, the Center and the Federal Defendants, through their authorized
16 representatives, have reached agreement on the terms of a settlement, which is captured in the
17 form of this Stipulated Settlement, that they consider to be a just, fair, adequate, and equitable
18 resolution of the issues in this case;

19 WHEREAS, the Center and the Federal Defendants agree that this Stipulated Settlement
20 is in the public interest and is an appropriate way to resolve the remaining disputed issues;

21 NOW, THEREFORE, THE PARTIES STIPULATE AS FOLLOWS:

22
23 **SECTION 7 CONSULTATION SCHEDULE**

24 **1. Compliance with Section 7(a)(2) of the Endangered Species Act**

25 The Service shall complete consultation with EPA, pursuant to the applicable
26 regulations, on the potential effects of seven pesticides on the California red-legged frog
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28

1 Pursuant to Fed. R. Civ. Pro. 25(d), Robert Perciasepe is substituted for Lisa Jackson.

1 (*Rana draytonii*), according to the schedule delineated in Paragraph 2 of this agreement.

2 The seven pesticides are: glyphosate, malathion, simazine, pendimethalin, permethrin,
3 methomyl, and myclobutanil.

4 **2. Consultation Schedule**

5 No later than one year after the entry of an order by the Court ratifying this Stipulated
6 Settlement, the Service shall conduct consultation and deliver to EPA a draft biological
7 opinion for two of the pesticides listed in Paragraph 1.

8
9 No later than two years after the entry of an order by the Court ratifying this Stipulated
10 Settlement, the Service shall complete consultation for all seven of the pesticides listed
11 in Paragraph 1.

12 13 **NOTIFICATION REQUIREMENTS**

14 **3. Web-site Content**

15 Prior to the issuance of the press release discussed below, the Service shall create a
16 dedicated webpage that displays the following: (i) a summary of the principal terms of the
17 Stipulated Settlement, including the schedule discussed in Paragraph 2; (ii) a hyperlink to
18 the full text of the Stipulated Settlement; (iii) a hyperlink to the EPA's webpage covering the
19 stipulated injunction entered in *Center for Biological Diversity v. Johnson*, 02-1580-JSW
20 ("Stipulated Injunction"), which is found at: [http://www.epa.gov/espp/litstatus/redleg-](http://www.epa.gov/espp/litstatus/redleg-frog/steps-info.htm)
21 [frog/steps-info.htm](http://www.epa.gov/espp/litstatus/redleg-frog/steps-info.htm); and (iv) a short description of the Stipulated Injunction entered in
22 *Center for Biological Diversity v. Johnson*, Civ. Case No. 02-1580-JSW (N.D. Cal. Oct. 20,
23 2006), including (1) a statement in bold or underlined text that the pesticide use restrictions
24 in the Stipulated Injunction are still in effect; (2) a list of the counties affected by the
25 Stipulated Injunction; (3) a map of the State of California highlighting the counties where
26 the Stipulated Injunction applies; (4) a statement that EPA has since found that 62 pesticides
27 covered by the Stipulated Injunction "may affect" and are "likely to adversely affect" the
28 California red-legged frog; and (5) a hyperlink to the Service's webpage on the California

1 red-legged frog, which is found at:

2 <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?sPCODE=D02D>.

3
4 Prior to the issuance of the press release discussed below, the Service shall also create a
5 dedicated webpage that will (i) include hyperlinks to all final biological opinions issued after
6 2012 that are the result of consultation between EPA and the Service regarding applications
7 for registration or re-registration under the Federal Insecticide, Fungicide, and Rodenticide
8 Act, 7 U.S.C. § 136, et. seq; (ii) provide a timeline for preparation of all biological opinions
9 imposed by court order; (iii) provide a hyperlink to the dedicated webpage on the Stipulated
10 Settlement that is described above; and (iv) explain that pesticides may be harmful to some
11 endangered species.

12 **4. Public Notification of Stipulated Settlement**

13 Within two weeks of the Court's approval of this Stipulated Settlement, the Service shall
14 issue a press release that alerts the public to the Stipulated Settlement and shall post said
15 press release on the homepage of the Service's webpage, which is found at:

16 <http://www.fws.gov/>. The press release shall include hyperlinks to the webpages developed
17 as discussed in Paragraph 3.

18 19 **MODIFICATION**

20 5. The Parties reserve the right to seek to have this Court modify this Stipulated Settlement
21 because of the Service's ongoing actions to comply with the ESA, to meet the requirements
22 of other federal agencies or departments, or to deal with circumstances not presently
23 anticipated. The Court will consider such future requests as it deems appropriate.

24 25 **DISPUTE RESOLUTION**

26 6. In the event of a disagreement between the Parties concerning the interpretation or
27 performance of any aspect of this Stipulated Settlement, the dissatisfied Party shall provide
28 the other Party with written notice of the dispute and a request for negotiations. The Parties

1 shall confer in order to attempt to resolve the dispute within 14 days after receipt of the
2 notice, or such time thereafter as is mutually agreed upon. If the Parties are unable to resolve
3 the dispute within 21 days after receipt of the notice, or such time thereafter as is mutually
4 agreed upon, then any Party may petition the Court to resolve the dispute.

5 **ATTORNEYS' FEES**

6 7. The Federal Defendants agree that Plaintiff is entitled to reimbursement of reasonable
7 attorneys' fees and costs. Federal Defendants and Plaintiff agree to attempt to resolve
8 Plaintiff's claim for fees and costs for all claims in this action expeditiously, without the
9 need for Court intervention. The Parties recognize that Defendants have not waived any
10 defense to and preserve their right to challenge the reasonableness of the amount of
11 attorneys' fees and costs requested by Plaintiff in the event that Plaintiff and Federal
12 Defendants are unable to resolve Plaintiff's claim for fees and costs. The Parties further
13 recognize that Plaintiff reserves the right to seek additional fees and costs incurred arising
14 from a need to enforce or defend against efforts to modify this Stipulated Settlement or for
15 any other unforeseen continuation of this action.

16
17 8. If the Federal Defendants and Plaintiff cannot agree on the amount of such fees within 60
18 days of the Court approving this Stipulated Settlement, Plaintiff shall file a motion for
19 attorneys' fees and costs with the Court in this matter. This 60 day period shall supersede the
20 14 day time period otherwise applicable pursuant to Federal Rules of Civil Procedure
21 Section 54(d)(2)(B) and the court order approving the Stipulated Settlement will accordingly
22 operate as an enlargement of time pursuant to Federal Rules of Civil Procedure Section
23 6(b)(1) for Plaintiffs to file a fee motion.

24
25 **SCOPE OF THE STIPULATED SETTLEMENT**

26 9. It is the expectation and understanding of the Parties that if EPA cancels the pesticide
27 registration of any of the active ingredients listed in Paragraph 1, the Service shall not be
28 required to complete consultation with regard to that active ingredient.

1
2 10. No provision of this Stipulated Settlement shall be interpreted as or constitute a
3 commitment or requirement that the Federal Defendants take action in contravention of the
4 ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing in
5 this Stipulated Settlement shall be construed to limit or modify the discretion accorded to the
6 Federal Defendants by the ESA, the APA, or general principles of administrative law with
7 respect to the procedures to be followed in conducting the ESA consultation described
8 above, or as to the substance of any such determinations.

9
10 11. Nothing in this Stipulated Settlement shall bar the Federal Defendants from acting on
11 any matters covered herein in a time frame earlier than required by this Stipulated
12 Settlement, or from taking additional actions not specified herein if the Federal Defendants
13 determines such actions are appropriate under applicable law.

14
15 12. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that
16 Defendants are obligated to pay any funds exceeding those available, or take any action in
17 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.

18
19 13. The Parties agree that this Stipulated Settlement was negotiated in good faith and that
20 entry of this Stipulated Settlement constitutes a settlement of claims that were vigorously
21 contested, denied, and disputed by the Parties. By entering into this Stipulated Settlement,
22 the Parties do not waive any claim or defense.

23
24 14. The undersigned representatives of each Party certify that they are fully authorized by
25 the Party (or Parties) they represent to agree to the terms and conditions of this Stipulated
26 Settlement and do hereby agree to the terms herein.

1 15. Upon entry of this Stipulated Settlement, Plaintiff's complaint shall be dismissed without
2 prejudice. Plaintiff resolves its Complaint as to the seven active ingredients listed in
3 Paragraph 1, but Plaintiff reserves the right to bring a new Complaint as provided herein
4 regarding the 57 other active ingredients. Plaintiff agrees not to bring, assist any other Party
5 in bringing, or join the Service, EPA, or any other Party in any court proceeding that
6 concerns a failure to complete consultation for the California red-legged frog as to those 57
7 active ingredients until two years after the Court's ratification of this Stipulated Settlement
8 as set forth in Paragraph 2 of this Stipulated Settlement.

9
10 16. This Stipulated Settlement does not constitute an admission or evidence of any fact,
11 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
13 Service or EPA, or any interpretation of any applicable provision of law. This Stipulated
14 Settlement has no precedential value and shall not be used as evidence in any other court
15 proceeding or in any other settlement discussions (other than litigation to enforce this
16 Stipulated Settlement).

17
18 17. Plaintiff's sole judicial remedy to address the merits of any final action that may ensue
19 from the Service's performance of its obligations under this Stipulated Settlement is to file a
20 separate lawsuit challenging such final action. The Federal Defendants reserve all defenses
21 to any such suit. Nothing in this Stipulated Settlement alters or affects the standards for
22 review of final agency action, or creates jurisdiction that otherwise would not exist to review
23 agency action.

24
25 18. Notwithstanding the dismissal of this action, the Parties have agreed and requested that
26 this Court retain jurisdiction to oversee compliance with the terms of this Stipulated
27 Settlement and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life*
28 *Ins. Co. of America*, 511 U.S. 375 (1994).

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19. The terms of this Stipulated Settlement constitute the entire agreement of the Parties, and no statement, agreement or understanding, oral or written, which is not contained herein, shall be recognized or enforced.


20. The terms of this Stipulated Settlement shall become effective upon entry of an order by the Court ratifying this Stipulated Settlement.

PURSUANT TO STIPULATION, IT IS ORDERED that the Settlement 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 herein consistent with the terms of that agreement; and

IT IS FURTHER ORDERED that this case is hereby **DISMISSED** without prejudice. The Court finds the claims settled in this action broader than those settled in the Stipulated Injunction issued in case no. 02-1580 JSW dated October 20, 2006 and thereby DENIES CropLife's motion to dismiss as not well-taken.

Dated: November 4, 2013


United States District Judge

Presented by:

/s Collette Adkins Giese

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