

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE

4 *NW Coalition for Alternatives to*)
5 *Pesticides, et al.*)

NO. 07-1791-RSL

6 Plaintiffs,)

7 v.)

STIPULATION AND ORDER TO
AMEND THE STIPULATED SETTLEMENT
AGREEMENT AFFIRMED BY THIS COURT
ON AUGUST 1, 2008

8 *National Marine Fisheries Service,*)

9 Federal Defendant.)

10
11 Plaintiffs Northwest Coalition for Alternatives to Pesticides, *et al.* (“Plaintiffs) and
12 Defendant National Marine Fisheries Service (“NMFS”) declare as follows:

13 WHEREAS, on July 2, 2002, the district court for the Western District of Washington, in
14 *Washington Toxics Coalition v. EPA*, No. C-01-132C (W.D. Wash. July 2, 2002) (“*Washington*
15 *Toxics*”), ordered the U.S. Environmental Protection Agency (“EPA”) to make effects
16 determinations and, as appropriate, initiate consultation with NMFS, as required under section
17 7(a)(2) of the Endangered Species Act (“ESA”), to ensure that 54 EPA-registered pesticides will
18 not jeopardize the survival and recovery of 26 threatened and endangered salmon and steelhead
19 species and will not destroy or adversely modify their designated critical habitat;
20
21

22 WHEREAS, pursuant to the *Washington Toxics* order, between August 2002 and
23 December 2004, EPA commenced initiation of consultation with NMFS on 37 pesticides EPA
24 determined “may affect” listed salmon and steelhead in the Pacific Northwest;
25

26 WHEREAS, Plaintiffs filed a Complaint (Dkt. No. 1) in the above-captioned case on
27 November 5, 2007, in this court, seeking a judgment declaring that NMFS’s failure to complete
28 section 7(a)(2) consultations on the 37 pesticides in a timely fashion violated section 7(b)(1) of

1 the ESA and its implementing regulations and section 706(1) of the Administrative Procedure
2 Act (“APA”);

3 WHEREAS Plaintiffs additionally sought in their Complaint an order compelling NMFS
4 to complete the consultations within two years;

5
6 WHEREAS, in July 2008, the parties settled this matter (Dkt. No. 20), with NMFS
7 agreeing to complete the consultations on the 37 pesticides at issue consistent with the
8 requirements of the ESA and its implementing regulations and in accordance with the schedule
9 mutually agreed to by the parties and attached to the parties’ settlement agreement as Attachment
10 1 (“Consultation Schedule”);

11
12 WHEREAS, the schedule attached to the Stipulated Settlement Agreement (Exhibit 1 to
13 Dkt. No. 20) requires NMFS to issue a number of biological opinions by dates certain;

14 WHEREAS, the Court subsequently extended the deadlines to issue biological opinions
15 for the chemicals originally to be covered by Biological Opinions 9-16 to June 30, 2013 (Dkt.
16 No. 35);

17
18 WHEREAS, Paragraph 5 of the Stipulated Settlement Agreement provides that:

19 Defendants represent that they intend to make every
20 effort to comply with the terms of this Stipulation in
21 good faith. If, however, through unforeseen
22 circumstances, events should change after the
23 Stipulation becomes effective, Defendants will
24 notify all other parties of record as soon as
25 reasonably possible of the change and the reason
26 therefor. The parties agree to attempt to work
27 reasonably toward a mutually acceptable solution.
28 In the event a solution is reached, the parties shall
jointly move this Court to amend the Stipulation, as
the parties agree that this Stipulation may be
amended or modified only by order of this Court.

1 WHEREAS, on November 18, 2008, NMFS issued its biological opinion concerning the
2 effects of three of the pesticides included in the parties' 2008 settlement agreement known as the
3 organophosphate ("OP") pesticides, malathion, diazinon, and chlorpyrifos, on listed salmonids
4 ("OP BiOp");
5

6 WHEREAS, on April 1, 2009, Dow AgroSciences, LLC and others challenged the
7 validity of the OP BiOp under the ESA, *Dow AgroSciences, LLC v. NMFS*, No. 09-cv-00824 (D.
8 Md.) ("*Dow AgroSciences LLC*") (Dkt. No. 1);
9

10 WHEREAS, in *Dow AgroSciences LLC*, the U.S. District Court for the District of
11 Maryland granted NMFS's cross-motion for summary judgment and denied plaintiffs' motion
12 for summary judgment in October 2011, *Dow AgroSciences, LLC v. NMFS*, 821 F. Supp. 2d 792
13 (D. Md. 2011);
14

15 WHEREAS on appeal, the U.S. Circuit Court for the Fourth Circuit reversed, vacated,
16 and remanded the OP BiOp to NMFS, *Dow AgroSciences, LLC v. NMFS*, 707 F.3d 462 (4th Cir.
17 2013);
18

19 WHEREAS, on April 20, 2009, NMFS issued its biological opinion concerning the
20 effects of the pesticides included in the parties' 2008 settlement agreement known as the
21 Carbamate pesticides, Carbaryl, Carbofuran, and Methomyl, on listed salmonids ("Carbamate
22 BiOp");
23

24 WHEREAS, on March 10, 2011, EPA, on behalf of itself and the Departments of the
25 Interior, Commerce and Agriculture requested that the National Academy of Sciences ("NAS")
26 evaluate the differing risk assessment approaches used by these agencies with regard to
27 pesticides and endangered species, using the OP and Carbamate BiOps as examples;
28

1 WHEREAS, on April 30, 2013, the NAS issued a report entitled “Assessing Risks to
2 Endangered and Threatened Species from Pesticides”;^{1/}

3 WHEREAS, the NAS Report makes a number of suggestions, including that EPA,
4 NMFS, and the U.S. Fish and Wildlife Service (“FWS”) of the Department of Interior, use a
5 common approach to assess risk from pesticide use;
6

7 WHEREAS, the Court subsequently suspended the deadlines embodied in the Court’s
8 June 30, 2013 Order to permit NMFS and the other agencies to consider the findings of the NAS
9 in its report;
10

11 WHEREAS, NMFS, FWS and EPA have been working closely to develop a common
12 approach to risk assessment in pesticides consultations, including a week-long retreat,
13 establishment of committees to address specific issues, and announcing interim approaches on
14 November 15, 2013;

15 WHEREAS, the agencies still have substantial work to implement the NAS’s
16 recommendations, including the development and testing of new methodologies and approaches
17 that the agencies can each use in a common approach;
18

19 WHEREAS, EPA must conduct a registration review pursuant to section 3(g) of the
20 Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1369(g) (“FIFRA”), each fifteen
21 years;
22

23 WHEREAS, in connection with registration review EPA will conduct preliminary risk
24 assessments and biological evaluations;
25

26 _____
27 ^{1/} http://www.nap.edu/catalog.php?record_id=18344.
28

1 WHEREAS, the agencies agree that the OP biological opinion that NMFS will develop
2 on remand should be based on new biological evaluations that incorporate the recommendations
3 of the NAS Report and should address impacts to all of the ESA-listed species under NMFS's
4 jurisdiction;

5
6 WHEREAS, these biological evaluations will be the first ever to address all NMFS
7 species, and for some of NMFS's species there is far less data, information and research
8 available than there is for salmonids;

9
10 WHEREAS, NMFS, EPA and FWS will be working together on developing and testing
11 new methodologies and a common approach;

12 WHEREAS, EPA intends to reopen its ESA evaluation of the two pesticides in the
13 Carbamate BiOp for which there are still registered end-use products (carbaryl and methomyl)
14 by preparing, with the assistance of NMFS and FWS, new nationwide biological evaluation(s)
15 that address all NMFS species; and by reinitiating consultation with NMFS as appropriate
16 following the completion of the nationwide evaluation(s);

17
18 WHEREAS, in order to allow time for NMFS to work with EPA on preparing new
19 biological evaluations for the Carbamates and complete a new nationwide Carbamate biological
20 opinion and incorporating the recommendations of the NAS report, NMFS intends to complete a
21 new Carbamate biological opinion on or before December 31, 2018;

22
23 WHEREAS, because NMFS has already completed and EPA has already provided to the
24 public a draft biological opinion on three pesticides, fenbutatin oxide, diflubenzuron and
25 propargite, based on EPA's early biological evaluations and addressing impacts to salmonids,
26 NMFS intends to finalize the draft opinion on the three pesticides;

27
28

1 WHEREAS, the agencies agree that consultation on the upcoming reregistration reviews
2 for the four remaining pesticides for which NMFS has not provided a biological opinion or a
3 draft biological opinion should incorporate methodologies developed in response to the NAS
4 Report’s recommendations and should address all species listed under NMFS’s jurisdiction;
5

6 WHEREAS, EPA intends to begin public comment on preliminary risk assessments, a
7 step that precedes preparation of a biological evaluation, on or before June 2017 (bromoxynil,
8 prometryn), December 2018 (1,3-D) and March 2019 (racemic metolachlor);
9

10 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
11 FOLLOWS:

12 1. NMFS agrees to finalize and publish a biological opinion concerning the effects
13 of Propargite, Fenbutatin-oxide; and Diflubenzuron by December 31, 2014.

14 2. NMFS agrees to complete a new OP biological opinion on or before December
15 31, 2017.
16

17 3. NMFS agrees to finalize and publish a biological opinion concerning the effects
18 of Bromoxynil and Prometryn by December 31, 2019.

19 4. NMFS agrees to finalize and publish a biological opinion concerning the effects
20

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

of 1, 3-D and racemic metolachlor by December 31, 2020.

Respectfully submitted,

SAM HIRSCH, Acting Assistant Attorney General
SETH M. BARSKY, Chief
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Telephone: (202) 353-0339
Facsimile: (202) 305-0275

J. Brett Grosko

J. BRETT GROSKO


STEPHEN D. MASHUDA
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104-1711
(206)343-7340

Steven D. Mashuda

STEPHEN D. MASHUDA

*Plaintiffs' counsel authorized Defendant's counsel to sign on his behalf.

Dated this 21st day of May, 2014.


Robert S. Lasnik
United States District Judge