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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NW Coalition for Alternatives to)
Pesticides, LLC. et al.)
)
)
Plaintiffs,)
)
v.)
)
NMFS,)
)
Defendant.)

NO. 07-1791-RSL

**STIPULATED SETTLEMENT
AGREEMENT AND [PROPOSED]
ORDER OF DISMISSAL**

Plaintiffs Northwest Coalition for Alternatives to Pesticides, Pacific Coast Federation of
Fishermen’s Associations, and Institute for Fisheries Resources (“Plaintiffs”), and defendant the
Secretary of Commerce, through the National Marine Fisheries Service (“NMFS”), declare as
follows:

Settlement Agreement

1 WHEREAS, Plaintiffs filed the present case on November 5, 2007 in the district court for
2 the Western District of Washington captioned Northwest Coalition for Alternatives to Pesticides
3 v. NMFS, No. 07-1791-RSL (W.D. Wash), in which Plaintiffs seek (a) a judgment declaring that
4 NMFS's failure to complete section 7(a)(2) consultations on 37 pesticides in a timely fashion
5 violates section 7(b)(1) of the ESA and its implementing regulations and section 706(1) of the
6 Administrative Procedure Act ("APA"), and (b) an order compelling NMFS to complete the
7 consultations within two years;

9 WHEREAS, on July 2, 2002, the district court for the Western District of Washington, in
10 Washington Toxics Coalition v. EPA, No. C01-132C, (W.D. Wash. July 2, 2002), ordered the
11 U.S. Environmental Protection Agency ("EPA") to consult with NMFS, as required under
12 section 7(a)(2) of the Endangered Species Act ("ESA"), to ensure that 54 EPA-registered
13 pesticides will not jeopardize the survival and recovery of 26 threatened and endangered salmon
14 and steelhead species and will not adversely modify their designated critical habitat;

16 WHEREAS, pursuant to the Washington Toxics order, between August 2002 and
17 December 2004, EPA began to initiate consultations with NMFS on 37 pesticides EPA
18 determined "may affect" listed salmon and steelhead in the Pacific Northwest;

20 WHEREAS, over five years have passed since EPA began to initiate the first of the
21 court-ordered consultations;

22 WHEREAS, NMFS has not completed the consultations initiated between August 2002
23 and December 2004, nor has NMFS issued any biological opinions;

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WHEREAS, NMFS understands that it is generally EPA's intention to make public the draft biological opinions it receives from NMFS regarding pesticide actions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA");

WHEREAS, it is in the interests of the parties and judicial economy to resolve the claims in this lawsuit without protracted litigation; and

WHEREAS, the parties enter this Settlement Agreement without any admission of fact or law, or any waiver of any factual or legal claims or defenses.

NOW, THEREFORE, the parties agree and stipulate to the following:

1. NMFS will complete the consultations on the 37 pesticides at issue in this case consistent with requirements of the ESA and its implementing regulations and in accordance with the schedule mutually agreed to by the parties and attached to this settlement agreement as Attachment 1 ("Consultation Schedule"). NMFS agrees to conduct the consultations pursuant to the regulations set forth in 50 C.F.R. 402.01- 402.14.

2. Given that EPA has consented to the public release of a draft of the biological opinion for chlorpyrifos, malathion, and diazinon (identified as Biological Opinion 1 in the Consultation Schedule), on or before July 31, 2008, NMFS shall provide the public with a draft of Biological Opinion 1 that shall be identical to any draft provided to EPA, including any draft reasonable and prudent alternatives and incidental take statements provided to EPA on or before that date. NMFS shall consider any timely comments received on draft Biological Opinion 1 as

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1 NMFS completes the consultations in accordance with the Consultation Schedule.

2 3. The parties agree that neither this settlement agreement nor any of its terms,
3 including the provision of the draft biological opinion referred to in paragraph 2, supra, act as res
4 judicata or create or establish precedent before this Court or any future tribunal.
5

6 4. NMFS may modify the Consultation Schedule by reordering Biological Opinions
7 7 through 17 (as identified in the Consultation Schedule), so long as any such modification is in
8 the public interest and NMFS completes all of the biological opinions listed in the Consultation
9 Schedule by February 29, 2012.

10 5. Defendants represent that they intend to make every effort to comply with the
11 terms of this Stipulation in good faith. If, however, through unforeseen circumstances, events
12 should change after the Stipulation becomes effective, Defendants will notify all other parties of
13 record as soon as reasonably possible of the change and the reason therefor. The parties agree to
14 attempt to work reasonably toward a mutually acceptable solution. In the event a solution is
15 reached, the parties shall jointly move this Court to amend the Stipulation, as the parties agree
16 that this Stipulation may be amended or modified only by order of this Court. If the parties are
17 unable to agree, the parties reserve the right to seek judicial intervention to enforce, alter, or
18 amend the terms and conditions of this Stipulation.
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21 6. Based on Defendants' agreement to complete 37 consultations with the issuance
22 of biological opinions in accordance with the Consultation Schedule, Plaintiffs agree to dismiss
23 their action with prejudice. Nothing in this Stipulation shall preclude Plaintiffs from bringing
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1 claims challenging any final biological opinions issued in accordance with the Consultation
2 Schedule. Any challenge to a final biological opinion issued in accordance with the
3 Consultation Schedule will be brought in a new lawsuit.

4
5 7. Defendants agree that Plaintiffs are the “prevailing party” in this action, and agree
6 to pay to Plaintiffs reasonable attorneys’ fees and costs, pursuant to Equal Access to Justice Act
7 (EAJA), 28 U.S.C. § 2412(d)(1)(A). Therefore, Defendants agree to settle all of Plaintiffs’
8 claims for costs and attorneys’ fees in the above-captioned litigation for a total of \$41,000.00. A
9 check will be made payable in that amount to Plaintiffs’ undersigned counsel, Earthjustice, c/o
10 Joshua Osborne-Klein, 705 Second Avenue, Suite 203, Seattle, Washington 98104-1711.

11
12 8. Defendants agree to submit all necessary paperwork for the processing of the
13 attorneys’ fee award to the Department of the Commerce’s, pursuant to 28 U.S.C.
14 § 2412(d)(1)(A), within ten (10) business days of receipt of the court order approving this
15 stipulation.

16
17 9. This Court shall retain jurisdiction over this matter and allow this action to be
18 reopened for the purpose of enabling the Parties to this Stipulated Settlement Agreement to apply
19 to the Court for any further order that may be necessary to construe, carry out, enforce
20 compliance and/or resolve any dispute regarding the terms or conditions of this Stipulated
21 Settlement Agreement, and for granting any further relief as the interests of justice may require.

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Respectfully submitted,

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COURTNEY TAYLOR

IT IS SO AGREED AND AFFIRMED

Robert S. Lasnik
United States District Judge

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