The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Northwest Center for Alternatives to Pesticides, et al., Plaintiffs, v. *National Marine Fisheries Service*, Defendant.	NO. 07-cv-1791-RSL **MOTION TO AMEND DKT. NO. 50 (STIPULATION AND ORDER)** **NOTED ON MOTION CALENDAR: NOVEMBER 24, 2017**

Pursuant to paragraphs 5 and 9 of the parties' 2008 Stipulated Settlement Agreement (Dkt. 21), as amended on May 21, 2014 (Dkt. 50), Defendant, the National Marine Fisheries Service ("NMFS") requests that the Court amend the Court's 2014 Stipulation and Order (Dkt. 50) to provide that NMFS's nationwide Endangered Species Act ("ESA") biological opinion concerning the effects of the organophosphate ("OP") pesticides malathion, diazinon, and chlorpyrifos on all ESA-listed species under NMFS's purview be due December 31, 2019, in lieu of December 31, 2017. Dkt. 50 ¶ 2. If granted, the buffer zones governing the use of the OP pesticides will remain in place for the additional time that NMFS requests to complete the OP

biological opinion ("OP BiOp"), mitigating any harm to the ESA listed species at issue. On November 8 and 9, 2017, counsel for Defendant contacted Plaintiffs, Northwest Center for Alternatives to Pesticides, *et al.*, concerning the instant motion. On November 9, 2017, counsel for Plaintiffs stated that they received notification of the instant motion on November 8, 2017 and believe the parties have not had the opportunity to "work reasonably toward a mutually acceptable solution" pursuant to paragraph 5 of the Stipulated Settlement Agreement. Plaintiffs further stated that they will continue to confer with Defendants and will take a position when a response is due under the local rules.

I. INTRODUCTION

On August 1, 2008, the Court entered the parties' Stipulated Settlement Agreement, establishing a Consultation Schedule for NMFS to complete seven separate regional ESA biological opinions. Dkt. 21. On May 21, 2014, at the parties' request, the Court amended the parties' Stipulated Settlement to allow NMFS through December 31, 2017, to issue a final nationwide biological opinion concerning malathion, diazinon, and chlorpyrifos. Dkt. 50 ¶ 2. NMFS now requests an additional 24 months to produce a final OP BiOp for the following reasons.

First, due to the scope and complexity of the required analyses and number of public comments received, EPA was delayed in providing NMFS with the biological evaluations by 9 months. Second, additional delays have also occurred associated with the transition to the new administration and the need to brief the new agency leadership. Third, a number of technical issues have arisen in the interagency discussions on this very complex issue between FWS, EPA, and NMFS that must be addressed before NMFS finalizes its OP BiOp. Fourth, NMFS's need to coordinate with FWS as FWS prepares its counterpart nationwide OP biological opinions

concerning effects to terrestrial and freshwater species. For these reasons, and for those set forth in the accompanying declarations of Samuel D. Rauch, Deputy Assistant Administrator for Regulatory Programs for the National Marine Fisheries Service, and Marietta Echeverria, the Director of the Environmental Fate and Effects Division of the Environmental Protection Agency, the interests of justice favor amending the Stipulated Settlement. The Court should accordingly alter the May 21, 2014 Stipulation and Order (Dkt. 50) to relieve NMFS from the obligation to produce a final OP BiOp by December 31, 2017 and instead require NMFS to issue a final OP BiOp on or before December 31, 2019.

II. LEGAL BACKGROUND

A. THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Subject to limited exceptions, a pesticide may be distributed or sold in the United States only if it is registered by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). 7 U.S.C. § 136a(a). Under FIFRA, EPA must register a pesticide if, among other things, the pesticide, when used in accordance with widespread and commonly recognized practice, generally will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). Once a pesticide is registered, EPA must periodically review that pesticide registration. 7 U.S.C. §§ 136a(g), 136a-1. If EPA determines at any time that a registered pesticide, including its approved labeling, no longer meets the standard for registration, EPA may initiate cancellation proceedings. In the case of an "imminent hazard," EPA may commence proceedings to suspend the registration of a pesticide during the period necessary to complete cancellation proceedings. 7 U.S.C. § 136d(b), (c).

B. THE ENDANGERED SPECIES ACT

Under Section 7(a)(2) of the ESA, each federal agency must insure that any action

authorized, funded, or carried out by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). To assist federal agencies, often referred to as the "action agencies," in complying with Section 7(a)(2), the ESA and its regulations outline a process of consultation between the action agency and FWS and/or NMFS (collectively, the "Services"). Under those regulations, if an action agency determines that an action "may affect" listed species or their designated critical habitat, the action agency must pursue some form of consultation with FWS and/or NMFS. Consultation may be formal or informal. If a federal action is "likely to adversely affect" a listed species, the action agency and one or both of the Services enter into "formal consultation," a process which is described at length at 50 C.F.R. § 402.14. Agencies typically initiate "formal consultation," by preparing a biological assessment under 50 C.F.R. § 402.12(a) & (b) or a biological evaluation that comports with § 402.14. In these assessments, the action agency describes the proposed action and evaluates any effects the action may have on listed species and designated critical habitat. In "formal consultation," the Services use the action agency's assessment, along with other information, to prepare a biological opinion. In the BiOp, the Services determine whether the proposed action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. If the action is likely to jeopardize the continued existence of a listed species or adversely modify designated critical habitat, FWS and/or NMFS must provide recommended reasonable and prudent alternatives to the action, if any exist. 16 U.S.C. § 1536(b)(3)(A).

Upon receipt of a BiOp, the action agency makes the final decision about whether and in what manner to proceed in light of its ESA Section 7 obligation to insure that its action is not

likely to jeopardize any listed species or to destroy or adversely modify any designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.15. The ESA does not, however, provide action agencies with regulatory authority to address the reasonable and prudent alternatives and associated reasonable and prudent measures to minimize take provided in a biological opinion. Rather, action agencies must utilize their existing regulatory authorities, to the extent such authorities are available, to implement any changes to their actions to address a BiOp.

III. FACTUAL BACKGROUND

Plaintiffs initiated the instant action in 2007 seeking to require NMFS to complete consultation on the effects of 37 pesticides on northwest salmonid species. Dkt. 1. In the parties' original August 1, 2008, settlement agreement, NMFS agreed to issue biological opinions on the effects of those pesticides pursuant to a Consultation Schedule. Dkt. 21.[1] On the basis of this schedule, on November 18, 2008, NMFS issued a biological opinion concerning the effects of malathion, diazinon, and chlorpyrifos on listed salmonids. Dkt. 50 at 2-6 ("2008 OP BiOp").

On April 1, 2009, Dow AgroSciences, LLC and other entities challenged the 2008 OP BiOp under the ESA, *Dow AgroSciences, LLC v. NMFS*, No. 09-cv-00824 (D. Md.) ("*Dow AgroSciences LLC*") (Dkt. No. 1). While NMFS prevailed at the district court level, *Dow AgroSciences, LLC v. NMFS*, 821 F. Supp. 2d 792 (D. Md. 2011), on appeal, the U.S. Circuit Court for the Fourth Circuit reversed, vacated, and remanded the 2008 OP BiOp to NMFS, *Dow AgroSciences, LLC v. NMFS*, 707 F.3d 462 (4th Cir. 2013).

[1] The original Stipulated Settlement allowed for a public comment period on NMFS's draft biological opinions. Dkt. 21 ¶ 2.

Following that decision, the Court amended the Stipulated Settlement per the parties' request to allow NMFS through December 31, 2017 to complete a new OP BiOp. Dkt. 50 ¶ 2. The Court granted this amendment both to allow NMFS to complete a new OP BiOp on remand from the Fourth Circuit, and to permit NMFS to collaborate with the U.S. Department of Agriculture, EPA and FWS as recommended by the 2013 National Academy of Sciences report, "Assessing Risks to Endangered and Threatened Species from Pesticides." The parties made the amendment request pursuant to paragraph 5 of the Stipulated Settlement, which provides:

> Defendants represent that they intend to make every effort to comply with the terms of this Stipulation in good faith. If, however, through unforeseen circumstances, events should change after the Stipulation becomes effective, Defendants will notify all other parties of record as soon as reasonably possible of the change and the reason therefor. The parties agree to attempt to work reasonably toward a mutually acceptable solution. 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.

Dkt. 21 ¶ 5. NMFS's current deadline for publishing a final replacement OP BiOp is December 31, 2017. Dkt. 50 at ¶ 2.

IV. ARGUMENT

NMFS requests that the Court enter an order providing a two-year extension to complete the new OP BiOp. Dkt. 21 ¶ 9. It is appropriate to amend the Stipulated Settlement to relieve NMFS of its December 31, 2017 deadline due to changed circumstances. *Id*. ¶¶ 5, 9. NMFS requests that the Court instead allow NMFS to finalize the OP BiOp before December 31, 2019.

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A. Significant Unforeseen Delay and Needed Interagency Coordination Has Rendered it Impossible for NMFS to Meet its December 31, 2017 Deadline for the OP BiOp.

Paragraph 9 of the Stipulated Settlement permits any party to apply for any order that may be "necessary to . . . resolve any dispute regarding the terms or conditions of the Stipulated Settlement Agreement, and for granting any further relief as the interests of justice may require." Dkt. 21 ¶ 9. Paragraph 5 explicitly contemplated the possibility that the terms of the Settlement Agreement would need to change due to unforeseen circumstances. *Id*. ¶ 5. Here the interests of justice support the requested extension.

First, EPA delivered its biological evaluations in January 2017 instead of March 2016, as it had originally anticipated. Decl. of Samuel D. Rauch (Exh. 1) ¶ 9; Decl. of Marietta Echeverria (Exh. 2) ¶¶ 6-7. This nine month delay materially impacted NMFS's ability to prepare its new OP BiOp. Rauch Decl. ¶¶ 19-24. NMFS based the Stipulated Settlement's target date of December 31, 2017 for completion of the OP BiOp on a schedule that it developed with EPA and FWS. *Id*. Under that schedule, EPA would have put draft biological evaluations out for public comment and issued final OP biological evaluations to NMFS and FWS by March 2016. Echeverria Decl. ¶ 6; Rauch Decl. ¶¶ 19-20. NMFS estimated completion of its replacement OP BiOp of December 31, 2017 on this March 2016 internal deadline. Rauch Decl. ¶ 20. Instead, EPA issued *draft* biological evaluations for public comment on March 31, 2016, and was not able to respond the many public comments received until in January 2017. Echeverria Decl. ¶ 6. EPA issued final biological evaluations, thus initiating formal consultation with the Services, only on January 17, 2017. *Id*. ¶ 7. This changed and unforeseen circumstance accounts for approximately nine months of the requested extension. *Id.* ¶ 6; Rauch Decl. ¶ 20.

This delay was compounded by the change in administration in January 2017. NMFS was further delayed by the unforeseen additional amount of time for EPA and the Services to appoint new agency leadership and have them confirmed by the Senate. Rauch Decl. ¶ 29. Once the new agency leadership began to arrive, EPA and the Services then needed to brief the new leadership on the very complex analyses and processes associated with the OP BiOp, which took additional time. *Id.* Because this inter-agency consultation process is uniquely and unprecedentedly collaborative and coordinated amongst the three agencies, the changes in leadership at one agency detrimentally affected the schedules of other agencies. *Id.* As a result, changes in leadership at EPA, FWS and in the Department of the Interior more broadly have also affected NMFS's ability to meet its deadline. *Id*. NMFS is striving to coordinate and remain in step with FWS and EPA. *Id.*

In addition to these factors, the OP BiOp–which is the first nationwide biological opinion ever drafted–has proven more complex than NMFS or EPA anticipated. Echeverria Decl. ¶¶ 4, 6, 11. For example, EPA's consultation obligations under the ESA involve extremely complex scientific assessments because rather than addressing effects of a discrete project at a specific location, EPA's pesticide registration actions effectively address the entire United States and therefore involve the potential for effects to hundreds of listed species in numerous and varying aquatic and terrestrial habitats. *Id.* ¶ 3; Rauch Decl. ¶¶ 6-7. The ESA risk assessment for pesticide registration must determine how each chemical enters and is dispersed in a wide variety of ecological settings, under a wide variety of usage scenarios involving different cropping and agricultural systems, and in widely varying environments. Rauch Decl. ¶ 7. It must consider how exposure to these chemicals affects a wide variety of biologically different kinds of non-target organisms, from micro-invertebrates to whales. *Id.* It must also consider how the direct

and indirect effects on individual organisms affect populations and the species as a whole. *Id.* The availability of data to inform this process varies considerably across locales, chemicals, and species. All of these complexities result in many levels of scientific uncertainty. *Id.*

Between January 2017, when EPA issued its chlorpyrifos, diazinon and malathion biological evaluations, and the present, significant issues and concerns about the methodology that EPA employed in those biological evaluations have come up. Rauch Decl. ¶¶ 3, 26. Those issues and concerns require further analysis and discussion by NMFS, EPA, and FWS and need to be resolved before NMFS issues its OP BiOp. *Id.* ¶¶ 3, 26, 31. EPA and the Services require more time to ensure that this unprecedented and novel collaborative National Academy of Sciences-recommended process continues to move forward based on shared methodologies and basis of information with appropriate input from the public. *Id.*

NMFS also needs to coordinate the release of its replacement OP BiOp with FWS. The NAS Report concluded that "What is needed is a common, scientifically credible Approach that is acceptable to EPA and the Services." *Id.* ¶ 10. It recommended a joint, nationwide approach, discussed the handling of models, data, and uncertainties associated with exposure analysis, considered various issues such as sublethal, indirect, and cumulative effects; modeling population-level effects; the effects of chemical mixtures; and incorporating uncertainties into the effects analysis. *Id.* The NAS recommended that the agencies work in a closely coordinated, collaborative fashion in order to develop and implement "a single, unified approach for evaluating risks to listed species posed by pesticide exposure under FIFRA and the ESA." *Id.* ¶ 11. FWS is currently working on its own OP biological opinions pursuant to a settlement in a separate matter, *Center for Biological Diversity v. FWS*, No. 15-568 (N.D. Cal.) (ESA suit concerning pesticide use and the California red-legged frog). Echeverria Decl. ¶ 4. EPA and the

Services have always understood that under the coordinated agency process now in place, the Services will issue their biological opinions at the same time, informed by the same inter-agency and public processes. Rauch Decl. ¶ 30. The Court should permit NMFS to collaborate with FWS to ensure the federal government is working in lockstep as it develops these first ever nationwide BiOps, as contemplated by the National Academy of Sciences. *Id.*

Finally, additional time is necessary to ensure public participation in this first-time use of a nationwide approach that will have far-reaching consequences. While the ESA and the Services' consultation regulations do not require the Services to issue draft biological opinions for public comment, given the broad extent of public interest in the evaluation and licensing of pesticides for use across the country, Congress, EPA and the Services have all agreed that meaningful public participation is a critical part of the consultation process on pesticide actions under FIFRA. Echeverria Decl. ¶¶ 8-11. During the past month, staff from EPA, FWS, and NMFS have also been discussing timelines for providing sufficient time for NMFS and FWS to complete the desired public and stakeholder processes that would follow issuance to the public of draft biological opinions. Rauch Decl. ¶ 32. Based on these discussions, the agencies anticipate that the public and stakeholder process would take an additional 18 months after the issuance by NMFS of its draft biological opinion. *Id.*

B. Buffer Zones Governing the Use of the OP Pesticides Will Remain in Place During the Pendency of the Extension.

Additionally, the buffer zones governing the use of the OP pesticides in the northwest will remain in place during the additional time requested to complete the OP BiOp. In 2010, the Plaintiffs brought a separate case in this Court under the ESA concerning EPA's OP pesticide registrations, *Northwest Center for Alternatives to Pesticides v. EPA*, No. 10-1919 (W.D.

Wash.). As part of the settlement agreement in that case, Plaintiffs negotiated protective buffer zones that apply to the use malathion, diazinon, and chlorpyrifos. *Id*. (Dkt. 124 ¶ 1). Pursuant to that agreement, users may not apply these OP pesticides within 20 yards of any salmon-supporting streams for ground applications or 100 yards of such streams for aerial applications. *Id*. (referring to Exh. 1 (*Washington Toxics Coalition v. EPA*, No. 01-132 (W.D. Wash.)), section III, paragraph A.1 to Dkt. 124)). Those buffers will remain in place until NMFS issues a new OP BiOp, thereby mitigating any harm Plaintiffs may allege will occur while NMFS completes its nationwide OP BiOp. *Id.* ¶ 2.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that the Court alter the Court's May 21, 2014 Stipulation and Order to Amend the Stipulated Settlement Agreement Affirmed by this Court on August 1, 2008 (Dkt. 50) to allow NMFS through December 31, 2019 to issue its final OP BiOp.

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Dated: November 9, 2017.

Respectfully submitted,

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/s/ J. Brett Grosko

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/ J. Brett Grosko

J. Brett Grosko