

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATURAL RESOURCES DEFENSE COUNCIL,
INC.,

Plaintiff,

v.

MICHAEL S. REGAN, et al.,

Defendants.

Case No. 1:17-cv-02034-TSC

**STIPULATED
SETTLEMENT AGREEMENT**

Judge:

Honorable Tanya S. Chutkan

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between Plaintiff Natural Resources Defense Council, Inc. and Defendants U.S. Environmental Protection Agency and Michael S. Regan, in his official capacity as EPA Administrator (hereafter “EPA”) (collectively, the “Parties”), who, by and through their undersigned counsel, state as follows:

WHEREAS, on October 3, 2017, Plaintiff filed the above-captioned action against EPA, alleging that EPA violated Section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), by failing to consult on the effects of 95 pesticide product registrations containing one of 3 pesticide active ingredients—acetamiprid, dinotefuran, and imidacloprid—registered by EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136-136(y), on numerous species listed as threatened or endangered under the ESA (“listed species”);

WHEREAS, on February 8, 2018, the Parties entered into a Stipulation of Partial Dismissal of any and all claims related to 36 pesticide product registrations identified in the complaint, which had been canceled or are registered for manufacturing use, use primarily in or around dwellings and other structures, or use in plant nurseries. Dkt. No. 15. The Court

approved this Stipulation of Partial Dismissal, Dkt. No. 16, leaving 59 pesticide product registrations at issue: forty-six registrations of products containing imidacloprid, eight registrations of products containing acetamiprid, and five registrations of products containing dinotefuran;

WHEREAS, in January 2021, the Parties filed a joint motion to approve the Stipulated Partial Settlement Agreement, Dkt. No. 54, which the Court approved, Dkt. No. 55. Pursuant to the Stipulated Partial Settlement Agreement, EPA agreed to do an effects determination and, as appropriate, initiate any necessary ESA Section 7 consultation by June 30, 2022, regarding the potential effects of imidacloprid on ESA-listed species and designated critical habitat in exchange for Plaintiff dismissing Claim Three with prejudice. Dkt. No. 55-1, ¶ 1;

WHEREAS, in May 2021, registrant Atticus, LLC submitted to EPA a request to voluntarily cancel Anniston 30 SG Insecticide (No. 91234-161) and Anniston 70 WP Insecticide (No. 91234-162);¹ registrant Valent submitted to EPA a request to voluntarily cancel V-10276 0.088 SL Insecticide/Fungicide (No. 59639-182); and registrant BASF Corporation submitted to EPA a request to voluntarily cancel Certador[®] Insecticide (No. 7969-376). All three registrants waived the minor agricultural use 180-day comment period;

WHEREAS, on August 27, 2021, EPA issued a final cancellation order for Anniston 30 SG Insecticide, Anniston 70 WP Insecticide, V-10276 0.088 SL Insecticide/Fungicide, and Certador[®] Insecticide. Accordingly, only the following nine product registrations remain in this case:

Active Ingredient	Product Registration	Product Number
Dinotefuran	Dinocide	7946-35
Dinotefuran	Dinocide HP	7946-34

¹ In 2019, Tacoma transferred product registrations Anniston 30 SG Insecticide (No. 83520-40) and Anniston 70 WP Insecticide (No. 83520-41) to Atticus, LLC, which are now registered at product registrations 91234-161 & 91234-162, respectively.

Dinotefuran	Dinotefuran Injectable	74779-15
Acetamiprid	ADA 11280 Insecticide	66222-264
Acetamiprid	Anarchy 30 SG Insecticide	34704-1096
Acetamiprid	Anarchy 70 WP Insecticide	34704-1098
Acetamiprid	ArVida 30 SG Insecticide	91234-14
Acetamiprid	ArVida 70 WP Insecticide	91234-15
Acetamiprid	RaVida 8.5 SL Insecticide	91234-16

WHEREAS the ESA implementing regulations, 50 C.F.R. § 402.14(a), provide that the trigger for interagency consultation is whether a federal agency's action "may affect" listed species or critical habitat of such species, which assessment is typically made by the action agency in an "effects determination;"

WHEREAS EPA typically memorializes its effects determinations in a document called a "Biological Evaluation" ("BE");

WHEREAS if EPA determines its action "may affect" listed species or critical habitat of such species, it sends the BE to the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service to initiate ESA consultation;

WHEREAS EPA has not made effects determinations for the pesticide product registrations remaining at issue in this case;

WHEREAS EPA intends to make effects determinations for acetamiprid and dinotefuran and expects to complete draft BEs for acetamiprid and dinotefuran no later than one year prior to the deadline for the final BEs enumerated below, as well as to provide notice and a 60-day opportunity for public comment on any such draft BEs;

WHEREAS consistent with EPA's practice in similar settlement agreements, the Agency intends to conduct nationwide-scale effects determinations, which will (1) include all uses on all registered pesticide products for acetamiprid and dinotefuran, and (2) consider effects on all listed species that are potentially affected;

WHEREAS Defendant-Intervenor, CropLife America, has indicated that it takes no position on this Agreement; and

WHEREAS although EPA does not concede any defenses or objections to any of the allegations or claims set forth in the Complaint, as amended by the Stipulation of Partial Dismissal, and whereas Plaintiff does not concede that EPA's implementation of the terms of this Agreement satisfies the legal requirements alleged in its underlying claims for relief in this case, the Parties, through their authorized representatives, have negotiated a settlement that they consider to be in the public interest and a just, fair, adequate, and equitable resolution of the disputes set forth in Claims One and Two of Plaintiff's Complaint, as amended by the Stipulation of Partial Dismissal;

WHEREAS this Agreement, which dismisses with prejudice Claim One (acetamiprid) and Claim Two (dinotefuran), when taken together with the Stipulated Partial Settlement Agreement, which dismissed with prejudice Claim Three (imidacloprid), Dkt. No. 55, dismisses with prejudice the entirety of Plaintiff's Complaint, as amended by the Stipulation of Partial Dismissal;

NOW, THEREFORE, the Parties hereby stipulate and agree as follows:

1. By October 2024, EPA shall complete "effects determinations" in final BEs, and request initiation of any necessary ESA consultation pursuant to 50 C.F.R. Part 402 regarding the potential effects of acetamiprid and dinotefuran on any and all listed species and designated critical habitat.

2. Scope.

a. The Parties agree that any challenge to the final BEs, the sufficiency of any action or inaction in response to the final BEs, or the sufficiency of implementation of

any resulting biological opinions, must be brought through a separate judicial action. The Parties agree that the Agreement and the scope of the Complaint, as amended by the Stipulation of Partial Dismissal (Dkt. Nos. 15 & 16), do not preclude any such separate judicial action, except as explicitly provided in the Agreement, provided that no Party waives any other argument it may have challenging or defending such agency action or inaction in any such separate judicial action.

- b. Except as set forth in the Agreement, the Parties retain all rights, claims, defenses, and discretion they may otherwise have. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that EPA take action in contravention of the ESA, the Administrative Procedure Act (“APA”), or any other law or regulation, either substantive or procedural. Except as expressly provided in this Agreement, nothing herein shall be construed to limit or modify any discretion accorded EPA by statute, regulation, or by general principles of administrative law. Nothing in this Agreement shall bar EPA from acting on any matters covered herein in a time frame earlier than required by this Agreement. No provision in this Agreement requires EPA to take any action under FIFRA.
3. Process to Modify Terms and Deadlines.
 - a. If EPA receives requests with good cause to extend the 60-day period for public comment on EPA’s draft acetamiprid and/or dinotefuran BEs, EPA may, within its discretion, extend this comment period. The Parties agree to file a stipulated motion to modify the deadlines for the final acetamiprid and/or dinotefuran BEs

by the same number of days of EPA's extension of the public comment period but not to exceed 60 days.

- b. Except as provided above, the deadlines in the Order entering the Agreement may be modified only by the Court. The Order may be modified upon good cause shown by stipulated motion of all Parties filed with and approved by the Court, including as agreed to above for good faith extension of the public comment period, or upon written motion filed by one of the Parties and granted by the Court after appropriate briefing.
- c. Any Party interested in modifying any term of the Agreement shall provide all Parties written notice of the proposed modification and the reasons for such proposed modification. The Parties shall meet and confer (telephonically or in person) no later than ten business days after written notice in a good faith effort to resolve any modification dispute and agree upon a stipulated motion to modify the Order.
- d. If EPA seeks to modify a deadline for the acetamiprid and/or dinotefuran final BEs required by the Agreement, other than as agreed to above for good faith extension of the public comment period, it shall provide written notice of the proposed modified deadline and the reasons for it at least 60 days prior to the deadline in the Order. The Parties shall meet and confer (telephonically or in person) no later than ten business days after written notice in a good faith effort to agree upon a stipulated motion to do so. If the Parties are unable to agree, and EPA still seeks to modify a deadline, EPA shall move to modify the deadline at least 45 days prior to the deadline in the Order.

4. Enforcement. If any Party believes another Party has failed to comply with any term of the Agreement, the Party's first remedy shall be a motion to enforce the term or terms. No Party shall institute a proceeding for contempt of court unless EPA is in violation of a separate order of the Court resolving a motion to enforce the terms of the Order.

5. Covenant Not to Sue. Plaintiff agrees not to bring, assist any other person or entity in bringing, or join any other person or entity in a new court proceeding alleging that EPA has procedurally violated ESA Section 7 pertaining to the effects of acetamiprid and/or dinotefuran on the listed species identified in the Complaint, as amended by the Stipulation of Partial Dismissal, until after completion of the final BEs. This Agreement does not preclude a challenge to EPA's compliance with the ESA pertaining to any active ingredients or pesticide products for which the consulting agency has completed a biological opinion. This Agreement also does not preclude a challenge to EPA's compliance with the ESA for a pesticide registration action for a product that contains both acetamiprid and one or more active ingredients other than acetamiprid, or for a product that contains both dinotefuran and one or more active ingredients other than dinotefuran, provided that Plaintiff agrees that in any such court proceeding it will not seek as a remedy for any such claim that EPA engage in consultation on acetamiprid and/or dinotefuran or join any other person or entity in requesting such a remedy.

6. Plaintiff agrees to reserve any claims against EPA for recovery of costs of litigation, including reasonable attorneys' fees and costs pursuant to 16 U.S.C. § 1540(g), until after the Court approves this Agreement. EPA does not waive any right to contest fees and costs claimed by Plaintiff or Plaintiff's counsel in this or any future litigation or continuation of the present action. Plaintiff and EPA agree to negotiate any future claims for fees and costs of this action. If Plaintiff and EPA fail to resolve Plaintiff's future claims for costs of litigation,

Plaintiffs may file a motion for reasonable attorneys' fees and costs with the Court as prescribed by the Federal Rules.

7. No part of this Agreement shall have precedential value in any litigation or in representations before any court, administrative proceeding, forum, or in any public setting. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for making an effects determination for a pesticide active ingredient.

8. Nothing in this Agreement shall be construed or offered as evidence in any proceeding as concession of any wrongdoing, liability, or an admission to any fact, law, claim, or defense concerning the claims settled under this Agreement or any similar claims brought in the future by any other party. Except as expressly provided in this Agreement, none of the Parties waive or relinquish any legal rights, claims, or defenses it may have. This Agreement is executed for the purpose of settling Claims One and Two of Plaintiff's Complaint, as amended by the Stipulation of Partial Dismissal (Dkt. Nos. 15 & 16), and nothing herein shall be construed as precedent having preclusive effect in any other context.

9. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that EPA is obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

10. Nothing in the terms of this Agreement shall be construed to limit or deny the power of a federal official to promulgate or amend regulations.

11. The Parties agree that this Agreement was negotiated in good faith and that it constitutes a settlement of Claims One and Two that was disputed by the Parties. By entering

into this Agreement, the Parties do not waive any claim or defense except as expressly stated herein. This Agreement contains all of the terms of agreement between the Parties concerning the Claims One and Two of Plaintiff's Complaint, and is intended to be the final and sole agreement between the Parties with respect thereto. The Parties agree that this Agreement coupled with the Stipulated Partial Settlement Agreement (Dkt. No. 55) constitutes a resolution to all Claims raised in the Complaint, as amended by the Stipulation of Partial Dismissal.

12. The Parties agree that any prior or contemporaneous representations or understanding not explicitly contained in this written Agreement, whether written or oral, are of no further legal or equitable force or effect.

13. The undersigned representatives of each Party certify that they are fully authorized by the Party or Parties they represent to agree to the terms and conditions of this Agreement and do hereby agree to the terms herein. Further, each Party, by and through its undersigned representative, represents and warrants that it has the legal power and authority to enter into this Agreement and bind itself to the terms and conditions contained in this Agreement.

14. The terms of this Agreement shall become effective upon entry of an Order by the Court approving this Agreement. Upon Court approval of this Agreement, Counts One and Two of Plaintiff's Complaint, as amended by the Stipulation of Partial Dismissal (Dkt. Nos. 15 & 16), shall be dismissed with prejudice. The Parties agree that, upon Court approval of this Agreement, all Claims raised in the Complaint, as amended by the Stipulation of Partial Dismissal, will be dismissed with prejudice. Notwithstanding the dismissal of all Claims raised in the Complaint, as amended by the Stipulation of Partial Dismissal, the Parties hereby stipulate to and respectfully request that the Court retain jurisdiction to oversee compliance with the terms

of this Agreement and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

Dated: March 4, 2022

Respectfully Submitted,

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