



Draft Settlement Agreement Regarding Endangered Species and Atrazine

2/24/06

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

NATURAL RESOURCES DEFENSE COUNCIL,)	
)	
Plaintiff,)	
)	
v.)	Civ. No: 03-CV-02444 RDB
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Defendants,)	
)	
SYNGENTA CROP PROTECTION, INC., et al.,)	
)	
Defendant-Intervenors.)	
_____)	

[DRAFT] SETTLEMENT AGREEMENT

Plaintiff Natural Resources Defense Council (“Plaintiff”), and Defendants, United States Environmental Protection Agency (“EPA”) and Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency (collectively, “Defendants”), by and through their undersigned attorneys respectfully submit the following Settlement Agreement and state as follows:

WHEREAS, Plaintiff filed its Complaint in this case on August 21, 2003, alleging that Defendants failed to comply with section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2);

WHEREAS, section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), requires federal agencies to ensure that any action authorized, funded or carried out by such agencies is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat;

WHEREAS, the loggerhead sea turtle has been listed as a threatened species under the ESA since 1978 (43 Fed. Reg. 32800 (July 28, 1978));

WHEREAS, the leatherback turtle has been listed as an endangered species under the ESA since 1970 (35 Fed. Reg. 8491 (June 2, 1970));

WHEREAS, the green turtle has been listed as an endangered species under the ESA since 1978 (43 Fed. Reg. 32800 (July 28, 1978));

WHEREAS, the Kemp's ridley turtle has been listed as an endangered species under the ESA since 1970 (35 Fed. Reg. 18319 (Dec. 2, 1970));

WHEREAS, the shortnose sturgeon has been listed as an endangered species under the ESA since 1967 (32 Fed. Reg. 4001 (March 11, 1967));

WHEREAS, the dwarf wedge mussel has been listed as an endangered species under the ESA since 1990 (55 Fed. Reg. 9447 (March 14, 1990));

WHEREAS, the pallid sturgeon has been listed as an endangered species under the ESA since 1990 (55 Fed. Reg. 36641 (Sept. 6, 1990));

WHEREAS, the Topeka shiner has been listed as an endangered species under the ESA since 1998 (63 Fed. Reg. 69008 (Dec. 15, 1998));

WHEREAS, the purple cat's paw pearly mussel has been listed as an endangered species under the ESA since 1990 (55 Fed. Reg. 28209 (July 10, 1990));

WHEREAS, the northern riffleshell has been listed as an endangered species under the ESA since 1993 (58 Fed. Reg. 5638 (Jan. 22, 1993));

WHEREAS, the Barton Springs salamander has been listed as an endangered species under the ESA since 1997 (62 Fed. Reg. 23377 (April 30, 1997));

WHEREAS, the Alabama sturgeon has been listed as an endangered species under the ESA since 2000 (65 Fed. Reg. 26438 (May 5, 2000));

WHEREAS, the fat pocketbook pearly mussel, pink mucket pearly mussel, shiny pigtoe pearly mussel, fine-rayed pigtoe mussel, and rough pigtoe mussel have been listed as endangered species under the ESA since 1976 (41 Fed. Reg. 24062 (June 14, 1976));

WHEREAS, the heavy pigtoe mussel and stirrup shell mussel have been listed as endangered species under the ESA since 1987 (52 Fed. Reg. 11162 (April 7, 1987));

WHEREAS, the ovate clubshell mussel and southern clubshell mussel have been listed as endangered species under the ESA since 1993 (58 Fed. Reg. 14330 (March 17, 1993));

WHEREAS, Plaintiff alleges in its Complaint that Defendants have violated ESA section 7(a)(2) by failing to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that registration of the pesticide atrazine will not jeopardize the continued existence of the above listed species or result in the destruction or adverse modification of their critical habitat;

WHEREAS, the ESA implementing regulations provide that before any need to engage in consultation might arise, an agency must first make an “effects determination,” *i.e.*, the agency must determine whether its action (1) has no effect on a listed species; (2) may affect but is not likely to adversely affect a listed species; or (3) may affect and is likely to adversely affect a listed species; and

WHEREAS, the ESA implementing regulations provide that if an agency determines that its action “may affect and is likely to adversely affect” a listed species or designated critical habitat, formal consultation may be required;

WHEREAS, the ESA implementing regulations provide that if an agency determines that its action “may affect but is not likely to adversely affect” a listed species or designated critical habitat, informal consultation may be required, depending on whether EPA adheres to the ESA implementing regulations found at 50 CFR Part 402, Subpart B, or those found at 50 CFR Part 402, Subpart D;

WHEREAS, atrazine registrant Syngenta Crop Protection, Inc., is currently conducting atrazine water monitoring in selected water bodies in order to satisfy data requirements applicable to all atrazine registrants, and is submitting that data to EPA on a rolling basis, and EPA seeks to consider that data in its effects determinations for atrazine where appropriate;

WHEREAS, Plaintiff asserts that Defendants are obligated to conclude tolerance reassessment for all atrazine tolerances and make a final determination as to atrazine’s eligibility for reregistration by August 6, 2006, as required by 21 U.S.C. § 346a(q)(1) and 7 U.S.C. § 136a-1(g)(2)(A)(i); and

WHEREAS, it is in the interest of the parties, the public, and judicial economy to resolve this action without protracted litigation;

THEREFORE, without admission or adjudication of any fact or law, the parties agree as follows:

PARTIES

1. The Parties to this Settlement Agreement are Plaintiff the Natural Resources Defense Council (“Plaintiff”); Defendants EPA and Administrator Stephen L. Johnson, in his official capacity (collectively, “Defendants”); and Syngenta Crop Protection, Inc., Kansas Corn Growers Association, et al., and CropLife America (collectively, “Defendant-Intervenors”).

PARTIES BOUND

2. The provisions of this Settlement Agreement shall apply to and be binding upon each of the Parties, including but not limited to, their officers, directors, employees, successors, and assigns.

DEFINITIONS

3. All terms not otherwise defined herein shall have the meaning, if any, assigned to them, as of the effective date of this Settlement Agreement or as subsequently modified, by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.*, and the ESA and the regulations implementing these statutes. Whenever the terms listed below are used in this Settlement Agreement, the following definitions shall apply:

- a. “Settlement Agreement” or “Settlement” or “Agreement” means this Settlement Agreement.
- b. “Effective Date” means the date upon which the “Stipulation and Order of Dismissal With Prejudice,” to which this Settlement Agreement is attached, is entered by the Court.
- c. “Plaintiff” means the Natural Resources Defense Council.
- d. “EPA” means the U.S. Environmental Protection Agency and Stephen L. Johnson, in his official capacity as Administrator of the EPA.
- e. “Effects determination” means a determination as to whether an action has “no effect” upon an ESA-listed species or designated critical habitat, “may affect but is not likely to adversely affect” an ESA-listed species or designated critical habitat, or “may affect and is likely to adversely affect” an ESA-listed species or designated critical habitat.

- f. “Consultation” means consulting with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, as appropriate, pursuant to section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and the implementing regulations at 50 C.F.R. Part 402.
- g. “Days” means calendar days, including weekends and federal holidays. To the extent that any deadline set forth in paragraphs 4, 5, or 6 falls on a weekend or federal holiday, the obligation for that day may be fulfilled on the next business day.
- h. “Atrazine ecological water monitoring data” means atrazine ecological water monitoring data from water bodies that are relevant to the 21 endangered or threatened species at issue in this case and that will be submitted to EPA by atrazine registrants pursuant to the atrazine ecological water monitoring requirement in the March 28, 2005 Data Call-In.

TERMS OF AGREEMENT

- 4. No later than August 31, 2006, EPA will make an effects determination for atrazine as it relates to the following species: loggerhead turtle, leatherback turtle, green turtle, Kemp’s ridley turtle, shortnose sturgeon, dwarf wedge mussel, Barton Springs salamander, and Alabama sturgeon.
- 5. No later than February 28, 2007, EPA will make effects determinations for atrazine as it relates to the pink mucket pearly mussel, shiny pigtoe pearly mussel, fine-rayed pigtoe mussel, rough pigtoe mussel, heavy pigtoe mussel, ovate clubshell mussel, southern clubshell mussel, and stirrup shell mussel. Such effects determinations will take into consideration, among other

relevant data, the results of the atrazine ecological water monitoring currently being conducted by the atrazine registrants for submission to EPA.

6. No later than August 31, 2007, EPA will make effects determinations for atrazine as it relates to the pallid sturgeon, Topeka shiner, fat pocketbook pearly mussel, purple cat's paw pearly mussel, and northern riffleshell. Such effects determinations will take into consideration, among other relevant data, results of the atrazine ecological water monitoring currently being conducted by the atrazine registrants to be submitted to EPA.

7. No later than 30 days in advance of making the effects determinations as set forth in paragraphs 4-6 above, EPA shall provide to Plaintiff via mail or email a copy of the atrazine ecological water monitoring data that have been submitted to EPA as of that date and that are relevant to the most immediately due effects determinations, and post a public notice on its website of the availability of that same data. Plaintiff shall execute a FIFRA § 10(g) affirmation before receiving such data.

8. During the pendency of the schedule for effects determinations outlined in paragraphs 4-6 above, Plaintiff agrees not to seek or assist any other party in seeking any injunction or other use restriction for atrazine based on the cause of action asserted by Plaintiff against EPA in this action, except as provided in paragraph 11 below.

9. During the pendency of the schedule for effects determinations outlined in paragraphs 4-6 above, Plaintiff may submit to EPA, and EPA shall consider, any information that Plaintiff believes is relevant to such determinations.

10. In the event that EPA makes a "may affect – likely to adversely affect" determination for atrazine with respect to any of the species identified in the Complaint, as set forth in paragraphs 4-6 above, EPA shall submit to the U.S. Fish and Wildlife Service or National Marine Fisheries

Service (as appropriate) those materials necessary for initiating formal consultation for such species within 14 days of making such an effects determination.

11. In the event that EPA makes a “may affect – likely to adversely affect” determination for atrazine with respect to any of the species identified in the Complaint, as set forth in paragraphs 4-6 above, Plaintiff shall retain the right to seek use restrictions for atrazine by filing a new complaint seeking such relief.

12. In the event that EPA makes a “may affect – not likely to adversely affect” determination for atrazine for any of the species identified in the Complaint, as set forth in paragraphs 4-6 above, EPA will proceed in accordance with the appropriate ESA implementing regulations found in 50 CFR Part 402. To the extent EPA is operating pursuant to the regulations found in 50 CFR Part 402, Subpart B, as opposed to the new counterpart regulations found in 50 CFR Part 402, Subpart D, EPA will forward to the U.S. Fish and Wildlife Service or National Marine Fisheries Service (as appropriate) those materials necessary for initiating informal consultation within 14 days of making such an effect determination. Prior to forwarding such materials, however, EPA will notify Plaintiff by mail or email of the “may affect – not likely to adversely affect” determination and Plaintiff will have 14 days to submit comments to EPA on such determination. EPA will include any such comments submitted by Plaintiff in the materials that EPA sends to the U.S. Fish and Wildlife Service or National Marine Fisheries Service for review. Nothing in this paragraph limits Plaintiff’s right to submit comments to the services or EPA at any other time. However, to the extent that EPA is operating pursuant to the regulations found in 50 CFR Part 402, Subpart D (the counterpart regulations), EPA will not be accepting comments from Plaintiffs upon making any “may affect – not likely to adversely affect” determination because EPA will not be forwarding materials to the U.S. Fish and Wildlife

Service or National Marine Fisheries Service in connection with any such determination. Thus, nothing in this paragraph limits any right EPA may have to pursue optional alternative informal consultation procedures, pursuant to 50 C.F.R. § 402.45(a), although Plaintiff does not concede the validity of such alternative informal consultation procedures and Plaintiff reserves the right to challenge EPA's application or implementation of such procedures for any particular species by filing a new complaint and seeking relief.

13. Nothing in this Settlement Agreement shall waive Plaintiff's right to challenge any final agency action following the outcome of the effects determinations that are the subject of this agreement, nor shall anything in this Agreement constitute a waiver of any defenses that Defendants may have to any such challenge. Plaintiff's sole judicial remedy to address the merits of any final action that may ensue from EPA's performance of its obligations under this Settlement Agreement is to file a separate lawsuit challenging such final action. Defendants reserve all defenses to any such suit. Nothing in this Settlement Agreement alters or affects the standards for review of final EPA action, or creates jurisdiction that would otherwise not exist to review EPA action.

14. Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the ESA, FIFRA, or general principles of administrative law.

15. Nothing in this Settlement Agreement shall bar EPA from acting on any matters covered in this Settlement Agreement in a time frame earlier than required by this Settlement Agreement or from taking additional actions not specified herein if EPA determines such actions are appropriate under applicable law.

16. Upon the Effective Date of this Settlement Agreement, Plaintiff's Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).

PUBLIC COMMENT

17. Before this Settlement Agreement became effective, EPA provided a 15-day public comment period on the Agreement. Following the 15-day public comment period, EPA reviewed the comments received for 10 days to determine if any particular comment or comments warranted reconsideration or revision of any portion of this Agreement. To the extent EPA determined that changes to this Agreement potentially were warranted, the Parties conferred and reached agreement on any such changes, which are reflected herein.

FORCE MAJEURE

18. The Parties recognize that performance under this Settlement Agreement is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq. A force majeure event may arise, due to circumstances outside the reasonable control of EPA, that could delay compliance with the obligations set forth in this Settlement Agreement. Such force majeure events include, but are not limited to, a government shutdown, such as occurred in 1995 and 1996, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to a force majeure event, any resulting failure to fulfill any obligations set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement, and any deadlines so affected shall be extended one day for each day of the delay. As soon as possible under such circumstances, EPA will provide Plaintiff with notice invoking the relief provided for under this Paragraph, along with an explanation of EPA's basis for invoking this relief. EPA shall also provide Plaintiff with reasonable notice of the termination of the force

majeure event upon which EPA invoked this relief. Any dispute regarding invocation of such relief shall be resolved in accordance with the dispute resolution provision of this Settlement Agreement.

DISPUTE RESOLUTION

19. In the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties shall confer in order to attempt to resolve the dispute within 14 days after receipt of the notice, or such time thereafter as is mutually agreed upon. If the Parties are unable to resolve the dispute within 21 days after receipt of the notice, or such time thereafter as is mutually agreed upon, then either Party may petition the Court to resolve the dispute.

RELEASE BY PLAINTIFFS

20. This Settlement Agreement constitutes a complete and final settlement and is in full satisfaction of all claims asserted by Plaintiff against Defendants in this Action. Upon the Effective Date of this Settlement Agreement, Plaintiff releases and discharges Defendants from the cause of action asserted by Plaintiff against Defendants in this Action. Plaintiff agrees not to bring, assist any other party in bringing, or join EPA in, any court proceeding that concerns an alleged violation of section 7(a)(2) of the ESA for EPA's alleged failure to consult with the U.S. Fish and Wildlife Service or National Marine Fisheries Service on the effects of the atrazine on the twenty-one species listed in the Complaint, until after the completion of any consultation triggered by a timely effects determination as set forth in paragraphs 4-6 of this Settlement Agreement. Nothing in this Settlement Agreement shall serve as a waiver of Plaintiff's right to challenge any and all EPA actions with respect to atrazine, except with respect to Plaintiff's

claim in the Complaint for failure to consult pursuant to the ESA that is expressly resolved herein. Defendants and Defendant-Intervenors reserve all defenses to any such challenges.

APPLICABLE LAW

21. This Settlement Agreement shall be governed by and construed under the laws of the United States.

ENTIRE AGREEMENT

22. This Settlement Agreement and the accompanying “Stipulation and Order of Dismissal With Prejudice” constitute the entire agreement of the Parties in this case. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Settlement Agreement. No modification to this Settlement Agreement shall be valid unless written and executed by all Parties.

MUTUAL DRAFTING

23. The Parties to this Settlement Agreement agree that this Agreement was jointly drafted by them. Accordingly, the Parties agree that any and all rules of construction that ambiguity is construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

NOTICE AND CORRESPONDENCE

24. Any notice, including correspondence, required with respect to this Settlement Agreement, shall be in writing, effective upon receipt, and sent to the undersigned counsel, or to such other person or persons as any Party may subsequently identify (in accordance with this provision) to the other Parties, by U.S. Mail, FedEx, or courier.

COUNTERPARTS

25. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed to constitute an original, and all of which, taken together, shall constitute one and the same document. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other Counterparts.

SEVERABILITY

26. If any term, condition, or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States invalid, void, or unenforceable, the remainder of the terms, covenants, conditions, or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

USE OF AGREEMENT

27. This Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, including, without limitation, EPA, its officers, or any other person affiliated with it, or an interpretation of any applicable provision of law.

ATTORNEYS' FEES

28. EPA agrees for purposes of this Settlement Agreement that Plaintiff will be entitled to an award of costs of litigation, including reasonable attorneys' fees pursuant to section 11(g)(4) of the ESA, 16 U.S.C. §1540(g)(4). EPA agrees to pay _____ to the Natural Resources Defense Council and the Environmental Law Clinic of the University of Maryland School of Law, on behalf of Plaintiff in this action. Plaintiff agrees that such award encompasses the entire amount of attorneys' fees and costs to which it is entitled from any party in the above-captioned

matter, including all work and costs already performed or incurred in this action through and including the date of the “Stipulation and Order of Dismissal With Prejudice.” Plaintiff reserves the right to seek fees and costs for work incurred in the course of seeking to enforce this Settlement Agreement, should the need arise, and EPA reserves all defenses it may have to any such claim.

29. This Settlement Agreement has no precedential value as to attorneys’ fees and costs and shall not be used as evidence in any other attorneys’ fees litigation. Within 10 days of receipt of a fully executed, file-stamped copy of the “Stipulation and Order of Dismissal With Prejudice” pursuant to this Settlement Agreement, Defendants agree that all necessary documentation will be submitted for initiation of disbursement processing by the U.S. Treasury Department for payment of this award from the Judgment Fund.

CONSISTENCY WITH OTHER LAW

30. No provision of this Agreement shall be interpreted as, or constitute a commitment or requirement that Defendants take actions in contravention of the Endangered Species Act, the Administrative Procedure Act, or any other law or regulation, either substantive or procedural. Plaintiff recognizes that Defendants have asserted that no provision of this Agreement shall be interpreted as, or constitute a commitment or requirement that Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. §1341, or any other law or regulation.

REPRESENTATIVE AUTHORITY

31. Each undersigned representative of the Parties to this Settlement Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement, and to bind such Party to this Settlement Agreement.

Dated: _____, 2005

Respectfully submitted,

[signature block]