

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

NATURAL RESOURCES DEFENSE COUNCIL,  
INC.,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

Defendants.

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

**STIPULATED PARTIAL SETTLEMENT AGREEMENT**

This Stipulated Partial Settlement Agreement (“Partial Agreement”) is entered into by and between Plaintiff Natural Resources Defense Council, Inc. and Defendants U.S.

Environmental Protection Agency and Andrew Wheeler, 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, leaving 59 pesticide product registrations at issue.

Dkt. No. 16;

WHEREAS 46 of the remaining 59 pesticide product registrations contain the active ingredient imidacloprid;

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 59 pesticide product registrations remaining at issue in this case;

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

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

are potentially affected;

WHEREAS Defendant-Intervenor has indicated that it takes no position on this Partial 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 Partial 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 partial resolution of the disputes set forth in Claim Three of Plaintiff's Complaint, as amended by the Stipulation of Partial Dismissal;

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

1. By June 30, 2022, EPA shall complete an "effects determination" in a final BE, and request initiation of any necessary ESA consultation pursuant to 50 C.F.R. Part 402 regarding the potential effects of imidacloprid on any and all listed species and designated critical habitat that are potentially affected.

2. Scope.

a. The Parties agree that any challenge to the final BE, the sufficiency of any action or inaction in response to the final BE, or the sufficiency of implementation of any resulting biological opinions, must be brought through a separate judicial action. The Parties agree that the Partial 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 Partial 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 Partial Agreement, the Parties retain all rights, claims, defenses, and discretion they may otherwise have. No provision of this Partial 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 Partial 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 Partial Agreement shall bar EPA from acting on any matters covered herein in a time frame earlier than required by this Partial Agreement. No provision in this Partial 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 imidacloprid BE, EPA may, within its discretion, extend this comment period. The Parties agree to file a stipulated motion to modify the deadlines for the final imidacloprid BE 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 Partial 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 Partial 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 imidacloprid final BE required by the Partial 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 Partial 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 imidacloprid on the listed species identified in the Complaint, as amended by the Stipulation of Partial Dismissal, until after completion of the final BE. This Partial 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 Partial 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 imidacloprid and one or more active ingredients other than imidacloprid, 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 imidacloprid 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 all claims in the Complaint are resolved. 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.

7. No part of this Partial 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 Partial 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 Partial 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 Partial Agreement or any similar claims brought in the future by any other party. Except as expressly provided in this Partial Agreement, none of the Parties waive or relinquish any legal rights, claims, or defenses it may have. This Partial Agreement is executed for the purpose of settling Claim Three 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 Partial 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 Partial 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 Partial Agreement was negotiated in good faith and that it constitutes a settlement of Claim Three that was disputed by the Parties. By entering into this Partial Agreement, the Parties do not waive any claim or defense except as expressly stated herein. This Partial Agreement contains all of the terms of agreement between the Parties concerning the Claim Three of Plaintiff's Complaint, and is intended to be the final and sole agreement between the Parties with respect thereto. The Parties agree that any prior or

contemporaneous representations or understanding not explicitly contained in this written Partial Agreement, whether written or oral, are of no further legal or equitable force or effect.

12. 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 Partial 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 Partial Agreement and bind itself to the terms and conditions contained in this Partial Agreement.

13. The terms of this Partial Agreement shall become effective upon entry of an Order by the Court approving this Partial Agreement. Upon Court approval of this Partial Agreement, Count Three of Plaintiff's Complaint, as amended by the Stipulation of Partial Dismissal (Dkt. Nos. 15 & 16), shall be dismissed with prejudice. Notwithstanding the dismissal of Claim Three, the Parties hereby stipulate to and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Partial Agreement and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

14. Meet and Confer to Resolve Remaining Issues.

- a. Within 10 business days after the Court enters an Order approving the Partial Agreement, Plaintiff, EPA, and Intervenor-Defendant will meet and confer (either in person or telephonically) regarding the remaining claims: Claim One (acetamiprid) and Claim Two (dinotefuran).
- b. If after the meet and confer Plaintiff, EPA, and Intervenor-Defendant are unable to resolve the remaining claims, then they will file a proposed briefing schedule



for summary judgment within 30 days after the Court enters an Order approving the Partial Agreement.

Dated: January 15, 2021

Respectfully Submitted,

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SETH M. BARSKY,  
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/s/ Briena L. Strippoli

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