

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Chief
ALISON C. FINNEGAN, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 305-0500; Fax: (202) 305-0275

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CENTER FOR ENVIRONMENTAL
HEALTH, et al.,

Plaintiffs,

v.

MICHAEL S. REGAN, in his official
capacity as Administrator of the U.S.
Environmental Protection Agency, et al.,

Defendants,

and

CROPLIFE AMERICA,

Intervenor-Defendant.

CASE NO. 4:18-cv-03197-SBA

**STIPULATED PARTIAL SETTLEMENT
AGREEMENT**

This Stipulated Partial Settlement Agreement (“Agreement”) is entered into by and
between Plaintiffs Center for Environmental Health, Center for Biological Diversity, and

1 Californians for Pesticide Reform (“Plaintiffs”); Defendants Michael S. Regan, in his official
 2 capacity as Administrator of the U.S. Environmental Protection Agency (“EPA”), the EPA, U.S.
 3 Fish and Wildlife Service (“FWS”), and Debra Haaland, in her official capacity as Secretary of
 4 the U.S. Department of the Interior (“Federal Defendants”); and Intervenor-Defendant CropLife
 5 America (“CropLife”) (collectively, “the Parties”), who state as follows:

6 WHEREAS, on January 18, 2017, EPA submitted to FWS a nationwide biological
 7 evaluation regarding the effects of malathion and two other active ingredients on species listed as
 8 threatened or endangered under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*,
 9 and their designated critical habitats and requested initiation of consultation pursuant to ESA
 10 Section 7(a)(2), 16 U.S.C. § 1536(a)(2) (“the Malathion Consultation”);

11 WHEREAS, the Malathion Consultation has been ongoing since that date;

12 WHEREAS, Plaintiffs filed this case in May 2018 (Dkt. No. 1);

13 WHEREAS, Plaintiffs first amended the complaint on July 25, 2018 (Dkt. No. 18), and
 14 then filed a Second Amended Complaint pursuant to leave of Court on November 27, 2018 (Dkt.
 15 No. 43);

16 WHEREAS, the claims in the Second Amended Complaint are as follows: in Count 1,
 17 Plaintiffs allege that FWS has failed to comply with its procedural duties under ESA Section
 18 7(a)(2) and EPA has failed to comply with its substantive and procedural duties under ESA
 19 Section 7(a)(2) by taking final agency actions of registering or reregistering certain products
 20 containing malathion in paragraph 84 of the Second Amended Complaint; in Count 2, pursuant
 21 to Section 706(1) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), Plaintiffs
 22 allege that, related to the registration review for all malathion products, FWS has unlawfully
 23 withheld and/or unreasonably delayed completion of its biological opinion for the Malathion
 24 Consultation under ESA Section 7(a)(2), and EPA has unlawfully withheld and/or unreasonably
 25 delayed completion of its procedural and substantive duties under ESA Section 7(a)(2); and in
 26 Count 3, Plaintiffs allege that EPA has violated ESA Section 7(d), 16 U.S.C. § 1536(d), through
 27 an “irreversible and irretrievable commitment of resources that has the effect of foreclosing the
 28

1 implementation of reasonable and prudent alternative measures” related to the Malathion
2 Consultation (Dkt. No. 43);

3 WHEREAS, twice during the course of the ongoing consultation, FWS requested that
4 both EPA and the technical registrants (which produce malathion products that are used solely to
5 manufacture or formulate other pesticide products) of the products under review agree to extend
6 the ongoing ESA consultation pursuant to ESA Section 7(b), 16 U.S.C. § 1536(b), and both EPA
7 and the technical registrants gave their written consents;

8 WHEREAS, on April 13, 2021, FWS provided a draft biological opinion (“Draft
9 Biological Opinion”) for malathion to EPA;

10 WHEREAS, EPA then made the Draft Biological Opinion available to the public on its
11 website for a 60-day comment period, which closed on June 19, 2021;

12 WHEREAS, the Draft Biological Opinion included “general categories” of the
13 reasonable and prudent alternatives (“RPAs”) that FWS would consider prior to finalizing the
14 biological opinion (“Final Biological Opinion”) for malathion and completing the consultation,
15 which would be tailored to the needs of specific species and critical habitat in order to avoid the
16 likelihood of jeopardy and destruction and adverse modification, *see* 50 C.F.R. § 402.15(g);

17 WHEREAS, according to the most recent extension request, FWS anticipates issuance of
18 the Final Biological Opinion no later than February 28, 2022;

19 WHEREAS, although Federal Defendants do not admit any of the allegations or claims
20 set forth in Plaintiffs’ Second Amended Complaint, the Parties, through their authorized
21 representatives, have reached a stipulation with regard to claims against Federal Defendants for
22 violation of their procedural duties concerning completion of the Final Biological Opinion
23 pursuant to ESA Section 7(a)(2) in Counts 1 and 2 that they believe is in the public interest and
24 consider to be a just, fair, adequate, and equitable resolution of this portion of Claims 1 and 2 set
25 forth in Plaintiffs’ Second Amended Complaint;

26 THEREFORE, the Parties stipulate and agree to the following:

27 1. FWS will issue its Final Biological Opinion and conclude the ESA Section 7(a)(2)
28 Malathion Consultation no later than February 28, 2022, unless one of the contingencies set out

1 in sub-paragraphs (a) through (d) occurs, in which case the timeframe for completing the
2 consultation shall be extended as set out therein:

3 a. if there is a delay in EPA or the applicants engaging with FWS in the
4 development of draft RPAs or reasonable and prudent measures (“RPMs”) or in
5 responding to FWS’s draft RPAs or RPMs by the milestone target date of November 30,
6 2021, then the milestone date for completion of those activities will be extended by a
7 period not to exceed 14 work days and the deadline for completion of the Final
8 Biological Opinion will be extended by an equal period of work days, not to exceed 14
9 work days beyond February 28, 2022;

10 b. if there is a lapse in federal appropriations, requiring FWS or EPA to
11 suspend work until government operations are restored, then FWS’s deadline for
12 completing the Final Biological Opinion will be extended by an equal number of work
13 days;

14 c. if comments received from EPA, the applicants, or the public raise
15 significant issues related to the substance of its effects analysis that require FWS to re-run
16 the mapping tools, re-visit its analysis of toxicological or usage data, or reconsider the
17 jeopardy or adverse modification findings for individual species or critical habitats, then
18 Federal Defendants will provide notice to the Parties, and the Parties will meet and confer
19 (telephonically or in-person) within 14 calendar days for the purpose of FWS advising
20 the number of additional days it will require to address these substantive issues in an
21 effort to obtain the Parties’ agreement on a timeframe for extending the consultation to
22 address the pertinent issues; or

23 d. if an unforeseen and unavoidable event, such as a natural disaster or
24 unavoidable legal barrier or restraint, including those arising from actions of persons or
25 entities that are not party to this Agreement, occurs which significantly disrupts the work
26 of FWS to complete consultation and issue a Final Biological Opinion by February 28,
27 2022, then Federal Defendants will provide notice to the Parties, and the Parties will meet
28 and confer (telephonically or in-person) within 14 calendar days for the purpose of FWS

1 advising the number of additional days it will require to address the unforeseen and
2 unavoidable event in an effort to obtain the Parties' agreement on a timeframe for
3 extending the consultation to address the pertinent issues.

4 If (c) or (d) occur and the Parties are unable to reach an agreement on a timeframe for extending
5 the consultation, FWS shall file a motion for relief from the terms of this Agreement with the
6 Court, for good cause shown.

7 2. This Agreement may be modified by the Court upon good cause shown by (a)
8 written stipulation between the Parties filed with and approved by the Court, or (b) upon written
9 motion filed by one of the Parties and granted by the Court. In the event that any Party seeks to
10 modify the terms of this Agreement, including the deadline specified in Paragraph 1, or in the
11 event of a disagreement between the Parties concerning any aspect of this Agreement, or in the
12 event that any Party believes that another Party has failed to comply with any term or condition
13 of this Agreement, the Party seeking the modification, raising the dispute, or seeking
14 enforcement shall provide the other Party with notice of the claim. The Parties agree that they
15 will meet and confer (telephonically or in-person) at the earliest possible time in a good-faith
16 effort to resolve the claim before seeking relief from the Court. If the Parties are unable to
17 resolve the claim themselves, any Party may seek relief from the Court. In the event that
18 Plaintiffs believe Federal Defendants have failed to comply with a term of this Agreement and
19 have not sought to modify it, Plaintiffs' first remedy shall be a motion to enforce the terms of
20 this Agreement. No Party shall institute a proceeding for contempt of court unless Federal
21 Defendants are in violation of a separate order of the Court resolving a motion to enforce the
22 terms of the Agreement.

23 3. Upon approval of this Agreement by the Court, the portions of the claims in
24 Count 1 and Count 2 against Federal Defendants for violation of their ESA Section 7(a)(2)
25 procedural duties of the Second Amended Complaint to complete the Final Biological Opinion
26 shall be dismissed with prejudice as set forth in the proposed form of Order. Claims in Count 1
27 and Count 2 related to EPA's substantive ESA Section 7(a)(2) duties are not covered by this
28 Agreement. Notwithstanding the dismissal of portions of those claims, the Parties hereby

1 stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the
 2 terms of this Agreement and to resolve any motions to modify such terms, until Federal
 3 Defendants satisfy their obligations under the Agreement. *See Kokkonen v. Guardian Life Ins.*
 4 *Co. of Am.*, 511 U.S. 375 (1994).

5 4. The Parties agree that Paragraph 3 does not extend the Court's jurisdiction to hear
 6 any dispute over the adequacy of FWS's Final Biological Opinion prepared under Paragraph 1 or
 7 any decision by EPA to rely on the Final Biological Opinion. The Parties agree that any such
 8 challenge must be brought through a new judicial action and/or any applicable agency objection
 9 process. Notwithstanding, Plaintiffs' claims against EPA for violation of its ESA Section 7
 10 substantive duties related to the Malathion Consultation are not dismissed through this
 11 Agreement.

12 5. No provision of this Agreement shall be interpreted as, or constitute, a
 13 commitment or requirement that Federal Defendants take action in contravention of the ESA, the
 14 APA, or any other law or regulation, either substantive or procedural. Nothing in this Agreement
 15 shall be construed to limit or modify the discretion accorded to Federal Defendants by the ESA,
 16 the APA, or general principles of administrative law with respect to the procedures to be
 17 followed in making any determination required herein, or as to the substance of any final
 18 determination. Federal Defendants reserve the right to raise any applicable claims or defenses to
 19 such challenges.

20 6. Nothing in this Agreement shall be interpreted as, or shall constitute, a
 21 requirement that Federal Defendants take any action in contravention of the Anti-Deficiency Act,
 22 31 U.S.C. § 1341, or any other appropriations law. In response, Plaintiffs assert that this
 23 Agreement does not create a conflict with the Anti-Deficiency Act because the ESA Section
 24 7(a)(2) consultation duties are in non-discretionary terms and the Anti-Deficiency Act would not
 25 excuse compliance with a pre-existing court-approved settlement agreement. Plaintiffs intend to
 26 assert this position if Federal Defendants fail to comply with the terms of this Agreement.

27 7. The Parties agree that this Agreement was negotiated in good faith and that it
 28 constitutes a partial settlement of claims disputed by the Parties. By entering into this

1 Agreement, the Parties do not waive any legal rights, claims, or defenses except as expressly
 2 stated herein. The Parties also do not waive any rights to appeal any decisions issued in this case.
 3 The Agreement contains all of the terms of agreement between the Parties, and is intended to be
 4 the final and sole agreement between the Parties with respect to the partial settlement of issues
 5 set out herein. The Parties agree that any prior or contemporaneous representations or
 6 understanding not explicitly contained in this written Agreement, whether written or oral, are of
 7 no further legal or equitable force or effect.

8 8. The undersigned representatives of each party certify that they are fully
 9 authorized by the party or parties they represent to agree to the Court's entry of the terms and
 10 conditions of this Agreement and do hereby agree to the terms herein.

11 9. It is hereby expressly understood and agreed that this Agreement was jointly
 12 drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of
 13 construction, to the effect that ambiguity is construed against the drafting party, shall be
 14 inapplicable in any dispute concerning the terms, meaning, or interpretation of the Agreement.

15 10. This Agreement is the result of compromise and settlement, and does not
 16 constitute an admission, implied or otherwise, by the Parties to any fact, claim, or defense on any
 17 issue in this litigation. No part of this Agreement shall have precedential value in any pending or
 18 future litigation or administrative action or in representations before any court or forum or in any
 19 public setting. No party shall use this Agreement or the terms herein as evidence of what does or
 20 does not constitute a reasonable timeline for making determinations regarding the progress or
 21 completion of ESA consultation.

22 11. Any notice required or made with respect to this Agreement shall be in writing
 23 and shall be effective on the date that notice is delivered by electronic mail. For any matter
 24 relating to this Agreement, the contact persons are:

25 a. For Plaintiffs –

26 Jonathan Evans
 27 Environmental Health Legal Director and Senior Attorney
 28 Center for Biological Diversity
 1212 Broadway

Suite 800
Oakland, CA 94612
Tel: (510) 844-7118
Cell: (213) 598-1466
jevans@biologicaldiversity.org

b. For Federal Defendants –

Alison C. Finnegan
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0500
alison.c.finnegan@usdoj.gov

c. For Intervenor-Defendant CropLife –

David B. Weinberg (dweinberg@wiley.law)
Hume M. Ross (hross@wiley.law)
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Tel: 202.719.7000

12. The terms of this Agreement shall become effective upon entry of an Order by the Court approving the Agreement.

The undersigned Parties hereby consent to the form, substance and entry of the foregoing Agreement.

Respectfully submitted this 22nd day of December, 2021.

Dated: December 22, 2021

/s/ Stephanie Parent (with permission)
Stephanie Parent
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Tel: 971-717-6404

Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Chief

/s/ Alison C. Finnegan

Jonathan Evans
Center for Biological Diversity
1212 Broadway Street, Suite 800
Oakland, CA 94612
Tel: 510-844-7100, ext. 318
jevans@biologicaldiversity.org

Counsel for Plaintiffs

WILEY REIN LLP

/s/ David B. Weinberg (with permission)
David B. Weinberg (DC Bar No. 186247)*
dweinberg@wiley.law
1776 K Street NW
Washington, DC 20006
Telephone: (202) 719-7000
Fax: (202) 719-7049
*admitted pro hac vice
*Counsel for Intervenor-Defendant CropLife
America*

ALISON C. FINNEGAN, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0500 Fax: (202) 305-0275
Counsel for Federal Defendants

~~PROPOSED~~ ORDER

The Court hereby approves the Stipulated Partial Settlement Agreement (“Agreement”) entered into by and among the Parties in the above-captioned case. Pursuant to the Agreement, it is hereby ORDERED that the U.S. Fish and Wildlife Service shall complete the ongoing consultation regarding the effects of all products containing malathion in registration review on species listed as threatened or endangered under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and their designated critical habitats by completing the Final Biological Opinion by February 28, 2022, unless one of the contingencies outlined in Paragraph 1(a) through (d) of the Parties’ Agreement occurs. It is further ORDERED the portions of claims in Count 1 and Count 2 in the Second Amended Complaint against Federal Defendants for violation of their ESA Section 7(a)(2) procedural duties to complete the malathion Final Biological Opinion are hereby dismissed with prejudice while the remaining claims in Count 1 and Count 2 against EPA related to EPA’s substantive ESA Section 7(a)(2) duties are not covered by this Order.

IT IS SO ORDERED.

Dated: January 4, 2022

 RS

Richard Seeborg for Saundra Brown Armstrong
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Alison C. Finnegan