



ENVIRONMENTAL PROTECTION AGENCY

6560-50-P

[EPA-HQ-OGC-2018-0745; FRL-9987-80-OGC]

Proposed Joint Stipulation, Endangered Species Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed stipulation; request for public comment.

SUMMARY: In accordance with the EPA Administrator’s October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a proposed joint stipulation and proposed stipulated notice of dismissal in the United States District Court for the Northern District of California in the case of Ellis, et al., v. Keigwin, et al., No. 3:13-cv-01266. On May 8, 2017, the court issued an order on summary judgment dismissing claims against EPA under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), but finding that EPA failed to perform duties mandated by the Endangered Species Act (“ESA”) to consult with the United States Fish and Wildlife Service (“FWS”) regarding 59 EPA-approved pesticide products containing either of the insecticidal active ingredients clothianidin or thiamethoxam. The parties are proposing to reach a settlement in the form of a joint stipulation on the appropriate remedy for the court’s finding of liability. Among other provisions, the joint stipulation would set a June 30, 2022, deadline for EPA to complete ESA effects determination for EPA’s registration reviews of clothianidin and thiamethoxam and, as appropriate, request initiation of any ESA consultations with FWS that EPA may determine to be necessary as a result of those effects determinations. EPA is also taking comment on a proposed stipulated notice of dismissal that would be entered with the court following execution of the joint stipulation.

DATES: Written comments on the proposed joint stipulation and stipulated notice of dismissal must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID number EPA-HQ-OGC-2018-0745 online at www.regulations.gov (EPA's preferred method). For comments submitted at www.regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from www.regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the "For Further Information Contact" section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Mark Dyner, Pesticides and Toxic Substances Law Office (2333A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564-1754; email address: dyner.mark@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Joint Stipulation and Stipulated

Notice of Dismissal

On March 21, 2013, Plaintiffs (several beekeepers and public interest organizations) filed suit in the United States District Court for the Northern District of California. Plaintiffs brought claims alleging that EPA had improperly denied a petition to suspend products containing clothianidin and that EPA's registration of certain clothianidin and thiamethoxam products violated certain registration requirements of FIFRA, and violated section 7(a)(2) of the ESA because EPA had failed to consult with FWS prior to issuing the registrations. On May 8, 2017, the court granted EPA's summary judgment motion with respect to the FIFRA claims and partially granted Plaintiffs' summary judgment motion with respect to the ESA claims, finding that EPA had failed to comply with the consultation requirements of section 7(a)(2) with respect to 59 clothianidin and thiamethoxam products. In its order, the court also directed the parties to develop a briefing schedule for determining the appropriate remedy and, concurrently, to schedule a settlement conference to determine whether the parties could settle the remedy proceeding outside of court.

The proposed stipulation and stipulated notice of dismissal would settle the remedy proceeding. Specifically, paragraph two of the proposed stipulation provides that EPA would agree to complete ESA effects determinations by June 30, 2022, for its FIFRA registration reviews of clothianidin and thiamethoxam and, as appropriate, request initiation of any necessary ESA consultations with the Services. As provided in paragraph three of the proposed stipulation, EPA would also agree to initiate informal consultation with the Services to begin an informal dialogue between the agencies prior to EPA completing its effects determinations.

In addition, as described in paragraph one of the proposed stipulation, defendant-

intervenors Syngenta, Bayer and Valent (the registrants of products containing clothianidin and thiamethoxam) have agreed to request that EPA voluntarily cancel the following 12 specific products that contain either clothianidin or thiamethoxam under section 6(f)(1) of FIFRA:

1. Adage Premier Seedcare, EPA Reg. No. 100-1450.
2. Adage Deluxe, EPA Reg. No. 100-1449.
3. Avicta Complete Corn 500, EPA Reg. No. 100-1399.
4. TMX-MXM-FDL-TBZ FS, EPA Reg. No. 100-1426.
5. Inovate Seed Protectant, EPA Reg. No. 59639-176.
6. Inovate Neutral Seed Protectant Reg. No. 59639-187.
7. Ernesto Quantum, EPA Reg. No. 264-1125.
8. Flower Rose & Shrub Care III, EPA Reg No. 72155-95.
9. V10170 0.25G GL, EPA Reg. No. 59639-164.
10. Meridian 0.14G, EPA Reg. No. 100-1346.
11. Meridian 0.20G, EPA Reg. No. 100-1341.
12. Aloft GC G Insecticide, Reg. No. 59639-214.

For a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed joint stipulation and stipulated notice of dismissal from persons who are not named as parties to the litigation in question. If so requested, EPA will also consider holding a public hearing on whether to agree to the proposed joint stipulation and stipulated notice of dismissal. EPA or the Department of Justice may withdraw or withhold consent to the proposed joint stipulation or proposed stipulated notice of dismissal if the comments disclose facts or considerations that indicate that such consent is

inappropriate, improper, inadequate, or inconsistent with the requirements of the ESA or FIFRA. Unless EPA or the Department of Justice determines that consent should be withdrawn, the terms of the proposed stipulation and stipulated notice of dismissal will be affirmed.

II. Additional Information About Commenting on the Proposed Stipulation and Stipulated Notice of Dismissal

A. How can I get a copy of the proposed stipulated order of partial dismissal?

The official public docket for this action (identified by EPA-HQ-OGC-2018-0745) contains a copy of the proposed stipulation and proposed order of dismissal. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OEI Docket is (202) 566-1752.

An electronic version of the public docket is available on EPA's website at <https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements> and through www.regulations.gov. You may use www.regulations.gov to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search." It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at www.regulations.gov without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by

statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket.

EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the www.regulations.gov website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or

other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through www.regulations.gov, your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 4, 2018.

Joseph E. Cole,

Associate General Counsel.

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