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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,)
et al.,)
Plaintiffs,)
v.)
U.S. ENVIRONMENTAL PROTECTION)
AGENCY, *et al.*,)
Defendants,)
CROPLIFE AMERICA, *et al.*,)
Defendant-Intervenors.)

Case No. CV-11-0293-JCS

~~PROPOSED~~ ORDER ENTERING
STIPULATED SETTLEMENT
AGREEMENT

On September 12, 2023, the parties submitted a Proposed Stipulated Settlement Agreement (ECF Doc. No. 412). Good cause having been shown, the Stipulated Settlement Agreement (ECF Doc. No. 412) is ENTERED, its terms are ADOPTED as part of this Order, and this case is DISMISSED. IT IS SO ORDERED.

Date: September 12, 2023


The Hon. Joseph C. Spero
United States Magistrate Judge

1 [COUNSEL LISTED IN SIGNATURE BLOCK]

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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 CENTER FOR BIOLOGICAL DIVERSITY,)
et al.,)
13 Plaintiffs,)
14 v.)
15 U.S. ENVIRONMENTAL PROTECTION)
AGENCY, *et al.*,)
16 Defendants,)
17 CROPLIFE AMERICA, *et al.*,)
18 Defendant-Intervenors.)

Case No. CV-11-0293-JCS

**PROPOSED STIPULATED
SETTLEMENT AGREEMENT**

Magistrate Judge Joseph C. Spero

19
20 This Stipulated Settlement Agreement (“Agreement”) is entered into by and between: Plaintiffs
21 Center for Biological Diversity, Pesticide Action Network North America (collectively, “Plaintiffs”);
22 Defendants the United States Environmental Protection Agency and Michael S. Regan, in his official
23
24
25

1 capacity as Administrator of the United States Environmental Protection Agency¹ (collectively, “EPA”);
2 and Defendant-Intervenors CropLife America, Responsible Industry for a Sound Environment, Southern
3 Crop Production Association, Western Plant Health Association, Mid America CropLife Association
4 (collectively, “CLA Intervenors”), together with the American Chemistry Council (collectively,
5 “Defendant-Intervenors”). Plaintiffs, EPA, and Defendant-Intervenors (together, the “Parties”) hereby
6 state as follows:

7 WHEREAS, Plaintiffs filed this action against EPA, alleging that EPA violated Section 7(a)(2)
8 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), by failing to consult on the effects of
9 382 pesticide active ingredients, registered by EPA pursuant to the Federal Insecticide, Fungicide, and
10 Rodenticide Act (“FIFRA”), §§ 7 U.S.C. 136-136(y), on numerous species protected under the ESA;

11 WHEREAS, the Court granted intervention to Defendant-Intervenor American Chemistry
12 Council in June 2011 and the CLA Intervenors in April 2013;

13 WHEREAS, after motions practice, the scope of the case has narrowed to the effects of the
14 specific pesticide product registration actions identified in the Fourth Amended Complaint (ECF 305)
15 for certain products containing one or more of thirty-five active ingredients;

16 WHEREAS, the Parties entered a Stipulated Partial Settlement Agreement on October 18, 2019
17 (ECF 364), the terms of which were entered by the Court on October 22, 2019 (ECF 366), and which
18 partially resolved Claims Four, Six, Seven, Nine, Eleven, Twelve, Nineteen, Thirty, Thirty-Four, and
19 Thirty-Five set forth in the Fourth Amended Complaint (ECF 305);

20 WHEREAS, the Stipulated Partial Settlement Agreement (ECF 364) has been subsequently
21 amended based on joint stipulations by the Parties (ECF 373, 383, 391, 395, 401, 407, 411) (as
22 amended, the “Partial Settlement Agreement”);

23
24
25 ¹ Michael S. Regan is substituted for his predecessor pursuant to Federal Rule of Civil Procedure 25(d).

1 WHEREAS, EPA has completed and issued draft and final Biological Evaluations concerning
2 the potential effects of the active ingredients Atrazine, Carbaryl, Methomyl, and Simazine (at issue in
3 Claims Four, Nine, Nineteen, and Thirty of the Fourth Amended Complaint) on ESA-listed species and
4 designated critical habitat pursuant to the terms of the Partial Settlement Agreement and has also
5 completed Biological Evaluations concerning effects of the active ingredients Chlorpyrifos and
6 Diazinon (at issue in Claims Eleven and Twelve of the Fourth Amended Complaint);

7 WHEREAS, it is the intent of the Parties that any ongoing obligations arising from the Partial
8 Settlement Agreement that are not yet satisfied, are set forth again in this Agreement such that this
9 Agreement resolves all claims in the Fourth Amended Complaint, and the Partial Settlement Agreement
10 is subsumed into and superseded by this Agreement;

11 WHEREAS, although EPA and Defendant-Intervenors do not concede any defenses or
12 objections to any of the allegations or claims set forth in the Fourth Amended Complaint, and whereas
13 Plaintiffs do not concede that Defendants' implementation of the terms of this Agreement satisfies the
14 legal requirements alleged in its underlying claims for relief in this case, the Parties, through their
15 authorized representatives, have reached a settlement that they believe is in the public interest and
16 consider to be a just, fair, adequate, and equitable resolution of all claims in this litigation, including
17 those that were partially resolved in the Partial Settlement Agreement referenced above;

18 **I. BIOLOGICAL EVALUATIONS**

19 WHEREAS, as part of this Agreement, EPA has committed to complete certain Biological
20 Evaluations as set forth in Paragraphs I.A. and I.B. below;

21 WHEREAS, ESA implementing regulation 50 C.F.R. § 402.14(a) provides that the trigger for
22 interagency consultation is whether a federal agency's actions "may affect" listed threatened or
23 endangered species or may destroy or adversely modify the designated critical habitat of such species,
24 which assessment is typically made by EPA, the action agency, in an "effects determination" in a
25 Biological Evaluation, 50 C.F.R. § 402.40(b);

1 WHEREAS, if EPA determines that the action will have “no effect” on ESA-listed species or
2 critical habitat, it need not consult under ESA Section 7, *see* 50 C.F.R. § 402.12, but if EPA determines
3 that the action “may affect” listed species or critical habitat, the action agency must pursue either
4 informal or formal consultation with one or both of the U.S. Fish and Wildlife Service (“FWS”) and
5 National Marine Fisheries Service (“NMFS”) (collectively, “the Services”), 50 C.F.R. §§ 402.13-
6 402.14, 402.40-402.46;

7 WHEREAS, as a result of consultation, a federal agency will obtain either a written concurrence
8 letter from the Services that its proposed action is “not likely to adversely affect” ESA-listed species or
9 their designated critical habitat, 50 C.F.R. §§ 402.13, 402.14(b)(1), or a Biological Opinion evaluating
10 the effects of the federal action on ESA-listed species and their designated critical habitat, 50 C.F.R. §
11 402.14(a);

12 WHEREAS, in the event that the Service(s) issue a final Biological Opinion related to any of the
13 effects determinations at issue in this case, using its best efforts, EPA intends to implement and/or carry
14 out any actions identified as reasonable and prudent measures (“RPMs”) in any Incidental Take
15 Statement (“ITS”) accompanying the final Biological Opinion that are necessary to minimize the
16 impacts of any incidental take that is anticipated to result from the agency action described in the final
17 Biological Opinion. In the event that the Service(s) conclude that the agency action is likely to
18 jeopardize an ESA-listed species or result in the destruction or adverse modification of designated
19 critical habitat, EPA intends to use its best efforts to implement the prescribed Reasonable and Prudent
20 Alternative(s).

21 **A. ORGANOPHOSPHATE BIOLOGICAL EVALUATIONS (CLAIMS THREE, FIVE,**
22 **FOURTEEN, SIXTEEN, TWENTY-TWO, TWENTY-SIX, TWENTY-SEVEN, AND**
THIRTY-ONE)

23 WHEREAS, EPA intends to conduct nationwide-scale effects determinations for the
24 Organophosphate active ingredients at issue in this litigation, including the pesticide products identified
25

1 in Claims Three, Five, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, and Thirty-One of
2 the Fourth Amended Complaint, unless a particular product is no longer registered;

3 WHEREAS, to the extent EPA determines it is efficient, EPA intends to conduct nationwide
4 scale effects determinations for the above-referenced Organophosphates by batching them into one or
5 two groups for the purpose of completing Biological Evaluations;

6 WHEREAS, EPA intends to make information publicly available regarding the grouping criteria
7 used to identify the respective batches of Organophosphates;

8 WHEREAS, in order to achieve programmatic efficiencies, EPA intends to conduct nationwide
9 scale effects determinations for the active ingredient Dichlorvos (DDVP) in the same timeframe as set
10 forth in Paragraph I.A.1. or I.A.2. below, and intends to add other Organophosphate active ingredients
11 (that are not at issue in this litigation) to the extent practicable. If EPA determines that other
12 Organophosphate active ingredients can be added, EPA expects to do so in the same timeframe as set
13 forth in Paragraph I.A.1. or I.A.2. below.

14 NOW, THEREFORE, THE PARTIES STIPULATE TO THE FOLLOWING TERMS:

15 On one of the two alternative tracks set forth below, EPA will complete Biological Evaluations
16 on the potential effects of the following eight active ingredients on ESA-listed endangered and
17 threatened species and designated critical habitat: Acephate, Bensulide, Dimethoate, Ethoprop, Naled,
18 Phorate, Phosmet, and S,S,S-tributyl phosphorotrithioate (Tribufos), including the pesticide products
19 identified in Claims Three, Five, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, and
20 Thirty-One of the Fourth Amended Complaint, unless a particular product is no longer registered, and
21 initiate consultation, as necessary.

22 **1. Alternative Track 1 - Organophosphates Completed as One Group**

23 **a. Commitment to Issue Organophosphates Biological Evaluation**

24 No later than September 30, 2027, EPA shall complete a final Biological Evaluation on the
25 potential effects of the following eight active ingredients on ESA-listed endangered and threatened

1 species and designated critical habitat: Acephate, Bensulide, Dimethoate, Ethoprop, Naled, Phorate,
2 Phosmet, and S,S,S-tributyl phosphorotrithioate (Tribufos), including the pesticide products identified in
3 Claims Three, Five, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, and Thirty-One of the
4 Fourth Amended Complaint unless a particular product is no longer registered (“Organophosphates
5 Biological Evaluation”) and initiate consultation, as necessary.

6 **b. Associated Milestones**

7 i. No later than March 31, 2027, EPA commits to issue a draft Organophosphates
8 Biological Evaluation, as well as provide notice and a 60-day opportunity for public comment on the
9 draft Biological Evaluation.

10 ii. No later than 90 days prior to the commitment to complete a draft
11 Organophosphates Biological Evaluation identified above, EPA shall provide a status report to the Court
12 and other Parties on its progress toward completing the draft Biological Evaluation and whether it
13 expects to meet that commitment.

14 iii. No later than 60 days prior to the deadline to complete the final
15 Organophosphates Biological Evaluations identified above, EPA shall provide a status report to the
16 Court and other Parties on its progress toward completing the final Biological Evaluations and whether
17 it expects to meet that deadline.

18 **2. Alternative Track 2 - Organophosphates Completed as Two Groups**

19 **a. Track 2 – Group 1**

20 **i. Commitment to Issue Organophosphates Group 1 Biological
21 Evaluation**

22 No later than September 30, 2026, EPA shall complete a final Biological Evaluation on
23 the potential effects of at least four of the following eight active ingredients on ESA-listed endangered
24 and threatened species and designated critical habitat: Acephate, Bensulide, Dimethoate, Ethoprop,
25 Naled, Phorate, Phosmet, and S,S,S-tributyl phosphorotrithioate (Tribufos), including the related

1 pesticide products identified in Claims Three, Five, Fourteen, Sixteen, Twenty-Two, Twenty-Six,
2 Twenty-Seven, and Thirty-One of the Fourth Amended Complaint unless a particular product is no
3 longer registered (“Organophosphates Group 1 Biological Evaluation”) and initiate consultation, as
4 necessary.

5 **ii. Associated Milestones for Organophosphates Group 1**

6 a) No later than March 31, 2026, EPA commits to issue a draft
7 Organophosphates Group 1 Biological Evaluation, as well as provide notice and a 60-day opportunity
8 for public comment on the draft Biological Evaluation.

9 b) No later than 90 days prior to the commitment to complete a draft
10 Organophosphates Group 1 Biological Evaluation identified above, EPA shall provide a status report to
11 the Court and other Parties on its progress toward completing the draft Biological Evaluation and
12 whether it expects to meet that commitment.

13 c) No later than 60 days prior to the deadline to complete the final
14 Organophosphates Group 1 Biological Evaluation identified above, EPA shall provide a status report to
15 the Court and other Parties on its progress toward completing the final Biological Evaluation and
16 whether it expects to meet that deadline.

17 **b. Track 2 – Group 2**

18 **i. Commitment to Issue Organophosphates Group 2 Biological
19 Evaluation**

20 No later than September 30, 2027, EPA shall complete a final Biological Evaluation on the
21 potential effects of the remaining four of the following eight active ingredients on ESA-listed
22 endangered and threatened species and designated critical habitat: Acephate, Bensulide, Dimethoate,
23 Ethoprop, Naled, Phorate, Phosmet, and S,S,S-tributyl phosphorotrithioate (Tribufos), including any
24 remaining pesticide products identified in Claims Three, Five, Fourteen, Sixteen, Twenty-Two, Twenty-
25 Six, Twenty-Seven, and Thirty-One of the Fourth Amended Complaint unless a particular product is no

1 longer registered (“Organophosphates Group 2 Biological Evaluation”) and initiate consultation, as
2 necessary.

3 **ii. Associated Milestones for Organophosphates Group 2**

4 a) No later than March 31, 2027, EPA commits to issue a draft
5 Organophosphates Group 2 Biological Evaluation, as well as provide notice and a 60-day opportunity
6 for public comment on the draft Biological Evaluation.

7 b) No later than 90 days prior to the commitment to complete a draft
8 Organophosphates Group 2 Biological Evaluation identified above, EPA shall provide a status report to
9 the Court and other Parties on its progress toward completing the draft Biological Evaluation and
10 whether it expects to meet that commitment.

11 c) No later than 60 days prior to the deadline to complete final
12 Organophosphates Group 2 Biological Evaluations identified above, EPA shall provide a status report to
13 the Court and other Parties on its progress toward completing the final Biological Evaluations and
14 whether it expects to meet that deadline.

15 **B. RODENTICIDE BIOLOGICAL EVALUATIONS (CLAIMS SIX, SEVEN, THIRTY-
16 FOUR, AND THIRTY-FIVE)**

17 WHEREAS, EPA’s commitments to issue draft and final Biological Evaluations for several
18 rodenticides, as set forth below, are the only obligations arising from the Partial Settlement Agreement
19 that are not yet satisfied, and are incorporated into this Agreement as set forth below:

20 WHEREAS, in order to achieve programmatic efficiencies, EPA intends to conduct nationwide
21 scale effects determinations for the active ingredients Chlorophacinone, Diphacinone (and its sodium
22 salt), Difenacoum, Difethialone, Bromethalin, Cholecalciferol, and Strychnine in the same timeframe as
23 set forth in Paragraph I.B.1. below;

24 WHEREAS, in developing a Biological Evaluation on the effects of active ingredients
25 Brodifacoum, Bromadiolone, Warfarin, Zinc Phosphide, Chlorophacinone, Diphacinone (and its sodium

1 salt), Difenacoum, Difethialone, Bromethalin, Cholecalciferol, and Strychnine (“Rodenticide
2 Evaluation”), EPA expects to consider factors relevant to ESA-listed species and individual rodenticides
3 (e.g., use patterns, toxicity data), including the different toxicities and registered uses of the 11
4 rodenticides, as not all 11 rodenticides have the same potential effects;

5 WHEREAS, in early 2024, EPA expects to consider public comments received on the draft
6 Rodenticide Biological Evaluation;

7 NOW, THEREFORE, THE PARTIES STIPULATE TO THE FOLLOWING TERMS:

8 **1. Commitment to Issue Rodenticide Biological Evaluations**

9 By November 12, 2024, EPA shall complete final Biological Evaluations on the
10 effects of the following four active ingredients on ESA-listed endangered and threatened species and
11 designated critical habitat: Brodifacoum, Bromadiolone, Warfarin, and Zinc Phosphide, including the
12 pesticide products identified in Claims Six, Seven, Thirty-Four, and Thirty-Five of the Fourth Amended
13 Complaint, unless a particular product is no longer registered, and initiate consultation, as necessary.

14 **2. Associated Milestones**

15 a. No later than November 12, 2023, EPA commits to issue draft Biological
16 Evaluations for Brodifacoum, Bromadiolone, Warfarin, and Zinc Phosphide, as well as provide notice
17 and a 60-day opportunity for public comment on the draft Biological Evaluations.

18 b. No later than 90 days prior to the commitment to complete draft
19 Biological Evaluations for Brodifacoum, Bromadiolone, Warfarin, and Zinc Phosphide, EPA shall
20 provide a status report to the Court and other Parties on its progress toward completing the draft
21 Biological Evaluations and whether it expects to meet that commitment.

22 c. No later than 90 days prior to the deadline to complete final Biological
23 Evaluations for Brodifacoum, Bromadiolone, Warfarin, and Zinc Phosphide, EPA shall provide a status
24 report to the Court and other Parties on its progress toward completing the final Biological Evaluations
25 and whether it expects to meet that deadline.

1 d. If the final Biological Evaluation deadline in Paragraph I.B.1. is extended
 2 pursuant to the procedures described below in Paragraph I.B.3., the dates for completing the milestones
 3 in this subsection will be extended correspondingly.

4 **3. Process to Modify Deadlines**

5 a. If EPA receives requests with good cause to extend the 60-day period for
 6 public comment on EPA's draft Biological Evaluations for Brodifacoum, Bromadiolone, Warfarin, and
 7 Zinc Phosphide, EPA may, within its discretion, extend this comment period. The Parties agree to file a
 8 stipulated motion to modify the deadlines for the final Biological Evaluations for Brodifacoum,
 9 Bromadiolone, Warfarin, and Zinc Phosphide by the same number of days as EPA's extension of the
 10 public comment period but not to exceed 60 days.

11 b. Other than potential modifications as set forth above in Paragraph I.B.3.a.,
 12 the deadlines in Paragraph I.B.1. and associated milestones in Paragraph I.B.2. may only be modified by
 13 a motion as set forth in Paragraph IV.B. below.

14 **II. EPA DEVELOPMENT OF MITIGATION STRATEGIES FOR CERTAIN PESTICIDE**
 15 **GROUPS AND EXPANSION OF THE VULNERABLE SPECIES PILOT PROGRAM**
 16 **(CLAIMS ONE, TWO, EIGHT, TEN, THIRTEEN, FIFTEEN, SEVENTEEN,**
 17 **EIGHTEEN, TWENTY, TWENTY-ONE, TWENTY-THREE, TWENTY-FOUR,**
 18 **TWENTY-FIVE, TWENTY-EIGHT, TWENTY-NINE, THIRTY-TWO, AND THIRTY-**
 19 **THREE)**

18 WHEREAS, on April 12, 2022, EPA issued a FIFRA and ESA pesticides work plan, entitled
 19 Balancing Wildlife Protection and Responsible Pesticide Use: How EPA's Pesticide Program Will Meet
 20 its Endangered Species Act Obligations ("Work Plan")²;

21 WHEREAS, the Work Plan addresses, inter alia, the challenge of protecting ESA-listed species
 22 from pesticides, and EPA's plan to address this complex challenge;

23 _____
 24 ² EPA's Work Plan can be found at <https://www.epa.gov/endangered-species/epas-workplan-and-progress-toward-better-protections-endangered-species>.

1 WHEREAS, in connection with furthering the goals of the Work Plan, EPA expects to develop
2 several strategies, including an Herbicide Strategy and a Rodenticide Strategy, targeted at identifying
3 necessary mitigation measures to address effects to ESA-listed species based on certain criteria, which
4 EPA expects to develop based on what it has learned from its ESA Section 7(a)(2) consultations to date;

5 WHEREAS, EPA expects to issue drafts of these strategies for a 60-day public comment period;

6 WHEREAS, where practicable, EPA expects to incorporate mitigation measures identified in the
7 strategies into proposed interim decisions (“PIDs”) issued in the registration review process;

8 WHEREAS, EPA intends to develop strategies to address vulnerable species that may be
9 affected by herbicides (“Herbicide Strategy”), rodenticides (“Rodenticide Strategy”), insecticides
10 (“Insecticides Strategy”) and fungicides (“Fungicides Strategy”);

11 WHEREAS, the Parties acknowledge that EPA is developing or plans to develop an
12 implementation plan for each of the strategies described in this Agreement;

13 WHEREAS, the Parties agree that, while this Agreement does not provide deadlines for effects
14 determinations for all of the active ingredients and pesticide products identified in the Fourth Amended
15 Complaint, the commitments set forth below constitute a resolution of all claims in the Fourth Amended
16 Complaint;

17 **A. HERBICIDE STRATEGY**

18 WHEREAS, EPA is currently developing a broad strategy to address spray drift and runoff
19 transport from treated fields to minimize exposure to ESA-listed plants from a group of pesticides
20 known as herbicides (pesticides that target plants that are pests) for which that is a problem (“Herbicide
21 Strategy”);

22 WHEREAS, EPA has begun developing recommended mitigation measures and associated
23 chemical criteria for herbicides in connection with its Herbicide Strategy, and expects to continue
24 developing such measures through early 2023;

1 WHEREAS, EPA expects that the Herbicide Strategy will focus on ESA-listed plants and those
2 species that rely on plants, and that potential effects to other species (e.g., effects to animals on the
3 treated field) would likely be assessed in any future Biological Evaluations;

4 WHEREAS, by determining measures that will minimize exposure to off-target ESA-listed
5 plants from herbicides, EPA's goal is to develop mitigation measures that would reduce the likelihood of
6 potential jeopardy or adverse modification of designated critical habitat to listed plants and listed species
7 that rely on those plants;

8 WHEREAS, EPA acknowledges that individual herbicides do not necessarily share the same fate
9 properties and potential for effects; however, EPA anticipates that evaluation of mitigation measures for
10 a subset of representative herbicides will allow it to identify a general suite of mitigation options that
11 can be applied to other herbicides based on fate and effects information;

12 WHEREAS, at a minimum, EPA plans to use the herbicides at issue in this lawsuit as
13 representative chemicals (including 2,4-D and its salts and esters, Dicamba and its salts, Diuron, MCPA
14 and its salts and esters, Metolachlor and its isomer S-metolachlor, Metribuzin, Oxyfluorfen, Paraquat
15 Dichloride, Pendimethalin, Propanil, Thiobencarb, and Trifluralin) in its Herbicide Strategy to ascertain
16 the effectiveness of the identified criteria and mitigation measures;

17 WHEREAS, EPA expects to consider the properties of the above-listed representative
18 herbicides, including their physical-chemical-fate properties (e.g., sorption to soil, persistence) and
19 potential effects (e.g., magnitude of exposure relative to available toxicity data), in order to develop
20 criteria in the Herbicide Strategy that risk managers could use to determine when such mitigation
21 measures are needed and appropriate;

22 WHEREAS, EPA will likely develop two or more suites of mitigation measures to be broadly
23 applied to herbicides with similar fate and effects profiles;

24 WHEREAS, EPA plans to issue a draft Herbicide Strategy for public comment, and after review
25 of public comments received, EPA plans to issue a final Herbicide Strategy;

1 WHEREAS, EPA expects that development of any implementation plan is likely to be dependent
2 upon how the associated strategy is developed;

3 WHEREAS, EPA plans to work with the registrants who hold registrations for products affected
4 by any mitigation measures identified in the Herbicide Strategy, and expects registrants to submit
5 requests to amend their registrations and labeling in a timely manner;

6 WHEREAS, if EPA determines that necessary actions have not been taken by the registrants,
7 EPA may consider, where appropriate, whether further regulatory action under FIFRA (e.g.,
8 cancellation) is warranted;

9 WHEREAS, when EPA receives requests for changes to registrations, including changes to
10 labeling, using its best efforts, EPA aspires to review those requests and act on them (e.g., render a
11 decision on whether to approve the request), no later than 18 months from receipt of the requests. EPA's
12 timing will depend on the number of label-change requests that require review, as some chemicals in
13 this lawsuit have hundreds of products;

14 WHEREAS, EPA is in the process of improving its labeling review and approval process (e.g.,
15 moving to an electronic labeling system). When this improvement is completed, EPA expects to be able
16 to approve labeling changes in less time and commits to doing so with respect to actions related to the
17 Herbicide Strategy;

18 NOW, THEREFORE, THE PARTIES STIPULATE TO THE FOLLOWING TERMS:

19 **1. Commitment to Issue Herbicide Strategy**

20 a. No later than May 30, 2024, EPA shall issue a final Herbicide Strategy, which
21 will be based on an analysis of representative active ingredients including, at a minimum, the herbicides
22 at issue in Claims Two, Thirteen, Fifteen, Seventeen, Twenty, Twenty-One, Twenty-Three, Twenty-
23 Four, Twenty-Five, Twenty-Eight, Thirty-Two, and Thirty-Three of the Fourth Amended Complaint
24 (i.e., 2,4-D and its salts and esters, Dicamba and its salts, Diuron, MCPA and its salts and esters,
25

1 Metolachlor and its isomer S-metolachlor, Metribuzin, Oxyfluorfen, Paraquat Dichloride,
2 Pendimethalin, Propanil, Thiobencarb, and Trifluralin).

3 **2. Associated Milestones**

4 a. No later than 60 days before May 30, 2024, EPA shall provide a status report to
5 the Court and other Parties on its progress toward completing the final Herbicide Strategy by May 30,
6 2024 and whether it expects to meet that commitment.

7 b. When EPA issues its final Herbicide Strategy, it will include a Response to
8 Comments document for comments received during the public comment period on the draft Herbicide
9 Strategy that was issued on July 24, 2023.

10 c. Once EPA issues the final Herbicide Strategy, EPA shall consider incorporating
11 and expects to incorporate the mitigation measures identified in the Herbicide Strategy into PIDs issued
12 under EPA's registration review program. Where EPA finds that groups of herbicides should receive the
13 same mitigation measures, EPA plans to issue group PIDs, instead of chemical-specific ones, where
14 appropriate.

15 d. EPA will make any PIDs available for a 60-day public comment period and does
16 not currently anticipate extending the public comment period beyond 60 days.

17 **B. RODENTICIDE STRATEGY**

18 WHEREAS, as set forth in Appendix A of the Work Plan and Paragraph I.B.1. above, EPA plans
19 to complete the Rodenticide Biological Evaluation by 2024;

20 WHEREAS, EPA will complete a draft Rodenticide Biological Evaluation and identify
21 mitigation measures for ESA-listed species and their designated critical habitats to avoid and minimize
22 exposure from the rodenticides ("Rodenticide Strategy");

23 WHEREAS, one goal of the Rodenticide Strategy is focused on addressing effects to mammals
24 and birds that consume rodenticide bait ("primary consumers"), and to birds, mammals and reptiles that
25 consume primary consumers ("secondary consumers");

1 WHEREAS, another goal of the strategy is to develop a suite of mitigation measures that will
2 reduce the likelihood of jeopardy to species potentially affected by rodenticides and of adverse
3 modification to designated critical habitat potentially affected by rodenticides, as well as to minimize
4 take for approximately 90 ESA-listed species (including bird, mammal, and reptile species that may be
5 primary or secondary consumers of rodenticides) that could be affected by the use of any of the 11
6 rodenticides;

7 WHEREAS, as part of the Rodenticide Strategy, EPA developed mitigation measures for three
8 representative species (one mammal primary consumer, one bird primary consumer, and one secondary
9 consumer) and one designated critical habitat, and plans to consider expanding those mitigation
10 measures to apply to the other approximately 90 ESA-listed species potentially affected by rodenticides;

11 WHEREAS, EPA incorporated mitigation measures for the above-mentioned three
12 representative species into PIDs (“Rodenticide PIDs”) issued in November 2022;

13 WHEREAS, in November 2023, EPA expects to issue the draft Rodenticide Biological
14 Evaluation, which EPA expects will include individual level effects determinations, as well as
15 predictions on the likelihood of jeopardy to species or adverse modification to critical habitat, and will
16 consider the mitigation measures identified in the Rodenticide PIDs;

17 WHEREAS, EPA expects to issue a final Rodenticide Biological Evaluation no later than
18 November 12, 2024, including on brodifacoum, bromadiolone, warfarin, and zinc phosphide as set forth
19 in Paragraph I.B.1. above, and initiate consultation as necessary (and EPA expects that any consultation
20 would be on the rodenticides as a group).

21 **C. INSECTICIDES STRATEGY**

22 WHEREAS, EPA intends to develop a strategy to address vulnerable species that may be
23 affected by insecticides (“Insecticides Strategy”) including the Organophosphates at issue in Claims
24 Three, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, and Thirty-One (i.e. Acephate,
25

1 Dimethoate, Ethoprop, Naled, Phorate, Phosmet, and S,S,S-tributyl phosphorotrithioate (Tribufos)), and
2 Propargite at issue in Claim Twenty-Nine;³

3 WHEREAS, EPA will complete Biological Evaluations for the above-referenced
4 Organophosphates (“Organophosphates Biological Evaluations”) no later than September 30, 2027, as
5 set forth in Paragraph I.A. above;

6 WHEREAS, EPA may identify mitigation measures that are developed through its Insecticide
7 Strategy that could be relevant to the Organophosphate Biological Evaluations, and include those
8 measures in the Biological Evaluations, as appropriate.

9 NOW, THEREFORE, THE PARTIES STIPULATE TO THE FOLLOWING TERMS:

10 **1. Commitment to Issue Insecticide Strategy**

11 a. EPA will use its best efforts to issue a final Insecticide Strategy by January 17,
12 2025, and in no event shall issue it later than March 31, 2025. The final Insecticide Strategy will be
13 based on an analysis of representative active ingredients including, at a minimum, the Organophosphates
14 at issue in Claims Three, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, and Thirty-One
15 of the Fourth Amended Complaint (i.e. Acephate, Dimethoate, Ethoprop, Naled, Phorate, Phosmet, and
16 S,S,S-tributyl phosphorotrithioate (Tribufos)), and Propargite at issue in Claim Twenty-Nine of the
17 Fourth Amended Complaint.

18 **2. Associated Milestones**

19 a. No later than 60 days before January 17, 2025 (i.e. by November 18, 2024), the
20 Parties shall meet and confer to discuss whether EPA expects to issue a final Insecticide Strategy by
21 January 17, 2025. Within 10 days after the Parties’ meet and confer (i.e. by November 29, 2024), EPA
22
23

24
25 ³ EPA may issue another Insecticide Strategy addressing different representative active ingredients at a later date.

1 shall provide a status report to the Court on its progress toward completing the final Insecticide Strategy
2 and the outcome of the Parties' meet and confer.

3 b. No later than July 30, 2024, EPA commits to provide the draft Insecticide
4 Strategy for a 60-day public comment period. EPA does not currently expect to extend the public
5 comment period beyond 60 days.

6 c. When EPA issues the above-referenced final Insecticide Strategy, it will include a
7 Response to Comments document for comments received during the public comment period on the draft
8 Insecticide Strategy.

9 d. Once EPA issues the final Insecticide Strategy, EPA shall consider incorporating
10 and expects to incorporate the mitigation measures identified in the Insecticide Strategy into PIDs issued
11 under EPA's registration review program. Where EPA finds that groups of insecticides should receive
12 the same mitigation measures, EPA may issue group PIDs, instead of chemical-specific ones, where
13 appropriate.

14 e. EPA will make any PIDs available for a 60-day public comment period and does
15 not currently anticipate extending the public comment period beyond 60 days.

16 **D. FUNGICIDES STRATEGY**

17 WHEREAS EPA intends to develop a strategy to address vulnerable species that may be affected
18 by fungicides ("Fungicides Strategy") including, inter alia, the fungicides at issue in Claims One, Eight,
19 Ten, and Eighteen of the Fourth Amended Complaint (i.e. 1,3-dichloropropene, Captan, Chlorothalonil,
20 and Mancozeb);

21 WHEREAS, before finalizing a Fungicides Strategy, EPA will consider input from stakeholders,
22 including the Parties;

23 WHEREAS, EPA cannot currently commit to a date certain to complete its final Fungicides
24 Strategy;

1 NOW, THEREFORE, THE PARTIES STIPULATE TO THE FOLLOWING TERMS:

2 **1. Commitment to Meet and Confer**

3 The Parties agree to meet and confer no later than August 31, 2024 to discuss the
4 development of a Fungicides Strategy and attempt to agree upon a date for completion of EPA's final
5 Fungicides Strategy.

6 **E. EXPANSION OF THE WORK PLAN'S VULNERABLE SPECIES PILOT**
7 **PROGRAM**

8 WHEREAS, as described in the Work Plan, EPA is currently developing mitigation measures for
9 listed species with narrow ranges that may be vulnerable to exposures from pesticides;

10 WHEREAS, the Work Plan sets forth two separate pilot efforts, the Federal Pilot and the
11 Vulnerable Species Pilot, that have different objectives but overlap in their intention to identify
12 mitigation measures that can be applied to protect ESA-listed species;⁴

13 WHEREAS, EPA expects to provide updates on its progress on the efforts set forth in the Work
14 Plan by updating its websites on the pilots identified above, as well as providing information on
15 additional initiatives such as the strategies identified above;

16 WHEREAS, EPA plans to review the Work Plan websites on at least a quarterly basis and to
17 make updates as needed, including by announcing new initiatives such as the strategies identified above
18 and publishing tentative schedules and information on when EPA expects to engage the public in the
19 process (which EPA may do through public webinars, posting documents for public comment, or formal
20 notice in the Federal Register for public comment);

21
22
23
24
25 ⁴ Information on the pilots can be found at <https://www.epa.gov/endangered-species/implementing-epas-workplan-protect-endangered-and-threatened-species-pesticides>.

1 WHEREAS, the Vulnerable Species Pilot involves EPA working to identify mitigation measures
2 for species with limited ranges and where pesticides have already been identified as a stressor to the
3 species;

4 WHEREAS, EPA is currently developing mitigation measures to be broadly applied across
5 different types of pesticides (e.g., herbicides, insecticides, fungicides), which are expected to be relevant
6 to many of the active ingredients at issue in this action (e.g., Atrazine, Chlorothalonil, and Methomyl);

7 WHEREAS, EPA identified an initial set of approximately 25 species for the Vulnerable Species
8 Pilot using documentation from FWS⁵ (e.g., five-year reviews, biological opinions) and spatial data for
9 ranges;

10 WHEREAS, for the initial set of species that EPA identified for this pilot, FWS concluded that
11 they have high or medium vulnerability to all relevant stressors and indicated that pesticides may be a
12 potential stressor, and EPA concluded that they have smaller ranges relative to other ESA-listed species
13 and many of their ranges or critical habitats overlap with those of other ESA-listed species, meaning that
14 any protections can be expected to benefit other ESA-listed species as well;

15 WHEREAS, in 2023, EPA expects to begin to develop a plan to expand the Vulnerable Species
16 Pilot to include additional species, including by considering how similarities and differences among
17 species may be determinative with respect to the mitigation measures;

18 WHEREAS, this will help EPA to expand mitigation measures from the pilot species to other
19 species that would benefit from similar mitigation measures (e.g., adaptation of the mitigation measures
20 for the Poweshiek skipperling and Taylor's checkerspot to other vulnerable listed butterflies);

21 WHEREAS, when identifying mitigation measures for the pilot and expanding the species list to
22 consider other vulnerable species, EPA intends to: consider potential use sites and available monitoring
23

24
25 ⁵ The vast majority of ESA-listed species are under the jurisdiction of FWS.

1 data to identify species that may be exposed; consider available monitoring data to identify specific
2 pesticide active ingredients that can be used to develop and evaluate the mitigation measures; and, if the
3 chemicals at issue in this lawsuit are detected in habitats relevant to vulnerable species, EPA may use
4 those the specific chemicals to develop and evaluate mitigation measures;

5 WHEREAS, EPA expects to prioritize the development of mitigation measures that would be
6 applicable to species impacted by the chemicals at issue in this action;

7 WHEREAS, as part of these processes, EPA expects to consider whether consultation with the
8 Services or another process that involves the Services could result in efficiencies for current or future
9 consultations⁶;

10 WHEREAS, EPA plans to announce an expanded set of species for the Vulnerable Species Pilot
11 and a tentative timeline for developing mitigation measures for those species on its Work Plan website,
12 *see supra* n.2;

13 **1. Statements of Intent to Expand the Vulnerable Species Pilot**

14 a. No later than June 30, 2023, EPA shall conduct public outreach on the mitigation
15 measures identified for the first set of species in the Vulnerable Species Pilot and on how to apply those
16 measures to EPA's applicable pesticide actions under FIFRA, as well as any proposed expansion of the
17 pilot to include additional species.

18 b. No later than December 30, 2023, after the completion of its public outreach, EPA
19 shall determine whether any mitigation measures identified by the Vulnerable Species Pilot should be
20 revised or whether more should be added.

21 c. No later than September 30, 2024, EPA shall determine how it could expand the
22 approach used in the Vulnerable Species Pilot to other selected vulnerable species.

23 _____
24 ⁶ For example, EPA may consider initiating a programmatic consultation for a taxon, such as butterflies or
25 mussels. In this way, ESA-listed species in a taxon may not need to be considered in future Biological
Evaluations, as potential effects for pesticides would be addressed through this project.

1 **III. COMPENSATORY MITIGATION OPTIONS DEVELOPMENT**

2 WHEREAS, as described in the Work Plan, EPA intends to consider the use of compensatory
3 mitigation (also known as offsets) to address the effects of pesticide registrations on ESA-listed species
4 to help meet EPA’s ESA obligations;

5 WHEREAS, offsets may assist EPA in meeting its ESA obligations in cases where effects of
6 pesticide registrations cannot reasonably be avoided or minimized;

7 WHEREAS offsets could include, without limitation, measures intended to replace or provide
8 substitute resources or environments for ESA-listed species through the restoration, establishment,
9 enhancement, or preservation of resources or environments;

10 WHEREAS, the Parties have previously had success with workshops in which relevant
11 government agencies, pesticide registrants and others from the private sector, and environmental
12 advocacy organizations discuss integration of ESA and FIFRA requirements and enhancing protections
13 for ESA-listed species, such as the Advancing ESA-FIFRA Consultations Workshop co-hosted by
14 Defenders of Wildlife and CropLife America in August of 2021;

15 **A. STATEMENTS OF INTENT CONCERNING COMPENSATORY MITIGATION**
16 **OPTIONS DEVELOPMENT**

17 1. CLA Intervenors will organize and fund a workshop for interested stakeholders,
18 comparable to the workshop held in August of 2021, to explore how offsets may be used to address the
19 effects of pesticide registrations on ESA-listed species and how such offsets could be incorporated into
20 the pesticide registration process (“Workshop”).

21 2. The Parties agree that the agenda for the Workshop will be developed by CLA
22 Intervenors in conjunction with representatives of the interested stakeholders that plan to be in
23 attendance, and that it is not the goal of the Workshop to reach consensus on any issues, nor that any
24 government agency will be bound to implement or propose to implement any concept developed at the
25 Workshop.

1 3. CLA Intervenors expect that the Workshop will be held within 12 months of the effective
2 date of this Agreement, subject to the availability of the Parties and other attendees, and will use best
3 efforts to hold the workshop within 24 months of the effective date of this Agreement.

4 4. Following the Workshop, CLA Intervenors will circulate a draft summary of the
5 proceedings at the Workshop, and the Parties will use their best efforts to draft a joint final summary of
6 the proceedings at the Workshop, and any of the Parties may distribute or otherwise publicize the final
7 summary.

8 5. If EPA later issues or proposes to issue a policy on the use of offsets in connection with
9 FIFRA actions, EPA intends to seek public comment on such policy or proposed policy, regardless of
10 the extent to which such policy or proposed policy incorporates concepts developed at the Workshop.

11 **IV. OTHER TERMS AND CONDITIONS**

12 **A. DISMISSAL WITH PREJUDICE**

13 Upon approval of this Agreement by the Court, all counts of Plaintiffs' Fourth Amended
14 Complaint shall be dismissed with prejudice.

15 **B. MODIFICATION OF TERMS**

16 1. The Order entering this Stipulated Settlement Agreement ("Order") may only be
17 modified by the Court. The Order may be modified upon good cause shown by stipulated motion of all
18 Parties filed with and approved by the Court, or upon written motion filed by one of the Parties and
19 granted by the Court after appropriate briefing.

20 2. Except as provided in Paragraph IV.B.3. below, any Party interested in modifying any
21 term of the Agreement shall provide all Parties written notice of the proposed modification and the
22 reasons for such modification. The Parties shall meet and confer (telephonically or in person) no later
23 than ten business days after written notice in a good faith effort to resolve any modification dispute and
24 agree upon a stipulated motion to modify the Order.

1 3. If EPA seeks to modify a deadline for a final Biological Evaluation required by this
2 Agreement, it shall provide written notice of the proposed modified deadline and the reasons for it at
3 least 60 days prior to the deadline in the Order. The Parties shall meet and confer (telephonically or in
4 person) no later than ten business days after written notice in a good faith effort to agree upon a
5 stipulated motion to do so. If the Parties are unable to agree, and EPA still seeks to modify a Biological
6 Evaluation deadline, EPA shall move to modify the deadline at least 45 days prior to the deadline in the
7 Order.

8 **C. ENFORCEMENT**

9 1. If any Party believes another Party has failed to comply with any term of the Agreement,
10 the Party's first remedy shall be a motion to enforce the term or terms. In any motion to enforce these
11 terms, Plaintiffs reserve the right to seek other relief to protect endangered or threatened species or their
12 habitat from effects of specific products identified in the Fourth Amended Complaint that they believe to
13 be at risk from EPA's alleged failure to comply with these terms. Defendants and Defendant-Intervenors
14 reserve all objections, arguments, and defenses to any such requested relief.

15 2. No Party shall institute a proceeding for contempt of court unless EPA is in violation of a
16 separate order of the Court resolving a motion to enforce the terms of the Order.

17 **D. COVENANTS NOT TO SUE**

18 1. Plaintiffs agree not to bring, assist any other person or entity in bringing, or join any other
19 person or entity in a new court proceeding alleging that EPA has violated ESA Section 7 pertaining to
20 the effects of products containing organophosphate and rodenticide active ingredients identified in
21 Claims Three, Five, Six, Seven, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, Thirty-
22 One, Thirty-Four, or Thirty-Five of the Fourth Amended Complaint until after the completion of the
23 Biological Evaluations for these active ingredients, as specified above in Paragraphs I.A. and I.B. of this
24 Agreement. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor will
25

1 they materially support, either by funding or providing legal assistance in, such litigation filed by
2 another person or entity, with the exceptions set forth below in Paragraph IV.D.5.

3 2. Plaintiffs agree not to bring, assist any other person or entity in bringing, or join any other
4 person or entity in a new court proceeding alleging that EPA has violated ESA Section 7 pertaining to
5 the effects of products containing the herbicide active ingredients identified in Claims Two, Thirteen,
6 Fifteen, Seventeen, Twenty, Twenty-One, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Eight,
7 Thirty-Two, and Thirty-Three of the Fourth Amended Complaint until nine months after the earlier of:
8 (1) issuance of the final Herbicide Strategy as specified above in Paragraph II.A. of this Agreement; or
9 (2) March 30, 2024. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor
10 will they materially support, either by funding or providing legal assistance in, such litigation filed by
11 another person or entity, with the exceptions set forth below in Paragraph IV.D.5.

12 3. Plaintiffs agree not to bring, assist any other person or entity in bringing, or join any other
13 person or entity in a new court proceeding alleging that EPA has violated ESA Section 7 pertaining to
14 the effects of products containing the insecticide active ingredient propargite identified in Claim
15 Twenty-Nine of the Fourth Amended Complaint until six months after the earlier of: (1) issuance of the
16 final Insecticide Strategy as specified above in Paragraph II.C. of this Agreement; or (2) March 31,
17 2025. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor will they
18 materially support, either by funding or providing legal assistance in, such litigation filed by another
19 person or entity, with the exceptions set forth below in Paragraph IV.D.5.

20 4. Plaintiffs agree not to bring, assist any other person or entity in bringing, or join any other
21 person or entity in a new court proceeding alleging that EPA has violated ESA Section 7 pertaining to
22 the effects of products containing the fungicide active ingredients identified in Claims One, Eight, Ten,
23 and Eighteen of the Fourth Amended Complaint until six months after the earlier of: (1) issuance of the
24 final Fungicides Strategy referenced in Paragraph II.D. of this Agreement; or (2) October 1, 2025. Nor
25 will Plaintiffs actively solicit other persons or entities to file such litigation, nor will they materially

1 support, either by funding or providing legal assistance in, such litigation filed by another person or
2 entity, with the exceptions set forth below in Paragraph IV.D.5.

3 5. This Agreement does not preclude a challenge to EPA's compliance with the ESA for a
4 pesticide registration action for a product that contains both an active ingredient listed in the Fourth
5 Amended Complaint and one or more active ingredients outside of the Fourth Amended Complaint;
6 provided, that Plaintiffs agree that in any such court proceeding, they will not seek as a remedy for any
7 such claim that EPA conduct an effects determination on any of the active ingredients listed in the
8 Fourth Amended Complaint or join any other person or entity in requesting such a remedy within the
9 timeframes set forth in Paragraphs IV.D.1. through IV.D.4., immediately above. This Agreement does
10 not preclude any existing ESA challenges to pesticide products identified in the Fourth Amended
11 Complaint.⁷ This Agreement does not preclude challenges alleging that EPA has violated ESA Section
12 7 pertaining to the effects of individual pesticide products identified in the Fourth Amended Complaint
13 provided that: (1) EPA has taken a new final registration action after the date(s) indicated for the
14 individual product(s) in the Fourth Amended Complaint; (2) in the registration action subject to clause
15 (1), EPA has approved one or more use patterns which were not previously approved for the individual
16 product(s); (3) the challenge is brought after the expiration of the timeframes set forth in Paragraphs
17 IV.D.1. through IV.D.4. immediately above; and (4) such challenge seeks relief only directed at EPA's
18 approval of the new use pattern(s). This Agreement does not preclude Plaintiffs from commenting on
19 any actions concerning the pesticide active ingredients identified in the Fourth Amended Complaint.
20 This Agreement does not preclude new court proceedings outside the scope of the Fourth Amended
21 Complaint, such as those set forth below in Paragraph IV.F.

22
23 ⁷ *Center for Biological Diversity v. Environmental Protection Agency*, Case No. 20-cv-00555-DCB, (D.
24 Ariz. filed Dec. 23, 2020); *American Soybean Association v. Regan*, Consolidated Case Nos. 20-1441, 20-
25 1445, 20-1484, 22-1048, 22-1050, 22-1067 (D.C. Cir. initial case filed Nov. 17, 2020); *Ctr. for Env'tl. Health*
v. Wheeler, Case No. 18-cv-03197-SBA (N.D. Cal. filed May 30, 2018); *Am. Soybean Ass'n. v. EPA*, No. 20-
cv-03190 (D.D.C. filed Nov. 4, 2020).

1 6. Nothing in Paragraphs IV.D.1. through IV.D.5. shall be construed to limit or negate
2 Plaintiffs' dismissal with prejudice of all claims in the Fourth Amended Complaint. The Parties agree
3 that, per the dismissal with prejudice provided in Paragraph IV.A., and subject to the terms of Paragraph
4 IV.D.5., Plaintiffs shall not, at any time, bring, assist any other person or entity in bringing, or join any
5 other person or entity in a new court proceeding alleging that EPA has violated ESA Section 7 regarding
6 the products identified in the Fourth Amended Complaint.

7 **E. RETENTION OF JURISDICTION**

8 The terms of this Agreement shall become effective upon entry of the Order by the Court
9 approving this Agreement. The Parties agree that the Court retains jurisdiction to enforce the terms of
10 this Settlement Agreement and any modified Settlement Agreement, modify its terms as described in
11 Paragraph IV.B., resolve any request for relief as described in Paragraph IV.C., resolve any motion for
12 costs of litigation (including reasonable attorney and expert witness fees) as described in Paragraph
13 IV.G., or resolve any disputes concerning its implementation, until EPA satisfies its obligations under
14 the Agreement. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

15 **F. SCOPE OF JURISDICTION**

16 The Parties agree that Paragraph IV.E. does not extend the Court's jurisdiction to hear any
17 dispute over the adequacy or content of any of the following: Biological Evaluations, ESA "no effect"
18 determinations, strategies referenced in Paragraphs II.A. through II.E., any actions contemplated in the
19 WHEREAS clauses or Milestones in this Agreement, the sufficiency of any action or inaction in
20 response to ESA effects determinations, the sufficiency of or implementation of any resulting Biological
21 Opinions, and/or any other EPA action taken on the pesticides at issue in the Fourth Amended
22 Complaint during registration review. The Parties agree that any challenge to the EPA actions or
23 inactions referenced in the first sentence of this paragraph must be brought through a separate judicial
24 action in accordance with all applicable judicial review requirements. The Parties agree that this
25 Agreement and the scope of the Fourth Amended Complaint do not preclude any such separate judicial

1 action, except as provided in Paragraph IV.D., provided that no Party waives any other argument it may
2 have challenging or defending such agency action or inaction in any such separate judicial action.

3 **G. COSTS OF LITIGATION**

4 Plaintiffs reserve any claims against EPA for recovery of costs of litigation (including reasonable
5 attorney and expert witness fees) through and including the effective date of this Agreement, pursuant to
6 16 U.S.C. § 1540(g) or 28 U.S.C. § 2412. Plaintiffs and EPA agree to negotiate the claims for fees and
7 costs of this action. The Parties also hereby stipulate to extending Plaintiffs' deadline(s) for filing any
8 motion for costs of litigation (including attorney fees) to 120 days after this Agreement is entered by the
9 Court. If Plaintiffs and EPA fail to resolve Plaintiffs' claims for costs of litigation (including reasonable
10 attorney and expert witness fees) within 120 days after entry of the Agreement, Plaintiffs may file a
11 motion for costs of litigation (including reasonable attorney and expert witness fees) with the Court.
12 Plaintiffs further reserve any claims against EPA for recovery of costs of litigation (including reasonable
13 attorney and expert witness fees) through and including final resolution of this lawsuit, including
14 compliance with and completion of the terms of this Settlement Agreement. EPA does not waive any
15 right to contest any fees, costs or expenses claimed by the Plaintiffs.

16 **H. DISCRETIONARY RIGHTS**

17 Except as set forth in this Agreement, the Parties retain all rights, claims, defenses, and
18 discretion they may otherwise have. Except as expressly provided in this Agreement, nothing herein
19 shall be construed to limit or modify any discretion accorded EPA by statute, regulation or by general
20 principles of administrative law. Nothing in this Agreement shall bar EPA from acting on any matters
21 covered herein in a time frame earlier than required by this Agreement. No provision in this Agreement
22 requires EPA to take any action under FIFRA.

23 **I. ANTI-DEFICIENCY ACT**

24 No provisions of this Agreement shall be interpreted as or constitute a commitment or
25 requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or

1 any other applicable law or regulation. In response, Plaintiffs assert that this Agreement does not create
2 a conflict with the Anti-Deficiency Act because the ESA Section 7(a)(2) consultation duties are in non-
3 discretionary terms and the Anti-Deficiency Act would not excuse compliance with a pre-existing court-
4 approved Settlement Agreement. Plaintiffs intend to assert this position if EPA fails to comply with the
5 terms of this Agreement for reasons of insufficient appropriations. EPA reserves all legal and equitable
6 defenses to such a claim.

7 **J. APPROPRIATIONS LAPSE**

8 The Parties recognize that the possibility exists that a lapse in the appropriations that fund EPA,
9 such as a government shutdown, or other legal barrier to EPA's expenditure of funds, could delay
10 compliance with the timetables in this Agreement. If a lapse in appropriations or other legal barrier to
11 EPA's expenditure of funds for EPA occurs within 120 days before any deadline in this Agreement,
12 including but not limited to the deadlines set forth in Paragraphs I.A through II.E., those deadlines shall
13 be automatically extended one day for each day of the lapse in appropriations or other legal barrier to
14 EPA's expenditure of funds.

15 **K. NO PRECEDENTIAL VALUE**

16 This Agreement does not represent an admission by any Party to any fact, claim, or defense in
17 any issue in this lawsuit. This Agreement has no precedential value and shall not be cited in any other
18 litigation or administrative proceeding except as necessary to enforce the terms of the Agreement.

19 **L. POWER OF FEDERAL OFFICIALS**

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

22 **M. RULES OF CONSTRUCTION**

23 It is expressly understood and agreed that this Agreement was jointly drafted by the Parties.
24 Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is
25

1 construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning,
2 or interpretation of this Agreement.

3 **N. ENTIRE AGREEMENT**

4 This Agreement is the entire agreement between the Parties to date to partially settle this case.
5 All prior conversations, meetings, discussions, drafts, and writings of any kind, including without
6 limitation the Partial Settlement Agreement in this litigation, are specifically superseded by this
7 Agreement.

8 **O. AUTHORIZATION**

9 The undersigned representative of each Party certifies that they are fully authorized by the Party
10 they represent to bind that Party to the terms of this Agreement.

11 Respectfully submitted this 12th day of September 2023,

13 /s/ Stephanie M. Parent
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20 **AND**

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