[COUNSEL LISTED IN SIGNATURE BLOCK]

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 STIPULATED SETTLEMENT AGREEMENT** **Magistrate Judge Joseph C. Spero**

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

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

WHEREAS, Plaintiffs filed this 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 382 pesticide active ingredients, registered by EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), §§ 7 U.S.C. 136-136(y), on numerous species protected under the ESA;

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

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

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

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

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

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

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

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

I. BIOLOGICAL EVALUATIONS

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

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

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

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

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

A. <u>ORGANOPHOSPHATE BIOLOGICAL EVALUATIONS (CLAIMS THREE, FIVE, FOURTEEN, SIXTEEN, TWENTY-TWO, TWENTY-SIX, TWENTY-SEVEN, AND THIRTY-ONE)</u>

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

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

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

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

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

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

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

1. Alternative Track 1 - Organophosphates Completed as One Group

a. Commitment to Issue Organophosphates Biological Evaluation

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

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

b. Associated Milestones

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

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

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

2. Alternative Track 2 - Organophosphates Completed as Two Groups

a. Track 2 – Group 1

i. Commitment to Issue Organophosphates Group 1 Biological Evaluation

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

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

ii. Associated Milestones for Organophosphates Group 1

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

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

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

b. Track 2 – Group 2

i. Commitment to Issue Organophosphates Group 2 Biological Evaluation

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

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

ii. Associated Milestones for Organophosphates Group 2

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

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

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

B. <u>RODENTICIDE BIOLOGICAL EVALUATIONS (CLAIMS SIX, SEVEN, THIRTY-FOUR, AND THIRTY-FIVE)</u>

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

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

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

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

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

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

1. Commitment to Issue Rodenticide Biological Evaluations

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

2. Associated Milestones

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

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

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

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

3. Process to Modify Deadlines

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

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

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

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

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

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[2] EPA's Work Plan can be found at https://www.epa.gov/endangered-species/epas-workplan-and-progress-toward-better-protections-endangered-species.

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

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

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

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

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

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

A. HERBICIDE STRATEGY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Commitment to Issue Herbicide Strategy

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

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

2. Associated Milestones

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

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

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

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

B. <u>RODENTICIDE STRATEGY</u>

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

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

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

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

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

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

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

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

C. INSECTICIDES STRATEGY

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

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

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

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

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

1. Commitment to Issue Insecticide Strategy

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

2. Associated Milestones

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

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

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

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

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

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

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

D. FUNGICIDES STRATEGY

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

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

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

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

1. Commitment to Meet and Confer

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

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

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

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

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

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

[4] Information on the pilots can be found at https://www.epa.gov/endangered-species/implementing-epas-workplan-protect-endangered-and-threatened-species-pesticides.

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

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

WHEREAS, EPA identified an initial set of approximately 25 species for the Vulnerable Species Pilot using documentation from FWS[5] (e.g., five-year reviews, biological opinions) and spatial data for ranges;

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

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

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

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

[5] The vast majority of ESA-listed species are under the jurisdiction of FWS.

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

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

WHEREAS, as part of these processes, EPA expects to consider whether consultation with the Services or another process that involves the Services could result in efficiencies for current or future consultations[6];

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

1. Statements of Intent to Expand the Vulnerable Species Pilot

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

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

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

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[6] For example, EPA may consider initiating a programmatic consultation for a taxon, such as butterflies or 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.

III. COMPENSATORY MITIGATION OPTIONS DEVELOPMENT

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

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

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

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

A. STATEMENTS OF INTENT CONCERNING COMPENSATORY MITIGATION OPTIONS DEVELOPMENT

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

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

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

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

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

IV. OTHER TERMS AND CONDITIONS

A. DISMISSAL WITH PREJUDICE

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

B. MODIFICATION OF TERMS

1. The Order entering this Stipulated Settlement Agreement ("Order") may only be modified 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, or upon written motion filed by one of the Parties and granted by the Court after appropriate briefing.

2. Except as provided in Paragraph IV.B.3. below, any Party interested in modifying any term of the Agreement shall provide all Parties written notice of the proposed modification and the reasons for such 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.

3. If EPA seeks to modify a deadline for a final Biological Evaluation required by this Agreement, 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 Biological Evaluation deadline, EPA shall move to modify the deadline at least 45 days prior to the deadline in the Order.

C. ENFORCEMENT

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

2. 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.

D. COVENANTS NOT TO SUE

1. Plaintiffs agree 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 violated ESA Section 7 pertaining to the effects of products containing organophosphate and rodenticide active ingredients identified in Claims Three, Five, Six, Seven, Fourteen, Sixteen, Twenty-Two, Twenty-Six, Twenty-Seven, Thirty-One, Thirty-Four, or Thirty-Five of the Fourth Amended Complaint until after the completion of the Biological Evaluations for these active ingredients, as specified above in Paragraphs I.A. and I.B. of this Agreement. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor will

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

2. Plaintiffs agree 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 violated ESA Section 7 pertaining to the effects of products containing the herbicide active ingredients identified in Claims Two, Thirteen, Fifteen, Seventeen, Twenty, Twenty-One, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Eight, Thirty-Two, and Thirty-Three of the Fourth Amended Complaint until nine months after the earlier of: (1) issuance of the final Herbicide Strategy as specified above in Paragraph II.A. of this Agreement; or (2) March 30, 2024. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor will they materially support, either by funding or providing legal assistance in, such litigation filed by another person or entity, with the exceptions set forth below in Paragraph IV.D.5.

3. Plaintiffs agree 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 violated ESA Section 7 pertaining to the effects of products containing the insecticide active ingredient propargite identified in Claim Twenty-Nine of the Fourth Amended Complaint until six months after the earlier of: (1) issuance of the final Insecticide Strategy as specified above in Paragraph II.C. of this Agreement; or (2) March 31, 2025. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor will they materially support, either by funding or providing legal assistance in, such litigation filed by another person or entity, with the exceptions set forth below in Paragraph IV.D.5.

4. Plaintiffs agree 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 violated ESA Section 7 pertaining to the effects of products containing the fungicide active ingredients identified in Claims One, Eight, Ten, and Eighteen of the Fourth Amended Complaint until six months after the earlier of: (1) issuance of the final Fungicides Strategy referenced in Paragraph II.D. of this Agreement; or (2) October 1, 2025. Nor will Plaintiffs actively solicit other persons or entities to file such litigation, nor will they materially

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

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

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[7] *Center for Biological Diversity v. Environmental Protection Agency,* Case No. 20-cv-00555-DCB, (D. Ariz. filed Dec. 23, 2020); *American Soybean Association v. Regan*, Consolidated Case Nos. 20-1441, 20-1445, 20-1484, 22-1048, 22-1050, 22-1067 (D.C. Cir. initial case filed Nov. 17, 2020); *Ctr. for Envtl. 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).

6. Nothing in Paragraphs IV.D.1. through IV.D.5. shall be construed to limit or negate Plaintiffs' dismissal with prejudice of all claims in the Fourth Amended Complaint. The Parties agree that, per the dismissal with prejudice provided in Paragraph IV.A., and subject to the terms of Paragraph IV.D.5., Plaintiffs shall not, at any time, 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 violated ESA Section 7 regarding the products identified in the Fourth Amended Complaint.

E. RETENTION OF JURISDICTION

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

F. SCOPE OF JURISDICTION

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

action, except as provided in Paragraph IV.D., 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.

G. COSTS OF LITIGATION

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

H. DISCRETIONARY RIGHTS

Except as set forth in this Agreement, the Parties retain all rights, claims, defenses, and discretion they may otherwise have. Except as expressly provided in this 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 Agreement shall bar EPA from acting on any matters covered herein in a time frame earlier than required by this Agreement. No provision in this Agreement requires EPA to take any action under FIFRA.

I. ANTI-DEFICIENCY ACT

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

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

J. APPROPRIATIONS LAPSE

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

K. NO PRECEDENTIAL VALUE

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

L. POWER OF FEDERAL OFFICIALS

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

M. RULES OF CONSTRUCTION

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

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

N. ENTIRE AGREEMENT

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

O. AUTHORIZATION

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

Respectfully submitted this 12th day of September 2023,

/s/ Stephanie M. Parent
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