[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 PARTIAL SETTLEMENT AGREEMENT** **Magistrate Judge Joseph C. Spero**

This Agreement is entered into by and between Plaintiffs Center for Biological Diversity, Pesticide Action Network North America (hereafter "Plaintiffs") and Defendants the United States Environmental Protection Agency ("EPA") and Andrew Wheeler, in his official capacity as EPA Administrator (hereafter "EPA") and CropLife America, Responsible Industry for a Sound Environment, Southern Crop Production Association, Western Plant Health Association, MidAmerican CropLife Association, American Farm Bureau Federation, National Agricultural

Aviation Association, National Alliance of Forest Owners, National Corn Growers Association, National Cotton Council, National Council of Farmer Cooperatives, National Potato Council, Oregonians for Food and Shelter, USA Rice Federation, Washington Friends of Farms and Forests, and the American Chemistry Council (hereafter "Defendant-Intervenors") (together, the "Parties"), who 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 Act;

WHEREAS, the Court granted intervention to Defendant-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 for certain products containing one or more of thirty-five active ingredients and the species listed in Paragraph 97 of the Fourth Amended Complaint (ECF 305);

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

WHEREAS, EPA has made effects determinations for products containing chlorpyrifos and diazinon, which are the subject of Claims Eleven and Twelve of the Fourth Amended

Complaint, and transmitted a final Biological Evaluation to the U.S. Fish & Wildlife Service ("FWS") on January 18, 2017;

WHEREAS, consistent with current practice, within 30 business days of receipt from the U.S. Fish and Wildlife Service of any draft biological opinions on the effects of chlorpyrifos and diazinon, including but not necessarily limited to pesticide products identified in Claims Eleven and Twelve of the Fourth Amended Complaint, EPA commits to make the draft available to the public for a 60-day comment period;

WHEREAS, EPA has not made effects determinations for the remaining products identified in the Fourth Amended Complaint;

WHEREAS, consistent with EPA's current practice, the Agency intends to conduct nationwide-scale effects determinations, which will include all uses on all registered pesticide products, for each active ingredient identified in Paragraphs 1 to 3 of this Agreement;

WHEREAS, consistent with EPA's stated intentions in *Center for Biological Diversity v.* EPA, No. 07-cv-2794 (N.D. Cal.) to make nationwide-scale effects determinations for atrazine, simazine, glyphosate, and propazine on the same schedule, EPA intends to conduct nationwide-scale effects determinations for the active ingredients propazine and glyphosate in the same timeframe as set forth in Paragraph 2 below;

WHEREAS, it is the Parties' intention that the deadlines for action set forth in Paragraphs 1, 2 and 3 should supersede any prior commitments made by Defendants in a prior settlement agreement with Plaintiffs to complete biological evaluations as to the active ingredients addressed in those paragraphs;

WHEREAS, for each final Biological Evaluation deadline enumerated below, EPA commits to issue a draft Biological Evaluation no later than one year prior to the deadline, as well to provide notice and a 60-day opportunity for public comment on any such draft Biological Evaluation; and

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 partial resolution of the Claims Four, Six, Seven, Nine, Eleven, Twelve, Nineteen, Thirty, Thirty-Four, and Thirty-Five set forth in the Fourth Amended Complaint.

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

1. Carbaryl and Methomyl

a. By February 14, 2021, EPA shall complete final Biological Evaluations on the potential effects of carbaryl and methomyl, including the pesticide products identified in Claims Nine and Nineteen of the Fourth Amended Complaint unless a particular product is no longer registered, on listed endangered and threatened species and designated critical habitat ("carbaryl and methomyl Biological Evaluations") and initiate consultation, as necessary.

b. Associated Milestones

i. No later than 90 days prior to the commitment to complete draft carbaryl and methomyl Biological Evaluations identified above, EPA shall provide a status report to the Court and other Parties on its progress toward completing those draft Biological

Evaluations and whether it expects to meet that commitment. As part of this status report, EPA will address any issues the agency has identified, in the process of developing the carbaryl and methomyl Biological Evaluations, as it relates to the role of use and usage data in the Biological Evaluations.

ii. No later than 90 days prior to the deadline to complete final carbaryl and methomyl Biological Evaluations identified above, EPA shall provide a status report to the Court and other Parties on its progress toward completing those final Biological Evaluations and whether it expects to meet that deadline.

iii. If the final Biological Evaluations deadline in Paragraph 1.a. is extended pursuant to the procedures described in Paragraph 1.c. herein, the dates for completing the milestones in this subsection will be extended correspondingly.

c. Process to Modify Deadlines

i. If EPA receives requests with good cause to extend the 60-day period for public comment on EPA's draft carbaryl and methomyl Biological Evaluations, EPA may, within its discretion, extend this comment period. The Parties agree to file a stipulated motion to modify the deadlines for the final carbaryl and methomyl Biological Evaluations by the same number of days of EPA's extension of the public comment period but not to exceed 60 days; the Parties also agree to stipulate to modify the deadlines for the final BEs identified in Paragraphs 2 and 3 below by the same number of days.

ii. Other than potential modifications as set forth above in Paragraph 1.c.i., the deadlines in paragraph 1.a. and associated milestones in paragraph 1.b. may only be modified by a motion as set forth in Paragraph 5 below.

2. Atrazine and Simazine

a. By August 14, 2021, EPA shall complete final Biological Evaluations on the potential effects of atrazine and simazine, including the pesticide products identified in Claims Four and Thirty of the Fourth Amended Complaint unless a particular product is no longer registered, on listed endangered and threatened species and designated critical habitat ("atrazine and simazine Biological Evaluations") and initiate consultation, as necessary.

b. Associated Milestones

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

ii. No later than 90 days prior to the deadline to complete final atrazine and simazine Biological Evaluations identified above, EPA shall provide a status report to the Court and other Parties on its progress toward completing those final Biological Evaluations and whether it expects to meet that deadline.

iii. If the final BE deadline in Paragraph 2.a. is extended pursuant to the procedures discussed in Paragraph 2.c. herein, the dates for completing the milestones in this subsection will be extended correspondingly.

c. Process to Modify Deadlines

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

days; the Parties also agree to stipulate to modify the deadlines for the final BEs identified in Paragraph 3 below by the same number of days.

ii. Other than potential modifications as set forth above in paragraphs 2.c.i., the deadlines in paragraph 2.a. and associated milestones in paragraph 2.b. may only be modified by a motion as set forth in Paragraph 5 below.

3. Brodifacoum, Bromadiolone, Warfarin, Zinc Phosphide

a. By August 14, 2024, EPA shall complete final Biological Evaluations on the effects of brodifacoum, bromadiolone, warfarin, 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, on listed endangered and threatened species and designated critical habitat ("brodifacoum, bromadiolone, warfarin, zinc phosphide Biological Evaluations") and initiate consultation, as necessary.

b. Associated Milestones

i. No later than 90 days prior to the commitment to complete draft brodifacoum, bromadiolone, warfarin, zinc phosphide Biological Evaluations identified above, EPA shall provide a status report to the Court and other Parties on its progress toward completing those draft Biological Evaluations and whether it expects to meet that commitment.

ii. No later than 90 days prior to the deadline to complete final brodifacoum, bromadiolone, warfarin, zinc phosphide Biological Evaluations identified above, EPA shall provide a status report to the Court and other Parties on its progress toward completing those final Biological Evaluations and whether it expects to meet that deadline.

iii. If the final Biological Evaluation deadline in Paragraph 3.a. is extended pursuant to the procedures described in Paragraph 3.c. herein, the dates for completing the milestones in this subsection will be extended correspondingly.

c. Process to Modify Deadlines

i. If EPA receives requests with good cause to extend the 60-day period for public comment on EPA's draft brodifacoum, bromadiolone, warfarin, zinc phosphide Biological Evaluations, EPA may, within its discretion, extend this comment period. The Parties agree to file a stipulated motion to modify the deadlines for the final brodifacoum, bromadiolone, warfarin, zinc phosphide Biological Evaluations by the same number of days of EPA's extension of the public comment period but not to exceed 60 days.

ii. Other than potential modifications as set forth above in paragraphs 3.c.i., the deadlines in paragraph 3.a. and associated milestones in paragraph 3.b. may only be modified by a motion as set forth in Paragraph 5 below.

4. Meet and Confer to Resolve Remaining Issues

a. The Parties shall meet and confer by August 30, 2021.

b. The purpose of this meet and confer is: 1) to assess the status of the remaining active ingredients and pesticide products listed in the Fourth Amended Complaint (Claims One to Three, Five, Eight, Ten, Thirteen to Eighteen, Twenty to Twenty-Nine, and Thirty-One to Thirty-Three) ("remaining claims") and to establish additional deadlines for corresponding effects determinations as well as any associated milestones; 2) to assess the appropriateness and scope of any interim remedies or other actions, which are not limited to the remaining claims; 3) to assess the status of the rodenticide consultation described in paragraph 3;

and 4) to attempt to enter a Stipulated Settlement Agreement to fully resolve this lawsuit. This meet and confer is not limited to these issues, and any Party may raise an issue for discussion.

c. By agreeing to the August 2021 meet and confer process, no Party waives any available claim, argument, defense to the remaining claims or any relief sought by the Fourth Amended Complaint, or right to seek relief or to modify the Order adopting this settlement as provided in paragraph 5.

d. The remaining claims shall be administratively closed and/or the case shall be stayed, as the Court may direct, until no later than December 15, 2021. By this deadline, the Parties will notify the Court in writing if they have reached a settlement of all or some of the remaining claims and/or the appropriateness and scope of any interim remedies, whether they request the assistance of a mediator in reaching settlement, or whether the administrative closure and/or stay should be lifted and litigation on the remaining claims and/or the appropriateness and scope of any interim remedies or other actions should proceed.

e. To the extent the Parties reach a Stipulated Settlement Agreement to fully resolve this lawsuit, including settlement of the remaining claims and/or the appropriateness and scope of any interim remedies or other actions, the Parties shall file a stipulated motion to modify the Order entering this Stipulated Partial Settlement Agreement by a mutually agreeable deadline.

5. Modification of Terms

a. The Order entering this Stipulated Partial 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, including as agreed to

above for good faith extensions of public comment periods, or upon written motion filed by one of the Parties and granted by the Court after appropriate briefing.

b. Except as provided in subsection 5.c., 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.

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

6. Enforcement

a. 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.

b. 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.

7. 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 procedurally violated ESA Section 7 pertaining to the effects of the active ingredients in Claims Four, Six, Seven, Nine, Nineteen, Thirty, Thirty-Four, and Thirty-Five on the listed species identified in the Fourth Amended Complaint until after the completion of the Biological Evaluations for these active ingredients, as specified in Paragraph 1 through 3 of this Agreement. 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 substantively violated ESA Section 7 pertaining to the effects of the active ingredients in the claims of the Fourth Amended Complaint on the listed species identified in the Fourth Amended Complaint until after the completion of the process set forth in Paragraph 4 of this Agreement, at which time this paragraph may be further modified, with the following two exceptions. This Agreement does not preclude a challenge to EPA's compliance with the ESA pertaining to any active ingredients or pesticide products for which the consulting agency has completed a biological opinion, as provided in paragraph 9. This Agreement also does not preclude a challenge to EPA's compliance with the ESA for a pesticide registration action for a product that contains both 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 engage in consultation on the active ingredient listed in the Fourth Amended Complaint or join any other person or entity in requesting such a remedy.

8. 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 5, resolve any request for relief as described in Paragraph 6, resolve any motion for costs of litigation (including reasonable attorney and expert witness fees) as described in Paragraph 10, resolve any disputes concerning its implementation, until EPA satisfies its obligations under the Agreement, or continue litigation if the process set forth in Paragraph 4 of this Agreement does not result in a final and complete settlement of this case. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994).

9. The Parties agree that Paragraph 8 does not extend the Court's jurisdiction to hear any dispute over the adequacy or content of the biological evaluations of chlorpyrifos and diazinon products referred to in the WHEREAS clauses above, the biological evaluations identified in Paragraphs 1 through 3, or any other biological evaluations that may be agreed to after the meet and confer process identified in Paragraph 4. The Parties agree that any challenge to these biological evaluations, the sufficiency of any action or inaction in response to these biological evaluations, or the sufficiency of implementation of any resulting biological opinions, must be brought through a separate judicial action. 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 7, 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.

10. 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 Stipulated Partial Settlement Agreement, pursuant to 16 U.S. C. § 1540(g). Plaintiffs and

EPA agree to negotiate the claims for fees and costs of this action. If Plaintiffs and EPA fail to resolve Plaintiffs' claims for costs of litigation (including reasonable attorney and expert witness fees) within a reasonable time 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) from the effective date of this Stipulated Partial Settlement Agreement through and including final resolution of this lawsuit, including compliance with and completion of the terms of this Settlement Agreement. Defendants do not waive any right to contest any fees, costs or expenses claimed by the Plaintiffs.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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 are specifically superseded by this Agreement.

17. The undersigned representative of each Party certifies that he or she is fully authorized by the Party he or she represents to bind that Party to the terms of this Agreement.

Respectfully submitted this 18th day of October, 2019,

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*Granted admission *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that today a true and correct copy of the foregoing document was filed with the Court's CM/ECF system, which will generate electronic service on all counsel of record.

/s/ Bridget K. McNeil
Bridget Kennedy McNeil