

SETTLEMENT AGREEMENT

This Settlement Agreement (or “Agreement”) is entered into by and among the Center for Biological Diversity (“Petitioner”) and Respondents the United States Environmental Protection Agency (“EPA”) and the United States Fish and Wildlife Service (“FWS”) (EPA and FWS collectively, “Respondents”) (Petitioner and Respondents collectively, “the Parties”), which, by and through their undersigned counsel, state as follows:

WHEREAS, on September 16, 2021, EPA published in the Federal Register a notice announcing issuance under Section 402 of the Clean Water Act (“CWA”), 33 U.S.C. § 1342, of the Final National Pollutant Discharge Elimination System (“NPDES”) Pesticide General Permit for Discharges from the Application of Pesticides (“PGP”), 86 Fed. Reg. 51,665 (Sept. 16, 2021) (“2021 Pesticide General Permit” or “2021 PGP”);

WHEREAS, the 2021 Pesticide General Permit covers discharges to waters of the United States from certain pesticide applications in Massachusetts, New Hampshire, New Mexico, and the District of Columbia; the federal territories of American Samoa, Guam, Johnston Atoll, Midway Island, Northern Mariana Islands, Puerto Rico, and Wake Island; the majority of Indian Country lands; and federal facilities in Colorado, Delaware, Vermont, and Washington;

WHEREAS, the 2021 Pesticide General Permit covers four pesticide use patterns: mosquito control and other flying insect pest control, weed and algae control, animal pest control, and forest canopy pest control;

WHEREAS, on March 2, 2021, FWS received a request from EPA to initiate formal consultation under Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), on the draft 2021 PGP, and EPA submitted to FWS a biological evaluation regarding the effects of

the 2021 PGP on species listed as threatened or endangered under the ESA and their designated critical habitats;

WHEREAS, on October 4, 2021, Petitioner, a non-profit, public benefit corporation organized under the laws of the State of California, dedicated to the preservation of biodiversity, native species, and ecosystems, timely filed a petition for judicial review of the 2021 PGP in the United States Court of Appeals for the Ninth Circuit (“Court”), Case No. 21-71306 (“the 2021 PGP Litigation”), naming EPA and FWS as Respondents;

WHEREAS, the petition for review alleges (*inter alia*): (1) EPA failed to comply with CWA Section 402(a), 33 U.S.C. § 1342(a), in issuing the 2021 PGP; (2) EPA and FWS violated the ESA by failing to ensure that the issuance of the 2021 PGP and subsequent uses of the permit will not jeopardize any listed species or destroy or adversely modify critical habitat; and (3) EPA and FWS failed to complete consultation pursuant to ESA Section 7, 16 U.S.C. § 1536(a)(2), prior to issuing the 2021 PGP;

WHEREAS, upon entry into the Ninth Circuit Mediation Program, the Parties, through their authorized representatives, and without any adjudication by the Court of the petition for review, have negotiated a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes at issue in this litigation;

WHEREAS, the 2021 PGP will expire on October 31, 2026;

WHEREAS, FWS recently joined EPA and the National Marine Fisheries Service (“NMFS”) in developing a strategy for analyzing and summarizing the PGP annual reports for the 2022 calendar year submitted by certain Operators under the 2021 PGP;

WHEREAS, with respect to covered discharges by Operators occurring on or after October 30, 2026, EPA intends to issue a new general permit that would take effect on or about

said date in 2026 (the “2026 PGP”), to authorize generally the same types of discharges by Operators currently authorized by the 2021 PGP;

WHEREAS, FWS intends to assist EPA in its compliance under ESA Section 7(a)(2) with respect to the 2026 PGP;

WHEREAS, for purposes of this Agreement and ESA Section 7(a)(2) consultation, the “proposed action” referenced herein is EPA’s proposed issuance of the 2026 PGP;

WHEREAS, an action agency must submit a written request containing the relevant data required by 50 C.F.R. § 402.14(c) to initiate formal consultation on a proposed action;

WHEREAS, formal consultation is initiated on the date that FWS receives a written request to initiate formal consultation on an action, provided that the action agency provides all relevant data required by 50 C.F.R. § 402.14(c); if all required data are not initially submitted, then formal consultation is initiated on the date on which all required information has been received;

WHEREAS, within 30 working days of receipt of an initiation package, FWS endeavors to provide written acknowledgment of an agency’s written request and either: (a) provides the action agency with the date formal consultation was initiated, or (b) if the informational requirements of 50 C.F.R. § 402.14(c) have not been met, advises the action agency of any data deficiencies and requests either the missing data or a written statement that the data are not available;

WHEREAS, pursuant to 50 C.F.R. § 402.14(g)(5), EPA may request a draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives (“RPAs”), if such RPAs are required;

WHEREAS, 50 C.F.R. § 402.02 defines RPAs as alternative actions identified during formal consultation that: 1) can be implemented in a manner consistent with the intended purpose of the action and are within the scope of the action agency's legal authority and jurisdiction; 2) are economically and technologically feasible; and 3) are measures that the FWS has determined would avoid the likelihood of jeopardizing the continued existence of ESA-listed species or resulting in the destruction or adverse modification of critical habitat;

WHEREAS, no later than July 15, 2023, FWS will provide EPA, for its consideration in developing the "proposed" or "draft" 2026 PGP ("Proposed 2026 PGP"), draft concepts of RPAs that FWS could potentially identify, if, upon evaluation during formal consultation, FWS determines that the proposed action, if finalized, would jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of critical habitat;

WHEREAS, the Parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve it without any further litigation;

NOW, THEREFORE, without admission of any issue of fact or law, or waiver of any claim or defense except to the extent (if any) provided below, the Parties agree as follows:

I. GENERAL PROVISIONS

1. The Parties to this Agreement are those entities defined above as Petitioner and Respondents. This Agreement applies to, is binding upon, and inures to the benefit of the Parties, and their successors, assigns, and designees.

2. This Agreement becomes effective on the date (the "Effective Date") that a fully executed copy of the Agreement is delivered to Petitioner via electronic mail sent from Department of Justice counsel on behalf of Respondents.

3. Nothing in this Agreement is intended to affect, or does affect, the terms and conditions of the 2021 PGP.

II. 2026 PGP CONSULTATION AND ISSUANCE

4. EPA agrees to request initiation of formal consultation in accordance with 50 C.F.R. § 402.14(c), as described above in the “whereas” clauses, by providing FWS with its biological evaluation regarding the effects of the proposed action on ESA-listed species and their critical habitats, no later than February 1, 2024.

5. FWS agrees to provide EPA with a draft biological opinion analyzing the effects of the proposed action on ESA-listed species and their critical habitats in accordance with 50 C.F.R. § 402.14(g)(5) and as described above in the “whereas” clauses, no later than August 30, 2024.

6. FWS agrees to issue its final biological opinion respecting the proposed action no later than October 31, 2024.

7. EPA agrees to take final action (i.e., final signatures of appropriate EPA officials) on the 2026 PGP no later than December 17, 2024, and promptly thereafter, no later than 7 calendar days, send to the Office of the Federal Register (“OFR”) for publication a notice announcing issuance of the final 2026 PGP that will take effect on or about October 30, 2026.

III. INTERIM ACTIONS BY EPA AND FWS

8. Within 15 business days after the Effective Date of this Agreement, EPA agrees to update its NPDES e-reporting Tool for the PGP (“NeT PGP”)¹ by adding such FWS email addresses as FWS requests. The purpose of this provision is to ensure that relevant persons at FWS receive and have the opportunity to review and respond as FWS deems appropriate to notices of intent

¹ Pesticide decision-makers must use the NeT PGP to electronically prepare and submit an NOI, NOT, or Annual Report for pesticide discharges under EPA’s 2021 PGP. The Net PGP can be accessed via EPA’s Central Data Exchange (“CDX”), located as of the Effective Date of this Agreement at <https://cdx.epa.gov/>.

(“NOIs”) submitted under the 2021 PGP after the Effective Date of this Agreement. FWS and EPA agree that FWS will generally have 30 days to review the NOIs overlapping with NMFS' Listed Resources of Concerns, and generally have 10 days for other NOIs, before the discharges becomes authorized, *see* Discharge Authorization Dates in Table 1-2 of the 2021 PGP, and respond as FWS deems appropriate.

9. FWS agrees to consider relevant information in the 2021 PGP NOIs received to inform FWS's consultation on the proposed action.

10. EPA agrees to provide summaries of PGP annual reports to FWS and NMFS, and FWS agrees to consider relevant information contained in the summary of PGP annual reports for 2022, and subsequent years until the date of the proposed action, to inform FWS's consultation on the proposed action. Relevant information may include, but is not limited to, a breakdown of the total number of new permittees; types of permittees; types and locations of use patterns; number of pest management areas; number, location, and size of treatment areas; and name, amount, and EPA registration number of pesticides used.

11. EPA agrees to include ESA-listed species and designated critical habitat under FWS's jurisdiction when EPA develops a 2021 PGP eligibility worksheet tool that is similar to the eligibility worksheet tool used to implement EPA's 2022 Construction General Permit. Specifically, EPA agrees to include text in its 2021 PGP eligibility worksheet tool that directs Operators to FWS's Information for Planning and Consultation (“IPaC”) ² online tool to procure a list of species and critical habitat under FWS's jurisdiction that should be addressed and to determine the need for any protective measures for the Operators to incorporate in their proposed activities. EPA further agrees to include text in its PGP eligibility worksheet tool encouraging

² As of the Effective Date of this Agreement, FWS's IPaC tool is available at <https://ipac.ecosphere.fws.gov>.

Operators to contact FWS for technical assistance if the tool indicates that ESA-listed species and designated critical habitat under FWS's jurisdiction are within the Operator's discharge location and surrounding areas and that may be affected by the proposed activities.

12. Promptly following the Effective Date of this Agreement, EPA agrees to list in its NeT PGP and on the PGP ESA webpage³ all biological opinions for pesticide registration decisions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y, for which FWS has already completed biological opinions that are also identified in EPA's Biological Evaluation for the 2021 PGP. With respect to such biological opinions analyzing the effects of pesticide registration decisions by FWS (or NMFS) in the future, upon notification by FWS (or NMFS) of completion of a new biological opinion on a FIFRA registration decision, EPA intends to promptly update the foregoing list at least through termination of this Agreement pursuant to Section XIII of this Agreement.

13. Within 30 business days after the Effective Date of this Agreement, EPA agrees to add a link to the FWS online tool IPaC to both its NeT PGP and PGP ESA webpages. The objective of this provision is to provide Operators covered by the PGP with a list of species and critical habitat under the FWS's jurisdiction that are within the Operator's discharge location and surrounding areas that may be affected by proposed activities.

14. Within 120 days after the Effective Date of this Agreement, and every 120 days thereafter, EPA and FWS, through Department of Justice counsel, shall provide a status report by email to all counsel and the Circuit Mediator (Stephen_liacouras@ca9.uscourts.gov or other assigned Circuit Mediator). Status report shall not be filed with the Court.

³ As of the Effective Date of this Agreement, EPA's PGP ESA webpage is available at <https://www.epa.gov/npdes/pesticide-permitting-esa-procedures>.

IV. PROPOSED CHANGES TO 2026 MONITORING PROVISIONS

15. In the Proposed 2026 PGP, EPA agrees to propose for public comment, at a minimum, the following additions and amendments in the “Monitoring” section of the PGP, which is reflected in Part 4⁴ of the 2021 PGP:

4.3 Documentation of Visual Monitoring

- a. *As required in Part 7.2 of the permit, all For-Hire Applicators must document the findings of each visual monitoring or, if no visual monitoring was conducted, the reason why no visual monitoring was conducted.*
- b. *As required in Parts 7.3 and 7.4 of the permit, any Decision-maker required to submit an NOI must document the findings of each visual monitoring or, if no visual monitoring was conducted, the reason why no visual monitoring was conducted.*

4.4 Additional Monitoring

If EPA determines that additional monitoring is appropriate to ensure compliance with the permit’s technology-based and water quality-based effluent limitations, EPA shall notify the Operator of additional monitoring requirements. Any such notice shall briefly state the reasons for the monitoring; locations and parameters to be monitored; frequency and period of monitoring; sample types; and reporting requirements.

⁴ Changes in the numbering of parts or subparts of the 2026 PGP are contemplated by the Agreement and shall not constitute violations of the Agreement so long as the substance and intent of the additions and amendments are maintained.

16. In the Proposed 2026 PGP, EPA agrees to propose for public comment the following additional text concerning the contents of the Pesticide Discharge Management Plan (“PDMP”), currently listed as Part 5.1 of the 2021 PGP:

c. Visual Monitoring Procedures – At a minimum, Decision-makers must have:

- 1. The process for determining the location of any monitoring;*
- 2. A schedule and procedures for monitoring;*
- 3. The person (or position) responsible for conducting visual monitoring;*
- 4. Procedures for documenting visual monitoring, including the date, time, and location.*

EPA agrees that, in the Proposed 2026 PGP, it will propose for public comment the following additional terms related to the PDMP Availability section of the PGP, which is currently reflected in Part 5.3 of the 2021 PGP, to the effect that: *Decision-makers required to prepare a PDMP must submit the PDMP with their NOI.*

17. In the Proposed 2026 PGP, EPA agrees to propose for public comment the following text—bolded directly below—to the Recordkeeping and Annual Reporting section of the PGP, which is currently reflected in Part 7.2(b)(7); Part 7.3(c)(10); and Part 7.4(e)(10) of the 2021 PGP:

*Whether or not visual monitoring was conducted during pesticide application and/or post-application and if not, why not and whether monitoring identified any possible or observable adverse incidents caused by application of pesticides. **If visual monitoring was conducted, the record must include the date, time and location where visual monitoring was conducted.***

18. EPA agrees, in the Proposed 2026 PGP, to propose for public comment the following revisions and amendments to the Recordkeeping and Annual Reporting section of the PGP, which is currently reflected in Part 7 of the 2021 PGP, to the effect that:

Decision-makers required to submit an annual report must submit copies of monitoring records required elsewhere in the Permit with their annual report.

V. ADMINISTRATIVE CLOSURE; DISMISSAL OF LITIGATION

19. Within 7 business days after the Effective Date, the Parties agree to file with the Circuit Mediator a joint motion for administrative closure requesting that this matter be held in abeyance until January 15, 2025.

20. Within 10 business days after EPA notifies Petitioner that the biological opinion has been issued and EPA has taken final action on the 2026 PGP, as described in Paragraphs 6 and 7, Petitioner will move to dismiss the petition for review with prejudice.

21. If the Mediator does not grant the Parties' joint motion for administrative closure, this Agreement shall cease being effective unless and until (and to the extent) it is revived by a subsequent Settlement Agreement executed by the Parties.

VI. PROCESS TO MODIFY TERMS AND DEADLINES

22. Any party interested in modifying any term of the Agreement agrees to provide all Parties written notice of the proposed modification and the reasons for such proposed modification. The Parties agree to meet and confer (virtually, telephonically, or in person) no later than 15 business days after written notice (or such time thereafter as is mutually agreed upon) in a good faith effort to resolve any modification request or dispute. If the Parties are unable to agree upon a modification (and any necessary attendant process), the Parties agree to request a settlement conference with the Circuit Mediator.

VII. CHALLENGES TO THE 2026 PGP OR FWS BIOLOGICAL OPINION FOR THE 2026 PGP

23. The Parties agree that any challenge to the FWS's Final Biological Opinion respecting the 2026 PGP or EPA's final action in issuing the 2026 PGP must be asserted through a separate

judicial action. Petitioner reserves whatever rights it may have to bring such a challenge, and Respondents reserve all rights they may have to defend against such a challenge.

24. Except as set forth in the Agreement, the Parties retain all rights, claims, defenses, and discretion they may otherwise have. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Respondents take action in contravention of the ESA, the CWA, the Administrative Procedure Act, FIFRA, or any other law or regulation, either substantive or procedural. Except as expressly provided in this Agreement, nothing herein shall be construed to limit or modify, or does limit or modify, any discretion accorded to Respondents by statute, regulation, or by general principles of administrative law.

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

VIII. DISPUTE RESOLUTION; REMEDY FOR NON-COMPLIANCE

26. If any party believes another party has failed to comply with any term of the Agreement, the party asserting noncompliance shall provide the other(s) with written notice and the basis for the alleged noncompliance. The Parties shall meet and confer (virtually, telephonically, or in person) to attempt to resolve the dispute within 21 days of the written notice or such time thereafter as is mutually agreed upon. If the Parties are unable to resolve the dispute within 21 days of such meeting, then the Parties shall request a settlement conference with the mediator and party representatives authorized to provide settlement recommendations. Should the mediator be unable to resolve the dispute, a party's sole remedy for asserted noncompliance is to move to reopen the PGP Litigation, and any such reopening renders any remaining obligations of the Parties under this Agreement null and void (without rendering provisions of this Agreement that are not obligations, such the Parties' reservations of rights, null and void). The Parties agree

not to seek to reopen the PGP Litigation unless there has been a material breach of this Agreement, or unless the Parties agree that there will be a material breach of this Agreement and the Parties have attempted, but failed to agree on, a modification of the relevant provision. Before Petitioner can reopen for a breach that has not yet occurred, Petitioner must first receive from EPA or FWS, through Department of Justice counsel, written confirmation that EPA or FWS will not meet an obligation under a provision of this Agreement, and the Parties must then follow the dispute resolution process identified in this Section VIII (meet and confer and then mediate) to attempt in good faith to reach a mutually agreeable modification to such deadline. Respondents do not waive or limit any defense relating to such motion or to the PGP Litigation if reopened. The Parties agree that contempt of Court is not an available remedy under this Agreement.

IX. GOVERNMENT SHUTDOWN AND FORCE MAJEURE

27. If there is a lapse in federal appropriations requiring FWS or EPA to suspend work in such a manner that causes delay in Respondents' compliance with the timelines, responsibilities, or other expectations contained in this Agreement, then the relevant deadlines shall be automatically extended one day for each day of the lapse in federal appropriations.

28. In the event Respondents' staff experience an unforeseen and unavoidable event, such as an extreme weather event or public health emergency, that Respondents believe will prevent them from complying with the timelines, responsibilities, or other expectations contained in this Agreement, Respondents may seek to modify the terms of the Agreement pursuant to Section VI (Process to Modify Terms and Deadlines). The Parties agree to work diligently to promptly resolve any request by Respondents to modify the terms of the Agreement in accordance with this paragraph and Section VI.

X. ANTI-DEFICIENCY ACT

29. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Respondents take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law or regulation. Petitioner asserts 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 settlement agreement. Petitioner intends to assert this position if Respondents fail to comply with the terms of this Agreement for reasons of insufficient appropriations. Respondents reserve all legal and equitable defenses to such a claim.

XI. USE OF SETTLEMENT AGREEMENT

30. This Agreement is the result of compromise and settlement and does not constitute a concession, implied or otherwise, by the Parties to any wrongdoing, liability, or an admission to any fact, claim, or defense concerning any issue in the PGP litigation or any similar claims brought in the future by any other party.

31. Except as provided in Section VIII of this Agreement, no part of this Agreement shall have precedential value in any pending or future litigation, representations before any court, administrative action, forum, or any public setting. For example, no party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for making determinations regarding the progress or completion of an ESA consultation.

XII. APPLICABLE LAW

32. This Agreement shall be governed by and construed under the laws of the United States.

XIII. TERMINATION

33. This Agreement shall terminate when Petitioner dismisses the petition for review with prejudice as described in Section V, Paragraph 20. If that event does not occur, then the Parties' obligations under this Agreement terminate when Petitioner reopens the administratively closed matter after fulfilling the steps outlined in Section VIII, Paragraph 26.

AGREED TO BY PETITIONER, THROUGH THE FOLLOWING AUTHORIZED

REPRESENTATIVE(S):



Dated: 7/25/2023

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**AGREED TO BY RESPONDENTS, THROUGH THE FOLLOWING AUTHORIZED
REPRESENTATIVE(S):**



Dated: July 25, 2023

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