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Attorneys for Defendants

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

_____)	
CENTER FOR BIOLOGICAL DIVERSITY,)	
)	
Plaintiff)	
)	
v.)	Case No: 1:22-cv-02922-CJN
)	
U.S. FISH AND WILDLIFE SERVICE,)	
MARTHA WILLIAMS, Director, U.S. Fish)	
And Wildlife Service, and DEB HAALAND,)	
Secretary of the U.S. Department of the Interior)	
)	
Defendants.)	
_____)	

STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between the Center for Biological Diversity (“Plaintiff”) and the United States Fish and Wildlife Service (“FWS”), Martha Williams, in her official capacity as Director of the FWS, and Debra Haaland, in her official capacity as Secretary of the Department of Interior (collectively, “Defendants”), who, by and through their undersigned counsel, state as follows:

WHEREAS, on April 20, 2010, Plaintiff petitioned the Service to list the Barrens darter (*Etheostoma forbesi*) as an endangered or threatened species under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, *et seq.*;

WHEREAS, on September 27, 2011, in accordance with 16 U.S.C. § 1533(b)(3)(A), the FWS published a finding that the petition presented substantial information that listing the Barrens darter may be warranted. 76 Fed. Reg. 59,835 (Sept. 27, 2011);

WHEREAS, on April 4, 2019, the FWS issued a finding, in accordance with 16 U.S.C. § 1533(b)(3)(B) (“12-month finding”), in which the FWS concluded that listing the Barrens darter was not warranted under the ESA. 84 Fed. Reg. 13,237 (Apr. 4, 2019);

WHEREAS, on April 7, 2021, as required by 16 U.S.C. § 1540(g)(2), Plaintiff sent Defendants a letter stating its intent to file suit under the ESA, challenging the FWS’s not warranted 12-month finding for the Barrens darter;

WHEREAS, on May 18, 2021, FWS responded to Plaintiff’s April 7, 2021, letter;

WHEREAS, on September 27, 2022, Plaintiff filed its Complaint challenging the FWS’s not warranted 12-month finding for the Barrens darter and alleging violations of the ESA and the Administrative Procedure Act (“APA”). ECF No. 1;

WHEREAS, FWS believes it is prudent to re-evaluate the status of the Barren’s darter under the ESA and develop a new 12-month finding, in accordance with 16 U.S.C. § 1533(b)(3)(B), based on the best scientific and commercial data available and other information required by 16 U.S.C. § 1533(b)(1)(A), as to whether the Barrens darter warrants listing as an endangered or threatened species;

WHEREAS, the parties, through their authorized representatives, and without any final adjudication of the issues of fact or law with respect to Plaintiff’s claims, have reached a

settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiff's Complaint;

WHEREAS, the Parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve Plaintiff's Complaint;

NOW, THEREFORE, the Parties hereby stipulate and agree as follows:

1. On or before June 30, 2025, the FWS will submit to the Office of the Federal Register for publication a new 12-month finding as to whether the listing of the Barrens darter as threatened or endangered is (a) not warranted; (b) warranted; or (c) warranted but precluded by other pending proposals, pursuant to the ESA, 16 U.S.C. § 1533(b)(3)(B).
2. The Order entering this Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadline specified in Paragraph 1, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other party with notice of the claim or modification. The parties agree that they will meet and confer (either telephonically or in person) at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court.

3. In the event that Defendants fail to meet the deadline specified in Paragraph 1 and have not sought to modify it, Plaintiff's first remedy shall be a motion to enforce the terms of this Agreement, after following the dispute resolution procedures described above. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.
4. Plaintiff reserves the right to request attorneys' fees and costs from Defendants pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), and Defendants reserve their right to contest Plaintiff's entitlement to recover fees and the amount of any such fees and do not waive any objection or defenses that they may have to Plaintiff's request. The parties agree to the following schedule for addressing attorneys' fees and costs:
 - a. Within thirty (30) days of the entry of the order by this Court approving this Agreement, Plaintiff will provide to Defendants an itemization of the attorneys' fees and costs it seeks to recover to allow Defendants to assess whether settlement of such claims is possible.
 - b. Within sixty (60) days of Defendants' receipt of this itemization of the Plaintiff's proposed fees and costs, the parties will notify the Court whether they have reached a settlement as to the payment of the Plaintiff's attorneys' fees and costs by Defendants.
 - c. If the parties have not reached agreement on attorneys' fees and costs at the time they provide this post-receipt notice to the Court, the Plaintiff may move within thirty (30) days of that date for the Court to award attorneys' fees and costs. Briefing and adjudication of the Plaintiff's motion for attorneys' fees and costs and Defendants' opposition thereto will then proceed as provided in LCvR 7. In the event that Plaintiff

files such a motion, Defendants reserve the right to contest any entitlement to and/or the reasonableness of the amount of Plaintiff's claims to attorneys' fees and costs, including the hourly rates and the number of hours billed.

5. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this Agreement arising from a need to enforce or defend against efforts to modify the underlying schedule outlined in Paragraph 2 or for any other continuation of this action. By this Agreement, Defendants do not waive any right to contest fees claimed by Plaintiff or Plaintiff's counsel, including hourly rates and the number of hours billed, in any future litigation or continuation of the present action. Further, this Agreement as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.
6. This Agreement requires only that Defendants take the action specified in Paragraph 1. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to Defendants by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any determinations made pursuant to Paragraph 1 of this Agreement. To challenge any 12-month finding issued pursuant to Paragraph 1, Plaintiff must file a separate action. Defendants reserve the right to raise any applicable claims or defenses to such challenges.
7. No part of this Agreement shall have precedential value in any litigation or in representations before any court or forum or in any public setting. No party shall use this

Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for issuing a 12-month finding for any petitioned species.

8. Nothing in this Agreement shall be construed or offered as evidence in any proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement or any similar claims brought in the future by any other party. Except as expressly provided in this Agreement, none of the parties waive or relinquish any legal rights, claims, or defenses they may have. This Agreement is executed for the purpose of settling Plaintiff's complaint, and nothing herein shall be construed as precedent having preclusive effect in any other context.
9. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Defendants are obligated to pay any funds exceeding those available or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.
10. The parties agree that this Agreement was negotiated in good faith and that it constitutes a settlement of claims that were disputed by the parties. By entering into this Agreement, none of the parties waive any legal rights, claims, or defenses except as expressly stated herein. This Agreement contains all of the terms of agreement between the parties concerning the complaint and is intended to be the final and sole agreement between the parties with respect thereto. The parties agree that any prior or contemporaneous representations or understanding not explicitly contained in this written Agreement, whether written or oral, are of no further legal or equitable force or effect.
11. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the terms and conditions of this Agreement and

do hereby agree to the terms herein. Further, each party, by and through its undersigned representative, represents and warrants that it has the legal power and authority to enter into this Agreement and bind itself to the terms and conditions contained in this Agreement.

12. The terms of this Agreement shall become effective upon entry of an Order by the Court ratifying this Agreement.

13. Upon adoption of this Agreement by Order of the Court, all counts of Plaintiff's complaint shall be dismissed with prejudice. Notwithstanding the dismissal of this action, however, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee any motion for attorneys' fees and costs, compliance with the terms of this Agreement, and to resolve any motions to modify such terms, until Defendants satisfy their obligations under this Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

Respectfully submitted, March 28, 2023:

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MEREDITH L. FLAX
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/s/ Bonnie Ballard
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2023, I electronically filed the foregoing Stipulated Settlement Agreement with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Bonnie Ballard

BONNIE BALLARD

Trial Attorney (Maryland Bar No. 2211280027)

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