SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into by and between Petitioners Center for Biological Diversity, Center for Food Safety, and Defenders of Wildlife (collectively "Petitioners"); Respondent Environmental Protection Agency ("EPA"); and Intervenors for Respondent Bayer CropScience LP, Syngenta Crop Protection LLC, and Dow AgroSciences LLC (collectively "Intervenors for Respondent") (together the "Parties"), who state as follows:

WHEREAS, Petitioners filed five separate petitions for review (collectively "Petitions") challenging EPA's orders issued pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), §§ 7 U.S.C. 136-136y, registering the pesticide active ingredients flupyradifurone, bicyclopyrone, benzovindiflupyr, cuprous iodide, and halauxifen-methyl, and certain products containing those ingredients (*Ctr. for Biological Diversity v. EPA*, No. 15-1054, Doc. 1542423 (Mar. 13, 2015); No. 15-1176, Doc. 1558360 (June 18, 2015); No. 15-1389, Doc. 1580497 (Oct. 27, 2015); No. 15-1462, Doc. 1590365 (Dec. 18, 2015); No. 16-1351, Doc. 1640538 (Oct. 7, 2016));

WHEREAS, in the Petitions, Petitioners allege that EPA violated Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), by failing to consult regarding the potential effects of flupyradifurone, bicyclopyrone, benzovindiflupyr, cuprous iodide, and halauxifen-methyl and certain products

containing those active ingredients on threatened and endangered species protected under the ESA ("ESA Listed Species");

WHEREAS, the Court granted intervention to Intervenors for Respondent Bayer Crop Science LP in case number 15-1054 (flupyradifurone); Syngenta Crop Protection LLC in case numbers 15-1176 and 15-1389 (respectively, bicyclopyrone and benzonvindiflupyr); and Dow AgroSciences LLC in case number 16-1351 (halauxifen-methyl);

WHEREAS, this Court consolidated these cases upon motion of Respondent EPA (*Ctr. for Biological Diversity*, Case No. 15-1054 (Lead), Doc. 1736834 (June 20, 2018));

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" ESA Listed Species or destroy or adversely modify the designated critical habitat of such species, and that assessment is typically made by the action agency in an "effects determination";

WHEREAS, Respondent EPA, in its discretion, may make an "effects determination" in a document called a "Biological Evaluation";

WHEREAS, EPA has not made effects determinations for flupyradifurone, bicyclopyrone, benzovindiflupyr, halauxifen-methyl, and all uses of cuprous iodide;

WHEREAS, the Parties, through their authorized representatives, have reached an Agreement that they believe is in the public interest and consider to be a just, fair, adequate, and equitable resolution of the case.

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

1. Joint Motion for Order on Consent

a. In consideration of Petitioners' allegations of violations of the ESA, within two days after the Effective Date of this Agreement, the Parties agree to file the attached Joint Motion for Order on Consent ("Attachment A") and [Proposed] Order ("Attachment B") requesting that the Court enter an Order establishing a schedule for further administrative proceedings under the ESA, as outlined therein, among other specified provisions.

b. If the Court does not enter an order that the Parties agree is similar to Attachment A, the settlement never was final and effective and this Settlement Agreement shall be null and void.

2. Schedule for Completion of Biological Evaluations

a. EPA shall undertake the administrative proceedings pursuant to the ESA in relation to the Petitions as outlined in Attachment A, Paragraph eight (8).

3. Crop Protection Information Websites

a. EPA shall create a webpage that includes a copy of this Agreement, Attachment A, and any Order entered in response thereto and that provides a link to the external third-party platform described in Section 3.b. This webpage also will include a disclaimer that indicates the viewer is leaving EPA's website.

b. Intervenors for Respondent commit to fund a website on an external third-party platform agreed upon by the Parties that includes, at a minimum, the following:

i. An interactive map identifying counties where there are narrow endemic endangered species present that Petitioners believe could be adversely affected by the four active ingredients flupyradifurone, benzovindiflupyr, bicyclopyrone, and halauxifen-methyl, along with a list of such species within those counties (attached to this Agreement as Appendix A), as agreed upon by the Parties;

ii. Website language, including landing-page and individual-product-page language, (i.e. language that is consistent with the current label on pesticide application practices that are relevant for the species habitat, including advisory language that provides best management practices to minimize risks to ESA Listed Species), as agreed upon by the Parties, the current version of which is attached to this Agreement as Appendix B.

iii. Instructions to easily allow users to navigate through content specific for counties and products that are included in Appendices A and B.

c. Consistent with Section 10.a. herein, nothing in this Agreement prevents Intervenors for Respondent from registering new products and uses containing the pesticide active ingredients flupyradifurone, bicyclopyrone, benzovindiflupyr, and halauxifen-methyl beyond those challenged in the Petitions (including all Attachments to the Petitions) or included in Appendix B. Should any Intervenor for Respondent seek to apply Sections 9 and 10 of this Agreement to any such products and uses (including, but not limited to, the prohibition on seeking vacatur and the limitations on future legal claims), it will provide notice to the Parties, add the product or uses to the website referenced in this Section 3, and include appropriate language consistent with subsection b.ii. above within forty-five (45) days following: (i) EPA's approval of the registration, (ii) commercialization of an EPA-approved registration, or (iii) the deadline for the website launch in Section 3.e., whichever is later. Such language is not subject to requests for modification by any other Party except as part of the Interim Measure Discussions referenced in Section 4.

d. EPA's webpage dedicated to this Agreement and the website maintained by the Intervenors for Respondents for this Agreement shall remain in effect for each active ingredient until the earlier of the following:

i. an agreement between the Parties that the website can be changed or removed as to one or more active ingredient;

ii. EPA determines that flupyradifurone, benzovindiflupyr, bicyclopyrone, and/or halauxifen-methyl will have "no effect" on Listed Species;

iii. EPA determines that any of these four active ingredients "may affect" Listed Species or their habitats, and the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service either issue a written concurrence indicating that these active ingredients are not likely to adversely affect Listed Species or their habitats; or

iv. the issuance of a Biological Opinion analyzing whether the four active ingredients are likely to jeopardize the continued existence of Listed Species or adversely modify their critical habitats.

e. The webpage and websites identified in Section 3 shall be completed and published online within 3 months of the Court Order entered in response to Attachment A.

4. Interim Measure Discussions

a. No later than three months following EPA's release of any draft Biological Evaluation for flupyradifurone, benzovindiflupyr, bicyclopyrone, and halauxifen-methyl, or regardless of whether EPA has released draft Biological Evaluations, by no later than December 2024 for the first two active ingredients scheduled for completion of Biological Evaluations by 2025 and by December 2026 for the remaining two active ingredients scheduled to have completed Biological Evaluations by 2027, the parties shall meet to discuss the appropriateness and scope of any interim measures related to flupyradifurone, benzovindiflupyr, bicyclopyrone, and halauxifen-methyl.

b. Any Petitioner seeking interim measures must participate in these discussions and bring forth issues and supporting data.

c. Each Party will be responsible for their own attorneys' fees and costs associated with these discussions regarding interim measures.

d. If the Parties cannot agree on interim measures through these discussions, within 90 days of the conclusion of the discussion for each active ingredient, Petitioners must seek any additional resolution, if desired, through confidential nonbinding mediation with a mutually agreed upon mediator.

i. To commence the mediation process, Petitioners must serve a "Notice of Mediation" on EPA and the relevant Intervenor for Respondent,

depending on the pesticide active ingredient at issue, signifying that the interim measures discussion was not successful.

ii. Within 14 days of service of a Notice of Mediation, the parties that will be participating in the mediation agree to complete and execute the Mediation Process Agreement attached hereto ("Attachment C") setting forth the process for the mediation. Mediation may be conducted through the D.C. Circuit's mediation program or a private mediator.

iii. As specified in Attachment C, the parties participating in the mediation will share the cost of mediation equally, except that each Party shall pay its own attorneys' fees and costs.

e. If the Parties are unable to reach an agreement regarding interim measures through the discussion and mediation process outlined above, Petitioners reserve the right to move the Court for interim measures regarding the use of pesticide active ingredients in these Petitions or products containing those active ingredients, including injunctive relief (subject to the limitations in section 9 of this Agreement), to prevent harm to ESA Listed Species. EPA and Intervenors for Respondent do not agree that Petitioners are entitled to seek any such interim measures or injunctive relief, reserve all rights to oppose any such request, and reserve all defenses to such a motion.

5. Ongoing Jurisdiction and Dismissal

a. The Parties agree that the Court retains jurisdiction over each individual petition as identified in Paragraph 10 of Attachment A, to enforce the terms of its Order and to resolve any motion for attorneys' fees and costs of litigation.

b. The Parties agree that Section 5.a. of this Agreement does not extend the Court's jurisdiction to hear any dispute over the adequacy or content of any effects determinations for cuprous iodide or the Biological Evaluations of flupyradifurone, bicyclopyrone, benzovindiflupyr, cuprous iodide, and halauxifen-methyl. The Parties agree that any challenge to these effects determinations and Biological Evaluations, the sufficiency of any action or inaction in response to these effects determinations and 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 does not preclude any such separate judicial action except as provided in this Agreement, 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.

c. The Parties agree that Petitioners will file a motion for voluntary dismissal of each individual Petition within 5 business days of (1) EPA's notice as described in Paragraph 8.h. of Attachment A, or (2) the Court's Order

resolving a motion for attorneys' fees and costs, as permitted in Paragraph 17 of Attachment A, whichever occurs later.

6. Modification of Terms

a. Except as provided in Subsection 6.b., 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. Modifications to the Agreement shall be made in writing and executed by all Parties.

b. Petitioners and Intervenors for Respondent agree not to move the Court without EPA's consent to modify the deadlines for Biological Evaluations established by the Order entered in response to Attachment A. If EPA seeks to move the Court to modify a deadline for a Biological Evaluation required by the Order entered in response to Attachment A, it shall provide written notice of the proposed modified deadline and the reasons for it at least 60 days prior to that deadline. The Parties shall meet and confer (telephonically or in person) no later than 10 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 that deadline at least 45 days prior to the deadline.

7. Enforcement

a. The Parties agree that the sole remedies for any alleged failure to comply with any term of the Order entered in response to Attachment A is a motion to enforce the term or terms of the Order. Except as noted in this Agreement, Petitioners expressly release any claim under section 7 of the ESA, 16 U.S.C. § 1536, or the All Writs Act, arising out of an alleged failure of EPA to make an "effects determination," complete Biological Evaluations, or initiate consultation on the pesticide active ingredient or product registrations that were challenged in the Petitions (including all Attachments to the Petitions), listed in Appendix B, or covered by Section 3.c. of this Agreement. Petitioners reserve all rights to challenge any future EPA agency actions, including failure to initiate consultation, as set forth in Section 5.b. and as limited by Section 10.

b. If any Party believes another Party has failed to comply with any term of the Order entered in response to Attachment A, the Party's first remedy shall be a motion to enforce the term or terms. Before filing any such motion, however, the moving Party must provide the Party alleged to be in violation of the Order entered in response to Attachment A with the details of the alleged violation in writing. The Party alleged to be in violation of the Order

entered in response to Attachment A then has fourteen days to respond to the allegations. Only after those fourteen days have passed can the moving Party file a motion to enforce the term or terms of the Order entered in response to Attachment A.

c. No Party shall institute a proceeding for contempt of court against EPA unless EPA is in violation of a separate Order of the Court resolving a motion to enforce the terms of the Order entered in response to Attachment A.

8. Under no circumstances shall any provision of this Agreement be the basis for any action for specific performance, mandamus, or any other remedy seeking to compel EPA to take any of the actions referenced in this Agreement except as specifically provided in Section 7. The Parties agree that contempt of court is not an available remedy for a breach of this Agreement except as specifically provided in Section 7.

9. Provided all Parties are in compliance with the terms of this Agreement that are not included in the Order entered in response to Attachment A and until EPA completes an effects determination or a Biological Evaluation for that particular active ingredient, no Party shall seek vacatur of the flupyradifurone, bicyclopyrone, benzovindiflupyr, or halauxifen-methyl registrations challenged in these Petitions (including all Attachments to the Petitions), listed in Appendix B, or covered by Section 3.c. of this Agreement; or any injunction restraining the

distribution or sale of pesticide products challenged in these Petitions (including all Attachments to the Petitions), listed in Appendix B, or covered by Section 3.c. of this Agreement. No Party is precluded from seeking any remedy, including vacatur or injunctive relief of products containing the active ingredients listed in the Petitions, in challenges to any future EPA agency actions not challenged in the Petitions, including failure to initiate consultation, as set forth in Section 5.b. and as limited by Section 10.

10. Limitations on Future Legal Claims

a. Petitioners 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 or substantively violated ESA Section 7 pertaining to the effects of the active ingredients in the Petitions on ESA Listed Species until after the completion of an effects determination or a Biological Evaluation for these active ingredients. Petitioners will not collectively or individually initiate or participate in other court litigation naming flupyradifurone, bicyclopyrone, benzovindiflupyr, or halauxifen-methyl or products containing flupyradifurone, bicyclopyrone, benzovindiflupyr, or halauxifen-methyl as an active ingredient that are challenged in the Petitions (including all Attachments to the Petitions), listed in Appendix B, or covered by Section 3.c. of this Agreement, for at least five (5) years after this Settlement Agreement's Effective Date. For avoidance of doubt,

Intervenors for Respondent remain free to seek new registrations, amend existing registrations, and to defend the registrability of products containing flupyradifurone, bicyclopyrone, benzovindiflupyr, or halauxifen-methyl as an active ingredient and Petitioners remain free to challenge the legality of pesticide products containing flupyradifurone, bicyclopyrone, benzovindiflupyr, or halauxifen-methyl as an active ingredient that are not challenged in the Petitions (including all Attachments to the Petitions), listed in Appendix B, or covered by Section 3.c. of this Agreement.

b. Notwithstanding the inclusion of a product on the website listed in Section 3, 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 Petitions and one or more active ingredients outside of the Petitions; provided, that Plaintiffs agree that in any such court proceeding, they will not seek as a remedy for any ESA claim that EPA engage in consultation on the active ingredient listed in the Petitions or seek vacatur of any product containing an active ingredient listed in the Petitions, or join any other person or entity in requesting such a remedy.

c. Petitioners agree that any challenge to the pesticide registrations at issue in these Petitions (including all Attachments to the Petitions), listed in

Appendix B, or covered by Section 3.c. of this Agreement, on the basis of EPA's compliance with the provisions of FIFRA has been waived.

11. Attorneys' Fees and Costs

a. Petitioners reserve any claims against EPA for recovery of costs of litigation (including reasonable attorney and expert witness fees) through and including the completion of EPA's obligations in Paragraph 8 of Attachment A. Petitioners and EPA agree to negotiate any claim for fees and costs of this action incurred through and including the date of the Court Order entered in response to Attachment A. If Petitioners and EPA fail to resolve that claim within a reasonable time after entry of the Agreement, Petitioners may file a motion for costs of litigation (including reasonable attorney and expert witness fees) incurred through and including the date of the Court Order entered in response to Attachment A with the Court. Petitioners 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 Agreement through and including final resolution of this lawsuit, including compliance with and completion of the terms of this Agreement.

b. EPA does not waive any right to contest any fees, costs or expenses claimed by the Petitioners.

12. Scope of Agreement

a. This Agreement requires EPA only to complete Biological Evaluations and initiate ESA consultation as necessary. No provision in this Agreement requires EPA to take any actions under FIFRA.

b. 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 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.

c. 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.

d. 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.

e. 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.

13. Mutual Drafting and Construction

a. It is expressly understood and agreed that this Agreement was jointly negotiated and drafted in good faith 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.

14. Entire Agreement

a. This Agreement is the entire agreement between the Parties to date to resolve this case. All prior conversations, meetings, discussions, drafts, and writings of any kind are specifically superseded by this Agreement.

15. Effective Date of Agreement

a. The terms of this Agreement shall become effective upon signature on the Agreement by counsel for all Parties.

b. The terms of this Agreement shall terminate as it relates to each active ingredient upon dismissal of the Petition for that corresponding active ingredient as set forth in Section 5.c.

16. Notice and Correspondence

a. Any notice required or made with respect to this Agreement shall be in writing and shall be effective on the date that notice is delivered by electronic mail. For any matter relating to this Agreement, the contact persons are:

Center for Biological Diversity
Jonathan Evans

Environmental Health Legal Director and Senior Attorney
Center for Biological Diversity
1212 Broadway
Suite 800
Oakland, CA 94612
tel: (510) 844-7100 x318
jevans@biologicaldiversity.org

Center for Food Safety
George A. Kimbrell
Legal Director
Center For Food Safety
2009 NE Alberta St, Suite 207
Portland, OR 97211
tel: (971) 271-7372
gkimbrell@centerforfoodsafety.org

Defenders of Wildlife
Jason Rylander
Senior Endangered Species Counsel
Defenders of Wildlife
1130 17th Street NW,
Washington, DC 20036-4604
tel: (202) 772-3245
jrylander@defenders.org

U.S. Department of Justice

Lesley Lawrence-Hammer
Senior Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
999 18th St., Suite 370
Denver, CO 80202
303-844-1368
Lesley.Lawrence-Hammer@usdoj.gov

PATRICK R. JACOBI
Senior Trial Attorney

U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
999 18th St., Suite 370
Denver, CO 80202
(303) 844-1348
patrick.r.jacobi@usdoj.gov

Bayer CropScience LP

Kirsten Nathanson
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
tel: (202) 624-2887
knathanson@crowell.com

Kristine Kring
VP & Associate General Counsel
Bayer U.S. LLC
Bayer – Crop Science
800 N Lindbergh Blvd.
St. Louis MO 63167
Tel: (919) 549-2191
E-mail: kristine.kring@bayer.com

Syngenta Crop Protection LLC

Kirsten Nathanson
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
tel: (202) 624-2887
knathanson@crowell.com

Brian Reeve
Senior Regulatory Counsel
Syngenta Crop Protection, LLC
410 Swing Road
Greensboro, NC 27409
Tel: (336) 632-7215

brian.reeve@syngenta.com

Dow AgroSciences LLC
Kirsten Nathanson
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
tel: (202) 624-2887
knathanson@crowell.com

Eileen B. Salathé
Global Senior Regulatory Counsel, Crop Protection
Corteva Agriscience
9330 Zionsville Road
Indianapolis, IN 46268
tel: (317) 337-4565
eileen.salathe@corteva.com

b. Upon written notice to the other Parties, any Party may designate a successor contact person for any matter relating to this Agreement.

17. Representative Authority

a. 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.

Dated: January 19, 2021

Respectfully Submitted,

JEAN E. WILLIAMS, Deputy
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources
Division
SETH M. BARSKY, Chief

MEREDITH L. FLAX, Assistant Chief

Lesley Lawrence-Hammer

LESLEY LAWRENCE-HAMMER
Senior Trial Attorney
D.C. Bar No. 982196
999 18th St., Suite 370
Denver, CO 80202
Telephone: 303-844-1368
Facsimile: 303-844-1350
Email:Lesley.Lawrence-Hammer@usdoj.gov
PATRICK R. JACOBI
Environmental Defense Section
Telephone: (303) 844-1348
Email: patrick.r.jacobi@usdoj.gov
Counsel for Respondent U.S. Environmental Protection Agency

STEPHANIE M. PARENT
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97221
Phone: (971) 717-6404
Fax: (503) 283-5528
sparent@biologicaldiversity.org
JONATHAN CARTER EVANS
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: (510) 844-7118
Fax: (510) 844-7150
jevans@biologicaldiversity.org
Counsel for Petitioners Center for Biological Diversity, Center for Food Safety, and Defenders of Wildlife

KIRSTEN L. NATHANSON
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Phone: (202) 624-2887
Fax: (202) 628-5116
knathanson@crowell.com
Counsel for Intervenors for Respondent Bayer CropScience LP, Syngenta Crop Protection LLC, Dow AgroSciences LLC

Attachment A

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Center for Biological Diversity, et al., Petitioners v. Environmental Protection Agency, Respondent Bayer CropScience LP, Syngenta Crop Protection LLC, and Dow AgroSciences LLC, Intervenors for Respondent	No. 15-1054 (and consolidated cases: 15-1176, 15-1389, 15-1462, 16-1351)

JOINT MOTION FOR ORDER ON CONSENT

Petitioners Center for Biological Diversity, Center for Food Safety, and Defenders of Wildlife (collectively "Petitioners"); Respondent Environmental Protection Agency ("EPA"); and Intervenors for Respondent Bayer CropScience LP, Syngenta Crop Protection LLC, and Dow AgroSciences LLC (collectively "Intervenors for Respondent") (together the "Parties") jointly move the Court for an order establishing the Parties' stipulated schedule for further administrative proceedings pursuant to the Endangered Species Act ("ESA"). In further support of this Joint Motion, the Parties state as follows:

1. These consolidated cases involve five separate petitions for review (collectively "Petitions") challenging EPA's orders issued pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), §§ 7 U.S.C. 136-136y, registering the pesticide active ingredients flupyradifurone, bicyclopyrone, benzovindiflupyr, cuprous iodide, and halauxifen-methyl, and certain products containing those ingredients (*Ctr. for Biological Diversity v. EPA*, No. 15-1054, Doc. 1542423 (Mar. 13, 2015); No. 15-1176, Doc. 1558360 (June 18, 2015); No. 15-1389, Doc. 1580497 (Oct. 27, 2015); No. 15-1462, Doc. 1590365 (Dec. 18, 2015); No. 16-1351, Doc. 1640538 (Oct. 7, 2016)).

2. The Court granted intervention to Intervenors for Respondent Bayer Crop Science LP in case number 15-1054 (flupyradifurone) (Doc. 1553603); Syngenta Crop Protection LLC in case numbers 15-1176 and 15-1389 (respectively, bicyclopyrone (Doc. 1568581) and benzonvindiflupyr (Doc. 1589578)); and Dow AgroSciences LLC in case number 16-1351 (halauxifen-methyl) (Doc. 1734540).

3. This Court consolidated these cases upon motion of Respondent EPA (*Ctr. for Biological Diversity*, Case No. 15-1054 (Lead), Doc. 1736834 (June 20, 2018)). On October 15, 2018, the Court granted the Parties' consent motion to hold this case in abeyance to allow for settlement discussions. Doc. 1755294. Petitioners filed their brief on March 4, 2019. Doc. 1775923. Subsequently, to facilitate continued settlement discussions, the Court granted multiple joint

motions for extensions to the deadline for EPA and Intervenors for Respondent to file their briefs. Docs. 1778523, 1785162, 1793073, 1807088, 1828398, 1840029, 1852459.

4. In their brief, Petitioners allege, *inter alia*, that EPA violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to consult regarding the potential effects of flupyradifurone, bicyclopyrone, benzovindiflupyr, cuprous iodide, and halauxifen-methyl and certain products containing those active ingredients on threatened and endangered species protected under the ESA ("ESA Listed Species") prior to taking final action on the registrations at issue in the Petitions.

5. The ESA implementing regulations, 50 C.F.R. § 402.14(a), provide that the trigger for interagency consultation is whether a federal agency's action "may affect" ESA Listed Species or destroy or adversely modify the designated critical habitat of such species, and that assessment is typically made by the action agency in an "effects determination." Respondent EPA, in its discretion, may make an "effects determination" in a document called a "Biological Evaluation."

6. On August 13, 2020, EPA published proposed effects determinations for certain uses of cuprous iodide in the Federal Register for public notice and comment. 85 Fed. Reg. 49,368 (Aug. 13, 2020).

7. On January 19, 2021, the Parties entered into a settlement agreement to resolve these Petitions, the terms of which settlement agreement are not subject to enforcement by this Court except as provided herein. Specifically, the settlement agreement provides, *inter alia*, that the Parties will seek an order from this Court entering the schedule for administrative proceedings proposed herein.

8. Accordingly, the Parties request that the Court enter an order establishing the following schedule for further administrative proceedings to be undertaken by EPA:

a. By **August 13, 2021**, EPA will complete a final effects determination and request initiation of any necessary ESA consultation pursuant to 50 C.F.R. § 402 on the potential effects on ESA Listed Species and designated critical habitats of any use of cuprous iodide that is approved for sale and distribution as of that date. EPA has no deadline to complete an effects determination for uses of cuprous iodide that are not approved for sale and distribution;

b. By **September 30, 2025**, EPA will prepare final Biological Evaluations on the potential effects on ESA Listed Species and designated critical habitats of two of the following four pesticide active ingredients identified in the Petitions: flupyradifurone, bicyclopyrone, benzovindiflupyr, or halauxifen-methyl. EPA retains full discretion to select what two active ingredients among these four to analyze in Biological Evaluations by September 30, 2025.

c. By **September 30, 2027**, EPA will prepare final Biological Evaluations on the potential effects on ESA Listed Species and designated critical habitats of the two remaining pesticide active ingredients identified in paragraph 8.b. not already analyzed.

d. If any active ingredient or product identified in paragraph 8.b. is no longer registered, then it is exempt from the requirements of paragraphs 8.b. and 8.c.

e. If EPA releases a draft Biological Evaluation for any active ingredient identified in paragraph 8.b. for public comment, per its policies, and EPA extends the 60-day public comment period for that draft Biological Evaluation, the deadline for EPA to prepare the corresponding final Biological Evaluation for that active ingredient will be extended by the same number of days as EPA's extension of the public comment period but not to exceed 60 days. If such an extension occurs for a Biological Evaluation completed under the terms of paragraph 8.b., the deadlines for final Biological Evaluations identified in paragraph 8.c. will be extended by the same number of days, but shall not exceed 60 days from the deadline in paragraph 8.c.

f. No later than 90 days prior to the commitment to complete the Biological Evaluations identified in paragraph 8.b. and 8.c., EPA shall provide a status report to the Court and other Parties on its progress toward completing those Biological Evaluations and whether it expects to meet that commitment.

g. If EPA determines that further consultation is necessary for any active ingredient identified in paragraph 8.b., then it will initiate such consultation within fourteen business days of issuing the Biological Evaluation analyzing that active ingredient.

h. EPA will provide notice to Petitioners upon completion of each commitment specified in paragraphs 8.a., 8.b., 8.c., and (if applicable) 8.g., above.

9. The Parties further request that the Court Order specify that the Parties may extend or modify the deadlines set forth in paragraph 8 above by written stipulation executed by counsel for all Parties and filed with the Court. If the Parties are unable to agree, and EPA still seeks to modify a deadline, EPA shall move the Court to modify the deadline.

10. The Parties further request that the briefing schedule currently in place for the Petitions (Doc. 1876923) be vacated and that the Petitions be put into abeyance, with the Court retaining jurisdiction over each petition to enforce the

terms of its Order and to resolve any motion for attorneys' fees and costs of litigation.

11. Petitioners reserve the right to move the Court for interim measures regarding the use of pesticide active ingredients in these Petitions or products containing those active ingredients, including injunctive relief, to prevent harm to ESA listed species. EPA and Intervenors for Respondent do not agree that Petitioners are entitled to seek any such interim measures or injunctive relief, reserve all rights to oppose any such request, and reserve all defenses to such a motion.

12. The Parties request that the Court enter the attached proposed order. If the Court believes any changes to the proposed order are appropriate, the Parties respectfully request that, before entering such a revised order, the Court advise the Parties of its intended changes and provide the Parties with fourteen days to file briefs indicating whether they accept those changes and, if not, stating the reasons for their objections.

13. Nothing in this Joint Motion constitutes a commitment or requirement that the United States or any of its departments or agencies obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341 et seq., or in violation

of any other statute, law or regulation.[1] Nothing in this Joint Motion requires EPA to take any action under FIFRA or addresses any of EPA's other obligations under the ESA. Nothing in this Joint Motion requires EPA to reach a particular conclusion in any Biological Evaluation. Nothing in this Joint Motion shall be construed to limit or deny the power of a federal official to promulgate or amend regulations.

14. Nothing in this Joint Motion should be construed to limit or modify the discretion accorded EPA by the ESA, FIFRA, Administrative Procedure Act, or the general principles of administrative law.

15. 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 deadlines set forth herein.

16. Except as expressly provided in this motion, none of the Parties to this Joint Motion waive or relinquish any legal rights, claims, or defenses it may have. Nothing in this Joint Motion represents an admission by any Party to any fact, claim, or defense in any issue in these Petitions.

[1] Petitioners 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 Order. Petitioners intend to assert this position if EPA fails to comply with the terms of this Agreement for reasons of insufficient appropriations. EPA disagrees and reserves all legal and equitable defenses to such a claim.

17. Petitioners assert that they are entitled to fees and litigation costs from EPA. The Parties will seek to reach agreement on an award of fees and litigation costs. If an agreement cannot be reached, Petitioners reserve the right to move this Court for an award of fees and costs, including for interim fees and costs. In the event that Petitioners file a motion for fees and litigation costs, EPA reserves the right to assert any and all defenses it may have in response to that request.

18. Petitioners will file a motion for voluntary dismissal of each individual Petition within 5 business days of (1) EPA's notice as described in paragraph 8.h. above or (2) the Court's order resolving a motion for attorneys' fees and costs, as permitted in paragraph 17 above, whichever occurs later.

WHEREFORE, the Parties respectfully request that the Court enter an order (1) vacating the current briefing schedule as set forth in Doc. 1876923 and holding the Petitions in abeyance; (2) setting forth the schedule contained in paragraph 8 above; (3) retaining jurisdiction over each petition to enforce the terms of its order and to resolve any motion for attorneys' fees and costs of litigation, consistent with paragraph 17; and (4) allowing EPA to stipulate or request that the Court extend or otherwise modify the deadlines set forth in paragraph 8 above.

Dated: January 19, 2021

Respectfully Submitted,

JEAN E. WILLIAMS, Deputy
Assistant Attorney General

U.S. Department of Justice
Environment & Natural Resources Division
SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Chief

LESLEY LAWRENCE-HAMMER
Senior Trial Attorney
D.C. Bar No. 982196
999 18th St., Suite 370
Denver, CO 80202
Telephone: 303-844-1368
Facsimile: 303-844-1350
Email:Lesley.Lawrence-Hammer@usdoj.gov
PATRICK R. JACOBI
Environmental Defense Section
Telephone: (303) 844-1348
Email: patrick.r.jacobi@usdoj.gov
Counsel for Respondent U.S. Environmental Protection Agency

STEPHANIE M. PARENT
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97221
Phone: (971) 717-6404
Fax: (503) 283-5528
sparent@biologicaldiversity.org
JONATHAN CARTER EVANS
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: (510) 844-7118
Fax: (510) 844-7150
jevans@biologicaldiversity.org

Counsel for Petitioners Center for Biological Diversity, Center for Food Safety, and Defenders of Wildlife

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KIRSTEN L. NATHANSON
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Phone: (202) 624-2887
Fax: (202) 628-5116
knathanson@crowell.com
Counsel for Intervenors for Respondent Bayer CropScience LP, Syngenta Crop Protection LLC, Dow AgroSciences LLC