

SETTLEMENT AGREEMENT

WHEREAS, this Settlement Agreement (“Agreement”) is entered into by and between the Center for Biological Diversity (“Center”) and the United States Environmental Protection Agency (“EPA”);

WHEREAS, on July 20, 2022, the Center filed a timely Petition for Review in the U.S. Court of Appeals for the District of Columbia Circuit captioned *Center for Biological Diversity v. Environmental Protection Agency*, assigned Case No. 22-1164 (the “Lawsuit”);

WHEREAS, the Lawsuit challenges the EPA action entitled “Renewable Fuel Standard (RFS) Program: RFS Annual Rules,” published in the Federal Register on July 1, 2022, 87 Fed. Reg. 39,600 (July 1, 2022) (the “2020–2022 RFS Annual Rule”) and was originally consolidated with, but has since been severed from, seven additional cases in the D.C. Circuit, Case Numbers 22-1210, 22-1225, 22-1227, 22-1228, 22-1229, 22-1230, and 22-1231;

WHEREAS, the Lawsuit challenges whether the 2020–2022 RFS Annual Rule complies with the consultation requirements of Endangered Species Act (“ESA”) section 7(a)(2), 16 U.S.C. § 1536(a)(2), the Clean Air Act (“CAA”), 42 U.S.C. § 7545(o)(2)(B)(ii)(I), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706;

WHEREAS, on September 27, 2022, as part of the Lawsuit, the Center filed a Motion for Summary Vacatur (Doc. Id. No. 1966328), which remains pending before the Court;

WHEREAS, the Court granted the Joint Motion of the Center and EPA to sever this case from other related cases and hold the matter in abeyance pending further order of the Court, and has directed the parties to file motions to govern future proceedings by April 17, 2023;

WHEREAS, EPA has initiated consultation regarding its RFS rules under ESA Section 7(a)(2) and applicable regulations at 50 C.F.R. part 402 with the National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service (“FWS”) (collectively the “Services”), to include EPA’s forthcoming proposal to issue the RFS annual rules applicable to 2023–2025 proposed on December 30, 2022, “Renewable Fuel Standard (RFS) Program: Standards for 2023–2025 and Other Changes, 87 Fed. Reg. 80582 (Dec. 30, 2022) (the “RFS Set Rule”);

WHEREAS, on January 30, 2023, EPA submitted its biological evaluation to the Services in support of the ongoing consultation setting forth its evaluation of effects for the species and critical habitat that may be affected by the RFS Set Rule consistent with the provisions of 50 C.F.R. §§ 402.13 and 402.14;

WHEREAS, EPA and the Services are working to complete ESA consultation on the RFS Set Rule before EPA’s promulgation of that Rule;

WHEREAS, in order to resolve the Lawsuit, the Parties, through their authorized representatives, and without any admission of fact or law with respect to the Center’s claims, have reached a settlement resolving the claims raised in the Lawsuit;

WHEREAS, in order to advance their settlement, on or before April 17, 2023, EPA and the Center will file a Joint Motion to Extend the Abeyance of the Lawsuit until August 14, 2023, or such later date as they may agree;

WHEREAS, the Parties agree that settlement in the manner described below is in the public interest and is an appropriate way to resolve the disputes between them;

NOW THEREFORE, EPA and the Center, intending to be bound by this Agreement, agree as set forth below:

1. Following completion of consultation on the RFS Set Rule, EPA will take appropriate action for each species covered by its biological evaluation, pursuant to its discretion to determine whether and in what manner to proceed with its action consistent with ESA section 7 and 50 C.F.R. Part 402. To the extent the EPA makes any “no effect” determinations and/or receives concurrence on any “not likely to adversely affect” determinations, then no further action by the EPA is required. To the extent that FWS and/or NMFS provide a formal biological opinion, EPA’s determination will address any conservation recommendations, terms and conditions of any incidental take statement, and/or reasonable and prudent alternatives within the time frames set forth in a biological opinion.

2. Within five days of the Center’s receipt of notice from EPA of the termination of ESA Section 7(a)(2) consultation on the RFS Set Rule pursuant to 50 C.F.R. § 402.14(m), the Center shall file a stipulation of voluntary dismissal with prejudice of the Lawsuit pursuant to FRAP 42(b).

3. The Center retains the right to challenge any final agency actions reached in the RFS Set Rule and the ESA Section 7(a)(2) consultation process described herein, and EPA reserves the right to raise any applicable defense to such challenges. Any challenge to such EPA action shall be brought in a new action.

4. In the event a dispute under this Agreement arises, or either Party believes that a breach of this Agreement has occurred, the Parties shall make best efforts to meet and confer in good faith to resolve any disputes within fourteen (14) calendar days, or as soon as reasonably achievable thereafter, of receiving written notification from the other Party of a request for a meeting. If the Parties are unable to resolve the dispute within twenty-eight (28) days of the initial meet and confer, the Center’s sole recourse under this Agreement is to move the Court to lift the abeyance and resume litigation of its claims in Case No. 22-1164 challenging the 2020–2022 RFS Annual Rule. Through

this Agreement, EPA does not waive any jurisdictional, procedural, or substantive defenses to such challenge. In no case shall a Party resume the Lawsuit without first invoking the dispute resolution procedures of this Agreement. Nothing herein shall be deemed to waive any defense in any litigation regarding any of the step(s) set forth in Paragraph 1.

5. 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 steps referenced in this Agreement. The Parties agree that contempt of court is not an available remedy for breach of this Agreement.

6. By entering into this Agreement, EPA does not waive any right to contest any matter addressed herein, including attorneys' fees and costs claimed by the Center, in any future litigation or continuation of the present action, and the Center does not waive any rights to such claims.

7. Nothing in this Agreement shall be construed to modify or limit the discretion afforded to EPA under the ESA, CAA, or any other statute or regulation, or general principles of administrative law. No provision of this Agreement shall be interpreted as constituting a commitment or requirement that EPA take actions in contravention of the ESA, the CAA, the APA, or any other law or regulation, either substantive or procedural.

8. Nothing in this Agreement limits or otherwise affects the Center's rights to address or take any position that it deems necessary or appropriate in any formal or informal proceeding before any administrative or legislative body.

9. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that EPA is obligated to spend funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.

10. If a lapse in EPA's appropriations occurs prior to any deadline in this Agreement, that deadline shall be extended automatically by one calendar day for each calendar day of delay caused by the lapse in appropriations. No notice is required to extend time in connection with a lapse in appropriations.

11. 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:

Jason Rylander
Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710
jrylander@biologicaldiversity.org

John H. Martin
Wildlife & Marine Resources Section
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
john.h.martin@usdoj.gov

Caitlin McCusker
Kimere J. Kimball
Environmental Defense Section
U.S. Department of Justice
150 M Street NE
Washington, DC 20002
Caitlin.McCusker@usdoj.gov
Kimere.Kimball@usdoj.gov

Meredith G. Miller
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, MC 2344A
Washington, DC 20146
miller.meredith@epa.gov

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

12. This Agreement shall not be offered as evidence in any other judicial proceeding or construed as an admission or concession of any wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement. Except as expressly provided in this Agreement, neither of the Parties waives or relinquishes any legal rights, claims, or defenses it may have. The undersigned parties agree and acknowledge that this Agreement has no precedential value and shall not be used as evidence in any other litigation, except as necessary to enforce the terms of this Agreement.

13. The terms of this Agreement constitute the entire agreement of the Parties, and all previous understandings, drafts, agreements, writings of any kind, and other communications concerning settlement of the Lawsuit that occurred prior to the date hereof, whether express or implied, oral or written, are fully and completely extinguished and superseded by this Agreement.

14. This Agreement may be modified only upon mutual written consent of the Parties.

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. The undersigned certify that they are authorized to enter into this Agreement and to execute and legally bind the Parties listed to the terms and conditions herein. Signature on a counterpart or authorization of an electronic signature shall constitute a valid signature.

17. The Parties agree and acknowledge that, before this Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). After the close of the public comment period, the EPA

Administrator and/or the Attorney General, as appropriate, shall promptly consider any public comments and determine whether to withdraw or withhold consent to this Agreement, in accordance with Clean Air Act section 113(g). If the EPA Administrator and/or the Attorney General elect not to withdraw or withhold consent to this Agreement, this Agreement shall become final on the date that EPA provides written notice of such finality to the Center, via electronic mail to the representatives identified in Paragraph 11.

18. This Agreement shall take effect when it has been signed by the representatives of the Parties, after final approval pursuant to Paragraph 17.

On Behalf of EPA:

Dated: _____

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

DRAFT
CAITLIN MCCUSKER
KIMERE J. KIMBALL
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950
caitlin.mccusker@usdoj.gov
kimere.kimball@usdoj.gov

JOHN H. MARTIN
Wildlife & Marine Resources Section
999 18th St., South Terrace Suite 370
Denver, CO 80202
john.h.martin@usdoj.gov
(303) 844-1383

Counsel for EPA

On Behalf of Petitioners:

Dated: _____

DRAFT

Margaret A. Coulter
mcoulter@biologicaldiversity.org
(202) 961-4820
Jason C. Rylander
jrylander@biologicaldiversity.org
(202) 744-2244

CENTER FOR BIOLOGICAL
DIVERSITY

1411 K Street NW, Suite 1300
Washington, DC 20005

Counsel for Petitioner Center for
Biological Diversity