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Attorneys for Defendant

**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL DIVERSITY,)
)
Plaintiff,)
 v.)
)
 NATIONAL MARINE FISHERIES SERVICE,)
)
Defendant.)
)
)

Case No. C11-04779-EDL

**STIPULATED SETTLEMENT
 AGREEMENT AND
~~PROPOSED~~ ORDER**

Plaintiff, Center for Biological Diversity (“Plaintiff” or “CBD”), and Defendant, National
 Marine Fisheries Service (“Defendant” or “NMFS”) (collectively, the “Parties”), have agreed to

1 settle the above-captioned case in its entirety on the terms memorialized in this Stipulated
2 Settlement Agreement ("Stipulation");

3 WHEREAS, on October 20, 2009, the Plaintiff submitted to NMFS a petition seeking to
4 list eighty-three (83) coral species as threatened or endangered under the Endangered Species
5 Act ("ESA"), 16 U.S.C. § 1531 *et seq.*;

6
7 WHEREAS, on February 10, 2010, NMFS published a 90-day finding in the *Federal*
8 *Register* that the petition presented substantial scientific or commercial information indicating
9 that listing may be warranted for 82 of the 83 petitioned coral species, 75 Fed. Reg. 6,616 (Feb.
10 10, 2010) ("Positive 90-Day Finding");

11
12 WHEREAS, on September 27, 2011, Plaintiff filed a Complaint for declaratory and
13 injunctive relief, pursuant to the ESA, 16 U.S.C. § 1531 *et seq.*, challenging NMFS's failure to
14 make a 12-Month Finding as required by 16 U.S.C. § 1533(b)(3)(B) as to the 82 coral species for
15 which NMFS has made a Positive 90-Day Finding;

16
17 WHEREAS, Plaintiff and Defendant, through their authorized representatives, and
18 without any admission or final adjudication of the issues of fact or law with respect to Plaintiff's
19 claim, have reached a settlement that they consider to be a just, fair, adequate, and equitable
20 resolution of the disputes set forth in Plaintiff's Complaint;

21
22 WHEREAS the Parties agree that settlement of this action in this manner is in the public
23 interest and is an appropriate way to resolve this dispute;

24
25 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
26 FOLLOWS:

- 27
28
1. On or before April 15, 2012, NMFS shall submit to the *Federal Register* for

1 publication a 12-Month Finding as to the 82 coral species for which NMFS has made its Positive
2 90-Day Finding.

3 2. Either party may seek to modify the deadline for the action specified in Paragraph
4 1, for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or
5 in the event that either party believes that the other party has failed to comply with any term or
6 condition of this Stipulation, the Parties shall use the dispute resolution procedures specified in
7 Paragraph 3 below.
8

9 3. The Order entering this Stipulation may be modified by the Court upon good
10 cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation
11 between the Parties filed with and approved by the Court, or upon written motion filed by one of
12 the Parties and granted by the Court. In the event that either party seeks to modify the terms of
13 this Stipulation, including the deadline specified in Paragraph 1, or in the event of a dispute
14 arising out of or relating to this Stipulation, or in the event that either party believes that the other
15 party has failed to comply with any term or condition of this Stipulation, the party seeking the
16 modification, raising the dispute, or seeking enforcement shall provide the other party with
17 notice of the claim. The Parties agree that they will meet and confer (either telephonically or in-
18 person) at the earliest possible time in a good faith effort to resolve the claim before seeking
19 relief from the Court. If the Parties are unable to resolve the claim themselves, either party may
20 seek relief from the Court. In the event that NMFS fails to meet the deadline identified in
21 paragraph 1, Plaintiff's first remedy shall be a motion to enforce the terms of this Stipulated
22 Settlement. This Stipulated Settlement shall not, in the first instance, be enforceable through a
23 proceeding for contempt of court.
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1 4. No party shall use this Stipulated Settlement or the terms herein as evidence of
2 what does or does not constitute a reasonable time line for making a determination under 16
3 U.S.C. § 1533 in any other proceeding regarding NMFS's implementation of the ESA.

4 5. Subject to the qualifications in paragraph 6, no provision of this Stipulated
5 Settlement shall be interpreted as, or constitute, a commitment or requirement that the Defendant
6 take action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other
7 law or regulation, either substantive or procedural. Nothing in this Stipulated Settlement shall be
8 construed to limit or modify the discretion accorded to NMFS by the ESA, the APA, or general
9 principles of administrative law with respect to the procedures to be followed in making any
10 determination required herein, or as to the substance of any final determination.

11 6. Nothing in this Stipulated Settlement shall be interpreted as, or shall constitute, a
12 requirement that the Defendant is obligated to pay any funds exceeding those available, or take
13 any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
14 appropriations law.

15 7. Defendant agrees that Plaintiff is the "prevailing party" in this action, and agrees
16 to pay Plaintiff's reasonable attorneys' fees and costs pursuant to section 11(g) of the ESA, 16
17 U.S.C. § 1540 (g). Defendant agrees to pay \$4,414.00 to settle Plaintiff's claim for fees
18 and costs. A check shall be made payable in this amount to Center for Biological Diversity, c/o
19 Miyoko Sakashita, 351 California St., Suite 600, San Francisco, California 94104.

20 8. Plaintiff agrees to furnish Defendant with the information necessary to effectuate
21 payment pursuant to paragraph 7 and to hold the United States harmless for any loss caused by
22 following this authorization and direction, if any loss should occur. Defendant agrees to submit
23 all necessary paperwork to the Department of Treasury's Judgment Fund Office pursuant to 16
24

1 U.S.C. § 1540(g)(4) within ten (10) business days of receipt of the signed court order approving
2 this Stipulation.

3 9. Plaintiff agrees to accept payment of \$4,414.00 in full satisfaction of any and all
4 claims for attorneys' fees and costs of litigation to which Plaintiff is entitled in this matter
5 through and including the date of this Stipulation. Plaintiff agrees that receipt of this payment
6 from Defendant shall operate as a release of Plaintiff's claims for attorneys' fees and costs in this
7 matter, through and including the date of this Stipulation.
8

9 10. By this Stipulation, the Defendant does not waive any right to contest fees
10 claimed by Plaintiff, including the hourly rate, in any future litigation or continuation of the
11 present action.
12

13 11. The terms of this Stipulation constitute the entire agreement of the Parties, and no
14 statement, agreement, or understanding, oral or written, which is not contained herein, shall be
15 recognized or enforced. Except as expressly stated herein, this Stipulation supersedes all prior
16 agreements, negotiations, and discussions between the Parties with respect to the subject matters
17 discussed herein.
18

19 12. This Stipulation may be modified or amended only by order of this Court.

20 13. Each of the Parties' undersigned representatives certifies that they are fully
21 authorized to enter into and execute the terms and conditions of this Stipulation, and do hereby
22 agree to the terms herein.
23

24 14. The terms of this Stipulation shall become effective upon entry of an order by the
25 Court ratifying the Stipulation.

26 15. This Stipulation has no precedential value and shall not be used as evidence of
27 such in any litigation or in representations before any forum or public setting.
28

16. Upon approval of this Stipulated Settlement by 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 compliance with the terms of this Stipulated Settlement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

Dated: September 27, 2011.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY
Section Chief
KRISTEN L. GUSTAFSON
Assistant Section Chief
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section

/s/ Brett Grosko(with permission)
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Attorney for Plaintiff

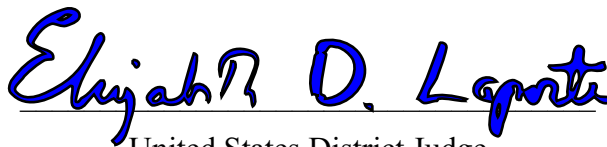
OF COUNSEL:

Cheryl Scannell
Attorney-Advisor
Office of General Counsel
National Oceanic and Atmospheric Administration

~~[PROPOSED]~~ ORDER

The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as an enforceable ORDER of this Court, and this matter is hereby DISMISSED with prejudice.

Dated: This 8th day of November, 2011.



United States District Judge
Magistrate

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2011, I caused the foregoing to be served via United States mail to the attorneys of record.

/s/ Miyoko Sakashita

Miyoko Sakashita