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11 **IN THE UNITED STATES DISTRICT COURT**
 12 **FOR THE NORTHERN DISTRICT CALIFORNIA**

13 NATURAL RESOURCES DEFENSE
 14 COUNCIL, INC.,

15 Plaintiff,

16 v.

17 KENNETH SALAZAR, in his official
 18 capacity as Secretary of Interior, the
 19 UNITED STATES DEPARTMENT
 20 OF THE INTERIOR, ROWAN
 21 GOULD, in his official capacity as
 22 Acting Director of the U.S. Fish &
 23 Wildlife Service, and the UNITED
 24 STATES FISH & WILDLIFE
 25 SERVICE,

26 Defendants.

CASE NO. 3:09-CV-1658-SC

**STIPULATED SETTLEMENT AND
 [PROPOSED] ORDER**

1 Plaintiff Natural Resources Defense Council and Defendants Kenneth
2 Salazar, in his official capacity as Secretary of Interior; the United States
3 Department of the Interior; Rowan Gould, in his official capacity as Acting
4 Director of the U.S. Fish & Wildlife Service; and the United States Fish & Wildlife
5 Service (“Service”), by and through their undersigned counsel, state as follows:

6 WHEREAS, the Service listed the tidewater goby, a small fish that inhabits
7 brackish waters along the coast of California, as an endangered species under the
8 Endangered Species Act (“ESA”) on March 7, 1994. 59 Fed. Reg. 5494 (1994).

9 WHEREAS, the Service subsequently designated critical habitat for the
10 tidewater goby on November 20, 2000. 65 Fed. Reg. 69,693 (2000).

11 WHEREAS, on January 31, 2008, the Service issued a revised critical
12 habitat designation and designated approximately 10,003 acres of critical habitat
13 for the tidewater goby. 73 Fed. Reg. 5920 (2008).

14 WHEREAS, on April 15, 2009, Plaintiff filed a complaint for declaratory
15 and injunctive relief alleging the Service’s revised critical habitat designation to be
16 arbitrary, capricious, and contrary to the ESA and Administrative Procedure Act
17 (“APA”).

18 WHEREAS, Plaintiff and the Defendants, through their authorized
19 representatives, and without any admission or final adjudication of the issues of
20 fact or law with respect to Plaintiff’s claims, have reached a settlement that they
21 consider to be a just, fair, adequate, and equitable resolution of the dispute.

22 WHEREAS, Plaintiff and the Defendants agree that settlement of this action
23 in this manner is in the public interest and is an appropriate way to resolve the
24 dispute between them.

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

27 1. The Service agrees to a voluntary remand of the 2008 final critical
28 habitat rule and agrees to submit to the Federal Register a new proposed critical

1 habitat designation for the tidewater goby on or before October 7, 2011. The
2 Service shall submit to the Federal Register a final determination on the proposed
3 rule for the tidewater goby on or before November 27, 2012. During the pendency
4 of the voluntary remand and until the effective date of the new final critical habitat
5 determination, the 2008 designation of critical habitat for the tidewater goby shall
6 remain in place and be effective.

7 2. In consideration of the Defendants' agreement to reconsider its final
8 critical habitat rule and to meet the deadlines outlined above, Plaintiff agrees to
9 dismiss the present action with prejudice. Notwithstanding the dismissal of this
10 action, the parties respectfully request that the Court retain jurisdiction to oversee
11 compliance with the terms of this Agreement and to resolve any motions to modify
12 such terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

13 3. Either party may seek to modify the deadline for any actions specified in
14 Paragraph 1 prior to the passing of the deadline, for good cause shown, consistent
15 with the Federal Rules of Civil Procedure, by using the procedures specified in
16 Paragraph 4.

17 4. The Order entering this Agreement may be modified by the Court upon
18 good cause shown, consistent with the Federal Rules of Civil Procedure, by written
19 stipulation between the parties filed with and approved by the Court, or upon
20 written motion filed by one of the parties and granted by the Court. In the event
21 that either party seeks to modify the terms of this Agreement, including the
22 deadline for the actions specified in Paragraph 1, or in the event of a dispute
23 arising out of or relating to this Agreement, the party seeking the modification or
24 raising the dispute shall provide the other party with written notice of the claim.
25 The parties agree that they will meet and confer, either in person or otherwise, at
26 the earliest possible time in a good-faith effort to resolve the claim before pursuing
27 relief from the Court. If the parties are unable to resolve the claim within a
28 reasonable time, either party may seek relief from the Court. In the event that

1 Defendants fail to meet a deadline and have not sought to modify it, Plaintiff's first
2 remedy shall be a motion to enforce the terms of this agreement. Plaintiff's first
3 motion to enforce the terms of the agreement shall not include a request for
4 contempt sanctions. Plaintiff may, however, file a motion seeking contempt
5 sanctions if Defendants fail to comply with any subsequent Court order.

6 5. No party shall use this Agreement or the terms herein as evidence of what
7 does or does not constitute a reasonable time line for making a determination under
8 16 U.S.C. § 1533 or in any other proceeding regarding the Service's
9 implementation of the ESA.

10 6. Defendants agree that Plaintiff is the "prevailing party" in this action, and
11 agree to pay Plaintiff reasonable attorneys' fees and costs, pursuant to Section
12 11(g) of the ESA, 16 U.S.C. § 1540 (g). Therefore, Defendants agree to settle all
13 of Plaintiff's claims for costs and attorneys' fees in the above-captioned litigation
14 for a total of \$42,000.00. A check will be made payable in that amount to Natural
15 Resources Defense Council, Inc., 40 West 20th Street, 11th Floor, New York, NY
16 10011-4231.

17 7. Defendants agree to submit all necessary paperwork for the processing of
18 the attorneys' fee award to the Department of the Treasury's Judgment Fund
19 Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt
20 of the court order approving this stipulation.

21 8. Plaintiff agrees to accept payment of \$42,000.00 in full satisfaction of
22 any and all claims for attorneys' fees and costs of litigation to which Plaintiff is
23 entitled in the above-captioned litigation, through and including the date of this
24 agreement. Plaintiff agrees that receipt of this payment from Defendants shall
25 operate as a release of Plaintiff's claims for attorneys' fees and costs in this matter,
26 through and including the date of this agreement.

27 9. Plaintiff reserves the right to seek additional fees and costs incurred
28 subsequent to this agreement arising from a need to enforce or defend against

1 efforts to modify the underlying schedule outlined in Paragraph 1, or for any other
2 unforeseen continuation of this action. Defendants reserve the right to contest fees
3 claimed by Plaintiff or Plaintiff's counsel, including the hourly rate, in any future
4 litigation, or continuation of the present action. Further, this stipulation as to
5 attorneys' fees and costs has no precedential value and shall not be used as
6 evidence in any other attorneys' fees litigation.

7 10. No provision of this Agreement shall be interpreted as, or constitute, a
8 commitment or requirement that Defendants take action in contravention of the
9 ESA, the APA, or any other law or regulation, either substantive or procedural.
10 Nothing in this Agreement shall be construed to limit or modify the discretion
11 accorded to the Service by the ESA, the APA, or general principles of
12 administrative law with respect to the procedures to be followed in making any
13 determination required herein other than as set forth in paragraph 1, or as to the
14 substance of any final determination.

15 11. Nothing in this agreement shall be interpreted as, or shall constitute, a
16 requirement that Defendants obligate to pay any funds exceeding those available,
17 or take any action in contravention of the Anti-Deficiency Act, 31 USC 1341, or
18 any other applicable appropriations law.

19 12. The parties agree that this Agreement was negotiated in good faith and it
20 constitutes a settlement of claims that were vigorously contested, denied, and
21 disputed by the parties. By entering into this Agreement the parties do not waive
22 any claim or defense.

23 13. The undersigned representatives of each party certify that they are fully
24 authorized by the party or parties they represent to agree to the Court's entry of the
25 terms and conditions of this Agreement and do hereby agree to the terms herein.

26 14. The terms of this Agreement shall become effective upon entry of an
27 order by the Court ratifying the Agreement.

28 15. Upon approval of this Agreement by the Court, all counts of Plaintiff's

1 Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil
2 Procedure 41(a)(1).

3 Respectfully submitted this 10th day of December, 2009.

4
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