

Nos. 19-72109, 19-72280

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CENTER FOR FOOD SAFETY, CENTER FOR BIOLOGICAL
DIVERSITY,**

Petitioners,

v.

**ANDREW WHEELER, in his official capacity as Administrator; U.S.
ENVIRONMENTAL PROTECTION AGENCY,**

Respondents,

DOW AGROSCIENCES LLC,

Respondent-Intervenor.

**AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA,
HAWAII, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK,
NEW MEXICO, OREGON, VERMONT, AND WASHINGTON, AND
THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF
PETITIONERS' OPPOSITION TO EPA'S MOTION FOR
VOLUNTARY REMAND WITHOUT VACATUR**

XAVIER BECERRA
Attorney General of California
EDWARD H. OCHOA
Senior Assistant Attorney General
CHRISTIE VOSBURG
Supervising Deputy Attorney General

ROBERT D. SWANSON (SBN 295159)
Deputy Attorney General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
Telephone: 916-210-7808
E-mail: Robert.Swanson@doj.ca.gov
*Attorneys for Amicus Curiae the State of
California*

December 7, 2020

TABLE OF CONTENTS

	Page
INTRODUCTION AND AMICI STATES' INTEREST.....	1
ARGUMENT	2
I. EPA's Failure to Comply with the ESA Here Is But One Example of EPA's Admitted Pattern of Registering Pesticides Without Complying with the ESA.....	2
II. Granting EPA's Motion Would Invite EPA to Circumvent FIFRA Review of its Future Pesticide Registration Decisions.	6
III. Prompt and Proper FIFRA Review Safeguards Substantial State Interests in Maintaining FIFRA's Cooperative Federalism, Which Protects Public Health, State Economies, and the Environment.	8
IV. Proceeding to the Merits Would Most Efficiently Resolve the Issues in this Case.	10
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE.....	17

TABLE OF AUTHORITIES

	Page
 CASES	
<i>Ctr. for Biological Diversity v. EPA</i> , 861 F.3d 174 (D.C. Cir. 2017).....	7
Fourth Amended Complaint, <i>Ctr. For Biological Diversity v. EPA</i> , No. 3:11-cv-00293-JCS, ECF No. 305 (N.D. Cal. 2019).....	4
<i>Lutheran Church-Missouri Synod v. F.C.C.</i> , 141 F.3d 344 (D.C. Cir. 1998)	8
Order Approving Stipulated Injunction and Order, <i>Ctr. for Biological Diversity v. EPA</i> , No. 3:07-cv-02794-JCS, ECF No. 121 (N.D. Cal. May 17, 2010)	3
Order Entering Stipulated Partial Settlement Agreement, <i>Ctr. For Biological Diversity v. EPA</i> , No. 3:11-cv-00293-JCS, ECF No. 366 (N.D. Cal. 2019)	3, 4
Order Granting Summary Judgment, <i>Ctr. for Biological Diversity v. Leavitt</i> , No. 3:02-cv-01580-JSW, 2005 WL 2277030 (N.D. Cal. Sept. 19, 2005).....	3
<i>Pollinator Stewardship Council v. EPA</i> , 806 F.3d 520 (9th Cir. 2015).....	7
Proposed Stipulated Partial Settlement Agreement, <i>Ctr. For Biological Diversity v. EPA</i> , No. 3:11-cv-00293-JCS, ECF No. 364 (N.D. Cal. 2019).....	3, 4
<i>SKF USA Inc. v. United States</i> , 254 F.3d 1022 (Fed. Cir. 2001)	11
 STATUTES	
7 U.S.C. § 136a.....	7
7 U.S.C. § 136a(a)	8
7 U.S.C. § 136a(c)(5).....	9
7 U.S.C. § 136a(g)(1)(A).....	4
7 U.S.C. § 136n.....	7

TABLE OF AUTHORITIES
(continued)

	Page
Cal. Food & Agric. Code § 12824	9
Cal. Food & Agric. Code § 12811	9
Cal. Food & Agric. Code § 12825	9
Cal. Food & Agric. Code § 12995	9
 OTHER AUTHORITIES	
United States Department of Agriculture, Economic Research Service, Farm Income and Wealth Statistics, 2019 Cash Receipts by Commodity, State Ranking, <i>available at</i> https://data.ers.usda.gov/reports.aspx?ID=17844	10
 REGULATIONS	
40 C.F.R. § 156.10	9
40 C.F.R., Part 155, Subpart C	4
 REGULATORY REVIEW MATERIALS	
2,4-DP-p Interim Registration Review Decision, EPA Docket No. EPA- HQ-OPP-2013-0726-0072 (Aug. 26, 2020)	5
<i>Dow Agrosciences LLC</i> , No. R-19-001 (California Department of Pesticide Regulation Aug. 14, 2019), <i>available at</i> https://www.cdpr.ca.gov/docs/chlorpyrifos/pdf/dow.pdf	9
Flonicamid, Proposed Interim Registration Review Decision, EPA Docket No. EPA-HQ-OPP-2014-0777-0032 (Sept. 2, 2020)	5
Pesticide Registration Review; Proposed Interim Decisions for Several Pesticides; Notice of Availability, 85 Fed. Reg. 26682 (May 5, 2020)	5

INTRODUCTION AND AMICI STATES' INTEREST

Amici, the States of California, Hawaii, Maryland, Minnesota, New Jersey, New York, New Mexico, Oregon, Vermont, and Washington, and the Commonwealth of Massachusetts (Amici States), submit this brief to explain how granting EPA's motion for remand without vacatur would unreasonably and indefinitely delay review of Petitioners' critical Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) claims in this and future pesticide registration review cases. EPA bases its remand request on its stated need to correct its violation of the Endangered Species Act (ESA). Because EPA has an admitted five-year backlog of pesticides awaiting ESA analyses, granting EPA's motion would foreclose timely review of Petitioners' unrelated FIFRA claims, which constitute the *only* claims brought in one of the two consolidated petitions, No. 19-72280. That alone is sufficient reason to deny EPA's motion. But as EPA admits in its motion (at 5), EPA's non-compliance with the ESA here reflects the agency's practice across hundreds of other pesticide registration decisions. Accordingly, an order granting EPA's motion could enable EPA to frustrate FIFRA review of future pesticide registration decisions violating the ESA, admitting the violation, and moving for remand without vacatur. As a result, EPA could indefinitely delay review of its pesticide registrations while potentially risky pesticides remain on the market.

Amici States have significant interests in prompt, lawful review of pesticide registrations under FIFRA. The application of chemicals to control pests is strictly regulated under both state and federal law to protect public health and the environment. FIFRA creates a careful balance of federal and state responsibilities. When EPA violates FIFRA, it shifts the burden of controlling exposures to pesticides to state and local authorities with far fewer resources and regulatory tools under FIFRA to manage human health, environmental, and economic risks. Here, for example, sulfoxaflor's toxicity poses risks to pollinators. Pollinators are integral to food security in the United States, contribute billions of dollars to Amici States' economies, and are critical species in Amici States' ecosystems.

Amici States urge the Court to deny EPA's motion for voluntary remand without vacatur. Addressing the merits of Petitioners' FIFRA claims now would most efficiently resolve the substantive disputes in this case and avoid years of unnecessary and consequential delay. If the Court is inclined to grant EPA's motion, the Court should vacate the sulfoxaflor registrations at issue.

ARGUMENT

I. EPA'S FAILURE TO COMPLY WITH THE ESA HERE IS BUT ONE EXAMPLE OF EPA'S ADMITTED PATTERN OF REGISTERING PESTICIDES WITHOUT COMPLYING WITH THE ESA.

EPA admits in its motion that its sulfoxaflor registration decision did not comply with the ESA. Although EPA refers to its ESA non-compliance as an

error, ECF 51-1 (Motion) at 1, the sulfoxaflor registration decision typifies EPA's pesticide registration practice.

As EPA's motion concedes, although "EPA has acknowledged its duty to consult under ESA section 7 prior to issuing a registration for a pesticide," "[m]any hundreds of pesticides have been approved and are available for use that have not undergone ESA review." Motion at 5. EPA attempts to paint this as a historical backlog it is working diligently to correct, with a focus on older pesticides. *Id.* at 5-7. However, the circumstances surrounding EPA's ongoing and systematic failure to consult under the ESA confirm that remand without vacatur is unwarranted.

First, EPA's recent ESA evaluations of pesticides have been compelled by court orders and pressure from Congress. Over the past fifteen years, EPA has lost or settled several matters where it failed to analyze a pesticide registration under the ESA.¹ In all of these cases, EPA agreed or was ordered to perform ESA analysis. For example, a recent action alleged that EPA violated the ESA with

¹ See, e.g., *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005); Proposed Stipulated Partial Settlement Agreement and Order Entering Stipulated Partial Settlement Agreement ("Settlement Agreement"), *Ctr. for Biological Diversity v. EPA*, No. 3:11-cv-00293-JCS (N.D. Cal. Oct. 2019), ECF Nos. 364, 366; Order Approving Stipulated Injunction and Order, *Ctr. for Biological Diversity v. EPA*, No. 3:07-cv-02794-JCS, ECF No. 121 (N.D. Cal. May 17, 2010); Order Granting Summary Judgment, *Ctr. for Biological Diversity v. Leavitt*, No. 3:02-cv-01580-JSW, 2005 WL 2277030, at *1 (N.D. Cal. Sept. 19, 2005).

respect to thirty-five different active ingredients. Fourth Amended Complaint, *Ctr. For Biological Diversity*, No. 3:11-cv-00293-JCS, ECF No. 305. In October 2019, after substantial motion practice and an appeal, EPA ultimately agreed to conduct the missing ESA evaluations of all thirty-five active ingredients under a partial settlement. Settlement Agreement, *Ctr. For Biological Diversity*, No. 3:11-cv-00293-JCS, ECF Nos. 364, 366. Congress has also pressured EPA to correct its ESA non-compliance. In both 2014 and 2018, Congress ordered EPA to report on its consultation progress. Appx005-06, Decl. ¶ 12. Congress has also demanded that EPA streamline integration of FIFRA and ESA procedures to ensure EPA conducts ESA review in pesticide registration decisions. *Id.*

Second, EPA's recent registration review decisions demonstrate that EPA is not bringing older pesticide registrations into ESA compliance. FIFRA requires EPA to review registrations of active ingredients every fifteen years to account for new information about pesticides' benefits and environmental impacts. 7 U.S.C. § 136a(g)(1)(A). FIFRA contemplates that EPA will normally conduct registration reviews, release proposed decisions for public comment, and conclude the process with registration review decisions. *See* 40 C.F.R., Part 155, Subpart C. However, EPA's recent practice has been to release "interim registration review decisions," with their "interim" status based on the lack of any ESA analysis. This practice brazenly circumvents the statutory requirement for proper ESA assessments and

timely registration review decisions. For example, in May 2020, EPA issued proposed interim registration review decisions for 29 active ingredients, only six of which contained ESA analysis. *See* Proposed Interim Decisions for Several Pesticides, Notice of Availability, 85 Fed. Reg. 26682 (May 5, 2020). And EPA has provided no indication that it is actively working on ESA evaluations of these pesticides to remove the “interim” status of these registration review decisions.

Third, EPA has been extraordinarily slow to remedy its ESA violations for the few pesticides where it has addressed the violations. In recent registration review decisions, EPA has stated that it “is currently working with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively referred to as, ‘the Services’) to develop methodologies for conducting [ESA assessments].” *See, e.g.*, 2,4-DP-p Interim Registration Review Decision, EPA Docket No. EPA-HQ-OPP-2013-0726-0072 (Aug. 26, 2020), at 3. But this work has been ongoing since at least 2013, when EPA and the Services released a summary of their joint interim approaches to ESA assessments. *See, e.g.*, Flonicamid, Proposed Interim Registration Review Decision, EPA Docket No. EPA-HQ-OPP-2014-0777-0032 (Sept. 2, 2020), at 24. According to EPA, in the seven years since that action, EPA has conducted biological evaluations—the result of formal ESA consultation with the Services—for just *three* chemicals. *Id.*

The instant case demonstrates the deeper hole EPA continues to dig for itself. Here, EPA expressly declined to conduct any ESA analysis prior to issuing its registration decision, conceding that it “has not made an effects determination for sulfoxaflor.” 2019 Sulfoxaflor Registration, Decision Memorandum, EPA Docket No. EPA-HQ-OPP-2010-0889-0570, at 10. According to EPA, its practice of ESA non-compliance reflects its policy to skip the required ESA consultation for new pesticides on the dubious and unsubstantiated rationale that older pesticides are more harmful. Appx008-09, Decl. ¶ 13c. But as outlined above, EPA has not conducted ESA analysis for most older pesticides in its recent registration review decisions either. Remand without vacatur would simply return sulfoxaflor, a pesticide labeled as toxic to pollinators, to the back of the line of pesticides indefinitely awaiting ESA review. Indeed, EPA admits that it would not even *begin* its ESA evaluation of sulfoxaflor on remand until June 2025 *at the earliest*. Appx015, Decl. ¶ 26.

II. GRANTING EPA’S MOTION WOULD INVITE EPA TO CIRCUMVENT FIFRA REVIEW OF ITS FUTURE PESTICIDE REGISTRATION DECISIONS.

Granting EPA’s motion would allow EPA to use its ESA non-compliance to frustrate judicial review of unrelated FIFRA claims here and in future cases. Here, Petitioners’ FIFRA claims are central to the litigation. This Court previously vacated some of the same sulfoxaflor registrations at issue here after a successful FIFRA challenge, *Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir.

2015), and Petitioners here allege that the instant sulfoxaflor registrations suffer from many of the same flaws. Indeed, one of the two consolidated petitions (No. 19-72280) *only* alleges violations of FIFRA and does not assert an ESA claim. EPA's proposed remand would do nothing to remedy the FIFRA violations alleged in that petition, and would instead indefinitely delay resolution of *all* of those petitioners' claims.

Delaying resolution of Petitioners' FIFRA claims would contravene the intent of FIFRA. Congress entrusted courts to resolve disputes over EPA's FIFRA compliance, outlining clear procedures for EPA pesticide registration decisions, including express provisions for judicial review. *See, e.g.*, 7 U.S.C. §§ 136a (registration), 136n (judicial review). The courts therefore act as a check on the agency's powers under FIFRA, to ensure that EPA carries out Congress's directives. Congress further granted federal appellate courts "exclusive jurisdiction over petitions to review a FIFRA order ... to [e]nsure speedy resolution of the validity of EPA determinations." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 186 (D.C. Cir. 2017).

While the consequences for this case of granting EPA's request are sufficiently severe to justify denial, granting EPA's motion would set a dangerous precedent for future cases: EPA could avoid judicial review of potential violations of a law (FIFRA) by violating an entirely different law (ESA). The basic facts

surrounding EPA's motion are not unique to this case. EPA's stated policy is to forgo ESA analysis for all but a handful of pesticides, such that EPA could easily admit error and seek remand in future cases. Appx007-09, Decl. ¶ 13. To avoid judicial scrutiny of its future pesticide registrations, including vital decisions affecting public health and the environment, EPA could take the same steps it has here—acknowledge the ESA violation, ask for an indefinite amount of time to correct the error, and oppose vacatur of its registration decision. Courts deny agency motions to remand when, if granted, they would incentivize agency gamesmanship. *See Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 349 (D.C. Cir. 1998) (refusing remand because the agency was attempting to avoid judicial review). Accordingly, EPA's motion should be denied.

III. PROMPT AND PROPER FIFRA REVIEW SAFEGUARDS SUBSTANTIAL STATE INTERESTS IN MAINTAINING FIFRA'S COOPERATIVE FEDERALISM, WHICH PROTECTS PUBLIC HEALTH, STATE ECONOMIES, AND THE ENVIRONMENT.

Amici States rely on judicial review of EPA pesticide registration decisions to maintain FIFRA's system of cooperative federalism, which safeguards states' resources, public health, economies, and ecosystems. Pesticide regulation under FIFRA involves a careful balance of federal and state authority. In general, under FIFRA, all pesticides must be federally registered before their use. 7 U.S.C. § 136a(a). Before registering a pesticide, EPA reviews human and environmental safety information to determine whether the pesticide will cause "unreasonable

adverse effects on the environment.” 7 U.S.C. § 136a(c)(5). EPA typically evaluates a proposed label and may require changes, including additional use restrictions and application instructions, to protect the public and the environment from dangers identified in the registration process. *See* 40 C.F.R. § 156.10.

Federal registrants may also be required to obtain state-level registration to permit the pesticide’s sale, distribution, or use in an individual state. *See, e.g.*, Cal. Food & Agric. Code §§ 12811, 12995. Many state laws contain prohibitions similar to FIFRA on pesticides that pose unreasonable environmental risks.² EPA review sets the foundation for state review. If EPA’s foundational review is inadequate, it passes the burden to states, which must then perform the jobs of both federal and state regulators to ensure that pesticides do not harm human or environmental health. When a state determines that additional restrictions on a pesticide are necessary, it must use its own regulatory tools to impose those restrictions. These procedures, such as formal regulation, local permit restrictions, or denial of registration,³ are often time- and resource-intensive. EPA fulfilling its FIFRA obligations reduces these impacts on state resources.

² *See, e.g.*, Cal. Food & Agric. Code §§ 12824, 12825.

³ *See, e.g.*, *Dow Agrosciences LLC*, No. R-19-001 (California Department of Pesticide Regulation Aug. 14, 2019), *available at* <https://www.cdpr.ca.gov/docs/chlorpyrifos/pdf/dow.pdf> (initiating cancellation of the pesticide chlorpyrifos).

These harms are concrete. Here, for example, EPA violated FIFRA by failing to solicit and consider the full spectrum of stakeholder views on sulfoxaflor. *See States' Amicus Brief in Support of Petitioners*, ECF No. 40, at 2-6. That FIFRA violation imposes additional burdens on Amici States' regulatory agencies, which must collect and synthesize stakeholder views in the first instance themselves. *Id.* at 11-13. In addition, Amici States account for over a quarter of U.S. agricultural production,⁴ and pollinators—which face risks from sulfoxaflor's toxicity—contribute billions of dollars to Amici States' economies and are keystone species in Amici States' ecosystems. *Id.* at 6-11. Amici States administer an array of state programs to safeguard these economic and environmental interests. *Id.* at 9-11. Prompt judicial review of EPA's FIFRA decisions thus protects these important state interests.

IV. PROCEEDING TO THE MERITS WOULD MOST EFFICIENTLY RESOLVE THE ISSUES IN THIS CASE.

Finally, the Court should deny EPA's motion because proceeding to the merits would most efficiently manage the legal disputes in this case.

First, EPA's motion requires resolution of Petitioners' FIFRA claims. EPA and Dow oppose vacatur on the basis that sulfoxaflor is allegedly less

⁴ United States Department of Agriculture, Economic Research Service, Farm Income and Wealth Statistics, 2019 Cash Receipts by Commodity, State Ranking, *available at* <https://data.ers.usda.gov/reports.aspx?ID=17844>.

environmentally harmful than its alternatives. Motion at 17-21. However, that assertion rests on the validity of EPA's FIFRA procedure and analysis—the precise targets of Petitioners' FIFRA claims. Rather than decide those issues on an abbreviated record and briefing in the context of EPA's motion to remand, this Court's review would be facilitated by, and should be based on, complete merits briefing on those issues.

Second, remand would neither simplify nor address the issues in dispute. All parties agree that EPA violated the ESA. EPA also admits that its ESA evaluation on remand would not affect Petitioners' FIFRA claims. Motion at 19 (“The ESA errors here do not go to the heart of the FIFRA analysis.”). That distinguishes EPA's motion from a typical case, where remand is warranted because an agency may alter or clarify its decision in ways that materially change a petitioner's claim. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Because Petitioners' same FIFRA claims would likely return to the Court after EPA completes its ESA evaluation, judicial economy favors resolving those issues now.

Third, proceeding to the merits would not prejudice EPA's ESA evaluation of sulfoxaflo, and could actually conserve EPA resources. EPA acknowledges that it would not begin its ESA work on remand until June 2025—years after this Court would decide Petitioners' FIFRA claims if this litigation proceeds.

Appx015, Decl. ¶ 26. If the Court considers Petitioners' FIFRA challenges now and sides with EPA, EPA can begin its ESA analysis in June 2025 as planned. But if the Court finds EPA violated FIFRA and vacates the registrations at issue, the ESA controversy would be moot. In that scenario, deciding the FIFRA claims now would save EPA years of work analyzing invalid sulfoxaflor registrations. Denying EPA's motion would therefore most efficiently resolve the issues in dispute.

CONCLUSION

EPA's motion for voluntary remand without vacatur should be denied. If the Court is inclined to grant EPA's motion, the Court should vacate the sulfoxaflor registrations at issue.

Dated: December 7, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
EDWARD H. OCHOA
Senior Assistant Attorney General
CHRISTIE VOSBURG
Supervising Deputy Attorney General

/s/ Robert Swanson
ROBERT D. SWANSON
Deputy Attorney General
Attorneys for Amicus Curiae State of California

[Counsel listing continues on next page]

FOR THE STATE OF HAWAII:

CLARE E. CONNORS
Attorney General of Hawaii
DIANE K. TAIRA
Supervising Deputy Attorney
General
WADE H. HARGROVE III
Deputy Attorney General
Attorneys General for Amicus
Curiae State of Hawaii
Department of the Attorney General
Health Division
465 South King Street, Room 200
Honolulu, Hawaii 96813

FOR THE STATE OF
MINNESOTA:

KEITH ELLISON
Attorney General
PETER N. SURDO
Special Assistant Attorney General
Office of the Minnesota Attorney
General
445 Minnesota Street, Suite 1400
Saint Paul, Minnesota 55101

FOR THE STATE OF
MARYLAND:

BRIAN E. FROSH
Attorney General
STEVEN J. GOLDSTEIN
Special Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6414

FOR THE STATE OF NEW
JERSEY:

GURBIR S. GREWAL
Attorney General
WILLIS A. DOERR
Deputy Attorney General
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625
Tel: (609) 376-2745
Email: Willis.Doerr@law.njoag.gov

FOR THE STATE OF NEW
MEXICO:

HECTOR H. BALDERAS
Attorney General
ROBERT F. LUNDIN
Special Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508

FOR THE STATE OF NEW
YORK:

LETITIA JAMES
Attorney General
CHANNING WISTAR-JONES
MORGAN A. COSTELLO
Assistant Attorneys General
STEVEN C. WU
Deputy Solicitor General
Office of the Attorney General
28 Liberty Street
New York, NY 10005

FOR THE STATE OF OREGON:

ELLEN F. ROSENBLUM
Attorney General
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
General Counsel Division
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE STATE OF VERMONT:

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3171
nick.persampieri@vermont.gov

FOR THE STATE OF
WASHINGTON:

ROBERT W. FERGUSON
Attorney General
KELLY T. WOOD
Assistant Attorney General
Washington Office of the Attorney
General
Environmental Protection Division
800 5th Avenue, Suite 2000, TB-14
Seattle, WA 98104-3188
(206) 326-5493

FOR THE COMMONWEALTH
OF
MASSACHUSETTS:

MAURA HEALEY
Attorney General
I. ANDREW GOLDBERG
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
Tel: (617) 963-2429
Email: andy.goldberg@mass.gov

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the requirements of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(5) and (6) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 2,598 words.

Dated: December 7, 2020

/s/ Robert D. Swanson

Robert D. Swanson