SETTLEMENT AND RELEASE AGREEMENT

Spokane Riverkeeper and Darigold, Inc.. (collectively, the "Parties") enter into this Settlement and Release Agreement ("Agreement") as follows:

I. RECITALS

1.1 Spokane Riverkeeper filed a Clean Water Act citizen-suit action on November 15, 2018, *Spokane Riverkeeper v. Darigold*, Case No. 2:18-cv-00357, U.S. District Court, Eastern District of Washington ("Complaint.") The Complaint alleged that Darigold, Inc. dba Inland Northwest Dairies was in violation of Washington Department of Ecology Industrial Stormwater General Permits issued on October 21, 2009, effective January 1, 2010, modified May 16, 2012 (the "2010 Permit"), and on December 3, 2014, effective January 2, 2015 (the "2015 Permit"). These Permits authorize discharges of stormwater and pollutants from Darigold's dairy processing facility located at 35 East Francis Ave., Spokane, Washington (the "Facility").

1.2 Before and after receipt of the Complaint, Darigold has undertaken and implemented measures to ensure compliance with the Clean Water Act and the NPDES Permit.

1.3 Counsel and representatives for the Parties have met and engaged in discussions relating to the settlement of this matter and wish to resolve it without the need for time consuming and expensive litigation.

1.4 By entering into this Agreement, Darigold does not admit and expressly denies liability for all claims alleged by Spokane Riverkeeper in the Complaint.

1.5 The Parties have agreed that settlement of this matter is in the best interest of the Parties, and that entry into this Agreement is the most appropriate means of resolving this dispute.

1.6 The Parties have entered into this Agreement without litigation, trial, adjudication, or the admission of any issue of fact or law.

II. BINDING EFFECT

2.1 The provisions of this Agreement shall inure to the benefit of and be binding upon the Parties hereto, including their officials, agents, representatives, officers, directors, employees, successors, and assigns. Changes in the organizational form or status of a party shall have no effect on the binding nature of this Agreement or its applicability.

III. COMPLIANCE-RELATED MEASURES

3.1 Darigold shall fully comply with all conditions of the 2015 NPDES Permit by March 31, 2019.

3.2 Darigold shall install and have operational the Enpurion MT stormwater treatment facility by March 31, 2019.

3.2 Darigold shall forward to Spokane Riverkeeper copies of all written communications to or from the Washington State Department of Ecology regarding the Industrial Stormwater General Permit for a period of two (2) years from the effective date of this Agreement.

IV. FORCE MAJEURE

4.1 Darigold shall comply with all requirements of this Agreement within the time periods specified herein. If any event occurs that is outside of the reasonable control

of Darigold (a "force majeure event" as further defined below), which causes a delay in performing tasks required by this Agreement, the delay shall not constitute a failure to comply with the terms of this Agreement, provided that Darigold has submitted written notification to Spokane Riverkeeper no later than fifteen (15) days after the date that Darigold first concludes that such event has caused or will cause non-compliance, describing the length or anticipated length of non-compliance, the precise circumstances causing non-compliance, the measures taken or to be taken to prevent or minimize non-compliance, and a schedule for implementation of the measure to be taken.

A force majeure event shall include, but not be limited to the following, to the extent they are outside the reasonable control of Darigold and cannot be overcome by diligence:

A. Acts of God, war, insurrection, or civil disturbance;

B. Earthquakes, landslides, fire, floods;

C. Actions or inactions of third parties over which defendant has no control;

D. Adverse weather conditions or unusual delay in transportation;

E. Restraint by court order or order of public authority;

F. Governmental approvals, authorizations, and approvals;

G. Strikes; and

H. Any other litigation or arbitration or mediation that causes delay.

Provided that Darigold complies with the notice provision of this paragraph, then in the event that Darigold fails to comply or anticipates failing to comply with the requirements of this Agreement because of a force majeure event, Darigold's failure to

comply, as described in the written notice to Spokane Riverkeeper under this paragraph, shall not be a violation of this Agreement and shall not result in any liability or other sanctions. In such event, the milestone date(s) shall be extended for a reasonable period of time following the force majeure event.

V. SUPPLEMENTAL ENVIRONMENTAL PROJECT

5. Within thirty (30) days from the effective date of this Agreement, Darigold shall make a payment in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00) to the Coeur d'Alene Tribe to fund projects for habitat and watershed improvements that will benefit the Hangman Creek watershed, including the Spokane River. The projects are set forth in Exhibit "A." Such payment shall be made within thirty (30) days of execution of this Agreement and by check payable and mailed to the Coeur d'Alene Tribe of Indians, 850 A Street, Plummer, Idaho 83851, and shall bear the notation "Spokane Riverkeeper/Darigold Clean Water Act Settlement," with a copy provided to Spokane Riverkeeper at that time. If, for any reasons, the Coeur d'Alene Tribe is unable to use all the funds described in this paragraph on the projects described in Exhibit "A" by January 1, 2023, then the Parties to this Settlement shall confer with the Tribe and determine what other tribal projects the remainder of the funds shall be used for, provided that the remaining funds shall similarly be used to benefit water quality in the Hangman Creek watershed. The Parties agree that the $125,000.00 payment referenced in this Section V will not be used to fund projects that support anti-agricultural activities.

VI. ATTORNEYS' FEES AND COSTS

6. Within thirty (30) days from the effective date of this Agreement, Darigold shall pay Spokane Riverkeeper's the amount of Twenty Thousand Dollars ($20,000.00) by check payable and mailed to Bricklin & Newman, LLP, 1424 Fourth Avenue, Suite 500, Seattle, WA 98101, Attention: Bryan Telegin, which payment is made in full and complete satisfaction of any claims Spokane Riverkeeper may have under the Clean Water Act for fees and costs.

VII. EFFECT OF SETTLEMENT AGREEMENT

7.1 The undersigned representative for each party certifies that he or she is fully authorized by the party he or she represents to enter into this Agreement and to legally bind such party and its successors in interest to it.

7.2 Each party hereto reserves all legal and equitable remedies available to enforce this Agreement. The Parties intend this Agreement to constitute a legally binding contract, and each party reserves the right to assert any defenses to any subsequent actions or remedies sought by the other party to enforce this Agreement in the future. In the event of a dispute over or action to enforce this Agreement, the aggrieved party shall provide written notice of the dispute to the other party not less than thirty (30) days before bringing any such action, and the Parties or their counsel shall endeavor to confer to discuss means to resolve any such dispute. The provisions of section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), regarding awards of costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, shall apply to any proceedings seeking to enforce the terms and conditions of this Agreement.

7.3 This Agreement is intended to be and shall constitute the exclusive remedy, final resolution, and complete settlement between the Parties and their respective officials, agents, representatives, officers, directors, employees, successors and assigns for all claims, demands, or causes of action arising under the Clean Water Act regarding discharges from the Facility and NPDES Permit violations, whether known or unknown, asserted or unasserted, which occurred at any time prior to the effective date of this Agreement. This release specifically includes, but is not limited to, claims or civil penalties, attorneys' fees and costs, and declaratory or injunctive relief. These claims are released and dismissed with prejudice and upon payment of the amounts specified in Sections V and VI of this Agreement, Spokane Riverkeeper agrees to file with the U.S. District Court, for the Eastern District of Washington, the attached Stipulated Motion for Order of Dismissal with Prejudice.

7.4 By entering into this Agreement, Darigold does not admit and expressly denies liability for all claims alleged by Spokane Riverkeeper in the Complaint. This Agreement shall not constitute an admission or adjudication with respect to any allegation in the Complaint, or an admission or evidence of any violation, negligence, wrongdoing, misconduct, or liability on the part of Darigold or any of its officials, agents, representatives, officers, directors, employees, successors, or assigns. This Agreement shall not constitute or be deemed to constitute an admission or adjudication with respect to any allegation, fact or conclusion of law in or arising out of the Complaint.

VIII. EFFECTIVE DATE and TERMINATION

8.1 This Agreement shall take effect upon full execution by the Parties.

8.2 The provisions of this Agreement shall terminate two (2) years from the effective date of this Agreement.

IX. NOTIFICATIONS

9. All notices and other communications regarding this Agreement shall be in writing and shall be fully given by mailing via first-class mail, postage pre-paid; by delivering the same by hand; or by sending the same via e-mail to the following addresses, or to such other addresses as the Parties may designate by written notice, provided that communications that are mailed shall not be deemed to have been given until three business days after mailing:

For Spokane Riverkeeper:

Spokane Riverkeeper
Attn: Jerry White Jr.
35 W. Main, Suite 300
Spokane WA 99201
Jerry@cforjustice.org

For Darigold:

Monica Johnson, General Counsel
Doug Pettinger, Senior Director of
Environmental Compliance
5601 6th Avenue South, Suite 300
Seattle, WA 98108
Monica.Johnson@darigold.com
Doug.Pettinger@darigold.com

X. ENTIRE AGREEMENT

10.1 This Agreement constitutes the entire agreement between the Parties. There are no other or further agreements, either written or verbal, except as expressly contained in this Agreement. This Agreement may not be modified or amended except as by a writing signed by both Parties.

10.2 The Parties to this Agreement are represented by legal counsel. The Agreement was mutually drafted and approved by counsel for each party. There shall not

be a presumption or construction against any party. Any ambiguities in this Agreement shall not be construed against any party.

10.3 Each party acknowledges that it has sought and obtained the advice of its own independent legal counsel before executing this Agreement. The Parties acknowledge that they have had the opportunity to freely negotiate the terms of this Agreement.

10.4 This Agreement may be executed in any number of counterparts, executed by any party, each of which shall compromise an original Agreement, and shall have the same force and effect as if the party had signed all other counterparts. Signatures on faxed or emailed copies shall be deemed original signatures.

10.5 If any term, covenant, or condition of this Agreement is held to be invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect any other provision included in this Agreement. This Agreement shall be construed as if such invalid or unenforceable provision had never been contained in this Agreement.

10.6 Each party shall, at the request of the other, execute, acknowledge, and deliver whatever additional documents, and do such other acts, as may be reasonably required in order to accomplish and/or carry out the intent, spirit, and purposes of this Agreement.

SPOKANE RIVERKEEPER

By: Jerry White, Jr.
Name: Jerry White Jr.
Title: Program Director

Date: 2/28/20

DARIGOLD, INC.

By: Monica Johnson Date: February 28, 2020

Name: Monica Johnson
Title: General Counsel

EXHIBIT A

Hangman Creek Project List

March 19, 2019

Project ID: 1 **Project Title**: Riparian buffer establishment near Stateline
Project Location (coordinates): 47.1918 N, -117.02532 W
Project Narrative: Much of the lower Hangman Creek watershed has been deforested and cleared for development. The focus of this project is on a reach of Hangman Creek that is located near the Washington/Idaho Stateline. The project area contains over one mile of Hangman Creek that has been straightened to facilitate faster drainage. The channel is deeply incised/entrenched, with significant bank erosion and little or no stream shading. Several isolated relict stream channels are present within the project area. The treatment proposed here is to establish a vegetated riparian buffer 100-200 feet wide of either side of the Hangman Creek channel. The buffer will be planted with a combination of trees, shrubs, and grasses. Trees will be planted at a rate of approximately 100 - 200 trees and shrubs per acre. This will help to provide stream shading, bank stabilization, reductions in nutrient and soil runoff, and improved wildlife habitat.

Project ID: 2 **Project Title**: Riparian buffer establishment NW of Tensed
Project Location (coordinates): 47.1700 N, -116.9418 W
Project Narrative: Much of the lower Hangman Creek watershed has been deforested and cleared for development. The focus of this project is on a reach of Hangman Creek that is located approximately 0.5 miles northwest of Tensed. Upstream of this site, Hangman Creek is included on the 303D list of impaired streams due to sediment and temperature. This reach is approximately 1000 feet in length, and is entrenched with significant bank erosion. The surrounding area is currently bare ground, and is almost completely devoid of trees; lacking a buffer between the stream and agricultural activities. The treatment proposed here is a combination of tree, shrub, and grass planting. Trees will be planted at a rate of 100 - 200 trees and shrubs per acre. This will help to provide much needed stream shading, bank stabilization, reductions in nutrient and soil runoff, and improved wildlife habitat.

Project ID: 3 **Project Title**: Native grass planting in riparian areas: transitioning from agricultural production to native habitat
Project Location (coordinates): Site A: 47.147 N, -116.911 W; Site B: 47.149 N, -116.906 W; Site C: 47.137 N, -116.882 W
Project Narrative: Riparian habitats in the Hangman Watershed are largely usurped for dryland farming. During the 20th Century, within the floodplains along Hangman Watershed and within the Coeur d'Alene Reservation, roughly 83% of these riparian habitats were destroyed by the conversion to agricultural production. The first step in returning these agricultural fields to productive, native fish and wildlife habitats is to establish a robust stand of native grasses that will withstand broad-scale establishment of noxious weeds. Once the native grasses are

established additional habitat components, such as native forbs, trees and shrubs, can be established. This initial establishment of native grass is quite expensive, with the mix of native wet meadow grass seed species costing approximately $24 per pound, with an application rate of 18.5 pounds per acre. Adding a cost of approximately $45 per acre to drill the grass seed into the soil surface, the cost of seeding the identified 365 acres totals $177,025. The initial step in converting agricultural fields back to native, riparian habitat will minimize erosional loss of the sediment from those fields and increase the water infiltration by increasing organic material throughout the soil profile.

Project ID: 4 **Project Title:** Relict channel reactivation and floodplain enhancement
Project Location (coordinates): 47.122586 N, -116.833979 W
Project Narrative: The stream channel in the project area was channelized in the 1940s and has since become highly incised and unstable. Much of the channel exhibits active streambank erosion and functions as a sediment source and transport reach. Habitat quality for redband trout is poor. Adjacent wetlands in the floodplain are farmed and drained by 7,900′ of ditches that reduce groundwater retention. Treatments would decommission existing drainage ditches to redistribute runoff across floodplain wetlands. Construction of plugs within 2,900′ of Hangman Creek that has been channelized would support full reactivation of 4,600′ of relict stream channel, which was initiated in 2016. Anticipated benefits include increased groundwater storage, improved channel/floodplain connectivity, sediment and nutrient retention and improved base stream flow.

Project ID: 5 **Project Title:** Riparian enhancement within k'wne' 'ulchiyark'wmntsut
Project Location (coordinates): 47.11115 N, -116.818297 W
Project Narrative: The stream downstream of the project area was channelized in the 1940s, initiating channel adjustments that resulted in a highly entrenched condition where channel capacity exceeds the 50-year return interval flood. Much of the channel exhibits active streambank erosion and functions as a sediment source and transport reach. Habitat quality for redband trout is poor. Restoration work was initiated downstream in 2014 to activate relict channels and upstream in 2016 to improve floodplain connectivity through other means. Riparian enhancement on this site would follow adaptive management prescriptions to trench willow poles on floodplain benches adjacent to the existing entrenched channel, and establish large potted hardwoods on 25 acres of perched wetlands located on the terrace above the active channel. Anticipated benefits include increased stream shading, increased floodplain and channel roughness, channel aggradation and reduced fine sediment transport.

Attached Stipulated Motion for Order of Dismissal with Prejudice

Hon. Stanley A. Bastian

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE RIVERKEEPER, Plaintiff, v. DARIGOLD, INC., Defendant.	NO. 2:18-cv-00357-SAB STIPULATED MOTION FOR ORDER OF DISMISSAL WITH PREJUDICE Note on Motion Calendar: [INSERT DATE]

Pursuant to Rule 41(a)(a)(ii) of the Federal Rules of Civil Procedure, Plaintiff Spokane Riverkeeper and Defendant Darigold, Inc. hereby jointly move for an order dismissing the above-captioned matter with prejudice.

The Parties further wish to inform the Court that this joint motion is made pursuant to a private settlement agreement, and that the United States has had an opportunity to review the settlement agreement as required by Section 505(c)(3) of the federal Clean Water Act, 33 U.S.C. § 1365(c)(3). Submitted herewith as Exhibit A is a true and correct copy of a letter that the undersigned received on February 6, 2020 from the United States Department of Justice, informing them that the United States does not object to the settlement or this dismissal.

A proposed order is submitted herewith.

///

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Dated this ___ day of February, 2020.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: s/DRAFT
Bryan Telegin, WSBA No. 46686
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
Telephone: (206) 264-8600
E-mail: brooks@bnd-law.com
Attorneys for Spokane Riverkeeper

FOSTER PEPPER PLLC

By: s/DRAFT
Lori A. Terry, WSBA No. 22006
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Attorneys for Darigold, Inc.

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U.S. Department of Justice

Environment and Natural Resources Division

90-1-24-05196

Law and Policy Section
P.O. Box 7415
Washington, DC 20044-7415

Telephone (202) 514-1442
Facsimile (202) 514-4231

February 6, 2020

PROVIDED TO COUNSEL OF RECORD
TO SUBMIT TO THE COURT VIA ECF

Clerk's Office
United States District Court
Eastern District of Washington, Spokane Division
Thomas S. Foley United States Courthouse
920 West Riverside Ave, Room 840
Spokane, WA 99201

Re: *Spokane Riverkeeper v. Darigold, Inc.*, No. 2:18-cv-00357 (E.D. Wash.)

Dear Clerk of Court:

I am writing to notify you that the United States has reviewed the proposed consent judgment in this action and does not object to its entry by this Court.

On January 3, 2020, the Citizen Suit Coordinator for the Department of Justice received a copy of the proposed consent judgment in the above-referenced case for review pursuant to Clean Water Act, 33 U.S.C. § 1365(c)(3).[1] This provision provides, in relevant part:

> No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

See also 40 C.F.R. § 135.5 (service on Citizen Suit Coordinator in the U.S. Department of Justice). A settlement that does not undergo this federal review process is at risk of being void.

[1] The term "consent judgment" in the Clean Water Act citizen suit provisions has a broad meaning and encompasses all instruments entered with the consent of the parties that have the effect of resolving any portion of the case. For example, a document stipulating to dismissal of a case of any part thereof is within the scope of this language. Such documents and any associated instruments must be submitted to the United States and the court for review, notwithstanding any provisions purporting to maintain the confidentiality of such materials. The Department monitors citizen suit litigation to review compliance with this requirement.

In its review, the United States seeks to ensure that the proposed consent judgment complies with the requirements of the relevant statute and is consistent with its purposes. *See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525-26 (1986) (a consent decree should conform with and further the objectives of the law upon which the complaint was based). For example, if the defendant has been out of compliance with statutory or permit requirements, the proposed consent judgment should require the defendant to come into prompt compliance and should include a civil penalty, enforceable remedies, injunctive relief, and/or a supplemental environmental project (SEP) payment sufficient to deter future violations, or combinations of the above. Where a consent judgment provides for the payment of sums to a third party that is to undertake an environmentally beneficial project and/or acquire a property interest that will have environmental benefits, the United States typically requests that the third party provide a letter to the Court and to the United States representing that it is a 501(c)(3) tax exempt entity (if an organization) and that it: (1) has read the proposed consent judgment; (2) will spend any monies it receives under the proposed judgment for the purposes specified in the judgment; (3) will not use any money received under the proposed consent judgment for political lobbying activities; and (4) will submit to the Court, the United States, and the parties a letter describing how the SEP funds were spent.

In this case, the proposed consent decree requires Defendant to pay $125,000 to fund projects for habitat and watershed improvements that will benefit the Hangman Creek watershed, including the Spokane River. In a letter attached as Exhibit A to the proposed consent decree, the designated recipient of the SEP funds, the Coeur d'Alene Tribe, makes the requested representations, including that any funds received as a result of the proposed consent decree would be used solely for the purpose outlined in the consent decree and that no portion of the funds would be used for political lobbying activities. The United States believes that this letter will help to ensure that any monies expended under the consent judgment will be used in a manner that furthers the purposes of the Clean Water Act and that is consistent with the law and the public interest.

Given the facts of this case, the United States has no objection to the proposed consent judgment. The fact that we do not have a basis to object to this consent judgment does not imply approval of this instrument.

The United States affirms for the record that it is not bound by this settlement. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982) (Attorney General is not bound by cases to which he was not a party); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 (1987) (explaining that citizen suits are intended to "supplement rather than supplant governmental action"); *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1356 n.8 (9th Cir. 1990) (explaining that the United States is not bound by citizen suit settlements, and may "bring its own enforcement action at any time"); 131 Cong. Rec. S15,633 (June 13, 1985) (statement of Senator Chafee, on Clean Water Act section 505(c)(3), confirming that the United States is not bound by settlements when it is not a party). The United States also notes that, if the parties subsequently propose to modify any final consent judgment entered in this case, the parties should so notify the United States, and provide a copy of the proposed modifications, forty-five days before the Court enters any such modifications. *See* 33 U.S.C. §1365(c)(3).

We appreciate the attention of the Court. Please contact the undersigned at (202) 514-4642 if you have any questions.

Sincerely,

/s/ Peter McVeigh
Peter McVeigh, Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 7415
Washington, D.C. 20044-4390

cc: Counsel on Record via ECF

Hon. Stanley A. Bastian

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE RIVERKEEPER,

Plaintiff,

v.

DARIGOLD, INC.,

Defendant.

NO. 2:18-cv-00357-SAB

[PROPOSED] ORDER GRANTING STIPULATED MOTION FOR ORDER OF DISMISSAL WITH PREJUDICE

Note on Motion Calendar:
[INSERT DATE]

Pursuant to the Parties' Stipulated Motion for Order of Dismissal with Prejudice (DATE) and Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, the above-captioned matter is hereby dismissed with prejudice.

Dated this ____ day of February, 2020.

Hon. Stanley A. Bastian
United States District Judge

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Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Presented by:

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