

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____ )	
IN RE ENDANGERED SPECIES ACT )	
SECTION 4 DEADLINE LITIGATION )	
_____ )	
This Document Relates To: )	Misc. Action No. 10-377 (EGS)
<i>Center for Biological Diversity v. Salazar,</i> )	MDL Docket No. 2165
10-cv-0230 )	
_____ )	

**JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT  
AND ORDER OF DISMISSAL OF THE CENTER’S CLAIMS**

Plaintiff Center for Biological Diversity (“Center”) and the Federal Defendants Ken Salazar, in his official capacity as Secretary of the U.S. Department of the Interior, and the U.S. Fish and Wildlife Service (“Service”) (collectively, the “Federal Defendants”) jointly move this Court to approve a Settlement Agreement (“Agreement”) (attached hereto as Exhibit 1), negotiated between the Center and the Service, and incorporate the terms of this Agreement into an order dismissing the Center’s above-captioned action in this consolidated multidistrict litigation (“MDL”).

The plaintiff in the twelve remaining cases consolidated in this MDL proceeding, WildEarth Guardians (“Guardians”), is not a signatory to this Agreement. However, Guardians is a signatory to a separate stipulated settlement agreement (“WEG Agreement”), filed on May 10, 2011, Docket (“Dkt.”) 31-1, that resolves Guardians’ claims in this consolidated MDL proceeding. This Agreement negotiated between the Federal Defendants and the Center, the product of extensive negotiations pursuant to the Court’s May 17, 2011, order that the parties reopen and continue their mediation discussions, is intended to be complementary to the WEG Agreement. In a separate

filing in Guardians' consolidated cases, the Center and the Service are providing notice of the filing of this Agreement.

For the reasons set forth below, the Agreement meets all applicable standards for judicial approval of a consent decree, and it should be approved and entered by the Court.

**I. THE COURT SHOULD APPROVE THE SETTLEMENT AGREEMENT AND ENTER AN ORDER OF DISMISSAL OF THE CENTER'S CLAIMS**

**A. Standard of Review**

The principles that apply to judicial review of a consent decree are well-established. In general, a court should enter and approve a consent decree if it is "consistent with the statute the consent [decree] is to enforce and fairly and reasonably resolves the controversy in a manner consistent with the public interest." *Citizens for a Better Env't v. Gorsuch*, 718 F. 2d 1117, 1128 (D.C. Cir. 1983) (citing *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977)), *cert. denied*, 467 U.S. 1219 (1984)). "Thus the function of the reviewing court is not to substitute its judgment for that of the parties to the decree, but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." *United States v. District of Columbia*, 933 F. Supp. 42, 46-47 (D.D.C. 1996).

The Court should be guided by the principle that "[f]ew public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute." *American Sec. Vanlines v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (citations omitted). "Not only do settlement agreements 'produce a substantial savings in judicial resources,' but they also 'promote efficient use of private resources by reducing litigation and related costs.'" *Wright v Foreign Serv. Grievance*

*Bd.*, 503 F. Supp. 2d 163, 176 (D.D.C. 2007) (quoting *American Sec. Vanlines*, 782 F.2d at 1060). “In order to encourage these public policies, ‘settlement agreements are to be upheld whenever possible.’” *Id.* (quoting *American Sec. Vanlines*, 782 F.2d at 1060).

A consent decree must spring from, and serve to resolve, a dispute within the court’s subject-matter jurisdiction, and come within the general scope of the case made by the pleadings. See *Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 525 (1986). However, the Court is not required to determine whether or not the plaintiff would have prevailed on its specific claims to approve the settlement. “[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.” *Id.* at 522; see also *Gorsuch*, 718 F.2d at 1126 (“The court’s duty when passing upon a settlement agreement is fundamentally different from its duty in trying a case on the merits.”); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (“Naturally, the agreement reached [in a consent decree] normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.”).

Consistent with these principles, a reviewing court is not limited to approving relief that the plaintiff requested in its complaint. See *Sierra Club v. Browner*, Nos. 93-124 (NHJ), 93-125, 93-197 and 93-564, 1994 WL 750290 (D.D.C. Sept. 20, 1994) (approving a consent decree in which EPA agreed to steps beyond the specific relief requested in the complaint, where the court had jurisdiction over the claims raised in the complaint and the actions to be taken were consistent with the operative statute); *NRDC v. Whitman*, No. C99-03701WHA, 2001 WL 1221774, at \*12 (N.D. Cal. Sept. 24, 2001)

(citation omitted) (approving consent decree where steps to be taken by agency were not sought in the complaint, but were consistent with the statute, “directly responsive” to the pleadings, and “further[ed] the broad objectives upon which the complaint was based.”).

Furthermore, “where a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement, a reviewing court may appropriately accord substantial weight to the agency’s expertise and public interest responsibility.” *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W.Va. 2000); *see also United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995).

### **B. Terms of the Settlement Agreement**

Below is a summary of the key terms of the Agreement:

1. The Agreement provides the Center with a separate right to enforce certain deadlines in the WEG Agreement for petition findings related to Center-petitioned species and/or at issue in this consolidated litigation. Agreement ¶¶ B(1) and B(2).
2. The Agreement provides that, by a specific fiscal year deadline prior to the end of FY 2017 (September 30, 2017), the Service shall submit a proposed listing rule or a not-warranted finding to the *Federal Register* for 32 candidate species and 8 non-candidate species. *Id.* ¶¶ B(3) and B(4).
3. The Agreement provides that the Center shall not oppose the approval of the WEG Agreement. *Id.* ¶ B(6).
4. The Agreement provides that the Center shall use its best efforts to obtain the agreement of its co-plaintiffs to file joint motions to dismiss, with prejudice, three additional cases in which the Center, Guardians, and other parties have challenged the warranted-but-precluded findings for roughly 200 species. *Id.* ¶ B(9). If the Center is

unable to obtain its co-plaintiffs' agreement to a joint motion to dismiss, the Center agrees to withdraw from any such case. *Id.*

5. The Agreement provides that most of the specific deadlines required of the Service, which are staggered over six years, would automatically shift to the end of FY 2016 (September 30, 2016) upon the occurrence of specified triggering events tied to the number of Center-filed deadline suits or warranted-but-precluded challenges over the six-year term of the Agreement. *Id.* ¶ B(10).

**C. The Settlement Agreement Meets the Applicable Standards**

The Agreement negotiated between the Federal Defendants and the Center satisfies all applicable standards and should be entered. The Agreement is “consistent with the statute the consent [decree] is to enforce,” and it fairly and reasonably resolves the controversy in a manner consistent with the public interest. *Gorsuch*, 718 F. 2d at 1128. The Agreement resolves disputes between the Federal Defendants and the Center that are within the Court’s subject-matter jurisdiction, and is within the general scope of the case made by the pleadings. *Local No. 93*, 478 U.S. at 525. In the Service’s judgment as the expert agency, the Agreement also is in the public interest, and does not unduly restrict the Service’s discretion. In fact, the Agreement between the Federal Defendants and the Center would not only resolve all of the specific challenges to the overdue petition findings at issue in the Center’s consolidated case, but the Agreement – in conjunction with the WEG Agreement – would also establish a feasible timetable for the Service to perform other necessary actions sought by the Center, including the issuance of proposed listing rules for several species that are candidates for listing. Accordingly, because the Agreement will resolve the claims currently at issue in the

Center's consolidated case, furthers the purposes of the ESA, is in the public interest, is fair and equitable, and is within the general scope of the case made by the pleadings, the Agreement meets all applicable standards for judicial approval of a consent decree, and it should be approved and entered by the Court.

## II. CONCLUSION

For the foregoing reasons, the Center and the Service respectfully request that the Court approve the Agreement and dismiss the Center's actions in this MDL proceeding.

Dated: July 12, 2011

Respectfully submitted,

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*/s/ Clifford E. Stevens, Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 12, 2011, I electronically filed the foregoing Joint Motion for Approval of Settlement Agreement and Order of Dismissal of the Center's Claims and [Proposed] Order with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

*/s/ H. Hubert Yang*

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