



U.S. Department of Justice

Environment and Natural Resources Division

WDH: dly

90-B-6-04673

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July 23, 2002

Via Hand Delivery

Nancy Mayer-Whittington, Clerk
United States District Court
for the District of Columbia
333 Constitution Ave., NW
Washington, D.C. 20001

Re: Save The Manatee Club, et al. v. Ballard, et al.
Civil No. 00-00076 (D.D.C.)

Enclosed for filing is the original and one copy of the Federal Defendants' Position on Remedy in the above-styled case. Please call me if you have any questions.

Sincerely,

Wayne Hettenbach
Trial Attorney
(202) 305-0213

cc: Counsel of Record

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

SAVE THE MANATEE CLUB, et al.

Plaintiffs,

v.

BALLARD, et al.

Defendants.

Civil No. 1:00CV-00076 (EGS/JMF)

FEDERAL DEFENDANTS' POSITION ON REMEDY

On July 9, 2002 this Court entered an order finding that the defendants, the U.S. Fish and Wildlife Service et al. (collectively "FWS") failed to abide by the terms of a settlement agreement regarding the designation of manatee refuges and sanctuaries. The court further ordered the defendants to file a written proposal "discussing the appropriate remedy for this violation." Accordingly, the defendants file the instant brief.^{1/}

The proposed rule-making for designating manatee refuges and sanctuaries identified sixteen potential sites. 66 Fed. Reg. 42318 (August 10, 2001). The FWS designated two of those sites as manatee refuges, determined that the remaining fourteen were less urgently in need of designation, and did not designate either refuges or sanctuaries at these fourteen sites, though it indicated that in the future it may do so. 67 Fed. Reg. 680 (January 7, 2002).

One remedy would be to order the FWS to engage in new final rule-making for the remaining

^{1/} By filing this brief the defendants in no way concede any positions taken in the previous briefing, and they do not waive any argument available to them on appeal.

fourteen potential sites identified in 67 Fed. Reg. 680 and 66 Fed. Reg. 42318. In originally approving the parties' settlement agreement, the court was acting to fashion an agreed to equitable remedy. Having determined the FWS to be in breach, the court retains equitable discretion to set a reasonable schedule for the FWS to comply with its settlement obligations under the settlement agreement. See Pigford v. Veneman, 292 F.3d 918, 923-24 (D.C. Cir. 2002).

As explained in the Declaration of Marshall P. Jones, attached as exhibit A, if the court were to order such a remedy, the FWS would need, at a minimum, until December 2, 2002 (which is approximately 120 days) to complete all of the steps that are required of the FWS when it engages in a final rule-making for these fourteen sites. Jones Dec. at ¶ 5. First, it will take the FWS field office approximately 20 days to prepare the draft final rule. Id. at 6(A). Second, approximately 17 days are needed for the regional office to review the field office's draft rule and supporting documentation. Id. at 6(B). Next, the rule must be reviewed by the Department of Interior's attorney's to make sure the rule complies with the law, for which only ten days has been allocated for both the regional and headquarters review. Id. at 6(C). After legal counsel has signed off on the rule, it is reviewed by the FWS headquarters for final review and approval, which will take approximately 30 days. Id. at 6(D). Following the FWS' final review, by executive order, the rule must be reviewed by the Office of Management and Budget, who could take up to 90 days to review the rule, but for which FWS has allocated only 10 days. Id. at 6(E). Finally, five days have been allocated to put the complete package together and submit the package to the Federal Register for final review and publication. Id. at 6(F). In light of all the many steps along the way to final rule-making, the FWS has proposed a reasonable time in which to engage in a final rulemaking for these fourteen sites.

Reason dictates that the FWS must have sufficient time to complete each step along the way to

promulgate the final rule, and FWS must still satisfy the applicable statutory standards for designating a refuge or sanctuary.^{2/} Equity favors adopting the schedule proposed by the FWS. There is no congressional timetable associated with designating refuges or sanctuaries. Human health and welfare are not at stake in taking this action, and, as this court is aware, the FWS is under numerous court ordered and statutory deadlines such that expediting its schedule will interfere with other and competing priorities. *Id.* at 7. Furthermore, there is little prejudice to the plaintiffs by allowing the FWS this time since the manatees are already otherwise protected under the Endangered Species Act. In addition, there are numerous speed zones throughout Florida and in many of the fourteen areas that would be under consideration during this rule-making.

Accordingly, if the court is determined to order a schedule for the FWS to engage in additional final rule-making for the previously identified and proposed fourteen sites, the FWS will require 120 days from the date of this court's order. The Court should accept this schedule as reasonable.

While ordering a schedule or new final rule-making is a remedy, the defendants believe they are obligated to advise the court that in light of its order, there is only one remedy lawfully available to the court. The court has read the settlement agreement as imposing substantive obligations upon the FWS, rather than mere procedural obligations, despite defendants argument to the contrary in their original briefing in this matter. Specifically, this Court has determined that the settlement agreement requires FWS to actually designate both refuges and sanctuaries, that the settlement agreement substantively requires FWS to actually designate these areas rather than merely engage in a rule-making to do so,

^{2/} Sanctuaries and refuges can be designated only (1) in compliance with Administrative Procedure Act notice and comment rulemaking procedures (2) when there is "substantial evidence" showing such designation is "necessary" to prevent the taking of manatees. 50 C.F.R. § 17.103 (citing 5 U.S.C. § 553).

and that the settlement agreement requires FWS to designate these areas in "at least a general distribution . . . around the entire region." Order of July 9, 2002 at 9-10, 12.

In light of this reading by the Court, the settlement agreement as it was entered into by the parties was illegal. The Administrative Procedure Act ("APA") mandates that agencies follow notice and public comment procedures before promulgating a substantive rule. 5 U.S.C. § 551 et seq. (2002). An agency may not bypass those procedures, forego its discretion, and determine the substantive outcome of a rule-making as part of a settlement agreement. Natural Resources Defense Council v. EPA, 859 F.2d 156, 194 (D.C. Cir. 1988); See Citizens for a Better Environment v. Gorsuch, 718 F.2d 117, 1129-30 (D.C. Cir. 1983) (settlement did not impermissibly infringe upon agency discretion since it did not prescribe a substantive outcome but was process-oriented); See also, Centers for Biological Diversity v. Bureau of Land Management 2001 WL 777088 at * 6 (N.D. Cal. 2001) (consent decree lawful where agency could exercise its discretion in a manner consistent with the law); Natural Resources Defense Council v. Whitman, 2001 WL 1221774 at * 8 (N.D. Cal. 2001). Therefore, in light of the manner in which the court has interpreted the settlement agreement, the FWS bargained away its discretion, binding itself to some substantive outcome in its rule-making before actually engaging in that rule-making. Accordingly, the settlement agreement violates the APA.

Since the settlement agreement was unlawful at its inception as the court has now interpreted it, the only remedy lawfully available to the court is to vacate the settlement agreement. A contract or settlement agreement can not bind a party to commit an illegal act. Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982). A court should release a party from its obligations under a contract or settlement agreement when it is confronted with the prospect of violating the law by complying with the settlement agreement. Id. Therefore, because the agreement to settle the dispute as interpreted by this court

bound FWS to violate the APA, the court should not require FWS to violate the law, and it should vacate the settlement agreement.^{3/}

While the FWS believes vacature of the settlement agreement in this manner is the only lawful remedy, such a belief is only occasioned by the court's order, it is a result that the FWS sought to avoid by arguing to the court that it not adopt plaintiffs' reading of the settlement, and it is a result about which the FWS is deeply troubled.

Finally, the plaintiffs requested attorney's fees in their original motion, and the court did not mention or award fees in its order. While there are detailed dispute resolution provisions in the settlement that were invoked in this instance, there is no provision in the settlement agreement that would provide a party prevailing in a settlement dispute with attorney's fees. The parties were free to include such provisions to allow one party to collect attorney's fees from another in the event of a breach, but the parties chose not to do so. In the absence of such language, the general rule of contract construction should apply, and the parties' attorney's fees are therefore not recoverable.

Respectfully Submitted,

THOMAS L. SANSONETTI,
Acting Assistant Attorney General

^{3/} We note that it is within the court's power to vacate only the section of the settlement agreement that pertains to the refuge and sanctuary issue. Where a contract or settlement agreement is clearly divided into sections such that the rights and obligations in one section are easily separable from those in another section, the contract or settlement agreement is considered "divisible," and the invalidity of one section will not necessarily doom the entire agreement. Restatement (Second) of Contracts § 184 (1979 Main Vol.); 17A Am. Jur. 2d Contracts § 414 (2002); Habib v. Raytheon Co., 616 F.2d 1204, 1208-09 (D.C. Cir. 1980). As this court has recognized, the manatee settlement agreement is not a unified whole, and is clearly divided into sections that achieve various purposes through unrelated actions. Order at 2. Therefore, the court should vacate only the provisions of the settlement agreement that relate to the refuge and sanctuary issue, yet leave the other lawful sections in place.

Environment and Natural Resources Division
SETH BARSKY, Assistant Chief
Wildlife and Marine Resources Section

Wayne Hetttenbach Date: *7/27/02*

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FOR THE DISTRICT OF COLUMBIA

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v.

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DECLARATION OF MARSHALL P. JONES
DEPUTY DIRECTOR, FISH AND WILDLIFE SERVICE
UNITED STATES DEPARTMENT OF THE INTERIOR

1. I, Marshall P. Jones, hereby aver as follows: I am the Deputy Director of the United States Fish and Wildlife Service (Service). I exercise authority delegated by the Congress and by the Secretary of the Interior. As Deputy Director, I supervise all of the Service's fish and wildlife conservation programs, including the endangered species program.
2. In response to this court's Order dated July 9, 2002, this declaration is tendered. This declaration provides information on the procedures and time frames that are required for new final manatee protection area rulemaking. The information is based on my personal knowledge and knowledge I have gained in my official capacity.
3. On August 10, 2001, the Service published its proposed rule for the designation of manatee refuges and sanctuaries, 66 Fed. Reg. 42318 (August 10, 2001), which included a sixty-day public comment period. The Service proposed to establish sixteen (16) additional manatee protection areas in Florida, i.e., four (4) areas in Hillsborough, Pinellas, and Citrus Counties, as manatee sanctuaries in which all waterborne activities would be prohibited, with an exception for residents, and twelve (12) areas located in Pinellas, Sarasota, Charlotte, DeSoto, Lee, and Brevard Counties, as manatee refuges, in which certain waterborne activities would be prohibited or regulated.
4. On January 7, 2002, the Service published its final rule, 67 Fed. Reg. 680 (January 7, 2002), having determined that only two (2) of the sixteen (16) sites in Brevard County (Barge Canal and Sykes Creek) merited designation at that time.
5. In view of the procedures that the Service must follow in order to promulgate a final rule, and other obligatory tasks that the Service must accomplish pursuant to the settlement agreement, the Service believes that a realistic time frame for moving forward with final manatee protection area

EXHIBIT

A

rulemaking would, considering the fourteen (14) sites identified in paragraph three (3) of this declaration, be December 2, 2002.¹

6. The following summarizes the steps necessary to complete the manatee protection area rulemaking, including specific tasks and estimates of time to complete those tasks:

A. Field Office: Preparation of the draft final rule by the Field Office - complete draft final rule by September 20, 2002. This includes: coordination with State/local governments, development of analyses to support final determinations for each site, response to public comments, development of revised maps, revision of the text of the Code of Federal Regulations, update of manatee status and population data, revisions to the Environmental Assessment to analyze changes to the rule, revision of the economic analysis (dependent on Washington Office Division of Economics), revision of section 7 consultation as appropriate, update of the record of compliance to reflect final determinations, revision of outreach package, organization of the literature cited and preparation of the administrative record.

B. Regional Office: Review/processing time - September 21, 2002 to October 7, 2002. This includes review of the new final rule and supporting documents.

C. Solicitor Office (Regional and Washington Office): review time- October 8, 2002 to October 17, 2002. This includes review of the new final rule and supporting documents.

D. Department/Washington Office: review time- October 18, 2002 to November 15, 2002. This includes review of the new final rule and supporting documents.

E. Office of Management and Budget (OMB): November 16, 2002 to November 25, 2002: Our past experience has been that OMB generally completes its review within two (2) weeks. However, we must advise the court that, pursuant to Executive Order 12866 of September 30, 1993, Section 6(b)(2)(B), OMB could take up to ninety (90) days to review the new final rule and supporting documentation. OMB review is not within the Service's control.

F. Federal Register: review and submission for publication - November 26, 2002 to December 2, 2002. This includes review of the new final rule and supporting documents.

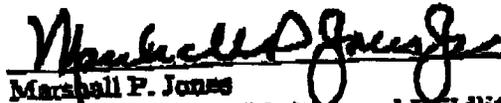
7. The preceding time frames take into consideration the fact that the Service's Jacksonville Field Office, which has the lead and expertise to develop the final rule, is simultaneously working on many other matters including commitments made in the settlement agreement. For example, the proposed Marine Mammal Protection Act incidental take rule which has a publication deadline of November 5, 2002, and essential manatee recovery tasks including the Warm Water Task Force and Habitat Working Group. These time frames also take into

¹ The December 1, 2002 date that was announced in the final rule falls on a Sunday. See paragraph 4 of the declaration.

consideration other tasks, such as section 7 consultations involving manatees, bald eagles, scrub-jays and sea turtles, that must be completed by the Field Office. While some of these tasks are not directly related to the settlement agreement, they affect the public and continue to be a priority for the Service. A time frame significantly shorter than the one outlined here would potentially adversely affect the other competing priorities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of July, 2002.



Marshall P. Jones
Deputy Director, U.S. Fish and Wildlife Service
U.S. Department of the Interior

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Federal Defendants' Position on Remedy was served, via facsimile and U.S. mail, to opposing counsel this 23rd day of July, 2002, to the following:

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