



U.S. Department of Justice

Environment and Natural Resources Division

WDH: dly

90-8-6-04673

Wildlife and Marine Resources Section

PO Box 7369

Ben Franklin Station

Washington D.C. 20044-7369

Telephone (202) 305-6210

Telecopier (202) 305-8773

August 7, 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' Response to Proposed Order and (Proposed) Order 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' RESPONSE TO PROPOSED ORDER**

Pursuant to this Court's order of August 5, 2002, the federal defendants, the U.S. Fish and Wildlife Service ("FWS") and U.S. Army Corps of Engineers ("Corps"), file this response to the plaintiffs' proposed order tendered to this Court on August 2, 2002.

If the court is inclined to grant additional relief to the plaintiffs in the form of ordering the FWS to engage in emergency rule-making, it should do so in a manner in accord with the attached proposed order.<sup>1</sup> The plaintiffs' proposal seeks to put the plaintiffs in a position to unilaterally influence, comment upon, and approve the FWS' potential emergency rulemaking, to the exclusion of the public at large and other potentially affected and interested individuals.<sup>2</sup> Further, as explained below and as

---

<sup>1</sup> By tendering such an order for the court's consideration, the federal defendants in no way concede that such relief is necessary or warranted.

<sup>2</sup> In addition, the plaintiffs' proposed order has this Court making factual findings regarding manatee mortality, with no administrative record or evidence before this Court, despite the parties having never engaged in discovery and that the parties have not engaged in any type of evidentiary exchange, and without the court having engaged in any type of evidentiary hearing. The issue before this Court involves only the legal interpretation of the settlement agreement between the parties and evaluating the timing of the regulatory actions by the FWS, and factual findings regarding manatee

demonstrated in the attached declaration of Marshall P. Jones (exhibit A),<sup>3</sup> an alternative is available that would have the FWS completing its evaluation, in accordance with the standards for emergency designation set forth at 50 C.F.R. § 17.106, determining the need for emergency designation of manatee protection areas and submitting its final emergency designations, if any, by September 16, 2002.<sup>4</sup>

If the court determines that such a remedy is warranted, it should not adopt the approach favored by the plaintiffs. The law affords the FWS discretion to adopt emergency rules to provide for manatee protection areas any time the FWS determines there is substantial evidence that there is imminent danger of taking of one or more manatees, and that such emergency designation is necessary to prevent such taking. 50 C.F.R. § 17.107. If the FWS determines such emergency designations are

---

mortality over the last five years and the current year were never issues properly before this Court. Accordingly, the court should not incorporate such factual findings into its order.

<sup>3</sup> In light of the court's two day five p.m. filing deadline, the Jones Dec. could not be completed prior to filing this motion. The FWS has orally represented to counsel the information to be contained in that declaration, and it will be filed as a supplemental exhibit later this evening or tomorrow, August 8, 2002.

<sup>4</sup> We note, as an initial matter, an order directing it to engage in emergency rulemaking is not warranted. First, the court has already ordered the FWS to engage in final agency rule-making for manatee protection, which will result in the final rulemaking occurring within just the next three months. Ordering FWS to simultaneously engage in additional emergency rulemaking, while it meets the existing deadline imposed by this Court's already entered order, as well as its already pre-existing obligations under the settlement agreement to promulgate new regulations under the Marine Mammal Protection Act, would create an undo hardship upon the FWS. Second, the FWS does not believe an imposition of emergency rulemaking is tied to the violation of the settlement agreement alleged by the plaintiffs. Paragraph 11 of the settlement agreement contains an obligation on the FWS to have evaluated the propriety of emergency rules, separate and apart from its final rulemaking, and to promulgate such rules as it determines in its discretion are necessary. There has been no allegation or finding that the FWS has ever violated the portion of the settlement agreement that relates to emergency rules, and under the settlement agreement the FWS has already considered whether such emergency rules were warranted. Accordingly, the imposition of a requirement to engage in emergency rulemaking is not warranted.

necessary, the FWS must publish a notice in a newspaper of general circulation in each county in which an area is to be designated, containing the information as provided in 50 C.F.R. § 17.103 regarding the areas to be designated. 50 C.F.R. § 17.107(b)(1). The emergency designation does not become effective until the FWS physically posts signs in each of the areas to be designated clearly making the boundaries of the protection areas. 50 C.F.R. § 17.107(b)(2). Whatever schedule the court may set for FWS' consideration and potential designation of these areas, it must provide the FWS with a reasonable schedule to both make the requisite scientific findings, determine the appropriate boundaries, formulate a proper notice for publication in the necessary county newspapers, create and construct suitable signs, and task agents or employees to travel around the waterways of the state to the designated areas to physically post these signs marking the boundaries of the emergency designated areas. To demark the boundaries, such posting may require the FWS to erect physical structures such as pylons to which the signs could be attached if none exist at the areas boundaries. If the FWS must erect such pylons, it must receive approval to do so from a variety of federal and state agencies. Jones Dec. In fashioning any type of emergency remedy, the Court must be aware of the regulatory and practical on-the-ground burdens placed upon FWS prior to making any such emergency designation effective.<sup>5</sup> The FWS should be given a reasonable opportunity to meet any new deadlines in relation to the task at hand, and considering the court's current order to engage in new final rulemaking in just a few months time, its need to continue to work on new regulations under the Marine Mammal Protection Act as called for in the settlement agreement, as well as its obligations to meet all its other statutory

---

<sup>5</sup> We note that under the plaintiffs approach, if the FWS was unable to secure plaintiffs' agreement and were forced to return to this Court, even if the court then ordered the FWS to engage in emergency rulemaking, there would not be sufficient time to accomplish the tasks necessary to take such an action before the new final rules are promulgated by the court's November 1, 2002 deadline.

obligations.

While the FWS believes the better course of action is to issue no further orders or remedies, and allow it to proceed with the considerable regulatory burdens imposed by those orders already in place, the FWS has tendered an appropriate order for this court's consideration, should it chose to grant the plaintiffs this type of relief. The order spells out that the FWS will commit to publishing final emergency manatee protection designations for the areas identified at 66 Fed. Reg. 42318 (August 10 2001) (the sixteen originally proposed potential manatee protection areas) in accord with the standards set at 50 C.F.R. § 17.106 by September 16, 2002. In addition, in an attempt to cut delays as much as possible in making such designations effective, the FWS has already begun the acquisition process for sign construction, and has already begun discussions with the appropriate federal agencies from whom permission would be required before such signs could be posted. The FWS has taken these actions to demonstrate that it is moving with all possible speed to provide for manatee protections consistent with its legal obligations. Unfortunately, it is beyond the FWS' ability or power to control the pace of acquisitions and other agencies' approvals. FWS assures the court that in the even the court orders it to take this course of action it will move with all possible speed to provide such manatee protections.

In a further effort to demonstrate to this Court that the FWS is moving with all possible speed to address manatee protections beyond those even contemplated in the original settlement agreement, and beyond those areas even originally proposed at 66 Fed. Reg. 42318, the Jones declaration recites that once this new review for emergency designation of the originally proposed sites is complete, and once the FWS completes its new final rule making process, already truncated to meets the court's November 1, 2002 deadline, the FWS intends to evaluate the propriety of issuing new proposed emergency rulemaking for manatee protection areas that go beyond those sixteen sites originally

identified by the FWS at 66 Fed. Reg. 42318. To be clear, these are additional steps that the FWS is advising the Court that it intends to take that go far beyond those that were contemplated in either the settlement or the FWS' prior rulemaking and evidences the FWS' continuing desire to provide the best possible manatee protections in a way that is consistent with its regulatory obligations.

This potential remedy is far superior to the process proposed by the plaintiffs that has the plaintiffs participating in, and in effect, being given veto power over the FWS emergency rulemaking, to the exclusion of the public at large and other interested parties. The process envisioned by the plaintiffs<sup>4</sup> creates procedural rights never contemplated in the settlement agreement and not afforded to any other parties or the public at large. Proceeding in the manner the FWS has outlined provides a reasonable time table to accomplish the tasks at hand, and will result in a more informed and complete emergency rule making by allowing all interested parties, not just the plaintiffs, to be involved to the maximum extent possible considering the nature of an emergency rule.

Furthermore, the plaintiffs' approach undermines the plaintiffs' premise, namely that the rulemaking must be done on an emergency basis. If areas are truly in need of designation in light of some emergency situation that justifies setting aside the normal constraints of the APA, then the process the plaintiffs have outlined does not have the FWS moving on an emergency basis, but rather engaging first in a dialog with the plaintiffs and then potentially returning to this Court in the event the plaintiffs do

---

<sup>4</sup> The proposed order submitted by the plaintiffs seeks to have this Court direct FWS to open its decision making process to the plaintiffs, seek plaintiffs' input on the "appropriate steps" the FWS should take, and then force the FWS to "reach an understanding" with the plaintiffs. If the FWS fails to "reach an understanding" with the plaintiffs (and no other interested person), which is nothing more than a euphemism for "secure plaintiffs' approval," the plaintiffs are to be free to report so to the Court, and then come back to this Court and alone propose new additional relief, without the benefit or input of any party, the public at large, or any interested person.

not approve of the FWS' decision making. If there is sufficient time to engage the plaintiffs in such discussions, then surely there is sufficient time to engage the public at large, and there is no emergency situation that justifies setting aside the normal requirements placed upon FWS by the APA, and the normal preference for public involvement. The approach proposed by the FWS is far superior to the approach presented by the plaintiffs, allows for greater public participation in the process, does not place any one person or organization in a position superior to any other, and sets definite dates for action to be taken by the FWS, resulting in real manatee protections getting put into place sooner.

Therefore, in the event the court believes an order directing the FWS to consider emergency rulemaking is warranted, the court should enter an order that directs the FWS to engage in such a rulemaking, consistent with the regulatory criteria, within a specified time-period that is consistent with an emergency situation.

Respectfully Submitted,

THOMAS L. SANSONETTI,  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
SETH BARSKY, Assistant Chief  
Wildlife and Marine Resources Section

 Date: 8/7/02  
WAYNE D. HETTENBACH, Trial Attorney  
Environment and Natural Resources Division  
U.S. Department of Justice  
Ben Franklin Station, P.O. Box 7369  
Washington, DC 20044-7369  
t: 202-305-0213  
f: 202-305-0275

Attorneys for Defendant

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)

**ORDER [proposed] REGARDING EMERGENCY RULE-MAKING**

This matter is before the Court on Plaintiffs' Expedited Motion to Enforce the Court-ordered Settlement Agreement. On July 9, 2002 the Court granted plaintiffs motion, found that federal defendants were in violation of the court-ordered settlement, and directed the parties to further brief remedy. At oral argument held on July 31, 2002, the court directed plaintiffs to tender a proposed order concerning appropriate relief to direct the U.S. Fish and Wildlife Service ("FWS") to engage in emergency rulemaking to establish manatee protection areas. On August 2, 2002, the Court entered its order specifying the remedy it had devised to date for the FWS' violation of the Court-ordered Settlement Agreement. On August 5, 2002, the Court ordered the federal defendants to file a response to the proposed order for additional relief tendered by plaintiffs on August 2, 2002, and for the plaintiffs to reply by August 9, 2002.

Having considered the briefs and positions of the parties with respect to additional relief, the Court determines that additional relief is warranted and it is hereby

**ORDERED**, that the FWS shall review the sixteen areas identified in its proposed rulemaking

for manatee protection areas at 66 Fed. Reg. 42318 (August 10, 2001) and determine, in its sole discretion, whether any of these areas are in need of emergency designation in accordance with law and pursuant to 50 C.F.R. §17.106 as manatee protection areas as defined at 50 C.F.R. § 17.102, not later than September 16, 2002; it is

**FURTHER ORDERED** in the event the FWS determines that any of these areas are in need of emergency designation as manatee protection areas, the FWS shall submit such final emergency regulations, if any, for publication in the Federal Register not later than September 16, 2002; it is

**FURTHER ORDERED** that the FWS shall complete the acts set forth at 50 C.F.R. § 17.106(b)(2) without unnecessary delay.

**IT IS SO ORDERED.**

\_\_\_\_\_  
Date

\_\_\_\_\_  
Emmett G. Sullivan  
United States District Judge

Notice to:

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

SAVE THE MANATEE CLUB, et al.

Plaintiffs,

v.

BALLARD, et al.

Defendants,

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

**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 August 1, 2002, Plaintiffs filed their proposed order for the emergency designation of refuges and sanctuaries. In response to this court's Order and plaintiffs' proposed Order, this declaration is tendered. This declaration provides information regarding actions that the Service is prepared to take with regard to emergency designations and final rulemaking for manatee protection areas. The information is based on my personal knowledge and knowledge I have gained in my official capacity.

3. The Service proposes to apply the process set forth at 50 C.F.R. § 17.106, Emergency Establishment of Protection Areas, to the fourteen (14) sites that have been identified by the Service in the proposed rule as the highest priority sites. If during this process, it is determined that any of these sites warrant emergency designation, the Service will move forward with emergency designation.

4. A notice will be filed for publication with the Office of the Federal Register no later than September 16, 2002, that announces the Service's decision on whether any of the sites warrant emergency designation, together with appropriate emergency designations for those warranted sites.

5. The Service is currently undertaking actions necessary for posting sites, including obtaining signs for these areas and seeking appropriate permits.

6. The Service will work with other appropriate entities to provide enforcement. The Service

specifically funds staff in the Law Enforcement (LE) and the National Wildlife Refuge (NWR) programs to implement the Service's law enforcement program directed to manatee protection and recovery. The LE program will continue to support a special agent dedicated primarily to manatee protection, as well as use task force operations to assist enforcement of speed zones in high priority areas. The Service will continue to allocate funds to the NWR program to support the refuge officers at Ten Thousand Islands NWR, Florida, Lake Woodruff NWR, Crystal River NWR, and Merritt Island NWR. These refuge officers conduct enforcement measure in and around the refuges and work with the LE program on task force operations. Additionally, the Service will continue to coordinate the LE program, including the enforcement of speed zones, with the State of Florida.

7. Pursuant to this court's Order, final rulemaking for all fourteen (14) sites will be submitted to the Federal Register no later than November 1, 2002.

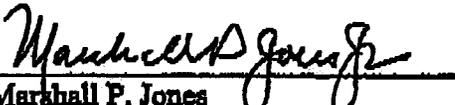
8. After completion of the above-described process together with completion of the proposed Incidental Take rule by November 6, 2002 (required by the Settlement Agreement), the Service is prepared to initiate another process to evaluate the propriety of undertaking additional measures to protect manatees, including establishing additional manatee protection areas. The Service proposes the following strategy:

A. Pursuant to the Florida Manatee Recovery Plan, the Service will use the Habitat Working Group (HWG) to identify and make recommendations for any additional habitat protection needs for the recovery of the manatee. To facilitate public participation in this process, the Service proposes to submit to the Federal Register, not later than November 1, 2002, a notice to solicit information from the public, including the plaintiffs, regarding the need for additional manatee protection areas. The public comment period for this notice will be ninety (90) days. The Service will conduct public meetings as requested during this time period to ensure full public participation on the issue. Once the comment period is closed, the Service will host a workshop of the Recovery Team and HWG members to discuss, evaluate and prioritize additional habitat protection needs; and,

B. If it is determined through this process that emergency designation of particular sites is warranted, the Service will make such designations and proceed to final rulemaking as expeditiously as possible.

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

Executed on this 7<sup>th</sup> day of August, 2002.

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

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SAVE THE MANATEE CLUB, et al.

Plaintiff,

v.

BALLARD, et al.

Defendant.

Civil No. 00-00076 (BGS/IMF)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Federal Defendants' Response to Proposed Order and (Proposed) Order was served, via facsimile and U.S. mail, to opposing counsel this 7th day of August, 2002, to the following:

Eric R. Glitzenstein  
Meyer & Glitzenstein  
Suite 700  
1601 Connecticut Ave., N.W.  
Washington, D.C. 20009  
(202) 588-5049

Virginia S. Albrecht  
Horton & Williams  
1900 K Street, N.W.  
Washington, D.C. 20006  
(202) 778-2201

John Longstreth  
Preston, Gates, Ellis & Rouvelas Meeds  
1735 New York Avenue, N.W.  
Suite 500  
Washington, D.C. 20006  
(202) 761-4932

  
WAYNE HETTENBACH