

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

TURTLE ISLAND RESTORATION
NETWORK, CENTER FOR BIOLOGICAL
DIVERSITY, DEFENDERS OF WILDLIFE,
AND SEA TURTLE CONSERVANCY

Plaintiffs,

vs.

Case No. 1:11-cv-01813-ABJ

NATIONAL MARINE FISHERIES SERVICE

Defendant

SETTLEMENT AGREEMENT AND STIPULATION OF DISMISSAL

WHEREAS, Plaintiffs Turtle Island restoration Network, Center for Biological Diversity, Defenders of Wildlife, and Sea Turtle Conservancy (“Plaintiffs”) commenced this action on October 13, 2011 challenging actions and inactions of the National Marine Fisheries Service (“Defendant” or “NMFS”) with regard to the Gulf of Mexico and South Atlantic shrimp trawl fisheries;

WHEREAS, Plaintiffs seek declaratory and injunctive relief for alleged violations of the Endangered Species Act of 1973 (“ESA”);

WHEREAS, all sea turtles that occur in U.S. waters are listed as either endangered or threatened under the ESA. The Kemp’s ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as

endangered;

WHEREAS, on May 20, 1981, NMFS published the final rule pursuant to the Magnuson Fishery Conservation and Management Act of 1976 (“Magnuson Act”), 16 U.S.C. § 1801 et seq., implementing the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico. 46 Fed. Reg. 27,489;

WHEREAS, on October 27, 1993, NMFS published the final rule pursuant to the Magnuson Act implementing the Fishery Management Plan for the Shrimp Fishery of the South Atlantic. 58 Fed. Reg. 57,750;

WHEREAS, on June 29, 1987, NMFS published the final rule pursuant to Section 4(d) of the ESA, 16 U.S.C. § 1533(d), requiring the installation and use of turtle excluder devices in many shrimp vessels (“Sea Turtle Conservation Regulations”);

WHEREAS, the NMFS Sea Turtle Conservation Regulations are currently codified at 50 C.F.R. § 223.205 et seq.;

WHEREAS, on August 17, 2010, NMFS reinitiated ESA consultation on shrimp trawling in the southeastern United States (i.e., in state and Federal waters) to re-analyze its effects on sea turtles;

WHEREAS, on June 24, 2011, NMFS published a notice of intent to prepare an Environmental Impact Statement (“EIS”) and to conduct public scoping meetings to comply with the National Environmental Policy Act (“NEPA”) by assessing potential impacts resulting from the proposed implementation of new sea turtle regulations pursuant to the ESA in the Atlantic and Gulf of Mexico shrimp trawl fisheries. 76 Fed. Reg. 37,050;

WHEREAS, NMFS has increased fishery observer coverage in 2012 aboard skimmer

trawl vessels in the northern Gulf of Mexico to more effectively monitor interactions with sea turtles;

WHEREAS, between the effective date of this agreement and September 30, 2012, NMFS plans to publish at least once monthly on the NMFS Southeast Regional Office website periodic reports of enforcement efforts relative to the Sea Turtle Conservation Regulations, with the reports including the number of vessel inspections conducted by NMFS law enforcement agents and the state where the inspections occurred;

WHEREAS, between the effective date of this agreement and September 30, 2012, NMFS plans to publish at least every other week on the NMFS Southeast Regional Office website periodic reports of sea turtle strandings, observed along the coasts of Louisiana, Mississippi, and Alabama, with the reports including the number of turtle strandings, species of stranded turtles, and location of the strandings;

WHEREAS, Plaintiffs and Federal Defendant, through their authorized representatives and without trial or final adjudication of the issues of fact or law with respect to Plaintiffs' claims on the merits, have reached a settlement thereof and hereby consent to the dismissal of Plaintiffs' causes of action as discussed herein;

NOW, THEREFORE, PLAINTIFFS AND FEDERAL DEFENDANT HEREBY AGREE AS FOLLOWS:

1. RULEMAKING - Defendant hereby agrees to publish a proposed rule pursuant to Sections 4(d) and 11(f) of the ESA, 16 U.S.C. § 1533(d), 1540(f), to address sea turtle interactions with skimmer trawls harvesting shrimp in state waters in the Southeast United States by May 9, 2012. As part of the proposed rule, NMFS will propose an effective date of no later

than March 15, 2013. If Defendant determines that a final rule is warranted, it will publish a final rule by November 27, 2012. The Parties agree that a filing with the Office of the Federal Register constitutes publication for purposes of this Settlement Agreement and in accordance with the Federal Register Act, 44 U.S.C. § 1507. If Defendant determines that a final rule is not warranted, Defendant will file a status report with the Court by November 27, 2012.

2. ENDANGERED SPECIES ACT CONSULTATION - On or before May 9, 2012, Defendant agrees to issue a new biological opinion with respect to listed sea turtles, the Atlantic sturgeon, Gulf Sturgeon, and the smalltooth sawfish on the continued implementation of the sea turtle conservation regulations and continued authorization of fishing activities pursuant to the Gulf of Mexico and South Atlantic Shrimp Fishery Management Plans.

3. ATTORNEYS' FEES - Notwithstanding entry of this Stipulated Settlement Agreement, Plaintiffs' claim for attorney fees and costs under in this litigation remains unresolved. Defendant agrees that Plaintiffs are the "prevailing parties" in this action, and agrees that Plaintiffs are entitled to recover reasonable attorneys' fees and costs, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or the Endangered Species Act, 16 U.S.C. § 1540. The Parties agree to determine the appropriate amount of attorneys' fees and costs to be paid to Plaintiffs pursuant to Paragraph 4 below.

4. The Parties respectfully request an order setting the following schedule for addressing attorneys' fees and costs:

(a) Within 30 days of the entry of this Stipulated Settlement Agreement, the Parties will notify the Court whether they have reached a settlement as to the payment of Plaintiffs' attorneys' fees and costs by Defendant; and

(b) If the Parties have not reached agreement on attorneys' fees and costs at the time they provide this notice to the Court, Plaintiffs may move within 30 days of that date for the Court to award attorneys' fees and costs. Defendant's opposition is due 30 days thereafter, and Plaintiffs' reply is due 15 days thereafter. In the event Plaintiffs file such a motion, Plaintiffs and Defendant reserve any and all arguments for and defenses to such an award including jurisdictional defenses pertaining to, entitlement, or the reasonableness of any amount. Plaintiffs further reserve the right to seek fees for hours expended on the fees motion.

5. RELEASE OF CLAIMS FOR FEES AND COSTS - Plaintiffs agree to accept payment (to be determined pursuant to Paragraph 4 above) in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in this matter through and including the date of any agreement or order pursuant to Paragraph 4 above. Plaintiffs agree that receipt of such payment from Defendant shall operate as a release of Plaintiffs' claims for attorney's fees and costs in this matter, through and including the date of any agreement or order pursuant to Paragraph 4 above.

6. FUTURE FEE CLAIMS - By this Agreement, Defendant does not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including hourly rates, in any future litigation, or continuation of the present action. Further, this Agreement has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

7. MODIFICATION OF AGREEMENT - Either party may seek to modify the terms of this Agreement for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes the other party has failed to comply with any term or condition of this Agreement, the parties shall use the dispute resolution procedures

specified in Paragraph 8 below.

8. DISPUTE RESOLUTION - This Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by (i) written stipulation between the parties filed with and approved by the Court, or (ii) upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadlines specified in Paragraph 1, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other party with notice of the claim. The parties agree that they will meet and confer (telephonically or in-person) at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court.

9. ENFORCEMENT OF AGREEMENT - In the event that Plaintiffs believes Defendant has failed to comply with a term of this Agreement and has not sought to modify it, Plaintiffs sole remedy shall be to re-commence their lawsuit or file a new lawsuit. This Agreement shall not, in any instance, be enforceable through a proceeding for contempt of court.

10. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendant take action in contravention of the ESA, the Administrative Procedure Act (“APA”), or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the Defendant by the ESA, the APA, or general principles of administrative law with

respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination.

11. This Agreement is being entered into so as to avoid further litigation of the Plaintiffs' pending lawsuit. Nothing in this Agreement shall be construed to constitute an admission of any issue of fact, law or liability by any of the parties. Except as expressly provided in this Agreement, none of the parties waives or relinquishes any legal rights, claims or defenses it may have.

12. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that NMFS is obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.

13. The parties agree that this Agreement was negotiated in good faith and that this Agreement constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

15. The terms of this Agreement shall become effective upon entry of an Order by the Court ratifying the Agreement.

16. DISMISSAL WITHOUT PREJUDICE - Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), the parties hereby stipulate to dismissal of this action without prejudice. Notwithstanding the dismissal without prejudice of this action, the parties hereby stipulate and

respectfully request that the Court retain jurisdiction to resolve any motions for attorneys' fees pursuant to Paragraph 4 above and to modify the terms of the parties' Settlement Agreement, if necessary, pursuant to Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381-82 (1994).

SETTLEMENT AGREEMENT APPROVED:

Date: April 26, 2012

/s/ Sierra B. Weaver
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Date: April 26, 2012

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