FILED 10 AUG 23 1351 USDC-ORP

ALLISON LAPLANTE
Pacific Environmental Advocacy Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6894 (phone)
(503) 768-6642 (fax)
laplante@lclark.edu

Attorney for Plaintiff

DWIGHT C. HOLTON (OSB No. 09054)
Interim United States Attorney
District of Oregon
STEPHEN J. ODELL (OSB No. 90353)
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204-2902
(503) 727-1197 (tel) / (503) 727-1117 (fax)

IGNACIA S. MORENO
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division
MEREDITH L. FLAX (DCB 468016)
Senior Trial Attorney
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
(202) 305-0404 (phone)
(202) 305-0275 (fax)
meredith.flax@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL ADVOCATES,

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

Civil No.: 10-907-BR

STIPULATED ORDER OF DISMISSAL

Plaintiff Northwest Environmental Advocates ("Plaintiff"), and Defendants the Secretary of Commerce, through the National Marine Fisheries Services ("NMFS") and the Secretary of Interior, through the U.S. Fish and Wildlife Service ("FWS") (collectively, "Defendants"), state as follows:

WHEREAS, Plaintiff filed the present lawsuit on August 2, 2010 in the district court for the District of Oregon, in which Plaintiff seeks a judgment declaring that Defendants have failed to timely complete Endangered Species Act ("ESA") section 7 consultations with the U.S. Environmental Protection Agency ("EPA") regarding EPA's Proposed Approval of Certain Oregon Administrative Rules Related to Revised (Aquatic Life) Water Quality Criteria for Toxic Pollutants (hereinafter, "consultations"), in violation of the ESA and the Administrative Procedure Act ("APA"), an order compelling Defendants to complete the consultations, including the issuance of biological opinions, by dates certain, and Plaintiff's attorneys' fees and costs;

WHEREAS, NMFS has developed a schedule providing an estimated deadline for completion of its consultation of December 31, 2011; and FWS has developed a schedule providing an estimated deadline for completion of its consultation of June 30, 2012;

WHEREAS, Plaintiff and Defendants, through their authorized representatives and without any admission or final adjudication of any issues of fact or law or waiver of any factual or legal claim or defense with respect to Plaintiff's complaint have reached a settlement that they consider to be a fair, adequate, and equitable resolution of Plaintiff's claims and to be in the public interest;

WHEREAS, the parties do not intend to resolve any disputes with respect to Oregon's human health water quality criteria for toxic pollutants;

WHEREAS, the parties agree to enter into this Stipulated Order of Dismissal as an appropriate way to resolve the claims Plaintiff has brought in this action.

NOW, THEREFORE, the parties agree and stipulate as follows:

1. NMFS will complete its consultation with EPA consistent with the requirements of the ESA and applicable regulations on or before December 31, 2011;

2. FWS will complete its consultation with EPA consistent with the requirements of the ESA and applicable regulations on or before June 30, 2012;

3. Defendants will provide written reports to Plaintiff describing the status of the consultations, including information regarding Defendants' progress with respect to the individual work items and schedules set forth in Defendants' work plans and the deadlines for completion of the consultations provided for in this Stipulated Order of Dismissal. Such progress reports will, *inter alia*, highlight any difficulties, delays, and/or unanticipated issues. Defendants will provide Plaintiff progress reports every four months until the consultations are completed, beginning four months from the effective date of this Stipulated Order of Dismissal.

4. If it becomes necessary during the course of the consultations to elevate any disagreements between FWS and/or NMFS and EPA regarding the consultation(s), Defendants will follow the procedures outlined in the *Memorandum of Agreement Between the*

Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination under the Clean Water Act and Endangered Species Act, February 22, 2001. See 66 Fed. Reg. 11,202 (Feb. 22, 2001).

5. Defendants shall make every effort to comply with the deadlines set forth in this Stipulated Order of Dismissal in good faith. If, however, due to unforeseen circumstances, Defendants are unable to meet the deadlines, Defendants reserve the right to seek reasonable modifications of the deadlines. In such a case, Defendants will notify Plaintiff of the requested modification and the reasons therefor. The parties will meet and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the request before pursuing relief from the Court. In the event a resolution is reached, the parties shall jointly move the Court to modify this Stipulated Order of Dismissal. If the parties are unable to agree, the parties reserve the right to seek the Court's intervention to enforce, alter, or modify the terms and conditions of this Stipulated Order of Dismissal.

6. In the event that either or both Defendants fail to meet a deadline and have not sought to modify it pursuant to the procedures set forth in Paragraph 5, Plaintiff's first remedy shall be a motion to enforce the terms of this Stipulated Order of Dismissal. This Stipulated Order of Dismissal shall not, in the first instance, be enforceable through a proceeding for contempt of court. However, this Stipulated Order of Dismissal does not affect the availability of remedies, including contempt, should either or both Defendants fail to comply with court orders issued, subsequent to missed deadlines, regarding the schedule of events to which the parties have agreed.

7. No party shall use this Stipulated Order of Dismissal or the terms herein as evidence of what does or does not constitute a reasonable time line for completing consultation pursuant to 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402 in any other court proceeding regarding the Services' implementation of the ESA.

8. Upon entry of this Stipulated Order of Dismissal, this action is dismissed with prejudice. Nothing in this Stipulated Order of Dismissal shall preclude Plaintiff from bringing

claims challenging any final biological opinion regarding Oregon's aquatic life water quality criteria for toxic pollutants. Any challenge to such biological opinion shall be brought in a new lawsuit.

9. Defendants agree that Plaintiff is a "prevailing party" in this action and agree to pay Plaintiff reasonable attorney fees and costs, pursuant to the Equal Access to Justice Act in the total amount of $13,500.00. Defendants shall submit all necessary paperwork authorizing payment to the appropriate offices for the processing of said payment within ten (10) business days of entry by the Court of this Stipulated Order of Dismissal. Payment shall be by wire transfer to:

Pacific Environmental Advocacy Center
Bank name: Key Bank
Bank address: P.O. Box 22114, Albany, NY 12201-2114
ABA#: 123002011
Routing #: 123002011
Account # 370181015444
Name of account: Pacific Environmental Advocacy Center Attorney Escrow Account/IOLTA
Federal Tax #: 93-0386858

10. Plaintiff agrees to accept payment of $13,500.00 in full satisfaction of any and all claims for attorney fees and costs of litigation to which Plaintiff is entitled in the above-captioned litigation, through and including the date of this Agreement. Plaintiff agrees that receipt of this payment from Defendants shall operate as a release of Plaintiff's claims for attorney fees and costs in this matter, through and including the date of this Stipulated Order of Dismissal.

11. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this Stipulated Order of Dismissal arising from a need to enforce or defend against efforts to modify the underlying schedules outlined in Paragraphs 1 and 2, or for any other unforeseen continuation of this action.

12. By this Stipulated Order of Dismissal, Defendants do not waive any right to contest fees claimed by either Plaintiff or Plaintiff's counsel, including the hourly rate, in any

other lawsuit, or continuation of the present action. Further, Plaintiff and Defendants agree that this stipulation as to attorney fees and costs has no precedential value and shall not be used as evidence in any other attorney fee litigation.

13. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the parties to this Stipulated Order of Dismissal to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance, modify, and/or resolve any dispute regarding the terms or conditions of this Agreement, and for granting any further relief as the interests of justice may require. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

14. This Stipulated Order of Dismissal shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Stipulated Order of Dismissal, the obligations set forth in this Stipulated Order of Dismissal are null and void.

15. This Stipulated Order of Dismissal is not to be construed as a concession by any party as to the validity of any fact or legal position concerning the claims or defenses in this action.

16. Nothing in this Stipulated Order of Dismissal shall be interpreted as, or shall constitute, a commitment or requirement that Defendants are 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.

17. No provision of this Stipulated Order of Dismissal shall be interpreted as or constitute a commitment or requirement that Defendants take action in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing in this Stipulated Order of Dismissal shall be construed to limit or modify the discretion accorded to Defendants by law with respect to the procedures to be followed in completing the actions set forth above or the substance of any biological opinion.

Each undersigned representative of the parties certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Stipulated Order of Dismissal.

IT IS SO STIPULATED.

Dated this 18th day of August 2010.

/s/ Allison LaPlante
Pacific Environmental Advocacy Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6894 (phone)
(503) 768-6642 (fax)
laplante@lclark.edu

Attorney for Plaintiff

IGNACIA S. MORENO
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources
Division

/s/ Meredith L. Flax
Senior Trial Attorney (DCB 468016)
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
(202) 305-0404 (phone)
(202) 305-0275 (fax)
meredith.flax@usdoj.gov

Attorneys for Defendants

IT IS SO ORDERED.

Dated: August 23, 2010

Anna J. Brown
United States District Judge