

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORIGINAL
FILED

DEC 17 2001

NANCY MAVER WHITTINSON, CLERK
U.S. DISTRICT COURT

AMERICAN OCEANS CAMPAIGN, et al.)
)
Plaintiffs.)
)
v.)
)
DONALD EVANS, Secretary of Commerce,)
et al.)
)
Defendants.)

Civil No. 99-982 GK

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BY: CRS

JOINT STIPULATION AND PROPOSED ORDER

WHEREAS, plaintiffs in this case challenged the federal defendants' approval (in whole or in part) of certain fishery management plan amendments concerning essential fish habitat (EFH) in the following fishery management regions: Caribbean, Gulf of Mexico, New England, North Pacific, and Pacific (hereinafter "the EFH Amendments");

WHEREAS, plaintiffs alleged that federal defendants' approval of the EFH Amendments violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and federal defendants' own regulations, because federal defendants had (1) failed to analyze adequately the potential adverse effects of fishing gear on EFH; (2) failed to analyze adequately whether there were any practicable steps to minimize any such adverse effects of fishing on EFH; and (3) failed to take all practicable steps to minimize any such adverse effects of fishing on EFH;

WHEREAS, plaintiffs also alleged that federal defendants' approval of the EFH Amendments violated the National Environmental Policy Act (NEPA), because federal defendants had failed to analyze adequately the potential direct and indirect environmental impacts of fishing on EFH and to develop and analyze adequately a range of alternatives for minimizing any such

adverse effects of fishing on EFH;

WHEREAS, the Texas Shrimp Association and Wilma Anderson (defendant-intervenors) intervened to defend the partial approval of the Gulf of Mexico EFH Amendment;

WHEREAS, in a Memorandum Opinion and Order filed on September 14, 2000, the Court denied defendant-intervenors' motion to dismiss plaintiffs' Magnuson-Stevens Act claim as to the Gulf of Mexico EFH Amendment, and granted federal defendants' and defendant-intervenors' summary judgment motions as to plaintiffs' Magnuson-Stevens Act claims;

WHEREAS, in its September 14, 2000. Memorandum Opinion and Order, the Court granted plaintiffs' summary judgment motion as to the NEPA claims relating to the EFH Amendments at issue in this case;

WHEREAS, in its September 14, 2000, Memorandum Opinion and Order, the Court remanded the EFH Amendments at issue in this case to the federal defendants to comply with NEPA; and

WHEREAS, in its September 14, 2000, Memorandum Opinion and Order, the Court enjoined federal defendants "from enforcing the EFH Amendments until such time as they perform a new, thorough, and legally adequate EA [environmental assessment] or EIS [environmental impact statement] for each EFH Amendment";

NOW, THEREFORE, IT IS HEREBY STIPULATED AND ORDERED AS FOLLOWS:

I. JURISDICTION AND SCOPE

1. This Court has jurisdiction over the parties and subject matter of this action pursuant to 16 U.S.C. §§ 1855(f) and 1861(d) and 28 U.S.C. §§ 1331 and 1361.
2. This Joint Stipulation and Order constitutes full settlement of all of plaintiffs' claims

under the Magnuson-Stevens Act and NEPA in this case. Further, the Joint Stipulation and Order provides the basis for plaintiffs' dismissal of their appeal of the Court's summary judgment ruling on their Magnuson-Stevens Act claims. Additionally, the Joint Stipulation and Order does not constitute a settlement of plaintiffs' claims for litigation costs, including attorney fees.

II. ENVIRONMENTAL IMPACT STATEMENTS

A. General EIS Provisions

3. Federal defendants, acting through the National Marine Fisheries Service (NMFS), will prepare EISs for all of the fisheries that were challenged in this lawsuit.

4. In preparing the EISs pursuant to this Joint Stipulation and Order, NMFS will comply with the requirements of all applicable statutes and regulations, including NEPA; the Council on Environmental Quality (CEQ) NEPA implementing regulations, 40 C.F.R. Parts 1500-1508; and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-6.

5. Each EFH Amendment amends one or more fishery management plans (FMPs). For each EFH Amendment, the scope of the EISs prepared pursuant to this Joint Stipulation and Order will include analyses of the environmental impacts of fishing on EFH, including direct and indirect effects, as defined in the EFH regulations at 50 C.F.R. § 600.810, and analyses of the environmental impacts of alternatives for implementing the requirement of the Magnuson-Stevens Act, 16 U.S.C. § 1853(a)(7), that the FMP "minimize, to the extent practicable, adverse effects on [EFH] caused by fishing."

6. Each EIS (or, where appropriate, the portions thereof relating to EFH) prepared pursuant to this Joint Stipulation and Order will consider a range of reasonable alternatives for minimizing the adverse effects (as defined by the EFH regulations at 50 C.F.R. § 600.810) of fishing

on EFH, including potential adverse effects. This range of alternatives will include "no action" or status quo alternatives and alternatives setting forth specific fishery management actions that can be taken by NMFS under the Magnuson-Stevens Act. The alternatives may include a suite of fishery management measures, and the same fishery management measures may appear in more than one alternative.

7. Each draft and final EIS prepared pursuant to this Joint Stipulation and Order will identify one preferred alternative, except that, in the draft EIS, NMFS may elect, if it deems appropriate, to designate a subset of the alternatives considered in the draft EIS, as the preferred range of alternatives, instead of designating only one preferred alternative.

8. Each draft and final EIS (or, where appropriate, the portions thereof relating to EFH) prepared pursuant to this Joint Stipulation and Order will present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options, as set forth in CEQ regulation 40 C.F.R. § 1502.14.

B. EIS Preparation Schedule

9. NMFS will prepare the EISs pursuant to this Joint Stipulation and Order in accordance with the schedule attached hereto as Attachment 1. NMFS will make good-faith efforts to complete EIS preparation tasks prior to the milestones set forth in Attachment 1 and to stagger the comment periods for the EISs so as to facilitate the provision of public comment.

C. NMFS Decisionmaking Based on EISs and RODs

10. In the Record of Decision (ROD) for each EIS prepared pursuant to this Joint Stipulation and Order, NMFS will determine either that action is necessary or that action is not

necessary to comply with the requirements of Section 303(a)(7) of the Magnuson-Stevens Act. If NMFS determines that action is necessary to comply with the requirements of Section 303(a)(7) of the Magnuson-Stevens Act, NMFS will determine whether the FMP will be amended in accordance with the preferred alternative identified in the Final EIS, and, if not, what other action, if any, is necessary.

11. Except as provided in Paragraph 12 below, if NMFS determines in a ROD that action is necessary and that the applicable FMP will be amended so as to comply with the requirements of Section 303(a)(7) of the Magnuson-Stevens Act, NMFS will approve an FMP amendment and implementing regulations no later than 24 months after the date of the ROD, unless the Secretary subsequently determines that an FMP amendment and implementing regulations are no longer necessary. If NMFS determines that action other than an FMP amendment and implementing regulations is necessary, NMFS will approve that other action no later than 24 months after the date of the ROD, unless the Secretary subsequently determines that such other action is no longer necessary.

a. If NMFS determines in a ROD that an FMP will be amended, NMFS will confer with plaintiffs, the appropriate Council, and other members of the interested public, regarding the schedule for the Council to develop and submit to NMFS an FMP amendment and implementing regulations. Based in part on the comments of plaintiffs, the Council, and other members of the interested public, NMFS will develop and recommend a schedule to the Council that will enable NMFS to approve an FMP amendment and any necessary implementing regulations, as quickly as practicable, but, in any event, no later than 24 months from the date of the ROD, pursuant to the appropriate decisions made in accordance with the provisions of Paragraphs 11(b) and (c) below.

If NMFS determines in a ROD that action other than an FMP amendment is necessary, NMFS will confer with plaintiffs, the appropriate Council, and other members of the interested public, regarding the schedule for the Council to take that other action. Based in part on the comments of plaintiffs, the Council, and other members of the interested public, NMFS will develop and recommend a schedule to the Council that will enable NMFS to take that other action, as quickly as practicable, but, in any event, no later than 24 months from the date of the ROD, pursuant to the appropriate decisions made in accordance with the provisions of Paragraphs 11(b) and (c) below.

b. If the Council transmits a proposed FMP amendment and implementing regulations to NMFS in accordance with the schedule that NMFS recommends to the Council pursuant to Paragraph 11(a) above, NMFS will evaluate the FMP amendment and implementing regulations pursuant to the standards and deadlines set forth in 16 U.S.C. §§ 1851 and 1854(a)-(b). If the Council transmits a proposed action other than an FMP amendment to NMFS, in accordance with the schedule that NMFS recommends to the Council pursuant to Paragraph 11(a) above, NMFS will review; approve, disapprove, or partially approve; and, if appropriate, implement such action pursuant to the standards and time-frames established by the Magnuson-Stevens Act and other applicable law.

c. If NMFS disapproves, in whole or in part, the EFH provisions of a proposed FMP amendment and/or proposed implementing regulations submitted to NMFS pursuant to Paragraph 11(b) above, or if the Council fails to comply with the schedule recommended by NMFS pursuant to Paragraph 11(a) above, NMFS will issue a written determination, stating either that NMFS will develop an FMP amendment and/or implementing regulations or other appropriate action, or that an FMP amendment and/or implementing regulations or other actions are no longer

necessary within the timeframe proposed. If NMFS disapproves, in whole or in part, an action other than an FMP amendment submitted to NMFS pursuant to Paragraph 11(b) above, or if the Council fails to comply with the schedule recommended by NMFS pursuant to Paragraph 11(a) above for such other action, NMFS will issue a written determination, stating either that NMFS will develop an appropriate action or that no action is necessary within the timeframe proposed.

d. Nothing in this Joint Stipulation and Order will limit the discretion of NMFS to decide to issue the EISs prepared pursuant to this Joint Stipulation and Order in combination with other FMP amendments. In the event that it decides to do so, NMFS will notify the Court and plaintiffs in writing within seven days after making such a decision. Further, NMFS will not exceed the EIS preparation schedule set forth in Paragraph 9 above and Attachment 1 hereto. Nothing in this sub-paragraph will be construed to limit plaintiffs' right to sue on any grounds, including NEPA, regardless of whether NMFS decides to integrate the EISs prepared pursuant to this Joint Stipulation and Order into an EIS already being prepared for an FMP amendment.

12. As to the New England Fishery Management Council, if NMFS determines in a ROD that action is necessary and that the applicable FMP will be amended so as to comply with the requirements of Section 303(a)(7) of the Magnuson-Stevens Act, NMFS will approve an FMP amendment and implementing regulations by no later than February 1, 2005, for the groundfish and the scallop fisheries, and by no later than September 10, 2005, for the herring, monkfish, and salmon fisheries, unless the Secretary subsequently determines that an FMP amendment and implementing regulations are no longer necessary. If NMFS determines that action other than an FMP amendment and implementing regulations is necessary, NMFS will approve that other action by no later than February 1, 2005, for the groundfish and the scallop fisheries, and by no later than September 10,

2005, for the herring, monkfish, and salmon fisheries, unless the Secretary subsequently determines that such other action is no longer necessary.

a. If the Council transmits a proposed FMP amendment and implementing regulations to NMFS in a timely manner that would allow NMFS to meet its schedule for approving an FMP amendment and implementing regulations by no later than February 1, 2005, for the groundfish and the scallop fisheries, and by no later than September 10, 2005, for the herring, monkfish, and salmon fisheries, NMFS will evaluate the FMP amendment and implementing regulations pursuant to the standards and deadlines set forth in 16 U.S.C. §§ 1851 and 1854(a)-(b). If the Council transmits a proposed action other than an FMP amendment to NMFS in a timely manner that would allow NMFS to meet its schedule for approving that other action by no later than February 1, 2005, for the groundfish and the scallop fisheries, and by no later than September 10, 2005, for the herring, monkfish, and salmon fisheries, NMFS will review; approve, disapprove, or partially approve; and, if appropriate, implement such action pursuant to the standards and time-frames established by the Magnuson-Stevens Act and other applicable law.

b. If NMFS disapproves, in whole or in part, the EFH provisions of a proposed FMP amendment and/or ~~proposed~~ implementing regulations submitted to NMFS pursuant to Paragraph 12(a) above, or if the Council fails to act in a timely manner that would allow NMFS to meet its schedule for approving an FMP amendment and implementing regulations by no later than February 1, 2005, for the groundfish and the scallop fisheries, and by no later than September 10, 2005, for the herring, monkfish, and salmon fisheries, NMFS will issue a written determination, stating either that NMFS will develop an FMP amendment and/or implementing regulations or other appropriate action, or that an FMP amendment and/or implementing regulations or other actions are

no longer necessary within the timeframe proposed. If NMFS disapproves, in whole or in part, an action other than an FMP amendment submitted to NMFS pursuant to Paragraph 12(a) above, or if the Council fails to act in a timely manner that would allow NMFS to meet its schedule for approving such other action by no later than February 1, 2005, for the groundfish and the scallop fisheries, and by no later than September 10, 2005, for the herring, monkfish, and salmon fisheries, NMFS will issue a written determination, stating either that NMFS will develop an appropriate action or that no action is necessary within the timeframe proposed.

III. STATUS REPORTS AND NOTIFICATIONS

13. For each EFH Amendment that is the subject of the Joint Stipulation and Order, NMFS will provide notice to the Court and plaintiffs, as soon as possible, upon the occurrence of each of the events specified in Sections II.B. and II.C. of this Joint Stipulation and Order.

14. NMFS will send to plaintiffs, by regular, first-class United States mail only, ten copies of each of the following documents, on the date of their release to the public: the Draft EIS, the Final EIS, the ROD, the proposed FMP Amendment and implementing regulations (if any), and the Final FMP Amendment and implementing regulations (if any). NMFS may provide the documents to plaintiffs on CD-ROM in a mutually acceptable file format, instead of paper copies.

15. Every 90 days, NMFS will file a status report with the Court describing the work that has been done by NMFS and the Councils, and the milestones that have been achieved, in preparing the EISs and, if applicable, the FMP Amendments, that are the subject of this Joint Stipulation and Order. NMFS will file the first status report within 90 days of the date of the entry of this Joint Stipulation as an Order of the Court.

16. All written notices, status reports, and documents referenced in this Joint Stipulation

and Order will be served on counsel for the parties at the following addresses and, whenever appropriate, by facsimile, at the following facsimile numbers, unless otherwise provided herein:

For Plaintiffs:

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IV. GENERAL PROVISIONS

17. This Joint Stipulation will become effective upon the date of its entry as an Order of the Court. On that date, the injunction that is set forth in the Court's Memorandum Opinion and Order filed on September 14, 2000, and that prohibits federal defendants from enforcing the EFH Amendments is dissolved. Also, upon entry of this Joint Stipulation as an Order of the Court, plaintiffs will dismiss their appeal of the Court's summary judgment ruling on their Magnuson-Stevens Act claims.

18. The terms and provisions of this Joint Stipulation and Order will apply to and be binding upon the parties hereto.

19. If there is a dispute over compliance with any term or provision of this Joint Stipulation and Order, the disputing party will notify the other parties in writing of the dispute. The parties will attempt to work out the dispute informally before seeking judicial review by this Court.

20. The disputing party will engage the other parties in informal dispute resolution. During this informal dispute resolution period, which will not exceed 21 days (unless the parties agree to an extension of the period), the parties will meet as many times as both deem necessary to discuss and attempt to resolve the dispute.

21. If the parties are unable to resolve the dispute through informal dispute resolution, either party may file a motion asking that the Court enforce the relevant term(s) and provision(s) of the Joint Stipulation and Order.

22. Each party expressly reserves the right to move the Court for relief from the provisions of this Joint Stipulation and Order, pursuant to Rule 60 of the Federal Rules of Civil Procedure.

23. Plaintiffs expressly reserve the right to apply to the Court for litigation costs, including attorney fees and expenses. Federal defendants expressly reserve all rights and defenses regarding plaintiffs' application(s) for costs.

24. The Court will retain jurisdiction over this case for the purpose of enabling the parties to this Joint Stipulation and Order to apply to the Court for any further order that may be necessary to construe, carry out, or enforce the terms of this Joint Stipulation and Order.

25. Upon formal written request by plaintiffs, transmitted by facsimile and mail, NMFS will produce, within 45 days of the date on which the agency receives the written request by facsimile, any document that pertains to the EISs, RODs, and any applicable FMP amendments prepared pursuant to this Joint Stipulation and Order, that is not already in the possession of plaintiffs or that is not already readily available to plaintiffs, unless the requested document is deemed by federal defendants to be protected from disclosure by privilege and/or unless the parties have agreed to a separate production schedule, as provided in this paragraph below. Federal defendants expressly reserve the right to assert the applicable privilege(s) as to any document(s) requested by plaintiffs and, based on that assertion, withhold the document(s) from production. In the event that federal defendants withhold from disclosure a document or documents requested by plaintiffs based upon their assertion of privilege, federal defendants will inform plaintiffs of their action and explain the basis for their action, promptly and in writing. In the event that plaintiffs' request for production of documents and/or NMFS's response thereto is complex or voluminous, the parties will confer and, if appropriate, agree to a period longer than 45 days for NMFS to produce the requested documents.

26. No term or provision of this Joint Stipulation and Order will constitute or will be

construed as a commitment or a requirement that federal defendants obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, and any other applicable law or regulation.

27. This Joint Stipulation and Order is the entire agreement between the parties in this case. All prior conversations, meetings, discussions, drafts, and writings of any kind are specifically superseded by this Joint Stipulation and Order. The terms of this Joint Stipulation and Order will not be changed, revised, or modified, except as provided (1) by a written instrument signed by the parties to this Joint Stipulation and Order and approved and entered by this Court as an Order; or (2) by an Order of the Court based on a party's motion for relief pursuant to Rule 60 of the Federal Rules of Civil Procedure, as set forth in Paragraph 22 above.

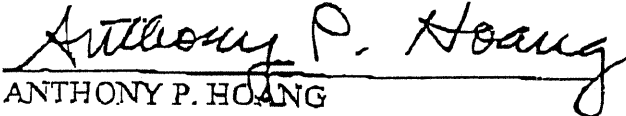
28. The undersigned representative(s) for each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Joint Stipulation and Order and to bind such party or parties legally to it.

Respectfully submitted this 5th day of December, 2001,



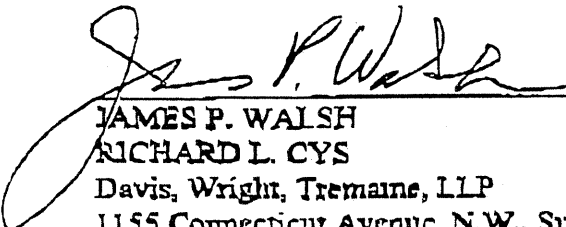
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Attorneys for Texas Shrimp Association and
 Wilma Anderson

~~PROPOSED ORDER~~

APPROVED and ENTERED as an Order of this Court, on this 17th day of
December, 2001.



 HON. GLADYS KESSLER
 United States District Judge

The following counsel should be notified of the entry of this Order:

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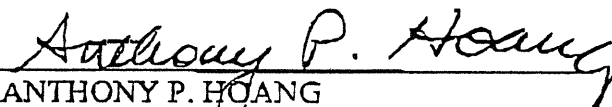
County Fisheries	Notice of Intent to Prepare EIS Published in Federal Register	Scoping Period	Scoping Meetings	Draft EIS Published	Draft EIS Public Comment Period	Issuance of Final EIS	Issuance of Record of Decision
NERMC / groundfish	2/1/01	2/1/01 - 4/4/01	Gloucester 2/22/01	10/31/03	10/31/03 - 1/30/04	5/31/04	7/1/04
NERMC / scallops	2/1/01	2/1/01 - 4/4/01	Gloucester 2/22/01	10/31/03	10/31/03 - 1/30/04	5/31/04	7/1/04
NERMC / herring, monkfish, salmon	9/10/01	9/10/01 - 11/21/01	Gloucester 11/7/01	10/31/03	10/31/03 - 1/30/04	5/31/04	7/1/04
CFMC / all fisheries challenged in AOC v. Daley	3/19/01	3/19/01 - 4/18/01 and 6/4/01 - 6/27/01	St. John 6/12/01 St. Thomas 6/13/01 St. Croix 6/14/01 Hato Rey 6/18/01 Arecibo 6/19/01 Mayaguez 6/20/01 Ponce 6/21/01 Culebra 6/25/01 Vieques 6/26/01 Fajardo 6/27/01	1/23/02	12/31/02 - 3/31/03	9/30/03	10/30/03
GMFMC / all fisheries challenged in AOC v. Daley	3/19/01	3/19/01 - 4/18/01 and 6/8/01 - 6/20/01	Corpus Christi 6/14/01 Houston 6/15/01 Kenner 6/18/01 Biloxi 6/19/01 Palama City 6/21/01 Key West 6/25/01 Tampa 6/28/01	1/10/03	1/10/03 - 4/30/03	11/28/03	12/30/03
PFMC / groundfish	4/10/01	4/10/01 - 6/30/01	Newport 5/22/01 Astoria 5/23/01 Eureka 5/29/01 Los Alamitos 5/30/01 Seattle 6/5/01 Burlingame 6/12/01	8/8/03	8/8/03 - 11/10/03	4/2/04	5/3/04
NPFMC / all fisheries challenged in AOC v. Daley	6/6/01	6/6/01 - 7/21/01	Kodiak 6/4/01 Unalaska 6/8/01 Anchorage 6/11/01 Seattle 6/19/01 Juneau 6/20/01 Sitka 6/21/01	8/1/03	8/1/03 - 10/31/03	6/1/04	8/13/04

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing JOINT STIPULATION AND [PROPOSED] ORDER was served on December 5, 2001, by regular, first-class United States mail, postage pre-paid, on the following counsel:

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