IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSERVATION LAW FOUNDATION, et al.	)	
Plaintiffs,	)	
v.	)	Case No. 1:00CVO1134 GK
DONALD L. EVANS, et al.	)	
Defendants.	)	

FEDERAL DEFENDANTS MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, A MOTION FOR CLARIFICATION

On April 26, 2002, this Court issued Remedial Order Opinion and a Remedial Order. The Remedial Order was amended on May 1, 2002.[1] Among other things, the Amended Remedial Order required the National Marine Fisheries Service (NMFS) to issue two Amended Interim Rules containing specific measures set forth in the Amended Remedial Order. On May 2, 2002, NMFS issued the first Amended Interim Rule which will be effective until July 31, 2002. 67 Fed. Reg. 30331 (May 6, 2002). In accordance with the Amended Remedial Order, n. 2, NMFS is working to publish the Second Amended Rule as quickly as possible.

In issuing its Amended Remedial Order, the Court rejected a request of a number of parties to enter a Settlement Agreement Among Certain Parties (Settlement Agreement). Other parties to that agreement either have moved or are moving this Court to reconsider its Amended Remedial Order to the extent that the order deviates from the terms of the Settlement Agreement. The Federal Defendants support that motion and also seek reconsideration pursuant to Fed. R. Civ. P. 59(e) and 60(b). However, to the extent that either motion to reconsider is

[1] The two orders will jointly be referenced as the Amended Remedial Order.

denied, the Federal Defendants seek clarification of the Amended Remedial Order.

Motion For Reconsideration[2]

In prior pleadings, the government has described why approval of the Settlement Agreement is the most appropriate remedy in this case. It was a carefully crafted agreement that was intended to be implemented as an integrated whole. Nevertheless, the Amended Remedial Order adopts some of the measures, rejects others, and modifies still others replacing the balanced approach represented by the Settlement Agreement with a different regime that has not been fully analyzed under the standards of all applicable law and has certainly never gone through even rudimentary public comment. Indeed, the other parties to the Settlement Agreement discuss some of the problems that this approach has caused in their motion to reconsider. Accordingly, the government requests that the current Amended Remedial Order be set aside in favor of the Settlement Agreement.

More fundamentally, the Amended Remedial Order represents a mandamus order requiring federal officials to promulgate specific rules in the Code of Federal Regulations that will subject both parties and non-parties alike to potential civil and criminal penalties. Despite the potential for criminal prosecution of non-parties, these non-parties have never been given an opportunity to comment or otherwise provide input into what would normally be an open public process. In addition, while the government was able to comply with all applicable law regarding the measures set forth in the Settlement Agreement (including the National Environmental Policy Act and the public participation requirements of the Magnuson Act), the provisions of the Amended Remedial Order have not been promulgated in accordance with these other laws. For

[2] The Federal Defendants are not submitting a proposed order with this motion. Should the motion be granted, the Federal Defendants merely request that the Court vacate the current remedial order and approve the previously filed Settlement Agreement.

these reasons, in addition to more general separation of powers concerns, mandamus orders, like the amended Remedial Order, are simply inappropriate in this context.

As the Federal Defendants indicated in prior pleadings, [a]n action purportedly requesting a mandatory injunction against a federal official is analyzed as one requesting mandamus. National Wildlife Federation v. United States, 626 F.2d 917, 918 (D.C. Cir. 1980). Because of the potential for conflict between coordinate branches of government, mandamus is an "extraordinary remedy." 13th Regional Corp. v. U.S. Department of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980). The courts "have limited its application to 'only . . . the clearest and most compelling cases.'" Id. (quoting Cartier v. Secretary of State, 506 F.2d 191, 199 (D.C. Cir. 1974); see also Swan v. Clinton, 100 F.3d 973, 976-77 & n. 1 (D.C.Cir.1996) (noting that mandatory injunction against Executive is appropriate only if injunction will compel performance of "ministerial" rather than discretionary obligation). In order for the court to exercise its discretion, the act sought to be compelled must be a ministerial duty and the obligation to act must be peremptory and clearly defined. Id. "'The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.'" Id. (citing McLennan v. Wilbur, 283 U.S. 414, 420 (1931)). The prerequisites for the entry of a mandamus order, like the Amended Remedial Order, have simply not been met. Accordingly, the Court should reconsider the Amended Remedial Order and approve the Settlement Agreement.

Alternative Motion To Clarify

In the event that the Court declines to reconsider its Amended Remedial Order, the Federal Defendants request that the Court clarify a portion of that order. Paragraph B. 3. of the Amended Remedial Order states as follows: Any latent effort permit not used in 2001 may not be activated. The term latent effort permit does not appear in eithe r the Northeast Multispecies Fishery Management Plan (FMP) or the regulations implementing the FMP and it

has no independent meaning. It is not clear, therefore, what is intended by this part of the Remedial Order. The Federal Defendants presume that the Court is requiring NMFS to prohibit the use of days-at-sea (DAS) by any multispecies limited access vessel that did not use any DAS in 2001 and that this requirement is to be effective August 1, 2002, through the date of promulgation of Amendment 13. The Federal Defendants also presume that the term 2001" refers to the 2001 fishing year (i.e., May 1, 2001, through April 30, 2002) rather than the 2001 calendar year. If these interpretations are correct, Defendants request affirmation from the Court. If these interpretations are not correct, Defendants request further clarification.

A clarification is important so as to avoid unintended consequences. If NMFS presumed interpretation is not correct, for example, NMFS would unnecessarily and mistakenly impose significant and potentially inequitable impacts on vessel owners that may have not have used DAS in the 2001 fishing year for reasons beyond their control. To illustrate, if a vessel owner was precluded from using DAS in the 2001 fishing year because his vessel sunk or became inoperable before the start of the 2001 fishing year, such vessel owner would be shut out of the groundfish fishery even though he may have been actively involved in the multispecies fishery in the years leading up the 2001 fishing year. Similarly, a vessel owner sidelined by illness or other unforeseen circumstances during the 2001 fishing year would be prohibited from groundfishing notwithstanding prior participation in the fishery.

Conclusion

For the foregoing reasons, the Court should reconsider its Remedial Order, as amended, and

approve the Settlement Agreement. In the alternative, the Federal Defendants ask that the Court to clarify the order as indicated above.

Dated: May 10, 2002

Respectfully submitted,

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