

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

OCEANA, INC.,

Plaintiff,

V.

GINA M. RAIMONDO, Secretary of
Commerce, *et al.*,

Defendants,

and

FISHERIES SURVIVAL FUND,

Defendant-Intervenor.

Case No. 1:08-cv-01881-PLF

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), Plaintiff Oceana, Inc. (“Oceana”), Defendants the Secretary of the United States Department of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (collectively “Defendants”), and Defendant-Intervenor Fisheries Survival Fund file this Joint Stipulation of Dismissal With Prejudice, and state as follows:

On October 31, 2008, Oceana filed a Complaint in the above-captioned matter against Defendants. On November 5, 2012, Oceana filed an Amended Complaint. The parties have subsequently come to a mutual resolution of the claims related to Oceana's allegations. As a result, the parties stipulate to the dismissal of the Amended Complaint with prejudice.

Dated: January 11, 2022

Respectfully submitted,

TODD KIM
Assistant Attorney General
SETH M. BARSKY
Section Chief
MEREDITH L. FLAX
Assistant Section Chief

/s/ Frederick H. Turner
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SETTLEMENT AGREEMENT

This Settlement Agreement and Mutual Release (“Agreement”) is entered into by and between Oceana, Inc. (“Oceana”); and Gina Raimondo, in her official capacity as Secretary of the United States Department of Commerce¹; the National Oceanic and Atmospheric Administration (“NOAA”); and the National Marine Fisheries Service (“NMFS”) (collectively “Defendants”); and the Fisheries Survival Fund (“Defendant-Intervenor”). Defendants and Oceana are referred to collectively herein as the “Parties.”

RECITALS

WHEREAS, Oceana filed a lawsuit against Defendants on October 31, 2008, in the United States District Court for the District of Columbia, styled *Oceana, Inc. v. Carlos M. Gutierrez, in his official capacity as Secretary of the United States Department of Commerce, National Oceanic and Atmospheric Administration, and National Marine Fisheries Service, defendants, v. Fisheries Survival Fund, intervenor defendant*, Case No. 1:08-cv-1881, alleging Defendants violated the Endangered Species Act and Administrative Procedure Act (the “Litigation”);

WHEREAS, the Parties filed cross motions for summary judgment in February and March 2013;

WHEREAS, on December 17, 2014, the Court granted in part and denied in part Oceana’s motion for summary judgment, and granted in part and denied in part the Defendants’ motion for summary judgment, and remanded the matter to the agency with instructions for the agency to better explain its decision to evaluate loggerhead takes resulting from trawl gear fishing only once every five years, as well as its reliance on a monitoring surrogate to measure loggerhead turtle takes caused by dredge fishing;

WHEREAS, on April 27, 2015, Defendants filed a notice of completion of remand, which Oceana opposed on July 10, 2015;

WHEREAS, on August 17, 2018, the Court issued a second remand again instructing the agency to better explain its reliance on a dredge hour monitoring surrogate to measure loggerhead turtle takes caused by dredge fishing;

WHEREAS, on November 28, 2018, Defendants filed a second notice of completion of remand, which Oceana opposed on February 15, 2019;

WHEREAS, on October 1, 2020, the Court issued a third remand to the agency directing it to more clearly explain whether there is a correlation between the dredge hour surrogate and the numerical take limit, and its selection of 359,757 dredge hours or, if unable to do so, to select

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Gina Raimondo replaces the former Secretaries of Commerce as defendant.

a more appropriate surrogate or other mechanism for monitoring loggerhead takes resulting from dredge fishing;

WHEREAS, on November 13, 2020, the Court ordered that the National Marine Fisheries Service shall have until July 1, 2021, to complete the Court's remand, and shall submit a status report every 60 days;

WHEREAS, on June 25, 2021, the National Marine Fisheries Service filed a notice of completion of remand and reinitiated Biological Opinion;

WHEREAS, the Parties desire fully, completely, and finally to settle and resolve the Litigation as set forth below.

AGREEMENTS AND COVENANTS

NOW THEREFORE, in consideration of the mutual covenants and promises set forth in this Agreement, and for other good and valuable consideration, the validity, sufficiency, and receipt of which are hereby acknowledged, Oceana, Defendants, and Defendant-Intervenor hereby STIPULATE AND AGREE as follows:

1. **Compromise and Settlement.** This Agreement constitutes a good-faith compromise and settlement of all claims in the Litigation. Oceana reserves the right to bring a separate cause of action challenging the reinitiated Biological Opinion for the sea scallop fishery that was issued on June 17, 2021, or any future biological opinions issued by Defendants. Defendants reserve all defenses to future challenges by Plaintiff concerning the Biological Opinion for the sea scallop fishery issued on June 17, 2021, and any other past or future Biological Opinions.

2. **Dismissal of Litigation.** Within three (3) business days after Oceana's receipt of the payment set forth in Paragraph 3 of this Agreement, Oceana will dismiss the Litigation and all claims filed therein, with prejudice.

3. **Payment, Attorneys' Fees, and Costs.** NMFS agrees to pay Sheppard Mullin \$180,000, in connection with its representation of Oceana, as settlement of the reasonable attorney's fees and costs Oceana incurred in litigating this case. Defendants shall make the payment set forth in this Paragraph by electronic funds transfer to Plaintiff's counsel, on behalf of Plaintiff. No later than ten (10) days following execution of this Agreement, Plaintiff, through its counsel, shall provide counsel for Defendants the following information necessary for Defendants to process the payment set forth in this Paragraph: the Plaintiff's name, the payee's name, the payee's address, the payee's bank name and bank address, the payee's bank account name and number, the account type, the bank routing transit number, the ABA number, and the payee's tax identification number. Upon the request of counsel for Defendants, counsel for Plaintiff shall provide additional information (including the tax identification numbers of Plaintiff), if needed, to process the payment set forth in this Paragraph. Defendants shall submit all paperwork necessary to complete the \$180,000 payment set forth in this Paragraph within fourteen (14) business days of receipt of the information described in this Paragraph. Plaintiff, through its counsel, shall confirm receipt of the payment within seven (7) days of receipt of such

payment in writing to counsel for Defendants. Plaintiff's acceptance of the \$180,000 payment set forth in this Paragraph shall operate as a full release of Plaintiff's claims for attorneys' fees and costs arising out of the Lawsuit. By entering into this Agreement, Defendants do not waive any right to contest fees and costs claimed by Plaintiff, including hourly rates, in any future litigation or continuation of the present action.

4. **Data Related To Turtle Takes.** NMFS agrees to publish on its website the number of observed sea turtle interactions and observed deaths for the sea scallop fishery under the following parameters. The data will be non-confidential and arranged by species as well as by dredge gear and by trawl gear in the Atlantic sea scallop fishery, defined as the "action area" at Section 3.6 in the 2021 Endangered Species Act Section 7 Consultation on the Atlantic Sea Scallop Fishery Management Plan. Following completion of an internal data quality review process, NMFS will post data twice a year for 5 years, beginning on the date of the first publication. The agency will post data gathered April 1 through September 30 in one year no later than March 1 of the following year. The agency will post data gathered beginning on October 1 through March 31 no later than August 1 of the same year. The first posting will be no later than March 1, 2022. The data will remain on the agency's website for at least one year after it is posted.

5. **Dispute Resolution.** If a dispute under the Settlement Agreement arises, or either party believes that a breach has occurred, the party raising the dispute or seeking enforcement shall provide the other party with notice of the controversy. The party shall commence an informal dispute resolution period, to be no shorter than thirty (30) days, by giving written notice to the other party stating the nature of the matter to be resolved. The Parties shall consult and negotiate with each other 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, Plaintiff shall be permitted to seek to reopen the case for the sole purpose of the court ascertaining compliance with the terms of this Agreement.

6. **Representations and Warranties.**

(a) **Non-assignment.** Each of the Parties to this Agreement hereby represents and warrants that such Party has not heretofore assigned or transferred, or purported to assign or transfer, to any person whomsoever any of the claims, demands, grievances, liabilities, debts, accounts, obligations, costs, expenses, liens, actions or causes or action that are released by the terms of this Agreement.

(b) **Authority.** Each person executing this Agreement on behalf of a corporation or other legal entity warrants that he or she holds the position indicated beneath his or her signature and that he or she has been duly authorized by said corporation or other legal entity to execute this Agreement on its behalf.

(c) **Effective Date.** This Agreement shall become effective upon the date it is signed by all the Parties.

(d) The Parties agree that this Agreement was negotiated and entered into in good faith and that it constitutes a settlement of claims that were vigorously contested, denied,

and disputed by the Parties. This Agreement shall not be offered as evidence in any other judicial proceeding or construed as an admission or concession of any wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement. Except as expressly provided in this Agreement, none of the Parties waives or relinquishes any legal rights, claims, or defenses it may have. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants are obligated to spend funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.

7. **Miscellaneous.**

(a) **Independent Advice.** Each Party to this Agreement acknowledges and agrees that such Party to this Agreement has been represented throughout the negotiation and documentation by attorneys of the Party's choice and has been advised by such attorneys with respect to this Agreement and the effect of the releases given in this Agreement. Each party to this Agreement further acknowledges and agrees that such Party has read this Agreement, knows the contents of this Agreement and in executing this Agreement has relied solely on the Party's own judgment, belief and knowledge, and the advice and recommendations of the party's attorneys and other advisers, concerning this Agreement, and has not been induced to enter into this Agreement by any representation or statement of any other party not expressly contained in this Agreement.

(b) **Integration.** The Parties acknowledge that this Agreement sets forth the entire agreement between the Parties relating to the subject matter of this Agreement.

(c) **Titles and Captions.** Titles and captions contained in this Agreement are inserted as a matter of convenience and for reference and are not intended and shall not be construed to define, limit, extend or otherwise describe the scope of this Agreement or any provision of this Agreement.

(d) **Waiver.** No breach of any provision of this Agreement can be waived unless in writing. Waiver of any one breach of this Agreement shall not be deemed to be a waiver of any other breach of that or any other provision of this Agreement.

(e) **Attorney's Fees and Costs for Enforcement.** In any proceeding or action brought to enforce this Settlement Agreement, the prevailing party may seek its reasonable costs and attorney's fees. Each party reserves all of its defenses to any such request.

(f) **Modification and Amendment.** No modification of any of the terms or provisions of this Agreement shall be binding on any Party to this Settlement Agreement unless made in writing and signed by a duly authorized representative of such Party.

(g) **No Construction.** No Party to this Agreement or such Party's attorney shall be deemed to be the drafter of this Agreement for purposes of interpreting or construing any of the provisions of this Agreement. This Agreement shall be interpreted in accordance with the fair meaning of its language and not strictly for or against any of the Parties to this Agreement.

(h) **Execution in Counterparts.** This Agreement may be executed in any number of copies by the Parties to this Agreement on separate counterparts and will become effective upon signature by all Parties upon one of more such counterparts.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Dated: 12/30/2021

On Behalf of Plaintiff:

/s/ Paul Werner

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Dated: December 28, 2021

On Behalf of Defendants:

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Dated: 12/29/21

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