

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

_____)	
OCEANA, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 1:15-cv-01824-CRC
)	
PENNY PRITZKER, in her official capacity)	
as Secretary of the United States Department)	
of Commerce, et al.,)	
)	
Defendants.)	
_____)	

STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between Plaintiff Oceana, Inc. (“Oceana” or “Plaintiff”) and Defendants Penny Pritzker, in her official capacity as Secretary of the United States Department of Commerce; the National Oceanic and Atmospheric Administration (“NOAA”); and the National Marine Fisheries Service (“NMFS”) (collectively, “Defendants”). Plaintiff and Defendants (collectively, the “parties”), by and through their undersigned counsel, state as follows:

WHEREAS, Oceana submitted a letter to NMFS, dated July 22, 2015, requesting that NMFS “take immediate action . . . to end overfishing of dusky sharks and rebuild the stock”;

WHEREAS, on October 27, 2015, Oceana filed a Complaint alleging violations of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), 16 U.S.C. §§ 1801-1891d, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, *see* Docket (“Dkt.”) 1;

WHEREAS, on January 14, 2016, NMFS responded to Plaintiff’s letter, stating that NMFS was already “in the midst of agency rulemaking to address dusky sharks” and that the

agency was “preparing a Draft Environmental Impact Statement (DEIS) and proposed rule, which will consider public comments received on NMFS’ predraft for the rule and other public input, including [Plaintiff’s] petition, and reflect updated analyses of the best scientific information available” and was “continu[ing] to work on the DEIS and proposed rulemaking that will address dusky sharks and Magnuson-Stevens Act overfishing and rebuilding requirements, as well as clarify annual catch limits and accountability measures for the prohibited shark complex, which includes dusky sharks”;

WHEREAS, NMFS also explained that “[i]n light of the ESA [Endangered Species Act] status review and updated data analysis, a dusky shark stock assessment update will be prepared in 2016 that will include updated data through 2015”;

WHEREAS, since sending their letter, NMFS has confirmed that it intends to complete rulemaking which it expects will address the claims in Plaintiff’s Complaint, as well as an EIS analyzing the environmental effects of that rule;

WHEREAS, an update to the dusky shark stock assessment is underway and, with a peer review, will likely be completed by August 2016; the parties agree it is reasonable to take the updated stock assessment results into account when preparing the DEIS and proposed rule for dusky sharks;

WHEREAS, Oceana has indicated that it will submit comments during the rulemaking process regarding the following specific issues:

- Requiring appropriate levels of at-sea monitoring/observer coverage to provide accurate, precise and timely information about the catch and bycatch of dusky sharks in all fisheries where such bycatch occurs, including the Highly Migratory Species fishery and other fisheries;

- Implementing management measures to end overfishing and rebuild dusky sharks that go beyond education and voluntary measures;
- Applying annual catch limits for dusky sharks to all fisheries that catch dusky sharks to limit and account for both catch of dusky sharks in the form of landings and discards in all fisheries where catch of dusky sharks occurs, including the Highly Migratory Species fishery and other fisheries; and
- Applying other management measures to end overfishing and rebuild dusky sharks in addition to annual catch limits, such as time-area closures and gear modifications, in all fisheries where catch of dusky sharks occurs, including the Highly Migratory Species fishery and other fisheries.

WHEREAS, NMFS will take any comments received during the public comment period on the proposed rulemaking and DEIS into consideration as appropriate and as obligated through the public rulemaking process;

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiff's claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiff's complaint;

WHEREAS, the parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

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

1. On or before the following dates, NMFS shall take the specified actions in relation to its rule to address dusky shark conservation and management, as required by the Magnuson-Stevens Act:

- a. On or before October 14, 2016, NMFS shall submit the proposed rule for publication to the Federal Register, including a 60-day public comment period that will be initiated upon publication;
 - b. On or before March 31, 2017, NMFS shall submit the final rule to the Federal Register for publication;
2. The parties acknowledge that the deadlines in paragraphs 1(a) and 1(b) of this Agreement may need to be modified for scientific, legal, or other reasons. Should NMFS become aware of any development that might hinder its ability to meet either of these deadlines, NMFS shall promptly notify Oceana and the Court.
3. The Order entering this Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or 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 (either 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. In such event, Plaintiff's first remedy shall be a motion to enforce the terms of

this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

4. Nothing in this Agreement shall limit Oceana's right to challenge, under the Magnuson-Stevens Act, the Administrative Procedure Act or any other applicable law, any final agency action that arises from the Agreement.
5. Nothing in this Agreement, or the dismissal without prejudice required by it, resolves Plaintiff's claims for awards of attorneys' fees and litigation costs, which are collateral to and separable from Plaintiff's claims on the merits that are resolved by the dismissal without prejudice, and which are left for resolution through future negotiation or motion practice. Judgment shall not be entered in the above-captioned action prior to resolution of Plaintiff's claims for awards of attorneys' fees and litigation costs. Prior to the entry of judgment herein, the Court shall not entertain any motions other than motions associated with Plaintiff's claims for awards of attorneys' fees and litigation costs or motions brought pursuant to paragraph 3.
6. Each party reserves any and all arguments, claims, and/or defenses it may have with respect to Plaintiff's claims for awards of attorneys' fees and litigation costs. Following the Court's entry of the Agreement as the Court's order, the parties will attempt to negotiate a resolution of Plaintiff's claims for an award of attorneys' fees and litigation costs. Should those negotiations prove unsuccessful, Plaintiff may file an application with this Court for the recovery of fees and costs within ninety (90) days of the entry of the Agreement as the Court's order.
7. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this Agreement arising from a need to enforce or defend against efforts to

modify the underlying schedule outlined in paragraph 1 or for any other continuation of this action. By this Agreement, Defendants do not waive any right to contest fees claimed by Plaintiff or Plaintiff's counsel, including hourly rates and the number of hours billed, in any future litigation or continuation of the present action.

8. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the Magnuson-Stevens Act, the 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 NMFS by the Magnuson-Stevens Act, 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.
9. Nothing in this Agreement shall be interpreted as, or shall constitute, a 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 applicable appropriations law.
10. 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.
11. 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.
12. The terms of this Agreement shall become effective upon entry of an order by the Court approving the Agreement.

13. Upon approval of this Agreement by the Court, all counts of Plaintiff's complaint shall be dismissed without prejudice. Notwithstanding the dismissal of this action, however, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

Dated: May 18, 2016

Respectfully submitted,

/s/ Andrea A. Treece

ANDREA A. TREECE
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2089
Email: atreece@earthjustice.org

Attorney for Plaintiff

JOHN C. CRUDEN
Assistant Attorney General
SETH M. BARSKY
Section Chief
MEREDITH L. FLAX
Assistant Section Chief

/s/ H. Hubert Yang

H. HUBERT YANG
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0210
Fax: (202) 305-0275
E-mail: hubert.yang@usdoj.gov

Of Counsel:

MEGAN J. WALLINE
Attorney-Advisor
NOAA General Counsel
Silver Spring, MD

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2016, I electronically filed the foregoing Stipulated Settlement Agreement and [Proposed] Order with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ H. Hubert Yang

H. HUBERT YANG

United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section

Ben Franklin Station

P.O. Box 7611

Washington, DC 20044-7611

Tel: (202) 305-0209

Fax: (202) 305-0275

E-mail: hubert.yang@usdoj.gov

Attorney for Defendants