

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAWAII LONGLINE ASSOCIATION,

Plaintiff,

vs.

NATIONAL MARINE FISHERIES
SERVICE, and

DONALD L. EVANS, In his official
capacity as Secretary, United States
Department of Commerce

Defendants.

Civil Action No. 1:01cv00765:CKK

Judge: Colleen Kollar-Kotelly

**PLAINTIFF'S EMERGENCY MOTION FOR RECONSIDERATION
AND FOR A TEMPORARY STAY**

I. RELIEF REQUESTED

Plaintiff Hawaii Longline Association ("HLA") respectfully requests that the Court reconsider its August 31, 2003 Order ("Order") on an emergency basis for the purpose of temporarily staying the effect of the Order for 45 days. Because of the National Marine Fishery Service's ("NMFS's") perpetuation of this litigation for two-and-a-half years through administrative maneuvers and theories invalidated by this Court, HLA now faces the prospect of complete closure of the Fishery pending NMFS's completion of a new administrative process. This unintended and unjust circumstance arises because, with the invalidation of the 2002 Biological Opinion ("2002 BiOP"), there is now no "take" authority under the Endangered Species Act ("ESA") for the incidental bycatch of sea turtles by the Hawaii longline fishery (the "Fishery").

Since issuance of the Order, NMFS has advised HLA that it will not expedite a new administrative process and that, under the circumstances and in the absence of a judicial stay, it

**PLAINTIFF'S EMERGENCY MOTION FOR
RECONSIDERATION AND FOR A TEMPORARY STAY - 1**

may either reinstitute the unlawful restrictions from the invalidated 2002 BiOp on an emergency basis or close the fishery entirely. Use of the emergency provisions of the ESA or the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 et seq., to reinstitute the restrictions previously vacated by the Court would constitute another unlawful manipulation of the administrative process by NMFS and would likely result in yet another round of litigation, raising issues that have been previously briefed by these parties several times. Closure of the fishery entirely would be entirely unjust as no party has ever contended that a complete closure is supported by the best available science or by law.

To avoid these unjust and untended consequences, HLA respectfully requests that the Court reconsider its vacatur Order and grant a temporary, 45-day stay to allow the parties to negotiate an interim management regime and to develop a responsibly expedited administrative process. HLA also respectfully requests that the Court make provision for the parties to report back to the Court at the end of the stay regarding the necessity for additional Court supervision. HLA requests that the Court consider this motion on an expedited basis because, as the Fishery has been and continues to be under threat of closure in the absence of incidental take protection under the provisions of the ESA.

II. GROUNDS FOR MOTION

The unusually complicated legal, procedural, and factual background of this lawsuit has led to an ironic and fundamentally unjust conclusion to HLA's two-and-a-half years of litigation. After having achieved a favorable ruling from this Court on its claims that NMFS unlawfully promulgated and maintained economically-devastating Fishery closures, HLA now faces the prospect of complete closure of the Fishery pending NMFS's compliance with this Court's orders, which could take 195 days or more.

On August 31, 2003, the Court granted HLA's motions for summary judgment on its second and third claims for relief, vacating and remanding to NMFS the 2002 BiOp and regulations promulgated by NMFS in June 2002. The Court denied the additional relief sought

by HLA, in particular, an order establishing a schedule for and providing judicial oversight of NMFS's formulation of a replacement biological opinion and fishery-management regulations. Because the last lawful biological opinion issued by NMFS for the Fishery, the 1998 BiOp, expired by its own terms in 2001,¹ vacatur of the 2002 BiOp has left the Fishery without the legal protections necessary to ensure continued operations in compliance with the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. ("ESA").

The 2002 BiOp contained an Incidental Take Statement ("ITS"), which is a permit authorizing the Fishery to "take" a certain number of sea turtles incidental to fishing operations. See 16 U.S.C. § 1536(b)(4), (o) (allowing NMFS to authorize specified amount of incidental take as part of a biological opinion and exempting such take from ESA enforcement). Unless specifically authorized by an ITS or similar permit, the ESA prohibits "take" of any listed species and provides for citizen-suit enforcement of this prohibition. 16 U.S.C. §§ 1538(a)(1), 1540(g). Civil and criminal penalties may imposed for unauthorized take. 16 U.S.C. § 1540.

Without the 2002 BiOp and ITS and in the absence of continued judicial supervision, the Fishery, which has historically caused the incidental take of a small number of turtles, has no protection from an ESA lawsuit seeking Fishery closure pending NMFS's issuance of a new biological opinion and ITS. Individual fishers, while technically free to continue operations, risk civil and criminal penalties should they interact with a single sea turtle. The present situation has created extreme uncertainty and confusion among the Fishery participants and regulators.

Unfortunately, this situation is likely to continue for some time. NMFS has indicated that it does not plan to deviate from the maximum statutory deadline of 195 days for preparation of a new biological opinion and has not yet issued a notice of reinitiation to start the 195-day clock running. See 16 U.S.C. § 1536(b); 40 C.F.R. § 402.14 (e). Thus, unless the Court takes further

¹ The 1998 BiOp was upheld by the Hawaii District Court. It covered only the three-year period 1998 to 2001.

² "Take" means to in any way disturb or harm a species. 16 U.S.C. § 1532(19).

action in this matter, the Fishery will be subject to closure and its participants subject to potential prosecutions and penalties despite the Court's favorable ruling.

III. ARGUMENT

District courts have broad discretion to grant or deny a motion for reconsideration. See Computer Professionals for Social Responsibility v. U.S. Secret Serv., 72 F.3d 897, 903 (D.C. Cir. 1996); Cobell v. Norton, 2002 WL 31060154, at *2 (D.D.C. Sept. 17, 2002). Appropriate reasons for granting such a motion include the availability of new evidence or the need to correct clear error or manifest injustice. See Cobell, 2002 WL 31060154, at *3; Firestone v. Firestone, 756 F.3d 1205, 1206-08 (D.C. Cir. 1996); Fed. R. Civ. P. 59(e), 60(a)-(b). Here, despite HLA's successful litigation vindicating its right to participate in Fishery management decisions, HLA's members now face penalties and threatened closure of the Fishery, a manifestly unjust result which warrants reconsideration of the Court's August 31, 2003 Order. Accordingly, HLA requests that the Court reinstate this lawsuit for purposes of granting a 45-day stay of the order setting aside the 2002 BiOp. This will revive the 2002 ITS, preserve the status quo, and allow HLA's members to continue fishing pending negotiations among the parties as to appropriate interim and future administrative process and action. HLA further requests that the Court hold a status conference prior to the expiration of the 45-day period in order to determine whether an extension of the stay or further relief is warranted.

No prejudice to NMFS, intervenors, or sea turtles will result from the temporary stay HLA seeks. Indeed, the only prejudicial effect of the stay will fall on HLA's members, who will remain subject to severe restrictions unlawfully imposed by NMFS under the invalidated 2002 BiOp. HLA seeks this relief, despite its prejudicial impact, because the alternatives are potentially catastrophic in consequence to the fishery notwithstanding the absence of any scientific, legal, or equitable justification for closure of the Fishery.

IV. COMPLIANCE WITH LOCAL RULE 7.1(M)

In accordance with Local Civil Rule 7.1(m), HLA has contacted opposing counsel and counsel for intervenor-defendants regarding the relief requested in this motion. Both counsel for NMFS and counsel for intervenor-defendants informed HLA that they generally support the relief sought but they take no formal position in advance of reviewing HLA's papers.

V. CONCLUSION

For the reasons stated above, HLA respectfully requests that the Court reconsider on an emergency basis its August 31, 2003 Order dismissing this lawsuit and grant a 45-day temporary stay of the Order insofar as it sets aside the 2002 BiOp. HLA further requests that the Court convene a status conference prior to the expiration of the 45-day period to determine whether additional relief is necessary to prevent a manifestly unjust result.

DATED this 9th day of September, 2003.

STOEL RIVES LLP

By: 

Rer A. Ramfjord, D.C. Bar No. 392237
Jeffrey W. Leppo, admitted pro hac vice
Washington State Bar No. 11099
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, Washington 98101-3197
Telephone: 206-386-7641
Attorneys for Plaintiff Hawaii Longline Assn.

Defendants/Intervenors The Ocean Conservancy and Turtle Island Restoration Network (the "Conservation Groups"), in response to plaintiff Hawai'i Longline Association's ("HLA's") Emergency Motion for Reconsideration and for a Temporary Stay, agree with HLA -- albeit for different reasons -- that it is not desirable for the Court to leave the Hawai'i-based longline fishery in a regulatory vacuum by vacating defendant National Marine Fisheries Service's ("NMFS's") 2001 and 2002 biological opinions and 2002 regulations restricting longline fishing in the Western Pacific. The Conservation Groups therefore do not oppose HLA's request for a stay of the Court's rulings, but do urge that a stay be put in place for 90 days, rather than 45 days as HLA requests.

Through this lawsuit, HLA sought the ultimate reduction or elimination of restrictions on longlining. Having succeeded in its effort to have the restrictions vacated, HLA now finds receiving what it asked for to be uncomfortable. As HLA explained in its motion, in the absence of a valid biological opinion and incidental take statement authorizing the longline fishermen to catch endangered sea turtles, any fisherman who catches a turtle is now subject to prosecution for violating Section 9(a) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a), which prohibits the unauthorized harming or killing of listed species. Since endangered turtles are inevitably caught

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HAWAII LONGLINE ASSOCIATION,)	CASE NO. 1:01CV00765 (CKK)
)	
Plaintiff,)	TURTLE ISLAND RESTORATION
)	NETWORK AND THE OCEAN
v.)	CONSERVANCY'S RESPONSE TO
)	HAWAII LONGLINE ASSOCIATION'S
NATIONAL MARINE FISHERIES)	MOTION FOR RECONSIDERATION
SERVICE; and)	
)	
DONALD L. EVANS, In his)	
official capacity as Secretary,)	
United States Department of)	
Commerce,)	
)	
Defendants.)	
)	
)	

TURTLE ISLAND RESTORATION NETWORK AND THE OCEAN
CONSERVANCY'S RESPONSE TO
HAWAII LONGLINE ASSOCIATION'S MOTION FOR RECONSIDERATION

in the process of longlining in the waters surrounding Hawai`i, and since no method of longlining that eliminates the bycatch of turtles is known, all Hawai`i-based fishermen now risk prosecution if they fish using longlines.

HLA would like to have its cake and eat it, too, and have its members be able to fish -- and catch turtles -- while also enjoying immunity from prosecution, regardless of the impacts of their activities on the individual animals and on the fates of these critically endangered species. HLA therefore now asks the Court to stay the vacatur it demanded so its members may continue to fish and catch turtles while HLA presses NMFS to adopt a different, less restrictive regulatory regime. HLA considers it "entirely unjust" to be precluded, even temporarily, from contributing to the extinction of endangered species, and profiting from it, as a result of having received the relief it requested.

The Conservation Groups, whose interest lies in avoiding the impending extinction of the turtle species at issue, do not share HLA's view of the equities. Contrary to HLA's statement in its motion that "no party has ever contended that a complete closure [of the Hawai`i-based longline fishery] is supported by the best available science or by law," motion at 2, the Conservation Groups have maintained exactly that, in their lawsuit that was transferred to this Court from the district of

Hawai'i, and which this Court subsequently dismissed. Like HLA, the Conservation Groups were denied a hearing on their challenge to the 2001 biological opinion. The Conservation Groups explained in their motion for summary judgment in their now-dismissed suit why, as a matter of science and law, the fishing restrictions NMFS imposed in its 2001 biological opinion (and 2002 regulations) were, regardless of their procedural propriety, substantively inadequate to insure against jeopardizing the sea turtle species at issue; the leatherback sea turtle, in particular, faces imminent extinction in the Pacific,¹ with longline fishing being the principal threat. Loosening those restrictions, let alone returning to the free-for-all that prevailed prior to restrictions being imposed,

¹ E.g., 2001 BiOp AR-604 at 9219 ("any additional reductions in the size of the western Pacific leatherback populations of leatherback turtles are likely to maintain or exacerbate the decline of these populations. This would further hinder population persistence or attempts at recovery as long as mortalities exceed any possible population growth, which appears to be the current case, appreciably reducing the likelihood that western Pacific leatherback populations will persist") (emphasis added); 2001 BiOp AR-606 at 9287 ("Given the current status of Pacific leatherback populations as judged by trends in the abundance of nesters as well-monitored nesting beaches, the cumulative human-caused mortality of leatherbacks known or reasonably surmised to occur appears to more than the populations can sustain. . . . Thus given the total mortality from other human activities and assuming such mortality rates persist, additional leatherback mortalities caused by the Hawaii longline fishery and CA/OR drift gillnet fisheries are probably not sustainable"); 2001 BiOp AR-604 at 9174 ("sea turtle populations cannot withstand current mortality rates" and are

first by the Hawai'i district court some four year ago and later by NMFS itself, would be catastrophic for the turtle species and marine biodiversity. NMFS would be violating Section 9(a) as well as Sections 7(a)(2) and 7(d) of the ESA, 16 U.S.C. §§ 1536(a)(2) and 1536(d), in that NMFS has authorized (in the Fishery Management Plan as it now provides after deleting the amendments the Court has vacated), HLA's members to fish with the knowledge that they will certainly catch endangered turtles, without insuring against jeopardy.

Although it may be legally risky for the longliners to continue fishing in the absence of regulations that insulate them from Section 9(a) liability, it is reasonable to anticipate that some, and likely many, fishermen will be willing to take that risk; indeed, this Court has already vacated the restrictions, the fishermen have been made aware of their ESA exposure, and they continue to fish. The availability of prosecution is cold comfort to the Conservation Groups, since it will not bring back the turtles that are likely to be killed, and each mortality pushes these species even closer to the brink of extinction. If this is allowed to occur, the Conservation Groups' option would be to seek injunctive relief precluding ESA violations during NMFS's new Section 7 consultation. See

"at a very high risk of extinction within the foreseeable future").

Greenpeace v. National Marine Fisheries Service, 106 F. Supp. 2d 1066 (W.D. Wash. 2000).

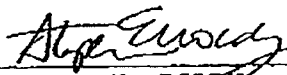
HLA has asked for a 45-day stay, which it evidently believes is just long enough to allow NMFS to implement interim regulations while avoiding having HLA's members subject to the existing restrictions any longer than absolutely necessary. The Conservation Groups believe a 90-day stay would be more appropriate. This would insure that NMFS has an adequate opportunity to implement an interim regime that may not only protect some of the longliners' economic interests, but comply with the mandates of the Endangered Species Act.

While the Court may, of course, order a shorter stay and then later extend it, this merely invites further hearings and disputes; it is plain from the outset that 45 days is unlikely to be adequate -- the Administrative Procedure Act requires at least 30 days notice of a proposed regulation -- whereas NMFS would have little excuse for failing to develop an appropriate interim regulation in 90 days. While HLA undoubtedly would like to shorten as much as possible the period in which the existing restrictions remain in place, complying for an additional few weeks with a regime that has been the status quo for some four years will not cause its members any substantial prejudice. Harm to the endangered species from an inadequate regulation would, however, be irreparable.

Any interim (or final) restrictions that NMFS may implement that are less restrictive than those that have been in place since 1999 would violate Section 7(a)(2) of the ESA (indeed, as has been discussed the Conservation Groups believe HLA has been fishing on borrowed time, in that even the vacated restrictions violate Section 7(a)(2)), so HLA's members will not lose many fishing opportunities if the stay extends for 90 days rather than 45. Having brought about the vacatur of the restrictions and asked that they be replaced, HLA cannot now be heard to object to a replacement process that minimizes use of the parties' and judicial resources and maximizes NMFS's opportunity to meet its duty to insure against jeopardizing endangered species.

Dated September 11, 2003.

Respectfully submitted,



STEPHEN E. ROATY
D.C. Bar No. 926477
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(p) (202) 667-4500
(f) (202) 667-2356

PAUL H. ACHITOFF
(admitted pro hac vice)
Hawai'i Bar No. 5279
Earthjustice

223 South King Street, Suite 400
Honolulu, Hawai'i 96813-4501
(p) (808) 599-2436
(f) (808) 521-6841

Attorneys for Turtle Island
Restoration Network and
The Ocean Conservancy

