



U.S. Department of Justice

Environment and Natural Resources Division

WDH: dly

~~90-8-6-04673~~

*Wildlife and Marine Resources Section
PO Box 7369
Ben Franklin Station
Washington D.C. 20044-7369*

*Telephone (202) 305-0210
Telecopier (202) 305-0275*

September 3, 2002

Via Hand Delivery

Nancy Mayer-Whittington, Clerk
United States District Court
for the District of Columbia
333 Constitution Ave., NW
Washington, D.C. 20001

Re: Save The Manatee Club, et al. v. Ballard, et al.
Civil No. 00-00076 (D.D.C.)

Enclosed for filing is the original and one copy of the Federal Defendants' Combined Response to Order to Show Cause in the above-styled case. Please call me if you have any questions.

Sincerely,

Jean Williams
Chief
(202) 305-0210

cc: Counsel of Record

As explained in detail below, the law governing the contempt sanction makes clear that it is a drastic remedy, to be imposed only where an individual violates a specific court order that is clear and unambiguous, requiring him to perform or refrain from performing a particular act or acts. In this case the Interior defendants believed that their actions substantially complied with all of this Court's orders, including the order calling upon them to designate refuges and sanctuaries throughout peninsular Florida, as they had interpreted the order. For reasons stated by the court in its Memorandum Opinion of July 9, 2002, the court interpreted the court approved settlement agreement in a fashion different from that of the Interior defendants, and has interpreted the Interior defendants' own actions in a manner different than the Interior defendants believed they would be interpreted. Having now received this Court's differing interpretations, the Interior defendants are moving with all possible speed to correct their actions to be consistent with this Court's expectations. Therefore, a contempt finding to force compliance with this Court's orders is not necessary.

The Corps defendants should not be held in contempt of court since it is undisputed that the Corps was not ever involved in the actions giving rise to the plaintiffs' allegations of breach of the consent decree. The portions of the consent decree that this Court has found to have been violated did not impose any obligations upon the Corps or involve the Corps defendants in any way. Further, the actions or lack of action found to violate the consent decree were not actions that were taken or were supposed to be taken by the Corps defendants. It would be both improper and unfair to attribute any action or lack of action by the Interior defendants to the Corps defendants, who are not statutorily responsible for and were not involved in any way with designating manatee refuges or sanctuaries.

BACKGROUND

I. Procedural Background

On January 5, 2001, this Court approved settlement of a case brought by plaintiffs, Save the Manatee Club et al. ("SMC"), against the Interior and Corps defendants alleging violations of the Endangered Species Act ("ESA"), Marine Mammal Protection Act ("MMPA"), National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). Exhibit A, Settlement Agreement. The plaintiffs' complaint alleged that the Corps violated the ESA by issuing permits that allowed construction of boat docks without consulting with the Fish and Wildlife Service ("FWS") under section 7 of the ESA on an individual or programmatic basis, by issuing construction permits that resulted in unauthorized take of manatees, and by failing to develop and carry out a conservation program for manatees. The plaintiffs further alleged that the Corps' issuance of the construction permits also violated NEPA and the MMPA since the take of manatees was not authorized under the applicable MMPA regulations. Finally, the plaintiffs claimed that the FWS violated the APA by failing to submit for public notice and comment a document it generated to provide advance guidance to the Corps on the scope and contents of the documents that it expected to receive to complete consultations on the dock construction permits.

This litigation was settled by a January 5, 2001, consent decree. The decree required several different actions by each of the federal defendants. That decree provided: 1) the FWS would engage in notice and comment rulemaking to promulgate small take regulations pursuant to the MMPA pursuant to a schedule; 2) the FWS would publish for public notice and comment its interim guidance document for use pending the MMPA rulemaking and revise the document accordingly; 3) the Corps would revise and publish its interim "key" for use pending MMPA rulemaking in determining which proposed actions warrant the initiation of consultation; 4) the FWS would publish a Florida manatee recovery plan for notice and comment and complete a final manatee recovery plan pursuant to a schedule; 5) the

FWS agreed to share and discuss with plaintiffs its enforcement plans related to manatees for fiscal year 2001; and 6) the FWS would engage in notice and comment rulemaking to promulgate regulations establishing manatee refuges and sanctuaries in Florida pursuant to a schedule.

II. Designation of Refuges and Sanctuaries

The time table for promulgating regulations to designate refuges and sanctuaries was extended several times by mutual agreement of the parties,² culminating in an agreed upon date to submit the proposed rules for publication by August 3, 2001. Exhibit B, Letter of June 19, 2001. The plaintiffs also agreed to extend the date for the FWS to submit the final rules for publication until December 31, 2001. Exhibit C, Letter of July 9, 2001 at fn. 2.

In accordance with the agreement as modified, the FWS submitted a proposed rule for publication on August 3, 2001, and the proposed rule was published in the Federal Register on August 10, 2001. 66 Fed. Reg. 42,318 (Aug. 10, 2001). The proposed rule included a sixty-day comment period, and gave notice of four public hearings in September 2001. 67 Fed. Reg. 680, 685 (Jan. 7, 2002) (final rules designating manatee protection areas). The FWS began its evaluation with a list of potential sites "throughout Florida and southeast Georgia that manatee experts believed should be considered for possible designation as manatee protection areas." 67 Fed. Reg. at 683. From this list of potential sites considered by FWS, it determined that sixteen sites in peninsular Florida potentially merited designation, and these were identified in the proposed rule for public comment. 67 Fed. Reg. at 683-84. However, the proposed rule further indicated that fourteen of the sites were somewhat less urgently in need of regulation.

² The parties were free to modify the settlement agreement, despite it having been entered as a court order. Exhibit A at ¶ 23.

The FWS submitted a final regulation to the Federal Register for publication by December 31, 2001; it was published on January 7, 2002. 67 Fed. Reg. at 684. In the rule, the FWS described the factors it used in making its site selections and determinations, and stated that it "relied on the best available data" which was "supplemented with information from manatee experts, the public, and [FWS's] best professional judgment." 67 Fed. Reg. at 684. The FWS concluded that two of the sixteen sites should be designated immediately as refuges. With respect to the other 14 sites, the FWS noted that the State of Florida was itself in the process of designating those sites as protected areas. In order to avoid potential confusion from overlapping designations, and more importantly, to maximize limited resources for enforcement, the FWS made the decision not to designate the 14 other sites at that time. The FWS, however, explicitly stated in the final rule that it would act on the remaining 14 sites by December 1, 2002 if the state had not protected these sites by that date. The FWS believed that this approach would achieve the most protection for manatees throughout peninsular Florida, taking advantage of both federal and state resources and was consistent with the court approved settlement. Exhibit D, Declaration of Marshall P. Jones ("Jones Dec.") at ¶¶ 5-14, 18-19.

III. Other Actions by FWS to Protect Manatees

The FWS has taken a number of actions to enhance manatee protections during the time since the settlement agreement was entered into by the parties. See Jones Dec. at ¶¶ 23-42. Some of these measures are provided for in the settlement agreement; others go beyond the agreement. See Jones Dec. at ¶¶ 23-39 (actions taken by FWS to comply with the settlement agreement); 40-42 (actions taken by FWS beyond those called for in the settlement agreement.) Together, the FWS believes it has significantly enhanced protections for the manatee.

IV. Regulatory Requirements for Designating Manatee Protection Areas

The Interior defendants have the discretion to designate refuges and sanctuaries for the protection of manatees (also called manatee protection areas); the process and standards are set forth at 50 C.F.R. § 17.100 – 17.105.³⁷ The Interior defendants are solely responsible for designating manatee protection areas. The Corps defendants are not involved in the designation of refuges and sanctuaries and the Corps has no ability to control another federal government agency's regulatory actions. This fact has been recognized by all the parties, since the settlement agreement does not impose any obligations upon the Corps defendants with respect to designating manatee protection areas, and the plaintiffs have not alleged that the Corps defendants violated the settlement agreement. Further, the Memorandum Opinion of July 9, 2002, does not address any failings or any violations of the settlement agreement committed by the Corps defendants.

ARGUMENT

The facts in this case do not warrant the issuance of a contempt order. The Interior defendants have made every effort to implement measures to protect manatees and to comply with both their statutory responsibilities and obligations under the settlement agreement. They believed that their actions were in compliance with the court's orders of January 5, 2001 and January 17, 2001. In the wake of the court's July 9 order, the Interior defendants have acted expeditiously to remedy the breach identified by the court, committed to designate seven sites on an emergency basis, and will promulgate new final regulations for designation of manatee protection areas consistent with this Court's order. Given the potential for reasonable parties to have interpreted the settlement agreement differently and

³⁷ In promulgating the regulations to designate manatee protection area, the FWS must do so only (1) in compliance with Administrative Procedure Act notice and comment rulemaking procedures; and (2) when it finds that there is "substantial evidence" showing such designation is "necessary" to prevent the taking of manatees. 50 C.F.R. § 17.103 (citing 5 U.S.C. § 553).

the fact that the FWS is now implementing the agreement pursuant to the court's interpretation and direction, a contempt order is not necessary or appropriate for the circumstances. Further, regardless of what conclusions the Court reaches with respect to the Interior defendants, a finding of contempt is not appropriate against the Corps defendants who were not involved in the actions giving rise to the settlement's breach.

I. Legal Standards for Contempt

A. The Court Has Authority to Enforce its Orders Through the Exercise of its Contempt Powers; However, this Power Should Be Sparingly Used Because Contempt Is an Extraordinary Remedy.

This Court has the inherent authority to enforce its orders through the exercise of its contempt powers. See Shillitani v. United States, 384 U.S. 364 (1966); Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993). That authority, however, is to be exercised sparingly, with "restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). "[T]he 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" S.E.C. v. Life Partners, Inc., 912 F. Supp. 4, 11 (D.D.C. 1996), quoting Joshi v. Professional Health Services, Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). Further, in light of the severity of the contempt sanction, it should not be resorted to "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." Life Partners, 912 F. Supp. at 11, citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co., 767 F.2d 882, 885 (Fed. Cir. 1985). In order for a court to find contempt, it must be shown by clear and convincing evidence that: "(1) a court order was in effect, (2) the order required certain conduct by the respondent, and (3) the respondent failed to comply with the court's order." Petties v. District of Columbia, 897 F.Supp. 626, 629 (D.D.C. 1995).

B. In Order to Be Held in Contempt, a Party must Violate a Definite and Specific

order.

In order to be held in contempt of court, a party must violate "a definite and specific court order requiring [him] to perform or refrain from performing a particular act or acts with knowledge of that order." Life Partners, 912 F.Supp. at 11, quoting Whitfield v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987). If the order in question contains any ambiguities, the court has to resolve those ambiguities in favor of the respondent. See United States v. Microsoft Corp., 980 F.Supp. 537, 541 (D.D.C. 1997), (rev'd on other grounds, 147 F.3d 935 (D.C. Cir. 1998), citing Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927-28 (D.C. Cir. 1982). Without a clear and unambiguous court order, therefore, there can be no finding of civil contempt. See Armstrong, 1 F.3d at 1289.

In Armstrong, for example, several government agencies appealed from an order by Judge Richey holding them in contempt of a prior order enjoining the Archivist of the United States to "take all necessary steps" to preserve federal records and requiring the agencies not to remove, alter, or delete any information until the Archivist took action to prevent the destruction of federal records. See Armstrong, 1 F.3d at 1277. Because the agency did not violate a clear order requiring certain conduct, the Court of Appeals reversed and remanded. Id. at 1277, 1288-90. In holding that the District Court had abused its discretion, the Court of Appeals emphasized that "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous." Id. at 1289 (emphasis added), quoting Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991)

C. The Purpose of a Contempt Order Is to Obtain Compliance or Compensate for Damages.

A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." Food Lion, Inc. v. United Food &

Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997), quoting National Labor Relations Board v. Blevins Popcom, 659 F.2d 1173, 1184 (D.C. Cir. 1981). Therefore, where a party is already complying, or is otherwise compensating for any damages, there is no need for a finding of contempt.

D. Good Faith Substantial Compliance Is a Defense to Contempt.

The District of Columbia Court of Appeals has indicated that a party charged with contempt may defend itself on the ground of "good faith substantial compliance" with the court order. See Food Lion, 103 F.3d at 1017 & n.16 (assuming the existence of the defense); see also Cobell v. Babbitt, 37 F.Supp.2d 6, 9-10 & n.3 (D.D.C. 1999) (noting that, "[a]lthough the viability of this defense has not been squarely resolved in this circuit . . . the plaintiffs have not made such a challenge in this case."). To demonstrate good faith substantial compliance, the respondent may demonstrate that it "took all reasonable steps within [its] power to comply with the Court's order." Food Lion, 103 F.3d at 1017 (citations omitted).

E. Even If a Contempt Order Might Otherwise Be Appropriate, a Party Should Be Given the Opportunity to Remedy Prior to a Finding of Contempt.

Finally, in the event a party is found to be in contempt it should be given an opportunity to purge itself of the contempt prior to the imposition of any penalties. See S.E.C. v. Bilzerian, 112 F.Supp.2d 12, 16 (D.D.C. 2000) (penalty should be imposed only after recalcitrant party has been given an opportunity to purge itself of contempt by complying with prescribed purgation conditions). This requirement stems from the remedial (as opposed to punitive) nature of civil contempt. See Food Lion, 103 F.3d at 1016 (unlike a criminal contempt proceeding, a civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a

result of noncompliance”), quoting Blevins Popcorn, 659 F.2d at 1184; see also Shillitani, 384 U.S. at 368-70. Thus, penalties should be imposed, if at all, only at the conclusion of a three-stage proceeding involving “(1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.” Blevins Popcorn, 659 F.2d at 1184-85, citing Oil, Chemical & Atomic Workers Int’l Union v. N.L.R.B., 547 F.2d 575, 581 (D.C. Cir. 1976); Bilzerian, 112 F.Supp.2d at 16.

II. A Finding of Contempt Against the Corps Defendants is Not Warranted

The Corps defendants played no role in the Interior defendants’ promulgation of regulations designating manatee protection areas. Such designations are committed by law to the sole discretion of the Interior defendants; the Corps defendants had no ability to control the Interior defendants’ actions. Accordingly, the portion of the settlement agreement that relates to refuges and sanctuaries contemplates action to be taken only by the FWS, places obligations only upon the FWS, and does not contemplate any action or place any obligations upon the Corps defendants. Plaintiffs have not alleged, and the court did not find, that the Corps defendants acted or failed to act, with respect to the designation of refuges and sanctuaries. Therefore, a finding of contempt by the Corps defendants is not supportable.

III. The Interior Defendants Substantially Complied and Continues to Comply With All Their Obligations Under the Settlement Agreement

A. The Interior Defendants Substantially Complied With the Court Approved Settlement Agreement when That Agreement is Viewed in Its Entirety.

The settlement agreement endorsed by this Court is a complex agreement that imposes many

obligations upon the FWS related to manatee protection, one of which is the requirement to designate refuges and sanctuaries for manatees. When viewed as a whole, it is apparent that the FWS has substantially complied with the settlement agreement, and is committed to continuing to fully implement the agreement in a timely manner.⁴ Good faith substantial compliance with a court order is a defense to contempt. See Food Lion, 103 F.3d at 1017 & n.16 (assuming that good faith substantial compliance with a court order is a defense to contempt); see also Cobell v. Babbitt, 37 F.Supp.2d 6, 9-10 & n.3 (D.D.C. 1999) (noting that, “[a]lthough the viability of this defense has not been squarely resolved in this circuit . . . the plaintiffs have not made such a challenge in this case.”) Therefore, even if this Court were to find that the FWS did not comply with a portion of the refuge and sanctuary provision,⁵ when looking at the settlement agreement as a whole, as it must be viewed, the Interior defendants have substantially complied with the settlement agreement’s obligations.

As discussed above, aside from the refuge and sanctuary rule making, the settlement agreement required the Interior defendants: 1) to engage in notice and comment rule making to promulgate small take regulations pursuant to the MMPA under a certain time table; 2) to publish the FWS’ guidance document for public notice and comment and revise the document accordingly; 3) to publish a Florida manatee recovery plan for notice and comment and complete a final manatee recovery plan by a date certain; and 4) to share with plaintiffs and discuss with plaintiffs FWS’ enforcement plans related to

⁴ Not only have the Interior defendants complied with the many requirements of the settlement agreement, it has undertaken other measures not called for in the settlement agreement to protect manatees. See Exhibit D, Jones Dec. at ¶¶ 33, 36-42.

⁵ We note that the refuge and sanctuary provisions contains a number of procedural requirements, of which only one was even at issue in plaintiffs’ breach allegations. See Settlement Agreement at ¶ 11.

manatees for fiscal year 2001. The FWS has met and continues to meet these obligations. See Exhibit D, Jones Dec. at ¶¶ 23-42, attachments 1-8.; Exhibit A, Settlement Agreement. In accordance with their many obligations under the settlement agreement, the Interior defendants have published an advance notice of proposed rulemaking for MMPA small take regulations in March 2001, advised a host of federal and state agencies that engage in activities that may affect manatees that they would need to participate in this MMPA rulemaking, are in the process of preparing an Environmental Impact Statement related to the MMPA rulemaking, co-sponsored a Manatee Population Ecology and Management Workshop and conducted follow-on technical meetings related to manatee protection, published draft and final revised interim strategy documents to be used as part of the Corps' defendants ESA consultations, consulted with the Corp's defendants regarding the "manatee key," transmitted to the parties the FWS' enforcement plans for Fiscal Year 2001, created and published a Manatee Recovery Plan for Florida, convened a Habitat Working Group (which has met at least three times) to help coordinate manatee protections, established a Warm Water Task force to analyze manatee protections including preparation for a warm water adaptive management plan and a review of Clean Water Act regulations that may affect manatees, and provided plaintiffs with reports listing agreed-upon tasks on June 7, 2001, December 5, 2001, and June 21, 2002. Jones Dec. at ¶¶ 23-42, attachments 1-8.

These actions by the FWS demonstrate that the FWS has made a substantial good faith effort to comply with all the provisions of the court approved settlement agreement. The FWS has fulfilled and continues to take steps to fulfill all its many obligations under the settlement agreement, and has substantially complied with the obligations in the settlement agreement. In light of the various actions taken by the FWS to implement all of the settlement agreement, a finding of contempt is not warranted.

B. The Substantive Obligations Created by The Language in Paragraph 11 and Paragraph 20 Were Not Clear and Unambiguous and the Interior Defendants Believed They had Complied With the Agreement

Even if this Court were to look at the refuge and sanctuary rulemaking provision of the larger settlement agreement in isolation, at the time the Interior defendants were engaged in their rulemaking to designate refuges and sanctuaries, they believed they were complying in good faith with their obligation to engage in a final rulemaking to promulgate regulations to designate manatee protection areas. Further, the language of paragraph 11 could be and was subject to different interpretations. Therefore it is not clear and unambiguous enough to serve as a basis for contempt.

1. The Court Approved Settlement Was Not Clear and Unambiguous

While the Interior defendants recognize this Court has rejected the defendants' interpretation of paragraph 11, the paragraph's language is sufficiently general to allow for differing interpretations as to the scope, number, and location of protected areas. A party should not be held in contempt when the order they are alleged to have violated is not clear and unambiguous. *See Armstrong*, 1 F.3d at 1289.

The Interior defendants interpreted paragraph 11 of the Settlement agreement to obligate the FWS to engage in the process to publish a proposed rule for manatee protection areas by a certain date and a final rule for manatee protection areas by a certain date. The Interior defendants did not understand or interpret the phrase "throughout peninsular Florida" to require the designation of manatee protection areas "in a general distribution around the state" as this Court has now interpreted this requirement. Memorandum Opinion of July 9, 2002, at 9-10. In reading the settlement agreement, the Interior defendants looked to the regulatory requirements of 50 C.F.R. §17.103, and looked to paragraph 20 of the settlement agreement, which calls the settlement agreement to be interpreted consistent with the APA. In that context, the Interior defendants believed that they had committed to

evaluating the biological needs of the manatee and practical considerations in designating areas for special protection. Similarly, the Interior defendants did not believe that they could have agreed in advance that their rule making process would result in both refuges and sanctuaries being designated. The Interior defendants believed that their commitment to designate "refuges and sanctuaries" was a commitment to designate "manatee protection areas," as described under 50 C.F.R. § 17.100 et seq., which is the title of the federal regulations section, of which refuges and sanctuaries constitute all types of manatee protection areas.⁹

The Interior defendants recognize that this Court has not interpreted the settlement language in the same manner as the Interior defendants. However, what these disparate readings demonstrate is that the original settlement agreement language and the substantive obligations it created in paragraph 11 were not clear and unambiguous, such that the Interior defendants may be held in contempt for having violated the court approved settlement agreement. Contrary to a decision on the merits of whether a party has breached a court approved settlement agreement, if the order in question contains any ambiguities, the court has to resolve those ambiguities in favor of the respondent. See United States v. Microsoft Corp., 980 F.Supp. at 541; Common Cause, 674 F.2d at 927-28. Therefore, given the court approved settlement's ambiguous language in paragraph 11, particularly in light of paragraph 20, and the obligation to resolve such ambiguities in favor of the Interior defendants in a contempt proceeding, this Court should not find the Interior defendants in contempt.

⁹ It bears noting that the Intervenor defendants and Corps defendants shared the Interior defendants' interpretation of these obligations, as expressed in their briefing and oral argument on breach. If three of the four parties involved in negotiating an agreement interpret the same language in a different fashion, it is at least plausible that the language was not clear and unambiguous to the parties at the time they were entering into the agreement.

2. *The Interior Defendants Believed They Were Complying and Substantially Complied With Paragraph 11*

Based upon their understanding of paragraph 11 of the settlement agreement, the Interior defendants engaged in a rule making to promulgate regulations for manatee protection areas consistent with 50 C.F.R. § 17.100 – 17.105, and within the schedule provided in the agreement as modified by the parties. The FWS studied the manatee situation throughout Florida, published a proposed rule, held public meetings, consulted manatee experts, considered public comment, and published a final rule promulgating regulations that established two manatee protection areas, all within the time deadlines called for in the settlement agreement as modified by the parties.⁷ Good faith substantial compliance with a court order is a defense to contempt. See Food Lion, 103 F.3d at 1017 & n.16 (assuming the existence of the defense). To demonstrate good faith substantial compliance, the respondent may demonstrate that it “took all reasonable steps within [its] power to comply with the Court’s order.” Food Lion, 103 F.3d at 1017 (citations omitted).

This is not a case where the Interior defendants simply ignored paragraph 11 of the settlement agreement. The Interior defendants undertook considerable effort and study to promulgate the proposed and final regulations. The proposed and final rules detail the steps taken by the Interior defendants when it engaged in this rulemaking. Indeed, there have been no allegations that there was any problem with the Interior defendants’ publication of the proposed rule, rather, only that the plaintiffs

⁷ The plaintiffs suggested at oral argument that the FWS breached the settlement agreement because the plaintiffs never agreed to extend the time in which the Interior defendants had to submit the final rule for publication, while admitting that they had agreed to extend the time in which the Interior defendants had to publish the proposed rule. However, as the letter from plaintiffs’ counsel states, the plaintiffs did in fact agree to also extend the time for the publication of the final rule. See Exhibit C at fn. 2.

failed in the substantive outcome of the final rule.

The Interior defendants did submit the final regulations for publication by December 31, 2001, resulting in their publication in early January 2002. The Interior defendants believed that they substantially complied with paragraph 11 by promulgating a final rule designating two refuges and concluding that manatee protection areas were not needed at that time in the 14 other areas it had proposed. Jones Dec. at ¶¶ 4-8, 10-19.²⁷ Although there were practical considerations that warranted not designating those sites at that time, the Interior defendants also determined that immediate designation was not necessary to protect manatees. Jones Dec. at ¶¶ 10-22. At the same time, however, the FWS committed to revisit the decision within one year to evaluate whether circumstances had changed in such a way as to warrant further action. This approach was intended to allow the Interior defendants to engage in and complete a rulemaking to meet its obligations under the settlement agreement, while maintaining the ability to issue future additional final rules if the state failed to take the regulatory action it indicated it was taking. Jones Dec. at ¶¶ 8-22.

The Interior defendants made a good faith effort to substantially comply with the provisions of paragraph 11 by the deadline to which it had agreed. Its efforts at studying the issue, conducting meetings, publishing the proposed rule, responding to the comments, and designating those areas the

²⁷ The DC Circuit has recently reaffirmed the principle that the courts will look to what an agency has actually done, rather than what it claims it is doing when it takes some agency action. See General Electric Co. v. EPA, 2002 WL 999466 (D.C. Cir. 2002) (despite agency's characterization of its action as issuing mere guidance and therefore not final agency action, the agency action was in reality a legislative decision and therefore final agency action notwithstanding agency's own description of its action); Appalachian Power Co. v. EPA 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) (same). It is the action itself, a decision not to designate at that time, rather than how the FWS characterized its action, as a deferral of designation, to which a court should look in evaluating the behavior of the Interior defendants.

Interior defendants believed merited designation all establish that there was good faith substantial compliance with paragraph 11 of the court approved settlement. These considerable undertakings to meet its obligations should not be discounted by this Court. Accordingly, the court should not hold the Interior defendants in contempt.

IV. The Court Should Not Hold the Interior Defendants in Contempt Because Such a Finding is Not Necessary to Bring About Compliance With This Court's Order.

FWS has now been provided the benefit of this Court's interpretation of the court approved settlement agreement. With this understanding, it has committed to undertake another final regulatory action by November 1, 2002, on the remaining fourteen sites it had determined were not in need of designation in the January 7, 2002 designation. The failure by the Interior defendants to comply with the court approved settlement agreement was the result of their differing interpretation of that agreement, but not from a disregard for its obligations or a fundamental failure to act. Therefore, there is no reason to believe that the Interior defendants will not comply with the court approved settlement as it has now been clarified by this Court. To the contrary, the Interior defendants have indicated that they are prepared to exceed the requirements of paragraph 11 by designating at least seven sites on an emergency basis by September 16, 2002.

Since the Interior defendants are already moving forward expeditiously to comply with this Court's order and the settlement agreement, it is not necessary to hold the Interior defendants in contempt. A civil contempt action, unlike a criminal contempt proceeding, is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." Food Lion, 103 F.3d at 1016, quoting Blevins Popcorn, 659 F.2d at 1184; See Shillitani, 384 U.S. at 368-70. In this case, as discussed above, the breach that this court found resulted

from the Interior defendants having interpreted the paragraph 11 language in a manner different from the court. It was not an act of bad faith or total failure to act. Furthermore, a contempt order is not necessary to remedy damages. The FWS is already designating areas on an emergency basis and engaging in a discussion with the plaintiffs. With the court having now stated its interpretations, and with the Interior defendants' representations that it will be able to meet the new deadlines imposed by this court for the promulgation of new regulations related to manatee protection areas, a finding of contempt would not serve or hasten to bring about compliance.

In addition, a potential contemtor should be given the opportunity to purge itself of its contemptuous behavior. See Bilzerian, 112 F.Supp.2d at 16 (penalty should be imposed only after recalcitrant party has been given an opportunity to purge itself of contempt by complying with prescribed purgation conditions). The Interior defendants should be given the opportunity to purge itself of the potentially contemptuous behavior, and should be allowed to promulgate its regulations in accord with this court's new interpretation of the settlement agreement and its November 1, 2002 deadline. If the Interior defendants meet this new deadline, as they have indicated that they intend to do, there would be no remedial purpose for this court to hold the Interior defendants in contempt.

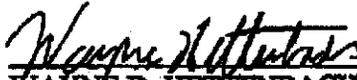
CONCLUSION

The facts of this case reflect a genuine misunderstanding regarding the scope and direction of one provision in a complex settlement agreement; they do not, however, justify the imposition of the extraordinary remedy of contempt. Since it entered into the settlement agreement with Save the Manatee Club in January 2001, the Interior defendants have made good faith efforts to substantially comply with the terms of that agreement. Its efforts were guided by its interpretation of the agreement that was based upon and supported by its own regulations— an

interpretation that the court subsequently ruled was wrong. The error was not intentional or unreasonable given the language of the settlement agreement. In any event, the Interior defendants are committed to continuing to comply with the terms of the settlement agreement, and, more importantly, to fully implementing the direction of the Court with respect to the designation of additional refuges and sanctuaries throughout peninsular Florida in accordance with paragraph 11 of the settlement agreement and the Court's July 9th Order, which also provide additional remedies. For these reasons, an order finding the Interior defendants in contempt is not warranted.

Respectfully Submitted,

THOMAS L. SANSONETTI,
Acting Assistant Attorney General
Environment and Natural Resources Division
SETH BARSKY, Assistant Chief
Wildlife and Marine Resources Section

 Date: 9/3/02
WAYNE D. HETTENBACH, Trial Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
t: 202-305-0213
f: 202-305-0275

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAVE THE MANATEE CLUB, et al.

Plaintiff,

v.

BALLARD, et al.

Defendant.

Civil No. 00-00076 (EGS/JMF)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Federal Defendants' Combined Response to Order to Show Cause was served, via facsimile and U.S. mail, to opposing counsel this 3rd day of September, 2002, to the following:

Eric R. Glitzenstein
Meyer & Glitzenstein
Suite 700
1601 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 588-5049

Virginia S. Albrecht
Hunton & Williams
1900 K Street, N.W.
Washington, D.C. 20006
(202) 778-2201

John Longstreth
Preston, Gates, Ellis & Rouvelas Meeds
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 761-4932


JEAN WILLIAMS