



U.S. Department of Justice

Environment and Natural Resources Division

Law and Policy Section
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May 2, 2013

VIA ELECTRONIC CASE FILING

Clerk of Court
United States District Court for the Southern
District of Texas, Houston Division
United States Courthouse
515 Rusk Avenue
Houston, TX 77002

Re: *Galveston Baykeeper v. D.B. Western, Inc., et al.*, No.: 4:12-cv-3516 (S.D. Tex.)

Dear Clerk of the Court:

On May 1, 2013, the Citizen Suit Coordinator for the Department of Justice received a copy of the consent judgment in the above-referenced case for review pursuant to the Clean Water Act, 33 U.S.C. § 1365(c)(3). This provision provides, in relevant part:

No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

See also 40 C.F.R. § 135.5 (service on Citizen Suit Coordinator in the U.S. Department of Justice). A settlement that does not undergo this federal review process is at risk of being void.

Among its terms, the proposed consent judgment (the "Settlement Agreement") provides that the Galveston Bay Foundation will receive a payment of \$45,000 for a supplemental environmental project ("SEP") for the benefit of the Galveston Bay watershed.

Where a consent judgment provides for the payment or possibility of payment of sums to a third party which is to undertake an environmentally beneficial project, such as a SEP, the United States typically requests that the third party provide a letter to the Court and to the United States representing that the third party is a 501(c)(3) tax-exempt entity and that it: (1) has read the proposed consent judgment; (2) will spend any monies it receives under the proposed judgment for the purposes specified in the judgment; (3) will not use any money received under the proposed consent judgment for political lobbying activities; and (4) will submit to the Court, the United States, and the parties a letter describing how the funds were spent.

In a letter dated May 1, 2013, Galveston Bay Foundation confirmed that any funds received as a result of the Settlement Agreement would be used solely for the purpose outlined therein, and that no portion of those funds would be used for political lobbying activities. A copy of that letter is attached hereto as Exhibit 1. The United States believes that this letter will help to ensure that any monies expended under the proposed consent judgment will be used in a manner that furthers the purposes of the Act, and that is consistent with the law and the public interest.

The United States also herein notifies the Court of its understanding concerning an aspect of the proposed consent judgment as to which the United States sought clarification. Based on a telephone conversation with, and confirming e-mail from, counsel for Plaintiff Galveston Baykeeper, both on May 1, 2013, the United States understands and Plaintiff's counsel has confirmed that notwithstanding use of the term "Penalty Settlement Payment" in paragraphs 1.1 and 3.3 of the Settlement Agreement, such payment by Defendant D.B. Western, Inc. to the Galveston Bay Foundation under the proposed consent judgment is not a civil penalty within the meaning of Clean Water Act section 505(a), 33 U.S.C. § 1365(a), but is instead a payment to fund a SEP as provided in the Settlement Agreement.

Given these representations and understandings, the United States has no objection to entry of the proposed consent judgment. We accordingly notify the Court of that fact. The United States affirms for the record that it is not bound by this settlement. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982) (Attorney General is not bound by cases to which he was not a party); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 (1987) (explaining that citizen suits are intended to "supplement rather than supplant governmental action"); *Sierra Club v. Elec. Controls Design*, 909 F.2d 1350, 1356 n.8 (9th Cir. 1990) (explaining that the United States is not bound by citizen suit settlements, and may "bring its own enforcement action at any time"); 131 Cong. Rec. S15,633 (June 13, 1985) (statement of Senator Chafee, on Clean Water Act section 505(c)(3), confirming that the United States is not bound by settlements when it is not a party). The United States also notes that, if the parties subsequently propose to modify any final consent judgment entered in this case, the parties should so notify the United States, and provide a copy of the proposed modifications, forty-five days before the Court enters any such modifications. *See* 33 U.S.C. §1365(c)(3).

Finally, the United States herein states that it waives any further time to which it may be entitled under 33 U.S.C. § 1365(c)(3) to review the proposed consent judgment and that the Court may proceed as appropriate without delay.

We appreciate the attention of the Court. If you have any questions, please contact the undersigned at (202) 514-4767.

Sincerely,

/s/ David S. Gaultieri

David S. Gaultieri, Attorney

U.S. Department of Justice

Environment and Natural Resources Division

Law and Policy Section

P.O. Box 7415

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David.Gaultieri@usdoj.gov

Attachment

cc: Counsel of record (via ECF)



May 1, 2013

Sarah Lu
Citizen Suit Paralegal
Environment and Natural Resources Division
U.S. Department of Justice
Submitted via email to: sarah.lu@usdoj.gov

Dear Ms. Lu,

The Galveston Bay Foundation (GBF) is the third-party recipient of supplemental environmental project (SEP) funding related to the Settlement Agreement between Galveston Baykeeper and D.B. Western, Inc. This letter is to confirm that GBF has read the Settlement Agreement, will spend SEP monies under this Settlement Agreement specifically for the purposes specified in the Settlement Agreement and discussed below, and will not utilize SEP monies for lobbying purposes.

GBF is a 501(c)(3) tax-exempt organization established in 1987 with the mission to restore, protect, and enhance the natural resources of the Galveston Bay estuarine system for present users and for posterity. Our programs in advocacy, conservation, education, and research strive to ensure that Galveston Bay remains a beautiful and productive place for generations to come. In order to effectively address the underlying issues affecting the Galveston Bay estuarine system, such as habitat loss, water quality, and salinity balance, it is imperative that citizens of all ages have the knowledge to make informed decisions for effective resource management. The Galveston Bay Foundation offers a number of environmental education and outreach opportunities to help citizens understand their environment, with a particular focus on the Galveston Bay watershed and ecosystem.

The largest and most popular of GBF's youth education programs is its "Get Hip to Habitat" program. The Get Hip to Habitat program is a school-based, hands-on coastal wetlands education program that involves students cultivating native marsh vegetation (smooth cordgrass, *Spartina alterniflora*) on their campus grounds in salt water pools that mimic an estuarine marsh environment, monitoring and caring for the marsh grass over the course of the school year, and finally, transplanting their grasses to Galveston Bay marsh restoration sites. From the time their school nurseries are stocked until the final transplanting date in the spring, students are responsible for regularly testing the salinity and pH of the mini-marshes and monitoring the growth and health of the grasses. The following spring, students culminate their project by transplanting their container grasses to designated local marsh

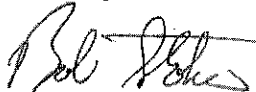
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restoration sites selected by GBF. The program has been expanding since 2006, and currently serves 1,200 students from 17 schools in the Houston-Galveston area.

Following program completion and expenditure of the SEP funds, GBF will submit to the Court, the United States, and the parties a report summarizing the results of the program on which the funds were spent.

I hope that this letter provides you with the information you require. Please feel free to contact me at any time at (281) 332-3381 extension 211 or bstokes@galvbay.org with questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Stokes". The signature is written in a cursive style with a horizontal line through the middle.

Bob Stokes
President

CC: Scott Jerger, Field Jerger LLP