

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

UNITED STATES OF AMERICA,

Case No. 15-CIV-81466-WPD

Plaintiff,

v.

THE BEAR'S CLUB FOUNDING PARTNERS, LTD;
THE BEAR'S CLUB DEVELOPMENT CO.,
THE BEAR'S CLUB BUILDERS LLC¹;
BEAR'S CLUB MANAGEMENT CORP.;
CLARENDON PROPERTIES GROUP, INC;
IVAN CHARLES FREDERICKSON;
IRA FENTON; and
ROBERT B. WHITLEY

Defendants.

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America ("United States"), at the request of the Secretary of the United States Department of the Army, acting through the United States Army Corps of Engineers, filed a Complaint in this action on October 20, 2015, alleging that The Bear's Club Founding Partners, Ltd. and certain of its affiliates and officers ("Defendants") violated Clean Water Act ("CWA") section 404(s), 33 U.S.C. §1344(s) (the United States and the Defendants shall be collectively referred to herein as the "Parties");

WHEREAS, the Complaint specifically alleges that through alterations in wetlands 14 and 14a identified in Permit Sheet 10 of 13, Defendants or some among them violated CWA

¹ This entity no longer exists and all legal rights, title and interest have been subsumed in the other listed entities. Therefore, no block is included on the signature page for The Bear's Club Builders, LLC.

section 404(s) and conditions or limitations of Department of the Army Permit Number SAJ-1998-03497 (IP-TA);

WHEREAS, the Complaint requests that the Court award injunctive relief and civil penalties;

WHEREAS, Defendants admit that wetlands 14 and 14a were altered but deny that the alterations violated the Permit or violated the CWA; and

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will end litigation between the United States and the Defendants, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, before the taking of any testimony upon the pleadings, without the adjudication or admission of any issue of fact or law except as provided in Section I of this Consent Decree, and upon consent of the Parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

1. This Court has jurisdiction over the subject matter of these actions and over the Parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and CWA section 404(s), 33 U.S.C. §1344(s).
2. Venue lies in the Southern District of Florida pursuant to CWA section 404(s), 33 U.S.C. §1344(s), and 28 U.S.C. §§ 1391(b) and (c).
3. For purposes of this Consent Decree, and any action to enforce this Consent Decree, the Parties consent to the Court's jurisdiction over this Consent Decree, over any such

action to enforce this Consent Decree, and over the Parties, and the Parties consent to venue in this judicial district.

4. For purposes of this Consent Decree, and any action to enforce this Consent Decree, the Parties agree, and the Court has previously found in its Order Denying Defendant's Motion to Dismiss, dated March 31, 2016 (DE 26), that the Complaint states claims upon which relief can be granted pursuant to CWA section 404(s) of the CWA, 33 U.S.C. § 1344(s).

II. APPLICABILITY

5. This Consent Decree applies to and is binding upon the United States, as well as the Defendants and their successors, assigns, or other entities or persons otherwise bound by law whether or not such entity or person has notice of this Consent Decree.

6. In any action to enforce this Consent Decree, the Defendants shall not raise as a defense the failure by any corporate officers, directors, employees, agents, contractors, or consultants to take any actions necessary to comply with this Consent Decree.

III. GENERAL PROVISIONS

7. This Consent Decree resolves all violations related to the claims of the United States under the CWA permit alleged in the Complaint by the Defendants or any of their affiliates, officers, directors, employees, agents, contractors, or consultants through the date of the lodging of this Consent Decree. In addition, the Defendants' compliance with this Consent Decree resolves the United States' claims for ongoing violations of the CWA permit alleged in the Complaint.

8. It is the express purpose of the Parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251.

9. The Consent Decree will not require Defendants to restore wetlands 14 and 14a to the condition existing before the alteration alleged in the Complaint to have violated the Permit and the CWA. After the Defendants fulfill the obligations set forth in paragraphs Section IV of this Consent Decree, the Corps shall complete a Nationwide Permit 32 ("NWP 32") verification authorizing, subject to the conditions provided in the Nationwide Permit and this Consent Decree, any dredged or fill material that, as of October 2010, was discharged into wetlands 14 and 14a as alleged in the Complaint.

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations. Except as provided in Paragraph 9, nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the United States Environmental Protection Agency's ability to exercise its authority pursuant to CWA section 404(c), 33 U.S.C. § 1344(c).

11. This Consent Decree in no way affects or relieves the Defendants of the responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree except as provided for in paragraph 7.

13. The Parties reserve any and all legal and equitable remedies available to enforce this Consent Decree and applicable law. The United States further reserves all legal and equitable remedies available to address any imminent and substantial endangerment to public health or welfare or the environment, whether related to the alleged violations addressed in this Consent Decree or otherwise. This Consent Decree shall not be construed to limit the rights of

the United States to obtain penalties or injunctive relief under the CWA or its implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in this Consent Decree. In any subsequent proceeding initiated by the United States, the Defendants shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim splitting, or other defenses based on any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims resolved by this Consent Decree as specified in Paragraph 7 of this Consent Decree.

14. Except as provided in Section I of this Consent Decree, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

15. Within ninety (90) Days of the Effective Date of this Consent Decree, the Defendants shall pay a civil penalty to the United States in the amount of four hundred thousand dollars (\$400,000).

16. Payment to the United States shall be made in accordance with the written instructions to be provided to the Defendants by the United States Department of Justice within ninety (90) Days of the Effective Date of this Consent Decree. Upon payment, the Defendants shall provide written notice to the United States at the addresses specified in Section VII of this Consent Decree.

17. The Defendants shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section VI in calculating any federal income tax owed.

V. DISPUTE RESOLUTION

18. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section (“Dispute Resolution”) shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Any Defendants’ failure to seek resolution of a dispute under this Section shall preclude raising any such issue as a defense to an action by the United States to enforce any obligation of the Defendants arising under or with respect to this Consent Decree.

19. Any dispute between the Parties that is subject to Dispute Resolution shall first be the subject of informal negotiations. The dispute shall be considered to have arisen on the date that either party sends the other party a written Notice of Dispute, pursuant to Section V. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed twenty one (21) Days from the date the Notice of Dispute is submitted to the other party unless that period is modified in writing by the United States. If the Parties cannot resolve a dispute by informal negotiations within that time period, then the position advanced by the United States in writing during the informal negotiations period shall be considered binding unless, within thirty (30) Days after the conclusion of the informal negotiation period, the Defendants file with the Court a motion for judicial resolution of the dispute.

20. In any dispute submitted to the Court for resolution pursuant to this Section, the Defendants shall have the burden of proving by a preponderance of evidence that the United States’ position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants’ position will achieve compliance with the terms of this Consent Decree and the CWA.

21. The invocation of Dispute Resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of the Defendants under this Consent Decree. Stipulated penalties, if applicable to the disputed matter, shall continue to accrue from the first Day of violation, but payment shall be stayed pending resolution of the dispute as provided in Section VI. If the Defendants do not prevail on the disputed issue, stipulated penalties, and interest, if applicable, shall be assessed and paid as provided in Section VI.

VI. STIPULATED PENALTIES

22. If Defendants fail to pay the civil penalty required under Paragraph 15 when due, Defendants shall be liable for a stipulated penalty of two thousand dollars (\$2,000) per Day for each Day that the payment or purchase is late.

23. Defendants shall satisfy any obligation to pay stipulated penalties in accordance with written instructions to be provided by the United States. Upon any such payment, the Defendants shall provide written notice, at the addresses specified in Section VII of this Consent Decree.

24. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree.

25. Any disputes concerning the amount of stipulated penalties or the underlying violation that gives rise to the assessment of stipulated penalties are subject to the Dispute Resolution provisions of Section V. Stipulated penalties shall continue to accrue as provided in Paragraph 25, but need not be paid until the following:

a. If the dispute is resolved by agreement between the Parties, the Defendants shall pay the amount due under such agreement to the United States within thirty (30) Days of the effective date of the agreement.

b. If the dispute is taken to the Court, the Defendants shall pay all accrued penalties determined by the Court to be owing within thirty (30) Days of receiving the Court's decision, except as provided in subparagraph c, below.

c. If any party appeals the Court's decision to the Court of Appeals (or beyond), the Defendants shall pay all accrued penalties determined to be owing, within fifteen (15) Days of receiving the final appellate decision.

26. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for the Defendant's failure to pay any stipulated penalties.

27. The stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for the Defendants' violation of this Consent Decree or applicable law.

VII. ADDRESSES

28. All notices and communications required under this Consent Decree shall be made to the Parties through each of the following persons and addresses:

a. TO THE UNITED STATES:

i. TO THE DEPARTMENT OF JUSTICE:

Carlos Raurell
United States Attorney
Southern District of Florida
99 Northeast 4 Street
Miami, Florida 33132
(305) 961-9243 (p)
Carlos.Raurell@usdoj.gov

Andrew J. Doyle, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice

P.O. Box 7611
Washington, D.C. 20044
(202) 514-4427 (p)
(202) 514-8865 (f)
andrew.doyle@usdoj.gov

ii. TO CORPS:

Jose Rivera
Project Manager
U.S. Army Corps of Engineers
4400 PGA Boulevard, Suite 500
Palm Beach Gardens, Florida 33410
(561) 472-3536 (p)
(561) 626-6971 (f)
Jose.J.Rivera@usace.army.mil

John F. Kasbar
Deputy District Counsel
U.S. Army Corps of Engineers
Jacksonville District
701 San Marco Boulevard
Jacksonville, Florida 32207
(904) 232-2126 (p)
(904) 232-1954 (f)
John.F.Kasbar@usace.army.mil

b. TO THE DEFENDANTS:

Eugene Stearns, Esq.
Matthew Dates, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
Museum Tower
150 West Flagler Street, Suite 2200
Miami, FL 33130
(305) 789-3200 (p)
(305) 789-3395 (f)
ESTearns@stearnsweaver.com
MDates@stearnsweaver.com

Reggie Bouthillier
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
106 East College Avenue, Suite 720

Tallahassee, FL 32301
(850) 580-7200 (p)
(850)329-4861 (f)
RBouthillier@stearnsweaver.com

29. Any party may, by written notice to the other party, change its designated notice recipient or notice address provided above.

VIII. COSTS OF SUIT

30. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should the Defendants subsequently be determined by the Court to have violated this Consent Decree, the Defendants shall be liable for any costs or attorneys' fees incurred by the United States in any action against the Defendants for noncompliance with or enforcement of this Consent Decree.

IX. PUBLIC COMMENT

31. The Parties acknowledge that after the filing and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts or considerations which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree. The Defendants consent to entry of this Consent Decree in its present form without further notice.

X. MODIFICATION

32. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Consent Decree, it shall be effective only upon approval by the Court.

XI. TERMINATION

33. After the Defendant has completed the requirements of Section IV paragraphs 15-16 of this Consent Decree and have paid any outstanding stipulated penalties required by this Consent Decree, the Defendants may submit to the United States, at the addresses specified in Section VII of this Consent Decree, a Request for Termination, stating that the Defendants have satisfied those requirements, together with supporting documentation.

34. Following receipt by the United States of the Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether the Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. Once the requirements of Section IV paragraphs 15-16 have been met, the United States shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

35. If the United States does not agree that the Consent Decree may be terminated, the Defendants may invoke Dispute Resolution under Section V of this Consent Decree. However, the Defendants shall not seek Dispute Resolution of any dispute regarding termination, under Section V of this Consent Decree, until ninety (90) Days after service of its Request for Termination.

XII. SIGNATORIES/SERVICE

36. Each undersigned representative of the Defendants and the United States Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

37. This Consent Decree may be signed in counterparts, such counterpart signature pages shall be given full force and effect, and its validity shall not be challenged on that basis. The Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XIII. INTEGRATION

38. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes any prior agreements and understandings, whether verbal or written, concerning the settlement embodied herein. Other than Appendices and modifications made effective in accordance with Section X of this Consent Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

XIV. FINAL JUDGMENT AND RETENTION OF JURISDICTION

39. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and the Defendants.

40. This Court retains jurisdiction over this action until termination of this Consent Decree, for the purpose of resolving disputes arising under this Consent Decree, or entering orders modifying this Consent Decree, or effectuating or enforcing compliance with the terms of this Consent Decree.

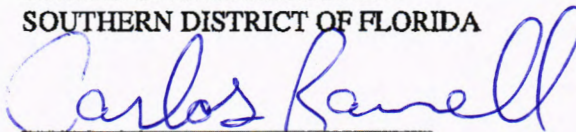
IT IS SO ORDERED

Dated, entered, and made effective this _____ day of _____, 201__.

United States District Judge

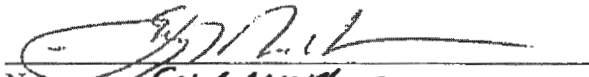
UNITED STATES

WIFREDO A. FERRER
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA

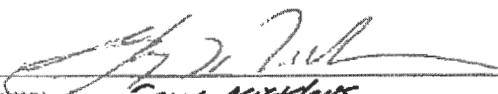


CARLOS J. RAURELL
Assistant United States Attorney
99 NE 4th Street
Miami, Florida 33132
Carlos.raurell@usdoj.gov
305-961-9243

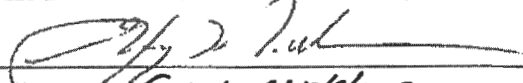
BEAR'S CLUB FOUNDING PARTNERS, LTD.


Name: Fay Nikolaus
Title: _____

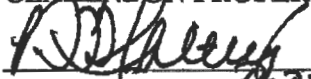
THE BEAR'S CLUB DEVELOPMENT CO.


Name: Gary Nicklaus
Title: _____

BEAR'S CLUB MANAGEMENT CORP.

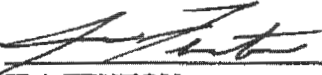

Name: Gary Nicklaus
Title: _____

CLARENDON PROPERTIES GROUP, INC


Name: Robert B. Whitley
Title: PRESIDENT



IVAN CHARLES FREDERICKSON



IRA FENTON



ROBERT B. WHITLEY