



Fisheries Litigation Update

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Council Process



Council Process

Anglers Conservation Network v. Pritzker (D.C. Cir. 2016)

Challenge to Mid-Atlantic Council decision to defer consideration of Amendment 15 regarding adding river herring and shad to MSB FMP.

Held: Council decision not reviewable.



Aquaculture



Aquaculture

Gulf of Mexico Aquaculture FMP

Gulf Restoration Network v. NMFS (D.D.C. 2010)

- Plaintiffs challenge plan before regulations are implemented

Held: Dismissed for lack of standing and ripeness, and because there is no final agency action.

Gulf Fishermen's Ass'n v. NMFS (E.D. La. *pending*)

- Challenge to rule published January 2016



Aquaculture

Kahea, Inc. v. NMFS (D. Haw. 2012/9th Cir. 2013)

Challenge to Special Coral Reef Ecosystem Fishing Permit for purpose of testing feasibility of stocking, culturing and harvesting almaco jack in a pod towed by a sailing vessel.

Held: “Defendants’ determination that [the project] falls within the term ‘harvesting’ was reasonable. The project involves growing and gathering a ‘crop’ of almaco jack to sell for human consumption.”

- Court also dismissed NEPA claim as moot, 9th Cir. reversed.



Aquaculture

Kahea, Inc. v. NMFS II (D. Haw. 2014) *On Remand*

2014 case focused on NEPA/failure to prepare EIS

Held:

- NMFS adequately considered whether issuance of permit would establish a precedent for future AQ projects, noting limited duration and scope of permitted project
- NMFS reasonably concluded that project was not highly controversial – no showing of substantial dispute over impacts on commercial or charter fishing or native medical practice



Observers and Monitoring



Observers and Monitoring

Goethel v. U.S. Dept. of Commerce (1st Cir. 2016)

Challenge to Am. 16 (requiring that sector participants pay the costs of at-sea monitors)

- Statutory and Constitutional claims challenging observer authority, industry funding requirement and MSA generally
- Favorable District Court Decision – July 29, 2016
 - Dismisses for Statute of limitations
 - Rejects all claims on the merits
- Court of Appeals Affirms – September 10, 2012
 - Statute of limitations only



Observers and Monitoring

New England Groundfish SBRM

CLF v. Evans (D.D.C. 2001) (Amendment 9)

Oceana v. Evans (D.D.C. 2005) (Amendment 13)

Oceana v. Locke (D.D.C. 2010/D.C. Cir. 2011) (Omnibus)

- Use of a discretionary “prioritization process” for reallocating observers under insufficient funding scenarios fails to “establish” an SBRM. NMFS may reserve some discretion in making observer allocation decisions on a case-by-case basis, but it must specify an identifiable standard that meaningfully constrains its decision making.

Oceana v. Ross (D.D.C. pending) (Omnibus after remand)



Observers and Monitoring

The Boat Co. v. Pritzker (D. Alaska 2014)

Challenge to Am. 76 (restructuring observing program)

Held:

- NEPA: NMFS should have supplemented EA to examine whether observer data would be unreliable after daily observer costs doubled.
- MSA: Court deferred to “scientifically sound sampling design” for observer allocation decisions



Observers and Monitoring

Willie R. Etheridge Seafood Co. v. Pritzker (E.D.N.C. 2016)

Challenge to HMS Amendment 7 IBQ and electronic monitoring requirements

Held:

- Record supported EM requirements



National Standard 1



NS1: Stocks in the Fishery

Anglers Conservation Network v. NMFS (DDC 2015)

Challenge to Am 14 to MSB FMP, which did not include four forage fish as stocks in fishery

Held:

- MSA: Not obligated to add stocks to FMP simply because C&M would be positive
- NEPA: Should have considered adding stocks

UCIDA v. NMFS (9th Cir. 2016)

Challenge to Am 12 for salmon fisheries off Alaska

Held:

- MSA requires a Council to prepare an FMP for each fishery that requires conservation and management



National Standard 1

Guindon v. Pritzker I (D.D.C. 2014)

Challenge to Reg Amendment establishing 2013 red snapper quotas

Held:

- NS1 - Accountability Measures were inadequate where they failed to account for high degree of management uncertainty and a history of regular overages.
- NS2 – Disregarding recent landing estimates indicating significant rec quota overage violated NS2
- NS4 – High likelihood of overharvest resulted in “de facto” reallocation fro commercial sector to the rec sector.



National Standard 1

Flaherty v. Pritzker (D.D.C. 2016)

Challenge to use of constant catch ABC control rule in 2013 to 2015 specifications for Atlantic herring.

Held:

- NS1: ABC “clearly permissible” and well-justified in record.
- NS2 “requires sound science and diligent research.... It does not mandate outcomes.”
- NEPA alternatives adequate.



Allocations



Allocations

Guindon v. Pritzker (Guidon III) (D.D.C. 2017)

Challenge to Gulf Reef Fish FMP/Red Snapper Reallocation

Held - Amendment 28 created a system in which a sector must demonstrate an increase in landings in excess of its quota to obtain an increase in its allocation.

- Places the commercial sector at a *permanent disadvantage* because it is managed under an IFQ system that precludes overages.



Catch Shares/LAPPs



Catch Shares/LAPPs

Pacific Dawn v. Pritzker (D.D.C. 2011 & 9th Cir. 2016)

Challenge to Pacific trawl rationalization program - whiting IFQ allocation

Held:

- NMFS gave careful consideration to the present participation factor and reasonably explained reasons for giving less weight to present participation – i.e. maintaining the credibility of control dates



Catch Shares/LAPPs

Glacier Fish Co. v. Pritzker (9th Cir. 2016)

Challenge to Pacific trawl rationalization program – cost recovery program

Held:

- The CP coop permit is a LAP issued to the group of harvesters and each member of the group is a “holder” of that permit.
- The 2014 cost recovery fee was inconsistent with cost recovery regulations because the agency did not determine the “actual” costs “directly related to” the CP program and failed to account for efficiencies gained as result of the program.



Catch Shares/LAPPs

Pacific Choice Seafood Co. v. Pritzker (N.D. Cal. 2016)

Challenge to Pacific trawl rationalization program –
accumulation limits

Held:

- Court denied motion to dismiss – July 2016.
- Case argued on merits – March 2017



Pending Cases

Massachusetts Lobstermen's Ass'n v. Ross (D.D.C.) (filed March 7, 2017)

- Challenge to the Proclamation establishing the Northeast Canyons and Seamounts Marine National Monument

Alfa International Seafood, Inc. v. Ross (D.D.C.)

- Challenge to seafood import marketing program (SIMP) rule



QUESTIONS/DISCUSSION