Review of Recent Court Rulings

Regulatory Training Program
Jan. 2008

Administrative Record

Plaintiff cited the Council's record to support its claim that the current bycatch reporting methodologies were inadequate:

> For instance, a Council staffer reported that, according to fishermen's logbook data (VTRs), one of the chief bycatch reporting methods, the New England groundfish fishery ranged from "Africa to Alaska, with heavy fishing in the Vancouver and Chicago areas." … The Council also had previously concluded that "both VTRs and the limited observer program are insufficient to estimate annual bycatch levels, because commercial fishers unlawfully underreport bycatch in VTRs."…. Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904, NE Scallop, p. 131-2.)

A court may compel production of additional documents to supplement the record, such as:

- Within thirty days after the entry of this Order, Defendants shall "complete" the administrative record, by providing to the Court all non-privileged documents and materials directly or indirectly considered by Defendants in making the decisions made the basis of this case, including evidence and material that may be contrary to such decisions. This should include non-privileged communications (including emails) among and between NMFS staff, the staff of the Council and other parties relating to the development of Amendment 22, and all non-privileged records related to the EIS process concerning (a) the possible impacts of the proposed rule, (b) assessments of alternatives, (c) the impact of scientific uncertainties on the selection of alternatives, and (d) the alternatives related to how much to reduce bycatch in the shrimp fishery (as opposed to lowering the TAC in the directed fishery). Coastal Conservation Association v. Gutierrez, S.D. TX Feb. 17 2006, 2006 U.S. Dist. LEXIS 96704, p. 8-9.

APA

Good Cause Waiver: Habitual invocation on annual basis is not precluded as long as there is an adequate, fact- and season-specific rationale. The court distinguished its earlier (2003) opinion invalidating the good cause waiver for Pacific groundfish specifications as follows:

- …we declared that generic "timeliness considerations of rulemaking on an annual basis cannot constitute good cause." …The agency must "demonstrate . . . some exigency apart from generic complexity of data collection and time constraints," and it had not done so. Id. We took pains to note, however, that we did not need to "determine the precise contours of what constitutes good cause in this context," and that "we did not mean to suggest that habitual invocation of the good cause exception is itself improper." We concluded in NRDC that the "NMFS should be free in future years to show that compliance is impracticable under specific circumstances pertinent to the year at issue."

  …the good cause statement in this case fills nearly a page in the Federal Register, and it thoroughly explains why the NMFS could not solicit public comment before the

measures' effective date. The NMFS justified its decision with specific fishery-related reasons, not generic complaints about time pressure and data collection difficulties.

The fact that the NMFS regularly invokes the good cause exception for the Pacific Plan salmon management measures does not render the exception unavailable for 2005. So long as the NMFS continues to give season-specific reasons for why the good cause exception is needed, its "habitual invocation" is not improper. Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007)*, p. 52-55.

GOOD EXAMPLE, from Oregon Trollers:

> The Assistant Administrator for Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553(b)(B), to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable.
>
> The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time-frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These pre-season abundance forecasts, which are derived from the previous year's observed spawning escapement, vary substantially from year to year, and are not available until January and February because spawning escapement continues through the fall.
>
> The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available. The public planning process requires coordination of management actions of four states, numerous Indian tribes, and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a 2-month period which culminates at the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval and implementation of fishing regulations effective on May 1.
>
> Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process would require 30 to 60 days in addition to the 2-month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days

would require that fishing regulations for May and June be set in the previous year without knowledge of current stock status. Although this is currently done for fisheries opening prior to May, relatively little harvest occurs during that period (e.g., in 2004 less than 10 percent of commercial and recreational harvest occurred prior to May 1). Allowing the much more substantial harvest levels normally associated with the May and June seasons to be regulated in a similar way would impair NMFS" ability to protect weak and ESA listed stocks and provide harvest opportunity where appropriate.

Overall, the annual population dynamics of the various salmon stocks require managers to vary the season structure of the various West Coast area fisheries to both protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose abundance has increased relative to the previous year thereby undermining the purpose of this agency action. For example, the 2005 forecast ocean abundance for Klamath River fall Chinook requires a reduction in the commercial season length from Humbug Mountain, OR, to the Oregon-California Border from being open from May-June in 2004 to being closed in 2005. With out these, and similar restrictions in other areas in 2005, the projected Klamath River fall Chinook escapement floor would not be met. Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(B).

The AA also finds that good cause exists under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness of this final rule. As previously discussed, data are not available until February and management measures not finalized until early April. These measures are essential to conserve threatened and endangered ocean salmon stocks, and to provide for harvest of more abundant stocks. If these measures are not in place on May 1, the previous year’s management measures will continue to apply. Failure to implement these measures immediately could compromise the status of certain stocks, such as the Klamath River fall Chinook, and negatively impact international, state, and tribal salmon fisheries, thereby undermining the purposes of this agency action.

To enhance notification of the fishing industry of these new measures, NMFS is announcing the new measures over the telephone hotline used for inseason management actions and is also posting the regulations on both of its West Coast regional websites (www.nwr.noaa.gov and swr.nmfs.noaa.gov). NMFS is also advising the States of Washington, Oregon, and California on the new management measures. These states announce the seasons for applicable state and

> Federal fisheries through their own public notification systems. 70 Fed. Reg. 23063.

BAD EXAMPLE, from NRDC (same court):

The court noted that the groundfish FMP Groundfish FMP "anticipates that the Secretary will 'waive for good cause the requirement for prior notice and public comment in the Federal Register,' as the Council process 'will adequately satisfy that requirement,'" and that NMFS had used the same rationale for invoking the good cause waiver since 1991. NRDC v. Evans, 9th Cir. 2003, 316 F.3d 904; 2003 U.S. App. LEXIS 388; 2003 Cal. Daily Op.Service 306; 2003 Daily Journal DAR 397; 33 ELR 20153, p. 7-8.

> This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under *5 U.S.C. 553(b)(B)* to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, *Amendment 4* to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process . . . . Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register. *66 Fed. Reg. 2338, 2371-72*.

Arbitrary and Capricious, an abuse of discretion, or otherwise not in accordance with the law:

> NMFS RAM Division's interpretation of the Alaska crab LLP was "plainly erroneous" in that it equated a "documented harvest" with a "landing" and required an individual fish ticket for each "documented harvest." The court found this interpretation contrary to the plain meaning of the regulation as well as contrary to the agency's clear, expressed intent to allow fish tickets to document more than one harvest. Alaska Trojan Partnership v. Gutierrez, 9th Cir. Sept. 22 2005, 425 F.3d 620; 2005 U.S. App. LEXIS 20298; 35 ELR 20193

EFH

Practicability limitation:

The D.C. District Court upheld NMFS's EFH measures in both the NE Scallop and NE Multispecies FMPs, writing as follows:

- Furthermore, the agency's definition of alternatives is consistent with the scope and purpose of the action as defined by the statute. As in *CLF I, 229 F. Supp. 2d at 34*, "plaintiffs' criticism ... is ultimately one of degree, and not kind. That is to say, plaintiffs fault the NMFS for failing to give habitat protection ... the full emphasis that plaintiffs believe they deserve, not that the NMFS failed to respond to the statutory directives to the extent that it deemed practicable under the circumstances in which [the management measures were] adopted." See also *CLF II, 360 F.3d at 28* (rejecting plaintiffs' claim that Framework 14 did not substantively comply with the MSA because "plaintiffs essentially called for an interpretation of the statute that equates 'practicability' with 'possibility,' requiring NMFS to implement virtually any measure that addresses EFH ... concerns so long as it is feasible"). Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904, NE Scallop)

- Oceana's singular focus on alternatives that close fishing grounds in order to protect EFH ignores these statutory mandates and effectively reads "practicable" out of the MSA. Indeed, the First Circuit has already rejected this reading of the SFA. ….Plaintiffs [Oceana and CLF] essentially call for an interpretation of the statute that equates "practicability" with "possibility," requiring NMFS to implement virtually any measure that addresses EFH and bycatch concerns so long as it is feasible. . . . The closer one gets to the plaintiffs' interpretation, the less weighing and balancing is permitted. We think by using the term 'practicable' Congress intended . . . to allow for the application of agency expertise and discretion in determining how best to manage fishery resources. … This Court is persuaded by the First Circuit's reasoning, and therefore holds that the Secretary's interpretation of "practicable" is consistent with the statutory purpose of protecting EFH while simultaneously giving the Secretary discretion to manage fishery resources. See *16 U.S.C. § 1802(28)(A)* (defining a fishery's OY as the amount of fish that "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems"). Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies p. 119-120.

HAPCs are discretionary

- The Secretary did not act arbitrarily in failing to designate HAPCs in Amendment 13, because such designations are discretionary, not obligatory. The HAPC regulation states that they "should" be identified in FMPs, id., but this term, as defined by the regulations, means that HAPC designation was only "strongly recommended." *50 C.F.R. § 600.305(c)(3)*; see also id. *§ 600.810(b)*. By contrast, [*124] numerous other components of FMPs "must" be included. See, e.g., *50 C.F.R. § 600.815(a)(1)(i)* (FMPs must identify

EFH); id. *§ 600.815(a)(1)(v)* (FMPs must include maps of EFH); id. *§ 600.815(a)(1)(iv)(E)* (where FMP groups species in designating EFH, the plan must include a justification and scientific rationale). Amendment 13 did designate EFH, but did not establish new HAPCs, as permitted by the regulation. In short, the Secretary (and the Council) did not act unlawfully by failing to consider additional HAPCs, because such consideration was not required by the MSA and was optional under the regulations. Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904, NE Scallop, p. 123.)

Emergency Rules

Denial of petition of emergency rulemaking, where decision was based on NMFS's criteria for use of emergency rules, was upheld.

- Coastal Conservation Association v. Gutierrez, S.D. TX Mar. 12, 2007, 512 F.Supp. 2d 896; 2007 U.S. dist. LEXIS 17376.

Frameworks

Limitations on Use: Can't change or eliminate mandatory FMP components via Framework actions. (Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904, NE Scallop)

MSA Discretionary FMP Components

Limited Entry: "present participation"

Final rule published in April 2002, NMFS established a license limitation program (LLP) for Pacific cod (p. cod). The FMC had been working on a long-term rationalization program for years. A control date had been published in January 1999 notifying permit applicants that 1999 might not count as a qualifying year. NMFS and the FMC considered over 100 alternatives for qualifying periods and concluded that landings in 1999 and beyond would not count. Plaintiff challenged alleging that this action failed to consider present participation in the fishery as required by 303(b)(6).

- …the Council did not reject 1999 out of hand, but still considered whether 1999 should be a qualifying year. The Council actually considered 106 alternatives, of which 42 included 1999 as a qualifying year. Even when the Council submitted its preferred alternative, which did not include 1999 as a qualifying year, the Council advised the Secretary of other options, which included proposals to make 1999 a qualifying year. In the end, the Secretary adopted the Council's recommendations, published the Final Rule and responded to comments regarding the "different requirements used for different methods of catching Pacific cod."

  Present participation is only one of six factors that must be taken into account when promulgating a new rule for Fishery Management Plans. *Alliance Against IFQs, 84 F.3d*

at 347 ("Congress left the Secretary some room for the exercise of discretion, by not defining 'present participation,' and by listing it as only one of many factors which the Council and the Secretary must 'take into account.'" (emphasis added)). The Secretary exercised the discretion granted him in the Act by concluding that a cut-off date was essential for the Final Rule's treatment of pot catcher/processor vessels. The Secretary's decision to reject the most recent year in favor of a cumulation of the other five factors that also must be considered, is reasonable and consistent with our precedent. We conclude that the Secretary had a rational basis for not allowing "present participation" in the form of including 1999 to take precedence over other relevant factors under consideration in crafting the FMP amendment. Yakutat, Inc. v. Gutierrez, 9th Cir. May 18 2005, 407 F.3d 1054; 2005 U.S. App. LEXIS 8873; 35 ELR 20103, p. 1070.

The Secretary placed a higher premium on historical participation and significant dependence, instead of focusing solely on present participation. The Secretary determined that by limiting entry of newer fishing vessels while assuring continued participation of historically dependent fishermen, the FMP amendment would conserve the fishery by reducing overcapitalization. *Final Rule, 67 Fed. Reg. at 18,129, 18,134*. The record provides a rational basis for the Secretary's decision, and the Final Rule did not violate National Standard 4. Yakutat, Inc. V. Gutierrez, 9th Cir. May 18 2005, 407 F.3d 1054; 2005 U.S. App. LEXIS 8873; 35 ELR 20103, pp. 49.

MSA Mandatory FMP Components

An FMP cannot defer to another FMP to address its mandatory FMP Components.

- Coastal Conservation Association v. Gutierrez, S.D. TX Mar. 12, 2007, 512 F.Supp. 2d 896; 2007 U.S. dist. LEXIS 17376.

Bycatch: The requirement to address bycatch means that the FMP must address by taken by the target fishery as well as other fisheries' bycatch of that FMP's target species. In this case, regarding a challenge to the Gulf of Mexico Reef Fish FMP, the court wrote:

- [NMFS] avoided discussing measures to reduce red snapper bycatch in the shrimp fishery by saying they will address the issue in the Shrimp Fishery Management Plan. This is contrary to the plain meaning of the statute. Accordingly, on remand, the Service will consider and adopt, if practicable, measures to minimize bycatch in the shrimp fishery. Coastal Conservation Association v. Gutierrez, S.D. TX Mar. 12, 2007, 512 F.Supp. 2d 896; 2007 U.S. dist. LEXIS 17376.

Rebuilding Plans are Mandatory FMP Components for overfished fisheries.

- It is not acceptable to submit an amendment to end overfishing that does not include a Rebuilding Plan. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047.

- The most natural reading of these provisions is that once a fishery is deemed overfished, any plan amendment that the Secretary prepares must contain conservation and management measures that are designed to rebuild the affected fish stocks…. (North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 88).

- Measures to end overfishing and rebuild overfished stocks via a plan amendment, in other words, must be issued simultaneously in a single amendment, not sequentially over the course of multiple amendments. Moreover, in situations where measures to rebuild particular fish stocks do not yet exist for the FMP in question, the failure to prescribe such measures will leave the FMP without one of its essential elements, thus calling into question the validity of that FMP. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 96.

MSA Procedure

Deviating from FMC recommendation

- Rule that allowed RA to chose between FMC's quota recommendations and the US/Canada Trans-Boundary Management Guidance Committee's recommendations violated MSA. (Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies).

- [Author's note: Note that another case dealt with a similar issue, but this aspect of it was not challenged and the action was upheld. In United Boatmen v. Gutierrez, E.D.N.Y. May 1 2006, 429 F.supp. 2d 543; 2006 U.S. Dist. LEXIS 31131; the court reviewed a case in which the FMC submitted a proposed quota that would not have a 50% probability of hitting the target F, and NMFS published a different quota than the one recommended. However, the challenges to the action dealt with the National Standards, APA, NEPA, ACFMA, and RFA rather than the MSA procedural issue.]

Process by which NMFS added new monitoring requirements into a draft rule, sent it to the Executive Director of the FMC, who then "transmitted" it to NMFS to initiated Secretarial review did not satisfy requirement that the FMC "deem" the requirements necessary. Fishing Company of Alaska v. Gutierrez, D.C. Cir. Dec. 18, 2007.

NMFS cannot correct an FMC's omission from a proposed rule by restoring it in final rule. [However, in this case, NMFS decided to promulgate an Interim Measure pursuant to overfishing authorities.] Associated Fisheries of Maine v. Evans, D. Me Dec. 21 2004, 350 F.supp. 2d 247; 2004 U.S. dist. LEXIS 25685.

NEPA

"Reasonable Range of Alternatives."

- "The heart of an EIS is its analysis of a reasonable range of alternatives to the agency's proposed action." (Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904p. 98. NE Scallop)

Duty to Include Plaintiff's Alternatives

- In Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904 (NE Scallop), the court held that the agency does not have to analyze the specific alternatives recommended by a commenter if similar to alternatives analyzed.

Alternatives based on Scope and rule of Reason

- Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904. NE Scallop)

The duty to consider all significant and viable alternatives does not always mean "all."

- While it is true that agencies have a duty to consider "significant and viable alternatives" identified through public comments, *City of Brookings Mun. Tel. Co. v. FCC, 262 U.S. App. D.C. 91, 822 F.2d 1153, 1169 (D.C. Cir. 1987),* and that "the failure of an agency to consider obvious alternatives has led uniformly to reversal," *Yakima Valley Cablevision, Inc. v. FCC, 254 U.S. App. D.C. 28, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986),* the duty to consider all such alternatives does not extend to situations where the possibilities are so numerous and the goals of the action so complex that the agency cannot possibly consider every significant alternative in a reasonable time period. Rather, in these circumstances, the agency has discretion to choose a manageable number of alternatives to present a reasonable spectrum of policy choices[**103] that meet the goals of the action. Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904. NE Scallop)

40 Most-Asked questions Description of Reasonable for Forest Plans Not Applicable to EFH

- Moreover, in constructing a regulatory action governing fishing for 23 species in an area covering hundreds of thousands of square nautical miles, virtually limitless alternatives could theoretically be evaluated, but such an undertaking is not demanded by the rule of reason. See *Tongass, 924 F.2d at 1140* . The Secretary properly identified the regulatory purpose, and considered the impacts of his decision, including giving a "hard look" at a reasonable range of practicable alternatives in light of that purpose. [*122] This is all that NEPA demands. See *NRDC v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988)*. n31. (Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies, p. 122).

50% probability of success:

- Not all alternatives must have a 50% likelihood of success, (Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies, p. 72).

Cumulative Impacts assessment based on rule of reason.

- Ocean Conservancy and Oceana v. Gutierrez, 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005.

Revising preferred alternative does not require recirculation of draft SEIS.

- In NMFS's draft SEIS, one of the described alternatives for avoiding sea turtle takes by the HMS Pelagic Longline Fishery was the use of 16/0 circle hooks. In the draft NMFS stated that 16/0 circle hooks on their own would not reduce takes to levels that would comply with the ESA. After taking public comment on the SEIS, NMFS issued a Biological Opinion. After considering the BO and the public comment, NMFS determined that 16/0 hooks were preferred for certain areas. Plaintiffs alleged that NMFS should have recirculated the SEIS for additional public comment in light of the revised preferred alternative. Ocean Conservancy and Oceana v. Gutierrez, 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005, p. 37.

- The Court wrote: In the final analysis, the [CEQ] regulation simply does not require NMFS to "rework its draft if it later realizes an alternative it preliminarily rejected should be more fully developed." Id. Accordingly, the Court concludes that the final SEIS allowed for adequate public comment and, thus, it does not violate NEPA. Ocean Conservancy and Oceana v. Gutierrez, 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005, p. 37.

N.S. 1

Net Benefits to the Nation include qualitative benefits that cannot be quantified. In assessing the practicability of a bycatch minimization program, NMFS considered it in terms of net benefits to the nation including qualitative benefits and the court agreed:

- [NMFS considered] "net benefits to the nation," including the regulation's environmental impact, impact on fish stocks, short term and long term economic impacts on fishermen, etc. *50 C.F.R. § 600.350(d).* Among the benefits of the GRS program recognized by the agency were (1) the reduction of fishery resource waste, 71 Fed. Reg. at 17,365 (noting that when the GRS reaches 85%, over 110 million pounds more groundfish will be retained annually); (2) the reduction in the capture of fish with minimal economic value, *id. at 17,366*; (3) the increase in the portion of groundfish entering the market from previously discarded species, id. at 17,369; (4) the improvements in monitoring, which will produce better information with which to analyze the health of the fishery, id.; (5) the alleviation of BSAI groundfish scarcity, to the benefit of others in the industry, A.R. 111-04 at 138. …Defendants correctly point out that it is inappropriate to assume simply because not all of these "benefits can be quantified . . . that the regulation's benefits are not real or substantial." In reviewing these determinations, I must defer to the NMFS, the agency charged with "making difficult policy judgments and choosing appropriate management and conservation measures based on their evaluations of the relevant quantitative and qualitative factors." *Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210,*

223 (D.D.C. 1990) (emphasis added). Legacy Fishing Co. v. Gutierrez, D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 24-5, (rev'd on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

Primacy of conservation goals

- Plaintiffs complain that the NMFS and the Council unreasonably rejected alternative plans that would have had imposed fewer costs on plaintiffs. In considering alternative plans, however, the agency has an affirmative duty to "give priority to conservation measures." *Natural Res. Def. Council, Inc. v. Daley, 341 U.S. App. D.C. 119, 209 F.3d 747, 753 (D.C. Cir. 2000).* The requirement to consider a plan that imposes fewer economic consequences applies only to plans that "achieve similar conservation measures." Legacy Fishing Co. v. Gutierrez, D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 28, (rev'd on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

N.S. 2

Using limited and/or old data: Where we articulated our basis for the data we used, and Plaintiffs offered no alternatives, we win. (Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904. NE Scallop)

It is not necessary for the SSC to sign off on a plan to assure compliance with N.S. 2 (*Note – this was based on activities prior to MSRA, but probably still applies—new SSC role is focused on research priorities and AMs).

- … if the MSA does not make the SSC's approval a prerequisite for a plan amendment to comply with National Standard 2, then it follows a fortiori that the Secretary's failure to resubmit a modified amendment to the SSC cannot, without more, render the agency action violative of National Standard 2. That the Secretary acted rationally is especially clear in this case, since he sought and received confirmation from the Southeast Regional Science Center that the amendment as modified was still based upon the best scientific information available. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 58.

Using vessel length to determine applicability of restrictions

- Plaintiffs allege that NMFS's decision to use vessel length to determine which vessels were subject to restrictions was based on the fact that smaller vessels could not operate profitably under the restrictions, and that because the plaintiff could not operate profitably on a slightly larger vessel, his vessel should be excluded as well. NMFS explained that it's selection of vessel length was based on which portions of the fishery contributed most significantly to the bycatch problem. The court found that NMFS had cited legitimate reasons for its use of vessel length. Legacy Fishing Co. v. Gutierrez,

D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 32, (rev'd on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

NMFS considered the results of an experiment indicating that 18/0 circle hooks were the most effective means of avoiding turtle takes. However, N.S. 2 did not require NMFS to implement the most protective strategy, nor to rely exclusively on one study.

- National Standard 2 neither requires NMFS to rely exclusively on the results from the Northeast Distant experiment in preparing the Final Rule, nor does it require NMFS to adopt the most protective measure throughout the fishery. While the findings of the Northeast Distant experiment are relevant to the issue of bycatch regulations in the fishery, they are not dispositive. NMFS was thus entitled to consider, as it did, other studies and expert opinions as part of the rule-making process. The comprehensive approach adopted by the NMFS, therefore, was entirely reasonable because it considered not only its own data, but also other studies, expert opinions, and considerations raised by the public at large. Ocean Conservancy and Oceana v. Gutierrez, 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005, p. 23.

Relationship to Tribal Treaty Rights: We Treaty Rights entitle a Tribe to 50% of whiting passing through fishing grounds, and Tribes agree to accept 14 – 17.5 percent instead, there is no N.S. 2 duty to demonstrate that the 14-17.5% range is based on best available science.

- Midwater Trawlers Cooperative v. Daley, 9th Cir. Dec. 28 2004, 393 F.3d 994; 2004 U.S. App. LEXIS 26896; 35 ELR 20006.

A methodology previously utilized based on a political agreement, then struck down on the court, could be utilized in subsequent years after agency demonstrated that the methodology was, in fact, based on the best available science.

- Midwater Trawlers Cooperative v. Daley, 9th Cir. Dec. 28 2004, 393 F.3d 994; 2004 U.S. App. LEXIS 26896; 35 ELR 20006.

N.S. 3

Definition of "Stock": The MSA does not preclude separation of naturally spawning and hatchery-spawned fish into separate stocks. Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007),* p. 35-36.

N.S. 4

Secretary acknowledge that certain sectors would bear the brunt of new restrictions, but determined it was justified. Court upheld:

- the Secretary here explicitly acknowledged that certain sectors -- and even certain vessels -- would bear the brunt of the plan [*68]amendment. AR 5620-22, *71 Fed. Reg. at*

55,102-55,104. He nevertheless determined that the burden borne was justified by the overall benefit of ending overfishing of the four species at issue. AR 5619, *71 Fed. Reg. at 55,101*. Plaintiffs have not identified anything "intentionally invidious or inherently unfair in the plan adopted by the Council and the Secretary," *Sea Watch Int'l, 762 F. Supp. at 378*, and their challenge under National Standard 4 therefore fails. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 68.

The Council was justified in not selecting an alternative that would have allocated a state's entire share of the fishery to one or two fishing operations on the basis of N.S. 4's excessive shares prohibition.

- Plaintiffs fail to draw the distinction that the Council members did -- namely, that Dr. Daniel's proposal would not just designate a significant percentage of the catch to North Carolina fishermen on the basis of a state or vessel's historic share, but could result in a direct allocation of the state's entire share to one or two fishing operations in particular. None of the cited cases addresses the point at which a fisherman's share becomes "excessive," and the Council members acted reasonably in worrying that the allocation proposed might violate the instruction in the advisory guidelines that all allocations must be "[c]arried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 75.

"Fair and Equitable:" there was no evidence that NMFS's decision to not include 1999 as a qualifying year for the Alaska p.cod LLP violated N.S. 4. Plaintiffs argued that the FMP qualified two boats that had clearly abandoned the fishing industry, while it excluded their boat, thereby demonstrating the unfairness of the qualifying criteria. The court found that NMFS and the FMC had directly addressed this issue and provided a rationale for the dates they selected. Therefore, the court wrote:

- The record demonstrates the Secretary's concern "to conserve and manage the Pacific cod resources" and "stabilize fully utilized Pacific cod resources" being harvested in the BSAI.

  "Controlling precedent requires that a plan not be deemed arbitrary and capricious, 'even though there may be some discriminatory impact,' if the regulations 'are tailored to solve a gear conflict problem and to promote the conservation of'" the fish in question. Yakutat, Inc. V. Gutierrez, 9th Cir. May 18 2005, 407 F.3d 1054; 2005 U.S. App. LEXIS 8873; 35 ELR 20103, pp. 31, 32.

N.S. 8

Where NMFS acknowledged that the approved amendment would have severe impacts on certain entities (21 of 408 vessels would suffer 62 percent of the net loss in their sector), but explained on the record why these impacts were justified, the court found no violation of N.S. 8:

- The Secretary, faced with a wealth of information and a variety of alternatives, reasonably concluded that the benefits of Amendment 13C to the fishery, the fishermen, and the fishing communities outweighed the short-term harms of which these groups now complain. While his conclusion may be debatable as a policy matter, mere policy disagreement is not a basis for a reviewing court to declare agency action unlawful. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 78.

It is OK for NMFS to merely update its N.S. 8 analysis for new measures rather than starting from scratch each year.

- Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007)*, p. 52-55.

N.S. 9

Practicability. Plaintiffs argued that the severity of the economic impacts of the Alaska Groundfish Retention Standards rendered the provisions impracticable. The court found that N.S. 9 cannot be viewed in a vacuum, but is a component of a larger balancing scheme that NMFS must consider. Finding for NMFS, the court wrote:

- … the agency carefully analyzed the impact of these regulations on the important factors recognized in National Standard 7 and 8, including all the potential hardships highlighted in plaintiffs' complaint. After the benefits were weighed against the costs, as required by statute, the agency determined that the "costs of the GRS program are justified by the groundfish discard and compliance history of the non-AFA trawl C/P sector." *71 Fed. Reg. 17,367*. The economic impacts on the plaintiffs' vessels are potentially grave, and the court does not diminish the difficulties that will be faced by the individuals forced to comply with the GRS program. But the record reflects that these difficulties were recognized, analyzed, and considered by the NMFS in striking the statutorily mandated balance. Legacy Fishing Co. v. Gutierrez, D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 26, (rev'd on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

N.S. 9 does not require the most protective bycatch avoidance measure available.

- …plaintiffs assert that National Standard 9 requires the NMFS to adopt the most protective measure available with regards to minimizing bycatch. Id. I disagree….

  Simply stated, National Standard 9 is not entitled to greater weight than any of these other standards. See *Nat'l Coalition for Marine Conservation v. Evans, 231 F. Supp. 2d 119, 137 (D.D.C. 2002)* (noting that because bycatch could only be entirely avoided by eliminating all commercial activity in the fishery, National Standard 9 only made sense within the larger context of the Magnuson-Stevens Act if it was interpreted as requiring the NMFS to find the combination of regulations that would best meet the statute's various objectives). In this Court's judgment, NMFS's 2004 Final Rule balanced

competing interests by reconciling the economic needs of fishermen with the conservation goal of reducing bycatch to the lowest level possible. In doing so, it thoroughly reviewed the relevant scientific data on bycatch and consulted with participants in the fishery to determine whether the proposed regulations would be effective and practical. Ocean Conservancy and Oceana v. Gutierrez, 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005, p. 24-6.

N.S. 10

Where NMFS responded to Coast Guard concerns about safety by creating mitigation measures, the court found no violation of N.S. 10:

- The Coast Guard stated during notice and comment that the ban on haul mixing may create safety problems by forcing fishermen to stack full nets on vessel decks, which could "adversely affect[] a vessel's stability." A.R. 152 (letter from Coast Guard to NMFS, noting that "sudden load shifts and unnecessarily high deck loads [are] significant contributors to vessel capsizings and sinkings"). The NMFS analyzed this concern and ultimately concluded that this safety risk could be avoided by refraining from stacking nets on vessel decks, and suggested several alternatives such as adjusting the timing of haul back activities, short-wiring a haul to the vessel, and modifying vessel layout to expand fish bin capacity. *71 Fed. Reg. at 17,370-71*. The Coast Guard ultimately agreed with the NMFS that the haul mixing ban will not decrease vessel safety, since regulated vessels may choose between a number of safe ways to respond to the ban. *71 Fed. Reg. 17,370*; A.R. 110-a. The agency thoroughly considered the ban's impact on vessel safety, and determined that the regulation would "not decrease vessel safety compared to the status quo," and was necessary to enforce the GRS program. Legacy Fishing Co. v. Gutierrez, D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 29-30, (rev'd on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

"Neutral" impacts on safety may be found to "promote safety to extent practicable."

- The fact that the measures are "neutral," and do not affirmatively promote safety, does not mean that they do not promote safety "to the extent practicable." Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007),* p. 49.

Rebuilding Plans

During the Rebuilding Period it is OK to set the target at Fmsy rather than OY.

> Plaintiffs also challenge the Secretary's selection of rebuilding goals that purportedly set the bar too low by seeking only to achieve Fmsy, rather than OY target rates, which are set at 75% of Fmsy. (A.R. 166 at C89, C94.) (CLF Mot. at 33.) But as already explained, the MSA only requires that, in the case of overfishing, OY "provide[] for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery." *16*

U.S.C. § 1802(28)(C). In other words, within a rebuilding period, there is no statutory requirement to provide a strict[*69] timetable for achieving OY. However, once stocks are rebuilt, control rules are instituted, see, e.g., *50 C.F.R. § 600.310(c)(1)(ii)*, which may lead to further adjustments to catch levels and the attainment of OY. (See A.R. 166 at C96.) But at this stage, until the stocks recover, the target OY that plaintiffs fault the Secretary for failing to achieve is simply inapplicable. (Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies).

As Mandatory FMP Components.

- It is not acceptable to submit an amendment to end overfishing that does not include a Rebuilding Plan. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047.

- The most natural reading of these provisions is that once a fishery is deemed overfished, any plan amendment that the Secretary prepares must contain conservation and management measures that are designed to rebuild the affected fish stocks…. (North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 88).

- Measures to end overfishing and rebuild overfished stocks via a plan amendment, in other words, must be issued simultaneously in a single amendment, not sequentially over the course of multiple amendments. Moreover, in situations where measures to rebuild particular fish stocks do not yet exist for the FMP in question, the failure to prescribe such measures will leave the FMP without one of its essential elements, thus calling into question the validity of that FMP. North Carolina Fisheries Association v. Gutierrez, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 96.

Relationship of time period to certainty. In situations where the rebuilding time period is maxed out, the degree of confidence in success must be higher: with at least a 50% chance of success.

- In this case, if the Service adopted a plan that rebuilt red snapper stocks in less than the maximum amount of time permitted under law, it could have argued that the resulting cushion made success at least fifty percent likely, but the Service and the Gulf Council did not choose this path. By adopting a plan that projected rebuilt red snapper stocks in close to the longest period permitted under law, the Gulf Council placed a premium on the accuracy of its predictions. The Gulf Council's own graphs reflect that even if the economic analyses are spot on, red snapper stocks will not be rebuilt within the required period. Accordingly, the court will remand Amendment 22 to the Service for promulgation of a rule within the next nine months that has, at least, a fifty percent chance of succeeding. Coastal Conservation Association v. Gutierrez, S.D. TX Mar. 12, 2007, 512 F.Supp. 2d 896; 2007 U.S. dist. LEXIS 17376, p. 17.

Length of Rebuilding Time Period: When rebuilding time period exceeds 10 years, record must demonstrate that time period is “as short as possible”.

- NRDC v. NMFS, 9th Cir. Aug. 24 2005, 421 F.3d 872; 2005 U.S. App. LEXIS 18143; 35 ELR 20174.

No requirement for total moratorium on fishing when rebuilding period exceeds 10 years.

- NRDC v. NMFS, 9th Cir. Aug. 24 2005, 421 F.3d 872; 2005 U.S. App. LEXIS 18143; 35 ELR 20174, p. 22.

Increasing the Annual catch limits when new information indicates the stock is worse off than previously thought (and therefore rebuilding period can be extended beyond 10 years) is "simply incompatible with making the rebuilding period as short as possible." NRDC v. NMFS, 9th Cir. Aug. 24 2005, 421 F.3d 872; 2005 U.S. App. LEXIS 18143; 35 ELR 20174, p. 23.

New Information in years between surveys: The court found it was reasonable for NMFS to handle reports of over- and under-harvests in years between surveys via in-season management actions such as time and area closures rather than revising the quotas.

- NRDC v. NMFS, 9th Cir. Aug. 24 2005, 421 F.3d 872; 2005 U.S. App. LEXIS 18143; 35 ELR 20174

RFA

What to do when there are no applicable size standards. When in doubt, do the IRFA/FRFA.

- The Small Business Association's classification standards "do not include a size standard for vessels that both harvest and process fish," such as those in the H&G CP sector. In determining whether the businesses in this sector qualified as "small business," NMFS had to choose between using the standard for "floating factory ships" and the standard for "fish harvesters." SBA's Office of Advocacy opined that NMFS should use the standard for "floating factory ships," but NMFS chose to use the standard for "fish harvesters." As a result NMFS concluded that none of the affected entities were "small". However, due to the uncertainty of which standards to apply, NMFS conducted an IRFA/FRFA as if all affected entities were small. The court found this satisfied the RFA. *See* Legacy Fishing Co. v. Gutierrez, D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 33-34 (rev'd on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

SBRM

Observer Coverage:

- Levels of observer coverage must be linked to science, can't be based purely on affordability, and can't be left completely discretionary at will of RA. (Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904, NE Scallop)

- Where the record indicates observer coverage is necessary, the FMC must establish the level of observer coverage in the FMP. (Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies).

- N.S. 9 does not mandate observer coverage at all or establish any mandatory levels of coverage. The HMS Pelagic Longline fishery adopted an observer coverage level of 8% based on recommendations from ICCAT. The court upheld. Ocean Conservancy and Oceana v. Gutierrez, D.D.C. 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005, p. 27.

  National Standard 9 provides that each FMP must include "a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery." *16 U.S.C. § 1853(a)*. Notably, the standard does not mandate on-board observer coverage or establish absolute levels of coverage. Furthermore, even if it did, the 8% coverage mandated in this case exceeds the 5% coverage upheld in *National Coalition for Marine Conservation v. Evans, 231 F. Supp. 2d 119, 139 (D.D.C 2002)* ("NCMC"). While NCMC is not binding on this Court, its holding and reasoning are persuasive, particularly because that Court relied, in part, on the fact that 5% coverage was the level of coverage recommended by the International Commission for the Conservation of Atlantic Tuna. Id. Accordingly, the Court concludes that the NMFS's standardized reporting methodology comports with National Standard 9 and is not arbitrary and capricious under the APA. Ocean Conservancy and Oceana v. Gutierrez, D.D.C. 394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388; 35 ELR20208, Oct. 6., 2005, p. 27.

SBRM's must attain both precision and accuracy, and be statistically reliable:

- Therefore, "for fisheries where observer coverage is needed to monitor bycatch . . . a level of coverage should be deployed that provides statistically reliable bycatch estimates." *Id. at 11,504*. n33 In light of defendants' own findings, as well as the Court's reasoning in CLF I, it was clear that a "methodology" that simply retained the status quo was unacceptable. Thus, insofar as Amendment 13's language indicates only an "intent" to implement an adequate program, it fails to comply with governing law, because defendants' intent could change at any time. "Because the observer program is optional under Amendment 13, NMFS in theory could decide not to implement an observer program for the ground fishery, and nothing in Amendment 13 would prohibit the agency from making that decision." *Pac. Marine Conservation Council, Inc. v. Evans, 200 F. Supp. 2d 1194, 1200 (N.D. Cal. 2002)*[*136] (deeming unlawful an FMP that failed to mandate in the FMP itself a bycatch assessment methodology); accord *CLF I, 209 F. Supp. 2d at 13*. By its very terms, an FMP that merely suggests a hoped-for result, as opposed to "establishing" a particular standardized methodology, does not measure up to the statute's requirements. See *16 U.S.C. § 1853(a)(11)*. (Oceana v. Evans, D.D.C. Mar. 9, 2005, 2005 U.S. Dist. LEXIS 3959. NE Multispecies, p. 135).

[Bad Example] Where the FMP's SBRM was described as follows:

> Vessels with sea scallop fishing permits may be required by the Regional Administrator to carry onboard an observer, whose costs will be born by the [*233]vessel.... The Regional Administrator will determine the number of sea sampled trips and distribution by gear and area, taking into account the desired level of sea sampling needed to estimate bycatch with an accuracy appropriate to the scallop [fishery] at which the bycatch information will affect management decisions. As such, it would be appropriate for sea sampling intensity to favor areas of higher than average groundfish and turtle bycatch.

the court held the SBRM to be inadequate:

> Amendment 10 fails to establish a bycatch reporting methodology, but instead gives complete discretion to the Regional Administrator. The Council recognized in formulating Amendment 10 that to obtain reliable bycatch estimates, the agency could not rely solely on the good faith of scallop crew members to accurately report the volume of fish discarded from their vessels. n36 Thus, the Council proposed to expand the live observer ("sea sampling") program in the sea scallop fishery. But rather than keying an expansion of the program to some assessment of what levels were necessary to generate reliable estimates, it instead linked the number of additional observers to a funding mechanism without considering whether this program would be adequate. Thus, though it proposes a one-percent "set aside" n37 to provide funding for increased bycatch coverage, and provides great detail on the operation of the set-aside (see, e.g., AR Doc. 138 at C1242), Amendment 10 does not set forth the substance of a reporting methodology for the scallop fishery except in a vague and conclusory fashion.
>
> "An FMP that merely suggests a hoped-for result, as opposed to establishing a particular standardized methodology, does not measure up to the statute's requirements." *Oceana I, 2005 U.S. Dist. LEXIS 3959, 2005 WL 555416, at *40....* Here, the FMP does not even suggest a "hoped-for result," except that the data will "improve" and that accuracy "appropriate" to the scallop fishery will be achieved…. Instead of analyzing what type of program -- whether a mandated level of coverage or some other mechanism -- would succeed in producing the statistically reliable estimates of bycatch needed to better manage the fishery, the FMP essentially assigns this task to the Regional Administrator.
>
> A methodology need not necessarily be detailed, but it must at the very least provide decisionmakers and the public with a program of what actually will be done to improve bycatch reporting, and why these measures will be sufficient based on the best available science. (Oceana v. Evans, D.D.C. Aug. 2, 2005, 384 F. Supp. 2d 203; 2005 U.S. Dist. LEXIS 15904, NE Scallop).

Statute of Limitations (S.O.L.)

S.O.L. on FMP amendment establishing Framework process was reopened by implementation of a framework procedure. Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007)*

- The text of the amended *§ 1855(f)(1)* provides that a plaintiff may challenge both an action and a regulation under which the action is taken so long as the suit is filed within thirty days of the action's publication in the Federal Register. *Section 1855(f)(1)* states that "[r]egulations . . . and actions . . . shall be subject to judicial review" if a petition for review is filed "within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register[.]" The conjunctive "and" -- italicized above -- indicates that both regulations and actions are reviewable in a timely filed petition. See *Dawson v. City of Seattle, 435 F.3d 1054, 1063 (9th Cir. 2006)* (describing the plain meaning of "and"). The disjunctive "or" -- also italicized above -- indicates that a petition is timely if it is filed within thirty days of either promulgation of the regulation or publication of the action. See *United States v. Tucor Int'l, Inc., 238 F.3d 1171, 1179 (9th Cir. 2001)* (interpreting the plain meaning of "or"). Thus, as a straightforward textual matter, a petition filed within 30 days of the publication of an action may challenge both the action and the regulation under which the action is taken. Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007),* p. 18-19.

  [Author's note: Apparently, the Court construes Frameworks as "actions" taken pursuant to regulations rather than regulations on their own…]

  The publication of the 2005 management measures in the Federal Register was an "action" under the Magnuson Act. It triggered the thirty-day limitations period during which plaintiffs could challenge both the action and the 1989 regulation implementing the Pacific Plan's 35,000 natural spawner escapement floor. Oregon Trollers Association v. NMFS, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007),* p. 56.

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The following "subsequent actions" relating to an MSA action, do NOT reopen the S.O.L. period on the original action requiring VMS: a notice providing a list of VMS options; a notice announcing the availability of grant funds, a delay in the effective date. Gulf Fishermen's Association v. Gutierrez, M.D. Fla. Apr. 24, 2007, 484 F.supp. 2d 1264; 2007 U.S. Dist. LEXIS 30584.

- *Oregon Trollers v. Gutierrez* is distinguishable inasmuch as the court in that case found that a rule was reviewable to the extent that some subsequent action was taken under the regulation. Gulf Fishermen's Association v. Gutierrez, M.D. Fla. Apr. 24, 2007, 484 F.supp. 2d 1264; 2007 U.S. Dist. LEXIS 30584, n.1.

Other statutes cannot be invoked to challenge the substance of an MSA regulation in order to avoid the S.O.L.

- The Court agrees with Defendants that the specific terms of the judicial review provision of the Act leave no doubt that they encompass claims brought under other statutes, and are not limited to allegations of violations of the Act. *Subsection 1855(f)(1)(B)* states that

"the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A),(B),(C), or (D) of [Title 5 of the APA]." The grounds specified in those subsections go well beyond inconsistency with the Act itself and, thus, the Act provides the exclusive means for obtaining judicial review in this case.

In light of the detailed arguments in Plaintiff's motion for summary judgment, it is clear that Plaintiff's four-count complaint in this action amounts to a challenge to the merits of the final rule itself that mandate the installation of a VMS device. Plaintiff wants the Court to declare that the VMS requirement of Amendment 18A is unlawful. Thus, Plaintiff was required to file this action within 30 days of the August 9, 2006, date on which the rule was initially promulgated or, in other words, no later than September 8, 2006. Gulf Fishermen's Association v. Gutierrez, M.D. Fla. Apr. 24, 2007, 484 F.supp. 2d 1264; 2007 U.S. Dist. LEXIS 30584, pp. 5-6.

- "Couching the action in different statutory language is not a hook which can remove the prohibitions of the Magnuson-Stevens Act." Id. (citing *Blue Water*).

  Plaintiffs attempt to frame their claims in terms of violations of the MBTA, APA, ESA, and NEPA, but in actuality Plaintiffs challenge the reopening of the Fishery and for that reason their claims are barred by the 30-day time limit under the MSA.

  Plaintiffs' claims are not "pure NEPA" claims as they suggest. Rather, all claims flow from the reopening of the Fishery pursuant to a properly promulgated amendment to the FMP. Therefore, judicial review is limited under *16 U.S.C. § 1855 (f)* and this Court lacks jurisdiction to adjudicate this matter. Turtle Island Restoration Network v. DOC, D.HI Jan 4 2005, 351 F.Supp. 2d 1048; 2005 U.S. Dist. LEXIS 303, p. 14 -16.