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National Coalition for Marine Conservation v. Evans, 2002 U.S. Dist. LEXIS 21614 (D.D.C. Oct. 31, 2002) (Civil Action No.s 99-1692 (RWR), 00-2086 (RWR), 00-3096 (RWR).

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APPEALS CASES

Case: Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 2002 U.S. App. LEXIS 23950 (1st Cir., Nov. 22, 2002) (No. 01-2282); Ace Lobster Co., Inc. v. Evans, 165 F. Supp. 2d 148, 2001 U.S. Dist. LEXIS 14424 (D.R.I., Aug. 7, 2001)(C.A. No. 00-004L, C.A. No. 00-005L, C.A. No. 00-006L)(Memorandum and Order Adopting Magistrate=s Document); Ace Lobster Co., Inc. v. Evans, 165 F. Supp. 2d 148, 2001 U.S. Dist. LEXIS 6050, (D.R.I., May 4, 2001)(C.A. No. 00-004L, C.A. No. 00-005L, C.A. No. 00-006L)(Magistrate=s Document)(hereinafter Ace I).

Related Cases: See also, Little Bay Lobster.

Facts: Lobster fishermen and lobster business owners or shareholders brought action challenging lobster trap regulations issued by Secretary of Commerce under Atlantic Coast Fisheries Cooperative Management Act (ACFCMA). Lobster, which was declared overfished in 1996, had been managed under the MSA until the FMP was withdrawn in favor of management under ACFCMA. Plaintiffs challenged the area per vessel trap cap ("uniform trap cap"), and the requirement that vessels fishing in more than one management area must abide by the measures in the most restrictive EEZ areas. Plaintiffs' alleged: (1) the regulations were arbitrary and capricious because they do not contemplate the historic participation of fishing vessels in the lobster fishery, and that a regulation reflecting historic participation would more effectively serve lobster conservation and management goals; (2) NMFS did not consult with the appropriate councils before issuing the regulations, and that the regulations are not compatible with "effective implementation of a coastal fishery management plan," in violation of the ACFCMA; (3) regulations violate MSA National Standards 1, 2, 4, 6, and 8, as incorporated by the ACFCMA; (4) regulations do not comport with the requirements of the Regulatory Flexibility Act; (5) NMFS did not have authority under the ACFCMA to withdraw the previous lobster management plan and promulgate the new regulations; and (6) NMFS abused discretion and violated statutory authority by promulgating ' 697.4(a)(7)(v). The matter was referred to a magistrate judge, who issued a fact intensive report and recommendations supporting NMFS=s actions, published on WestLaw with the case, and separately on LEXIS at 2001 U.S. Dist. LEXIS 6050. Upon cross-motions for summary judgment, the District Court adopted the magistrate=s report without further explanation.

Plaintiffs appealed on four grounds: (1) failure to Aconsult@ the Councils pursuant to ACFCMA, (2) violation of National Standard 2, (3) violation of National Standard 8, and (4) violation of the RFA. The First Circuit addressed only the first claim.

Holding:

(1) ACFCMA. 16 U.S.C.A. ' 5103(b). Consultation with Council. The First Circuit found that the Secretary=s acceptance of comments during the public comment period on the NEPA document, did not satisfy the specific duty of the Secretary to Aconsult@ with the Councils pursuant to ACFCMA.

Case: Gulf of Maine Fishermen=s Alliance v. Daley, 292 F.3d 84; 2002 U.S. App. LEXIS 11150, 2002 AMC 1944, (1st Cir., Jun. 11, 2002)(No. 00-1160).

Facts: An association of commercial fishermen challenged NMFS=s implementation of Framework 25 to the Northeast Multispecies FMP, alleging procedural and substantive violations. While the suit was pending, NMFS implemented Framework 27 which replaced the management regime of Framework 25, maintaining some of the same management measures, and expanding certain closures. Subsequently, two additional Frameworks were implemented further modifying the management measures. The district court dismissed the challenge to Framework 25 as moot. Appellants appealed.

Holdings:

(1) **Mootness. Frameworks.** Appellants argued that some of the measures implemented through Framework 25 were still in place, such as the closure of Jeffrey=s Ledge, and that the court could invalidate that closure. The First Circuit ruled that although the closure of Jeffrey=s Ledge was still in effect, it was based on Framework 27 rather than Framework 25. In Framework 27, NMFS specifically addressed maintaining the closure. Thus although some of the same management measures were still in place, they were based on entirely different records and procedures.

(2) **Mootness. Frameworks. Capable of Repetition Yet Evading Review.** Appellants argued that FMPs are adopted and amended so rapidly that it is impossible to challenge one before the next one is put into place. The court noted that neither party had asked for an expedited schedule for the litigation, and in fact both sides had requested Anumerous extensions for filing.@ Also citing to the Aactual, as opposed to theoretical, interval between most frameworks and the historical fact that review is indeed possible,@ the First Circuit found that the action in question was not Acapable of repetition yet evading review.@

Case: Midwater Trawlers Coop. et al v. Commerce, 2002 U.S.App. LEXIS 3419 (9th Cir. (Wash.)(March 5, 2002)(No. 00-35717, No. 00-35853). Midwater Trawlers Coop. et al v. Commerce, 139 F.Supp.2d 1136 (W.D. Wash. July 26, 2000)(Nos. C96-1808R, C99-1500R, C96-5671R, C99-1415R).

Facts: These cases (both lower court and appeals) were decided after the related appellate decision in Washington v. Daley. They involved fishing industry challenges to (1) NMFS's 1996 framework rule for implementing tribal treaty rights in the groundfish fishery off the Washington and Oregon coasts of four tribes - the Makah, Quileute, Hoh and Quinault - and (2) the annual allocation (under the framework rule) of a specific amount of Pacific whiting to the Makah for 1996. The NMFS rules were based on tribal treaty rights and the court's continuing jurisdiction in U.S. v Washington. Plaintiffs claimed that (1) the tribes have no treaty rights to harvest whiting because whiting was not a fishery at the time of the treaty; (2) the usual and accustomed fishing areas do not extend beyond Washington State's territorial waters (3 miles) and therefore do not include federal waters or federal fisheries; (3) language in the rule referring to Tribes as Aco-managers of the Ashared fishery improperly ceded power to the Tribes which are exclusively federal; and (4) the 1999 allocation of whiting to the Makah, that was calculated not based on science but based on a political compromise was improper.

Holdings:

(1) **M-S Act 303(a)(1)(C); 304(a)(1)(B). Tribal treaties as Aother applicable law.** Plaintiffs claimed that Magnuson Act requirement that implementing regulations be consistent with Aother applicable law does not apply to tribal treaty rights. Both courts held Aother applicable law includes the Stevens Treaties of the 1850's.

(2) **M-S Act 2(b)(5)(A); 101(a); 302(h)(3); 302(i). Public Process.** Plaintiffs claimed that the final rule language describing tribes as Aco-managers of fishery resource and providing for Aconsultation with the tribes improperly conferred additional legal interests in the fish and violated the M-S Act's open public process requirements. The lower court held that the Aco-manager language simply describes practical realities of fisheries management and does not confer additional fishing rights. Tribal consultation in setting allocations is not improperly Aex parte since M-S Act public process is not exclusive and does not bar participation outside the public process. This issue was not addressed on appeal.

(3) **M-S Act 304(a)(2); APA, 5 U.S.C. 554(d). Ex Parte Communication.** The lower court held that in deciding whether to approve a regulation, the Secretary may take into account views and information outside the prescribed process. The APA's prohibition on ex parte contacts only applies to formal adjudications. Agencies are free to develop their own procedures for other ex parte communications. This issue was not addressed on appeal.

(4) **APA. Logical Outgrowth.** AThe terms of the final rule may vary substantially from the proposed. (lower court p. 1146.)

(5) National Standard 2; National Standard 4; APA. Validity of political compromise allocation. Plaintiffs contended that a 1999 compromise allocation of whiting harvest to the Makah tribe was arbitrary and capricious. The lower court held that the compromise allocation was reasonable, since NMFS acknowledged potential flaws in earlier methodology to quantify 50% treaty allocation, and settled on an amount within a range of reasonable allocations, while also adequately accounting for the conservation necessity principal. On appeal, the 9th Circuit reversed and found that the 1999 allocation was inconsistent with the scientific principles set forth in the Magnuson-Stevens Act. The 9th Circuit ruled that the allocation must be based on the best scientific information available. The court wrote:

A plain reading of the proposed NMFS rule, and the undisputed history leading up to the allocation decision, demonstrate that the rule was a product of pure political compromise, not reasoned scientific endeavor. Although the NMFS allocation may well be eminently fair, the Act requires that it be founded on science and law, not pure diplomacy.

(6) Treaty Interpretation. Whiting Included. Federal Waters included. Both lower and appellate court agreed that the delineation of 40-mile boundary to the U&A fishing area is a reasonable interpretation of the law, under basic tenets of Treaty interpretation (treaty referred to areas under the fisheries management jurisdiction of the United States). Even though there had been no express mention of whiting in the treaty, the term fish as used in the treaty included all fish, even whiting.

(7) RFA. Analytical approach. Significance. In an earlier summary judgement order from the 1996 cases, (Midwater Trawlers Cooperative v. Department of Commerce, NO. C96-1808R (W.D. Wash., May 1, 1997) (not published), *aff'd* Washington v. Daley, 173 F. 3d 1158 (9th Cir. 1999)), the court determined that the agency's analytical approach for assessing impacts pursuant to the RFA was reasonable. When publishing the 1996 rule allocating 7% percent of the whiting harvest to the tribes, the agency concluded that the action could affect a substantial number of small entities, but that the impacts would not be significant. This conclusion was based on the fact that in 1994, whiting harvest accounted for only 35% of the ex-vessel value from vessels landing whiting onshore, and only 20% of that same category in 1995. Therefore a 7% reduction in the whiting allocation would result in approximately 1-3% reduction in average gross annual income. Plaintiffs alleged that the Secretary should have calculated significance by considering impacts to the whiting sector alone rather than considering whiting harvest as one part of a multi-species fishery. The court held that the Secretary's approach was reasonable, and that the Secretary did not have to consider the impacts to the whiting sector in isolation from the other aspects of the fishery.

DISTRICT COURT CASES

Cases: Greenpeace v. NMFS, 2002 U.S. Dist. LEXIS 24809 (W.D.Wash., Dec. 18, 2002) (NO. C98-492Z).

Prior History: Greenpeace v. National Marine Fisheries Service, 55 F.Supp.2d 1248 (W.D.Wash., Jul 13, 1999) (NO. C98-492Z); Greenpeace v. National Marine Fisheries Service, 80 F.Supp.2d 1137; 30 Env'tl. L. Rep. 20,314 (W.D.Wash., Jan 25, 2000) (NO. C98-492Z); Greenpeace v. National Marine Fisheries Service, 106 F.Supp.2d 1066 (W.D.Wash., Jul 19, 2000) (NO. C98-492Z).

Facts: In November 2000, in the midst of this ongoing litigation, NMFS issued a biological opinion on the North Pacific Groundfish fisheries, which concluded with a jeopardy finding, but included an RPA that would allow the fishery to operate under constraints (FMP BiOp). Congress then passed an appropriations rider restricting the agency's ability to implement the RPA and required NMFS to consult with the Council to develop a revised RPA. As a result of this process, the Council proposed a revised RPA that re-opened certain areas of critical habitat to fishing that the original RPA had closed. Because of the appropriations rider, the Parties agreed to a temporary stay in the litigation. During the stay, NMFS issued a biological opinion assessing the impacts of the revised RPA (2001 BiOp). NMFS indicated that its Nov. 2000 FMP BiOp still provided the necessary programmatic review of the fishery's impacts.

Holdings:

- (1) **ESA. Conclusions Not Supported by Record.** In a detailed opinion that explored the sufficiency of the ESA analysis, the court concluded that the conclusions contained in the Biological Opinion were not supported by the facts in the record.
- (2) **Remedy.** The court remanded the 2001 BiOp to NMFS.

Case: Kristine L. v. Evans, (D.N.J., Nov. 18, 2002)(Civil Action No. 00-2390 (MLC))(Memorandum); (D.N.J., Apr. 16, 2001)(Civil Action No. 00-2390 (MLC))(Order).

Facts: This case involved a limited entry permit denial. In 1999, NMFS established a limited entry system for Atlantic swordfish and sharks. (May 28, 1999; 64 FR 29090). In order to qualify for a permit, a vessel was required to have held a valid permit during 1998. Plaintiff, a fisherman, applied for and was denied a limited access permit. He submitted no evidence that his vessel had held the requisite permit. His vessel had been permitted in 1997, and he argued that he had demonstrated intent to remain in the fishery by expending \$300,000 on the vessel and by submitted logbooks to NMFS during 1998. He argued that NMFS=s limited access regulations violated the M-S Act, the APA, and the RFA. He also argued that NMFS=s determination of his permit eligibility pursuant to the regulations was arbitrary and capricious. He also argued that because he had submitted logbooks to NMFS in 1998, and NMFS had failed to inform him that his vessel was not permitted, NMFS should be barred by equitable estoppel from withholding his permit.

Holdings:

(1) **M-S Act 305(f)(1). Statute of Limitations.** The court dismissed the statutory challenges to the validity of the regulations as time-barred. (April 16, 2001 Order).

(2) **APA. Deference to Agency Interpretation of its rule.** The scope of review under the APA is narrow and presumes the validity of the actions taken by NMFS. A certain degree of deference is due to a governmental agency, particularly on issues on which experts disagree, because the agency is expected to have expertise in its area. When reviewing an agency=s interpretation of its own regulation, the agency is entitled considerably strong deference. The court upheld NMFS interpretation of its regulations.

(3) **Estoppel. Misrepresentation.** There are four elements to an estoppel claim: (1) misrepresentation by the government, (2) consisting of affirmative misconduct (not mere negligence), (3) that the plaintiff reasonably relied upon, (4) to his detriment. In this case, NMFS receipt of the plaintiff=s logbooks did not constitute affirmative misrepresentation. This was nothing more than Asilence, acquiescence, or negligence.@ NMFS did not have a duty to inform all potential applicants for limited access permits of misfiled papers. Estoppel would not lie.

(4) **Estoppel. Reasonable Reliance. Duty to Inform.** As professional entity with a knowledgeable shareholder operating in its area of expertise, the plaintiff had a duty to remain informed of, and to comply with, the relevant legal requirements. The plaintiff could have checked its permit records itself. AThe plaintiff was not an inexperienced victim of a confusing regulation, but rather a professional entity engaging in its area of expertise and facing a very straightforward regulatory requirement... that was well publicized before its implementation.@ Estoppel would not lie.

Case: National Coalition for Marine Conservation v. Evans, 2002 U.S. Dist. LEXIS 21614 (D.D.C. Oct. 31, 2002) (Civil Action No.s 99-1692 (RWR), 00-2086 (RWR), 00-3096 (RWR)).

Facts: NMFS implemented the HMS FMP in 1999. A variety of fishing interests and conservation organizations sued and intervened arguing about the FMP's compliance with various including allegations of failure to comply with National Standards 1, 2, 4, 7, 8, 9, and 10; failure to minimize bycatch of white and blue marlin and failure to establish a reliable bycatch reporting methodology (303(a)(11)); noncompliance with sections 304(e)(rebuilding overfished fisheries), 304(g)(1)(C) and 304(g)(1)(G)(ii)-(iii)(Requirements that HMS FMPs consider effects on domestic versus foreign fishing interests, consider traditional fishing practices, and be fair and equitable). Plaintiffs also alleged that NMFS had violated the APA and the RFA by failing to evaluate the FMPs impacts on small businesses.

Key features of the FMP included 4 closed areas to pelagic longlining to prevent overfishing and a ban on live bait to reduce marlin bycatch. In addition, a regulation in place since 1999 prevents commercial fishers from retaining billfish landed in the Atlantic. NMFS determined that further measures to prevent billfish bycatch would not be practicable. Because billfish occur widely throughout the Gulf and Atlantic, NMFS would have to eliminate all pelagic longlining in order to further reduce billfish bycatch. The FMP's methodology for reporting bycatch requires fishermen to self-report in logbooks their bycatch amounts. In addition, if selected, a vessel must carry an observer. Observer data are then compared to the self-reported data. ICCAT recommended that NMFS seek to ensure that 5% of longline vessels have observer coverage. With the exception of 1998 (when only 2.9% of the vessels carried observers), from 1992 to 1998 NMFS maintained 4-5% coverage. The observer reports indicated that the self-reported data were accurate.

Holdings:

(1) **National Standard 1. OY. Displacement of Effort.** Plaintiffs argued that the Florida Closure would cause fishermen who had previously fished in that area to shift their fishing efforts into the non-closed areas leading to an increase in billfish bycatch. Plaintiffs based these allegations on assumptions known as the Aeffort redistribution model.@ NMFS studies led it to conclude that the effort shift would be somewhere between the complete effort redistribution assumed by plaintiffs and the other extreme of non effort shift. The court stated that NMFS has discretion to implement measures that it believes will best rebuild the fishery and attain optimum yield. The court upheld NMFS's actions with regard to N.S. 1.

(2) **National Standard 1. Optimum Yeild.** The court recognized that Aoptimum yield is a standard that should be achieved over the long-run, not necessarily a standard that must be achieved with precision each year.@

(3) **National Standard 2. Political compromise.** Plaintiffs argued that the Florida Closure was not based on scientific data, but was the result of political pressure and lobbying. NMFS argued that the location of the closure was based on information from logbooks, which constituted the best

available data. The court found that the closure did not violate National Standard 2.

(4) National Standard 2. Adequacy of Logbooks versus observer data. Potential Underreporting. The court found that logbooks were the best available data, and stated that unlike observer records, logbooks reflect data from across the universe of pelagic fishers and not merely a sampling of them. The court further concluded that even if the logbooks underreported a certain amount of bycatch, the underreporting would ultimately lead to more stringent conservation measures and greater conservation benefits. Plaintiffs failed to point to any other information that would have been appropriate for NMFS to consider.

(5) National Standard 4; 50 C.F.R. 600.325. Allocation of fishing privileges. Plaintiffs argued that the locations of the closures discriminated against Florida residents; alleged that NMFS had rescinded a closure in the Gulf in order to protect Louisiana residents; and alleged that NMFS had failed to consider alternative locations for the permanent closures. The court found that although the Florida closure may have incidental allocative effects, it is not an allocation for the purposes of N.S. 4.

(6) National Standard 4; Allocation Justified. Even if the Florida Closure were an allocation, it was justified by the record. The record showed that the closure furthered a legitimate FMP goal, and would achieve conservation benefits. Plaintiffs failed to show that the closure was unfair, inequitable, or failed to promote conservation under N.S. 4.

(7) National Standard 7. Duty to Consider Alternatives; APA Record Review. Burden of Proof. Plaintiffs alleged that NMFS violated N.S. 7 because the closures would force many small entities out of business, and because a less costly approach was practicable. The court found that NMFS had considered both the impacts of and alternatives to the FMP, and plaintiffs had failed to specify any record evidence showing that NMFS ignored a less costly, practicable alternative.

(8) National Standard 8. Adequacy of Record. Community Impacts versus Conservation Requirements. Plaintiffs alleged that the Closures violated N.S. 8 because NMFS was aware of the inability of the Florida vessels to transit the closed area and fish in the open areas, and that this would mean economic elimination of livelihoods and businesses, and that NMFS failed to consider alternatives or provide assistance that would have minimized the economic impacts. The court, citing the administrative record, found that NMFS had considered impacts and alternatives, but had concluded that the bycatch reduction and conservation benefits from the Florida Closure would outweigh its costs. The court found that NMFS had complied with the N.S. 8 Mandate that it take into account impacts to communities. The court also noted that deliberations regarding impacts to communities must not compromise the achievements of the conservation requirements and goals of the FMP.

(9) National Standard 9. Plaintiffs argued that NMFS's decision not to implement certain specific provisions in the FMP rendered the FMP noncompliant with N.S. 9. Specifically, the Plaintiffs alleged that the FMP should have addressed marlin bycatch through time area closures,

imposed gear restrictions, and closed an area of the Western Gulf. Plaintiffs also argued that NMFS failed to analyze the potential of different closed areas for reducing bycatch. Plaintiffs argued that the FMP=s measures for reducing bycatch would only achieve between 15 and 9 percent reductions, and that this reduction was not minimization to the extent practicable. NMFS argued that the 1999 prohibition on retention of billfish combined with the closed areas in the FMP and the ban on use of live bait, worked together to reduce bycatch to the extent practicable. NMFS determined that further measures to prevent billfish bycatch would not be practicable. Because billfish occur widely throughout the Gulf and Atlantic, NMFS would have to eliminate all pelagic longlining in order to further reduce billfish bycatch. The court found that the FMP complied with N.S. 9, citing to NMFS=s record and its statutory discretion.

(10) National Standard 10. Fishermen=s Choice; APA Record Review. Burden on Proof. Plaintiffs alleged that the Florida Closure would effectively force fishermen in small vessels to risk their lives or their livelihoods. NMFS argued that whether fishermen chose to undertake the risks of fishing far offshore in small boats is not within NMFS=s control. The court found that the Plaintiffs had the burden of pointing to record evidence of the FMP=s failure to promote the safety of life at sea, and that Plaintiffs had failed to make this showing.

(11) M-S Act 303(a)(11). Bycatch. Standardized Reporting Methodology. Observer Coverage versus Logbooks. Plaintiffs argued that the bycatch reporting methodology in the FMP did not prevent fishermen from underreporting bycatch and should have included additional observer coverage requirements. The FMP=s methodology for reporting bycatch requires fishermen to self-report in logbooks their bycatch amounts. In addition, if selected, a vessel must carry an observer. Observer data are then compared to the self-reported data. ICCAT recommended that NMFS seek to ensure that 5% of longline vessels have observer coverage. With the exception of 1998 (when only 2.9% of the vessels carried observers), from 1992 to 1998 NMFS maintained 4-5% coverage. Plaintiffs asserted that NMFS did not determine what level of observer coverage would be sufficient to Adetect a statistically significant number of blue and white marlin discards,@ and plaintiffs noted that NMFS agreed that increase observer coverage would be beneficial. However, the court held that these factors were not enough to show that NMFS had not complied with 303(a)(11).

(12) M-S Act 304(g)(1)(C), 304(g)(1)(G)(ii)-(iii). Fair Allocations of Restrictions and Benefits in HMS. APA Record Review Burden of Proof. Plaintiffs alleged that NMFS failed to adequately consider the impacts of the Florida closure on domestic versus foreign fishers, and that NMFS had failed to adequately consider traditional fishing patterns. The placed the burden on the plaintiffs to show that the Florida closures failed to promote conservation, that the Secretary had failed to consider impacts, and that Florida fishermen would suffer harm as a result of foreign competition. Finding that NMFS had adequately described the conservation benefits it was intending to achieve, and that the plaintiff had failed to show evidence of NMFS=s failures, the court found in favor of the agency.

(13) M-S Act, generally. National Standards, Generally. Balancing Considerations. The court stated that Congress was aware of the potential conflicts among the many mandates and considerations required by the M-S Act. The M-S Act requires the Secretary to exercise

discretion in balancing the competing factors, but requires him to give priority to conservation measures.

(14) **Regulatory Flexibility Act. Universe. Methodology. Alternatives.** Plaintiff alleged that NMFS violated the RFA by failing to assess economic impacts on Florida communities and failing to consider alternatives that would have mitigated impacts on them, such as rolling closures gear restrictions or different closure locations, and that NMFS erred by basing the analysis on swordfish data. The court upheld NMFS's FRFA which defined the universe of small entities as all pelagic longline permit holders. The court found that there was no evidence of NMFS failing to comply with the requirements of the RFA. The administrative record showed that NMFS gave explicit consideration to less onerous alternatives. The RFA could not trump the requirements of the M-S Act.

Case: Conservation Law Foundation v. United States Department of Commerce, 229 F. Supp. 2d 29; 2002 U.S. Dist. LEXIS 21145 (D.Mass., Oct. 31, 2002)(No. 01-CV-10927-RGS).

Facts: NMFS=s regulations implementing the FMP for the Atlantic Sea Scallop Fishery permit the agency to make certain types of changes to the management regime through a Aframework@ process. The framework process allows NMFS to implement a management change without first publishing a proposed rule if certain factors are met. 50 CFR 648.55(g). Plaintiffs, an environmental organization, brought suit alleging procedural and substantive deficiencies. Plaintiffs alleged that Magnuson-Stevens Act provisions requiring NMFS to provide for at least 15 days of public comment on Aproposed regulations@ transmitted by the Councils, require NMFS to take public comment on Aframework@ actions. Plaintiffs also alleged that Framework 14 failed to minimize adverse effects on EFH, Framework 14 failed to minimize bycatch, and that NMFS=s compliance with NEPA was deficient.

The Council prepared an FSEIS for Framework 14 and published an NOA on March 9, 2001 (66 FR 14141). Subsequent to the publication of the NOA on the FSEIS, NMFS received a comment letter on the FSEIS requesting that NMFS reject the environmental analysis because it failed to comply with the National Environmental Policy Act (NEPA) and the Magnuson-Stevens Fishery Conservation and Management Act. The commenter indicated that there were numerous procedural deficiencies during the FSEIS development and approval process, most notably that the Council failed to analyze the environmental impacts of Framework 14 and a range of alternatives to minimize the environmental effects before the Council took final action. The commenter also indicated that the FSEIS failed to analyze the environmental consequences of Framework 14 and a range of alternatives that would minimize the environmental impacts. NMFS determined that the Council considered an adequate analysis of the impacts and range of alternatives when it voted to submit Framework 14 to the agency for its consideration. NMFS, in making the decision to approve and implement Framework 14, also considered a broad range of alternatives in the FSEIS, which addresses measures to achieve objectives established by Amendment 7 and to achieve optimum yield. NMFS indicated that it would be appropriate for the Council to further consider some of the commenter=s points in the development of the next FMP amendment.

Holdings:

(1) **M-S Act 303(c), 304(b)(1)(A), 305(f). Public Comment. Framework Actions.** Plaintiffs argued that there is no difference between Aa proposed regulation@ and any other Aaction taken by the Secretary.@ Plaintiffs relied on the district court=s opinion in NRDC v. Evans, 168 F.Supp.2d 1149 (N.D.Cal. 2001), which has since been partially vacated by the 9th Circuit in NRDC v. Evans, 2003 U.S. App. LEXIS 388 (9th Cir., Jan. 13, 2003)(No. 01-17143). NMFS argued that the M-S Act clearly differentiates between Aregulations@ and other Aactions taken by the Secretary under regulations that implement an FMP.@ The court upheld NMFS=s interpretation of the M-S Act as contemplating a category of Aactions@ distinct from Aregulations.@ The court found that the M-S Act=s required 15 day comment period did not apply to the Framework action. *[Compare: NRDC v. Evans, 2003 U.S. App. LEXIS 388 (9th Cir., Jan. 13, 2003)(No. 01-17143); Natural Resources Defense Council, Inc. v. Evans, 168 F.Supp. 2d 1149 (N.D.Cal., Aug. 20, 2001)(NO. C 01-0421

JL, C 01-0637 JL).]

(2) **APA. Good Cause Waiver. Framework Actions.** In a footnote, the court also stated that NMFS's abbreviated rulemaking procedures set forth in 50 CFR 648 constituted a good cause for purposes of waiving notice and comment pursuant to the APA.

(3) **M-S Act 303(a)(7). EFH.** Plaintiffs argued that Framework 14 did not minimize to the extent practicable adverse effects on habitat. The court wrote: "The key word, of course, is >practicable.= The record amply demonstrates that habitat and bycatch were considered in formulating Framework 14."

(4) **M-S Act 303(a). Substantive FMP Requirements. Applicability to Framework Actions.** The court states in a footnote that it concurs with NMFS's argument that M-S Act 303(a)(7) applies only to the development of FMPs and not to the development of framework actions.

(5) **National Standard 9.** Plaintiffs argued that Framework 14 did not adequately avoid bycatch. The court wrote: "The key word, of course, is >practicable.= The record amply demonstrates that habitat and bycatch were considered in formulating Framework 14."

(6) **NEPA. NMFS/Council Relationship and Responsibilities.** There was no evidence that NMFS failed to comply with NEPA either with regard to its integration of the SEIS into the decisionmaking process, or with regard to its consideration of Plaintiffs' suggested alternatives.

Case: Blue Water Fisherman=s Ass=n v. Mineta, C.A.No. 99-2846-RWR (Oct. 15, 2002) (Memorandum and Order).

Prior History: Blue Water Fisherman=s Ass=n v. Mineta, 122 F. Supp. 2d 150 (D.D.C., Sept. 25, 2000) (No. CIV. A. 99-2846 RWR)

Facts: This case involves a challenge by the pelagic longline fishing industry (vessels and associated processing entities) to the Secretary=s regulations implementing the 1999 Highly Migratory Species FMP. In a previous decision (Blue Water Fisherman=s Ass=n v. Mineta, 122 F. Supp. 2d 150 (D.D.C., Sept. 25, 2000) (No. CIV. A. 99-2846 RWR), the court reviewed challenges to four sets of management measures: (1) trip limits on Atlantic bluefin tuna (BFT); (2) an area closure during the month of June; (3) annual quotas for blue sharks and subquotas for porbeagle sharks; and (4) a requirement that all pelagic longline vessels install a Vessel monitoring system (VMS) unit. The challenge alleged violations of National Standards 1, 8, and 9, failure to include mandatory components of FMPs, violation of the international parity requirements of 304(g)(1)(C), and an inadequate RFA analysis. The case was decided on cross-motions for summary judgement following oral argument, and the judge ruled in favor of the agency on each count except a challenge to the rational basis for the VMS requirement, which the court remanded to NMFS for further consideration. This decision addresses the validity of the VMS requirement in light of the agency=s remand findings.

Issues and Holdings:

(4) **National Standard 7 and 8. Vessel Monitoring System.** On remand, NMFS submitted a reconsideration memorandum that the court found adequately considered alternatives, public comments, costs and economic impacts, and conservation benefits.

Case: Blue Water Fishermen's Assoc. v. NMFS, 2002 U.S. Dist. LEXIS 19417(D.Mass., Sept. 30, 2002)(C.A. No.00-12313-NG).

Prior History: Blue Water Fishermen's Ass'n v. National Marine Fisheries Service, 158 F.Supp.2d 118 (D.Mass., Aug 20, 2001) (NO. 00-12313-NG)

Facts: Plaintiffs, vessel owners and operators in the pelagic longline industry, sought injunctive relief from NMFS=s regulations closing the Northeast Distant Statistical Reporting Area of the Atlantic Ocean (the NED) to pelagic longlining. The purpose of the NMFS regulations was to protect endangered sea turtles.

In 1999, NMFS implemented the HMS FMP which authorized a certain amount of pelagic longline fishing in the NED. Pursuant to a Biological Opinion on the fishery=s interactions with endangered turtles, NMFS authorized a certain level of incidental take of the endangered turtles. In November 1999, NMFS determined that the fishery had exceeded its authorized incidental take and reinitiated consultation. The B.O. ultimately included an RPA that required permanent closure of the NED. In previous proceedings (Blue Water Fishermen's Ass'n v. National Marine Fisheries Service, 158 F.Supp.2d 118 (D.Mass., Aug 20, 2001) (NO. 00-12313-NG)), the same court had denied a preliminary injunction based on the M-S Act judicial review provisions; that it was appropriate to review NMFS=s action pursuant to the M-S Act rather than the ESA; and that NMFS had joint authority under the combination of the M-S Act and ATCA to regulate activities beyond the EEZ in the NED.

This decision relates to Plaintiffs motion for summary judgement on the legal and scientific bases of the B.O., an APA claim of arbitrary and capriciousness relating to the disproportionate burden on the pelagic longline fleet to recover turtles, and alleged lack of M-S Act jurisdiction to control fishing in the NED, which lies beyond the EEZ.

Holdings:

(1) **ESA. Best Scientific and Commercial Data Available.** Plaintiffs alleged that NMFS=s conclusions were not based on the best scientific information because peer reviews had found fault with them and because NMFS extrapolated some of its conclusions from inconclusive underlying data. The court noted that for the most part the peer reviews had been positive and that NMFS had revised parts of the BO in response to criticisms from the peer reviews. The court also held that while at a certain point an agency might so manipulate the data in a way that would Afudge@ unsupported conclusions, in this case NMFS=s conclusions plausibly flowed from the data available.

(2) **ESA. Impacts on Subpopulations not independently listed.** Plaintiffs argued that the jeopardy conclusion was based on impacts to a subpopulation of turtles that was not independently listed. The court found that while a previous BO found jeopardy only to the subpopulation, and indicated that more research was necessary with regard to the entire population, the current BO in question found jeopardy on the entire population. Therefor the agency=s conclusions were

upheld.

(3) **ESA. APA. Allocating burden of protection.** Plaintiffs asserted that the pelagic longline fishery was a minor contributor to the problems of turtles and that requirements of the BO disproportionately burdened them in comparison to other activities affecting turtles. The court found that the law provides no redress for the inequity plaintiffs identified. The scope of the consultation was appropriately the impacts of the pelagic longline fishery in context of other existing anthropogenic impacts on turtles.

(4) **M-S Act section 102. Jurisdiction Beyond EEZ.** Plaintiffs reasserted the argument that the court had rejected at the preliminary injunction stage that the M-S Act did not provide authority for regulating vessels beyond the EEZ. The court stated that section 102 of the M-S Act expressly permits the United States to regulate beyond the confines of the EEZ under certain conditions. The section could be read broadly depending on whether the term Asuch species@ means simply Ahighly migratory species@ in general, or less broadly if the term refers only to highly migratory species subject to an international agreement. Under the broad interpretation, NMFS has authority to regulate highly migratory species beyond the EEZ with no limitation. If the term is read narrowly, then NMFS has authority to regulate for species subject to an international agreement. In the case of this action, NMFS had authority under either reading. It is irrelevant that there is no international agreement for the conservation of sea turtles.

Case: Hawaii Longline Assoc. v. NMFS, (D.D.C., Sept. 24, 2002)(Civil Action No. 01-765 (CKK)) (Memorandum and Order).

Facts: Plaintiffs, a non-profit organization representing part of the fishing industry, challenged a NMFS Biological Opinion assessing the impacts of the fishery on endangered sea turtles. Plaintiffs alleges that the B.O. was procedurally flawed because NMFS failed to provide Plaintiffs an opportunity to review and comment on the draft B.O. Plaintiffs argued that they were Applicants@ for the purposes of NMFS regulations implementing the ESA, and as such were entitled to review the draft. NMFS argued that (1) plaintiffs were not Applicants@ and that (2) even if Plaintiffs were applicants, the regulations allowed but did not require NMFS to share draft B.O.s with applicants. Plaintiffs also argued that the B.O. was arbitrary and capricious.

Holdings:

(1) **ESA. Section 7. Fishermen as Applicants@ Obligation to Share Draft B.O.** The court accepted a Magistrate=s recommended findings that plaintiffs were in fact applicants and that NMFS was required to share a draft B.O. with them.

(2) **ESA. Adequacy of B.O. Moot.** The court dismissed as moot the arbitrary and capricious challenge.

Case: Atlantic Fish Spotters Ass'n v. Evans, 206 F.Supp.2d 81 (D.Mass., May 22, 2002) (on appeal).

Facts: This case involves a challenge by a fishing association and individual participants in the Atlantic bluefin (BFT) tuna fishery to a permit condition prohibiting the use of spotter planes. Other fishing associations were defendant-intervenors in the case. In December of 2000, Congress included a provision in an appropriations act that barred the Secretary from using appropriated funds to issue or renew BFT General and Harpoon category permits that would allow the use of spotter planes. To comply with this limitation, NMFS included a condition in its 2001 BFT General and Harpoon category permits, without prior notice and comment, that prohibited the use of spotter planes. Plaintiffs argued that the permit condition expired on September 30, 2001, because the underlying appropriations act was only applicable to FY 2001. Plaintiffs also asserted that NMFS violated the APA by failing to provide prior notice and comment and violated the Regulatory Flexibility Act. The court decided the case in NMFS's favor after cross-motions for summary judgment and oral argument.

Holdings:

(1) **Ripeness. Capable of Repetition Yet Evading Review.** Although 2001 permits had expired and fishing season ended, case was ripe because 2002 season was less than month away and NMFS would issue permits soon. Case was quintessential example of controversy capable of repetition yet evading review as question over permit condition would arise each year.

(2) **Statutory Construction.** Under canons of statutory construction, the spotter plane provision in the appropriations act was permanent legislation.

(3) **APA. RFA.** Inclusion of the spotter plane prohibition in the permits was not rulemaking, but compliance with existing law. Because the prohibition was not a rule, no analysis of impacts on small businesses and less-harmful alternatives was required under the RFA. The court did not provide case law for this part of its ruling.

Case: Conservation Law Foundation v. Evans, 211 F. Supp. 2d 55, 2002 U.S. Dist. LEXIS 9719 (D.D.C., May 22, 2002)(No. 00-1134(GK))(Order);Conservation Law Foundation v. Evans, (D.D.C., April 26, 2002)(No. 00-1134(GK))(Remedial Order); Conservation Law Found. v. Evans; 2001 U.S. Dist. LEXIS 21991, (D.D.C., December 28, 2001) (No. 00-1134(GK)).

Facts: The New England groundfish fishery includes overfished stocks. The New England Council submitted, and NMFS approved, Amendment 9 to the New England Groundfish FMP, effective November 15, 1999. Amendment 9 included both biomass- and fishing mortality-based overfishing definitions intended to bring the FMP into compliance with the SFA. On April 24, 2000, NMFS approved Framework 33 which implemented fishing targets specified in a version of the FMP that pre-dated amendment 9 and that allowed fishing at levels up to three times greater than would have been allowed under amendment 9. On May 19, 2000, Plaintiffs sued alleging that NMFS had violated the SFA by failing to give effect to amendment 9; and that both framework 33 and Amendment 9 violated the SFA's bycatch provisions and the APA. NMFS argued that technical flaws prevented NMFS from implementing amendment 9, Framework 33 adequately protected the fishery pending completion of a new FMP amendment that would comply with the SFA, and because NMFS was developing a new FMP amendment, the challenge was moot. With respect to the bycatch allegation, NMFS claimed that the SFA did not necessitate implementation of new bycatch measures because those already in place were adequate. All holdings described below were reached in the December 28, 2001, opinion except for the Remedies, which were ordered in the Remedial Order of April 26, 2002, and the Order of May 22, 2002.

Holdings:

(1) **M-S Act 305(f). Time Bar.** NMFS alleged that the claims relating to the bycatch provisions were time-barred. The court found that neither the challenges to amendment 9, nor the challenges to Framework 33, were time-barred, stating *It is well established that a party against whom a rule is applied may bring a substantive challenge to the rule at the time of its application...* In this case, Plaintiffs bring a substantive, not procedural, challenge to Amendment 9; consequently, their challenge is not time-barred. @ 2001 U.S. Dist. LEXIS 21991, 26.

***The court's rationale for this holding is not clearly articulated. Possible rationales include: (a) The challenges were brought pursuant to the SFA, and not the M-S Act, and the SFA and APA jointly convey some type of standing independent of the M-S Act, not subject 305(f)'s restrictions; (b) the challenge was brought against framework 33 within the 30 days and this was the first action taken failing to implement amendment 9; (c) Section 305(f) of the M-S Act only applies to procedural challenges, not to substantive challenges; or (d) some other rationale. Also, note that the case cites to 305(b) rather than 305(f). This appears to be a typo.

(2) **SFA; M-S Act, National Standard 1; M-S Act 303(a)(1), 304(e). Prevent Overfishing; Rebuild Overfished Fisheries.** Framework 33 violated the SFA because it allowed fishing at levels up to 3 times higher those approved in amendment 9, and was allowing overfishing to occur. The probability of the framework's achieving the rebuilding requirements mandated in the SFA ranged from zero to 29 percent for most of the species covered. *To comply with the SFA as a*

matter of law, Defendants must show that there is at least a 50 percent probability that Framework 33 can meet the targets set by the SFA and the relevant FMP.@ 2001 U.S. Dist. LEXIS 21991, 19-20, citing, NRDC v. Daley, 209 F.3d at 754.

(3) **M-S Act 304(b)(1). Consistency with FMP and other law.** AThe Secretary must reject any framework adjustment which is not consistent with the underlying FMP or applicable law.@ 2001 U.S. Dist. LEXIS 21991, 7. In this case, the framework adjustment did not comply with the approved provisions of the FMP amendment containing required overfishing provisions. The Secretary=s approval of the framework was arbitrary and capricious. A[The agency] may not approve an FMP that is inconsistent with the M-S Act, as amended by the SFA.... Furthermore, it is well-established that government agencies are bound by their own regulations, including their FMPs.@ 2001 U.S. Dist. LEXIS, 21991, 15.

(4) **Mootness. Remedial Efforts underway.** NMFS=s assertions that it was developing a remedial FMP did not render moot the plaintiffs= claims. Framework 33 was currently in effect and allowing overfishing to occur.

(5) **M-S Act 304(b); APA. Duty to Implement Approved FMPs.** Amendment 9, which NMFS approved, required NMFS to adopt one of two control rules. NMFS then claimed that it could not implement one of the control rules because the council had not provided necessary fishing mortality rates. The court held that since NMFS had approved the amendment as written, NMFS is precluded from arguing that the amendment cannot be implemented. In addition, the court found clear evidence in the record that (a) NMFS could have calculated the rates itself, and (b) NMFS could have implemented one of the two control rules without the rates in question. NMFS=s failure to implement violated the SFA and the APA. (*The court does not state the basis for its legal conclusion on this issue, but it appears to relate to section 304(b) of the M-S Act and the APA).

(6) **M-S Act 303(a)(11); 50 CFR 600.350(d)(1). Bycatch. Duty to Report and Assess. Status Quo.** NMFS=s regulations state that the SFA required the agency to review, and where necessary improve, data collection methods and sources to ensure compliance with the bycatch reporting provisions of the SFA. The court found that the record showed no evidence of NMFS conducting such a review. However, the record did reveal deficiencies in the current bycatch reporting methodologies. The record did not explain NMFS=s failure to implement alternative methodologies that had been suggested, such as a dedicated observer program. Further, Congress=s clear intent in enacting the SFA was to direct NMFS to improve bycatch reporting methodologies. NMFS=s failure to improve upon the status quo violated the APA and the SFA.

(7) **M-S Act 303(a)(11); National Standard 9. Bycatch. Duty to Minimize. Status Quo.** NMFS claimed that the measures in place already complied with the requirements to minimize to the extent practicable. The court ruled that there was no record to show whether defendants had ever considered this question. The court held that NMFS had Aentirely failed to consider an important aspect of the problem.@

(8) **National Standard 9. Bycatch. Duty to Minimize. Raising of Trip Limits.** Through Framework 33, NMFS raised trip limits in order to reduce the number of regulatory discards. In a footnote, the court implies, without deciding, that this approach is questionable: this approach simply legislates bycatch away by allowing fish to be landed instead of discarded. (See FN 28, 29).

(9) **APA. failure to consider an important aspect.** The Council's executive director had prepared a report on the problems with trip limits and gear selectivity. The record shows no subsequent deliberation over either issue, and the record does not explain why NMFS rejected a request to implement a dedicated observer program and to require less destructive gear.

(10) **Remedy. Injunction. Settlement. Mandamus.** The court and all parties agreed that new information on the fishery indicated that factual basis for the approval of Amendment 9 was no longer valid and that ordering the agency to implement Amendment 9 would have created absurd results. The court ordered the parties to engage in mediation. Some, but not all, submitted to the court a proposed Settlement Agreement Among Certain Parties. Three environmental plaintiffs and one intervener from the seafood industry objected to the proposed agreement. After considering the proposed settlement agreement as well as the positions of the non-settling parties, the court crafted its own unique remedy that took components from the settlement agreement as a baseline, but added various requirements to what the parties had proposed, and ordered the agency to implement a variety of specific management measures.

Several parties, including NMFS moved for reconsideration. Among other things, NMFS argued that the Amended Remedial Order represents a mandamus order requiring federal officials to promulgate specific rules in the Code of Federal Regulations that will subject both parties and non-parties alike to potential civil and criminal penalties. NMFS stated that non-parties had not been afforded an opportunity to comment, and that the Amended Remedial Order had not been promulgated pursuant to the analytical and procedural requirements of other applicable laws, such as NEPA and the Magnuson-Stevens Act. Finally, NMFS pointed out that mandamus orders are appropriate only in cases where the duty to act is not only authorized, but nondiscretionary. On May 23, 2002, the court vacated its April 26 Order and ordered that the Settlement Agreement Among Certain Parties be implemented in its original form with the addition of observer coverage requirements. The court did not address NMFS's mandamus argument, but rather hinged its decision on the fact that the April 26 order would have produced unintended results and caused grave economic and social hardship.

Case: Little Bay Lobster v. Evans, 2002 DNH 96; 2002 U.S. Dist. LEXIS 8978 (D.N.H., May 16, 2002) (Civil No. 00-007-M).

Prior History: Little Bay Lobster Co. v. Daley, 2001 DNH 12; 2001 U.S. Dist. LEXIS 1022 (D.N.H. January 12, 2001) (Civil No. 00-007-M).

Related cases: Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 2002 U.S. App. LEXIS 23950 (1st Cir., Nov. 22, 2002) (No. 01-2282), and Ace Lobster Co., Inc. v. Evans, 165 F.Supp.2d 148 (D.R.I., Aug. 7, 2001) (NO. CIV. A. 00-004L, CIV. A. 00-005L, CIV. A. 00-006L).

Facts: This case involves a challenge by New Hampshire lobstering companies and federal permit holders in the lobster fishery (including Little Bay, a purchaser of 80% of lobsters landed in N.H.) to NMFS= regulations implementing a revised boundary line between two lobster fishery management areas (nearshore and offshore) under Amendment 3 to the Interstate Fishery Management Plan (ISFMP). The plan amendment provides for comprehensive management of the lobster fishery in state and federal waters of the New England coast. Amendment 3 was developed and adopted by the Atlantic States Marine Fisheries Commission (ASMFC) in December 1997, and accepted by the Secretary as a replacement for the previous American Lobster FMP and implementing regulations. In December 1999, the Secretary promulgated regulations implementing Amendment 3, including a revision to the boundary line between EEZ Nearshore management area 1 and EEZ Offshore management area 3. The effect of this revision was to shift the boundary line in the Gulf of Maine approx. 20 further offshore, causing plaintiffs to lose approx. 2000 square miles of previously available fishing ground (accounting for approx. 30% of plaintiffs landings). While NMFS analyzed six different alternative management regimes, only one of the alternatives included a revised boundary, and there was no alternative to the location of the revised boundary other than status quo.

Plaintiffs argued that NMFS=s adoption of the new boundary violated section 706(2) of the APA because (1) the record did not support the need for the new boundary, the record did not show that the boundary complied with the requirements of ACFCMA and M-S Act national standards, and that NMFS had violated the RFA by failing to identify alternatives to the new boundary and by failing to minimize the impacts.

Holdings:

(1) **APA. 5 U.S.C. 706(2).** The court stated that section 706 of the APA does not create an independent cause of action, (ASection 706, standing alone, does not create a substantive right or cause of action.@) However, the court sua sponte Arcast@ plaintiffs= APA argument and reviewed NMFS=s compliance with the procedural requirements of the APA at 5 USC 553.

(2) **APA. 5 U.S.C. 553. Extension of APA requirements to bodies that recommend action to NMFS.** Plaintiffs argued that the new boundary line was arbitrary and capricious because (1) the Lobster Board had failed to collect sufficient public comment, (2) NMFS had failed to respond

adequately to public comments on the EIS and proposed rule, and (3) there is no evidence in the record of NMFS deliberating on the location of the new boundary. The court noted that there was no evidence of a legal requirement for the Lobster Board to engage in an APA rulemaking process. However, the court would review the lawfulness of NMFS's rulemaking, which relied in part on the actions of the Board and the Commission.

(3) **APA. 5 U.S.C. 553. Sufficiency of Record. Reliance on records of bodies that recommend.** The court concluded that it was appropriate for NMFS to rely on the administrative records of the Lobster Board and the Commission in making its decision, and that those underlying records contained sufficient rationale to justify the new boundary.

(4) **APA. 5 U.S.C. 553. Sufficiency of Response to Comments. Reliance on records of bodies that recommend.** The court concluded that it was appropriate for NMFS to incorporate into its responses to public comments information from the administrative records of the Lobster Board and the Commission. Further, the court wrote that, when responding to comments, NMFS is not required to give an exhaustive, detailed account of every aspect of the rulemaking proceedings. NMFS's responses to comments adequately disclosed NMFS's awareness of and reliance on pertinent evidence.

(5) **National Standard 2; ACFCMA 16 U.S.C.A. § 5103(b)(1)(B).** Plaintiffs argued that the record contained no support for adopting the new boundaries, and that the original boundaries should be restored because the new boundaries had the effect of opening an additional 20 miles of inshore lobster fishing. NMFS pointed to evidence in the record supporting its decision and noted that plaintiffs had not submitted any new scientific information that NMFS had failed to consider. The court found that NMFS's actions complied with National Standard 2, and noted that the facts on this case were different from the facts in the Parravano case, cited by Plaintiffs. (Parravano v. Babbitt, 837 F. Supp. 1034, 1993 U.S. Dist. LEXIS 15990, 94 Daily Journal DAR 1543, 24 ELR 20604 (N.D. Cal. Nov.3, 1993).) In Paravano, NMFS's decision on allocation of fish based on a political compromise was overruled because it did not explain the scientific basis for the decision. In this case, Plaintiffs sought to overrule the NMFS decision that had scientific rationale articulated and replace it with a pre-existing plan that had been based on consensus building process (i.e., the Dick Allen line).

(6) **National Standard 4; 50 C.F.R. 600.325(b). ACFCMA 16 U.S.C.A. § 5103(b)(1)(B). Discrimination among residents of different states.** Plaintiffs argued that the new boundary line violated N.S. 4 because it would have a greater impact on fishermen in New Hampshire than in Maine. NMFS argued that the regulation did not facially discriminate, and that measures that affected people differently in different geographic locations could be allowable if justified on other grounds (as specific in NMFS's N.S. 4 regulations). The court agreed with NMFS finding that the even if historical patterns showed that the inshore fleet was based primarily in New Hampshire, because the regulation did not refer to state of residence to determine who may fish in which areas, it had no discriminatory intent.

(7) **National Standard 4; 50 C.F.R. 600.325(a), (c). ACFCMA 16 U.S.C.A. § 5103(b)(1)(B). Allocation of fishing**

privileges. Plaintiffs argued that conservation and management measures that have different effects on persons in different geographic locations must satisfy NMFS's guidance on fair and equitable allocations. Although NMFS did not argue that the boundary line was not an allocation, the court raised the issue. The court concluded that although the regulation may have created an incidental allocative effect by establishing boundaries when other regulations established limitations on effort within the boundaries, the boundary line itself was not a direct deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals, and, as such, is not an allocation. Because it was not an allocation, NMFS was not required to comply with the fair and equitable criteria.

(8) **National Standard 4; 50 C.F.R. 600.325(a), (c). ACFCMA 16 U.S.C.A. § 5103(b)(1)(B). Fair and Equitable.**

Burden of Proof. Plaintiffs argued that NMFS had not produced evidence that it conducted an on-the-record analysis of the fair and equitable issue. The court held: "The APA... does not require [NMFS] to prove that NMFS conducted an on-the-record analysis of the criteria in 50 CFR 600.325. Rather, plaintiffs must prove that NMFS failed to examine the pertinent evidence and articulate a satisfactory explanation for its action."

(9) **National Standard 4; 50 C.F.R. 600.325(a), (c). ACFCMA 16 U.S.C.A. § 5103(b)(1)(B). Fair and Equitable.**

Although the court found that the fairness and equity criteria did not apply since NMFS's action was not an allocation, had the criteria applied, NMFS would have prevailed because the record showed that NMFS had sufficiently considered fairness and equity issues. The court identified particular places in the record where NMFS made reference to fairness and equity such as in a response to a comment suggesting that Area 3 be closed to lobster fishing.

(10) **National Standard 8; ACFCMA 16 U.S.C.A. § 5103(b)(1)(B); Impacts on Communities. Scope of**

Analysis. Plaintiffs argued that the rule violated National Standard 8 because NMFS did not analyze the impacts of the boundary line on one particular fishing community, the New Hampshire offshore fishing fleet. The court found that NMFS's broad analysis of the social, cultural, and economic impacts of the proposed rule as a whole... and in comparison to other alternatives that were rejected, was sufficient. The court also found it reasonable that NMFS did not analyze alternatives to the location of the boundary line recommended by the Commission because it would not have been feasible to do so. The court found that NMFS was not required to analyze potential impacts of each individual element of the plan on each individual community. Nor was NMFS obliged to predict and trace out the various hypothetical impacts that could result from various fishermen's individual responses to various shifts in the boundary location.

(11) **National Standard 8; ACFCMA 16 U.S.C.A. § 5103(b)(1)(B); 50 C.F.R. 600.345. Impacts on**

Communities. Sustained Participation. The court relied on NMFS's interpretation of sustained participation in 50 C.F.R. 600.345 to conclude that while NMFS was obligated to try to provide for access to the lobster fishery, NMFS was not obligated to ensure economic viability of 70 ft steel boats in the fishery. Economic decisions by members of the fishing community regarding the type of vessel to use are separate issues.

(12) **ACFCMA. 16 U.S.C.A. § 5103(b). Consultation with Councils.** The court held that the facts in this case demonstrated that NMFS had complied with its duty under ACFCMA to consult with the NEFMC. NMFS provided copies of the DEIS, the FEIS, and the proposed rules to the Council, and the Council submitted comments during the comment period. [*The court cited as authority the similar conclusion of the Ace Lobster court. Note that the First Circuit subsequently reversed the decision in Ace Lobster on this point in Campanale & Sons.]

(13) **Regulatory Flexibility Act. Purpose. Small vs. Large Entities.** In dicta, the court notes that the purpose of the RFA was ensure that agencies consider disproportionate effects of regulations on small versus large entities. Consequently, the court notes, it is not at all clear that the RFA has any applicability to this case,@ since all lobster fishermen are small entities.

(14) **Regulatory Flexibility Act. Response to Comments. Significant Issues.** Plaintiffs argued that NMFS=s response to comments on the RFA issues were unlawfully Acursory.@ The court found that NMFS responded to the comments satisfactorily. In addition, the court noted that the RFA requires summaries of and responses to only those comments that are Asignificant.@ The court questioned whether comments addressing the location of the boundary were significant given the hypothetical/attenuated nature of potential impacts related to the location of the boundary and the non-allocative nature of the boundary.

(15) **Regulatory Flexibility Act. Sufficiency of Analysis.** The RFA does not require the agency to conduct a full-blown cost-benefit analysis or economic modeling. An agency may provide quantitative or qualitative descriptions of effects.

(16) **Regulatory Flexibility Act. Sufficiency of Alternatives. Significant Alternatives.** The court held that the RFA requires a consideration of only Asignificant@ alternatives. The court defined significant alternatives as those that would have Apotentially lesser impacts on small entities (versus large scale entities) as a whole, not those that may lessen the regulatory burden on some particular small entity.@ The court ruled that NMFS was not required to consider alternatives that would have had lesser impacts on certain small entities vis a vis other small entities.

Case: Pacific Marine Conservation Council, Inc. et al., v. Evans, (N.D. Cal., April 12, 2002)(No. C 01-2506 JL)(Order granting Plaintiffs= Motion for Summary Judgment).

Facts: The Pacific Fishery Management Council submitted, and NMFS approved, amendment 13 to the Pacific Groundfish FMP. NEPA compliance consisted of an EA/FONSI. Amendment 13 was intended to bring the FMP into compliance with the requirements of the SFA.. with respect to bycatch in the groundfish fishery, NMFS was on record stating that it lacked adequate data on bycatch in the fishery, that the absence of data hampered its ability to manage the fishery, and that Acritical information on the portion of catch that is discarded at sea is available only through the placement of onboard observers.@ The amendment provided that NMFS Amay implement@ an observer program, but did not require such a program. At the time of approving Amendment 13, NMFS had an observer program in place, but was on record stating that the limited scope of that program, an lack of funding for expanding it, would not result in reliable data to support new discard estimates.

In disapproving Amendment 13's predecessor, Amendment 11, NMFS had stated that to make the FMP compliant with the SFA, a bycatch amendment must include an analysis of Aall practicable alternatives to the current year-round trip limit management system that could be expected to result in a reduction of bycatch rates.@ In developing Amendment 13, the Council considered a range of alternatives for minimizing bycatch, including capacity reduction, marine reserves, vessel incentive program, and discard caps, but implemented only a voluntary increased utilization program. The FMP also listed bycatch reduction measures that might implemented in the future.

Holdings:

(1) **M-S Act 303(a)(11). Bycatch. Standardized Reporting Methodology.** The court ruled that Amendment 13 did not comply with the M-S Act=s requirement that FMPs include a standardized reporting methodology to assess bycatch. The amendment allowed, but did not require, the establishment of an observer program. In concluding that the amendment did not comply with the M-S Act, the court noted NMFS=s own assertions that such a program was critical: ABecause Amendment 13 fails to establish a mandatory and adequate observer program B a program that NMFS itself concedes is critical B this court finds that Amendment 13 is not in accordance with the MSA.@

(2) **National Standard 9; M-S Act, 303(a)(11). Bycatch. Duty to Minimize to the extent practicable. Discretionary Provisions in the FMP.** The court held that the amendment did not comply with the M-S Act. Although the amendment considered a range of bycatch minimization strategies, the only one included in the FMP was a voluntary program. Others were under consideration for implementation at some point in the future. The court wrote, AThis court finds that by using this discretionary language..., Amendment 13 fails to implement the mandate of the MSA to reduce bycatch and bycatch mortality.@ The court further wrote, that the AMSA requires timely action on bycatch reduction and further requires that all practicable measures be included in the [FMP].@

(3) **National Standard 9; M-S Act, 303(a)(11); APA. Bycatch. Duty to Minimize to the extent practicable. Sufficiency of Analysis.** The court ruled that this duty requires NMFS to conduct a thorough analysis of all available alternatives to ensure that it was minimizing bycatch to the extent practicable. It was not sufficient to describe, and summarily dismiss alternatives as impracticable without sufficiently analyzing them. NMFS's rationale for dismissing some of these alternatives was based on the fact that implementation would be require further discussion beyond the scope of the current FMP amendment. NMFS dismissed other alternatives as impracticable without a 100% observer program. The court found that NMFS had failed to consider these measures on their substantive merits and therefore had made an unreasonable decisions.

(4) **NEPA Adequacy of FONSI.** The court found the EA inadequate because its evaluation of the action's significance addressed only one of the ten significance criteria set forth at 40 CFR 1508.9. References to the remaining factors were conclusory and either not explained in the EA or contradicted by facts in the record. for example, the EA stated that the proposed actions were not expected to significant effects on the environment that are highly uncertain or involve unknown risks. The court found that this statement directly contradicted the agency's record which shows that the amount of bycatch occurring in the fishery is indeed highly uncertain... [and] involves highly unknown (but potentially grave) risks. The court also found the EA's statement that the action was not expected to have cumulatively significant adverse effects, was not supported given the record showing the serious decline in groundfish populations, the contribution of bycatch to that decline, and the failure to take action to minimize that bycatch. The court also found that the EA's conclusion that the action would have generally positive impacts on the environment was not supported by the record, because the only action being taken to reduce bycatch was implementation of a voluntary program.

(5) **NEPA. Adequacy of Alternatives.** The court found that the EA had failed to consider a reasonable range of alternatives. specifically, the court found that the EA should have considered immediate implementation of an adequate observer program and bycatch reduction measures for the non-whiting fishery. The court stated that the effects of such alternatives could be easily ascertained and their implementation was not remote and speculative. Nor are these alternatives infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.

(6) **Remedy.** Remand. The court remanded Amendment 13 to the agency for further consideration in light of its ruling.

Case: Center for Marine Conservation v. NMFS, D. Hawaii, Cv. No. 99-00152DAE, Feb. 26, 2002, ORDER of Dismissal.

Prior History: Leatherback Sea Turtle; Olive Ridley Sea Turtle; Loggerhead Sea Turtle; Center for Marine Conservation; Turtle Island Restoration Network v. NMFS, D. Hawaii, Cv. No. 99-00152DAE, October 18, 1999, ORDER.

Facts: In the Western Pacific, endangered sea turtles B leatherback, olive ridley, and loggerhead B migrate through the waters surrounding Hawaii in which the longline fishery occurs. In 1999, two environmental organizations, the Center for Marine Conservation and Turtle Island Restoration Network, challenged NMFS=s conclusions under the ESA as being based on assumptions contrary to the record or without a basis. In addition, they claimed that NMFS=s authorization of the fishery did not comply with NEPA. The court found NMFS in violation of NEPA and issued a series of orders imposing specific management regimes on the fishery pending completion of an EIS.

Dismissal: After considering the status of the agency=s progress, the court dismissed the case without prejudice, but also retained jurisdiction and ordered NMFS to issue the ROD on the EIS by 6/1/2002.

Case: Steven H. Loga & Tuna Fresh v. Daley, 2002 U.S. Dist. LEXIS 2571 (E.D. La. Jan. 31, 2002)(Civ. Act. No. 00-1722 sec. N).

Facts: NMFS implemented regulations for the shark fishery prohibiting Federally permitted fishermen and Federally permitted dealers from buying and selling large coastal sharks during Federal closures. NOAA assessed penalties against plaintiffs (a Federally permitted dealership) for attempting to purchase large coastal sharks from a federally permitted dealer during a federal closure. Plaintiffs filed a motion for summary judgement alleging that the regulation was exceeded NMFS=s statutory authority, and that the ALJ=s decision was not supported. The agency filed a cross motion for summary judgement, and the court found in favor of the agency.

Holdings:

1. **APA; [M-S Act 101; M-S Act 301(a)(3); M-S Act 306]. State Waters.** Plaintiffs claimed that NMFS=s regulation extending federal permit requirements into state waters exceeded the agency=s authority under the M-S Act, (impliedly implicating M-S Act sections 101, 301(a)(3), and 306). The court determined that the regulation did not exceed the Secretary=s authority, and endorsed the agency=s rationale as follows:

AThe Government aptly summarizes the authority/legality of federal regulation of shark fishing via federal permit condition and requisite nexus (federal permit), the salutary purpose of which is to permit some regulation of shark fishing in state waters, albeit regulation of federal permittees only, pursuant to the Magnuson Act, to wit:

...In general, the federal management plan does not apply to shark fishing in state waters. However, in order to best manage shark throughout their range as mandated by the Magnuson Act, in order to enhance the success of rebuilding overfished shark stocks, and in order to facilitate enforcement, NMFS adopted a permit condition that allowed for the accomplishment of compliance with federal regulations (closures)in state waters. The permit condition requires all federally permitted shark fishers to abide by federal regulations even when fishing in state or international waters. Participation in the federal scheme is not mandatory however. Fishers that fish for sharks exclusively in state waters are not required to hold federal permits, and therefore are not subject to federal management.

Thus, the regulations which prohibited plaintiffs from purchasing shark from a fisherman with a federal shark permit when a closure was in effect are not unauthorized regulation of state waters. Rather, they are a legitimate management tool, justified by the conservation mandates of the Magnuson Act.@

2. **APA. Arbitrary and Capricious and Not Supported by Facts.** The Court deferred to the ALJ=s assessments of credibility and evidence before him.

3. **M-S Act 305(f). Judicial Review. ALJ.** The court applies section 305(f) to review of

ALJ decisions. Note that the court seems to read M-S Act 305(f) to allow review under 5 U.S.C. 706(2)(A)-(F); however, M-S Act 305(f) actually limits judicial review to the standards under 5 U.S.C. 706(A)-(D). This appears to be harmless error since the court found in favor of the agency on the question of whether the ALJ's decision was supported by the facts in evidence.

Case: Aleutian Pribilof Island Community Development Association v. Department of Commerce, (D. Alaska, January 30, 2002)(No. A01-0053-CV (HRH)).

Facts: In accordance with the M-S Act, NMFS implements a community development program for Western Alaska communities that involves annually allocating 10 percent of the pollock quota among eligible groups of communities (CDQ groups). Aleutian Pribilof Island Community Development Association (APICDA) is one of several such groups. Regulations at 50 CFR 679.30 provide that the state of Alaska annually recommends allocations among the groups which NMFS can either approve or reject. In 2000, the CDQ groups had requested allocations that exceeded 100% of the available quota. The state recommended that NMFS allocate to APICDA, 14% of the available CDQ quota, a reduction from APICDA=s 16% allocation the previous year, and even further below APICDA=s request of 18% for 2000. APICDA notified NMFS that it disagreed with the state=s recommendation and requested that NMFS reject it. NMFS determined that Alaska had not provided sufficient rationale to support its recommendations, and rejected the State=s submission. The state then resubmitted the same recommended allocations, and provided a detailed explanation of its rationale, particularly explaining its rationale with respect to the APICDA allocation. NMFS approved the state=s recommendations and documented the reasons for its approval in a detailed record of decision.

APICDA sued alleging (1) due process violations due to lack of adequate notice of the state=s hearing, and lack of prior notice of the state=s intended recommendations; (2) NMFS had failed to approve and publish in the Federal Register the criteria Alaska would use to evaluate allocation requests; (3) the regulations implementing the CDQ program impermissibly delegate authority to the state; (4) NMFS=s approval of Alaska=s recommendations was arbitrary and capricious; and (5) the allocations violated the Equal Protection Clause. APICDA sought relief in the form of a judgement declaring the previous year=s allocations to remain in effect.

Holdings:

(1) **M-S Act 305(f). Standard of Review.** The court noted that its authority to review the final agency action under the M-S Act was limited to the review criteria listed in 305(f)(1)(B) (arbitrary and capricious, an abuse of discretion, not in accordance with law; contrary to constitutional right; in excess of statutory authority; or without observance of procedure required by law) and specifically noted that the M-S Act does not provide for de novo review as to whether the action was warranted by the facts or supported by substantial evidence.

(2) **M-S Act 305(f)(1). Statute of Limitations.** The court noted that the final rule establishing state and federal roles in setting the allocations was published in 1992, well beyond the 30 day time limit for challenging regulations. Thus, APICDA=s challenge to the division of state and Federal duties pursuant to the regulations was not timely.

(3) **APA. Deference to Agency Interpretation of its rule.** To the extent that Plaintiffs challenged NMFS interpretations of its regulations applying to state and Federal roles, the court deferred to NMFS .

(4) APA. Arbitrary and Capricious. Rubber Stamping of State Recommendations.

Plaintiffs argued that NMFS merely rubber-stamped the states recommendations. The relied on the record, which demonstrated serious consideration of APICDA=s claims, an initial rejection of state recommendations, and a fleshed out record of decision explaining the agency=s rationale for its approval and concluded that the agency had not acted arbitrarily and capriciously.

(5) Due Process. Notice. The court reviewed Alaska state law as well as the requirements set forth in the regulations at 50 CFR 679, and concluded that the state had complied with the required notification procedures. The court also noted that Alaska was not obligated to reveal in advance the levels of allocations it intended to recommend. The court relied heavily on the factual background of this case which included serious efforts to address APICDA=s concerns on the record before making a final decision.

(6) Property Interest in Quota Allocation. (5th Amendment Takings argument implied).

Plaintiffs argued that the reduction in their quota allocation from one year to the next constituted a deprivation of a property interest. The court responded that AThis is simply wrong. The harvest interest is not a property interest. Nor is a negative change in quota allocation from one regulatory period to the next a deprivation of property.@

(7) M-S Act 305(i). Alaska CDQ. Duty to Publish Criteria. Plaintiffs argued that the M-S Act required NMFS to approve and publish the criteria that Alaska would use to base allocation recommendations on. The court held that M-S Act 305(i) requires NMFS to approve and publish the criteria for determining which communities are eligible to receive quota, but not the criteria the state would use to recommend allocations among eligible groups.

(8) Equal Protection. Because Plaintiffs provided no support for the claim of equal protection violation, and the agency offered numerous arguments as to why that challenge should fail, the court found in favor of the agency.

(9) Remedy. Limited to ASet-Aside.@ Although noting that plaintiffs had Adisavowed@ their request for declaratory judgement reinstating the previous year=s allocations, the court stated that its authority to provide relief under the M-S Act is limited to setting aside the invalid action. It wrote, AThe Act does not provide the court with the authority to allocate CDQs.@

Case: South Atlantic Fisheries v. Evans, (D. Mass., Jan. 25, 2002)(C.A. No. 01-11726-MLW)(Order).

Facts: On May 18, 2001, NMFS published an emergency rule imposing restrictions on the red crab fishery for 180 days. The owners of two vessels whose harvesting activities were restricted by the emergency rule sued NMFS alleging that the rule violated National Standards 4, 5, 7, and 8; failed to adhere to NMFS=s published guidance on the use of emergency regulations; and was not supported by the record.

In February 2000, the New England Fishery Management Council announced its intention to develop an FMP for red crab, a fishery that had existed since the mid-1970's. NMFS published a control date of March 1, 2000 to notify the public that regulation of the fishery was being considered and that some form of limited access system could potentially be established. At that time, there were five vessels of limited capacity participating in the fishery. By November 2000, the Council had not completed an FMP for red crab, and had set the development of the red crab FMP as a low priority. However, in December 2000, the Council became aware of two vessels that intended to enter the fishery, both of which were of greater capacity than current participants. In January 2001, the Council requested NMFS to implement emergency regulations to restrict access. On May 8, 2001, NMFS published an emergency rule, effective May 18, 2001, restricting access to historic catch levels. This action was intended to prevent overfishing while the Council developed an FMP.

Holdings:

(1) **M-S Act 305(c). Emergency existed.** On January 25, 2002, the court ruled in favor of NMFS=s motion for summary judgement supporting the agency=s finding that an emergency existed and the decision to limit the harvest of red crab.

(2) **M-S Act 305(c). Mootness of N.S. Challenges.** The court found that plaintiffs challenges to the National Standards 4 and 5 were moot.

(3) **National Standard 4. National Standard 5. Mootness.** The court found that plaintiffs challenges to the National Standards 4 and 5 were moot.