

Fisheries Litigation Update

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Overview

- **Recent Decisions**
- **Pending Litigation**
- **Themes**



RECENT CASES

- *Pacific Coast Federation of Fishermen's Association v. Locke*
- *Lovgren v. Locke*



Pacific Coast Federation of Fishermen's Associations v. Locke

Pacific Council – Challenge to Amendment 20/21 (Trawl Rationalization Program)

- Favorable District Court Decision - Aug. 5, 2011
- Court of Appeals Affirms – September 10, 2012
 - MSA does not mandate direct participation of fishing communities in initial allocation of quota under a LAPP; only requires that interests of fishing communities be considered
 - MSA does not require that only those who substantially participate in a fishery be permitted to obtain limited access privileges



Lovgren v. Locke

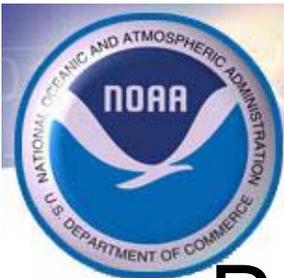
New England Council – Challenge to Amendment 16

- Favorable District Court Decision (under title of *City of New Bedford v. Locke*) June 30, 2011
- Court of Appeals Affirms November 28, 2012
 - Sector management not a LAPP or IFQ; MSA 303A procedures not applicable, referendum not required.
 - Amendment 16 complied with National Standards 1, 4, 8.
 - Mixed stock management: requirement that FMPs end overfishing immediately overrides Council’s ability to allow overfishing of stocks, even at expense of sacrificing catch of healthy stocks



Lovgren and *PCFFA*: NEPA

- Range of Alternatives
 - Both courts pay careful attention to statement of purpose and need
- Sufficiency of Analysis
 - Both courts pay careful attention to discussion of uncertainties in information



Pending Cases (and one “old” case)

- Oceana v. Blank (D.C.)
 - Mid Atlantic Omnibus Amendment

- Oceana v. Blank (N.D. Cal.)
 - Pacific Council Coastal Pelagics Amendment 13



Flaherty v. Bryson (D.D.C.)

New England Council Atlantic Herring Amendment 4

- Plaintiffs want council to include river herring and shad as “stocks in the fishery”
- Court found that Council delayed considering relevant and reasonable alternatives to ACLs and Ams for river herring or for addressing bycatch without a reasoned explanation why it could not and did not consider them.
 - » Council must make two basic determinations:
 1. What stocks can be treated as a unit and should be considered a fishery?
 2. Which fisheries require conservation and management?

IF a fishery requires conservation and management it **MUST** be included in FMP



Oceana v. Blank (D.D.C.)

Mid-Atlantic Omnibus ACL Amendment

- Stocks in the Fishery
- Bycatch of stocks in other fisheries
- Failure to establish Annual Catch Targets (ACTs)
- Adequacy of monitoring

Status: Briefing to be Completed this Week



Oceana v. Blank (D.D.C.)

Stocks in the fishery

- Plaintiffs: council was required to evaluate makeup of the fishery and determine whether stocks should be added
- NMFS:
 - Request is significantly broader than in Flaherty
 - Not w/in purpose of amendment
 - Burden on councils



Oceana v. Blank (N.D.Cal.)

Pacific Coastal Pelagics Amendment 13

- OY and Forage Issues
- MSY Proxy (Northern Anchovy)
- MSST (Pacific Sardine and Mackerel)
- NEPA
- ESA

Status: Argued February 14



Oceana v. Blank (N.D. Cal.)

OY and Forage Issues

- Plaintiffs: Council (a) failed to specify OY, and (b) unlawfully connected OY to ABC
- NMFS:
 - OY previously specified in Amendment 8
 - Importance of CPS stocks as forage in California Current ecosystem a primary consideration
 - Revising OY not within purpose of Amendment 13
 - Council/NMFS not required to revisit every element of Plan



Common Themes

- Importance of Forage Species
- Scope of Requirement/Responsibility to Revisit Established Foundations
- Significance of Statutory Deadline to Implement ACLs/AMs



NS1 Cases

- Stocks in Fishery:
 - Flaherty v. Bryson (D.D.C.) – Herring Am. 4
 - Oceana v. Locke (D.D.C.) – New England Amendment 16
 - Oceana v. Blank (D.D.C.) - Mid-Atlantic Omnibus
- OY
 - Western Seas Fishing Co. v. Locke (D. Mass.) – NE Atlantic Herring
 - Oceana v. Blank (N.D. Cal.) – CPS Amendment 13
- Mixed Stock Fisheries
 - New Bedford/Lovgren v. Locke (1st Cir.) – NE Am 16
 - Mass. v. Gutierrez (D. Mass.) – NE FW 42
- Rebuilding Plans
 - NRDC v. Locke (N.D. Cal.) – Pacific groundfish specs
- Accountability Measures
 - Oceana v. Locke (D.D.C.) – NE Am 16
 - NRDC v. NMFS (D.D.C.) – S. Atlantic Snapper-Grouper Reg Am 11
- ABC Control Rule
 - Oceana v. Locke (D.D.C.) – NE Amendment 16
 - Flaherty v. Locke (D.D.C.) – Herring Am. 4



QUESTIONS/DISCUSSION



Parting Shot

“The [national] standards are broadly worded statements of the MSA's objectives for all fishery conservation and management measures. The purposes of the national standards are many, and can be in tension with one another.” – *Lovgren v. Locke*