**Summary of Cases for the Fall 2015**

**Maritime Law Association**

**Fisheries Committee Meeting**

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***Li-Shou v. United States*,**

777 F.3d 175, 2015 AMC 539 (4th Cir. 2015) (cert. denied Oct. 4, 2015).

Taiwanese widow brought action against the United Sates for damages arising from the killing of her husband and the sinking of his fishing vessel during a NATO counter-piracy mission.  The district court granted the government’s motion to dismiss and the plaintiff appealed.  The Fourth Circuit upheld the lower court holding that plaintiff’s claims presented non-justiciable political questions, that the Public Vessels Act included a discretionary function exception, and that the discretionary function exception to the government’s waiver of sovereign immunity applied to the claims.

***Johnson v. Williams Party Boats, Inc.*,**

2015 WL 1143178, No. 3:14-CV-123 (S.D. Tex. March 12, 2015).

“The Texas Gulf Coast is blessed with warm waters filled with plentiful sportfish, easily accessible by chartered fishing expeditions.  On an idyllic Texas day, a passenger on such an excursion can enjoy boundless views of the Gulf of Mexico, the hot sun spilling on to the boat’s deck, the refreshing sea breeze, and the occasional briny taste of sea spray.  Sometimes, however, the breeze is a little stiffer and the seas a little choppier.  One such day led to this lawsuit.”

Plaintiff and 37 other passengers embarked on a 36-hour fishing trip with Williams Party Boats (WPB) aboard the CAPT JOHN out of Galveston.  The CAPT JOHN is authorized by the USCG to operate with up to 106 passengers, 200 miles out to sea, and in seas of up to 8.5 feet.  Although the weather report was relatively benign with 3.5 to 5 foot seas, Plaintiff contends the seas were choppy and many passengers retreated to bunks with sea sickness.  Plaintiff gave up his bunk to another passenger, and decided to lay down on a bench affixed to the upper deck of the CAPT JOHN when a large wave caused him to be thrown from the bench and injure his left shoulder.  The caption returned to port after the incident.  Plaintiff filed a suit for negligence under the general maritime law for travelling in rough seas, and the Defendants removed the claim to federal court.

Plaintiff did not identify an expert until five days after the deadline for exchange of reports, and did not provide a report.  Defendants moved to strike the expert and for summary judgment.  In the Fifth Circuit, when determining whether to exclude expert testimony that has been improperly designated, the Court considers four factors: (1) the explanation of the failure to identify; (2) the importance of the testimony; (3) potential prejudice; and (4) the availability of a continuance to cure the prejudice.  *Citing Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007).  Although the Plaintiff clearly was late and inexcusably so, the Court focused on the fact that determining water conditions and the captain’s choice was highly technical and required expert testimony, and that by granting a continuance and allowing the Defendants to prepare a rebuttal report cured any prejudice.  Accordingly, the Court denied both of the Defendant’s motions and continued the trial.

***Shuman v. Lauren Kim, Inc.*,**

2015 WL 1472003, No. 14-251(RBK/JS) (D. N.J. March 30, 2015).

Plaintiff filed claims for negligence and unseaworthiness, maintenance and cure, and punitive damages alleging he suffered an injury while working aboard the commercial F/V MISS LAURIE LOUISE. Plaintiff also sought to pierce the corporate veil, which claim Defendant moved to dismiss.  Determining whether a pleading states a claim is evaluated by: (1) noting the elements; (2) identifying the allegations that are not entitled to an assumption of truth; and (3) considering whether the well-pled allegation support the entitlement to relief.  *Citing Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010).   The Court granted the motion because the only facts pled were that the Defendants created the entities to avoid legal obligations and shield assets, which the Court noted was the purpose of corporations and not illegal - the Claimant failed to allege any facts that suggested they avoided legal obligation and shielded assets for a fraudulent purpose.

***United States v. Bengis*,**

783 F.3d 407, 2015 AMC 1181 (2d. Cir. 2015).

Bengis and Noll pleaded guilty to conspiracy to commit smuggling and violate the Lacey Act, which prohibits trade in illegally taken fish and wildlife.  The district court entered a restitution order directing Bengis and Noll to pay South Africa $22,446,720.  They appealed the order.  The Second Circuit considered whether (1) the appeal should be dismissed; (2) the restitution order violated the Sixth Amendment; and (3) Bengis was solely responsible.  The illegal fishing took place from 1987 to 2001 and involved the taking of rock lobster from South Africa to be sold in the United States.  The Second Circuit upheld the lower court in all respects except for the award against Bengis, who had only joined the conspiracy in 1999.  The Court remanded for a determination of the extent to which he knew of the past operations of the conspiracy when he joined.

***Mycko v. M/Y AMARULA SUN***,

2015 WL 2384060, Civ. Case No. 14-62215-CIV (S.D. Fla. May 19, 2015).

Plaintiff seamen filed suit, and moved for summary judgment for unpaid wages and related penalties after the master of the M/Y AMARULA SUN terminated them without the notice required by their contracts and for the penalty in 46 USC 10313(g) for failure to timely remit a final paycheck.  The Court denied both motions for summary decision.  Plaintiffs are not entitled to notice if, as the Defendant alleged, they were terminated for cause.  Finally, the judge noted that 46 U.S.C. § 10313(h) specifically excludes fishing or whaling vessels or yachts, and therefore the Defendant’s contention that it was a yacht defeated the motion for summary judgment.

***Seafarers, Inc. v. King Ocean Services Ltd.*,**

2015 AMC 1450, 2015 WL 3455331, No. 15-Civ-20834, (S.D. Fla. May 29, 2015).

This decision denied a motion for remand and dismissed the case without prejudice concerning a cause of action arising under COGSA and the Harter Act.  The Plaintiff, a producer and importer of fish, filed suit in state court in Florida against multiple international common carriers including three under the King Ocean corporate umbrella and one inland carrier, Martainer, seeking to recover attorney fees and a $50,000 liquated damages payment Seafarers made to Customs and Border Patrol.

Seafarers imported 27,880 pound of Gold Snapper Fillets, which were rejected by the U.S. Food and Drug Administrations.  Seafarers hired the defendants to export the Snappers to Bogota, Colombia.  CBP, however demanded re-delivery of the Snappers for re-inspection.  Disregarding the demand, Martainer and King Ocean loaded the Snappers and exported the Snapper to Colombia. CBP levied a $50,000 liquidated damages to Seafarers, which Seafarers sought to recover in state court.  The Defendants removed to federal court, and Seafarers moved for remand.

The court held that COGSA and the Harter Act applies to all contracts for carriage of goods by sea to or from open ports of the United States in foreign trade, regardless of whether the goods themselves or damaged or lost, and including customs penalties.  Accordingly, the motion for remand was denied, and the case was dismissed without prejudice to allow the Plaintiff to state proper complaints.

***Willie R. Etheridge Seafood Co. v. Pritzker,***

2015 WL 4425659, No. 2:14-CV-73-BO (E.D.N.C. July 16, 2015).

Plaintiffs are eighteen commercial fishermen and companies operating out of North Carolina who contested Amendment 7 to the Consolidated Atlantic Migratory Species Fishery Management Plan on December 2, 2014.  Plaintiffs are pelagic fisherman, but tuna may not be targeted with pelagic longlines – thus they are required to have Bluefin tuna permits because they are a common bycatch.  Amendment 7 sought to minimize Bluefin tuna bycatch, and plaintiffs allege that it threatens the economic viability of their business as the swordfish catch will lower and regulatory compliance through monitoring will increase.

The Court dismissed the violation of the APA complaint because no part of the APA creates a substantive right.  The Court dismissed the Fifth Amendment complaint as a fishing permit is not a legitimate property interest.  The court dismissed the complaint for failing to complete a Regulatory Flexibility Act review and non-justiciable.  Finally, the Court dismissed the NEPA complaint because NEPA was designed to protect the environment, not the economic interest of those adversely affected by agency decisions.

***Beech v. F/V WISHBONE***,

2015 WL 4458839, Civ. Case No. 14-0241-WS-B, (S.D.A.L. July 21, 2015).

This decision concerned three post-judgments motions: (1) Skipper’s Landing Inc.’s Motion for Discharge of Vessel Release Bond; (2) Skipper’s Motion to Tax Costs; and (3) Plaintiff’s Motion to Alter or Amend Judgment.  First, the Court denied plaintiffs’ motion on procedural grounds under FRCP 59(e) as the plaintiffs had failed to present new evidence.  However, it noted that the motion also failed substantively, because the applicable test for a ‘stranger of the vessel’ theory was not mechanical, and no one aspect of the relationship was determinative.  And finally, it noted the motion was pointless in any event because the plaintiffs did nothing to address the fact that the Judge had ruled against them on laches in any event.

In regard to the Motion to Tax Costs, the plaintiffs had the vessel arrested *in rem*, and Skipper’s was required to post bond of $108,000, costing it approximately $2,160.  It sought to recover under 28 U.S.C. § 1919, which provides payment of just costs where an action is dismissed for want of jurisdiction.  The Court held that the finding that the maritime liens did not amount to a determination that jurisdiction was lacking, and noted that section 1920 plainly did not allow taxing of costs for bond premiums, in denying the motion.

Finally, unopposed, the court ordered the discharge of the vessel’s release bond.

***United States v. Daniels*,**

2015 WL 4509995, Civ. Case No 4:14-CR-11-F-1 (E.D.N.C. July 24, 2015) (now pending at the Fourth Circuit Court of Appeals – Case No. 15-4501).

This Order concerned pre-trial motions filed by the Defendant Bryan Daniels.  Daniels, a commercial fisherman held a federal vessel operator permit from NOAA since 1996.  In 2009, Daniels was the captain of the JOYCE D*.*, a commercial stem trawler fishing vessel.  North Carolina authorized the fishing of striped bass in inland and ocean waters within three nautical miles from shore.  The vessel monitoring system tracking data revealed a trip netting 1,086 pounds of striped bass on a two-day trip in January 2009; a trip netting $2,159 pounds of striped bass 6.5 miles from shore; and a trip netting 5,158 pounds of striped bass 8.8 offshore – all of which are in the Exclusive Economic Zone, more than three miles from shore, and in violation of federal law.

Daniels moved to dismiss certain indictments on the grounds that his actions were not in violation of the Lacey Act and that the applicable statutes were unconstitutional on the grounds of vagueness.  First the Court noted the indictment rests at the nexus of the Lacy Act, the Magnuson-Stevens Act, and the Atlantic Striped Bass Conservation Act.  The Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase and fish or wildlife or plant taken, possessed, transported or sold in violation of any law, treaty, or regulation of the Unties or in violation of any Indian Tribal law.  In particular, Daniels was charged with taking Atlantic striped bass in the EEZ under 50 CFR 697.9(b).  However, the Lacey Act does not apply in any case where the activity is regulated by a fishery management plan in effect under the Magnuson-Stevens Act.  Here, the Court held that the Lacey Act exception applied through the ASBCA FMP, which was recognized in the Magnuson-Stevens Act.

The other aspects of the pretrial motions concern the Notice of Intent to use Rule 404(b) evidence, a Motion to Sequester Government witnesses, a Motion to disclosure *Brady/Giglio* materials, and a Motion for disclosure of Government exhibits.

***Train v. Abdon Callais Offshore, LLC*,**

2015 WL 4528774, Civ. Case No. 12-0999 (E.D.La. July 27, 2015).

This appeal challenged the decision arising out of a bench trial regarding the collision between metal and fiberglass vessels.  The parties included the F/V STAR OCEAN, the M/V ST. JOSEPH THE WORKER, the salvager Tran & Peter LLC, the captain and deckhand of the F/V STAR OCEAN for personal injury damages, the Defendant who sought to recover the cost of the spill response incurred in the aftermath, and intervenor Tom’s Marin & Salvage, LLC for its contract with Tran & Peter LLC.  The Court held: (1) the metal and fiberglass vessels were 75% and 25% at fault respectively; and (2) the fiberglass vessel owner was not entitled to pre-judgment interest.

***Yang v. Majestic Blue Mountain Fisheries, LLC*,**

2015 WL 5003606, No. 13-00015 (D. Guam Aug. 24, 2015).

This case concerns a wrongful death action in which Plaintiffs seek damages for the death of Chang Cheol Yang while he was onboard the F/V MAJESTIC BLUE, which sank in the West Pacific on June 14, 2010.

Dongwon Industries Co., Ltd., is a Korean Corporation that sold the vessel to Majestic Blue, a Delaware Corporation in April 2008 for $10.00.  In May 2008, they entered a contract whereby Dongwon was to arrange and supervise dry-docking and repairs, maintain the vessel, supply equipment and parts, and supply a crew to man the vessel.  In March 2010, the MAJESTIC BLUE arrived in China for its annual dry-docking and set out May 7, 2010, shortly thereafter needing to travel to Guam for further repairs on May 13, 2010.  On May 21, 2010, it again set sail on a tuna fishing expedition with 23 crew and one observer, and sank on June 14, 2010.  The crew and the observer abandoned ship, but the captain and Yang went down with it.   On December 9, 2010, MAJESTIC BLUE filed in district court for exoneration and limitation of liability.

The Magistrate concluded MAJESTIC BLUE: (1) knew the vessel was unseaworthy; (2) knew specifically of the unseaworthy conditions manifesting at the rudderstock and the excessive and constant leaks; (3) knew of the incompetency of the crew which lacked, experience, training, a common language, and basic emergency skills; and (4) knew the captain had no real authority on the vessel, and therefore was not eligible for limitation.  Meanwhile, the Plaintiffs filed suit under the Jones Act, general maritime law, and DOHSA.   After consolidation, the Magistrate recommended the Court compel arbitration.

The Court found that despite the decedent having signed a contract in English, which he did not speak, that there was a contract and meeting of the minds.  Next, it concluded the prospective-waiver doctrine did not apply as South Korea allowed for mediation and recovery.  Thus, the only issue remaining concerned whether, Dongwon, a non-signatory to the decedent’s contract with Majestic Blue, could enforce the arbitration agreement.

In the Ninth Circuit, a non-signatory to an arbitration agreement may compel arbitration if the relevant state law contract so permits.  *See Kramer V. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013).  Although there is no Guam case law on the point, the Supreme Court of Guam has recognized that it drew on California Civil Procedure law, which permits a non-signatory to enforce an arbitration agreement only when equitable estoppel applies.  As the claims do not rely on a contractual relation, the Court denied Dongwon’s motion to compel.

However, Majestic Blue, with whom the decedent was a signatory, joined Dongwon’s motion to compel arbitration.  As Majestic Blue had filed limitation action, Plaintiff opposed the motion to arbitrate on the grounds that the limitation action was inconsistent with its right to arbitrate and on the grounds that they had suffered prejudice as a result because Defendants had gained unfair access to discovery that while available in the limitation action, would not be available to Plaintiff in the South Korean arbitration.  The Court concluded that although South Korea does not permit interrogatories, the information was discoverable through other means in South Korea.  Accordingly, the Court granted Majestic Blue’s motion to compel arbitration.

***Oceana, Inc. v. Pritzker*,**

2015 WL 5138389, Civ. Case No. 12-0041, (D. D.C. Aug. 31, 2015).

Oceana, Inc., an environmental group filed suit against the NMFS under the Endangered Species Act challenging the agency’s Biological Opinion (“BiOp”) that the combined operation of seven fisheries (the Northeast multispecies, the Monkfish, the Spiny Dogfish, the Atlantic Bluefish, the Northeast Skate Complex, the Mackerel, Quid, and Butterfish, and the Summer Flounder, Scup, and Black Seas Bass Fisheries) was not likely to jeopardize the continued existence of a population of Loggerhead Sea Turtles.  Both parties moved for summary judgment.  The fisheries employ various methods that can cause harm to loggerheads including sink gillnets and bottom otter trawls.  Gillnets are particularly suspicious in that in historical times they were commonly used in the sea turtle fishery industry for their effectiveness as catching sea turtles.

The first argument the Court considered was the NMFS Article III argument that Oceana lacked standing to sue on behalf of its members, which requires: (1) the members to have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted not the relief requested requires the participation of the individual members. The Court rejected the NMFS argument and found the Oceana members, some of who actually study loggerheads, satisfied the requirements.  Second, the Court disposed of Oceana’s argument that the NMFS failed to take account of cumulative effects and aggregate effects.  The Court likewise rejected this argument reasoning that the NMFS’ approach to use the historical baseline cumulative effects would be similar to those in the future, and reasoning that the Population Visibility Analysis utilized by the NMFS was not the exclusive grounds for its decision, labelling the objection as myopic.   Third, the Court rejected Oceana’s argument that the NMFS failed to the account for recovery by focusing on prospects for survival.  Fourth, the Court rejected the argument that a ten-year time period for the BiOp was arbitrary and capricious distinguishing the case from a Ninth Circuit case that found five years to be arbitrary and capricious.  See *Wild Fish Conservancy v. Salazar*, 628 F.2d 513, 522-25 (9th Cir. 2010).  Fifth, the Court rejected the argument that the NMFS had failed to take into account climate change effects, noting that just because the agency concluded it was unable to fully evaluate climate change did not mean that it did not consider the issue.

Finally, the Court considered Ocean’s challenge regarding the statistical modelling and the monitoring of incidental takes.  The NMFS estimated that 269 will be taken from gillnets of which 167 with be lethal takes, and 213 will be taken from bottom trawl gear, of which 71 will be lethal takes.  The Court agreed that the ITS failed to address how the NMFS would monitor whether the take estimate were accurate or whether they were exceeded – i.e. whether the modelling was accurate. Accordingly, the Court remanded to the NMFS to provide an explanation of the sufficiency and operation of its monitoring mechanisms, and noted that it would not vacate the BiOp.

***Oceana Inc. v. Pritzker*,**

2015 WL 5184605, Civ. Case No. 08-1881(PLF), (D. D.C. Sept. 4, 2015).

This case concerned a Biological Opinion issued by the National Marine Fisheries Service (“NMFS”) in which the NMFS determined the operation of the Atlantic Sea Scallop Fishery would not jeopardize the continued existence of the Northwest Atlantic Distinct Population Segment of loggerhead sea turtles.  Previously, the court had denied various motions by NMFS, plaintiff Oceana, and intervenor Fisheries Survival Fund, and directed the NMFS to explain its methods for monitoring interactions between loggerheads and fishing gear.   NMFS completed its review, and Oceana argued that the NMFS methodology was arbitrary and capricious in violation of the Administrative Procedure Act necessitating a second remand. NMFS moved to strike an expert declaration in support of the motion for second remand.

More specifically, the issue concerned a scatterplot that purported to show a strong positive linear relationship between two variables: the number of hours that vessels are out at sea using dredge fishing gear, and the number of loggerhead sea turtles struck by the gear – 252,323 dredge hours equating to 161 loggerhead takes.  Oceana’s expert contended that the NMFS’ methodology was flawed, and NMFS moved to strike the expert as outside of the administrative record.

The judge noted there were four circumstances which permitted the court to resort to extra-record evidence in the D.C. Circuit:  the agency: (1) acted in bad faith in reaching its decision, (2) engaged in improper behavior in reaching its decision, (3) failed to examine all relevant factors, or (4) failed to adequately explain its grounds for decision.  The court held that the NMFS failed to adequately explain the grounds for its conclusion that a strong positive linear relationship exist between dredge hours and loggerhead takes, and denied the motion to strike noting the expert’s declaration was instructive in respect to the sufficiency of the statistical explanation of the relationship between two variables.

Accordingly, the court instructed NMFS to file a response and permitted it to obtain its own statistical expert.

***Marilley v. Bonham***,

\_\_\_ F.3d \_\_\_, 2015 WL 5472732 (9th Cir. 2015) (Ninth Circuit Court of Appeals recently approved enlargement of time to file for rehearing en banc on or before 11/16/15).

This case concerned a class action brought by non-resident commercial fishers against the Director of California Department of Fish and Game, who had imposed higher fees on the non-residents than local fishermen, and which the class alleged violated the Privileges and Immunities Clause.  The district court granted summary judgment in favor of the class and the Department appealed.  The Ninth Circuit upheld the lower court and found: (1) non-resident fishing activity is sufficiently basic to the livelihood of the nation as to fall within the purview of the clause and that (2) California had no substantial reason to discriminate.

In doing so, the Ninth Circuit explained the P&I process.  First, whether the challenged statute directly burdens a protected activity (commercial fishing fees directly affects commercial fishing).  Second, whether the State has substantial reasons to justify the discrimination and that the regulation bears a close relation to the reasons (the fees charged while reasonable, were not simply higher than what residents paid, but wholly new, and therefore not closely related to “taxes which only residents pay.”).

Thus, the Ninth Circuit held California’s differential commercial fishing license fees, Cal. Fish & Game Code §§ 7852, 7881, 8550.5, and 8260.6, violate the Privileges and Immunities Clause. Charging non-residents two to three times that amount charged to residents. The statute plainly burdened non-residents’ right to pursue a common calling, commercial fishing, and the State failed to carry its burden to the discrimination bore a close relation to a resident’s share of the State’s expenditures.

***Sanders v. Cambrian Consultants America, Inc.*,**

2015 WL 5554639, Civ. Case No. H-15-680 (S.D. Tex. Sept. 21, 2015).

Plaintiff, Sanders, filed suit in Texas against various defendants alleging a sexual assault by the captain of the seismic vessel M/V GECO TAU, and the case was removed to federal court.  Plaintiff moved for remand arguing the state court had jurisdiction over her claim because of the Savings to Suitors clause, 28 USC 1333.  Defendants argued that Sanders was asserting a general maritime claim under 28 USC 1441(a) and that she was not a seaman as a matter of law because she was a marine mammal observer.

The issue concerned the standard for determining whether the Jones Act claim was fraudulently pled for the purposes of avoiding removal and whether the Fifth Circuit’s decision in *Ryan v. Hercules Offshore, Inc.*, 945 F.Supp.2d 772 (S.D. Tex. 2013) was still good law.  A defendant wishing to remove a Jones Act claim to federal court must prove that the allegations of the complaint were fraudulently made, and any doubts should be resolved in favor of the plaintiff.  The court pierced the pleading and relied on *O’Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993), and *Belcher v. Sundad, Inc.*, 2008 WL 2937358 (E.D.La. Aug. 1, 2007), for the propositions that federally-required marine observers are generally not seaman.  It further noted that when it recodified Title 46 in 2006, Congress removed a scientific personnel exclusion from ORVA on the basis that the definition of “seaman” already excluded scientific personnel, and held that the Plaintiff fraudulently pled the Jones Act claim.

The Court then turned to the *Ryan v. Hercules, Offshore, Inc.* issue, noting the disagreement among the district courts in its wake.  It noted that *Gregoire v. Enterprise Marine Services, LLC*, 38 F.Supp.3d 749 (E.D.La. 2014) provides a compelling argument that the amendments to the removal statute did not impact the historical bar on removal of maritime claims files at law in state court, explaining, “when a maritime claim is filed in state court under the Savings to Suitors Clause, it is transformed into a case *at law*, as opposed to admiralty.”  Therefore, the Court held it did not have jurisdiction over the claim and granted the motion for remand.

***Fuller Marine Services, Inc. v. F/V WESTWARD, in rem*,**

2015 WL 5674828, Civ. Case No. 2:15-cv-212-NT (D. Maine Sept. 24, 2015).

Plaintiff filed a complaint against the vessel seeking foreclosure of a maritime salvage lien on the vessel.  The Marshall for the district of Maine arrested the vessel, and transferred it to Fuller Marine as custodian.  Default was entered against the vessel.  However, the Defendant appeared to solely argue that salvage liens to not attach to a vessel’s fishing permits.  The court noted that the is no formula for salvage awards, but should be discretionary rewards and that professional salvors should receive higher grants that chance salvorsciting to the *THE BLACKWALL*, 77 U.S. 1 (1869), while noting the value of the award may not exceed the value of the property saved.

Plaintiff argued that fishing licenses, as appurtenances of the vessel, were part of the value of the ship.  The owner took the position that the permits were fungible licenses, not property saved.  The Court considered *Gowen v. F/V Quality One*, 244 F.3d 64 (1st Cir. 2001), which concerned a lien for wharfage and repairs. The Court found its reasoning that licenses were part of the appurtenances and essential to the evaluation of credit provided to a vessel.  Accordingly, the Judge considered the value (1) the value of the vessel; (2) the value of the licenses; and (3) the value of property that would have been destroyed had Fuller not engaged in the salvage operation in making its award.

***Anglers Conservation Network v. Pritzker*,**

2015 WL 5885341, No. 14-509, (D. D.C. Oct. 5, 2015) (note that related matter *Anglers Conservation Network v. Pritzker* pertaining to a 9/30/14 decision has been set for an argument on 10/20/15 before the D.C. Circuit Court of Appeals, Case No. 14-5304).

Plaintiffs brought a case against NOAA and the NMFS pursuant to the Magnuson-Stevens Fishery and Management Act (“MSA”), 16 U.S.C. § 1801; NEPA, 42 U.S.C. § 4321; and the APA, 5 U.S.C. § 701.  Defendants promulgated a rule amending the fishery management plan governing the Mackerel, Squid, and Butterfish (MSB) fishery of the eastern coast of the United States.  More specifically they alleged the Defendant: (1) failed to include four species of river herring and shad as “stocks” to be regulated by the MSB plan; and (2) failed to adequately consider the environmental impact of its chosen course.

This dispute centered around the treatment of four species of anadromous fish (two shad and two herring) — fish that spend most of their lives in the ocean but migrate upstream to fresh water in the spring to spawn, and play a critical role in the biology of rivers, estuaries, and ocean waters on the Atlantic seaboard.  The Defendants issued a 50-page administrative decision on August 12, 2013 finding the listing of river herring as threatened and endangered under the Endangered Species Act as unwarranted as the NMFS determined that neither species of river herring was in danger of extinction or likely to become so for the foreseeable future.  The Defendants were unable to make any determination regarding the shad.

Shad and herring are exposed to the Atlantic mackerel, squid, and butterfish seasons under the Fishery Management Plan as the herring and shad are frequently taken in the catch and either discarded or sold as incidental catch. The two particular issues concerns Amendments 14 and 15 to the Mid-Atlantic Fisheries Management Plan (MSB FMP), which the Plaintiffs had proposed, but had not been adopted. *See* 75 Fed.Reg. 32.745, 10.029 (February 24, 2014).  In particular, Plaintiffs proposed that Amendment 14 require additional on-board observers for compliance and argued for the inclusion of the shad and herring stocks in the MSB FMP.  Amendment 15 in turn was an attempt to add shad and herring to the stock for the MSB FMP.

The standard of the review under the APA is whether the challenged agency action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.  While the court review is highly deferential, it will not merely rubber stamp the agency decisions.

The Court roundly rejected the NMFS’s legal arguments on the addition of stocks, but upheld its decision.  First, it rejected the position that the decision of whether to add stock rests with regional counsel.  *Citing Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D. D.C. 2012).  Second, it rejected the government’s position that because the issue of whether to add stocks was at issue in Amendment 15 that it had no need to address it on the grounds that promises of future compliance to no alleviate the government from its current legal obligation.  Third, the government argued it did not need to every time it updated a FMP, which, to the extent accurate, the Court held inapplicable in this case because an agency acts arbitrarily or capriciously when it fails entirely to consider an important aspect of the problem.  Finally the Court rejected the argument that before they could appeal the Plaintiffs need to attempt different course of having the stocks added.  However, from a factual point of view, the evidence supported the government’s position to not include the stocks.  In granting the government’s motion for summary decision, it noted that the government has no obligation to add stocks to a fishery because the impacts of doing so are likely to be positive.  The Court likewise upheld the decision to not mandate 100% observer coverage through a cost sharing between participants and the NMFS.  The Court accepted the NMFS’ argument that to have adopted the amendment would have been in violation of the Anti-Deficiency Act’s prohibition against unauthorized future outlay spending.

However, the Court agreed with Plaintiff’s on the NEPA charge.  NEPA is evaluated under a “take a hard look” standard, which requires Environmental Impact Statements (“EIS”).  Plaintiff argues the government’s EIS failed to evaluate the proposed addition of stocks and that therefore, the government failed to ‘take a hard look.’  The Court agreed noting the EIS failed to include a sufficient number of alternative plans and outcomes, and highlighted the fact that the EIS failed to justify why it did not consider the alternative of adding the stocks.