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To:	MLA Fisheries Committee Members
From:	Justin G. Guthrie
Date:	October 18, 2023
Re:	2023 Fall MLA Meeting – Fisheries Committee – Recent Case Update

***New York v. Raimondo,* No. 22-1189, 2023 U.S. App. LEXIS 27214 (2d Cir. Oct. 13, 2023)**

FACTS: This is a case out of the Second Circuit on appeal from the Southern District of New York. The dispute arose from the NMFS' management plan concerning the conservation of summer flounder, or fluke, off the eastern seaboard. Eleven states participate in this fishery, including New York, and the applicable Fishery Management Plan (FMP) includes an annual commercial quota for each state.

The summer flounder quota system was created in 1992, with an adjustment in 1993. At that time, each state's quota was based on catch data reflecting how much summer flounder each state had landed from 1980-1989. From 1993 onward, New York was allocated a 7% share of each year's total flounder catch. States with higher historical landings, like Virginia, received higher quotas, *e.g.*, Virginia's quota is 21% of each year's total catch. Since 1993, flounder populations have shifted northward, closer to New York. In response, the NMFS undertook a rule making process to reassess and revise the quota system, as needed. It completed that process in 2020 when it promulgated the 2020 Allocation Rule. New York brought suit challenging the 2020 Allocation Rule.

The 2020 Allocation Rule retains each state's quota from 1993 up to the first 9.55 million pounds of summer flounder caught. After that, the 2020 Allocation Rule provides that additional catch is evenly divided in a surplus quota. That is, every state receives approximately 12% of any additional catch during a good fishing year. Thus, under the 2020 Allocation Rule, New York is entitled to its historical 7% for the first 9.55 million pounds of coastwide catch, then 12% of any surplus catch after that.

New York argued that, in setting current surplus quota, the NMFS failed to actually account for the long-term movement of fluke northward, closer to New York's shores. New York, therefore, claimed that the surplus quota under the 2020 Allocation Rule violated several of the Magnuson-Stevens Act's standards as well as the APA. The Southern District of New York granted summary judgment to the NMFS.

ISSUE: Whether the NMFS, in setting each state's summer flounder quotas, properly weighed the relevant statutory considerations under the Magnuson-Stevens Act, specifically the standards provided under 16 U.S.C. § 1851(a)(1)-(10).

HOLDING: The Second Circuit affirmed the Southern District of New York, finding the NMFS properly weighed the relevant statutory considerations under the Magnuson-Stevens Act, it was clear from the administrative record that the NMFS considered all ten National Standards provided by the Magnuson-Stevens Act under 16 U.S.C. § 1851(a)(1)-(10), and thus the NMFS properly exercised its discretion in formulating the 2020 Allocation Rule.

REASONING: The Second Circuit noted that New York's principal argument was that the NMFS simply did not consider the northward movement of the summer flounder population and was, therefore, inconsistent with the Magnuson-Stevens Act, specifically National Standards 2, 4, 5, and 7. New York argued that under National Standard 2, which provides that conservation and management measures be "based on the "best scientific information available," its quota should have reflected the increased proximity to the summer flounder population. Thus, by keeping each state's baseline quota unchanged from 1993, and by evenly splitting each state's surplus quota during good fishing years, the 2020 Allocation Rule was not "based upon the best scientific information available."

The Second Circuit noted the phrase "based upon" implied that the NMFS must use (and not merely consider) the location of summer flounder populations when crafting a fishery management plan. However, the Second Circuit found that the NMFS did consider the summer flounder's northward movement. The new surplus quota in the 2020 Allocation Rule was based, to some degree, on the northward movement of summer flounder. The NMFS explained that the surplus quota was meant to reduce the proportion of quotas for states at the southern end of summer flounder distribution (North Carolina, Virginia, and New Jersey) and increase allocation for many northern states, including New York. In practice, New York's quota should increase from 7% to 12% during surplus periods, while states farther away from the summer flounder should see corresponding decreases in their quotas. Accordingly, the Second Circuit found the 2020 Allocation Rule was "based upon" the shifted location of the summer flounder sufficient to withstand scrutiny under National Standard 2.

As to New York's challenges under National Standards 4, 5, and 7, the Second Circuit noted that New York basically argued that conservation and management measures could not discriminate between residents of different states and allocation of fishing privileges had to be fair, equitable, and efficient. Thus, New York argued it was unfair and inefficient to allocate higher quotas to states that are farther away from summer flounder populations.

The Second Circuit found that the NMFS had persuasively articulated why it balanced the National Standards the way it did and why it rejected the location-based rule that New York wanted. In so doing, the NMFS balanced National Standard 4 against National Standard 8, which requires management measures to "take into account the importance of fishery resources to fishing communities" and "minimize adverse economic impacts on such communities" where practicable. 16 U.S.C. § 1851(a)(8). By including ten standards, the Second Circuit noted the Magnuson-Stevens Act contemplated other fishery management considerations — here, the inertia of fishing industries established over decades — and could outweigh equitability concerns that flow from the

transitory movement of the summer flounder. The Second Circuit then approved of the Ninth Circuit's proposition that the NMFS is allowed to sacrifice the interest of some groups of fishermen for the benefit, as the NMFS sees it, of the fishery as a whole. *See All. Against IFQS v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996) (citing *Alaska Factory Trawler Assoc. v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir. 1987)).

As to the efficiency and cost concerns provided under National Standards 5 and 7, the NMFS argued that the southern states' operations involved longer trips and large vessels built in reliance on their higher quotas. A location-based rule, like the one New York wanted, would inequitably frustrate that reliance.

***N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC,* 76 F.4th 291, 294 (4th Cir. 2023)**

FACTS: This is a case out of the Fourth Circuit on appeal from Eastern District of North Carolina. N.C. Coastal Fisheries Reform Group alleged that certain shrimp trawlers operating along North Carolina's Pamlico Sound, Captain Gaston, LLC, were violating the Clean Water Act by engaging in two types of activity: (1) throwing bycatch overboard and (2) distributing sediment with their trawl nets. The Eastern District of North Carolina found these activities did not violate the Clean Water Act.

ISSUE: Whether the shrimpers violated the Clean Water Act by either: (1) throwing bycatch overboard; and/or (2) distributing sediment with their trawl nets without obtaining applicable permits from the EPA and/or the Army Corps of Engineers.

HOLDING: The Fourth Circuit affirmed the Eastern District of North Carolina and found that both of the plaintiffs' claims under the Clean Water Act failed. The Fourth Circuit found that while the Clean Water Act's definition of "pollutant" included the term "biological materials," that definition was not a clear authorization for the EPA to regulate bycatch under the Clean Water Act. So, the plaintiffs' first claim — that the shrimpers were violating the Clean Water Act by discarding bycatch overboard without a permit — was properly dismissed. The plaintiffs' second claim — that the shrimpers were violating the Clean Water Act by using trawl nets without a permit — fared no better. The Fourth Circuit agreed that the shrimpers were not "dredging" the Pamlico Sound with their nets, nor were they adding pollutants, like rock and sand, into the water.

REASONING: The Clean Water Act prohibits the "discharge of any pollutant by any person . . . ." 33 U.S.C. § 1251; 1311(a). To comply, would-be polluters must obtain permits that authorize the discharge of a pollutant. Two types of permits are relevant to this case. First, the EPA can issue a National Pollutant Discharge Elimination System permit. Second, the Army Corps of Engineers can issue a permit under the Clean Water Act to authorize discharge of "dredged or fill material . . . at specified disposal sites." 33 U.S.C. § 1344 (A). Thus, the foregoing required the Fourth Circuit to engage in a statutory analysis of Clean Water Act's definition of "pollutant."

The Clean Water Act defines "pollutant" to include "biological materials," but that term is not further defined. The plaintiffs argued that the term "pollutant" encompassed all animal mater, including bycatch. The plaintiffs further argued that bycatch was a "pollutant" because it is within what the plaintiffs argued was the ordinary meaning of "biological materials," and the "discharge

of a pollutant," as defined by the Clean Water Act, includes any "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Stringing these definitions together, the plaintiffs argued that, by dumping bycatch back into the ocean from a boat after it was hauled onboard (from the ocean), the shrimpers were adding bycatch to the ocean. Upon this theory, plaintiffs argued the shrimpers violated the Clean Water Act because they didn't have a permit from the EPA to do that.

The Fourth Circuit found the plaintiffs' argument and reading of the Clean Water Act's definition of "pollution" and "discharge of a pollutant" plausible in isolation. However, the Fourth Circuit ultimately rejected the plaintiffs' interpretation after relying upon "background principles" of interpretation, including the major-questions doctrine, which was recently formalized by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) and *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023).

In short, the major-questions doctrine requires clear authorization from Congress for agency action in "extraordinary cases" when the "history and breadth" and "economic and political significance" of the action at issue gives us "reason to hesitate before concluding that Congress meant to confer such authority" to act on the agency. *West Virginia, supra*.

The Fourth Circuit found that the major-questions doctrine applied to the plaintiffs' claims against the shrimpers specifically for their bycatch claim because Congress had erected a distinct regulatory scheme under the gyre of the Magnuson-Stevens Act that addressed bycatch; therefore, the NMFS under the Magnuson-Stevens Act, and not the EPA under the Clean Water Act, was charged with bycatch regulation. Furthermore, according to the Fourth Circuit, the NMFS regulates fisheries in federal waters, and the regulatory scheme governing the NMFS suggests that the courts should expect clear authorization from Congress before finding that the NMFS' ability to regulate something like bycatch under Magnuson-Stevens Act had been displaced by the Clean Water Act.

With this in mind, the Fourth Circuit found that adopting the plaintiffs' interpretation would upset the Magnuson-Stevens Act while raising significant federalism concerns. It would also be plainly impractical. According to Judge Richardson, who wrote the opinion, under the plaintiffs' interpretation, almost every commercial and recreational fisherman in America would be subject to the EPA's new regulatory control, and anyone fishing in navigable waters using live bait, or chumming, or after catching and releasing a fish, would be engaging in pollution under the plaintiffs' reading of the Clean Water Act unless they first obtained a permit from the EPA in addition to their fishing license. Because the plaintiffs failed to identify clear authorization from Congress to support their far-reaching interpretation of the Clean Water Act as it applied to bycatch, their bycatch claim failed.

As for the sediment claim, the plaintiffs argued that the shrimpers' trawl nets disturbed the sea floor, causing sediment to suspend in the water, which amounted to an unpermitted discharge of a "pollutant." The plaintiffs proffered two theories supporting this sediment claim. Their first theory was the sediment the trawl nets disturbed was "dredged spoil," and thus a "pollutant," requiring a permit from the Army Corps of Engineers Their second theory was that, even if the disturbed sediment was not "dredged spoil," it at least consisted of rock and sand, which separately qualified as pollutants, requiring a permit from the EPA. The Fourth Circuit noted that to prevail

under either theory, the plaintiffs needed to clear three hurdles: (1) the disturbed sediment must be a "pollutant"; (2) that pollutant must be added to the water; and (3) that addition must come from a point source.

The plaintiffs' first theory failed to clear the first hurdle because, while the Clean Water Act included "dredged spoil" in the "pollutant" definition, *see* 33 U.S.C. § 1362(6), stirred up sediment could not qualify as "dredged spoil." While the Clean Water Act did not define "dredged spoil," the Fourth Circuit found the plain language of that term made it clear that spoil had to first be dredged, and, according to the definitions of "dredge" and "dredged material" under the dictionary and the Code of Federal Regulations, "dredged spoil" is not the temporary, incidental sediment disturbance caused by a trawl net.

The plaintiffs' second theory failed to clear the second hurdle because no "pollutant" had been added. While rock and sand may be stirred up by trawl nets, and while the Clean Water Act does identify both "rock" and "sand" as pollutants, *see* 33 U.S.C. § 1362(6), the trawl nets and the shrimpers controlling them do not add rock or sand into the water. The Fourth Circuit, citing Supreme Court authority, found that discharging a pollutant requires its "addition" to navigable waters. 33 U.S.C. § 1362(12). If a pollutant is already present in the body of water, moving that pollutant around inside that same body of water does not amount to discharge because ultimately nothing is added to the water. *L.A. Cty. Flood Control Dist. v. NRDC, Inc*., 133 S. Ct. 710, 712 (2013).

***United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv*.*, No. 3:21-cv-00255-JMK, 2023 U.S. Dist. LEXIS 174645 (D. Alaska Sep. 28, 2023)**

FACTS: This case is the latest in a long-running dispute between commercial fishermen and the NMFS stemming from the Ninth Circuit's 2016 decision in *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1057 (9th Cir. 2016).

The genesis of the dispute began in 1979 when the NMFS promulgated the Fishery Management Plan (FMP for short) for High Seas Salmon pursuant to the Magnuson-Stevens Act. The FMP divided Alaskan waters into eastern and western areas and prohibited commercial salmon fishing in the west, which included Cook Inlet, with the exception of three net fishing areas and a sport fishery. Over the next several decades, changes to the FMP and legislative action resulted in an incomplete FMP that did not address how fisheries in the federal waters of Cook Inlet would be managed, as a result, Alaska managed salmon fishing in the western area. In 2012, the NMFS sought to address the FMP and promulgated a final rule that amended the FMP to remove the three net fishing areas and sport fishery from the west, eliminating federal management of salmon fishing in Cook Inlet, leaving it to Alaska to manage. The plaintiffs challenged that amendment as contrary to the Magnuson-Stevens Act.

The issue at the heart of the matter was whether the NMFS could exempt a commercial fishery that requires conservation and management from an FMP promulgated under the Magnuson-Stevens Act because the NMFS is satisfied with state (as opposed to federal) management. The District of Alaska held that the NMFS could and granted summary judgment to the NMFS, the

Ninth Circuit disagreed and reversed, directing that judgment should be entered in favor of the plaintiffs.

The Ninth Circuit concluded that the NMFS must expressly delegate authority to a state in an FMP, and the NMFS could not simply delegate management of a commercial fishery by removing an area from an FMP.

Following the Ninth Circuit's remand, in July 2017, the District Court granted judgment to the plaintiffs and remanded the FMP back to the NMFS so that they could begin drafting a new FMP. Nothing appeared to have happened. In September 2019, the plaintiffs moved to enforce their judgment, the District Court then specially set a deadline for completion of the remand to the NMFS. About two years later, in November 2021, the NMFS promulgated a new FMP. The plaintiffs filed a new case that same month to challenge the new FMP. In June 2022, the District Court granted summary judgment to the plaintiffs, vacated the new FMP, and remanded to the NMFS, again.

This time, in conjunction with its remand, the District Court requested briefing on appropriateness of other relief, including imposing a deadline for completion of the remand to the NMFS, requiring periodic status reports and conferences, and to ensure compliance with its remand order. In September 2023, the plaintiffs sought their attorneys' fees and costs against the United States, amounting to $790,000, under the Equal Access to Justice Act.

ISSUE: Whether the plaintiffs, who were ultimately the prevailing party (twice), were eligible to recover under the Equal Access to Justice Act, which requires a court to award fees and costs to a prevailing party in a civil action brought against the United States.

HOLDING: The District Court found that the plaintiffs were entitled to approximately $340,000 in their attorneys' fees and costs. The United States did not dispute that some fee award was appropriate, they did not object to the plaintiffs' eligibility under the Equal Access to Justice Act, whether the position of the NMFS was substantially justified, or whether enhanced attorneys' fees were appropriate, instead, the United States argued that the requested award was excessive. To some degree, the District Court agreed.

REASONING: Ultimately, the District Court found that the plaintiffs were not entitled to their fees for certain pre-litigation work stemming from the prior iteration of the dispute that was before the District Court and the Ninth Circuit. The District Court in this case found it could not award the plaintiffs their fees and costs for work on motions filed in the separate action or appeal because it did not have jurisdiction over those prior cases.

District Court also found that the plaintiffs were not entitled to their fees for their participation in the administrative remands to the NMFS. The District Court noted that generally the Equal Access to Justice Act prohibits fees for administrative proceedings, but there is an exception allowing the recovery of such fees as long as the administrative proceedings were intimately tied to the resolution of the judicial action. In practice, under this exception, a court can award fees only when a suit has been brought, where a formal complaint within the court's jurisdiction remains pending, and when resolution at the court depends upon the outcome of the administrative proceedings. Thus, in those cases where a court retains jurisdiction over the civil action and

contemplates entering a final judgment following the completion of the administrative proceedings, a plaintiff may collect for work done at the administrative level. As applied here, the District Court found that the complaint that initially gave rise to the administrative remand was no longer pending and did not depend on the outcome of the administrative proceedings for resolution since the District Court judge in the prior case remanded to the NMFS the first time *after* issuing final judgment to the plaintiffs.

Recent cases discussed at the last MLA Fisheries Committee meeting in May 2023 in addition to the amendment of the Jones Act concerning "aquaculture workers" *see* 46 U.S.C. § 30104(b).

1. ***Loper Bright Enters. v. Raimondo,* 45 F.4th 359 (D.C. Cir. 2022) cert. granted *Loper Bright Enters. v. Raimondo,* 143 S. Ct. 2429 (2023); *see also Relentless, Inc. v. United States DOC,* 62 F.4th 621 (1st Cir. 2023)**

ISSUE: Whether a NMFS rule that required the New England commercial fishing industry to fund at-sea fishery observer monitoring programs was reasonable under the Magnuson-Stevens Act and the analytical framework provided in *Chevron*.

HOLDING: The D.C. Circuit Court affirmed the District Court for the District of Columbia, finding that, although the Magnuson-Stevens Act might not unambiguously resolve whether the NMFS could require such industry-funded monitoring, the NMFS' interpretation of its authority under the Magnuson-Stevens Act as allowing it to do so was reasonable under the applicable *Chevron* framework, and that rule's promulgation followed the proper procedures under the APA.

NOTE: This case is currently pending in the Supreme Court.

2. ***Relentless, Inc. v. United States DOC,* 62 F.4th 621 (1st Cir. 2023) cert. granted *Relentless, Inc. v. DOC,* No. 22-1219, 2023 U.S. LEXIS 4146 (Oct. 13, 2023)**

ISSUE: Whether the NMFS rule implementing industry-funded at-sea fishery observer monitoring of the herring fishery was unlawful and/or arbitrary and capricious under the APA. Specifically, whether the NMFS could require fishing vessels to procure, carry, and pay for fishing observers/monitors.

HOLDING: The First Circuit affirmed the District of Rhode Island, finding the NMFS rule was lawful because, under *Chevron*, NMFS' interpretation of its authority under the Magnuson-Stevens Act as allowing it to do so was reasonable under the applicable *Chevron* framework, that rule's promulgation followed proper procedures under the APA, and that rule did not violate the Constitution.

NOTE: This case is currently pending in the Supreme Court.

3. *Metlakatla Indian Cmty. v. Dunleavy,* 48 F.4th 963 (9th Cir. 2022)

ISSUE: Whether the Metlakatla Indian Community was subject to an Alaskan statute, which provided a limited entry program for commercial fishing in Alaskan state waters, or the "1891 [federal] Act," which granted Community members rights to fish in the off-reservation waters.

HOLDING: The Ninth Circuit Court of Appeals reversed the District of Alaska and found that: (i) there was an implied fishing right for the Metlakatlan Community stemming from the 1891 Act; (ii) the 1891 Act preserved for the Community and its members an implied right to non-exclusive off-reservation fishing for personal consumption and ceremonial purposes as well as commercial purposes; (iii) neither the fact that the Metlakatlans were "immigrants," nor the fact that they had formed what Senators believed was a model Christian community was relevant to the question whether Congress expected the Metlakatlans to support themselves through off-reservation fishing; and (iv) Congress' intent in the 1891 Act was that the Metlakatlans would have off-reservation fishing rights that would satisfy the future as well as the present needs of their Community.

4. *Mexican Gulf Fishing Co. v. United States DOC,* 60 F.4th 956 (5th Cir. 2023)

ISSUE: Whether a NMFS rule that required charter fishing boat owners to, at their expense, install a vessel monitoring system that continuously transmitted the boat's GPS location to the NMFS, regardless of whether the boat was being used for charter fishing or personal purposes, was unlawful and/or arbitrary and capricious under the APA.

HOLDING: The Fifth Circuit reversed the Eastern District of Louisiana and held that the NMFS rule was unlawful because the Magnuson-Stevens Act did not authorize the NMFS to issue the GPS-tracking requirement. The Fifth Circuit also found that the regulation violated the APA because it was arbitrary and capricious.

5. *Fishermen's Finest, Inc. v. United States,* 59 F.4th 1269 (Fed. Cir. 2023)

ISSUE: Whether a commercial fishing business had a cognizable Fifth Amendment property interest in certain fishing endorsements, licenses, and permits, separate from or appurtenant to its fishing vessels.

HOLDING: The Federal Circuit affirmed the Court of Federal Claims, finding that: (i) precedent establishes that fishing permits and licenses issued pursuant to the Magnuson-Stevens Act are revocable privileges, rather than compensable property interests; (ii) subsequent amendments to the Act in 2007 and the NMFS' regulations did not then create compensable property rights in fishing permits or licenses; and (iii) there is no inherent right in vessel ownership to fish within the EEZ.