

Summary of Cases for the Fisheries Committee Meeting on April 30, 2015¹

1. *Yates v. United States*, 135 S. Ct. 1074 (2015).

Parties and Issue:

Petitioner John Yates (“Yates”) was a captain onboard a commercial fishing vessel fishing for red grouper in the Gulf of Mexico. During an offshore inspection of Yates’ vessel, a federal agent found that the vessel’s catch contained undersized red grouper, in violation of federal conservation regulations. The officer instructed Yates, to keep the undersized fish segregated from the rest of the catch until the ship returned to port. After the officer departed, Yates instead told a crew member to throw the undersized fish overboard. For this offense, Yates was charged with destroying, concealing, and covering up undersized fish to impede a federal investigation in violation of 18 U.S.C. § 1519, a provision of the Sarbanes–Oxley Act (“SOX”) of 2002.

At trial, Yates moved for a judgment of acquittal on the §1519 charge. Yates argued that SOX was designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation, and therefore §1519’s reference to “tangible object” includes objects used to store information, such as computer hard drives, not fish. The District Court denied Yates’s motion, and a jury found him guilty of violating §1519. The Eleventh Circuit affirmed the conviction, concluding that §1519 applies to the destruction or concealment of fish because, as objects having physical form, fish fall within the dictionary definition of “tangible object.” Certiorari was granted.

Holding:

The Supreme Court reversed the Eleventh Circuit’s ruling and found that the disposal of undersized fish did not involve a tangible object for the purpose of SOX. The Court noted that SOX was prompted by the exposure of Enron’s massive accounting fraud and revelations that the company’s outside auditor had destroyed potentially incriminating documents. §1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. The Court agreed with Yates, and in reliance on the statute construction of SOX, held that the definition of “tangible object,” within meaning of SOX, includes objects that one can use to record or preserve information, not all objects in the physical world, such as a fish.

2. *Bland v. Omega Protein, Inc.*, No. CIV.A. 14-0127, 2014 WL 7179379 (W.D. La. Dec. 15, 2014).

Parties and Issue:

Plaintiff Author Bland was employed by Omega Protein (Omega) as a member of the crew of the F/V RACCOON POINT. Bland was allegedly injured onboard the vessel on May 3, 2013. Bland and his wife, individually and on behalf of their minor child, (hereinafter referred to as Plaintiffs) filed a lawsuit against Omega for Jones Act negligence, unseaworthiness and failure to pay

¹ Submitted by Vice-Chair Terence Kenneally and based upon the legal research and writing assistance of Kirby Aarsheim, Esq. of Clinton & Muzyka, P.C., Boston, MA.

maintenance and cure. Plaintiffs sought punitive damages as well as damages for loss of society, consortium, and services.

Holding:

The District Court relied on *McBride v. Estis Well Service, Inc.*, 768 F.3d 382, 384 (5th Cir.2014) and dismissed the Plaintiffs' claims for punitive damages on the basis that neither an injured seaman nor the personal representative of a deceased seaman can recover punitive damages under either Jones Act or general maritime law for unseaworthiness. The Court reiterated the *McBride* court's rationale that seaman's recovery is limited to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness. However, the Court permitted the Plaintiffs' claims for punitive damages with respect to the claims for Omega's failure to pay maintenance and cure.

The Court granted Omega's motion to dismiss with respect to Bland's wife and minor child's independent claims for loss of society, holding that they were not entitled to an independent claim of loss of society under the general maritime law or Jones Act.

3. *Frontier Fishing Corp. v. Pritzker*, 770 F.3d 58 (1st Cir. 2014).

UPDATE: Fall 2013 Case Summary Report, District Court opinion, *Frontier Fishing Corp. v. Locke*, CIV.A. 10-10162-DPW, 2013 WL 2090551 (D. Mass. May 13, 2013).

Parties and Issue:

Plaintiff, Frontier Fishing Corp. ("Frontier") brought suit against the Secretary of the Department of Commerce and the Under Secretary for the Oceans and Atmosphere (collectively, the "Defendants"), challenging the imposition of penalties by the National Oceanic and Atmospheric Administration ("NOAA") for allegedly fishing in a restricted gear area in violation of the Magnuson–Stevens Fishery Conservation Management Act ("MSA"). The district court affirmed NOAA's finding of a violation and Frontier appealed.

Holding:

The First Circuit affirmed the District Court's ruling and held that the ALJ did not abuse his discretion by denying Frontier's request to supplement the record. The Court held that additional discovery was not warranted because Frontier was given ample opportunity to conduct reasonable discovery through the various administrative proceedings, was able to move for summary judgment without information it sought in the appeal, and received all of the information NOAA used in making its determination. Finally, the Court affirmed the district court's finding that there was substantial evidence presented to support NOAA's determination that Frontier's vessel was trawling in a restricted gear area.

4. *Glacier Fish Co. LLC v. Pritzker*, No. C14-40 MJP, 2015 WL 71084 (W.D. Wash. Jan. 6, 2015).

Parties and Issue:

The total amount of Pacific whiting available to be caught by non-tribal commercial harvesters has been divided among three sectors: the catcher-processor sector (“CP Sector”) which consists of vessels that harvest and process Pacific whiting at sea, the mothership sector, and the shoreside sector. Glacier Fish Company (“Plaintiff”) and two other Seattle-based companies formed the Pacific Whiting Conservation Cooperative (“PWCC”). The PWCC intended to avoid an unrestrained “race for fish” among sector participants by having each member limit its Pacific whiting harvest to a certain percentage of the CP Sector’s total allocation.

In January 2011, National Marine Fisheries Services (“NMFS”) implemented Amendment 20, which created an individual fishing quota (“IFQ”) program for the trawl fleet and cooperative programs for the CP Sector and mothership sector. Amendment 20 implemented several changes for PWCC including, but not limited to: the requirement to apply annually for a CP Coop permit, individual CP-endorsed limited-entry trawl permit owners would be issued IFQs in the event the coop dissolved; and the CP Coop Program was allocated key bycatch species along with Pacific whiting. In December 2013, NMFS published its final rules implementing a cost recovery program for the Trawl Rationalization Program.

On January 9, 2014, Plaintiff filed suit against the Secretary of the United States Department of Commerce Penny Pritzker, National Oceanic and Atmospheric Administration (“NOAA”), and NMFS (collectively referred to as “Defendants”) alleging that the cost recovery regulations violate the Magnuson-Stevens Act (“MSA”). Plaintiff alleged that the regulations violated MSA because: 1) the CP Coop Permit is not a LAPP; (2) Plaintiff is not the holder of the LAPP and should not be charged the fee; (3) NMFS, and not Pacific Council, developed the methodology to calculate the cost recovery fee; and (4) the cost recovery fee should be set aside because NMFS included unrecoverable costs within its fee calculation. Defendants moved for Summary Judgment.

Holding:

The Court found that the CP Coop Permit is a LAPP as determined by NMFS and that the CP Coop Permit should formally register the CP Coop and its associated members to harvest and process through a formal rulemaking procedure. The CP Coop Permit identified Plaintiff as a holder. The Court gave deference to NMFS’s position that it complied with MSA by adopting the Pacific Council’s definition of direct program costs or incremental costs. The Court concluded that NMFS’s actions in calculating the general cost figure, including the incremental costs, met the standard in considering the relevant factors and articulating a rational connection between the facts found and the choice made.

5. *Oceana, Inc. v. Pritzker*, No. CV 08-1881 (PLF), 2014 WL 7174875 (D.D.C. Dec. 17, 2014).

Parties and Issue:

Plaintiff Oceana, Inc. (“Oceana”) brought suit alleging that the National Marine Fisheries Service’s (“NMFS”) determination in its Biological Opinion that the Atlantic Sea Scallop Fishery would not jeopardize the existence of the Northwest Atlantic population of loggerhead sea turtles. That particular population segments is listed as threatened under the Endangered Species Act (“ESA”). Oceana argued that NMFS reached its no-jeopardy determination by employing an interpretation of a key regulation that contravenes both the regulatory text as well as the language and spirit of the underlying ESA.

This matter was before the District Court for the District of Columbia on cross-motions for summary judgment filed by Oceana and NMFS, as well as by Defendant-intervenor Fisheries Survival Fund.

Holding:

NMFS first asserted that Oceana lacked standing to challenge the 2012 Biological Opinion because the “action area” does not extend to the specific North Carolinian island on which the Oceana declarants observe sea turtles. Oceana offered declarations of two members who stated that they enjoy the study and observation of loggerheads and would be injured by harm to the species. To process standing, a plaintiff must have suffered an “injury in fact.” The Court found that Oceana’s declarants were sufficient to ground Oceana’s standing and that Oceana was able to show, as required for standing, that the interest it seeks to protect by the lawsuit are germane to its organizational purpose.

Oceana’s principal argument was that NMFS, in determining whether the Scallop Fishery would “jeopardize the continued existence of” loggerheads within the Northwest Atlantic, applied an unlawful construction of the regulation that defines this pivotal statutory phrase. The regulation at issue provides that the statutory phrase “jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02. In the 2008 Biological Opinion, NMFS defined the term “reduce appreciably” to mean that there be a “considerable or material reduction in the likelihood of survival and records” of the species. Oceana argued that NMFS unlawfully imported a heightened requirement that any reduction in the likelihood of loggerheads survival and recovery be “considerable” or “material” rather than simply being perceptible. The Court afforded deference to NMFS’s interpretation of its own regulation and found that NMFS’s interpretation of the phrase “reduce appreciably” does not contravene with the text of 50 C.F.R. § 402.02.

Oceana next argued that NMFS impermissibly construed the ESA because NMFS’ interpretation of “reduce appreciably”—which reaches only “considerable” or “material” reductions—is out of step with the plain language of ESA. ESA requires that federal agencies insure that any action

authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of a listed species. Oceana maintains that for an agency action to “jeopardize the continued existence of” a listed species, that action must only cause some deterioration in the species pre-action condition. The Court reasoned that just because Oceana’s approach may be more protective than the agency’s does not mean that NMFS’ interpretation of 50 C.F.R. § 402.02 is in conflict with the ESA. NMFS may reasonably conclude that a given agency action would not be likely to jeopardize the continued existence of the species even if said action may reduce the likelihood of a species’ survival and recovery to some degree. The Court found that NMFS’ reading of “jeopardize the continued existence of” is inconsistent with the ESA. The statute does not define how the concept is to be measured, and the agency therefore has discretion to make this determination on the basis of its own expertise.

Finally, Oceana challenges the Incidental Take Statement (ITS) issued as a part of the 2012 Biological Opinion. NMFS concluded that the agency action will not jeopardize a species’ continued existence, yet will cause some takes incidental to that action. Oceana challenged the adequacy of the ITS with respect to both dredge and trawl fishing, and specifically maintained that due to inadequate monitoring of fishing activities in the Scallop Fishery, the take limits established in the ITS did not serve as meaningful triggers for the reinitiation of consultation. To determine whether the incidental take limit of 161 turtles annually has been exceeded, NMFS intended to employ methods aimed at addressing the inadequacy of “observer coverage” as a means of monitoring loggerhead takes.

The two major modifications to dredge gear were (1) Turtle Deflector Dredges (“TDDs”) and (2) chain mats. A TDD deflects sea turtles over the dredge rather than underneath it. Keeping sea turtles from going underneath the dredge and keeping them out of the dredge bag is expected to reduce the severity of some interactions that occur. Chain mats provide a similar benefit by acting as a barrier to prevent the capture of sea turtles in the ring of the bag. These modifications make the observation of loggerhead takes more difficult. As a consequence, NMFS planned to rely primarily on a monitoring “surrogate” to measure when the numerical take limit of 161 turtles has been reached. The surrogate chosen by NMFS was the “dredge hour”, which is the number of hours spent dredge fishing. NMFS will consider the ITS “exceeded,” thus re-triggering consultation, if the two-year running average of dredge hours in Mid-Atlantic waters during the period of May through November of any scallop fishing year is greater than the average of the total number of dredge hours from Mid-Atlantic waters during the same period of 2007 and 2008.

Oceana challenged two aspects of the ITS with respect to dredge fishing, arguing that (1) NMFS’ use of a surrogate for monitoring incidental takes is arbitrary and capricious because there are viable options for direct monitoring of these takes; and that (2) even if employing a surrogate is not unlawful, NMFS’ choice of the dredge hour surrogate in particular is arbitrary and capricious, because the method fails to serve as a meaningful trigger for reconsultation. The Court found that NMFS’ decision to use a surrogate rather than to directly monitor loggerhead takes was not arbitrary and capricious. NMFS determined that while the gear modifications obscure observers’ ability to count actual takes, making coverage less effective, video monitoring as another method was infeasible.

The Court next turned to Oceana's challenge to the particular monitoring surrogate chosen by NMFS, i.e. the number of hours spent dredge fishing in Mid-Atlantic waters from May through November. Oceana argued that the dredge hour surrogate failed to function in a manner that will give effect to the ITS' dredge take limit of 161 loggerheads. NMFS theory behind the dredge hour monitoring surrogate was the more hours spent dredge fishing, the more turtles will interact with the dredge gear. NMFS contended that by counting dredge hours and comparing them, on an annual basis, against the average number of dredge hours fished in 2007 and 2008, the agency implemented a monitoring system capable of functioning as a trigger to determine when the dredge take limit of 161 turtles has been exceeded. If the allowable level of incidental take is exceeded, NMFS is required to reinitiate ESA consultation immediately.

The Court concluded that NMFS' proposed ITS failed to explain how 252,323 hours equaled 161 takes and remanded the ITS to NMSF so that it could either more clearly explain the connection or chose a number of hours that aligns with the numerical take limit. The Court also ordered NMFS to either revise its ITS to provide a more thorough explanation of its choice to re-estimate trawl takes on a five [5] year schedule rather than more frequently, or to reach a different conclusion. The Court rejected Oceana's argument that the Biological Opinion should be vacated and held that NMFS must continue to use its existing monitoring tools while it revises the ITS.

6. *United States v. Reeves*, No. CRIM. 11-520 JBS, 2015 WL 461860 (D.N.J. Feb. 4, 2015).
UPDATE: Fall 2012 Case Summary Report, District Court opinion, *U.S. v. Reeves*, 2012 WL 2576394 (D. N.J. July 3, 2012).

Parties and Issue:

Defendants included six [6] individuals and two [2] corporations involved in the oyster harvesting and distribution industry along the Delaware Bay in New Jersey and Delaware were indicted in a fifteen-count Indictment. Individual Defendants Thomas Reeves, Todd Reeves, and Todd's wife Renee Reeves were affiliated with Defendant Shellrock, LLC, d/b/a Reeves Brothers, in Port Norris, New Jersey. Thomas and Todd Reeves are brothers who owned and operated Reeves Brothers, an oyster dealer authorized to buy and sell oysters under New Jersey law. Renee Reeves worked in the Reeves Brothers office and performed functions such as preparing invoices for oyster purchases and sales. Thomas and Todd Reeves also harvested oysters from the Delaware Bay under annual licenses with a Seaford, Delaware company, Defendant Harbor House, of which Defendant Mark Bryan was an owner and operator. Defendant Pamela Meloney was an office employee of Harbor House.

Various Defendants were charged with aiding and abetting committing the crime of false records under the Lacey Act, 16 U.S.C. §§3372-3373, by making or causing another to make records and logs that falsely included the amount of oysters that had been harvested, landed, sold or purchased by the defendants. Defendants were also charged with trafficking, or aiding and abetting trafficking, in oysters processed or transported in violation of New Jersey law. Various Defendants were also charged with falsifying records with the Food and Drug Administration ("FDA").

The jury found most Defendants guilty of Lacey Act violations, trafficking, and falsifying records. Ms. Meloney was acquitted of all counts against her. Defendants filed post-trial motions for judgment notwithstanding the verdict or for a new trial.

Holding:

The Court denied all of Defendants' post-trial motions, with the exception of granting the motion of Kenneth W. Bailey for judgment of acquittal on a count of falsifying records submitted to the FDA based on insufficient evidence to sustain a conviction for obstruction of justice. The Court denied all other post-trial motions finding that the Defendants were not prejudiced by the variance between the indictments and evidence allowed at trial. The evidence was sufficient to sustain convictions for conspiracy to falsify federal oyster transaction records. The Defendant Renee Reeves' conviction for conspiracy and her acquittal on two [2] substantive counts under the Lacey Act were found not inconsistent.

7. *United States v. Bengis*, No. 13-2543-CR, 2015 WL 1726801 (2d Cir. Apr. 16, 2015).

Parties and Issue:

From 1987 to 2001, the Defendants, through their company Hout Bay Fishing Industries Ltd., harvested rock lobsters from South African in amounts that exceeded the authorized quotas for export to the United States in violation of both South African and U.S. law. The Defendants were individually indicted in the United States District Court for the Southern District of New York.

Defendants, Arnold Bengis and Jeffrey Noll pled guilty of conspiring to violate Lacey Act, which prohibits trade in illegally taken fish and wildlife, and to commit smuggling, related to elaborate scheme to illegally harvest lobsters in South African waters for export to United States. David Bengis pled guilty to conspiracy to violate the Lacey Act.

The Defendants were sentenced to terms of imprisonment and to a forfeiture order. The United States thereafter sought restitution on behalf of South Africa. The District Court eventually issued a restitution order of \$22,446,720.00 The Defendants appealed the restitution order and demand to deposit funds up to the restitution amount with the Clerk of Court.

Holding:

The Second Circuit upheld the lower court's amount of restitution and concluded that judicial fact finding to determine the appropriate amount of restitution under a statute that does not prescribe a maximum does not implicate a defendant's Sixth Amendment rights.

The Court next considered Defendant David Bengis' separate argument that he should be excluded from paying restitution beyond his involvement in the conspiracy which was only from 1999 through August 1, 2001. The Court remanded David Bengis' case for the lower court to determine whether David Bengis, when he joined the conspiracy in 1999, understood the scope of conspiracy, such that he knew or should have known the extent of its adverse economic impact.