

2001

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Recommended Citation

Marian McCall, *The View From Ground Zero: Government As Defendant, Courts As Fishery Managers*, 7 Ocean & Coastal L.J. (2001). Available at: <http://digitalcommons.minelaw.maine.edu/oclj/vol7/iss1/7>

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*The View from Ground Zero:
Government as Defendant, Courts as Fishery Managers*

Mariam McCall⁴²

This has been great. I have so many thoughts in my head after listening to the previous speaker, I kind of wish I had spoken first, because I could have been a bit more focused. I feel like I should be in court right now, and I should stand up and rebut some of the statements, but I will refrain and maybe we can have a lively discussion at a later time. I do hope that we will discuss some of the alternatives to litigation. However, I do agree with a lot of people that litigation has certain benefits. For instance, it has made lawyers a little bit more visible in the agency, which is always good. These cases, the adverse decisions and the positive ones as well, have also reminded all of us in the agency and on the fishery councils of the extreme importance of these laws and the need to follow these laws. I think it is going to remind all of us, if it has not already, as we proceed with training, that these laws are good laws and that if they are followed, adhered to, and well understood by everyone from the decisionmaker on down, they will result in better decisions that are better understood by everyone. As more data is collected, this will help as well. Finally, I would like to note that I have been working with a colleague in my office, Marian Macpherson, on analyzing NMFS's litigation, so I would like to acknowledge Marian.

I should have started with the disclaimer. I do need to give the disclaimer that although I am a NOAA lawyer, anything that I say today should not be used in court against me or my agency. I am speaking here strictly on my own. These are my own personal viewpoints. I do not say this lightly, because in the last few years I have seen some of my most benign statements in various e-mails turn up in court against me. I will just point out one silly example. I put in an e-mail: "Man, I'm so excited those guys are going to meet with us I offered to bring cookies." This became the great "cookie" part of a particular brief, which was brought up to show how really truly unserious the agency was about this meeting that the agency was going to have. I thought it just showed that I was kind of nice! Please remember my disclaimer.

As for the number of lawsuits we have filed against us, we were saying one hundred and eight for a while, however, I just counted our litigation docket, and now it is approximately one hundred and fifteen. Some of

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those are old, stale cases that are just languishing somewhere. It is hard to keep a real up-to-date count, because the agency does not take them off the docket until the time for appeal is over. Suffice it to say, we have plenty of lawsuits.

What I want to do is talk a little bit about the consequences of litigation. I am not going to go into real detailed explanations of cases, although I would find that fascinating. For those non-lawyers, I do not want to bore you, but I do want to talk about some of the consequences of litigation, namely the immediate ones to the agency and the public when a case is filed. Then I would like to discuss some of the consequences and difficulties that result when we get a decision or when a court retains jurisdiction over a fishery that the agency is trying to manage on a day-to-day, ongoing basis.

At the very end, I want to bring up a few of the things that we as the legal representatives of the agency are doing in response to this litigation, and certainly in response to what might be termed or has been termed as our "spectacular losses." We are trying to be active in looking both ahead and behind, in analyzing where some of our problems are or have been, while at the same time looking to come up with some new ways to improve the way we do business in the hopes that some of that will help not only with the lawsuits, but will also result in what I think we would all agree is our goal of better decision-making and better fisheries management.

So, a lawsuit gets filed, then what happens? Well, in NOAA General Counsel, where I work, there are about forty lawyers around the country, while there are maybe fifteen or sixteen in Silver Spring, Maryland. We are NOAA General Counsel; we are not a litigation boutique. Litigation is not what we do generally. Generally, we advise our clients on everything they do, namely the legal issues. We work on litigation, we review Fisheries Management Plans (FMP), EISs, draft EISs, agency letters, we work with Capitol Hill, and we work on Freedom of Information Act (FOIA) requests. We work on almost everything.

When a lawsuit gets filed that goes to the front of the workpile. It becomes the overlay for everything we do. We are not simply lawyers, we are also officers of the court, and as a result, we have to follow the rules very carefully. We have to meet our deadlines. Some of these deadlines are outlined in statutes or in the federal rules. We have to help our clients do this as well, because we do not work on these cases alone. I have heard it discounted a bit that court deadlines should not be an issue, but they really are an issue when you are faced with them inside the government.

For example, and I think many of you have probably seen cited in a couple of different articles, the Atlantic Highly Migratory Species FMP

that was approved in 1999.⁴³ The rule went into place in the end of May, and within the thirty-day window that the statute provides for challenges to those regulations,⁴⁴ we had six lawsuits filed. One of those suits was stayed, but by statute we had forty-five days in which to respond to the remaining suits. We had that deadline that we had to meet.⁴⁵ We had no choice. We had to put together five different records ranging in size from thirty-two, three-inch binders to about fifty, three-inch binders. We had to make multiple copies. We had to produce about one thousand binders, in addition to, drafting the answers and the statements of material facts that we had to produce for all those cases. It is pretty much true that during that time we did nothing else. It is also true that the National Marine Fisheries Service people, who were working on the Atlantic Highly Migratory Species FMP, were basically working for me, because it was their responsibility to put the record together.

The other thing that happens in terms of the workload issue, and the fact that we are often prevented from working on the ongoing management issues, is that ironically sometimes we are prevented from working on things that the very plaintiffs want us to work on. We had litigation from the shark industry that is actually still ongoing.⁴⁶ At the same time while we had remands and were working on all sorts of other issues, the same plaintiffs were suing us seeking implementation of a limited entry program. We had started developing the limited entry program before the lawsuit, but because of workload it just did not progress for a number of years. The plaintiffs recognized this and were not happy with it, but it was just a fact.

The other consequence of a lawsuit that is very immediate is that it takes issues and sometimes all of the issues in the fishery, if they are included in that lawsuit, out of the realm of public comment. It gets into the legal realm, where as you know and have probably seen over and over again, we have a policy that we do not comment on issues pending in litigation. A closed group develops, which includes the lawyers, the Department of Justice, our clients, and the U.S. Fisheries Service. We all essentially become the clients of the Department of Justice. If we enter into settlement discussions with the plaintiffs those talks are confidential. The only way that a party can get involved is to move to intervene. Sometimes judges grant that motion, while other times a judge will not. In the CLF

43. Atlantic Highly Migratory Species (HMS) Fisheries; Fishery Management Plan (FMP), Plan Amendment, and Consolidation of Regulations, 64 Fed. Reg. 29,090 (May 28, 1999) (to be codified at 50 C.F.R. pt. 635).

44. 16 U.S.C. § 1855(f)(1) (1994 & Supp. 1999).

45. 16 U.S.C. § 1855(f)(3).

46. See *supra* note 20.

case, parties moved to intervene and were denied at the district court level, though, ultimately on appeal these parties were allowed to participate, but that was after a lot of the action had already occurred.⁴⁷

Generally, we do not discuss what is going on in terms of litigation with the fishery councils. It was mentioned earlier that sometimes the real parties are the councils and they are not the ones who are able to be sued. That is because we have a legal opinion, which I believe comes from the Department of Justice, that the fishery councils do not have independent legal authority.⁴⁸ In fisheries management from the litigation perspective, the councils are part of the arm of the federal government. We do not generally discuss settlement discussions with them. We have a provision in the statute that a fishery council can close a meeting to the public to discuss issues under litigation.⁴⁹ I do not know if that has ever occurred, and I think there would always be the concern about confidentiality. We have promised in our office to look into this and to reconsider that posture, likely on a case-by-case basis, because the councils are not happy when we discuss with plaintiffs those actions that will have a direct and real effect on the council. Taking things out of the hand of the public can result in suspicion and hostility. There is certainly a tension that goes on between the government, the councils, and the public.

Now when a court rules sometimes the agency wins, sometimes it loses, and sometimes it loses in such a way that an order can be very difficult to read and to understand. One of the things in litigation that we have to deal with is when we get a court's order, we have to follow that order. If we do not follow the order we can be held in contempt of court, which is very serious. This has only happened once in the last hundred years where the Secretaries of Treasury and Interior were held in contempt of court on some issues relating to use of tribal funds held in trust for the tribes. It was very, very serious, and it is something that we must avoid at all costs. You do what a judge tells you.

Sometimes, however, a court's order can be very difficult to understand. For instance, we just got an order from a judge last week that we initially understood, but then he went and made a broader statement. The judge vacated the three hundred-pound trip limit for non-trawl gear in the monkfish fishery.⁵⁰ That is clear enough. The judge vacated the limit. We,

47. CLF v. Mosbacher, 966 F. 2d 39 (1st Cir. 1992).

48. Litigation Authority of Regional Fishery Management Councils, (NOAA, Office of General Counsel) No. 91 (1980) (formally adopting Dept. of Justice opinion written by Larry J. Simms on Sept. 17, 1980).

49. 16 U.S.C. § 1852(i)(3)(a)(ii).

50. Hall v. Evans, 165 F. Supp. 2d 114, 2001 WL 1042461 (D.R.I. 2001).

in turn, were not going to enforce it. Then the judge stated that we should impose a fifteen hundred-pound trip limit for all monkfish fishermen. If you know enough about the monkfish fishery, you know there are other trip limits that he did not mention that were not at issue. In addition, there is a whole different variety of people that might be termed “monkfish fishermen,” plus he called them “monk fishermen,” which also was strange.

Sometimes the agency will initially win and then will lose on appeal. Recently this happened when we won at the district court level in the National Resources Defense Council (NRDC) challenge to the summer flounder quota.⁵¹ We had implemented something that gave us an eighteen percent probability of achieving the goal, and we believed that this was good. The district court agreed. We thought we had to balance the economic impacts on communities with our conservation goals. The Court of Appeals disagreed and overruled us.⁵² We had to concede on appeal that it was not a balancing act between National Standards 1 and 8. The Court of Appeals ruled that National Standard 1, which requires the prevention of overfishing while achieving optimum yield, was the pre-eminent standard, and that if you had two alternatives that achieved the conservation goals, then you could chose the alternative that minimizes the economic impact on communities, but not until you actually achieved National Standard 1.

I will read you, because it is funny, what the court said about the agency. It made us sit up a little bit straighter, and I think it made everyone look at what we do in a different light. The Court of Appeals said: “Only in Superman Comic’s Bizzarro world, where reality is turned upside down, could the service reasonably conclude that a measure that is at least four times as likely to fail as succeed offer a fairly high level of confidence.”⁵³ So I would say that that was certainly a wake-up call for a lot of people in the government. We like that. It is always nice to see that a judge has a sense of humor.

We have had several situations where we have had a series of orders from the court, including the Hawaii longline case⁵⁴ and the Steller sea lion case.⁵⁵ These cases have produced a series of orders and decisions by courts. In the Hawaii longline case, we had a series of five orders. First we got the injunction, and then the order. Then the order was amended. The order was amended a second, third, and fourth time. The only parties who

51. NRDC. v. Daley, 62 F. Supp. 2d 102 (D.D.C. 1999).

52. NRDC v. Daley, 209 F.3d 747 (D.C. Cir. 2000).

53. *Id.* at 754.

54. *See supra* note 27.

55. Greenpeace v. NMFS, 106 F.Supp. 2d 1066 (W.D. Wash. 2000).

were involved in that were parties that had filed lawsuits. One group also appeared as an intervener defendant. The court ended up asking for a panel of three scientists to advise him, including a government scientist, a scientist recommended by the industry group, and a scientist recommended by the plaintiff environmental groups. All of these orders were done beyond the public's eye and without public participation. I think the consequences in the Hawaii longline case were that the agency was not sure from day-to-day what was going on. The fishermen certainly were not sure from day-to-day, nor was the council. I think it was an example of the confusion that can develop, and I would hope that this confusion is something that could be avoided and will be avoided in the future.

The Hawaii longline case order was based on a procedural irregularity where the court upheld the biological opinion that analyzed the effect of the longline fishery on turtles, but concluded that the agency needed to prepare and had failed to prepare a programmatic EIS. As a remedy for this procedural error, the judge enjoined a very large area from being fished. The judge's order closed a huge area initially, and I think it went clear up to the North Pole where there are not a whole lot of swordfish, but he subsequently made modifications and then more modifications. That is one example of the potential for confusion within a court's order.

The Stellar sea lion case was similar, though not quite the same series of orders, but orders that were nonetheless confusing for the fishery. The fishery was enjoined, and part of the fishery was enjoined for a long time. Then, Congress stepped in, and we had the Stevens rider to our 2001 appropriations bill.⁵⁶

I want to now discuss a little bit about what we are doing. Well we have also had some of the cases that were cited earlier, which were challenges to our compliance with the Regulatory Flexibility Act⁵⁷ (RFA), which was amended in 1996 to make it judicially reviewable. We became kind of the laboratory in federal courts to develop federal case law. We stumbled a bit, but actually a lot of our regulatory flexibility analyses have been upheld. We have spent a fair amount of money. We are hiring people. We have worked pretty hard on our regulatory flexibility work. We have new guidelines for the agency to follow, and I think we are on the road to recovery.

56. Act of Dec. 21, 2001, Pub. L. No. 106-554, § 209(c), 114 Stat. 2763 (2001) (containing a one-year timetable for implementing the reasonable and prudent alternative for the Nov. 30, 2000 biological opinion.) See Fisheries of the Exclusive Economic Zone off Alaska; Steller Sea Lion Protection Measures for the Groundfish Fisheries off Alaska; Final 2001 Harvest Specifications and Associated Management Measures for the Groundfisheries off Alaska, 66 Fed. Reg. 7276 (Jan. 22, 2001) (to be codified at 50 C.F.R. pt. 679)..

57. 5 U.S.C. §§ 601-12 (West. 1996 & Supp. 2000).

As far as everything else goes, we have looked at those cases where we have had some procedural problems, especially in cases where the fishery runs into a protected species issue. This results in a Magnuson-Stevens Act meets the ESA and NEPA type situation. Congress has also recognized this and in their Senate report language for the 2002 budget we have been told that we have to look at the way we do business. We have to develop standardized practices to improve the quality and efficiency of our regulatory decisions. We also have to come up with a plan to streamline the process in order to reduce layers and to concentrate the responsibility on qualified decisionmakers. We have to present that plan to Congress in December 2001 assuming that this language survives conference report.

We also have seen, as many of you may have, the WorldCatch.com article written by Dan McGovern of the World Catch News Network. The headline is great: "Bill Hogarth Wants to Stop the Madness." That is good. We are going to stop this madness! I think I can make light of it, but the agency has gone about in the last year and a half a very concentrated effort to look at what the problems have been. We recognize that we need to do a better job in developing analytical documents that comply with NEPA, the ESA, and other statutes, so that the decisionmakers at both the council and government level have good things in front of them when they make these decisions.

We have done some work in trying to make things a bit more accessible to the public. We have a pilot project where we are releasing two draft biological opinions to the public, so that the public and the councils have an opportunity to comment on these opinions. We have done it for the two longline biological opinions in the Pacific and Atlantic. We are also going to do it for the North Pacific biological opinion and the groundfish biological opinion fairly soon.

Finally, we have also recognized that we need a lot more training. People from the top down and from the bottom up need to better understand these laws, and to this end we are undertaking an effort to develop that training.

