

# RECENT DEVELOPMENT

## A VIOLATION OF THE MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT BY NATIONAL MARINE FISHERIES SERVICE

In *Natural Resources Defense Council, Inc. v. National Marine Fisheries Service*, the Ninth Circuit held that the National Marine Fisheries Service's, ("the Agency"), 2002 darkblotched rockfish<sup>1</sup> limit was based on an impermissible construction of the Magnuson-Stevens Fishery Conservation and Management Act ("Act").<sup>2</sup> Although this lawsuit was not the first challenge by an environmental organization to a fishery rebuilding plan, this case is significant because of the Ninth Circuit's interpretation of section 1854 of the Act, as amended in 1996 by the Sustainable Fisheries Act.<sup>3</sup>

In 1976, Congress promulgated the Act to "conserve and manage the fishery resources found off the coasts of the United States."<sup>4</sup> The Act vests responsibility for developing and implementing rebuilding plans for overfished fish species with the Secretary of Commerce, who carries out his management and conservation duties through the Agency and eight Regional Fishery Management Councils established by the Act.<sup>5</sup>

In 1996, Congress amended the Act through the Sustainable

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1. A darkblotched rockfish is a species of Pacific groundfish commonly sold as "red snapper." *Natural Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 876 (9th Cir. 2005).

2. *Id.* at 881-82; *see also* Magnuson-Stevens Fishing Conservation & Management Act § 304(e)(4), 16 U.S.C. § 1854(e)(4) (1996).

3. Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (codified as amended in scattered sections of 16 U.S.C. (1996)).

4. 16 U.S.C. § 1801(b)(1) (1996) (originally enacted as the Magnuson Act and later renamed the Magnuson-Stevens Fishery Conservation and Management Act).

5. § 1854(e)(4)(A)(i); *see also* 16 U.S.C. § 1852(a) (1999).

Fisheries Act (“SFA”) and added new requirements to accelerate the rebuilding of overfished species. In particular, the SFA strengthened the Act by establishing more stringent requirements to prevent overfishing, rebuild overfished fisheries, and minimize bycatch.<sup>6</sup> The main focus of Natural Resources Defense Council’s (“NRDC”) appeal was the Agency’s interpretation of section 1854(e) of the Act, as amended by the SFA. Section 1854(e)(4) provides that when a fishery is overfished, any rebuilding plan approved by the Agency must:

(A) specify a time period for ending overfishing and rebuilding the fishery that shall—

(i) be as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise.<sup>7</sup>

Although the Act is mostly straightforward, section 1854(e)(4) does not address the length of a rebuilding period in situations where it is impossible to meet the ten-year statutory period. Seeking, among other things, to clarify the ambiguity in section 1854(e)(4), the Agency adopted the 1998 National Standards Guideline (“NSG”). The NSG provides that whenever it takes longer than ten years to rebuild an overfished species, the Agency will set a ceiling on the rebuilding period, calculated by adding the shortest possible time to rebuild plus “one mean generation time”<sup>8</sup> based on the biological characteristics of the species.<sup>9</sup>

In 2000, the Agency assessed the status of the darkblotched rockfish in the Pacific Groundfish Fishery.<sup>10</sup> The Agency found

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6. 16 U.S.C. § 1853(a)(10)–(11) (2000). Bycatch is defined as “fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.” Sustainable Fisheries Act § 102, 16 U.S.C.A. § 1802(2) (1996).

7. § 1854(e)(4).

8. “Mean generation time” is defined as the length of time it will take for an average mature fish to be replaced by its offspring. See 50 C.F.R. § 600.310(e)(4)(ii)(B)(3).

9. *Id.*

10. Natural Res. Def. Council, 421 F.3d at 874.

that the species was at twenty-two percent of its unfished population and concluded that the species was “overfished” within the meaning of the Act.<sup>11</sup> The Agency predicted that the species could be rebuilt in ten years or less, triggering the mandatory ten-year cap on the rebuilding period.<sup>12</sup> The Agency then set a 130 metric ton “fishing harvest level” quota for darkblotched rockfish in 2001.<sup>13</sup>

In a 2001 assessment, the Agency discovered that it had significantly overestimated the health of the fishery and found that the darkblotched rockfish was only at twelve percent of its unfished population level.<sup>14</sup> The Agency also calculated that the minimum period for rebuilding was now fourteen years.<sup>15</sup> No longer shackled by the mandatory ten-year cap, the only statutory time limit was the provision that the rebuilding period be “as short as possible.”<sup>16</sup> The Agency applied its interpretation of the Act as set forth in the NSG and calculated the new ceiling for the rebuilding period as fourteen years (the minimum rebuilding period) plus thirty-three years (“one mean generation time” for darkblotched rockfish).<sup>17</sup> Statutorily confined to a cap of forty-seven years, the Agency set a target rebuilding time of thirty-four years but raised the fishing quota for 2002 from the previous year’s 130 metric tons to 169 metric tons.<sup>18</sup>

In its *de novo* review of the district court’s grant of summary judgment in favor of the Agency, the Ninth Circuit first determined whether, under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,<sup>19</sup> Congress’ intent could be clearly ascertained through analysis of the language, purpose, and structure of the statute.<sup>20</sup> Noting the inherent ambiguity in section 1854(e)(4)’s rebuilding period provisions, the Court wrote:

It would be possible to resolve the ambiguity by concluding that the Act as a whole makes it clear that the needs of the fishing communities are perfectly aligned with the environmental goal of rebuilding fish stocks in as short a time as possible. But if this were the case, the language

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11. *Id.* at 876 (citing Magnuson-Stevens Act Provisions, 66 Fed. Reg. 2347, 2349–50 (Jan. 11, 2001)).

12. *Id.*; see also § 1854(e)(4)(A)(ii).

13. *Natural Res. Def. Council*, 421 F.3d at 876 (citing Magnuson-Stevens Act Provisions, 67 Fed. Reg. 10,491 (Mar. 7, 2002)).

14. *Id.*

15. *Id.*

16. § 1854(e)(4)(A)(i)–(ii).

17. *Natural Res. Def. Council*, 421 F.3d at 876.

18. *Id.*

19. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

20. *Id.* at 842–43.

“the needs of fishing communities” would be redundant (as these needs would be no different than the need to rebuild stocks in as short a time as possible).<sup>21</sup>

Because Congress did not address the precise question at issue, the Court moved on to the second part of the *Chevron* analysis to determine whether the Agency’s quota was based on a permissible construction of the statute.<sup>22</sup> The Court focused on the plain language of section 1854(e)(4) and noted that even if it were to ignore the purpose of the Act, which was to give conservation of fisheries priority over short-term economic interests, it could still not accept the interpretation of the Act contained in the NSG as applied to the darkblotched rockfish.<sup>23</sup>

The Ninth Circuit interpreted section 1854(e)(4)(i)’s mandate that a rebuilding period be “as short as possible” while giving consideration to “the status and biology of the overfished species and the needs of the fishing communities” as Congress’ way of ensuring that overfished species were rebuilt as quickly as possible while “leaving some leeway to avoid disastrous short-term consequences for fishing communities.”<sup>24</sup> Using this interpretation of section 1854(e)(4)(i), the Ninth Circuit declared that Congress intended section 1854(e)(4)(ii) as a limit on the Agency’s discretion.<sup>25</sup> When it is possible to rebuild a species within ten years, the Agency “may consider the short-term economic needs of fishing communities” but “may not use those needs to go beyond the ten year-cap set in subsection (ii).”<sup>26</sup> This cap may not be breached unless required by an international agreement, or the biology of the species makes it impossible to rebuild within ten years, even with a total moratorium on fishing.<sup>27</sup> These circumstances, however, do not relieve the Agency of its obligation to rebuild the species in a time frame that is “as short as possible.”<sup>28</sup> The court concluded:

The needs of the fishing communities may still be taken into account even when the biology of the fish dictates

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21. *Natural Res. Def. Council*, 421 F.3d at 878 (citing 16 U.S.C. § 1854(e)(4)). *But see* *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000).

22. *Natural Res. Def. Council*, 421 F.3d at 878; *see also* *Chevron*, 467 U.S. at 843 (applying the second part of the *Chevron* analysis that requires the judiciary to determine if the administrative agency’s interpretation of the statute is reasonable once it has been determined that Congress has not directly addressed the precise question at issue).

23. *Natural Res. Def. Council*, 421 F.3d at 879 (citing *Daley*, 209 F.3d at 753).

24. *Id.* at 880; *see also* § 1854 (e)(4)(A)(i).

25. *Natural Res. Def. Council*, 421 F.3d at 880.

26. *Id.*

27. *Id.*

28. *Id.*

exceeding the 10-year cap—so long as the weight given is proportionate to the weight the Agency might give to such needs in rebuilding periods under 10 years. . . the 2002 darkblotched rockfish quota is patently unreasonable, however, and reflects no such measured proportionality.<sup>29</sup>

After revising its population estimate for the darkblotched rockfish in 2001, the Agency increased the 2002 quota by twenty-nine percent to 169 metric tons.<sup>30</sup> This dramatic increase, the court concluded, was simply incompatible with making the rebuilding period “as short as possible.”<sup>31</sup>

Interestingly, the Ninth Circuit acknowledged that the Agency’s “target rebuilding time” of thirty-four years had a fifty percent chance of being reached, while the forty-seven year ceiling had a seventy percent chance.<sup>32</sup> In *Natural Res. Def. Council v. Daley*, the Court of Appeals for the D.C. Circuit held a 1999 summer flounder quota unreasonable because it had only an eighteen percent likelihood of being reached, whereas the Agency itself had mandated that all rebuilding plans have at least a fifty percent probability of being achieved.<sup>33</sup> One year after the D.C. Circuit’s decision, the Agency set the 2002 quota for darkblotched rockfish. It appears that the Agency, upon discovering that it was no longer statutorily confined to a ten-year cap by section 1854(e)(4), raised the 2002 quota to a level at which its target rebuilding time would still have a 50% chance of being reached. Because the new quota had even odds of success, the Ninth Circuit was unable to strike down the rebuilding plan using the reasoning of *Daley*. The court instead turned to the inherent ambiguity in section 1854(e)(4) and held the Agency’s interpretation was unreasonable as applied to the darkblotched rockfish.<sup>34</sup>

This decision is significant not only because of the Ninth Circuit’s novel interpretation of section 1854(e)(4) of the Act, but also because it is one of the few examples of a fishery management or rebuilding plan failing to withstand judicial scrutiny. In most instances in 2005, for example, courts refused to second-guess agency decision-making.<sup>35</sup> However, after *Daley*,

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29. *Id.* at 881.

30. *Id.*

31. *Id.*

32. *Id.* at 876 n.4.

33. *Daley*, 209 F.3d 747, 749–51.

34. *Natural Res. Def. Council*, 421 F.3d at 881.

35. *See, e.g., Oceana, Inc. v. Evans*, 389 F. Supp. 2d 4 (D.D.C. 2005) (rejecting challenges to Atlantic sea scallop management plan); *Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147 (D.D.C. 2005) (rejecting challenges to the Fishery Management Plan

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the Agency appears reluctant to implement rebuilding plans under constructions of the Act found impermissible by prior circuit court decisions.<sup>36</sup> That said, the Ninth Circuit's interpretation of section 1854(e)(4) of the Act will likely influence future fishery rebuilding plans across the nation where biology of overfished species necessitate exceeding the ten-year cap.

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for the Atlantic Highly Migratory Species Pelagic Longline Fishery).

36. *Daley*, 209 F.3d 747 at 751–53.