*Oceana, Inc. v. Penny Pritzker, et al.*
(Ninth Circuit No. 13-16183; District Court No. C-11-6257 EMC (N.D. Cal.))

Settlement Agreement

This agreement is entered by and among Plaintiff-Appellant Oceana, Inc. ("Oceana"); Defendants-Appellees Penny Pritzker, in her official capacity as Secretary of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (collectively, "NMFS"); and Intervenors-Defendants-Appellees California Wetfish Producers Association, City of Monterey, Monterey Fish Company, Tri-Marine Fish Company, Ventura Port District, Joseph Nicholas Ferrigno, and Nick Jurlin.

WHEREAS:

On April 15, 2013, the District Court in No. C-11-6257 EMC (N.D. Cal.) entered judgment granting in part and denying in part the parties' respective motions for summary judgment;

On June 10, 2013, Oceana filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit;

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") requires NMFS to review and, as appropriate, implement recommendations from the Pacific Fishery Management Council ("Council") within certain timelines; and

The parties wish to resolve this appeal without need for further litigation in the Court of Appeals.

NOW THEREFORE:

The parties enter this Settlement Agreement without any admission of fact or law, or any waiver of claims or defenses, factual or legal, and agree as follows:

**DISTRIBUTION Parameter in the Pacific Sardine Harvest Control Rule**

1. NMFS shall ensure that a scientific workshop is convened and a report of the workshop is completed no later than October 15, 2015, to examine the DISTRIBUTION parameter in the harvest control rule used to manage Pacific

sardine (as managed under the Coastal Pelagic Species Fishery Management Plan), which examination will include consideration that catch can occur in United States, Mexican, and Canadian waters. The workshop is expected to be conducted by the Council in a manner that efficiently integrates the results into the Council process as described in paragraphs 2, 3 and 4 below. The purposes of this workshop will be:

> To examine and discuss the DISTRIBUTION parameter in the Pacific sardine harvest control rule used in setting management reference points to account for the presence of sardine in the waters of the United States, Mexico, and Canada. Workshop participants are expected to compile the best available scientific information on the distribution of Pacific sardines along the North American Pacific coast as well as examine potential alternative means of accounting for the fact that some portion of Pacific sardine stock exists and is subject to catch outside of U.S. waters.

Alternatives analyzed at the workshop will address the northern subpopulation of Pacific sardine and will include, but are not limited to:

- Setting DISTRIBUTION annually as part of the specifications process based on the most recent data on the actual mean distribution of the Pacific sardine stock in U.S. waters
- Using landings information from Canada and Mexico to account for catch in the waters of those nations in estimating DISTRIBUTION, using work from recently published scientific studies regarding Pacific sardine management
- Estimating the stock biomass in U.S. waters only, instead of the total sardine biomass, in the stock assessment
- Using a numerical-based Distribution parameter as an alternative to the existing percent-based Distribution parameter

2. NMFS shall ensure that the results of the DISTRIBUTION workshop are presented at the Council's November 2015 meeting. NMFS shall request in writing that the Council review the workshop results, as well as the advice of its own advisory bodies and public comment, and that the Council determine, at the November 2015 meeting, whether further action regarding this item is warranted.

3. Should the Council determine that further action regarding the DISTRIBUTION parameter or other method for taking into account the presence of Pacific sardine coast-wide is warranted, NMFS shall request in writing that the

Council take action to make a recommendation to NMFS at one or more of the Council meetings scheduled for March 2016, April 2016, and/or June 2016.

4. In the event that the Council has a recommendation for change, within six months of the Council's final decision to revise the DISTRIBUTION parameter, NMFS shall ensure that all supporting documentation has been assembled (including any analysis under the National Environmental Policy Act (NEPA)) and according to the process and timelines set forth in section 304(a) or (b) of the Magnuson Act, 16 U.S.C. §1854(a) or (b), shall review the recommendation, and as required by the Magnuson Act publish a notice in the Federal Register initiating public comment on the proposal. NMFS shall approve, disapprove, or partially approve any measures recommended by the Council and notify the parties of its decision within 30 days of the close of the public comment period. Upon NMFS's decision, NMFS's obligations under this Settlement Agreement shall be deemed fulfilled with respect to this matter.

5. If NMFS has otherwise complied with the terms in this Settlement Agreement and the Council determines that no further action in response to the DISTRIBUTION workshop is warranted, NMFS's obligations under this Settlement Agreement shall be deemed fulfilled with respect to this matter.

6. If NMFS has otherwise complied with the terms in this Settlement Agreement and the Council has not made a final decision to recommend any change with respect to the DISTRIBUTION parameter by June 30, 2016, NMFS's obligations under this Settlement Agreement shall be deemed fulfilled with respect to this matter.

**Minimum Stock Size Thresholds**

7. NMFS shall consider revising or establishing, as appropriate, minimum stock size thresholds ("MSSTs") for Pacific sardine, as it is managed under the Coastal Pelagic Species Fishery Management Plan; Pacific mackerel; the central subpopulation of northern anchovy; the northern subpopulation of northern anchovy; and jack mackerel.

8. NMFS shall compile and examine scientific information available at the time of NMFS's analysis pertaining to MSSTs for the stocks listed in paragraph 7; develop recommendations based on that evaluation, which might or might not include recommendations to revise or establish MSSTs; and present a report of the results to the Council at or before the September 2016 Council meeting.

9. NMFS shall request in writing that, by or before the close of the March 2017 Council meeting, the Council determine whether action is warranted to revise or establish one or more of the five MSSTs listed in paragraph 7.

10. Within one year of a Council decision to propose the revision or establishment of one or more of the five MSSTs listed in paragraph 7, in accordance with the process and timelines set forth in section 304(a) or (b) of the Magnuson Act, 16 U.S.C. §1854(a), or (b), NMFS shall: (i) review the proposal from the Council, probably in the form of an amendment to the CPS Fishery Management Plan, including any supporting documents under NEPA; (ii) as required by the Magnuson Act publish in the Federal Register a notice of the proposal; and (iii) approve, disapprove, or partially approve the Council's proposal. At the point of NMFS's final decision, NMFS's obligations under this Settlement Agreement shall be deemed fulfilled with respect to this matter.

11. If NMFS has otherwise complied with the terms in this Settlement Agreement and the Council determines that no further action is warranted with respect to revising or establishing one or more of the five MSSTs listed in paragraph 7, the federal Defendants-Appellees' obligations under this Settlement Agreement shall be deemed fulfilled with respect to the MSST(s) that the Council has declined to address.

12. If NMFS has otherwise complied with the terms in this Settlement Agreement and the Council has not made a final decision to propose the revision or establishment of any of the MSSTs listed in paragraph 7 at or before by the conclusion of the March 2017 Council meeting, NMFS's obligations under this Settlement Agreement shall be deemed fulfilled with respect to this matter.

**Voluntary Dismissal of Oceana's Appeal**

13. Within five calendar days of the date on which this Settlement Agreement is executed by the parties, Oceana shall file the stipulation to dismiss without prejudice to reinstatement the above-captioned appeal (No. 13-16183) in the Ninth Circuit Court of Appeals, a copy of which is attached hereto. Any reinstatement shall be pursuant to Ninth Circuit General Orders, Appendix A(46), as specified in paragraphs 14 and 15 below.

14. Subject to the proviso set forth in paragraph 15, Oceana may move for reinstatement of its appeal pursuant to Ninth Circuit General Orders, Appendix A(46), if any of the following conditions occurs:

a. With respect to the DISTRIBUTION parameter addressed in this Agreement, NMFS fails to take the action described in paragraphs 1 and 2 by the date stated in those paragraphs;

b. With respect to the DISTRIBUTION parameter addressed in this Agreement, NMFS fails to make the written request of the Council described in paragraph 3;

c. With respect to the DISTRIBUTION parameter addressed in this Agreement, NMFS fails to take the action described in paragraph 4 on the time-line stated in that paragraph;

d. With respect to the MSSTs addressed in this Agreement, NMFS fails to take the action described in paragraph 8 by the date stated in that paragraph;

e. With respect to the MSSTs addressed in this Agreement, NMFS fails to make the written request of the Council described in paragraph 9; or

f. With respect to the MSSTs addressed in this Agreement, NMFS fails to take the action described in paragraph 10 on the time-line stated in that paragraph.

15. If Oceana believes that one or more of the conditions specified in paragraphs 14(a) through 14(f) has occurred, Oceana shall provide written notice of that belief to NMFS within 30 days of NMFS's deadline for completing the relevant action referenced in paragraphs 14(a) through 14(f). In that event, the parties shall make a good faith effort to resolve the dispute informally within 30 days after the written notice has been provided to NMFS ("dispute resolution period"). If necessary, the dispute resolution period may be extended by written consent of the parties. If the parties are unable to resolve the dispute during the dispute resolution period (including any extension(s) thereof), (*i.e.*, before the expiration of this period), NMFS or Oceana shall provide written notice to the parties that the dispute resolution period is closed. Within 28 days of the date on which NMFS or Oceana provides such written notice, Oceana may file a motion to reinstate this appeal pursuant to Ninth Circuit General Orders Appendix A(46). Written notice shall be provided by electronic mail to ensure timely receipt by all parties. Alternatively, if the dispute resolution period (including any extension(s) thereof) expires and the

parties have not resolved the dispute, Oceana may file a motion to reinstate this appeal pursuant to Ninth Circuit General Orders Appendix A(46) within 28 days of the last day of the expired dispute resolution period (including any extension(s) thereof). A motion for reinstatement of the appeal shall be Oceana's sole remedy for any perceived occurrence of one or more of the conditions specified in paragraphs 14(a) through 14(f).

16. The parties hereby waive any and all rights to oppose any such reinstatement pursuant to Ninth Circuit General Orders, Appendix A (46) on any grounds other than timeliness of the motion to reinstate. In the event that this appeal is reinstated, any remaining obligations of NMFS under this Settlement Agreement shall be deemed fulfilled.

**Other Terms**

17. Nothing in this Settlement Agreement shall be interpreted to limit the ability of the Council to take action, independent of any settlement terms and the attendant obligations of any party, with respect to the management issues discussed herein. For example, should NMFS's settlement obligation be deemed fulfilled before the Council has taken final action on any item addressed in this Agreement, nothing in the Agreement shall limit the Council's ability to proceed with taking final action.

18. Nothing in this Settlement Agreement shall limit the right of any party to the agreement to challenge, under the Administrative Procedure Act or any other applicable law, any final agency action that may arise from the agreement.

19. Nothing in this Settlement Agreement shall be construed to limit or modify any discretion that is afforded NMFS by the Magnuson Act, the Administrative Procedure Act, or general principles of administrative law with respect to the procedures to be followed in making any determination required by this Agreement, or as to the substance of any final determination.

20. No provision of this Settlement Agreement shall be interpreted so as to constitute a commitment or requirement that the NMFS obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. §1341, or other applicable provision of law.

21. The parties agree that each party to this Settlement Agreement shall bear its own attorneys' fees, costs, and expenses for creation, negotiation or administration of this Agreement, and that no party may seek reimbursement or an award of

attorneys' fees, costs, and expenses for creation, negotiation or administration of this Agreement. For purposes of this paragraph, "administration" includes filing a motion for reinstatement of this appeal and complying with the dispute resolution procedure as set forth in paragraphs 13 through 15 of this Agreement. The parties shall bear their own attorney's fees and costs associated with this appeal if the appeal is not reinstated.

22. Oceana acknowledges and agrees that this Settlement Agreement represents a compromise of disputes and does not constitute, and shall not be construed as, an admission of liability by NMFS or the Intervenors-Defendants-Appellees with respect to any matter. This Settlement Agreement has no precedential effect and its contents shall not be used as evidence in any other matter.

23. This document sets forth the entire agreement of the parties respecting the settlement of Oceana's appeal in Ninth Circuit No. 13-16183. No modification of this document shall be valid unless expressly consented to in writing by all the parties.

24. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by the parties. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

25. This Settlement Agreement shall be governed by and construed under federal law.

26. This Settlement Agreement is signed by authorized representatives of Oceana, NMFS, and the Intervenors-Defendants-Appellees. The undersigned warrant that they have full authority to enter into this Agreement and by their signatures bind to the terms of this Agreement the party or parties on whose behalf they have signed.

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