

2012

Battle To Determine The Meaning Of The Magnuson-Stevens Fisheries Conservation And Management Reauthorization Act of 2006: A Survey of Recent Judicial Decisions

Shaun M. Gehan

Michele Hallowell

Follow this and additional works at: <http://digitalcommons.maine.gov/oclj>

Recommended Citation

Shaun M. Gehan & Michele Hallowell, *Battle To Determine The Meaning Of The Magnuson-Stevens Fisheries Conservation And Management Reauthorization Act of 2006: A Survey of Recent Judicial Decisions*, 18 *Ocean & Coastal L.J.* (2012).
Available at: <http://digitalcommons.maine.gov/oclj/vol18/iss1/9>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

BATTLE TO DETERMINE THE MEANING OF THE
MAGNUSON-STEVENSON FISHERIES
CONSERVATION AND MANAGEMENT
REAUTHORIZATION ACT OF 2006: A SURVEY OF
RECENT JUDICIAL DECISIONS

*Shaun M. Gehan & Michele Hallowell*¹

I. INTRODUCTION

During waning hours of its lame duck session, the 109th Congress passed the first major overhaul of the Magnuson-Stevens Fishery Conservation and Management Act² (“MSA”) since the 1996 Sustainable Fisheries Act (“SFA”).³ President Bush signed the Magnuson-Stevens Fishery Conservation and Management Reauthorization of 2006 (“Reauthorization Act”) on January 12, 2007, ushering a new and challenging era in fisheries management.⁴ These amendments effected deep changes to the nation’s fishery management laws by, among many other things, strengthening the MSA’s conservation objectives and fostering increased use of controversial, market-based fisheries management systems. The regulated fishing community, non-

1. Shaun M. Gehan and Michele Hallowell are attorneys with the law firm Kelley Drye & Warren, LLP in Washington, D.C. Each received their J.D. from the University of Maine School of Law and extensively practice in the field of fisheries management and regulation.

2. 16 U.S.C. §§ 1801-1891(d) (2006). For a history of the original Magnuson-Stevens Act, including its purpose and structure, see James William Merrill, *Trawling For Meaning: A New Standard For “Best Scientific Information Available” in the Magnuson-Stevens Fisheries Conservation Act*, 60 CATH. U. L. REV. 475, 482-85 (2010-11).

3. Sustainable Fisheries Act of 1996, Pub. L. No. 104–297, 110 Stat. 3559 [hereinafter SFA].

4. See Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109–479, 120 Stat. 3575 (2007) [hereinafter Reauthorization Act].

governmental organizations, and the government itself are still adjusting to the new regime.

As is typical following major changes in law, the Reauthorization Act has spurred a great deal of litigation.⁵ The reason is simple; the legislative process is one of compromise and negotiation, often fostering vague statutory language and contradictory mandates. Congressional give-and-take that ensures clarity is a rare commodity in Washington. Resulting ambiguity leaves room for interpretation, initially by the administering agency—in this case, the National Marine Fisheries Service (“NMFS”)⁶—and subsequently by litigants offering competing interpretations of the new law’s (and its implementing regulations’) meaning and reach.

This cycle followed in the wake of the SFA.⁷ Major litigation tested the meaning and limits of the SFA’s new requirement to minimize bycatch and create a “standardized bycatch reporting methodology,”⁸ its essential fish habitat provision,⁹ and the deadlines the law created for ending overfishing and rebuilding stocks.¹⁰ As explained below, a very similar process is now underway, with many early cases beginning to

5. In addition to the cases discussed herein, there are at least two additional cases at the briefing stage, including *Oceana, Inc. v. Bryson*, No. 11-1896 (D.D.C. filed Oct. 28, 2011) (challenging the Mid-Atlantic Fishery Management Council’s Omnibus Amendment to Establish Annual Catch Limits and Accountability Measures), and *Oceana, Inc. v. Bryson*, No. 11-6257 (N.D. Cal. filed Dec. 13, 2011) (challenging aspects of the Pacific Fishery Management Council’s Amendment 13 to the Coastal Pelagic Species Fishery Management Plan on various Reauthorization Act grounds).

6. NMFS is part of the National Oceanic and Atmospheric Administration (“NOAA”), which itself is part of the Commerce Department. See 15 U.S.C. § 1511 (1993) & accompanying notes (stating that Reorganization Plan No. 4 created NOAA within the Department of Commerce, transferring to it the functions of the Bureau of Commercial Fisheries, which became NMFS); see also *Northeast Fisheries Science Center, Fisheries Historical Timeline: Historical Highlights 1970’s*, <http://www.nefsc.noaa.gov/history/timeline/1970.html> (last visited July 20, 2012).

7. See SFA, Pub. L. No. 104–297, 110 Stat. 3559.

8. See *id.* § 108(a)(7); see also *Conservation Law Found. v. Evans*, 209 F. Supp. 2d 1, 11-15 (D.D.C. 2001) (“Bycatch refers to fish caught incidentally while a fisher is trying to catch fish of a different species.” (citing 142 Cong. Rec. S10810 (daily ed. Sept. 18, 1996)) (footnote omitted)); *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011); *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 231-37 (D.D.C. 2005); *Oceana, Inc. v. Evans*, No. Civ.A.04-0811(ESH) 04-0811, 2005 WL 555416, at **37-43 (D.D.C. Mar. 9, 2005).

9. See SFA § 108(a)(3).

10. See *id.* § 109(e); see also *Conservation Law Found. v. Evans*, *supra* note 8.

define the meaning and scope of new provisions of the Reauthorization Act.¹¹

Few would argue that the Reauthorization Act changes are insignificant. Samuel Rauch, acting head of NMFS, stated: “With [Reauthorization Act mandated] annual catch limits in place this year for all domestic fish populations and the continued commitment of fishermen to rebuild the stocks they rely on, we’re making even greater progress in ending overfishing and rebuilding stocks around the nation.”¹² While many in the fishing industry are heartened by this progress, the cost has been high and there is a feeling that the law’s flexibility is too rarely employed. Conversely, environmental groups frequently challenge the agency for not fully living up to the Act’s requirements.¹³ The stakes in legal battles over Reauthorization Act changes are high. Some of the most important of these are discussed below.

II. THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

The modern United States fishery management regime was created in 1976.¹⁴ The MSA (then simply known as the “Magnuson Act”) created eight quasi-legislative bodies known as regional fishery management councils comprising citizens “knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources,” the head of each state’s marine fisheries agency, and the NMFS regional administrator.¹⁵ Councils must respond to declarations that stocks of fish are overfished by preparing a fishery management plan (“FMP”) or plan amendment designed “to end overfishing in the fishery and to rebuild affected stocks of fish.”¹⁶

Recommended management plans and implementing regulations are reviewed for consistency with applicable law by NMFS, as the Commerce Secretary’s designee.¹⁷ NMFS may only accept, reject, or partially reject these recommended plans, amendments, and

11. *See infra* Part I.

12. Press Release, NMFS, Annual NOAA report shows a record number of rebuilt fisheries (May 14, 2012), *available at* http://www.nmfs.noaa.gov/mediacenter/2012/05/15_statusofstocks.htm.

13. *See, e.g.*, *Oceana Inc., v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011).

14. 16 U.S.C. §§ 1801-1882 (1976).

15. *See* 16 U.S.C. §§ 1852(a)(1), (b)(1)-(b)(2)(A) (2006).

16. *Id.* § 1854(e)(3).

17. *Id.* §§ 1854(a)-(b).

regulations.¹⁸ “Any fishery management plan prepared, and any regulation promulgated to implement any such plan, shall be consistent with [ten] national standards for fishery conservation and management.”¹⁹ Chief among these is National Standard 1: “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”²⁰

III. MAJOR CHANGES IMPLEMENTED BY THE REAUTHORIZATION ACT

The Reauthorization Act was a sweeping piece of legislation, dealing with everything from tsunami warnings²¹ and polar bears,²² to data collection and cooperative research.²³ Here we focus on Title I, which changed the procedural and substantive aspects of the nation’s fishery management system under the MSA in fundamentally important ways.²⁴

A. Strengthened Economic and Social Considerations in Fisheries Management

While this bill’s conservation measure received the most attention, the Reauthorization Act also addressed concerns relating to the social

18. *Id.* §§ 1854(a)(3), (b)(1)(B). “[W]hen the Secretary is presented with proposed amendments and regulations, he does not have the independent authority to, *sua sponte*, add a regulation that is inconsistent with the proposal from the Council.” *Connecticut v. Daley*, 53 F. Supp. 2d 147, 160-61 (D. Conn. 1999) (citing *Midwater Trawlers Coop. v. Mosbacher*, 727 F. Supp. 12, 16 (D.D.C. 1989)).

19. 16 U.S.C. § 1851(a) (2006).

20. *Id.* § 1851(a)(1). Among the most important of the others, National Standard 2, provides that “[c]onservation and management measures shall be based upon the best scientific information available”; National Standard 4 prohibits discrimination “between residents of different States,” and requires that, if allocations are made, they “be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges”; National Standard 5 requires managers “consider efficiency in the utilization of fishery resources,” but disallows measures that “have economic allocation as [their] sole purpose”; National Standard 9 requires minimization of bycatch, or incidental harvest of non-target species, and the minimization of mortality of such species that cannot be avoided; and National Standard 10 requires the “protection of human life at sea.” *Id.* § 1851(a)(2), (a)(4), (a)(5), (a)(9), (a)(10).

21. *See* Reauthorization Act, Pub. L. No. 109–479, 120 Stat. 3575 (2007).

22. *Id.* at 3660.

23. *Id.* at 3611.

24. *See id.* at 3575.

and economic impacts of fisheries management.²⁵ National Standard 8 provides that, consistent with the duty to prevent overfishing and rebuild depleted stocks, conservation and management measures must “take into account the importance of fishery resources to fishing communities,” “provide for [their] sustained participation[,]” and “to the extent practicable, minimize adverse economic impacts on such communities.”²⁶ The Reauthorization Act increased the rigor of the social and economic inquiry into the “importance of fishery resources to fishing communities” by specifying that it be conducted “utilizing economic and social data that meet the requirements of” National Standard 2, the best science standard.²⁷

In terms of substance, this new language may not add much to the councils’ or NMFS’ duties under the law. That Congress felt it necessary to add this clause, however, underscores the importance it attached to a more rigorous impacts analysis. Senator Ted Stevens explained that the Reauthorization Act was meant to strengthen the role of science in council decision making It specifies that the role of the Scientific and Statistical Committees SSCs is to provide their councils with ongoing scientific advice needed for management decisions, which may include recommendations on acceptable biological catch or optimum yield, annual catch limits, or other mortality limits. The SSCs are expected to advise the councils on a variety of other issues, including stock status and health, bycatch, habitat status, and socio-economic impacts.²⁸

Congress also expanded the scope of the required “fishery impact statement” to accompany every fishery management plan or amendment.²⁹ It is meant to ensure that fishery managers consider the impacts of regulations on “participants in the fisheries and fishing

25. *See id.*

26. 16 U.S.C. § 1851(a)(8); *see also* *AML Int’l Inc. v. Daley*, 107 F. Supp. 2d 90, 103 (D. Mass. 2000) (interpreting National Standard 9, stating, “All other things being equal, however, where two alternatives achieve similar conservation goals, the alternative which provides the greater potential for sustained participation of communities and minimizes the adverse economic impacts is preferred.” (citing 50 C.F.R. § 600.345(b))).

27. Reauthorization Act § 101(a), 120 Stat. at 3579 (codified at 16 U.S.C. § 1851(a)(8)).

28. 152 CONG. REC. S.6050 (daily ed. Jun. 19, 2006) (statement of Sen. Stevens).

29. Reauthorization Act § 101(b), 120 Stat. at 3579 (codified at 16 U.S.C. § 1853(a)(9)).

communities affected by the plan or amendment.”³⁰ In this respect, a fishery impact statement is analogous to an environmental impact statement under the National Environmental Policy Act (“NEPA”),³¹ and is even more so in light of the Reauthorization Act changes.

Specifically, the bill added a requirement that such impact statements “analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for” regulated fishermen and their communities.³² Thus, like an environmental impact statement under NEPA, the MSA now requires an assessment of both cumulative impacts and a consideration of alternatives, albeit in the context of impacts on the regulated community.³³ Congress clearly wanted councils to take a hard look at the impacts of recommended conservation measures that other parts of the law ensured would become more onerous.

B. Strengthened the Role of Science in Fisheries Management

The regional fishery management councils established under the MSA are required to establish a scientific and statistical committee (“SSC”) to “assist . . . in the development, collection, evaluation, and peer review of such statistical, biological, economic, social, and other scientific information as is relevant to such Council’s development and amendment of any fishery management plan.”³⁴ The Reauthorization Act expanded the mandate of the SSCs by, for example, allowing the committees to undertake peer review of such information and more specifically defining the SSC’s duties.³⁵

These now explicitly include recommending levels of acceptable biological catch, overfishing limits, rebuilding targets, and evaluations of a stock’s status.³⁶ These duties are not necessarily new—this is effectively the function SSCs have long served. However, these provisions take on new import as the Reauthorization Act sets the

30. 16 U.S.C. § 1853(a)(9)(A).

31. 42 U.S.C. §§ 4321-4347 (2006).

32. Reauthorization Act § 101(b), 120 Stat. at 3575 (2007).

33. *See* Oceana, Inc. v. Evans, No. Civ.A.04-0811(ESH), 2005 WL 555416, at **37-43 (D.D.C. March 9, 2005)(citing 40 C.F.R. §§ 1502.14 (alternatives) and 1502.2 (cumulative impacts)).

34. 16 U.S.C. § 1852(g)(1)(A) (2006).

35. *See* Reauthorization Act § 103(b)(1), 120 Stat. at 3580 (codified at 16 U.S.C. § 1852(b)).

36. *Id.* (codified at 16 U.S.C. § 1852(g)(1)(B)).

“fishing level recommendations” that the SSC makes as the mandatory upper limit on catch levels that a council may adopt.³⁷ This has added importance to the role of SSCs and, based on personal experience, raised the stakes of SSC meetings for the regulated community and interested parties. The increased role of science as a determinative element in fisheries management has also placed extreme pressure on the data collection and fishery stock assessment process.³⁸

C. Heightened Conservation Requirements

By adding a single sentence to the mandatory requirements of a fishery management or amendment, Congress begat a revolution in fisheries management. Under the Reauthorization Act, councils are required to “establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.”³⁹ Annual catch limits (“ACLs”) and accountability measures (“AMs”) have come to dominate the battlefield over fisheries management, both at the council level and in litigation, as discussed below.⁴⁰

Coupled with the provision noted above (regarding the prevention of management bodies setting ACLs above those levels recommended by their SSCs), this provision has done more to put stocks on a sustainable footing than any other reform over the MSA’s thirty-six year history. In essence, while stopping short of absolutely requiring catch levels be managed by quota, the ACL requirement has made formerly ubiquitous “input controls” – measures such as gear restrictions (like minimum

37. *See id.* § 103(c)(3) (requiring councils to “develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g)”); *see also infra* Part I.C (discussing annual catch limits).

38. *See, e.g.,* Don Cuddy, *Scallopers urge feds to rework yellowtail survey*, NEW BEDFORD STANDARD TIMES, July 19, 2012, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20120719/NEWS/120719881> (describing industry letter to NMFS urging improved data collection for an important flounder stock).

39. Reauthorization Act § 104(a)(1), 120 Stat. at 3584 (codified at 16 U.S.C. § 1853(a)(15)).

40. *See infra* pp. 14-16.

mesh sizes), fishing season limitations, and area restrictions⁴¹ – less feasible strategies for managing stocks.

AMs have also had a profound effect on management. Defined as “management controls to prevent ACLs . . . from being exceeded, and to correct or mitigate overages of the ACL if they occur,”⁴² AMs have both proactive and reactive elements. Within a fishing season, the measure might be as simple as closing a fishery when a quota is projected to be reached, or lowering catch limits to account for uncertainty in calculating total harvest during the year.⁴³ Reactively, AMs may call for “payback,” or a reduction in the next year’s harvest if catch limits are exceeded.⁴⁴ The sufficiency of AMs for a given management plan has become a ripe point of dispute in litigation.⁴⁵

Congress accelerated the pace of these changes by requiring the establishment of ACLs and AMs for overfished (depleted) stocks or stocks harvested at an unsustainable rate (i.e., those subject to “overfishing”) within three years of adoption of the Reauthorization Act, and four years for all others.⁴⁶

D. Limited Access Privilege Programs

Finally, for purposes of this review, Congress added a new section entitled “Limited access privilege programs.”⁴⁷ This term, LAPP for short, is enshrined in statute, but was not a term of art prior to the Reauthorization Act, nor is it used in the discussions of fisheries management policy today. Rather, the phrase “catch share programs” has come to cover the types of management strategies the law considers LAPPs.⁴⁸ “[C]atch share programs [is] a generic term describing programs that allocate a specific portion of the total allowable catch to individuals, cooperatives, communities, or other entities.”⁴⁹ The

41. See, e.g., Shannon Carroll, Comment, *Sector Allocation: A Misguided Solution*, 17 OCEAN & COASTAL L.J. 163, 169 (2011); see also *Oceana, Inc. v. Locke*, 2011 WL 6357795 at *4; *Madeiras v. Vincent*, 431 F.3d 25, 30 (1st Cir. 2005).

42. 50 C.F.R. § 600.310(g)(1).

43. See *id.* § 600.310(g)(2).

44. *Id.* § 600.310(g)(3).

45. See, e.g., *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 99 (2011).

46. Reauthorization Act, Pub. L. No. 109–479, § 104(b)(1), 120 Stat. at 3575, 3584 (2007).

47. *Id.* § 106, 120 Stat. at 3586 (codified at 16 U.S.C. § 1853(a)).

48. See, e.g., Eric Schwaab, *The Magnuson Act Thirty-Five Years Later*, 17 ROGER WILLIAMS U. L. REV. 14, 18 (2012).

49. *Id.*

extensive new LAPP provision sets forth substantive and procedural requirements for such programs.⁵⁰

Among the species of catch share programs is a special breed known as the individual transferable quota (“ITQ”) or individual fishing quota (“IFQ”).⁵¹ Always controversial, these rights-based management strategies vest individual fishermen with the privilege to individually harvest a fixed portion of an annual quota and, when transferable, to sell or lease that allocation to others.⁵² Fears of excessive consolidation of fishing privileges in fewer hands and high barriers to entry for young fishermen, among other concerns, led Congress to establish a moratorium on new ITQ programs as part of the 1996 SFA.⁵³ By its terms, the moratorium expired in 2000,⁵⁴ but the controversy did not abate.

The Reauthorization Act’s LAPP provision represents Congress reckoning with these types of management systems. The law attempts to lessen the concerns of excessive concentration via a suite of initial allocation standards, provisions to assist new entrants in obtaining shares, excessive share limitations, and the creation of a purchase assistance program.⁵⁵ In a parochial nod to regions with strong anti-ITQ sentiments, the Act also included referendum provisions for new ITQ programs sought to be established by the Gulf of Mexico and New England Fishery Management Councils.⁵⁶ As both cases like *City of New Bedford v. Locke*,⁵⁷ and recent congressional action⁵⁸ show, Congress’ attempt to allay concerns has not been entirely successful.

50. See 16 U.S.C. § 1853(a) (2006).

51. See *Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996); see also R. Quentin Grafton, *Individual Transferable Quotas: Theory and Practice*, 6 *REVIEWS IN FISH AND BIOLOGY* 5, 5 (1996).

52. See *Alliance*, 84 F.3d at 345 (discussing the details of the halibut IFQ program).

53. See Carroll, *supra* note 41, at 177-78.

54. SFA, Pub. L. No. 104-297, § 108(e), 110 Stat. 3559 (1996).

55. 16 U.S.C. §§ 1853a(c)(5), (g).

56. *Id.* at § 1853a(c)(6)(D). As an example of the regionalized nature of this provision, not only are only two of the eight regional councils required to hold a referendum among permit holders in the fishery, but the level of vote required to adopt the programs are different among the two. In New England, it takes a 2/3 majority to approve an ITQ, while a simple majority can adopt such a program in the Gulf. *Id.* at § 1853a(c)(6)(D)(i).

57. No. 10–10789-RWZ, 2011 WL 2636863 (D. Mass. June 30, 2011).

58. A very temporary ban on expending funds on development or approval of LAPPs passed as a rider on the 2011 omnibus appropriations bill, H.R. 1473. Pub. L. No. 112-10, § 1349, 125 Stat. 57 (Apr. 15, 2011). Other bills in the 112th Congress, such as the Saving Fishing Jobs Act of 2011 (H.R. 2772, 112th Cong. (2011-2012)), likewise create barriers to expansion of rights-based management efforts.

IV. REVIEW OF REAUTHORIZATION ACT CASES

A. *Cases Involving the Reauthorization Act's Catch Share Provisions*1. *City of New Bedford v. Locke*

The first ITQ program in the United States, involving the relatively small and distinct surf clam and ocean quahog fishery, was jointly developed by the New England and Mid-Atlantic Fishery Management Councils in the late 1980s.⁵⁹ Despite this early effort, resistance to rights-based management schemes, particularly by some participants in New England's major fisheries—groundfish⁶⁰ and scallops—has been strong.⁶¹ Because many fishermen in the region shared the view expressed by then Commissioner of the Maine Department of Marine Resources George LaPointe that “the implementation of [catch shares], or ITQs as they were previously known, would mean the end of the traditional character of the New England fleet,”⁶² it was almost thirty years after the pioneering surf clam ITQ program before a remotely similar management scheme was proposed for the region.⁶³

That program, codified through Amendment 16 to the Northeast Multispecies FMP and associated rulemakings, was at issue in *City of*

59. See *Sea Watch Int'l v. Mosbacher*, 762 F. Supp. 370, 373 (D.D.C. 1991) (discussing development of the surf clam ITQ program implemented in 1990); see also EUGENE H. BUCK, *Individual Transferable Quotas in Fishery Management*, CONG. RESEARCH SERV., 95-849 ENR (1995), available at <http://cnie.org/NLE/CRSreports/marine/mar-1.cfm>.

60. Groundfish is a generic name for a suite of bottom-dwelling fish stocks, including cod, haddock, and a variety of flounders that are collectively managed under the New England Council's Northeast Multispecies Fishery Management Plan (“FMP”). See *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 107 n.2 (1st Cir. 1997) (citing Peter Shelley et al., *The New England Fisheries Crisis: What Have We Learned?*, 9 TUL. ENVTL. L. J. 221, 223 & n.4 (1996)); see also NEW ENGLAND FISHERY MANAGEMENT COUNCIL, <http://www.nefmc.org/nemulti/index.html> (last visited Sept. 14, 2012).

61. See Carroll, *supra* note 41, at 165, 181.

62. *Id.* at 181, n.151 (quoting Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Hearing Before the S. Comm. on Commerce, Sci. & Transp., 109th Cong. 15 (2005) (statement of George LaPointe, Comm'r, Maine Department of Marine Resources)).

63. NORTHEAST MULTISPECIES FISHERY MANAGEMENT PLAN, AMENDMENT 16, http://www.nefmc.org/nemulti/planamen/Amend16/final%20amendment%2016/1.0_091016_Final_Amendment_16.pdf (last visited Sept. 14, 2012).

New Bedford.⁶⁴ In fact, the most basic question at issue in *City of New Bedford* was whether the “sectors” program established in Amendment 16 fell within the MSA’s definition of a LAPP and was therefore subject to the special procedural requirements, including an industry referendum, the Reauthorization Act created.⁶⁵

Prior to Amendment 16, the New England groundfish fishery was primarily regulated through a limitation on the total amount of fishing time each permitted vessel could expend each year harvesting groundfish.⁶⁶ This “days-at-sea” (“DAS”) program sought to reduce fishing pressure on overfished groundfish by limiting the number of days fishermen could expend in harvesting activities.⁶⁷ This approach “has been partially effective; some overfished stocks have recovered while others have shown little or no improvement.”⁶⁸ However, to meet the MSA’s rebuilding and overfishing objectives, NMFS “determined that dramatic decreases in fishing mortality are necessary” for the latter class of fish stocks.⁶⁹

The new sector system was designed to implement the newly established ACLs for New England groundfish stocks while also providing fishermen a means of adjusting economically to the dramatically lower catch limits.⁷⁰ “Sectors are an alternative to days-at-sea effort controls, whereby a group of fishermen jointly form a sector and are collectively assigned a catch limit, an ‘Annual Catch Entitlement’ (‘ACE’).”⁷¹ Each groundfish “permit holder is allocated a ‘potential sector contribution’ (‘PSC’) based upon its landings history.”⁷² “This is a proportional measure of the vessel’s landing history relative to the total landings over a given period of time for each stock.”⁷³ Permit holders seeking to join a sector add their PSC to those of others in the sector, and the sum of all these contributions equates to that sector’s

64. See *City of New Bedford v. Locke*, No. 10–10789–RWZ, 2011 WL 2636863, at *2 (D. Mass. June 30, 2011) (describing the management program established by Amendment 16).

65. *Id.* at *3.

66. See *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 108 (1st Cir. 1997).

67. *Id.*

68. *City of New Bedford*, 2011 WL 2636863, at *2 (citation omitted).

69. *Id.*

70. *Id.*; see also *id.* at *6 (“The Agency concluded that the sector program, which is not a conservation measure, would increase fishing efficiency and could ameliorate some of this harm.”) (citations omitted).

71. *Id.* at *2.

72. *Id.*

73. *Id.* (citations omitted).

ACE, which may be traded with other sectors.⁷⁴ The combination of all sectors' ACE and the PSC that belong to vessels not choosing to join a sector, which becomes part of a common pool governed by DAS, is limited by the overall ACL for each of the New England groundfish species.⁷⁵

The basic elements of the Amendment 16 management system thus include: an individualized allocation of fishing privileges for each of the managed species based on a permit holder's catch history; cooperative-like structures given proportionate shares of an ACL that may be harvested by members or traded among sectors; and a "common pool" of vessels operating under DAS that is allocated its own proportion of the overall ACL for the various groundfish species based on the historical landings of the vessels choosing not to join a sector.⁷⁶ The MSA, as amended by the Reauthorization Act, defines a "limited access privilege" as "a Federal permit, issued as part of a limited access system under [16 U.S.C. § 1853a] to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person."⁷⁷

By its terms, it would appear that the Amendment 16 sector program fits within the general definition of a LAPP.⁷⁸ Whether this program could be considered an IFQ system is another question. Notwithstanding the limited access privilege being a broader category than IFQ,⁷⁹ the definitions are virtually identical.⁸⁰ Distinguishing between the two, however, is important because the MSA's referendum requirement for New England only applies to an FMP or an amendment "that creates an individual fishing quota program."⁸¹ Thus, if Amendment 16 created an

74. *Id.*

75. *Id.*

76. *Id.*

77. 16 U.S.C. § 1802(26)(A) (2006). "Person" is defined as "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." *Id.* § 1802(36).

78. *See id.* § 1802(26).

79. *See id.* § 1802(26)(B) (LAP definition "includes individual fishing quotas").

80. *Compare id.* § 1802(23) (defining IFQ in relevant part to mean "a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person"), *with id.* § 1802(26)(A). The only difference is that the LAP definition specifies that the "limited access system" in question is the one "under section 303A." *See* 16 U.S.C. § 1853a (2006).

81. *Id.* § 1853a(c)(6)(D)(i).

IFQ, as some plaintiffs in *City of New Bedford* argued, a referendum should have been held.⁸² Even if the sector program was not an IFQ, but still some other species of LAPP, other special procedural and substantive requirements added by the Reauthorization Act would apply.⁸³

NMFS and the Council denied that Amendment 16 created any form of LAPP.⁸⁴ They argued that “fishermen are issued permits with an associated PSC, but that the PSC never operates as a limitation on how much the permit holder may catch and only acquires meaning when aggregated with other PSCs in a sector.”⁸⁵ Further, while a particular “sector is, arguably, limited by an ACE to a quantity of fish within the meaning of the LAPP and IFQ definitions,” the sectors themselves are not issued a permit and thus do not meet the statutory LAP definition.⁸⁶ In short, the government argued that Amendment 16 created “no ‘permit . . . to harvest a quantity of fish,’” which it contended was the touchstone of a LAPP.⁸⁷

In what it deemed a “close call,” the court agreed with the New England Council and NMFS that Amendment 16’s sector program was neither a LAPP nor an IFQ.⁸⁸ Ostensibly employing the *Chevron*⁸⁹ analysis, Judge Zobel determined that Congress had “explicitly left a gap for an agency to fill”⁹⁰ and found she was “bound by the Agency’s informed conclusion, reached at Congress’ express direction after an extended and formal administrative process including a notice-and-comment period.”⁹¹ More specifically to the plaintiff’s argument that a referendum was required, the court noted that Congress explicitly exempted sectors from this provision.⁹²

82. *City of New Bedford v. Locke*, No. 10–10789–RWZ, 2011 WL 2636863, at *3 (D. Mass. June 30, 2011).

83. *See, e.g.*, 16 U.S.C. §§ 1853a(c)(1), (5), (7).

84. *City of New Bedford*, 2011 WL 2636863, at *4.

85. *Id.* (citations omitted).

86. *Id.* (citations omitted). Note that the MSA defines only a “limited access privilege,” not a limited access privilege program. Here, “LAP” refers to the former, “LAPP” to the latter.

87. *Id.* (quoting 16 U.S.C. § 1802(26) (2006)).

88. *Id.* at *4.

89. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

90. *City of New Bedford*, 2011 WL 2636863, at *3 (quoting *Chevron, U.S.A., Inc.*, 467 U.S. at 843–44).

91. *Id.* at *4.

92. *Id.* (citing 16 U.S.C. § 1853a(c)(6)(D)(vi)).

The decision that the sector program did not amount to an IFQ appears well founded. Amendment 16 allowed for the creation of cooperative-like entities that enable fishermen to pool and manage a fixed amount of quota in a manner substantially different from the individual allocations under established IFQ programs like those for surf clams.⁹³ The sector program, however, almost certainly constitutes a LAPP. Because the plaintiffs appeared to focus exclusively on the referendum provision, it does not appear that they drew the court's attention to MSA section 1853a(c)(4), "Regional Fishery Associations."⁹⁴

Regional fishery associations are a specifically enumerated form of limited access privilege program.⁹⁵ They must "be located within the management area of the relevant Council," which develops criteria governing their operation.⁹⁶ The associations must be voluntary and have "established by-laws and operating procedures" and "consist of participants in the fishery who hold quota share."⁹⁷ Regional fishery associations must "develop and submit a . . . plan to the Council and the Secretary for approval based on criteria developed by the Council," and these plans must be "published in the Federal Register."⁹⁸ Perhaps most significantly, the association itself is not "eligible to receive an initial allocation of a limited access privilege," but it may hold those privileges which are assigned to its members.⁹⁹

The aforementioned discussion fairly describes the sector program. Amendment 16 created the framework for establishing these bodies, and each sector is responsible for submitting an operations plan that must be approved and published in the Federal Register.¹⁰⁰ The court itself noted that "sectors are 'temporary, voluntary, fluid associations of vessels.'"¹⁰¹ The fact that sectors are not issued permits, something the court found dispositive, is not a basis for finding that Amendment 16 did not create a LAPP, as the MSA's regional fishery association provision makes clear.

93. *See generally* Alliance Against IFQs v. Brown, 84 F.3d 343, 345 (9th Cir. 1996).

94. 16 U.S.C. § 1853a(c)(4).

95. *See id.*

96. *Id.* §§ 1853a(c)(4)(A)(i), (ii). Such criteria must also be approved by the Secretary and published in the Federal Register. *Id.* § 1853a(c)(4)(A)(ii).

97. *Id.* §§ 1853a(c)(4)(A)(iii), (iv).

98. *Id.* § 1853a(c)(4)(A)(vi).

99. *Id.* § 1853a(c)(4)(A)(v).

100. *See* City of New Bedford v. Locke, No. 10-10789-RWZ, 2011 WL 2636863, at *1 (D. Mass. June 30, 2011) (describing the program); *see also* 77 Fed. Reg. 26129 (May 2, 2012) (publication of sector operation plans for the 2012 groundfish fishing season).

101. *City of New Bedford*, 2011 WL 2636863, at *4 (citations omitted).

It appears, rather, that the court conflated the definition of a “limited access privilege,” which is a type of permit,¹⁰² with a limited access privilege program, which only requires the existence of fishery participants who hold such a permit. Had the plaintiffs focused more on this aspect, the New Bedford decision may have turned out differently.

2. Pacific Dawn, LLC v. Bryson

Another important aspect of catch share programs—the basis on which initial shares of fishing privileges are allocated—was at issue in another groundfish case, this time on the west coast.¹⁰³ *Pacific Dawn, LLC v. Bryson* involved Amendments 20 and 21 to the Pacific Groundfish FMP.¹⁰⁴ These two interrelated and highly complex sets of rules established an IFQ program for groundfish harvesters, shore-side and at-sea processors (motherships), and catcher-processing vessels.¹⁰⁵ Of particular concern were the baseline years used to determine allocations of Pacific whiting among fishing vessels and processors.¹⁰⁶

Councils often rely on control dates to establish break points for determining allocation baselines and even continued qualification for a fishery.¹⁰⁷ In *Pacific Dawn*, the court found a council’s failure to consider Pacific whiting harvests and processing patterns over a seven and six year period, respectively, between issuance of a control date and promulgation of an individual fishing quota program utilizing it to be unlawful.¹⁰⁸ In particular, the court shed additional light on the issue of when, if ever, a control date may become “stale” and how councils should weigh “current harvest” in allocating fishing privileges under a catch share program.¹⁰⁹

The Pacific Council began exploring an IFQ program in 2003.¹¹⁰ In order to “discourage increased fishing effort in the limited entry trawl fishery based on economic speculation” while the plan was under development, the Council established a control date of November 6,

102. See 16 U.S.C. § 1802(26) (2006).

103. *Pacific Dawn, LLC v. Bryson*, No. C10-4828 TEH, 2011 WL 6748501, at *1 (N.D. Cal. Dec. 22, 2011).

104. *Id.*

105. *Id.*; see also *id.* at *2.

106. *Id.* at *4.

107. See, e.g., *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1367 n.3 (Fed. Cir. 2004).

108. *Pacific Dawn*, 2011 WL 6748501, at *6.

109. *Id.* at *4.

110. *Id.* at *2.

2003.¹¹¹ The notice, published in the Federal Register, was meant to warn fishermen and processors that harvests after this date might not be considered for purposes of allocating quota shares.¹¹²

Development of the plan proceeded slowly.¹¹³ The final rule implementing these two amendments was not published until October 1, 2010, nearly seven years after the control date.¹¹⁴ In the course of developing the plan, the Council utilized the 2003 cut-off date for fishing vessels, allocating most stocks based on shares of harvest from 1994-2003.¹¹⁵ However, for allocation of some overfished species, the years 2003-2006 were used, due to implementation of “rockfish conservation areas” that substantially changed fishing patterns.¹¹⁶ For processor quotas, the Council used the years 1994 to 2004.¹¹⁷ The one-year extension for the processors, which allowed one company long involved in the fishery to qualify for a higher percentage of quota, “was the result of compromise.”¹¹⁸

Plaintiffs, groundfish fishermen and processors who would have gained a larger share of quota based on more recent history, argued that using the 2003/2004 cut off as the basis of allocating Pacific whiting violated the MSA.¹¹⁹ The Reauthorization Act required NMFS to develop a set of procedures “to ensure fair and equitable initial allocations, including consideration of —

- (i) current and historical harvests;
- (ii) employment in the harvesting and processing sectors;
- (iii) investments in, and dependence upon, the fishery; and

111. *Id.* (quoting Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Advance Notice of Proposed Rulemaking regarding a Trawl Individual Quota Program and to Establish a Control Date, 69 Fed. Reg. 1563 (Jan. 9, 2004) (to be codified at 50 C.F.R. pt. 600)).

112. *See* Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Advance Notice of Proposed Rulemaking regarding a Trawl Individual Quota Program and to Establish a Control Date, 69 Fed. Reg. at 1563 (to be codified at 50 C.F.R. pt. 600).

113. *Pacific Dawn*, 2011 WL 6748501, at *4.

114. *Id.*

115. *Id.* at *2.

116. *Id.* at *7 (quoting Decision Memorandum from NOAA Regional Administrator William W. Stelle, Jr. to NOAA Assistant Administrator for Fisheries Eric C. Schwabb, D45:*66 (Aug. 3, 2010)).

117. *Id.* at *2.

118. *Id.* at *4 n.5.

119. *Id.* at *4.

(iv) the current and historical participation of fishing communities.”¹²⁰

“Plaintiffs contend that Defendants violated subsection (i) of this provision—and also failed to base their decisions on ‘the best scientific information available,’ as required by National Standard Two . . . by not considering [more recent] fishing history.”¹²¹

NMFS relied on two principle arguments.¹²² One was that the NMFS and the Council “adequately considered current harvests by allocating quota shares to current permit owners rather than to individuals or vessels that may have participated in the fishery in the past.”¹²³ This argument was summarily dismissed.¹²⁴ “[T]he statute requires consideration of current harvests, not current permits, and considering historical harvests of current permits is distinguishable from considering current harvests themselves.”¹²⁵

The second, and ultimately self-defeating, argument was that the NMFS and the Council did consider more recent harvests for some purposes.¹²⁶ For example, they used the period from 2003 to 2006 to allocate certain “overfished” species, because that period “reasonably reflected recent fishing patterns,” which had been altered by new conservation areas established in 2003 to protect rockfish, “while not diverging too far from the target species allocation period of 1994-2003.”¹²⁷ The court found that it was rational to consider these more recent changes in making allocations of certain species, but that it was not rational to fail to conduct a similar analysis for Pacific whiting.¹²⁸ The court noted industry-provided information showing similar large changes post-2003/2004 in the distribution of whiting harvests and processing submitted during the comment period.¹²⁹ NMFS was faulted for failing to point to any evidence in the record “of whether the IFQ

120. Reauthorization Act, Pub. L. No. 109-479, § 106(a)(2), 120 Stat. 3575, 3589 (2007) (codified at 16 U.S.C. § 1853a(c)(5)(A)).

121. *Pacific Dawn*, 2011 WL 6748501 at *2 (quoting 16 U.S.C. § 1851(2)).

122. *Id.* at **4, 7.

123. *Id.* at *4.

124. *See id.* at *8.

125. *Id.*

126. *Id.* at *7.

127. *Id.* (quoting Decision Memorandum from NOAA Regional Administrator William W. Stelle, Jr. to NOAA Assistant Administrator for Fisheries Eric C. Schwabb D45:*66).

128. *See id.*

129. *See id.*

allocations based on history through 2003 and 2004 ‘reasonably reflected’ these more recent fishing patterns.”¹³⁰

The court was even more critical of the decision to extend the qualification period to 2004 for distribution of processor quotas.¹³¹ The Council did so “because keeping the date at 2003 was viewed to disadvantage a processor that was present as a participant during the window period but had increased its share of the processing substantially since the close of the original allocation period (2003).”¹³² The record showed that this exception was made on behalf of one processor and was adopted pursuant to an agreement among industry participants, to which the Council acceded.¹³³

The record also showed, however, that “five new buyers have entered the fishery since 2004.”¹³⁴ They were denied quota share based on NMFS’ and the Council’s reasoning that they accounted for only a small portion of the total Pacific whiting processing, and thus would not be prejudiced by being denied processing shares.¹³⁵ Finding no evidence that the “new entrants engaged in speculation when they entered the market after the announced control date,” the court held that no rational basis had been demonstrated for excluding these businesses.¹³⁶ “[T]he extension to 2004 was made to benefit a single processor, which begs the question of why that particular processor should benefit— notwithstanding an earlier control date—when others should not. This appears to be a quintessential case of arbitrariness.”¹³⁷ The judge was also troubled by the fact that this decision was the product of negotiation, “thus undermining any argument that Defendants’ decision-making was free from political compromise.”¹³⁸

In conclusion, the court held:

130. *Id.* (citation omitted).

131. *See id.* (“Most problematic is Defendants’ explanation of why the qualifying period for processors was extended to 2004.”)

132. *Id.* (quoting June 2010 Final Environmental Impact Statement prepared by the Council and NMFS, B22:A–214).

133. *Id.*

134. *Id.* (quoting June 2010 Final Environmental Impact Statement prepared by the Council and NMFS, B22:A–216).

135. *See id.*

136. *Id.*

137. *Id.*

138. *Id.* In light of this statement, Judge Henderson’s earlier dismissal of the claim that these accommodations constituted an unlawful “political compromise” contrary to the MSA’s National Standard 2 is somewhat puzzling. *See id.* at *4 (citing *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346, 350, 354 (D.R.I. 2003) (overturning tilefish allocation scheme based on industry compromise)).

While Defendants correctly argue that they have broad discretion to make decisions, and that no particular outcome is required by the MSA, they have failed to present a reasonable explanation for relying on the 2003 control date for some purposes but not others. Consequently, the Court finds that Defendants' failure to consider fishing history beyond 2003 for harvesters and 2004 for processors was arbitrary and capricious.¹³⁹

Despite the decision not to create a per se rule as to when a control may become stale, the court's strong language will likely be cited in future cases where there is a significant lag between a control date and the conclusion of the rulemaking process.

3. Coastal Conservation Association v. Blank

The Gulf and New England region ITQ referendum provision¹⁴⁰ provides that any new program is to be decided by a vote of "eligible permit holders."¹⁴¹ "For multispecies permits in the Gulf of Mexico, only those participants who have *substantially fished* the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum."¹⁴² In Coastal Conservation Association, the plaintiff challenged the Gulf Council's interpretation of what it meant to have "substantially fished" for so-called reef fish, including such stocks as grouper and tilefish, when it established eligibility to participate in a referendum to create a grouper and tilefish IFQ program.¹⁴³

139. *Id.* at *8.

140. *See supra* note 56 and accompanying text.

141. 16 U.S.C. § 1853a(c)(6)(D)(i).

142. *Id.* (emphasis added); *see also id.* § 1853a(c)(5) ("In developing a limited access privilege program to harvest fish a Council or the Secretary shall— . . . (E) authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons *who substantially participate in the fishery*, including in a specific sector of such fishery, as specified by the Council.") (emphasis added). Unlike the New England Council, the Gulf of Mexico Fishery Management Council ("Gulf Council") does not have a "multispecies" FMP. Congress appears to have intended to mean the Gulf Council's Reef Fish FMP, which covers a multitude of snapper, grouper, and like species. *See Gulf of Mexico Fishery Management Council, Reef Fish Management Plans*, http://www.gulfcouncil.org/fishery_management_plans/reef_fish_management.php (last visited Aug. 1, 2012).

143. Coastal Conservation Ass'n v. Blank, Nos.2:09-cv-641-Ftm-29SPC, 2:10-cv-95-Ftm-29SPC, 2011 WL 4530544, at *8 (M.D. Fla. Sept. 29, 2011).

The importance of being qualified to vote carries with it not only the ability to decide how an individual wishes his or her fishery to be managed, but also whether one will have the continued right to participate in the future LAPP-governed fishery at all. In this case, the council decided that in order to have “substantially fished” for purposes of the referendum, one has to have “landed 8,000 pounds of grouper and/or tilefish per permit within each of the years between 1999 and 2004, with the ability to drop one year”¹⁴⁴ Plaintiffs were fishermen excluded by these criteria.

The crux of their argument was that the term “substantially fished” had a plain meaning and that NMFS’ interpretation, as codified in the regulations,¹⁴⁵ was unworthy of deference under Chevron.¹⁴⁶ Further, the fishermen argued that the NMFS and the Council impermissibly applied MSA’s requirements for determining eligibility in the context of the reef fish IFQ program.¹⁴⁷

The court, reasonably in our view, disagreed that the term “substantially fished” was clear in its meaning and proceeded with the Chevron analysis on that basis.¹⁴⁸

Chevron set up a two-step framework for evaluating whether a court must defer to an agency’s construction of a statute it is charged with administering. Deference from the court is due if (1) Congress has not spoken directly on the precise question at issue and its intent is unclear, and (2) the agency’s interpretation is based on a permissible construction of the statute.¹⁴⁹

Having found the meaning of the term unclear, the court then agreed that NMFS’ regulatory interpretation of “substantially fished” and its application in this case was reasonable, denying the fishermen’s claims.¹⁵⁰

The regulations setting forth the Gulf IFQ referendum voter eligibility contain the following, non-exclusive considerations for determining if a permit holder meets the “substantially fished” standard:

144. *Id.*

145. *See* 50 C.F.R. § 600.1310 (2009).

146. Coastal Conservation Ass’n, 2011 WL 4530544, at *8.

147. *Id.*

148. *Id.* at *9.

149. *Id.* (quoting *In re MDL1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1193 (11th Cir. 2011)).

150. *Id.* at *10.

- (i) Current and historical harvest and participation in the fishery;
- (ii) The economic value of and employment practices in the fishery; and
- (iii) Any other factors determined by the Council with jurisdiction over the fishery for which an IFQ program is proposed to be relevant to the fishery and the proposed IFQ program.¹⁵¹

The council factors, noted in subparagraph (iii), “may include, but are not limited to, levels of participation or reliance on the fishery as represented by landings, sales, expenditures, or other considerations. A Council may also apply the same criteria for weighting eligible referendum votes.”¹⁵² These considerations are similar to the MSA’s criteria for establishing a general limited access program¹⁵³ and those specifically enumerated in the LAPP provision.¹⁵⁴ It is therefore unsurprising that the court in Coastal Conservation Association upheld their validity.

It is difficult to imagine what other factors would assist the Council in drawing a line between those active participants relying on a fishery, and those participants that fall short, and the line being tied to a “substantially fished” standard. Experience suggests that these plaintiffs may likely have preferred to see more emphasis on the National Standard 8 focus on sustaining the participation of fishing communities.¹⁵⁵ Catch share programs like the grouper/tilefish IFQ are controversial in large part because people with some demonstrated reliance on or participation in a fishery are excluded, while those making the cut obtain a valuable allocation.¹⁵⁶ Fewer vessels mean fewer crew jobs and support services provided in coastal communities.

The criteria used in the Gulf reef fish referendum makes this clear. The 8,000-pound per year criterion qualified fishermen accounting for about ninety percent of the grouper and tilefish landings over the baseline period.¹⁵⁷ However, these fishermen accounted for only thirty-

151. 50 C.F.R. § 600.1310(c)(3).

152. *Id.* § 600.1310(d).

153. 16 U.S.C. § 1853(b)(6).

154. *Id.* § 1853a(c)(5).

155. *See id.* § 1851(a)(8).

156. *See* Carroll, *supra* note 41, at 175-76; *see also* Peter Schikler, *Has Congress Made It Harder to Save the Fish? An Analysis of the Limited Access Privilege Program (LAPP) Provisions of The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006*, 17 N.Y.U. ENVTL. L.J. 908, 915-16 (2008-2009).

157. Coastal Conservation Ass’n, 2011 WL 4530544, at *10.

one percent of all reef fish permit holders.¹⁵⁸ The other sixty-nine percent will have to buy quota shares in order to harvest these species in the future.¹⁵⁹ This may be considered a harsh result, but the Gulf Council's decision here is typical of those councils that have had to wait for decades when determining who qualifies for permits in fisheries to which access has been limited.¹⁶⁰

Catch shares can raise the stakes of these decisions, both for managers and the industry, but the need to make such choices is a consequence of MSA's conservation requirements. Limiting harvest inevitably involves making an allocation decision—even keeping a quota-limited fishery open to all entrants entails an allocation, such as to the swiftest and most powerful vessels.¹⁶¹ Having an objective and reasonably clear set of standards on which to base qualification decisions provides fishermen with some sense of the “rules of the road” and is a more effective means of participating in the management process.

B. Meaning and Extent of ACLs and AMs

1. *Oceana, Inc. v. Locke*

As previously mentioned, the addition of ACLs and AMs has been one of the more contentious aspects of the Reauthorization Act, as well as a ripe field for litigation.¹⁶² *Oceana, Inc. v. Locke* revolved around Amendment 16 to the New England Council's Northeast Multispecies FMP. The court examined the relationship between the new ACL/AM provision and the existing requirement that each FMP “establish a standardized bycatch reporting methodology” or SBRM.¹⁶³ Amendment 16 was, in part, designed to satisfy §104(a)(10) of the Reauthorization

158. *Id.*

159. *See id.*

160. “A limited access scheme restricts the number of vessels allowed to fish in a particular fishery with the goal of ending overfishing and rebuilding the fish population.” *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346, 349-50 (D.R.I. 2003). Limited access is not synonymous with catch shares, it is a distinct tool long used to limit effort in a fishery for conservation purposes. *See generally* LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL: PROCEEDINGS OF A NATIONAL CONFERENCE TO CONSIDER LIMITED ENTRY AS A TOOL IN FISHERY MANAGEMENT (R. Bruce Rettig & Jay J.C. Ginter eds., 1978), cited in Seth Macinko, *Fishing Communities as Special Places: The Problems and Promise of Place in Contemporary Fisheries Management*, 13 OCEAN & COASTAL L.J. 71, 78 n.21 (2007-2008).

161. *See* 16 U.S.C. § 1853(b)(6).

162. *See* Introduction *supra* pp. 2-3.

163. *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 107 (D.D.C. 2011).

Act, requiring councils to “establish a mechanism for specifying annual catch limits [ACLs] . . . at a level such that overfishing does not occur in the fishery, including measures to ensure accountability’ with those limits.”¹⁶⁴ In relevant part, Oceana challenged Amendment 16 on two grounds: “Amendment 16’s mechanism for monitoring compliance with ACLs and its alleged lack of AMs for certain species.”¹⁶⁵ With respect to the former, Oceana argued that NMFS had violated both the SBRM and ACL requirements by failing to include in Amendment 16 “a bycatch-reporting methodology (as required by § (a)(11)) capable of monitoring compliance with ACLs (as required by § (a)(15)).”¹⁶⁶

The court found that nothing in the statutory text requires FMPs to “include a bycatch-reporting methodology designed to do the work of monitoring and enforcing ACLs.”¹⁶⁷ To hold otherwise would inappropriately “fus[e] these two distinct requirements into a new obligation that is not actually part of the Act.”¹⁶⁸ The court honed in on the fact that Congress used two distinct words in ACL/AM and SBRM provisions: “measures” in the former and “methodology” in the latter.¹⁶⁹ Canons of statutory construction require that the words be interpreted to mean separate things because they serve distinct purposes.¹⁷⁰ The court explained that subsection (a)(11)’s “methodology” was designed to “produce[] annual fishery-wide assessments of bycatch that benefit from high-quality data gathered over a long period of time.”¹⁷¹ Subsection (a)(15), on the other hand, “requires in-season bycatch reports to measure discards in real time” to determine whether ACLs have been exceeded in

164. *Id.* at 104 (alteration in original) (quoting 16 U.S.C. § 1853(a)(15)).

165. *Id.*

166. *Id.* at 107 (emphasis omitted). In a previous case, Oceana had successfully challenged the Northeast Multispecies Plan for failing to establish an SBRM. *See Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 232 (D.D.C. 2005). It also succeeded in overturning the Omnibus SBRM Amendment promulgated by NMFS to address this finding on the grounds that the agency had too much discretion to implement its terms. *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011). In the Amendment 16 case, Oceana again tried to litigate the failure to establish an SBRM, but the Court found it “can provide no further relief because the SBRM Amendment has already been remanded” and NMFS was in the process of complying with the Circuit Court’s order. *Oceana*, 831 F. Supp. 2d at 114.

167. *Oceana*, 831 F. Supp. 2d at 108.

168. *Id.* at 109 (alteration in original) (citation omitted).

169. *Id.* (quoting 16 U.S.C. §§ 1853(a)(11), (15) (2006)).

170. *See id.* at 108 (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002)).

171. *Id.* at 109 (citations omitted).

a given year.¹⁷² The court ultimately held that a “FMP is sufficient so long as it independently complies with [subsections] (a)(15) and (a)(11).”¹⁷³

The interplay between accountability measures and bycatch monitoring, however, presented another question.¹⁷⁴ The definition of catch includes both fish that are retained and bycatch.¹⁷⁵ Bycatch must be accurately assessed to ensure ACLs are not exceeded because bycatch counts against a stock’s catch limits.¹⁷⁶ Bycatch, therefore, must be monitored to comply with both subsections (a)(11) and (a)(15).¹⁷⁷ The question is: what level of monitoring is sufficient to comply with both requirements?

Oceana argued that Amendment 16 failed to allocate at-sea observers “at a level higher than that required under the [vacated Northeast Region] SBRM Amendment.”¹⁷⁸ To monitor bycatch, the SBRM Amendment required government-funded, on-board observers to monitor bycatch discards of fishing vessels at sea to ensure sufficient data is collected to meet delineated performance standards.¹⁷⁹ Oceana argued in this case that the Amendment 16’s bycatch monitoring provisions, which it alleged relied on the SBRM, were “inadequate to monitor compliance with ACLs.”¹⁸⁰

The court held that “an FMP need not necessarily mandate a specific level of observer coverage.”¹⁸¹ Instead, all that the FMP must do to satisfy the law “is require bycatch monitoring adequate to support measures to ensure accountability with ACLs.”¹⁸²

Although the court found that Amendment 16 does not require a set level of observer coverage, its monitoring provisions were nonetheless sufficient.¹⁸³ As the court noted,

172. *Id.* (citation omitted).

173. *Id.*

174. *Id.* at 110.

175. *Id.* (citing 50 C.F.R. § 600.310(f)(2)(i) (2011)). “The term ‘bycatch’ means 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.” 16 U.S.C. § 1802(2) (2006).

176. *Oceana*, 831 F. Supp. 2d at 110.

177. *Id.*

178. *Id.*

179. *See* 73 Fed. Reg. 4736, 4738 (Jan. 28, 2008).

180. *Oceana*, 831 F. Supp. 2d at 110.

181. *Id.* at 111.

182. *Id.*

183. *Id.* at 112.

Amendment 16 provides: For observer or at-sea monitor coverage, minimum coverage levels must meet the coefficient of variation in the [SBRM Amendment]. The required levels of coverage will be set by NMFS based on information provided by the Northeast Fisheries Science Center (NEFSC) and may consider factors other than the SBRM CV standard when determining appropriate levels.¹⁸⁴

This provision was determined to be both mandatory and sufficiently detailed to satisfy the requirements of subsection (a)(15) because it “require[d] that bycatch be accurately reported throughout the fishing season at levels such that ACLs can be monitored and enforced.”¹⁸⁵

Oceana also addressed whether accountability measures are necessary where a zero allocation has been given for a species.¹⁸⁶ In this case, sector vessels were subject to sub-ACLs and sub-AMs for most stocks with the exception of five (“[Atlantic] halibut, ocean pout, windowpane flounder, Atlantic wolffish, and SNE/MA winter flounder”).¹⁸⁷ For these five stocks, the groundfish sectors did not receive any annual catch entitlement.¹⁸⁸

Because the sector vessels were prohibited from retaining any fish from these five stocks, it was unclear how to interpret the lack of an allocation.¹⁸⁹ *Oceana* interpreted it as if the sector’s sub-ACL was zero.¹⁹⁰ Reasoning from this position, *Oceana* contended that because a sub-ACL existed (albeit for zero fish), there must also be accompanying sub-AMs.¹⁹¹ In short, the argument is that Amendment 16 lacks

184. *Id.* at 113 (alteration in original) (citation omitted).

185. *Id.* at 111.

186. *Id.* at 114-15. In other words, sustainable catch levels consistent with the rebuilding requirements for such species are so low as to not allow for any directed harvest such that a prohibition on retention and landing is warranted. *See id.*

187. *Id.* at 115. The National Standard 1 guidelines allow for what it calls “sector-ACLs,” here called “sub-ACLs,” when a fishery contains “distinct user group[s] to which separate management strategies and separate catch quotas apply.” 50 C.F.R. § 600.310(f)(5)(ii) (2011). As noted above, Amendment 16 created two distinct classes, sectors and a “common pool.” *See City of New Bedford v. Locke*, No. 10-10789-RWZ, 2011 WL 2636863, at *2 (D. Mass. June 30, 2011). “It also allocated sub-ACLs—e.g., portions of each stock’s total ACL—to the common pool and sectors.” *Oceana*, 831 F. Supp. 2d at 115 (citations omitted). *Oceana* challenged the failure of NMFS to establish “sub-AMs” for the sectors. *See id.* at 115-18.

188. *Oceana*, 381 F. Supp. 2d at 115.

189. *Id.*

190. *Id.*

191. *Id.*

measures to ensure accountability in the event that groundfish sectors' incidental catch of the five species causes their ACL to be exceeded.¹⁹²

On this point the court agreed, explaining,

[T]he fact that the five species may not be retained, and are thus unlikely to be targeted by fishermen, does not mean that they will not accidentally be caught and subsequently discarded. Since the "catch" limited by ACLs includes both fish that are retained (landed) and bycatch that are discarded at sea, the ACLs for the five stocks may be exceeded by accumulation of bycatch alone.¹⁹³

It also based its decision on NMFS' own interpretation of this issue, as expressed in the National Standards guidelines.¹⁹⁴ Having been implemented through full notice and comment rulemaking, the court found the guidelines deserving of considerable deference.¹⁹⁵ Relevant to this issue, the court agreed with the guidelines' interpretation "that sub-AMs are not mandatory so long as Amendment 16 establishes an overall suite of accountability measures sufficient to prevent overfishing of each of the five stocks as a whole."¹⁹⁶ The court found, however, that NMFS did not.¹⁹⁷

Under Amendment 16, the common pool fishery ends when its allocation of the five stocks at issue is projected to be met, and any overages are deducted from the following year's allocation.¹⁹⁸ The court found "that adjusting fishing-input or -output controls for the common pool alone will be insufficient to protect these five stocks from overfishing."¹⁹⁹ The court also rejected NMFS' argument that the "management measures [governing sectors . . .] function as prospective sub-AMs for the five species."²⁰⁰ While the court agreed that appropriate management measures could "function as 'prospective' AMs" so long as they help ensure that overfishing does not occur, it found in this case that

192. *Id.* at 116.

193. *Id.* at 115-16 (citation omitted).

194. *See* 16 U.S.C. § 1851(b) (2006) (directing the Secretary to "establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans"). *See also* 50 C.F.R. § 600.310 (2011) (the National Standard One guidelines).

195. *Oceana*, 831 F. Supp. 2d at 117 (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

196. *Oceana*, 831 F. Supp. 2d at 117. (emphasis in original).

197. *Id.* at 118.

198. *Id.* at 118, n.3.

199. *Id.* at 118 (citations omitted).

200. *Id.* (citation omitted).

the management controls would not achieve that end.²⁰¹ Most importantly, the court held: “NMFS’s Guidelines indicate that while in-season AMs like the ones established by Amendment 16 for the five stocks are appropriate and even recommended, AMs for when an ACL is exceeded are mandatory”²⁰²

This is a strong holding, one to which Councils and NMFS will likely adhere when deciding when and how to establish sub-ACLs for various segments of a particular fishery. When no allocation is made, or where ACLs are set at zero, it is clear that AMs still must be put in place to ensure that any catch (bycatch or landings) do not exceed whatever low catch threshold is necessary to rebuild such stocks.²⁰³ This will prove to be challenging. When no allocation of a particular stock of fish is made, it is generally, like the five species at issue in *Oceana*, because the stocks are severely depleted.²⁰⁴ Instituting ACLs and AMs for such stocks typically means that the harvest of other, healthier stocks caught in association will be foregone.²⁰⁵ These low-allocation stocks are known as “choke species” for this very reason, and currently, the New England region is plagued with many such stocks in addition to the aforementioned five.²⁰⁶

The other major holding of *Oceana*, relating to the need for an FMP to include some level of monitoring as an adjunct to the Reauthorization Act’s new ACL and AM provisions, will likely be influential.²⁰⁷ Undoubtedly, this is another issue that will be tested again judicially.²⁰⁸

2. Flaherty v. Bryson

Before any other decisions can be made, the council and NMFS must define what exactly they are going to manage. In the case of the MSA, that decision comes in the form of defining the “fishery.”²⁰⁹ The MSA

201. *Id.* at 119 (citing 50 C.F.R. § 600.310(g)(2) (2011) & 16 U.S.C. § 1853(a)(15) (2006)).

202. *Id.* at 119-120 (emphasis added).

203. *See* 50 C.F.R. § 600.310(g).

204. *See, e.g., Oceana*, 831 F. Supp. 2d at 119.

205. *See* Mark Schroppe, Fisheries: *What’s the Catch?*, 465 NATURE 3 (2010).

206. *See id.*

207. *See generally Oceana*, 831 F. Supp. 2d at 95.

208. Indeed, in *Oceana*’s present case challenging the Mid-Atlantic Council’s Omnibus ACL/AM Amendment, *supra* note 5, the issue of what level, if any, of in-season monitoring is required is one of the issues raised.

209. *See* 16 U.S.C. § 1852(h)(1) (2006) (“Each Council shall, . . . for each fishery under its authority that requires conservation and management, prepare and submit” FMPs and amendments to such FMPs “that are necessary.”).

defines a “fishery” as “one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics.”²¹⁰ A “stock of fish” is “a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.”²¹¹ The Council determines which “target stocks” (fish that are deliberately caught), and/or “non-target stocks” (fish that are incidentally caught) to include in the fishery.²¹² “Once a fish is designated as a ‘stock in the fishery’ the Council must develop conservation and management measures, including ACLs and AMs, for that stock.”²¹³ Put another way, any stock managed by an FMP is said to be a stock in the fishery.²¹⁴

Plaintiffs in *Flaherty v. Bryson* challenged Amendment 4 to the Atlantic Herring FMP, alleging that a distinctly different species, the river herring, was unlawfully excluded as a stock in the fishery.²¹⁵ The Atlantic sea herring fishery has been managed as the only stock in the Atlantic herring FMP since 1999.²¹⁶ These herring are distinguishable from “river herring” because they spend their entire lives at sea, instead of spawning in rivers as their anadromous counterparts do.²¹⁷ River herring mix with Atlantic herring during their time at sea, and are incidentally caught with Atlantic herring.²¹⁸

In 2009, the Council initiated Amendment 4 to the FMP as a means of bringing the plan into compliance with the Reauthorization Act’s new requirements.²¹⁹ Because Atlantic herring were not subject to

210. *Id.* § 1802(13).

211. *Id.* § 1802(42).

212. 50 C.F.R. § 600.310(d)(1), (3)-(4) (2011).

213. *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 50 (D.D.C. 2012) (citations omitted).

214. *Id.* at 58 n.9 (citation omitted).

215. *Id.* at 58. In fact, “river herring” are actually four different species which are referred to in the collective: “(1) blueback herring (*Alosa aestivalis*), (2) alewife (*Alosa pseudoharengus*), (3) American shad (*Alosa sapidissima*), and (4) hickory shad (*Alosa mediocris*).” *Id.* at 45 (citation omitted). Parenthetically, on November 2, 2011, NMFS made a 90-day finding under the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A), that a petition to list two of these species, alewife and blueback herring, “presents substantial scientific information indicating the petitioned action may be warranted,” and initiated a status review. 76 Fed. Reg. 67652, 67652 (Nov. 2, 2011).

216. See New England Fishery Management Council, *Atlantic Herring Fishery Management Plan*, available at <http://www.nefmc.org/herring/summary/herring.pdf>. The original herring FMP was adopted in 1978, but that plan was rescinded in 1982 in favor of state regulation of the resource. *Id.*

217. *Flaherty*, 850 F. Supp. 2d at 45.

218. *Id.*

219. *Id.*

overfishing, the MSA required the Council to update the FMP so that it complied with ACL and AM requirements by 2011.²²⁰ Due to a lengthy plan development process, the Council deferred a host of other difficult measures, including “measures to address river herring bycatch,” to a subsequent amendment.²²¹ This action was the subject of dispute in *Flaherty*.²²²

The court ultimately agreed with plaintiffs’ contention that the Council’s decision to exclude river herring was arbitrary and capricious and unsupported by the record, finding that ACLs and AMs are required for “all stocks in need of conservation and management, not just for those stocks that are part of the fishery prior to passage of the [Reauthorization Act].”²²³ This holding was premised on a textual reading of the MSA, along with the National Standard One guidelines.²²⁴

[I]n developing an FMP, the Council must decide which species or other categories of fish are capable of management as a unit, and therefore should be included in the fishery and managed together in the plan. This decision entails two basic determinations. The Council must decide (1) which stocks “can be treated as a unit for purposes of conservation and management” and therefore should be considered a “fishery” and (2) which fisheries “require conservation and management.”²²⁵

In holding that NMFS and the Council unlawfully failed to explain the exclusion of river herring as a stock in the fishery in Amendment 4, the court rejected NMFS’ arguments that (1) the statutory deadline for implementing herring ACLs and AMs necessitated deferring consideration of the addition of river herring and (2) that NMFS reasonably deferred to the Council’s reasoned decision.²²⁶

As to the first, the court found no basis in the record for not addressing the issue “when the Council had more than four years to meet the statutory deadline for fishing year 2011.”²²⁷ “Defendants must provide some meaningful explanation as to why it was not possible to consider which stocks, other than Atlantic herring, should be subject to the ACLs and AMs which are so central to effective fishery management

220. *Id.*

221. *Id.* at 46 (citation omitted).

222. *Id.*

223. *Id.* at 52.

224. *See id.* at 43-44.

225. *Id.* at 51 (quoting 16 U.S.C. §§ 1802(13), 1852(h)(1)).

226. *Id.* at 51.

227. *Id.* at 52.

and avoidance of overfishing.”²²⁸ The court also faulted the agency for failing to explain “why the information in the Administrative Record cited by Plaintiffs was deemed insufficient to justify including river herring as a stock . . . or to permit setting at least an interim Acceptable Biological Catch limit for the species”²²⁹

As to the second argument, NMFS stated that “river herring were not designated as a stock in the fishery because the Council decided to include only target stocks in the fishery, and river herring is a non-target stock.”²³⁰ The agency argued that, short of a clear violation of law, it must “defer to the Council’s determination of what stocks are in the fishery”²³¹ The court, however, held that it is NMFS’ “responsibility to decide whether an FMP, including the composition of its fishery, satisfies the goals and language of the MSA.”²³² While NMFS may defer to a council’s “policy choices,” the agency “must make its own assessment of whether the Council’s determination as to which stocks can be managed as a unit and require conservation and management is reasonable.”²³³ The court found that NMFS failed to make this inquiry it found required, a failure that “does not demonstrate reasoned decision-making.”²³⁴

The court’s reasoning in reaching this decision is subject to some criticism. It appears that the Council and NMFS mostly erred in initially considering measures to reduce river herring bycatch, but then changing course and limiting Amendment 4 solely to addressing herring ACLs and AMs.²³⁵ The court’s decision, that it was arbitrary and capricious to have failed to more thoroughly consider including river herring as a “stock in the fishery” and setting ACLs and AMs for that stock, was largely predicated on the MSA’s definition of “fishery” and “stock of fish.”²³⁶ There is no doubt that as river herring are incidentally harvested in the sea herring fishery (as well as others), they could be considered part of that “fishery.” However, the National Standard One guidelines authorize

228. *Id.* at 52-53 (citing *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010)).

229. *Id.* at 53.

230. *Id.* (citing Defs.’ Mot. 17).

231. *Id.* (citing Defs.’ Mot. 15-16).

232. *Id.* at 54 (citing *N.C. Fisheries Ass’n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 71-72 (D.D.C. 2007)).

233. *Id.* at 55 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

234. *Id.* at 56 (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 56).

235. *Id.* at 45.

236. *Id.* at 51 (quoting 16 U.S.C. §§ 1802(13), (42)). *See also* notes 157-158, and accompanying text.

a council to make the determination as to “which specific target stocks and/or non-target stocks to include in a fishery.”²³⁷ *Flaherty* appears to go too far in removing that discretion from the councils.

This is particularly true in the case of river herring. As quoted above, the MSA requires the development of an FMP “for each fishery under its authority that requires conservation and management.”²³⁸ River herring, as an anadromous fish principally found in state waters during key portions of its lifecycle, falls under the authority of the Atlantic States Marine Fisheries Commission (“ASMFC”), which has its own FMP for the stock.²³⁹ Furthermore, the MSA has a specific provision giving councils the discretion to investigate the “effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region.”²⁴⁰ Thus, the law provides a specific (and non-mandatory) means of addressing incidental river herring bycatch via a means far short of adding such species to an FMP. While these points appear not to have been raised by NMFS in this case, the lack of deference to the Council’s and NMFS’ determination as to the definition of the appropriate management unit is somewhat disconcerting.

As a result of *Flaherty*, when information exists that species are being targeted or caught incidentally as bycatch, the Council and NMFS will feel compelled to determine whether to include that stock in the fishery, first by assessing whether that stock can be treated as a unit for purposes of management and conservation, and second by determining whether that stock requires conservation and management.²⁴¹ In this regard, the *Flaherty* decision will likely create some confusion over the proper management plan under which a bycatch must be managed. Councils will have to decide how much bycatch of a given species will require that it be included as a stock in the fishery, regardless of how small the catch may be, or if the bycatch must be sizeable enough to warrant management.

237. 50 C.F.R. § 600.310(d)(1).

238. *Flaherty*, 850 F. Supp. 2d at 43 (quoting 16 U.S.C. § 1852(h)(1) (emphasis added)).

239. See Atlantic States Marine Fisheries Commission, Managed Species: Shad and River Herring, <http://www.asmf.org/shadRiverHerring.htm> (last visited July 30, 2012). The ASMFC is an interstate compact organization designed to coordinate fisheries management among the states on the East Coast. Atlantic States Marine Fisheries Commission, About Us, <http://www.asmf.org/aboutUs.htm> (last visited July 30, 2012).

240. 16 U.S.C. § 1853(b)(9).

241. See *Flaherty*, 850 F. Supp. 2d at 38.

C. Cases Addressing Other Reauthorization Act Issues

These cases are by no means exhaustive of the issue raised by the Reauthorization Act's new provisions. For instance, that Act's provision requiring improved collection of the amount and type of fish harvested by recreational anglers was at issue in *The Fishing Rights Alliance, Inc. v. NMFS*.²⁴² Plaintiffs in that case argued that NMFS' failure to timely meet the Reauthorization Act's January 1, 2009 deadline for creating an improved data collection program and registry of fishery participants should essentially estop the agency "from basing closures on data Congress expressly found was no longer useful."²⁴³ While the new data collection program was not operative by the deadline, the court avoided the issue of whether a failure in this regard warranted vacation of the challenged management measures by finding that NMFS had taken sufficient steps towards implementation in a timely manner.²⁴⁴

In terms of the Reauthorization Act's heightened social and economic protections, no decisions have thoroughly examined the meaning or extent of the changes in the law.²⁴⁵ The one case that did make a substantive decision relating to the fishery impact statement, *Coastal Conservation Association*,²⁴⁶ did not examine the scope of this provision in any great detail. Rather, the case is noteworthy for its holding that subsection 1853(a)(9) of MSA, requiring each FMP to contain a "fishery impact statement,"²⁴⁷ "provides an independent basis for [a] challenge" to that FMP.²⁴⁸ In other words, a councils' or NMFS' failure to comply with either the substantive or procedural requirements in subsection 1853(a)(9) is grounds for finding an FMP unlawful.

The court in *Coastal Conservation Ass'n* outlined some of the considerations that would be involved in a review of a fishery impact statement.²⁴⁹ First, the court stated "in cases where the substance of the decision [e.g., the sufficiency of the analysis in the impact statement] is

242. No. 8:09-CV-00916-T-30AEP, No. 8:09-CV-01544-T-30AEP, No. 8:09-CV-02265-T-30AEP, 2011 U.S. Dist. LEXIS 100031 at **30-31 (M.D. Fla. July 15, 2011) (citing 73 Fed. Reg. 79705, 79705 (Dec. 30, 2008)).

243. *Id.* at *39 (quoting Dkt. No. 33 at 6).

244. *See id.* at *46.

245. For a discussion of these changes, *see supra* Part II.A.

246. *See Coastal Conservation Ass'n v. Blank*, Nos. 2:09-cv-641-FtM-29SPC, 2:10-cv-95-FtM-29SPC, 2011 WL 4530544, at *5-6 (M.D. Fla. Sept. 29, 2011).

247. *See supra* notes 26-30, and accompanying text.

248. *Coastal Conservation Ass'n*, 2011 WL 4530544, at *5.

249. *Id.* at *6

at issue, a court gives deference to a final agency decision.”²⁵⁰ This is not the *Chevron* deference given to the agency’s interpretation of statutes it is charged with administering,²⁵¹ but rather the deference a court will give an agency, acting “within its area of expertise, at the frontiers of science[,]” to its scientific determinations.²⁵² That is to say, with a great deal of deference. When, as in *Coastal Conservation Ass’n*, the issue is whether the agency “followed the proper procedures in reaching [its] decision[,]” the court undertook a *de novo* review.²⁵³

In this case, the plaintiffs alleged that NMFS violated subsection 1853(a)(9) by failing “to consider the effect of Amendment 29 on the entire fishery [and] failed to consider its effect on the recreational fishing sector”²⁵⁴ Recall from the discussion above that the management plan at issue involved the development of a grouper/tilefish IFQ for Gulf of Mexico commercial fishermen.²⁵⁵ As it did not change the allocation between the recreational and commercial sectors, nor did it affect overall harvest limits, the impact assessment concluded that the amendment “does ‘not present many potential impacts to the recreational sector.’”²⁵⁶ Obviously, the plaintiffs felt otherwise, and the impacts they perceived were not captured in the fishery impact statement.

The amendment did “not contain a specifically identified section addressing 16 U.S.C. § 1853(a)(9).”²⁵⁷ However, the court accepted the government’s argument that the fishery impact statement requirement could be met by containing analysis of the issue – here recreational sector impacts – anywhere scattered about the amendment’s voluminous final environmental impact statement and even by incorporating other documents by reference.²⁵⁸

While this case likely did not present the best set of facts for testing how rigorously courts will hold the councils and NMFS to the letter of the Reauthorization Act-strengthened social and economic provisions, the holding is not encouraging. A similar holding was made in a very

250. *Id.* (citing *Sierra Club v. Johnson*, 436 F.3d 1269, 1273 (11th Cir. 2006)).

251. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

252. *Id.* (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)).

253. *Id.*

254. *Id.* at *5 (citation omitted).

255. *See supra* Part III.A.

256. *Coastal Conservation Ass’n*, 2011 WL 4530544, at *7 (quoting Doc. # 93, p. 11).

257. *Id.* at *6.

258. *See id.* at *7.

cursory fashion in *City of New Bedford v. Locke*.²⁵⁹ Thus far, courts are not according the new procedural requirements the same type of “hard look” review applied to NEPA analyses.²⁶⁰

V. CONCLUSION

The process of untangling the meaning of the new Reauthorization Act provisions is far from over. At this early stage, however, environmental organizations, particularly Oceana, Inc., have been both more active and more successful in litigation. This may be explained, at least in part, by the observation that such organizations tend to focus more on overarching conservation issues than the details of particular fisheries. That is to say, such groups may find it more important to establish the principle that reactive accountability measures are mandatory for all fisheries than simply trying to show that they are needed for the Atlantic halibut fishery in particular. Fishermen and the organizations that represent them have the opposite concern. Again, to generalize, they are most concerned about their particular fishery and the impacts of the management measures imposed by an FMP or amendment upon it. They care what area may be closed to harvest next year if the Atlantic halibut ACL is exceeded this year. In short, environmental groups can choose their cases, while the industry’s cases choose them.

But it has been ever thus. The battle to define the Reauthorization Act’s terms will continue and courts will continue to provide clarity where Congress failed to do so. At some point in the not too distant future, Congress will take up Magnuson-Stevens Act reauthorization again, and it will again have its say on the next stage of evolution of our nation’s fishery management system.

259. See No. 10-10789-RWZ, 2011 WL 2636863, at *6 (D. Mass. June 30, 2011).

260. See, e.g., *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 19 (D.D.C. 2000).