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JUDICIAL REMEDIES IN FISHERIES LITIGATION: PROS, CONS, AND PRESTIDIGITATION?

Marian Macpherson and Mariam McCall*

[In our Constitutional system the commitment to separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches. — Chief Justice Burger]

I. INTRODUCTION

On August 7, 2000, a federal district judge in Seattle enjoined trawling for Alaska groundfish, one of the biggest commercial fisheries in the world.2 In September 1998, a federal district judge in Virginia issued an order increasing the quota for the summer flounder fishery by almost 400,000 pounds.3 In 1999 and 2000, a federal district judge in Hawaii issued a series of five court orders closing large portions of the Pacific ocean to fishing and establishing an evolving regime of incredibly specific fishery management measures.4 In 2002, a federal judge in the District of Columbia issued, then rescinded, an order imposing fifty specific management measures on the New England groundfish fishery ranging from bag...
limits, to closed areas, to observer coverage requirement. The growing number of court orders that appear to judicially manage our federal fisheries requires us to consider these remedies in light of Constitutional notions of separation of powers, as well as to consider their practical implications. Understanding these injunctions and what they mean requires an exploration of the roots of agency regulatory authority, a review of the statutes governing federal fisheries management, and a review of the recent lines of cases resulting in these surprising remedies. This paper will provide this overview, then consider the outcomes of these cases from the perspectives of the litigants, the public, and the resource.

II. BACKGROUND

In the United States, the National Marine Fisheries Service (NMFS) manages our federal fisheries pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), a groundbreaking statute that sets up a system of regional fishery management councils composed of various stakeholders in the fishing community and empowers the Councils to use a public process to develop recommended regulations for fisheries under their jurisdictions. The statute is designed to encourage science and policy debates taking place at the stakeholder level, well in advance of agency rulemaking.

Since 1996, NMFS has been the subject of a dramatically increasing number of lawsuits. Several key factors influencing this increase in fisheries litigation include: the 1996 Sustainable Fisheries Act amendments

6. The authors note that because this paper is focused on the issue of judicial remedies, the only cases discussed are those which the agency lost, with an emphasis on those that resulted in injunctions. This limited discussion might present a somewhat skewed picture of the National Marine Fisheries Services' overall litigation record. Overall, NMFS has a winning record with respect to fisheries management issues. For example, in 2002, there were eighteen decisions in lawsuits regarding NMFS's management of federal fisheries, including three that addressed the interface of the ESA with fisheries management. Of these eighteen decisions, NMFS won ten, lost five, experienced two with mixed results, and had one dismissed.
8. It has been suggested that negotiated rulemaking should be used to resolve issues involving the use of Federal fisheries resources. See, e.g., Sebastian O'Kelly, Old Conflicts Stymie NMFS' Industry Progress, COM. FISHERIES NEWS, Apr. 2001, at 7A. However, the council system established by the Magnuson-Stevens Act is essentially negotiated rulemaking, though some might argue that not all perspectives are fairly represented at the table. (Author's note).
to the Magnuson-Stevens Act, which established new conservation requirements for fishery management plans to meet; the 1996 amendments to the Regulatory Flexibility Act, adding a judicial remedy to enforce the requirement that federal agencies analyze economic impacts on small entities; and a large influx of money to environmental organizations to support a coordinated legal effort to “restore marine ecosystems and fisheries.” Due in part to these changes, a new genre of fishery litigants has emerged on the scene that includes interests as diverse as North Pacific factory trawlers, Gulf of Mexico sport fishermen, and environmental groups such as Greenpeace and Natural Resources Defense Council. For a variety of reasons, these litigants have chosen not to pursue their desired changes through the Magnuson-Stevens Act’s council process, but rather to proceed to court. This new wave of litigation has led to a variety of far-reaching injunctions, including massive closures of areas in the Pacific Ocean and court-ordered modifications of fishing quotas in the Atlantic.

Our discussion of modern fisheries injunctions begins with an overview of the source of agency regulatory authority, a description of the Magnuson-Stevens Act and other applicable laws that govern Federal fisheries management, and a brief description of traditional judicial remedies.

A. Source of Agency Regulatory Authority

The source of agency regulatory authority in the United States traces back to the Constitution. The Constitution vests the power to prescribe laws solely with the legislative branch. For certain complex regulatory programs, Congress establishes the general legal requirements, then delegates authority for administering the programs, and hammering out the details, to executive branch agencies. The judicial branch may review agency actions to determine whether the agency has complied with the

statutory parameters Congress established; however, the judicial branch may not review these sorts of agency actions from a policy perspective. If an agency action is found to be in violation of the law, then a court may invalidate the action or impose various other sorts of relief, but must stop short of substituting its judgment for that of the agency on a matter delegated to the agency’s discretion.

In *Marbury v. Madison*, the seminal case on separation of powers, Chief Justice John Marshall wrote:

By the [C]onstitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience .... In such cases, [the acts of his officers] are his acts; and whatever opinion may be entertained of manner in which executive discretion may be used, still there exists, and can exist no power to control that discretion .... [W]here the heads of departments are the political or confidential agents of the executive ... to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.  

Our modern legal system still espouses the notion that courts are not appropriate for resolving political or policy questions. Yet the question of relief remains. A court must have some power to enforce its decisions. The rest of this paper will explore the intricate balancing act that the courts and the agency must walk in navigating the unique realm of the Magnuson-Stevens Act.

**B. Overview of Fishery Management Regime**

1. **The Magnuson-Stevens Act**

The Magnuson-Stevens Act is designed to encourage user-group self-regulation within legislatively prescribed scientific and policy-based parameters. The statute establishes eight regional fishery management councils (Councils) and gives them responsibility for designing management measures to achieve the “optimum yield” (OY) from the fishery while preventing over-fishing. Congress delegated to NMFS and the Councils broad scientific and policy discretion on issues ranging from the identifica-

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tion of a "management unit" to the valuation of social and ecological factors in determining "optimum yield."\textsuperscript{13} As long as the measures the Councils recommend are consistent with the provisions of the Magnuson-Stevens Act, including its national standards described below and other applicable law, the Secretary must approve them. He may not substitute an alternate management strategy of his own, unless he determines that further management is necessary and the Council fails to act within a reasonable time. Once the Secretary reaches the stage of implementing his own management regime, he too has broad discretion in determining how to meet the goals of the Magnuson-Stevens Act within the constraints of the Magnuson-Stevens Act's standards and other applicable law.

The Magnuson-Stevens Act's national standards\textsuperscript{14} set forth an array of competing policy goals that Councils and NMFS must balance, some of which Congress has accorded greater priority than others. The standards require that fishery management measures: (1) prevent overfishing while achieving optimum yield; (2) be based on the best available scientific information; (3) manage individual stocks of fish and interrelated stocks of fish as a unit \textit{to the extent practicable}; (4) ensure that allocations, to the extent they are necessary, are fair and equitable, reasonably calculated to promote conservation, and carried out so that no individual acquires excessive shares; (5) consider efficiency in the utilization of the resource \textit{where practicable}, except that no measure may have economic allocation as its sole purpose; (6) take into account and allow for variations and contingencies; (7) \textit{where practicable}, minimize costs and avoid unnecessary duplication; (8) \textit{consistent with the conservation requirements of this act} (including \textit{the prevention of overfishing and rebuilding of overfished stocks}), take into account the importance of fishery resources to fishing communities in order to provide for their sustained participation, and \textit{to the extent practicable}, minimize adverse economic impacts on such communities; (9) \textit{to the extent practicable}, minimize bycatch, and minimize the mortality of bycatch that cannot be avoided; and (10) \textit{to the extent practicable}, promote the safety of human life at sea.\textsuperscript{15}

While these standards prescribe a range of considerations fishery managers must consider, the statutory language gives priority to the Act's conservation goals. The italicized phrases above demonstrate the ample discretion delegated to the Councils and NMFS.

A notable aspect of the Magnuson-Stevens Act that sets it apart from other resource management statutes such as National Forest Management

\textsuperscript{13} See, \textit{e.g.}, 16 U.S.C. § 1802(28); 50 C.F.R. §§ 600.305-.310 (2002).


\textsuperscript{15} \textit{Id.} (emphasis added).
Act\textsuperscript{16} and the Federal Land Policy and Management Act\textsuperscript{17} is that, absent some affirmative agency action, fisheries in federal waters go unregulated. The default status of fisheries in the Exclusive Economic Zone (EEZ) is open access, allowing unrestricted harvests. When NMFS takes an action pursuant to the Magnuson-Stevens Act, it imposes a restriction that otherwise would not exist. In contrast, public lands are considered to be "owned" by the United States, and the Federal agencies charged with managing them must take an action to authorize consumptive use. What this means for fisheries litigation and remedies is that, in some cases, when a court strikes down an agency action, there may be no management measure left in its place to restrict consumptive use.

2. Other Applicable Law

In addition to the considerations required by the Magnuson-Stevens Act, a variety of other laws impose additional procedural and substantive limitations on NMFS's regulatory discretion, and are therefore relevant to the discussion on what relief is available.

\textit{a. APA}

The Administrative Procedure Act (APA) prescribes basic requirements to ensure public participation in the development of agencies' regulations. In general, whenever an agency plans to implement a rule or regulation that will have "general applicability and future effect," the agency is required to publish a notice of the proposed action in the Federal Register and give the public an opportunity to comment on the proposal.\textsuperscript{18}

In addition, the APA provides for judicial review of agency actions and delineates appropriate remedies. It states that a "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed," and "hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right; (C) in excess of statutory jurisdiction; (D) without observance of procedure required by law; (E) unsupported by substantial evidence;" or "(F) unwarranted by the facts."\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{16} 16 U.S.C. § 472(a)-(i) (2000).
\item \textsuperscript{17} 43 U.S.C. §§ 1701-1785 (2000).
\item \textsuperscript{18} 5 U.S.C. §§ 551-552 (1994).
\item \textsuperscript{19} Id. § 706. The last two of these failures are not available for challenges to actions taken pursuant to the Magnuson-Stevens Act. The Magnuson-Stevens Act specifies that only the first four provide potential basis for challenge. 16 U.S.C. § 1855(f)(1)(B) (2000).
\end{enumerate}
\end{footnotesize}
Thus the APA specifically authorizes a court to set aside an agency’s action, or to compel a specific action unlawfully withheld. However, it specifically does not authorize a judge to grant relief that any other statute specifically or impliedly forbids.\(^2\)

In general, when reviewing an agency’s interpretation of a statute the agency is charged with implementing, courts defer to the agency’s interpretation unless that interpretation clearly violates express statutory mandates.\(^2\) In addition, courts defer to agencies in matters requiring scientific or technical expertise.\(^2\)

\textit{b. NEPA}

The National Environmental Policy Act (NEPA) requires that an agency undertaking any “major federal action significantly affecting the quality of the human environment” prepare an environmental impact statement (EIS) describing the effects of the proposed action as well as the reasonable alternatives to the proposal.\(^2\) In accordance with the implementation regulations of the Council on Environmental Quality (CEQ), if the agency can demonstrate through a preliminary analysis called an environmental assessment (EA) that the action will not result in a “significant impact” on the environment (finding of no significant impact/FONSI) then the full-blown EIS need not be prepared.\(^2\) NEPA does not require that the more environmentally attractive alternatives be selected — only that the reasonable range of alternatives and their impacts be analyzed, considered, and discussed on the record, and public comments be considered, before the agency makes its final decision.

\textit{c. RFA}

The Regulatory Flexibility Act (RFA) requires that agencies promulgating rules through notice and comment rulemaking consider the economic impact of their proposed actions on “small entities,” and explain why less burdensome alternatives have not been selected.\(^2\) As defined under the statute, “small entities” include small, independently owned businesses,

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independently owned and operated non-profit organizations, and government jurisdictions with populations less than 50,000. A business in the fishing industry is considered "small" if it earns less than three million dollars per year or has fewer than 500 employees.  For purposes of Magnuson-Stevens Act regulations, most fishing businesses are considered small entities. If an agency certifies that its rule will not have a significant economic impact on a substantial number of small entities, then it need not complete the full-blown initial and final regulatory flexibility analyses (IRFA/FRFA). This is a procedural statute designed to ensure reasoned decision making and public disclosure and involvement. Like NEPA, it contains no requirement that any particular alternative be selected – only that the reasonable alternatives be considered and discussed.

d. ESA

Unlike NEPA and the RFA, the Endangered Species Act (ESA) imposes both substantive and procedural requirements on agencies when threatened or endangered species may be affected. Procedurally, the ESA requires that an agency ensure that its planned actions will not jeopardize threatened or endangered species or adversely modify their critical habitat. When marine species under the jurisdiction of NMFS, such as marine mammals and sea turtles are involved, the action agency meets this requirement by "consulting" with NMFS. If a consultation results in a finding that the action could jeopardize the species or adversely modify critical habitat, the action agency must modify its proposed action with "reasonable and prudent alternatives" (RPAs) suggested by NMFS, or not undertake the action. Substantively, the ESA strictly regulates the "taking" of threatened and endangered species.

The ESA authorizes NMFS to "promulgate such regulations as may be appropriate to enforce this chapter."

C. Remedies: Injunction and Mandamus

In general, there are two main types of violations and corresponding types of relief that litigants allege in administrative law challenges. The

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26. Id. § 601.
29. Id.
30. Id. § 1536(b)(4)(A).
31. Id. § 1533(d).
32. Id. § 1540(f).
violations include: (1) violation of the APA’s “arbitrary and capricious” or “without observance of procedure” standards, which can result in a judge setting aside the agency’s action; and (2) unlawfully withholding a nondiscretionary action, which can result in a court order to compel the agency to perform that action. These two types of relief can be thought of as “injunction” and “mandamus.” The availability of relief relates directly to the delegations of, and restrictions on, agency discretion discussed above. Before exploring some examples of injunctions and mandamus in the fisheries context, we will briefly review these two types of relief.

1. Mandamus

Mandamus, Latin for “we command,” is a command to perform a specific official act or duty. It is a judicial remedy that grants a court supervisory authority to compel a “person to perform a particular duty required by law.” In modern times, mandamus orders arise pursuant to the Mandamus Venue Act, or under the functionally similar mandatory injunction provisions of the APA. Mandamus is a specific relief compelling specific action and is only available when a government official has failed to perform a specific non-discretionary duty that he is clearly obligated to perform. It is not appropriate for compelling agencies to reach a particular conclusion on a matter over which the agency retains even the smallest amount of discretion. Courts consider mandamus an extreme remedy, and there are few cases in which it has successfully been sought. As the Ninth Circuit has opined, “[m]andamus is extraordinary relief that involves reaching into an agency of the executive branch and dictating the details of its internal operations.”

33. There are two types of injunctions: mandatory and prohibitory. A mandatory injunction, which requires an agency to act affirmatively, is functionally equivalent to the concept of mandamus. See text accompanying notes 34–38, infra.
34. 52 AM. JUR. 2D Mandamus § 1 (2000).
35. Independence Mining Co. v. Babbitt, 105 F.3d 502 (9th Cir. 1997).
37. Mandamus is appropriate only if the relief requested is nondiscretionary. Marquez-Ramos v. Reno, 69 F.3d 477, 479 (10th Cir. 1995).
38. Independence Mining Co., 105 F.3d at 506 (citing Independence Mining Co. v. Babbitt, 885 F. Supp. 1356, 1364 (D. Nev. 1995)). In Independence Mining Co., the Ninth Circuit considered a request for mandamus as a request for compulsory injunctive relief under the APA, 5 U.S.C. § 706(1), which provides that a court may compel “agency action unlawfully withheld or unreasonably delayed.” 105 F.3d at 507. The court found that the agency, at some level, had a “general, non-discretionary duty to act on applications . . . ,” then looked at the question of whether there had been unreasonable delay. Id.
Although modern day case law on the issue of mandamus is scant, several cases, two of which involved the Department of Commerce, illustrate the limitations on the judiciary in compelling specific agency action. In the 1986 Supreme Court case, *Japan Whaling Association v. American Cetacean Society*, the Court reviewed whether the district court had acted properly in issuing an order to compel the Secretary of Commerce to "certify" that Japan had violated the International Convention for the Regulation of Whaling (ICRW).39 Under the Pelly Amendment of 1971 (Pelly Amendment), United States law required the Secretary of Commerce to certify to the President if foreign nationals are conducting fishing operations that "diminish the effectiveness" of an international fishery conservation program.40 Further, under the Packwood Amendment of 1979 (Packwood Amendment), if the certification related to the requirements of the ICRW, economic sanctions were mandatory.41 The International Whaling Commission (IWC) had established a quota of zero for the harvest of certain whales and ordered a commercial whaling moratorium to begin in 1985.42 Japan objected to these measures and continued to harvest the whales.43 In 1984, the United States and Japan entered an agreement according to which Japan would adhere to certain limits on harvest and completely phase out its commercial whaling operations by 1988.44 In exchange, the United States would agree not to impose sanctions under the Pelly and Packwood Amendments.45 Environmental groups filed suit in federal district court to compel the Secretary to "certify" Japan and the lower court granted a writ of mandamus.46 The Supreme Court reversed, concluding that Congress had delegated discretion to the Secretary of Commerce to determine whether the actions of foreign nationals were "diminishing the effectiveness" of the fishery conservation program and that the Secretary’s decision to pursue the ICRW’s conservation goals by entering into an agreement with Japan rather than by issuing a certification was reasonable.47

The *Brower v. Evans* case involved a question relating to the Secretary’s statutory mandate to determine whether the chase and netting of dolphins was having a significant adverse impact on certain dolphin

42. *Japan Whaling Ass’n*, 478 U.S. at 221.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 222.
47. *Japan Whaling Ass’n*, 478 U.S. at 240.
The Secretary, claiming that there was insufficient evidence to make a determination either way, did not decide. The court held that the duty to decide was mandatory under the statute, that there was information that could be considered, and that the Secretary had a duty to gather and consider it. Failure to do so was arbitrary and capricious. The court ordered the agency to make a decision one way or the other, but did not dictate what the outcome of the decision must be. As a remedy, the court set aside the Secretary’s initial findings “until such time as the Secretary has had an opportunity to consider [the results of available studies].”

Two additional cases addressing the mandamus issue are Marquez-Ramos v. Reno and Independence Mining Co. v. Babbitt. In Marquez-Ramos, a prisoner brought suit seeking mandamus to compel the Attorney General to transfer him to a Mexican prison pursuant to the Treaty on the Execution of Penal Sentences. The treaty provided that if the Attorney General finds the transfer to be appropriate, then she “shall” transmit a request for transfer to appropriate officials in the other country. The treaty also set forth criteria to consider in deciding whether the transfer would be appropriate, including: the nature and severity of the offense, previous criminal record of the prisoner, his medical condition, family relations, and social factors. In deciding whether to grant the requested mandamus order, the court focused on the issue of whether the relief requested was discretionary, stating, “[t]he importance of the term ‘nondiscretionary’ cannot be overstated.” The court concluded that both the statute and the treaty required the Attorney General to use discretion; therefore, the decision was non-ministerial and mandamus was not appropriate.

The Independence Mining Co. case arose under the General Mining Act of 1872, a statute allowing citizens to stake mining claims on public lands and, if a valuable mineral deposit is discovered, to apply to the

48. Brower v. Evans, 257 F.3d 1058 (9th Cir. 2001).
49. Id. at 1060.
50. Id. at 1064.
51. Id. at 1066.
52. Id. at 1064.
53. 69 F.3d 477 (10th Cir. 1995).
54. 105 F.3d 502 (9th Cir. 1997).
55. Marquez-Ramos, 69 F.3d at 478.
56. Id.
57. Id. at 480.
58. Id. at 479.
59. Id. at 481.
Department of the Interior (DOI) for a patent.\textsuperscript{60} The DOI does not issue a patent until it has determined that the claim is valid based on a mineral examiner's report.\textsuperscript{61} In addition, patent applications undergo legal and secretarial review prior to approval.\textsuperscript{62} In 1991 and 1992, the Independence Mining Company (IMC) filed a series of twelve applications for patents.\textsuperscript{63} As a result of procedural and regulatory changes at the DOI, no final decision had been made on the applications as of August 1994.\textsuperscript{64} IMC filed suit under the Mandamus Venue Act and under the APA seeking to compel the DOI to make a determination on the applications.\textsuperscript{65} The appellate court determined that the delay was not unreasonable under the APA.\textsuperscript{66} On appeal, IMC argued that it had a vested right in the patents and that the Secretary had a non-discretionary duty to issue the patents.\textsuperscript{67} The district court held that such rights had not vested and that mandamus was not appropriate, concluding that the "extraordinary relief of mandamus, which would require 'reaching into an agency of the executive branch and dictating the details of its internal operations,' was not warranted in this case."\textsuperscript{68} The court further described the significance of agency discretion as follows:

\begin{quote}
[I]ssuance of the patents prior to a validity determination is not a ministerial act. An agency "ministerial act" for purposes of mandamus relief has been defined as a clear, non-discretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and "so plainly prescribed as to be free from doubt." The Secretary has no such ministerial duty to issue a patent prior to a validity determination. Specifically, when the "Department has not yet determined officially that all conditions to issuance of the patents have occurred, ... [it] has not yet reached the point when it is left with the purely ministerial act of issuing the patent ..." The Secretary's validity determination requires considerable judgment and discretion to evaluate and assess the results of the mineral examination, and to ultimately
\end{quote}

\begin{itemize}
\item \textsuperscript{60} Independence Mining Co., 105 F.3d at 506.
\item \textsuperscript{61} Id. at 506–07.
\item \textsuperscript{62} Id. at 507.
\item \textsuperscript{63} Id. at 505.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Independence Mining Co., 105 F.3d at 506–07.
\item \textsuperscript{66} Id. at 506.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. (citing Independence Mining Co. v. Babbitt, 885 F. Supp. 1356, 1364 (D. Nev. 1995)).
\end{itemize}
conclude whether the statutory requirement of a "valuable discovery" has been met.\textsuperscript{69}

In another Supreme Court case on mandamus, \textit{California v. Yamasaki},\textsuperscript{70} the Supreme Court upheld the Ninth Circuit’s decision to order mandamus, but the remedy was procedural rather than substantive.\textsuperscript{71} The mandamus order required the Secretary of Health, Education, and Welfare to conduct hearings, as required by law, prior to taking preliminary actions to recover wrongful payments.\textsuperscript{72} The Court did not direct the Secretary on how to decide, but only required that he conduct a hearing and decide something.\textsuperscript{73}

2. Injunctions

The injunctive relief envisioned under the APA for arbitrary and capricious or procedurally flawed agency action is limited to remanding or setting aside the action being reviewed.\textsuperscript{74} However, courts dispense a wide variety of injunctions as "equitable remedies" for all sorts of violations. An injunction is an order from a court that commands a person to refrain from doing certain acts or to undertake certain steps to undo a wrong.\textsuperscript{75} A mandatory injunction, as opposed to a prohibitory injunction, is one that requires an affirmative act, and it is generally granted for the purpose of maintaining or restoring the status quo as it would have been absent some violation.\textsuperscript{76} While it is generally recognized that courts have broad authority to craft appropriate injunctions as equitable remedies, injunctions must be based on the consideration and balancing of various issues and interests. Generally, in granting an injunction a court must consider the necessity of intervention to protect cognizable rights; the character of the interest to be protected; the risk of irreparable harm; success on the merits or the likelihood thereof; lack of other adequate remedies at law; balancing of hardships; and public interest.\textsuperscript{77} Injunctions are binding on parties to the

\textsuperscript{69} Id. at 508–09 (internal citations omitted).
\textsuperscript{70} 442 U.S. 682 (1979).
\textsuperscript{71} Id. at 698.
\textsuperscript{72} Id. at 686.
\textsuperscript{73} Id. at 695–97.
\textsuperscript{74} The APA states that a court may “\textit{hold unlawful and set aside} agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right; (C) in excess of statutory jurisdiction; or (D) without observance of procedure required by law.” 5 U.S.C. § 706(2) (1994) (emphasis added).
\textsuperscript{75} BALLENTINE’S LAW DICTIONARY 626 (3d ed. 1969).
\textsuperscript{76} 42 AM. JUR. 2D INJUNCTIONS §§ 5, 12 (2d ed. 2000).
\textsuperscript{77} Id. § 14. In the Ninth Circuit, for example, a judge has broad discretion to issue an
litigation and are enforceable through contempt of court charges and by federal marshals. 78 A court cannot compel an action that is prohibited by law, and a court must consider and record the relevant factors in determining whether the relief is appropriate. 79

We examine these limitations further as we discuss the specific judicial remedies being crafted in response to Magnuson-Stevens Act, RFA, NEPA, and ESA violations. Key considerations will be the extent to which these statutes grant the agency discretion and constrain available judicial relief. Arguably, whether a court terms its relief “injunction” or “mandamus,” if the result is a mandate for the agency to undertake affirmative regulatory action, then the specificity of the relief ordered must be examined in light of controlling statutory limitations. 80

injunction upon a showing of success on the merits, irreparable injury, and inadequacy of legal remedies. See Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998). In environmental litigation, some jurisdictions recognize presumptions of harm for violations of statutes such as NEPA and ESA. See, e.g., Greenpeace v. Mineta, 122 F. Supp. 2d 1123, 1136–38 (D. Haw. 2000). In the D.C. Circuit, there is a presumption against continuance of an action until the agency comes into compliance, and key considerations include whether there might be “irreversible effects on the environment until possible adverse consequences are known,” the level of public interest, and remedial purpose. American Oceans Campaign v. Daley, 183 F. Supp. 2d 1 D.D.C. 2000) (citing Izaak Walton League of America v. Marsh, 655 F.2d 346, 364 (1981)). Note that Izaak concerned whether to halt an action pending completion of an analysis, not a decision to order implementation of a different action during the interim.

78. Lawson v. Murray, 515 U.S. 1110 (1995). However, if a court could compel an agency to implement its injunction through rulemaking, then the court’s order would have more far-reaching effect.

79. 42 AM. JUR. 2D Injunctions § 14 (2d ed. 2000). See, e.g., Rosen v. Siegel, 106 F.3d 28 (2d Cir. 1997), in which the appellate court struck an injunction due to the lower court’s failure to make requisite findings of fact. Id. at 32. There, the Second Circuit noted:

[T]he district court “in granting or refusing interlocutory injunctions shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.” Fed. R. Civ. P. 52(a); see also Fed. R. Civ. P. 65(d) (“Every order granting an injunction . . . shall set forth the reasons for its issuance.”). This requirement is essential to effective appellate review: absent explicit findings, we lack a “clear understanding of the ground or basis of the decision of the trial court.” It further “encourages the trial judge to ascertain the facts with due care and to render a decision in accord with the evidence and the law.”

Id. at 31–32.

80. For example, if a court orders NMFS to implement a specific fisheries management program, then that program must comply with the national standards of the Magnuson-Stevens Act. In addition, it would seem that a court could not exempt NMFS from the procedural requirements for public participation in the APA and Magnuson-Stevens Act. (Authors’ note).
III. RECENT LITIGATION

In light of the foregoing discussion on sources of authority and forms of relief, we will now review several lines of cases that illustrate the variety of judicial remedies evolving in the world of fisheries, different judicial perspectives on deference to agency expertise, and the statutory constraints on agency and judicial discretion that may influence the outcomes of cases and remedies. Some of the cases discussed below involve a single lawsuit; others involve complex controversies that have given rise to seemingly conflicting judicial opinions in different jurisdictions. Our case studies include the North Pacific Steller sea lion controversy; the multi-jurisdictional summer flounder litigation; the series of shark quota suits; the Hawaii longline/turtle suit; the Hawaiian monk seal suit, involving both the bottomfish and crustacean fisheries; the nationwide essential fish habitat suit; the New England monkfish suit; the West Coast groundfish decision; and the ongoing New England groundfish case.

A. The Steller Sea Lion Controversy

On August 7, 2000, a decade-long controversy surrounding the relationship between the North Pacific commercial fisheries and the endangered Steller sea lion culminated in the court’s issuance of an injunction prohibiting trawling for groundfish within Steller sea lion critical habitat.81 Pursuant to its authority under the ESA, NMFS implemented this injunction through a rule published in the Federal Register.82 Among the many interesting aspects of this case are the overlapping requirements of the ESA and the Magnuson-Stevens Act, the degree of discretion accorded to agency expertise in light of scientific uncertainty, the type of relief imposed and the agency’s method of complying with the court’s order. A brief history of the sea lion controversy helps put these issues into perspective.

With respect to the North Pacific groundfish fishery, NMFS plays two roles. NMFS is both the agency responsible for managing federal fisheries (the action agency), as well as the agency responsible for protecting threatened and endangered species such as the Steller sea lion (the consulting agency). The North Pacific groundfish fisheries have historically occurred in much of the same area that is designated as critical habitat for Steller sea lions. For over a decade there has been scientific uncertainty

regarding the relationship between the commercial fisheries and the sea lions, and the extent to which commercial fishing may have been affecting the availability of the sea lions’ prey.

In 1990, after a decade of precipitous decline in population, Steller sea lions were listed as threatened under the ESA. NMFS immediately began implementing protective measures to reduce potentially destructive interactions with the commercial fisheries that occurred in the same areas as the sea lions. For instance, NMFS established a three nautical mile no-entry zone around rookeries and prohibited the shooting of sea lions. The causes of the sea lions’ decline were unclear, and theories ranged from climate shift to blaming the commercial fisheries for excessive prey competition.

1. Greenpeace Action

In 1991, NMFS proposed to approve the annual authorization of the North Pacific groundfish fisheries and a forty percent increase in allowable harvest, supported by an EA/FONSI. Greenpeace Action filed suit. Instead of finalizing its proposed action, NMFS allowed the first part of the fishing year to occur on temporary “interim” quotas. Later it initiated consultation under the ESA, imposed additional protective measures, and lowered the proposed quotas. The district court found that the agency’s conclusions under the ESA and NEPA were reasonable given the facts of the case. On appeal in 1992, the Ninth Circuit found in favor of the agency. As an aside, the court noted Greenpeace Action’s failure to participate in the public process of the Magnuson-Stevens Act.

84. Id.
85. Id. at 1327–28.
86. Id. at 1329.
87. Id. at 1337.
88. Greenpeace Action, 14 F.3d at 1334. The court wrote:
We express no opinion as to the propriety of Greenpeace’s choice to sue instead of submitting comments on the TAC and mitigation measures . . . which could continue in effect for only three months and thus were amenable to modification. Nevertheless, we cannot characterize the agency’s action as “arbitrary” for failing to consider views that were never presented to it. Nor can we consider its failure to provide for earlier public comment arbitrary under these circumstances.
Id.
2. Stellers Listed as Endangered

For the next several years, NMFS continued to reauthorize the fisheries on an annual basis and to prepare EA/FONSIs on those actions. However, in March 1997, after issuing the EA/FONSI on the 1997 fishery, NMFS published a notice of intent to prepare an EIS. On May 5, 1997, NMFS listed the western population of Steller sea lions as endangered due to continuing declines in populations. 89

3. Greenpeace v. NMFS

In March 1998, NMFS had not yet completed the new EIS and opened the 1998 fisheries based on an EA/FONSI. A consortium of environmental groups filed suit, challenging NMFS’s compliance with NEPA and the ESA. 90 The suit was stayed pending completion of NMFS’s ongoing Supplemental Environmental Impact Statement (SEIS) and fishery-wide biological opinion (1998 fishery-wide BO). 91 In addition to the fishery-wide biological opinion, NMFS planned a separate biological opinion covering only the pollock and atka mackerel fisheries (1998 pollock and mackerel BO). In December 1998, NMFS issued (1) the SEIS, (2) the 1998 pollock and mackerel BO, evaluating the impacts of the atka mackerel and pollock fisheries only, and finding no jeopardy for the atka mackerel fishery, and jeopardy for the pollock fishery, but recommending an RPA, i.e., a modification to the action that would allow it to proceed without causing jeopardy and (3) the 1998 fishery-wide BO, evaluating the combined effects of the entire groundfish fisheries, but only over the period of one year, and concluding no jeopardy. NMFS then reinitiated consultation on fishery-wide impacts to address interactions for the years beyond 1999. The agency planned to replace the 1998 fishery-wide BO with a more programmatic BO, known as the FMP BiOP, due out later in 2000 (FMP BiOP/BO 2000).

In July 1999, the court ruled on the SEIS and the 1998 pollock and mackerel BO, holding that NMFS’s SEIS was inadequate in scope, and that NMFS’s pollock and mackerel BO was arbitrary and capricious because it did not explain how the RPA for the pollock fishery avoided jeopardy. The court remanded both documents to the agency. It did not rule on the 1998 fishery-wide BO at that time. In October 1999, NMFS submitted a revised RPA for the pollock fishery along with an analysis explaining how it

91. Id.
avoided jeopardy. The court has never been asked to rule on the adequacy of the revised pollock RPA.

In January 2000, the court ruled that the 1998 fishery-wide BO, analyzing the cumulative effects of all the groundfish fisheries for the year 1999, was inadequate in scope. Despite NMFS's assertion that it had reinitiated consultation, the court reviewed the 1998 BO and concluded that it was not coextensive in scope with the management regime that governed the fisheries, and therefore did not satisfy the requirements of the ESA. Thus, to the extent that the 1998 BO was in place, it was legally inadequate, and to the extent it had been withdrawn, NMFS had nothing in its place. The court found NMFS to be in procedural noncompliance with the ESA.

On July 20, 2000, the court granted the plaintiffs' motion for an injunction prohibiting trawling for groundfish within Steller sea lion critical habitat and issued an order detailing the prohibitions on August 7, 2000.

In considering whether to grant an injunction, the judge noted that the standards for issuing injunctions under the ESA are different than for non-ESA cases:

The traditional test for permanent injunctive relief is actual success on the merits, irreparable injury, and inadequacy of legal remedies . . . . This test requires the court to balance any competing claims of injury and the effect granting or withholding the injunctive relief would have on the parties and the public interest. [However,] under the ESA, Congress has foreclosed the exercise of discretion possessed by a court of equity . . . . Under the ESA, the balance of hardships has already been struck in favor of endangered species . . . [and] legal remedies are necessarily inadequate. Accordingly, injunctive relief under the ESA is generally mandated where the moving party (1) has had or can likely show success on the merits, and (2) makes the requisite showing of irreparable injury.

The plaintiffs had already won on the merits, so the only issue for the court to decide was whether there was irreparable injury. The court analyzed the irreparable injury question under two standards. First, the court concluded that where a "substantial procedural violation" of the ESA has occurred, injunctive relief can be appropriate. Defendant-intervenors, a group of commercial fishing interests, argued that the court should issue an injunction only if necessary to "prevent substantive violations of the

94. Id. at 9–10.
95. Id. at 11 (citing Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)).
ESA,” as demonstrated by proof of imminent harm to the species. While disagreeing with the appropriateness of the “imminent harm test,” the court nevertheless analyzed it, and concluded that “[b]ased on the administrative record alone, the Court concludes continued trawl fishing in sea lion critical habitat threatens to appreciably diminish the value of critical habitat as a prey resource for sea lions.”

3. Deference to Agency Science

This second prong of the judge’s analysis raises the issue of the degree of discretion that should be accorded to an agency expert on questions involving scientific uncertainty. NMFS’s expert fishery biologist, Dr. Andrew Rosenberg, had concluded that:

The TAC [total allowable catch] setting process, specified in the FMPs is very conservative with respect to the harvest rate by internationally accepted scientific standards. . . . Conducting a fishery in 2000 should not irreversibly or irretrievably alter the ability of these groundfish species to sustain the proposed harvest levels. Further, a fishery in 2000 would not alter recruitment rates for any of the species and it would not alter their ability to redistribute throughout the area of concern in a way that would reduce their availability for foraging Steller sea lions. While the Biological Opinion will examine the TAC setting process, we do not believe that the 2000 TAC specifications will threaten the survival and recovery of Steller sea lions nor diminish the value of designated critical habitat for sea lions.

Plaintiffs submitted a statement from a different expert, Dr. David LaVigne, a marine mammal biologist. Dr. LaVigne offered a different conclusion about the effects of fishing on the dispersion of the fish populations, stating that “[b]ecause the North Pacific groundfish fisheries undisputedly remove large quantities of sea lion prey from areas essential
for sea lion foraging, . . . the fisheries likely reduce prey availability to the detriment of sea lions." The court concluded that plaintiffs had met the standards for injunctive relief.

As mentioned in the discussion of APA review, courts generally defer to agency expertise on issues of scientific uncertainty. Yet, in this instance, the court seems to deviate from that jurisprudence, and seems to imply that there are different standards of deference for evaluating an agency's completed ESA consultation and its interim determinations of potential for harm. The court wrote:

[T]he court takes no position on the ultimate validity of any expert opinions upon which NMFS may rely in completing the consultation process, . . . for the purposes of this motion . . . the plaintiffs' expert's opinion provides further evidence that continued fishing in critical habitat threatens to appreciably diminish the value of critical habitat as a prey resource for sea lions.

The court appears to rely on the assertions of the plaintiffs' expert as evidence in determining that plaintiffs had made the required showing of harm of the species rather than deferring to agency expertise.

4. Implementation of the Injunction

NMFS implemented the court's injunction by promulgating a rule in the Federal Register, pursuant to its ESA authority. The judge's ruling that the agency was out of procedural compliance with the ESA provided a factual basis for utilizing the ESA's section 11(f) authority to implement regulations necessary to enforce the ESA.

5. Subsequent History

On November 30, 2000, NMFS issued a programmatic biological opinion, including an RPA that would have seriously constrained fishing effort in large parts of critical habitat and potentially forced smaller boats out of business (FMP BiOp/BO 2000). The judge lifted the injunction. However, several weeks later Congress passed, and the President signed,

an appropriations rider restricting NMFS's ability to implement the RPA.° As a result of this process, the Council proposed a revised RPA that reopened certain areas of critical habitat to fishing that the original RPA had closed. Because of the appropriations rider, the Parties agreed to a temporary stay in the litigation. During the stay, NMFS issued a biological opinion assessing the impacts of the revised RPA (2001 BiOp). NMFS indicated that its November 2000 FMP BiOp still provided the necessary programmatic review of the fishery's impacts. Plaintiffs challenged the 2001 BiOp alleging that its conclusions were not supported by the underlying analysis.° In a detailed opinion that explored the sufficiency of the ESA analysis, the court concluded that the conclusions contained in the Biological Opinion were not supported by the facts in the record and remanded the analysis to the agency.

B. The Summer Flounder Saga

1. Overview

With a litigation history stretching back to 1993 and spanning two federal jurisdictions, the summer flounder fishery provides a wealth of considerations regarding fisheries litigation and remedies. First subjected to federal management in 1988, the summer flounder fishery has been the subject of courtroom battles in both the federal district courts of the District of Columbia and the Eastern District of Virginia, as well as the D.C. Circuit and Fourth Circuit courts of appeals, resulting in dueling court orders constraining NMFS's management discretion. We will discuss the three main lines of summer flounder cases: the Fishermen's Dock cases, the NRDC cases, and the North Carolina Fishermen's Association cases.

2. Background

Summer flounder migrate up and down the East coast throughout the year, and whether they are found in State or Federal waters is largely

influenced by the shape of the continental shelf and the season. In North Carolina, for example, during the early part of the year, summer flounder occur predominantly in state waters (i.e., within three miles from shore). During the later part of the year, they are more abundant farther offshore in Federal waters. Thus it is necessary for the Atlantic coastal states and the federal government to coordinate management of summer flounder.

The summer flounder resource has been in an "overfished" status for years.\(^{107}\) NMFS first implemented a fishery management plan for summer flounder in 1988, and has been instituting protective measures designed to halt overfishing and rebuild the resource ever since. NMFS manages the fishery in Federal waters pursuant to regulations at 50 C.F.R. § 648. These regulations require that NMFS set an annual coastwide quota, then divide the quota into allocations for the states. The regulations also require that if a State exceeds its allocation in one year, that NMFS must deduct the amount of the "overage" from the following year's quota.\(^{108}\)

3. The 1993 and 1994 quotas

a. The Fishermen's Dock Cases

This intriguing line of cases features an order from a district court judge increasing the agency's summer flounder quota by almost three million pounds, followed by the appeals court's reversal of that order too late to restore the fish to the fishery. The litigation began in 1993, when a group of owners and operators of fishing vessels, Fishermen's Dock Cooperative, brought suit challenging the agency's use of data and exercise of discretion, within the Magnuson-Stevens Act parameters, in the face of substantial scientific uncertainty. The first suit was filed in 1993, in the D.C. District court challenging the 1993 quota. However, the court was unable to hear the case until December of that year, when the effective period of the 1993 quota was about to expire. The court found the challenge moot, dismissed the case without prejudice, and instructed the plaintiffs that if they brought challenges to later quotas, the same judge, who was familiar with the facts and issues, would hear the case.\(^{109}\)

The following year, those same plaintiffs filed suit in the U.S. District Court for the Eastern District of Virginia challenging NMFS's 1994 summer flounder commercial quota.\(^{110}\) That year NMFS had accepted the

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110. Id. at 386.
recommendations of the Mid-Atlantic Fishery Management Council (Council) in setting the quota. The Council had considered three potential quota figures based on different estimates of the stock’s recruitment rate: one estimate was based on a geometric mean, one was based on one standard deviation above the geometric mean, and one was based on a standard deviation below the geometric mean. Due to uncertainty about the stock’s recruitment, the Council chose to use the conservative estimate of recruitment equal to the figure one standard deviation below the geometric mean rather than equal to the geometric mean. The Council recommended the quota based on the one standard deviation below the geometric mean, which would have produced an eighty-one percent probability of achieving the target fishing mortality goal.

The district court reviewed this case in light of the Magnuson-Stevens Act’s statutory requirements that management decisions be based on the best available scientific information, and concluded that the geometric mean constituted the best available scientific information and that to the extent the basis for the quota deviated from the mean, it was invalid. The opinion stated, “the 1994 summer flounder quota is invalid to the extent of the deviation from the geometric mean. . . .” The court ordered that the quota be invalidated to the extent that it was less than the geometric mean, resulting in an increase in quota from 16.005 million pounds to 19.05 million pounds. This order appears to straddle the line between invalidating an agency action, and requiring the agency to impose a judicially determined quota. One way of characterizing which side of the aisle it falls on, and to what extent it accomplished its goals, is to inquire what the specific effect of the order was.

NMFS regulations for managing the summer flounder fishery provide for the agency to set the quota on a calendar year basis, and then, when the quota is reached, announce closure of the fishery. In 1994, the final specifications were set for the calendar year to achieve the goals of the FMP. If those quotas were struck down, it seems likely that there would have been no alternative quotas in place to provide a basis for closing the fishery upon attainment of the court-ordered quota.

111. Id. at 388.
112. Id. at 388, 397.
113. Id. at 397.
b. NMFS's Response

NMFS appealed the district court’s decision, but in the interim, agreed to a consent order requiring the agency to apply the three million pound increase to the 1995 quota. When publishing the final specifications for 1995, NMFS explained that it had calculated the 1995 quotas in accordance with the regulations and the Magnuson-Stevens Act requirement to prevent overfishing, then, pursuant to the court order, had added an additional 3.05 million pounds onto the original quota calculation that would have prevented overfishing. In so doing, NMFS "acknowledged that the 1995 catch limit may not assure attainment of the target fishing mortality rate." NMFS noted that the FMP did not require any particular level of probability of achieving the target rate.

c. Appeal

On appeal, the Fourth Circuit concluded that the provisions of the Magnuson-Stevens Act, NMFS's regulations, and the FMP required that the summer flounder monitoring committee seek a "fairly high level of confidence that the quota it recommends will not result in [a fishing mortality greater than the target], even as it must be equally concerned to provide the fishing industry with an 'optimum yield' both in the current year and over the long-term." The court stated that the law does not require managers to achieve 100 percent certainty, but allows the use of discretion in selecting a level of certainty that is consistent with "reasonable assurance." The court went on to recognize the agency’s four main reasons for selecting the more conservative quota: (1) the age structure of the population magnified the risks; (2) the nature of the recruitment estimate being used; (3) risks that stock size estimates might be overly optimistic; and (4) quota restrictions in future years were expected to be even greater, so it was better to err on the side of conservation in 1994, to avoid even greater cuts in the future. The appellate court wrote:

A quota 'based on' [the best available scientific] information and designed to 'assure' that the target F was not exceeded while still providing the fishing industry with an 'optimum yield' could not properly be determined by a court in judicial review to be, as a

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118. Id. at 8959.
120. Id. at 171.
matter of law, only one that happened to provide [fifty-nine percent] chance of not exceeding $F$.\textsuperscript{121}

The Fourth Circuit succinctly drives home the point that in reviewing fishery management measures developed under the Magnuson-Stevens Act, a district court cannot substitute its judgement for the agency’s on issues of science and policy. The structure of the Magnuson-Stevens Act relies on agency discretion.\textsuperscript{122}

The appeal was not decided until February 1996. Although NMFS won the appeal, the three million pounds of fish had been taken from the fishery. The court left it to the agency to determine the next step and, in addressing the issue of the irreparable consequences to the resource, the Fourth Circuit wrote:

We recognize, but need not further address, the practical problem of adjusting the ongoing annual quota-setting process to accommodate our decision upholding the Department’s 1994 quota [on February 2, 1996]. The cyclical administrative process of course has had to continue while this litigation proceeded. The problem of adjusting it to successive decisions made in judicial review originated with the district court’s decision which, in late 1994, effectively increased the agency’s 1994 quota by three million pounds. About six weeks later, responding to a show cause order as to why the court’s order had not yet been implemented, the Department agreed to a consent order to control the matters at issue pending this appeal. Under that order, the Department was required to apply to 1995 the three million pound increase originally ordered for 1994. In its brief to this court, the Department indicated that were it to prevail, it would accommodate our decision in its favor by rescinding the three million pound increase of the 1995 quota. With 1995 now past, that particular accommodation of course is no longer possible. We need not attempt to direct just how our invalidation of the judicially-ordered increase should now be worked into the process. It suffices to reject, as we

\textsuperscript{121} Id. at 171–72.
\textsuperscript{122} Id. at 173. On this point, the court further noted the agency’s good faith:

Our independent review of the record satisfies us that the agency’s process of setting the 1994 quota was conducted in good faith, pursued with a proper understanding of the law, based on the best scientific information available, and adequately justified by the agency. If there was an inevitable element of arbitrariness in the decision, it was not the least caprice. Id.
do, the Coalition’s argument that because the consent order was not appealed by the Secretary, the three million pound increase it ordered cannot be rescinded . . . With that decided, we may leave to the Department’s properly exercised discretion the matter of how the invalidated increase is to be accommodated in the ongoing quota-setting process. 123

4. The 1996 and 1997 Quotas

a. The North Carolina Fisheries Association cases

A year after the Fourth Circuit’s decision in the Fishermen’s Dock case, a subset of the Fishermen’s Dock plaintiffs, the North Carolina Fishermen’s Association, again challenged the agency’s summer flounder quotas, this time challenging NMFS’s compliance with the RFA, Magnuson-Stevens Act’s National Standard Eight, and the APA, among other things. 124 Specifically, the plaintiffs alleged that NMFS’s failure to prepare an IRFA and FRFRA, and failure to adequately consider impacts on fishing communities, rendered the quotas illegal. 125

An important aspect of summer flounder management is the way in which NMFS collects data on the number of fish caught in North Carolina. In previous years, both NMFS and the state of North Carolina had collected the same types of data from fish dealers. 126 In 1995 and 1996 NMFS did not collect the data on its own because it was negotiating to share North Carolina’s data. 127 However, in December 1996, North Carolina advised NMFS that, due to confidentiality constraints, it would not be able to share the data. 128

Another key issue was the timing of finalization of North Carolina’s final quotas. On January 4, 1996, NMFS published a final rule establishing the quota for the North Carolina summer flounder fishery. In April 1996, NMFS published revised quotas for states other than North Carolina deducting their overages from 1995 from their 1996 quotas. Because of the issues surrounding data gathering, NMFS did not publish North Carolina’s

123. Id.
124. N.C. Fisheries Ass’n v. Daley, 16 F. Supp. 2d 647 (E.D. Va. 1997) [hereinafter N.C. Fisheries I]. Recall that in 1996 both the Regulatory Flexibility Act and the Magnuson-Stevens Act had been amended making old requirements that agencies consider economic impacts on small entities judicially reviewable, and imposing new requirements that NMFS consider impacts on fishing communities.
125. Id. at 651.
126. Id. at 650.
127. Id. n.3.
128. Id.
1995 overages, and consequent deductions from the 1996 quota until December 10, 1996. A week later, on December 18, 1996, NMFS published North Carolina’s 1997 proposed quota. The final quota for 1997 was published in March 1997.129 However, additional overages were subtracted, and revisions to the quota made, on July 15, 1997.130 When NMFS published the proposed rule for the 1997 quota, it certified, pursuant to the RFA, that the proposed quotas would not have a “significant economic impact on a substantial number of small entities.”131 The basis of this certification was that “[t]he recommended 1997 quota is no different from the 1996 coastwide harvest limit. . . .”132

On April 4, 1997, plaintiffs, North Carolina Fisheries Association and Georges Seafood Inc., filed suit, again in the Eastern District of Virginia, challenging NMFS’s setting of the 1997 summer flounder quota for the state of North Carolina. Among other things, plaintiffs alleged that NMFS violated the RFA, National Standard Eight of the Magnuson-Stevens Act, and the APA in failing to prepare an IRFA and FRFA and in failing to adequately consider impacts on fishing communities. The district court held that NMFS’s “status quo” rationale (i.e., the determination that this year’s quota is the same as last year’s quota) did not provide an acceptable basis for determining whether there is an economic impact. There must be a showing that the quotas have been examined in light of the current year’s conditions.

b. Remand

As a remedy, the court remanded the quota and ordered the Secretary to undertake a more thorough analysis of the quota’s impacts. The court also ordered the Secretary to “fix each year’s fishing quota including adjustments, within a reasonable period of time.”133

During the period of the remand, the agency published the 1998 quota, and adjusted it twice to account for over harvesting of the 1997 quota. The original amount of North Carolina’s 1998 summer flounder quota was 3,049,589 pounds.134 Two deductions, in January and April 1998, reduced

132. Id.
133. N. C. Fisheries 1, 16 F. Supp. 2d at 658.
that quota by 399,740 pounds as new information came in regarding the amount of fish that had been harvested in 1997.135

In September 1998, the court reviewed the agency’s remanded analysis, as well as the agency’s timeliness in setting a final quota.136 In its remanded analysis, the agency had again concluded that the 1997 quotas would not have a significant economic impact on a substantial number of small entities, and concluded that the requirements of National Standard Eight had been satisfied. The court found that the remanded analyses were arbitrary and capricious because they were simply post hoc rationalizations of the previous decision. In addition, the court concluded that the Secretary’s adjustments of the 1998 quota on January 23 and the April 1998 adjustments of the quota violated the court’s order to set the final quota within a reasonable time.137

c. Remedy

In considering the type of remedy to impose, the judge reviewed the remedial provisions of the Magnuson-Stevens Act and the RFA, noting the availability of remedies such as remand, stay of enforcement, and set-aside of the agency’s action, saying:

The Court has considerable latitude to fashion an appropriate remedy in this action. The Regulatory Flexibility Act expressly authorizes “corrective action” “including but not limited to—(A) remanding the rule to the agency, and (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.” See 5 U.S.C. § 611(a)(4). The Magnuson-Stevens Act expressly authorizes a court to “set aside” a regulation or agency action. . . . In the present case, the Secretary has acted arbitrarily and capriciously in failing to make a good faith attempt at conducting an Economic Analysis as mandated under the RFA and the Magnuson Act.138

After this discussion of the types of remedies generally contemplated, the court ordered that the 1997 summer flounder quota be set aside by the amount of the 1997 over harvests. The court described its remedy as a “sanction” against the agency:

137. Id. at 657.
138. Id.
The Court sanctions the Secretary and sets aside the 1997 commercial flounder quota by 399,740 pounds as arbitrary and capricious. In imposing this sanction, the Court notes that as a corrective measure, it could have sanctioned the Secretary by up to 762,397.2 pounds without impacting the Secretary's regulations concerning a stock assessment goal of $F = .23$ for 1997. Yet for the time being, the Court only will set aside 399,740 pounds as a sanction, the total amount of which represents the penalty adjustment that the Secretary applied for 1997 overages. [Further,] the Court ORDERS the Secretary and his subordinates not to utilize that figure as "overfishing" for any subsequent years in setting a summer flounder quota. In that respect, the Court retains jurisdiction of these proceedings and may revisit the entire matter for purposes of enforcement of its prior orders.139

From an administrative law perspective, this order could be interpreted as an order to strike down or enjoin enforcement of the agency action's final rule implementing the 399,740 pound deduction. Yet, it is not clear how the order preventing the Secretary from ever accounting for the 399,740 pounds fits that interpretation. On the other hand, the order could be construed as the court's striking down of the agency's quota and determination of OY, and replacing them with a new, specific quota of its own, new practical results regarding OY, and accounting for the fish harvested. The practical result for the fishery was that the court order increased the 1997 quota by 399,740 pounds.140

5. The 1999 Quota

Meanwhile, back in the U.S. District Court for the District of Columbia, a new wave of litigation was brewing to challenge NMFS's selection of "probabilities." On December 31, 1998, NMFS published the summer flounder quota for 1999. The quota had an eighteen percent probability

139. Id. at 668–69.
140. Id.
of achieving the target fishing mortality rate (F) that would prevent overfishing. NMFS selected the quota as a compromise between the summer flounder monitoring committee’s recommendations, which would have had a fifty percent probability of preventing overfishing, and the Mid-Atlantic Fishery Management Council’s recommendation, which would have had a three percent probability of preventing overfishing. Plaintiffs challenged that the quota violated the Magnuson-Stevens Act requirement to prevent overfishing and rebuild overfished fisheries. The lower court ruled that the Magnuson-Stevens Act required a balancing of competing policy objectives including National Standard Eight’s requirement to provide for sustained participation of fishing communities, and National Standard One’s mandate to achieve OY, prevent overfishing, and rebuild overfished fisheries, and that NMFS’s decision was reasonable in light of the Chevron standard of deference. Also, the court was sensitive to the practical problems of reviewing a quota much of which had already been harvested:

[T]he parties agreed at the Motions Hearing on July 21, 1999, that the 1999 summer flounder fishing season has already proceeded more than half way to completion. As a practical matter, Plaintiffs’ prayer for relief to revise the 1999 ... quota cannot be implemented, given the fact that the ... quota has already been in place for some time. As a consequence, although not a dispositive factor, this Court questions the feasibility of implementing a new ... quota at this juncture.

Because Plaintiffs failed to show that NMFS’s actions were arbitrary and capricious, the lower court ruled in favor of the government.

On appeal, the D.C. Circuit found that Congress had not left complete discretion to balance National Standards Eight and One to the agency. Rather, the Magnuson-Stevens Act makes the requirements of National Standard One an absolute obligation, while the substantive requirements of National Standard Eight apply only when comparing management alternatives that satisfy the conservation goals of National Standard One.

The Government concedes, and we agree, that under the Fishery Act, the Service must give priority to conservation measures. It is

144. Id. at 109.
145. Id. at 108.
only when two different plans achieve similar conservation measures that the Service takes into consideration adverse economic consequences. 147

The *Daley II* court, taking note of the Fisherman’s Dock case, stated that NMFS must have a “fairly high level of confidence that the quota it recommends will not result in [exceeding the target fishing mortality rate].” 148 Ultimately, the court held that a quota with an eighteen percent chance of meeting mandatory conservation goals was arbitrary and capricious. The court wrote:

The disputed 1999 TAL had at most an [eighteen percent] likelihood of achieving the target F. Viewed differently, it had at least an [eighty-two percent] chance of resulting in an F greater than the target F. Only in Superman Comics’ Bizarro world, where reality is turned upside down, could the Service reasonably conclude that a measure that is at least four times as likely to fail as is to succeed offers a “fairly high level of confidence.” 149

a. Remedy

On April 25, 2000, the court concluded that the statute and regulations require at least fifty percent probability of achieving the target F and remanded the quota to the agency “for further proceedings consistent with this opinion.” 150 At that point, the 1999 quota had been fully harvested.

6. The 2000 Quota

In January 2000, prior to the D.C. Circuit rendering its opinion in *NRDC v. Daley II*, NMFS had published a proposed rule to set the 2000 summer flounder specifications. 151 Before NMFS could issue the final rule, the D.C. Circuit ruled that summer flounder specifications must have at least a fifty percent probability of achieving their target rates. 152 On May 24, 2000, NMFS published the final rule to implement the specifications noting that additional work needed to be done to assure the fifty percent probability, but asserting that it was better to implement some level of

147. *Id.* at 753.
148. *Id.* at 754 (quoting *Fishermen’s Dock II*, 75 F.3d at 169–70).
149. *Id.*
150. *Id.* at 756.
control in the interim.\footnote{153} NMFS stated its intention to promulgate final measures complying with the D.C. Circuit's order by August 1, 2000.\footnote{154} In the final rule, NMFS also noted that any quota overages in the 2000 commercial summer flounder fishery would be deducted from 2001 quotas, as provided under the FMP.\footnote{155}

On June 23, 2000, NRDC filed suit alleging that the 2000 quotas did not prevent overfishing and failed to account for excess fishing mortality that occurred in 1999.\footnote{156} NRDC alleged that NMFS's failure to account for fishing mortality from 1999 skewed the probability of the 2000 quota's success to a level below fifty percent.\footnote{157} In November, 2000, NMFS and NRDC entered a settlement agreement pursuant to which NMFS agreed to revise the summer flounder quota in 2001 so that it would achieve the biomass that would have been achieved had the 1999, 2000, and 2001 quotas all been set to have a fifty percent probability of hitting the target fishing mortality rate (Biomass target).\footnote{158} The agreement also explicitly addressed the issue of deducting overages, providing: "[n]othing in this agreement excuses Defendant's responsibility pursuant to 50 C.F.R. 648.100(d)(2) to deduct overages from the 2001 TAL."\footnote{159}

7. The 2001 Quota

In December 2000, NMFS was struggling to finalize the counts of fish harvested and set the next year's final quota in a reasonable time and to comply with orders in two competing law suits when an additional complication arose. The Atlantic States Marine Fisheries Commission (ASMFC), the coalition of state management agencies that share responsibility for the summer flounder fishery in state waters, announced that it would set the state quotas higher than the proposed Federal quota. NMFS delayed publishing a final quota while it worked to coordinate summer flounder management with the ASMFC.

While NMFS and the ASMFC discussed how best to resolve the inconsistency, in March 2001, North Carolina Fisheries Ass'n, Inc. sued to enforce the court's order that NMFS publish the final quota in a reasonable

\footnotesize{\begin{itemize}
\item 154. \textit{Id}. at 33,487.
\item 155. \textit{Id}.
\item 156. NRDC v. Minetta, D.D.C., Civ. No. 1:00CV01481 HHK, Nov. 1, 2000, Settlement Order.
\item 157. \textit{Id}.
\item 158. \textit{Id}.
\item 159. \textit{Id}. at 4.
\end{itemize}}
time.\textsuperscript{160} By this time, NMFS was under court order from the \textit{NRDC v. Daley II} case to ensure that the Federal quota would achieve a fifty percent probability of achieving the rebuilding target.\textsuperscript{161} Failure to deduct overages from the previous year could have had adverse effects on the ability to achieve that target. The court in the Eastern District of Virginia did not rule on the March motion until July 30, 2001. By that time, NMFS had published the final unadjusted quota (which did take into account some of the overages) on March 23, 2001. When the court did rule, it concluded that NMFS had violated the order to set the final quota in a reasonable and timely manner, and that sanctions were appropriate.\textsuperscript{162}

\textit{a. Remedy}

As a sanction, the court ordered the Secretary “not to make any additional adjustments to North Carolina’s summer flounder quota in 2001 or any year thereafter on the basis of any additional overages that are discovered from North Carolina’s 2000 summer flounder quota.”\textsuperscript{163} This remedy could be viewed as the imposition of a new and different quota from the one selected by the Secretary. On the other hand, it could be viewed as an injunction prohibiting future agency action. In any event, the practical effect may have been to further challenge the agency’s ability to achieve the Biomass target mandated by the D.C. Circuit’s order.

\textit{C. The Hawaii Longline Fishery}

1. Background

In the Western Pacific, NMFS manages several fisheries including the pelagic longline fishery for tuna and swordfish. Endangered sea turtles—leatherback, olive ridley, and loggerhead—migrate through the waters surrounding Hawaii in which the longline fishing occurs. Over the years, NMFS completed a series of ESA consultations on the fishery’s effects on the turtles with varying conclusions. NMFS also prepared a series of environmental assessments on the fishery, and a single environmental impact statement on the action to implement a limited entry program in the

\begin{itemize}
  \item \textsuperscript{160} N.C. Fisheries Ass’n, Inc. v. Evans, 152 F. Supp. 2d 870, 870 (E.D. Va. 2001).
  \item \textsuperscript{161} \textit{NRDC v. Daley II}, supra note 146, at 749.
  \item \textsuperscript{162} \textit{N.C. Fisheries Ass’n}, 152 F. Supp. 2d at 882–83. The court stated that NMFS’s efforts to coordinate with the ASMFC did not excuse the agency from setting a final quota in a timely manner. The court further concluded that his orders did not conflict with the D.C. Circuit’s \textit{(NRDC v. Daley II)} order that management measures achieve a fifty percent probability of achieving the Biomass target. \textit{Id.} at 880.
  \item \textsuperscript{163} \textit{Id.} at 882.
\end{itemize}
fishery in 1993, but no environmental impact statement on the fishery as a whole.

The conclusions of the ESA consultations consistently highlighted the need for more information. In the first consultation, completed in 1985, NMFS concluded that the fishery was not likely to jeopardize the turtles. In 1991, the agency completed another consultation on the fishery, again concluding no jeopardy, but noting that limited information was available and requiring fishery participants to submit logbooks. In 1993, NMFS issued a new biological opinion (BO) incorporating new information received through the log books. The 1993 BO concluded that the fishery was adversely affecting the turtles but was not likely to jeopardize their continued existence over the next twelve months. The 1993 BO stated that current levels of turtle takes could not be sustained over the long-term without causing jeopardy. The agency implemented an observer program. In 1994, NMFS issued another BO increasing the number of authorized turtle takes based on information from logbooks and the observer program. In 1998, NMFS issued a new BO concluding that the fishery's operations from 1998–2001 would not jeopardize sea turtles.

In 1999, two environmental organizations, the Center for Marine Conservation and the Turtle Island Restoration Network, challenged NMFS's conclusions under the ESA as being based on assumptions contrary to the record or without a basis. In addition, they claimed that NMFS's authorization of the fishery did not comply with NEPA. Plaintiffs claimed that NMFS should have prepared an EIS before issuing the 1998 BO. The court upheld the agency's ESA conclusions of no jeopardy based on the fact that the agency was using the best available scientific information.

165. Id. at *3.
166. Id.
167. Id.
168. Id.
170. Id.
171. Id. at *1.
172. Id. On August 26, 1999, the day before the complaint was filed, NMFS decided to prepare an EIS on the longline fishery, and planned to complete it by October 1, 2001. NMFS also decided to prepare an EA on the operation of the fishery during the period the EIS was being developed. In addition, NMFS implemented several precautionary measures to reduce turtle hooking mortality.
173. Id. at *9–*11.
However, the court concluded that the incidental take statement (ITS) included in the 1998 BO constituted a "permit" that required NEPA compliance pursuant to Ramsey v. Kantor.\textsuperscript{174} The last NEPA analysis the agency had prepared was in 1993 and was focused on an amendment to the FMP rather than on an ITS. The court found that NMFS had violated NEPA by not preparing an EA on the 1998 ITS:

Defendants failed to thoroughly evaluate the environmental impact of the authorized incidental takes and because of this, the harm to the turtles is incalculable and it appears that the turtles may suffer irreparable harm.\textsuperscript{175}

\textit{a. Remedy}

In considering what remedy to order for the NEPA violation, the judge considered jurisprudence on the issuance of injunctions. He concluded that injunctive relief is appropriate for NEPA violations, and that remedies for violations of NEPA should be carefully tailored to balance environmental concerns of NEPA with broader societal interests.\textsuperscript{176}

As a remedy, the judge issued a court order, which he subsequently modified four times, establishing closed areas, gear requirements, and other management requirements for the Hawaii longline fishery. His goal appears to have been to carefully tailor a remedy that would provide

\textsuperscript{174} Leatherback Sea Turtle, 1999 WL 33594329, at *15 (citing Ramsey v. Kantor, 96 F.3d 434, 444 (9th Cir. 1996)).

\textsuperscript{175} Id. at *16.

\textsuperscript{176} See id. at *17 (citing Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984), Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1984), Save Our Ecosystems v. Clark, 747 F.2d 1240 (9th Cir. 1984), Alpine Lakes Protection Soc'y v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975), American Motorcycle Ass'n v. Watt, 714 F. 2d 962 (9th Cir. 1983); citing Environmental Defense Fund v. Marsh, 651 F. 2d 983 (5th Cir. 1981), Western Oil and Gas Ass'n v. Alaska, 439 U.S. 922 (1978), and Conservation Soc'y of Southern Vermont v. Secretary of Transportation, 508 F.2d 921 (2nd Cir. 1974).

While these cases do support the premise that injunctive relief can be appropriate, none of them deals with a comparable situation in which the "injunction" so specifically affects agency discretion and management. The case most relevant to the point that judges are free to craft relief short of full-blown estoppel of an ongoing or proposed action is Weinberger v. Romero-Barcelo, in which the U.S. Supreme Court upheld a district court opinion that an injunction to stop the unpermitted discharge of ordinance into the waters surrounding Puerto Rico was not necessary since less restrictive relief, in the form of an order to obtain a permit, was available. 456 U.S. 305 (1982). Yet even the relief in that case arose from a specific, nondiscretionary statutory obligation that already existed within the Federal Water Pollution Control Act (FWPCA), that an agency must obtain a permit. That relief is distinguishable from this case in which the judge designs and orders a specific regulatory regime to be imposed. As demonstrated by the number of modifications to the order, the remedy the judge granted does not appear to be a specific, nondiscretionary statutory obligation.
interlocutory protection to turtles while minimizing to the extent possible harm to the fishery. He wrote,

Here, because of the public interest in the Fishery, an injunction, as framed by Plaintiffs, which stops all activities of the Fishery pending completion of an EIS, cannot be justified as an appropriate remedy under the circumstances of this case. However, a carefully tailored injunction during the EIS period is warranted. Given the complexity of this case, the court has given the parties an opportunity to input their suggestions on the terms of the injunction.  

Although the court could have enforced its injunction against parties to the lawsuit through contempt of court powers, it appeared that the judge intended the agency to implement the injunction through rulemaking. However, because the judge had found the agency to be in compliance with the ESA, there was no necessity for the agency to further enforce the ESA, and consequently no basis for promulgating a rule under section 11(f) of the ESA.

b. Implementation

NMFS elected to use its regulatory authority under section 305(c) of the Magnuson-Stevens Act based on a finding that an emergency existed, and on December 27, 1999, promulgated a rule implementing the closed area and management measures ordered by the U.S. District Court for the District of Hawaii. 178 On June 19, 2000, NMFS published an extension of the emergency rule managing the fishery pursuant to the court’s order, and explained that the basis for the rule was to “reduce adverse impacts to sea turtles by restricting the activities of the Hawaiian long-line fishery.” 179 Language in the extension further explained that, “[e]xtension of the emergency rule will maintain the temporary area closure until December

177 Leatherback Sea Turtle, 1999 WL 33594329, at *18.
178. Hawaii-based Pelagic Longline Area Closure, 64 Fed. Reg. 72,290 (Dec. 27, 1999). Under the Magnuson-Stevens Act, if the Secretary finds that an emergency exists, he may promulgate emergency regulations not to exceed 180 days in duration. 16 U.S.C. § 1855(c) (2003). The Magnuson-Stevens Act further states that any FMP, and any regulation promulgated to implement such plan, shall be consistent with the National Standards. Id. § 1851(a). Any emergency regulation which changes an existing FMP shall be treated as an amendment to the FMP. Id. § 1855(c)(3). Thus, emergency rules that modify existing FMPs must be consistent with the National Standards and the section 303(a) requirements.
179. Fisheries off West Coast States and in the Western Pacific, 65 Fed. Reg. 37,917 (June 19, 2000).
23, 2000, or until new time and area closures, as imposed by the court, are implemented by NMFS." 180

Through several additional rules published in the Federal Register, NMFS implemented a series of increasingly complex management requirements reflecting modified court orders that culminated in an elaborate, judicially imposed regime. 181 The specific requirements of the final scenario included:

(1) No vessel registered for use with a Hawaii longline limited access permit (Hawaii longline vessel) may use longline fishing gear to target swordfish north of the equator. Longline gear must always be deployed such that the deepest point of the main line between any two floats, i.e., the deepest point in each sag of the main line, is at a depth greater than 100 m (328.1 ft or 54.6 fm) below the sea surface. (2) No Hawaii longline vessel may fish with longline gear from April 1, 2001, through May 31, 2001, in the area bounded on the south by the equator, on west by 180 [degrees] W. long., on the east by 145 [degrees] W. long., and on the north by 15 [degrees] N. lat. (3) A Hawaii longline vessel that is de-registered from a Hawaii longline limited access permit after March 29, 2001, may not be registered again with a Hawaii longline limited access permit, except during the month of October. (4) If a sea turtle is discovered hooked or entangled on a longline during gear retrieval, retrieval shall cease until the turtle has been removed from the gear or brought onto the vessel's deck. (5) Hooks must be removed from the sea turtles as quickly and carefully as possible. If a hook cannot be removed, the line must be cut as close to the hook as possible. (6) Wire or bolt cutters capable of cutting through a longline hook must be on board each vessel to facilitate cutting of hooks imbedded in sea turtles. (7) The vessel operator shall bring comatose sea turtles on board the vessel and perform resuscitation as prescribed in 50 C.F.R. 223.206(d)(1). The Order shall remain in effect until further order of the Court. 182

180. Id. (emphasis added).
In sum, the orders closed a large portion of the Pacific ocean to longlining. The fishery is still subject to the court’s injunction pending filing of a final rule to implement the agency’s new management scheme. The new management regime about to be implemented is based on recommendations from a three person panel consisting of one appointee from the plaintiffs, one from the agency, and one from the Defendant Intervenors. Other interested members of the public did not have the same opportunity to participate as the litigants.

The agency’s lack of discretion and reliance on the court order to provide the legal basis for these rules raise questions about how the Magnuson-Stevens Act’s national standards are being evaluated. When courts get into the level of detail that this one did, and the agency uses Magnuson-Stevens Act powers to implement court-ordered management measures, the result can be less public involvement and frustration of the intent of the Magnuson-Stevens Act.

D. Monk Seals and Crustaceans

1. Background

In addition to the pelagic longline fishery, NMFS manages two other federal fisheries in the Western Pacific: the crustacean (lobster) fishery, and the bottomfish fishery, both of which occur in areas inhabited by endangered monk seals. In January 2000, environmental groups sued NMFS alleging violations of NEPA and sections 7 and 9 of the ESA, with respect to the agency’s management of the crustacean fishery, and violations of NEPA and section 9 of the ESA with respect to the bottomfish fishery. Specific facts regarding each fishery are provided below.

2. Lobster

In 1983, NMFS implemented the FMP for the Crustacean Fisheries of the Western Pacific Region. This FMP governs fishing for lobsters in the waters around Hawaii. In conjunction with implementation of the FMP, NMFS prepared an EIS on the fishery in 1983. Monk seals, an endangered species, also inhabit the Hawaiian islands and are known to consume lobster. In conjunction with implementation of the FMP, NMFS completed an ESA consultation in 1981 noting a paucity of information available on

the monk seals’ food supply.\textsuperscript{184} The BO stated that based on the available data, monk seals were opportunistic feeders, and if there were a scarcity of lobsters, they would probably be able to switch to other prey. The BO also stated:

[T]here is insufficient information available \ldots to be able to insure that the proposed activity will not jeopardize the continued existence of the monk seal \[because\] the predator-prey relationship of monk seals and spiny lobster is poorly understood and there is essentially no information available on the importance of spiny lobster in the monk seal diet.\textsuperscript{185}

In addition the BO noted that it “should not be construed as a ‘no jeopardy opinion,’” but it nevertheless recommended approval of the FMP.\textsuperscript{186} NMFS implemented the FMP.\textsuperscript{187}

Subsequently, in 1996, NMFS prepared another BO in conjunction with a new harvest strategy.\textsuperscript{188} The BO concluded that competition with the lobster fishery for prey had been identified as a factor in the continuing decline of the monk seals. However, it concluded that given the healthy status of the lobster stocks, and the relatively small fishing effort expected to occur in key areas, the FMP, as amended, was not likely to jeopardize the monk seals.\textsuperscript{189} In 1999, based on the availability of new information on monk seals, NMFS reinitiated consultation, and concluded that the 1999 harvest levels were not likely to jeopardize the continued existence of monk seals.\textsuperscript{190}

3. Bottomfish

NMFS prepared a BO on the bottomfish fishery in 1986, and another in 1991. The BO’s acknowledged previous interactions between the fishery and monk seals, such as hookings. NMFS concluded that the level of harmful interactions was probably not a significant concern, but planned a program of education for fishermen and implemented requirements for observer coverage. With respect to NEPA, NMFS had prepared an EIS on the lobster fishery in 1986, but had not prepared an EIS on the bottomfish

\textsuperscript{184} Greenpeace Found. v. Daley, 122 F. Supp. 2d at 1118.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Greenpeace Found. v. Daley, 122 F. Supp. 2d at 1118.
\textsuperscript{190} Id. at 1118–19.
fishery. At the time of litigation, the agency had begun preparing EISs for both fisheries.

4. The Court’s Conclusions

   a. Lobster
   
   The court concluded that with respect to the lobster fishery, NMFS had not complied with section 7 of the ESA because it had not taken into account the best available data, and consultation must be reinitiated; there was not sufficient data to prove that the lobster fishery was taking monk seals through competition for prey in violation of section 9; an EIS was required under NEPA to evaluate fishery interactions with monk seals; and NMFS had failed to meet this requirement.191

   b. Bottomfish
   
   With respect to the ESA, the court concluded that NMFS had not complied with the requirements of section 7 of the ESA. The court noted that “NMFS cannot speculate that no jeopardy to monk seals or adverse modification of their habitat will occur because it lacks enough information regarding the impact of the fishery on [the monk] seals.”192 The court stressed that the agency’s duty was a “rigorous,” “affirmative” duty to “insure” that the FMP does not jeopardize the monk seals, and found that the agency had not met this requirement.193 With respect to section 9, the court found that there was evidence in the record showing that “monk seals have been killed, hooked, and poisoned in connection with the bottomfish fishery,” in the past.194 However, the court could not make a preliminary ruling that the fishery was continuing to take monk seals in violation of section 9 of the ESA.195 Such a determination depended upon facts not available in the record. However, the court expected that NEPA and ESA section 7 analyses would produce the necessary information.196

5. Remedy

   In terms of relief, the court enjoined the lobster fishery pending completion of a new BO and EIS. The order read, “[d]efendants are

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191. Id. at 1117–22.
193. Id. at 1131.
194. Id. at 1136.
195. Id. at 1134.
196. Id. at 1135.
enjoined from implementing the Crustacean FMP until the Court receives notice that both the Biological Opinion and the EIS . . . are complete and have been issued. Accordingly, the lobster fishery is to remain inactive until such time.” However, noting that some of the potentially affected parties were not represented in the case, the court refrained from enjoining the bottomfish fishery pending a hearing to gather evidence on whether harm was still occurring and on the impacts on the fishermen in order to do a balancing of the harms. Subsequently, the court conducted an evidentiary hearing and determined that an injunction was not justified for the bottomfish fishery.

6. NMFS’s Implementation of the Crustacean Closure

During the court’s consideration of this case and through the time the court issued its injunction on November 15, 2000, NMFS had already closed the lobster fishery pursuant to the FMP due to NMFS’s scientific concern about the health of the lobster resource and to prevent overfishing. Under the FMP’s default provisions, the lobster fishery is closed from January through June each year. In 2000, due to concerns about the potential for overfishing, NMFS closed the fishery from July through December as well. In February 2001, following the court’s order, NMFS issued a notice that pursuant to the court order and other considerations, there would be zero allowable landings of lobster in 2001. A unique aspect of the crustacean FMP is that it provides regulatory authority for instituting emergency response measures to address harm to monk seals.

Although NMFS did not purport to announce the zero harvest level in accordance with these procedures, an argument exists that the judge’s remedy was within the agency’s power to implement regulatorily. On the other hand, the judge’s phrasing of the injunction, so that it prohibited NMFS from implementing the FMP, arguably rendered the crustacean fishery open access. If read literally, it actually prohibited NMFS from maintaining the closures already on the books.

197. Mineta, 122 F. Supp. 2d at 1140.
198. Id. at 1139. The judge wrote: “[t]he Court is concerned that participants in the bottomfish fishery . . . are unrepresented in this suit. Although it is a safe assumption that those active in the fishery (if represented) would join NMFS in opposing an injunction, the Court cannot assume that they share identical interests with NMFS.” Id.
E. The Sharks' Story

NMFS regulates fishing for sharks off the coast of the eastern United States pursuant to the Magnuson-Stevens Act. Because sharks are considered "highly migratory species," the Secretary, rather than any of the fishery management councils, has primary regulatory authority over the Atlantic shark fisheries. In 1993, after determining that shark populations were overfished, NMFS implemented an FMP to regulate the shark fishery. As the agency managed the species in the face of significant scientific uncertainty, controversy brewed about whether the agency's quotas were too conservative or too liberal, and ultimately led to litigation.

The 1993 shark FMP established a permitting system and set commercial quotas and recreational bag limits for three groups of sharks: large coastal sharks (LCS), small coastal sharks (SCS), and pelagic sharks. In 1996, the two advisory bodies charged with recommending management measures could not agree on how to manage the shark fishery; one could not even reach internal agreement. In October 1996, an environmental group, the Biodiversity Legal Foundation (BLF) filed a petition for rulemaking requesting that NMFS cut the 1997 shark quotas by fifty percent and reduce the recreational bag limits as well. This request reflected recommendations from one of the two advisory committees that, in light of risk to the species, a cut be made for precautionary purposes. In December 1996, NMFS proposed a rule to implement the reductions and stated that the proposal was based on the best available scientific information.

With its proposed rule, NMFS published a certification pursuant to the RFA, stating that the proposed quota cuts would not have a significant economic impact on a substantial number of small entities. The basis for this conclusion was NMFS's estimate that directed shark fishermen earn at most $26,426 per year from the directed shark fishery and supplement their income from other sources. During the public comment period, NMFS received comments from commercial shark fishermen who disagreed with the certification and asserted their economic dependence on the fishery. At the final rule stage, NMFS supplemented its certification with additional analysis, but maintained the conclusion that the reductions would not result

in a significant economic impact on a substantial number of small entities.\(^{205}\)

Plaintiffs, a coalition of shark fishermen and fishing organizations, challenged the scientific basis for the reductions under the Magnuson-Stevens Act and challenged the agency's failure to prepare a full-blown analysis, as required by the RFA for rules that cannot be "certified" as having no "significant economic impact on a substantial number of small entities."\(^{206}\) On July 16, 1997, BLF, which had petitioned for the rule in the first place, in conjunction with other environmental organizations, moved to intervene.\(^{207}\) The court "denied as untimely the proposed intervenors' motion on August 22, 1997," but allowed them to file amicus briefs.\(^{208}\)

In a decision issued February 28, 1998, the court upheld the agency's actions on a variety of APA and Magnuson-Stevens Act challenges, noting that:

The administrative record before the court evinces a healthy debate (both within NMFS and between NMFS and participating constituencies) which featured noticeably vocal expert opinions both supporting and opposing the means employed by the Secretary. It is the prerogative of [the Secretary] to weigh those opinions and make a policy judgment based on the scientific data.\(^{209}\)

However, the court concluded that the agency's determinations under the RFA were not supported by the record and were therefore arbitrary and capricious.\(^{210}\)

1. Remedy

The court remanded the RFA determinations to the agency with instructions to "undertake a rational consideration of the economic effects and potential alternatives to the 1997 quotas."\(^{211}\) The court also upheld the agency's new quotas during the period of remand, writing: "[c]onsidering the delicate status of the Atlantic sharks, ... the public interest requires

\(^{206}\) SOFA I, 995 F. Supp. at 1434.
\(^{207}\) Id. at 1424.
\(^{208}\) Id.
\(^{209}\) Id. at 1432–33 (quoting Organized Fishermen of Florida v. Franklin, 846 F. Supp. 1569, 1577 (S.D. Fla. 1994)).
\(^{210}\) SOFA I, 995 F. Supp. at 1437.
\(^{211}\) Id. at 1436.
maintenance of the 1997 Atlantic shark quotas pending remand and until further order of the court."212

2. Rebuilding Plan

Upon implementation of the FMP in 1993, NMFS had determined Atlantic sharks to be "overfished." After the SFA amendments of 1996, the "overfished" status triggered substantive new requirements that FMPs rebuild overfished fisheries to sustainable levels. When NMFS included Atlantic sharks on a list of overfished fisheries in 1997, a statutory one-year deadline went into effect for developing a rebuilding plan. NMFS began developing the required rebuilding plan during the period of the Southern Offshore Fishing Ass'n (SOFA) litigation.213

On May 15, 1998, NMFS submitted its remanded economic impact analysis to the court. The remanded analysis concluded that the action may have had a significant economic impact on a substantial number of small entities.214 The court appointed a special master to review the document and analyze the availability of workable alternatives to the restrictive quotas.215 At this point, there were a series of joint requests for stays in the litigation and in the special master proceedings pending settlement discussions.216 The court issued a series of three orders staying the litigation.217 In each of these orders, the court included language that existing (1997) quotas would remain in effect during the stay. The final stay concluded on June 21, 1999.

On May 28, 1999, at the culmination of a long and public process, the agency published a final rule to implement a rebuilding plan for the Highly Migratory Species (HMS) fisheries (including Atlantic sharks), to be effective on July 1, 1999, over a week after the judge's final stay order

212. Id.
215. Id. at 1340. The special master was appointed on October 17, 1998. Id.
216. Id. at 1342.
217. Id.
would expire.\textsuperscript{218} The rebuilding plan included strict cuts in quotas for sharks. The agency notified the court of the final rule on June 3, 1999. The plaintiffs added a challenge to the new 1999 quotas to the case that was still pending before the court.\textsuperscript{219}

On June 30, 1999, the judge issued an opinion (1) agreeing with the agency’s conclusion that the 1997 quotas may have had a significant economic impact on small entities, (2) but criticizing the agency’s analytical approach and indicating that the agency had not sufficiently considered potential alternatives that would have minimized economic impacts, and (3) holding that the new 1999 quotas contained in the rebuilding plan violated his original 1998 order that the court would maintain the 1997 quotas pending further consideration.\textsuperscript{220} The specific fault the judge found with the analytical approach was that the agency erred by considering the impacts of the quotas on all permit holders, three-fourths of whom had not recently used their permits or who caught only small amounts of shark.\textsuperscript{221} The judge concluded that this approach diluted the analysis of impacts on a smaller group of high-level participants in the commercial shark fishery.\textsuperscript{222} While not directly invalidating the remand analysis which was still under consideration by the special master, the judge commented that the remanded analysis seemed to be “clearly skewed,” and “arbitrary and capricious,” despite his agreement with its conclusion. Although the judge ordered that the remand to the special master continue to proceed, he harshly criticized the agency for violating his 1998 order, writing:

I reluctantly conclude that in this instance NMFS is an agency willing to pursue its institutional objectives without acknowledging applicable Congressional and judicial limitations. . . . Although the preservation of the Atlantic shark species is a benevolent, laudatory goal, conservation does not justify government lawlessness.\textsuperscript{223}

\begin{itemize}
\item \textsuperscript{218} See supra note 213.
\item \textsuperscript{219} SOFA II, 55 F. Supp. 2d at 1343.
\item \textsuperscript{220} Id. at 1345–46.
\item \textsuperscript{221} Id. at 1339.
\item \textsuperscript{222} Id. at 1339–40.
\item \textsuperscript{223} Id. at 1345.
\end{itemize}
3. Remedy

In considering the remedy, the judge considered both the biological and the economic risks. Regarding the health of the shark stock, he appeared to disagree with the agency's conclusions about the level of fishing the stocks could sustain. He wrote:

> Considering the short duration of the commercial shark-fishing season (two to three weeks, twice a year), the injunction imposed by this order (expected, if the defendant is diligent, to last a zoologically inconsequential duration) should have no significant impact on the defendant's long-term goal of rebuilding shark stocks to ideal levels. . . .

Of the potential economic consequences, he noted that the plaintiffs, who had successfully challenged NMFS's "draconian and probably confiscatory limits," have "reaped no reward and enjoyed no relief." He decided to enjoin NMFS from enforcing the 1999 regulations for Atlantic shark to the extent that they differed from the 1997 measures, and he ordered that the 1997 measures remain in place to preserve the status quo "pending further judicial review." Although this order raised a potential biological dilemma for the agency and the sharks, it did not create as much of a legal feasibility conundrum as some of the other orders discussed earlier in this paper. The 1997 quotas had been published as permanent regulations that would remain in place as annual quotas until superseded. As long as the judge continued to strike down new agency rules superseding the 1997 quotas, the 1997 quotas remained enforceable and on the books.

F. West Coast Groundfish

1. Amendment 12

NMFS manages the Pacific coast groundfish fishery pursuant to an FMP developed by the Pacific Fishery Management Council. In December 2000, NMFS approved Amendment 12 to the FMP. Amendment 12 provided framework procedures for developing rebuilding plans, for setting guidelines for rebuilding plan contents, and for sending rebuilding plans to NMFS for review and approval/disapproval, and was intended to satisfy the

224. SOFA II, 55 F. Supp. 2d at 1346.  
225. Id. at 1345.  
226. Id. at 1346–47.
Magnuson-Stevens Act's requirements for rebuilding plans. Two weeks later, NMFS approved the final harvest specifications for 2001 based on the requirements of the FMP and Amendment 12, waiving prior notice and comment on this part of the action.\textsuperscript{227} NMFS accepted comments on the final rule after it was published. Pursuant to the Magnuson-Stevens Act, the FMP and the annual harvest levels must minimize bycatch to the extent practicable and prevent overfishing.\textsuperscript{228}

NRDC challenged NMFS's implementation of the 2001 fishing specifications for West Coast groundfish.\textsuperscript{229} The challenge alleged that the calculations used to estimate the bycatch mortality rates, a key factor in determining whether bycatch was being minimized, were arbitrary; that NMFS violated the APA and the Magnuson-Stevens Act by not providing for advance notice and public comment on proposed specifications; that the underlying FMP (Amendment 12) on which the rebuilding portions of the specifications were based did not comply in form with the requirements of the Magnuson-Stevens Act; that the FMP's authorization of overfishing under the "mixed stock exception" violated the Magnuson-Stevens Act; and that the EAs prepared for both Amendment 12 and the 2001 groundfish specifications were inadequate because they failed to consider a reasonable range of alternatives.\textsuperscript{230}

On August 20, 2001, the court ruled in favor of the plaintiffs on every ground except the mixed stock exception, which it determined was not yet ripe for review.\textsuperscript{231}

\textit{a. Remedy}

The judge provided the following relief: (1) declaratory judgment that the 2001 specifications were legally inadequate; (2) an order that the agency reassess the 2001 specifications using a legally adequate discard mortality rate; (3) an order that NMFS provide adequate notice and comment in promulgating future groundfish specifications; (4) an order setting aside the portion of Amendment 12 that allows the Council to

\begin{itemize}
\item \textsuperscript{228} 66 Fed. Reg. 2339 (Jan. 11, 2001).
\item \textsuperscript{229} NRDC v. Evans, 168 F. Supp. 2d 1149, 1153 (N.D. Cal. 2001).
\item \textsuperscript{230} \textit{Id.} at 1153–60.
\item \textsuperscript{231} \textit{Id.} at 1160–61. On January 13, 2003, the Ninth Circuit vacated the portion of the lower court’s ruling that had found NMFS to be in non-compliance with notice and comment requirements of the Magnuson-Stevens Act. NRDC v. Evans, 316 F.3d 904, 913 (9th Cir. 2003).\end{itemize}
develop rebuilding plans that are not in the format required by the Magnuson-Stevens Act (FMP, FMP amendment, or proposed regulations); and (5) an order setting aside the EAs prepared for the Amendment 12 and the 2001 specifications, and remanding them to the agency for further consideration.\(^\text{232}\)

While the court did not enjoin the agency from enforcing the 2001 quota, it did declare that quota legally inadequate.\(^\text{233}\) However, much of the 2001 quota had already been taken by the time the court ruled.

b. NMFS's Implementation

NMFS responded by immediately undertaking a new analysis of bycatch rates and undertaking development of a new approach for formulating specifications using prior notice and comment. To the extent that Amendment 12 had been set aside, the agency had to find a new way to comply with the Magnuson-Stevens Act's rebuilding requirements. On January 11, 2002, the agency published an emergency rule to manage the fishery through February and simultaneously published a proposed rule that would regulate the fishery for the remainder of the year.\(^\text{234}\) NMFS stated in the emergency rule that it planned to work with the Council to revise the method of implementing annual specifications for future years.\(^\text{235}\)

2. Amendment 13

In a related case, environmental plaintiffs had also challenged Amendment 13 to the West Coast Groundfish FMP.\(^\text{236}\) Amendment 13 had been intended to bring the FMP into compliance with the SFA's requirements regarding bycatch assessment and avoidance. NMFS had previously disapproved Amendment 11, due to the fact that it failed to analyze all practicable alternatives to the current year-round trip limit management system. In developing Amendment 13, the Council considered a range of alternatives for minimizing bycatch, including capacity reduction, marine reserves, a vessel incentive program, and discard caps, but implemented only a voluntary increased utilization program. The FMP also listed bycatch reduction measures that might be implemented in the future.


\(^{233}\) Id.


\(^{235}\) Id. at 1540–41.

The Amendment was supported by an EA/FONSI which considered four alternatives for implementing a standardized reporting methodology, including status quo (no new observer programs beyond those already in place), and mandatory logbook reporting. In approving Amendment 13, NMFS noted that "states are now implementing a largely government-funded observer program." The Amendment provided that NMFS "may implement" an observer program, but did not require such a program.

At the time of approving Amendment 13, NMFS had an observer program in place, but was on record stating that the limited scope of that program, and lack of funding for expanding it, would not result in reliable data to support new discard estimates. NMFS was on record stating that it lacked adequate data on bycatch in the fishery, that the absence of data hampered its ability to manage the fishery, and that "critical information on the portion of catch that is discarded at sea is available only through the placement of onboard observers."

The court ruled in favor of the plaintiffs, finding that Amendment 13 did not comply with the Magnuson-Stevens Act requirement that FMPs include a standardized reporting methodology to assess bycatch and did not adequately analyze alternatives; and that NMFS had failed to explain the EA's FONSI and failed to consider a reasonable range of alternatives in the EA.

a. Remedy

On April 12, 2002, the court remanded Amendment 13 to the agency for further consideration in light of its ruling.

3. Plaintiff's Attempt to Enforce the Timelines

After the court's remand, NMFS began the process of developing Amendment 16, that would bring the FMP into compliance with the court's orders, utilizing the procedures set forth in the Magnuson-Stevens Act, which requires involvement of the fishery management council. NMFS began development of both a short-term and a long-term EIS. NMFS also engaged in settlement discussions with the plaintiffs from April 2002 to October 2002. As of November 2002, NMFS's projected schedule for completing Amendment 16 was Fall 2003.

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237. Fisheries off West Coast States and in the Western Pacific, 66 Fed. Reg. 29,729, 29,732 (June 1, 2001).
239. Id. at 1206-07.
240. Id. at 1207.
On November 20, 2002, plaintiffs filed a motion seeking new remedies for both the Amendment 12 and the Amendment 13 cases. Plaintiffs alleged that NMFS was in violation of Congressionally mandated deadlines that required the agency to implement rebuilding plans within twenty-one months of a species being listed as overfished if a council had failed to act by that time. Plaintiffs also alleged that NMFS was required to implement bycatch requirements since the original Congressional deadline had been 1998.

In an opinion that highlights the complexities of fisheries litigation and remedies, the court wrestles with fundamental questions of how to craft an appropriate remedy in this specific context, how to incorporate the necessary science, how to consider the necessary impacts, and how to respond to a management process that is "glacially slow."

This court could reasonably find that the agency's action is contrary to law and therefore the Plaintiffs win, but then where are we? It is one thing for a court to enjoin an agency action, then revoke a regulation and order an agency to stop. How does a court force an agency to do its job within the time required by law? Most of the cases this court has found on this issue involve an agency's enacting a regulation which violates the intent of Congress. The court then steps in and orders the agency to cease and desist. In the case at bar, Plaintiffs ask the court to apply the standard to an agency's failure to take action in the time-frame mandated by Congress. Most of the fish species at issue in this case were identified as overfished in 1999, and the measures which this court ordered taken in August 2001 have yet to be implemented, and it's been three years, going on four. Defendants have been actively engaged in pursuing measures to reach the goals of the MSA and the regulations and to comply with the orders of this court. The process has just been glacially slow. Setting new deadlines would probably be futile, unless the court were willing to assume an active role, perhaps by appointing a special master at defendant's expense. Decades will pass before some of the fish species at issue are predicted to recover. Defendants spend a portion of their budget each year to buy fishing boats from captains who are leaving the fishery and to pay to retrain their crews for other work. This court perceives a need for restraint and patience. In the larger context, the court must balance the survival of the fish and the survival of the fishermen. Plaintiffs at this time present no

concrete recommendations as to how Defendants should implement the mandate of Congress. Where is the science to support a shorter timeline than the agency proposes? While they are legally correct, Plaintiffs offer no remedy which will produce the desired result. The court is reluctant to issue orders without an adequate technical and scientific foundation. However, the court will not throw up its hands and abdicate its responsibility to see that the will of Congress is met, eventually.242

In the end, the court denied the plaintiff's motion, but required NMFS to report periodically on its progress.

G. The Monkfish's Tale

NMFS declared monkfish to be overfished in 1997, and implemented a monkfish FMP in 1999. The FMP established a limited access system with different categories of permits, and established different trip limits for vessels in the different qualification categories and using different types of gears. For example, in the southern region the following trip limits were implemented depending on the type of monkfish permit the vessel holds and the type of gear the vessel uses: (1) for category A and C vessels using mobile gear, a landing limit of 1,500 pound tail-weight or 4,980 pound whole weight; (2) for category B and D vessels using mobile gear, a landing limit of 1,000 pound tail-weight or 3,320 pound whole weight; and (3) for any vessel using fixed gear, a landing limit of 300 pound tail-weight or 996 pound whole weight.243

The gillnetters challenged this disparate treatment alleging violations of the Magnuson-Stevens Act's national standards. The court agreed with the plaintiffs' finding that the trip limits were not based on the best available scientific information, that there was no documentation that the trip limits resulted in equitable proportions among categories, and that there was nothing in the record to demonstrate that the limits were fair and equitable to all "monkfishermen."244

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242. Id. at 1058–59.
243. Fisheries of the Northeastern U.S., 64 Fed. Reg. 54,732, 54,733, 54,734 (Oct. 7, 1999). In the monkfish fishery, there are three gear types: trawls, dredges, and gillnets. The term "fixed gear" effectively refers to gillnets. The term "non-trawl" would appear literally to encompass both dredges and gillnets. However, because there were separate rules for dredges in the monkfish fishery, the only remaining gear type to be governed by the general non-trawl rules was gillnet gear.
1. Remedy
On August 14, 2001, the court issued an order enjoining the 300 pound trip limit for non-trawlers and establishing a 1,500 pound trip limit for all vessels.

[T]he imposition of the 300 [pound] limit on non-trawlers is arbitrary and capricious. It is hereby vacated and all monk fishermen will be governed by the 1,500 [pound] limit until such time as the Secretary establishes a fair and equitable gear differential or otherwise revises the catch limit for all monk fishermen.245

This order raises some interesting issues from both legal and practical perspectives. It addresses the plaintiff’s primary concern that they be allowed to catch more fish. However, while the lawsuit challenged only the 300/1,500 pound differential for vessels in the A and C categories, the judge’s order appears to apply a 1,500 pound trip limit to categories B and D as well. The immediate result is that a variety of vessels will be able to catch more fish. Perhaps even more than 1,500 pounds, since, when the judge vacates the existing trip limits, there is nothing remaining in terms of regulations to limit the fishery. NMFS is without legal authority to enforce a different set of quotas unless it engages in rulemaking, pursuant to the Magnuson-Stevens Act, to implement them. The legal result may be that some categories of vessels are fishing open access. Also, from a practical perspective, the increase in catch that the court order authorizes may trigger a variety of unintended impacts.

H. Essential Fish Habitat

In 1996, the Sustainable Fisheries Act amended the Magnuson-Stevens Act to require that fishery management councils amend their FMPs to “describe and identify essential fish habitat [(EFH)] . . . [and] minimize to the extent practicable [the] adverse effects on such habitat caused by fishing. . . .”246 In addition, the new law established requirements for other federal agencies to consult with the Secretary when undertaking actions that could adversely affect essential fish habitat.247 The consultation provisions further require that the Secretary make recommendations to consulting agencies about measures to conserve EFH, and for the consulting agencies to provide a written response explaining which measures they

245. Id. at 117–18.
will be adopting and which not, and providing reasons if they have chosen not to adopt the recommendations.\textsuperscript{248}

After NMFS had approved the Council-recommended EFH amendments to FMPs around the country, environmental plaintiffs filed suit alleging NEPA and Magnuson-Stevens Act violations.\textsuperscript{249} For each of the challenged FMP amendments, the NEPA documents were EA/FONSIs. Plaintiffs complained that NMFS had not considered alternative EFH designations to what the Councils had recommended.\textsuperscript{250} NMFS argued in its defense that pursuant to the Magnuson-Stevens Act, its decision making authority with regard to Council recommendations is limited to approval, partial approval, or disapproval. The Magnuson-Stevens Act does not provide a mechanism for secretarial modification of Council submissions.

The court expressed concern that NMFS did not consider alternative designations of EFH, nor measures for further reducing the impacts of fishing gears. The court concluded that these EAs did not address the necessary factors for determining whether an EIS was necessary, were inadequate in scope, did not consider a reasonable range of alternatives, and did not present adequate analyses of impacts.\textsuperscript{251}

1. Remedy

The court's remedy was to enjoin the agency from enforcing the EFH amendments ending completion of a new analysis:

Because the public interest would be served by enjoining the Secretary's actions until such time as he can identify and evaluate all alternatives to the EFH Amendments, this Court will enter an injunction against the enforcement of those Amendments until the Secretary performs a new, thorough, and legally adequate EA or EIS for each EFH Amendment, in compliance with the requirements of NEPA.\textsuperscript{252}

Compare this result to the judge's enjoining of the crustacean fishery in the monk seal case. If read literally, these orders appear to prevent NMFS from doing the thing that the litigants, and perhaps the judge, were trying to achieve.

\textsuperscript{248} Id.
\textsuperscript{249} American Oceans Campaign, 183 F. Supp. 2d at 1.
\textsuperscript{250} Id. at 9.
\textsuperscript{251} Id. at 20.
\textsuperscript{252} Id. at 21.
In November 1999, NMFS approved Amendment 9 to the New England Groundfish FMP. Amendment 9 included overfishing definitions intended to bring the FMP into compliance with the 1996 SFA amendments to the Magnuson-Stevens Act. Subsequently, NMFS determined that Amendment 9 could not be implemented due to technical flaws, and began development of a new amendment to replace Amendment 9. Before the replacement of Amendment 9 was completed, NMFS approved a regulatory action, labeled Framework 33, that allowed fishing at higher levels than would have been allowed under Amendment 9.

On May 19, 2000, the Conservation Law Foundation sued NMFS alleging that it had violated the SFA by failing to give effect to Amendment 9, and that both Framework 33 and Amendment 9 violated SFA's bycatch provisions and the APA by failing to require adequate assessment and minimization of bycatch. NMFS argued that technical flaws prevented the agency from implementing Amendment 9 and that Framework 33 adequately protected the fishery pending completion of a new FMP amendment that would comply with the SFA. With respect to the bycatch allegation, NMFS claimed that the SFA did not necessitate implementation of new bycatch measures because those already in place were adequate.

The court found that Framework 33 did not comply with the underlying FMP and violated the SFA because it allowed fishing at levels up to three times higher than those approved in Amendment 9, and because it was allowing overfishing to occur. The probability of Framework 33 achieving the rebuilding requirements mandated in the SFA were too low. Echoing the standard articulated by the D.C. Circuit in NRDC v. Daley, the court stated that in order "[t]o comply with the SFA as a matter of law, Defendants must show that there is at least a [fifty percent] probability that Framework 33 can meet the targets set by the SFA and the relevant FMP."

With respect to NMFS's argument that technical flaws prevented it from implementing Amendment 9, the court held that NMFS's approval...
of the amendment precluded the use of that defense. In addition, the court found evidence in the record indicating that NMFS could have possibly implemented all or part of the amendment. With respect to NMFS’s duty to report, assess, and minimize bycatch, the court found that the record did not support the agency’s conclusion that existing measures were sufficient.

1. Remedy

This case presented a factual situation in which a mandamus order could have been appropriate relief for a Magnuson-Stevens Act violation, due to the fact that NMFS had already approved an FMP amendment. The court could have simply ordered the agency to implement what it had already approved. However, the remedial phase actually became more complex than any we have discussed thus far. Because the court and all parties agreed that new information on the fishery indicated that factual basis for the approval of Amendment 9 was no longer valid, and that ordering the agency to implement Amendment 9 would have created absurd results, the court directed the parties to engage in mediation. As of April 16, 2002, with the fishing season scheduled to open on May 1, 2002, some but not all of the parties had been able to reach agreement on terms of a possible settlement. The agreeing parties submitted to the court a proposed “Settlement Agreement Among Certain Parties.” Three environmental plaintiffs and one intervenor from the seafood industry objected to the proposed agreement. After considering the proposed settlement agreement as well as the positions of the non-settling parties, the court crafted its own remedy that started with components of the settlement agreement as a baseline, but added various requirements to what the parties had proposed. The court described the various factors it had weighed and considered in crafting an appropriate remedy as follows:

Fashioning an appropriate remedy has been one of the hardest tasks this Court has ever undertaken. The livelihood—indeed the way

258. Id. at 10–11.
259. Id.
260. Id. at 15.
261. In its initial summary judgment decision, the court stated that NMFS “can, and must, give effect to Amendment 9.” Id. at 23–24.
263. Id. at 189.
264. Id. at 190.
of life—of many thousands of individuals, families, small businesses, and maritime communities will be affected. The economy of state and local governments in the region will therefore undoubtedly be impacted in turn. The future of a precious natural resource—the once-rich, vibrant and healthy—and now severely depleted New England Northeast fishery—is at stake. All of these diverse interests must be respected and considered, as the then National Standards set forth in the Magnuson-Stevens Act mandate. . . .265 Thus, the Court has concluded . . . that it is appropriate to use the Settlement Agreement Among Certain Parties as a baseline remedy. . . . Some additions . . . have been made to the terms of the Settlement Agreement where the Court felt that certain provisions could be strengthened in terms of reducing over-fishing and minimizing bycatch without risking the lives of fishermen or endangering the future of their communities and their way of life.266

The court issued an order that included thirty-six specific management measures, ranging from bag limits, effort limitations known as "days-at-sea" (DAS), closed areas, and minimum fish sizes, to observer coverage requirements.267 The court order required the

265. Id.
266. Id. at 192.
267. Conservation Law Found., 195 F. Supp. 2d at 195–98. For example, some of the specific measures in the order included:
A. Effective May 1, 2002 to July 31, 2002, for all vessels fishing under a multispecies DAS, the Amended Interim Rule, containing the following measures, shall apply:
  1. Restrict vessels from fishing more than [twenty-five] percent of their allocated DAS during May through July.
  2. Count multispecies DAS as a minimum of [fifteen] hours, for any trip longer than three hours.
  3. Prohibit “front loading” of the DAS clock (require that vessels leave port within one hour after calling into the DAS program to prevent vessels from accumulating time for the purposes of fishing Gulf of Maine cod).
  4. Close the inshore Western Gulf of Maine closure area. . . .
  13. Vessels intending to charter/party fish in the Gulf of Maine closed areas must “declare into charter/party fishery” for the duration of the closure or for three months whichever is greater. . . .
B. Effective August 1, 2002, until promulgation of Amendment 13, for all vessels fishing under a multispecies DAS, the Second Amended Interim Rule, containing the following measures, shall apply:
  1. Freeze DAS at the average DAS used during the base period of May 1, 1996 to April 30, 2001, not to exceed the current allocation. Vessels are not entitled to any minimum DAS other than their average during the five-year base period. For limited access vessels not operating under the call-in system during the period May 1996
Secretary of Commerce to implement the management measures by regulations and by certain dates specified in the order. 268

through June 1996, a vessel’s DAS will be based on vessel trip reports submitted to NMFS before April 9, 2002. Otherwise, DAS will be based on NMFS’ call-in system.

2. DAS will be reduced by twenty percent from the baseline set forth in Paragraph B 1.

3. Any latent effort permit not used in 2001 may not be activated.

4. The minimum size for cod that may be sold shall be twenty-two inches.

5. For all gear sectors, NMFS shall provide five percent observer coverage, or higher, if necessary to provide statistically reliable data. Effective May 1, 2003, NMFS shall provide ten percent observer coverage for all gear sectors, unless it can establish by the most reliable and current scientific information available that such increase is not necessary.

6. Freeze issuance of new open access hand-gear permits to any vessel that has never been issued such permit, or has not applied for such permit, as of August 1, 2002.

7. Prohibit “front loading” of the DAS clock for all areas (require that vessels leave port within one hour after calling into the DAS program to prevent vessels from accumulating time).

8. Prohibit use of de-hookers or “crucifiers” with no less than six-inch spacing between the fairlead rollers.

9. Continue Western Gulf of Maine year round closure, unless modified by amendment.

10. Prohibit use of de-hookers or “crucifiers” with no less than six-inch spacing between the fairlead rollers.

25. The boundary for the Southern New England measures . . . is as follows:

(a) Bounded on the east by straight lines connecting the following points:

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<th>Lat.</th>
<th>Long.</th>
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<tr>
<td>(*)</td>
<td>70o00'</td>
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<td>40o50'</td>
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<td>40o50'</td>
<td>69o40'</td>
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<td>40o18.7'</td>
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<tr>
<td>40o22.7'</td>
<td>69o00'</td>
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(*) South facing shoreline of Cape Cod

(**) Southward to its intersection with the EEZ

(b) Bounded on the west by:

A line beginning at the intersection of 74o00' longitude and the south facing shoreline of Long Island, NY, and then running southward along the 74o00' longitude line. Id. 195–97.

268. Id. The court was clearly aware of the obligations it was placing on the agency, stating:

The Court is of course aware that there are some differences between the provisions of the Settlement Agreement submitted by certain parties which were to be incorporated into the First and Second Interim Rules and the final Remedial Order being entered today. . . . In any event, the present Remedial Order includes those departures, and only those departures, from the Settlement Agreement which the Court deemed essential to meet the demands of the statute. The Government will need to publish in the Federal Register, as quickly as possible, the Amended Interim Rule and Amended Second Interim Rule to include the departures from the Settlement Agreement incorporated in the Remedial Order.

Id. at 198 n.2.
Several parties, including NMFS, moved for reconsideration. Among other things, NMFS argued that the "Amended Remedial Order represents a mandamus order requiring federal officials to promulgate specific rules in the Code of Federal Regulations that will subject both parties and non-parties alike to potential civil and criminal penalties." NMFS stated that non-parties had not been afforded an opportunity to comment, and that the Amended Remedial Order had not been promulgated pursuant to the analytical and procedural requirements of other applicable laws, such as NEPA and the Magnuson-Stevens Act. Finally, NMFS pointed out that mandamus orders are appropriate only in cases where the duty to act is not only authorized, but nondiscretionary.

On May 23, 2002, the court vacated its April 26, 2002 Remedial Order and ordered that the "Settlement Agreement Among Certain Parties" be implemented in its original form with the addition of certain observer coverage requirements. The court did not address NMFS's mandamus argument, but rather hinged its decision on the fact that the April 26, 2002 order would have produced unintended results and caused grave economic and social hardship. The court currently retains jurisdiction over this case as the parties work towards deadlines to implement a revised FMP.

IV. ANALYSIS OF REMEDIES

Having reviewed the current trends in fisheries injunctions, we will now consider the possible friction between some of these remedies and our notions of separation of powers, and whether the outcome of these lawsuits comports with the best interests of the litigants, the public, and the resource.

As mentioned previously, crafting effective judicial remedies to procedural violations of fishery management laws requires sensitivity to the regulatory status quo ante and the exact meanings of the orders themselves in light of underlying regulations on the books. While some of the injunctions we have just discussed in effect do nothing more than strike down an unsupported agency action in accordance with the APA, others appear to go far beyond this familiar boundary. For example, while the judge in the shark case may appear to be setting a new quota contrary to

269. Id. Federal Defendants' motion for reconsideration.
270. Id.
271. Id.
273. Id.
274. SOFA I, 995 F. Supp. at 1411.
the one proposed by the agency, what he is actually doing is striking down agency actions that would have changed the status quo, the status quo being the 1997 quotas already on the books. This is nothing new. Contrast, on the other hand, the Hawaii longline case,275 in which the court’s order required the agency to take regulatory action implementing very specific management measures in the Pacific Ocean; and with the monkfish case,276 in which the court replaced a variety of quotas with the new 1,500 pound limit for all. In the Hawaii longline case, the judge required proactive agency rulemaking to implement his management regime. In the monkfish case, the judge’s order striking down the agency’s quotas, in effect, left no regulations on the books, and called into question how the agency would enforce the 1,500 pound limit against fishermen to whom existing regulations did not apply.

The line between what may work legally in terms of a fisheries injunction and what may not is fuzzy at best, but jurisprudence on the issue of mandamus may provide a few helpful considerations as this area of law develops further. The key point that emerges is that, in the tradition of Marbury v. Madison, compelling an agency to implement a specific outcome can be complicated at best, particularly if a statute vests discretion with the agency. In cases where the agency has discretion, such as in developing FMPs under the Magnuson-Stevens Act, judicial relief may well be limited to striking down the agency’s action.

Whether we agree or disagree with the ultimate validity of any of the judicial orders previously discussed, it is interesting to consider the net results of these injunctions from the perspectives of the litigants, the resources, and the public.

A. Steller Sea Lion

From a technical legal perspective, the injunction issued in the Steller sea lion case277 seems to work. The court’s finding of a procedural violation of the ESA gave the agency a basis to utilize its ESA regulatory authorities to prevent further violations until the procedural flaw was corrected. However, this outcome may have been unattractive from a political perspective, as exemplified by the appropriations rider directing that future management decisions originate through the Magnuson-Stevens Act council process.

At times, the controversy was so heated that it appeared Congress might respond with a repeal of the ESA, or at least the creation of a "snail darter-like" exception for the North Pacific, or even a convening of the God Squad. Although Congress's intervention prohibiting implementation of the 2000 RPA may have been a slight set back to the Steller sea lions, the phased-in protections may have struck a balance that would have avoided jeopardizing sea lions while still enabling an important U.S. fishery to continue to exist during the development of a workable long-term RPA. Also, Congress responded positively by providing much needed funding to support efforts to gather information on predator prey relationships in the North Pacific ecosystems, new information which ultimately should benefit all the parties involved.

Litigants may perceive that litigation has helped them achieve their goals in this case. It is likely that the new information that will be produced will enhance the management of the fishery and should benefit protected species. On the other hand, the agency has devoted a great deal of resources attempting to develop a comprehensive plan based on relatively little data. This raises the question of whether agency resources are being best utilized.

B. Summer Flounder

It is hard to capture the net results of the summer flounder litigation in a tidy summary of pros and cons because the issues are so complex and numerous. However, at its heart, this line of cases is really about allocations. The NRDC cases²⁷⁸ sought for NMFS to set more conservative quotas, and the North Carolina Fisheries Association cases²⁷⁹ promoted letting fishermen take more fish. This is the kind of resource allocation issue that the Magnuson-Stevens Act is designed to address through public process. One might conclude that the effect of the litigation was to take the debate out of the Council forum, in which the interested members of the public fight for their perspectives before a single decision-making body, and into the courts, in which a narrower group of interests fight for their perspectives before a wider variety of decision-making bodies.

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²⁷⁹ See N.C. Fisheries Ass'n I, 16 F. Supp 2d at 647; N.C. Fisheries Ass'n II, 27 F. Supp. 2d at 650.
C. Hawaii Longline

From a technical legal perspective, this case, resulting in a series of five court ordered rules managing the fishery, highlights the separation of powers questions discussed above and raises questions about what additional findings a court may need to make in concluding that one set of management measures is a nondiscretionary duty that the agency is obligated to implement.

From a practical perspective, the results may have been positive. All the affected interests were present in the lawsuit and were able to express their concerns to the court. The management measures erred on the side of precaution, protecting the resource pending development of new analyses. The development of the new analyses will likely aid in improving management for all involved. However, the public was cut out of the rulemaking process. In addition, there may be some unintended ramifications of the court ordered management measures regarding relocation of fishing effort.

D. Monk Seals

The monk seal case exemplifies how a court order can sometimes have unintended results. By striking down the agency’s regulatory authority to close the fishery, the court seems to have technically undermined the results it intended to accomplish. Even if the court’s order had accomplished what it was intended to accomplish, it would not have provided any additional protections for the resource beyond what the agency was already doing—closing the fishery and developing new analyses. One consequence that may have actually harmed the resource was that the court order foreclosed research that could have provided additional important information about the predator prey relationships the agency was trying to understand.

E. Shark

Technically, the injunctions issued in the shark case seem to comport with the relief delineated by the APA. Because of the underlying regulatory regime on the books in the Code of Federal Regulations, the judge was able to maintain the 1997 quotas indefinitely by simply striking down each

subsequent agency action. This result appears to have been good for the litigants as well—at least in the short run. They were able to accomplish their short-term economic objectives of harvesting more sharks, although it remains to be seen what the long-term biological effects on the fishery may be.

From a public participation perspective, this case demonstrates the cost to the public of having management taken out of the agency's hands. Not only was the public excluded from participating in the development of shark quotas, but the organization that originally requested the 1997 rulemaking was denied the opportunity to intervene.

F. West Coast Groundfish

The ultimate resolution of the West Coast groundfish case remains to be seen, but, as of this writing, NMFS is proceeding with developing management measures pursuant to the Magnuson-Stevens Act procedures by submitting regular progress reports to the court. On one hand, the Fishery Management Council has indicated that delays in developing FMP amendments have been due in part to the litigation itself. On the other hand, although the plaintiffs did not win the ultimate remedy they sought in terms of the schedule for the implementation of the new plans, as a result of the litigation, the agency is reevaluating measures with which the plaintiffs were not satisfied. It will be interesting to observe whether this litigation has any long term effect on how the environmental community participates in the Magnuson-Stevens Act process, and whether it has any effect on how NMFS and the Council respond to participation of the environmental community.

G. Monkfish and Essential Fish Habitat

The orders in the monkfish and EFH cases provide additional examples of how injunctions can lead to confusion if there is not a clear linkage to the underlying regulatory regime. The technical legal readings of these two orders seem to effect results far beyond what the litigants and the courts intended.

283. NRDC v. Evans, 168 F. Supp. 2d at 1149.
H. New England Groundfish

Although the unusual factual situation surrounding the New England groundfish case may have given rise to one of the rare occasions in which mandamus would have been an appropriate remedy, the court and the parties agreed that forcing NMFS to implement Amendment 9 would have produced absurd and undesirable results. Ascertaining an appropriate remedy that accounts for the various legal requirements and public policy considerations continues to challenge all the parties involved.

V. CONCLUSION

In conclusion, our review of the legal authorities for issuance and implementation of fishery management injunctions indicates that there are many complexities involved when a plaintiff requests a court to order an agency to implement a particular management regime. An agency must carefully consider what a court is expecting in terms of implementing or complying with an injunction, particularly if the injunction is intended to impose a new regulatory regime on the fishery. An agency may not disregard underlying regulatory and statutory schemes already in place. To the extent the court is requiring the agency to engage in rulemaking to effect a particular result, such an order may constitute "mandamus."

That said, future litigants should be aware of several considerations when deciding whether or not to pursue their objectives through litigation. First, while this paper has focused on remedies that have resulted when NMFS has lost a lawsuit, overall NMFS wins the majority of its fishery management related litigation. Some plaintiffs may never get to the remedy phase. Those who do pursue litigation should be aware of the extensive reach of judicial jurisdiction and, when considering the costs and benefits of litigation, should be aware of the potential for unanticipated results when the power for managing fisheries is transferred from the agency and the public to the judiciary. Litigation shifts the balance of the interests represented in the decision making process away from open public participation. The Magnuson-Stevens Act is intended to provide stakeholders a forum for working out their differences early in the process. Before resorting to litigation, parties should attempt to work through the statutory process designed to give them a voice in the development of management measures.

286. See supra note 6.