A SURVEY OF LITIGATION OVER CATCH SHARES AND GROUNDFISH MANAGEMENT IN THE PACIFIC COAST AND NORTHEAST MULTISPECIES FISHERIES

BY

SUZANNE IUDICELLO & SHERRY BOSSE LUEDERS*

Government regulators and regulated businesses issue periodic alarms about the cost of environmental litigation in delayed decisions and burdensome response requirements. Litigation over commercial fishing in U.S. waters is no exception. The effects of litigation on the operations of the National Marine Fisheries Service have been the subject of internal investigations, National Academy studies, congressional hearings, and opinion columns. While lawsuits over endangered species, compliance with harvest limits, and consideration of environmental consequences have been part of the fishery management scene for decades, a more recent phenomenon involves challenges to federal catch share policy—the practice of limiting the pool of users who have access to take public resources.

This controversial fishery management tool has been around since the early 1990s. Much has been written in economic and political journals about the policy, variously termed "catch shares," "individual

* After more than 20 years experience in ocean policy, sustainability, and resource management in Alaska and Washington D.C., Iudicello provides policy analysis and environmental consulting to nongovernmental organizations, fishing associations, government agencies, and foundations. She is project co-manager for a five-year project sponsored by the Gordon and Betty Moore Foundation to measure the effects of catch shares in two U.S. fisheries. For more information on the project visit http://catchshareindicators.org/. Iudicello has experience at the state and national level in policy and regulatory analysis and advocacy, environmental impact assessment, and environmental conflict resolution. She has worked for the Alaska legislature and Alaska governor's Washington, D.C. office, and with national advocacy groups on reauthorizations of major U.S. environmental legislation. She has authored three books, many publications and law review articles, and is a contributor to both editions of the American Bar Association's Ocean and Coastal Law and Policy. Lueders and Iudicello have collaborated on fisheries and marine policy research since 2007. In 2008, The National Sea Grant Law Center published their review and development of a near-shore legal and policy framework for community-based fishery management opportunities in Port Orford, Oregon. Lueders presently serves as an Of Counsel attorney with the law firm Stacey L. Romberg, Attorney at Law, where she represents clients in the firm's practice areas of estate planning, probate, and business law. Prior to joining the firm, her solo law practice in Seattle's Ballard neighborhood focused on estate planning for families with young children and marine policy research. Most recently, she has investigated enforcement and litigation in the context of catch share fishery management programs.

transferable quotas," "limited access privileges," and "rationalization." Whatever one labels this grant of public resources to individuals the process has been legislated, regulated, litigated, and implemented.

An examination of the record of wins and losses, sources of claims, changes in regulation, and legislative reform reveals a twenty-year history of fine-tuning the rules of catch share programs. Early litigation over fundamental questions, such as whether a catch share permit created a property right, was addressed by Congress in legislative reforms enacted in 1996 and 2006. Challenges arose equally from environmental advocates, the fishing industry, and other entities. Federal fishery managers have prevailed in more lawsuits and in the substance of their decisions more frequently as the law included greater specificity. Like catch share programs, litigation is a tool. Agency hand wringing to the contrary, it is part of the system—not an indication that the system is broken.

I. INTRODUCTION

This Article reviews litigation related to catch share programs[1] implemented under the Magnuson-Stevens Fishery Conservation and Management Act (MSA)[2] and its predecessors[3] and discusses the effects litigation has had on the development of catch share programs as fishery management tools.

The cases reveal a twenty-year history of fine-tuning the administrative rules governing catch share programs, through legislative and regulatory processes. Federal fishery managers have prevailed in more lawsuits and in the substance of their decisions more frequently as Congress revised the legislation guiding management measures to include greater specificity in the requirements of catch share programs.[4] Early litigation raised core policy questions, such as whether a catch share permit created a property right.[5] Congress answered these questions in 1996[6] and 2006.[7]

The case law analysis was conducted as part of the project "Measuring the Effects of Catch Shares," a five-year examination of two specific programs through a suite of fourteen indicators of change.[8] This Article focuses on two categories of catch share litigation: 1) all cases related to catch share management decided prior to the year 2000[9]; and 2) since 2000, cases involving the Pacific Coast Groundfish and New England Multispecies fisheries, which are the subjects and timeframe of the indicator project. This

1 The term "catch share" is the generic descriptor for rights-based fishery management programs. For purposes of this Article, this term is used for all types of measures including Individual Fishing Quotas, Individual Transferable Quotas, Limited Access Privilege Programs, and Sector Programs.

2 16 U.S.C. §§ 1801–1891d (2012).

3 Current parlance refers to the law and cumulative amendments as the Magnuson-Stevens Fishery Conservation and Management Act. To distinguish specific versions of the law and amendments during the more than 30-year period discussed in the Article, the authors use the title of the statute to which the citation refers. Four public law versions are referenced in this Article: Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976) (FCMA); Fishery Conservation Amendments of 1990 Pub. L. No. 101-627, 104 Stat. 4436 (1990); Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 2559 (1996) (SFA). Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No.109-479, 120 Stat. 3575 (2007).

4 *See* 16 U.S.C. § 1853a(c)(2012) (describing the requirements for catch share programs).

5 *See* Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 586 (9th Cir. 1998) (discussing whether a fishery participant could have a property interest in a catch share permit in the Alaska halibut and sablefish fishery).

6 SFA, Pub. L. No. 104-297, 110 Stat. 2559 (1996).

7 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No.109-479, 120 Stat. 3575 (2007).

8 Measuring the Effects of Catch Shares, *Project Overview*, http://www.catchshare indicators.org/project-overview/ (last visited Feb. 13, 2016).

9 Catch share programs in effect prior to 2000 include: 1) Mid-Atlantic Surf Clam & Ocean Quahog IFQ (1990); 2) South Atlantic Wreckfish ITQ (1992); 3) Western Alaska Community Development Quota (1992); 4) Pacific Halibut & Sablefish IFQ (1995); and 5) Bering Sea AFA Pollock Cooperatives (1999). Nat'l Oceanic & Atmospheric Admin. Fisheries, *Map of Catch Share Programs by Region*, http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/programs_by_region.html (last visited Feb. 13, 2016).

Article excludes both challenges to individual permit decisions that did not address the legal basis for the catch share program and procedural claims under the National Environmental Policy Act (NEPA)[10] and similar administrative statutes.[11]

The catch share programs established by Northeast Multispecies Fishery Management Plan Amendment 16[12] and Pacific Coast Groundfish Fishery Management Plan Amendments 20 and 21[13] have faced challenges from both the fishing industry[14] and conservationists.[15] These programs have so far survived most legal disputes intact,[16] even as critics file new legal challenges to subsequent revisions.[17]

10 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

11 Many of the cases discussed in this Article included NEPA and other procedural challenges involving statutes other than the MSA that are not discussed because they are outside the scope of this Article.

12 Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 16, 75 Fed. Reg. 18,262 (Apr. 9, 2010) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pt. 648).

13 Fisheries off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program; Final Rule, 75 Fed. Reg. 60,868 (Oct. 1, 2010) (codified at 15 C.F.R. pt. 902 and 50 C.F.R. pt. 660).

14 *See* Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank, 693 F.3d 1084, 1086 (9th Cir. 2012) (alleging a failure to take into account fishing communities in the development of Amendments 20 and 21, filed by nontrawl fishermen on the Pacific Coast); Pac. Dawn, LLC v. Bryson (*Pacific Dawn I*), No. C10-4829, 2011 WL 6748501, at *1 (N.D.Cal. Dec. 22, 2011) (challenging the control period used in making initial allocations of catch share permits for the Pacific Coast Whiting fishery set in Amendments 20 and 21, filed by the fishing industry); Lovgren v. Locke, 701 F.3d 5, 13 (1st Cir. 2012) (challenging Amendment 16 on the grounds it conflicted with the MSA's LAPP provisions and several national standards, filed by northeast fishermen).

15 *See, e.g.*, Oceana, Inc. v. Locke, 831 F. Supp. 2d 95, 99 (D.D.C. 2011) (challenging Amendment 16 for failing to establish an adequate system for enforcing annual catch limits and requiring sufficient accountability measures to prevent overfishing and rebuild overfished stocks, filed by a conservation group); *See also infra* Part III (discussing Northeast litigation); *infra* Part IV (discussing Pacific Coast litigation).

16 The regulations implementing catch shares for the most part have been upheld in challenges to Amendment 16 and Amendment 20. The exceptions are *Oceana* and *Pacific Dawn I*. In *Oceana*, a D.C. district judge held that Amendment 16 failed to establish sufficient accountability measures for five stocks. The court remanded the issue to the agency to develop measures consistent with its ruling. *Oceana*, 831 F. Supp. 2d at 132. In *Pacific Dawn I*, a Northern California District judge remanded the portion of regulations setting the control dates for determining eligibility for catch share permits in the whiting fishery but refused to vacate the existing regulations. *Pacific Dawn I*, 2011 WL 6748501, at *8. The court ordered NMFS to implement revised regulations no later than April 1, 2013. Pac. Dawn, LLC v. Bryson (*Pacific Dawn II*), No. C10- 4829, 2012 WL 554950, at *1 (N.D. Cal. Feb. 21, 2012). In response to the court order, NMFS published new regulations maintaining the initial whiting catch share allocations. Fisheries off West Coast States; Pacific Coast Groundfish Fishery; Trawl Rationalization Program; Reconsideration of Allocation of Whiting, 78 Fed. Reg. 18,879, 18,879–80 (Mar. 28, 2013) (codified at 60 C.F.R. pt. 660).

17 *See infra* notes 244–260 and accompanying text (discussing recent litigation filed over Framework Adjustments 48 and 50).

II. THE BEGINNINGS OF CATCH SHARE LITIGATION: 1990–2000

Fishery management councils began authorizing, and National Marine Fisheries Service (NMFS) began approving, catch share programs under the Magnuson Fishery Conservation and Management Act (FCMA)[18] in the early 1990s.[19] Fisheries adopting catch shares were already managed under a relatively restrictive regulatory regime, where the full range of "input controls" had failed to foster the recovery of a fishery collapsing or on the brink of a population collapse.[20] In addition, allocation among gear groups or sectors of a fishery could not provide sufficient volume of the total allowable catch for competitors to remain profitable.[21] The first to challenge these programs in court were fishermen and processors in the fisheries who found their ability to participate greatly reduced—or even eliminated—by catch shares.[22]

The first catch share program to be adopted under the FCMA, for the Mid-Atlantic surf clam and quahog fishery, saw a challenge to whether the Act gave fishery managers the legal authority to impose a catch share program on the fishery.[23] Lawsuits disputing other early catch share programs addressed whether a permit to participate in a catch share fishery created a property right, and if so, whether a regulatory takings claim was possible when a fishery participant did not receive a permit.[24] Other claims addressed the timeframe used to set the qualifying period for the initial permit allocations in a catch share fishery[25] and how tribal fishing rights fit into catch share management programs.[26]

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18 Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801–1882 (1976)). The statute has been amended more than a dozen times since its passage in 1976. *See* COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, NAT'L RESEARCH COUNCIL, SHARING THE FISH: TOWARDS A NATIONAL POLICY ON INDIVIDUAL FISHING QUOTAS 260–64 (1999) [hereinafter SHARING THE FISH].

19 *See, e.g.*, SHARING THE FISH, *supra* note 18, at 60–70 (discussing surf clam and ocean quahog fisheries on the U.S. East Coast and the South Atlantic Wreckfish Fishery).

20 *See, e.g.*, *id.* at 60–66 (discussing failure of prior controls to promote recovery of surf clam and quahog fisheries on the U.S. East Coast).

21 *Id.* at 21–25 (discussing studies showing rent dissipation in fisheries subject to allocation limits).

22 *See* Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370, 372–73 (D. D.C. 1991) (discussing fishermen and seafood processing companies challenging a catch share program).

23 *See id.* at 379 (holding that the catch share program at issue did not violate the Act).

24 *See* Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 586 (9th Cir. 1998) (holding that while a fishery participant had a "protectable property interest in receiving a guaranteed fishing quota permit," NMFS had met the requirements for procedural due process).

25 *See* Alliance Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996) (upholding the method for determining initial allocations in the Alaska halibut and sablefish catch share program).

26 *See* Native Village of Eyak v. Daley, 154 F.3d 1090, 1097 (9th Cir. 1998) (holding that the federal paramountcy doctrine barred claims that the Alaska sablefish and halibut catch share program interfered with tribal fishing rights).

Many of these claims fueled quests for legislative reform, including measures to define issues such as property rights,[27] rents,[28] and monitoring,[29] as well as efforts to stop rights-based quota programs altogether.[30] By 1994, during reauthorization of the Magnuson Act, members of Congress expressed misgivings about catch share programs in hearings and floor statements.[31] When presenting the Senate bill on the floor, Senator Ted Stevens called the debate over catch share provisions "divisive."[32] The House bill did not prohibit introduction of new catch shares, but placed restrictions on their design and implementation.[33] In contrast, the Senate bill prohibited the councils from submitting, and the Secretary from approving, any new catch share programs through September 2000[34], and called for a National Research Council study on "controversial IFQ [individual fishing quota]-related issues such as initial allocation, transferability, and foreign ownership."[35] Compromises contributed to eventual passage of the Senate bill, S. 39.[36] The House approved the Senate version of the reauthorization, and the bill was enacted as the Sustainable Fisheries Act of 1996 (SFA).[37]

The resulting National Research Council (NRC) study, released in a 1999 report, made numerous recommendations,[38] including lifting the moratorium and using catch shares "in a preventive manner with stocks that are not overfished or to remedy existing overfishing, overcapitalization, and incentives to fish under dangerous conditions."[39] Congress tried unsuccessfully to extend the moratorium,[40] but it was repealed by the 2006 amendments to the law.[41] In the intervening years while the moratorium was in place, certain sectors in some fisheries adopted cooperative management measures, a form of catch share management that circumvented the specific individual quota moratorium.[42]

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27 *Transferable Quotas under the Magnuson Act: Hearing on Serial No. 103-82 Before the H. Subcomm. on Fisheries Management of the Comm. on Merchant Marine and Fisheries*, 103rd Cong. 82, at 50, 121, 426 (1994).

28 *Id.* at 60 (statement of Rolland A. Schmitten, NMFS Assistant Administrator for Fisheries), 87 (statement of Frank Dulcich on behalf of the Pacific Processors Association), 67–68 (letter from the Pacific Coast Federation of Fishermen's Associations to Rep. Manton).

29 *See id.* at 60.

30 *Id.* at 474–77 (statement of Greenpeace).

31 *Id.* at 2–3, 5–6, 8 (statements of Reps. Young, Hughes, Hamburg, and Furse).

32 142 CONG. REC. S10810 (Sept. 18, 1996).

33 H.R. REP. NO. 104-171, at 6, 29 (1995).

34 S. 39, 104th Cong. § 108 (1996).

35 S. REP. NO. 104-276, at 6 (1995).

36 *See, e.g.*, 142 CONG. REC. S10814 (Sept. 18, 1996) (statement of Sen. Slade Gorton describing compromises).

37 Sustainable Fisheries Act, Pub. L. No. 104-297, 120 Stat. 3575 (1996).

38 SHARING THE FISH, *supra* note 18, at 192–224.

39 *Id.* at 192.

40 146 CONG. REC. S6142 (2000) (statement of Sen. Snowe); 149 CONG. REC. S6985-8 (2003) (statement of Sen. Snowe).

41 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479, 121 Stat. 3575 (2007).

42 Scott C. Matulich et al., *Fishery Cooperatives as an Alternative to ITQs: Implications of the American Fisheries Act*, 16 MARINE RESOURCE ECON. 1, 3 (2001).

Many of the issues highlighted in the congressionally mandated 1999 NRC report,[43] as well as concerns of regional councils,[44] fishermen,[45] fishing communities,[46] crew, and processors, were subject to considerable discussion when Congress took up the next reauthorization. The legislation introduced in the Senate[47] called for program "requirements regarding eligibility to hold shares, fairness in initial allocation, excessive share caps, consideration of the needs of entry-level and small-vessel fishermen, maintaining the participation of owner-operated fishing vessels, consideration of crew, prevention of consolidation, and the need to establish policies on transferability, auctions, and cost recovery."[48] A House bill, HR 5946, introduced by Rep. Richard Pombo, did not initially include catch share provisions other than lifting the moratorium.[49] The Senate amended the bill passed by the House to include provisions related to limited access privilege programs; the House agreed to the Senate amendments; and the bill setting out catch share program requirements in U.S. fisheries became law.[50]

A. Can They Do That? The First Catch Share Programs under the FCMA

Although Congress authorized catch share programs as a fishery management measure when it passed the Fishery Conservation and Management Act of 1976,[51] it was not until 1990 that the Mid-Atlantic surf Clam and Ocean Quahog fishery became the first fishery to adopt catch

43 SHARING THE FISH, *supra* note 18, at 194, 198, 200, 203–207.

44 *See, e.g.*, *Fishery Conservation and Management Amendments Act of 2004, A Bill to Reauthorize the Magnuson-Stevens Fishery Conservation and Management Act: Hearing on S. 2066 Before the Subcomm. on Oceans, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004) (statement of Stephanie Madsen, Chair, North Pacific Fishery Management Council) (detailing various concerns of the Council related to the Act) [hearinafter *Fishery Conservation Hearing*].

45 *See, e.g.*, *Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Hearing Before the Subcomm. on Fisheries Conservation, Wildlife, and Oceans of the H. Comm. on Resources*, 107th Cong. 78–84 (2001) (statement of W.F. "Zeke" Grader Jr., Exec. Dir., Pac. Coast Fed'n of Fishermen's Ass'ns) (encouraging Congress to reject any legislation imposing individual fishing quotas and to reduce groundfish fleet harvesting capacities through other means).

46 *See, e.g.*, *Fishery Conservation Hearing*, *supra* note 44, (statement of Dr. Madeleine Hall-Arber, Anthropologist, MIT Sea Grant Program) (testimony suggesting alterations to the proposed legislation so that the impacts on fishing communities can be better understood and addressed).

47 S. 2012, 109th Cong. (2005).

48 S. REP. NO. 109-229, at 9 (2006).

49 H.R. 5946, 109th Cong. (2006).

50 109 CONG. REC. H9206-9235 (Dec. 8, 2006).

51 Pub. L. No. 94-265, 90 Stat. 331 (1976). Congress renamed the law the Magnuson Fishery Conservation and Management Act in 1980. Pub. L. No. 96–561, § 238(a), 94 Stat. 3275, 3300 (1980). Following the passage of the SFA, Congress again renamed the law, this time as the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. § 211(a), 104–208, 110 Stat. 3009, 3041 (1996).

share management under the act.[52] It follows that this program was also the first catch share program to be challenged under the Act, in *Sea Watch International v. Mosbacher*.[53] In *Sea Watch International*, two groups of fishermen and a seafood processor filed suit against the Secretary of Commerce to challenge the catch share program for the Mid-Atlantic Surf Clam and Ocean Quahog fishery, arguing that managing the fishery with catch shares went beyond the agency's statutory authority.[54] The fishermen also alleged that NMFS discriminated against smaller fleets and rewarded fishermen who had fished in violation of the fishery's prior regulations, contrary to the National Standard Four requirement that fishing privileges be allocated in a fair and equitable manner.[55] The U.S. District Court for the District of Columbia rejected both arguments, holding that the FCMA specifically authorized quotas and noting that the "ITQ [individual transferable quota] system differs only in degree from the system of aggregate quotas and transferable permits previously in use" for the fishery.[56] The court also rejected arguments that catch shares violated National Standard Four, ruling that allocating catch based on vessel history was a "consistent and reasonable regulatory scheme," and that NMFS had presented sufficient evidence to the court that the agency had considered and accounted for illegal catch as a component of catch histories.[57] The court noted that while the catch share program may cause consolidation in the fishery, the possibility of that outcome was not a foregone conclusion, and it did not rise to the level of rendering catch shares inherently unfair.[58]

The Mid-Atlantic Surf Clam and Quahog catch share program was litigated again in 1995, when processors and vessel owners sued the Secretary of Commerce to challenge the year's catch limits.[59] NMFS set the 1995 allowable catch at 10% below the previous year's limit for surf clam and 9% below the previous limit for ocean quahog.[60] To set the catch limits, NMFS relied on a new scientific model for estimating population abundance

52 NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERV., CATCH SHARE SPOTLIGHT NO. 8: SURF CLAM AND OCEAN QUAHOG ITQ (2009), *available at* http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/documents/surfclam_oceanquahog.pdf.

53 762 F. Supp. 370 (D.D.C. 1991). *See* Alison Rieser, *Prescription for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENVTL. L. REV. 393, 414–15 (1999) (discussing early challenges to ITQ programs in federal court, including Sea Watch International v. Mosbacher). While the litigation over issues in the Northeast Groundfish FMP that led to the adoption of catch shares began prior to this case, the catch share program itself did not follow for another 20 years. *See* AYEISHA A. BRINSON & ERIC M. THUNBERG, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., THE ECONOMIC PERFORMANCE OF U.S. CATCH SHARE PROGRAMS 4 (2013), *available at* https://www.st.nmfs.noaa.gov/Assets/economics/catch-shares/documents/Catch_Shares_Report_FINAL.pdf (indicating that the Northeast catch share programs were implemented in 2010).

54 *Sea Watch Int'l*, 762 F. Supp. at 372–73.

55 *Id.* at 376–77; 16 U.S.C. § 1851(a)(4) (2012).

56 *Sea Watch Int'l*, 762 F. Supp. at 375–76, 378.

57 *Id.* at 377.

58 *Id.* at 378.

59 J.H. Miles & Co., Inc. v. Brown, 910 F. Supp. 1138, 1142 (E.D. Va. 1995).

60 *Id.* at 1144.

that excluded results of the most recent stock assessment, from 1994, which showed a large increase in the populations of both species.[61] The agency disregarded the results of the 1994 survey because it found the survey to be inconsistent with thirty years' worth of data from previous stock assessments of the species and thus deemed the results unreliable, setting aside the stock assessment pending scientific review.[62] The 1995 catch limits were challenged as contrary to a number of provisions of the MSA, including National Standard One,[63] National Standard Two,[64] National Standard Five,[65] and National Standard Six.[66] The court ruled in favor of the agency on all claims, holding that its actions were within the requirements of the various national standards, and that by "reducing the quotas, [the Secretary] was acting in what he believed to be the long-term health of the fishery."[67]

Perhaps the most interesting aspect of the opinion was the court's reasoning in rejecting the argument that NMFS violated National Standard Two by failing to use the best available science in setting the catch limits, because the agency had disregarded data it considered an anomaly. The fishermen presented evidence that research vessels typically traveled at slower speeds than the vessels actually engaged in fishing surf clams.[68] These experts suggested that the controversial survey results were more accurate than previous surveys, because ocean conditions during the 1994 survey caused the research vessel to travel at speeds closer to those of fishing vessels.[69] This evidence caused the court to question the methodology used by agency research vessels, going so far as to write in its opinion that if it were "acting as Secretary of Commerce, the Court might have chosen differently" in deciding whether to set aside the 1994 survey data.[70] However, the court held that the agency decision to disregard the data was nonetheless a reasonable one and within its discretion.[71]

61 *Id.* at 1145.

62 *Id.*

63 16 U.S.C. § 1851(a)(1) (2012) ("Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."); J.H. Miles, 910 F. Supp. at 1148.

64 *Id.* § 1851(a)(2) ("Conservation and management measures shall be based upon the best scientific information available."); J.H. Miles, 910 F. Supp. at 1149, 1152.

65 *Id.* § 1851(a)(5) ("Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose."); J.H. Miles, 910 F. Supp. at 1154.

66 *Id.* § 1851(a)(6) ("Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches."); J.H. Miles, 910 F. Supp. at 1155.

67 J.H. Miles, 910 F. Supp. at 1148, 1152–55.

68 *Id.* at 1151.

69 *Id.* at 1150–51.

70 *Id.* at 1151–52.

71 *Id.* at 1152.

The Atlantic Wreckfish ITQ[72] and Western Alaska Community Development Quota Program[73] followed in 1992. Both catch share programs are distinguished by the lack of litigation in their wake.

The Alaska halibut and sablefish catch share programs, which went into effect for the 1995 fishing season, were challenged, however. In *Alliance Against IFQs v. Brown*,[74] a fishing industry group filed suit over the regulations developed to implement the catch share program.[75] Specifically, fishermen challenged the cutoff date NMFS used to establish the qualifying period for substantial participation in the fishery.[76] Although NMFS published the rule establishing the catch share program in late 1993,[77] fishery managers allocated initial permits for the Alaska halibut and sablefish catch share program based on a vessel's participation in the fishery during the 1988, 1989, or 1990 seasons.[78] The fishermen argued that the three-year lapse between the cutoff date for participation in the fishery under the catch share program and the permit application process violated the FCMA requirement that NMFS consider "present participation in the fishery" when determining catch share allocations.[79] While the court noted that "the length of time between the end of the participation period considered and the promulgation of the rule pushed the limits of reasonableness," the agency had nonetheless acted within the scope of its discretion, particularly after taking into account the agency's reasons for the delay, which included lengthy procedural requirements and the desire to prevent a race for the fish while the catch share program was under development.[80] The judge

72 NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERV., CATCH SHARE SPOTLIGHT NO. 7: WRECKFISH ITQ (2009), *available at* http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/documents/wreckfish.pdf.

73 NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERV., CATCH SHARE SPOTLIGHT NO. 2: WESTERN ALASKA COMMUNITY DEVELOPMENT QUOTA (CDQ) PROGRAM (2009), *available at* http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/documents/alaska_cdq.pdf.

74 84 F.3d 343 (9th Cir. 1996).

75 *Id.* at 346.

76 *Id.*

77 Pacific Halibut Fisheries; Groundfish of the Gulf or Alaska; Groundfish of the Bering Sea and Aleutian Islands; Limited Access Management of Fisheries off Alaska, 58 Fed. Reg. 59,375 (Nov. 9, 1993) (codified at 50 C.F.R. pts. 204, 672, 675–76).

78 Limited Access Management of Federal Fisheries in and off of Alaska, 50 C.F.R. § 676.20(a)(1)(i) (1994); *Alliance Against IFQs*, 84 F.3d at 345 (noting that NMFS set quota shares for the fishery based on the highest total legal landings of halibut and sablefish the applicant made between 1984 and 1990); Limited Access Management of Federal Fisheries in and off of Alaska, 60 Fed. Reg. 58, 528–29 (Nov. 28, 1995) (codified at 50 C.F.R. pt. 676). Several administrative challenges were also filed regarding NMFS's decision to require historic landings of specific species (halibut or sablefish) during the baseline period. *See, e.g.*, Patrick Selfridge, Appeal No. 98-0048, *4 (NOAA App. 1998), *available at* https://alaskafisheries.noaa.gov/appeals/95-0023.pdf; Jeff W. Hanson, Appeal No. 95-0048, *2 (NOAA App. 1999), *available at* https://alaskafisheries.noaa.gov/appeals/95-0048.pdf. The issue of historic landings was later litigated in 2000. Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1215 (9th Cir. 2002) (determining that historic legal landings for halibut and sablefish qualified plaintiff to harvest both species, even though it only fished one species during the regulatory base period).

79 *Alliance Against IFQs*, 84 F.3d at 347.

80 *Id.* at 347–48.

articulated the central struggle in catch share policy between supporting fishing communities and achieving conservation goals by providing protection to dwindling fish populations, noting "[t]his is a troubling case. Perfectly innocent people going about their legitimate business in a productive industry have suffered great economic harm because the federal regulatory scheme changed."[81] However, the court ultimately ruled in favor of NMFS on all counts.[82]

The Alaska halibut and sablefish catch share programs also saw litigation over whether a catch share permit created a property right or a due process claim against NMFS.[83] In *Foss v. National Marine Fisheries Service*,[84] the Ninth Circuit held that although the catch share program created a protectable property right in receiving a permit for qualifying fishermen,[85] the NMFS administrative appeals process satisfied the requirements of procedural due process when fishermen were deprived of that right.[86] Richard Foss, the fisherman who filed the suit challenging the Alaska halibut and sablefish catch share program, had fished in the fisheries during the qualifying period for the catch share program, but had switched to tuna fishing in the South Pacific during the years leading up to the permit application deadline for the halibut and sablefish catch shares.[87] Foss filed his application to participate in the halibut and sablefish catch share program forty-five days after the final deadline for permit applications.[88] Although he would have otherwise met the qualifications for a catch share permit for the fisheries, NMFS denied his application as untimely.[89] Foss sued the agency, arguing that it denied him procedural due process because he did not receive actual notice of the catch share program.[90] The court determined that the system for the initial allocation of permits in the halibut and sablefish fisheries created a property interest in receiving a catch share permit for the purposes of procedural due process.[91] However, it held that

81 *Id.* at 352.

82 *Id.* at 344.

83 *See* Dell v. U.S. Dep't of Commerce, Nos. 98-35021, 98-35044, 98-35045, 1999 WL 604217, *2 (9th Cir. Aug. 11, 1999) (unpublished table decision) (noting that, while permit holders "do have a protectable property interest in obtaining catch share permits," the administrative hearing process satisfied the requirements of procedural due process). In dissent, Judge Reinhardt wrote that he believed that NMFS administrative hearings for appeals of decisions related to catch share programs did not provide sufficient procedural due process because the "inability to compel the appearance of witnesses and to obtain documents under the control of opposing private parties—who competed for, and won, the license sought by the appellants—rendered the hearing process fundamentally unfair." *Id.* at *4.

84 161 F.3d 584 (9th Cir. 1998).

85 *Id.* at 588 (noting that "[t]he Ninth Circuit has long held that applicants have a property interest protectable under the Due Process Clause where the regulations establishing entitlement to the benefit are, as here, mandatory in nature").

86 *Id.* at 586.

87 *Id.* at 587.

88 *Id.*

89 *Id.*

90 *Id.* at 588.

91 *Id.*

the agency's procedures had provided Foss with "all the notice and process that was due" since, in addition to publishing notice of the program in the Federal Register, NMFS also published notice in fishing industry publications, sent letters to known participants in the halibut and sablefish fisheries during the qualifying period, and scheduled the 180-day permit application period during the months when most of the fixed-gear fleet was inactive and presumed not to be at sea and thus its participants would have been available to meet application deadlines.[92]

In *Native Village of Eyak v. Daley*,[93] a group of Alaska Native villages challenged NMFS regulations for the Alaska halibut and sablefish catch shares by asserting what the villages characterized as an "unextinguished aboriginal title" to exclusively fish a portion of the Outer Continental Shelf (OCS).[94] A 1998 ruling held that the federal paramountcy doctrine, in which federal rights trump state—or native nations'—in jurisdictional ownership over oceans surrounding U.S. territories, barred the claims of exclusive use.[95] In 2012, the Ninth Circuit considered the issue of whether any of the villages could establish nonexclusive aboriginal rights to fishing on the OCS.[96] Over a vigorous dissent,[97] the court held that the villages failed to demonstrate they engaged in use of the OCS waters to the exclusion of other tribes and therefore declined to find aboriginal rights for the villages.[98]

B. The Sustainable Fisheries Act and the Rise of Harvesting Cooperatives

When Congress passed the SFA, it placed a four-year moratorium on new catch share programs.[99] Nonetheless, during the moratorium, councils initiated two allocation programs organized as "harvesting cooperatives" that operate as quota or catch share programs: one for Pacific whiting[100] and one for the Alaska pollock fishery.[101]

The Pacific whiting fishery extends from waters off the coast of California north to Canadian waters off British Columbia's coast, and the United States and Canada each set annual catch limits for their respective portions of the whiting fishery.[102] Pacific whiting is part of the groundfish

92 *Id.* at 590.

93 154 F. 3d 1090 (9th Cir. 1998).

94 *Id.* at 1091.

95 *Id.* at 1097.

96 Native Village of Eyak v. Blank, 688 F.3d 619, 620–21 (9th Cir. 2012).

97 *See id.* at 626 (W. Fletcher, J., dissenting) (drawing attention to the unsigned nature of the majority opinion and writing that he concluded "based on the district court's findings, that the Chugach have established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS, and that these rights are consistent with federal paramountcy").

98 *Id.* at 626.

99 Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (Oct. 11, 1996); 16 U.S.C. § 1853(d)(1)(A) (1996).

100 *See infra* notes 103–127 and accompanying text (discussing harvest cooperatives in the Pacific whiting fishery).

101 *See infra* notes 128–152 and accompanying text (discussing sector allocation in the Alaska pollock fishery).

102 United States v. Washington, 143 F. Supp. 2d 1218, 1220 (W.D. Wash. 2001).

fishery managed by the Pacific Fishery Management Council (PFMC) under its West Coast Groundfish Fishery Management Plan (GFMP), first adopted in 1982.[103] At that time, most of the foreign vessels, or joint ventures between American and foreign companies, dominated the fishery.[104] By the early 1990s, American catcher-processors (vessels that both harvest and process) and mother ships (vessels to which catcher boats deliver fish for processing) had acquired exclusive access to the fishery.[105] In an effort to address excess capacity, the council implemented a limited entry program with adoption of Amendment 6 to the GFMP in 1994.[106] The Council considered a draft of a proposed catch share program in 1993, but it selected a multi year allocation as its preferred approach to reducing capacity.[107] In 1996, as part of its annual catch setting and allocation for groundfish, the Pacific Fishery Management Council proposed allocating portions of the total allowable catch of whiting among four different sectors of the whiting fleet: first a tribal allocation, and then the remaining portion of the Pacific whiting total allowable catch (TAC) split among the following three sectors: 1) vessels delivering to shoreside processors (42%); 2) vessels delivering to at-sea processors or motherships (24%); and 3) vessels that both catch and process (34%).[108]

The four companies that operated the ten vessels in the Pacific whiting fishery's catcher-processor sector formed the Whiting Conservation Cooperative.[109] To avoid potential problems under federal antitrust law, organizers formed the cooperative as a Washington State nonprofit corporation under an agreement drafted to conform to the requirements of the Fishermen's Collective Marketing Act,[110] which exempts from antitrust requirements certain collective operations in the fishing industry.[111]

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103 47 Fed. Reg. 43,974 (Oct. 5, 1982) (codified at 50 C.F.R. pt. 663).

104 PAC. FISHERY MGMT. COUNCIL, STATUS OF THE COASTAL PACIFIC WHITING STOCK IN U.S. AND CANADA IN 1997 A-6 (1997). For an interactive history of the fishery linked to decision documents, see MEASURING THE EFFECTS OF CATCH SHARES, *West Coast Groundfish fishery*, http://www.catchshareindicators.org/catch-shares-and-fisheries-overview/west-coast-groundfish/ (last visited Feb. 13, 2016).

105 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 6 (LIMITED ENTRY) TO THE FISHERY MANAGEMENT PLAN FOR PACIFIC GROUNDFISH 5-23 (1992).

106 *Id.* at 8-1.

107 PAC. FISHERY MGMT. COUNCIL, PACIFIC WHITING ALLOCATION ES-1 to ES-2 (1993), *available at* http://www.pcouncil.org/wp-content/uploads/1993_Whiting_EA.pdf.

108 Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Whiting Allocation Among Nontribal Sectors, 62 Fed. Reg. 18,572, 18,572–73. (Apr. 16, 1997).

109 Letter from Joseph M. Sullivan to Joel Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Justice Dep't (Apr. 22, 1997) at 5–6, *available at* http://www.justice.gov/sites/default/files/atr/legacy/2014/06/24/302629.pdf.

110 15 U.S.C. § 521 (2012).

111 *See* JOSEPH M. SULLIVAN, HARVESTING COOPERATIVES AND U.S. ANTITRUST LAW RECENT DEVELOPMENTS AND IMPLICATIONS 4–5 (2000), *available at* http://oregonstate.edu/dept/iifet/2000/papers/sullivan.pdf (discussing the legal developments that allowed the formation of harvesting cooperatives).

Upon publication of the rule implementing the allocation,[112] the organizers requested an opinion from the Justice Department on a cooperative agreement among the companies to "allocate among themselves the percentage of the Whiting Fishery Catcher/Processor allocation that each of them will harvest."[113] The Justice Department approved the agreement[114] to manage the catcher-processor portion as a cooperative, while the mothership and shoreside sectors remained traditionally managed.[115]

Fishing associations objected to these non-treaty allocations under the Pacific whiting fishery management plan in both *Washington v. Daley*,[116] in Washington State, and *Midwater Trawlers Cooperative v. Department of Commerce*,[117] in Oregon.[118] Both cases challenged the NMFS decision to allocate a portion of the whiting harvest to the Makah Tribe,[119] which held a treaty right to whiting and rockfish in the Tribe's accustomed fishing grounds off Washington's Olympic Peninsula.[120] Because of the Tribe's allocations,[121] federal fishery managers reduced non-treaty whiting allocations.[122] In 2003, the Ninth Circuit held that NMFS's method to allocate the Makah's share of whiting catch was inconsistent with the "best available scientific evidence" requirement of National Standard Two, because the agency adopted the Tribe's proposed allocation without stating the scientific rationale for the figure.[123] After the Ninth Circuit remanded the regulation to NMFS to develop allocations based on the best available science or to provide support that the current allocation met the "best available science standard," the U.S. District Court for the Western District of Washington

112 62 Fed. Reg. at 18,572.

113 Sullivan, *supra* note 109, at 7.

114 Letter from Joel Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Justice Dep't to Joseph M. Sullivan (May 20, 1997) at 4, *available at* http://www.justice.gov/atr/response-whiting-conservation-cooperatives-request-business-review-letter.

115 Dietmar Grimm et al., *Assessing Catch Shares' Effects from Federal United States and Associated British Columbian Fisheries*, 36 MARINE POL'Y 644, 651 (2012).

116 173 F.3d 1158 (9th Cir. 1999).

117 282 F.3d 710 (9th Cir. 2003).

118 The cases shared similar issues and even one judicial opinion, although they were never formally consolidated. *See Daley*, 173 F.3d at 1161 (noting the case's prior history and explaining the court's reasoning in issuing its decision in a single opinion for both cases on appeal); *Midwater Trawlers*, 282 F.3d at 715–16 (discussing the somewhat tangled procedural posture in the whiting cases).

119 The framework allocating tribal shares of the whiting fishery also included the Hoh, Quileute, and Quinault Tribes, but the Makah's share was the only tribal allocation at issue in the case. *Midwater Trawlers*, 282 F. 3d at 716.

120 Tribes have a right to fish in their "usual and accustomed fishing grounds" and are entitled to a share of up to half the harvestable quota of fish. United States v. Washington, 143 F. Supp. 2d 1218, 1222 (W.D. Wash. 2001).

121 Not all tribal assertions of treaty rights in federal fisheries have been successful. *See supra* notes 93–98 and accompanying text, discussing the Ninth Circuit's refusal to grant either exclusive use or nonexclusive aboriginal rights in the Alaska Halibut and Sablefish IFQ fishery to a group of Native Alaskan Villages.

122 *Daley*, 173 F.3d at 1165.

123 *Midwater Trawlers*, 282 F.3d at 718–20.

allowed NMFS to supplement the administrative record and approved the agency's method of allocation without remanding to the agency for additional rulemaking—a decision affirmed when the matter was again before the Ninth Circuit in 2004.[124] The Ninth Circuit agreed with the district court's ruling that NMFS's method of allocating the tribal share of the whiting harvest on a sliding scale based on the entire United States yield for the fishery was based on the best scientific information available, even if the available data was incomplete.[125] In both *Midwater Trawlers* and the *State of Washington* litigation, federal fishery managers prevailed and neither the suballocations among the non-tribal sectors nor the cooperative came under further scrutiny.[126]

The moratorium on quota programs prevented participants in the Alaska pollock fishery—also struggling with overcapacity and the race to fish—from devising an ITQ program similar to the one implemented for halibut and sablefish in Alaska.[127]

The North Pacific Fishery Management Council was embroiled in issues related to overcapacity and conflict between onshore and offshore sectors of the fishery for years.[128] Industry representatives, in private negotiations with Senators Ted Stevens (R-Alaska) and Slade Gorton (R-Washington), produced a compromise agreement incorporated into the American Fisheries Act that also authorized a form of rationalization for the pollock fishery, yet avoided ITQs: cooperatives.[129]

Congress intended the American Fisheries Act[130] (AFA), signed into law in October 1998, to rationalize the overcapitalized pollock fishery.[131] The AFA also purported to "tighten U.S. ownership standards for U.S. fishing vessels under the Anti-Reflagging Act,"[132] though this stated purpose has been criticized.[133] The AFA limited access to fishing and processing sectors of the

124 Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994, 997 (9th Cir. 2004).

125 *Id.* at 1004–05.

126 *Daley*, 173 F.3d at 1161, 1164, 1171.

127 MICHAEL L. WEBER, FROM ABUNDANCE TO SCARCITY: A HISTORY OF U.S. FISHERIES POLICY 209-10 (Island Press 2002).

128 *Id.* at 179, 181; U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR AMERICAN FISHERIES ACT AMENDMENTS 61/61/13/8 1-3 (2002), available *at* https://alaskafisheries.noaa.gov/sustainablefisheries/afa/eis2002.pdf.

129 SCOTT C. MATULICH ET AL., POLICY-INDUCED MARKET FAILURE UNDER THE AMERICAN FISHERIES ACT 1–2 (2000), *available at* http://oregonstate.edu/dept/iifet/2000/papers/matulich.pdf.

130 Pub. L. No. 105-277, 112 Stat. 2681-616 (1998).

131 N. Pac. Fishery Mgmt. Council, *American Fisheries Act (AFA) Pollock Cooperatives*, http://www.npfmc.org/american-fisheries-act-afa-pollock-cooperatives/ (last visited Feb. 13, 2016).

132 *Id. See also* Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, Pub. L. 100-239.

133 Keith R. Criddle & James Strong, *Dysfunction by Design: Consequences of Limitations on Transferability of Catch Shares in the Alaska Pollock Fishery*, 40 MARINE POL'Y, July 2013, at 91, 98.

Bering Sea/Aleutian Islands Pollock fishery to U.S. owned vessels,[134] closed the pollock fishery to new entrants, established quotas and allocations among the sectors,[135] called for regulations governing the formation and operation of fishery cooperatives in the fishery,[136] provided for the buy out of a number of catcher-processor vessels specifically named in the statute,[137] set out measures to protect other fisheries,[138] and required regulations for catch measurement and monitoring of the fishery.[139]

A vessel owner challenged the Alaska pollock cooperatives program in the guise of a constitutional takings claim in *Arctic King Fisheries, Inc. v. United States*.[140] In *Arctic King*, the former owner of a catcher-processor vessel, the Arctic Trawler, that historically had operated in the Alaska pollock fishery but neither qualified for a quota share nor a buyout under the AFA filed a Fifth Amendment takings claim against the federal government, arguing that the diminished value of the vessel due to its exclusion from the pollock fishery amounted to an uncompensated taking of private property.[141]

The Arctic Trawler had fished in the Alaska pollock fishery from 1987 until 1995, when the vessel's owner reflagged it under Belize law and began fishing in Russian waters.[142] After two years of unprofitable fishing in Russia, the vessel's owner returned it to the United States and decided to sell it, applying for a permit for the Alaska pollock fishery under the Vessel Moratorium Program (established in 1995 to prevent new vessels from entering the fishery).[143] The owner did not, however, fish with the vessel or apply for a federal fisheries permit while the vessel was being prepared for sale.[144] When Congress enacted the AFA in 1998, the Arctic Trawler was under contract for sale, but because the vessel had no recent catch history, it was disqualified from participation in the pollock fishery.[145] As a result, the vessel's purchase price dropped by more than half—from $2 million to $750,000.[146]

The case went to trial in November 2002 on the sole issue of whether the AFA caused an uncompensated taking of the vessel.[147] In its ruling, the court concluded that any takings claim would have to reside in whether the exclusion of the vessel from the pollock fishery under the AFA resulted in a

134 AFA §§ 202, (42 U.S.C § 12102(c) (2012)), 205–206 (AFA provisions concerning the Bering Sea Polluck Fishery codified as a statutory note to 16 U.S.C. § 1851, "Bering Sea Polluck Fishery").

135 *Id.* §§ 206, 208.

136 *Id.* §§ 203, 210.

137 *Id.* §§ 207, 209.

138 *Id.* § 211.

139 *Id.* § 211(b)(6).

140 59 Fed. Cl. 360, 361 (2004).

141 *Id.* at 361–62, 365–66, 370.

142 *Id.* at 362.

143 *Id.* at 362–63.

144 *Id.* at 363.

145 *Id.* at 363–65.

146 *Id.* at 365.

147 *Id.* at 366.

taking of the property interest in the vessel.[148] While the court found that the passage of the AFA resulted in a reduction in value of the vessel of more than 50% percent, it ultimately concluded that no taking had occurred.[149] The court reasoned that a catch share management regime for the fishery with an eligibility period set for the mid-1990s was reasonably foreseeable, therefore the vessel owner could not "have had reasonable investment-backed expectations that, despite what it knew and the actions it took notwithstanding, it would be insulated from or insured against any decapitalization of the fishery."[150] As with other early catch share cases, federal regulators prevailed.[151]

III. HOW LAWSUITS SHAPED THE NORTHEAST MULTISPECIES FISHERY MANAGEMENT PLAN

The Northeast Multispecies Fishery Management Plan (NMFMP) has long been the subject of litigation.[152] When NMFS approved Amendment 4 to the NMFMP in 1991, the Agency acknowledged that the original plan did not include adequate measures to prevent overfishing and rebuild stocks under the MSA.[153] In response, conservation groups filed a series of lawsuits against federal regulators, arguing that NMFS had approved NMFMP measures that did not comply with the MSA.[154] This marked the start of a pattern of conservation groups prevailing in lawsuits filed to prod NMFS to approve plan amendments, followed by delayed and protracted rulemakings.[155] The pattern continued until the Amendment 16 catch share management program commenced.[156] Amendment 16 faced a number of fishing industry lawsuits (consolidated in *Lovgren v. Locke*[157]) and continued challenges by

148 *Id.* at 373.

149 *Id.* at 385.

150 *Id.* at 380.

151 *See, e.g.*, Avenal v. United States, 100 F.3d 933, 938 (Fed.Cir. 1996) (holding for the government because the plaintiffs did not have "the right to be free from the planned and announced efforts of the Government" to regulate oyster harvesting); Conti v. United States, 48 Fed. Cl. 532, 539 (2001) (holding for the government because there was no "property interest in the continued use of his gear, vessel, or permit in a particular manner").

152 *E.g.*, Conservation Law Found. of New England, Inc. v. Mosbacher, CIV.A.No. 91-11759-MA, 1991 WL 501640 (D. Mass. Aug. 28, 1991).

153 *See* 56 Fed. Reg. 24,724 (May 31, 1991) (to be codified at 50 C.F.R. pt. 61) (approving Amendment 4 and noting it did not "constitute a complete rebuilding strategy").

154 Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 56 (1st Cir. 1993) (refusing to vacate the consent decree established in 1991).

155 ROBERT BUCHSBAUM ET AL., THE DECLINE OF FISHERIES RESOURCES IN NEW ENGLAND: EVALUATING THE IMPACT OF OVERFISHING, CONTAMINATION, AND HABITAT DEGRADATION, at iv–vi, 1–2 (2005), *available at* http://massbay.mit.edu/publications/NEFishResources/Decline%20of%20Fisheries%20Resources.pdf (discussing several lawsuits filed by conservation groups over the NMFMP).

156 Peter Shelley, *Ten Years "After the Fall": Litigation and Groundfish Recovery in New England*, 7 OCEAN & COASTAL L.J. 21, 22, 27 (2001) (suggesting continued success of conservationist challenges).

157 701 F.3d 5 (1st Cir. 2012).

conservation groups.[158] While the fishing industry challenges failed, conservation groups prevailed on the claim that Amendment 16's bycatch prevention measures were insufficient, resulting in a partial remand of the bycatch provisions for additional rulemaking by the agency.[159]

A. Caught in a Regulatory Net While Stock Recovery Drifts

Soon after NMFS implemented Amendment 4, Conservation Law Foundation of New England (CLF) filed the first of many lawsuits challenging the NMFMP, alleging Amendment 4 violated National Standard One.[160] NMFS and CLF engaged in settlement negotiations and developed a consent decree, which required regulators to develop a new NMFMP amendment that would "eliminate the overfished condition of cod and yellowtail flounder stocks in five years after implementation and . . . eliminate the overfished condition of haddock stocks in ten years after implementation."[161] However, a number of fishing associations had moved to intervene in the case, marking what would become the first of many delays in rulemaking to bring the NMFMP into compliance with the MSA.[162] The U.S. District Court for the District of Massachusetts denied the motion to intervene, and the fishing associations appealed. While the appeal was pending, the district court approved the consent decree.[163] The First Circuit then vacated the lower court's decision denying the fishing associations' motion to intervene,[164] and the fishing associations subsequently moved to vacate the consent decree.[165] After the procedural tango, the First Circuit denied the intervening parties' motion to vacate the consent decree.[166]

The consent decree led to Amendment 5 to the NMFMP, implemented in 1994, which required a 50% reduction in groundfish fishing effort over the subsequent five years and included new gear restrictions (mesh size), expanded closure areas, blocked new entrants while the fishery was rebuilding, established a vessel tracking system, required logbooks to track reporting, and limited individual vessel days at sea (DAS restrictions).[167] Fishing industry group Associated Fisheries of Maine (Associated Fisheries) filed suit on March 31, 1994, alleging that under Amendment 5, "fishermen

158 *See* Oceana, Inc. v. Locke, 831 F. Supp. 2d 95, 99 (D.D.C. 2011) (alleging Amendment 16 failed to establish adequate system for enforcing annual catch limits and to require sufficient accountability measures to prevent overfishing).

159 *Id.* at 132.

160 Conservation Law Found. of New England, Inc. v. Franklin (*CLF v. Franklin*), 989 F.2d 54, 56–57 (1st Cir. 1993).

161 *Id.* at 58 (citing the consent decree).

162 *Id.* at 54–55, 58 (showing that fishing associations moved to intervene, had their motion denied, and appealed the decision, causing delay).

163 Conservation Law Found. Inc. v. Mosbacher, No. 91-11759, 1991 WL 501640, at *2 (D. Mass. Aug. 28, 1991).

164 Conservation Law Found. of New England v. Mosbacher, 966 F.2d 39, 45 (1st Cir. 1992).

165 *CLF v. Franklin*, 989 F.2d at 58.

166 *Id.* at 62.

167 59 Fed. Reg. 9872 (Mar. 1, 1994).

caught in the regulatory net will not be able to survive financially" under its management restrictions.[168] Associated Fisheries amended its complaint three months after filing suit,[169] following NMFS's implementation of Amendment 6 in reaction to the collapse of haddock stocks, making permanent haddock protection measures previously imposed under a temporary emergency rule.[170] The U.S. District Court for the District of Maine granted a joint motion to stay the case while the New England Fishery Management Council (NEFMC) developed Amendment 7 to the NMFMP, on October 7, 1994.[171] After Amendment 7 became effective on July 1, 1996,[172] Associated Fisheries again amended its complaint to address Amendment 7,[173] and the case then proceeded with summary judgment motions before the district judge.[174]

Associated Fisheries challenged Amendment 7 on the grounds that NMFS's decision to exclude Coast Guard enforcement costs from its cost–benefit analysis, which included heightened enforcement provisions, was contrary to National Standard One and National Standard Seven.[175] National Standard One states that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry,"[176] while National Standard Seven requires that such measures "shall, where practicable, minimize costs and avoid unnecessary duplication."[177] The First Circuit rejected the fishing industry's argument that Amendment 7 increased enforcement costs, because it retained the enforcement structure imposed by Amendment 5, which was primarily shore-based and therefore did not involve an increase in at-sea enforcement by the Coast Guard, making its enforcement numbers irrelevant to NMFS's Amendment 7 cost–benefit

168 Associated Fisheries of Maine Inc. v. Daley, 127 F.3d 104, 107 (1st Cir. 1997).

169 Amended Complaint, Associated Fisheries of Maine v. United States Secretary of Commerce, No. 94-cv-00089 (DBH) (D. Me., July 25, 1994).

170 Among other measures, the emergency rule imposed a 500-lb possession limit for haddock and expanded closed areas, initially from January through April 1994. 59 Fed. Reg. 26 (Jan. 3, 1994). The emergency rule was later extended through June 30, 1994, when Amendment 6 would become effective after the required notice and comment period. 59 Fed. Reg. 15,656 (Apr. 4, 1994).

171 Order Granting Joint Motion to Stay All Proceedings in this Case Until the Court Enters a Further Order, Either Sua Sponte or Pursuant to a Motion Lifting the Stay, Set Status Report Deadline to 1/7/95, Associated Fisheries of Maine v. United States Secretary of Commerce, No. 94-cv-00089 (DBH) (D. Me. Oct. 7, 1994).

172 61 Fed. Reg. 27,710 (May 31, 1996). Amendment 7 accelerated the DAS effort reduction program and eliminated exemptions from effort control program; provided incentives to fish with larger mesh and increased closed area; set "allowable catch" targets for regulated species; and increased haddock possession limit from 500 lbs established in A6 to 1000 lbs. *Id.*

173 *Associated Fisheries of Maine*, 127 F.3d at 108 (discussing the amended complaint filed June 28, 1996 in the wake of Amendment 7); Amended Complaint, Associated Fisheries of Maine v. United States Secretary of Commerce, No. 94-cv-00089 (DBH) (D. Me. June 28, 1996).

174 *Associated Fisheries of Maine*, 127 F.3d at 108.

175 *Id.* at 111.

176 16 U.S.C. § 1851(a)(1) (2012).

177 *Id.* § 1851(a)(7).

analysis.[178] The court did not, however, give NMFS a ringing endorsement for its analysis, writing, "The sockdolager, of course, is the enormous difficulty of estimating enforcement costs in advance. Administrative decisionmaking is not an exact science . . . we cannot say that this determination offends the applicable standard of review." [179]

Amendment 7 also provided for an abbreviated framework adjustment procedure to allow the NEFMC to adjust measures in the NMFMP with an expedited procedure in response to changing conditions.[180] A fisherman, Brian Roche, challenged this portion of Amendment 7 in the context of an enforcement case that originated from the Coast Guard's at-sea boarding of his fishing vessel in a closed area.[181] Roche argued that Framework 25, which created the closed area, violated National Standard Four[182] because the location of the closed area had a disparate impact on the inshore fleet.[183] While the court did not disagree that the location of the closed area may have had an adverse impact on fishing communities, it concluded that NMFS had acted within its discretion and had not violated the SFA.[184]

B. Amendment 9 and the First Whispers of Catch Shares

When Congress passed the SFA, the Northeast Multispecies fishery was operating under measures included in Amendment 7.[185] While the SFA placed a moratorium on the adoption of any new catch shares until 2000,[186] Congress specifically intended the law to halt overfishing and rebuild diminished stocks, such as groundfish in New England.[187] Federal regulators acknowledged that Amendment 7 failed to comply with the SFA's requirements: 1) to prevent overfishing, 2) to rebuild overfished populations, and 3) to report, assess, and minimize bycatch.[188]

178 *Associated Fisheries of Maine*, 127 F.3d at 111.

179 *Id.* at 110–11.

180 Northeast Multispecies Fishery; Amendment 7, 61 Fed. Reg. 27,710, 27,747 (May 31, 1996) (to be codified at 50 C.F.R. pt. 651).

181 Roche v. Evans, 249 F. Supp. 2d 47, 49–50 (D. Mass. 2003).

182 National Standard Four provides that, "[c]onservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be A) fair and equitable to all such fishermen; B) reasonably calculated to promote conservation; and C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." 16 U.S.C. § 1851(a)(4) (2012).

183 *Roche*, 249 F. Supp. 2d at 55–56. The Coast Guard boarding of Roche's fishing vessel, the *F/V High Flyer*, occurred on February 1, 1999. *Id.* at 51.

184 *Id.* at 59–60.

185 16 U.S.C. § 1852(a)(1)(A) (2012).

186 *See supra* notes 38–50 and accompanying text (discussing the SFA moratorium on additional catch share programs until the National Research Council produced its study).

187 Conservation Law Found. v. Evans (*CLF I*), 209 F. Supp. 2d 1, 6 (D.D.C. 2001).

188 *Id.*

Three years after Congress enacted the SFA, the Council adopted Amendment 9 to the FMP, and its provisions took effect in November 1999.[189] Regulators intended Amendment 9 to bring the FMP into compliance with the SFA by redefining overfishing and setting optimum yield (OY) for 12 groundfish species.[190] Four months later, NMFS approved Framework Adjustment 33, which set fishing mortality targets based on the pre-SFA Amendment 7, rather than the recently adopted Amendment 9.[191]

In *Conservation Law Foundation v. Evans* (*CLF I*), a number of conservation groups filed suit against the Secretary of Commerce, alleging that NMFS violated the SFA by failing to fully implement Amendment 9, and by failing to minimize bycatch in Framework 33.[192] The U.S. District Court for the District of Columbia ruled that NMFS has a "statutory responsibility to implement Amendment 9, and must now ensure that the New England Council gives it full effect."[193] In addition, the court held that Framework 33 failed to comply with the SFA as a matter of law because it did not provide adequate protections for at least four of the twelve species it was intended to protect.[194]

The Conservation Law Foundation litigation crawled through the courts for several years. Following the ruling that Amendment 9 and Framework 33 violated the SFA in *CLF I*, and at the court's prompting, the parties engaged in mediation.[195] Some of the parties reached a tentative settlement agreement, which was formally filed with the U.S. District Court for the District of Columbia on April 16, 2002 (*CLF II*).[196] The parties also briefed for the court the agency's proposal for appropriate Total Allowable Catch (TAC)

189 Northeast Multispecies Fishery; Amendment 9 to the Northeast Multispecies Fishery Management Plan, 64 Fed. Reg. 55,821, 55,821 (Nov. 15, 1999) (codified at 15 C.F.R. pt. 902 and 50 C.F.R. pt. 648).

190 *Id.*

191 Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 33 to the Northeast Multispecies Fishery Management Plan, 65 Fed. Reg. 21,658, 21,658–59 (Apr. 24, 2000) (codified at 50 C.F.R. pt. 648).

192 *CLF I*, 209 F. Supp. 2d at 4.

193 *Id.* at 9.

194 *Id.* at 10.

195 Settlement Agreement Among Certain Parties at 2, Conservation Law Found. v. Evans, No 1:00CV01134 GK (D.D.C. Apr. 16, 2002).

196 Conservation Law Found. v. Evans (*CLF II*), 195 F. Supp. 2d 186, 190 (D.D.C. 2002), *vacated*, Conservation Law Found. v. Evans (*CLF III*), 211 F. Supp. 2d 55 (D.D.C. 2002). The parties signing onto the settlement agreement were plaintiff Conservation Law Foundation and defendants Secretary of Commerce Donald L. Evans, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service; the State of Maine; the Commonwealth of Massachusetts; the State of New Hampshire; the State of Rhode Island; the Associated Fisheries of Maine, Inc., the City of Portland, Maine; the City of New Bedford, Massachusetts; the Trawlers Survival Fund; and Paul Parker; Craig A. Pendelton; Northwest Atlantic Marine Alliance, Inc.; Stonington Fisheries Alliance; Saco Bay Alliance; and Cape Cod Commercial Hook Fishermen's Association, Inc. The parties objecting to the settlement agreement were plaintiffs National Audubon Society, Natural Resources Defense Council, and The Ocean Conservancy, and intervening party Northeast Seafood Coalition. Settlement Agreement Among Certain Parties at 1–3, Conservation Law Found. v. Evans, No 1:00CV01134 GK (D.D.C. Apr. 16, 2002).

levels for the 2002–2003 fishing season for all fish species governed by Amendment 9, and the management measures that would secure compliance with Amendment 9. On March 19, 2002, federal regulators released a report reevaluating the biological reference points for New England Groundfish,[197] which the court stated "virtually all parties" acknowledged to be the best available science related to New England groundfish.[198] In *CLF II*, the court set deadlines for an initial interim rule, a second interim rule, and retained jurisdiction until the implementation of Amendment 13 (which it described as a Fishery Management Plan that complies with the overfishing, rebuilding, and bycatch provisions of the SFA).[199] While recognizing the settlement agreement was the result of significant compromise on the part of the parties, the court declined to approve the agreement as written, making changes by way of its ruling that included "modified DAS restrictions, increased area closures, accelerated implementation dates for some measures, elimination of the increase in poundage limits for Gulf of Maine Cod, and increased observer coverage."[200]

During settlement negotiations, Conservation Law Foundation broke ranks with other conservation group plaintiffs over the issue of catch limits referred to by the court as "hard TACs" and described as "a management system that prohibits further catching of a particular species as soon as a pre-set quota of that species has been caught."[201]

The court accepted settlement terms that did not include catch limits (over objections of some plaintiffs) because it concluded the real-time catch data necessary to implement a TAC program didn't exist and there was still a dispute as to what the best available science was regarding the status of the groundfish stocks.[202] The ruling included additional reasoning as to why the court believed "hard TACs" were not appropriate for the New England groundfish fishery at that time.[203] The *CLF II* ruling enumerated the terms of

197 NAT'L OCEANIC & ATMOSPHERIC ADMIN., RE-EVALUATION OF BIOLOGICAL REFERENCE POINTS FOR NEW ENGLAND GROUNDFISH (2002), *available at* http://nefsc.noaa.gov/publications/crd/crd0204/crd0204.pdf.

198 *CLF II*, 195 F. Supp. 2d at 190–91.

199 *Id.* at 193. The court took NMFS to task for failing to fulfill its statutory duties, noting: "Much of the blame for this situation can be laid at the feet of NMFS. It frequently misses its own deadlines for complying with statutory mandates, it drags its feet completing vitally significant marine research, and it is often the case that the federal courts must be called upon to force it to live up to its statutory obligations." *Id.* at 190 n.6.

200 *Id.* at 193.

201 *Id.* at 193–94.

202 *Id.* at 194 ("It is the determination of this Court that implementation of a hard TAC program beginning in May 2002 will not achieve the desired results and may result in extremely negative, though unintended, consequences for the groundfish stocks, the fishermen, and the fishing industry as a whole.").

203 *Id.* at 194–95.The court commented on the gravity of the task at hand and the social, economic, and environmental factors involved in the case:

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

the settlement agreement and, in an appendix, included copies of the many letters to the court from fishermen, discussing the potential adverse implications on the fishing industry from the court's ruling.[204]

The order approving the settlement agreement did not conclude the case. In *CLF III*, the court granted a motion for reconsideration of its ruling in *CLF II* that was filed by the parties to the settlement agreement.[205] In response to arguments that the court's tinkering with the terms of the settlement agreement would have unintended consequences and interfere with the implementation of a carefully crafted agreement, the *CLF III* court vacated its previous order.[206] The court not only backed away from the non-settling plaintiffs' arguments in favor of catch limits, but also removed the increased protections it had added to the original settlement agreement, and then ordered that the settlement agreement be implemented according to its terms.[207]

C. Amendment 13 and the Introduction of Sector Management

Amendment 13 to the FMP, developed as part of the settlement agreement in the CLF litigation over Amendment 9 and Framework 33, became effective May 1, 2004.[208] Amendment 13 further reduced allowable fishing mortality rates and included bycatch and essential fish habitat provisions.[209] It also allowed fishing "sectors" to be formed, with fishing privileges allocated to the sector (rather than to individual vessels).[210] A sector's fishing privileges were to be based on a "hard TAC" (fixed amount of a particular fish stock that the sector is allowed to catch per season) or a maximum days at sea ceiling for all vessels in the sector, along with a "target" TAC.[211]

In two separate lawsuits, both conservation groups and fishing interests challenged Amendment 13. In *Associated Fisheries of Maine v. Evans*,[212] the plaintiff fishing industry group brought a procedural challenge to the way the Secretary of Commerce altered the manner in which the "days at sea" limit was calculated in the final rule from the proposed rule.[213] While the suit

> 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.

Id. at 190.

204 *Id.* at 198.

205 *CLF*, 211 F. Supp. 2d 55, 56 (D.D.C. 2002).

206 *Id.* at 57.

207 *Id.* Judge Kessler once again included, attached to her memorandum opinion, copies of the letters from fishermen the court had received in connection to its prior ruling. *Id.* at 59–80.

208 Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 13, 68 Fed. Reg. 74,939 (Dec. 28, 2003); 50 C.F.R. § 648.87 (2007).

209 50 C.F.R. § 648.87 (2007).

210 *Id.*

211 50 C.F.R. § 648.87(b)(1) (2015).

212 350 F. Supp. 2d 247 (D. Me. 2004).

213 *Id.* at 250.

was pending, NMFS cured the procedural deficiencies of the challenged rule with an interim rule, which the court held rendered moot the challenged days at sea calculation method in *Associated Fisheries of Maine*.[214] In an unreported case, *Oceana v. Evans*,[215] the U.S. District Court for the District of Columbia held on summary judgment that NMFS violated the SFA by failing to establish a standard bycatch reporting methodology in Amendment 13.[216] As a result of this ruling, NMFS developed and approved the Northeast Region Standardized Bycatch Reporting Methodology Amendment, which acted as an omnibus amendment to all FMPs managed by the Mid-Atlantic and New England Fishery Management Councils.[217] Oceana later challenged this omnibus bycatch amendment on the grounds that it did not provide for sufficient accountability measures, which resulted in the amendment being vacated by the court and remanded back to NMFS for revision at the time the agency implemented Amendment 16 in 2011.[218]

Framework 42, implemented in November 2006, was the next FMP amendment to be challenged.[219] Here, the States of Massachusetts and New Hampshire filed suit, in support of their fishing industries, against NMFS on the basis that the Framework was too restrictive.[220] As a result, the court temporarily suspended provisions of Framework 42 related to the days at sea counting system.[221] However, the court later reinstated Framework 42 in full by an order on April 10, 2009.[222] The court ultimately dismissed the lawsuit as moot when NMFS published a final interim rule replacing Framework 42 three days after court's ruling reinstating Framework 42, on April 13, 2009.[223]

In the meantime, federal fishery law was modified again, in a reauthorization that was enacted in 2006 and took effect in 2007.[224] The Magnuson-Stevens Reauthorization Act (MSRA)[225] added further reforms to those adopted in the 1996 SFA, including: a mandatory annual catch limit (or

214 *Associated Fisheries of Maine*, 350 F. Supp. 2d at 256; Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery, 69 Fed. Reg. 70,919–21 (Dec. 8, 2004).

215 No. Civ.A.04-0811(ESH), 2005 WL 555416 (D.D.C. Mar. 9, 2005).

216 *Id.* at *43.

217 Magnuson-Stevens Fishery Conservation and Management Act Provisions: Fisheries of the Northeastern United States; Northeast Region Standardized Bycatch Reporting Methodology Omnibus Amendment, 73 Fed. Reg. 4736 (Jan. 25, 2008).

218 Oceana v. Locke, 831 F. Supp. 2d 95, 117–18, 132 (D.D.C. 2011).

219 Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 42, 72 Fed. Reg. 73,274 (Dec. 27, 2007) (final rule correction).

220 Massachusetts v. Gutierrez, 594 F. Supp. 2d 127, 129 (D. Mass. 2009).

221 *Id.* at 131.

222 Massachusetts v. Gutierrez, 628 F. Supp. 2d 239, 241 (D. Mass. 2009)

223 Massachusetts v. Gutierrez, 607 F. Supp. 2d 284, 285 (D. Mass. 2009); Temporary Final Rule, Interim Measures, 74 Fed. Reg. 17,030 (Apr. 13, 2009).

224 Magnuson Stevens Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (2006).

225 *Id.*

hard TAC);[226] accountability measures to ensure that FMP objectives were met;[227] and a mandatory timeframe to end overfishing within two years.[228] The implementation of MSRA requirements simultaneously with development of sector management in the Northeast at times resulted in a conflation of the approaches by critics, and litigation challenged various aspects of the NMFMP: the implementation of MSRA requirements, the development of sectors, and the implementation of the MSRA requirements in sector programs.[229]

D. Amendment 16: Sector (Catch Shares) Management

After nearly three and a half years of proposals, drafts, public hearings, revisions, and comments that began in November 2006, NMFS published Amendment 16 on April 9, 2010, establishing catch share management for the Northeast Multispecies Fishery,[230] along with Framework Adjustment 44, which set specific catch limits for the first two years of the catch share program.[231]

Both the fishing industry and conservationists challenged the rule implementing the Framework Adjustment and FMP Amendment. Conservation group Oceana filed suit on May 7, 2010, on the grounds that Amendment 16 failed to establish an adequate system to enforce annual catch limits, arguing the bycatch monitoring provisions were inadequate under the MSA.[232] The court concluded that Amendment 16 failed to establish sufficient accountability measures for five stocks,[233] and remanded the bycatch monitoring provisions to NMFS, with instructions to develop measures consistent with its ruling.[234]

226 *Id.* at 3851, 3584.

227 *Id.* at 3584.

228 *Id.*

229 *See, e.g.*, Oceana v. Locke, 831 F. Supp. 2d 95 (D.D.C. 2011) (litigation related to the implementation of Amendment 16 MSA requirements), Lovgren v. Locke, 701 F.3d 5 (1st Cir. 2012) (litigation related to sector development and the implementation of MSA requirements in sectors).

230 Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 16, 75 Fed. Reg. 18,262 (April 9, 2010).

231 Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 44, 75 Fed. Reg. 18,356 (April 9, 2010).

232 *Oceana*, 831 F. Supp. 2d at 105–06.

233 *Id.* at 121.

234 *Id.* at 122. The court refused to address the question of whether Amendment 16 established adequate standardized bycatch reporting methodology because the issue was the grounds for Oceana's lawsuit challenging the omnibus bycatch amendment as a whole that had previously been remanded in a different lawsuit. *Id.* at 114; *see also* Oceana v. Locke, 670 F.3d 1238, 1239 (D.C. Cir. 2011) (discussing Oceana's previous lawsuit challenging NMFS bycatch reporting methodology as incorporated into the Northeast Multispecies FMP through Amendment 15).

The fishing industry also challenged Amendment 16,[235] arguing that it violated National Standard One,[236] National Standard Four,[237] and National Standard Eight[238] of the MSA and that the sector management program it established was in effect a Limited Access Privilege Program (LAPP) passed without meeting the referendum requirement set forth in the 2006 reauthorization of the MSA applicable to LAPPS in New England.[239] The agency prevailed on all counts in a district court ruling upheld on appeal.[240] The First Circuit concluded that the sector allocation program in Amendment 16 was not a LAPP, in part because the sector—and not the individual fishers—would control catch allocations.[241] Further, the court held that Amendment 16 was consistent with the MSA's national standards, noting in particular that the 2006 reauthorization act prohibited overfishing of stocks that had earlier been permissible, which necessarily led to the challenged stock-by-stock allocations.[242]

In 2013, NMFS implemented Frameworks 48 and 50, adjusting the management measures for the Northeast Multispecies Fishery Management Plan.[243] Again, both conservation groups and fishing interests filed suit. In *Conservation Law Foundation v. Pritzker* (*Conservation Law Foundation I*),[244] conservation groups challenged Framework 50, alleging violations of MSA National Standard One[245] and National Standard Two[246] because Framework 50's ten percent "carryover" of catch for certain northeast groundfish species from 2012 to 2013 would result in catches exceeding

235 Lovgren v. Locke, 701 F. 3d 5, 13 (1st Cir. 2012). The First Circuit decision addressed issues raised in rulings by the district court in two separate challenges to Amendment 16. One, a consolidated case filed by the cities of New Bedford and Gloucester, as well as other plaintiffs, alleging Amendment 16 did not comply with several of the MSA's National Standards. *Id.* at 19. Fisherman James Lovgren, filed the second action, arguing that Amendment 16 was not only a LAPP, but an IFQ, and as such, NMFS was required to follow the referendum procedure established in the 2006 reauthorization of the MSA. *Id.* at 22.

236 16 U.S.C § 1851(a)(1) (2012).

237 *Id.* § 1851(a)(4).

238 *Id.* § 1851(a)(8).

239 *Id.* § 1853(a)(6)(D).

240 *Lovgren*, 701 F.3d at 13.

241 *Id.* at 24–27.

242 *Id.* at 33.

243 Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 48, Framework Adjustment 50; 2013 Sector Operations Plans, Contracts, and Allocation Annual Catch Entitlements, 78 Fed. Reg. 53,363 (Aug. 29, 2013).

244 37 F. Supp. 3d. 254 (D.D.C. 2014) (*Conservation Law Foundation I*).

245 16 U.S.C. § 1851(a)(1) (2012) ("Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.").

246 *Id.* § 1851(a)(2) ("Conservation and management measures shall be based upon the best scientific information available."). *See* Magnuson-Stevens Act Provisions; National Standard Two—Scientific Information, 78 Fed. Reg. 43,066 (July 19, 2013) (amending the guidelines for National Standard by providing guidance on what constitutes the best scientific information available for the effective conservation and management of fisheries managed under Federal FMPs and adds new language regarding the advisory role of the Scientific and Statistical Committees of the Regional Fishery Management Councils).

recommended levels for twelve stocks.[247] Conservation Law Foundation filed a separate but contemporaneous challenge to Framework 48, alleging that Framework 48 violated the MSA by allowing sectors to gain access to closed areas via an exemption in each sector's annual operating plan.[248] In addition, the conservation group Oceana filed suit challenging Framework 48's reduction in the number of third-party observers collecting catch data on vessels.[249]

The Commonwealth of Massachusetts, joined by New Hampshire, also filed a lawsuit challenging Frameworks 48 and 50.[250] Here, the plaintiff-states (on behalf of their fishing communities) alleged that the Frameworks prevented northeast fishermen from achieving OY of the healthy groundfish species in the fishery, in violation of National Standard One; the Frameworks were not supported by the best available science, in violation of National Standard Two; and the Frameworks violated National Standard Eight due to the drastic reduction in allotments of catch contained in them.[251] The states' complaint also cited Office of Inspector General reports addressing National Oceanic and Atmosphereic Administraction's (NOAA) enforcement activities to support its claims, indicating that the "drastic reduction" in catch allocations instituted by the Frameworks were made "[a]gainst this backdrop of dysfunction and distrust between NOAA and the fishermen it regulates."[252] While the Conservation Law Foundation suit addressed the same Frameworks as the case filed by the states, the U.S. District Court for the District of Columbia denied NMFS's motion to transfer the three conservation group challenges to federal district court in Massachusetts, where the states' challenges to the Frameworks had been filed.[253]

On April 8, 2014, the U.S. District Court for the District of Massachusetts granted summary judgment in favor of NMFS in the challenge to Frameworks 48 and 50 brought by the states of Massachusetts and New Hampshire, ruling that the agency met its requirements under the MSA in promulgating Frameworks 48 and 50.[254]

In early 2014, U.S. District Court for the District of Columbia issued opinions on summary judgment motions for all three conservation group challenges to Frameworks 48 and 50, ruling in favor of federal regulators in

247 *Conservation Law Foundation I*, 37 F. Supp. 3d at 265–66, 268.

248 Conservation Law Found. v. Pritzker (*Conservation Law Foundation II*), 37 F. Supp. 3d 234, 253 (D.D.C. 2014).

249 Oceana, Inc. v. Pritzker, 26 F. Supp. 3d 33, 36–37 (D.D.C. 2014).

250 Massachusetts v. Pritzker (*Massachusetts*), 10 F. Supp. 3d 208, 211 (D. Mass. 2014). The State of New Hampshire later joined the suit as an intervening plaintiff. *Id.*

251 *Id.* at 214.

252 Petition for Judicial Review at 8, *Massachusetts*, 10 F. Supp. 3d 208 (D. Mass. May 31, 2013) (No. 13–11301RGS).

253 *See* Oceana, Inc. v. Pritzker, 58 F. Supp. 3d 2, 3–5 (D.D.C. 2013) (discussing the motions to consolidate and the decision not to do so).

254 *Massachusetts*, 10 F. Supp. 3d at 224.

both challenges to Framework 48.[255] In *Conservation Law Foundation II*, which challenged the opening of areas previously closed to commercial fishing, the U.S. District Court for the District of Columbia ruled that NMFS met its statutory requirements under the MSA in allowing commercial fishing in previously closed areas.[256] In the Oceana suit challenging Framework 48's changes to observer coverage, NMFS also prevailed, with the court ruling once again that the agency met its statutory requirements under the MSA in developing Framework 48.[257] In April 2014, however, the same court issued a ruling in favor of Conservation Law Foundation in its challenge to the "carry over" provision of Framework 50, holding that by allowing the quota to be carried into a subsequent year, NMFS violated the MSA's requirement for setting annual catch limits—as a result, the court vacated that portion of the implementing rule.[258] The court remanded to NMFS for rulemaking to comport with the decision in time for the next fishing season.[259]

IV. PACIFIC COAST GROUNDFISH

The Secretary of Commerce approved the first Pacific Coast Groundfish Fishery Management Plan (PCGFMP) on January 4, 1982.[260] There have been thirty amendments to the PCGFMP through 2014, with the first six appearing in the plan's first decade.[261] Amendment 4 (1990) established additional framework procedures for developing and modifying management measures, replaced the first three amendments, and provided a "comprehensive update and reorganization" for the FMP.[262] Like the Northeast Multispecies FMP, the PCGFMP has been shaped by litigation, much of it by conservation groups arguing that NMFS fishery management measures in the pre-catch share era were inadequate and did not comply with the requirements of the MSA.[263]

255 *See Conservation Law Foundation II*, 37 F. Supp. 3d 234, 254 (D.D.C. 2014); Oceana, Inc. v. Pritzker, 26 F. Supp. 3d 33, 52 (D.D.C. 2014).

256 *Conservation Law Foundation II*, 37 F. Supp. 3d at 234.

257 *Oceana*, 26 F.Supp.3d at 51–52.

258 *Conservation Law Foundation I*, 37 F. Supp. 3d, 254, 267 (D.C.C. 2014).

259 *Id.* at 273.

260 PAC. FISHERY MGMT. COUNCIL, PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN FOR THE CALIFORNIA, OREGON, AND WASHINGTON GROUNDFISH FISHERY 1 (2014) [hereinafter PACIFIC COAST GROUNDFISH FMP], *available at* http://www.pcouncil.org/wp-content/uploads/GF_FMP_FINAL_May2014.pdf.

261 *See* Pac. Fishery Mgmt. Council, Groundfish: Fishery Management Plan and Amendments, http://www.pcouncil.org/groundfish/fishery-management-plan/ (last visited Feb. 13, 2016) (providing links to both the Fishery Management Plan and approved plan amendments); PACIFIC COAST GROUNDFISH FMP, *supra* note 260, at 2.

262 PACIFIC COAST GROUNDFISH FMP *supra* note 260, at 2.

263 *See, e.g.*, Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904 (9th Cir. 2003) (invalidating the 2001 groundfish specifications because NMFS failed to make the rule available for public comment).

A. Not Letting Bycatch be Bycatch

Amendment 12, adopted in 2000, was one of three amendments intended to incorporate the 1996 SFA requirements into the FMP.[264] The Pacific Council proposed Amendment 12 as a framework amendment for developing rebuilding plans for overfished stocks.[265] A year later, conservation groups challenged Amendment 12 in several cases eventually consolidated in *Natural Resources Defense Council v. Evans*.[266] The plaintiff conservation groups alleged that the bycatch provisions of Amendment 12 violated the SFA by failing to protect boccacio and lingcod in their rebuilding plans and by failing to represent the best available science.[267] The court held that NMFS violated the SFA by authorizing rebuilding plans with inadequate protections for overfished species, and that NMFS failed to undertake required notice and comment procedures when it promulgated Amendment 12.[268] The court's decision to remand Amendment 12 in this litigation led to the development of Amendment 16.[269]

Earlier in the same case, a 2001 ruling held that NMFS failed to follow appropriate notice and comment procedures with its annual management measures,[270] leading the Council to adopt Amendment 17.[271] On appeal, the Ninth Circuit addressed only whether NMFS violated the notice and comment requirements of both the SFA and NEPA when it invoked a "good cause" exception to waive notice and comment on management measures for the fishery for 2001, noting that NMFS had invoked the same good cause exemption to waive notice and comment for its yearly management measures every year since 1991, when Framework procedures for management were adopted.[272] The Ninth Circuit concluded that NMFS failed to meet the notice and comment requirements of the Administrative Procedure Act (APA)[273] and did not reach the issue of whether it had also violated the SFA's notice and comment provisions.[274] The last ruling on the merits of the case occurred in 2011, after the 2006 MSA reauthorization amended the SFA, specifying rebuilding time frames.[275] In an April 2010

264 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 12 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 1 (2000), *available at* http://www.pcouncil.org/wp-content/uploads/a12gf.pdf.

265 *Id.* at 3.

266 168 F. Supp. 2d 1149, 1153 (N.D. Cal. 2001).

267 *Id.*

268 *Id.* at 1154–55.

269 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 16-1 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 1–4 (2003), *available at* http://www.pcouncil.org/wp-content/uploads/0803a16-1.pdf.

270 NRDC v. Evans, 168 F. Supp. 2d, 1149, 1160–61 (N.D. Cal. 2001).

271 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 17 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 1–2 (2003), *available at* http://www.pcouncil.org/wp-content/uploads/a170703.pdf.

272 Nat. Res. Def. Council v. Evans, 316 F.3d 904, 906, 908 n.5 (9th Cir. 2003).

273 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

274 *Nat. Res. Def. Council*, 316 F.3d at 910.

275 Magnuson Stevens Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575, 3584–3585 (2006).

summary judgment order, the U.S. District Court for the Northern District of California held that the 2009–2010 harvest specifications for darkblotched rockfish, cowcod, and yelloweye rockfish violated the MSA by failing to rebuild the species in as short a time as possible.[276]

Amendment 13 incorporated SFA bycatch requirements into the FMP.[277] In *Pacific Marine Conservation Council, Inc. v. Evans*,[278] the U.S. District Court for the Northern District of California remanded Amendment 13 to NFMS—as it had done with Amendment 12—because it failed to meet SFA requirements for preventing bycatch and bycatch mortality.[279] Specifically, the court ruled that NMFS failed to adopt an adequate methodology for assessing bycatch when the agency acknowledged an at-sea observer program was "essential" to obtaining bycatch data for the Pacific Coast groundfish fishery, but did not require a program.[280] The court also remanded the portions of Amendment 13 that addressed bycatch reduction measures because it held that NMFS had failed to require any such measures in the Amendment, in violation of the SFA.[281] Finally, the court remanded to the Agency the task of evaluating four bycatch reduction measures it found NMFS had dismissed without adequate consideration.[282]

NMFS was slow to remedy the deficiencies in Amendments 12 and 13. In 2003, the U.S. District Court for the Northern District of California, which retained jurisdiction, ordered NMFS to submit reports every six months detailing the agency's progress in bringing the FMP into compliance with the SFA.[283] In a later order, the judge set a series of deadlines for NMFS to revise the rebuilding plans at issue in the case.[284] The judge eventually issued a stay in the case while the appeal of *Natural Resources Defense Council v. National Marine Fisheries Service* (*NRDC v. NMFS*),[285] discussed below, was pending before the Ninth Circuit. The resolution of *NRDC v. NMFS*, together

276 Nat. Res. Def. Council v. Locke, 771 F. Supp. 2d 1203, 1207 (N.D. Cal. 2011) (citing Nat. Res. Def. Council v. Nat. Marine Fisheries Serv., 421 F.3d 872, 874 (9th Cir. 2005) (invalidating the rebuilding period established by NMFS for darkblotched rockfish in the same fishery; (discussed *infra* notes 289–295)). The case remained open until February 2011. *Id.* at 1205. The final issue resolved in the case involved a dispute over attorney's fees following the April 2010 summary judgment order. *Id.* at 1206. The ruling on the attorney's fees issue—which awarded fees to the plaintiffs in the amount of $505,841.41 under the Equal Access to Justice Act, 18 U.S.C. § 2412 (2012)—included a summary of the case's long history. *Id.* at 1206–08, 1218–19.

277 Amendment 13 to the Pacific Coast Groundfish Fishery Management Plan, *Environmental Assessment and Regulatory Impact Review*, 1, *available at* http://www.pcouncil.org/wp-content/uploads/gfa13.pdf.

278 200 F. Supp. 2d 1194 (N.D. Cal. 2002).

279 *Id.* at 1196.

280 *Id.* at 1198.

281 *Id.* at 1201.

282 *Id.* at 1202–03.

283 Nat. Res. Def. Council v. Evans, 243 F. Supp. 2d 1046, 1059 (N.D.Cal. 2003). The court's order contained sharp criticism of NMFS for failing to meet its statutory obligations under the SFA and frustration with the lack of scientific data available about the species at issue. *Id.* at 1159.

284 Nat. Res. Def. Council v. Evans, 290 F. Supp. 2d 1051, 1057 (N.D.Cal. 2003).

285 421 F.3d 872 (9th Cir. 2005).

with the Amendment 12 and 13 cases, led to the development of Amendment 16.[286]

While NMFS developed rebuilding plans for the overfished species consistent with the SFA and the Amendment 12 and 13 cases, the agency continued to issue management measures for the fishery.[287] Conservation groups again filed suit. In *NRDC v. NMFS*, the Natural Resources Defense Council challenged 2002 catch limits on four groundfish species that NMFS had previously determined were overfished.[288] After the U.S. District Court for the Northern District of California ruled in favor of the agency, the Ninth Circuit reversed the decision as it applied to one stock, darkblotched rockfish.[289] The court held that the agency's decision to increase the quota for the species in 2002, after an assessment found that the agency had previously overestimated the population, rendered the prior ten-year rebuilding plan inapplicable.[290] Instead of imposing more stringent quotas for the species to promote faster rebuilding—even though the rebuilding period would still exceed ten years—the agency had used the extended rebuilding period as an invitation to extend rebuilding over a much longer (forty-four year) timespan.[291] The Ninth Circuit held that the decision to increase the darkblotched rockfish quota was not a permissible construction of the SFA and remanded the issue back to the district court for further proceedings.[292] However, the Ninth Circuit upheld the district court's ruling in favor of the agency's decision not to adjust quotas for three other groundfish species that were also overfished, despite evidence the yearly take far exceeded the quota.[293] The court held that the agency had acted within its discretion when it decided to delay setting the quota until after it conducted a stock reassessment and attempted to control species' populations through other management measures.[294]

The Council's rebuilding plan for darkblotched rockfish was again at issue five years later in *Natural Resources Defense Council v. Locke* (*NRDC v. Locke*),[295] the final ruling on the merits in the decade-long litigation battle over Pacific Coast groundfish rebuilding plans that began with the challenge to Amendment 12 in *NRDC v. Evans*.[296] In *NRDC v. Locke*, the U.S. District Court for the Northern District of California ruled that the 2009–2010 harvest specification levels for darkblotched rockfish, cowcod, and yelloweye

286 PAC. FISHERY MNGT. COUNCIL, PACIFIC COAST GROUNDFISH FMP 2 (2014), *available at* http://www.pcouncil.org/wp-content/uploads/GF_FMP_FINAL_May2014.pdf

287 *NRDC v. NMFS*, 421 F.3d at 874.

288 *Id.*

289 *Id.*

290 *Id.* at 881.

291 *Id.*

292 *Id.* at 883.

293 *Id.* at 882–83.

294 *Id.* at 883.

295 771 F. Supp. 2d 1203 (N.D.Cal. 2011).

296 Nat. Res. Def. Council, Inc. v. Evans, 243 F. Supp. 2d 1046, 1049 (N.D.Cal. 2003). *See supra* notes 266–269 and accompanying text (discussing the *NRDC v. Evans* litigation challenging Amendment 12).

rockfish violated what was by this time the reauthorized and amended MSA by failing to rebuild the stocks in as short a time period as possible and by prioritizing short-term economic gains over conservation.[297] The court was particularly critical of the NMFS decision to use in its analysis economic data from the 1990s, when the Pacific Coast groundfish fishery was unsustainable and the fleet was much larger.[298] As a remedy, the court required new harvest specifications for the three species for which the agency failed to adopt adequate rebuilding periods.[299] NMFS initially appealed this decision, but voluntarily dismissed its action, with the court entering its final order in the case in May 2011.[300]

B. Pacific Coast Groundfish Catch Shares

NMFS published the final regulations for implementing Amendments 20 and 21, the catch share program for Pacific Coast Groundfish, on October 1, 2010.[301] These amendments were promulgated under the provisions of the MSRA.[302] Later that same month, fishing industry interests filed two lawsuits (both with multiple parties) to challenge elements of Amendments 20 and 21. In *Pacific Coast Federation of Fishermen's Ass'n v. Blank*,[303] fishermen's associations and groups who had primarily participated in the fishery's non-trawl sector filed suit against the Secretary of Commerce.[304] The plaintiffs argued that Amendments 20 and 21 violated the MSA by failing to protect and promote the interests of fishing communities when the agency: 1) declined to develop procedures allowing fishing communities to receive an initial allocation of fishing privileges; 2) failed to restrict recipients of catch shares to those who "substantially participate" in the fishery; and 3) failed to comply with National Standard Eight, which requires FMPs to foster community participation in the fishery.[305] The Ninth Circuit, affirming the lower court's earlier decision in the case, ruled in favor of the agency on all counts.[306] The court concluded that NMFS complied with the terms of the MSA because while the law requires the agency to consider fishing communities when it develops a catch share program, it does not require managers to actually provide a role for those communities in the final catch share program.[307] Similarly, the court held that NMFS met its duty to account for fishing communities in drafting the catch share program, noting that

297 *NRDC v. Locke*, 771 F. Supp. 2d at 1207.

298 *Id.* at 1208.

299 *Id.*

300 West Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc., 643 F.3d 701, 706 (9th Cir. 2011).

301 Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program, 75 Fed. Reg. 60,868 (Oct. 1, 2010).

302 *Id.*

303 693 F.3d 1084 (9th Cir. 2012).

304 *Id.*

305 *Id.* at 1092–94.

306 *Id.* at 1104.

307 *Id.* at 1092 (citing 16 U.S.C. § 1853a).

while National Standard Eight requires NMFS to "take into account the importance of fishery resources to fishing communities," it does not require a particular outcome.[308] Finally, the court concluded that the MSA "did not preclude NMFS" from deciding to prioritize economic efficiency and fleet consolidation over "protection of existing fishery participants, a choice that required fewer restrictions on who could acquire and hold quota shares."[309]

Harvesters and processors who participated in the Pacific Whiting fishery also challenged the baseline period NMFS used to make initial allocations of permits for the Pacific Coast groundfish catch share program. In *Pacific Dawn v. Bryson* (*Pacific Dawn I*),[310] harvesters and processors argued that the timeframe NMFS used to establish historic catch in making its initial allocation of catch shares for the whiting fishery violated the MSA because the agency failed to account for "current and historical harvests"[311] when it declined to consider catch history after 2003 (2004 for processors) in making catch share allocations.[312] The U.S. District Court for the Northern District of California decided the case on summary judgment, distinguishing the claims at issue in this case from those in *Blank*, discussed above, noting that here the issue was whether NMFS followed the MSA's procedural requirements, rather than whether it reached the correct conclusions.[313]

Citing *Alliance Against IFQs v. Brown*,[314] the court noted the similarities in the grounds underlying the challenge—both cases addressed whether NMFS used a reasonable period for establishing catch history when making an initial allocation in a catch share program.[315] However, the court found several differences that distinguished the case from *Alliance Against IFQs*, including the even longer lapse in time between the cutoff date for participation and the actual commencement of the catch share program, and persuasive evidence that NMFS had in fact considered some types of participation in the fishery as recent as 2006 in making its allocations.[316] The court considered this to be inconsistent treatment by the agency of the actual control date and ruled that the agency thus had acted in an arbitrary and capricious manner.[317] After requesting supplemental briefing on the issue of remedy, the court remanded the regulations to NMFS for revision consistent with its ruling, setting a deadline for the new regulations of April 1, 2013, but allowed the existing regulations to remain in effect until then.[318] NMFS undertook a new rulemaking following the remand of the initial allocation regulations, and, after considerable Council deliberation,

308 *Id.* at 1093 (citing 16 U.S.C. § 1851(a)(8)).

309 *Id.* at 1097.

310 No. C10-4829, 2011 WL 6748501, at *1 (N.D. Cal, Dec. 22, 2011).

311 16 U.S.C. § 1853a(c)(5)(A)(i).

312 *Pacific Dawn I*, No. Clo-4829, 2011 WL 6748501, *1–*2 (N.D. Cal. Dec 22, 2011).

313 *Id.* at *6.

314 84 F.3d 343 (9th Cir. 1996), discussed *supra* notes 74–82 and accompanying text.

315 *Pacific Dawn I*, 2011 WL 6748501 at *6.

316 *Id.* at *5.

317 *Id.* at *6.

318 Pac. Dawn, LLC v. Bryson, No. C10-4829, 2012 WL 554950, at *1 (N.D. Cal Feb. 21, 2012).

published a new rule that maintained whiting allocations at the same levels as under the agency's initial allocation.[319]

Many of the same plaintiffs filed suit again to challenge this new regulation—which included an identical baseline period to the remanded regulations.[320] As in *Pacific Dawn I*, the case was assigned to Judge Henderson in the Northern District of California, and all issues were again ruled on at summary judgment.[321] However, this time the U.S. District Court for the Northern District of California held that although the rule was substantively the same as the rule he had previously remanded, the new rule was procedurally sound.[322] In *Pacific Dawn II*, the agency prevailed on all counts, and the case was dismissed.[323]

V. LITIGATION EFFECTS ON CATCH SHARE PROGRAMS

Litigation is a consistent topic on fishery management council meeting agendas. Whether discussed in open or executive sessions, the effects of the cases discussed above in Part IV are revealed in meeting minutes, discussion reports, and action items, as councils grappled with carrying out their part of responding to the courts' rulings.

A. New England Council Discussions Related to Litigation over Groundfish

Discussion of delays caused by litigation is documented in meeting minutes from the New England Council. For example, the New England Council discussed the *Conservation Law Foundation* litigation over Amendment 9 at a Council meeting in Portsmouth, New Hampshire, January 15–17, 2002, noting in the meeting minutes that their closed session resulted in decision to establish special committees and additional meetings "to complete Amendment 13 to the FMP as soon as possible."[324] Likewise, a notice of the February meeting points out that discussion on Amendment 13 "may be influenced by a pending court order in the matter of *Conservation Foundation et al.*"[325]

On May 16, 2002, the NEFMC met to discuss groundfish management issues and Amendment 13, which was developed in response to the *Conservation Law Foundation* litigation.[326] The Council continued to devote

319 Fisheries off West Coast States; Pacific Coast Groundfish Fishery; Trawl Rationalization Program; Reconsideration of Allocation of Whiting, 78 Fed. Reg. 18,879 (Mar. 28, 2013).

320 Pac. Dawn, LLC v. Bryson (*Pacific Dawn II*), No. C13-1419, 2013 WL 6354421, at *1 (N.D. Cal. Dec. 5, 2013).

321 *Id.*

322 *Id.* at *6.

323 *Id.* at *15.

324 NEW ENGLAND FISHERY MGMT. COUNCIL, JAN. COUNCIL REPORT 3 (2002), *available at* http://archive.nefmc.org/actions/council_reports/council-report-j02.pdf.

325 New England Fishery Management Council; Public Meetings, 67 Fed. Reg. 6231 (Feb. 11, 2002).

326 NEW ENGLAND FISHERY MGMT. COUNCIL, JUNE COUNCIL REPORT 1 (2002), *available at* http://archive.nefmc.org/actions/council_reports/council-report-jun02.pdf.

substantial time and discussion to developing Amendment 13 over the course of the next several meetings, noting in its August 2002 Council Report that members "deliberated for nearly 20 hours" and that implementation by 2003 would "comport with Judge Gladys Kessler's most recent court ruling."[327]

The New England Council again discussed *Conservation Law Foundation* at its November 2002 meeting, where it also noted groundfish management—and completing Amendment 13 specifically—was the Council's top priority for 2003.[328] The Council meeting report described correspondence from the Council to the court requesting additional time for peer review of stock information.[329]

The Council approved a draft Amendment 13 at the November 2002 meeting.[330] At the next meeting, in February 2003, Council members discussed U.S. District Court Judge Kessler's decision to grant NMFS an additional eight months to implement the amendment and set a timeline for implementation of Amendment 13 by the revised deadline of May 1, 2004.[331] NMFS subsequently proposed an emergency rule extending the settlement agreement management measures until the new May 2004 deadline,[332] and the NMFS Regional Administrator heard public comment from fishermen and other interested parties at the May 2003 Council meeting.[333]

After the Council approved Amendment 13, the next discussion of groundfish litigation at NEFMC related to *Massachusetts v. Gutierrez*, in which the First Circuit temporarily vacated Framework 42's management measures and ordered a review of the mixed-stock exception, which "allows for overfishing of one stock in a multispecies fishery in order to permit harvest of another species at its optimum level."[334] After discussion in February 2009, the Council concluded it disagreed with NMFS's report to the court that the mixed-stock exception cannot be applied to the Northeast Multispecies Fishery.[335] In a follow-up discussion at the April 2009 Council meeting, the Council considered a revised NOAA report analyzing the

327 NEW ENGLAND FISHERY MGMT. COUNCIL, AUG. COUNCIL REPORT 1 (2002), *available at* http://www.nefmc.org/actions/council_reports/council-report-aug02.pdf.

328 NEW ENGLAND FISHERY MGMT. COUNCIL, NOV. COUNCIL REPORT 2–3 (2002), *available at* http://www.nefmc.org/actions/council_reports/council-report-nov02.pdf.

329 *See id.* at 3 (stating that "[u]nder the terms of a settlement agreement . . . the court required the Council to approve the Amendment 13 draft documents at its November meeting and specifies implementation of a new plan to meet all requirements of the Sustainable Fisheries Act by August 2003").

330 *Id.*

331 NEW ENGLAND FISHERY MGMT. COUNCIL, FEB. COUNCIL REPORT 1 (2003), *available at* http://www.nefmc.org/actions/council_reports/council-report-jan03.pdf.

332 Proposed Emergency Rule; Request for Comments, 68 Fed. Reg. 20096–20097 (Apr. 24, 2003).

333 NEW ENGLAND FISHERY MGMT. COUNCIL, JUNE COUNCIL REPORT 1 (2003), *available at* http://www.nefmc.org/actions/council_reports/council-report-jun03.pdf.

334 594 F. Supp. 2d 127, 130, 133 (D. Mass. 2009); *supra* notes 219–223 and accompanying text (discussing *Massachusetts*, 10 F. Supp. 3d 209 (D. Mass. 2014)).

335 NEW ENGLAND FISHERY MGMT. COUNCIL, FEB. COUNCIL REPORT 2 (2009), *available at* http://archive.nefmc.org/actions/council_reports/council-report-feb09.pdf.

application of the mixed-stock exception.[336] Interestingly, though Council members did not agree with the revised NOAA report, and thus the Council never provided the court with an official review of the mixed stock exception, the First Circuit found that NMFS had met the terms of its previous order and "fully reinstated all of the provisions of Framework 42."[337]

Perhaps because NMFS has so far prevailed in the legal challenges to catch share management in the Northeast Multispecies Fishery, the lawsuits involving Amendment 16 and Frameworks 48 and 50 have not garnered discussion in NEFMC reports. Moreover, the more recent challenges have hinged more on the National Standards of the MSA than on the design of the sector program itself.[338] According to Peter Shelley of the Conservation Law Foundation:

> The litigation conservation groups brought in New England spans over twenty years of ground fish management, and the majority of the groundfish are still in overfished status or subject to overfishing, including the cod we tried to protect in 1994. All of the cases that produced "delays" were on the basis of court decisions that NMFS and the Councils had violated some fundamental aspect of the law such as preventing overfishing.[339]

B. Pacific Council Discussions of Litigation over Groundfish Management

Litigation also had a considerable impact on council time and resources on the West Coast. At Pacific Council meetings, these discussions typically occur during closed sessions, obscuring a precise analysis of the extent to which the councils have delayed management measures or deliberated a particular course of action as a direct result of lawsuits.[340] But it is clear from council briefings, book materials, agenda items, and correspondence that discussion of delays occurred.[341]

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336 NEW ENGLAND FISHERY MGMT. COUNCIL, APR. COUNCIL REPORT 3 (2009), *available at* http://archive.nefmc.org/actions/council_reports/council-report-apr09.pdf.

337 *Id.*; Massachusetts v. Gutierrez, 628 F. Supp. 2d 240 (1st Cir. 2009).

338 *See, e.g.*, *Massachusetts*, 10 F. Supp. 3d 208, 214 (D. Mass. 2014) (plaintiffs challenged Framework 48 and 50 for failure to comply with National Standards 1, 2, and 8); Oceana, Inc. v. Pritzker, 26 F. Supp. 3d 33, 47 (D.D.C. 2014) (plaintiff challenged Framework 48 for violation of National Standards).

339 E-mail from Peter Shelley to author, July 4, 2014 (on file with author).

340 *See* PAC. FISHERY MGMT. COUNCIL, PROPOSED APR. COUNCIL MEETING AGENDA 3 (2006), *available at* http://www.pcouncil.org/bb/2006/0406/aga4.pdf (noting that litigation would be discussed at an April 3 closed session); PAC. FISHERY MGMT. COUNCIL, PROPOSED JUNE COUNCIL MEETING AGENDA 2–3 (2004), *available at* http://www.pcouncil.org/bb/2004/0604/A4_June04 Agenda_June04BB.pdf (including litigation as an agenda item for a closed session in June 2004).

341 PAC. FISHERY MGMT. COUNCIL, PROPOSED APR. COUNCIL MEETING AGENDA, *supra* note 340 (providing that litigation issues would be discussed during a closed session); PAC. FISHERY MGMT. COUNCIL, MINUTES: 207TH SESSION OF THE PACIFIC FISHERY MANAGEMENT COUNCIL 26 (2011), *available at* http://www.pcouncil.org/wp-content/uploads/Final_March_2011_Minu tes.pdf (indicating that the Council discussed the partial disapproval of Amendment 23, and noting that the matter would require "a more comprehensive analysis and discussion").

In the West Coast program, a number of cases challenged whether NMFS had satisfied procedural requirements when the agency adopted or revised management measures under FMPs.[342] Generally, when the court held that the Agency had violated procedural requirements, the court-ordered remedy resulted in a lengthy council process to meet them. For example, the PFMC developed Amendments 16 and 17 to the Pacific Coast groundfish FMP as a result of rulings in *NRDC v. Evans*.[343] In that 2001 ruling, the U.S. District Court for the Northern District of California held that the process NMFS and the Councils had been using to develop specifications for annual management measures for FMPs failed to satisfy notice and comment requirements.[344] Over a year-long process, the PFMC developed Amendment 17 to resolve the procedural deficiencies in the way it adopted annual management measures at issue in the case.[345] The process began with a November 2001 discussion about incorporating notice and comment into the Council's management measure development procedure, consistent with the initial *NRDC v. Evans* decision, and the Council's Ad-Hoc Groundfish Multiyear management committee held public meetings in December 2001 and early 2002.[346] After making the committee's recommendations available for review in March 2002, the Council heard public comments on the issue in April 2002, and selected five alternatives for analysis.[347] At its April 2002 meeting, the PFMC devoted almost seventy-five minutes to its discussion of a groundfish FMP amendment, seeking ways to approach multiyear management while the amendment was under consideration.[348] One Council

342 *See, e.g.*, Nat. Res. Def. Council, Inc. v. Evans, 243 F. Supp. 2d 1046 (N.D. Cal. 2003) (discussing NMFS's failure to adhere to all procedural requirements to amend FMP); Conservation Law Found. v. Evans, 209 F. Supp. 2d 1 (D.D.C. 2001) (same).

343 168 F. Supp. 2d 1149, 1156 (N.D. Cal. 2001), *supra* note 266–276 and accompanying text. While the Ninth Circuit had affirmed the district court's holding that NMFS procedure for adopting annual management measures violated the APA's notice and comment procedures, by the time the court issued its opinion, the Council had already begun developing Amendment 17 in response to the 2001 district decision on that issue. *See* PAC. FISHERY MGMT. COUNCIL, AMENDMENT 17 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 2 (2003), *available at* http://www.pcouncil.org/wp-content/uploads/a170703.pdf (discussing the *NRDC v. Evans* ruling as the reason for developing the procedures in Amendment 17).

344 *NRDC v. Evans*, 168 F. Supp. 2d at 1156. Conservationists challenged NMFS procedure for adopting annual management measures, where the agency published a final rule in the Federal Register in January and allowed comments and corrections after the final rule had taken effect. The district court held that this process failed to comply with the MSA requirements for notice and comment regarding proposed regulations at 16 U.S.C. § 1854(b)(1), as well as APA notice and comment requirements for rulemaking at 5 U.S.C. § 553(b)(B). On appeal, the Ninth Circuit held that this procedure did not meet APA notice and comment requirements but did not reach the issue of whether the agency also violated the MSA. Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 909–10 (9th Cir. 2003).

345 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 17 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 2–3 (2003), *available at* http://www.pcouncil.org/wp-content/uploads/a170703.pdf.

346 *Id.*

347 *Id.* at 3.

348 PAC. FISHERY MGMT. COUNCIL, APRIL MEETING MINUTES 42–45 (2002), *available at* http://www.pcouncil.org/wp-content/uploads/0402min.pdf.

member noted, in reference to *NRDC v. Evans*, adopting "an interim rule might be difficult without agreement from the plaintiffs."[349] The Council heard public comment on the alternatives in June 2002 and requested additional analysis on one issue,[350] which was reviewed and addressed at the September 2002 council meeting.[351] The Council adopted its final decision for Amendment 17, implementing a biennial management schedule, in November 2002, about a year after it initiated the process.[352]

The PFMC also developed Amendment 16 to the PCGFMP after a similar process, again in response to *NRDC v. Evans*.[353] The *NRDC* court had held that Amendment 12 to the Groundfish FMP failed to comply with the SFA because Amendment 12—while not itself a stock rebuilding plan—authorized the development of rebuilding plans that were not in the form of a fishery management plan, plan amendment, or proposed regulation, as the SFA required in its provisions related to the rebuilding of overfished stocks.[354] The court's ruling resulted in the Council and NMFS developing an FMP amendment for a rebuilding plan consistent with the court decision.[355]

In March 2001, the Council made reference to ongoing groundfish litigation in the context of how NMFS involvement in lawsuits has caused the agency to lower the priority of management measures, such as permit stacking.[356] The March 2001 meeting minutes also note that political forces had affected the timeline for adopting groundfish management measures: "the federal hiring freeze is preventing [NMFS] from filling open positions, which will result in some delays. In addition, there is a moratorium on federal regulations that has slowed the process, and may affect future regulations."[357] The Council requested Eileen Cooney, from NOAA General Counsel (GC), to talk about the litigation, and she stated that "[t]he lawsuits challenged the discard assumptions used for annual specifications, the progress for setting annual specifications, Groundfish FMP Amendment 12,

349 *Id.* at 45.

350 PAC. FISHERY MGMT. COUNCIL, JUNE MEETING MINUTES 19–21 (2002), *available at* http://www.pcouncil.org/wp-content/uploads/0602min.pdf.

351 PAC. FISHERY MGMT. COUNCIL, SEPT. MEETING MINUTES 5–6 (2002), *available at* http://www.pcouncil.org/wp-content/uploads/0902min.pdf.

352 PAC. FISHERY MGMT. COUNCIL, NOV. MEETING MINUTES 42–43 (2002), *available at* http://www.pcouncil.org/wp-content/uploads/1102min1.pdf.

353 168 F. Supp. 2d 1149, 1157–59 (N.D. Cal. 2001).

354 *Id.* at 1157–58 (citing 16 U.S.C. § 1854(e)(3)).

355 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 16-1 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN PROCESS AND STANDARDS FOR REBUILDING PLANS INCLUDING ENVIRONMENTAL ASSESSMENT AND REGULATORY ANALYSES 1-1 (2003), *available at* http://www.pcouncil.org/wp-content/uploads/0803a16-1.pdf.

356 PAC. FISHERY MGMT. COUNCIL, MAR. MEETING MINUTES 22 (2001), *available at* http://www.pcouncil.org/wp-content/uploads/0301min.pdf [hereinafter PFMC MAR. 2001 MEETING MINUTES] ("[Mr. Robinson] added that NMFS is currently responding to three separate lawsuits, and the stacking issue is not the highest priority."). This is presumably in reference to proposed Amendment 14 (sablefish permit stacking). Later, at the March 2005 PFMC meeting, Ms. Cooney advised the Council that permit stacking in Amendment 14 amounted to "a de facto IFQ." PAC. FISHERY MGMT. COUNCIL, MAR. MEETING MINUTES 30 (2005), *available at* http://www.pcouncil.org/wp-content/uploads/0305min.pdf.

357 PFMC MARCH 2001 MEETING MINUTES, *supra* note 356, at 22.

and our NEPA compliance . . . [W]e need to redo Amendment 12 and reformat the rebuilding plans. We need to figure out the exact format and process."[358] Later at that same meeting, a Council member again raised the topic of groundfish litigation in the context of whether the recent court decisions would affect the implementation of the Council's Strategic Plan priorities of developing a trawl permit stacking program and rationalization of the open access fishery.[359] The representative of NOAA GC present at the meeting responded: "the Council may want to revisit the implementation priorities."[360] During the discussion of the Groundfish Strategic Plan Implementation at the March 2002 Council meeting, Bill Robinson of NMFS noted that "the increased complexity of the groundfish management process is dominating Council workload" and suggested that multiyear management—as the Council eventually implemented in Amendment 17—had the potential to alleviate this burden, an argument supplemented by NOAA attorney Eileen Cooney, who "highlighted the importance of Council progress on this issue, especially in light of the recent court decision in *NRDC v. Evans*."[361]

NMFS published a Notice of Intent to Prepare an Environmental Impact Statement (EIS) in April 2002, starting a formal APA rulemaking for what would become Amendment 16.[362] NMFS and the Council subsequently amended their process to prepare separate Environmental Assessment (EA) documents for different components of the rebuilding plan and the procedures for their development.[363] A March 2003 Notice of Intent described a scoping meeting scheduled for April 6, 2003, with an Environmental Assessment to be prepared to analyze the establishment of procedures for reviewing and revising rebuilding plans and an EIS prepared to analyze the environmental impacts of implementing rebuilding plans for four of the nine groundfish species that were overfished at the time.[364] The Council heard public comment on several different proposed rebuilding plans over the course of seven meetings, as well as at a public scoping meeting in Vancouver, Washington, in April 2003.[365] At its June 2003 meeting, the Council approved Amendment 16–1 and 16–2.[366]

358 PAC. FISHERY MGMT. COUNCIL, SEPT. MEETING MINUTES 6 (2001), *available at* http://www.pcouncil.org/wp-content/uploads/0901min.pdf.

359 *Id.* at 16.

360 *Id.*

361 PAC. FISHERY MGMT. COUNCIL, MAR. MEETING MINUTES 24 (2002), *available at* http://www.pcouncil.org/wp-content/uploads/0302min.pdf.

362 Pacific Fishery Management Council Notice of Intent to Prepare an Environmental Impact Statement, 67 Fed. Reg.18,576 (April 16, 2002).

363 *See* Pac. Fishery Mgmt. Council Notice of Intent to Prepare an Environmental Impact Statement, 68 Fed. Reg. 12,888, 12,889 (March 18, 2003).

364 *Id.*

365 PAC. FISHERY MGMT. COUNCIL, AMENDMENT 16-1 TO THE PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 1-5 to 1-6 (2003). The Council heard comments on the proposed rebuilding plans at its March, April, June, September, and November 2002 meetings, as well as at its April and June 2003 meetings. *Id.* at 1-6.

366 PAC. FISHERY MGMT. COUNCIL, JUNE MEETING MINUTES 37–38 (2003), *available at* http://www.pcouncil.org/wp-content/uploads/0603min.pdf. NMFS published the final rule for

The Council also adopted Amendment 18 to the PCGMP as a result of litigation. In *Pacific Marine Conservation Council, Inc. v. Evans*,[367] the U.S. District Court for the District of Northern California ruled against federal regulators, holding that the bycatch prevention and reduction measures in Amendment 13 to the groundfish FMP failed to satisfy the requirements of the SFA, and remanded the provisions back to the agency.[368] In response to this ruling, the Council developed Amendment 18, which it adopted in September 2006.[369] Another court ruling regarding the Pacific Coast Groundfish FMP that warranted discussion by the Council was *NRDC v. NMFS*, which held that the rebuilding plan for darkblotched rockfish violated the SFA.[370] The agency's presentation to the Council noted that although the decision specifically addressed only darkblotched rockfish, NOAA General Counsel had indicated that "the underlying law will be used by the courts in this region" and that the court's "discussion of the 'shortest time possible, taking into account the biology of the stocks and needs of fishing communities' needs to be considered as the rebuilding standards and specifications are developed."[371] NOAA General Counsel informed the Council that it planned to develop more specific guidance in response to the ruling, which would emphasize the shortest time possible for rebuilding and the needs of the affected fishing community.[372]

Litigation over groundfish sparked discussion at the PFMC regarding whether the implementation schedule for the Pacific Coast groundfish catch share program needed to be revised for regulations to be compliant with a court order.[373] At the November 2010 PCFMC meeting, the Council discussed NMFS's proposal to modify the schedule for implementing the catch share program as a result of the court's April 2010 order in *NRDC v. Locke*,[374] which invalidated the 2009–2010 harvest levels for three groundfish species—cowcod, darkblotched rockfish, and yelloweye rockfish—replacing

Amendment 16-1 in February 2004. Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Amendment 16-1, 69 Fed. Reg. 8,861 (Feb. 26, 2004). It published the Final Rule for Amendment 16-2 in April 2004. Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Amendment 16-2, 69 Fed. Reg. 19,347 (Apr. 13, 2004).

367 200 F. Supp. 2d 1194 (N.D. Cal. 2002).

368 *Id.* at 1201.

369 PAC. FISHERY MGMT. COUNCIL, DECISIONS AT THE NOVEMBER 2005 MEETING 3-4 (2005), *available at* http://www.pcouncil.org/wp-content/uploads/1105decisions.pdf.

370 421 F.3d 872, 874 (9th Cir. 2005). Although Council meeting minutes for the presentation on the case note that the Ninth Circuit's decision "is not final since it can be appealed," the decision stands. PAC. FISHERY MGMT. COUNCIL, SEPT. MEETING MINUTES 23 (2005), *available at* http://www.pcouncil.org/wp-content/uploads/0905min.pdf [hereinafter PFMC SEPT. 2005 MEETING MINUTES]. *See supra* notes 290–295 (discussing the *NRDC v. NMFS* decision).

371 PFMC SEPT. 2005 MEETING MINUTES, *supra* note 370, at 24.

372 *Id.*

373 PAC. FISHERY MGMT. COUNCIL, NOV. MEETING MINUTES 21 (2010), *available at* http://www.pcouncil.org/wp-content/uploads/Final_November_2010_Minutes.pdf [hereinafter PFMC NOV. 2010 MEETING MINUTES].

374 Order on Summary Judgment, at 22–23, Nat. Res. Def. Council v. Locke, No. 01-0421 JL (N.D. Cal. April 23, 2010).

the agency's harvest specifications for those stocks with court-ordered harvest levels and ordering the agency to publish new harvest specifications within a year.[375]

The Council initially responded to the Court's order by resetting darkblotched rockfish bycatch levels at its June and September 2010 meetings, adjusting trip limits and Rockfish Conservation Area boundaries, but by November of that year the Council was faced with bycatch numbers for darkblotched rockfish in excess of those deemed acceptable by the court.[376] In response, the Council passed a motion to adopt more stringent caps on darkblotched rockfish bycatch for the limited entry, mid-water trawl and shoreside sectors, adjusted the Rockfish Conservation Area boundaries, and implemented additional closures for the limited entry non-whiting trawl fishery.[377] At the next Council meeting, in March 2011, NMFS briefed the Council on why the agency believed the proposed 2011 and 2012 harvest specifications for yelloweye rockfish and cowcod were consistent with the court's order in *NRDC v. Locke* and the MSA provisions requiring rebuilding of overfished stocks in as short a time as possible.[378] However, after much discussion over the course of several meetings, the PFMC implemented the catch share program in January 2011, as it intended before the *NRDC v. Locke* order regarding harvest specifications.[379]

In the period encompassing the *Pacific Dawn* cases, council proposals for pending additional actions in the implementation of the IFQ program remained on hold until the allocation formula issues were resolved.[380] Economists identified an opportunity cost in resolving the trailing amendments early in the program, as considerable PFMC and NMFS staff time was diverted toward revisiting the allocation.[381]

The *Pacific Dawn* litigation exemplifies the amount of Council and agency resources consumed by litigation over catch shares.[382] In *Pacific*

375 *Id.*; PFMC NOV. 2010 MEETING MINUTES, *supra* note 373, at 21. *See also supra* note 277 and accompanying text (discussing the *NRDC v. Locke* order).

376 PFMC NOV. 2010 MEETING MINUTES, *supra* note 373, at 24–25.

377 *Id.* at 25–26.

378 PAC. FISHERY MGMT. COUNCIL, MAR. MEETING MINUTES 27–29 (2011), *available at* http://www.pcouncil.org/wp-content/uploads/Final_March_2011_Minutes.pdf.

379 *See* Pac. Fishery Mgmt. Council, *History of Trawl Rationalization Discussions in the Pacific Coast Region*, http://www.pcouncil.org/groundfish/fishery-management-plan/fmp-amendment-20/#HISTORY (last visited Feb. 13, 2016) (discussing the timeline and process behind the development of the catch share program for Pacific Coast groundfish).

380 PAC. FISHERY MGMT. COUNCIL, SUMMARY OF RATIONALE FOR ACTION ON RECONSIDERATION OF ALLOCATION OF WHITING (2012), *available at* http://www.pcouncil.org/wp-content/uploads/Xmit_WhtgRealloc_Att1_Rationale.pdf.

381 *See* Letter from Frank Lockhart, NMFS Asst. Regional Administrator, to Dan Wolford, Chair, Pacific Fishery Management Council, Feb. 29, 2012, *available at* http://www.pcouncil.org/wp-content/uploads/I5a_ATT1_REMAND_LTR_NMFS_APR2012BB.pdf (discussing work needed for revisiting allocation); Measuring the Effects of Catch Shares Project, *West Coast Governance Indicators*, http://www.catchshareindicators.org/results/westcoast/governance/cost-of-fishery-management-to-the-public/ (last visited Feb. 13, 2016) (describing opportunity cost of not resolving the amendments earlier).

382 *See* PAC. FISHERY MGMT. COUNCIL, NOV. MEETING MINUTES 39 (2012), *available at* http://www.pcouncil.org/wp-content/uploads/FINAL_Nov_2012_Minutes.pdf (noting the demand the

Dawn I, fishing industry plaintiffs challenged 2010 regulations establishing a baseline period for the initial allocation of catch share permits for the Pacific Coast whiting fishery of 1994–2003 for fishing vessels[383] and 1998–2004 for processors,[384] arguing that the regulations should have taken into account participation in the Pacific whiting fishery during more recent fishing years.[385] After the court remanded the regulations to the agency, NMFS undertook a formal rulemaking reconsidering the baseline period for catch share permit allocations in the fishery.[386] At the Pacific Fishery Management Council's recommendation,[387] the agency ultimately adopted a final rule that used the same baseline period as the original 2010 regulations.[388] Many of the same plaintiffs filed suit the day following the final rule's publication in the Federal Register.[389] *Pacific Dawn II* once again challenged the baseline period for the initial permit allocation in the Pacific whiting fishery, although in this second round, federal regulators prevailed.[390]

In addition to the resources involved in defending the agency in the cases themselves, the *Pacific Dawn* litigation resulted in NMFS undertaking a second rulemaking spanning the course of a year to satisfy procedural requirements that the agency perhaps should have applied when it initially developed the rule establishing the baseline period for determining eligibility for permits in the Pacific whiting catch share program.[391]

Pacific Dawn litigation placed on human resources at NMFS). *See also, supra* notes 310–23 and accompanying text (discussing the *Pacific Dawn* litigation).

383 Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program, 75 Fed. Reg. 60,868 (October 1, 2010).

384 Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program, 75 Fed. Reg. 78,344 (Dec. 15, 2010).

385 Pacific Dawn, L.L.C. Complaint for Declaratory and Injunctive Relief at ¶4, Pacific Dawn v. Bryson, 2013 WL 1281233 (N.D. Cal. 2013) (No. C-13 1419) [hereinafter *Pacific Dawn I Complaint*].

386 Fisheries Off West Coast States; Reconsideration of Allocation of Whiting, 78 Fed. Reg. 72 (Jan. 2, 2013) (proposed rule).

387 *See* Letter from D.L. McIsaac, Exec. Director, Pacific Fishery Management Council, to Will Stelle, Regional Administrator, NMFS Northwest Office, Oct. 30, 2012, *available at* http://www.pcouncil.org/wp-content/uploads/Xmit_WhtgRealloc_Ltr.pdf (recommending the agency adopt a rule maintaining the same baseline period for allocating catch share permits for the Pacific Whiting fishery and noting this was a unanimous vote by the Council).

388 78 Fed. Reg. 18,879 (Mar. 28, 2013).

389 *See id.* (noting that the final rule was published on March 28, 2013); *Pacific Dawn I Complaint*, *supra* note 385 (indicating a filing date of March 29, 2013).

390 *See* Order Granting Defendants' and Intervenor-Defendants' Cross-Motions for Summary Judgment, at *2, *Pacific Dawn II*, No. C13-01419 (N.D. Cal. Dec. 5, 2013), *available at* http://www.edf.org/sites/default/files/case3-13-cv-01419-teh.pdf (describing the procedural history in the *Pacific Dawn* challenges to the catch share program).

391 *See* Pacific Coast Groundfish Fishery; Advance Notice of Proposed Rulemaking Regarding the Reconsideration of the Allocation of Whiting, 77 Fed. Reg. 20,337, 20,338 (Apr. 4, 2012) (proposed rulemaking regarding the reconsideration of the Pacific whiting allocation); 77 Fed. Reg. 29,955 (May 21, 2012) (temporary emergency rule delaying or revising whiting allocations while the allocation is being reconsidered as a result of the *Pacific Dawn I* ruling); 78 Fed. Reg. 3,848 (Jan. 17, 2013) (extending the temporary emergency rule); 78 Fed. Reg. 72 (Jan. 2, 2013) (proposed rule on reconsideration of whiting allocation, explaining rationale for

Pacific Dawn also absorbed considerable Council time. The case first appeared as an agenda item in the November 2010 PFMC Briefing Book, which included a copy of the complaint filed on October 25, 2010.[392] Following the court's December 2011 order in *Pacific Dawn I*, NMFS briefed the PFMC on the case at its March 2012 meeting[393] and selected a rulemaking process that would take place over the course of three council meetings, in April, June, and September, 2012.[394] On April 5, 2012, the Council devoted more than an hour to listening to testimony related to the rule remanded in *Pacific Dawn I* and adopted the range of alternatives for the new rulemaking.[395] At its June 2012 meeting, the Council selected its preliminary preferred alternative and received 184 pages of public comments.[396] In September 2012, the Council listened to seven hours of testimony from twenty-four individuals or groups and received reports from the Groundfish Advisory Subpanel and the Scientific and Statistical Committee before voting to select the no-action alternative as its preferred alternative.[397] In January 2012, NMFS published the proposed final rule, which followed the Council's recommendation to adopt the "no action" alternative, with publication of the final rule on March 28, 2013.[398]

selecting "no action" alternative); 78 Fed. Reg. 18,879 (Mar. 28, 2013) (final rule adopting same baseline for Pacific whiting allocations as the previous rule).

392 Pac. Fishery Mgmt. Council, *PFMC November 2010 Briefing Book*, http://www.pcouncil.org/resources/archives/briefing-books/november-2010-briefing-book/ (last visited Feb. 13, 2016) (listing *Pacific Dawn* as an agenda item as Supplemental Attachment 6 to agenda item H.5.a).

393 PAC. FISHERY MGMT. COUNCIL, MAR. MEETING MINUTES 25 (2012), *available at* http://www.pcouncil.org/wp-content/uploads/Final_Minutes_March_2012.pdf.

394 *Id.* at 57; *see also* 78 Fed. Reg. 73 (Jan. 2, 2013) (describing the rulemaking process involved in developing the proposed final rule maintaining previous method for allocating catch shares in the Pacific Whiting Fishery).

395 *See Pacific Dawn II*, No. C13-1419, 2013 WL 6354421, at *6 (N.D. Cal. Dec. 5, 2013), (discussing the process involved in developing the March 2013 final rule); *see also PFMC April 2012 Briefing Book Agenda Item I.5*, *available at* http://www.pcouncil.org/wp-content/uploads/I5_APR2012BB.pdf (materials related to reconsideration of the methodology for making the whiting allocation, including written public comments received by the Council prior to the meeting).

396 Pac. Fishery Mgmt. Council, *PFMC June 2012 Briefing Book, Public Comments*, http://www.pcouncil.org/resources/archives/briefing-books/june-2012-briefing-book/ (last visited Feb. 13, 2016); *see also* PAC. FISHERY MGMT. COUNCIL, JUNE MEETING MINUTES 37–41 (2012), *available at* http://www.pcouncil.org/wp-content/uploads/FINAL_June_2012_Minutes.pdf (discussing the court's order and potential courses of action by the Council to achieve compliance).

397 *See* PAC. FISHERY MGMT. COUNCIL, SEPT. MEETING MINUTES 8, 10, 41, 59 (2012), *available at* http://www.pcouncil.org/wp-content/uploads/FINAL_Sept_2012_Minutes.pdf (discussing the court order in *Pacific Dawn* and the reasoning behind the Council's belief that maintaining with the status quo was compliant with the court's decision).

398 Pacific Coast Groundfish Fishery; Trawl Rationalization Program; Reconsideration of Allocation of Whiting, 78 Fed. Reg. 18,879 (Mar. 28, 2013) (codified at 60 C.F.R. part 660).

VI. ANALYSIS

Catch share programs have been challenged since first implemented in the early 1990s, but have generally been found consistent with the MSA.[399] In the nine challenges to early catch share programs discussed in this Article, federal regulators ultimately prevailed on all counts, though issues raised in the first programs (authority to create catch shares, nature of the right, initial allocation, tribal claims)[400] were subsequently addressed in legislation.[401] Of the twenty-five cases involving the NMPFMP and PCGFMP discussed in this Report, most caused councils to delay implementation of some measures, and ten resulted in at least a partial remand or a settlement agreement that required NMFS to engage in additional rulemaking.[402] While some remands led to a brief rulemaking that cured a procedural deficiency and resulted in a minor (or no) change to the regulations,[403] others caused NMFS to approve a new plan amendment to cure the deficiencies.[404]

The FMPs for groundfish both on the Pacific Coast and in the Northeast, however, were frequently held to be insufficient under the SFA or MSA before the implementation of catch share programs began in 2010.[405] The catch share programs, while certainly not eliminating litigation over

399 *See, e.g.*, Pac. Coast Fed'n of Fishermen's Ass'n v. Blank, 693 F.3d 1084, 1086 (9th Cir. 2012) (upholding Amendments which impose procedural and substantive requirements for managing fisheries as lawful under the MSA).

400 *See supra* notes 23–26 and accompanying text.

401 *See supra* Part II.

402 *See supra* Part V.

403 *See, e.g.*, Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994, 1008 (9th Cir. 2004) (allowing NMFS to supplement the administrative record to cure deficiencies rather than undertake a rulemaking), *supra* notes 117–126; Mass. Fisheries v. Gutierrez, 594 F. Supp. 2d 127, 129 (D. Mass. 2009) (noting that the days at sea counting system was temporarily suspended as a result of the lawsuit but later reinstated) *supra* notes 220–223 and accompanying text; Oceana v. Locke, 831 F.Supp.2d 95, 103–04 (D.D.C. 2011) (partially remanding bycatch provisions) *supra* note 158; *NRDC v. NMFS*, 421 F.3d 872, 874 (9th Cir. 2005) (remanding darkblotched rockfish management measures) *supra* notes 285–294; *Pacific Dawn I*, No. C10-4829, 2011 WL 6748501, at *1 (N.D. Cal. Dec. 22, 2011) (remanding a portion of Amendment 20 for a rulemaking which ultimately upheld the status quo), *supra* notes 310–320 .

404 *See, e.g.*, CLF v. Franklin, 989 F.2d 54, 56–57 (1st Cir. 1993) (resulting in a consent decree that led to the adoption of Amendment 5), discussed *supra* notes 161–168; *CLF II*, 195 F. Supp. 2d 186, 190 (D.D.C.), *vacated*, *CLF III*, 211 F. Supp. 2d 55, 56–57 (D.D.C. 2002), (resulting in a settlement agreement that led to the adoption of Amendment 13), discussed *supra* notes 197–212 and accompanying text; Oceana v. Evans, No. 2004-cv-0811, 2005 WL 555416, at *1 (D.D.C. Mar. 9, 2005) (resulting in the adoption of the Northeast Region Standardized Bycatch Reporting Methodology Amendment), discussed *supra* notes 216–218; *NRDC v. Evans*, 168 F. Supp. 2d 1149, 1154 (N.D. Cal. 2001), (resolving the remand with the development of Amendment 16), discussed *supra* notes 267–270; Pac. Marine Conservation Council, Inc. v. Evans, 200 F. Supp. 2d 1194, 1196 (N.D. Cal. 2002) (resolving the remand with the development of Amendment 16), discussed *supra* notes 279–287 .

405 *See, e.g.*, CLF v. Franklin, 989 F.2d at 56–57; *CLF v. Evans II*, 195 F. Supp. 2d at 190, *vacated*, *CLF III*, 211 F. Supp. 2d at 56–57; Oceana v. Evans, No. 2004-cv-0811, 2005 WL 555416, at *1. For the Pacific Coast, see, e.g., *NRDC v. Evans*, 168 F. Supp. 2d at 1154; Pacific Marine Conservation Council, Inc. v. Evans, 200 F. Supp. 2d at 1196 (remanding portions of Amendment 13 related to bycatch reduction); *NRDC v. NMFS*, 421 F.3d at 874 (invalidating the rebuilding period established by NMFS for darkblotched rockfish in the same fishery).

management plans in either fishery, have resulted in more favorable rulings for NMFS.[406] While conservation groups prevailed in part in a challenge to Amendment 16,[407] the remanded portion of the rule was not vacated, and the catch share program withstood a comprehensive challenge by the fishing industry.[408] Likewise on the Pacific Coast, NMFS prevailed on all counts to a fishing industry challenge to Amendment 20, and additional rulemaking required by the court in *Pacific Dawn I* resulted in upholding the status quo.[409]

A. Changing Trends in Catch Share Litigation

The legal authority to use catch shares in a fishery has not been challenged since *Sea Watch International*.[410] Likewise, early litigation also appears to have settled the question of how tribal fishing rights are incorporated into catch share fisheries.[411]

Congress has dealt with some issues raised in early litigation in the increasingly detailed amendments to the provisions in the MSA authorizing catch share programs.[412] Following the MSRA amendments in 2007, catch share cases that included takings claims were decided on other grounds or rejected.[413] Although no court found catch shares to result in a taking of property that required government compensation, the three cases involving

406 *See, e.g.*, *Pacific Dawn II*, No. C13-1419, 2013 WL 6354421, at *1 (N.D. Cal. Dec. 5, 2013) (upholding the Pacific Groundfish Fishery catch share program implemented by NMFS).

407 *See* Oceana v. Locke, 831 F. Supp. 2d at 114, 122 (discussing the decision to remand the portion of the rule related to accountability measures for five stocks).

408 *See* Lovgren v. Locke, 701 F. 3d 5, 12–13 (1st Cir. 2012) (ruling in favor of the agency on all counts).

409 *See* Pac. Coast Fed'n of Fishermen Ass'ns v. Blank, 693 F.3d 1084, 1086 (9th Cir. 2012); *Pacific Dawn I*, No. C10-4829, 2011 WL 6748501 (N.D. Cal. Dec. 22, 2011).

410 *See* George J. Mannina Jr., *Is There a Legal and Conservation Basis for Individual Fishing Quotas?*, 3 OCEAN & COASTAL L.J. 5, 24 (1997) (explaining the rejection of IFQ challenges in *Sea Watch International*); Sea Watch International v. Mosbacher, 762 F. Supp. 370 (D.D.C 1991).

411 For a discussion of how to apply fishery catch share programs to tribal fishing rights, see Washington v. Daley, 173 F.3d 1158, 1161 (9th Cir. 1999), Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994, 997 (9th Cir. 2004), and Native Village of Eyak v. Daley, 154 F. 3d 1090, 1097 (9th Cir. 1998).

412 *See, e.g.*, Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479 § 106 (2007) (amending the Magnuson-Stevens Fishery Act to include the Limited Access Privilege Programs); S. REP. NO. 109-229, at 8–9, 25 (2006) (explaining that the amendments were meant to address interested parties' concerns, such as "eligibility to hold shares, fairness in initial allocation, [and] excessive share caps," as well as "prevention of consolidation, and the need to establish policies on transferability, auctions, and cost recovery").

413 *See* Coastal Conservation Ass'n v. Locke, Nos. 2:09–cv–641–FtM–29SPC, 2:10–cv–95–FtM–29SPC, 2011 WL 4530631 (M.D. Fla. Aug. 16, 2011) (challenge to Gulf of Mexico red snapper program included a constitutional takings claim regarding catch shares, but was decided on MSA and APA grounds). *See also* General Category Scallop Fishermen v U.S. Dep't of Commerce, 720 F. Supp. 2d 564 (D.N.J. 2010) (rejecting a takings claim asserted by scallop permit holders in a challenge to a catch share program); Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360, 384–85 (2004) (finding "no cognizable property interest" in fishing license or permit).

takings claims were time-consuming, and the rulings did not preclude the possibility that a future claim may prevail.[414] These rulings, in addition to extensive testimony by both conservation and fishing groups, informed the "time out" on new rights-based programs in the 1996 amendments.[415] As early as 1994, conservation groups raised concerns about property rights, testifying at a House Hearing that Congress needed to clarify that quotas did not confer private property rights, and that the public needed to be compensated for private use of its resources.[416] Consideration of takings, transferability, foreign ownership, appeals, and other issues in congressional deliberations were explored in the required National Research Council report on limited access privilege programs.[417] These findings contributed to action by Congress to include provisions in the 2007 MSRA specifying that catch share permits do not create any property interest.[418]

The MSRA also included a requirement that catch share programs must include an administrative appeals process for reviewing initial allocation decisions of catch share permits,[419] as well as "establish procedures to ensure fair and equitable initial allocations" and take into consideration the fishery's "basic cultural and social framework."[420] Initial permit allocations were litigated in *Alliance Against IFQs*,[421] as well as in other catch share programs outside the scope of this report.[422] However, these revisions to the statute did not prevent the *Pacific Dawn* litigation, which addressed whether a gap of several years between the baseline period and the commencement

414 *See generally* Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584 (9th Cir. 1998) (holding the catch share program created a protectable property right but finding procedural due process was satisfied for the fisherman); Dell v. U.S. Dep't of Commerce, Nos. 98-35021, 98-35044, 98-35045, 1999 WL 604217, *2 (9th Cir. Aug. 11, 1999) (holding that the court already decided that the catch share provisions met Due Process requirements and established a protectable property right (citing *Foss*, 161 F.3d 584)); *Arctic King Fisheries, Inc.*, 59 Fed. Cl. at 384–85 (2004) (finding a reduction in value to the fishing vessel caused by the catch share program but concluding no taking occurred because the owner should have foreseen the potential of the vessel to lose value).

415 *See* SHARING THE FISH, *supra* note 19, at 16 (discussing a study on the economic, social, and biological affects of IFQs, which found that an increase in environmental and conservation group involvement in federal fisheries legislation influenced the 1996 Amendments to the MSA, reflecting a shift to resource management and biological conservation objectives).

416 *See, e.g.*, *Transferrable Quotas under the Magnuson Act: Hearing Before the Subcomm. On Fisheries Mgmt. of the H. Comm. On Merchant Marine and Fisheries*, 103rd Cong. 426–27 (Feb. 9, 1994) (statement of Roger McManus, President, Center for Marine Conservation). *See also*, Carl Safina & Suzanne Iudicello, *Wise Use Below the High Tide Line*, *in* LET THE PEOPLE JUDGE 119, 123, 125 (John D. Echeverria & Raymond B. Eby eds., 1995).

417 SHARING THE FISH, *supra* note 19, at 2, 7, 8, 39, 40.

418 Pub. L. No. 109-479 § 303A(b)(1–5) (2007).

419 *Id.* § 303A(c)(1)(I).

420 16 U.S.C. § 1853a(c)(5)(A)–(B) (2012).

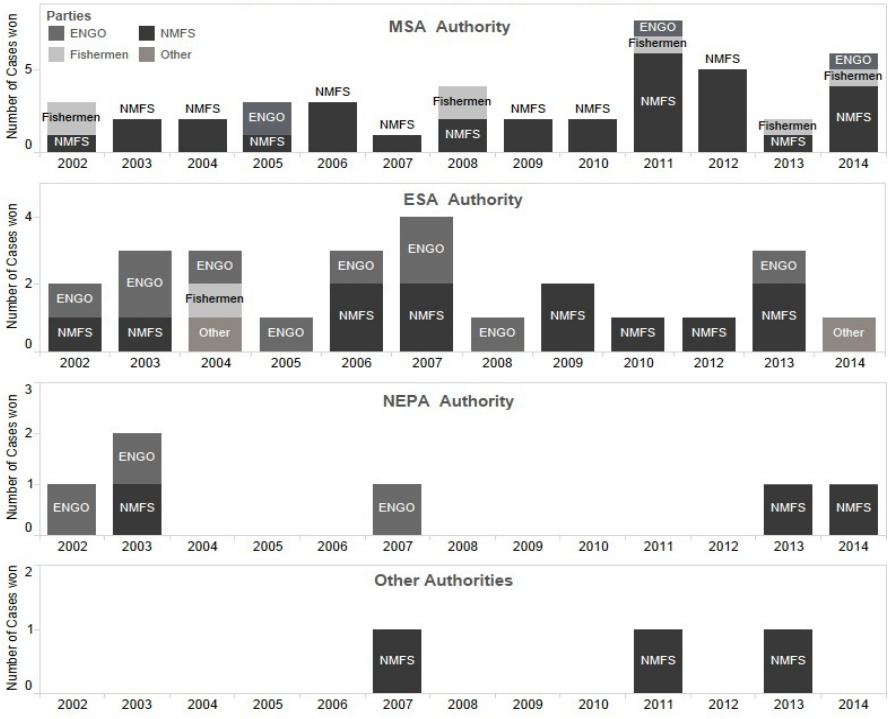
421 *See supra* notes 74–76 and accompanying text. The amendment has not eliminated all litigation related to initial allocations, as evidenced by *Pacific Dawn I*, No. C10- 4829, 2011 WL 6748501, at *5 (N.D. Cal. Dec. 22, 2011), discussed *supra* notes 310–319.

422 *See, e.g.*, Yakutat, Inc. v. Gutierrez, 407 F. 3d 1054, 1068 (9th Cir. 2005) (challenging a baseline period of any two years between 1995–1998 for issuing initial permits for Pacific Cod in the Bering Sea and Aleutian Islands fishery catch share program established by a final rule in April 2002).

of permit allocations for a catch share program qualified as considering "current" harvests in making the initial allocation.[423] In *Pacific Dawn II*, the court held that it did, noting that "present participation" in the fishery does not necessarily require the participation be "contemporaneous" with the regulations and that the complex facts and procedural history involved in making the fishery's catch share allocation made the time delay reasonable.[424]

Figure A illustrates the basis of legal challenges to FMPs over time and the parties prevailing in those cases. Catch share program issues were brought under the authority of the MSA, and represent a much smaller portion of litigation than procedural and other MSA issues. Figure B shows catch share cases only, revealing that they averaged less than half of all MSA cases and only twenty percent of all the fishery cases examined. The trend has been not only that the agency prevailed in most of the catch share cases, but it also won most of the MSA and NEPA cases.

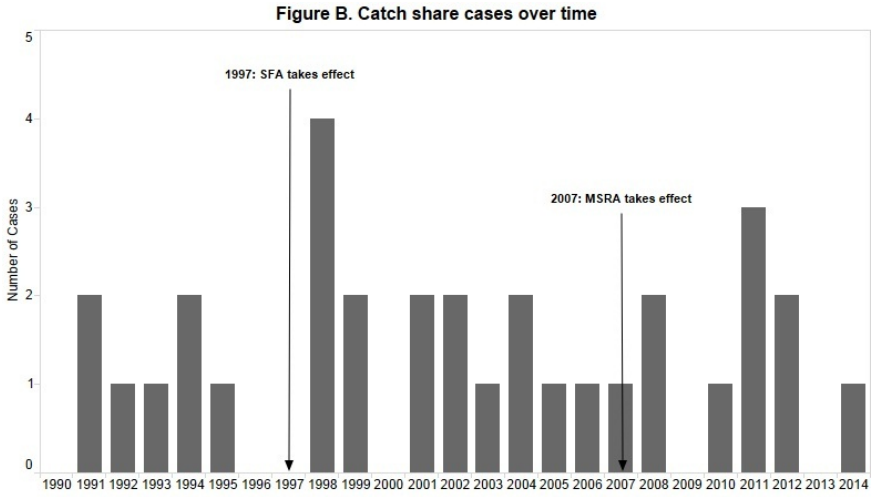
Figure A. Basis of challenge and prevailing party



Source: Measuring the Effects of Catch Shares (2016)

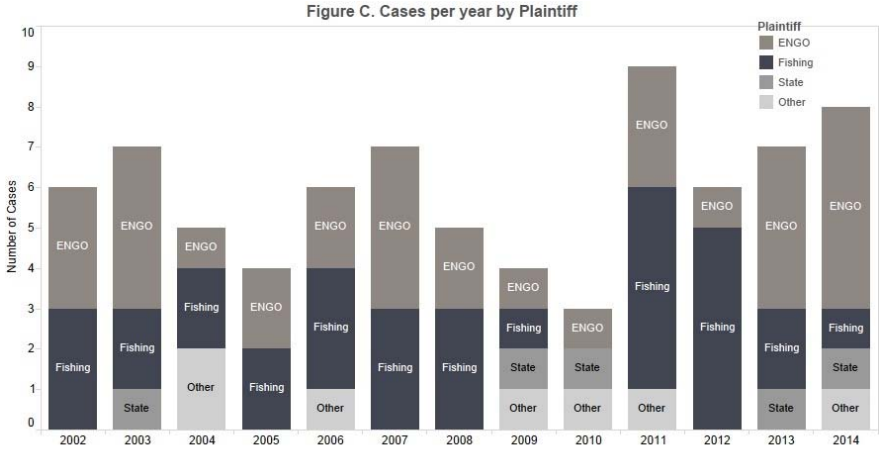
423 *Pacific Dawn II*, No. C13-1419, 2013 WL 6354421, at *5 (N.D. Cal. Dec. 5, 2013) (citing 16 U.S.C. § 1853a(c)(5)(A)(i)).

424 *Id.* at *11.



Source: MECS (2016)

Figure C compares the plaintiffs bringing suit. It is noteworthy that the catch share cases where litigation concerned the program itself were brought by fishermen, fishing associations, or states on behalf of the fishing industry. In the case of administrative or procedural claims, environmental groups brought all cases but one; similarly, environmental groups initiated twice as many Endangered Species Act[425] cases as other plaintiffs. Cases brought using MSA provisions as a basis were evenly divided between environmental and fishing interests.

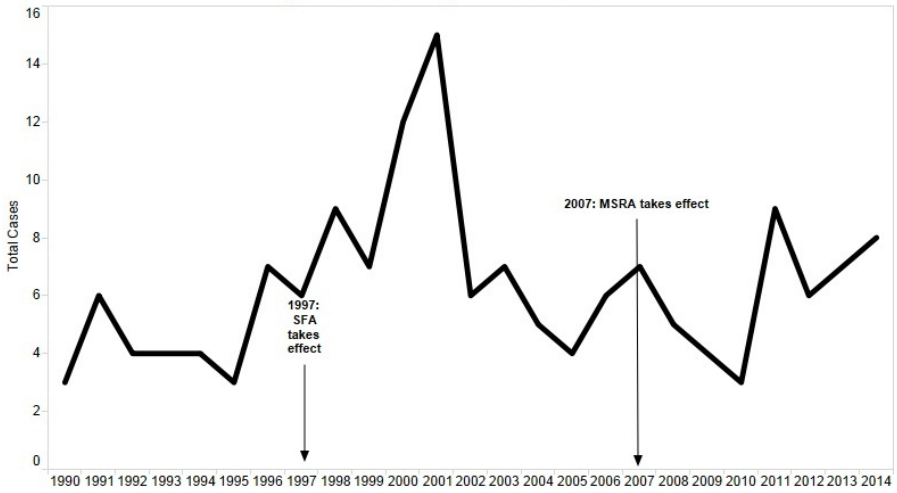


Source: MECS (2016)

425 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

Finally, Figure D provides information regarding the total number of fisheries cases brought each year from 1990 to 2014.

Figure D. Total fishery cases 1990 to 2014



Source: 1997 to 1999, National Academy of Public Administration (2002); MECS (2016)

B. The More Things Remain the Same

Claims that NMFS violated National Standard Two and failed to take into account the "best available science" have been the most common grounds for challenges to catch share programs. They regularly crop up in catch share litigation, in lawsuits initiated by conservation groups and the fishing industry alike.[426] For example, the arguments presented in *J.H. Miles & Company v. Brown*[427]—a fishing industry lawsuit asserting that NMFS failed to use "best available science" when it reduced catch limits for two Mid-Atlantic fisheries—parallel those made by Massachusetts in its 2014 lawsuit challenging Frameworks 48 and 50, which greatly reduced catch limits for the Northeast Multispecies fishery.[428] *Conservation Law Foundation v. Pritzker* also challenges the science NMFS relied upon in devising Frameworks 48 and 50, although in contrast to the position of Massachusetts, the conservation group argued NMFS should have imposed greater management restrictions in the frameworks.[429] As in *J.H. Miles & Company*, the court rejected the argument that the agency failed to use the

426 *See* J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1149 (E.D. Va. 1995); *Massachusetts*, 10 F. Supp. 3d 208, 217 (D. Mass. 2014); *Pacific Dawn I*, No. C10–4829, 2011 WL 6748501, at *2 (N.D. Cal. Dec. 22, 2011); Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994, 997 (9th Cir. 2004); Nat. Res. Def. Council, Inc. v. Evans, 168 F. Supp. 2d 1149, 1154 (N.D. Cal. 2001).

427 *See supra* notes 59–71, (discussing *J.H. Miles & Company v. Brown*).

428 *Compare* J.H. Miles & Co., 910 F. Supp. at 1149, *with Massachusetts*, 10 F. Supp. at 216–220.

429 Conservation Law Foundation v. Pritzker, 37 F. Supp. 3d 254, 268 (D.D.C. 2014).

best available science in its analysis of the impact of fishing in previously closed areas.[430]

Litigation over the control period used for making the initial allocation of permits for a newly implemented catch share program has likewise persisted. In the 1996 case *Alliance Against IFQs v. Brown*, the court rejected a fishing industry group's arguments that the three-year lapse between the control period and the permit application process for the Alaska halibut and sablefish catch share program violated a requirement that the agency consider "present participation in the fishery."[431] More recently, in *Pacific Dawn I*, fishing industry participants argued that the six-year gap between the cutoff date for the control period and the actual permit application process for the Pacific Coast whiting catch share program also indicated an agency failure to consider "present participation."[432] Citing *Alliance Against IFQs*, the court intimated that because the gap at issue here was nearly twice as long, it may not have been reasonable, but it did not rule on the issue because it rejected the challenged regulations on procedural grounds.[433]

VII. CONCLUSION

That catch shares gave rise to a body of litigation is to be expected, given the high-stakes economic impacts of fishery management measures. Moreover, catch share programs arose in a period bracketed by two major revisions to federal fishery law. With new legal requirements for management measures and processes, a pulse of litigation during the period was a certainty.

Looking at catch share litigation in this context, a trend emerges of fishery managers prevailing in more lawsuits, and in the substance of their decisions, more frequently. Issues litigated in early programs, such as whether a catch share permit created a property right, were addressed by Congress in later amendments to the law, eliminating additional claims over the issue.[434] As Congress revised the legislation to include greater specificity in requirements of catch share programs, NMFS followed with catch share policy direction[435] and guidance,[436] also addressing issues raised in prior litigation.

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430 *Id.*

431 *See supra* notes 74–76 and accompanying text (discussing Alliance Against IFQs v. Brown, 84 F.3d 343, 346 (9th Cir. 1996)).

432 *Pacific Dawn I*, 2011 WL 6748501, at *5.

433 *See supra* notes 310–319 and accompanying text (discussing *Pacific Dawn I*).

434 *See supra* notes 84–92 and accompanying text (discussing Foss v. National Marine Fisheries Service, 161 F.3d 584 (9th Cir. 1998)).

435 *See generally* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NOAA CATCH SHARE POLICY (2010) *available at* http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/documents/noaa_cs_policy.pdf.

436 NAT'L OCEANIC AND ATMOSPHERIC ADMIN., THE DESIGN AND USE OF LIMITED ACCESS PRIVILEGE PROGRAMS 23–24 (Lee G. Anderson & Mark C. Holliday eds., 2007), *available at*

A look at the statistics reveals that while catch share cases were part of the litigation record for federal managers, they were an insignificant component. When compared to the what was termed "litigation gridlock" and a "national crisis" in the case load of the NMFS in 2002,[437] catch share litigation in the subsequent decade appears minimal.[438] In the years following the passage of the SFA, litigation against NMFS increased from one or two cases per year to a high of twenty-six lawsuits in 2001.[439] Prior to 1997, the agency had sixteen open cases; by 2000 it had more than 100.[440] Following recommendations of internal and external reviews,[441] budget increases,[442] and regulatory streamlining efforts,[443] the agency improved its consistency in meeting administrative and procedural requirements, thereby improving its won–lost record in court.[444]

In contrast, the number of lawsuits that challenged the agency's decision-making process in allocating catch share privileges is an area of litigation that is unlikely to disappear as long as purposes and goals of the programs respond to local conditions. Where a goal of a proposed program is to reduce capacity, the design of a catch share program will inevitably have exclusion effects,[445] creating dissatisfaction among participants in a fishery who feel they were disadvantaged by the initial permit allocation process.[446]

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http://www.nmfs.noaa.gov/sfa/management/allocation/anderson_and_holliday_design_and_use_laps_2007.pdf.

437 *Oversight on Management Issues at the National Marine Fisheries Service: Hearing Before the Subcomm. on Oceans, Atmosphere, and Fisheries of the S. Comm. on Commerce, Science, and Transportation*, 107th Cong. 1–5, 25–40 (2002) (statements of Sen. Kerry and David Benton, Chair, N. Pac. Fishery Mgmt. Council).

438 *See supra* Fig. B, D.

439 *See Oversight on Management Issues at the National Marine Fisheries Services*, *supra* note 437, at 76 (statement of Penelope Dalton, V.P. and Technical Director, Consortium for Oceanographic Research and Education).

440 *Id.* at 70 (statement of Ray Kammer, Consultant).

441 *Oversight on Management Issues at the National Marine Fisheries Services: Hearing Before the Subcomm. on Oceans, Atmosphere, and Fisheries of the S. Comm. on Commerce, Science, and Transportation*, 107th Cong. 9 (2002) (statement of Suzanne Iudicello, Author, Marine Conservation Consultant). NAT'L ACAD. OF PUB. ADMIN., COURTS, CONGRESS, AND CONSTITUENCIES: MANAGING FISHERIES BY DEFAULT 11–16 (2002), *available at* http://www.ciaonet.org/attachments/11146/uploads.

442 NAT'L ACAD. OF PUB. ADMIN, *supra* note 441, at 78–79.

443 *See Oversight on Management Issues at the National Marine Fisheries Services*, *supra* note 436, at 15–20 (statement of William Hogarth, NMFS Asstistant Admin. for Fisheries).

444 *Magnuson-Stevens Fishery Conservation and Management Act and its Relationship to the National Environmental Policy Act, Before the Subcomm. on Fisheries and Oceans of the H. Comm. on Resources*, 109th Cong. (2005), *available at* http://naturalresources.house.gov/uploadedfiles/hogarthtestimony04.14.05.pdf (statement of William Hogarth).

445 Measuring the Effects of Catch Shares, *Have Opportunities or Barriers to Entering the Fishery Changed?*, http://www.catchshareindicators.org/results/westcoast/economic/access-and-exclusion-effects/ (last visited Feb. 13, 2016) (discussing exclusion effects in the West Coast Trawl ITQ program).

446 *See supra* notes 74-76 (discussing *Alliance Against IFQs v. Brown*, 84 F.3d 343, 346 (9th Cir. 1996)); *supra* notes 310–319 (discussing *Pacific Dawn I*, No. C10-4829, 2011 WL 6748501, at

It remains to be seen whether the required performance reviews[447] of each of these programs will result in improved consistency with the national policy, or whether experience in designing programs will result in less conflict, and therefore fewer court cases. However, by their nature catch share programs are designed by fishery participants at the regional council level to address local concerns.[448] They have varying objectives and purposes; stakeholder interests are debated, argued, and voted on in an economically competitive setting. This essentially political process takes time, and makes one-size-fits-all rules difficult and avoidance of litigation unlikely. If regional councils use existing laws, rules, guidance, and experience to design catch share programs that are fair and reasonable, structured to meet stated objectives, and ensure all procedural requirements are satisfied, the agency may continue to prevail in the vast majority of future challenges to catch share programs, as it has in recent challenges to both the NMFMP and PCGFMP. [449]

Catch share programs, though, are only one approach provided to managers among many. They do not obviate the overriding requirements of the MSA to end overfishing, rebuild overfished stocks, protect habitat, and reduce bycatch.[450] Litigation over these fundamental aspects of the MSA's requirements, as well as adherence to NEPA, the APA, and similar procedural requirements will continue irrespective of the design of catch share programs, since these mandates apply whether or not management measures include rights-based allocation schemes. Like catch share programs, litigation is a tool. Agency hand wringing to the contrary, it is part of the system—not an indication that the system is broken.

*1 (N.D.Cal. Dec. 22, 2011)); *supra* notes 303–305 (discussing *PCFFA v. Blank*, 693 F.3d 1084, 1092–94 (9th Cir. 2012)).

447 Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479 § 303A(c)(1)(G) (2007).

448 NAT'L MARINE FISHERIES SERVICES, CATCH SHARES & COMMERCIAL FISHING COMMUNITIES WORKSHOP 20 (2011), *available at* http://www.nmfs.noaa.gov/op/docs/final_10-11-12.pdf.

449 *See supra* notes 434–435 and accompanying text.

450 NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NOAA CATCH SHARE POLICY ii, 5–6 (2010), *available at* http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/documents/noaa_cs_policy.pdf.