In The

United States Court of Appeals

for the

First Circuit

11-1952

JAMES LOVGREN; NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; PAUL THERIAULT; CHUCK WEIMER; DAVID ARIPOTCH; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; RICHARD GRACHEK; ROANOKE FISH CO., INC.; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES; NEW BEDFORD FISH LUMPERS PENSION PLAN; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,

Plaintiffs

(continuation of caption on next page)

Appeal from an Order entered from the United States District Court for the District of Massachusetts, Boston

BRIEF FOR PLAINTIFFS-APPELLANTS

JOHN FARRELL FOLAN, ESQ.
FOLAN & MCGLONE, P.C.
401 County Street
P.O. Box 2095
New Bedford, Massachusetts 02741
(508) 992-9800

Attorney for Plaintiffs-Appellants, New Bedford, MA and Gloucester, MA at No. 11-1952 and Tempest Fisheries, et al. at No. 11-2001

CITY OF NEW BEDFORD; CITY OF GLOUCESTER,

Plaintiffs-Appellants

v.

THE HONORABLE GARY LOCKE, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration,

Defendants-Appellees

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC),

Defendants

11-1964

JAMES LOVGREN,

Plaintiff-Appellant

CITY OF NEW BEDFORD; NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; PAUL THERIAULT; CHUCK WEIMER; DAVID ARIPOTCH; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; RICHARD GRACHEK; ROANOKE FISH CO., INC.; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,

Plaintiffs

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v.

THE HONORABLE GARY LOCKE, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration,

D*efendants-Appellees*

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC),

Defendants

11-1987

JAMES LOVGREN; CITY OF NEW BEDFORD; PAUL THERIAULT; CHUCK WEIMER; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; ROANOKE FISH CO., INC.; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,

Plaintiffs

NEW HAMPSHIRE COMMERCIAL FISHERMEN'S ASSOCIATION; DAVID ARIPOTCH; RICHARD GRACHEK; AMERICAN ALLIANCE OF FISHERMEN AND THEIR COMMUNITIES,

Plaintiffs-Appellants

v.

THE HONORABLE GARY LOCKE, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration,

Defendants-Appellee

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC),

Defendants

11-2001

JAMES LOVGREN; CITY OF NEW BEDFORD; PAUL THERIAULT; CHUCK WEIMER; TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; ROANOKE FISH CO., INC.; NEW BEDFORD FISH LUMPERS PENSION PLAN; CITY OF GLOUCESTER; ATLANTIC COAST SEAFOOD, INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; REIDAR'S MANUFACTURING, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC.; LOCAL 1749 ILA, AFL-CIO, NEW BEDFORD FISH LUMPERS PENSION PLAN,

Plaintiffs

TEMPEST FISHERIES, LTD.; GRACE FISHING, INC.; ROANOKE FISH CO., INC.; LYDIA & MAYA, INC.; JOHN & NICHOLAS, INC.; BERGIE'S SEAFOOD, INC.; NORDIC, INC.; LYMAN FISHERIES, INC.; THE HOPE II, INC.; DIAMOND DOG FISHING CORP.; ATLANTIC ENTERPRISES, LLC; WANCHESE FISH COMPANY; EASTER JOY, INC,

Plaintiffs-Appellants

v.

THE HONORABLE GARY LOCKE, Secretary of Commerce; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, (NOAA); THE NATIONAL MARINE FISHERIES SERVICE, (NMFS); CONSERVATION LAW FOUNDATION, INC.; JANE LUBCHENCO, Administrator of the National Oceanic and Atmospheric Administration,

Defendants-Appellee

ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM, (ACCSP); ATLANTIC STATES MARINE FISHERIES COMMISSION, (ASMFC),

Defendants

Rule 26.1 CORPORATE DISCLOSURE STATEMENT
FOR
APPELLANTS CITIES OF NEW BEDFORD AND GLOUCESTER

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned discloses that New Bedford and Gloucester are municipalities having no parent corporations and that no publicly held company owns 10 percent or more of their stock.

Respectfully submitted

Dated: December 21, 2011

/s/ John F. Folan
John F. Folan (Court of Appeals Bar #19171
Folan & McGlone P.C.
401 County Street
New Bedford, MA 02740
508-992-9800
Fax: 508-992-9730
Email: folan.mcglone@verizon.net

Rule 26.1 CORPORATE DISCLOSURE STATEMENT
FOR
APPELLANT JOHN & NICHOLAS, INC.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned discloses that WJA Holding Company, Inc. owns 100 percent of the shares of John & Nicholas, Inc., and that no publicly held company owns 10 percent or more of the stock of John & Nicholas, Inc.

Respectfully submitted

Dated: December 21, 2011

/s/ John F. Folan
John F. Folan (Court of Appeals Bar #19171
Folan & McGlone P.C.
401 County Street
New Bedford, MA 02740
508-992-9800
Fax: 508-992-9730
Email: folan.mcglone@verizon.net

Rule 26.1 CORPORATE DISCLOSURE STATEMENT
FOR
APPELLANTS TEMPEST FISHERIES, LTD., GRACE FISHING, INC. ROANOKE FISH CO., INC., BERGIE'S SEAFOOD, INC., NORDIC, INC., LYMAN FISHERIES, INC., HOPE II, INC., DIAMOND DOG FISHING CORP., ATLANTIC ENTERPRISES, LLC, WANCHESE FISH COMPANY AND EASTER JOY, INC.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned discloses that Tempest Fisheries, Ltd.; Grace Fishing, Inc.; Roanoke Fish Co., Inc.; Bergie's Seafood, Inc.; Nordic, Inc.; Lyman Fisheries, Inc.; Hope II, Inc.; Diamond Dog Fishing Corp.; Atlantic Enterprises, LLC; Wanchese Fish Company and Easter Joy, Inc., have no parent corporations and that no publicly held company owns 10 percent or more of their stock.

Respectfully submitted

Dated: December 21, 2011

/s/ John F. Folan
John F. Folan (Court of Appeals Bar #19171
Folan & McGlone P.C.
401 County Street
New Bedford, MA 02740
508-992-9800
Fax: 508-992-9730
Email: folan.mcglone@verizon.net

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INTRODUCTION

While ostensibly about fishery conservation and management and the technicalities of the Magnuson-Stevens Act ("MSA"), 16 U.S.C. §§1801-1891d (2009), this appeal really is about Defendants' attempt to circumvent the law. Defendants in this case are the National Marine Fisheries Service ("NMFS"), the National Oceanic and Atmospheric Administration ("NOAA"), the Secretary of Commerce, and the NOAA Administrator.

The MSA contains a number of provisions designed to preserve fishing communities or, at the very least, ensure that before any measure is implemented, efforts are made to minimize adverse impacts on them. These provisions include requirements that: (1) a referendum of eligible permit holders be conducted before an individual fishing quota ("IFQ") program is implemented in New England, 16 U.S.C. §1853a(c)(6)(D); (2) a range of protections be established before any limited access privilege program ("LAPP") is approved, 16 U.S.C. §1853a(c); and (3) economic and social data be collected and analyzed in connection with fisheries measures, 16 U.S.C. §1851(a)(8).

In April 2010, Defendants implemented Amendment 16 ("A16") to the Northeast Multispecies Groundfish Fishery Management Plan. Among other things, A16 established new annual catch limits and a new catch share program Defendants labeled "sector management." A16's catch share program meets the

statutory definition of a LAPP and IFQ, yet Defendants did not conduct the required referendum or establish the other protections mandated by law. In addition, Defendants did not collect and analyze the social data required by the MSA and their own guidelines.

The cities of New Bedford and Gloucester (collectively "New Bedford Plaintiffs"), and others, filed suit to vacate A16 and order Defendants to fully comply with the requirements set forth in the MSA and NEPA because A16 flouts the protections for fishing communities that Congress carefully crafted, deprives New England fishermen of their right to vote, is engineered to promote consolidation in the fishing industry, and its socioeconomic impacts were not adequately considered. Since A16's implementation, consolidation has accelerated, which in turn is making it impossible for small vessels to survive and decimating traditional fishing communities.

The District Court erroneously granted summary judgment to Defendants and Defendant-Intervenors Conservation Law Foundation ("CLF"). On the issue of whether A16's catch share program should have been put to a referendum and included the LAPP protections, the District Court ignored the unambiguous meaning of the MSA and improperly deferred to the Defendants' interpretation. On the issue of whether the Defendants adequately collected and analyzed social data, the District Court misconstrued and minimized the MSA's requirements.

The District Court should be reversed. Any other outcome lets traditional fishing communities go the way of the American family farm by administrative fiat.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction in this action challenging A16 to the Northeast Multispecies Fishery Management Plan under the MSA, 16 U.S.C. §1855(f) and 28 U.S.C. §1331 (federal jurisdiction question). This Court has jurisdiction to review this appeal of the District Court's order(s) pursuant to 28 U.S.C. §1291. This appeal is from a final judgment that disposes of all parties' claims.

On June 30, 2011, the District Court issued an Order denying Motions for Summary Judgment filed by a number of Plaintiffs, including that filed by a number of fishermen and fishing-related businesses and joined by the cities of New Bedford and Gloucester (collectively "New Bedford Plaintiffs") and granting the Defendants' and CLF's Cross Motions for Summary Judgment. Addendum at 1;[1] Dist. Ct. Doc. No. 113. On July 1, 2011 the District Court entered final judgment on this order. AD20; Dist. Ct. Doc. No. 114. On July 27, 2011 another group of plaintiffs, the "Lovgren Plaintiffs," filed a Motion for

[1] Addendum pages hereinafter cited as "AD" followed by page number.

Reconsideration (Appendix at 26;[2] Dist. Ct. Doc. No.115), denied by order entered August 17, 2011. *Id*. Plaintiffs Cities of New Bedford and Gloucester filed a timely notice of appeal on August 17, 2011 (A26; Dist. Ct. Doc. No. 118), subsequently amended. A28; Dist. Ct. Doc. No. 128. Plaintiffs Tempest Fisheries, et al., filed a timely notice of appeal on August 30, 2011. *Id*.; Dist. Ct. Doc. No. 126. *See* Fed. R. App. 4(a)(1)(B).

On September 20, 2011, the clerk for the First Circuit Court of Appeals consolidated several appeals before this Court concerning A16: Appeal Nos.: 11-1952, 11-1964, 11-1987, and 11-2001. New Bedford and Gloucester is number 1952, and Tempest Fisheries, et al is number 2001. New Bedford and Gloucester and Tempest Fisheries, et al, ("New Bedford Plaintiffs") file this appeal brief jointly.

STATEMENT OF THE ISSUES

(1) Did the Defendants violate the MSA when they approved and implemented A16's catch share program without complying with the MSA's LAPP requirements at 16 U.S.C. §1853a, including the referendum requirement at 16 U.S.C. §1853a(c)(6)(D)?

(2) Did the Defendants meet their obligations under the MSA's National Standard (8) to collect and analyze social data in connection with A16?

[2] Appendix pages hereinafter cited as "A" followed by page number.

(3) Did the Defendants adequately analyze alternatives to Amendment 16's catch share program as required by the National Environmental Policy Act ("NEPA") at 42 U.S.C. §4332(2)(C)?

STATEMENT OF THE CASE

This appeal arises from an action challenging Amendment 16 to the Northeast Multispecies Groundfish Fishery Management Plan ("A16"). New Bedford Plaintiffs seek review of the District Court's Order denying their Motion for Summary Judgment and allowing the Defendants' and CLF's Cross Motion for Summary Judgment.

New Bedford Plaintiffs filed their complaint in the U.S. District Court for the District of Massachusetts on May 9, 2010 (A12; Dist. Ct. Doc. No. 1), amending it on June 24, 2010. *Id.*; Dist. Ct. Doc. No. 4. Plaintiff James Lovgren, a New Jersey fisherman, filed a complaint on behalf of himself and similarly situated fishermen (collectively "Lovgren Plaintiffs") in the U.S. District Court for the District of New Jersey on April 29, 2010. The cases were consolidated in the Court below on August 3, 2010. A14; Dist. Ct. Doc. No. 19. Defendants in the action are the National Marine Fisheries Service ("NMFS"), the National Oceanic and Atmospheric Administration ("NOAA"), Secretary of Commerce Gary Locke, and NOAA Administrator Jane Lubchenco (collectively "Defendants"). A7-9; A12; Dist. Ct. Doc. Nos. 1, 4.

On September 2, 2010 the District Court allowed a motion by Conservation Law Foundation ("CLF") to intervene on behalf of the Federal Defendants. A14-15; 09/02/2010 Dist. Ct. Docket Entry. On February 4, 2011 the District Court denied Food & Water Watch's ("FWW") motion to intervene as a plaintiff but granted it leave to file as amicus. A21; Dist. Ct. Doc. No. 78.

On November 22-23, 2010, Plaintiffs filed their motions for summary judgment and supporting memoranda. A18, A19; Dist. Ct. Doc. Nos. 56, 61. Massachusetts Governor Deval Patrick and the Director of the Massachusetts Division of Marine Fisheries Paul Diodati ("State Amicus"), Representatives Barney Frank and John Tierney ("Congressional Amicus"), and FWW ("FWW Amicus") filed briefs as amici on behalf of the plaintiffs. A21-22, A23, A24; Dist. Ct. Doc. Nos. 79, 91, 104, respectively. Defendants and CLF filed their oppositions and cross motions for summary judgment on January 28, 2011. A21; Dist. Ct. Doc. Nos. 73-76. Plaintiffs filed their replies on February 14, 2011. A22; Dist. Ct. Doc. Nos. 83, 84. Between March 1 and 8, 2011, Defendants and CLF filed separate replies to Plaintiffs, FWW Amicus and State Amicus. A23; Dist. Ct. Doc. Nos. 92, 93, 94, 95, 96, 98.

On July 30, 2011 the District Court issued an Order denying all Plaintiffs' motions for summary judgment and granting Defendants' and CLF's cross-motions for summary judgment (AD1; Dist. Ct. Doc. No.113), and on July 1,

2011 the District Court entered judgment accordingly. AD20; Dist. Ct. Doc. No.114. On July 27, 2011 the New Jersey Plaintiffs filed a Motion for Reconsideration (A26; Dist. Ct. Doc. No.115), which the District Court denied by order entered August 17, 2011. *Id*.; 08/17/2011 Dist. Ct. Docket Entry.

STATEMENT OF FACTS

"New England's fishery has been identified with groundfishing both economically and culturally for over 400 years." A174; Administrative Record Doc. No.[3] 901 at 52783. It is a small business fishery, composed primarily of small to medium-sized vessels. A107; AR Doc. 3 at 1427. Fishing here has been a multigenerational occupation (A175; AR Doc. 901 at 52784) and over 100 communities distributed throughout the coastal northeast and middle Atlantic are homeport to Northeast groundfishing vessels. *Id*. NOAA estimated that during FY 2005 to FY 2007, the average annual revenue for groundfish vessels was $101 million. A130; AR 773 at 48447. These estimates do not include shoreside support and related businesses such as ice and processing facilities, shipyards and industry suppliers, vendors and repair businesses, or tax revenue from the industry.

The Magnuson-Stevens Fishery Conservation and Management Act

The MSA, as amended, 16 U.S.C. §§1801-1891d (2009), establishes a

[3] Hereinafter referred to as "AR Doc. No." followed by the Document number and bate stamped page number(s) assigned by Defendants.

detailed system for managing fisheries with the twin goals of promoting conservation and protecting this country's fishermen and their communities. The MSA designates eight regional councils to help manage United States fisheries, one being the New England Fishery Management Council ("NEFMC"). The NEFMC has authority over the Northeast Multispecies Groundfish Fishery (the "fishery"). 16 U.S.C. §1852(a)(1)(A). Councils prepare Fishery Management Plans ("FMPs") and amendments thereto. *Id.* §1852(h)(1). FMPs and amendments do not become effective until the Secretary of Commerce ("Secretary") approves them. *Id*. §§ 1854(a)-(b) & 1855. The Secretary delegates this responsibility to the National Marine Fisheries Service ("NMFS"), which may promulgate the FMPs and amendments as regulations only after ensuring that they are consistent with the MSA's ten National Standards, 16 U.S.C. §1851(a)(1)-(10), and any other applicable laws after a period of public comment. *Id*. §§1853(a)(1)(C), 1854(a)(1)(B) & (b)(1)(A).

Longstanding Regulation of the Fishery through Effort Control

From 1994 until 2006, the fishery was regulated primarily through "effort control" measures. Rather than setting numerical limits on how many fish could be caught, these effort control measures, which included Days at Sea (DAS), area closures, trip limits and gear restrictions, helped conserve the fishery by limiting the amount of "input" into it. A174; AR Doc. 901 at 52783.

Amendment 13

A narrow exception to the reliance on effort control measures was Amendment 13 ("A13") of the fishery's management plan, enacted in 2004. A13 authorized a "sector allocation" option not intended as the fishery's primary system of management. A79; AR Doc. 3 at 167. Under this option, NMFS authorized the "Georges Bank Cod Hook Sector" and the "Georges Bank Fixed Gear Sector" (A175; AR Doc. 901 at 52784) and allocated to each a portion of the fleetwide Total Allowable Catch of George's Bank cod. A126-127; AR Doc. 773 at 48131, 48135, *See also* A78; AR Doc. 3 at 32. At this time, the fishery-wide Total Allowable Catch ("TAC") was a target not mandated by law. Members of the A13 sectors were exempted from DAS and some of the other effort control restrictions in exchange for agreeing to limit their aggregate catch to a specified amount. A174; AR Doc. 901 at 52783. The allocation was justified, in part, by its members' gear sector, as hooks were viewed as less adversely affecting fish habitat. A80; AR Doc. 3 at 576.

Amendment 13 Sector Allocations Limited in Nature and Scope

The two groups authorized by the A13 sector allocation shared specific characteristics, using the term "sector" in its traditional sense (*i.e.,* to refer to a defined group with common traits): a gear sector (the use of hooks or fixed gear), a geographical sector (certain areas of Cape Cod) and small day-boat vessels. Dist.

Ct. Doc. No. 81 at 4. *See, e.g.*, *Pacific Coast Federation of Fishermen's Association v. Locke*, No. C10-04790, 2011 WL 3443533 at *1 (N.D. Cal. Aug. 5, 2011) ("The fishery is made up of groups of participants ('sectors') that use different types of fishing gear/methods."); (A112; AR Doc. 270 at 17753) (NEFMC members discussing how tow sectors should be treated differently than hook sectors in leasing DAS); AD28; Sen. Rep. No. 109-229, 109th Cong., 2d Sess. (2006) at 13 ("all sectors of the fishing industry").

A13 "specifically restricted the size of an individual sector allocation to no more than 20% of the yearly TAC [Total Allowable Catch] … of any regulated species…" (A182; AR Doc.997 at 56500) and the two A13 sectors were only allocated a quota for one species: Georges Bank cod. A126-127; AR Doc. 773 at 48131, 48135. Under A13, the "sector allocation" option never grew larger than the two Cape Cod groups and never comprised more than a small fraction of the fleet. The fishery continued to be primarily managed with traditional effort controls such as Days at Sea (DAS) and gear restrictions. A79; AR Doc. 3 at 167; *See* A175; AR Doc. 901 at 52784) (By FY2009, only about 40 – 50 vessels out of approximately 700 were members of the two A13 Cod Sectors). Since its formation the Georges Bank Cod Hook Sector saw a steady decline in membership (A126; AR Doc. 773 at 48131) and in 2010 consolidated operations into the Georges Bank Cod Fixed Gear Sector. A173; AR Doc. 898 at 52391.

2006 Changes in MSA: LAPP Provisions and Total Allowable Catch Requirements

In 2006, Congress amended the MSA in two relevant ways. First, it enacted Total Allowable Catch or Annual Catch Limits at 16 U.S.C. §1853(15), requiring NMFS to implement mandatory Annual Catch Limits ("ACLs") and accountability measures in all fisheries subject to overfishing by May 1, 2010. 16 U.S.C. §1853(a)(15); P.L. 109-479, § 104(b) (Jan. 12, 2007).

Second, the MSA was amended to include Limited Access Privilege Program ("LAPP") provisions at 16 U.S.C. §1853a. The MSA defines a "limited access privilege" in relevant part as:

> (A) . . .a Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person; and
>
> (B) includes an individual fishing quota . . .

AD39; 16 U.S.C. §1802(26). Defendants have referred to both LAPPs and individual fishing quotas ("IFQs") as "catch share programs." *NOAA Catch Share Policy*, available at http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/noaa_cs_policy.pdf

Congress was concerned about the potential adverse effects of catch share type programs, such as excessive share accumulation and industry consolidation, fairness in allocating privileges, loss of employment, windfall profits,

monopolization, ownership of the nation's fisheries by foreign interests, and loss of access to the fishery by small owner-operated boats and fishing communities. AD24, AD26, AD27, AD32-37; Sen. Rep. No. 109-229, 109th Cong., 2d Sess. 4, 8, 9, 25-30 (2006). *See also* H.R. Rep. No. 109-567, 109th Cong., 2d Sess. 88-89 (2006).

These adverse effects result from the ability of quota- or share-based systems to cause "…accumulation of quota … because larger and more efficient firms … [can] buy out smaller and less efficient firms. Concentration of quota among a small number of … firms or individuals may unduly strengthen the market power of quota shareholders and adversely affect wages and working conditions … in the fishing industry ." *See* AD28; Sen. Rpt. 109-229 at 13, *citing Sharing The Fish: Toward A National Policy On IFQS* at 174*,* Committee to Review Individual Fishing Quotas, National Research Council *(1999)*. Excessive concentration of shares or quota leads to monopoly power in the market for quota and in the sale of fish products to the general consumer. A70.1-A70.2; *The Design and Use of Limited Access Privilege Programs*. NOAA Technical Memorandum NMFS-F/SPO-86 at 50-51 (November 2007); Attachment A to Dist. Ct. Doc. 84.

To minimize these potential adverse effects, Congress enacted a comprehensive set of strict requirements for all LAPPs at 16 U.S.C. §1853a. Congress also gave careful consideration to regional variations in the history and

culture of the nation's fisheries. With respect to the New England fishery, Congress imposed the specific requirement that an IFQ program not be approved or implemented unless it has "been approved by 2/3 voting in a referendum among eligible permit holders." AD47; §1853a(c)(6)(D). As noted above, an IFQ is a type of LAPP. AD 39; 16 U.S.C. 1802(26).

Defendants Admit That A13's Sector Allocation is a LAPP

In 2007, NOAA issued a technical manual entitled *The Design and Use of Limited Access Privilege Programs*. A61; NOAA Technical Memorandum NMFS-F/SPO-86 (November 2007); Attachment A to Dist. Ct. Doc. 84. In this manual, NOAA discusses the 2006 LAPP amendments in detail, using the Cape Cod Hook Sector (now known as the Fixed Gear Sector) authorized pursuant to A13 as an example of a LAPP. *Id.* at A64.4, A71.1; vi and 117.

Development and Implementation of Amendment 16

On April 9, 2010, the Defendants implemented A16 (codified at 50 CFR Part 648), which effected two major changes in the fishery. The first change was the imposition of Annual Catch Limits (ACLs). AR Doc. 997 at 56490. As stated above, ACLs are mandated by the MSA's 2006 amendments. The second change was what Defendants characterized as "significant revisions" of a management program Defendants labeled "sectors." A180; AR Doc. 997 at 56486. *See also* AR 996 at 56465-56484.

A16 defines "sector" as a "group of persons holding limited access [Northeast] multispecies permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time, and that have been allocated a portion of the TACs of species managed under the [FMP]." A185; AR Doc. 997 at 56533; 50 C.F.R. § 648.2. In contrast to ACLs, the sector management program is not mandated by the MSA. The Defendants said the new sector management would "fundamentally change the way this fishery is managed" (A176; AR Doc. 978 at 56408) and provide a "mechanism for capacity reduction" (i.e., reduce the capacity of the fleet). A119; AR Doc. 773 at 47854. The Defendants expected the economic impacts of A16 to be severe. A116; AR Doc. 773 at 47771.

Elements of A16's Catch Share Program

A16's catch share program assigns each permit holder a quota representing the amount of fish that permit holder can catch in a year. The quota cannot be used until the permit holder joins a "sector" and contributes his or her quota to the sector. Defendants call the quota assigned to an individual permit holder a Potential Sector Contribution ("PSC").[4] A185; AR Doc. 997 at 56533; 50 C.F.R.

[4] PSC "with respect to the NE multispecies fishery, means an individual vessel's share of the ACL for each stock of regulated species … derived from the fishing history associated with the permit issued to that particular vessel for the purposes of participating in a sector and contributing to that sector's ACE for

§ 648.2. PSC for each permit is based solely on the permit holder's landings history (total fish caught) associated with that permit. *Id*. PSCs are determined by first calculating the sum of the pounds of fish landed ("landings") from 1996 to 2006. A182; AR Doc. 997 at 56500; 75 Fed. Reg. 18,276. This number is then divided by the total landings in the same period by all sector-eligible permits. *Id*. Each permit holder's initial allocation is determined by the permit holder's landings **as a percentage** of the total landings. NMFS issues a letter to each limited access permit holder in the fishery granting, conditional upon the permit holder joining a "sector," the right to harvest a defined amount of quota shares expressed as a percentage of a total allowable catch (PSC) for each stock in a list of regulated species. A186-A189; AR Doc. 1004, 56739 – 56742 (template letter)

PSCs remain tied to these individual permits indefinitely, even if the permit holder sells the permit to another vessel. A182; AR Doc. 997 at 56500; 75 Fed. Reg. 18,276. Those with smaller catches over the relevant time frame will receive a low initial allocation. Fishermen can only obtain more PSC by buying or leasing PSC from others' permits. *Id.* at A183.

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each stock allocated to sectors under the NE Multispecies FMP." 50 C.F.R. § 648.2.

A16 annually distributes a portion of Total Allowable Catch ("TAC")[5] to "sectors," with the remainder of the TAC left in what is called the "Common Pool" for those fishermen who do not join the catch share program. A177; AR Doc. 990 at 56439. The percentage of the TAC allocated to a sector is known as that sector's "Annual Catch Entitlement" ("ACE"). ACE is calculated by totaling the quotas assigned to each individual permit holder joining that sector. A185; AR Doc 997 at 56533; 50 C.F.R. § 648.2.

Permit Holders' Quota Passes Through Sectors and Back to Themselves. Under A16, every one of the "sector" operations plans required and approved by NMFS for FY 2010 specifies that each member may harvest or lease from this total (ACE) an amount of fish equal to the "PSC," less a small buffer for overages, that his or her permit contributed to the sector. A178; AR Doc. 996 at 56466; 75 FR 18113, 18114 (April 9, 2010). One law firm corresponding with NMFS described the A16 "sector" entity as "…merely a mechanism through which harvest shares "flow-through" to individual sector members." A113; AR Doc. 394 at 23429.

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[5] "Total allowable catch" ("TAC") means "the annual domestic harvest targets for regulated species." 50 C.F.R. § 648.2. "Annual Catch Limit" (ACL) appears in the 2006 revised MSA and refers to the aggregate annual catch limits of a fishery. The terms are essentially the same, except ACL is a binding limit. 74 Fed. Reg. 3,183. TAC appearing in older regulations is still used to refer to an ACL that may or may not be subdivided among each boat or other unit or groups of units in a fishery. AR 52727.

A16 Different Than A13. The Defendants have characterized A16 both as a "new paradigm" for the fishery (A115; AR Doc. 570 at 31815) and as merely a continuation of A13's sector allocation. However, A16 contains a number of "significant changes" from A13. A180, AR Doc. 997 at 56486. First, A13's 20% cap on a sector's accumulation of shares of the Total Allowable Catch (TAC) was removed. A182; AR Doc. 997 at 56500. "Technically, a sector [under A16] could acquire an unlimited amount of ACE…" A178; AR Doc. 996 at 56466. Second, whereas the A13 sector allocations were allocated a portion of the fishery's TAC for only a single regulated species (A126-127; AR Doc. 773 at 48131, 48135), A16's catch share program allocated a percentage of the fishery's TAC for every regulated species save four to "sectors." A178; AR Doc. 996 at 56466. Third, unlike A13's two Cape Cod sector allocations, some A16 "sectors" did not share common characteristics in the traditional sense of the word sector such as gear, community, or vessel type. Finally, unlike A13, where the "sector allocation" option was not intended as the fishery's primary system of management (A79; AR Doc.3 at 167), A16 authorized the formation of 17 new "sectors"(A181; AR Doc. 997 at 56499; A109; AR Doc. 134 at 11161) containing almost all of the fishery's vessels and its allowable catch. A178; AR Doc. 996 at 56466 (i.e., 812 of the 1,477 eligible NE multispecies permits representing 98% of the historical catch). NOAA announced that A16's catch share program was "the largest …

ever … in the U.S." (75 Fed. Reg. 55305)(Sept. 10, 2010).

LAPP Requirements Not Met

The Defendants did not conduct a referendum among eligible permit holders before implementing A16. In their implementing regulations, they announced that:

> based upon the comments … there remains some confusion as to whether a sector is a … (LAPP) as defined in the [MSA]. … NMFS does not consider sectors to be LAPPs, and they are not subject to the referendum or cost recovery requirements ...[of the LAPP provisions]. There is no permit issued to a sector, and no permanent or long term allocation of fish is made to any sector. Unlike individual fishing quotas, sectors are temporary, voluntary, fluid associations of vessels that can join … [and change] from one year to the next.
>
> A181; AR Doc. 997 at 56499.

The cost recovery requirements cited provide for assessing and collecting from the industry costs related to the management of a LAPP, while limiting such costs to "3% of the ex-vessel value of fish harvested" and mandating the agency to deposit fees collected into a Limited Access System Administration Fund. AD 52; 16 U.S.C. §1854(d)(2)(A). This Fund is used to create and maintain a central registry for "Limited Access System permits"… "including limited access privileges" and otherwise administer the LAPP provisions. AD53-54; 16 U.S.C. §1855(h)(1) and (5)(B). The agency did none of these things. Under A16, the costs to industry of catch shares are unlimited, and the agency neither established the required central registry nor devoted fees collected to it.

The agency also did not provide the administrative appeals process mandated by 16 U.S.C. §1853a(c)(1)(I)) so that fishery participants could formally appeal their initial allocations of quota. The agency did nothing to prevent the acquisition of excessive shares of privileges by establishing an accumulation cap, as required by 16 U.S.C. §1853a(c)(5)(D). As noted above, A16 actually removed an accumulation cap set by A13.

The agency further did not create procedures to "address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery," as required by 16 U.S.C. §1853a(c)(5)(B)(ii), nor did it include "measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators … and fishing communities …" by setting aside for such groups harvesting privileges or giving them economic assistance in purchasing privileges, as required by 16 U.S.C. §1853a(c)(5)(C).

Known Effects of Amendment 16

While not part of the administrative record,[6] several reports analyzing the

[6] These reports may be considered as evidence confirming or denying agency predictions. *See Strahan v Linnon*, 966 F. Supp 111 (D. Mass. 1997) *citing Conservation Law Foundation of New England, Inc. v. Clark*, 590 F.Supp. 1467, 1475 (D. Mass. 1984) at 114 ("Courts have also 'recognized an exception [to the administrative record rule] when evidence either confirming or denying agency predictions made in the original decision subsequently becomes available."). These reports are also official publications of government agencies. *See* Fed. R. of Evid. 803(8) and 902(5).

effects of A16's catch share program have now been published. These reports show the realization of the very ills Congress sought to prevent with the 2006 LAPP amendments to the MSA. One report, published by NOAA, found that:

> There has … been an increasing concentration of … revenues among top earning vessels and vessel affiliations, as … revenues have become consolidated on fewer individual vessels… About 68% of …revenues from groundfish sales during 2007-2009 resulted from landings by 20% of active groundfish vessels. …In 2010, 20% of vessels accounted for about 80% of …revenues from groundfish sales."
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> *2010 Final Report on the Performance of the Northeast Multispecies (Groundfish) Fishery*. US Dept. of Commerce, Northeast Fish Sci Cent Reference Doc. 11-19 (2011) at viii; available online at http://www.nefsc.noaa.gov/nefsc/publications/.

The Governor of Massachusetts sought federal disaster assistance, citing "rapid consolidation" and "severe economic losses" caused by A16. Letter from Governor Patrick to the Secretary of the Department of Commerce (November 15, 2011), at 3, available online at http://www.mass.gov/dfwele/dmf/marinefisheriesnotices/2011/groundfish_request_and_reports_111511.pdf. The Governor concluded that A16's effects were "imperiling our historic and economically important commercial fishing industry." *Id*. at 4.

SUMMARY OF ARGUMENT

The decision below should be reversed, and A16 should be vacated or Defendants ordered to comply with the requirements set forth in the MSA and NEPA because:

(1) A16's sector management program is unambiguously a LAPP and IFQ under the MSA's LAPP provisions at 16 U.S.C. §1853a, and the District Court erred in deferring to Defendants' conclusion that it is not. Because Defendants failed before implementing A16 to conduct a referendum, as is required for an IFQ, and to establish the other required protections for a LAPP, A16 should be vacated. A16's sector management program, moreover, does not fall within the MSA's "sector allocation" exemption from the referendum requirement. Even if it did, Defendants' failure to establish the other LAPP protections are fatal to A16.

(2) The District Court misconstrued National Standard (8) of the MSA, 16 U.S.C. §1851(a)(8), and erroneously held that Defendants met its requirements. The District Court should be reversed because Defendants failed to collect and assess the requisite social data in connection with A16's implementation.

(3) Defendants violated National Standard (8) of the MSA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq.*, by failing to consider reasonable alternatives to the catch share and sector system, despite the

fact that reasonable alternatives existed and were made known to Defendants in public comments.

ARGUMENT

I. Defendants' Approval and Implementation of Amendment 16's Sector Management Program Did Not Comply with the Magnuson Stevens Act's Limited Access Program Provisions at 16 U.S.C. §1853a

The District Court erred in upholding the Defendants' conclusion that A16 was neither a LAPP nor an IFQ under the MSA, and that the substantive and procedural protections for fishermen triggered by the attempted implementation of a LAPP and/or IFQ therefore do not apply.

A. Standard of Review

The standard of review is *de novo*. *Little Bay Lobster Co., Inc. v. Evans*, 352 F.3d 462, 466 (1st Cir. 2003).

A threshold question for the Court is whether the Defendants' interpretation of the MSA should be accorded any deference. This question is governed by the two-step test articulated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). At step one, a reviewing court examines *de novo* whether Congress has spoken to the precise question at issue. *Id.* at 842. A court may look to the statute's language, history, and purpose and apply traditional tools of statutory construction in ascertaining the intent of Congress. *Id*. at 843 n.9; *Me. Ass'n of Interdependent Neighborhoods v. Comm 'r, Me.*

Dep't of Human Servs., 946 F.2d 4, 6 (1st Cir. 1991). If the intent of Congress is clear, then the matter is at an end, and the court must give effect to Congress's expressed intent. *Chevron 467 U.S.* at 842-43 & n.9.

Whether a statute is ambiguous depends on Congress; an agency may not create ambiguity where there is none. "Although the *Chevron* framework requires courts to give administrative agencies a substantial amount of deference in interpreting the statutes they administer, agencies cannot manufacture statutory ambiguity with semantics to enlarge their congressionally mandated border." *Texas Pipeline Ass'n v. Federal Energy Regulatory Comm'n*, 661 F.3d 258, 264 (5th Cir. 2011).

Only if a statute is genuinely ambiguous does a court move to step two of the *Chevron* framework, where a court must determine whether the agency's interpretation of the statute is permissible. *Chevron*, 467 U.S. at 843. It must give deference to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to statute." *Id*. at 844. A regulation is arbitrary or capricious if it conflicts with the statute or if the "agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency's

expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm*, 463 U.S. 29, 43 (1983). An agency's departure from its own internal guidelines is evidence of failure to provide the reasoned decision-making required by the APA. *Town of Barnstable v. FAA*, 659 F.3d 28, 34, 36 (D.C. Cir. 2011).

B. A16 Sector Management Program Is a LAPP and IFQ under the MSA

In examining whether A16's sector management program is a LAPP and IFQ, the District Court ignored the first step of *Chevron*'s two-part test. Instead, the District Court assumed that *Chevron* deference was warranted because, as a general matter, "Congress expressly delegated to the Secretary the authority to create FMPs." AD6; June 30, 2011 Dist Ct. Order at 6. Applying this deference, the District Court upheld Defendants' interpretation of the MSA as not "manifestly contrary to the statute." *Id*. at AD7; 7.

The District Court should be reversed. First, applying *Chevron*'s first step – analyzing the MSA's language, structure, history, and purpose – demonstrates that A16's sector management program is unambiguously a LAPP and IFQ. Therefore, under *Chevron*, Congress has spoken to the "precise question at issue," and no deference is warranted. Second, even if the MSA is deemed ambiguous on the issue of whether A16's sector management program is a LAPP and IFQ, Defendants' interpretation that it is not should be set aside as arbitrary, capricious and manifestly contrary to statute.

1. A16's Sector Management Program Meets the Statutory Definition of a LAPP and IFQ

In assessing whether A16's sector management program ("the A16 program") is a LAPP and IFQ under the MSA, the Court should examine whether, as a matter of function and practical reality, the sector program meets the MSA's definition of a LAPP and IFQ. This emphasis on function and reality is crucial because, as explained below, in implementing the A16 program, the Defendants invented new words, re-purposed others, and created new structures to mask their establishment of a LAPP and IFQ without adhering to the MSA's protections for fishermen and fishing communities. Defendants then invoked their fabricated words and structures to claim that the MSA is ambiguous as to whether the A16 program is a LAPP and IFQ.

The Defendants' attempt to manufacture ambiguity should be rejected. *Texas Pipeline Ass'n 661F.3d at 264*. Form may not vanquish substance. *See, e.g.*, *Brown Exp., Inc. v. U.S.*, 607 F.2d 695, 700 (5th Cir. 1979). ("The label …[an] agency puts upon its … exercise of administrative power is not … conclusive; rather it is what the agency does in fact.")(citation omitted). In truth, the A16 program is both a LAPP and IFQ as those terms were intended and understood by Congress.

a. Definitions of LAPPs and IFQs

Under the MSA, a "limited access privilege" is defined in relevant part as:

> a Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person . . . and includes an individual fishing quota.

AD39; 16 U.S.C. §1802(26); MSA §3(26).

The definition of "individual fishing quota" is nearly identical to "limited access privilege," using the term "percentage" in lieu of "portion" when referencing that part of the total allowable catch represented by the units of quota to be received or held. AD38; 16 U.S.C. §1802(23); MSA §3(23). "Percentage" is defined by Webster's New Collegiate Dictionary, 1977 ed., as "part of a whole expressed in hundredths" and "an indeterminate part: proportion." "Portion" is defined "part or share of something." Thus the terms "portion" and "percentage" both refer to some proportion or part of a whole.

b. The A16 Program Contains All of the Statutory Elements of a LAPP and IFQ

The A16 program should be deemed a LAPP and IFQ because it meets the definition above.

i. "Limited Access System"

The parties do not dispute that the fishery is managed as a "limited access system," which is a "system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in an FMP or regulation." 16 U.S.C. §1802(27); *see* AD39; A181; AR Doc 997 at 56499. The A16 program

therefore meets this part of the statutory definition of a LAPP and IFQ.

ii. "Federal Permit"

Defendants have argued that because the agency does not issue a physical or electronic document expressly labeled a "permit" under the A16 program, the A16 program does not constitute a LAPP and IFQ. Defendants' argument fails. As described below, Defendants issue the functional equivalents of permits, both to sectors and to sector members.

Moreover, Defendants' assertion that sectors must be issued something explicitly called a "permit" is based on a fabricated requirement. While Congress referred to the issuance of "permits," it did not specifically define what constitutes a "permit" in a LAPP or IFQ, nor does the statute require that authorizations expressly denominated as "permits" be issued.

Annual Catch Entitlement and NMFS Letters Are Functional Equivalents of Permits. The dictionary definition of a "permit" is: "1. Permission, esp. in written form. 2. A document for certificate giving permission to do something; license; warrant." The American Heritage Dictionary, Second College Edition, 1976. Under the A16 program, Defendants assign to sectors an "Annual Catch Entitlement" that, to use Defendants' words, they "**may** fish." A59; Defendants' Mot. for Summ. J., Dist. Ct. Doc. No. 76 at 17 (emphasis added). "Annual Catch Entitlement," which is a word that Defendants invented for the purposes of the

A16 program, is therefore functionally a permit. It is a grant of **permission** to catch a share of fish.

Moreover, NMFS issues letters of authorization (a) specifying each permit holders' harvest shares expressed as both a percentage of the total TAC available for each regulated species in the fishery and as a number of pounds (A186-A189; AR Doc 1004 at 56739-42) and (b) granting each permit holder the right to harvest shares as a member of a recognized A16 sector. A179; AR Doc. 996 at 56467; 75 Fed. Reg. 18,115 (April 9, 2010). For all intents and purposes, these letters are permits.

Permits Are the Foundation of Sectors. Further, the A16 program specifies that in order to join an A16 sector, a fisherman must first have a limited access federal permit or "CPH" (Confirmation of Permit History, denoting the catch history associated with a permit when the vessel to which the permit is attached is sold or lost). Thus, limited access federal permits are a condition precedent for the formation of A16 "sectors." The catch history is the key attribute of each permit. These permits, or the equivalent of their key attribute, CPH, are the foundation of each A16 sector.

Privileges Treated as Permits in Required Central Registry. 16 U.S.C. §1855(h)(1) instructs the Secretary to create and maintain a central registry for "Limited Access System permits…including limited access **privileges**" (emphasis

added). Thus the statute expressly includes the limited access "privilege" - what participants in the A16 program receive - as within the scope of the term "permit." AD53-54.

Privileges Are Permits. Finally, §1853a(b)(5) states that "Limited access privilege, quota share, or other limited access system authorization established, implemented or managed under this Act (5) shall be considered **a grant of permission** to the holder of the limited access privilege or quota share to engage in activities permitted by such limited access privilege or quota share." (emphasis added). AD42.

This language demonstrates Congress's unambiguous intent to broadly define LAPPs so as to encompass many variations on the basic theme of a grant to someone or something some form of permission to harvest a portion of an overall amount of fish. Congress intended the LAPP provisions' coverage to be inclusive. It did not intend so cramped and formalistic an application as to hinge upon invocation of the word "permit."

iii. "Exclusive Use by a Person"

Defendants have argued below that A16 is not a LAPP and IFQ because sectors do not receive permits "for the exclusive use of a person." Defendants' argument fails first because an A16 sector is a "person" within the meaning of the MSA and second because, as a real life matter, sectors

inevitably divide their ACE (or permit) into the functional equivalent of individual Federal permits for the "exclusive use" of their members (*i.e.*, individual persons), based on those members' PSCs.

Sectors Are Persons Under the MSA. A "person" under the MSA is "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local or foreign government or any entity of such government." 16 U.S.C. §1802(36); MSA §3(36). AD39.

Defendants required that A16 sectors organize themselves so as to meet the definition of "person." NOAA's General Counsel recommended in 2008 that each A16 "sector" "…be required to establish itself as a legally recognized independent entity, such as a corporation or partnership …. and provide the applicable documentation as part of its yearly operations plan…" A114; AR Doc. 422 at 23768. Accordingly, A16 Sectors organized as legal entities, typically describing themselves in operations plans required by the Defendants as "Nonprofit organization[s] incorporated in Massachusetts…" AR190; AR Doc. 1061 at 59451. Therefore, A16 sector entities are "persons" under the MSA, and they receive or hold for their "exclusive use" their ACE which, as described above, is the functional equivalent of a permit.

Sectors Give Their Members a Portion of the ACE (or Permit) For Their "Exclusive Use". A second and independent reason why the MSA's "exclusive use" requirement is met is because in reality, when a fisherman puts his PSC into the sector, the sector gives it right back to him for his "exclusive use." A fisherman inevitably receives the exclusive right to fish or lease, as he sees fit, a portion of the sector's ACE (or permit) equivalent to the PSC he contributed. Every one of the "sector" operations plans required and approved by NMFS for FY 2010 specifies that each member may harvest or lease from this total an amount of fish equal to the quota, or "PSC," less a small buffer for overages, that his or her permit contributed to the sector. A178; AR Doc. 996 at 056466; 75 FR 18113, 18114 (April 9, 2010). Any other result would render the sector unviable. Fishermen would not join sectors that did not return their contributions to them; to do so would be to give something away for free.

The A16 sector entity serves merely to launder individual permit holders' quota. It is a pass-through mechanism that enables Defendants to make the specious argument that individual fishermen technically do not hold permits for their "exclusive use." Indeed, one law firm corresponding with NMFS described the A16 "sector" entity as "…merely a mechanism through which harvest shares "flow-through" to individual sector members." A113; AR Doc. 394 at 23429.

Holding that under the A16 program, Defendants do not issue Federal permits for the "exclusive use by a person" would elevate form over substance. It would permit the agency to use new words ("ACE" and "PSC") and new intermediary structures ("sectors") to create the functional equivalents of LAPPs and IFQs without adhering to the MSA's protections for fishermen and their communities. The Court should not permit Defendants to mask their conduct with clever language and structures.

iv. "To Harvest a Quantity of Fish Expressed by a Unit or Units Representing a Portion of the Total Allowable Catch of the Fishery"

Finally, it is clear that the A16 program is a LAPP and IFQ under the remaining part of the statutory definition: that the permission granted is "to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery." The allocation or harvest privileges that individual fishermen receive from sectors are based on their PSCs, which in turn are based on "an individual vessel's **share** of the ACL," or Total Annual Catch, for each stock (emphasis added). A185; AR Doc. 997 at 56533; 50 CFR §648.2. Similarly, a sector's ACE is "the **share** of the annual catch limit (ACL) that is allocated" to it "based on the cumulative fishing history attached to each permit participating in that sector in a given year. *Id*. (emphasis added).

2. Defendants Have Acknowledged That A16's Catch Share Program Is a LAPP and IFQ

The Court need not rely entirely on Plaintiffs' analysis of the MSA to conclude that the A16 program is a LAPP. Defendants themselves have acknowledged this fact.

A13 Admission. Defendants' argument that A16's sector management program was neither a LAPP nor an IFQ because it merely continues without significant change A13's "sector allocation" option contradicts their own written guidance. *See* A61-A71.1; *The Design and Use of Limited Access Privilege Programs*, NOAA Technical Memorandum NMFS-F/SPO-86 (November 2007) (Att. A to Plaintiffs' Opposition, Dist. Ct. Doc. 84). In this manual, NOAA discusses the 2006 LAPP amendments in detail (*Id*., *esp.* at A64.1; iii) and uses the Cape Cod Hook Sector (now the Fixed Gear Sector) as an example of a LAPP. *Id.* at A64.4 and A71.1; vi and 117.

NMFS Describes Similar Programs as LAPPs. NMFS categorizes similar programs in other regions not subject to the New England referendum requirement as LAPPs. For example, NMFS describes a catch share program in the Bering Sea fishery where participants are assigned "quota shares" based on their fishing history and can pool their shares in voluntary cooperatives as: "LAPP, cooperatives." Each year, a portion of the TAC is allocated to the "cooperatives." Catch Share Spotlight No. 12, available at www.nmfs.noaa.gov/sfa/domes_fish/

catchshares

3. The Defendants' Conclusion that the A16 Program Is Neither a LAPP Nor an IFQ is Not Entitled to Deference, and Even If It Was, It Should Be Set Aside as Arbitrary, Capricious, and Manifestly Contrary to Statute

The preceding analysis of the LAPP amendments' history, purpose, structure and language shows that A16's catch share program is unambiguously a LAPP and an IFQ. Any alleged ambiguity was created by Defendants. They sowed confusion by labeling the A16 entities "sectors," a term traditionally and almost universally used to refer to defined groups sharing common traits such as gear type, geographic area, etc. They invented the term "Potential Sector Contribution" (PSC) to refer to the A16 sectors' shares or quota. They avoided calling "permits" the letters of authorization granting a percentage of the total allowable catch to each permit holder, as well as permission to harvest such shares as part of an A16 sector. They characterized the A16 sectors as merely contractual agreements and not clearly LAP-eligible entities, yet required them to submit operations plans documenting their existence as legally recognized entities.

Even if this Court were to find the MSA ambiguous, the agency's interpretation should be set aside as arbitrary, capricious, and manifestly contrary to the statute. Among other things, the agency failed to consider the social consequences of its determination that the A16 catch share program was neither a LAPP nor an IFQ. See argument that Defendants failed to adequately gather and

Assess Social Data as required by MSA's National Standard 8 *infra* at 48-57. Thus, Defendants "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*. 463 U.S. 29, 43 (1983). Also, since Defendants previously classified A13 as a LAPP, and now they are saying that a purported extension of A13 (A16), is not, they have deviated from their own guidelines. Their claim that A16's program is not a LAPP does not comport with their own guidelines. This is evidence of the agency's failure to provide the reasoned decision-making required by the APA. *Town of Barnstable, 659 F.3d at 34* ("…in light of the FAA's improper application of its own handbook, the FAA did not 'adequately explain its result.')(citation omitted).

C. A16 Should Be Vacated

A16 should be vacated and Defendants ordered to fully comply with the MSA's requirements because A16 was enacted without all of the protections mandated by the MSA's LAPP provisions. The statutory exemption from a referendum for "sector allocations" in New England does not apply, but even if it did, it would not save A16 because Defendants failed to comply with the other LAPP provisions.

1. It Was Enacted without the Protections Mandated by LAPP/IFQ Provisions

a. The Protections

To address and minimize the adverse effects of quota and share based programs in general, Congress enacted a lengthy set of strict requirements for LAPPs at 16 U.S.C. §1853a. It is undisputed that they are not part of A16. These include:

- a requirement that the Council or the Secretary "establish procedures to ensure fair and equitable initial allocations" taking into account "employment in the harvesting and processing sectors," "investments in, and dependence on, the fishery," and "current and historical participation of fishing communities" §1853a(c)(5)(A) and (A)(ii), (iii) and (iv);

- a requirement that LAPPs include policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities and address excessive geographic or other consolidation. §1853a(c)(5)(B)(i) and (ii);

- a requirement that the Council or the Secretary "ensure that limited access privilege holders do not acquire excessive share of the total limited access privileges" §1853a(c)(5)(D) (including an accumulation cap or maximum share);

- a prohibition on "any person other than a United States citizen, a corporation, partnership or other entity established under the laws of the United States or any State, or a permanent resident alien" from "acquiring a privilege to harvest fish." §1853a(c)(1)(D);

- an "appeals process for administrative review of the Secretary's decisions." 1853a(c)(1)(I);

- provisions for cost recovery (setting, collecting and limiting fees and dedicating their use to a fund for the administration of the program). 16 U.S.C. § 1853a(e);

- approval by more than 2/3 of those voting in a referendum of any proposal to implement an IFQ program in New England. 16 U.S.C. § 1853a(c)(6)(D)(i).

It is undisputed that Defendants implemented A16 without conducting a referendum. *See* A56, *Lovgren v. Locke*, 10-cv-11168, Complaint at ¶ 77, Dist. Court Doc. No. 1 and A58; Ans. at ¶ 77, Dist Ct. Doc. No. 16. Defendants therefore deprived New England fishermen of their statutory right to vote on the implementation of a quota share program. It is undisputed that Defendants removed from A16 the only measure preventing permit holders from acquiring excessive shares of harvesting privileges as required by §1853a(c)(5)(D): A13's 20% cap on any one sector's accumulation of the yearly TAC. 75 Fed. Reg. 18,276, 18,296. It is undisputed that Defendants failed to provide fishery participants with the required due process so that they could administratively appeal their initial allocations of quota under A16. It is undisputed that Defendants failed to provide for recovery of the program's costs and cap such costs at 3% of the ex vessel value of fish harvested under the program, and failed to deposit the fees collected into a fund for the management of the program. A181; AR Doc 997 at 56499. In short, it is undisputed that Defendants met none of the LAPP requirements, as they claimed they had approved neither a LAPP nor an IFQ. *Id.*

b. Why the Protections Are Important

The LAPP protections are not optional window dressing. They are mandates produced by Congress through careful thought and compromise, designed to prevent or mitigate the well-known adverse effects of quota based programs, such as industry and geographic consolidation, loss of infrastructure, excess accumulation of shares and the elimination of small businesses. The legislature held "numerous hearings on the [MSA's] … reauthorization…" including: listening sessions with the Chairmen of all eight regional Councils, with national environmental groups, and with commercial fishing industry groups focusing on the standards for quota programs; the incorporation of information from the National Research Council's 1999 report on developing a national policy for IFQs; and the review of over 700 comments. AD28-29; *Sen. Rep*. 109-229 at 13-14.

The referendum requirement for all IFQs is of utmost importance. The MSA mandates substantive consideration of fairness and equity. Limited access privilege programs ("LAPPs"), including IFQ programs, are highly controversial measures in large part due to their potential impact on smaller-scale fishermen and coastal communities. *See* AD27; S. Rep. 109-229, at 9 (2006) (explaining the need for measures to protect these groups from adverse impacts of LAPPs). The referendum requirement established by Congress in 2006 as part of the law governing LAPPs ensures that individual fishermen have equal rights to

determine the fate of the fishery.[7] *Id.* The referendum guarantees that by law, even smaller-scale fishermen have a vote in deciding how—and whether—the fishery's resources should be distributed.

Despite the well-debated history of IFQs and the resulting comprehensive statutory LAPP framework, as well as their own written guidance, Defendants approved a program devoid of LAPP protections and seemingly designed to maximize the adverse effects of such programs. They approved a program combining the impact of low initial PSC allocations, transferrable PSC and ACE, and the ability of sector participants to combine multiple PSCs, effectively forcing out smaller-scale fishermen.

Several recent reports analyzing the effects of A16's catch share program have now been published. These reports show the realization of the very ills Congress sought to prevent:

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[7] NMFS' own data show dramatic reductions in fleets wherever IFQs are implemented. *See* NOAA Catch Share Spotlights: Alaska halibut and sablefish fisheries (IFQ program resulted in 70% reduction in the number of vessels from 1994 to 2008), *available at* http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/ak_halibut_sablefish.pdf; Red king crab fishery (IFQs resulted in 71% reduction in number of vessels from 2004 to 2008), *available at* http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/crabrat_program.pdf ; Wreckfish fishery (fleet reduced from 91 to 27 vessels within first two years of IFQs; by 2009 there were 10 vessel permits and fewer than 5 five active vessels), *available at* http://www.nmfs.noaa.gov/sfa/domesfish/catchshare/docs/wreckfish.pdf.

> There has … been an increasing concentration of … revenues… [which] … have consolidated on fewer … vessels… About 68% of …revenues from groundfish sales during 2007-2009 resulted from landings by 20% of active groundfish vessels. [whereas after the implementation of A16] In 2010, 20% of vessels accounted for about 80% of the gross nominal revenues from groundfish sales.
>
> *2010 Final Report on the Performance of the Northeast Multispecies (Groundfish) Fishery*. US Dept. of Commerce, Northeast Fish Sci Cent Reference Doc. 11-19 (2011) at viii; available online at http://www.nefsc.noaa.gov/nefsc/publications/.

"…Available information suggests that the number of participating vessels, total fishing effort and crew opportunities declined in 2010 from previous levels." *Id*. at 30.

A report published jointly by NOAA, the Massachusetts Division of Marine Fisheries and the University of Massachusetts found that overall 111 fewer vessels fished for groundfish in FY2010 than in FY2009. *Break-Even Analysis of the New England Groundfish Fishery for FY2009 and FY2010*, (November 14, 2011) at 7, available online at http://www.mass.gov/dfwele/dmf/publications/informational.htm.

A report published by the Massachusetts Division of Marine Fisheries found that:

> Between 2009 and 2010 [one A16 sector's] groundfish landings declined 61 percent and groundfish revenue declined by 52 percent. The sector's total revenue loss … would have been significantly higher if not for a dramatic and unsustainable shift in effort … to … lobster, dogfish, skate, etc….this shift … is likely to have negative conservation and management implications …Thirty percent [of the

> sector's] permit holders lost at least 80% of their net groundfish revenue … Throughout the … fishery … we see evidence of a fisheries disaster caused by the transition to catch shares, with a disproportionate impact on small boat (30-50') owners, which have been hampered by their limited range and limited access to quota."
>
> *Comparative Economic Survey and Analysis of Northeast Fishery Sector 10*, Massachusetts Division of Marine Fisheries (November 2011) at p. i, available online at: http://www.mass.gov/dfwele/dmf/publications/informational.htm.

The Governor of Massachusetts sought federal disaster assistance, citing the "rapid consolidation" and "severe economic losses" caused by A16. Letter from Governor Patrick to the Secretary of the U.S. Department of Commerce (November 15, 2011) at 3, available online at http://www.mass.gov/dfwele/dmf/marinefisheriesnotices/2011/groundfish_request_and_reports_111511.pdf. The Governor concluded that A16's effects were "imperiling our historic and economically important commercial fishing industry." *Id*. at 4.

Had Defendants simply complied with the LAPP provisions before implementing A16, such problems could have been avoided or minimized. Defendants knew that the adverse effects of LAPPs "can … be more significant, longer lasting, and harder to "un-do" [than other fishery management actions], warning that "Council members should always remember this as they design and vote on a LAP[P]." A68.3; NOAA Technical Memorandum NMFS-F/SPO-86 at 25-26. Despite their own warnings, Defendants ignored both Congress and their own guidelines.

In approving and implementing A16, Defendants evaded their statutory duty to consider, analyze and adequately protect against the negative consequences of this consolidation. Defendants chose to avoid the requirements for LAPPs, creating a monster with the worst features Congress sought to avoid and none of the LAPP safeguards. Defendants' interpretation ignores Congress's focus on protecting the rights of fishermen and their fishing communities and leads to absurd results. This Court should not allow the Defendants to evade an entire congressionally-mandated regulatory scheme with semantics.

2. The Sector Allocation Exemption from Referendum Does Not Apply to the A16 Program

The MSA exempts "sector allocations" from the referendum requirement, 16 U.S.C. § 1853a(c)(6)(D)(vi), but Defendants improperly rely on this exemption with respect to A16. 75 Fed. Reg. 18,292 (responding to public comments that Defendants should have held a referendum, Defendants first cite the sector allocation exemption).

First, §1853a(c)(6)(D)(vi) exempts "sector allocations" in New England only from the requirement that IFQs in that region be approved via referendum. See AD 47-48. It does not exempt "sector allocations" from any of the other LAPP requirements of the MSA. As the LAPP provisions only permit a Council's submission to the Secretary and the Secretary's approval of a LAPP "if it meets the requirements of" the LAPP provisions (16 U.S.C. §1853a(a)), Defendants' failure

to meet any one of these requirements is fatal. As noted earlier, Defendants failed to comply with any of the LAPP provisions.

Second, the "sector allocation" exemption does not apply to the A16 catch share program. Congress did not exempt "sectors" or sector *programs* from the referendum requirement. It exempted only "*sector allocations*." 16 U.S.C. § 1 853a(c)(6)(D)(vi). Defendants mix and match the terms "sector" and "sector allocation," manufacturing ambiguity and confusion. Although the MSA defines neither "sector" nor "sector allocation," Defendants' use of these terms to avoid submitting A16 to a referendum and evade the LAPP provisions is impermissible.

At the time the referendum requirement and exemption were added, Defendants used "sector allocation" to describe an allocation of one fish species to two Cape Cod "sectors" under A13, a program radically different from A16's "largest ever" catch share program. *See* 69 Fed. Reg. 22,906 (Apr. 27 2004). The subsection exempting sector allocations from the referendum requirement was not part of either bill passed out of the Senate and House committees of jurisdiction; the exemption language appeared as a last minute change just prior to passage. No legislative history is available. *See* 152 Cong. Rec. S11507, 11511 & 11535 (Dec. 7, 2006). In the absence of direct legislative history, and in light of the overall structure and language of the LAPP provisions, the only

reasonable conclusion is that Congress intended "sector allocation" to be defined as used at the time in existing regulatory schemes. *See Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000) ("We assume that the words that Congress chose to implement its wishes, if not specifically defined, carry their ordinary meaning and accurately express Congress' intent"). This interpretation aligns with other provisions of the bill preventing the new limited access provisions of the MSA from disrupting existing programs. 16 U.S.C. § 1853a(h).

Third, even if the MSA had exempted "sectors," as opposed to "sector allocations," from the referendum requirement, Congress could not possibly have intended to include A16's sectors in the exemption because they are fundamentally different than the A13 sectors in several significant ways. As noted earlier, A13 authorized the allocation of catch to two discrete groups that organized around a limited geographical area and particular gear type, thus utilizing the term "sector" in the way that "sector" was traditionally used until the advent of A16 and the need to circumvent the LAPP protections.

Nationally, and under Amendment 13, "sectors" have historically referred to groups of fishermen formed around a unifying characteristic of the members, *e.g.* type of gear used, targeted stock, or purpose (recreational versus

commercial).[8] *See e.g. Pacific Coast Fed'n of Fishermen's Ass'n v. Locke,* 2011 WL 3443533 at *1 ("The fishery is made up of groups of participants (sectors') that use different types of fishing gear/methods"); *Alabama Power Co. v. U.S. EPA*, 40 F.3d 450, 454 (C.A.D.C 1994), *citing McDermott Int'l v. Wilander*, 498, 337, 342 (1991)("In the absence of contrary indication, we assume that when a statute uses a [technical word or term of art], Congress intended it to have its established meaning.")

By contrast, the "sectors" under A16 are unified only by the members' individual desires to access their quota.[9] 50 C.F.R. § 648.2; *see* 75 Fed. Reg. 18,295 ("Sectors themselves are merely vehicles for allowing individual fishermen to voluntarily enter into an arrangement to fish under certain exemptions to the FMP based on their individual fishing histories."). Defendants have therefore impermissibly expanded the term sector beyond its traditional

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[8] *See, e.g.,* 75 Fed. Reg. 10,450 (Mar. 8, 2010) (dividing sectors based on commercial or recreational fishermen); 75 Fed. Reg. 32,994 (June 10, 2010) (dividing sectors between whiting [a type of fish] and non-whiting fishermen); 73 Fed. Reg. 15,674, 15,675 (Mar. 25, 2008) (dividing sectors into charter, private, and headboat type). Defendants also use the term "sector" in a more general sense in the context of A16. *See* A125; AR Doc. 773 at 48068 (stating that the fishery is comprised of a commercial sector and a recreational sector).

[9] A16's sector management program resemble programs called "cooperatives" in regions where IFQs do not call for a referendum (and thus styling a program a "sector allocation" has no legal effect). *See* A111; AR Doc. 175 at 12326 (summary of West Coast multispecies management measure based on cooperatives, which closely resemble A16's sector program).

meaning. *See Alabama Power*, 40 F.3d at 454, n.8 (citing Supreme Court's determination in *McDermott Int'l v. Wilander* that a term, in that case "seaman," can have an established meaning despite the absence of a statutory definition).

In addition, the A13 "sector" entities had features preventing consolidation not present in the A16 sectors. Under A13, entities receiving a sector allocation were restricted from transferring quota to other entities, no less other gear types. The entities created under A16, with freely transferable quota between sectors, did not exist when the Act was signed and cannot be equated with the A13 sector allocations. A16 sectors need not even have active vessels to hold permits, and the fishing rights can be owned separately from a vessel, controlled by anyone and accumulated without limitation. Further, A13 "specifically restricted the size of an individual sector allocation to no more than 20% of the yearly TAC . . .of any regulated species." No such cap exists under A16. A182; AR Doc. 997 at 56500.

Given the broad scope of the LAPP provisions and the vast differences between the two sector allocations of cod authorized by A13 in 2004 and A16's "largest ever" catch share program, "sector allocation" can only refer to the A13 "sector allocations" then extant, rather than the vastly different and subsequently created sector management program created by A16.

Defendants twist the meanings of traditionally and widely used terms and equate two very different programs to fit what it called the largest catch share

program ever in the U.S. into this one exception. Defendants' interpretation of the "sector allocation" exemption makes the exception swallow the rule. This narrow exemption from the broad and comprehensive LAPP scheme cannot be construed so as to render the referendum requirement superfluous. Doing so allows the entire fishery to be transformed into an IFQ while evading the required referendum.

D. Federal Defendants Cannot Evade the MSA's LAPP Provisions with Labels and Semantics

Thanks to word games and circular arguments, the Amendment 16 Sector Management plans have all of the attributes of LAPPs but none of their protections. The Agency's wish to avoid a referendum and ensure the rapid implementation of a catch share program, even if motivated by a genuine belief that effecting catch shares is more important than complying with LAPP rights and protections, is no excuse for subverting the clearly stated intent of Congress. Neither a court nor an agency may substitute its policy judgment for that of Congress. *E.g*. *Natural Resources Defense Council v. EPA*, 643 F.3d 311, 323 (D.C. Cir. 2011) (if agency disagrees with statute's requirements, "then it should take its concerns to Congress…In the meantime it must obey the [statute] as written"), *citing Sierra Club v. EPA,* 479 F.3d 875, 884 (D.C. Cir. 2007).

Since the distribution of the TAC to individual vessels is the functional equivalent of an IFQ, it is subject to the same requirements. *See United States v. Lopez*, 380 F.3d 538, 545 (1st Cir. 2004) (functionally equivalent actions triggered

same requirements), *citing Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Defendants have impermissibly read into the statute unfettered freedom to avoid congressional requirements by merely slapping the label they want on the reality they do not, substituting "sector allocation" for what is in all respects an IFQ. *See e.g. Haw. Longline Ass'n v. NMFS*, 281 F. Supp. 2d 1, 22 (D.D.C. 2003) ("Agencies derive their authority from law and may not exceed its limitations or circumvent its requirements.")

Plaintiffs respectfully ask that this Court reverse the District Court, vacate Amendment 16 and compel the agency to, pursuant to 5 U.S.C. §706(1), subject A16's catch share program to the MSA's LAPP provisions and conduct the required referendum.

II. Defendants' Failure to Gather and Analyze Social Data in Connection with Amendment 16 Violated National Standard (8)

A16 should be vacated or Defendants ordered to comply with the MSA's requirements for the additional and independent reason that Defendants implemented it without complying with National Standard (8) of the MSA. The District Court's holding that Defendants met their obligations under National Standard (8) was based on a misunderstanding and misapplication of the law and should be reversed.

A. Standard of Review

The District Court's decision is reviewed *de novo*. *Little Bay Lobster Co., Inc.*, 352 F.3d at 466. In reviewing regulations implementing FMPs or amendments thereto, the MSA requires a court to apply the standards of review prescribed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(A)-(D); *see* 16 U.S.C. § 1855(f)(1); *Conservation Law Found. v. Evans*, 360 F.3d 21, 27 (1st Cir. 2004). Under the APA, a court may set aside an administrative action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

Although the standard of review is narrow, the court "must undertake a thorough, probing, in-depth review and a searching and careful inquiry into the record." *NLRB v. Beverly Enter.-Mass., Inc.*, 174 F.3d 13, 24 (1st Cir. 1999) *citing Citizens to Preserve Overton Park*, *v. Volpe,* 401 U.S. 402, 415 (1971). An agency's ultimate decision is entitled to deference, but the record supporting the decision must reveal that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass 'n,* 463 U.S. at 43 (internal citations omitted). The reviewing court may not simply "rubber stamp" the agency action. *Penobscot Air Serv., Ltd. v. FAA.*, 164 F.3d 713, 718 n.2 (1st Cir. 1999).

B. National Standard (8)'s Requirements

Congress prohibits Defendants from approving or implementing a Fishery Management Plan ("FMP") that is not consistent with the ten (10) National Standards at 16 U.S.C. 1851(a). *Commonwealth of Mass. by Div. of Marine Fisheries v. Daley*, 10 F. Supp. 2d 74, 76 (D. Mass. 1998) (citing 16 U.S.C. § 1851 (a)(1)-(10)), *aff'd*, 170 F.3d 23 (1st Cir. 1999).

National Standard (8) is designed to protect fishing communities and states:

> Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

16 U.S.C. §1851(a)(8). The MSA defines "fishing community" as "a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators and crew and United States fish processors that are based in such community." 16 U.S.C. §1802(17).

The MSA further requires that any Fishery Management Plan ("FMP") include a "fishery impact statement" ("FIS") "which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation,

economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for ... participants in the fisheries and fishing communities affected by the plan or amendment." 16 U.S.C. § 1853(a)(9).

The District Court held that Defendants complied with National Standard (8) because they "took into account" the information produced pursuant to the FIS requirement – a requirement that the District Court in turn described as "procedural, not substantive." AD11-12; Dist. Ct. Order June 30, 2011 at 11-12.

The District Court mischaracterized and improperly minimized National Standard (8) and the FIS requirement. Although it is true that National Standard (8) does not dictate a specific substantive result, it is not a meaningless provision that requires no more than a perfunctory analysis. As the District Court for the Northern District of California recently stated in *Pacific Coast Federation of Fishermen's Ass'n, 2011 WL 3443533, at *14.*

> The plain language of National Standard 8 requires the NMFS to do more than merely "take into account the importance of the fishery resources to fishing communities" . . . Instead, the NMFS must "take into account the importance of fishing resources to fishing communities . . . **in order to** (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." (emphasis in original).

In assessing whether the government has fulfilled its obligation under National Standard (8), First Circuit courts must:

> ask whether the Secretary has examined the impacts of, and alternatives to, the plan he ultimately adopts and whether a challenged failure to carry the analysis further is clearly unreasonable, taking account of the usual considerations (*e.g.*, whether information is available and whether further analysis is likely to be determinative).

Little Bay Lobster Company, Inc., 352 F.3d at 470.

C. Defendants Failed to Comply with National Standard (8)

Defendants here failed to comply with National Standard (8) because they did not adequately: (1) gather and assess sufficient social data relating to A16; and (2) consider alternatives to A16. Rather than conducting a meaningful review of Defendants' compliance with National Standard (8), as it should have done, the District Court rubber-stamped Defendants' assertion that they fulfilled their statutory obligations.

1. Inadequate Assessment of Social Data

In Defendants' Consolidated Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Motions for Summary Judgment ("Defendants' Consolidated Memorandum"), they effectively concede that they did not gather and assess the requisite "social data" under National Standard (8). The social data requirement is separate and distinct from the economic data requirement. 16 U.S.C. §1851(a)(8) ("by utilizing economic **and** social data")(emphasis added). Defendants address the MSA's social data requirement in a mere footnote in the Consolidated Memorandum and in that

footnote, they identify only 43 pages dealing with social factors. *See* A60; Defendants' Consolidated Memorandum, Dist. Ct. Doc. No. 76 at 37; internal page 33, n11.

An examination of those meager 43 pages establishes that Defendants violated National Standard (8). Although there is "no mechanical way to say when enough is enough" in terms of an agency's compliance with National Standard 8, *Little Bay Lobster Company, Inc.*, 352 F.3d at 470, there can be no dispute that in this case, Defendants did not do enough.

First, of the 43 pages cited by Defendants, approximately 16, from pages 746 to 761 in the Environmental Impact Statement (EIS) for Amendment 16 (A131-A146; AR 773 at 48502-17) are copied almost verbatim from the corresponding sections in the December 2003 SEIS conducted for A13 (A81-A106; AR 3 at 945-970). Indeed, in these 16 pages Defendants mistakenly refer to A16 as A13. A133; AR 773 at 48504 ("the impacts of Amendment 13 are predicted to be large in scale"). They also explicitly state there is no quantitative analysis, and for any qualitative analysis, they refer to social impact community information meetings held for A13. *See* A135; AR 773 at 48506 ("The discussions highlight comments received at Amendment 13 informational meetings") and A139; 48510 (". . . these meetings occurred prior to Amendment 13"). Defendants even admit in another part of the EIS that

they failed to conduct any social impact community information meetings for A16. A128; AR 773 at 48226. Because these 16 pages were clearly created for A13, and because A16 effected entirely different changes than A13, they do not contribute to fulfillment of Defendants' obligations under National Standard (8).

Second, the remaining 27 pages cited by Defendants in their footnote (A147-A163; AR 773 at 48518-34; A165-A172; AR 882 at 51243-50; A116; AR 773 at 47771), in which they purport to assess the social impacts of A16, are insufficient as a matter of law to meet their obligations under National Standard (8). Those pages do not describe or analyze any social data with respect to any particular community, which even Defendants acknowledge is a requirement under National Standard (8). 50 C.F.R. § 600.345(c)(3). *See also A.M.L. International, Inc. v. Daley*, 107 F.Supp.2d 90, 103 (D. Mass. 2000)(no violation of National Standard (8) where "the Secretary and the councils considered the importance of the fishery to numerous communities"); *Recreational Fishing Alliance v. Evans*, 172 F.Supp.2d 35, 46 (D.D.C. 2001)(no violation of National Standard (8) where "NMFS commissioned and assessed the results of a five-state impact study of twelve defined fishing communities"); *North Carolina Fisheries Ass'n, Inc. v. Daley*, 27 F.Supp.2d 650, 662 (E.D. Va. 1998)(Secretary "completely abdicated his responsibilities under the Magnuson

Act" where he gave "no consideration to the population size of communities, the significance of the fishing industry on local economies, or to what even constitutes a fishing community").

Rather, the remaining 27 pages cited by Defendants discuss the social impacts of Amendment 16 in the most general and speculative terms and do not even attempt to describe the social impact of any particular A16 measure (*e.g.*, catch limits, sector management system) on any particular community. While in some cases it might be difficult for a court to assess whether an agency has done its job, this is not one of those cases.

The District Court should have held that Defendants violated National Standard (8). Instead, it incorrectly treated National Standard (8) as a hollow procedural requirement and did not conduct, as it should have, "a searching and careful inquiry into the record." *Beverly Enter.-Mass., Inc*., 174 F. 3d at 24. The District Court did not even specifically address the social data requirement, and it relied entirely on the pages from the Administrative Record cited by Defendants to hold that they met their obligation under National Standard (8). Had the District Court properly scrutinized Defendants' compliance with National Standard (8), it would have concluded there was no way Defendants could have:

> take[n] into account the importance of fishing resources to fishing communities by utilizing economic and social data . . . **in order to**

> (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

*Pacific Coast Federation of Fishermen's Ass'n, 2011 WL 3443533, at *14* (emphasis in original).

Since Defendants did not gather and assess the requisite social data, they could not possibly have properly evaluated the importance of fishing resources to particular fishing communities. This in turn precluded them from devising any measures to "provide for the sustained participation of such communities" or to "minimize economic impacts on such communities." Had they implemented such measures in conjunction with A16, New England's fishing communities and their families might not be suffering to the extent they are today.

National Standard (8) is there for a reason: to protect fishing communities. The Defendants ignored this aspect of the MSA, and the District Court perpetuated their error, incorrectly treating National Standard (8) as mere procedural requirement. The District Court's holding that Defendants complied with National Standard (8) should be reversed, A16 vacated, and Defendants ordered to fully comply with National Standard (8) pursuant to 5 U.S.C. §706(1).

2. Failure to Consider Alternatives

The District Court's holding that Defendants complied with National Standard (8) should be reversed for the additional reason that they failed to consider reasonable alternatives to the catch share and sector system. *See, e.g.*, *Little Bay Lobster Company Inc.*, 352 F.3d at 470 (Secretary must examine alternatives to plan adopted). The argument that Defendants failed to consider alternatives under the NEPA, *infra* at 57 - 60 is adopted and incorporated herein with respect to the MSA.

III. NMFS Failed to Adequately Analyze Reasonable Alternatives in Violation of NEPA

A. Standard of Review

The standard of review applied to the argument that Defendants failed to gather and assess social data as required by National Standard (8) of the MSA, *infra* at Section II, pages 48 - 49, is adopted and incorporated herein with respect to the argument that Defendants failed to analyze adequately alternatives in violation of the NEPA.

B. Defendants Failed to Adequately Consider Reasonable Alternatives to the Catch Share and Sector System

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") that includes a "detailed statement" analyzing the impacts of a proposed federal action. 42 U.S.C. § 4332(2)(C); *Dubois v. U.S. Dep't of Agric.*,

102 F.3d 1273, 1285 (1st Cir. 1996). Chief among this consideration of impacts is the study of alternatives to the proposed action "that appear reasonable and appropriate for study . . . as well as significant alternatives suggested by other agencies or the public during the comment period." *Roosevelt Campobello Int'l Park Comm'n v. EPA,* 684 F.2d 1041, 1047 (1st Cir. 1982).

The consideration of alternatives is the "heart of the [EIS]," and agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14; *Dubois*, 102 F.3d at 1286. "The existence of a viable but unexamined alternative renders an [EIS] inadequate." *Dubois*, 102 F.3d at 1287.

In the EIS prepared for Amendment 16, Defendants failed to adequately consider reasonable alternatives to the catch share and sector system, despite the fact that reasonable alternatives existed and were made known to the agency in public comments. *See* A124; AR Doc. 773 at 047977. Rather, Defendants impermissibly narrowed the consideration of alternatives to minor variations within the catch share framework, and failed to consider non-catch share alternatives. Specifically, the EIS analyzed different ways of calculating quota allocations to individual vessels as part of a catch share management scheme. A121-A123, A129; AR 773 at 47944-46; 48392. The environmental impacts of

each of these "alternatives" would be largely the same, rendering the EIS insufficient to provide the agency with enough information to compare environmental impacts across alternatives.

By considering only one substantive management tool—sectors—Defendants impermissibly limited the scope of alternatives considered and failed in its obligation to consider the "full spectrum of alternatives" that would allow for a truly reasoned choice. *See* 40 C.F.R. § 1502.14; *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

Defendants also failed in their obligation to consider reasonable alternatives suggested by the public. *See Dubois*, 102 F.3d at 1286. Public comments identified several reasonable alternatives to sector management. *See, e.g.*, A124; AR 773 at 47977 (identifying suggestions by public for a points-system, area management system, and individual fishing quota system). One example is the "Point System," supported by many different stakeholders in the fishery. *See* A108; AR 59 at 5876; A117; AR 773 at 47821. Defendants did not evaluate the Point System or other suggested alternatives in the EIS, asserting "limited time and resources." A118; AR 773 at 47822. Failure to consider the suggested alternatives renders the EIS inadequate because it precludes the public and the agency from participating in informed decision-making. *See Dubois*, 102 F.3d at 1287, 1290-91

(holding EIS inadequate in part due to agency's failure to address reasonable alternative submitted via public comment).

Defendants justified their failure to consider alternatives by asserting there was not enough time to consider alternatives. *See* Defs. Mot. Summ. J. at 63-66. This argument is unavailing because agency obligations under NEPA are not trumped by statutory deadlines. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984) (rejecting argument that nine- month statutory deadline prevented agency from preparing an EIS). Even if Defendants had authority to flout their NEPA obligations, there was no factual basis to do so here: the agency had sufficient time to consider alternatives, and alternatives such as the Point System had already been the subject of considerable study.

Defendants failed in their duty to consider a reasonable range of alternatives, including reasonable alternatives suggested by the public. Plaintiffs respectfully ask that this Court reverse the District Court, vacate A16 and pursuant to 5 U.S.C. §706(1), remand the matter to and compel the agency to complete the required NEPA analysis of alternatives to A16's catch share program and effect such mitigation as indicated by such analysis.

IV. CONCLUSION

The regulatory scheme established under A16 is in all but name a LAPP under the MSA that effects an IFQ. It has the practical effect of transferring the ability to fish to large, industrial-scale fishing vessels while pushing out smaller-scale fishermen. This leads to significant adverse consequences that went unconsidered in the adoption of A16. Defendants also adopted A16 without the required community input in the form of a referendum. Defendants' action failed to comport with its own guidance. Enacting "the largest catch share program … ever … in the U.S." (75 FR 55305)(Sept. 10, 2010) entirely outside of and without consideration to the MSA's LAPP standards with semantics, special purpose pass-through entities and informal policy opinions cannot be what Congress intended when it enacted the LAPP amendments.

In addition, Defendants failed to gather and analyze sufficient social data in connection with A16, as required by MSA's National Standard (8). They also did not rigorously explore all reasonable alternatives as required by both NEPA and MSA's Standard (8), dismissing viable alternatives because of time constraints and failing to consider as a primary management system non-catch share alternatives.

Defendants failed to meet their statutory obligations under the MSA and NEPA, and they did not base A16 on informed and reasoned decision-making. For these reasons, this Court should reverse the District Court's order, vacate A16 and, pursuant to 5 U.S.C. §706, order Defendants to fully comply with the requirements set forth in the MSA and NEPA.

Respectfully submitted,

/s/ John F. Folan_____
John F. Folan
(Court of Appeals Bar No. 19171)
Folan & McGlone, P.C.
P.O. Box 2095
New Bedford, MA 02741
Tel. 508-992-9800 / Fax. 508-992-9730
folan.mcglone@verizon.net

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14 point, proportionally spaced font, Times New Roman. As calculated by my word processing software (Microsoft Word), this brief (exclusive of those parts permitted to be excluded by the Federal Rules of Appellate Procedure) contains 13,821 words.

Dated: December 21, 2011

/s/ John F. Folan
John F. Folan

ADDENDUM

OF APPELLANTS CITIES OF NEW BEDFORD AND GLOUCESTER AND OF TEMPEST FISHERIES, ET AL

(Appeal Nos. 11-1952 and 11-2001)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 10-1 0789-RWZ

CITY OF NEW BEDFORD, *et al.*

v.

HONORABLE GARY LOCKE, *etc.*, *et al.*

ORDER

June 30, 2011

ZOBEL, D.J.

In 2009, the Department of Commerce introduced a trio of rules and regulations, Amendment 16, Framework 44, and the sector operations rule (collectively "A1 6"), that regulate fishing off the coast of New England and the mid-Atlantic states. The City of New Bedford along with other parties (collectively the "New Bedford Plaintiffs") challenged A1 6 in this court and plaintiff James Lovgren filed a similar suit in the District of New Jersey. The Lovgren suit was transferred here and consolidated with the New Bedford litigation. (Docket # 17.) The Secretary of Commerce Gary Locke (the "Secretary"), the National Oceanic and Atmospheric Administration and its administrator Jane Lubchenco, and the National Marine Fisheries Service ("NMFS") (collectively the "Agency"), are named as defendants, joined by intervenor the Conservation Law Foundation, Inc.

Plaintiffs have cast a dragnet in this litigation, woven from a multitude of alleged failings of A1 6. They argue that the Agency misinterpreted the law, relied on

inaccurate facts, and acted in an arbitrary and capricious manner in implementing A16, primarily in violation of the Magnuson-Stevens Act ("MSA") and the procedural directives of the National Environmental Policy Act ("NEPA"). Now pending are the parties' cross-motions for summary judgment. Their briefs are supplemented by memoranda of amici Congressmen Barney Frank and John Tierney, the Commonwealth of Massachusetts, and Food and Water Watch, Inc., all in support of plaintiffs, and the Georges Bank Cod Fixed Gear Sector, in support of Defendants.

I Background

The Northeast multispecies fishery includes 13 species of groundfish, divided into 20 stocks, located off the coasts of New England and the mid-Atlantic states. Administrative Record ("AR") 1001 at 56717-18. These stocks have been fished for centuries and annual output peaked at more than a quarter of a million tons in the 1960s. AR 320 at 19875. Since then, as fishing technology has improved, fishing has depleted stocks and output has declined precipitously, to less than 50,000 tons in the 1990s. Some of this reduction reflects changes in the geographical boundaries of the fishery and environmental factors, but there is no dispute that current harvests are substantially below long-term sustainable levels.

Congress enacted the MSA in 1976, amended in significant part by the Sustainable Fisheries Act in 1996 and the Magnuson-Stevens Reauthorization Act of 2006, to restore this fishery to robust health. 16 U.S.C. § 1801 et seq. The MSA directs the creation of eight fishery management councils, each council representing a coastal region. Id. at § 1852. The New England Fishery Management Council

("NEFMC") represents Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut, and has authority over the fisheries in the Atlantic ocean seaward of those states. Id. Each council is required to prepare and amend as necessary a fishery management plan ("FMP") containing "conservation and management measures . . . to prevent overfishing," 16 U.S.C. § 1853, consistent with 10 "National Standards" that set forth general principles such as fairness, efficiency, and concern for fishing communities, id. at § 1851(a). An FMP is submitted to the Secretary for approval, where it is evaluated by NMFS, after which it takes effect. Id. at § 1854. The target for an FMP is the "maximum sustainable yield" ("MSY"), see id. at § 1802(33)-(34), 50 C.F.R. § 600.31 0(b)(2)(i), the "largest long-term average catch or yield that can be taken from a stock or stock complex," 50 C.F.R. § 600.310(e)(1)(I). See AR 997 at 56488 (listing MSY for each groundfish stock).

The NEFMC adopted the Northeast Multispecies Fishery Management Plan in 1986 ("NEFMP"). It has been amended several times in the intervening years before A16, most recently in substantial part by Amendment 13 ("A13") in 2004. 69 Fed. Reg. 22906 (Apr. 27, 2004). The NEFMP has historically limited fishing through "days-at-sea" effort restrictions, which limit the effort that fishermen expend as a proxy for total fish caught. It has been partially effective; some overfished stocks have recovered while others have shown little or no improvement. AR 550 at 31537. As of the most recent assessment, in 2009, two Haddock stocks, Redfish, and American Plaice were rebuilt to MSY with sustainable mortality, while the majority of the other stocks were

both overfished and subject to overfishing.[1] AR 773 at 47763; see AR 320 at 18989. The Agency has determined that dramatic decreases in fishing mortality are necessary to restore these stocks. AR 773 at 64.

The three measures collectively referred to as A1 6 constitute the Agency's revisions to the NEFMP to restore these overfished stocks to health. A key part of this amendment, and a focal point of contention in this lawsuit, is an expansion and revision of the "sector" program introduced in A1 3. Sectors are an alternative to days-at-sea effort controls, whereby a group of fishermen jointly form a sector and are collectively assigned a catch limit, an "Annual Catch Entitlement" ("ACE"). Fishermen who do not join sectors continue to operate in the "common pool," subject to days-at-sea constraints. For two stocks, A1 6 also considers the annual catch of recreational fishermen.

Under A1 6, each multispecies fishery permit holder is allocated a "potential sector contribution" ("PSC") based upon its landings history. AR 997 at 56500-01. This is a proportional measure of the vessel's landing history relative to the total landings over a given period of time for each stock. PSC is not a limit on how much a permit holder can catch. If permit holders choose to join a sector, their PSCs are aggregated to constitute the sector's ACE, a proportion of the total "Annual Catch Limit" ("ACL") for the entire commercial fishing sector which is a cap on annual harvest. ACE

[1]Overfishing refers to a rate of mortality which exceeds MSY, while overfished refers to a biomass that is less than half that which would support MSY. AR 320 at 18987.

may be traded between sectors. Sectors operate under various reporting requirements to ensure they do not exceed their ACE.

Amendment 16 implements this sector system and makes other changes to the NEFMP. AR 997. Framework 44 establishes the ACL for fishing years 2010-12. AR 1001. Sector ACEs for fishing year 2010 are implemented with the sector operations rule. AR 996. In 2010, 812 of 1477 permit holders joined one of 17 sectors. The sectors hold approximately 98% of the historical landings during the relevant PSC period. The recreational sector was allocated 27.5% of GOM haddock and 33.7% of GOM cod, but nothing of the other stocks.

I Analysis

The standard of review for agency actions challenged under either the MSA or NEPA is that of the Administrative Procedures Act. 16 U.S.C. § § 1855(f); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1284 (1st Cir. 1996).

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.

5 U.S.C. § 706.

"An agency's decision is not arbitrary and capricious if that decision was based on consideration of the relevant factors and if it did not commit a clear error of judgment." Town of Winthrop v. FAA, 535 F.3d 1, 8 (1st Cir. 2008).

A. MSA

1. LAPP/IFQ

Plaintiffs dispute the Agency's conclusion that Amendment 16 does not create either a limited access privilege program ("LAPP") or an individual fishing quota ("IFQ"), two labels appearing in the MSA statute which, if applicable, trigger certain procedural and substantive protections. Initially, this dispute raises the threshold question of what deference is due to the Agency's interpretation of the MSA statute.

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

United States v. Mead Corp., 533 U.S. 218, 227 (2001) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

> "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying Chevron deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."

Mead Corp., 533 U.S. at 230 (internal citations omitted).

Congress expressly delegated to the Secretary the authority to create FMPs. 16 U.S.C. §§ 1852(h), 1854. Amendment 16 to the NEFMP is the product of a highly formalized administrative procedure, including a notice-and-comment period. Id. at §§ 1852-54. Chevron deference is warranted.

IFQ and "limited access privilege" are both defined as a "federal permit" issued under a "limited access system" to harvest a quantity of fish representing a portion of

the total allowable catch of the fishery that may be held for exclusive use by a person. 16 U.S.C. § 1802(23) and (26). A "limited access privilege" is issued "under section 1853a" and "includes an individual fishing quota." Id. at § 1802(26). Section 1853a sets forth various requirements that a LAPP must satisfy before it may be approved by the Secretary and mandates that an IFQ program in the New England fishery be submitted to a referendum and receive 2/3 approval of fishery participants.

While it is a close call, I do not find that the Agency's conclusion that Amendment 16 implements neither a LAPP nor an IFQ, reached as part of the rulemaking process, see AR 864 at 50496-98 (FWW comment that the sector model is an IFQ and thus a LAPP); AR 997 at 56516 (Agency response to FWW comment), is manifestly contrary to statute. The agency reasons that fishermen are issued permits with an associated PSC, but that the PSC never operates as a limitation on how much the permit holder may catch and only acquires meaning when aggregated with other PSCs in a sector. AR 103; AR 997 at 56516. While a sector is, arguably, limited by an ACE to a quantity of fish within the meaning of the LAPP and IFQ definitions, sectors are "temporary, voluntary, fluid associations of vessels" that are not issued permits. AR 997 at 56499. Accordingly, there is no "permit . . . to harvest a quantity of fish." 16 U.S.C. § 1802(26).

It is literally true that the permit and the quantity limitation are assigned to different entities, but plaintiffs respond that it is a distinction without a difference: fishermen will, as a practical matter, be limited to the PSC they bring to a sector, making it a defacto quantity limitation, and to the extent a sector is so limited by

regulation, it is the equivalent of a permit. The effect on small-scale fishermen, plaintiffs reason, will be the same, and as the referendum requirement evidences a concern for these individuals, the sector program should be considered a LAPP.

The Agency, obviously, disagrees. It views the sector program as introducing flexibility compared to a quota or days-at-sea approach because input/effort restrictions are lifted and permit holders can allocate ACE however they prefer within a sector or transfer ACE between sectors. See, e.g., AR 901 at 52787-88; AR 1010 at 56758. On this mixed question of both statutory interpretation and the impact of sectors on the fishing industry, the court is bound by the Agency's informed conclusion, reached at Congress' express direction after an extended and formal administrative process including a notice-and-comment period.

The Agency's position that Amendment 16 is not an IFQ, subject to a referendum, binds this court for the additional reason that the statute excludes "sectors" from the referendum requirement, 16 U.S.C. § 1853a(c)(6)(D)(vi), and the Agency reasonably interpreted the exemption to apply to the A16 sector program, AR 997 at 56516. The sector exemption was introduced as part of a 2007 amendment to the MSA, after A13 was implemented. While "sector" is not defined in the statute, it is reasonable to infer Congress was referring to the existing A13 sector program, as it was the only sector program then managed by the NEFMC. There are, to be sure, differences between the A13 and A16 sector programs, but both apply quota-like allowable catch limits to sectors. 69 Fed. Reg. at 22914 (describing A13 sector regulations). It is not manifestly contrary to law to construe the "sector" exclusion as a

reference to the quota-like limits applicable to these sectors.

2 Overfishing in the Fishery

Plaintiffs raise a second issue of statutory interpretation. They argue that, contrary to the Agency's position, the statute requires a fishery to be managed only as an aggregate quantity, rather than in respect to individual stocks, when it comes to measuring MSY and the determination of overfish ing. The issue arises because two of the groundfish stocks in the Northeast multispecies fishery are in robust health, while the remaining 20-odd stocks are either overfished or subject to overfishing. Conservation measures for these many threatened stocks have the practical effect of limiting catch for the two abundant stocks.

Plaintiffs' statutory argument relies, at core, on National Standard 1. "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851 (a)(1). "Fishery" means "(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks," 16 U.S.C. § 1802(13), and "overfish ing" and "overfished" mean "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis," id. at § 1802(34). Plaintiffs read all of this together to mean that the focus is on the "fishery," which is multiple stocks of fish treated as a single unit. Thus, the measure of yield, in their view, is the aggregate of these stocks, not the health of

any individual stock.

While there is sufficient ambiguity in the above statutory language to encompass either the Agency's or the plaintiffs' interpretation, the rest of the MSA makes clear that the Agency must manage the health of individual stocks.[2] National Standard 8 identifies "rebuilding of overfished stocks" as a conservation requirement. Id. at § 1851(8). A fishery management plan "shall" contain conservation measures "necessary . . . to prevent overfishing and rebuild overfished stocks," id. at § 1853(a), and "may" establish limitations necessary for conservation based on "species," id. at § 1853(b). The Secretary is required to notify Congress when a fishery is overfished, and within one year the relevant Fishery Management Council must prepare a plan "to rebuild affected stocks of fish." 16 U.S.C. § 1854(e)(3). The fishery must be rebuilt as quickly as possible, taking into account various factors including "the biology of any overfished stocks of fish," not to exceed 10 years, except where one of several conditions, including "the biology of the stock of fish," dictate otherwise. Id. at § 1854(e)(4). The Secretary is required to review such a plan at intervals not to exceed two years to determine if there has been adequate progress "rebuilding affected fish stocks." Id. at

§ 1854(e)(7).

[2] It is unclear if plaintiffs rely, in part, on a provision in NMFS interpretive guidelines referred to as the "mixed stock exception," 50 C.F.R. § 600.310(m), which gives the NEFMC discretion to allow optimum harvesting of one stock that results in the overfishing of another if several conditions are met. The choice to invoke this exception is "entirely within the province of the administrative agency and not with the court." Mass. ex rel Div. of Marine Fisheries v. Gutierrez, 607 F. Supp.2d 284, 285 (D. Mass. 2009). The Agency decided not to invoke the exception as part of the rebuilding strategy of A1 6. AR 773 at 47838.

The Agency's interpretation is also longstanding and codified in regulation, and deserving of deference. Mead Corp., 533 U.S. at 228 (identifying consistency as a factor which weighs in favor of deference). "[M]anagement approaches to meet the objectives of National Standard 1" include guidance on criteria to determine if "stocks" are overfished and "rebuilding stocks." 50 C.F.R. § 600.310(b)(1). "The [MSA] . . . requires that . . the abundance of an overfished stock or stock complex be rebuilt." Id. at § 600.31 0(b)(2). Both the current and prior versions of the regulation define "overfishing" as "whenever a stock . . . is subjected to a rate or level of fishing mortality that jeopardizes the capacity of a stock . . . to produce MSY on a continuing basis." 50 C.F.R. § 600.310(d)(1)(ii) (1998); see 50 C.F.R. § 600.310(e)(2)(i)(B).

3. Fishery Impact Statement

An FMP must include a "fishery impact statement ["FIS"] . . . which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for . . . participants in the fisheries and fishing communities affected by the plan or amendment." 16 U.S.C. § 1 853(a)(9). National Standard 8 requires that conservation measures "take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." Id. at § 1 851(a)(8).

Plaintiffs argue that the combined effect of the reduced ACL and the sector

program will be economically ruinous for fishermen and fishing communities, and therefore the Agency failed to "assess" the economic and social impacts of A1 6. The FIS requirement is, however, procedural, not substantive. The Agency, through the NEMFC, produced multiple, extensive environmental assessments that more than satisfy this procedural requirement. AR 773 48382-534 (A16 FEIS); AR 882 51221-250 (environmental assessment for Framework 44); AR 898-99, 901-913, 915-16 (environmental assessments for individual sectors).

It is also clear from the record that the Agency "took into account" this information. There is no dispute that the A1 6 policies instituted to rebuild fish stocks will have a negative short-term economic effect on the fishery. AR 773 at 47770. The Agency concluded that the sector program, which is not a conservation measure, would increase fishing efficiency and could ameliorate some of this harm. Id.; AR 1001 at 56728; see AR 773 at 48464-65; AR 996 at 56482-84. In the long-term, "economic benefits from rebuilt stocks would mean that this action would produce the most economic benefits to affected entities once stocks rebuild when compared to the alternatives considered in this action." AR 997 at 56532.

4 Allocations

A1 6 establishes PSC for all stocks other than GB Cod on the basis of permit landings from 1996-2006. For GB Cod, permits that participated in the A13 sectors have a PSC calculated on the basis of landings between 1996-2001, which was the period used to determine the sector allocation under A1 3, while other permits have a PSC calculated using the standard 1996-2006 time frame. Plaintiffs argue this

distinction is arbitrary and not "fair and equitable to all fishermen." 16 U.S.C. § 1851(a)(4).

The record shows that the Agency's allocation method is rational. The Agency used this alternate allocation for GB Cod "to promot[e] stability in the fishery and foster[] an environment where sectors can create efficient and effective business plans." AR 658 (letter from the NEFMC Executive Committee to the Secretary). The 1996-2001 allocation "was the basis of [the A13 sectors'] operations and planning." Id.; see AR 773 at 48593; AR 997 at 56518. If their PSC were not fixed, they would "be forced to revisit their business plans as a result of other fishermen deciding to form sectors several years later, or due to a Council decision to revise sector policies." AR 773 at 48593; see AR 997 at 56518. The NEFMC similarly intends to freeze the catch history for the A1 6 sector permits as of sector implementation. AR 997 at 56518. The two tier calculation also results in only a modest shift in PSC, 2.1% more GB Cod for the A1 3 sector permits, AR 773 at 48433-34, which is too slight, given this reasonable goal of stability, to be considered unfair.

Plaintiffs also object to the allocation of ACL between the commercial and recreational fleets on the basis of their relative landings from 2001-2006. A recreational allocation is made if the recreational catch exceeds 5% of total landings. Only GOM Cod and GOM Haddock cross this threshold. The 2001-2006 time period was selected because of concern that earlier landings data for the recreational fleet was inaccurate and less representative of present utilization of the fishery. AR 658; AR 997 at 56514. The inaccuracy of this earlier data is not in dispute, and it provides a

rational justification for the Agency's decision. It is unclear from plaintiffs' briefing why they believe using the most accurate data is unfair.

5. ACL

Plaintiffs argue, in conclusory fashion, that the ACLs for some stocks are overly conservative. A reviewing court should be most deferential where an Agency is making difficult scientific predictions in its area of special expertise. Baltimore Gas & Elec. Co v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983). The Agency decided upon the A1 6 ACL methodology after a reasoned and scientifically grounded process, including the Groundfish Assessment Review Meeting, a year-long effort by at least 18 fishery scientists to assess the health of groundfish stocks. AR 773 at 47831-42; see AR 320 (GARM III report); AR 615 (recommendations of Scientific and Statistical Committee). The ACLs are not arbitrary.

6. Bycatch and Discards

The New Bedford Plaintiffs separately object that bycatch and discards are not considered when calculating PSC, but are "assumed" and count against a sector's ACE. See AR 997 at 56565-66. They are assumed fleet-wide, however, only if a sector has inadequate monitoring to determine an actual sector-specific rate. AR 997 at 56502. There is also nothing arbitrary about holding fishermen accountable for bycatch and discards. See 16 U.S.C. § 1851 (a)(9) (specifying that conservation

measures should "minimize bycatch") .[3]

7. Database Data

Plaintiffs object that PSC was not calculated based "upon the best scientific information available" as required by National Standard 2. 16 U.S.C. § 1851(a)(2). Fishermen are required to submit a vessel trip report ("VTR") to NMFS for each landing. Dealers are also required to report their purchases. The database used to calculate PSC was populated with the dealer report data. There is no dispute that the database contains errors and plaintiffs argue that the dealers' original paper reports, not the database into which the information was later entered, provide the best available information.

There is, however, no evidence in support of plaintiffs' argument that the paper reports would be a more reliable source of information than the existent database. The paper reports would necessarily have to be entered into a new database, and the record does not indicate that data entry errors, as opposed to mistakes on the paper reports, are the reason for the database inaccuracies. Furthermore, the Agency advised permit holders to review their landing history data and submit requests, properly documented, for corrections. See, e.g., AR 555. The determination that this dealer report database, with corrections, is the "best data available," AR 997 at 56516, is not arbitrary.

[3]Plaintiff Lovgren argues that A1 6 does not comply with National Standard 9 because fishermen from the New York/New Jersey area will have to discard fish caught in Southern New England. He neither cites any evidence in support of this factual contention nor explains why such discards would result from A1 6.

8 Mid-Atlantic Region

The groundfish fishery extends into the geographic area of both the NEFMC and the Mid-Atlantic Fishery Management Council. By statute, the Secretary has the discretion to designate one council to prepare the fishery management plan, 16 U.S.C. § 1854(f), and has selected the NEFMC. Plaintiff Lovgren argues that the NEFMC did not involve or consider the needs of mid-Atlantic fishermen when preparing A1 6. This position finds no evidentiary support. To the contrary, the record contains numerous examples of input from, and consideration of, mid-Atlantic fishermen, including plaintiff Lovgren. Many such examples are set forth in the Agency's motion for summary judgment and they need not be cited again here. See Fed'l Def. Mot. for Summ. J. at 56-58, Docket # 76.[4]

B. NEPA

NEPA creates various procedural requirements for federal actions such as A1 6. It requires "in every . . . report on . . . major Federal actions . . . a detailed statement" addressing several considerations, including "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). This section must "briefly discuss the reasons [why an alternative was] eliminated." 40 C.F.R. § 1502.14. Plaintiffs object that the Agency

> failed to consider alternatives, in particular, the "point system."[5]

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[4]The citation therein on page 57 to AR 773 at 04279 is incorrect. See AR 773 at 48534-48546, 48550.

[5]Plaintiff Lovgren also objects that A1 6 violates NEPA because the A1 6 FEIS does not adequately address the effect on mid-Atlantic fishermen. That argument fails in the NEPA context for the same reason it failed under the MSA.

The Agency considered numerous alternatives to the measures adopted in A1 6. AR 773 at 47773-76; 47927-78. One alternative considered early in the process, during the "scoping" period when the NEFMC was "select[ing] a range of alternatives to be considered and analyzed," AR 18 at 4461, was the point system. See AR 59 at 5876, 5888-92. The NEFMC elected to defer consideration of the point system and other options until Amendment 17, AR 773 at 47822, "because of concerns the design of the measures could not be completed in time," AR 773 at 47977.

The determination to defer consideration of the point system was not arbitrary. Early in the process, the NEFMC Multispecies oversight committee identified specific concerns as to how a point system would integrate with existing management systems including sectors and be correlated with hard catch limits, such that "it was not clear which of the alternative systems would meet Council objectives, or which ones could be developed and implemented in the limited time available." AR 51 at 5741-42; see AR 59 at 5915 (identifying obstacles to point system implementation), 5925 (expressing "concerns about ability to implement by May 2009 given current budgets"). Timing was paramount because the statute requires that the "time period for ending overfishing and rebuilding the fishery. . . shall . . . be as short as possible," 16 U.S.C. § 1854(e)(4)(A). Prior to A1 6, "[s]everal groundfish stocks . . . [were] rebuilding under programs that

[did] not meet the requirements of the M-S Act," AR 773 at 47816, and "[t]he rebuilding plans in the FMP rely upon implementation of management measures beginning in FY 2010 on May 1, 2010, otherwise the success of such rebuilding programs may be compromised," AR 997 at 56505.

C. Regulatory Flexibility Act and Paperwork Reduction Act

Plaintiffs argue that the Agency violated the Regulatory Flexibility Act ("RFA") and the Paperwork Reduction Act ("PRA") because the costs of sector monitoring are excessive.[6] The RFA requires an agency to prepare an Initial Regulatory Flexibility Analysis and a Final Regulatory Flexibility Analysis after, respectively, proposing and promulgating a new rule. 5 U.S.C. §§ 603, 604. The Agency did prepare an IRFA and RFA for all three components of A1 6. AR 773 at 48616-23 (A1 6 IRFA); AR 997 at 56529-32 (A16 FRFA); AR 882 at 51287-90 (IRFA for FW 44); AR 1001 at 56727-30 (FRFA for FW 44); see AR 863 at 50414 (IRFA for sector operations rule); AR 996 at 56482-84 (FRFA for sector operations rule). Arguments about the substantive merits of a new rule are beyond the scope of these procedural requirements. The PRA directs agencies to "reduce information collection burdens on the public." 44 U.S.C.

§ 3506(b)(1). It does not create a private cause of action to enforce this mandate. Sutton v. Providence St. Joseph Med. Ctr.,192 F.3d 826, 844 (9th Cir. 1999); Ass'n of Am. Physicians & Surgeons, Inc. v. U .S. Dep't of Health & Human Servs., 224 F. Supp.2d 1115, 1128-29 (S.D. Tex. 2002).

D. Fifth Amendment

Plaintiff Lovgren separately asserts that A16 violates the Fifth Amendment because, so far as I can discern from the convoluted briefing, there was a taking without notice and an opportunity to be heard. This claim is groundless. First, A16

[6]Plaintiff Lovgren asserts a claim under the Freedom of Information Act, but the basis for that claim cannot be discerned from his briefing. There is no evidence of a FOIA request or that he was denied access to any documents.

does not deprive plaintiffs of all economically beneficial use of their fishing gear. See, e.g., Franklin Mem'l Hosp. v. Harvey, 575 F.3d 121, 126 (1st Cir. 2009). It is simply the latest in a long line of rules and regulations that alter the amount of fish that a permit holder can catch. Second, as already discussed, there were numerous public meetings, committees, and a notice and comment period as part of the A1 6 process. Plaintiff Lovgren was, in fact, a member of one of those committees, the "Groundfish Advisory Panel." See, e.g., AR 65.

Conclusion

The New Bedford Plaintiffs' motion for summary judgment (Docket # 56) is DENIED. Plaintiff Lovgren's motion for summary judgment (Docket # 61) is DENIED. Defendant Conservation Law Foundation's motion for summary judgment (Docket # 73) is ALLOWED. The Agency's motion for summary judgment (Docket # 75) is ALLOWED. The New Bedford Plaintiffs' motion to strike (Docket # 99) is DENIED. The New Bedford motion for leave to file a supplemental complaint (Docket # 108) is DENIED.[7]

June 30, 2011
DATE

/s/Rya W. Zobel
RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

[7]Plaintiffs seek to add Framework 45 to this litigation. 76 Fed. Reg. 23042 (Apr. 25, 2011). Framework 45 does not alter the A1 6 provisions that are at the core of this dispute and render the litigation moot, and inclusion would cause significant delay. A new administrative record would have to be prepared, followed by new rounds of briefing, all subject to risk of further delay if Framework 46 is published.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CITY OF NEW BEDFORD ET AL
Plaintiff

V.

CR ACTION

NO. 1 0CV1 0789-RWZ

HONORABLE GARY LOCKE ET AL
Defendants

JUDGMENT

ZOBEL, D. J.

In accordance with the ORDER entered on 6/30/11; Judgment is entered for DEFENDANTS.

By the Court,

7/1/11 — **s/ Lisa A. Urso**
Date — **Deputy Clerk**

Calendar No. 389

109TH CONGRESS
2d Session

SENATE

REPORT
109–229

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT REAUTHORIZATION ACT OF 2005

APRIL 4, 2006.---Ordered to be printed

Mr. STEVENS, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

[To accompany S. 2012]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2012) to authorize appropriations to the Secretary of Commerce for the Magnuson-Stevens Fishery Conservation and Management Act for fiscal years 2006 through 2012, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 2012 is to reauthorize the Magnuson-Stevens Fishery and Conservation and Management Act (16 U.S.C. 1801 et seq.) (Magnuson-Stevens Act). In particular, S. 2012 would amend the Magnuson-Stevens Act to: (1) improve the regional fishery management council decision-making process, including strengthening the role science plays in management decisions, (2) provide consistency in the environmental review process, (3) establish national criteria for quota-based programs (limited access privilege programs), (4) strengthen fisheries enforcement, (5) improve the sustainability of fishing practices, and (6) strengthen compliance authorities for international fisheries management. S. 2012 would authorize appropriations of $328 million for fiscal year (FY) 2006 and such sums as necessary for FYs 2007 through 2012 to carry out the purposes of the Magnuson-Stevens Act. S. 2012 also contains provisions to combat illegal, unreported, and unregulated fishing and other unsustainable high seas fishing activities, and the bill would reauthorize and amend several other relevant fishery

statutes,and it contains implementing legislation for two inter-national fisheries treaties.

BACKGROUND AND NEEDS

The exclusive ocean jurisdiction of the United States is larger than its combined land mass, and the fishery resources managed in this vast marine environment are an important national asset. At the end of 2004, our nation's commercial fisheries were valued at more than $31.6 billion, and saltwater recreational fishing generated an additional $30.5 billion in sales. In that year, the United States landed over 9.6 billion pounds of fish and shellfish. According to the United Nations Food and Agriculture Organization, Americans rank as the third largest consumer of seafood in the world. In 2004, the United States consumed 4.8 billion pounds of seafood, up to 16.6 pounds per person annually, and generated $61.9 billion in consumer expenditures. While the U.S. is one of the world's largest seafood exporters ($3.7 billion in 2004), the nation imports over 80 percent of domestically consumed seafood. Currently, the largest offshore fishery in terms of volume landed is walleye pollock, with 3.4 billion pounds in 2004. By value, the leading U.S. fisheries in 2004 were: crab, at $447.9 million; shrimp, at $425.6 million; lobster, at $344.1 million; and scallops, at $322.1 million.

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

The enactment of the Fishery Conservation and Management Act of 1976 (P.L. 94–265) ushered in a new era of marine fishery management for the United States by establishing a national framework for conserving and managing marine fisheries within a 200-mile wide zone contiguous to the United States. Authority to develop and recommend management measures in specific regions was divided among eight regional fishery management councils (Councils). The 1996 Sustainable Fisheries Act (SFA) (P.L. 104– 297) substantially amended the legislation, which was renamed the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), to improve conservation and management, and assist fishing communities in adapting to the ensuing changes. The authorization of appropriations for SFA expired in 1999.

The Councils established under the Magnuson-Stevens Act are the New England Council, Mid-Atlantic Council, South Atlantic Council, Caribbean Council, Gulf of Mexico Council, Pacific Council, North Pacific Council, and Western Pacific Council. Each Council is comprised of industry, recreational, governmental, and some non-affiliated representatives (e.g., scientists) and each has authority over the fisheries seaward of the States comprising the region for which it has responsibility. The voting members of each Council include the regional fisheries director of the National Oceanic and Atmospheric Administration (NOAA), the chief fishery official from each State, and between four and twelve individuals with fishery expertise. The primary responsibility of each Council is to develop fishery management plans (FMPs) for important fishery resources. Each plan must be consistent with the ten national standards established under the Magnuson-Stevens Act, including a require-

ment that the plan prevent overfishing. An environmental assessment or impact statement is prepared for every FMP, which is then subject to public hearings.

The Secretary of Commerce (Secretary), through NOAA's National Marine Fisheries Service (NMFS), administers the Magnuson-Stevens Act and reviews, approves (or disapproves), and implements each FMP prepared by a Council. The Secretary must report annually on the health of marine fisheries and identify fisheries that either are overfished, or approaching an overfished condition. For fisheries identified as either overfished, or approaching an overfished condition, the appropriate Council is given one year to develop a plan to stop overfishing and rebuild the fishery, and the Secretary is required to intervene if either the Council fails to act or a Council-prepared plan is inconsistent with the national standards. While a rebuilding plan is being formulated, the Council and Secretary can impose interim or emergency restrictions to reduce overfishing. In addition, the Secretary is responsible for the development of plans for wide-ranging Atlantic fish species like tuna and swordfish, also known as "highly migratory species." Fisheries law enforcement is the joint responsibility of the Secretary and the Secretary of the department in which the Coast Guard is operating.

RECOMMENDATIONS OF THE U.S. COMMISSION ON OCEAN POLICY

The U.S. Commission on Ocean Policy (U.S. Ocean Commission), established pursuant to the Oceans Act of 2000 (P.L. 106–256), submitted its final report to Congress in September 2004. This comprehensive evaluation of U.S. ocean policy, the first in over 30 years, provided important recommendations for the reauthorization of the Magnuson-Stevens Act. While the Commission found that the existing Federal system for managing the nation's fisheries provided a solid foundation, it suggested a number of improvements. The following major recommendations of the Commission for the reauthorization of the Magnuson-Stevens Act were a catalyst for moving the legislation forward and were incorporated in S. 2012:

- Require the Councils to make management decisions based on the findings of their scientific and statistical committees (SSCs).
- Require nominees to the SSCs to be individuals with strong technical credentials and experience, selected from Federal, State, or academia.
- Require each Council to set harvest limits at or below the allowable biological catch determined by its SSC.
- Develop a process for independent peer review of scientific information provided by the SSCs to the Councils.
- Require all saltwater fishermen to obtain licenses to better assess the impacts that recreational fishing has on fisheries, and improve collection of data.
- Require newly appointed Council members to complete a training course within six months of their appointment covering a variety of topics relevant to preparing and better understanding fishery management.
- Affirm that fish managers can use dedicated access privileges (e.g., limited access privilege programs), including community quotas, cooperatives, and geographically based programs.

- Provide national guidelines for dedicated access privileges that allow for regional flexibility in implementation and consider the biological, social, and economic goals of the plan; provide for periodic review; include measures to prevent excessive share consolidation; and be adopted only after adequate public discussion and consultation with all affected stakeholders.
- Take steps to reduce the overcapitalization of fisheries.
- Expand NMFS' use of joint enforcement agreements to implement cooperative fisheries enforcement programs with State agencies.
- Move the management of fisheries towards an ecosystem approach, considering the health of non-commercial resources, and non-fishing impacts on fish stocks, such as pollution.
- Pursue, enforce, and implement international fishing agreements.
- Continue to press for inclusion of environmental objectives as legitimate elements of trade policy, which can play an important role in marine conservation.

Many of these recommendations were supported by the Department of Commerce, which either began implementation or included them in its proposed reauthorization legislation. Even where the recommendations could be achieved under existing Magnuson-Stevens Act authority, such as ecosystem considerations and joint enforcement agreements, the Committee has included language in S. 2012 to signal its support for their continued implementation. Explanations of these provisions appear below and in the section-by- section description of the bill.

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SUMMARY OF PROVISIONS

S. 2012 includes provisions to improve the effectiveness of the Magnuson-Stevens Act and strengthen fishery conservation and management both domestically and internationally. Some of the more substantive changes contained in S. 2012 include: (1) a new requirement for Councils to establish an annual catch limit capped at optimal yield (OY) for each of its managed fisheries, and to ensure any overages are deducted from the following year's annual limit, (2) a provision to strengthen the process for SSCs to provide scientific advice to Councils, (3) the development of a environmental review process that integrates and conforms the environmental impact assessment requirements of both the Magnuson-Stevens Act and the National Environmental Policy Act (NEPA) into one consistent and predictable review process for fishery management, (4) national criteria for quota programs (known as "limited access privilege programs"), including quota programs for fishing communities and RFAs, (5) a program to develop and engineer new technological devices to reduce bycatch and mortality associated with bycatch, (6) incentives for increased U.S. ownership of shore- side fishery-related infrastructure, and (7) strengthened controls on illegal, unreported, and unregulated fishing that also would require other nations to provide comparable protections to populations of living marine resources at risk from high seas fishing activities.

Several provisions in S. 2012 received considerable attention and generated important discussion over the last year and merit additional comment below.

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ernment agency. Second, as noted above, section 104 of the bill would mandate the annual catch limit be set at or below the OY of the fishery, based on the best available scientific information, and section 103 would direct the Councils to consult with its SSCs, or other appropriate scientific body, in setting such catch limits. Finally, sections 201 and 204 contain provisions intended to improve scientific and economic data collection in both commercial and recreational fisheries, including through cooperative research.

COUNCIL PROCESS REFORMS

The bill includes provisions based on both the Department of Commerce bill and expert reports that respond to calls for improving the efficiency, integrity, and expertise of the Council process. Section 103 of the bill would establish a Council training program open to both new and existing Council members designed to prepare members for complying with the legal, scientific, economic, and conflict of interest requirements applicable to the fishery management process. The bill also strengthens and clarifies the Magnuson-Stevens Act's conflict of interest and recusal requirements to ensure that all potential financial conflicts of interest are disclosed and made easily accessible for public review.

Sections 103 and 107 of the bill incorporate provisions designed to improve the speed and uniformity of decision-making. Section 103 would authorize the establishment of a Coordinating Committee comprised of Council chairs, vice chairs, and executive directors as a forum to discuss issues relevant to all Councils. In addition, section 107 would direct the Secretary, with public participation and in consultation with the Council on Environmental Quality (CEQ) and the Councils, to develop one uniform, fishery management-specific environmental review process that conforms the National Environmental Policy Act (NEPA) review, analysis, and public input schedules to the timelines appropriate for fishery management decisions under the Magnuson-Stevens Act. The intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation, but to establish one consistent, timely, and predictable regulatory process for fishery management decisions. The Committee understands that it is not uncommon for Councils and NMFS to spend several years developing and reviewing NEPA analyses for FMPs. The Committee intends section 107 to streamline this environmental review process in the context of fishery management.

NATIONAL GUIDELINES FOR LIMITED ACCESS PRIVILEGE PROGRAMS

Section 106 of the bill would establish national guidelines for limited access privilege programs (LAPPs) for the harvesting of fish. These include individual fishing quotas (IFQs), but are expanded to allow allocation of harvesting privileges to fishing communities and creation of voluntary regional fishery associations (RFAs), in order to ensure inclusion of small vessel or entry-level participants, communities, and affected non-harvesters, such as processors, in any plan to rationalize a fishery. Only fisheries that have been operating under a limited access system for at least one year would be eligible for consideration for a LAPP. As for any FMP, LAPPs would be developed by Councils under national cri

teria, and subject to Secretarial approval, an approach that balances the benefits of regional flexibility with the need for a national policy. The bill would provide for a five-year administrative review of each program's compliance with the goals of the program and the Magnuson-Stevens Act.

The Committee incorporated criteria in S. 2012 that would allow Councils to balance many of the concerns fishermen, crew, communities, conservation groups, and other interests have had over the potential impacts of quota or rationalization programs. Many of these issues were highlighted in the 1999 report of the National Research Council, as well as in subsequent Committee hearings and expert reports, such as the report of the U.S. Ocean Commission. These include 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.

The bill would address concerns raised by harvesters, processors, crew, communities, and related businesses about impacts of harvester quota programs in a region or community, including quota consolidation or transfer out of the region, by allowing them to participate in RFAs. Coastal communities dependent on fishery resources crossing their docks and the associated taxes and jobs from related shoreside businesses, have raised concerns that quota programs reward the "actual participants" but ignore the community and next-generation fishermen who were not part of the initial allocation and could be forever priced out of the fishery. RFAs are intended to mitigate such impacts by providing a means of designation or "linking" harvesting LAPPs to a region or a community, which will ensure continued participation of harvesters, processors, and other community interests dependent on the fishery. Processors would be eligible to hold LAPPs to harvest fish to the same extent as permitted under current law, as determined in the Council allocation process. The bill also would provide communities with the opportunity to be issued and hold LAPP quota.

IMPROVING FISHERIES ENFORCEMENT

In response to recommendations by both the U.S. Ocean Commission and the Department of Commerce, the bill contains provisions to strengthen enforcement authorities and increase penalties for violations, consistent with authorities provided under other legislation. In addition, the bill would authorize the establishment of joint enforcement agreements under which the Secretary would deputize and provide Federal funding for State law enforcement officials to carry out any of the Secretary's marine law enforcement responsibilities, including those contained within the Magnuson-Stevens Act.

IMPROVING SUSTAINABILITY OF FISHING PRACTICES

While there has been progress in reducing overfishing after enactment of the SFA, bycatch reduction remains an important goal of the Magnuson-Stevens Act and one that could benefit from greater gear engineering research and deployment. Section 117 of the bill would establish a bycatch reduction engineering program

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LEGISLATIVE HISTORY

The Magnuson-Stevens Act was last reauthorized in 1996 (Public Law 104–297) providing authorization of appropriations through FY 1999. The Committee has held numerous hearings on the reauthorization of the Magnuson-Stevens Act since its authorization expired. The provisions contained in S. 2012 reflect some of those earlier discussions. In addition, Chairman Stevens and Co-Chairman Inouye held several listening sessions with a variety of constituents during 2005 to provide Committee members and staff an informal forum for open dialogue on the many complex, and sometimes divisive, issues facing this process.

On February 17, 2005, a listening session for Committee members and staff was held with the Chairmen and Executive Directors of all eight Councils, focusing on issues such as reconciling the similar requirements of NEPA and the Magnuson-Stevens Act in development of FMPs, and ongoing Council work on ecosystem- based fishery management. A listening session held with national environmental groups on April 12, 2005, provided an important discussion on Council reforms, the need to end overfishing and rebuild stocks, and the growing problem of illegal, unreported and unregulated fishing on the high seas. On May 19, 2005, commercial fishing industry groups provided recommendations at a listening session that focused on standards for quota programs that allow for sustained participation of coastal communities in the fishery and the ability for the fishing industry to grow in the global seafood market.

On August 4, 2005, the Chairman and Co-Chairman released a discussion draft of S. 2012 for comment. This draft was based on the Department of Commerce's reauthorization proposal, listening sessions, and the recommendations contained in the following expert reports and documents: the Reports of the U.S. Commission on Ocean Policy and Pew Ocean Commission, consensus positions of the Council chairs, the *Managing Our Fisheries II Conference Report* (2004), and *Sharing The Fish: Toward a National Policy on Individual Fishing Quotas* (National Research Council, 1999). Numerous groups provided specific expertise for the development of the bill, including the Department of Commerce, the Councils, State fishery managers, industry (fishermen, processors, and suppliers), environmental groups, sportsmen and recreational groups, and members of the U.S. Commission on Ocean Policy.

During the month of August, Committee staff met with all sec
tors of the fishing industry, States, conservation and other interest
groups, concerned individuals, the Department of Commerce, and

Members' staff to discuss any potential questions or issues with the draft bill or recommendations on its improvement. Over 700 comments were received, read, categorized, and evaluated by Committee staff for consideration by Senators Stevens and Inouye for inclusion in the introduced bill.

S. 2012 was introduced in the Senate on November 15, 2005, by Senators Stevens and Inouye and was cosponsored at that time by Senators Snowe, Cantwell, Vitter, and Boxer. The bill was referred to the Senate Committee on Commerce, Science, and Transportation. On November 16, 2005, the Committee held a full Committee hearing on S. 2012, which received broad support from Committee members, with eleven cosponsors representing all the coastal regions of the United States. On December 15, 2005, the Committee considered the bill in an open Executive Session. Senator Stevens offered a substitute amendment to S. 2012 at the Executive Session, it was agreed to by voice vote without objection, and the Committee ordered S. 2012 reported subject to amendment. No other amendments were offered.

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SECTION-BY-SECTION ANALYSIS

Section 1. Short title and table of contents.

This section sets forth the short title of the bill, the "Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2005," and the table of contents of the bill.

Section 2. Amendment of Magnuson-Stevens Fishery Conservation and Management Act.

This section provides that any amendments or repeals set forth in the bill are to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, 16 U.S.C. 1801 et seq.), unless otherwise indicated.

Section 3. Changes in findings and definitions.

This section would make a number changes to the findings and definitions set forth in sections 2 and 3 of the Magnuson-Stevens Act respectively. The section also would make technical and conforming changes to reflect the use of the term "limited access privilege" in place of "individual fishing quota" in various sections of the Magnuson-Stevens Act, as revised by the draft.

In addition, the section would insert a new finding in section 2(a) of the Magnuson-Stevens Act, acknowledging that a number of Councils have demonstrated progress in integrating ecosystem considerations in fisheries management under existing authorities in the Magnuson-Stevens Act.

This section also would make the following changes to definitions in section 3 of the Magnuson-Stevens Act:

- Defines the term "confidential information" to mean any information submitted to the Secretary that could cause competitive harm if disclosed.
- Defines the term "regional fishery association" (RFA) as an association formed for mutual benefit of members for social or economic benefit in a region or subregion, and, is comprised of persons engaged in fish harvesting or processing in that region or subregion or who own or operate businesses substantially dependent on a fishery.
- Defines the term "import" as it applies to fisheries products or goods and specifies that the definition does not apply to fish caught within the U.S. EEZ or by a U.S. vessel.
- Defines the term "limited access privilege" as a permit issued for the harvesting in a limited access system authorized under section 107 of the bill. The definition mirrors the existing definition of individual fishing quota, but does not include language from that definition specifying that the quantity of fish involved must be expressed as a percentage of the allowable catch, which is intended to indicate that quantities may be expressed by volume alone. The provision specifies that IFQs are included in the definition but that community development quotas (CDQs) are not.

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TITLE I—CONSERVATION AND MANAGEMENT

Section 101. Cumulative impacts.

Under National Standard 8, section 30 1(a)(8) of the Magnuson-Stevens Act, management measures must take into account the importance of fishery resources to fishing communities. This section would amend National Standard 8 to require the evaluation to utilize the best data and methodology available. This clarifies that the Committee intends that the "best scientific information available" requirement of National Standard 2 should extend to economic and social information evaluated under National Standard 8. This requirement is not limited to evaluation of economic and social impacts under National Standard 8, but would apply to all such evaluations under the Magnuson-Stevens Act. The provision also would amend section 303(a)(9) to require the cumulative economic and social impacts of conservation and management measures be included in any fishery impact assessment submitted as part of a FMP.

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CONSIDERATION OF INTERSTATE DIFFERENCES.—Section 105(3) would amend section 303(b)(5) of the Magnuson-Stevens Act to authorize a Council to consider differences within a fishery but between various States and ports, including distance to fishing grounds and the proximity to time and area closures, in their FMPs.

LIMITED ACCESS SYSTEMS.—Section 105(4) would amend section 303(b)(6) to clarify that, in addition to the current criteria for establishing limited access systems, a Council must also consider the conservation requirements of the Magnuson-Stevens Act and the fair and equitable distribution of access privileges. While these criteria are already contained in two of the National Standards, the Committee's intent is to highlight their importance in the context of other listed considerations.

ECONOMIC DATA COLLECTION.—Sections 105(5)-(7) would make technical changes in several subsections of 303(b) to allow for the collection of economic data from fish processors.

NEPA COMPLIANCE.—The bill would create a new subsection 303(b)(12) to allow an FMP to set forth a process for compliance with NEPA established pursuant to section 107 of the bill.

ECOLOGICAL FACTORS.—The bill would create a new subsection 303(b)(13) to allow an FMP to include management measures that consider a variety of ecological factors affecting fishery populations, including the conservation of target and non-target species. This provision is intended to encourage Councils to continue to include ecosystem considerations in FMPs.

Section 106. Limited Access Privilege Programs.

This section would create a new Magnuson-Stevens Act section 303A to authorize Councils to create a Limited Access Privilege Program (LAPP) for the harvesting of fish within a given fishery. A LAPP, defined in section 3 of the bill, includes individual fishing quota (IFQ) programs as well as other programs in which a permit is issued to a specific person or authorized entity that allows harvest of a specified unit or units of the TAC of a fishery. All LAPPs would be subject to Secretarial approval through the FMP process and could only be developed for a fishery already being run under a limited access system.

The bill also contains specific provisions that would authorize the issuance of quota to fishing communities and for the creation of regional fishery associations (RFAs). These provisions were created in response to the concerns of communities and shoreside businesses around the country over the economic harm that could result from consolidation of quota in IFQs and similar programs. Many of these concerns were reflected in hearings and expert reports, including the 1999 National Research Council report required under the SFA. While some groups argued that allocating specific shares of processing privileges ("processor shares") would provide economic stability to communities, other groups believed that no special status should be granted to processors. The Committee chose to take a broader, community-based view and allow allocation of harvesting privileges to communities, and inclusion of processors and other shore-based businesses in RFAs with LAPP holders which would allow for the designation or linkage of LAPPs to a region or community.

In particular, the Committee recognizes that many small, poor coastal communities lack the resources to enter fisheries that may be subject to future LAPPs, and they have often been overlooked in allocation decisions. The Committee cautions the Councils not to use the requirements of section 106 to prevent these communities from being fully included in allocation of the fishery resource.

In addition, LAPPs are not intended to be used as a mechanism to reduce harvests through refinement of catch quota by those who are not fishery participants. Total quota available for harvest is established separately under the conservation requirements of the Act. Therefore, this section restricts the holding, acquisition, use, or issuance of LAPPs only to persons who substantially participate in a fishery.

The new section 303A would set forth the following provisions concerning LAPPs:

NO CREATION OF RIGHT, TITLE, OR INTEREST.—The new section 303A(b) would re-affirm existing law relating to IFQs that a LAPP is a permit that may be revoked or limited at any time without right to compensation. This permit would be considered a grant of permission to participate in the fishery and, as such, would not grant the holder any right to a fish before it was harvested. As a permit, the privilege could also be revoked or modified for any failure to comply with the program or if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen.

REQUIREMENTS FOR LIMITED ACCESS PRIVILEGES.—New section 303A(c)(1) lists the criteria that any proposed LAPP must meet. These requirements specify that any LAPP must:

(A) Assist in rebuilding an overfished fishery;

(B) Reduce capacity in a fishery that is over capacity;

(C) Promote fishing safety and fishery conservation and management;

(D) Prohibit any person other than a U.S. citizen, corporation, partnership, or other entity established under the laws of the United States or a State, or resident alien that meets the requisite participation and eligibility requirements, from holding a harvesting privilege;

(E) Require that processing of fish harvested under a LAPP be done within U.S. jurisdiction, i.e. in U.S. territory or by vessels of the United States. New section 303A(c)(2) would allow a waiver of this requirement for fisheries that have historically processed their catch outside the United States if the United States has a seafood safety equivalency agreement with the country where processing is to occur;

(F) Specify the goals of the program;

(G) Be subject to continual monitoring with a formal review of the program every 5 years which shall include any modifications needed to ensure the program meets its goals;

(H) Include an effective system for monitoring, management, and enforcement, including the use of observers of electronic monitoring systems;

(I) Include an appeals process for administrative review of Secretarial determinations;

(J) Provide for a separate review process, established by the Secretary in consultation with the Department of Justice and

Federal Trade Commission, to determine if any acts of illegal collusion, anti-competition, antitrust, or price-fixing occurs among members of RFAs established under the program; and

(K) Provide for the revocation of privilege held by anyone who violates U.S. antitrust laws.

FISHING COMMUNITIES.—New section 303A(c)(3) would establish that fishing communities may be deemed eligible to receive and hold harvest privileges if they meet criteria developed by the relevant Council. According to new section 303A(c)(3)(A)(i), the community would have to: (1) be located within the management area of the relevant Council, (2) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register, (3) consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the relevant Council's jurisdiction, and (4) develop and submit a community sustainability plan to the Council and Secretary. This plan must address the social and economic development needs of the community, including those who have not historically had access to resources to participate in the fishery. Failure to adhere to this plan will result in the loss of any privilege.

Participation criteria for a Council to consider are: (1) traditional fishing or processing practices in, and dependence on, the fishery, (2) the cultural and social framework of the fishing community, (3) economic barriers to access to the fishery, (4) the existence and severity of projected socio-economic impacts associated with a LAPP on participants in the fishery and related businesses, (5) the expected effectiveness, transparency and equitability of the community sustainability plan, and (6) the potential for improving economic conditions in remote coastal communities that lack the resources to participate in fishery related activities. The Committee intends the Councils to consider as "traditional" those uses that pre-date contemporary commercial fishing in smaller, isolated communities that can demonstrate historic dependence on combination fisheries or participation in the fishery during years that may not fall within the qualifying period for individual LAPPs.

REGIONAL FISHERY ASSOCIATIONS.—RFAs provide for persons in the limited access fisheries in a specific region or subregion to make voluntary arrangements for their own mutual interest, and to promote the economic and social well-being of the region. The Committee intends that participation in a particular RFA will be limited to persons substantially participating in or substantially dependent on one or more fisheries subject to a LAPP within the RFA's region or subregion of concern. Determinations of substantial participation and substantial dependence shall be established by the Secretary upon recommendation by the Council. In an RFA, quota would be allocated to the harvester but classified for use in a specific region in order to maintain a relative balance between the harvesting sector receiving the quota and the communities, processors, and other fishery-related businesses that have become dependent on the resource entering their port. Establishment of such RFAs would allow for mitigation of any impacts of a LAPP on a variety of community and fishery-related business interests, without allocation to individual companies of an exclusive right to process fish. The bill would also allow a Council to consider regional or port-specific landing requirements to maintain a relative

balance of the commercial industry sectors, such that fishermen, processors, and communities could participate in and benefit from the rationalized fishery.

New section 303A(c)(4) would provide that an RFA may participate in a LAPP if it meets certain eligibility and participation criteria. To be eligible, an RFA must: (1) be located within the management area of the relevant Council, (2) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register, (3) be voluntary organizations with bylaws and procedures and consisting of members who conduct commercial or recreational fishing, fish processing, or support businesses, and (4) develop and submit an RFA sustainability plan to the relevant Council and Secretary. Failure to adhere to this plan would result in the loss of harvest privileges.

RFA participation criteria set by a Council must consider: (1) traditional fishing or processing practices, (2) the cultural and social framework relevant to the fishery, (3) economic barriers to access to the fishery, (4) the existence and severity of projected socio-economic impacts associated with a LAPP on participants in the fishery and its related businesses, (5) the administrative and fiduciary soundness of the RFA, and (6) the expected effectiveness, transparency, and equitability of the RFA's sustainability plan.

ALLOCATION.—New section 303A(c)(5) would require LAPPs to provide a fair and equitable distribution of the initial allocation of catch in a way that:

(A) Considers catch history, employment, investment, dependence on the fishery, and historic participation of fishing communities;

(B) Considers the basic social and cultural framework of the fishery, and promotes the sustained participation of small, owner-operated fishing vessels and communities that depend on the fisheries, which could include regional landing requirements;

(C) Assists entry level and small scale members of the fishing community;

(D) Limits the maximum share of the access privileges able to be held, acquired, or used by a qualified entity; and

(E) Authorizes all those who substantially participate in the fishery to hold a limited access privilege.

PROGRAM INITIATION.—New section 303A(c)(6) would provide that any Council may establish a LAPP in an FMP or FMP amendment on its own initiative or in response to a petition certified by the Secretary and signed by a group of fishermen representing a majority of the permit holders or allocation within a multi-species fishery. Section 303A(c)(6)(B) provides that for a petition initiated in the Gulf of Mexico region for a fishery using multi-species permits, only those fishermen who had substantially fished the species named in the petition would be eligible to sign.

Subsection 303A(c)(6)(D) would specify that in the New England and Gulf of Mexico regions any IFQ program would also be subject to a final referendum in order to be approved. Approval in New England would require a 2/3 majority of voting permit holders and approval in the Gulf of Mexico would require a majority of eligible permit holders. Only fishermen who have fished the species in question will be eligible to vote in a Gulf of Mexico referendum on

an IFQ in a multi-species fishery. With respect to such Gulf of Mexico programs, the majority vote may be measured by weighting votes considering the quantity of fish authorized to be harvested under the permit (e.g., 200 pounds per day or 2,000 pounds per day). The Gulf of Mexico Red Snapper Fishery would be exempted from these requirements. The Secretary would be responsible for the conduct of the referendum and any referenda would not be subject to the requirements of the Paperwork Reduction Act (Chapter 33 of 44 U.S.C.).

TRANSFERABILITY.—New subsection 303A(c)(7) would require a Council to establish a policy on the transferability of privileges and a program to monitor such transfers that is consistent with the policies that the Council established during the allocation process, including with respect to continued participation of small vessel owner-operators and communities.

PREPARATION AND IMPLEMENTATION OF SECRETARIAL PLANS.—New subsection 303A(c)(8) would state that any FMP prepared by the Secretary for Atlantic highly migratory species under section 304(g) of the Magnuson-Stevens Act would be required to meet the same requirements for any potential LAPPs.

ANTITRUST SAVINGS CLAUSE.—New subsection 303A(c)(9) would provide a savings clause stating that nothing in the Magnuson-Stevens Act shall waive any U.S. antitrust laws as defined in the first section of the Clayton Act or section 5 of the Federal Trade Commission Act.

AUCTION AND OTHER PROGRAMS.—New section 303A(d) would authorize a Council to use an auction or other system to collect royalties from the initial distribution of privilege in a LAPP if: (1) the system or program is conducted in a manner consistent with the requirements, and (2) revenues from the distribution system are deposited in the limited access system administration fund (established in section 305(h)(5)(b) of the Magnuson-Stevens Act). Funds from the limited access system administration fund would be made available through annual appropriations.

COST RECOVERY.—New section 303A(e) would require a Council that develops a LAPP to establish a methodology for assessing the management, data collection and analysis, and enforcement programs, and provide for a schedule of fees to support these activities. Section 106(b) amends section 304(d)(2)(A) of the Magnuson-Stevens Act to establish technical amendments allowing the collection of fees for this purpose.

LIMITED DURATION.—New section 303A(f) would authorize a Council to establish limits on the duration of any LAPP allocation and provide a mechanism for participants and new entrants to require or re-acquire allocations.

LIMITED ACCESS PRIVILEGE ASSISTED PURCHASE PROGRAM.—New section 303A(g) would retain language of existing section 303(d)(4), which authorizes Councils to allow 25 percent of fees collected from a fishery to be used to aid entry-level and small boat fishermen in purchasing shares. Such a program would be developed under a Council's standard rules and procedures and be subject to public comment. The Secretary would be prohibited from approving a plan that has not met all the other requirements for LAPPs.

EFFECT ON CERTAIN EXISTING SHARES AND PROGRAMS.—New section 303A(h) would ensure that section 303A would not require a

reallocation of quota share from any limited access system, including sector allocations, submitted to the Secretary and approved by the Council prior to the date of enactment of this bill.

However, the LAPP provisions of S. 2012 adopt the recommendations of the U.S. Ocean Commission, and the Committee expects that quota programs now being developed by the Councils will incorporate these recommendations even before enactment of this legislation. The Committee recognizes that Councils must move forward on programs under development and does not intend to cause unwarranted delays by requiring mature plans to be re-drafted wholesale. But Councils should attempt to ensure plans adhere to the spirit of the criteria recommended by the U.S. Ocean Commission and those contained in the bill in order to improve the consistency and fairness of future programs.

FEES.—Section 106(b) would amend section 304(d)(2)(A) of the Magnuson-Stevens Act to authorize the Secretary to collect fees from any LAPP to cover the costs of the data collection, in addition to fees for enforcement and management, already permitted under current law.

INVESTMENT IN UNITED STATES SEAFOOD PROCESSING FACILITIES.—Section 106(c) would direct the Secretary to work with the Small Business Administration and other Federal Agencies to develop incentives for U.S. investment in U.S. seafood processing facilities for fisheries that lack U.S. based facilities.

APPLICATION WITH AMERICAN FISHERIES ACT.—Subsection 106(e) of the bill contains a savings clause, stating that any changes in law contained in section 106 would not supersede the requirements of the American Fisheries Act (46 U.S.C. 12102 note; 16 U.S.C. 1851 note et alia).

Section 107. Environmental review process.

This section would add a new subsection 304(i) to the Magnuson-Stevens Act requiring the Secretary, with public participation and in consultation with the Council on Environmental Quality (CEQ) and the Councils, to develop integrated procedures for compliance with NEPA. These integrated procedures would then be established as the sole environmental impact assessment for FMPs. Such a procedure would have to meet a number of criteria including: (1) conformity to timelines for review and approval of FMPs, and (2) integration of the environmental analytical procedures and public input timelines with FMP preparation and dissemination. The Secretary would be given 12 months to propose the revised procedures, allow a requisite 90 days for public comment, and promulgate final procedures 18 months after enactment of the bill.

Section 108. Emergency regulations.

This section would amend section 305(c)(3)(B) of the Magnuson-Stevens Act to extend from 180 to 186 days the period during which an emergency amendment to an FMP may remain in effect. It also permits a potential extension period of the same length. These changes would allow an emergency regulation to remain in effect for a full year.

(18) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for—

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

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(23) The term "individual fishing quota" means a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person. Such term does not include community development quotas as described in section 305(i).

* * * *

Source: Magnuson Stevens Fishery and Conservation Act As amended through January 12, 2007, May 2007 2nd Printing; downloaded from:
http://www.nmfs.noaa.gov/sfa/magact/MSA_Amended_2007%20.pdf

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(26) The term ‘limited access privilege’—

(A) means a Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person; and

(B) includes an individual fishing quota; but

(C) does not include community development quotas as described in section 305(i).

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(27) The term ‘limited access system’ means a system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.

* * * *

(30) The term "national standards" means the national standards for fishery conservation and management set forth in section 301.

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(36) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

* * * *

TITLE III—NATIONAL FISHERY MANAGEMENT PROGRAM

SEC. 301. NATIONAL STANDARDS FOR FISHERY CONSERVATION AND MANAGEMENT 16 U.S.C. 1851

(a) IN GENERAL.—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

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(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation 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.

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(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.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

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(8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

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(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

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(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

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(b) GUIDELINES.—The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.

SEC. 302. REGIONAL FISHERY MANAGEMENT COUNCILS 16 U.S.C. 1852

97-453, 101-627, 104-297

(a) ESTABLISHMENT.—

(1) There shall be established, within 120 days after the date of the enactment of this Act, eight Regional Fishery Management Councils, as follows:

(A) NEW ENGLAND COUNCIL.—The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in paragraph (3)). The New England Council shall have 17 voting members, including 11 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(B) MID-ATLANTIC COUNCIL.—The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except North Carolina, and as provided in paragraph (3)). The Mid-Atlantic Council shall have 21 voting members, including 13 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(C) SOUTH ATLANTIC COUNCIL.—The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in paragraph (3)). The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

P.L. 109-479, sec. 104(b), MSA § 303 note **16 U.S.C. 1853 note**

EFFECTIVE DATES; APPLICATION TO CERTAIN SPECIES.—The amendment made by subsection (a)(10)[16]—

(1) shall, unless otherwise provided for under an international agreement in which the United States participates, take effect—

(A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and

(B) in fishing year 2011 for all other fisheries; and

(2) shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species; and

(3) shall not limit or otherwise affect the requirements of section 301 (a)(1) or 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 185 1(a)(1) or 1854(e), respectively).

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SEC. 303A. LIMITED ACCESS PRIVILEGE PROGRAMS. **16 U.S.C. 1853a**

(a) IN GENERAL.—After the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

(b) NO CREATION OF RIGHT, TITLE, OR INTEREST.—Limited access privilege, quota share, or other limited access system authorization established, implemented, or managed under this Act—

(1) shall be considered a permit for the purposes of sections 307, 308, and 309;

(2) may be revoked, limited, or modified at any time in accordance with this Act, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen;

(3) shall not confer any right of compensation to the holder of such limited access privilege, quota share, or other such limited access system authorization if it is revoked, limited, or modified;

(4) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder; and

(5) shall be considered a grant of permission to the holder of the limited access privilege or quota share to engage in activities permitted by such limited access privilege or quota share.

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(6) [16] Section 104(a)(10) of P.L. 109-479 added section 303(a)(15).

(c) REQUIREMENTS FOR LIMITED ACCESS PRIVILEGES.—

(1) IN GENERAL.—Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall—

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote—

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this Act, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

(2) WAIVER.—The Secretary may waive the requirement of paragraph (1)(E) if the Secretary determines that—

(A) the fishery has historically processed the fish outside of the United States; and

(B) the United States has a seafood safety equivalency agreement with the country where processing will occur.

(3) FISHING COMMUNITIES.—

(A) IN GENERAL.—

(i) ELIGIBILITY.—To be eligible to participate in a limited access privilege program to harvest fish, a fishing community shall—

(I) be located within the management area of the relevant Council;

(II) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;

(III)consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council's management area; and

(IV) develop and submit a community sustainability plan to the Council and the Secretary that demonstrates how the plan will address the social and economic development needs of coastal communities, including those that have not historically had the resources to participate in the fishery, for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(ii) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section for any person who fails to comply with the requirements of the community sustainability plan. Any limited access privileges denied or revoked under this section may be reallocated to other eligible members of the fishing community.

(B) PARTICIPATION CRITERIA.—In developing participation criteria for eligible communities under this paragraph, a Council shall consider—

(i)traditional fishing or processing practices in, and dependence on, the fishery;

(ii)the cultural and social framework relevant to the fishery;

(iii) economic barriers to access to fishery;

(iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;

(v) the expected effectiveness, operational transparency, and equitability of the community sustainability plan; and

(vi) the potential for improving economic conditions in remote coastal communities lacking resources to participate in harvesting or processing activities in the fishery.

(4) REGIONAL FISHERY ASSOCIATIONS.—

(A) IN GENERAL.—To be eligible to participate in a limited access privilege program to harvest fish, a regional fishery association shall—

(i) be located within the management area of the relevant Council;

(ii) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;

(iii) be a voluntary association with established by-laws and operating procedures;

(iv) consist of participants in the fishery who hold quota share that are designated for use in the specific region or subregion covered by the regional fishery association, including commercial or recreational fishing, processing, fishery-dependent support businesses, or fishing communities;

(v) not be eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after the initial allocation, and may hold the annual fishing privileges of any limited access privileges it holds or the annual fishing privileges that is [sic][17] members contribute; and

(vi) develop and submit a regional fishery association plan to the Council and the Secretary for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(B) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section to any person participating in a regional fishery association who fails to comply with the requirements of the regional fishery association plan.

[17] So in original.

(C) PARTICIPATION CRITERIA.—In developing participation criteria for eligible regional fishery associations under this paragraph, a Council shall consider—

(i) traditional fishing or processing practices in, and dependence on, the fishery;

(ii) the cultural and social framework relevant to the fishery;

(iii) economic barriers to access to fishery;

(iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;

(v) the administrative and fiduciary soundness of the association; and

(vi) the expected effectiveness, operational transparency, and equitability of the fishery association plan.

(5) ALLOCATION.—In developing a limited access privilege program to harvest fish a Council or the Secretary shall—

(A) establish procedures to ensure fair and equitable initial allocations, including consideration of—

(i) current and historical harvests;

(ii) employment in the harvesting and processing sectors;

(iii) investments in, and dependence upon, the fishery; and

(iv) the current and historical participation of fishing communities;

(B) consider the basic cultural and social framework of the fishery, especially through—

(i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements; and

(ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;

(C) include measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations, including providing privileges, which may include set-asides or allocations of harvesting privileges, or economic assistance in the purchase of limited access privileges;

(D) ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by—

(i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and

(ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges; and

(E) authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons who substantially participate in the fishery, including in a specific sector of such fishery, as specified by the Council.

(6) PROGRAM INITIATION.—

(A) LIMITATION.—Except as provided in subparagraph (D), a Council may initiate a fishery management plan or amendment to establish a limited access privilege program to harvest fish on its own initiative or if the Secretary has certified an appropriate petition.

(B) PETITION.—A group of fishermen constituting more than 50 percent of the permit holders, or holding more than 50 percent of the allocation, in the fishery for which a limited access privilege program to harvest fish is sought, may submit a petition to the Secretary requesting that the relevant Council or Councils with authority over the fishery be authorized to initiate the development of the program. Any such petition shall clearly state the fishery to which the limited access privilege program would apply. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the limited access program shall be eligible to sign a petition for such a program and shall serve as the basis for determining the percentage described in the first sentence of this subparagraph.

(C) CERTIFICATION BY SECRETARY.—Upon the receipt of any such petition, the Secretary shall review all of the signatures on the petition and, if the Secretary determines that the signatures on the petition represent more than 50 percent of the permit holders, or holders of more than 50 percent of the allocation in the fishery, as described by subparagraph (B), the Secretary shall certify the petition to the appropriate Council or Councils.

(D) NEW ENGLAND AND GULF REFERENDUM.—

(i) Except as provided in clause (iii) for the Gulf of Mexico commercial red snapper fishery, the New England and Gulf Councils may not submit, and the Secretary may not approve or implement, a fishery management plan or amendment that creates an individual fishing quota program, including a Secretarial plan, unless such a system, as ultimately developed, has been approved by more than 2/3 of those voting in a referendum among eligible permit holders, or other persons described in clause (v), with respect to the New England Council, and by a majority of those voting in the referendum among eligible permit holders with respect to the Gulf Council. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum. If an individual fishing quota program fails to be approved by the requisite number of those voting, it may be revised and submitted for approval in a subsequent referendum.

(ii) The Secretary shall conduct a referendum under this subparagraph, including notifying all persons eligible to participate in the referendum and making available to them information concerning the schedule, procedures, and eligibility requirements for the referendum process and the proposed individual fishing quota program. Within 1 year after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, the Secretary shall publish guidelines and procedures to determine procedures and voting eligibility requirements for referenda and to conduct such referenda in a fair and equitable manner.

(iii) The provisions of section 407(c) of this Act shall apply in lieu of this subparagraph for an individual fishing quota program for the Gulf of Mexico commercial red snapper fishery.

(iv) Chapter 35 of title 44, United States Code, (commonly known as the Paperwork Reduction Act) does not apply to the referenda conducted under this subparagraph.

(v) The Secretary shall promulgate criteria for determining whether additional fishery participants are eligible to vote in the New England referendum described in clause (i) in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum.

(vi) In this subparagraph, the term 'individual fishing quota' does not include a sector allocation.

(7) TRANSFERABILITY.—In establishing a limited access privilege program, a Council shall—

(A) establish a policy and criteria for the transferability of limited access privileges (through sale or lease), that is consistent with the policies adopted by the Council for the fishery under paragraph (5); and

(B) establish, in coordination with the Secretary, a process for monitoring of transfers (including sales and leases) of limited access privileges.

(8) PREPARATION AND IMPLEMENTATION OF SECRETARIAL PLANS.—This subsection also applies to a plan prepared and implemented by the Secretary under section 304(c) or 304(g).

(9) ANTITRUST SAVINGS CLAUSE.—Nothing in this Act shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. For purposes of the preceding sentence, the term 'antitrust laws' has the meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.

(d) AUCTION AND OTHER PROGRAMS.—In establishing a limited access privilege program, a Council shall consider, and may provide, if appropriate, an auction system or other program to collect royalties for the initial, or any subsequent, distribution of allocations in a limited access privilege program if—

(1) the system or program is administered in such a way that the resulting distribution of limited access privilege shares meets the program requirements of this section; and

(2) revenues generated through such a royalty program are deposited in the Limited Access System Administration Fund established by section 305(h)(5)(B) and available subject to annual appropriations.

(e) COST RECOVERY.—In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 304(d)(2), for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

(f) CHARACTERISTICS.—A limited access privilege established after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 is a permit issued for a period of not more than 10 years that—

(1) will be renewed before the end of that period, unless it has been revoked, limited, or modified as provided in this subsection;

(2) will be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have failed to comply with any term of the plan identified in the plan as cause for revocation, limitation, or modification of a permit, which may include conservation requirements established under the plan;

(3) may be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have committed an act prohibited by section 307 of this Act; and

(4) may be acquired, or reacquired, by participants in the program under a mechanism established by the Council if it has been revoked, limited, or modified under paragraph (2) or (3).

(g) LIMITED ACCESS PRIVILEGE ASSISTED PURCHASE PROGRAM.—

(1) IN GENERAL.—A Council may submit, and the Secretary may approve and implement, a program which reserves up to 25 percent of any fees collected from a fishery under section 304(d)(2) to be used, pursuant to section 53706(a)(7) of title 46, United States Code, to issue obligations that aid in financing—

(A) the purchase of limited access privileges in that fishery by fishermen who fish from small vessels; and

(B) the first-time purchase of limited access privileges in that fishery by entry level fishermen.

(2) ELIGIBILITY CRITERIA.—A Council making a submission under paragraph (1) shall recommend criteria, consistent with the provisions of this Act, that a fisherman must meet to qualify for guarantees under subparagraphs (A) and (B) of paragraph (1) and the portion of funds to be allocated for guarantees under each subparagraph.

(h) EFFECT ON CERTAIN EXISTING SHARES AND PROGRAMS.—Nothing in this Act, or the amendments made by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation in effect before the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.

(i) TRANSITION RULES.—

(1) IN GENERAL.—The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, except that—

(A) the requirements of section 303(d) of this Act in effect on the day before the date of enactment of that Act shall apply to any such program;

(B) the program shall be subject to review under subsection (c)(1)(G) of this section not later than 5 years after the program implementation; and

(C) nothing in this subsection precludes a Council from incorporating criteria contained in this section into any such plans.

(2) PACIFIC GROUNDFISH PROPOSALS.—The requirements of this section, other than subparagraphs (A) and (B) of subsection (c)(1) and subparagraphs (A), (B), and (C) of paragraph (1) of this subsection, shall not apply to any proposal authorized under section 302(f) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 that is submitted within the timeframe prescribed by that section.

P.L. 109-479, sec. 106(e), MSA § 303A note **16 U.S.C. 1853a note**

APPLICATION WITH AMERICAN FISHERIES ACT.—Nothing in section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1 801 et seq.), as added by subsection (a) [P.L. 109-479], shall be construed to modify or supersede any provision of the American Fisheries Act (46 U.S.C. 12102 note; 16 U.S.C. 1851 note; et alia).

P.L. 104-297, sec. 108(i), MSA § 303 note

EXISTING QUOTA PLANS.—Nothing in this Act [P.L. 104-297] or the amendments made by this Act shall be construed to require a reallocation of individual fishing quotas under any individual fishing quota program approved by the Secretary before January 4, 1995.

SEC. 304. ACTION BY THE SECRETARY 16 U.S.C. 1854

104-297

(a) REVIEW OF PLANS.—

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall—

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall—

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify—

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(7) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (6). The Secretary must publish in the Federal Register an explanation of any substantive differences between the proposed and final rules. All final regulations must be consistent with the fishery management plan, with the national standards and other provisions of this Act, and with any other applicable law.

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(d) ESTABLISHMENT OF FEES.—

(1) The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1). The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

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(2)(A) Notwithstanding paragraph (1), the Secretary is authorized and shall collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any—

(i) limited access privilege program; and

(ii) community development quota program that allocates a percentage of the total allowable catch of a fishery to such program.

(B) Such fee shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program, and shall be collected at either the time of the landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

(C)(i) Fees collected under this paragraph shall be in addition to any other fees charged under this Act and shall be deposited in the Limited Access System Administration Fund established under section 305(h)(5)(B).

(ii) Upon application by a State, the Secretary shall transfer to such State up to 33 percent of any fee collected pursuant to subparagraph (A) under a community development quota program and deposited in the Limited Access System Administration Fund in order to reimburse such State for actual costs directly incurred in the management and enforcement of such program.

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104-297
(h) CENTRAL REGISTRY SYSTEM FOR LIMITED ACCESS SYSTEM PERMITS.—

109-479
(1) Within 6 months after the date of enactment of the Sustainable Fisheries Act, the Secretary shall establish an exclusive central registry system (which may be administered on a regional basis) for limited access system permits established under section 303(b)(6) or other Federal law, including limited access privileges, which shall provide for the registration of title to, and interests in, such permits, as well as for procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosure of interests, enforcement of judgments thereon, and related matters deemed appropriate by the Secretary. Such registry system shall—

(A) provide a mechanism for filing notice of a nonjudicial foreclosure or enforcement of a judgment by which the holder of a senior security interest acquires or conveys ownership of a permit, and in the event of a nonjudicial foreclosure, by which the interests of the holders of junior security interests are released when the permit is transferred;

(B) provide for public access to the information filed under such system, notwithstanding section 402(b); and

(C) provide such notice and other requirements of applicable law that the Secretary deems necessary for an effective registry system.

(2) The Secretary shall promulgate such regulations as may be necessary to carry out this subsection, after consulting with the Councils and providing an opportunity for public comment. The Secretary is authorized to contract with non-Federal entities to administer the central registry system.

(3) To be effective and perfected against any person except the transferor, its heirs and devisees, and persons having actual notice thereof, all security interests, and all sales and other transfers of permits described in paragraph (1), shall be registered in compliance with the regulations promulgated under paragraph (2). Such registration shall constitute the exclusive means of perfection of title to, and security interests in, such permits, except for Federal tax liens thereon, which shall be perfected exclusively in accordance with the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.). The Secretary shall notify both the buyer and seller of a permit if a lien has been filed by the Secretary of the Treasury against the permit before collecting any transfer fee under paragraph (5) of this subsection

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(4) The priority of security interests shall be determined in order of filing, the first filed having the highest priority. A validly-filed security interest shall remain valid and perfected notwithstanding a change in residence or place of business of the owner of record. For the purposes of this subsection, "security interest" shall include security interests, assignments, liens and other encumbrances of whatever kind.

(5) (A) Notwithstanding section 304(d)(1), the Secretary shall collect a reasonable fee of not more than one-half of one percent of the value of a limited access system permit upon registration of the title to such permit with the central registry system and upon the transfer of such registered title. Any such fee collected shall be deposited in the Limited Access System Administration Fund established under subparagraph (B).

(B) There is established in the Treasury a Limited Access System Administration Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purposes of—

(i) administering the central registry system; and

(ii) administering and implementing this Act in the fishery in which the fees were collected. Sums in the Fund that are not currently needed for these purposes shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

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CERTIFICATE OF FILING AND SERVICE

I, Elissa Matias, hereby certify pursuant to Fed. R. App. P. 25(d) that, on December 21, 2011, the foregoing Brief for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically as well as Express Mail on the individual listed below:

Joan M. Pepin, Esq.
US Dept. of Justice
Appellate Section
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795
(202) 305-4626

Peter Shelley, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 850-1754

Stephen Michael Ouellette
Ouellette & Smith
127 Eastern Ave
Ste 1
Gloucester, MA 01930
978-281-7788

Patrick F. Flanigan, Esq.
Law Office of Patrick Flanigan
P.O. Box 42
Swarthmore, PA 19081
(484) 904-7795

/s/ Elissa Matias
Elissa Matias