

THERE MAY NOT ALWAYS BE MORE FISH IN THE SEA: WHY NOAA'S RESTRICTIONS DO NOT VIOLATE THE MAGNUSON-STEVENS ACT

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INTRODUCTION

In May 2013, Massachusetts Attorney General Martha Coakley brought suit in federal district court asserting that the National Oceanic and Atmospheric Administration's ("NOAA") new fish-catch restrictions violated federal law.¹ Her lawsuit specifically targets the fish-catch restrictions announced earlier in the spring, which she claims violate the Magnuson-Stevens Act by prohibiting fishermen from catching the optimum yield.² Moreover, she claims NOAA erred both by not using the best science to determine fishing quotas and by neglecting to consider the economic ramifications of reduced numbers for regional fishermen.³ These regional fishermen and other local industry representatives allege that the new numbers bear little scientific basis at all and instead reveal NOAA's desire for "retaliation" after local fishermen complained about perceived "overaggressive" regulatory enforcement that resulted

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¹ Alyssa Carducci, *Massachusetts AG Coakley Sues NOAA over Fishing Limits*, HEARTLAND INST. (Aug. 14, 2013), <http://news.heartland.org/newspaper-article/2013/08/14/massachusetts-ag-coakley-sues-noaa-over-fishing-limits>, archived at <http://perma.cc/L2JG-CB7T>.

² 16 U.S.C. § 1802(33)(A)(C)(2012).

The term "optimum [yield]," with respect to the yield from a fishery, means the amount of fish which—(A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

Carducci, *supra* note 1.

³ Carducci, *supra* note 1.

in both NOAA officials' in-person apologies and the repayment of fines in some cases.⁴

Attorney General Coakley's recent action provides an appropriate anecdote to introduce this Note, which will argue that NOAA's new restrictions on allowable catch for Massachusetts fishermen does not violate the Magnuson-Stevens Act by prohibiting them from catching an optimum yield. In addition, this Note will explain the special federal interest by exploring NOAA's role in fisheries management and its use of scientific and political data to calculate optimum yield. It will reveal and discuss the tension between developing management strategies and restrictive regulations that both provide for the livelihoods of regional fishermen and ensure the protection and conservation of a valuable resource.

This Note will demonstrate NOAA's superior ability to make these difficult decisions as a rational actor representing the interests of the federal government. Finally, the Note will contend that the current system of United States fisheries management is both appropriate and necessary to achieve the fundamental goal of conservation established by Congress in the Magnuson-Stevens Act.

Part I provides background information about the Magnuson-Stevens Fishery Conservation and Management Act, NOAA, and the National Marine Fisheries Services ("NMFS").⁵ This section includes discussion of the environmental science calculations conducted by NOAA as part of its rule-making process.⁶ Moreover, it describes the scientific evidence and projections for the future of fisheries that influence the agency's decisions.⁷ Finally, Part I details the ways in which states and citizens can challenge federal agency decisions⁸ and provides a brief summary of past litigation efforts that demonstrate the way that courts have treated these matters in the past.⁹

Part II engages in a defense of NOAA as the entity most capable and well-suited for the enforcement of the Act and the management and regulation of fisheries.¹⁰ First, it addresses the specific arguments launched by Attorney General Coakley in order to bolster NOAA's ("NMFS") role given specific circumstances.¹¹ This part will argue that NOAA neither

⁴ *Id.*

⁵ *See infra* Part I.

⁶ *See infra* Part I.

⁷ *See infra* Part I.

⁸ *See infra* Part I.C.

⁹ *See infra* Part I.D.

¹⁰ *See infra* Part II.

¹¹ *See infra* Part II.

ignored the economic effects of its regulations¹² nor did it use “flawed science” to reduce yearly catch limits.¹³ Next, the section explores NOAA’s actions under the standard of review for federal agency actions and determines that those actions were neither “arbitrary” nor “capricious” but instead rooted in congressional intent established by the Act.¹⁴ Moreover, NOAA provided appropriate opportunities for public feedback, thus fulfilling its obligation as a federal agency.¹⁵

Finally, Part III concludes this Note’s defense of NOAA by offering a summary of the arguments contained within Part II.¹⁶ It specifically identifies the most common arguments raised in opposition to NOAA’s role, then it refutes those arguments. Moreover, it reiterates NOAA’s commitment to balancing the science of fisheries management with the potential economic impacts on the fisheries and the broader surrounding regions. Ultimately, the Note concludes by describing and emphasizing the difficulties of NOAA’s role, which requires a precarious balancing of environmental and economic interests and the consideration of various viewpoints representing all aspects of the fisheries management scheme.¹⁷

I. BACKGROUND

A. *Magnuson-Stevens Fishery Conservation and Management Act*

In 1976, Congress passed the MSFCMA (“the Act”)¹⁸ to manage and conserve fisheries in the United States at a time of drastic fisheries stocks declines.¹⁹ Originally an industry-regulation law intended to ensure that fish stocks remained capable of providing business opportunities, it

¹² See *infra* Part II.B.

¹³ See *infra* Part II.C; *AG Coakley Moves to KO Fish Limits*, GLOUCESTER TIMES (Dec. 4, 2013), http://www.gloucestertimes.com/news/local_news/article_6260716b-9769-59b5bcce8f9a6430dae1.html, archived at <http://perma.cc/P3VR-F4M3>.

¹⁴ See 16 U.S.C. § 706(2)(A) (2012); *infra* Part I.D.

¹⁵ See *infra* Part I.D.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part III.

¹⁸ Magnuson-Stevens Fishery Conservation and Management Act 16 U.S.C. §§ 1801–1884 (2012).

¹⁹ 16 U.S.C. § 1801(b)(1) (“the purposes of the Congress . . . to take immediate action to conserve and manage the fishery resources found off the coasts of the United States . . .”). Arguably, Congress passed the Act “largely in response to the concern over foreign fishing off U.S. shores.” Erin R. Englebrecht, Comment, *Can Aquaculture Continue to Circumvent the Regulatory Net of the Magnuson-Stevens Fishery Conservation and Management Act?*, 51 EMORY L.J. 1187, 1207 (2002).

has been called “the nation’s most important federal fishery management law.”²⁰ Initially, the Act established Exclusive Economic Zones (“EEZs”)—from state seaward boundaries out as far as two hundred nautical miles—under federal management.²¹ The states control and maintain jurisdiction over the three nautical miles closest to their coasts as a result of a 1953 act of Congress.²² In addition to creating EEZs, another critical piece of the congressional approach to domestic fisheries management required the formation of eight regional Fishery Management Councils (hereinafter referred to as “Councils”), each of which it charged with the direction and management of specified fisheries embracing large portions of federal waters.²³

The Act charges each Council to form two advisory committees, the first of which will concentrate efforts on science and statistics “to assist [the Council] in the development, collection, evaluation, and peer review of such statistical, biological, economic, social, and other scientific information as is relevant.”²⁴ The second committee—the Fishing Industry Advisory Committee—focuses on providing information and recommendations to assist in the development of fishery management plans (hereinafter referred to as “FMPs”) and possible later amendments to those plans.²⁵

At the time of the initial passage of the MSFCMA, Congress provided these regional management councils with much discretion to act pursuant to the manner best suited to meet short-term economic and industry requirements, which often resulted in compromising or sacrificing the goals of conservation and environmental protection.²⁶ Congress reined in this provision of unbridled discretion with the 1996 passage of the Sustainable Fisheries Act,²⁷ which required councils to designate conservation of fish stocks as their new principal priority.²⁸ Only ten

²⁰ DONALD C. BAUR ET AL., OCEAN AND COASTAL LAW AND POLICY 275–301, 275 (2008).

²¹ 16 U.S.C. §§ 1802(11), 1811–1812; BAUR ET AL., *supra* note 20, at 275–76.

²² BAUR ET AL., *supra* note 20, at 275 (referring to the Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (2012)).

²³ 16 U.S.C. § 1852; BAUR ET AL., *supra* note 20, at 277. The eight Councils are: New England, Mid Atlantic, South Atlantic, Gulf of Mexico, Caribbean, Pacific, North Pacific, and Western Pacific.

²⁴ BAUR ET AL., *supra* note 20, at 278.

²⁵ *Id.* (quoting 16 U.S.C. § 1852(g)(3)(A)).

²⁶ *Id.* at 280.

²⁷ Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996). At this time, Congress enacted revisions to “put our fisheries back onto a sustainable path and literally avert an environmental catastrophe on a national level.” 142 CONG. REC. 23,698 (1996) (statement of Sen. Kerry).

²⁸ BAUR ET AL., *supra* note 20, at 280.

years later, the Magnuson Reauthorization Act²⁹—which amended the MSFCMA—reiterated the change in priorities and announced a list of ten “National Standards” meant both to guide fisheries management policies and to provide a set of principles with which all fishery management plans must conform.³⁰ The recent passage of this legislation underscores a renewed federal interest in changing fisheries management policies by dedicating a larger role for science, research, and conservation efforts, all while seeking an immediate end to overfishing and increased efforts at conservation.³¹

Currently, each FMP must comply with these ten “national standards” while maintaining a sharp focus on efforts at conservation. At this stage, the Secretary of Commerce plays a key role on behalf of the federal interest as he/she must review each FMP to confirm that it conforms to these standards before allowing the plans to move forward through the approval and execution phases of the process.³² The first national standard appears most elusive at the execution phase because it requires FMPs to achieve optimum yield from fish stocks while simultaneously attempting to prevent overfishing.³³ Further guidance addressing this standard indicates that scientific and management uncertainties within each fishery must contribute to reductions of the allowable catch statistic.³⁴

National Standards Two and Three urge Councils to utilize the best available scientific information to develop their FMPs and encourages the coordination of management efforts between Councils and the National Marine Fisheries Service (“NMFS”) when stocks cross multiple jurisdictions.³⁵ National Standards Four and Five create policies for the fair apportionment of fishing privileges among fishermen and express the congressional perspective that efficiency should constitute one of many (not *the* only) considerations for fisheries managers.³⁶

The sixth National Standard instructs Councils to consider the possibility of future environmental and economic variations when they create their FMPs.³⁷ The seventh and eighth standards direct Councils

²⁹ Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. 109-479, 120 Stat. 3575 (2007) (codified in both 16 U.S.C. and 33 U.S.C.).

³⁰ 16 U.S.C. § 1854(a) (2006); *see also* 16 U.S.C. § 1851(a) (2012).

³¹ *See* BAUR ET AL., *supra* note 20, at 280.

³² 16 U.S.C. § 1854(a)(1)(A).

³³ *See* 16 U.S.C. § 1851(a)(1).

³⁴ 50 C.F.R. § 600.310(g)(2) (2009).

³⁵ BAUR ET AL., *supra* note 20, at 280.

³⁶ *Id.*

³⁷ *Id.*

to minimize costs by reducing paperwork and duplication of efforts while also urging them to consider the needs of the fishing communities and how best to minimize the economic stresses that FMPs might place on those communities.³⁸ Finally, National Standards Nine and Ten require Councils “to the extent practicable” to create plans that minimize bycatch³⁹ within fisheries and attempt to manage them in ways that promote the safety of humanity.⁴⁰

These national standards provide the framework within which NOAA coordinates its regulatory activities with the cooperation of the Councils. Regional councils occupy an essential position within this framework due in part to their front-line responsibilities to create the FMPs that NOAA will later review for compliance. While it may seem that Councils retain little influence in a process dominated by a federal agency, such a view fails to consider the value of organizing a council system based on geography. While NOAA must ensure adherence of all FMPs to the ten national standards, Councils can operate within those standards to highlight particularly salient or distinguishable characteristics only found within their regional fisheries. In other words, Councils should consider the national standards as helping, rather than hindering, their efforts to advocate for their local environments.

B. National Oceanic and Atmospheric Association (“NOAA”)

After a cursory review of some of the responsibilities of the Councils as outlined in the MSFCMA, this Note now turns to a more complete review of NOAA and how it provides the structure and wherewithal to maintain the fisheries management system. First, the National Marine Fisheries Service exists as a subagency of NOAA, which itself exists as a federal agency within the United States Department of Commerce.⁴¹

³⁸ *Id.*

³⁹ “The term ‘bycatch’ means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.” 16 U.S.C. § 1802(2) (2012).

⁴⁰ BAUR ET AL., *supra* note 20, at 280.

⁴¹ BAUR ET AL., *supra* note 20, at 293, n.5. For an organizational chart that illustrates these agency relationships, see *NOAA Headquarters Organization*, NOAA, <http://www.pco.noaa.gov/org/noaaOrganization.pdf> (last visited Oct. 27, 2014). The MSFCMA espouses “ecosystem management” principles and empowers NMFS to adopt approaches based on those standards to manage ocean and coastal environments. *Ecosystem-Based Fishery Management and the Re-Authorization of the Magnuson-Stevens Fishery*

Based on the role envisioned by Congress through the 1996 and 2006 amendments to the MSFCMA, NOAA acts on behalf of the federal government in demonstrating its interest in reducing fisheries yields as part of its efforts to conserve precious environmental resources.⁴²

Part of its fisheries management role necessitates the use of scientific findings and data to calculate Maximum Sustainable Yield (“MSY”) figures for fisheries, where MSY is calculated as the “largest average annual catch” capable of being removed from a fish stock over a significant period under average environmental conditions.⁴³ Next, NOAA scientists must convert those scientifically generated numbers into appropriate Optimum Yield (“OY”) figures—which represent a downward adjustment of MSY—and are defined as the harvest rate for a fish stock that will “provide the greatest overall benefit to the Nation.”⁴⁴

Ultimately, the scientifically calculated MSY figure provides the “ceiling” for NOAA, while OY, a political (not scientific) calculation, provides the greatest opportunities for manipulation by interested stakeholders.⁴⁵ These opportunities for statistical manipulations lead to tension between NOAA, representing federal interests, and Councils, who once enjoyed larger roles in regional fisheries management. Conservation groups constitute a third interest group that adds to the contentiousness of the debate.⁴⁶ Moreover, the conflicting views of industry scientists and NMFS scientists (whose conclusions provide the basis for catch limits for EEZ fisheries) nullify science’s role in FMP development, leading other interests to dictate policy outcomes.⁴⁷ Later, this Note will argue that the way in which NOAA calculates OY is both politically appropriate and scientifically proper based on the requirements imposed by the MSCFMA.

According to NOAA’s 2004 Fisheries Status Report, the regional councils’ success in management of stocks is mixed as about 20% of major stocks could be classified as “overfished” or “below a prescribed biomass

Conservation and Management Act: Hearing Before the Subcomm. on Fisheries Conservation, Wildlife & Oceans of the H. Comm. on Res., 107th Cong. 6–10 (2001) (statement of William Hogarth, Ph.D., Acting Assistant Administrator for Fisheries, National Marine Fisheries Service).

⁴² BAUR ET AL., *supra* note 20, at 285.

⁴³ JAMES R. RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY*, 474–75 (2d ed. 2009).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World’s Marine Fisheries*, 21 STAN. ENV’T L. J. 45, 55 (2002).

threshold.”⁴⁸ In 2007, the United Nations released a similar type of report categorizing 28% of fish stocks “as overexploited, depleted, or recovering from depletion.”⁴⁹ In fact, some scientists forecast that by 2050, almost all commercial fisheries will collapse.⁵⁰ The most recent United States-specific numbers released by the NMFS estimate that “15% of fish stocks are subject to overfishing and that 23% of fish stocks are overfished.”⁵¹

Unfortunately, NMFS’s Annual Fisheries Status reports are only crude, rudimentary tools for measuring the performance of the Council system as they clearly indicate that NOAA lacks sufficient information required to assess the population status of more than half of the species under Council management.⁵² Significant problems exist with methodology and data used to determine how many of the “known” stocks are overfished or subject to overfishing.⁵³ First, the majority of data used derive from fishery landings and not from independent scientific investigations, which contributes to collection biases and reporting problems.⁵⁴ Moreover, Councils are responsible for writing the criteria by which “success” is measured, and the definition of “overfished” is a technical one adopted only for a certain species by its relevant council.⁵⁵

In an effort to mitigate the effects of some of the potential collection biases and reporting problems, MSFCMA gives Congress the power to preempt state fishery management law through other specified federal laws.⁵⁶ For example, federal law establishes its own primacy in situations where conflicts might arise. In other words, when fisheries under the control of fisheries management plans (created by MSFCMA) predominantly encompass federal waters and state management of those fisheries in state waters “will substantially and adversely affect the carrying out of such

⁴⁸ BAUR ET AL., *supra* note 20, at 278–79.

⁴⁹ FOOD & AGRIC. ORG. OF THE U.N. (FAO), THE STATE OF WORLD FISHERIES AND AQUACULTURE 2008 (2009), available at <ftp://ftp.fao.org/docrep/fao/011/i0250e/i0250e.pdf>.

⁵⁰ See Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCIENCE 787, 788–89 (2006) (predicting downward trends in fisheries sustainability).

⁵¹ NAT’L MARINE FISHERIES SERV., 2009 STATUS OF U.S. FISHERIES 1 (2010), available at http://www.nmfs.noaa.gov/sfa/statusoffisheries/2009/StatusFisheries_2009.pdf. “Subject to overfishing” signifies a fish stock in which the mortality of harvest rate exceeds what is required to provide for maximum sustainable yield. *Id.* “Overfished” means that the biomass level of the fish stock resides below an established threshold contained in the fisheries management plan for the stock. *Id.*

⁵² BAUR ET AL., *supra* note 20, at 279.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 276.

fishery management plan[s],” then Congress directs NOAA to exercise its regulatory and enforcement authority over the fishing activities in state waters as well.⁵⁷ However, states can exercise some degree of control over fishing activities in federal waters through the Coastal Zone Management Act (“CZMA”).⁵⁸ This act contains descriptions of administrative and judicial procedures available to coastal states whose leaders believe that proposed federal activities will “affect any land or water use or natural resource” in a way that is incongruent with the “enforceable policies” of that state’s coastal zone management plan.⁵⁹

Under the Commerce Department umbrella, NOAA takes responsibility for execution of the congressional initiatives contained within the MSFCMA. For this purpose, NOAA’s subagency, the National Marine Fisheries Service, operates as the federal government’s agent vis-à-vis the Department of Commerce. This role requires the NMFS to assemble and analyze scientific data for the purposes of setting guidelines and limits for regional councils to utilize in preparing their FMPs. Perhaps one of the most important duties for the NMFS results from the requirement to combine the scientific with the political. In other words, the limiting figures NOAA provides to the Councils must consider primarily the best way to conserve the environment while also providing opportunities for industries whose participants depend on fisheries for their economic survival. Poor performance by Councils, as seen in recent annual reports⁶⁰ and scientific studies,⁶¹ leads to the logical conclusion that without NOAA’s involvement, the state of fisheries may be direr than ever imagined.

C. *State and Citizen Powers to Challenge Federal Agency Decisions*

As part of its powers under the CZMA, if a state believes that the proposed federal actions will “affect any land or water use or natural resource” in a way that is incompatible with the “enforceable policies” of that state’s extant coastal zone management plan, it can seek recourse through both administrative and judicial remedies.⁶² Despite coastal states’ abilities to assert these rights of recourse, the total absence of reported court decisions relating to the exercise of those rights suggests a confirmed

⁵⁷ 16 U.S.C. § 1856(b) (2012).

⁵⁸ BAUR ET AL., *supra* note 20, at 277.

⁵⁹ *Id.*

⁶⁰ *Id.* at 278–79.

⁶¹ Worm et al., *supra* note 50.

⁶² BAUR ET AL., *supra* note 20, at 277.

reluctance to challenge the federal government's actions and decisions.⁶³ This reluctance, perhaps, results from an entrenched belief that such challenges stand little chance of success in the face of considerable substantive and procedural barriers to questioning federal agency judgment.⁶⁴

The first such barrier concerns the standard of review, which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable law," which provides a high barrier for any litigant to surmount.⁶⁵ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁶⁶ the Supreme Court increased difficulties for plaintiffs challenging federal agency action when it "created a default rule of deference to reasonable agency interpretations in the event of statutory ambiguity or silence, reading such silence as implying Congress's intent to allow an agency to fill in the gaps."⁶⁷

Another barrier results from the prevention of discovery, which both prevents agency policymakers from facing direct judicial inquiry and requires challengers to demonstrate the unlawful, procedurally flawed, or otherwise unreasonable nature of the agency's action at the beginning of litigation.⁶⁸ In addition to this initial procedural barrier, even challengers who prevail in their suits receive a reward of questionable value in the form of court-ordered remand to the same federal agency charging it to issue another decision.⁶⁹ Even despite these barriers, however, plaintiffs do win their challenges and remands result in more favorable determinations.⁷⁰

⁶³ *Id.*

⁶⁴ Jeffrey W. Leppo, *Litigating Against Government Agencies: Case Studies in Challenge to Agency Decisions Under Federal Environmental Statutes*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10575, 10576 (2013) (asserting that the "defining principle of so-called record review cases drives a series of primary litigation characteristics that, from the perspective of a party litigating against an agency, are essential to understand and, for the most part, inherently biased for the agency.").

⁶⁵ *Id.* See also Administrative Procedure Act, 5 U.S.C. § 706 (2012).

⁶⁶ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶⁷ Kate Stanford, Student Article, *The Need for Chevron Step Zero in Judicial Review of Interpretations Developed by Fishery Management Councils*, 19 N.Y.U. ENVT'L. L.J. 380, 395 (2012) (citing *Chevron U.S.A., Inc.*, 467 U.S. at 844).

⁶⁸ Leppo, *supra* note 64; see also BAUR ET AL., *supra* note 20, at 285 (noting that citizens challenging the validity of FMPs, amendments, and/or regulations must demonstrate "reli[ance] on factors Congress has not intended it to consider, . . . fail[ure] to consider an important aspect of the problem, offer[ing] an explanation for its decision that runs counter to the evidence . . . or . . . implausib[ility] that . . . could not be ascribed to a difference in view or the product of agency expertise.").

⁶⁹ Leppo, *supra* note 64.

⁷⁰ *Id.*

Although plaintiffs sometimes achieve favorable results after challenging federal agencies, the Court's opinion in *Chevron* underscores the judicially common assertion that federal agencies maintain superior institutional capabilities to make decisions and policies in areas where Congress fails to speak.⁷¹ Justice Stevens's majority opinion continued describing this deference, ultimately asserting that courts should not replace agency interpretations with their own judgments, regardless of whether Congress explicitly or implicitly delegates decision-making authority to those agencies.⁷²

D. Significant Court Battles over MSFCMA

While the Supreme Court's decision in the *Chevron* case demonstrates its willingness to defer to the federal government's decisions in certain circumstances, citizens and groups still seek to challenge those decisions before other courts. Several of these decisions and their holdings will now be explored along with their influence on the fisheries management framework.

1. *Natural Resources Defense Council v. Daley*

In *Natural Resources Defense Council v. Daley*,⁷³ the court established a rule that Council management procedures must have a greater than 50% chance of success for the purposes of complying with MSFCMA.⁷⁴ In addition, the court repudiated the lower court's suggestion that the Act's explicit commitment to conservation conflicted with its goal of mitigating adverse economic effects.⁷⁵ However, the court acknowledged that the Act dictates that the NMFS "must give priority to conservation measures."⁷⁶ In fact, the court further elaborated that adverse economic consequences only enter the FMP discussion when two competing plans achieve comparable conservation measures.⁷⁷

⁷¹ Stanford, *supra* note 67 (noting the appearance of this kind of language in Justice Stevens's majority opinion for the Court).

⁷² *Id.* (citing *Chevron, U.S.A., Inc.*, 467 U.S. 865 and explaining the agency capabilities that require courts to defer to agency judgments).

⁷³ 209 F.3d 747 (D.C. Cir. 2000).

⁷⁴ BAUR ET AL., *supra* note 20, at 287.

⁷⁵ *Natural Res. Def. Council*, 209 F.3d at 753.

⁷⁶ *See id.*

⁷⁷ *See id.*; *see also* 50 C.F.R. § 600.345(b)(1) (1999) ("Where two alternatives achieve

Moreover, the court amplified the Supreme Court's *Chevron* holding by explaining that its decision engaged in *Chevron* Step Two review by investigating "whether the agency's disputed action reflects a reasonable and permissible construction of the statute."⁷⁸ The court then finds that, without a specific quota figure, the NMFS's position fails to merit deference.⁷⁹ In fact, the court left little doubt about its opinion of the validity of the quota figure when it asserted that it "completely 'diverges from any realistic meaning' of the Fishery Act that it cannot survive scrutiny. . . ."⁸⁰ In reversing the lower court's judgment deferring to the NMFS, the court notes that its purpose in hearing cases does not constitute a "rubber stamp" for agency actions.⁸¹

2. *Oceana, Inc. v. Locke*

Adding to its case law, the Court of Appeals for the D.C. Circuit in *Oceana, Inc. v. Locke*,⁸² remanded an Amendment to a FMP with directions for the lower court to vacate the Amendment and remand it to the NMFS for additional proceedings.⁸³ The litigation began when Oceana, Incorporated, sued Secretary of Commerce Gary Locke along with the NMFS, alleging that an amendment to a FMP violated the MSFCMA and the Administrative Procedure Act.⁸⁴ In a prior opinion, the district court found no violation and entered summary judgment for the appellee NMFS.⁸⁵

similar conservation goals, the alternative that . . . minimizes the adverse impacts on [fishing] communities would be the preferred alternative.").

⁷⁸ *Natural Res. Def. Council*, 209 F.3d at 754 (explaining that the Act lacks a precise quota measure, which necessitates an analysis of whether the agency's challenged action is a reasonable and allowable construction of the statute).

⁷⁹ *See id.*

⁸⁰ *Natural Res. Def. Council*, 209 F.3d at 755 (explaining that NMFS rejects its opinion by suggesting that the court owes deference to its "scientific" judgments).

⁸¹ *See id.* The court asserts that if it simply rubber-stamped agency actions and decisions, such a decision would be "tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act." *Id.* (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995)).

⁸² *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011).

⁸³ *Id.* at 1243.

⁸⁴ *Id.* at 1239 (challenging in particular Amendment 16 and noting specifically that appellant organization challenged the legality of the NMFS methodology used to track bycatch in the Northeast coastal fisheries).

⁸⁵ *Id.* (noting that bycatch can be defined either as "fish that are inadvertently or unavoidably captured by nets or other gear and then discarded," 16 U.S.C. § 1851(a), or as "fish which are harvested in a fishery, but which are not sold or kept for personal use," 16 U.S.C. § 1801(c)(3)).

In its later analysis, the D.C. Circuit first considered and weighed heavily in NMFS's favor the fact that the regulation was implemented through full notice and comment rule-making procedures, which required the court to show substantial deference toward NMFS.⁸⁶ However, the court later found that the NMFS-proposed (and regional council-supported) amendment to the FMP failed to survive the "arbitrary and capricious" standard of review.⁸⁷ Its failure resulted from carving out for itself an exception providing total discretion for it to decide when an "external operational constraint prevents [it] from fully implementing the required coverage levels."⁸⁸ The most problematic result of this indefinite exception proceeds from the fact that the amendment contains no safeguard preventing NMFS from annually announcing the existence of some "constraint."⁸⁹

In the end, this decision reiterates the court's earlier finding in *National Resources Defense Council v. Daley*,⁹⁰ providing little to no deference to federal agency decisions or regulations, which conflict with the explicit intentions found in the MSFCMA. As before, the court shows an unwillingness to rubber-stamp agency decisions and specifically expresses its discomfort with rules that operate to provide agencies with excess discretion that can then be manipulated to allow an agency's actions to go unchecked.⁹¹

3. *Northwest Environmental Defense Center v. Brennen*

Earlier decisions from the Ninth and First Circuit Courts of Appeal provide a more complete picture of the case law surrounding the federal agency-regional council relationship. The Ninth Circuit case, *Northwest Environmental Defense Center v. Brennen*,⁹² involved affirmance of a district court grant of summary judgment for the appellee.⁹³ The court's analysis revealed that the agency regulations at issue were neither arbitrary nor

⁸⁶ *Id.* at 117 (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)).

⁸⁷ *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012); *see also* 16 U.S.C. § 1855(f) (containing instructions for judicial review of regulations pursuant to the Administrative Procedure Act).

⁸⁸ *Oceana, Inc.*, 670 F.3d at 1241 (citing Magnuson-Stevens Fishery Conservation and Management Act Provisions, 73 Fed. Reg. 4736, 4738 (Jan. 28, 2008) (to be codified at 50 C.F.R. pt. 648)).

⁸⁹ *Id.*

⁹⁰ *Natural Res. Def. Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

⁹¹ *Oceana, Inc.*, 670 F.3d at 1243.

⁹² *Nw. Env'tl Def. Ctr. v. Brennen* ("NEDC"), 958 F.2d 930 (9th Cir. 1992).

⁹³ *NEDC*, 958 F.2d at 932, 938.

capricious and instead constituted reasonable decisions aligned with the intentions of the MSFCMA.⁹⁴ Specifically, the appellant challenged as unlawful a few regulations promulgated by the appellee (Secretary of Commerce) permitting overfishing in direct defiance of the MSFCMA.⁹⁵

While the court ultimately deems the regulations reasonable and defers to the Secretary's judgment,⁹⁶ its analysis reveals some of the difficulties associated with vague or imprecise definitions. This difficulty results because the Act fails to define "overfishing" explicitly, which provides NEDC the opportunity to make an argument about what definition the court should use.⁹⁷ Instead, the Secretary argues for the use of a definition contained within a federal regulation.⁹⁸ In choosing the Secretary's preferred definition, the court demonstrates its willingness to interpret the MSFCMA as providing the federal government with broad discretion to define key statutory terms provided they are reasonable and adhere to the intention of the Act.⁹⁹ After this analysis, the court concludes by emphasizing its responsibility to defer to the Secretary's decision-making after its determination that the questioned acts proved reasonable in view of the plain meaning and purpose of the statute.¹⁰⁰

4. *Conservation Law Foundation of New England, Inc. v. Franklin*

Like the Ninth Circuit decision described above, the First Circuit litigation again involved an environmental advocacy group challenging the federal government's role in fisheries management through the office of the Secretary of Commerce.¹⁰¹ Without delving into the specifics of the consent

⁹⁴ *NEDC*, 958 F.2d at 936. In a prior decision, the District Court for the District of Columbia noted, "[t]he question is not whether this Court agrees with the decision of the agency; the question is whether the decision made by the agency finds support in the administrative record." *Se. Fisheries Ass'n v. Mosbacher*, 773 F. Supp. 435, 439 (citing *C&W Fish Co. v. Fox*, 745 F. Supp. 6, 8 (D.D.C. 1990)).

⁹⁵ *NEDC*, 958 F.2d at 932.

⁹⁶ *Id.* at 935.

⁹⁷ *Id.* at 934 (citing 50 C.F.R. § 602.11(d)(1) (1990)) (noting that NEDC's preferred definition for overfishing "means all fishing which exceeds maximum sustainable yield.").

⁹⁸ *Id.* at 935 (providing the text of the Secretary's preferred definition: "Overfishing is a level or rate of fishing mortality that jeopardizes the long-term capacity of a stock or stock complex to produce [maximum sustainable yield] on a continuing basis." 50 C.F.R. § 602.11(c)(1) (1990)).

⁹⁹ *Id.* at 935 (explaining that the intention of the Act is "maximum utilization of fishery resources consistent with the long-term health of the fishery.").

¹⁰⁰ *Id.* at 935.

¹⁰¹ *Conservation Law Found. of New England v. Franklin*, 989 F.2d 54, 56 (1st Cir. 1993).

decree at issue in *Conservation Law Foundation of New England, Inc. v. Franklin*,¹⁰² this litigation again tested the power of the federal government while simultaneously probing courts' willingness to defer to that power in certain circumstances. Consistent with the Ninth Circuit litigation, the challengers again argued that the Secretary acted outside the law in promulgating certain regulations.¹⁰³ Moreover, this court's analysis paralleled the Ninth Circuit's when it, too, analyzed the claim by looking to statutory language and plain meaning.¹⁰⁴

This analysis demonstrates that the MSFCMA explicitly empowers the Secretary of Commerce to initiate certain procedures and enforce certain regulations after waiting a reasonable time for the Councils to act in accordance with the statute.¹⁰⁵ Following this line of reasoning, the court asserts that its statutory interpretation provides the Secretary with appropriate due deference to follow the mandate of the MSFCMA, which charges him with the responsibility to prevent overfishing.¹⁰⁶ Moreover, the court notes that Councils fulfill their roles by creating FMPs. The review of FMPs allows the federal government, acting through the Secretary and NMFS, discretion to decide whether Councils show appropriate progress in conservation and management goals.¹⁰⁷

5. Summary of Pertinent Litigation

A review of the cases above demonstrates that conducting fisheries management in accordance with the Act presents a complicated set of problems. Several seemingly concrete standards arise that should guide courts facing future litigation related to fisheries management under the MSFCMA. First, a case predating those discussed above stated that "[a]n action by the Secretary [of Commerce] is presumed to be valid, and the

¹⁰² *Id.* at 58 ("The consent decree established a timetable for a FMP or an amendment . . . applicable to New England waters that would 'eliminate the overfished condition of cod and yellowtail flounder stocks in five years after implementation and . . . eliminate the overfished condition of haddock stocks in ten years after implementation.'" (quoting *Conservation Law Found. v. Mosbacher*, No. 91-11759-MA, slip op. at 2 (D. Mass., Aug. 28, 1991))).

¹⁰³ *Id.* at 59.

¹⁰⁴ *Id.* at 60.

¹⁰⁵ *Conservation Law Foundation*, 989 F.2d at 60 (citing 16 U.S.C. § 1854(c)(1)(B)) (2012).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See 16 U.S.C. § 1853(b)(10) (stating that the Secretary's discretion allows him to include "such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery," again reiterating the grant of discretion found in the MSFCMA).

Court must not substitute its own judgment for that of the Secretary.”¹⁰⁸ Second, the courts acknowledged that the Act explicitly requires the NMFS to prioritize conservation efforts above all other pursuits.¹⁰⁹

In a similar vein, the courts reiterate that Councils fulfill their MSFCMA roles by creating FMPs, which NMFS later reviews to ensure they adhere to the statutory standards.¹¹⁰ These FMP reviews and other rule-making procedures logically require that the NMFS exercise broad discretionary powers, including the ability to define essential terms, provided those definitions prove reasonable and track closely the intentions of the statute.¹¹¹ The courts follow the same procedures to decide on the reasonableness and consistency of the Secretary’s challenged actions after engaging in classic statutory analysis that includes reviews of language and plain meaning.¹¹²

After completing the statutory analysis, courts analyze whether the Secretary’s challenged rules or actions merit deference by the judiciary branch—a decision ultimately determined by the reasonableness of the acts at issue.¹¹³ The evaluation of whether to provide deference appears both controversial and difficult for the courts; however, they explicitly state and then reiterate through analysis their refusal to serve as “rubber stamps” for agency actions, which may account for the extensive analysis that ensues when courts attempt to assess reasonableness.¹¹⁴ This desire to avoid rubber-stamping federal agency actions, without earnest review, explains the court’s unwillingness to provide deference to those actions that directly conflict with congressional intentions memorialized in the MSFCMA.¹¹⁵

II. NOAA IS THE AGENCY MOST WELL-SUITED TO THE TASK OF FEDERAL FISHERIES MANAGEMENT

The brief review of some of the past litigation pitting citizens and other parties against the federal government highlights one aspect of the tensions surrounding fisheries management. An equally, if not more,

¹⁰⁸ See *Fisheries Ass’n v. Mosbacher*, 773 F. Supp. 435, 441–42 (D.D.C. 1991) (citing *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981)).

¹⁰⁹ BAUR ET AL., *supra* note 20, at 277.

¹¹⁰ *NEDC*, 958 F.2d 930 (9th Cir. 1992).

¹¹¹ *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1239 (D.C. Cir. 2011).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Stanford*, *supra* note 67, at 395.

¹¹⁵ *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011).

important portion of that tension results from a seemingly pervasive belief among groups at the grassroots level that NOAA is ill-suited for or does not fulfill adequately its role as federal fisheries manager, decision maker, and enforcer. This belief seemed a major influence on Attorney General Coakley's decision to file suit against NOAA in May 2013.¹¹⁶ Her complaint, filed in United States District Court in Boston,¹¹⁷ "alleges that NOAA ignored the devastating economic impact of the new regulations"¹¹⁸ and utilized "flawed science to drastically reduce the annual 'catch limits' for cod and other species imposed on the Massachusetts fishing industry."¹¹⁹

Without the ability to study the exact materials on which Coakley specifically bases her allegations, a successful defense of NOAA must treat these arguments more broadly. Moreover, a successful defense of NMFS requires analysis of whether agency actions, at any time, could be deemed "arbitrary and capricious."¹²⁰ Finally, evidence must demonstrate that the agency provided enough opportunity for feedback from the public, and that the agency considered such feedback in its rule-making and enforcement process.

A. *NOAA and Congressional Role/Intent in MSFCMA*

"Through the Magnuson-Stevens Act, the United States has a clear mandate to achieve sustainable fisheries."¹²¹ In order to realize that mandate, Congress must maintain (and exercise) the power to preempt state fishery management laws, which it accomplishes through its primacy as established by the Magnuson-Stevens Act¹²² and through other environmentally based federal legislation.¹²³ Given the statutorily promoted, legislatively recognized preemptive power of the federal government, it

¹¹⁶ Carducci, *supra* note 1.

¹¹⁷ *AG Coakley Moves to KO Fish Limits*, *supra* note 13.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Leppo, *supra* note 64.

¹²¹ *NOAA's Fishery Science: Is the Lack of Basic Science Costing Jobs?: Oversight Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs of the H. Comm. on Natural Resources*, 112th Cong. 13 (2011) (statement of Eric Schwaab, Assistant Administrator, National Marine Fisheries Service, National Oceanic and Atmospheric Administration).

¹²² BAUR ET AL., *supra* note 20, at 276; see 16 U.S.C. § 1856(b) (2012) (describing the way in which NMFS may exercise regulatory authority over fishing activities in state waters).

¹²³ Other federal statutes that limit state authority within state waters include the Marine Mammal Protection Act, the Endangered Species Act, the Clean Water Act, and the Atlantic Coastal Fisheries Cooperative Management Act. BAUR ET AL., *supra* note 20, at 276.

is no surprise that states often feel constrained or restricted by NOAA's regulations. Moreover, the means by which outsiders evaluate the status reports for specific fisheries relies overmuch on a binary conception of success or failure,¹²⁴ which leaves no room for exploration of the gray areas within which many of these critical agency-council interactions occur.

B. NOAA Did Not Ignore the Economic Impact of its Regulations

Attorney General Coakley's assertion that NOAA (through NMFS) ignores fishermen in its rule-making process diametrically opposes National Standard Eight,¹²⁵ which expressly requires that NMFS "take into account the importance of fishery resources to fishing communities" by developing regulations that allow the sustainment of the industry with as few negative economic impacts as possible.¹²⁶ Importantly, this standard underscores NOAA's chief priorities as the "prevention of overfishing and rebuilding of overfished stocks."¹²⁷ In other words, environmental interests in preventing overfishing supplant the requirement that NOAA *attempt* to minimize negative impacts on the fishing industry. NOAA's role as guardian of fisheries almost necessitates that its decisions may adversely affect the economic interests of fishermen who likely would benefit most from a regulatory scheme with far fewer restrictions.

The regional councils' concerns—serving as proxies for fishermen's concerns—along with other competing and divergent interests require the federal government to take an active role in fisheries management in order to protect the environment.¹²⁸ A recent example of NOAA taking seriously the potential adverse effects on fishermen arose as a result of the New England Fishery Management Council's ("NEFMC") substantially reduced annual catch limits for certain fish stocks in 2013.¹²⁹ NOAA

¹²⁴ BAUR ET AL., *supra* note 20, at 279.

¹²⁵ See 16 U.S.C. § 1851(a)(8) (2012).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ BAUR ET AL., *supra* note 20, at 292. Ironically, deferring conservation efforts fails to serve long-term industry interests (as well as environmental ones) for at least two reasons. First, the industry's longevity and prosperity depends on maintenance of healthy fish stocks. *Id.* Second, deferring to the future these difficult choices will make them harder for NOAA to implement and even more difficult for fishermen to absorb. *Id.*

¹²⁹ Emergency Action Extension for Northeastern Monkfish Fishery Relating to Magnuson-Stevens Act Provisions, 78 Fed. Reg. 63,892 (Apr. 30, 2013) (to be codified at 50 C.F.R. pt. 648). This reduction occurred as part of Framework Adjustment 50 to the NE Multispecies FMP and "was necessary to prevent overfishing and rebuild overfished groundfish stocks consistent with rebuilding plans required under [the Act]." *Id.*

understood that these reduced numbers likely would result in substantial negative economic impacts for fishermen, which prompted it to develop a rule to open the monkfish fishery under emergency conditions based on a request from the NEFMC.¹³⁰ In other words, NOAA proved receptive and sympathetic to the concerns of fishermen and acted to mitigate negative economic impacts, while never failing to maintain focus on its environmental priorities.¹³¹

When compared to other entities that might administer fisheries management, NOAA's actions suggest that it is both capable and willing. However, as noted in the summary in Part I,¹³² past court decisions show a distinct unwillingness by judges to impose the necessary, though sometimes drastic cuts often required to ensure long-term fisheries health.¹³³ At the same time, the federal government does not seek an end to the fishing industry nor desire to harm it economically; however, it must use the tools available to it—regulating the people who fish, their equipment, and their catch amounts—in order to achieve the national goal of sustainable fisheries and protected environments.

C. *NOAA Did Not Use Flawed Science to Reduce Catch Limits*

A second assertion found in Attorney General Coakley's complaint relates to NOAA's alleged use of flawed science in developing its regulations.¹³⁴ Like the first allegation, this argument directly counters one of NOAA's "national standards."¹³⁵ In this case, her assertion counters National Standard Two, which states that "conservation and management measures shall be based upon the best scientific information available."¹³⁶ In addition to countering a national standard, Coakley's allegation appears even less credible in light of a demonstrated shift in the leadership of NOAA prior to the announcement of the decreased catch numbers with which she takes issue.¹³⁷

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *See supra* Part I.

¹³³ BAUR ET AL., *supra* note 20, at 292.

¹³⁴ *AG Coakley Moves to KO Fish Limits*, *supra* note 13.

¹³⁵ *See* 16 U.S.C. § 1851(a) (2012).

¹³⁶ *Id.* § 1851(a)(2).

¹³⁷ In 2008, as part of his "Science Team," President Obama nominated Dr. Jane Lubchenco, a marine ecologist and environmental scientist, to serve as NOAA administrator. *NOAA Administrator: Dr. Jane Lubchenco*, NOAA, <http://www.noaa.gov/lubchenco.html> (last visited Oct. 27, 2014), archived at <http://perma.cc/32YV-7C4N>. He regarded highly her experience in connecting human well-being to the environment using science. *Id.*

1. NOAA's Science Team

With its new “Science Team”¹³⁸ in place in 2009, NOAA began to approach fisheries with a greater emphasis on how to use science to improve the dismal state of many national fisheries.¹³⁹ Echoing a common refrain, however, the new leadership noted the uphill battle faced by any efforts attempting to repair the state of fisheries.¹⁴⁰ Ultimately, the new science-minded NOAA leaders took comfort in the fact that they could justify measures that may appear to protect the environment at the expense of the industry by noting that “in the end fishing jobs depend on fish, and fish depend on healthy oceans.”¹⁴¹ The essential part of that quotation, as it relates to the Magnuson-Stevens Fishery Conservation and Management Act, is that the oceans (environment) must be protected before the fish can be healthy. Only at that point—when healthy fish survive at appropriate levels—can the fishing industry achieve a higher level of profitability.

2. Misunderstandings Perpetuate Mistruths

The Act itself memorializes this point in its prioritizing of the environment above all other interests.¹⁴² Regardless of NOAA's attempts to place science and the environment at the forefront of fisheries management, officials like Rhode Island's Attorney General Peter Kilmartin continue to misunderstand and mischaracterize the congressional directive of the Act as it concerns NOAA's role.¹⁴³ In his amicus curiae brief to Coakley's suit against NOAA, Mr. Kilmartin asserted that “fisheries

¹³⁸ *See id.*

¹³⁹ Cornelia Dean, *NOAA Chief Believes in Science as Social Contract*, N.Y. TIMES (Mar. 23, 2009), http://www.nytimes.com/2009/03/24/science/earth/24prof.html?_r&_r=0, archived at <http://perma.cc/XU6A-UEXV>.

¹⁴⁰ *Id.* Dr. Lubchenco said, primarily, that “. . . fishing communities, scientists, regulators and other stakeholders in the debate need to overcome a legacy of bitterness and distrust.” *Id.*

¹⁴¹ *Id.* Dr. Lubchenco's background included numerous successful challenges to the “typical” practice of science where “researchers cannot spare time for public involvement, much less public service.” *Id.*

¹⁴² *See* Natural Res. Def. Council v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000); BAUR ET AL., *supra* note 20, at 280.

¹⁴³ *Fish Talk in the News—Friday, December 13*, TALKINGFISH.ORG (Dec. 13, 2013), <http://www.talkingfish.org/in-the-news/fish-talk-in-the-news-friday-december-13>, archived at <http://perma.cc/QU4-3LU5>.

regulations should “balance the need to conserve fishery resources with the well being of the fishing communities that it will impact.”¹⁴⁴

3. Bad Science: Industry Advocates vs. Scientists

Mr. Kilmartin’s misguided statement serves as a useful introduction to the debate over the kind and quality of science NOAA and the NMFS use when making decisions about the management of fisheries. According to the NOAA website, NOAA’s Office of Science and Technology manages the agency’s scientific information resources and oversees the development of internal policies that emphasize scientific integrity through the use of quality data, analyses, and information produced by agency activities.¹⁴⁵

In fact, at the end of 2011,¹⁴⁶ NOAA issued its first ever Administrative Order specifically discussing its policy of “Scientific Integrity.”¹⁴⁷ In this document, NOAA reaffirms its commitment to fostering a “continuing culture of scientific excellence and integrity”¹⁴⁸ while strengthening public confidence in its scientific methods and practices.¹⁴⁹ Operating in conjunction with its methods, NOAA’s “Principles of Scientific Integrity” include recognition of the division between scientific methods and policy decisions based on the results of those methods.¹⁵⁰ To fulfill these principles, NOAA encourages its scientists “to publish data and findings in ways that contribute to the effective transparency and dissemination of NOAA science and that enhance NOAA’s reputation for reliable science”¹⁵¹

In direct contrast to NOAA’s stated commitment to utilize the “best scientific information available,”¹⁵² some industry advocates and representatives accuse NOAA and NMFS of using “wrong and antiquated science.”¹⁵³ In fact, some of those advocates even began an Internet/

¹⁴⁴ *Id.*

¹⁴⁵ *Science Quality Assurance*, NOAA, <https://www.st.nmfs.noaa.gov/science-quality-assurance/index> (last visited Oct. 27, 2014), *archived at* <http://perma.cc/3BE6-SBCM>.

¹⁴⁶ NAT’L OCEANIC & ATMOSPHERIC ADMIN., ADMIN. ORDER 202-735D, SCIENTIFIC INTEGRITY POLICY (2011).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See 16 U.S.C. § 1851(a)(2) (2012).

¹⁵³ Carmine Gorga, *My View: Bad NOAA Science Rooted in Flawed Model*, GLOUCESTER DAILY TIMES (May 24, 2012), http://www.gloucestertimes.com/opinion/article_1e669233

newspaper campaign to gain signatures for two petitions,¹⁵⁴ noting that legal action would prove useful only in the short-term, while political action would provide the only long-term solution.¹⁵⁵ Interestingly, one critic of NOAA as fisheries manager initially appears to take issue with NOAA's use of faulty science¹⁵⁶ while later reversing course and resorting to blaming poor, sloppy, or incomplete congressional drafting of the Magnuson-Stevens Act for preventing NOAA and NMFS from using better science to influence policy decisions.¹⁵⁷ Only two years later,¹⁵⁸ the same critic launched a new attack, this time claiming that NOAA makes decisions based on unreliable numbers gathered based on questionable scientific bases.¹⁵⁹ The critic, of course, acknowledges the inherent difficulties of obtaining accurate information from the kinds of surveys NOAA must conduct; however, he offers no suggestions of alternatives or better practices,¹⁶⁰ which suggests either that no viable alternatives exist or that NOAA does the best work possible given the constraints within which it must operate. Based on the unconvincing arguments pressed by anti-NOAA critics and industry-first advocates, NOAA's record demonstrates its commitment to using the best science in a field replete with obstacles for effective data-gathering and analysis.

D. NOAA's Actions Were Not "Arbitrary and Capricious"

Prior case law establishes this deference as a matter of law and shows an unwillingness by the courts to intervene in matters pitting federal government decisions supporting environmental conservation

-420e-5402-a792-7e3863fe3c3e.html, archived at <http://perma.cc/942K-RNQR>; Len Belcaro, *Flexibility, Better Science & The Magnuson-Stevens Act*, BIG GAME FISHING J., <http://www.biggamefishingjournal.com/editorial13.html> (last visited Oct. 27, 2014), archived at <http://perma.cc/UP7M-68MG>.

¹⁵⁴ One petition is directed at President Obama and asks him to "[s]top NOAA [n]ow," and the other seeks Congressional amendment of the Magnuson-Stevens Act by inserting information about the predator/prey model and by requiring NOAA/NMFS to direct major enforcement efforts toward the large corporations, while leaving mostly untouched smaller, independent fishing fleets. See Gorga, *supra* note 153.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Specifically, the author takes issue with the fact that the statute does not follow predator/prey fisheries management, which he notes is not included in the Act, under which NOAA and NMFS must operate and, thus, respect. *Id.*

¹⁵⁸ Gorga, *supra* note 153.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

efforts against regional assertions of economic needs.¹⁶¹ While the federal government will not ignore the economic importance of fisheries to the industry as a whole, it refuses to sacrifice the need for environmental protection in exchange for increased opportunities for fishermen and related industries.¹⁶²

According to the Administrative Procedure Act,¹⁶³ a court may set aside any agency action that is “arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law.”¹⁶⁴ To determine if an agency decision meets this standard, a court should “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁶⁵ Next, the agency must provide a satisfactory explanation for its policy decision that connects sufficiently the facts found and agency conclusions.¹⁶⁶ In the end, an agency decision is deemed arbitrary and capricious if the agency relies on factors Congress did not intend it to consider, fails to consider a key part of the problem, offers a justification that counters the evidence on the record, or is so implausible that it could not be the result of a difference of opinion or agency expertise.¹⁶⁷

Given the standard above, the actions with which Coakley’s lawsuit finds fault do not rise to the level of arbitrary and capricious. First, looking to the Interim Final Rule promulgated by NMFS and recorded in the Federal Register, the reader concludes that the agency expended a significant amount of effort toward the development of the standards with which Coakley disagrees.¹⁶⁸ In other words, NMFS/NOAA actions satisfied the requirement to consider all relevant factors.¹⁶⁹ In fact, during the development and promulgation process for the rule, NOAA provided opportunities for public feedback through the traditional notice-and-comment rule-making procedures prescribed for federal

¹⁶¹ See *supra* Parts I.C, I.D.

¹⁶² See *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000).

¹⁶³ 5 U.S.C. § 706 (2012).

¹⁶⁴ *Id.* § 706(2)(A).

¹⁶⁵ See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

¹⁶⁶ See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Adm’n*, 538 F.3d 1172, 1193 (9th Cir. 2008).

¹⁶⁷ See *O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 92 F.3d 940, 942 (9th Cir. 1996).

¹⁶⁸ See *Magnuson-Stevens Fishery Conservation and Management Act Provisions*, 78 Fed. Reg. 26,172 (May 3, 2013) (to be codified at 50 C.F.R. pt. 648).

¹⁶⁹ *Id.*

agencies.¹⁷⁰ A thorough review of the Framework Adjustment¹⁷¹ reveals extensive consideration of various factors related to environmental science, industry concerns, and public comment. All of which suggest that a court would struggle to define NOAA's actions as arbitrary and capricious. Therefore, a court will provide NOAA/NMFS great deference when its decisions are challenged in court.¹⁷²

III. NOAA MUST REMAIN RESPONSIBLE FOR FISHERIES
MANAGEMENT IF PROTECTION OF THE ENVIRONMENT
REMAINS THE CHIEF PRIORITY OF THE MAGNUSON-STEVENSON
FISHERY CONSERVATION AND MANAGEMENT ACT

Ultimately, NOAA seeks to protect valuable natural resources while taking into consideration the fact that fishermen depend on a region's waters for their livelihoods. This is a precarious balance to strike; however, NOAA proves itself capable of making informed, though often unpopular, decisions. In order for NOAA to maintain its vital role as federal fisheries manager, Massachusetts Attorney General Coakley's suit must fail. First, NOAA—as representative of the federal government—is the most well-positioned to honor the environmental commitments at the heart of the Magnuson-Stevens Act.¹⁷³ Second, NOAA's recent recommitment to using the best possible scientific practices emphasizes that its paramount concern is the protection of the environment and the conservation of valuable fisheries.¹⁷⁴ In fact, various courts hearing numerous disputes over the last several decades overwhelmingly upheld NOAA's practices as consistent with its statutory mandate and in no way “arbitrary and capricious.”¹⁷⁵

Moreover, NOAA continues to fulfill its role by involving the public and other interest and environmental groups through direct and indirect measures including traditional notice-and-comment rule-making proceedings.¹⁷⁶ Ultimately, through the Magnuson-Stevens Act and

¹⁷⁰ *Id.* “Based on the public comments received . . . NMFS is implementing the proposed measures as an interim final rule to become effective at the start of FY 2014.” *Id.* At that point, NMFS will seek additional public comment. *Id.*

¹⁷¹ *Id.*

¹⁷² *See* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁷³ *See supra* Part II.

¹⁷⁴ Dean, *supra* note 139; *see NOAA Administrator: Dr. Jane Lubchenco*, *supra* note 137.

¹⁷⁵ Administrative Procedure Act, 5 U.S.C. § 706 (2012); *see supra* Part I.D.

¹⁷⁶ *See* Magnuson-Stevens Fishery Conservation and Management Act Provisions, 78 Fed. Reg. 26,172 (May 3, 2013) (to be codified at 50 C.F.R. pt. 648).

subsequent renewals, Congress expressed its clear intent to make environmental conservation and protection its chief priority,¹⁷⁷ even at the (unfortunate) expense of the fishing industry in some instances. In other words, Congress appeared to decide that the long-term viability of a fishery would prove much more beneficial than allowing fishermen to benefit maximally from fisheries in the short-term in ways that would prove unsustainable for the future. NOAA and NMFS remain capable of fulfilling congressional objectives and continue to honor congressional intent by making difficult decisions to protect the environment, so that “there will always be more fish in the sea.”

¹⁷⁷ See *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000).

