

# FEDERAL FISHERIES MANAGEMENT: A QUANTITATIVE ASSESSMENT OF FEDERAL FISHERIES LITIGATION SINCE 1976

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## I. INTRODUCTION

Unlike many federal environmental and natural resources laws, Congress actually designed federal fisheries management under the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act) to operate as environmental law without the courts. Instead, as two attorneys for the National Oceanic

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and Atmospheric Administration (NOAA)<sup>1</sup> have explained, “[t]he Magnuson-Stevens Act is designed to encourage user-group self-regulation within legislatively prescribed scientific and policy-based parameters.”<sup>2</sup> Indeed, some commentators continue to view the administrative realm as the only proper jurisdiction for fishery management decisions.<sup>3</sup>

Protecting the U.S. fishing industry was clearly a main goal of Congress in 1975 and 1976 as it considered enacting the Magnuson-Stevens Act. The House of Representatives, for example, described fisheries in U.S. waters as improperly managed common-pool resources, with the resulting scramble for fish destroying the economic value of most U.S. fisheries.<sup>4</sup> International fisheries agreements were inadequate to fix these problems.<sup>5</sup> As a result, the House concluded:

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1. NOAA is located within the U.S. Department of Commerce and houses the National Marine Fisheries Service (NMFS), now known as NOAA Fisheries, the federal agency that most directly implements the Magnuson-Stevens Act. *About Us*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/aboutus/aboutus.html> (last visited Apr. 2, 2017).

2. Marian Macpherson & Mariam McCall, *Judicial Remedies in Fisheries Litigation: Pros, Cons, and Prestidigitation?*, 9 OCEAN & COASTAL L.J. 1, 4 (2003).

3. See, e.g., Joseph A. Farside, Jr., Comment, *Atlantic States Marine Fishery Commission: Getting a Grip on Slippery Fisheries Management*, 11 ROGER WILLIAMS U.L. REV. 231, 264–65 (2005) (advocating an administrative appeals process for the Atlantic States Marine Fishery Commission to “keep contentious fishery management issues, especially those regarding allocation, out of courts and in the hands of fishery managers where they belong. Fishery managers frequently struggle with litigation that delays the fishery management process, and an effective appeals process within the ASMFC would eliminate much of the need for parties to litigate management issues.”); *Symposium on the Costs and Benefits of Litigation in Fishery Management: Editor’s Foreword*, 7 OCEAN & COASTAL L.J. 1, 1 (2001) [hereinafter *Editor’s Foreword*] (“To some observers, courts are becoming too engrossed in the fishery management process and in making management decisions, which should be left to the specialized and technical expertise of the fishery management agencies. Agency decision-making has been tainted by a general fear of litigation.”).

4. Thus:

There is little doubt that with some species (haddock, for example) the intense foreign effort has resulted in biological overexploitation and considerable economic waste for the domestic fishing industry. However, the high rate of foreign fishing, the old age of vessels and crewmen, and the low earnings to labor and capital in certain fisheries are primary symptoms rather than causes. That is, these are characteristic of a common property resource in which there is no ownership of the resource and thus entry (either by foreign or domestic interests) into the fishery takes place as long as there is economic rent or profit to be earned. This means that in any fishery, unless there are restrictions on entry, fishing effort tends to increase to a level where average profits—or economic rent attributable to the resource—is dissipated. Therefore, while some vessels in each fishery earn a profit, the tendency is toward zero profits, with the result being old crewmen and vessels and low earnings to labor and capital.

H.R. REP. NO. 94-445, at 1081 (1976), as reprinted in 1976 U.S.C.C.A.N. 593, 602–03.

5. *Id.* at 1093.

the depletion of these stocks is in large measure attributable to the phenomenal increase in recent years in the number of technologically sophisticated and very efficient foreign fishing vessels in waters off United States coasts, and that if such fishing pressure is not regulated and reduced immediately, irreversible damage may well be done to important fish stocks and to American fishing interests alike.<sup>6</sup>

The House also conceived of federal fisheries management as primarily a science-based administrative assessment focusing on maximum sustainable yield and optimum yield.<sup>7</sup> “Maximum sustainable yield” was a term-of-art concept that Congress borrowed directly from fisheries biology, which reflects “the biological well-being of the fishery.”<sup>8</sup> “Optimum sustainable yield” (later codified as “optimum yield”<sup>9</sup>), in turn, was the more political concept and:

takes into account the economic well-being of the commercial fishermen, the interests of recreational fishermen, and the welfare of the nation and its consumers. The optimum sustainable yield of any given fishery or region will be a carefully defined deviation from MSY in order to respond to the unique problems of that fishery or region.<sup>10</sup>

As further evidence of federal fisheries management’s “law without courts” leanings, unlike the vast majority of federal environmental and natural resources statutes that Congress enacted in the 1970s, the Magnuson-Stevens Act contains no citizen-suit provision allowing for citizen enforcement of its provisions in the courts.<sup>11</sup> Notably, the House of Representatives in 1975 did not mention courts or judicial review at all, except in connection with enforcement actions against individuals and businesses, where due process concerns mandate access to judicial processes.<sup>12</sup> In addition, at least as originally conceived, the Act provides relatively limited fodder for lawsuits under the federal Administrative Procedure Act’s (APA) judicial review provisions,<sup>13</sup> and it expressly limits

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6. *Id.* at 1095.

7. *Id.* at 1098.

8. *Id.* at 1099.

9. 16 U.S.C. § 1851(a)(1) (2012).

10. H.R. REP. NO. 94-445, at 1099 (1976), as reprinted in 1976 U.S.C.C.A.N. 593, 616.

11. See, e.g., *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 n.1 (1989) (listing a number of federal statutes with citizen suit and notice requirements, but not including the Magnuson-Stevens Act).

12. See, e.g., H.R. REP. NO. 94-445, at 1125–30 (1976), as reprinted in 1976 U.S.C.C.A.N. 593, 641–45 (discussing the 1976 Act’s enforcement provisions).

13. 5 U.S.C. §§ 701–706 (2012). See Macpherson & McCall, *supra* note 2, at 4–5 (emphasizing the broad discretion that both Fishery Management Councils and the Secretary

judicial review under the APA of the Secretary of Commerce's regulations implementing the Act.<sup>14</sup>

Indeed, as Part IV will discuss in more detail, much of the fisheries-related litigation that *has* occurred in the federal courts has been based on *other* statutes that federal fisheries management can trigger<sup>15</sup>—for example, the National Environmental Policy Act (NEPA),<sup>16</sup> the Regulatory Flexibility Act,<sup>17</sup> or the Endangered Species Act<sup>18</sup>—rather than the Magnuson-Stevens Act itself. In addition, some particularly troublesome fisheries—such as the summer flounder fishery in the mid-Atlantic region,<sup>19</sup> the West Coast groundfish fishery,<sup>20</sup> or the many fisheries governed by the Northeast Multispecies Fishery Management Plan<sup>21</sup>—have prompted decades of litigation through multiple lawsuits and pursuant to multiple statutes. Thus, at least from the perspective of environmental plaintiffs, the Magnuson-Stevens Act has not been nearly as effective a litigation breeder with respect to federally managed fisheries as more traditional environmental statutes.

This article seeks to quantify the amount and types of litigation that *have* occurred under the Magnuson-Stevens Act, focusing on whether progressive and substantial amendments to the Act in 1996 and 2006 seem to have affected litigation patterns. To set the stage for this quantitative analysis, Part II examines in some detail the original provisions of the 1976 Fishery Conservation and Management Act, the 1996 Sustainable Fishery Act amendments, and the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act. Part III, in turn, reviews previous

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of Commerce have under the Magnuson-Stevens Act and the limited grounds available for disapproving Council management plans).

14. PUB. L. NO. 94-265, § 305(d), 90 Stat. 331 (1976) (codified at 16 U.S.C. § 1855(d)) (requiring petitions for review to be filed within 30 days and making inapplicable the APA's provisions, see 5 U.S.C. §§ 705–706, for judicial relief pending review, substantial evidence review, and review based on actions “unwarranted by the facts”).

15. Macpherson & McCall, *supra* note 2, at 7–8.

16. 42 U.S.C. §§ 4321–4370h (2012). For an example of federal fisheries litigation based primarily on NEPA, see Pacific Coast Federation of Fishermen's Ass'ns. v. Blank, 693 F.3d 1084, 1097–1104 (9th Cir. 2012) (holding that Fishery Management Plan amendments had complied with NEPA).

17. 5 U.S.C. §§ 601–612 (2012). For an example of federal fisheries litigation based primarily on the Regulatory Flexibility Act, see Little Bay Lobster Co. v. Evans, 352 F.3d 462, 470–72 (1st Cir. 2003) (holding that NMFS had complied with the Act).

18. 16 U.S.C. §§ 1531–1544 (2012). For an example of fisheries litigation based primarily on the Endangered Species Act, see generally Greenpeace v. Nat'l Marine Fisheries Serv., 80 F. Supp. 2d 1137 (D. Wash. 2000) (involving the North Pacific groundfish fishery's impacts on the endangered Steller sea lion).

19. Macpherson & McCall, *supra* note 2, at 21–33.

20. *Id.* at 46–51. See also Suzanne Iudicello & Sherry Bosse Lueders, *A Survey of Litigation Over Catch Shares and Groundfish Management in the Pacific Coast and Northeast Multispecies Fisheries*, 46 ENVTL. L. 157, 184–90 (2016) (describing litigation in the Pacific groundfish fishery).

21. Iudicello & Lueders, *supra* note 20, at 173–84.

perceptions and analyses of Magnuson-Stevens Act litigation, noting that this literature clearly identifies the 1996 Sustainable Fishery Act as a turning point in that litigation. Part IV presents our quantitative analysis based on a thorough Westlaw review of decided federal fisheries cases from 1976-2016, confirming that the Sustainable Fisheries Act's enactment does correlate to a significant increase in federal fisheries litigation but also noting that the primary litigants under the Magnuson-Stevens Act itself remain fishers. We conclude that increased statutory mandates for environmental protection, increased fisheries enforcement efforts, and increased use of limited access fisheries are likely explanations for the increase in litigation directly related to fisheries management but that our initial research, while revealing, would benefit from deeper contextualization.

## II. FEDERAL FISHERIES MANAGEMENT LEGISLATION

The federal government manages fisheries through the Magnuson-Stevens Fishery Conservation and Management Act,<sup>22</sup> which Congress enacted in 1976<sup>23</sup> and renamed to its current appellation in 1996.<sup>24</sup> With certain exceptions, federal jurisdiction over fisheries generally applies more than three miles out to sea, while states generally have authority to manage fisheries within the three miles of ocean closest to shore.<sup>25</sup>

The Magnuson-Stevens Act is long and complex, and many of its provisions neither inspire nor support litigation over fisheries management. As a result, the discussions that follow focus on the provisions of the Act and its major amendments that create requirements and standards that in turn can either lead to fisheries restrictions that can prompt lawsuits by fisherman or create enforceable legal requirements against which courts can judge the acceptability of actions taken by the federal entities charged with fisheries management responsibility.

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22. 16 U.S.C. §§ 1801–1884 (2012).

23. PUB. L. NO. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801–1884).

24. PUB. L. NO. 104-208, § 211, 110 Stat. 3009 (1996) (designating the renaming and requiring it to be used everywhere fifteen days after enactment of the Sustainable Fisheries Act of 1996).

25. 16 U.S.C. § 1856 (2012).

### A. Fishery Conservation and Management Act of 1976

The federal government enacted the original federal Fishery Conservation and Management Act on April 13, 1976.<sup>26</sup> This act recognized that:

As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.<sup>27</sup>

Emphasizing the importance of commercial and recreational fishing to the U.S.,<sup>28</sup> the Act also proclaimed fisheries' status as a renewal and sustainable resource—so long as overfishing could be avoided.<sup>29</sup> To ensure the safe future of U.S. fisheries, “[a] national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.”<sup>30</sup>

The Fishery Conservation and Management Act proclaimed a 200 nautical mile “fishery conservation zone” around the U.S.,<sup>31</sup> anticipating international law developments in the 1982 third United Nations Convention on the Law of the Sea (UNCLOS III, in effect 1994) that would allow coastal nations to claim a 200 nautical mile exclusive economic zone (EEZ) for purposes that include fisheries management.<sup>32</sup> The Act then generally excluded foreign fishing vessels from this zone as of the end of February 1977.<sup>33</sup> As a result, since 1977 fishing in the U.S.’s EEZ. has been reserved almost exclusively for Americans.

For domestic fisheries management, the Act created eight regional Fishery Management Councils (FMCs), for New England, the Mid-Atlantic, the South Atlantic, the Caribbean, the Gulf of

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26. PUB. L. NO. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801–1884).

27. *Id.* § 2(a)(2) (codified at 16 U.S.C. § 1801(a)(2)).

28. *Id.* § 2(a)(3) (codified at 16 U.S.C. § 1801(a)(3)).

29. *Id.* § 2(a)(5) (codified at 16 U.S.C. § 1801(a)(5)).

30. *Id.* § 2(a)(6) (codified at 16 U.S.C. § 1801(a)(6)).

31. *Id.* § 101 (codified at 16 U.S.C. § 1811).

32. See Robin Kundis Craig, *Regulation of U.S. Marine Resources: An Overview of the Current Complexity*, 19 NAT. RES. & ENV’T. 3, 4–5 (2004) (providing an overview of UNCLOS III’s jurisdictional provisions and the U.S.’s adoption of them through presidential proclamations).

33. PUB. L. NO. 94-265, § 210(a), 90 Stat. 331 (1976) (codified at 16 U.S.C. § 1821(a)).

Mexico, the Pacific, the North Pacific, and the Western Pacific regions.<sup>34</sup> These regional FMCs are overseen by the Secretary of Commerce, who has delegated much of his or her authority to the National Marine Fisheries Service (NMFS) within NOAA.<sup>35</sup> One of the primary functions of each regional FMC is to “prepare and submit to the Secretary [of Commerce] a fishery management plan [FMP] with respect to each fishery . . . within its geographical area of authority and, from time to time, such amendments to each such plan as are necessary . . .”<sup>36</sup> NMFS (also known as “NOAA Fisheries”) and the regional FMCs currently “track[] 473 fish stocks managed by 46 fishery management plans.”<sup>37</sup>

For any species managed under the Act, the management goal is “optimum yield.”<sup>38</sup> The 1976 Act defined “optimum” to mean:

with respect to the yield from a fishery, . . . the amount of fish—

(A) which will provide the greatest overall benefit to the nation, with particular reference to food production and recreation opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.<sup>39</sup>

To achieve this goal, FMPs in 1976 had to meet seven national standards:

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

(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.

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34. *Id.* § 302(a) (codified at 16 U.S.C. § 1852(a)).

35. *About Us*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/aboutus/aboutus.html> (last visited Apr. 2, 2017).

36. PUB. L. NO. 94-265, § 302(h)(1), 90 Stat. 331 (1976) (codified at 16 U.S.C. § 1852(h)(1)).

37. *Our Work: Fisheries*, NOAA FISHERIES, <http://www.noaa.gov/fisheries> (last visited Apr. 2, 2017).

38. PUB. L. NO. 94-265, § 301(a)(1), 90 Stat. 331 (1976) (codified at 16 U.S.C. § 1851(a)(1)).

39. *Id.* § 3(18) (codified at 16 U.S.C. § 1802(18)).

(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.

(5) Conservation and management measures shall, where practicable, promote 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.<sup>40</sup>

In addition, each FMP had to contain five mandatory components. Specifically, each FMP must:

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

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40. *Id.* § 301(a) (codified at 16 U.S.C. § 1851(a)).

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3), and

(B) the portion of such optimum yield which, on an annual basis will not be harvested by fishing vessels of the United States and can be made available for foreign fishing; and

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, and number of hauls.<sup>41</sup>

FMPs could also contain a plethora of other provisions at the FMC's discretion, including permit requirements, fishing zones, catch limitations, and gear limitations.<sup>42</sup> Congress also empowered the FMCs to limit access to fisheries.<sup>43</sup>

On the enforcement side, the 1976 Fishery Conservation and Management Act made several actions related to fishing illegal<sup>44</sup> and punishable through civil penalties,<sup>45</sup> criminal enforcement,<sup>46</sup> and civil forfeitures.<sup>47</sup> The Secretary of Commerce and the "Secretary of the department in which the Coast Guard is operating" received authority to enforce these provisions.<sup>48</sup>

Nevertheless, the 1976 Fishery Conservation and Management Act fairly systematically excluded environmental interests from fisheries management. For example, Congress designated a varying number of voting members for each regional FMC,<sup>49</sup> but it created the requirements for these voting members so as to greatly favor fisheries interests. Thus, in general, FMC voting members were to include: (1) "The principal State official with marine fishery management responsibility and expertise in each constituent State," designated by the governor of each relevant state; (2) "[t]he regional director of the National Marine Fisheries Services for the geographic area concerned, or his designee"; and (3) other FMC

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41. *Id.* § 303(a) (codified at 16 U.S.C. § 1853(a)).

42. *Id.* § 303(b) (codified at 16 U.S.C. § 1853(b)).

43. *Id.* § 303(b)(6) (codified at 16 U.S.C. § 1853(b)(6)).

44. *Id.* § 307 (codified at 16 U.S.C. § 1857).

45. *Id.* § 308 (codified at 16 U.S.C. § 1858).

46. *Id.* § 309 (codified at 16 U.S.C. § 1859).

47. *Id.* § 310 (codified at 16 U.S.C. § 1860).

48. *Id.* § 311 (codified at 16 U.S.C. § 1861); *see also id.* § 3(20) (defining "Secretary" in the Act to be the Secretary of Commerce).

49. *Id.* § 302(a) (codified at 16 U.S.C. § 1852(a)).

members appointed by the Secretary of Commerce from state governors' lists of "qualified individuals," where "qualified individual" "means an individual [who is] knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources of the geographical area concerned."<sup>50</sup> John P. Wise noted about U.S. fisheries management in 1991 that the fish themselves (in particular, the haddock) "ha[ve] no friends,"<sup>51</sup> while another observer has noted that "[t]here is a very strong implication that the fishing industry is the major stakeholder in the fishery management process."<sup>52</sup>

### B. Sustainable Fisheries Act of 1996

The Sustainable Fisheries Act<sup>53</sup> amended the Magnuson-Stevens Act in a number of ways to implement more ecologically-minded goals for marine fisheries management. Many of these amendments emphasized habitat requirements for fish and the need to actively rebuild overfished fish stocks.

Congress used the Sustainable Fisheries Act to inject habitat concerns throughout the Magnuson-Stevens Act. For example, it amended the findings and purposes of the Act to acknowledge that:

Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) the inadequacy of fishery resource conservation and management practices and controls, or (C) *direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels.*<sup>54</sup>

Indeed, according to Congress, "One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States."<sup>55</sup>

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50. *Id.* § 302(b)(1) (codified at 16 U.S.C. § 1852(b)(1)).

51. JOHN WISE, FEDERAL CONSERVATION AND MANAGEMENT OF MARINE FISHERIES IN THE UNITED STATES 10 (Center for Marine Conservation 1991).

52. Bonnie McCay, *You Win Some, You Lose Some: The Costs and Benefits of Litigation in Fishery Management*, 7 OCEAN & COASTAL L.J. 5, 5 (2001).

53. Sustainable Fisheries Act, PUB. L. NO. 104-297, 110 Stat. 3559 (1996) (amending 16 U.S.C. §§ 1801–1884).

54. *Id.* § 101(1) (amending 16 U.S.C. § 1801(a)) (emphasis added).

55. *Id.* § 101(3) (amending 16 U.S.C. § 1801(a)).

As a result, a new purpose of the Act became “to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.”<sup>56</sup> The Sustainable Fisheries Act defined “essential fish habitat” to be “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity,”<sup>57</sup> and Congress charged the Secretary of Commerce with promulgating regulations that would help the regional FMCs to properly identify essential fish habitat.<sup>58</sup>

The Sustainable Fisheries Act also sought to directly protect fish species by reducing bycatch<sup>59</sup> and requiring depleted stocks to be rebuilt. Under the amendments, “bycatch” is “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.”<sup>60</sup> The rebuilding requirements, in turn, redefined what the “optimum” yield from a fishery could be. After the Sustainable Fisheries Act, “optimum,” is defined to mean:

with respect to the yield from a fishery . . . 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;

(B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and

(C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.<sup>61</sup>

Relatedly, “[t]he terms ‘overfishing’ 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.”<sup>62</sup>

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56. *Id.* § 101(7) (amending 16 U.S.C. § 1801(b)).

57. *Id.* § 102(10) (amending 16 U.S.C. § 1802).

58. *Id.* § 305(b) (amending 16 U.S.C. § 1855).

59. *Id.* § 101(8) (amending 16 U.S.C. § 1801(c)(3)).

60. *Id.* § 102(1) (amending 16 U.S.C. § 1802).

61. *Id.* § 102(7) (amending 16 U.S.C. § 1802).

62. *Id.* § 102(8) (amending 16 U.S.C. § 1802).

To fulfill the Act's new biological goals (as well as human safety goals), the Sustainable Fisheries Act also expanded the requirements for FMPs. First, it added three new national standards to govern federal FMPs:

(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 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.

(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.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.<sup>63</sup>

Second, the 1996 amendments expanded the FMPs' required provisions to ensure that FMPs would: "rebuild overfished stocks;"<sup>64</sup> "describe and identify essential fish habitat for the fishery . . . , minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;"<sup>65</sup> and:

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management

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63. *Id.* § 106(b) (amending 16 U.S.C. § 1851(a)).

64. *Id.* § 108(a)(1) (amending 16 U.S.C. § 1853(a)(1)(A)).

65. *Id.* § 108(a)(3) (amending 16 U.S.C. § 1853(a)(7)).

measures that, to the extent practicable and in the following priority—

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors; [and]

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery.<sup>66</sup>

Finally, Congress created new procedures that require the Secretary of Commerce to keep track of whether fish stocks in each region are either overfished or “approaching a condition of being overfished.”<sup>67</sup> Once the Secretary determines that a fishery is overfished, it must notify the relevant FMC, requiring that FMC to create or amend FMPs within one year to address the problem.<sup>68</sup> If the FMC fails to comply, the Secretary must prepare the FMP or amendment instead.<sup>69</sup> In addition, Congress imposed time limits and distributional equities on the rebuilding process, specifying that the FMPs for overfished fisheries shall:

(A) specify a time period for ending overfishing and rebuilding the fishery that shall—

(i) be as short as possible, taking into account the status and biology of any overfished stocks of fish, the

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66. *Id.* § 108(a)(7) (amending 16 U.S.C. § 1853(a)).

67. *Id.* § 109(e) (amending 16 U.S.C. § 1854(e)). “A fishery shall be classified as approaching a condition of being overfished if, based on trends in fishing effort, fishery resource size, and other appropriate factors, the Secretary estimates that the fishery will become overfished within two years.” *Id.* § 109(e).

68. *Id.* § 109(e) (amending 16 U.S.C. § 1854(e)).

69. *Id.* § 109(e) (amending 16 U.S.C. § 1854(e)).

needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise;

(B) allocate both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery; and

(C) for fisheries managed under an international agreement, reflect traditional participation in the fishery, relative to other nations, by fishermen of the United States.<sup>70</sup>

These new requirements arguably gave potential litigants new grounds for lawsuits, both if the regional FMCs failed to make the required amendments and if those FMP amendments did not comply with the new standards. In addition, new National Standard 8, which required FMCs to consider impacts of fishery management on affected fishing communities, created unavoidable tensions with the new requirement to rebuild overfished fish stocks, which generally requires a reduction of, and occasionally a complete moratorium on, fishing for that species. Similarly, zealous implementation of the essential fish habitat requirements could limit access to traditional fishing grounds. These ambiguities regarding the Act's exact priorities also became sources of litigation.

Congress did negate one potentially controversial management measure in the Sustainable Fisheries Act, at least until 2000: It imposed a moratorium on the use of Individual Fishing Quotas (IFQs) in federal fisheries management,<sup>71</sup> eliminating the regional FMCs' abilities to incorporate this potential management option for eliminating overfishing and rebuilding overfished fisheries. Instead, Congress ordered a report from the National Academy of Science on IFQs, due to Congress in 1998.<sup>72</sup> The National Academy was also to report on Community Development Quotas.<sup>73</sup> However, Congress did provide for fisheries disaster relief and a funded fishing capacity reduction program, aiding the transition to sustainable fisheries.<sup>74</sup>

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70. *Id.* § 109(e) (amending 16 U.S.C. § 1854(e)).

71. *Id.* § 108(e) (amending 16 U.S.C. § 1853).

72. *Id.* § 108(f) (amending 16 U.S.C. § 1853).

73. *Id.* § 108(h) (amending 16 U.S.C. § 1853).

74. *Id.* § 116 (amending 16 U.S.C. § 1861a).

*C. Magnuson-Stevens Fishery Conservation & Management  
Reauthorization Act of 2006*

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 was, according to Congress, “[a]n Act [t]o amend the Magnuson-Stevens Fishery Conservation and Management Act to authorize activities to promote improved monitoring and compliance for high seas fisheries, or fisheries governed by international fishery management agreements, and for other purposes.”<sup>75</sup> Large sections of these amendments, therefore, dealt with U.S. obligations under international law and added new provisions of law external to the Magnuson-Stevens Act proper. Thus, for example, while Part IV added provisions to the Magnuson-Stevens Act to implement numerous international fishery obligations,<sup>76</sup> Part V implemented the Western and Central Pacific Fisheries Convention through new provisions<sup>77</sup> and the last parts of the Act enacted new laws to deal with Pacific whiting<sup>78</sup> and tsunamis,<sup>79</sup> while Part IX amended the Marine Mammal Protection Act with provisions governing polar bears.<sup>80</sup>

With respect to domestic fishery regulation, the 2006 amendments strengthened many of the environmental features of the Sustainable Fisheries Act, such as bycatch reduction<sup>81</sup> and habitat protection.<sup>82</sup> Most importantly for assessing litigation impacts, the 2006 Reauthorization Act imposed a fifteenth mandatory component for FMPs, which must now “establish a mechanism for specifying annual catch limits in the plan . . . at a level such that overfishing does not occur in the fishery, including measures to

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75. PUB. L. NO. 109-479, 120 STAT. 3575 (2007).

76. *Id.* §§ 401–408 (codified at 16 U.S.C. §§ 1826a, 1826h, 1826i, 1826j, 1826k, 1829, 1891c, 1891d) (amending scattered other provisions of the Magnuson-Stevens Act and other fisheries-related statutes).

77. *Id.* §§ 501–511 (codified at 16 U.S.C. §§ 6901–6910).

78. *Id.* §§ 601–611 (codified at 16 U.S.C. §§ 7001–7010).

79. *Id.* §§ 801–808 (codified at 33 U.S.C. §§ 3201–3207).

80. *Id.* §§ 901–902 (amending the Marine Mammal Protection Act by adding 16 U.S.C. §§ 1423–1423h).

81. See *id.* § 116 (adding a Bycatch Reduction Engineering Program at 16 U.S.C. § 1865). As Madeline Kass has noted, the Act more generally “clarifies and strengthens existing stock rebuilding provisions by requiring Councils to actually *implement* required plans and regulations to end overfishing of stocks declared overfished. Moreover, such plans and regulations must now provide for ending overfishing *immediately*. Pub. L. No. 109-479, § 104.” Madeline June Kass, *Fishery Conservation and Management Act Reauthorization: “A” for Effort, “C” for Substance*, 21 NAT. RES. & ENV’T. 52, 53 (2007). In addition, “Congress bolstered scientific research by establishing a nationwide, regionally based cooperative research and monitoring program (Cooperative Research Program), a Fisheries Conservation and Management Fund (Conservation Fund), and a regional ecosystem research study. Pub. L. No. 109-479, §§ 204, 208, and 210.” *Id.*

82. See PUB. L. NO. 109-479, § 105, 120 STAT. 3575 (2007) (amending 16 U.S.C. § 1853(b) to allow FMPs to protect deep sea coral habitats); *id.* § 117 (adding a Community-Based Restoration Program for Fishery and Coastal Habitats at 16 U.S.C. § 1891a).

ensure accountability.”<sup>83</sup> These mechanisms had to be in place in FMPs by 2010 for overfished fisheries and 2011 for all other fisheries (unless the managed species lives a year or less).<sup>84</sup>

However, the main domestic focus of the 2006 amendments was to authorize, even encourage, limited access privilege programs (LAPPs),<sup>85</sup> a more general term than IFQ.<sup>86</sup> Commentators have viewed this new program as a “shift to a more market-based approach” that may help to “avoid the ‘fishing derby’ style of fishing.”<sup>87</sup> While a market-based approach might sound like a litigation-avoiding strategy, the details of the new program requirements instead would seem to facilitate and multiply the types of litigation possible under the Magnuson-Stevens Act. As Peter Schikler observed shortly after the Reauthorization Act’s passage, “Congress, in response to political pressures from interest groups in fisheries, included in section 303A a number of complexities that will hinder the implementation of LAPPs and therefore the recovery of fish stocks.”<sup>88</sup>

According to the Act, a “limited access privilege” is a federal permit “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 can include an IFQ.<sup>89</sup> In turn, a “limited access system” is “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.”<sup>90</sup> FMCs must consider seven factors in establishing these systems.<sup>91</sup>

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83. *Id.* § 104(a)(10) (amending 16 U.S.C. § 1853(a)).

84. *Id.* §§ 104(b)(1)–(2).

85. *Id.* § 105(4) (amending 16 U.S.C. § 1853(b)(6)).

86. “These amendments effected deep changes to the nation’s fishery management laws by, among many other things, strengthening the MSA’s conservation objectives and fostering increased use of controversial, market-based fisheries management systems.” Shaun M. Gehan & Michele Hallowell, *Battle to Determine the Meaning of the Magnuson-Stevens Fisheries Conservation and Management Act of 2006: A Survey of Recent Judicial Decisions*, 18 OCEAN & COASTAL L.J. 1, 1 (2012).

87. *Lame Duck Congress Reauthorizes and Revamps Magnuson-Stevens Fishery Conservation and Management Act*, MARTEN LAW (Jan. 10, 2007), <http://www.martenlaw.com/news/?20070110-fishery-act-reauthorized>.

88. Peter Schikler, Comment, *Has Congress Made It Harder to Save the Fish? An Analysis of the Limited Access Privilege Program (LAPP) Provisions of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006*, 17 N.Y.U. ENVT'L. L.J. 908, 909 (2008).

89. PUB. L. NO. 109-479, § 3(b)(3), 120 Stat. 3575 (2007) (adding 16 U.S.C. § 1802(23A)).

90. *Id.* § 3(b)(3) (adding 16 U.S.C. § 1802(23B)).

91. Specifically, an FMC may:

establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery;

(B) historical fishing practices in, and dependence on, the fishery;

The 2006 amendments created an entire new provision to govern LAPPs.<sup>92</sup> Under this section, after the Act's effective date, "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."<sup>93</sup> Any privileges created under this program are permits that can be revoked, not property rights.<sup>94</sup> In addition, limited access systems must meet eleven statutory requirements.<sup>95</sup>

LAPPs potentially increase both motivation and opportunities for litigation under the Magnuson-Stevens Act. First, by definition, limited access systems bar some fishermen from regulated fisheries, creating an economic and cultural incentive to sue the relevant FMC, NMFS, and the Secretary of Commerce.<sup>96</sup> Second, the last three requirements for limited access systems each invite legal proceedings, either over the initial allocation of fishing privileges or over antitrust violations.<sup>97</sup> Moreover, the statute enumerates a number of factors for FMCs to consider when allocating fishing

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- (C) the economics of the fishery;
  - (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
  - (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
  - (F) the fair and equitable distribution of access privileges in the fishery; and
  - (G) any other relevant considerations . . . .

*Id.* § 105(4) (16 U.S.C. § 1853(b)(6)).

- 92. *Id.* § 106 (adding 16 U.S.C. § 1853a).
- 93. *Id.* (codified at 16 U.S.C. § 1853a(a)).
- 94. *Id.* (codified at 16 U.S.C. § 1853a(b)).
- 95. *Id.* (codified at 16 U.S.C. § 1853a(c)(1)).
- 96. As Peter Schikler has observed:

While LAPPs have important potential benefits, LAPPs have also been a source of controversy in U.S. fisheries. The primary criticisms are based on distributional and equitable arguments. Critics of LAPPs are concerned that fishers who have historically harvested fisheries may not receive quota allocations and will be excluded from fisheries, leading to economic hardship. Critics also fear that trading in LAPPs will allow some fishers to consolidate large portions of quotas and further exclude fishers that have fewer economic resources. There is no doubt that, as the critics contend, increasing efficiency in overcapitalized fisheries by implementing LAPPs will have significant effects on the distribution of resources among prior users. But these concerns about the distributional consequences of LAPPs can be partially addressed when designing limited access programs, particularly through the initial allocation of quota shares.

Schikler, *supra* note 88, at 915–16 (citations omitted). Suzanne Iudicello and Sherry Lueders have also noted that, after FMCs began implementing catch share programs in the 1990s, "[t]he first to challenge these programs in court were fishermen and processors in the fisheries who found their ability to participate greatly reduced—or even eliminated—by catch shares." Iudicello & Lueders, *supra* note 20, at 161.

97. PUB. L. NO. 109-479, § 106, 120 Stat. 3575 (2007) (codified at 16 U.S.C. §§ 1853a(c)(1)(I)–(K)).

privileges,<sup>98</sup> providing the legal substance to support court challenges from people left out. Third, in order to be eligible to participate in limited access fisheries, relevant fishing communities must meet a number of requirements, including developing and submitting:

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.<sup>99</sup>

In addition, FMCs must consider six factors in evaluating fishing community eligibility, again providing legal criteria for challenging a Council's decisions.<sup>100</sup> Fourth, the amendments allow the Secretary of Commerce to waive the U.S. processing requirement<sup>101</sup> if "the fishery has historically processed the fish outside of the United States" and "the United States has a seafood safety equivalency agreement with the country where processing will occur,"<sup>102</sup> again inviting legal proceedings and challenges. Finally, fishermen themselves can initiate the creation of a LAPP through a petition to the Secretary of Commerce,<sup>103</sup> invoking all of the potential procedural and substantive challenges that the federal APA allows for ignored, denied, and granted petitions to federal agencies.

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98. *Id.*

99. *Id.* (116 U.S.C. § 1853a(c)(3)(A)(i)(IV)).

100. *Id.* (codified at 16 U.S.C. § 1853a(c)(3)(B)). The six criteria are:

- (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.

*Id.*

101. *Id.* (codified at 16 U.S.C. § 1853a(c)(1)(E)).

102. *Id.* (codified at 16 U.S.C. § 1853a(c)(2)).

103. *Id.* (codified at 16 U.S.C. § 1853a(c)(6)(B)).

At the same time that it created new avenues for fisheries litigation, however, Congress also sought to reduce litigation under NEPA. Specifically, Congress ordered the Secretary of Commerce to “revise and update” its NEPA procedures, requiring that the new procedures “conform to the time lines for review and approval of fishery management plans and plan amendments” and:

integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this Act in order to provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork, and effectively involve the public.<sup>104</sup>

These changes would eliminate some of the more obvious NEPA procedural challenges by conforming the Magnuson-Stevens Act to general NEPA requirements, such as public participation and completing environmental impact analyses before completing the decision-making process.

### III. PERCEPTIONS OF MARINE FISHERIES LITIGATION

Litigation under the Magnuson-Stevens Act is often considered an aberration, even detrimental, to effective fisheries management. For example, Marian Macpherson and Mariam McCall, both NOAA attorneys working on fisheries issues at the time they were writing, noted that “absent some affirmative . . . action, fisheries in federal waters go unregulated,” meaning that “in some cases, when a court strikes down an agency action, there may be no management measure left in its place to restrict consumptive use.”<sup>105</sup>

Observers consistently identify the 1996 Sustainable Fisheries Act amendments (sometimes in conjunction with other legal developments at the time) as a turning point in Magnuson-Stevens Act litigation. In conjunction with proposed new amendments to the Act, the 106th and 107th Congresses held numerous hearings regarding the Magnuson-Stevens Act at the turn of the 21st century, leading the House of Representatives to report in 2002 that:

One of the issues that was raised during the hearings and concerns the Committee is the number of lawsuits facing

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104. *Id.* § 304 (adding 16 U.S.C. § 1854(i)).

105. Macpherson & McCall, *supra* note 2, at 6.

NMFS, the primary federal fisheries conservation and management authority for fisheries found in the EEZ. While a number of different statutes have been used to initiate lawsuits against the agency, the result of this substantial increase in lawsuits since the enactment of the SFA has forced the agency to spend time and personnel to defend its actions. NMFS estimates that it is currently spending as much as one tenth of its manpower and funding to address lawsuits. Before the enactment of the SFA, the number of lawsuits facing the Secretary of Commerce over fisheries conservation and management issues was 16. The Secretary is currently facing 104 with petitions pending which could lead to a number of additional, new lawsuits. It is clear that if fisheries conservation and management measures are to be effective, NMFS cannot continue to spend more than 10 percent of its funding and staff time on litigation.

Litigation was not a major concern of the agency before the SFA; however, it has become a factor in fisheries management since the enactment of the SFA. This concern has been heightened because the SFA added a number of new mandates for NMFS. In fact, the SFA: amended or added 15 definitions; added three new National Standards and amended one existing Standard; added eight new provisions for the Councils to comply with in developing any new FMP and required that all existing plans be amended to comply with these new required provisions; included five new discretionary provisions for Councils to consider when developing FMPs; and required 13 new reports.<sup>106</sup>

The House also viewed the Sustainable Fisheries Act's Essential Fish Habitat provisions as difficult-to-implement litigation breeders in need of reform.<sup>107</sup>

Congress was also now viewing litigation as a possible impediment to or burden on the implementation of new programs created within the Magnuson-Stevens Act. Thus, for example, when Congress was considering ecosystem-based management of fisheries, the House of Representatives advised the Secretary of Commerce to "use sound judgment in selecting" fisheries to pilot the new approach and especially to avoid both "fisheries whose current management is so complicated that further layers of management will open the fishery to extensive litigation" and

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106. H.R. REP. NO. 107-746, at 16–17 (2002).

107. *Id.* at 35–36.

fisheries already “burdened with extensive litigation at the time of selection for such ecosystem-based fishery management.”<sup>108</sup> Similarly, proposed “habitat areas of particular concern” requirements could “potentially add to the litigation burden faced by the agency.”<sup>109</sup>

Macpherson and McCall also view the Sustainable Fisheries Act as an important turning point in Magnuson-Stevens Act litigation:

Since 1996, NMFS has been the subject of a dramatically increasing number of lawsuits. Several key factors influencing this increase in fisheries litigation include: the 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Act, which established new conservation requirements for fishery management plans to meet; the 1996 amendments to the Regulatory Flexibility Act, adding a judicial remedy to enforce the requirement that federal agencies analyze economic impacts on small entities; and a large influx of money to environmental organizations to support a coordinated legal effort to “restore marine ecosystems and fisheries.” Due in part to these changes, a new genre of fishery litigants has emerged on the scene that includes interest as diverse as North Pacific factory trawlers, Gulf of Mexico sport fishermen, and environmental groups such as Greenpeace and Natural Resources Defense Council. For a variety of reasons, these litigants have chosen not to pursue their desired changes through the Magnuson-Stevens Act’s council process, but rather to proceed to court. This new wave of litigation has led to a variety of far-reaching injunctions, including massive closures of areas of the Pacific Ocean and court-ordered modifications of fishing quotas in the Atlantic.<sup>110</sup>

Macpherson and McCall thus suggest that the Sustainable Fisheries Act allowed environmental interests to weigh in on fisheries management in ways that had not been possible under the 1976 Act. Others have articulated similar views—for example, that the Sustainable Fisheries Act amendments articulated for the first

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108. *Id.* at 32.

109. *Id.* at 36.

110. Macpherson & McCall, *supra* note 2, at 2–3 (quoting Nils Stolpe, *Who Puts Up the Money? Environmental Lawsuits Backed by BIG Bucks*, COMMERCIAL FISHERIES NEWS, Apr. 2001, at 12A). For a more in-depth analysis of how the 1996 amendments to the Regulatory Flexibility Act affected judicial review for the Magnuson-Stevens Act, see generally M. Jean McDevitt, *Impact of the Regulatory Flexibility Act on the Implementation and Judicial Review Provisions of the Magnuson-Stevens Fishery Conservation and Management Act*, 6 OCEAN & COASTAL L.J. 371 (2001).

time truly competing perspectives on fisheries management, what one group of authors has compared as the “biocentric view of fishery management” focused on fish stocks and a “more social and human ecological perspective” on fisheries management.<sup>111</sup> They noted that, in the wake of these amendments, “[t]he issue of balancing competing objectives is the crux of [the] recent fisheries cases.”<sup>112</sup> In the same vein, many others read the Sustainable Fisheries Act as creating a new conservation imperative that could stand against fishermen’s economic incentives and well-being. For example, Paul R. Bagley saw in post-1996 Magnuson-Stevens Act litigation a new “conservation mandate [that] tak[es] priority over minimization of economic impacts on fishing communities . . . .”<sup>113</sup> Roger Fleming, Peter Shelley, and Priscilla Brooks similarly characterized Congress as “setting as the paramount objectives the restoration and conservation of fish populations at optimum yield levels and the protection of essential fish habitats.”<sup>114</sup>

Under these characterizations, what the Sustainable Fisheries Act most importantly did was allow non-fishermen interested parties, like environmental groups, to characterize the Magnuson-Stevens Act as truly a *conservation* statute with larger environmental purposes, rather than just as a statute that managed the fishing industry. Armed with new statutory provisions that created sufficient mandatory duties and conservation standards to advance environmental goals, environmental groups could increasingly convince courts to adopt more ecologically-focused interpretations of the Act—a result that was arguably unlikely at the FMC level (thus answering Macpherson and McCall’s lament that litigants were not using the FMC processes).<sup>115</sup> For example, the Natural

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111. McCay et al., *supra* note 52, at 6.

112. *Id.*

113. Paul R. Bagley, Note, *Don’t Forget About the Fishermen: In the Battle over Fisheries Conservation and Management a Conservation Ethic Has Trumped Economic Concerns of the Community—Or Has It?*, 36 SUFFOLK U. L. REV. 765, 766 (2003) (focusing on two cases involving the New England groundfish fishery, *Conservation Law Found. v. Evans*, 195 F. Supp. 2d 186 (D.C. 2002), and *Conservation Law Found. v. Evans*, 211 F. Supp. 2d 55 (D.C. 2002)).

114. Roger Fleming, Peter Shelley, & Priscilla M. Brooks, *Twenty-Eight Years and Counting: Can the Magnuson-Stevens Act Deliver on Its Conservation Promise?*, 28 VT. L. REV. 579, 580 (2004). See also Shi-Ling Hsu & James E. Wilen, *Ecosystem Management and the 1996 Sustainable Fisheries Act*, 24 ECOLOGY L.Q. 799, 799 (1997) (“Many observers have hailed the 1996 Sustainable Fisheries Act (SFA), reauthorizing and amending the 1976 Magnuson Fishery Conservation and Management Act (FCMA or Magnuson Act), as a victory for conservation and ecosystem preservation.”); Roger Fleming & John D. Crawford, *Habitat Protection Under the Magnuson-Stevens Act: Can It Really Contribute to Ecosystem Health in the Northwest Atlantic?*, 12 OCEAN & COASTAL L.J. 43, 45 (2006) (noting that “the Sustainable Fisheries Act was enacted in 1996 to strengthen the conservation provisions of our nation’s fisheries law . . . .”).

115. Macpherson & McCall, *supra* note 2, at 2–3 (also quoted above in connection with n. 110).

Resources Defense Council persuaded the U.S. Court of Appeals for the Ninth Circuit that NMFS was not entitled to deference when it significantly extended the time to rebuild the overfished darkblotched rockfish population.<sup>116</sup> If this view of the Sustainable Fishery Act's true importance is correct, then we would expect litigation by environmental groups to increase significantly after 1996—which it did, as Part IV will discuss.

While the 1996 Sustainable Fisheries Act may have opened the proverbial litigation floodgates for the Magnuson-Stevens Act, however, scholars have also credited the 2006 Reauthorization Act for promoting a new wave of litigation.<sup>117</sup> In Gehan and Hallowell's 2012 assessment of new litigation under the 2006 amendments, most of the post-Act litigation concentrated—as might be expected—on issues surrounding the LAPPs, annual catch limits, and accountability measures;<sup>118</sup> a more limited set of cases also addressed the collection of recreational fishing data and the fishery impact statements.<sup>119</sup> More broadly, Gehan and Hallowell concluded that environmental groups, particularly Oceana, were bringing more general challenges to establish what the Reauthorization Act meant for *all* managed fisheries (and generally winning), while fishermen and their organizations were challenging the details of particular management decisions in particular fisheries.<sup>120</sup>

In their more recent and more focused analysis of litigation over catch share programs under the Northeast Multispecies Fisheries Management Plan and the Pacific Groundfish Fishery Management Plan, Suzanne Iudicello and Sherry Lueders concluded that catch share programs for these fisheries, begun in 2010, may actually reduce litigation over these fisheries in the future.<sup>121</sup> Like Gehan and Hallowell, they also indicated that environmental groups are

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116. Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv., 421 F.3d 872, 879–80 (9th Cir. 2005). See also generally Dane C. Bruun, Note, *A Violation of the Magnuson-Stevens Fishery Conservation and Management Act by National Marine Fisheries Service*, 1 ENVTL. & ENERGY L. & POL'Y J. 397 (2007) (describing the importance of this case for federal fishery management).

117. Gehan & Hallowell, *supra* note 86, at 2 (“As is typical following major changes in law, the Reauthorization Act has spurred a great deal of litigation.”).

118. *Id.* at 10–31. See also generally Lindsey Nicolai, Note, *There May Not Always Be More Fish in the Sea: Why NOAA's Restrictions Do Not Violate the Magnuson-Stevens Act*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 269 (2014) (describing a 2013 lawsuit by the State of Massachusetts against NOAA challenging catch limits).

119. Gehan & Hallowell, *supra* note 86, at 32–34.

120. *Id.* at 34.

121. Iudicello & Lueders, *supra* note 20, at 200–01 (“The FMPs for groundfish both on the Pacific Coast and in the Northeast, however, were frequently held to be insufficient under the [Sustainable Fisheries Act] or [Magnuson-Stevens Act] before . . . implementation of catch share programs began in 2010. The catch share programs, while certainly not eliminating litigation over management plans in either fishery, have resulted in more favorable rulings for NMFS.”).

bringing different kinds of litigation challenges than fishermen and their representatives, with fishermen-based lawsuits challenging the catch share programs themselves and environmental groups bringing cases based on administrative law, procedural claims and the Endangered Species Act.<sup>122</sup>

Perhaps most revealingly in terms of the evolution of litigation under the Magnuson-Stevens Act, however, both of these two recent studies conceptualize litigation under the Reauthorization Act as “typical”—*i.e.*, what occurs under any federal statute after major congressional amendments.<sup>123</sup> Gehan and Hallowell conclude that the distinction between environmental groups’ and fishermen’s cases “has been ever thus,”<sup>124</sup> while Iudicello and Lueders conclude that, “[a]gency hand wringing to the contrary, [litigation] is part of the system—not an indication that the system is broken.”<sup>125</sup> Thus, both studies suggest that litigation under the Magnuson-Stevens Act has become the new normal—quite an evolution for a statute designed originally to operate largely without the courts.<sup>126</sup>

#### IV. WHAT GETS LITIGATED UNDER THE MAGNUSON-STEVENS ACT AND ITS AMENDMENTS—AND WHAT DOESN’T—AND BY WHOM

As noted, we set out to construct a first quantitative assessment of litigation under the Magnuson-Stevens Act, hypothesizing that the 1996 and 2006 amendments to the Act have made a difference to both the amount and kinds of lawsuits filed regarding federal fisheries management. The following conclusions and tabulations are based on multiple and comprehensive searches of the Westlaw federal cases database to elicit decisions invoking the Magnuson-Stevens Act (using a long list of relevant search terms) since its enactment in 1976. This search resulted in a collection of 294 cases. We organized these cases first according to the exact legal bases for the litigation (*e.g.*, specific issues under Magnuson-Stevens Act itself, NEPA, Endangered Species Act, and so on), then by the year the plaintiffs filed the case, and finally by general groupings of

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122. *Id.* at 204.

123. Gehan & Hallowell, *supra* note 86, at 2; Iudicello & Lueders, *supra* note 20, at 206 (“That catch shares gave rise to a body of litigation is to be expected, given the high-stakes economic impacts of fishery management measures. Moreover, catch share programs arose in a period bracketed by two major revisions to federal fishery law. With new legal requirements for management measures and processes, a pulse of litigation during the period was a certainty.”).

124. Gehan & Hallowell, *supra* note 86, at 34.

125. Iudicello & Lueders, *supra* note 20, at 208.

126. *See also Editor’s Foreword*, *supra* note 3, at 1 (noting that some observers “see the current litigation trend as a more natural phenomenon that has been experienced by other resource agencies in the past and that is a necessary step in educating the involved agencies about the meaning of the laws and their legal duties in managing these marine resources.”).

plaintiffs (e.g., fishers and their representatives, environmental groups, or others). The categories of lawsuits included cases about FMPs, challenges to general NOAA regulations under the Act, challenges to NOAA enforcement actions under the Act, cases involving other environmental issues and statutes, cases about administrative and procedural issues, and a catchall category of other types of cases.

#### *A. Who Sued Over What Issues in Fisheries Management, and When*

Between 1976 and 2016, plaintiffs brought 294 federal cases under the Magnuson-Stevens Act. Because the Magnuson-Stevens Act regulates the U.S.'s eight regional FMCs, the FMPs, and overfished stocks, most of the federal cases deal primarily with fishing regulations and enforcement, including gear restrictions, fishing quotas, essential fish habitat, conservation, and a number of similar issues.<sup>127</sup> The figures and table below (see Figures A and B and Table C) depict who brought suit and the bases for those cases over the last forty years. In addition, the figures show the changes in litigation that occurred after the 1996 amendments, strongly suggesting that the Sustainable Fisheries Act resulted in increased litigation by providing new legal bases for lawsuits.

Fishers have filed the majority of these federal lawsuits under the Magnuson-Stevens Act over the last forty years, with most cases challenging fishing restrictions or enforcement actions for violations.<sup>128</sup> Nevertheless, later amendments appear to have changed the balance regarding who brings fisheries-related lawsuits. Before the 1996 amendments, fishers brought 67 percent of the suits, while environmental groups brought only 11 percent (see Figure A). After the 1996 amendments, environmental plaintiffs nearly tripled, making up 32 percent of the federal suits brought between 1996 and 2016 (see Figure B). These numbers support the hypothesis above, that the Sustainable Fisheries Act amendments, and to a lesser extent the changes in the 2006 Reauthorization Act,

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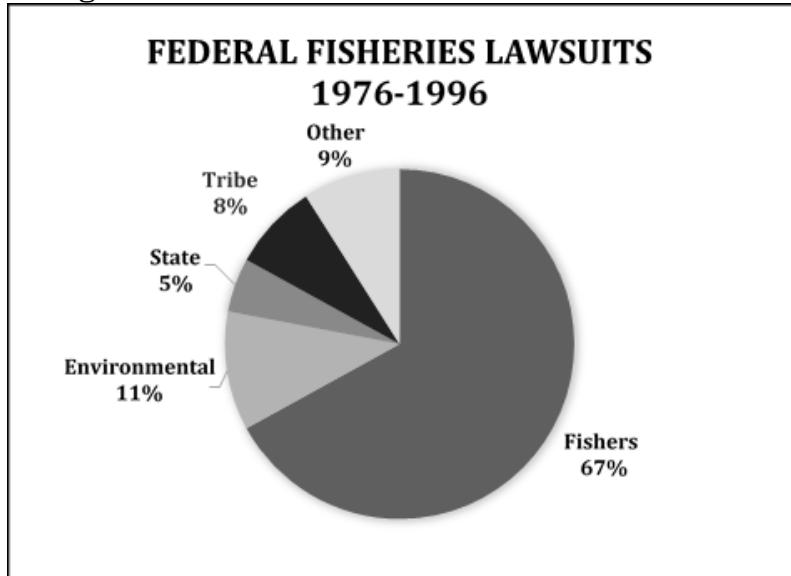
127. For example, in *Louisiana Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439 (E.D. La. 1996), and *Hall v. Evans*, 165 F. Supp. 2d 114 (D.R.I. 2001), fishers challenged regulations over fishing gear. In addition, *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747 (D.C. Cir. 2000), and *State of New York v. Evans*, 162 F. Supp. 2d 161 (E.D.N.Y. 2001), involved challenges to FMP quotas.

128. For example, in *Ace Lobster Co. v. Evans*, 165 F. Supp. 2d 148 (D.R.I. 2001), lobstermen brought suit to challenge new lobster trap regulations, while in *Bramante Fisheries, Inc. v. Sec'y of U.S. Dep't of Commerce*, No. CIV. A. 91-12318-Y, 1993 WL 463337, at \*1 (D. Mass. Nov. 4, 1993), a fishing association challenged the \$25,000 civil penalty and one-year permit sanctions for multiple Magnuson-Stevens Act violations.

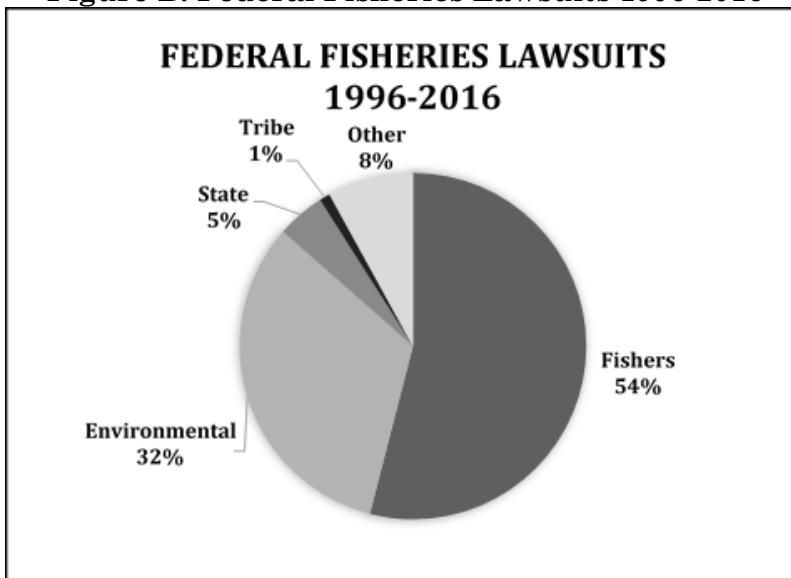
allowed environmental groups to effectively recharacterize the Magnuson-Stevens Act as a conservation and ecological law.

Nevertheless, fishers still brought more than half of the 218 cases brought over the last twenty years (see Figure B). In addition, after the 1996 amendments, the number of lawsuits brought by tribes declined from 8 percent to 1 percent. The percentages of state and other suits remained consistent.

**Figure A: Federal Fisheries Lawsuits 1976-1996**



**Figure B: Federal Fisheries Lawsuits 1996-2016**



Furthermore, the Sustainable Fisheries Act also appears to have increased the volume of fisheries litigation, as both commentators and Congress perceived. Table C shows a dramatic increase in litigation under the Magnuson-Stevens Act after 1996, from only 76 cases filed between 1976 and 1996 to 218 cases brought between 1996 and 2016. Most of the suits brought under the Magnuson-Stevens Act challenged Fishery Management Plans (FMPs), with 114 of 294 federal cases challenging various of the FMCs' FMPs. Of those 294 federal cases, another 23 challenged general NOAA regulations, 31 challenged specific fishery regulations, 43 contested enforcement actions for violations, and 41 dealt with administrative and procedural issues. Another 21 cases handled a variety of other issues, including whether fishing quota rights were "property" for purposes of a Chapter 7 bankruptcy proceeding,<sup>129</sup> the construction of a wind farm off Nantucket Sound,<sup>130</sup> and whether a defendant's ship was a "fishing vessel" under the Magnuson-Stevens Act.<sup>131</sup> Nevertheless, despite this variety of cases, fishers were the most frequent plaintiffs, usually either challenging enforcement actions or contesting an FMP in some capacity.

However, from 1996 to 2016, there was a substantial increase in the number and kinds of environmental issues that plaintiffs raised. Only 5 cases raising issues other than FMPs were filed between 1976 and 1996, but plaintiffs brought 36 such cases between 1996 and 2016 (see Table C). This change suggests that the 1996 amendments provided more legal bases for environmental groups to sue in order to protect overfished stocks and fish habitat. In addition, it reflects the amendments' increased focus on conservation, overfishing, and bycatch. For example, the cases brought by environmental groups after 1996 established important legal interpretations of the Act by challenging the stock quotas, stock recovery and rebuilding plans, lack of explanations from agencies regarding decisions, procedural errors, effects on vulnerable species, gear restrictions, bycatch monitoring and mitigation, and environmental assessments and impacts. With these new enforceable requirements, environmental groups acquired new avenues to sue under the Magnuson-Stevens Act. Moreover, different environmental plaintiffs brought the litigation. Prior to 1996, only one environmental organization, the Northwest Environmental Defense Center, brought cases against FMPs, and they were all brought between

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129. *In re Schmitz*, 270 F.3d 1254 (9th Cir. 2001).

130. *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs.*, 373 F.3d 183 (1st Cir. 2004).

131. *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008).

1986 and 1989.<sup>132</sup> After 1996, various environmental groups brought twenty-one cases challenging FMPs and corresponding regulations.

### **Figure C: Bases for Federal Fisheries Lawsuits**

Bases for Federal Fisheries Lawsuits: 1976-1996  
(76 Cases)

<i>Plaintiffs</i>	<i>FMPs</i>	<i>General NOAA Regs.</i>	<i>Specific Fishery Regs.</i>	<i>Challenging Enforcement</i>	<i>Other Envtl. Issues</i>	<i>Administrative and Procedural</i>	<i>Other</i>
<b>Fishers</b>	26	3	3	13	0	1	4
<b>Envrtl.</b>	3	0	2	0	3	0	0
<b>State</b>	1	1	0	0	0	1	1
<b>Tribes</b>	3	0	1	0	0	0	2
<b>Combination</b>	1	0	0	0	0	0	0
<b>U.S.</b>	0	0	0	5	0	0	0
<b>Other</b>	0	0	0	0	2	0	1

Bases for Federal Fisheries Lawsuits: 1996-2016  
(218 Cases)

<i>Plaintiffs</i>	<i>FMPs</i>	<i>General NOAA Regs.</i>	<i>Specific Fishery Regs.</i>	<i>Challenging Enforcement</i>	<i>Other Envtl. Issues</i>	<i>Administrative and Procedural</i>	<i>Other</i>
<b>Fishers</b>	52	10	13	22	4	12	5
<b>Envrtl.</b>	21	5	9	3	30	4	2
<b>State</b>	6	2	1	0	0	1	0
<b>Tribes</b>	0	1	0	0	0	0	0
<b>Combination</b>	1	1	2	0	2	0	0
<b>U.S.</b>	0	0	0	0	0	0	1
<b>Other</b>	0	0	0	0	0	2	5

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132. See, e.g., Nw. Envrtl. Def. Ctr. v. Brennan, Civ. No. 86-725-FR, 1989 WL 20346, at \*1 (D. Or. Mar. 7, 1989); Nw. Envrtl. Def. Ctr., Oregon, Inc. v. Evans, Civ. No. 87-229-FR, 1988 WL 360476, at \*1 (D. Or. Aug. 12, 1988); Nw. Envrtl. Def. Ctr. v. Brennan, 958 F.2d 930 (9th Cir. 1992).

Despite the increase in environmental plaintiffs and environmental issues after 1996, however, most environmental litigation regarding federal fisheries continued to be based on other statutes, like the Endangered Species Act or NEPA. Even though the 1996 amendments expanded opportunities for environmental plaintiffs to bring suits under the Magnuson-Stevens Act, it remained difficult for an environmental group to succeed with those claims. Between 1976 and 2016, environmental groups brought 33 cases for other environmental issues using the Magnuson-Stevens Act in conjunction with other environmental statutes. Out of these 33 cases, 32 raised the Endangered Species Act, 19 invoked the National Environmental Policy Act, 3 used the Migratory Bird Treaty Act, 1 raised the Clean Water Act, and 1 invoked the Marine Mammal Protection Act, with many cases invoking more than one of these statutes.

The Endangered Species Act has thus been the primary alternate statute for challenging the environmental impacts of fisheries management under the Magnuson-Stevens Act. Some such cases involved endangered fish stocks,<sup>133</sup> while others challenged how fishery management under the Magnuson-Stevens Act affected non-fish endangered species, such as the Hawaiian monk seal, Steller sea lions, or Loggerhead sea turtles.<sup>134</sup>

Nevertheless, despite these additions and alternate legal avenues, fishers remained the primary plaintiffs throughout the forty years since the Magnuson-Stevens Act's initial enactment. The typical fishermen's lawsuit consists of multiple plaintiffs, usually in the form of a fishermen's association, and can include fishermen, fishing companies, vessel owners, and processing or canning facilities.<sup>135</sup> Prior to the 1996 Sustainable Fishery Act,

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133. See, e.g., Humane Soc'y of the U.S. v. Pritzker, 75 F. Supp. 3d 1, 5 (D.D.C. 2014) (alleging that NMFS acted arbitrarily and capriciously when it denied the plaintiffs' petition to list the porbeagle shark as endangered or threatened); Common Sense Salmon Recovery v. Evans, 329 F. Supp. 2d 96 (D.D.C. 2004) (challenging a decision to permit fishing of endangered salmon species).

134. See, e.g., Greenpeace Found. v. Daley, 122 F. Supp. 2d 1110 (D. Haw. 2000) (alleging that the crustacean FMP adversely affected endangered Hawaiian monk seal); Greenpeace, Am. Oceans Campaign v. Nat'l Marine Fisheries Serv., 237 F. Supp. 2d 1181 (W.D. Wash. 2002) (alleging that NMFS violated the Endangered Species Act because it failed to evaluate FMPs' effects on the endangered Steller sea lion); Oceana, Inc. v. Evans, 384 F. Supp. 2d 203 (D.D.C. 2005) (alleging that an amendment to the Atlantic Sea Scallop FMP failed to protect ESA-listed loggerhead sea turtles).

135. See, e.g., Wash. State Charterboat Ass'n v. Baldridge, 702 F.2d 820 (9th Cir. 1983) (a lawsuit brought by a sports anglers association for operating offices and vessels); Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456 (9th Cir. 1987) (a lawsuit brought by a trawl fishermen association); United Boatmen of NJ v. Mosbacher, Civ. A. No. 90-2089(JCL), 1992 WL 13197, at \*1 (D.N.J. Jan. 24, 1992) (a lawsuit brought by a charter boat owners and operators organization); Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370 (D.D.C. 1991) (a lawsuit brought by fish harvesters and processors brought suit); Se. Fisheries Ass'n, v. Mosbacher, 773 F. Supp. 435 (D.D.C. 1991) (a lawsuit brought by commercial fishermen

fishers often brought claims that the FMCs' and Secretary of Commerce's decisions were arbitrary and capricious or followed improper procedures, including decisions regarding fishery closures, the division of FMP zones, vessel regulations, federalism concerns, and the Secretary of Commerce's authority. For example, in *Alliance Against IFQs v. Brown*, fishermen brought suit over halibut and sablefish catch regulations, arguing that the Secretary of Commerce lacked authority to impose such regulations and that his decision was arbitrary and capricious.<sup>136</sup> The government won when the court held the catch allowance lawful and within the Secretary's authority.<sup>137</sup> Likewise, in *Southeastern Fisheries Ass'n, Inc. v. Mosbacher*, commercial fishing canning and processing associations challenged the red drum FMP in the Gulf of Mexico.<sup>138</sup> The U.S. District Court for the District of Columbia issued judgments for both the plaintiffs and defendants, finding both that the government's failures to supersede state laws and the state's vessel regulations were arbitrary and that the division of the red drum fishery into zones and closing the fishery in the EEZ was not arbitrary or capricious.<sup>139</sup>

These two cases are excellent examples of the typical fishermen's lawsuits, where fishers challenge the regulations regulating their fishing practices. Considering the great impact that the Magnuson-Stevens Act can have on the fishers' livelihood and on the socioeconomic wellbeing of fishing communities, these types of challenges—not surprisingly—reflect the socioeconomic concerns of the fishers themselves. In fact, fishermen plaintiffs frequently cite concerns over a regulation's economic impact on locals and their fishing industry,<sup>140</sup> in light of the Magnuson-Stevens Act's National Standard 8,<sup>141</sup> added in the 1996 Sustainable Fishery Act.

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and canning and processing associations).

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

137. *Id.* at 351–52.

138. *Se. Fisheries Ass'n v. Mosbacher*, 773 F. Supp. at 437.

139. *Id.* at 440–42.

140. *N.C. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650, 661 (E.D. Va. 1998) (“National Standard 8 mandates that the Secretary’s regulatory measures ‘provide for the sustained participation of [fishing] communities, and [ ] to the extent practicable, minimize adverse economic impacts on such communities.’”); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084, 1093 (9th Cir. 2012) (“The question remains whether NMFS met its obligations to consider fishing communities in fashioning Amendments 20 and 21. It did. NMFS recognized that fishing communities must be considered under the MSA; surveyed the current status of fishing communities (including observing that many are ‘faltering’ under the status quo); described the effects of quota programs and other management tools on those communities; and explained how communities participated in the Pacific Council’s decisions. In addition, NMFS proposed, and the Council adopted, various measures to mitigate the impacts of trawl rationalization on fishing communities.”).

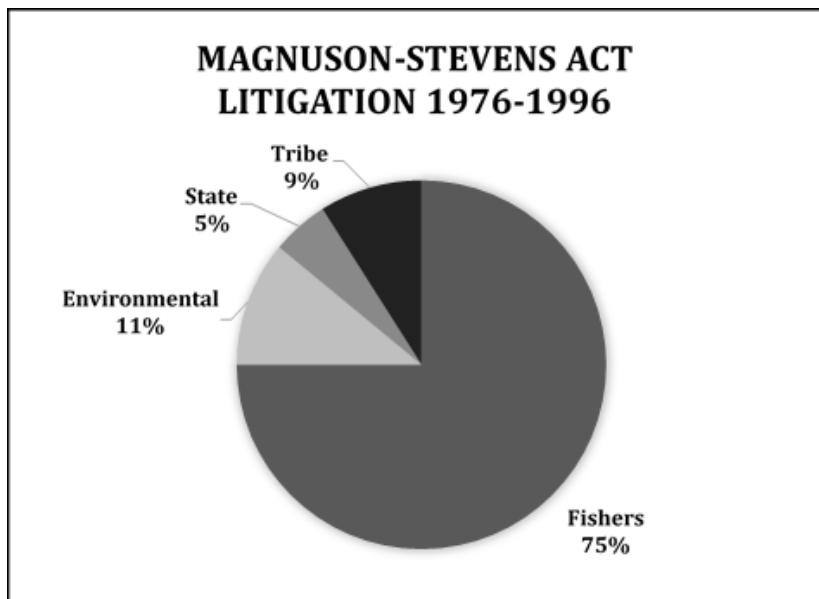
141. 16 U.S.C. §§ 1853a(c)(5)(A), (C)–(D) (2012).

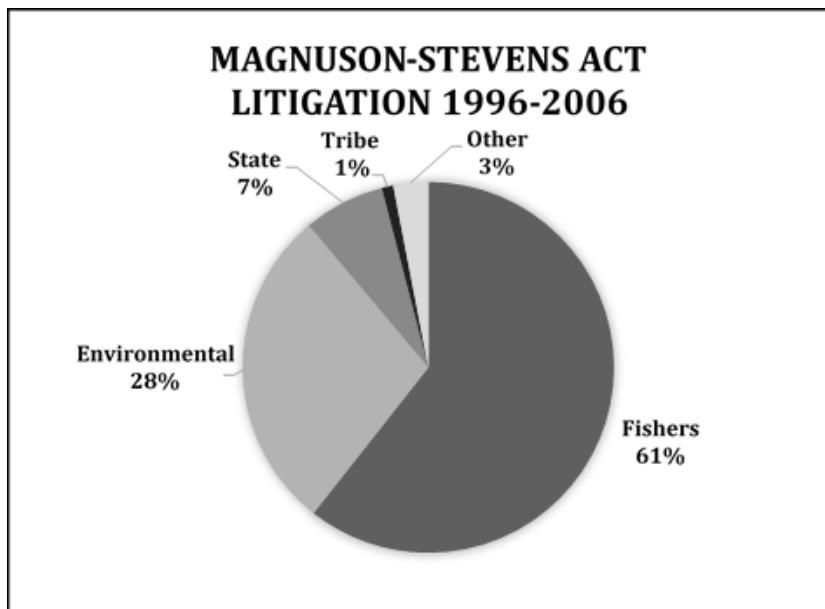
### *B. Segregating Litigation Based on the Magnuson-Stevens Act Itself*

As noted, many lawsuits by environmental groups are actually based on statutes other than the Magnuson-Stevens Act, especially the Endangered Species Act. Thus, when we narrow the focus to litigation actually based on the Magnuson-Stevens Act itself—specifically, to cases dealing with FMPs, general NOAA regulations, and specific fishery regulations—fishers become even more decisively the plaintiffs. Between 1976 and 1996 fishers brought 75 percent of these federal cases, while environmental groups brought only 11 percent (see Figure D). While the fishers' share of cases declined from 75 percent to 61 percent after the 1996 amendments, they remained the primary plaintiffs bringing litigation under the Magnuson-Stevens Act (see Figure E).

Notably, however, even looking just at the Magnuson-Stevens Act-based cases, environmental plaintiffs still increased from 11 percent before to 28 percent after 1996 (compare Figures D and E). The number of cases is equally impressive: Environmental plaintiffs only brought 5 Magnuson-Stevens Act cases between 1976 and 1996, but they brought 35 such cases between 1996 and 2016. Thus, the 1996 amendments correlate with an increased ability of environmental plaintiffs to use the Magnuson-Stevens Act itself for fisheries-related litigation.

**Figure D: Magnuson-Stevens Act Litigation 1976-1996**



**Figure E: Magnuson-Stevens Act Litigation 1996-2016**

### C. Apparent Effect of the 1996 Sustainable Fisheries Act

Given the litigation patterns discussed above, the 1996 Sustainable Fisheries Act appears to have fostered several changes in litigation patterns under the Magnuson-Stevens Act, including a dramatic increase in the amount of litigation, a significant increase in cases brought by environmental groups, and the emergence of more combination cases where a variety of plaintiffs unite to challenge fishery regulations. First, as Table C demonstrates, there was a surge in fisheries-related litigation following the 1996 amendments. Between 1976 and 1996, only 76 cases came to the federal courts, but plaintiffs brought 218 cases between 1996 and 2016. Within this litigation, moreover, the category of lawsuits brought by environmental groups saw the greatest percentage increase since 1996, and that increase seems to be at least partially attributable to the enforceable requirements that Congress added to the amended Magnuson-Stevens Act (see Figures D and E). For example, in *National Audubon Society v. Evans*, the plaintiff challenged Atlantic bluefin tuna stock rebuilding plans under the Highly Migratory Species FMP.<sup>142</sup> Specifically, the National Audubon Society raised concerns that the rebuilding plans would not achieve the maximum

142. Nat'l Audubon Soc'y v. Evans, No. Civ. A. 99-1707 (RWR), 2003 WL 23147552, at \*1-\*3 (D.D.C. July 3, 2003).

sustainable yield, which was required under the Sustainable Fisheries Act.<sup>143</sup> Likewise, in *Natural Resources Defense Council, Inc. v. Daley*, the Natural Resources Defense Council challenged the summer flounder fishing quota because it failed to prevent overfishing.<sup>144</sup> Both of these cases demonstrate environmental groups using litigation to enforce the Sustainable Fisheries Act's new enforceable requirements to halt overfishing and rebuild overfished fish stocks.

Second, the 1996 amendments saw an increase in combination cases where two factions joined forces to challenge fishing regulations under the Magnuson-Stevens Act. For example, in *Flaherty v. Pritzker*, two fishermen and an environmental group brought suit to challenge the Atlantic Herring FMP;<sup>145</sup> in *Alaska v. Lubchenco*, the State of Alaska and various fishing industry representatives joined forces to challenge commercial fishing limitations in the Bering Strait, Aleutian Islands, and Gulf of Alaska;<sup>146</sup> and in *Coastal Conservation Association v. Gutierrez*, the Coastal Conservation Association and Fishing Rights Alliance simultaneously challenged red grouper bag limits.<sup>147</sup> These combination cases not only show an increase in plaintiffs in different categories teaming up against fishery regulations, but they also evidence an increase in widespread opposition to specific regulations, even when the individual plaintiffs varied in their legal reasoning and purposes for challenging those regulations.

Nevertheless, fishermen's lawsuits remain largely unchanged, with most challenges focusing on fishing restrictions. However, there was a slightly increased focus on overfishing, with cases increasing their focus on catch limits, quotas, and bycatch monitoring. For example, in *Willie R. Etheridge Seafood Co. v. Pritzker*, pelagic longline fishermen from states along the East Coast contested the amended Atlantic Highly Migratory Species FMP because it imposed new quotas, gear restricted areas, and increased monitoring.<sup>148</sup> The U.S. District Court for the Eastern District of North Carolina found the regulations to be in compliance with the Magnuson-Stevens Act and rejected the plaintiffs' claims that

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143. *Id.* at \*3.

144. *Nat. Res. Def. Council, Inc., v. Daley*, 209 F.3d at 748–49.

145. *Flaherty v. Pritzker*, No. 11-0660 (GK), 2016 WL 3360480, at \*1 (D.D.C. June 14, 2016).

146. *Alaska v. Lubchenco*, 723 F.3d 1043, 1047 (9th Cir. 2013), *reh'g and reh'g en banc denied*, (Oct. 16, 2013).

147. *Coastal Conservation Ass'n v. Gutierrez*, No. 2:05CV400-FTM-29DNF, 2005 WL 2850325, at \*4 (M.D. Fla. Oct. 31, 2005).

148. *Willie R. Etheridge Seafood Co. v. Pritzker*, No. 2:14-CV-73 BO, 2016 WL 1126014, at \*2–\*3 (E.D.N.C. Mar. 21, 2016).

NMFS acted arbitrarily and capriciously.<sup>149</sup> Meanwhile, in *Sea Hawk Seafoods, Inc. v. Locke*, Alaskan fish processors contested FMP amendments because of an alleged lack of competition protections for shore side processors.<sup>150</sup> Thus, as in the cases from 1976 to 1996, the federal suits brought by fishers following the 1996 amendments focus on fishing restrictions and community impacts, but with a greater emphasis on conservation-based regulations.

Likewise, fishermen's lawsuits challenging NMFS's enforcement actions remained largely unchanged between 1976 and 2016. Fishers, however, lost most of those suits. Out of 43 enforcement challenges, the government won 34 of the cases, fishers won 4, the court remanded 1 case for factual findings, and in another 4 cases the court granted and denied relief in part to both parties. The basis of most of these cases (18 of 34) was a fisherman challenging allegedly high penalties imposed for a violation. For example, in *Duckworth v. United States*, fisherman Duckworth challenged his \$50,000 fine for "unlawfully catching and possessing monkfish in federal waters without a federal permit."<sup>151</sup> Like many plaintiffs in NOAA enforcement challenges, Duckworth lost.<sup>152</sup> The court held the penalty lawful and justified and commented that "Duckworth was not a greenhorn in the fishing industry and was not forthcoming in his dealing with the agents. Moreover, a meaningful civil penalty in this case will serve the ultimate goal of protecting the country's fisheries."<sup>153</sup>

#### *D. The More Subtle Effects of the 2006 Reauthorization Act*

The effects of the 2006 Reauthorization Act on federal fisheries litigation does not appear to be nearly as dramatic as that of the 1996 Sustainable Fisheries Act. Specifically, the amount and types of litigation between 2006 and 2016 was comparable to that between 1996 and 2006, although the exact focus of challenges has changed somewhat (*i.e.*, from challenging rebuilding plans to challenging LAPPs).

As noted, between 1996 and 2016, plaintiffs filed 218 cases in federal courts challenging federal fisheries management. 11 cases were brought in 2006 alone, with 6 brought by fishers, 3 brought by environmental plaintiffs, 1 brought jointly by the states of Massa-

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149. *Id.* at \*10.

150. *Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 762–63 (9th Cir. 2009).

151. *Duckworth v. United States*, No. 05-145S, 2006 WL 753081, at \*1 (D.R.I. Mar. 22, 2006).

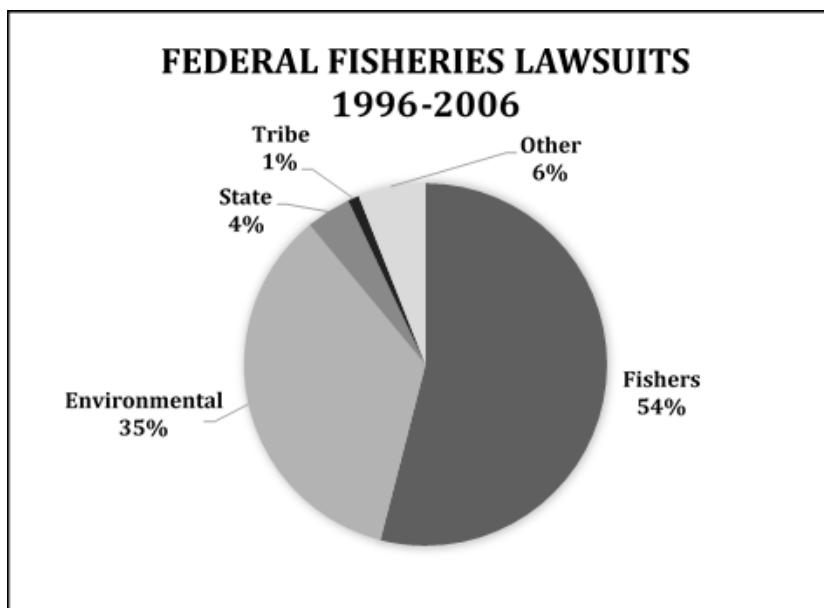
152. *Id.*

153. *Id.* at \*5.

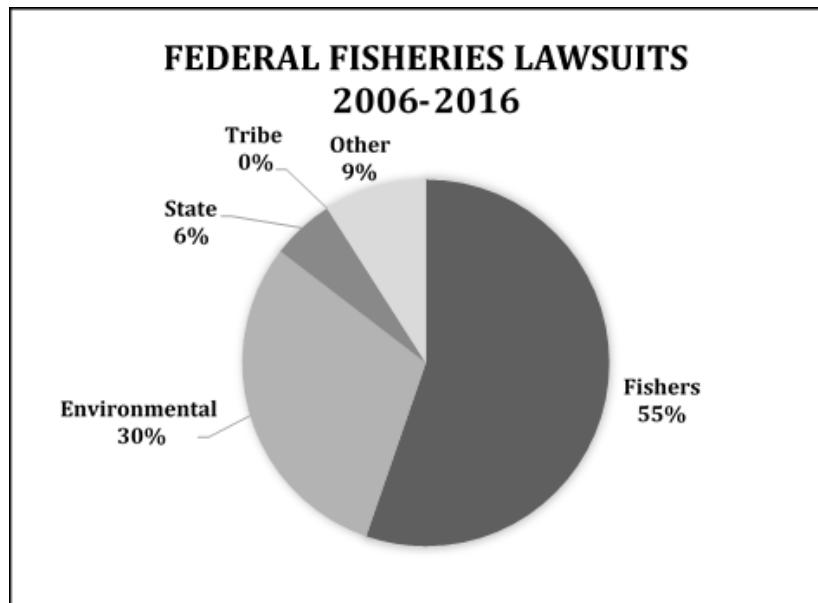
chusetts and New Hampshire, and 1 being a U.S. enforcement action. Of the total 218 cases over these 20 years, the number of cases evenly split before and after the Reauthorization Act, with 109 brought between 1996 and 2006 and the other 109 brought between 2006 and 2016.

The breakdown of litigants before and after the Reauthorization Act is also relatively constant, although perhaps with a slight increase in enforcement actions after 2006. Cases brought by fishers remained constant, at about 54 to 55 percent, in both periods, while cases brought by environmental plaintiffs declined from 35 percent to 30 percent after 2006 (compare Figures F and G). Whether this decline is significant or not, and what it might reveal about compliance and enforcement under the Magnuson-Stevens Act, warrants further study. Nevertheless, as noted, the main effect of the Reauthorization Act on federal fisheries litigation appears to have been subtle shifts in the exact challenges raised rather than major changes in the types or numbers of cases filed.

**Figure F: Federal Fisheries Lawsuits 1996-2006**



**Figure G: Federal Fisheries Lawsuits 2006-2016**

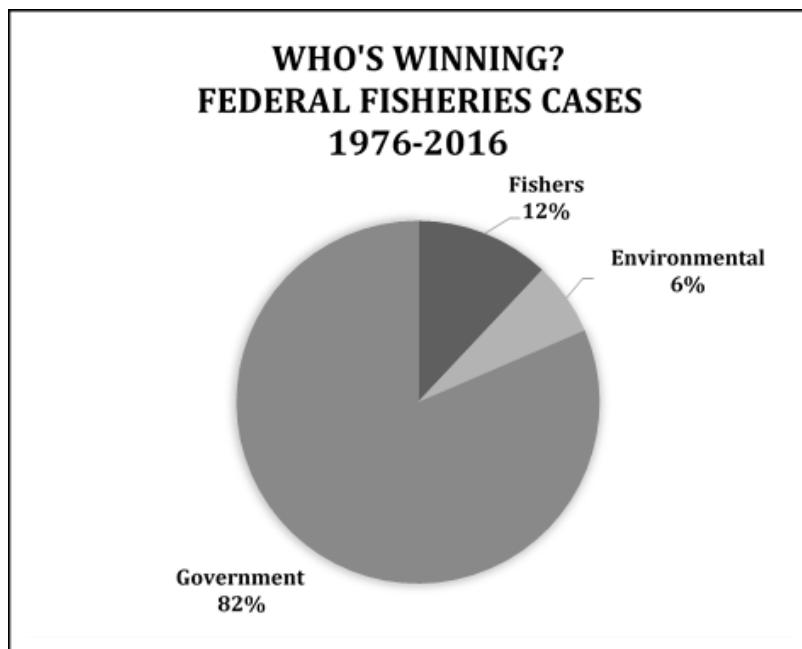
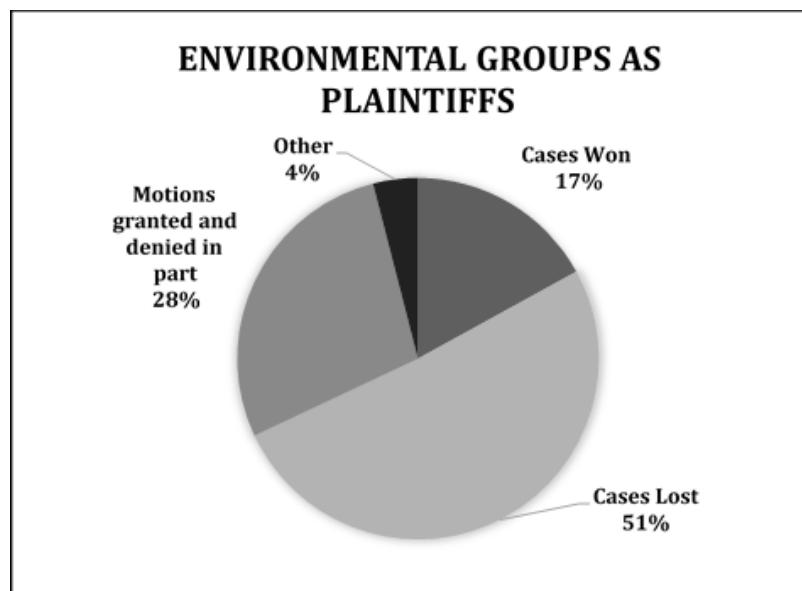


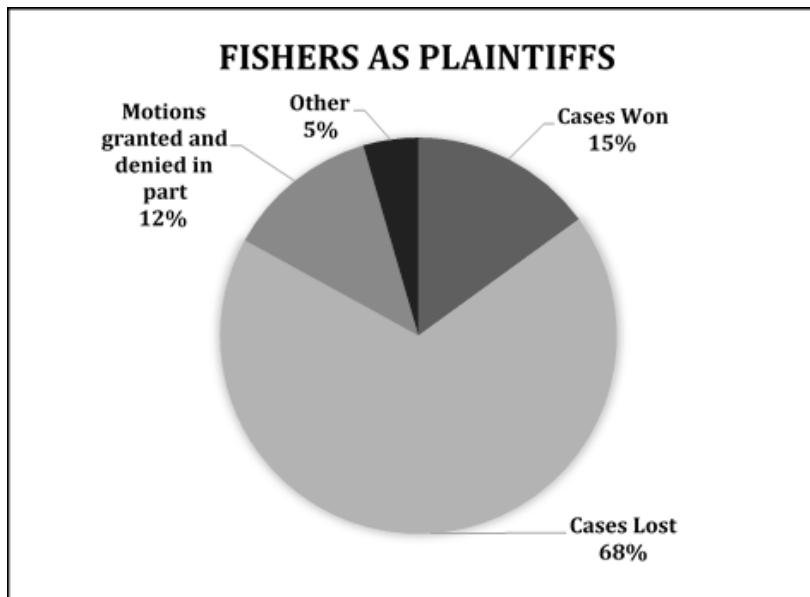
#### *E. Who Wins Federal Fisheries Litigation?*

Overall, in cases where the government was the defendant—whether that involved NMFS, the Secretary of Commerce, or other federal agencies—plaintiffs usually lost and the government often won (see Figure H).<sup>154</sup> Over the last forty years, both fishers and environmental groups lost over half of the cases they have brought (see Figures I and J). Thus, even with an increased variety of legal bases on which to sue and the 1996 amendments’ increased focus on conservation, plaintiffs lost the majority of their federal cases—a typical outcome in any administrative law setting.

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154. Our finding is thus consistent with Suzanne Iudicello’s and Sherry Lueders’ recent review of catch share litigation under the Magnuson-Stevens Act, which concluded that “[f]ederal fishery managers have prevailed in more lawsuits ... in the substance of their decisions ... as Congress revised the legislation guiding management measures to include greater specificity in the requirements of catch share programs.” Iudicello & Leuders, *supra* note 20, at 159.

**Figure H: Litigation Winners, 1976-2016****Figure I: Environmental Groups as Plaintiffs**

**Figure J: Fishers as Plaintiffs**

## V. CONCLUSION

Our empirical analysis may, on first impression, do little more than confirm what observers at the time felt as clear reality: federal fisheries-related litigation increased significantly after Congress enacted the Sustainable Fisheries Act of 1996, and more of that litigation sought to entrench conservation and ecological values into the Magnuson-Stevens Act's implementation than had occurred before the 1996 amendments. Indeed, litigation over federal fisheries management did surge after Congress enacted the Sustainable Fisheries Act of 1996. Courts decided only 76 cases brought under the Magnuson-Stevens Act before 1996, but they decided 218 from 1996 to 2016. As part of this increase in litigation, moreover, environmental groups have, as it were, become players in fisheries management. Fishermen and commercial fishing and processing organizations brought about 67% of the cases decided before 1996; the remaining 33% divided roughly equally among other types of plaintiffs, with 11% brought by environmental groups. In contrast, environmental groups brought about 32% of the 218 federal cases decided after 1996.

Thus, from the perspectives both of environmental law without courts and of statutory design, the Sustainable Fisheries Act and its implementation are worthy of increased study. We suggest preliminarily that these 1996 amendments both provided plaintiffs

with more statutory issues to litigate and allowed new kinds of plaintiffs—namely, environmental groups—to recharacterize the Magnuson-Stevens Act as truly a *conservation* law rather than as just a federal statute to facilitate the fishing industry. At the same time, however, the Sustainable Fisheries Act articulated clear tensions between Congress's desire to conserve, restore, and sustainably manage fish stocks and Congress's desire to preserve the economic and social well-being of fishermen and fishing communities, manifested in new National Standard 8. These tensions and conflicting mandates also provided fodder for courtroom litigation, while FMCs' actual and perceived adherence to policies that allowed fishing despite increasing evidence of problems probably dissuaded the new plaintiffs from seeking their relief in administrative fora. This very preliminary analysis, however, would benefit considerably from deeper contextualization, in terms both of what science might have been revealing about the status of U.S. fisheries and of what was going on more broadly in fisheries and environmental politics around 1996. As such, we hope that our preliminary quantitative analysis will spur additional research in this area.

Nevertheless, in addition to confirming certain perceptions regarding the litigation impact of the Sustainable Fisheries Act, our empirical investigation also offers several more subtle insights into the Magnuson-Stevens Act's implementation, suggesting several lines of further investigation that may prove profitable. First, while Congress may have intended federal fisheries management to operate largely without the courts, that has never been the reality. Even before the 1996 amendments, plaintiffs were challenging the implementation of the Act in court.

That said, it should also be noted that, even *after* 1996, the Magnuson-Stevens Act remains one of the least-litigated of the federal environmental and natural resources statutes: Westlaw searches reveal over 2,600 lawsuits invoking the federal Clean Water Act,<sup>155</sup> over 1,200 lawsuits invoking the Endangered Species Act, over 1,500 lawsuits against the U.S. Forest Service, and over 750 lawsuits against the federal Bureau of Land Management. Fisheries management thus, comparatively, still operates largely as environmental law without the courts.

Interestingly, however, the pace of litigation under the Magnuson-Stevens Act (an average of 7.35 cases per year) is roughly equivalent to litigation under the Outer Continental Shelf Lands Act,<sup>156</sup> which governs offshore oil and gas leasing on the federal Outer Continental Shelf and which has been invoked in

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155. 33 U.S.C. §§ 1251–1388 (2012).

156. 43 U.S.C. §§ 1331–1356b (2012).

about 517 cases since 1953, an average of 8.2 cases per year. In contrast, the Mining Act of 1872,<sup>157</sup> which governs mining claims on terrestrial federal public lands, has prompted less than 50 cases. These numbers, rough as they are, suggest that the role of litigation in federal statutory natural resource allocation more generally could be a fruitful topic of further investigation.

Second, contrary to many popular and even official perceptions, fishermen bring (and always have brought) more federal marine fisheries lawsuits than any other group. As the figures and table in Part IV reveal, the four other major subgroups of litigators are states (against the federal government, as regulators in their own right, and as representatives of local fishermen's interests); tribes; the federal government in its enforcement capacity; and environmental organizations. Even though litigation by environmental groups increased significantly after 1996, their lawsuits still constitute slightly less than a third of the fisheries cases decided by federal courts, while 54% of the cases decided since 1996 were brought by fishers or their representatives.

Third, under both the original Magnuson-Stevens Act and its two major amendments, by far the largest percentage of cases are direct challenges to FMPs. This result makes sense, given that FMPs are the front lines of federal fishery management, defining exactly how a particular fishery will meet the national standards, prevent overfishing or rebuild overfished fish stocks, protect essential fish habitat, and avoid bycatch, while simultaneously defining the limitations with which fishers will have to comply. Challenges to FMPs are concentrated along the East Coast and, to a lesser extent, in the Gulf of Mexico and involve a variety of fisheries.<sup>158</sup> Challenges to Pacific Ocean fisheries management, in contrast, tend to concentrate on a very few fisheries, such as the West Coast groundfish fishery and the Hawaiian longline fishery.<sup>159</sup> Further

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157. 30 U.S.C. §§ 21–54 (2012).

158. See generally, e.g., *Stinson Canning Co. v. Mosbacher*, 731 F. Supp. 32 (D. Me. 1990) (involving the Northeast Multispecies FMP); *Islamorada Charter Boat Ass'n v. Verity*, 676 F. Supp. 244 (S.D. Fla. 1988) (involving the King Mackerel FMP); *United Boatmen of N.J. v. Mosbacher*, No. CIV. A. 90-2089(JCL), 1992 WL 13197 at \*1 (D.N.J. Jan. 24, 1992) (involving the Atlantic Bluefish FMP); *Organized Fishermen of Fla., Inc. v. Franklin*, 846 F. Supp. 1569 (S.D. Fla. 1994) (involving the Snapper-Grouper FMP); *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995) (involving the FMPs for surf clams and ocean quahogs); *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346 (D.R.I. 2003) (involving the Tilefish FMP); *Medeiros v. Vincent*, 431 F.3d 25 (1st Cir. 2005) (involving the interstate FMP of Atlantic States Marine Fisheries Commission); and *United Boatmen v. Locke*, CIV. A. No. 09-5628, 2011 WL 765950, at \*1 (D.N.J. Feb. 25, 2011) (involving the Black Sea Bass FMP).

159. See generally, e.g., *Vietnamese Fishermen Ass'n of Am. v. California Dep't of Fish & Game*, 816 F. Supp. 1468 (N.D. Cal. 1993) (involving the Pacific Groundfish FMP); *Nat. Res. Def. Council v. Evans*, No. C 01-0421 JL, 2004 WL 2271595, at \*1 (N.D. Cal. Mar. 29, 2004) (same); *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886 (9th Cir. 2010) (involving the Groundfish FMP for the Bering Sea and Aleutian Islands, Alaska); Hawaii

investigation of these regional differences could reveal insights not just into fisheries litigation, but also into varying approaches to fisheries management and variations in fishery cultures.

Finally, while our empirical analysis strongly suggests that the Sustainable Fisheries Act significantly shifted some portion of Magnuson-Stevens Act implementation from the purely administrative arena to the courts, it also suggests that the 2006 Reauthorization Act acted more to add to the specific issues that courts address rather than to again significantly change litigation patterns under the Magnuson-Stevens Act (compare Figures F and G). This observation reinforces the suggestions of both Gehan and Hallowell and Iudicello and Lueders that there is a “new normal” of litigation under the Magnuson-Stevens Act, in which each new amendment will alter the exact topics but not the fundamental patterns of fishery management litigation. Of course, whether these patterns hold in response to future amendments will depend in part on what Congress does in those amendments, but our empirical analysis of the litigation responses to the 1996 and 2006 amendments now provides two baselines to help evaluate the impact of future amendments.

Again, however, these preliminary results would benefit considerably from further contextualization, including a finer-grained breakdown of litigation patterns than we have presented here and comparisons to overall trends in environmental and natural resources litigation. Indeed, our investigation of fisheries-related litigation suggests several broader studies of environmental and natural resources law through the lens of litigation and begs several important questions about the relationship of federal fisheries litigation not just to changes in the law itself but also to broader social, economic, and scientific developments.

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Longline Ass'n v. Nat'l Marine Fisheries Serv., 288 F. Supp. 2d 7 (D.D.C. 2003) (challenging the Pelagics FMP); Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv., No. 99-00152 DAE, 1999 WL 33594329, at \*1 (D. Haw. Oct. 18, 1999) (alleging that the Hawaii Longline Fishery violated the Endangered Species Act).

