

1 ROBERT FERGUSON  
2 Attorney General of Washington  
3 KELLY T. WOOD, WSBA #40067 (pro hac vice pending)  
4 Assistant Attorney General  
5 800 Fifth Avenue, Suite 2000  
6 Seattle, WA 98104  
7 Telephone: (206) 326-5494  
8 Fax: (206) 587-5088

6 KENDALL BRILL & KELLY LLP  
7 Laura W. Brill (195889)  
8 *lbrill@kbkfirm.com*  
9 Kendall Brill & Kelly LLP  
10 10100 Santa Monica Blvd., Suite 1725  
11 Los Angeles, CA 90067  
12 Telephone: 310.556.2700  
13 Facsimile: 310.556.2705

*Attorneys for the State of Washington*

12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**  
14 **WESTERN DIVISION**

14 OCEANA, INC.,

15 Plaintiff,

16 v.

17 WILBUR ROSS, in his official  
18 capacity as Secretary of the U.S.  
19 Department of Commerce;  
20 NATIONAL OCEANIC AND  
21 ATMOSPHERIC  
22 ADMINISTRATION; and  
23 NATIONAL MARINE  
24 FISHERIES SERVICE,

25 Defendants.

NO. 2:17-cv-05146 RGK-  
JEMx

AMICUS CURIAE BRIEF OF  
THE STATE OF  
WASHINGTON

**TABLE OF CONTENTS**

**Page**

1			
2			
3	I.	INTRODUCTION .....	1
4	II.	IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	2
5	III.	BACKGROUND .....	3
6		A. Regulatory Framework .....	3
7		B. The California Drift Gillnet Fishery .....	4
8		C. The Pacific Council’s Process for Developing the Proposed Rule .....	9
9	IV.	ARGUMENT .....	12
10		A. The Magnuson-Stevens Act Limits NMFS’s Role in Crafting Regional Management Plans and Places Conservation Interests Over Short-Term Economic Impacts .....	12
11		1. The 1996 amendments purposefully limited NMFS’s role in approving fishery management plans and implementing regulations .....	13
12		2. The 1996 amendments forbid NMFS from doing precisely what it did here, i.e., placing short-term economic interests over conservation .....	17
13			
14			
15			
16	V.	CONCLUSION .....	19
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Conti v. U.S.*,  
291 F.3d 1334 (Fed. Cir. 2002).....4

*Humane Soc’y of U.S. v. Clinton*,  
236 F.3d 1320 (Fed. Cir. 2001).....4, 5

*Lovgren v. Locke*,  
701 F.3d 5 (1st Cir. 2012)..... 16

*Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of  
Engineers*,  
619 F.3d 1289 (11th Cir. 2010)..... 14

*Nat. Res. Def. Council, Inc. v. Nat’l Marine Fisheries Serv.*,  
421 F.3d 872 (9th Cir. 2005).....15, 16

*Turtle Island Restoration Network v. U.S. Dep’t of Commerce*,  
672 F.3d 1160 (9th Cir. 2012).....3

**Statutes**

5 U.S.C. § 706 ..... 16

1	16 U.S.C.	
2	§ 1361(6) .....	3
3	§ 1361 <i>et seq.</i> .....	3
4	§ 1362(12) .....	3
5	§ 1362(13) .....	3
6	§ 1531(c) .....	3
7	§ 1531 <i>et seq.</i> .....	3
8	§ 1532(15) .....	3
9	§ 1532(19) .....	4
10	§ 1533 .....	3
11	§ 1801(b) .....	3
12	§ 1801(b)(5) .....	3
13	§ 1802(39) .....	3
14	§ 1826(b)(1) .....	5
15	§ 1826(b)(5) .....	5
16	§ 1851 .....	4
17	§ 1851(a) .....	4
18	§ 1851(a)(9) .....	18
19	§ 1851(b) .....	3
20	§ 1851(b)(5) .....	4
21	§ 1852 .....	4
22	§ 1853 .....	4
23	§ 1853(a)(1) .....	18
24	§ 1853(a)(11) .....	18
25	§ 1854 .....	13
26	§ 1854(a)(3) .....	15
	§ 1854(b) .....	15
	§ 1854(b)(1) .....	14
	§ 1854(b)(1)(A) .....	14
	§ 1854(b)(1)(B) .....	14
	§ 1854(b)(3) .....	18
	§ 1854(c) .....	14
	§ 1854(b)(3) .....	16

1	<b>Regulations</b>	
2	50 C.F.R.	
3	§ 600.345(b)(1) .....	17
4	§ 600.350 .....	4
5	§ 635.71(a)(17).....	6
6	§ 660.713 .....	6
7	§ 660.713(b) .....	7
8	§ 660.713(c) .....	7
9	§ 660.713(d)(8) .....	6
10	63 Fed. Reg. 24,212, 24,224 (May 1, 1998) (codified at 50 C.F.R. pt. 600).....	4
11	64 Fed. Reg. 4055 (Jan. 27, 1999) (codified at 50 C.F.R. pt. 630).....	6
12	Wash. Admin. Code 220-355-080(2) (2017) .....	6
13	<b>Other Authorities</b>	
14	142 Cong. Rec. S10794-02 .....	14
15	1995 WL 227474.....	14
16	1996 WL 528720.....	14
17	H.R. Rep. 104-171 (1995).....	15
18	Robin Kundis Craig & Catherine Danley, <i>Federal Fisheries</i>	
19	<i>Management: A Quantitative Assessment of Federal Fisheries</i>	
20	<i>Litigation Since 1976</i> , 32 J. Land Use & Env'tl. L. 381, 386-87	
21	(2017) .....	12
22	S. REP. 104-276 (1996) .....	13, 15, 17, 18
23	Standards of Judgment: Intent of the Legislature, 2A Sutherland	
24	Statutory Construction § 45:5 .....	15
25	Washington Dep't of Fish & Wildlife, Species of Concern in	
26	Washington State, <i>available at</i>	
	<a href="https://wdfw.wa.gov/conservation/endangered/All/">https://wdfw.wa.gov/conservation/endangered/All/</a> .....	8



1           *Amicus curiae* the State of Washington agrees with the Plaintiff that  
2 NMFS's actions in this case violate the plain language of the Magnuson-Stevens  
3 Act and its strict procedures for NMFS's review and approval of council-proposed  
4 fishery regulations. By rejecting the proposed rule, NMFS upset the role that the  
5 Act assigns to states like Washington in the development of regulations through  
6 the regional fishery management councils. As a result, the Court need not look  
7 beyond this plain language to resolve this case in Plaintiff's favor. If the Court does  
8 find the statute ambiguous, however, the legislative history of the Act (set out  
9 below) also firmly establishes that NMFS's actions should be invalidated.

## 10           **II.     IDENTITY AND INTEREST OF *AMICUS CURIAE***

11           Washington's interest in the current case is significant. Congress gave  
12 certain states a direct role on regional fishery management councils to help shape  
13 federal fishery rules. Because Washington's fisheries are within the jurisdiction of  
14 the Pacific Council, Washington, through its designated regulatory agency the  
15 Washington Department of Fish and Wildlife, is a permanent voting member of  
16 the Pacific Council. In this capacity, Washington participated directly in crafting  
17 the proposed fishery regulations that are at issue in this case. Washington, thus,  
18 has a vested interest in ensuring that NMFS properly adheres to the Magnuson-  
19 Stevens Act's procedures for review of regional councils' fishery management  
20 plans and implementing regulations—both as related to the proposed hard cap  
21 regulations and as precedence for other regulations that may be proposed by the  
22 Pacific Council in the future.

23           Washington also has a significant interest in benefits provided to the species  
24 targeted for protection by the proposed hard cap rule. Many of the species  
25 vulnerable to bycatch under the California drift gillnet fishery are migratory in  
26 nature and frequent Washington waters, including humpback and sperm whales,

1 sea turtles (leatherback, loggerhead, and green turtles), and a host of other marine  
2 animals. Because many of these species are listed as endangered or threatened  
3 under Washington State law, Washington expends significant resources on  
4 protecting these species and their habitat. These efforts are undermined by bycatch  
5 in the California drift gillnet fishery, particularly when Washington has for decades  
6 prohibited the use of drift gillnets in state coastal waters because of the adverse  
7 impacts. As NMFS has acknowledged, the hard cap rule—if implemented—will  
8 likely decrease bycatch rates. As a result, NMFS’s reversal of its affirmative  
9 decision on the proposed rules means that neither the anticipated reduction of  
10 bycatch of protected species, nor Washington’s burden of protecting these species,  
11 will be lessened.

### 12 III. BACKGROUND

#### 13 A. Regulatory Framework

14 The California drift gillnet fishery is subject to several other statutes in  
15 addition to the Magnuson-Stevens Act, including the Endangered Species Act, 16  
16 U.S.C. § 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. § 1361  
17 *et seq.*<sup>1</sup> The Magnuson-Stevens Act, however, remains the primary regime for  
18 managing fisheries in United States waters. *Compare* 16 U.S.C. § 1361(6) (stating  
19 “the goal to obtain an optimum sustainable population” of marine mammals); *with*  
20 16 U.S.C. § 1531(c) (stating policy “to conserve endangered species and threatened  
21 species”); 16 U.S.C. § 1801(b) (act designed to “conserve and manage the fishery  
22 resources found off the coasts of the United States”).<sup>2</sup>

23  
24 <sup>1</sup> The National Marine Fisheries Service, an office of the National Oceanic and  
25 Atmospheric Administration within the Department of Commerce, implements each statute.  
26 *See* 16 U.S.C. §§ 1362(12); 1532(15); 1533; 1802(39); 1851(b).

<sup>2</sup> Under the Marine Mammal Protection Act, “take” means “to harass, hunt, capture, or  
kill, or attempt to harass, hunt, capture or kill any marine mammal.” 16 U.S.C. § 1362(13).

1 As described above, the Magnuson-Stevens Act created regional fishery  
2 management councils “to exercise sound judgment in the stewardship of fishery  
3 resources through the preparation, monitoring, and revision” of fishery  
4 management plans and proposed regulations to implement such plans. 16 U.S.C.  
5 §§ 1801(b)(5); 1852, 1853; *Turtle Island Restoration Network v. U.S. Dep’t of*  
6 *Commerce*, 672 F.3d 1160, 1166 (9th Cir. 2012). Under the Magnuson-Stevens  
7 Act, any fishery management plan or regulation implementing such a plan, must  
8 be consistent with the ten national standards set forth in 16 U.S.C. § 1851(a).  
9 Significant to this case, National Standard 9 requires that “[c]onservation and  
10 management measures shall, to the extent practicable, (A) minimize bycatch and  
11 (B) to the extent bycatch cannot be avoided, minimize the mortality of such  
12 bycatch.” 16 U.S.C. § 1851; 50 C.F.R. § 600.350. As NMFS has previously  
13 observed, this requirement to minimize bycatch or to minimize the mortality of  
14 bycatch “is clearly not discretionary.” Magnuson-Stevens Act Provisions; National  
15 Standard Guidelines, 63 Fed. Reg. 24,212, 24,224 (May 1, 1998) (codified at 50  
16 C.F.R. pt. 600).

## 17 **B. The California Drift Gillnet Fishery**

18 The California drift gillnet fishery targets swordfish and to a lesser extent  
19 thresher sharks. To catch these target species, fishing boats deploy specially  
20 designed nets that form a vertical wall in the ocean and entangle swordfish and  
21 thresher sharks as they swim into the net. *See* AR 134 (figure 2); *Conti v. U.S.*, 291  
22 F.3d 1334, 1336 (Fed. Cir. 2002).

23  
24  
25  
26  

---

Under the ESA, “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Although these definitions differ slightly, “generally, any interaction between a protected species and fishing gear is considered a take” Under both statutes. AR 5848.

1           Drift gillnets, however, cannot distinguish between the species targeted by  
2 the fishery and other non-target species that become entangled in the net. *See*  
3 *Humane Soc’y of U.S. v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001); *cf. Conti*,  
4 291 F.3d at 1336–37 (discussing national and international concern over drift  
5 gillnets ensnaring significant numbers of sea turtles and marine mammals).  
6 Although some of the non-target species may be retained and sold or kept, most  
7 bycatch is discarded. *See* AR 6842; AR 5856 (estimating annual bycatch of  
8 finfish). The Federal Circuit has described the drift gillnet fishery and the  
9 inevitable bycatch that occurs as a result of the indiscriminate fishing method:

10           Though intended to catch fish, the nets indiscriminately  
11 catch virtually all aquatic life including fish, whales,  
12 dolphins, sea turtles, and sea birds. The fish are  
13 captured when the mesh catches behind their gills, and  
14 the whales, dolphins, and other air-breathing sea life are  
15 caught when they become entangled in the net. At  
16 dawn, fishermen collect the driftnets, remove the target  
17 fish, and discard any non-target species, often drowned,  
18 that were caught in the nets.

19 *Humane Soc’y of U.S.*, 236 F.3d at 1322.

20           Concerns over growing use of drift gillnets on international waters led the  
21 United Nations to adopt a moratorium on the use of large-scale driftnets beyond  
22 the exclusive economic zone of any nation. *See* 16 U.S.C. § 1826(b)(5); *Humane*  
23 *Soc’y of U.S.*, 236 F.3d at 1322. In implementing the moratorium, Congress found  
24 that “the continued widespread use of large-scale driftnets beyond the exclusive  
25 economic zone of any nation is a destructive fishing practice that poses a threat to  
26 living marine resources of the world’s oceans ....” 16 U.S.C. § 1826(b)(1).

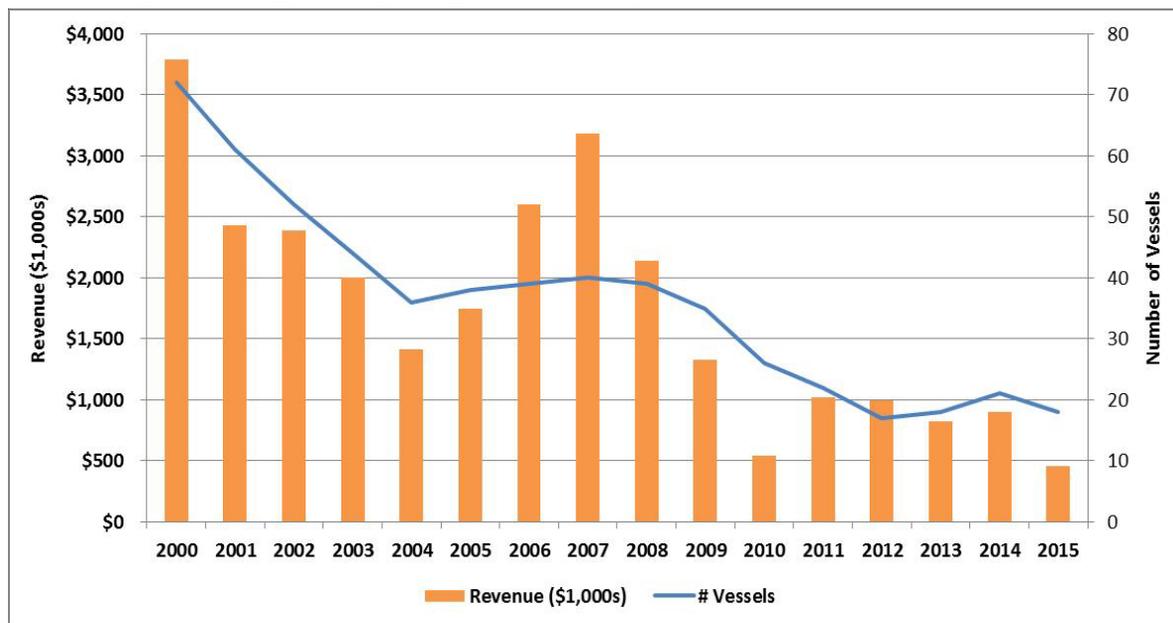
1 Many areas within the exclusive economic zone have also been closed to  
2 drift gillnet fishing in response to concerns about its impacts. The use of driftnet  
3 gear is prohibited in the Atlantic tuna and swordfish fisheries and off the  
4 Washington Coast. *See* 50 C.F.R. § 635.71(a)(17); Atlantic Swordfish Fishery;  
5 Mgmt. of Driftnet Gear, 64 Fed. Reg. 4055 (Jan. 27, 1999) (codified at 50 C.F.R.  
6 pt. 630); *see also* 50 C.F.R. § 660.713(d)(8); Wash. Admin. Code 220-355-080(2);  
7 AR 25–26. In addition, Oregon closed its drift gillnet fishery program due to  
8 inactivity in the Oregon fishery from 2006 to 2008. AR 38–39. Some California  
9 leaders have also expressed a desire to transition away from the use of drift gillnets  
10 in the West Coast swordfish fishery. *See* AR 2934–35 (Letter from Senators  
11 Feinstein, Boxer, and Wyden advocating for transition from drift gillnets to more  
12 environmentally sustainable fishing gears and the use of enforceable limits to  
13 reduce bycatch); AR 2932–33 (supplemental letter from Senators reiterating  
14 support for transitioning the fishery); AR 4447–48 (letter from Congressman  
15 Huffman encouraging the Pacific Council to develop a comprehensive transition  
16 plan and minimize bycatch); AR 5268–69 (letter from five California Assembly  
17 Members advocating for a transition away from drift gillnets); AR 7237  
18 (discussing legislation proposed in California House to prohibit use of drift gillnets  
19 to take sharks and swordfish for commercial purposes in State waters; the bill did  
20 not pass).

21 Although the California drift gillnet fishery remains open, it is subject to  
22 strict time and location restrictions in an effort to limit bycatch impacts from the  
23 fishery. *See e.g.*, 50 C.F.R. § 660.713; AR 22 (Final Environmental Assessment)  
24 (all drift gillnets must be fished at a minimum depth of 10.9 meters below the  
25 surface); AR 23–25 (describing Pacific Sea Turtle Conservation areas and other  
26 federal closures); AR 26 (describing state restrictions on drift gillnet fishery); AR

1 1176 (Proposed Rule) (describing seasonal closures to drift gillnet fishery). To  
2 protect endangered leatherback and loggerhead sea turtles, a large area off the  
3 California coast extending north to Cape Falcon, Oregon is seasonally closed to  
4 the fishery, and these restrictions are extended during El Niño events. 50 C.F.R.  
5 § 660.713(c); AR 1175 (Proposed Rule). Driftnet gear also must meet certain  
6 criteria, including length limitations on the nets, 50 C.F.R. § 660.713(b), and the  
7 use of acoustic deterrent devices to try to minimize bycatch, AR 22. In addition,  
8 NMFS places observers on drift gillnet fishery vessels to monitor bycatch, but, due  
9 to funding constraints, observers monitor only about 30 percent or less of the drift  
10 gillnet fleet. AR 1175 (Proposed Rule); AR 7267 (describing role of observers in  
11 monitoring and accountability of fishery).

12 California Department of Fish and Wildlife also limits the number of permits  
13 issued to the California drift gillnet fishery. AR 1176 (Proposed Rule). Under  
14 California’s permitting regime, California will not issue any new permits and  
15 current permits may only be transferred to another individual currently holding or  
16 eligible for a general gillnet/trammel net permit under California law. AR 26.  
17 Although currently 73 individuals hold valid permits to engage in the fishery, only  
18 about 20 vessels participate in the fishery each season. AR 1176–77 (Proposed  
19 Rule); AR 18894–95 (NOAA Technical Memorandum). These numbers represent  
20 a significant decline from the peak of the California drift gillnet fishery in the mid-  
21 1980s when the number of permits in the fishery reached 251 permits with 200  
22 vessels participating in the fishery. AR 357 (Final Regulatory Impact Review); AR  
23 18895 (NOAA Technical Memorandum). As shown below, the revenue from the  
24 fishery also has declined steadily, reaching an all-time low of \$454,000 in 2015.

1 AR 358 (Final Regulatory Impact Review).



12 Although past regulatory efforts decreased bycatch rates in the  
13 California drift gillnet fishery, AR 6845, bycatch remains a reality, *see* AR 6838  
14 (Report on Routine Management Measures to Establish Hard Caps); Mem. of  
15 Points and Auths. In Supp. of Fed. Defs.’ Cross-Mot. for Summ. J. & in Opp. To  
16 Pl.’s Mot. for Summ. J. 9, ECF No. 67-1. Between 2001 and 2015, bycatch from  
17 the fishery included approximately six humpback whales, nine sperm whales, more  
18 than 12 leatherback turtles, 20 loggerhead sea turtles, 14 short-fin pilot whales, and  
19 more than 6 bottlenose dolphins. *See* ECF No. 67-1 at 9. Most of these species are  
20 protected as endangered or threatened under the Endangered Species Act and  
21 Washington law and the whale and dolphin species are further protected under the  
22 Marine Mammal Protection Act. AR 56–57, 65–67 (Final EA).<sup>3</sup> Although NMFS  
23 previously concluded that this bycatch level does not jeopardize listed species or  
24 significantly impact listed marine mammals, AR 6510, strong public opposition

25 \_\_\_\_\_  
26 <sup>3</sup> *See* Washington Dep’t of Fish & Wildlife, Species of Concern in Washington State, *available*  
*at* <https://wdfw.wa.gov/conservation/endangered/All/>.

1 exists to the California drift gillnet fishery and the associated bycatch, including  
2 the number of other, non-protected species that the fishery discards as bycatch. *See*  
3 *e.g.*, AR 6864–7160, 7165–7236. The Pacific Council estimates that each year the  
4 California drift gillnet fishery catches and discards an average of nearly 12,000  
5 finfish, including sharks, tuna, marlin, mackerel, and common mola. AR 5856.  
6 Close to 3,000 of those species are discarded dead. *Id.*

### 7 **C. The Pacific Council’s Process for Developing the Proposed Rule**

8  
9 In October 2016, NMFS published the proposed regulation to implement an  
10 immediate closure of the drift gillnet fishery when observed mortality or injury to  
11 high priority species—including fin, humpback, and sperm whales, leatherback,  
12 loggerhead, olive ridley, and green sea turtles, short-fin pilot whales, and  
13 bottlenose dolphins—meets or exceeds the established hard cap for any of these  
14 species during a rolling 2-year timeframe. AR 1176 (Proposed Rule). The Pacific  
15 Council issued the proposed rule implementing hard caps after several years of  
16 consideration. *See* AR 1175 (Proposed Rule); AR 13008–09 (March 2012 Decision  
17 Summary Document). During this time, the Pacific Council engaged in several  
18 wide-ranging discussions on the status and future prospects for the California drift  
19 gillnet fishery, including the prospect of transitioning the fishery to full federal  
20 management under Magnuson-Stevens Act authority and ultimately eliminating  
21 drift gillnet gear in favor of “more environmentally and economically sustainable  
22 gear types.” AR 7237–38; AR 7426–27. In response to these discussions, the  
23 Pacific Council received thousands of public comments and signatures, including  
24 from business owners, chefs, and game fisherman, encouraging the Pacific Council  
25 to phase out the drift gillnet fishery and transition to a more sustainable fishery.  
26 *See, e.g.*, AR 4620–5013, 5927–6256, 6864–7160, 7165–7236. NMFS received

1 only limited comments in favor of retaining the drift gillnet fishery. *See e.g.*, AR  
2 6853–63.

3 As part of its consideration of the future of the California drift gillnet fishery,  
4 and more broadly the West Coast swordfish fishery, the Pacific Council  
5 enumerated several policy objectives for managing the West Coast swordfish  
6 fishery, including using hard caps to reduce bycatch of high priority species,  
7 increasing observer coverage on vessels to help facilitate implementation of hard  
8 caps and other bycatch reduction efforts, and supporting collaboration between  
9 stakeholders to “develop alternative fishing gears, conduct research to further  
10 minimize bycatch in the DGN fishery, maintain a viable domestic West Coast  
11 highly migratory species fishery, and reduce capacity in the DGN fishery through  
12 buyouts and other incentives.” AR 7266–67 (June 2014 Decision Summary  
13 Document). The Pacific Council’s policy objectives also included routinely  
14 reviewing the performance of the DGN fishery “to evaluate its ability to operate  
15 within hard cap levels and successfully minimize bycatch of other discard species  
16 according to bycatch performance standards to be adopted by the Council.” AR  
17 7267. Although the Pacific Council “discussed a policy goal to end the DGN  
18 fishery and transition to a swordfish target fishery that excludes DGN gear at some  
19 point in the future,” the Pacific Council instead decided to pursue a policy of  
20 “strong management measures designed to improve the target performance of the  
21 DGN fishery, while at the same time encouraging alternative gears that can provide  
22 for a viable commercial fishery with significantly better bycatch performance than  
23 the past DGN fishery.” AR 6338 (November 2014 Decision Summary Document).  
24 The hard caps were a key part of implementing this policy. *See* AR 5842 (Proposed  
25 Management and Monitoring Plan); AR 6338–39.

26 The Pacific Council engaged in a detailed process to implement its policy

1 objectives culminating in transmitting the proposed hard cap rule to NMFS in  
2 September 2016. *See* AR 1326–27 (letter transmitting proposed regulations to  
3 implement hard caps). During this process, the Pacific Council considered different  
4 alternatives to implement its hard caps, observer monitoring and bycatch  
5 performance objectives, AR 5842 (report on proposed management and  
6 monitoring plan); AR 5068–69 (June 2015 Decision Summary Document), created  
7 a proposed California Drift Gillnet Management and Monitoring Plan, AR 5842–  
8 64, and developed a regulatory impact review, AR 1589–1602. Notably, in  
9 proposing the hard caps, the Pacific Council sought “to protect certain non-target  
10 species and increase incentives to reduce bycatch.” AR 1326. Although the Pacific  
11 Council could have sought to reduce bycatch by proposing to close the drift gillnet  
12 fishery, the Pacific Council instead proposed hard caps as an incentive for the  
13 fishery to voluntarily change their fishing practices to avoid or reduce bycatch. The  
14 Pacific Council did not intend “to manage marine mammal or endangered species  
15 populations, but rather to enhance the provisions of the Endangered Species Act  
16 and the Marine Mammal Protection Act through implementation of MSA section  
17 303(b)(12) and National Standard 9.” *Id.*

18 In its Draft Environmental Assessment, NMFS agreed with the Pacific  
19 Council that the hard caps would result in a beneficial effect to hard cap species.  
20 AR 1290. Although unable to definitively quantify, NMFS also acknowledged that  
21 potential benefits to protected species could flow from incentives the hard cap rule  
22 would place on vessel operators to reduce future bycatch of hard cap species to  
23 avoid fishery closures. *See* AR 1177.

#### IV. ARGUMENT

##### A. **The Magnuson-Stevens Act Limits NMFS’s Role in Crafting Regional Management Plans and Places Conservation Interests Over Short-Term Economic Impacts**

What is now commonly known as the “Magnuson-Stevens Act” originated as the Magnuson Fishery Conservation and Management Act of 1976. In its original form, the Act sought to both gain control over U.S. coastal fisheries by establishing an exclusive economic zone off coastal waters, and respond to a general lack of regulatory oversight that was leading to overfishing. Robin Kundis Craig & Catherine Danley, *Federal Fisheries Management: A Quantitative Assessment of Federal Fisheries Litigation Since 1976*, 32 J. Land Use & Envtl. L. 381, 386-87 (2017). After 20 years of fisheries management under the Magnuson Act, however, serious cracks were showing.

First, the “conservation” aspect of the original Magnuson Act proved ineffective. Despite shutting out foreign fishing within the exclusive economic zone, fish stocks and marine species continued to decline precipitously. By the 1990s, certain stocks were threatening to collapse completely. Second, in addition to continued overfishing, the Magnuson Act’s process for establishing effective, de-centralized management policies became bogged down by inefficiencies. The Magnuson Act placed primary responsibility for fishery management with eight regional fishery councils in order to place local knowledge at the heart of fishery policy. However, the Secretary of Commerce (again, delegated to NMFS) was given responsibility over reviewing and adopting regional fishery management plans and implementing regulations. As originally drafted this process was cumbersome, and timelines for approving these plans and regulations often stretched out for months, leaving fisheries in limbo.

Congress responded to these and other problems via the Sustainable

1 Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3559 (1996). As set out  
2 below, this massive overhaul of the Magnuson Act, now dubbed the Magnuson-  
3 Stevens Act, sheds light on the problems Congress sought to address in the  
4 amendments and explains why Defendants’ actions in this case violate both the  
5 letter and the intent of the 1996 amendments.

6 **1. The 1996 amendments purposefully limited NMFS’s role in**  
7 **approving fishery management plans and implementing**  
8 **regulations**

9 Defendants’ interpretation of the procedures and process for approving or  
10 disapproving proposed fishery management plan regulations cannot be reconciled  
11 with either the plain language of the Magnuson-Stevens Act or its legislative  
12 history and should be rejected.

13 The statutory provisions central to this case (codified at 16 U.S.C. § 1854)  
14 were grafted onto the Magnuson Act by the Sustainable Fisheries Act in 1996 as  
15 part of Congress’ efforts to “streamline the approval process for fishery  
16 management plans and regulations[.]” S. REP. No. 104-276, at 1 (1996).  
17 Streamlining was certainly necessary in 1996. As is common for many regulatory  
18 efforts, regional councils often employed “framework” fishery management plans  
19 that relied on separate implementing regulations to establish key parameters such  
20 as season openings and closures, allowable catches, and harvest allocations. S.  
21 REP. NO. 104-276 at 18. The 1976 Magnuson Act, however, did not contain  
22 provisions setting sideboards on NMFS’s review and approval of such regulations.  
23 As a result, many months would often lapse prior to approval, leaving regional  
24 councils and regulated vessel operators in the dark as to critical aspects of how the  
25 fishery would be regulated right up to (or beyond) its opening. *Id.* This led to  
26 “growing frustration” that the Magnuson Act’s attempt to de-centralize fishery  
policy was mired in “redtape” and led to calls for “limiting the role of the Secretary

1 [i.e., NMFS] in modifying Council decisions[.]” 142 Cong. Rec. S10794-02,  
2 S10820, 1996 WL 528720; 1995 WL 227474.

3 Congress heeded those calls. The Sustainable Fisheries Act reworked the  
4 Magnuson Act to place *significant* limitations on NMFS’s review and approval of  
5 regulations crafted by regional councils.

6 First, and as with review of fishery management plans, Congress limited  
7 NMFS’s review of implementing regulations to only a determination of whether  
8 the regulation is consistent with the fishery management plan itself, the goals and  
9 policies of the Magnuson-Stevens Act, and “other applicable law.” 16 U.S.C. §  
10 1854(b)(1). NMFS was only allowed to develop its own regulations in the event a  
11 regional council failed to discharge its duty to do so. *See* 16 U.S.C. § 1854(c).

12 Next, Congress imposed strict timeline restrictions on NMFS by providing  
13 only 15 days after receipt of proposed regulations to complete review. Following  
14 that review, and within those 15 days, Congress required NMFS to make one of  
15 two possible actions: (1) an affirmative determination of consistency; or (2) a  
16 negative determination of consistency. 16 U.S.C. § 1854(b)(1)(A)–(B). If  
17 affirmative, Congress required NMFS to immediately publish the regulations in  
18 the Federal Register for a public comment period not to exceed 60 days and then  
19 publish a final rule within 30 days from the close of public comment. *Id.* If  
20 negative, Congress did not allow NMFS to reject the regulations outright; rather,  
21 Congress required NMFS to provide written recommendations to the appropriate  
22 regional council on how the proposed regulations could be made consistent. *Id.*  
23 These duties are mandatory, and no other options were provided. *See id.*

24 There is no dispute that Defendants did not follow this procedure in this  
25 case. Rather, Defendants argue that—within this extremely circumscribed  
26 framework—Congress intended an unwritten, “third” path. Specifically,

1 Defendants assert that 16 U.S.C. § 1854(b) tacitly allows NMFS to make a  
2 tentative or preliminary affirmative determination, later convert that determination  
3 into a negative one following public comment, and then refuse to publish final  
4 regulations. ECF No. 67-1 at 13. But Defendants’ interpretation is belied by the  
5 language and structure of the statute and its legislative history and represents  
6 precisely the kind of delay and inefficiency Congress sought to tamp out in the  
7 Sustainable Fisheries Act.

8 In fact, in 1995 and 1996, the House of Representatives considered language  
9 that would have allowed NMFS to do what was done in this case, i.e., “decline to  
10 publish” final regulations following the public comment period based on some  
11 objection to the proposal. *See* H.R. REP. NO. 104-171, at 10 (1995). However,  
12 drafters struck this language from the final bill during the reconciliation process in  
13 favor of the much more rigid procedures proposed by the Senate and now codified  
14 in the statute.<sup>4</sup> *C.f.* H.R. REP. 104-171, at 10 *with* S. REP. 104-276, at 106–07  
15 (1996). Because there is no evidence that Congress was unaware of this change in  
16 language, this Court should presume the change was purposeful and that Congress  
17 intended exactly what the statute now says: once an affirmative determination is  
18 made, NMFS must publish a final rule after public comment. *Miccosukee Tribe of*  
19 *Indians of Florida v. U.S. Army Corps of Engineers*, 619 F.3d 1289 at 1300 n. 18  
20 (11th Cir. 2010) (recognizing that changes between subsequent drafts of a statute  
21 provide evidence of legislative intent); *see also* Standards of Judgment: Intent of  
22 the Legislature, 2A Sutherland Statutory Construction § 45:5 (7th ed.) (recognizing

---

23 <sup>4</sup> The process Congress ultimately adopted is even more rigorous when it comes to the  
24 approval of fishery management plans. The Sustainable Fisheries Act’s amendments prohibits  
25 NMFS from responding to public comments through revisions to a regional council’s proposed  
26 fishery management plan. *See* 16 U.S.C. § 1854(a)(3). The limits on review and approval of  
fishery management plans further demonstrate Congress’s clear intent to streamline the fishery  
plan and implementing regulations approval process.

1 same).

2 Defendants also attempt to counter the plain language of the statute by  
3 insisting that Congress could not have intended NMFS to fail to correct problems  
4 or conduct a public process and then ignore the content of any public feedback  
5 received. ECF No. 67-1 at 14. But that result does not flow from either the statutory  
6 language or the position asserted by Plaintiff in this case. Indeed, Congress  
7 expressly gave NMFS the ability to modify council-proposed regulations  
8 following public comment, so long as NMFS consults with the appropriate regional  
9 council prior to making such changes. *See* 16 U.S.C. § 1854(b)(3). This allows  
10 NMFS and the regional council to work together and be responsive to public  
11 feedback while maintaining the efficiencies and strict timelines set out in the  
12 statute for timely approving fishery regulations.<sup>5</sup> There is no dispute that this is not  
13 what happened in this case and, as a result, there should be little dispute that NMFS  
14 strayed beyond what the statute allows when it failed to follow these procedures.

15 In short, given the limitations of NMFS’s authority relative to the Pacific  
16 Council’s actions, NMFS should have expressed its concerns based on the public  
17 comment period to the Pacific Council and worked with the Pacific Fishery  
18 Council to ensure timely finalization of the regulations, as the Magnuson-Stevens  
19 Act requires. Instead, NMFS undercut the strict process laid out in the Act by  
20 unilaterally reversing its original “affirmative” determination, refusing to publish  
21 a final rule, and leaving the fishery in limbo. There is no basis in the law for doing  
22 so, and this Court should invalidate NMFS’s action.

23  
24  
25 <sup>5</sup> It also avoids the “parade of horrors” (such as being forced to adopt an  
26 unconstitutional regulation) trotted out by Defendants in their attempt to skirt the Act’s  
requirements. *See* ECF No. 67-1 at 14.

1           **2. The 1996 amendments forbid NMFS from doing precisely what it**  
2           **did here, i.e., placing short-term economic interests over**  
3           **conservation**

4           In addition to violating the mandatory procedures for reviewing proposed  
5 regulations, Defendants’ actions in this case also violate the policies set out in the  
6 revised Act.

7           The Sustainable Fisheries Act did not just tackle the inefficiencies in the  
8 regional council management plan and regulation approval process discussed  
9 above. The Act constituted a wholesale re-alignment of the policy priorities of U.S.  
10 fisheries regulation. Where the 1976 Magnuson Act focused on curtailing foreign  
11 fishing within the exclusive economic zone and maximizing U.S. fisheries yields,  
12 the Sustainable Fisheries Act amendments sought to prevent overfishing by U.S.  
13 vessels and rebuild limited and threatened fishery resources. S. REP. NO. 104-276,  
14 at 1 (1996).

15           Key to these efforts, the Sustainable Fisheries Act reworked the Magnuson  
16 Act to recognize that individualized and short-term economic interests are  
17 antithetical to the long-term survival of U.S. fisheries. *See Nat. Res. Def. Council,*  
18 *Inc. v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005). As a result,  
19 Congress chose in the revised Act to “give conservation of fisheries priority over  
20 short-term economic interests.” *See id.* While impacts to individual affected fishing  
21 communities are taken into account, those economic impacts are “subordinate” to  
22 the Act’s “overarching conservation goals” and “must not compromise the  
23 achievement of [the Act’s] conservation requirements....” *Lovgren v. Locke*, 701  
24 F.3d 5, 35 (1st Cir. 2012), *citing* 50 C.F.R. § 600.345(b)(1).

25           Congress’ focus on fishery conservation is now embodied throughout the  
26 Act, including the express targeting of bycatch, which Congress viewed as

1 particularly wasteful and harmful to all U.S. fisheries. 16 U.S.C. § 1851(a)(9); *see*  
2 *also* S. REP. 104-276, at 5–6. Indeed, National Standard 9 requires that  
3 “[c]onservation and management measures shall, to the extent practicable, (A)  
4 minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the  
5 mortality of such bycatch.” 16 U.S.C. § 1851(a)(9).

6 As set out in greater detail above, the Pacific Fishery Council reasonably  
7 determined in this case that hard caps were necessary, appropriate, and practicable  
8 measures to minimize bycatch of non-target species and help protect the long-term  
9 health and stability of the California Drift Gillnet Fishery—consistent with  
10 National Standard 9. NMFS reversed that determination (purportedly under  
11 National Standard 7) based solely on a “new economic analysis of short-term  
12 effects on individual [drift gillnet] Fishery participants.” ECF No. 67-1 at 7; AR  
13 1023.

14 But this focus on short-term interests directly violates the bycatch-related  
15 conservation mandates of the Act. *See* 16 U.S.C. § 1853(a)(1), (11). Thus, even if  
16 NMFS had the authority to reverse its initial affirmative determination, NMFS  
17 action here should still be invalidated under Section 706 of the Administrative  
18 Procedures Act as contrary to law because it elevates economic concerns over  
19 conservation. *See Lovgren*, 701 F.3d at 35; *see also* 5 U.S.C. § 706. Furthermore,  
20 from a procedural standpoint and in light of the existing “affirmative”  
21 determination, any “new economic analysis” developed by NMFS should have  
22 been shared with the Council along with a request that the Council work with  
23 NMFS to revise the regulation in light of the new data. *See* 16 U.S.C. § 1854(b)(3).  
24 In this manner, the Council could have then reviewed the new analysis and  
25 determined whether, as a matter of policy, the short-term effects on individual  
26 fishery participants actually outweighed the greater risks to conservation, which is

1 the proper role of the Council.

2 NMFS’s justifications—namely that the hard cap rule would permanently  
3 drive drift gillnet fishermen to “other professions”—is irrational. ECF No. 67-1 at  
4 7. NMFS itself invalidated this argument when it acknowledged the improbability  
5 of the caps ever being reached, and further recognized the potential effectiveness  
6 of incentives to avoid risky fishing practices created by the hard caps. *See* AR  
7 1290; AR 1177 (recognizing that hard caps would only be reached approximately  
8 every *thirteen* fishing seasons and that fishermen’s deliberate efforts to avoid  
9 reaching the hard caps may further reduce the frequency of hard cap species catch  
10 in the future). Put another way, NMFS claims a need to reject the Pacific Council’s  
11 hard cap rule based on impacts that NMFS itself agrees will rarely—if ever—  
12 happen because of the hard caps. *Id.* NMFS’s explanations are implausible,  
13 contrary to the law, and should be rejected.

#### 14 V. CONCLUSION

15 Defendants’ actions in this case violate both the spirit and letter of the  
16 Magnuson-Stevens Act. NMFS violated the strict mandates Congress set out for  
17 review and approval of fishery regulations proposed by regional councils, and its  
18 focus on short-term economic impacts over conservation measures render its action  
19 contrary to law. *Amicus curiae* the State of Washington respectfully requests that  
20 this court grant Plaintiff’s Motion for Summary Judgment.

21 //

22 //

23 //

24 //

25 //

26 //

1 DATED this 27th day of August, 2018.

2 ROBERT W. FERGUSON  
3 Attorney General of Washington

4 /s/ Kelly T. Wood  
5 Kelly T. Wood (*pro hac vice* pending)  
6 Assistant Attorney General  
7 Washington Attorney General's Office  
8 Counsel for Environmental Protection  
9 800 5th Ave Ste. 2000 TB-14  
10 Seattle, Washington 98104  
11 (206) 326-5493  
12 Email: [kelly.wood@atg.wa.gov](mailto:kelly.wood@atg.wa.gov)

13 DATED: August 27, 2018 KENDALL BRILL & KELLY LLP

14 By: /s/ Laura W. Brill  
15 Laura W. Brill  
16 Special Assistant Attorney General  
17 Attorneys for the State of Washington