

# CAUSE of ACTION INSTITUTE

Pursuing Freedom and Opportunity through Justice and Accountability

## STATEMENT FOR THE RECORD

COMMITTEE ON NATURAL RESOURCES  
SUBCOMMITTEE ON WATER, POWER AND OCEANS  
UNITED STATES HOUSE OF REPRESENTATIVES

July 19, 2017

*Oversight Hearing on “Exploring the Successes and Challenges of the Magnuson-Stevens Act”*

1324 Longworth House Office Building  
Hon. Doug Lamborn, Subcommittee Chairman  
Hon. Jared Huffman, Subcommittee Ranking Member

**Ryan P. Mulvey, Counsel**  
**Cause of Action Institute**

Chairman Lamborn, Ranking Member Huffman, and Members of the Subcommittee: Thank you for the opportunity to submit this statement for the record as part of your important hearing on the Magnuson-Stevens Act, 16 U.S.C. § 1801 *et seq.* My name is Ryan Mulvey, and I work as an attorney with Cause of Action Institute (“CoA Institute”), a nonpartisan 501(c)(3) nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability, as well as agency adherence to the rule of law. CoA Institute advocates on behalf of clients facing federal overreach and overregulation, including members of the New England fishing industry.

My organization currently represents David Goethel, a New Hampshire-based fisherman, and the members of Northeast Fishery Sector XIII in a lawsuit challenging the legality of the Northeast multispecies sector at-sea monitoring program.<sup>2</sup> Specifically, we contest the statutory authorization for the so-called “industry funding requirement,” which shifts costs for at-sea monitoring onto fishermen. At more than \$700 per day at sea, these costs are more than double what many small-scale fishermen take home from an average day of fishing. The National Marine Fisheries Service (“NMFS”) promulgated the industry funding requirement in 2010, but delayed its implementation for half-a-decade and, in the interim, paid for the third-party monitors with congressionally-appropriated funds. This changed in late 2015. Now, once industry funding is fully implemented, the New England fishing industry will be devastated.

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<sup>1</sup> CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last visited July 19, 2017).

<sup>2</sup> See *Goethel v. Dep’t of Commerce*, 854 F.3d 106 (1st Cir. Apr. 14, 2017), *petition for cert. filed* No. 17-75 (July 12, 2017); *Goethel v. Pritzker*, No. 15-497, 2016 WL 4076831 (D.N.H. July 29, 2016).

Our clients' opportunity for review of the industry-funding requirement is quickly passing. The District Court for New Hampshire and the First Circuit Court of Appeals both dismissed their case as untimely under the Magnuson-Stevens Act's extremely short statute of limitations, 16 U.S.C. § 1855(f). Last week, we filed a petition for writ of certiorari to the Supreme Court of the United States, arguing that the lower courts' rulings conflicted with well-established precedents on the availability of pre-enforcement review and misconstrued the definition of an "implementing action" under Section 1855(f)(2) of the Magnuson-Stevens Act.<sup>3</sup> Yet, no matter the outcome of the petition, this case highlights the urgent need for congressional action. As the First Circuit itself commented:

[G]iven [the government's] own study which indicated that the groundfish sector could face serious difficulties as a result of the industry funding requirement, . . . this may be a situation where *further clarification from Congress* would be helpful for the regulated fisheries and the agency itself as it balances the competing goals of conservation and the economic vitality of the fishery.<sup>4</sup>

With this in mind, I respectfully direct the Subcommittee's attention to NMFS's plans to expand industry-funded monitoring without any semblance of statutory authorization through the New England Fishery Management Council's Industry-Funded Monitoring Omnibus Amendment ("Omnibus Amendment").<sup>5</sup> Like the groundfish at-sea monitoring program, the Omnibus Amendment raises a number of serious legal questions concerning the Executive Branch's authority to compel regulated parties, *i.e.*, fishermen, to pay for at-sea monitoring. In short, there is *no* authority under the Magnuson-Stevens Act for most industry funding requirements, and Congress should therefore reiterate its intentions in light of NMFS's egregious deviation from the statute.

### **I. Magnuson-Stevens Does Not Generally Authorize Industry Funding.**

The stated purpose of the Omnibus Amendment is straightforward: the New England Council is "interested in increasing monitoring and/or other types of data collection to assess the amount and type of catch, to more precisely monitor annual catch limits, and/or provide other information for management,"<sup>6</sup> but its ability to fund that increased monitoring is limited.<sup>7</sup> The proposed solution is to design a standardized mechanism that

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<sup>3</sup> Cause of Action Inst., Press Release: CoAI Seeks Supreme Court Review of Job-Killing Fishing Regulation (July 13, 2017), *available at* <http://coainst.org/2sTZreu>.

<sup>4</sup> *Goethel*, 854 F.3d at 116 (emphasis added).

<sup>5</sup> New Eng. Fishery Mgmt. Council & Mid-Atl. Fishery Mgmt. Council, Industry-Funded Monitoring Omnibus Amend. (Sept. 2016) [hereinafter Omnibus Amend.], *available at* <http://bit.ly/2mQxrtm>.

<sup>6</sup> *See* Omnibus Amend. at 41.

<sup>7</sup> *See id.* at 43–44 ("NMFS has limited funding for monitoring, so both Councils have considered requiring industry to contribute to the cost of monitoring."); Greater Atl. Reg'l Fisheries Office, Nat'l Marine Fisheries Serv., Press Release: Industry-Funded Monitoring Omnibus Amendment, Public Hearings and

would permit the government to order fishermen to cover a substantial portion of monitoring costs.<sup>8</sup> Unfortunately, the Council and NMFS fail to point to *any provision* in Magnuson-Stevens that grants authority to implement such a plan.

**a. NMFS Must Have Explicit Statutory Authority to Compel Industry to Fund Discretionary At-Sea Monitoring Programs.**

Federal agencies do not enjoy unbridled power in choosing which programs to pursue; they cannot impose new fees or taxes, nor can they simply demand that citizens pay for programs that the government ought to be financing in the first place. In this sense, the basic presumption in the Omnibus Amendment, namely, that an Executive Branch agency can order industry to fund a monitoring program, is gravely mistaken and runs afoul of a fundamental principle of administrative law: “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”<sup>9</sup> The New England Council appears to acknowledge as much, but does not give the principle due credit: “A Federal agency cannot spend money on a program beyond the maximum authorized program level without authorization from Congress. [It] also cannot get around the maximum authorized program level by adding to its appropriations from sources outside the government without permission from Congress.”<sup>10</sup>

The Magnuson-Stevens Act does not authorize NMFS and the regional councils to redesign fishery management plans to introduce the sort of industry-funded monitoring envisioned by the Omnibus Amendment. At most, the statute authorizes the *placement* of observers and monitors.<sup>11</sup> But NMFS is not at liberty to implement any particular *funding*

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Comment Period (Sept. 20, 2016) (“The amount of available Federal funding to support additional monitoring is limited[.]”), *available at* <http://bit.ly/2nHNp11>.

<sup>8</sup> See Omnibus Amend. at 62 (“Under Omnibus Alternative 2, there would be an established, standardized structure for new industry-funded monitoring programs . . . [that addresses] (1) standard cost responsibilities associated with industry-funded monitoring for NMFS and the fishing industry, (2) a process for FMP-specific industry-funded monitoring to be implemented via [amendment and revised via] a . . . framework adjustment action, (3) standard administrative requirements [for industry-funded monitoring service providers] . . . (4) [a] process to prioritize new industry-funded monitoring programs in order to allocate available Federal resources for industry-funded monitoring across FMPs, including the type of weighing approach and the timing of revising the weighing approach, and [(5)] a process for FMP-specific monitoring set-aside programs to be implemented via a future framework adjustment action. Additionally, [it] would include a range of options for the process to prioritize industry-funded monitoring across all FMPs.”) (alternations indicate changes in the April 2017 Omnibus Amendment draft, *available at* <http://bit.ly/2omwA0Q>).

<sup>9</sup> *La. Pub. Serv. Comm’n v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 374 (1986); see *Util. Air Regulatory Grp. v. Emtl. Prot. Agency*, 134 S. Ct. 2427, 2466 (2014) (“An agency confronting resource constraints may change its own conduct, but it cannot change the law.”).

<sup>10</sup> See Omnibus Amend. at 45.

<sup>11</sup> 16 U.S.C. § 1853(b)(8); 50 C.F.R. § 648.2.

mechanism. The plain meaning of Magnuson-Stevens is clear and unambiguous.<sup>12</sup> The statute only authorizes industry-funded monitoring in a few specific regions and circumstances: (1) foreign fishing,<sup>13</sup> (2) limited access privilege programs,<sup>14</sup> and (3) the North Pacific fisheries research plan.<sup>15</sup> Congress's decision to permit NMFS and the councils to require industry-funded monitoring and observing in those, and only those, three situations shows its intent to disallow industry funding in other instances.<sup>16</sup> To read Magnuson-Stevens otherwise violates Congress's clear intent and the statute's legislative history.<sup>17</sup>

### **b. The Omnibus Amendment's Industry-Funded Monitoring Scheme Violates National Standards and Other Important Legal Principles.**

Notwithstanding the lack of explicit legal authority, the introduction of industry-funded monitoring across the Greater Atlantic fisheries would impose a tremendous economic burden on the fishing industry and could lead to the wholesale elimination of small-scale fishing. This result would violate National Standards 7 and 8 of the Magnuson-Stevens Act.<sup>18</sup> Congress never intended to grant NMFS the authority to regulate a substantial portion of the Atlantic fleet out of existence.<sup>19</sup> As the Supreme Court has held, "Congress

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<sup>12</sup> See generally *Palmieri v. Nynex Long Distance Co.*, 437 F.3d 111, 115 (1st Cir. 2006); *Bonilla v. Muebles J.J. Alvarez, Inc.*, 194 F.3d 275, 277 n.2 (1st Cir. 1999).

<sup>13</sup> 16 U.S.C. § 1821(h)(4).

<sup>14</sup> *Id.* § 1853a(e). The Greater Atlantic Region contains two fisheries that permit cost recovery through a fee system: the Atlantic sea scallop individual fishing quota and golden tilefish individual fishing quota limited access privilege programs. See Omnibus Amend. at 51.

<sup>15</sup> 16 U.S.C. § 1862(a).

<sup>16</sup> Any other reading of Magnuson-Stevens would render provisions discussing industry funding surplusage, *Nat'l Credit Union Admin v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998), and offend important canons of construction. *Duncan v. Walker*, 533 U.S. 167, 173 (2001); see also *EchoStar Satellite L.L.C. v. Fed. Comm'n's Comm'n*, 704 F.3d 992, 999 (D.C. Cir. 2013); *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994); cf. *Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102, 116 n.9 (D.D.C. 2015) ("[C]ost sharing' programs with industry participants in other fisheries in order to provide higher observer coverage levels . . . were expressly authorized by statute for particular fisheries only.") (emphasis added) (citing 16 U.S.C. § 1862).

<sup>17</sup> There is no evidence of congressional recognition for some pre-existing, implied authority to impose monitoring costs on industry. Congress has repeatedly declined the opportunity to permit industry funding nationwide. Each time that Magnuson-Stevens has been reauthorized, Congress considered (and rejected) bills that would have created blanket authority for mandatory industry funding. H.R. 1554, 101st Cong. § 2(a)(3) (1989); H.R. 39, 104th Cong. § 9(b)(4) (1995); H.R. 5018, 109th Cong. § 9(b) (2006).

<sup>18</sup> See 16 U.S.C. § 1851(a)(7)–(8). It should not lightly be concluded that Congress intend to grant authority for the regional councils and NMFS to take actions that would put fishermen out of business. See *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1061 (W.D. Wash. 2008) (rejecting agency interpretation as it "leads to absurd results—the inevitable elimination of the fishery); *W. Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 140 (D. Mass. 2010) ("[Magnuson-Stevens] creates a duty to allow for harvesting at optimum yield in the present, while at the same time protecting fishery output for the future[.]").

<sup>19</sup> Any council could certainly repeal or revoke any of its fishery management plans, but it must do so explicitly and by three-quarters majority approval of its voting members. 16 U.S.C. § 1854(h).

. . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,”<sup>20</sup> nor does it “delegate a decision of such economic and political significance in so cryptic a fashion.”<sup>21</sup> Industry-funded monitoring as a normal course of fishery regulation is not only novel, but represents a shift of economic and political significance.

In the absence of statutory authorization for the sort of industry-funded monitoring programs contemplated by the Omnibus Amendment—and already in place in the ground-fish fishery—the Executive Branch can only be described as preparing to impose a “tax” to extract money from regulated parties in order to fund desired regulatory programs. This cannot stand as “only Congress has the power to levy taxes.”<sup>22</sup> The Omnibus Amendment, as applied in future fishery management plan amendments, would also violate numerous statutes governing agency finance, such as the Anti-Deficiency Act<sup>23</sup> and the Miscellaneous Receipts Statute.<sup>24</sup> Finally, industry funding requirements impermissibly compel fishermen into commercial transactions in violation of the Commerce Clause<sup>25</sup> and arguably violate other parts of the Constitution, including the Fourth Amendment.

## **II. The Economic Impact of the Omnibus Amendment and Stakeholder Feedback Expose Other Deficiencies with Industry-Funded Monitoring.**

In line with the National Standards, the Omnibus Amendment and future industry-funded monitoring programs must “minimize costs,”<sup>26</sup> “provide for the sustained participation of [fishing] communities,”<sup>27</sup> and “minimize adverse economic impacts.”<sup>28</sup> The Omnibus Amendment fails to meet these standards because it will have a severe and adverse impact on the fishing industry.

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<sup>20</sup> *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

<sup>21</sup> *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); see *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (rejecting the argument that Congress would delegate “broad and unusual authority through an implicit delegation”).

<sup>22</sup> *Thomas v. Network Solutions*, 2 F. Supp. 2d 22, 29 (D.D.C. 1998); see U.S. Const., art. I., § 8, cl. 1; *Nat’l Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 340 (1974) (“Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes[.]”).

<sup>23</sup> See 31 U.S.C. § 1341(a)(1)(A)–(B); see also *Env’tl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995).

<sup>24</sup> See 31 U.S.C. § 3302(b); see also *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996). The Government Accountability Office has rejected the proposition that an agency can avoid the Miscellaneous Receipts Statute “by authorizing a contractor to charge fees to outside parties and keep the payments in order to offset costs that would otherwise be borne by agency appropriations.” Gov’t Accountability Office, 2 Principles of Fed. Appropriations L. at 6-177 (3d ed. 2006).

<sup>25</sup> See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (The government cannot “compel[] individuals to become active in commerce by purchasing a product.”).

<sup>26</sup> 16 U.S.C. § 1851(a)(7).

<sup>27</sup> *Id.* § 1851(a)(8).

<sup>28</sup> *Id.*

The expected economic impact of industry-funded monitoring on fishery-related businesses and communities is uniformly negative.<sup>29</sup> Monitoring costs in the herring fishery, for example, will likely exceed \$710 per sea day for an at-sea monitor and \$818 per sea day for a NEFOP-level observer.<sup>30</sup> Such costs are higher than the daily landings revenue of the typical small-scale vessel. This is certainly the case in the Northeast multispecies fishery. Under the groundfish sector at-sea monitoring program, which our clients are presently challenging, up to 60% of the fleet is expected to “see negative returns to owner when full” monitoring costs “are factored in.”<sup>31</sup> It is irresponsible for NMFS to ignore the devastating economic effects of industry funding. Yet, with the Omnibus Amendment and the herring and mackerel fisheries, NMFS has done just that by deeming cost estimates too “speculative” even to consider.<sup>32</sup>

It is worth noting the overwhelmingly negative feedback that NMFS and the New England Council have received in pursuing the Omnibus Amendment. Of the eighty-three (83) submissions posted to the electronic docket during the last round of public comment, only six (6) voiced various levels of support for industry-funded monitoring; the vast majority, 93%, opposed it.<sup>33</sup> The reasons for this opposition are straightforward enough. Many small-scale fishermen cannot remain profitable if they must assume monitoring costs.<sup>34</sup> The Long Island Commercial Fishing Association, for example, expects that the Omnibus Amendment’s approximate \$800 per-sea-day cost would force more than half of the entire New York-based fleet out of business.<sup>35</sup> Stakeholders are skeptical that increased monitoring has any connection to conservation or maintaining the sustainability of the

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<sup>29</sup> See, e.g., Omnibus Amend. at xiii–xxiv; *id.* at 244 (“Overall, there will be *negative direct economic impacts to fishing vessels* as a result of selecting Omnibus Alternative 2[.]”) (emphasis added).

<sup>30</sup> *Id.* at 291 (Table 89). For fishermen active in both the herring and the mackerel fisheries, these costs could rise even further. See *id.* at 301 (“Many of the vessels that would be impacted by industry-funded monitoring costs in the herring fishery would also be impacted by industry-funded monitoring costs in the mackerel fishery.”). Total estimated costs for vessels active in the mackerel fishery will depend, of course, on the Mid-Atlantic Fishery Management Council’s preferred mackerel coverage target alternatives, which have not yet been chosen.

<sup>31</sup> New Eng. Fishery Mgmt. Council, Draft Report: Preliminary Evaluation of the Impact of Groundfish-Sector Funded At Sea Monitoring on Groundfish Fishery Profits at 10 (June 19, 2015), *available at* <http://bit.ly/28QUXwT>. These costs are predicted to be heaviest for small vessels. *Id.* at 13 (Table 12). NMFS recognized these prospects, describing them as a “restructuring of the fleet.” *Id.* at 10.

<sup>32</sup> Omnibus Amend. at 237 (“[P]otential downstream effects (e.g., subsequent management measures to address bycatch issues) of this action are considered too remote and speculative to be appropriate for consideration[.]”).

<sup>33</sup> Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., 81 Fed. Reg. 64,426 (Sept. 20, 2016), Docket No. NOAA-NMFS-2016-0139-0001, *available at* <http://bit.ly/2p5NO1s>.

<sup>34</sup> See Comment of Meghan Lapp, Seafreeze Ltd., on Omnibus Amend. (Nov. 7, 2016), Docket No. NOAA-NMFS-2016-0139-0009, *available at* <http://bit.ly/2nUf8Ph>.

<sup>35</sup> See Comment of Long Island Commercial Fishing Ass’n on Omnibus Amend. (Nov. 8, 2016), Docket No. NOAA-NMFS-2016-0139-0084, *available at* <http://bit.ly/2odOrsX> (“The onus for NMFS required observer coverage should be on NMFS, not industry. It is cost prohibitive.”).


fisheries, and they question the quality of the data collected. Most importantly, however, the public recognizes that the Magnuson-Stevens Act does *not*, in fact, authorize industry-funded monitoring simply because the New England Council or NMFS wishes it to do so,<sup>36</sup> and the public acknowledges the potential constitutional problems.<sup>37</sup>

Finally, apart from the lack of statutory authority for industry-funded monitoring, NMFS and the New England Council have failed to provide an adequate explanation for why increased monitoring is necessary, let alone justify that monitoring in light of the extreme financial burden it will put on fishermen. Industry-funded monitoring, as proposed, will destroy multi-generational, small-business fishermen up and down the East Coast while benefitting industrial fishing firms. That result is unacceptable and highlights why this Subcommittee should urgently act on the matter.

### Conclusion

Thank you for your consideration. I am prepared to offer further details about our ongoing litigation or, more generally, the legality of industry-funded at-sea monitoring. If you have any questions, or if there is anything further that CoA Institute can provide, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org.

Respectfully,



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<sup>36</sup> See, e.g., Comment of David Goethel on Omnibus Amend. (Nov. 7, 2016), Docket No. NOAA-NMFS-2016-0139-0010, *available at* <http://bit.ly/2o04Mye> (“Monitoring is a function of government and should be funded at levels Congress deems appropriate through NOAA line items in the budget. . . . [The Magnuson-Stevens Act] allows for the placement of observers on fishing boats but is silent on cost recovery except in specific fisheries in the North Pacific Region.”); *see also* Comment of Gregg Morris on Omnibus Amend. (Nov. 8, 2016), Docket No. NOAA-NMFS-2016-0139-0080, *available at* <http://bit.ly/2o09hjp> (same).

<sup>37</sup> E.g., Comment of N.C. Fisheries Ass’n on Omnibus Amend. (Nov. 7, 2016), Docket No. NOAA-NMFS-2016-0139-0082, *available at* <http://bit.ly/2oXBtAa> (raising due process concerns) (“There was no reasonable opportunity for [public hearings] down in the affected states of Maryland, Virginia, and North Carolina. Their involvement in the public hearings process was substantially truncate. [Those] whose stand to be severely impacted . . . have not been given a single public hearing reasonably close enough for them to be expected to attend.”); *cf.* Brooke Constance White, *Stonington fishermen, first select-man: Camera proposal violates Fourth Amendment rights*, THE WESTERLY SUN (Apr. 7, 2017), <http://bit.ly/2o00maB>.