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Anglers Conservation Network v. Pritzker

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Anglers Conservation Network v. Pritzker, 809 F.3d 664 (D.C. Cir. 2016)

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After the Mid-Atlantic Fishery Management Council declined to further investigate an amendment that would add two species of fish to a management plan, the appellants brought suit stating that federal agencies failed to properly manage river herring and shad in the Atlantic Ocean. Appellants asserted this inaction triggering judicial review under the Magnuson-Stevens Act and the Administrative Procedure Act. The court refused to find the National Marine Fisheries Services subject to judicial review, holding that the Council was not a government agency and that not amending the act did not constitute final agency action.

I. INTRODUCTION

Appellants, a group composed of a New Jersey shore fishing boat captain, a "herring warden"[1] and two membership organizations, respectively involved in the preservation of fish and promotion of fishing, sued the Secretary of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service ("Fisheries Service").[2] The Appellants claimed that the federal agencies had "unlawfully neglected to manage stocks of river herring and shad in the Atlantic Ocean from New York to North Carolina."[3] Relying on the Fishery Conservation and Management Act, also known as the Magnuson-Stevens Act, and the judicial review provision of the Administrative Procedure Act ("APA"), the Appellants asserted that the Mid-Atlantic Fishery Management Council failed to properly address a suggested amendment to the current management plan.[4] The Appellants alleged that this determination contravened the Magnuson-Stevens Act and triggered judicial review under the APA.[5] However, the United States Court of Appeals for the District of Columbia Circuit disagreed

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1. *See generally* COMMONWEALTH OF MASS., DIV. OF MARINE FISHERIES, TECHNICAL REPORT TR-46: AN ASSESSMENT OF RIVER HERRING STOCKS IN MASSACHUSETTS (Jan. 2011*), available at* http://www.mass.gov/eea/docs/dfg/dmf/publications/tr-46.pdf.
2. Anglers Conservation Network v. Pritzker, 809 F.3d 664, 666 (D.C. Cir. 2016).
3. *Id*.
4. *Id*. at 666-68.
5. *Id*.

and affirmed the United States District Court for the District of Columbia, finding that the Appellants were not entitled to relief under either claim.[6]

II. FACTUAL BACKGROUND

The goal of the Magnuson-Stevens Act is to "promote domestic commercial and recreational fishing under sound conservation and management principles."[7] In furtherance of this aim, the Magnuson-Stevens Act set up eight regional Fishery Management Councils, providing each with "authority over a specific geographic region and [whish are] composed of members who represent the interests of the states included in that region."[8] The Magnuson-Stevens Act's territory, termed the "exclusive economic zone," is extended 200 miles seaward from each states' coastline.[9]

The Magnuson-Stevens Act provides that the Fishery Management Councils "shall" put forward fishery management plans and implement regulations "for each fishery under its authority that requires conservation and management."[10] Fishery plans are altered for a variety of reasons: to set yearly quotas for individual species, to restrict the gear used to catch specific species and to add species to the plan.[11] A Fishery Management Council will accept proposed plan changes by a majority vote of the members who are currently there and voting.[12] These regional councils, such as the Mid-Atlantic Council ("Council"), have no authority to disseminate a federal rule, but instead send proposed amendments to the Fisheries Service.[13] The Fisheries Service then starts a comment period, which aids with the decision to accept, decline, or partially accept the suggested amendments.[14] If the Fisheries Service neglects to make any response thirty days after the termination of the

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6. *Id*. at 672.
7. 16 U.S.C. § 1801(b)(3) (2012).
8. C & W Fish Co., Inc. v. Fox, 931 F.2d 1556, 1557-58 (D.C. Cir. 1991) (citing 16 U.S.C. § 1852 (2012)).
9. 16 U.S.C. § 1801(b)(1); *see* Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10,605 (Mar. 14, 1983).
10. *Anglers Conservation Network*, 809 F.3d at 667 (citing 16 U.S.C. § 1852(h)(1)).
11. *Id*. at 668.
12. *Id*. at 667.
13. *Id*.
14. 16 U.S.C. § 1854(c)(3)(C) (2012).

comment period, an amendment submitted by a Fishery Management Council is treated "as if approved."[15]

In 2012, the Council started considering an amendment ("Amendment 15") to the Mackerel, Squid, and Butterfish Fishery Management Plan. Amendment 15 was proposed to add both river herring and shad to the purview of the Mackerel, Squid, and Butterfish Fishery Management Plan.[16] River herring and shad are consumed by other species, including striped bass, and the amendment would have safeguarded these species within the Magnuson-Stevens Act exclusive economic zone.[17] After consideration of Amendment 15, the Council determined that it would create a "working group" that would reconsider the amendment in three years.[18] The Appellants asserted that this decision violated judicial review under the Magnuson-Stevens Act and the APA.[19] If a Fishery Management Council decides not to complete an essential management plan or amendment, the Fisheries Service is "'the party responsible for that action' . . . [as] it 'must fulfill its statutory responsibility as a backstop' to the Council."[20] The D.C. District Court granted the defendants' motion to dismiss the complaint, finding that the Appellants were not entitled judicial review of the Council's decision.[21]

III. ANALYSIS

A. Judicial Review under the Magnuson-Stevens Act

The Magnuson-Stevens Act holds that there will be judicial review of "[r]egulations promulgated by the Secretary under this [Act] and . . . actions that are taken by the Secretary under regulations which implement a fishery management plan."[22] The Magnuson-Stevens Act incorporates sections of judicial review under the APA. Notably, the Magnuson-Stevens Act does not integrate § 706(1), the provision that enables a court to "compel agency action unlawfully withheld or unreasonably delayed."[23] The Appellants argued that the Council's

15. *Id*.
16. Notice of Initiation of Scoping Process, 77 Fed. Reg. 65,867 (Oct. 31, 2012).
17. Appellants' Br. 2.
18. *Anglers Conservation Network*, 809 F.3d at 668.
19. *Id*.
20. *Id*. at 669 (citing Appellants' Br. 30 (quoting Guidon v. Pritzker, 31 F. Supp. 3d 169, 197-98 (D.D.C. 2014))).
21. *Anglers Conservation Network*, 809 F.3d at 667.
22. *Id.* at 668 (citing 16 U.S.C. § 1855(f)(1)-(2) (2012).
23. *Id*. (citing 5 U.S.C. § 706(1) (2012)).

choice fell under "actions that [were] taken by the Secretary under regulations which implement a fishery management plan" and therefore implicated judicial review.[24] They asserted that the Council's decision to end the amendment process with a three-year postponement to reexamine constituted an "action [by the Secretary or the Fisheries Service] under the regulations that define all Mid-Atlantic fisheries."[25] The D.C. Circuit Court of Appeals found this to be clearly incorrect; "it was the Mid-Atlantic Council, not the Secretary or the Fisheries Service, who tabled Amendment 15."[26]

The Appellants' attempts to connect the Mid-Atlantic Council's actions to the Fisheries Service also fail.[27] They abandoned an argument advanced in their complaint that the Fisheries Service's regional administrator's vote against the amendment was associated with the Fisheries Service.[28] Shifting track on appeal, The Appellants argued instead that the Fisheries Service is accountable for the action or inactions of the Council.[29] The court found this to be a sweeping assertion; "even if the Fisheries Service had such a broad, mandatory duty to act as a 'backstop'. . . this would at most obligate the Fisheries Service to act when the Council fails to do so."[30] Additionally, the court found the decisions cited by the Appellants failed to promote their arguments.[31] The court distinguished the cases because in them the Fisheries Services had completed a federal agency action, prompting judicial review under 16 U.S.C. § 1855(f)(1).[32] Here, the Appellants took issue not with a Fisheries Service action, but the act of the Council.[33]

B. Judicial Review under the APA

The court then addressed the claim to judicial review advanced by the Appellants under the APA. Section 706(1) allows judicial review, provided the several conditions are met.[34] The court, examining "final

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24. *Id.* (citing U.S.C. § 1855(f)(2)).
25. Appellants' Br. 26.
26. *Anglers Conservation Network*, 809 F.3d at 669.
27. *Id*.
28. Angler Conservation Network v. Pritzker, 70 F. Supp. 3d 427, 435-36 (D.D.C. 2014).
29. Appellants' Br. 30.
30. *Anglers Conservation Network*, 809 F.3d at 669.
31. *Id*. (citing Flaherty v. Bryson, 850 F. Supp. 2d 38 (D.D.C. 2012); Oceana Inc. v. Pritzker, 24 F. Supp. 3d 49 (D.D.C. 2014)).
32. *Id*.
33. *Id*.
34. *Id.* at 670.

agency action," concluded that the Council, as a non-governmental agency, fell outside of the scope of this judicial review provision.[35] Furthermore, the Council is not a defendant in the suit and so the court lacks jurisdiction to review its findings.[36] However, the court went on to assert that even if the Council was a federal agency, the inaction it took was not a "final agency action."[37] In reaching this decision, the court compared the Council's decision to the Secretary's census report, where the President of the United States can and does accept the report without alterations, but may order the Secretary to make changes that do not constitute a final action.[38]

The Appellants' assertion that agency inaction violated the APA strikes most closely at the crux of their complaint, yet failed to enter the realm of a valid claim.[39] APA § 706(1), which allows courts to "compel agency action unlawfully withheld," has not been incorporated into the Magnuson-Stevens Act.[40] The court hypothesized that the Appellants applied § 706(1) because they found that agency inaction has no other remedy in court, "so judicial review pursuant to § 706(1) must be available."[41] Because the government has allowed APA § 706(1) to "provide a basis for relief in cases under the Magnuson-Stevens Act," the court assumed for the sake of argument that the section did apply.[42] Regardless of the hypothetical application of § 706(1), the court concluded that Appellants would still be unsuccessful.[43]

Judicial review under APA § 706(1) is prompted only by agency responsibility that establishes "a specific, unequivocal command."[44] Delving into the authority granted to the Secretary by the Magnuson-Stevens Act, the court determined it to be an elective, not an unequivocal command.[45] A statute that employs both "shall" and "may" is held to operate under the common usage of the terms; shall indicates a duty required, while may signals an option.[46] The Magnuson-Stevens Act uses

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35. *Id.* (citing 5 U.S.C. § 704 (2012)).
36. *Id.* at 669.
37. *Id*. at 669-70.
38. *Id*. at 670.
39. *Id*.
40. *Id*. (citing Norton v. S. Utah Wilderness Alliance, 543 U.S. 55, 62 (2004)).
41. *Id*.
42. *Id*.
43. *Id*.
44. *Norton*, 542 U.S. at 63-64.
45. *Anglers Conservation Network*, 809 F.3d at 671.
46. *Id*.

both terms, indicating that the typical understanding of may controls.[47] The court honed in on the provision that states that the Fisheries Service can employ its discretion when determining whether to make a plan for a fishery that "requires conservation and management."[48] If, the court conjectured, the provision was actually mandatory, then its requirement would be "largely redundant" as there is already an over-arching plan for these types of fisheries.[49]

Finally, the court addressed The Appellants' claim that river herring and shad embodied "overfished stocks."[50] The court found this to be lacking a factual basis.[51] The Fisheries Service is only required to develop a management plan if "the Secretary determines . . . that a fishery is overfished."[52] In this case, the Secretary had not made the determination that either species is overfished.[53]

IV. CONCLUSION

This decision seems to be a fairly straightforward application of the Magnuson-Stevens Act and the APA. However, it could be considered notable for the definitions the court provides. The court drew a line demarcating when an action becomes a final action. Additionally, the D.C. Circuit refused to find the Mid-Atlantic Council to be a government agency. The Magnuson-Stevens Act established these Fishery Management Councils, which are given management authority over the fisheries in their respective regions. Members are nominated by state Governors and the councils fall under the authority of the Secretary of Commerce. Still, the court declined to designate these councils agents of the government. Further, the court concluded that the Fisheries Services does not act as a "backstop" to a council's conclusions, and even if it was burdened by this obligation, it would not be held accountable for the councils' inaction.

47. *Id*.
48. *Id.* (citing 16 U.S.C. § 1854(c)).
49. *Id*.
50. *Id*. at 671-72.
51. *Id*. at 672.
52. *Id.* at 671-72 (citing 16 U.S.C. § 1854(e)(2)).
53. *Id*. at 672.