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COMMENTS

The Evolving Role of Federal Courts in Domestic Fisheries Management

I. Introduction

On September 20, 2004, the United States Commission on Ocean Policy\(^1\) presented Congress with the most significant proposal for ocean governance reform since the mid-1970s.\(^2\) Included among the 212 recommendations set forth by the Commission were a series of proposals designed to fundamentally alter the current fisheries management structure. During the past fifteen years, as global and domestic fish stocks declined, the management system created by the Fishery Conservation and Management Act (FCMA)\(^3\) has come under intense scrutiny and criticism from conservation groups, academics, and industry alike. Though management of open-access resources has long been recognized as an economic, social, and political challenge,\(^4\) the system of governance currently in place with respect to domestic fisheries has in large part failed to successfully maintain viable fish populations. In the tension between short-term economic considerations and long-term sustainability, short-term considerations have generally prevailed. Conservation and environmental groups, without a significant voice in the decision-making process under the FCMA, have recently turned to the courts in an effort to enforce statutory conservation mandates under the FCMA. While this strategy has often resulted in injunctions preventing the National Marine Fisheries Service from promulgating certain management plans,\(^5\) in certain instances, the use of litigation has also placed courts in the position of \textit{de facto} fishery managers.

This Comment examines the evolving role of courts in domestic


\(^{4}\) See Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

fisheries management and the potential implications of the Ocean Commission Report on the need for frequent judicial review of fishery management plans. The recent litigation involving the management of New England groundfish serves as a basis for evaluation of a court’s impact on fishery management. First, this Comment explores the statutes pertaining to fisheries within the United States’ Exclusive Economic Zone, with particular emphasis on the management regime employed by the FCMA. Second, this Comment offers an in-depth analysis of the case Conservation Law Foundation v. Evans and its substantial impact on the New England groundfish industry. Third, within the context of recent legal challenges to existing statutory structures, this Comment examines current issues in federal fisheries management and forthcoming changes to the management structure following the release of the Ocean Commission Report and legislation currently pending in Congress.

II. HISTORY OF DOMESTIC REGULATION

The 1970s marked a decade of significant international and domestic debate regarding fisheries management. In 1973, Congress passed the Eastland Resolution, designed to provide “all support necessary” to strengthen the domestic fishing industry. In the mid-1970s, member states of the United Nations convened for the Third United Nations Conference on the Law of the Sea (UNCLOS). The conference prompted debate among nations as to the distance over which a coastal state could restrict and exercise jurisdiction over foreign fishing.

On the domestic front, new legislative proposals geared toward reserving rich fishing grounds for American fishing vessels eventually resulted in the Fishery Conservation and Management Act of 1976.

The FCMA was enacted with two principal objectives: (1) to exclude foreign fishermen from America’s coastal waters and, in turn, promote the development of American fishing fleets; and (2) to pre-

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9. Articles 56 and 57 of UNCLOS provide coastal states with jurisdiction over fisheries resources up to 200 nautical miles from shore.

vent fishery depletion in America's coastal waters. Although fishermen have historically been resistant to any regulation, the benefits afforded to domestic fishermen under the FCMA reduced opposition to a federal management regime. In a compromise in 1976, the fishing industry consented to a federal fisheries management system in exchange for federal loan guarantees and subsidies and the exclusion of most, if not all, foreign vessels. Like the Law of the Sea Convention, the FCMA is based on the notion that "surplus" is available to foreign fishing.

The congressional drafters of the FCMA viewed the legislation as a great step forward for both the American fishing industry and for conservation purposes. Senator Warren Magnuson, a lead sponsor of the Act (and after whom the Act would eventually be named), declared that "the tools for truly effective management are there." Senator Magnuson argued that successful federal management was necessary as "time was running out on many vital stocks.

In the twenty-nine years following the enactment of the FCMA, efforts to achieve the first goal have been extremely successful. By 1989, foreign fishing vessels were entirely displaced by U.S.-flagged vessels, while the quantity of fish extracted from the sea remained constant. Today, foreign fishing vessels are excluded from fishing within 200 miles of the coast without permission. The late twentieth century saw the rise of American fishing fleets, benefited by governmental subsidies for the construction of new, technologically sophisticated vessels. These plans included the Capital Construction Fund, the Fishing Vessel Obligation Guarantee Program (providing loans to finance up to 87.5% of the cost of a vessel), and the Fisheries Finance Program (providing long-term low interest loans to fishermen for the

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11. Id. § 1801(b)(3).
14. Id. at 439.
17. FISHING GROUNDS, supra note 7, at 27.
19. FISHING GROUNDS, supra note 7, at 27.
construction of new vessels). The original FCMA did not require fishery managers to maintain fishery stocks at a level that allows for taking of the maximum sustainable yield. Moreover, the FCMA defined the optimum yield as "the amount of fish which will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities." The notion of "greatest overall benefit to the Nation" has been regarded as allowing great discretion to managers in determining what quantity of fish may be considered "optimum." With the FCMA offering two objectives in opposition to one another — development of domestic fishing fleets and conservation of living marine resources — it should come as no surprise that economic exploitation largely prevailed over resource conservation.

Even when attempts were made at regulation in the early years of the FMCA, economic incentives to violate regulations prevailed. One study suggests that in 1987, a typical frequent violator fishing on George’s Bank would gross nearly a quarter of a million dollars in extra revenue from illegal fishing.

III. FISHERY MANAGEMENT COUNCILS UNDER THE FCMA

When Congress enacted the FCMA, it created a governance structure composed of eight Regional Fishery Management Councils. The statute states that council members must be knowledgeable or experienced with regard to the conservation and management, or the recreational or commercial harvest, of the fishery resources within their respective geographic areas of responsibility. Members are selected

21. See, e.g., FISHING GROUNDS, supra note 7, at 27.
24. Burke, supra note 22, at 28.
26. 16 U.S.C. § 1852(a) (2000). The Eight regions governed by the councils are New England, the Mid-Atlantic, the South Atlantic, the Caribbean, the Gulf, the Pacific, the North Pacific, and the Western Pacific.
27. Id. § 1852(b)(2)(A).
by the Secretary of Commerce from lists of nominees submitted by the Governor of each constituent state. In order for a new council member to be approved, the Secretary must consult with representatives of commercial and recreational fishing interests. Non-voting members of management councils include the area director of the United States Fish and Wildlife Service, the commander of the United States Coast Guard for the area concerned, the executive director of the Marine Fisheries Commission for the region, and a representative from the Department of State.

The primary function of the regional councils is to develop fishery management plans for each major fishery under its control. These management plans serve as recommendations to the Secretary of Commerce for allocation of fisheries resources. All management plans must be consistent with ten prevailing national standards. Once a council

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28. Id. § 1852(b)(2)(C).
29. Id.
30. Id. § 1852(c)(1)(A).
31. Id. § 1852(c)(1)(B).
32. Id. § 1852(c)(1)(C).
33. Id. § 1852(c)(1)(D).
34. Id. § 1852(h)(1).
35. 16 U.S.C. § 1851(a). The ten standards are as follows:

1. Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
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.
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, consider 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.
8. Conservation and management measures shall, consistent with the conservation requirements of this chapter (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
adopts a fishing plan, it submits the plan to the National Marine Fisheries Service (NMFS). NMFS has the authority to review and adopt or reject the councils’ management plans.36

Management councils also play a significant role in managing over-capitalized stocks. The FCMA defines overfishing as “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.”37 The council must determine when a fishery is overfished and include measures in a management plan to rebuild any overfished fishery.38 The Secretary then uses this standard to identify fisheries that are overfished or approaching this condition.39 If the Secretary determines a fishery to be overfished, he is required to present this determination to the councils and force the councils to adopt management plans designed to rebuild a depleted fishery.40

IV. CHALLENGES WITH THE STRUCTURE OF COUNCILS

One estimate suggests that shortly after the FCMA was enacted, seventy-nine percent of voting members of fishery management councils represented the fishing industry.41 Even today, because most federal managers are non-voting members of the councils, the decision-making authority is largely left in the hands of those with an economic interest in the fishery. Given that the language of the FCMA calls for members of management councils to be “qualified individuals,” commercial and recreational fishing interests prevail in the management structure.42

37. Id. § 1802(29).
38. Id. § 1853(a)(10).
39. Id. § 1854(e)(1).
40. Id. § 1854(e)(2).
Commercial fishermen and state representatives account for a majority of the votes on councils. In accordance with the priorities of fishermen, state officials are largely concerned with economic considerations, as deriving income from the fishing industry and minimizing unemployment is of great importance to a state's political leaders. As such, the regime under the FCMA grants management plan authority to those individuals and groups with a significant economic interest in the very fishery they regulate. Insofar as councils are directed to arrive at management decisions through the best available science, the lack of scientists and academics as participating members of management councils should be a cause for alarm. While the FCMA calls for each management council to commission a scientific committee, this committee has no voting power, its decisions are merely advisory in nature, and there is no apparent requirement for the committee to convene.

Foreseeing the management failures under the FCMA from an economic standpoint, Professor Giulio Pontecorvo stated in 1977 that "no regional or local body, no matter how constructed or how constituted, is likely to move effectively and efficiently to enhance the general welfare." Drawing upon the reasoning of Adam Smith, Professor Pontecorvo predicted that councils composed of individuals advocating local interests will act in their own interest. Accordingly, the tendency was for management councils to yield to shortsighted management goals desired by the industry at the expense of long-term conservation. Therefore, not only did fishermen gain valuable subsidies through the

NATION'S FISHERIES: PAST PRESENT AND FUTURE: PROCEEDINGS OF A CONFERENCE ON FISHERIES MANAGEMENT IN THE UNITED STATES 11, 12 (David Witherell ed., 2004) (A "terrible policy objective is the attempt to federalize regional councils to reduce [their] relevance to that of subcommittee status. ... The mechanism we have now works!").

43. Pontecorvo, supra note 41, at 651.


46. Pontecorvo, supra note 41, at 654.

47. Adam Smith wrote:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.


48. Pontecorvo, supra note 41, at 654.

49. Scheiber, supra note 15, at 128. Professor Scheiber argues that the Reagan and Bush I administrations elected not to interfere with regional councils or force them to ensure that management plans achieved conservation objectives.
passage of the FCMA, but they also managed to gain control of the legislative apparatus under the new program.\textsuperscript{50}

The original version of the FCMA was largely silent on what action NMFS was to take to prevent overfishing. Conservation groups asserted that throughout the 1980s and early 1990s, NMFS largely served as a rubber stamp for council recommendations.\textsuperscript{51}

While Congress established a system in the FCMA designed to avoid overfishing and to remedy any depleted fishery, the conservation language of the statute is undermined by the mandate to make all decisions within the context of economics.\textsuperscript{52} The FCMA clearly states that overfishing is to be balanced against achieving the optimum yield from each fishery.\textsuperscript{53} With governmental actions in the 1970s and 1980s aimed toward encouraging the development of domestic fishing fleets, there should have been little doubt that the exploitation and conservation language of the statute would eventually be at loggerheads. Indeed, commercial catches in the U.S. exclusive economic zone (EEZ) by U.S. fishermen quadrupled from 737,000 metric tons in 1976 to 2,953,000 metric tons in 1988.\textsuperscript{54}

V. A Shift Toward Conservation

The decline of fish populations and the lack of conservation measures employed by the Councils led to a National Oceanic and Atmospheric Administration (NOAA) "Blue Ribbon" panel in the mid-1980s.\textsuperscript{55} The panel's recommendation called for the separation of the decision-making responsibility regarding conservation and allocation in fisheries management.\textsuperscript{56} For instance, conservation decisions such as stock assessments, health of fish populations, and available catch are made without regard or consideration to how the available catch will be allocated among fishermen. Adoption of such an approach, viewing biological data outside the context of socioeconomic factors, presented a framework for greater ecological emphasis in management.\textsuperscript{57} By the late 1980s, the notion of excluding individuals from fishing — consid-

\textsuperscript{50} Hsu & Wilen, supra note 12.
\textsuperscript{52} This, however, is a complex question. The purpose of long-term sustainability — maximum sustainable yield — is both environmental and economic. The difficult issue, though, is long-term sustainability versus short-term economic gain.
\textsuperscript{54} Morton M. Miller et al., Impressions of Ocean Fisheries Management Under the Magnuson Act, 21 Ocean Dev. & Int'l L. 263, 264 (1990).
\textsuperscript{55} Fishing Grounds, supra note 7, at 28.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 29.
ered a radical idea earlier in the decade — became an accepted requirement in many fisheries. 58 With this, councils and states began adopting limited entry programs to curb the excessive number of vessels engaged in marine fishing. 59

a. Sustainable Fisheries Act of 1996

Not only was there growing sentiment among members of Congress that the council system disregarded conservation, beginning in the early 1990s, non-profit environmental groups began challenging NMFS' approval of council management plans. 60 In an effort to address management issues including conservation, the FCMA went through Congressional reauthorization in 1996. The Sustainable Fisheries Act (SFA), which amended the FCMA, placed a greater emphasis on conservation by revising the statute to require measures such as protecting essential fish habitat, 61 rebuilding overfished fisheries, 62 and reducing bycatch. 63

Recognizing the potential for conflicts of interest associated with the council system, Congress altered the voting procedures through an entirely new section in the SFA. 64 The SFA requires council members to abstain from voting on decisions that would have a "significant and predictable effect on [their] financial interests." 65 To ensure compliance with the new voting procedures, the Secretary is required to select an official to attend Council meetings and determine if a conflict of interest exists. 66 While this system is designed to prevent individuals from voting on management plans in which they have a direct financial interest, the system does not take any steps to change the composition of the management councils. On most councils, traditional advocates of long-term sustainability of fish populations are still without a vote. As a result, lawsuits in the federal courts have grown in number as environmental groups seek a forum in which to promote enforcement of the statutory conservation mandates.

58. Id.
59. Id.
62. Id. § 1802(29).
63. Id. § 1802(2).
64. Id. § 1852(j).
65. Id. § 1852(j)(7)(A).
66. Id. § 1852(j)(1)(B).
b. Conservation Law Foundation v. Evans

As of January 2002, NOAA and NMFS were named defendants in more than 110 pending fisheries lawsuits. A recent, and perhaps the most compelling, lawsuit to enter federal court revolves around New England groundfish. Commenced in the District Court for the District of Columbia by four environmental groups, the lawsuit sought to prevent NMFS from approving a management plan promulgated by the New England Fishery Management Council.

Following the passage of the SFA, the New England Council adopted Fisheries Management Plan Amendment 9, designed to revise the annual groundfish fishing mortality rates of twelve species in order to bring the council into compliance with the SFA. Amendment 9 took effect on November 15, 1999. On April 24, 2000, NMFS approved Framework Adjustment 33, which implemented fishing mortality rates from the old Amendment 7, not the new Amendment 9. As such, the fishing target of Framework 33 did not comply with the overfishing and fishery rebuilding provisions of Amendment 9. The four environmental groups alleged that NMFS violated the SFA and the Administrative Procedure Act (APA).

NMFS claimed that the council sought to avoid the comprehensive environmental impact statement required by the National Environmental Policy Act, and therefore, reverted to Amendment 7. Moreover, NMFS further argued that Amendment 9 itself did not comply with the SFA. Although NMFS conceded its measures did not comply with the SFA, it claimed that by August 2003 it would implement the forthcoming Amendment 13, which purportedly would comply with the SFA. In the meantime, NMFS claimed Framework 33 was an adequate system

67. OCEAN COMMISSION REPORT, supra note 2, at 232.
69. Conservation Law Found., 209 F. Supp. 2d at 7 n.7. The twelve species are cod, haddock, yellowtail flounder, American plaice, witch flounder, winter flounder, redfish, white hake, pollack, windowpane flounder, ocean pout, and Atlantic halibut.
70. Framework adjustments are ways in which councils can add or modify management measures.
72. Id.
73. Id. at 8.
76. Id.
77. Id. at 9-10.
for conservation of overfished species. On a motion for summary judgment, the District Court determined that NMFS' refusal to implement Amendment 9 was arbitrary and capricious, thus violating the SFA and the APA.

Following the summary judgment proceeding, the District Court for the District of Columbia conducted a remedial phase of the case. Recognizing the significance of judicial proceedings involving groundfish allocation, many seafood processing groups, states, cities, and fishing alliances intervened in the remedial proceedings. Due to the substantive complexities of the case and the regional interest in the outcome, on February 15, 2002, the court urged mediation. Further adding to the judicial challenges in this case was the fact that the fishing season commenced on May 1, 2002. Thus, the primary reason for urging mediation (while simultaneously conducting formal briefings before the court) was to avoid a situation in which the court had to develop a remedy under intense time pressures.

On the mediation track, more than forty people from all interested parties engaged in five fourteen-hour sessions attempting to reach a resolution. Ultimately, many of the parties reached a proposed settlement, which was filed on April 16, 2002, two weeks prior to the opening of the 2002 fishing season. The court elected to use this agreement as

78. Id. at 9.
79. Id. at 10.
81. Id. at 188. The intervening parties were Northeast Seafood Coalition, Associated Fisheries of Maine, the Cities of Portland, Maine and New Bedford, Massachusetts, the Trawlers Survival Fund, the State of Maine, the State of New Hampshire, the State of Rhode Island, the Commonwealth of Massachusetts, and Paul Parker, Craig A. Pendleton, Northwest Atlantic Marine Alliance, Stonington Fisheries Alliance, Saco Bay Alliance, and Cape Cod Commercial Hook Fishermen's Association.
82. Id. at 188-89.
83. Id. at 189.
84. Id. As noted infra, this is precisely the type of situation that courts are not well prepared to manage and, thus, such determinations should be left to the federal agency with the relevant technical and scientific expertise.
85. Id.
86. Id. The settlement agreement is available at http://www.nefsc.noaa.gov/press_release/settleagree.pdf (last visited Jan. 20, 2005). The following parties submitted to the Settlement Agreement: Plaintiff Conservation Law Foundation, Defendants Donald L. Evans, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, the State of Maine, the Commonwealth of Massachusetts, the State of New Hampshire, the State of Rhode Island, the Association Fisheries of Maine, Inc., the City of Portland, Maine, the City of New Bedford, Massachusetts, the Trawlers Survival Fund, and Paul Parker, Craig A. Pendleton, Northwest Atlantic Marine Alliance, Inc., Stonington Fisheries Alliance, Saco Bay Alliance, and Cape Cod Commercial Hook Fisherman's Association, Inc. Objections to the Settlement Agreement were filed by Plaintiffs National Audubon Society, Natural Resources Defense Council, and The Ocean Conservancy, and Intervenor Northeast Seafood Coalition.
a baseline remedy and made its own substantive changes due to the objections of the non-settling parties.\textsuperscript{87}

The principal area of disagreement between the settling parties and the non-settling parties dealt with the implementation of a total allowable catch (TAC) system.\textsuperscript{88} The non-settling plaintiffs advocated a hard-TAC system such as a firm catch limit to supplement indirect management measures, including controlling numbers of boats, nets, net size, or fishing time, utilized by NMFS to prevent overfishing.\textsuperscript{89} Defendants, intervenors, and plaintiff Conservation Law Foundation all strongly opposed such a system.\textsuperscript{90} While hard-TAC systems aim to cap fish landings at a fixed limit, such systems require sound scientific information to determine the population projections that form the basis for catch limits information that is not available for all fisheries. Furthermore, hard-TAC systems can lead to so-called "race to fish," whereby fishing effort is concentrated at the beginning of the season, a time when sea conditions are more dangerous and when fish spawning is at or near its peak.

Determining an appropriate remedy to the problems facing New England groundfish fishing was termed by the court to be "one of the hardest tasks this Court has ever undertaken."\textsuperscript{91} The complexity stems from the social, economic, and political interests in fishing. Moreover, the court indicated it lacked the "rigorous, focused, scientific research, data, and understanding which are absolutely necessary to develop long-term strategies for rebuilding stocks . . . ."\textsuperscript{92} The situation was further complicated when amid this litigation, and six weeks prior to the opening of the 2002 fishing season, the government filed the most recent best available scientific information for the multispecies New England groundfish complex.\textsuperscript{93} Frustrated with the changes in the scientific landscape, the court acknowledged in its opinion the difficulty of having to fashion a remedy with changing scientific information.\textsuperscript{94}

\begin{itemize}
\item \textsuperscript{87} Conservation Law Found., 195 F. Supp. at 192.
\item \textsuperscript{88} Under a total allowable catch system, fishing for a species is prohibited once a pre-set quantity of fish of that particular species has been caught.
\item \textsuperscript{89} Conservation Law Found., 195 F. Supp. 2d at 193.
\item \textsuperscript{90} Id. at 193-94.
\item \textsuperscript{91} Id. at 190.
\item \textsuperscript{92} Id.
\item \textsuperscript{94} Conservation Law Found., 195 F. Supp. 2d at 190-91. The court stated:
\begin{quote}
Much of the blame for this situation can be laid at the feet of NMFS. It frequently misses its own deadlines for complying with statutory mandates, it drags its feet
\end{quote}
\end{itemize}
Prior to outlining a substantive remedy, the court first evaluated the applicability of a hard-TAC system. Citing four principal reasons, the court rejected the opportunity to establish such a system. First, the scientific data necessary to successfully implement a hard-TAC system did not exist at the time.\(^9\) The court explained that for a hard-TAC to be successful, resource managers must have access to not only landing data, but also real-time catch data to determine the quantity of bycatch mortality — data that was not available for the New England groundfish fisheries.\(^{96}\) Furthermore, no consensus existed as to the best scientific information available regarding biological reference points for catch limits.\(^{97}\) Without such information, a hard-TAC system would run counter to National Standard Two,\(^{98}\) which mandates fisheries be managed “‘based upon the best scientific information available.’”\(^{99}\)

The second reason the court rejected a hard-TAC system was that such a system might lead to increased bycatch.\(^{100}\) This reasoning suggests that if a hard-TAC system was in place, fishermen would continue fishing for the remaining available stocks, which, in turn, would result in discarding accidental catch of the prohibited species, thereby increasing bycatch and fish mortality.\(^{101}\)

The court’s third reason for rejecting a hard-TAC system was that such a system could have an adverse impact on the safety of fishermen. A management regime that serves to threaten fishermen’s safety runs counter to National Standard Ten, which requires promotion of safety at sea.\(^{102}\) The court determined that a hard-TAC system “‘inevitably leads to a race to fish whereby individual fishing vessels are compelled to catch as much of the quota possible before fishing is shut down.’”\(^{103}\)

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\(^{9}\) Id. at 191 n.6.

\(^{95}\) Id. at 194.

\(^{96}\) Id.

\(^{97}\) Id.


\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) 16 U.S.C. § 1851(a)(10) (2000). Hard-TAC systems are believed to encourage fishermen to fish in dangerous conditions in order to capture as much of the allowable catch as possible before the total catch limit is reached.

\(^{103}\) Conservation Law Found., 195 F. Supp. 2d at 194 (quoting Conservation Law Foundation’s Reply to Responses of National Audubon Society et al. and Northeast Seafood Coalition to the Proposed Settlement Agreement and Stipulated Order at 5, Conservation Law
The fourth reason the court cited for rejecting a hard-TAC system was a potential adverse effect on the biological health of the fish stocks. A “race to fish” beginning on the first of May would serve to concentrate fishing effort at a peak spawning period for New England groundfish.104

After considering the Settlement Agreement Among Certain Parties, the court modified substantive portions of the agreement to facilitate what, in its mind, would achieve the intended conservation mandates of the FCMA. Although the judicial remedy was the result of careful deliberation, all of the settling parties submitted motions for reconsideration of the remedial action.105 This fact suggests that judicial tampering with consensus agreements among the vast majority of interested parties, particularly in the context of complex scientific disputes, may run counter to the very outcome the court sought to achieve.

Less than one month after issuing its Remedial Order, the court granted all motions for reconsideration, stating that “the important changes made by the Court in the complex and carefully crafted Settlement Agreement Among Certain Parties would produce unintended consequences.”106 The court outlined three potential unintended negative consequences stemming from the Remedial Order: (1) failing to achieve desired results and potentially further harming particular vulnerable species; (2) unbalancing the Settlement Agreement that was intended by the parties to be implemented as a whole; and (3) causing grave economic and social hardship and injustice to individuals, fishing communities, and states.107 As a result, the Settlement Agreement was implemented according to its terms, and all judicial modifications were stricken.108

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106. Id. at 56-57.
107. Id. at 57.
108. Id. In the months following the implementation of the Settlement Agreement Among Certain Parties, there were several developments that further complicated the landscape of the New England groundfish situation. The catalyst for outcry among fishermen and industry representatives was the revelation that NMFS did not accurately conduct fish stock assessment surveys, upon which the settlement agreement was based. In September 2002, NMFS revealed that its nets may have been faulty. See, e.g., David Arnold, Test Said to Show Fish Undercount: Officials Meeting on Research Results, BOSTON GLOBE, Sept. 29, 2002, at B3; John Richardson, Experts Trolling for Data Run Afoul of Fishermen: “Trawlgate” Only Increases the Distrust of Fishermen Whose Livelihoods Depend on Solid Groundfish Counts, MAINE SUNDAY TELEGRAM, Oct. 6, 2002, at 1A. Industry seized on the error, claiming the faulty equipment NMFS deployed underestimated the groundfish stock size. See JOHN RICHARDSON, Delay Likely for Groundfish Rules, PORTLAND PRESS HERALD, Nov. 10, 2002, at 1B.
c. Prevailing Council Issues

The New England groundfish litigation serves as a useful case study for the evolving landscape of fisheries management. A situation that began with the New England Fishery Management Council promulgating a fishery management plan subsequently approved by NMFS turned into lengthy and complex federal litigation, which served to illuminate many of the prevailing issues in domestic fisheries management.

When Congress passed the FCMA in 1976, the "tools for truly effective management" advocated by Senator Magnuson involved granting much of the decision-making authority to "qualified individuals" as opposed to governmental agencies. This system of public involvement and empowering user groups had the objective of providing for a regime in which all interested parties had a voice and a stake in the outcome. Although fish stocks in many regions of the United States' EEZ experienced substantial population declines since the FCMA took effect, the consensus management regime is not altogether an inappropriate system. The problem is not consensus regimes in general; rather, it is the specific regime employed by the FCMA. A regime of negotiated decisions must involve all interested parties, as equitable consensus cannot be achieved when a large voting bloc is occupied by one common interest.

The director of the New England Fishery Management Council argues that "[s]tewardship, accountability, innovation and partnerships are most likely to develop using the Council process, which provides for transparency and stakeholder input at all levels of fishery management plan development." Given the recent history of council decisions, and the associated management plans that consider conservation as a secondary objective, it remains an issue as to whether the Council process is actually promoting "[s]tewardship, accountability, innovation and partnerships." The conceptual goal is laudable; the question, however, is whether it is achievable under the current system.

Fisheries policy must be structured in a manner that reflects current

As a result of the dispute over science, the court agreed to delay the implementation of new fishing regulations until May 2004. See Beth Daley, Judge Delays Start of New Fishing Rules, BOSTON GLOBE, Dec. 5, 2002, at B2. Moreover, the Assistant Administrator for NMFS agreed to extend the timeline for complete rebuilding of the groundfish fishery from 2009 until 2014. See Kay Lazar, Fishermen Catch Break on Fed. Restrictions, BOSTON HERALD, Jan. 15, 2003, at 2.


110. There is, of course, a tension between the long-term, risk-averse, views of fisheries management typically held by conservationists, and the short-term, loss-averse views typically held by industry representatives.

ecological and economic conditions. When the FCMA took effect in 1976, one principal objective was to advance the domestic fishing fleet at the expense of foreign fleets. With this objective accomplished, the management regime must now focus on how best to protect the resource and advance the ecological health of the stocks and the economic status of fishermen. One challenge is attempting to modify a nearly thirty-year-old statute to meet the different management issues of today. While Congress, through the SFA, attempted to address the collapse of fish stock populations through modifying conflict of interest provisions in council voting procedures, it did nothing to alter the fundamental structure of the councils and the composition of the voting members.

Councils continue to be dominated by members of the commercial fishing industry, or individuals sympathetic to the economic needs of fishermen and associated industries. Biologists, conservation groups, academics, and federal government officials are still relegated largely to the role of outside observers of the voting process. Even after the SFA, councils continue to adopt policies that fail to meet congressionally mandated conservation objectives. This problem is not limited to the New England council. Two recent examples illustrate the prevailing problem on a national scale. First, in 1999 summer flounder litigation arose after NMFS was presented with the Mid-Atlantic Council’s quota decision that had a three percent chance of meeting target mortality rates.\(^{112}\) NMFS modified that plan to have an eighteen percent chance of meeting target mortality rates and was subsequently sued by a conservation group.\(^{113}\) The D.C. Circuit held that NMFS’s quota “so completely ‘diverges from any realistic meaning’ of the Fishery Act that it cannot survive scrutiny under \textit{Chevron} Step Two.”\(^{114}\)

A second example of a council adopting policies that do not meet conservation objectives is the Pacific Fisheries Management Council’s submission of an unsustainable proposed amendment to the Pacific Coast Groundfish FMP in order to comply with the SFA.\(^{115}\) When NMFS approved the plan, three conservation groups collectively sued and moved for summary judgment on the ground that NMFS violated the FCMA through its approval of the plan.\(^{116}\) The District Court for the

\(113\). \textit{Id.} at 751.
\(116\). \textit{Id.} at 1196.
Northern District of California engaged in a classic discussion regarding what deference courts should give to agencies following the guidelines provided through previous decisions of the U.S. Supreme Court. The NMFS took the position that a court should defer to the expertise of the Councils and agency approval of council decisions. The conservation groups argued that an agency decision is due no deference when the agency fails to engage in reasoned decision-making. The court here accepted the conservation groups' argument and held that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." Perhaps the lasting message from this decision is that NMFS may not hide behind the purported expertise of council members. Although the function of the councils is to promulgate management plans, the ultimate decision-making authority and responsibility remain with NMFS.

VI. LEGAL CHALLENGES

Instead of direct participation in promulgating and voting on management plans, those advocating conservation interests are left with two primary recourses. The first is to appeal to NMFS to reject or modify management plans. The second is to mount a legal challenge in the federal courts to enforce the statutory provisions of the FCMA and the APA. As the statute is currently written, a legal challenge must occur through the APA, as no citizen suit provision remains in the FCMA.

Without input on regional councils, conservation groups are likely to continue turning to courts for enforcement of their interests. Recent litigation suggests federal courts are increasingly willing to hear challenges to fishery management plans. A system formerly characterized

119. Id.
120. Id. at 1200 (citing Chevron, 467 U.S. at 842-43).
121. Other environmental statutes already contain such provisions. See, e.g., Clean Water Act, 33 U.S.C. § 1365 (2000); Clean Air Act, 42 U.S.C. § 7604 (2000); Endangered Species Act, 16 U.S.C. § 1540(g) (2000); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2000). One commentator suggests that through citizen suit provisions, environmental groups have assumed some of the fundamental functions of the federal government insofar as such provisions give power to decide what laws to enforce. See Susan D. Daggett, NGOs as Lawmakers, Watchdogs, Whistle-blowers, and Private Attorneys General, 13 Colo. J. Int'l Envtl. L. & Pol'y 99, 102 (2002). Although representation on regional councils and litigation are not mutually exclusive, one objective of the former would be to reduce the need to resort to litigation and promote a better understanding of all sides of the issues if litigation does occur.
122. For a sample of recent fisheries litigation, see, e.g., Am. Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363 (Fed. Cir. 2004); Conservation Law Found. v. Evans, 360 F.3d 21 (1st Cir. 2004); Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904 (9th Cir. 2003); Campanale &
by deference to councils is undergoing a judicial modification that grants greater supervisory powers to NMFS and an increasing role for federal district courts as overseers of conservation procedures. The *Conservation Law Foundation* case is but one example of a court retaining jurisdiction to ensure compliance with congressional mandates. The court in that case recognized the position advocated by many conservation groups when it stated, "NMFS' history demonstrates the necessity of judicial monitoring. . . ." As conservation groups have no adequate legal remedy at law to prevent overfishing, the injunction is a tool one would expect to be employed in fisheries litigation.

Before environmental groups hail litigation as the best solution to disputes over allocation, conservation, and limited entry, a series of questions must be addressed to adequately assess the potential impact of taking fishing disputes to the courtroom. These issues regarding the appropriate role of courts are relevant to fisheries management not only in the United States, but also in other countries and at the international level.

First, is a court the appropriate forum for conservation groups to address their issues? Judges may lack the expertise and specialized knowledge that the FCMA requires of decision makers. Thus, by placing complex fisheries issues in the hands of the judiciary, the most controversial and complex issues are no longer ultimately decided by the most knowledgeable individuals. While courts are insulated from industry pressures in reaching decisions, judges typically are not equipped with the scientific expertise or specialization required to assess intricate circumstances.

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124. *Id.* at 193.
125. For an in-depth discussion of the use of injunctions, see, e.g., OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 58 (2d ed. 1984).
data.  

Second, do judges want to decide the merits of these complex, technical issues? Judicial interpretation of intricate and often disputed science may not serve the interests of either fishermen or conservation groups.

Third, does litigation serve to decrease public participation in fisheries management? Perhaps by removing some of the decision-making process from the council system, the balance of power in fisheries management will shift to those with access to lawyers. Some commentators suggest that fisheries litigation moves many management decisions away from the public domain and into the courts. As courts are increasingly called upon to enforce conservation requirements, "we are seeing a movement away from participatory management toward a more command and control kind of decision-making process."  

At this point, it is worth returning to the New England groundfish litigation to consider the fate of the case following the court’s implementation of the Settlement Agreement Among Certain Parties. Following the court’s order to draft a new fisheries management plan that complies with the conservation provisions of the FCMA, the New England Fishery Management Council began drafting Amendment 13. On December 18, 2003, the New England Fishery Management Council (NEFMC) submitted Amendment 13 to the Secretary of Commerce for review. Pursuant to section 1854(a)(1) of the FCMA, the Secretary published notice of Amendment 13 in the Federal Register on December 29, 2003. Following the sixty-day comment period, the Secretary

127. The Law of the Sea Convention, in connection with compulsory arbitration in adjudication of fisheries disputes, offers in Annex VIII, a special procedure for arbitrating fisheries disputes designed to provide more expertise. Annex VIII provides:

[A]ny party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping, may submit the dispute to the special arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

United Nations Convention on the Law of the Sea, supra note 8, at Annex VIII, art. 1. Annex VIII further provides that each party to the dispute shall appoint two members to the arbitral tribunal and the parties shall agree to the appointment of the President of the tribunal. Id. at Annex VIII, arts. 3(b), 3(c), 3(d). This system of dispute resolution thus allows for resolution by experts in the technical field, rather than by a court of general jurisdiction.


129. Id.


partially approved Amendment 13. Finally, on April 27, 2004, four days before the Conservation Law Foundation court’s deadline for a new management plan, the Secretary published the final version of Amendment 13 in the Federal Register.\textsuperscript{132}

Although Amendment 13 arose out of a settlement agreement between conservation groups, the fishing industry, and the federal managers, the new plan is now the foundation for even more litigation. New litigation was commenced in both the District Court for the District of Columbia\textsuperscript{133} and the District Court for the District of Maine.\textsuperscript{134} These cases were brought both by the fishing industry (challenging the reduction in available days at sea for fishing) and by conservation groups (alleging that Amendment 13 still fails to comply with the overfishing requirements of the FCMA). Even after the highly publicized Settlement Agreement, the passion for both the fishing livelihood and the environmentally sound management of marine resources is strong enough to land this controversy back in court. It is becoming ever more apparent that the only way to avoid placing disputes over marine resources in the hands of the federal judiciary is to reform the management system that creates the rules. The current management regime has evolved to the point where federal courts are called upon to resolve disputes that are better dealt with by those with scientific and industry expertise. In this respect, implementation of the recommendations by the Ocean Commission will create a more comprehensive system of management plan review before approval by the Secretary of Commerce, rather than a system requiring a dedication of substantial judicial resources after the Secretary’s approval.

These considerations have led to the suggestion that arbitrators and adjudicators should serve as “conservators of last resort.”\textsuperscript{135} There is little question that courts do have a significant role to play in administrative law generally. To the extent that this role is to ensure not only that administrative agencies do not exceed their powers, but also carry out their statutory duties, the courts act as a necessary safeguard. The question here, however, is one of appropriate balance and the minimization


of situations in which courts are confronted with the need to take over management themselves.

VII. MOVING FORWARD

Over the course of the next year, fisheries policy is likely to undergo substantial change. Under the Oceans Act, the President of the United States had ninety days from the release of the Ocean Commission Report to formulate a course of action, and the Bush Administration has in fact released its response. Additionally, members of both the House of Representatives and the Senate are already working toward the passage of new legislation. Three new bills relating to ocean governance are currently pending on the floors of Congress. Through various legislative mechanisms, these bills seek to reform fishery management councils by strengthening conflict of interest provisions, to require that science play a larger role in fisheries management decisions, and to implement recommendations of the Ocean Commission.

Broader participation in the decision-making processes of regional councils is the first step towards reducing the pressures on Article III courts to intervene in the management regime. Without a voice — or, more importantly, a vote — on many of the councils, the efforts put forth by advocates of long-term fisheries sustainability are frequently marginalized. With short-term economic interests driving the management decisions, courts are increasingly called upon to enforce the conservation mandates contained in the FCMA. Recognizing this problem, the Ocean Commission urged the reform of the council member selection process. The Commission suggested that "Congress should amend the [FCMA] to require governors to submit a broad slate of candidates for each vacancy of an appointed Regional Fishery Management Council seat. The slate should include at least two representatives each from the commercial fishing industry, the recreational fishing section, and the general public." With wider representation on councils, the delicate balance between long-term and short-term interests will be addressed in a more effective manner. The process of negotiation, as advocated in the original version of the FCMA, will produce more effective results, provided that representatives of all interested groups are equal at the negotiation table.

138. OCEAN COMMISSION REPORT, supra note 2, at 243.
The second significant improvement to the current system of fisheries management contained in the reform proposals involves greater attention to scientific data and a separation of biological stock assessments and fisheries catch limits. An effective management structure requires a trust in sound science and the absence of a scientific agenda. As the New England groundfish stock assessments illustrated, poor science only complicates the management difficulties.\(^{139}\) To address this issue, the Ocean Commission suggested that "[e]ach Regional Fishery Management Council . . . should set harvest limits at or below the allowable biological catch determined by its Scientific and Statistical Committee. The [Councils] should begin immediately to follow this practice, which should be codified by Congress in amendments to the [FCMA]."\(^{140}\) Furthermore,

[once] allowable biological catch is determined, whether by the Scientific and Statistical Committee or the National Marine Fisheries Service . . . Regional Science Director, the [Council] should propose a fishery management plan in time for adequate review and approval by NMFS. If the plan is not in place in a timely fashion, NMFS should suspend all fishing on that stock until it is able to review the adequacy of the management plan.\(^{141}\)

Effective reform of the fisheries management process requires innovative thought and interdisciplinary decision-making from those in the policy arena. However, even the most effective concepts will fail to achieve desired results without a reduction in fishing effort. With too many technologically sophisticated boats and too few fish, the industry can undermine any management scheme that does not call for a reduction in days at sea or catch. To this end, the Ocean Commission recommends removing all economic incentives for fishermen to better equip their existing boats or construction of new vessels. "Congress should repeal all programs that encourage overcapitalization of fishing fleets, including the Fisheries Finance Program (formerly the Fishing Vessel Obligation Guarantee Program) and those sections of the Capital Construction Fund that apply to fisheries. [NOAA] should take appropriate steps to permanently reduce fishing capacity to sustainable levels."\(^{142}\) Although these economic incentives were necessary to develop the American fishing fleet in the 1970s and early 1980s, today's fisheries

\(^{139}\) See, e.g., Gareth Cook & Beth Daley, Mistrust Between Scientists, Fishermen Mars Key Mission, BOSTON GLOBE, Oct. 27, 2003, at A1 (NOAA's flawed data collection has been referred to as "Trawlgate" on the docks).

\(^{140}\) OCEAN COMMISSION REPORT, supra note 2, at 235.

\(^{141}\) Id. at 236.

\(^{142}\) Id. at 248.
landscape clearly requires a reduction in fishing effort.\textsuperscript{143}

Implementation of the recommendations proffered in the Ocean Commission Report will serve as an effective beginning in realigning the scope of federal fisheries management. While the federal courts have served to enforce the conservation mandates of the FCMA, there is little doubt that the goals federal management structure developed in 1976 and subsequently amended in 1996 did not include turning to courts as \textit{de facto} fisheries managers. As the \textit{Conservation Law Foundation} case demonstrates, complex biological and policy problems that involve an industry with a significant social and economic history do not lend to simple solutions. While the \textit{Conservation Law Foundation} court considered these factors in a laudable manner, the ultimate decisions in fisheries management need to be resolved by members of regional councils and the National Marine Fisheries Service, not the federal courts. With increased public representation on the regional councils, a reduction in fishing effort, and the separation of science and allocation, the federal management structure has the potential to guide America's fisheries toward greater short-term and long-term prosperity.

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