

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 3, 2020

Lyle W. Cayce
Clerk

No. 19-30006

GULF FISHERMENS ASSOCIATION; GULF RESTORATION NETWORK; DESTIN CHARTER BOAT ASSOCIATION; ALABAMA CHARTER FISHING ASSOCIATION; FISH FOR AMERICA USA, INCORPORATED; FLORIDA WILDLIFE FEDERATION; RECIRCULATING FARMS COALITION; FOOD & WATER WATCH, INCORPORATED; CENTER FOR FOOD SAFETY,

Plaintiffs — Appellees,

versus

NATIONAL MARINE FISHERIES SERVICE; EILEEN SOBECK, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR FISHERIES; DOCTOR ROY CRABTREE, IN HIS OFFICIAL CAPACITY AS REGIONAL ADMINISTRATOR, SOUTHEAST REGION; NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION; DOCTOR KATHRYN SULLIVAN, IN HER OFFICIAL CAPACITY AS UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE AND ADMINISTRATOR FOR NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; PENNY PRITZKER, IN HER OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF COMMERCE,

Defendants — Appellants.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:16-CV-1271

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

We consider whether a federal agency may create an “aquaculture,” or fish farming, regime in the Gulf of Mexico pursuant to the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (“Magnuson-Stevens Act” or “Act”), 16 U.S.C. §§ 1801–83. The answer is no. The Act neither says nor suggests that the agency may regulate aquaculture. The agency interprets this silence as an invitation, but our precedent says the opposite: Congress does not delegate authority merely by not withholding it. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff’d by equally divided Court*, 136 S. Ct. 2271 (2016). Undaunted, the agency seeks authority in the Act’s definition of “fishing”—the “catching, taking, or *harvesting* of fish.” 16 U.S.C. § 1802(16) (emphasis added). “Harvesting,” we are told, implies gathering crops, and in aquaculture the fish are the crop. That is a slippery basis for empowering an agency to create an entire industry the statute does not even mention. We will not bite. If anyone is to expand the forty-year-old Magnuson-Stevens Act to reach aquaculture for the first time, it must be Congress.

We therefore AFFIRM the district court’s ruling that the challenged aquaculture rule exceeds the agency’s statutory authority. *See* 81 Fed. Reg. 1762 (Jan. 13, 2016), *codified at* 50 C.F.R. pts. 600 and 622.

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I.

A.

The Magnuson-Stevens Act seeks to “conserve and manage the fishery resources found off the coasts of the United States.” *Id.* § 1801(b)(1); *see also Delta Commercial Fisheries Ass’n v. Gulf of Mexico Fishery Mgmt. Council*, 364 F.3d 269, 271 (5th Cir. 2004) (the Act “aims to preserve fishery resources by preventing overfishing”). Congress passed the Act in 1976 after finding that aggressive fishing practices, especially by foreign trawlers, had imperiled important fish stocks and the coastal economies dependent on them.¹ *See* 16 U.S.C. § 1801(a)(2) (finding the economies of “[m]any coastal areas . . . have been badly damaged by the overfishing of fishery resources,” particularly by “[t]he activities of massive foreign fishing fleets”). Accordingly, the Act provides a framework for protecting and managing fishing and fishery resources in federal waters. *See id.* §§ 1801(b), (c) (stating Act’s purposes and policies).

As relevant here, the Act creates eight Regional Fishery Management Councils and tasks them with drafting Fishery Management Plans (“FMPs”). 16 U.S.C. §§ 1801(b)(5), 1852–53. Each FMP must identify and describe the fishery to which it applies, *id.* § 1853(a)(2), and contain “conservation and management measures” that are “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery,” *id.* § 1853(a)(1)(A). In addition, each FMP must “be consistent with” ten “national standards.” *Id.* § 1851(a). Among these standards are requirements

¹ *See* Robert J. McManus, *America’s Saltwater Fisheries: So Few Fish, So Many Fisherman*, 9 Nat. Resources & Env’t 13, 13 (Spring 1995).

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to “prevent overfishing while achieving . . . the optimum yield from each fishery.” *Id.* § 1851(a)(1).²

Today, the Act is administered by the National Marine Fisheries Service (“NMFS” or the “agency”), a division of the National Oceanic and Atmospheric Administration, by delegation from the Secretary of

² These are the ten standards:

- (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. . . .
- (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 . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet [certain] requirements
- (9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.
- (10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

16 U.S.C. § 1851(a).

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Commerce. *See id.* §§ 1854, 1855. NMFS reviews each FMP for consistency with the Act and other applicable laws. If NMFS fails to act within a specified period of time after the council submits an FMP, the plan is approved. *Id.* § 1854(a)(3). Each plan is then implemented through separate regulations, which NMFS reviews, *id.* § 1853(c), and, upon approval, implements through final rules, *id.* § 1854(b).³

The concept of a “fishery” is central to the Act and to the issues we consider in this case. The Act defines “fishery” as follows:

- (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
- (B) any fishing for such stocks.

Id. § 1802(13). “Fishing,” in turn, is defined as:

- (A) the catching, taking, or harvesting of fish;
- (B) the attempted catching, taking, or harvesting of fish;
- (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
- (D) operations at sea in support of, or in preparation for any activity described in subparagraphs (A) through (C).

³ See generally *Anglers Conserv. Network v. Pritzker*, 809 F.3d 664, 667–68 (D.C. Cir. 2016) (discussing administration of the Act); *Lovgren v. Locke*, 701 F.3d 5, 13 (1st Cir. 2012) (same); *General Category Scallop Fishermen v. Sec’y, U.S. Dep’t of Commerce*, 635 F.3d 106, 108–09 (3rd Cir. 2011) (same); *Oregon Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1108 (9th Cir. 2006) (same).

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