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ASSOCIATED FISHERIES OF MAINE, INC. v. DALEY:
IS DISCRETION THE BETTER PART
OF JUDICIAL REVIEW?

*Steven E.B. Lechner**

I. INTRODUCTION

The United States District Court for the District of Maine recently upheld a groundfish recovery plan that amended the Northeast Multispecies Fishery Management Plan.¹ This recovery plan, known as Amendment 7, was submitted by the New England Fishery Management Council to Secretary of Commerce William Daley, who adopted and implemented the proposed regulations.² Associated Fisheries of Maine, Inc. (AFM)³ challenged Amendment 7, promulgated in response to the perceived threat to specific fish populations in the New England region.⁴ AFM claimed that the changes made by Amendment 7 were financially destructive for small fishing vessels, particularly the trawling industry in the area, and thus violated federal law.⁵

In upholding Amendment 7, the district court held, *inter alia*: (1) judicial review was not available on the claim that the Secretary violated the Regulatory Flexibility Act;⁶ (2) the Secretary adequately considered public comments about tougher restrictions on fishing vessels and did not engage in arbitrary and capricious rulemaking in violation of the Administrative Procedure Act;⁷ and (3) the Secretary adequately complied with the Magnuson-Stevens Fishery Conservation and Management Act's national standards and general purposes.⁸

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1. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. 383 (D. Me. 1997).

2. *Id.* at 385.

3. *Id.*

4. The specific fish populations at risk are cod, haddock, and yellowtail flounder. *Id.*

5. *Id.*

6. *Id.* at 387.

7. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 388.

8. *Id.* at 388-390.

This Note summarizes the district court's assessment of AFM's claims. A brief survey of the Magnuson Act will be provided, followed by an analysis of the court's review of AFM's Magnuson Act claim. The most significant part of the district court's review of the Secretary's implementation of Amendment 7 was its relationship to the Magnuson Act's goal of groundfish stock conservation, and its effect on New England's commercial fishing industry. This Note argues that the court's deference to the Secretary's adoption and promulgation of Amendment 7 was justified. Moreover, the Note argues that the court's approach in *Associated Fisheries of Maine, Inc. v. Daley* is an appropriate model for the proper role of judicial review in Magnuson Act claims.

II. ASSOCIATED FISHERIES OF MAINE, INC. v. DALEY

A. Facts

William Daley, United States Secretary of Commerce, adopted and implemented amendments to the Northeast Multispecies Fishery Management Plan submitted by the New England Fishery Management Council.⁹ The Council recommended changes to counteract a perceived threat to the cod, haddock, and yellowtail flounder populations in the New England fishery.¹⁰

Associated Fisheries of Maine, Inc. (AFM), a membership organization comprising and representing Maine commercial fishermen,¹¹ challenged two specific amendments adopted by the Secretary.¹² AFM originally brought suit in 1994 to challenge Amendment 5,¹³ promulgated March 1, 1994,¹⁴ which was adopted and implemented to curtail depletion of the

9. The New England Fishery Management Council is comprised of members from Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. The Council has seventeen voting members:

- (1) the Regional Administration of the National Marine Fisheries Service;
- (5) the principal state official with marine fishery management responsibility for each state, and;
- (11) eleven members nominated by the governors of the states and appointed by the Secretary of Commerce for three year terms.

NEFMC Web Page (visited Apr. 17, 1998) <<http://www1.shore.net/~nefmc/overview/structure.htm>>.

10. *Associated Fisheries of Me., Inc., v. Daley*, 954 F. Supp. at 385.

11. *Id.* at 386.

12. *Id.* at 385.

13. *Id.*

14. *Id.*

aforementioned groundfish stocks.¹⁵ Amendment 7, promulgated on May 31, 1996,¹⁶ went further than Amendment 5, by seeking to rebuild stocks by reducing groundfish mortality to near zero.¹⁷ AFM brought suit in the United States District Court for the District of Maine challenging this later Amendment on several grounds,¹⁸ but generally claiming the Amendment was destructive to Maine's commercial fishing industry.¹⁹

B. The Court's Analysis

1. Secretary's Standing Challenge

The Secretary claimed AFM lacked standing to bring a suit challenging Amendment 7.²⁰ The district court disposed of this claim, finding that AFM met the two-pronged test for standing²¹ as enunciated in *DuBois v. United States Department of Agriculture*.²² The first prong of the test, constitutional in nature, required the plaintiff to "have suffered an injury in fact"²³ that was "personal to the plaintiff,"²⁴ and was "actual or imminent, not conjectural or hypothetical."²⁵ The injury must also have been "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."²⁶ The court found that Amendment 7 "directly affected" commercial fishing,²⁷ thus meeting the first prong of the *DuBois* test.

15. *Id.*

16. *Associated Fisheries of Me., Inc., v. Daley*, 954 F. Supp. at 385.

17. *Id.* "F" symbolizes the portion of the total mortality rate of the stock attributable to fishing-related mortalities in a given year. *Id.* at 385, n.2.

18. *Id.* at 383-91. AFM challenged Amendment 7 based on the Regulatory Flexibility Act, the Administrative Procedure Act, the Magnuson Act, Executive Orders 12,291 and 12,866, and the Omnibus Appropriations Act of 1997. *Id.* at 385.

19. *Id.* "Associated Fisheries asserts that both Amendments are disastrous for small fishing boats—particularly the trawling industry—in the area." *Id.*

20. *Id.* at 386.

21. *Id.*

22. *DuBois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (involving a citizen and environmental group's action against the U.S. Forest Service for issuing a permit for expansion of a skiing facility which allegedly violated the National Environmental Policy Act, Clean Water Act, and executive order).

23. *Id.* at 1281.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 386.

The second prong assessed the prudence of exercising federal jurisdiction.²⁸ Normally, a plaintiff “must assert [his] own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”²⁹ However, as a membership organization, AFM plainly fits into an exception to this general rule because “one or more of the members certainly would satisfy the individual requirements for standing in . . . [their] own right.”³⁰

2. *AFM's Regulatory Flexibility Act Claim*

AFM first claimed the Secretary's adoption and implementation of Amendment 7 violated the Regulatory Flexibility Act (RFA) “by failing to perform an adequate final regulatory flexibility analysis.”³¹ The language of the RFA in effect at the time that the Secretary promulgated Amendment 7 specified three requirements for an agency's final regulatory flexibility analysis.³²

Of these requirements, AFM specifically attacked the Secretary's failure to consider the negative impact that Amendment 7 would have on the small commercial fishing boat industry,³³ and the Secretary's failure to find and assess ways to minimize these economic hardships.³⁴

28. *DuBois v. United States Dep't of Agric.*, 102 F.3d at 1281.

29. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

30. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 386.

31. *Id.*

32. The RFA in force at the time that the Secretary promulgated Amendment 7 mandated that every final regulatory flexibility analysis contain the following:

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

5 U.S.C. § 604(a) (1994), *amended by* 5 U.S.C. § 604(a) (Supp. II 1996).

Although changes were made to the RFA prior to the May 31, 1996 promulgation of Amendment 7, these changes were not scheduled to come into effect until June 27, 1996. Thus, the court reasoned that AFM's RFA claim should be decided under the prior statutory scheme. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 387.

33. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 387. AFM was particularly concerned with Amendment 7's effect on trawlers and other small businesses. *Id.*

34. *Id.*

The district court concurred with AFM's claim that the Secretary failed to fully examine every alternative;³⁵ However, the RFA required that agencies examine only "significant alternatives."³⁶ The court found evidence of satisfactory compliance by the Secretary in the public comments portion and in the Final Supplemental Environmental Impact Statement for Amendment 7, stating that "much of the eighteen pages that are the comments and responses portion of the final rule are directed to a discussion of alternatives," and that the Environmental Impact Statement included "many alternatives."³⁷

3. *AFM's Administrative Procedures Act Claim*

AFM's second claim alleged that the Secretary violated the Administrative Procedure Act (APA).³⁸ The APA required the reviewing court to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"³⁹

AFM claimed that the Secretary engaged in arbitrary and capricious rulemaking by failing to "conscientiously consider" public comments about Amendment 7,⁴⁰ specifically the decision to alter the fishery management strategy to a goal of near zero groundfish mortality.⁴¹ The court found ample evidence within the administrative record that the Secretary considered public comments about Amendment 7 and about groundfish mortality reduction.⁴² The court stated that "eighteen pages of the final rule . . . were devoted to a discussion of [public] comments and responses[.]"⁴³ and an inter-agency memorandum analyzed public opinion and comments item by item.⁴⁴ The court thus concluded that the Secretary's rulemaking showed

35. *Id.* "Associated Fisheries may be correct that not every alternative has been considered by the agency . . ." *Id.*

36. 5 U.S.C. § 604(a) (1994) amended by 5 U.S.C. § 604(a)(3) (Supp. II 1996).

37. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 387.

38. *Id.*

39. 5 U.S.C. § 706(2)(A) (1994).

40. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 387. AFM characterized the comment period as "just an empty exercise." *Id.*

41. *Id.* at 388.

42. *Id.*

43. *Id.*

44. *Id.*

a fair consideration and treatment of the comments and was not arbitrary and capricious.⁴⁵

4. *AFM's Magnuson Act Claim*

The Magnuson Act created a system in which regional councils devise fishery management plans which are submitted to the Secretary for ultimate approval and implementation.⁴⁶ The majority of the district court's opinion in *Associated Fisheries* was dedicated to an analysis of AFM's claim that the Secretary failed to comply with four elements of the Magnuson Act. To assess the Secretary's adoption and implementation of Amendment 7, the court permitted each side to present expert testimony about the scientific and economic information at issue in the case.⁴⁷

First, AFM claimed that the Secretary based his decision on unreliable scientific information rather than on the best science available.⁴⁸ Specifically, AFM challenged groundfish species population data,⁴⁹ and the Secretary's failure to assess the presence of factors other than overfishing as the reason for the groundfish depletion.⁵⁰ The court characterized the "best science available" requirement as a highly subjective standard.⁵¹ The court further described disagreements about scientific data as a difficulty to be expected,⁵² and stressed that a reviewing court must find an abuse of discretion by the Secretary to overturn decisions based on science.⁵³ The court found merit in both sides' experts,⁵⁴ which meant that the Secretary's decisions based on available science were deemed plausible.

45. *Id.*

46. 16 U.S.C. § 1851 (1994).

47. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 388. The court's permission to present this testimony was based on language in the Magnuson Act which states that "measures shall be based upon the best scientific information available." 16 U.S.C. § 1851 (a)(2) (1994).

48. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 389. The court characterized AFM's best science available allegation as follows: "The science is generally unreliable inasmuch as there are problems with the quantitative data concerning species population and the inability to say with confidence that factors other than overfishing . . . are not at work in depleting the groundfish." *Id.*

49. *Id.*

50. *Id.* AFM pointed to environmental factors. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 389-90.

54. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 389. "[T]he record reflects . . . strenuous disagreement among the scientists . . ." *Id.*

Second, AFM claimed that the Secretary's economic analysis of Amendment 7, as compared to Amendment 5, was deficient in three respects.⁵⁵ AFM alleged that the economic analysis failed to consider the impact of Coast Guard enforcement costs,⁵⁶ incorrectly treated crew payments as costs,⁵⁷ and misjudged the economic benefits in the final three years of the plan.⁵⁸ Similar to the debate about the best scientific data, the court found that the Secretary's consideration of the Coast Guard's budget estimate and treatment of crew payments as costs was not arbitrary and capricious.⁵⁹ The court held that reasonable economists could differ about these particular decisions.⁶⁰ The court agreed with AFM's assertion that uncertainties existed about the projected benefits Amendment 7 would have in years eight, nine, and ten of the plan.⁶¹ The court commented "there will be drastic effects for the fishing industry,"⁶² but, the court found that this economic uncertainty was not tantamount to clear evidence that the Secretary failed to make a "good faith judgment" about the best way to proceed for all interested parties.⁶³

Third, AFM alleged the chosen regulatory practices had greater detrimental effects than "equally effective alternatives."⁶⁴ The court, having earlier addressed the Secretary's consideration of proposed alternatives, described these choices as "discretionary judgments," which in this case were not arbitrary and capricious.⁶⁵

Finally, AFM claimed Amendment 7 was adopted and promulgated before Amendment 5 had had a reasonable chance to reduce groundfish mortality.⁶⁶ The court rejected the assertion that the Secretary is confined to an earlier solution, and found instead that the Secretary was free to make changes based on new data.⁶⁷ The court held that the Secretary, in adopting

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 389. "Economists can argue in good faith over whether crew payments should be treated as a cost, but it is hardly arbitrary and capricious for the Secretary to make the choice to treat them as such in the analysis." *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 389.

67. *Id.*

and implementing Amendment 7 after having adopted and implemented Amendment 5, responded to new information and made appropriate alterations to achieve the goal of "preserv[ing] the fishery to obtain its optimum yield."⁶⁸

5. AFM's Other Claims

AFM also claimed that the Secretary violated two Executive Orders and the Omnibus Appropriations Act of 1997.⁶⁹ Executive Order (E.O.) 12,291 targeted federal regulation and sought to "reduce the burdens of existing and future regulation, increase agency accountability,"⁷⁰ and "insure well-reasoned regulations."⁷¹ To achieve this end, section two of E.O. 12,291 required agencies to base decisions on adequate information and weigh the resulting societal costs and benefits.⁷²

AFM posited that because the Magnuson Act required compliance with the specified time limitations in E.O. 12,291 and other laws, "as they apply to the Secretary,"⁷³ the Magnuson Act mandated total compliance with the language of E.O. 12,291.⁷⁴ The court interpreted this language as applicable only to time limits.⁷⁵ In addition, the court found that E.O. 12,291 was inapplicable because it was explicitly revoked by E.O. 12,866.⁷⁶

Executive Order 12,866 also outlined principles and guidelines for regulatory decisions, but explicitly limited its intent to improvement of the "internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable by law or equity by a party against the United States . . ." ⁷⁷ The court held that this language proscribed AFM from having a private cause of action based on E.O. 12,866.⁷⁸

AFM lastly claimed that the Secretary's implementation of Amendment 7 was barred by the Omnibus Consolidated Appropriations Act of 1997

68. *Id.* at 390.

69. *Id.*

70. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 390.

75. *Id.* "All section 1855(e) instructs is that the time limits in the Magnuson Act must be observed." *Id.*

76. *Id.* The revocation became effective on September 30, 1993. *Id.*

77. Exec. Order No. 12,866, 358 Fed. Reg. 51,735 (1993).

78. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 390.

which prohibited "funds appropriated under [the] Act . . . [to be] used to develop new fishery management plans, amendments, or regulations which create new individual fishing quota programs. . . ." ⁷⁹ The court found that Amendment 7 was not a quota program, because it did not limit "access to the fishery for individual vessels or fishermen to a percentage of the total allowable catch." ⁸⁰ The court opined that even if Amendment 7 was a quota program, the Sustainable Fisheries Act authorized offsetting fees to pay the administrative costs of "individual fishing quota programs." ⁸¹

III. MAGNUSON ACT

A. A Brief Survey

No limitations on commercial fishing beyond the United States' three mile territorial sea existed prior to 1976. ⁸² In that year, overfishing by foreign vessels led Congress to enact the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act). ⁸³ The Act established a zone, the exclusive economic zone (EEZ), extending 200 miles from the U.S. coast, in which no foreign fishing was permitted. ⁸⁴ Regional Fishery Management Councils were created to exercise American fishery management authority over all fish within this zone ⁸⁵ through the development of Fishery Management Plans (FMPs). ⁸⁶

79. Omnibus Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 16 U.S.C.A. § 1851 (West Supp. 1998).

80. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 391.

81. *Id.* See Sustainable Fisheries Act, Pub. L. No. 104-297, § 109(c)(2), 110 Stat. 3559, 3583 (1996) (codified as amended at 16 U.S.C.A. § 1854(d)(2)(A) (West Supp. 1998).

82. Sarah Bittleman, *Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues*, 9 TUL. ENVTL. L.J. 349, 352-354 (1996).

83. *Id.* Warren Grant Magnuson (1905-1989) served as a Democratic Senator from Washington state from 1944 to 1981. *United States Senate* (visited Jan. 19, 1998) <<http://www.senate.gov/history/nameindex/m.htm>>.

84. Catherine Decker, Note, *Issues in the Reauthorization of the Magnuson Fishery Conservation and Management Act*, 1 OCEAN & COASTAL L.J. 323, 324 (1995). The United States established "exclusive management authority . . . over all living resources within this zone." *Id.*

85. Bittleman, *supra* note 82, at 357.

86. Decker, *supra* note 84, at 357.

B. Successes and Failures of the Magnuson Act

The general purpose of the Magnuson Act, as enacted in 1976 and through its subsequent amendments, was to create a comprehensive system of fishery conservation and management.⁸⁷ A reduction of foreign fishing in the EEZs has been achieved,⁸⁸ which in turn has increased domestic fishing.⁸⁹ American vessels' gross annual catch has increased from 1.56 billion pounds in 1977 to over 6.32 billion pounds in 1993.⁹⁰ This dramatic growth in American fishing has produced an equally dramatic growth in annual fishing revenues and created thousands of jobs.⁹¹ In turn, this goal's achievement produced negative effects on the conservation component of the legislation, specifically the groundfish stock levels.⁹²

Overfishing has been, and in many cases continues to be, the primary reason for the perceived threat to many groundfish species.⁹³ "Overutilization," a measurement of fishing volume, occurs when fishing effort exceeds fish production.⁹⁴ The northeast region has suffered the greatest percentage of overutilization stocks in the United States.⁹⁵ This reality has produced severe economic impacts on New England's traditional commercial fishing industry.⁹⁶ The New England region's groundfish landings declined from more than 1.6 billion pounds in 1965 to less than 220 million pounds in 1991.⁹⁷

Shortly after the enactment of the Magnuson Act, the New England Regional Council created their initial FMP which placed quotas on total fishing of cod, haddock, and yellowtail flounder, regulated fishing net size, and established a minimum size for cod and haddock.⁹⁸ One criticism of

87. Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641 (1982). The Magnuson Act also "redefined the scope of the remaining state jurisdiction." *Id.*

88. Decker, *supra* note 84, at 323. "Perhaps its greatest success, the Act effectively eliminated foreign fishing within the 200-mile band now known as the exclusive economic zone." *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 324.

93. *Id.*

94. Decker, *supra* note 84, at 337.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 338.

this FMP was its failure to control the entry of new vessels into the fishery.⁹⁹ This unregulated competition for a finite resource created a "race to fish,"¹⁰⁰ to catch as many fish as possible before total limits were reached, and to reduce the amount of fish available to competitors.¹⁰¹

The New England Regional Council altered their policy in 1980 by establishing less restrictive measures, and then increased the minimum size of cod, haddock and yellowtail flounder in 1987.¹⁰² In response to the continued decrease in groundfish stock levels, the Northeast Multispecies Fishery Management Plan was amended on March 1, 1994 to avoid further depletion,¹⁰³ and amended again on May 31, 1996 to place tougher restrictions on fishing vessels and rebuild groundfish stocks.¹⁰⁴

IV. JUDICIAL REVIEW OF THE MAGNUSON ACT CLAIM IN *ASSOCIATED FISHERIES OF MAINE, INC. V. DALEY*

Judicial review of the Secretary's implementation of FMPs accords another check in this process. In *Maine v. Kreps*,¹⁰⁵ the State of Maine challenged species quotas on Georges Bank established by the Secretary. *Kreps* was decided shortly after the passage of the Magnuson Act, and the First Circuit took the opportunity to enunciate the discretion a reviewing court should give to quotas set by the Secretary "in the exercise of [his] conservation and management authority under the Act."¹⁰⁶ The court stated that the Secretary has "substantial discretion in selecting the appropriate quota for a given fishery"¹⁰⁷ adding that a reviewing court "may decide only whether this discretion was exercised rationally and consistently with the standards set by Congress, and may not substitute its own judgment as to values and priorities for that of the Secretary."¹⁰⁸

National Fisheries Institute, Inc. v. Mosbacher,¹⁰⁹ is another illustrative case regarding proper judicial review for Magnuson Act claims. National

99. *Id.*

100. Decker, *supra* note 84, at 340-41.

101. *Id.*

102. *Id.* at 338-39.

103. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 385.

104. *Id.*

105. *Maine v. Kreps*, 563 F.2d 1052 (1st Cir. 1977). Maine wanted the First Circuit to "clarify for the future the limits of the Secretary's authority." *Id.* at 1056.

106. *Id.* at 1055.

107. *Id.*

108. *Id.* (citation omitted).

109. *National Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210 (D.D.C. 1990).

Fisheries challenged the Secretary's regulation of billfish harvest.¹¹⁰ The court analyzed the administrative record and held that the Secretary's actions were justified based upon conservation factors,¹¹¹ and furthermore that the Secretary was not limited to conservation considerations.¹¹² Overall, the court showed deference to the Secretary's selected solutions, which were held not to be arbitrary and capricious.¹¹³

In *Associated Fisheries*, Judge D. Brock Hornby applied the *Kreps* standard of review to non-quota Magnuson Act regulations.¹¹⁴ The district court gave three principle justifications for its appropriate deference to the Secretary's adoption and implementation of Amendment 7.¹¹⁵

First, the court both explicitly and implicitly relied on the mechanics of the Magnuson Act.¹¹⁶ Decisions made under the Magnuson Act must survive several checks Congress placed in the system such as: the Regional Council's structure,¹¹⁷ the inclusion of public comment and participation throughout the process,¹¹⁸ the requirement of submitting FMPs for the Secretary's approval,¹¹⁹ and most importantly, Magnuson Act regulations must comport with the Act's ten national standards.¹²⁰ The court stated that "the administrative record demonstrates that comments were considered."¹²¹ Implicit in the court's holding was the belief that the Magnuson Act was enacted to give affected parties a voice in this process.¹²² Amendment 7 represented a plan that properly progressed through this process. Critics argue that the public participation invited by the Magnuson Act is ineffectual.¹²³ AFM alleged the Secretary "failed to conscientiously

110. *Id.* The challenged regulations in *National Fisheries* had the "effect of significantly reducing the domestic commercial harvest of Atlantic Ocean billfish while also limiting the recreational harvest to a lesser degree." *Id.* at 211.

111. *Id.* at 226.

112. *Id.* at 219. The D.C. Circuit applied a "common sense construction of the term 'conservation and management,' in which the two words do not have synonymous and redundant meanings." *Id.*

113. *Id.* at 226-27.

114. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 388.

115. *Id.* at 388-91.

116. *Id.*

117. 16 U.S.C. § 1852 (1985 & West Supp. 1998).

118. *Id.* §§ 1852-54.

119. *Id.* § 1853(c).

120. *Id.* § 1851(a). When the case arose there were just seven national standards. See *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 388.

121. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 388.

122. See *id.* at 388-391.

123. Decker, *supra* note 84, at 341-42. The conflicts of interest among voting members of the Regional Councils has been identified as a defect in the Magnuson Act's public

consider comments responding to Amendment 7.”¹²⁴ The court found that the record showed the Secretary properly considered public input and did not engage in arbitrary and capricious rulemaking.¹²⁵

Second, the court intimated that the fishery management issues before it were highly subjective and complex.¹²⁶ Judge Hornby allowed expert testimony to help him “understand science, economics, statistics, fishery management principles and the fishing industry.”¹²⁷ Opponents of judicial deference in Magnuson Act claims argue that courts should analyze each detail of challenged fishery regulations.¹²⁸ The *Associated Fisheries* court heard detailed testimony and found merit in each party’s experts.¹²⁹ However, the court stressed that these issues required the Secretary to make “assessment[s] [that are] obviously a matter of judgment and discretion,” and must be reviewed on this basis.¹³⁰

Lastly, the district court stated “there is not much disagreement that the [New England] ground fishery is in bad shape[.]”¹³¹ The court also recognized that “the New England fishing industry is facing a monumental crisis[.]”¹³² and even agreed with AFM’s contention that Amendment 7 would have a drastic effect on the commercial fishing industry.¹³³ In the end, however, the court stressed the “uncertainties” of the fisheries’ future.¹³⁴ The court rejected AFM’s claim that Amendment 5 should have been given a chance to work, stating “[t]he Secretary is not limited to an earlier solution if new data show that the fishery is in direr straits than previously thought.”¹³⁵ The court ostensibly focused on the long term effect of the Secretary’s actions and whether they comported with the Magnuson Act’s goal of preserving the fishery to obtain its optimum yield.¹³⁶ The court found appropriate the Secretary’s choice to “be conser-

review process. *See id.*

124. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 387.

125. *Id.* at 387-88.

126. *Id.* at 388.

127. *Id.*

128. *See Alison Rieser & William J. Milliken, A Review of Developments in U.S. Ocean and Coastal Law 1990-1991*, 1 TERRITORIAL SEA J. 291, 333 (1991).

129. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 387.

130. *Id.* at 389.

131. *Id.*

132. *Id.*

133. *Id.* “[F]or many communities a traditional way of life is at stake.” *Id.*

134. *Id.*

135. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 389.

136. *Id.* at 390. “[T]he primary area of disagreement is how rapidly [the fishery] must be permitted to recover.” *Id.* at 389.

vative in dealing with the issue of conservation and, in the face of uncertainty, to take the more strenuous measures—even though they may unfortunately have a short term drastic negative effect on the fishing industry.”¹³⁷ The court correctly relied on the Magnuson Act’s broad optimum yield goal as paramount in assessing the Secretary’s actions, and only regulations clearly inconsistent with this goal should be found impermissible.

V. CONCLUSION

The *Associated Fisheries* court showed proper judicial deference to the Secretary of Commerce’s adoption and implementation of Amendment 7. This amendment represented a proposed solution proffered by the New England Regional Management Council to deal with a critical groundfish population problem.¹³⁸ The *Associated Fisheries* court reviewed Amendment 7 to ensure that the groundfish recovery plan complied with the Magnuson Act’s goal of achieving optimum yield.¹³⁹ As stated in *Kreps*¹⁴⁰ and restated in *Associated Fisheries*, “[a] reviewing court may decide only whether this discretion was exercised rationally and consistently with the standards set by Congress . . . and may not substitute its own judgment as to values and priorities for that of the Secretary.”¹⁴¹

Amendment 7 represented a deliberate response to a grave and uncertain future for the New England fishery. The Secretary’s adoption and implementation of this groundfish recovery plan was appropriate and warranted by the circumstances. By showing deference to the Secretary, the *Associated Fisheries* court showed faith in the Magnuson Act’s system and gave the groundfish recovery plan an opportunity to work. This approach should serve as a model for other courts throughout the nation in reviewing challenges to fishery regulations implemented under the Magnuson Act.

137. *Id.* at 390.

138. U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., *Recovery Measures for New England Groundfish Approved*, press release (1996).

139. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 390.

140. *Maine v. Kreps*, 563 F.2d at 1055.

141. *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. at 388.