COMMENTS ON FISHERIES MANAGEMENT WITHOUT COURTS

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Thank you for inviting me to participate in this excellent *Environmental Law Without Courts* Symposium and for giving me the opportunity to comment on the issues raised by Robin Craig and Erin Ryan on fisheries management and the courts.[1] I will take my cue from Ryan and address three points relevant to the discussion: (1) Did the original 1976 Fishery Conservation and Management Act (1976 Act) create a framework for management without the courts?; (2) Why did the role of the courts grow after the 1996 Sustainable Fisheries Act?; and (3) Is it realistic to anticipate fisheries management without courts under the current provisions of the Magnuson-Stevens Act? Like Ryan, I hope I will be allowed, as an avid observer of fishery management since 1976, to speculate on some points.

As Craig and Danley pointed out, the 1976 Magnuson-Stevens Fishery Conservation and Management Act (1976 Act or Act) was certainly intended to operate independently of the courts. The goal of 1976 Act was, first and foremost, to extend U.S. jurisdiction over marine resources to 200-miles offshore in order to exclude foreign fishing in U.S. coastal waters.[2] After World War II, foreign fishing in U.S. coastal waters increased dramatically, and distant water, technologically sophisticated foreign fishing fleets severely overexploited fisheries beyond three miles offshore. The small U.S. domestic fishing fleet could not compete for the depleting resources.[3] The focus of the Act was on protection and development of this small, but politically potent,[4] industry, rather than conservation of fisheries resources. The widely accepted assumption was that once the

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1. Robin K. Craig & Catherine Danley, *Federal Fisheries Management: A Quantitative Assessment of Federal Fisheries Litigation Since 1978*, 32 J. OF LAND USE & ENVTL. L. 381 (2017); Erin Ryan, *Fisheries Management Without Courts*, 32 J. OF LAND USE & ENVTL. L. 431 (2017).

2. 16 U.S.C. § 1811(a) (2012).

3. *See generally* Harry N. Scheiber, *Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation—and Frustration*, 20 VA. ENVTL. L.J. 119, 119–21 (2001) (discussing the history of overexploitation of fisheries off U.S. coasts after WWII by foreign fishers due to the "industrialization of fishing vessels," the emergence of "giant factory ships," and "a rapidly increasing tonnage of fishing vessels").

4. David Dana described the fishing industry as a "concentrated minority" capable of exerting disproportionate political force in the regulatory process, and their "geographic concentration afford[ed] them the special benefit of being an indispensable constituency to at least some local, state, and federal officials." David A. Dana, *Overcoming the Political Tragedy*

pressure of foreign boats no longer existed in U.S. coastal waters, fish stocks would recover sufficiently to maintain the domestic fishing industry and allow it to develop and grow.[5] Consequently, conservation measures included in the 1976 Act were largely an afterthought. The few resource protection measures that were authorized were mostly discretionary and not subject to challenge by environmental groups.[6]

The Act's unique self-government by the fishing industry[7] also suggested a limited role for the courts. The eight regional Fishery Management Councils (FMCs) are responsible for development of fishery management plans (FMPs) that not only establish management policies for how, when, where, and how many fish are caught, but also allocate the catch among users. The FMC submits a FMP to the Secretary of Commerce for approval and implementation through appropriate regulations. The Secretary has little discretion at this point[8] and *must approve or partially approve* the FMP if it is consistent with the Act and other relevant law.[9] It

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of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act, 24 ECOLOGY L.Q. 833, 836 (1997).

5. Based on these assumptions, the U.S. government provided tax incentives and other assistance and subsidization that led to massive overcapitalization of the industry. *See generally,* EUGENE H. BUCK, CONG. RESEARCH SERV., 35-296 ENR, OVERCAPITALIZATION IN THE U.S. COMMERCIAL FISHING INDUSTRY 7 (1995).

6. For example, the Act provided that: "[t]he Secretary *may* prepare a fishery management plan . . . if . . . the appropriate [Fishery Management] Council fails to develop and submit to the Secretary, *after a reasonable period of time*, a fishery management plan for such fishery … if such fishery requires conservation and management . . . ." 16 U.S.C. § 1854(c)(1)(A) (2012) (emphasis added). Challenges under the Administrative Procedure Act are precluded where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2012). The 1976 Act contained no citizen suit provisions.

7. The Act does provide for appointment of individuals other than resource users to the Fishery Management Councils (FMCs). Other people who are "knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned" may be nominated for the FMCs by governors and appointed by the Secretary of Commerce. 16 U.S. C. § 1852(b)(2)(A) (2012). In practice, however, resource users have dominated FMC membership. *See* Thomas A. Okey, *Membership of the Eight Regional Fishery Management Councils in the United States: are special interests vver-represented?*, 27 MARINE POL'Y 193, 197 (2003) (commercial fishing interests comprised the largest collective on regional FMCs between 1990 and 2001); *see also* Dana, *supra* note 4, at 834 (industry participants dominate the regulatory entity, resulting in capture of the entity by those with an interest in overuse of the resource).

8. The Secretary's action is limited to approving or partially approving the FMP. There is no authority for the Secretary to make changes to the plan to bring it into compliance. If a plan is not approved or partially approved, it is resubmitted to the FMC. The FMC *may* submit a revised plan but is not required to do so. 16 U.S.C. § 1854(a)(4) (2012). The Secretary has discretionary authority to develop a plan if the plan is not revised and resubmitted in a reasonable time. *Id.* § 1854(c)(1)(A). But this authority was seldom, if ever exercised. The provisions of the Magnuson-Stevens Act now *require* the Secretary to prepare a FMP when a FMC does not submit a FMP for rebuilding an overfished fishery within two years of notification by the Secretary of the overfished status of the fishery, the Secretary is required to prepare a FMP. *Id.* §§ 1854(c)(3), (5).

9. *Id.* § 1854(a)(3). The regulations must be published and the Act does provide for a sixty-day comment period before the Secretary acts. *Id.* § 1854(a)(1)(B). A default provision provides: "If the Secretary does not notify a [FMC] within 30 days of the end of the comment

is the Secretary's implementing regulations, rather than the FMC's plan *per se*, [10] that is reviewable by the courts, but only if a petition is made within thirty days of publication of the regulation.[11] Because the Secretary's authority to disapprove an FMP is so circumscribed by the Act, the bases for challenging the regulations are also limited. And a challenger is further discouraged by the deference courts afford to agency decisions applying the agency's technical or scientific expertise.[12] The environment created by the 1976 Act left little role for the courts in fishery management.

One can imagine that the Secretary of Commerce often experienced tensions due to the lack of discretion afforded by the Act. The dilemma was often approval of a less than adequate FMP or no FMP at all for a seriously depleted fishery.[13] While many commentators attributed approval of poor FMPs to capture of the process and the agency by the fishing industry,[14] in many cases approval of such plans may have been a reasonable judgment by the agency given the alternative of no regulation and little means to coerce FMC revision of the plan. Such circumstances did, however, provide one of the few realistic opportunities for challenge of the FMP by environmental interests. The 1996 Sustainable Fisheries Act (SFA) amendments addressed this particular dilemma in regard to the most stressed fisheries by requiring the Secretary to prepare an FMP where an

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period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved." *Id.* § 1854(a)(3)(C).

10. 16 U.S.C. § 1855(d) (2012). A Department of Justice Opinion takes the position that FMCs do not have independent legal status to be sued. Memorandum from Nat'l Oceanic & Atmospheric Admin. Office of Gen. Counsel, Litigation Authority of Regional Fishery Management Councils, No. 91 (1980) (on file with author) (adopting Dep't of Justice opinion written by Larry J. Simms on Sept. 17, 1980); *see also* Miriam McCall, *The View from Ground Zero: Government as Defendant, Courts as Fishery Managers*, 7 OCEAN & COASTAL L. J. 35, 38 (2001).

11. 16 U.S.C. § 1855(f) (2012).

12. Marian Macpherson & Mariam McCall, *Judicial Remedies in Fisheries Litigation: Pros, Cons, and Prestidigitation*?, 9 OCEAN & COASTAL L. J. 1, 6–7 (2003).

13. As noted by Macpherson and McCall, the default in management of offshore fisheries resources is unregulated fisheries. Without affirmative agency action, an unregulated fishery simply remains subject to "open access, allowing unrestricted harvests." *Id.* at 5–6. This circumstance explains why much of the litigation surrounding fisheries involves claims under other acts, like the Endangered Species Act or the Marine Mammal Protection Act, which would afford opportunities to enjoin harmful fishing practices.

14. *See* Dana, *supra* note 4, at 834 (asserting that industry participants dominate the regulatory entity, resulting in capture of the entity by those with an interest in overuse of the resource); *see also* Okey, *supra* note 7, at 194 (FMCs dominated by user groups capture the regulatory or management process, leading to decisions that "maximize short-term profit at the expense of sustainability"). Dana has referred to the FMC system as a "political tragedy of the commons," because the industry arguably has captured not only the regulatory process, but also the regulators and legislative process. Dana, *supra* note 4, at 834. The influential Pew Oceans Commission went so far as to say that due to capture, government regulators believe their "role is to defend the interests of the regulated community rather than promote the public interest." PEW OCEANS COMM., AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 44 (2003).

FMC does not address a plan for rebuilding an overfished fishery within one year of notification by the Secretary of its overfished status.[15]

Ryan has explained that fisheries management is a complicated process, not well suited to the legislature or the courts. She is undoubtedly correct in her assessment of the complexity of the systems and the science involved, and the inability of Congress or the courts to deal with such a "highly technical, data-driven, fluid, and adaptive project."[16] Craig and Danley noted the legislative history suggesting that Congress envisioned fishery management as primarily a science-based administrative assessment.[17] Congress chose Maximum Sustainable Yield (MSY),[18] the dominant concept in fishery management for several decades, as the scientific goal of the 1976 Act.[19] The strength of relying on such an objective scientific concept is that it avoids political, economic, and social issues related to fisheries and focuses on the resource rather than the users.[20] But Congress did not stop there: National Standard 1, for example, required that MSY be adjusted—up or down[21]—in light of social, economic, and ecological factors[22] to achieve an "optimum yield" (OY) [23] for the fishery. This sweepingly broad public policy that literally promised something for everyone assured that either the industry or conservationists would be dissatisfied with virtually every determination of the level of exploitation of a fishery. As pointed out by Craig, Danley, and Ryan, other national standards exacerbated these tensions by adopting policies and standards for FMPs that seemed to conflict on their face.[24] Without the limitations

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15. The 2006 reauthorization of the Act amended the section to require the FMP to be developed and implemented within two years. 16 U.S.C. § 1854(e)(5) (1996) as amended by Pub. Law 109-479, § 104(c)(5) (2007).

16. *See* Ryan, *supra* note 1, at 451.

17. Craig & Danley, *supra* note 1, at 383.

18. Maximum sustainable yield (MSY) is defined in the guidelines for National Standard 1, issued in 1998, as "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions." 50 C.F.R. § 600.310(c)(1) (2004); *see also* Ryan, supra note 1, at 435–36.

19. 16 U.S.C. § 1802(33)(B) (2012).

20. *See* Harry N. Scheiber & Christopher J. Carr, *From Extended Jurisdiction to Privatization: International Law, Biology, and Economics in the Marine Fisheries Debates, 1937–1976*, 16 BERKELEY J. INT'L L. 10, 25 (1998).

21. Because this approach was so unsuccessful in maintaining or restoring fish stocks, the 1996 SFA amended the MSA to determine optimum yield (OY) on the "basis of maximum sustainable yield, *as reduced by* any relevant social, economic, or ecological factor." 16 U.S.C. § 1802(33)(B) (2012) (emphasis added). Optimum yield must now also provide for rebuilding of overfished stocks. *Id.* § 1802(33)(C).

22. Magnuson-Stevens Act, Pub. L. No. 94-265, Title III, § 3, 90 Stat. 335 (1976).

23. "Optimum yield" is the "amount of fish which . . . will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems . . . ." 16 U.S.C. § 1802(33)(A) (2012).

24. Craig & Danley, *supra* note 1, at 419; Ryan, *supra* note 1, at 443–46.

on challenging FMPs discussed above, Congress's "ambitious but ambiguous regulatory design, [and] confusion of scientific and political visions"[25] would certainly have led to more litigation in the first decades of the Act.

The 1996 reauthorization of the MSA by the SFA[26] was the opportunity for a "reality check." In two decades of "management," one fishery after another collapsed under the intensive fishing effort of an overcapitalized U.S. fishing fleet. Without the new goals, time limits, and procedural and structural reforms regarding, particularly the prohibition of overfishing and the rebuilding of overfished stocks imposed by the SFA,[27] it appeared that many stocks would become economically, or even ecologically, extinct. And although the SFA continued to send conflicting signals with a new National Standard 8 about protecting the viability of fishing communities and minimizing economic impacts of regulation on these communities,[28] the SFA for the first time effectively prioritized the National Standards by making it clear that National Standard 8 could only be applied "consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks)."[29]

In an accounting of the amount of litigation following the enactment of the SFA, Suzanne Iudicello and Sherry Bosse Lueders assessed that "litigation against NMFS increased from one or two cases per year to a high of twenty-six lawsuits in 2001. Prior to 1997, the agency had sixteen open cases; by 2000 it had more than 100."[30]

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25. Scheiber, *supra* note 3, at 127.

26. Pub. L. No. 104-297, 110 Stat. 3559 (Oct. 11, 1996) (amending 16 U.S.C. §§ 1801–1884).

27. 16 U.S.C. § 1854 (e)(3) (2012).

28. *Id.* § 1851(a)(8) (2012).

29. *Id.* In *Natural Resources Defense Council v. Daley*, the Court of Appeals of the D.C. Circuit emphasized that the duty to prevent overfishing under National Standard 1 takes precedence over National Standard 8:

> As an initial matter, we reject the District Court's suggestion that there is a conflict between the Fishery Act's expressed commitments to conservation and to mitigating adverse economic impacts. *Compare* 16 U.S.C. § 1851(a)(1) (directing agency to "prevent overfishing" and ensure "the optimum yield from each fishery"); *with id.* § 1851(a)(8) (directing agency to "minimize adverse economic impacts" on fishing communities). The Government concedes, and we agree, that, under the Fishery Act, the Service must give priority to conservation measures. It is only when two different plans achieve similar conservation measures that the Service takes into consideration adverse economic consequences. This is confirmed both by the statute's plain language and the regulations issued pursuant to the statute.

Nat. Res. Def. Council v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000); *see also*, N.C. Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62 (D.C. Cir. 2007).

30. Suzanne Iudicello & Sherry Bosse Lueders, *A Survey of Litigation Over Catch Shares and Groundfish Management in the Pacific Coast and Northeast Multispecies Fisheries*, 46 ENVTL. L. 157, 207 (2016) (citations omitted).

There seems to be a general consensus about why litigation greatly increased after the 1996 SFA amendments to the MSA. While other factors also contributed,[31] Congress's mandate that the FMCs and Secretary "*shall* prepare and implement" FMPs that will "*end overfishing immediately* in [overfished] fisher[ies], . . . rebuild [overfished] stocks . . . ," and "*prevent overfishing* [in fisheries] identified as approaching an overfished condition," [32] backed with enforceable time limits and procedures, provided the major driver for litigation. Fishermen were confronted with regulation with the potential to shut down fisheries for years,[33] and environmental groups were armed with new enforceable, nondiscretionary, conservation-related requirements and procedures with deadlines, as well as science that demonstrated that around 90% of U.S. fish stocks were overfished and over 80% were experiencing overfishing.[34] Under these circumstances, more litigation by both fishermen and environmental groups was hardly surprising.[35]

Litigation can lead to improvement in management by the National Marine Fisheries Service (NMFS) and the Councils by clarifying ambiguous policies and goals and assuring timely and rational implementation of MSA requirements. Litigation highlighting problems in implementation of the MSA had led not only to addressing specific deficiencies in applying the Act, but also to "internal and external reviews, budget increases, and regulatory streamlining efforts [that] improved [the agency's] consistency in meeting administrative and procedural requirements, thereby improving its won–lost record in court"[36] and presumably its effectiveness in managing the resource. Commentators who contended that the agency and the process had been captured by the industry would argue that the current trend toward recovery of most fisheries[37] was only assured by vigorous litigation.

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31. *See* Macpherson & McCall, *supra* note 12, at 2–3.

32. 16 U.S.C. § 1854 (e)(3) (2012) (emphasis added).

33. For example, in *A.M.L. Int'l v. Natural Resources Defense Council*, 107 F.Supp. 2d 90 (2000), participants in the spiny dogfish fishery were faced with closure of the fishery for at least five years. Also recall that the Secretary was mandated to develop and implement these FMPs if the FMCs failed to do so within two years.

34. *See* THE PEW CHARITABLE TRUSTS & OCEAN CONSERVANCY, THE LAW THAT'S SAVING AMERICAN FISHERIES: THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT 13 (2013).

35. The 2006 reauthorization of the MSA introduced more changes and management concepts to the act, including the extremely significant requirement for annual catch limits and the controversial "catch shares" provisions. Iudicello and Lueders note, however, that catch share litigation is "an insignificant component" with many challenges focusing on issues traditionally litigated under the 1976 or 1996 provisions. Iudicello & Lueders, *supra* note 30, at 206–07.

36. *Id.* at 207 (citations omitted).

37. The 2015 status of U.S. fisheries indicated that only 16% of fisheries were overfished, 9% were experiencing overfishing, and 39 stocks have been rebuilt. *See Status of U.S.*

But litigation imposes incredible costs on both the government and plaintiffs. Congress had focused primarily on the direct costs in relation to agency resources. There are obvious costs simply in the time and money involved in litigation that is so heavily dependent on science and information about the resource. Susan Hanna further summarized transactional cost in fisheries litigation as follows:

> Transaction costs are the costs of arranging everything that contributes to management: gathering information, negotiating among all the different interests, designing the regulations, implementing the regulations, monitoring compliance with the regulations, and enforcing the regulations. Transaction costs are costs that are absorbed by agency staff, council staff, commercial fishermen, recreational fishermen, scientific advisers, and all other participants.[38]

In terms of the agency in particular, lawyers and scientists working on defending lawsuits are not available for ongoing management responsibilities.[39] Decisions are delayed; resources may suffer from the delay. Hanna also explains a different kind of indirect costs of litigation. Participants become polarized, damaging a "system based on participation, negotiation, interaction, and communication."[40] This also leads to loss of credibility of the regulators and scientists, loss of morale by the regulators, and "erosion of legitimacy" of the fishery management process.[41] Finally, litigation diverts resources from focusing on the root causes of problems and the long term objectives of management.[42]

Is it likely that the MSA will evolve into a program that can operate largely without the courts? Congress took some additional action to limit litigation in 2006 in relation to fisheries cases raising National Environmental Policy Act (NEPA)[43] issues.[44] The MSA

Fisheries, NOAA FISHERIES, http://www.fisheries.noaa.gov/sfa/fisheries_eco/status_of_fisheries/index.html (last visited Apr. 17, 2017).

38. Susan Hanna, *More Than Meets the Eye: The Transaction Costs Of Litigation*, 7 OCEAN & COASTAL L. J. 13, 14 (2001).

39. *See* McCall, *supra* note 10, at 37; Hanna, *supra* note 38, at 15.

40. Hanna, *supra* note 38, at 15–16.

41. *Id.* at 16.

42. *Id.* at 16–17.

43. National Environmental Policy Act, 42 U.S.C. § 4231 *et. seq.* (2012).

44. 16 U.S.C. § 1854 (i)(1) requires NMFS to revise its NEPA procedures to:

> (A) conform to the time lines for review and approval of fishery management plans and plan amendments under this section; and (B) integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this chapter in order

now provides that the agency's revised procedures to integrate FMP and NEPA review "shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to [the MSA]".[45] But each time Congress reauthorizes the Act, it adds new policies, definitions, and requirements that must inevitably go through a process of clarification by the agency and, often, eventually by the courts. Perhaps "inevitably" is the key word, as Craig and Danley's article points out, referencing other authors including ones with long experience in the agency.[46] Litigation is simply a part of the system.

There is a saying, though, that nothing succeeds like success, and perhaps this is the key to fisheries management without the courts. The lessons learned in the first two decades of fisheries management have led to improvements in the process and great strides in the recovery of fish stocks during the second two decades. If this progress continues, perhaps the next two decades will achieve robust fish stocks flourishing in healthy ecosystems and supporting a sustainable fishing industry with no need for intervention by the courts. Dream on!

> to provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork, and effectively involve the public.

16 U.S.C. § 1854 (i)(1) (2012).

45. *Id.* at § 1854(i)(2). In some cases, NEPA review had become a sort of court-imposed surrogate for an ecosystem-based approach to management involving years of litigation.

> Adequate environmental assessment has been ordered in cases concerning essential fish habitat, rebuilding plans for overfished stocks, and amendments to an FMP affecting an endangered species. One court has ordered that the EIS must contain analysis of the impacts of the FMPs "as a whole on the North Pacific ecosystem."
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> The courts' use of NEPA to "jump start" NOAA Fisheries into applying an ecosystem-based approach to management decisions, while justified under NEPA, does not provide a reasoned, incremental approach to ecosystem management based on an adequate framework of data, policies, and guidelines.

Donna R. Christie, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes*, 34 ENVTL. L. 107, 137–38 (2004).

46. *See* Craig & Danley, *supra* note 1, at 404.