

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL AUDUBON SOCIETY,)
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 Plaintiff,)
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 v.) Civil Action No. 99-1707 (RWR)
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 DONALD EVANS, et al.,)
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 Defendants.)
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MEMORANDUM OPINION

Plaintiff, a non-profit corporation that develops and operates programs to conserve marine resources, including Atlantic bluefin tuna ("ABT"), brought this challenge to defendants'¹ regulations implementing the final Highly Migratory Species Fishery Management Plan ("HMS FMP"), 64 Fed. Reg. 29,090 (1999). The parties have filed cross-motions for summary judgment. Because the Secretary acted within his authority in implementing the ABT measures at issue, except for the delay in issuing the draft HMS FMP, defendants' motion for summary judgment will be granted as to plaintiff's claims for relief under 16 U.S.C. §§ 1851(a)(1), 1853(a)(10), 1854(e)(4), 1854(g)(1)(F), 1854(g)(1)(G)(i) (2000), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and plaintiff's motion for summary judgment as to these claims will be denied. Plaintiff's

¹ Donald Evans is the current Secretary of Commerce and is substituted as the named defendant pursuant to Fed. R. Civ. P. 25(d)(1).

motion for summary judgment will be granted as to its claim under 16 U.S.C. § 1854(e)(3) regarding defendants' delay in issuing the draft HMS FMP, and defendants' motion for summary judgment as to this claim will be denied. Accordingly, the challenges presented pursuant to 16 U.S.C. § 1854(e)(3) will be remanded to the Secretary of Commerce for a sufficient explanation as to defendants' failure to comply with § 1854(e)(3)'s one year time frame for preparing a fishery management plan, plan amendment, or proposed regulations.²

BACKGROUND

ABT are found in the western Atlantic Ocean, from Newfoundland to the Gulf of Mexico. These tuna can live for more than twenty years and grow to more than ten feet in length and up to 1,500 pounds. ABT demand has increased during the past two decades, causing the price to rise as high as \$83,000 per fish. At the current fishing rate, ABT has a significant risk of extinction or stock collapse.

Congress regulates fishing for HMS, including ABT, with a number of statutory and regulatory regimes, as well as international agreements, all of which are designed to protect

²At oral argument, plaintiff also requested as declaratory relief that the defendants be ordered to comply with the one year deadline in § 1854(e)(3) for future fishery management plans that address overfished species. Given that the HMS FMP issued here was not unlawful, the delay was relatively minor and not shown to have been willful or repeated, and the Secretary may be presumed to know of his extant obligation under the law regarding the timely production of such future FMPs, plaintiff's request for additional relief will be denied.

HMS. The focus of this litigation is the final 1999 HMS FMP and its specific provisions regarding rebuilding ABT stocks. The National Marine Fisheries Service ("NMFS") promulgated the HMS FMP pursuant to its authority as delegated by the Secretary of Commerce under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-83.

On September 30, 1997, the Secretary identified ABT as an "overfished"³ species, pursuant to 16 U.S.C. § 1854(e)(1). Within one year of identifying an HMS species as overfished, the Secretary must "prepare a fishery management plan, plan amendment, or proposed regulations for the fishery" to "end overfishing in the fishery and to rebuild affected stocks of fish," meaning that the Secretary had to prepare an ABT rebuilding plan by September 30, 1998. 16 U.S.C. § 1854(e)(3).

³ Overfished is defined 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." 16 U.S.C. § 1802(29).

A fishery is "(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." 16 U.S.C. § 1802(13).

Maximum sustainable yield ("MSY") is "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)(i). The Code recognizes that "[a]ny MSY values used in determining [optimum yield] will necessarily be estimates, and these will typically be associated with some level of uncertainty. Such estimates must be based on the best scientific information available (see § 600.315) and must incorporate appropriate consideration of risk (see § 600.335)" 50 C.F.R. § 600.310(c)(2)(ii).

NMFS began to develop an ABT fishery management plan in September 1997 and continued to develop the plan throughout the year, including a public comment period through January 9, 1998. See Administrative Record ("A.R.") 152a, at ix. NMFS issued its draft HMS FMP on October 26, 1998. See 63 Fed. Reg. 57,093 (1998). In November 1998, the International Convention for the Conservation of Atlantic Tunas ("ICCAT"), which is described more fully below, made recommendations for the first ABT rebuilding program. See A.R. A34. NMFS issued an addendum to the draft HMS FMP in February 1999, and issued the final HMS FMP in April 1999, which adopted ICCAT's recommended ABT rebuilding program. See 64 Fed. Reg. 9,298 (1999); 64 Fed. Reg. 29,090 (1999); A.R. 152a, ch. 3, at 17-20.

I. THE MAGNUSON-STEVENSON ACT

The purpose of the Magnuson-Stevens Act is to protect HMS in waters extending two hundred (200) miles from the United States coast through conservation and management measures. See 16 U.S.C. §§ 1801(a), (b). The Magnuson-Stevens Act directs the Secretary to create management plans for certain HMS, including ABT. See 16 U.S.C. §§ 1802(20), 1854(g)(1). The Secretary must prepare "fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery."⁴ 16 U.S.C. § 1801(b)(4). NMFS advises the Secretary

⁴ Optimum yield is "the amount of fish which - - (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities,

of its plan regulations, and the Secretary has the authority to implement the plan. Id.

II. ATLANTIC TUNAS CONVENTION ACT

In addition to the Magnuson-Stevens Act, the Atlantic Tunas Convention Act ("ATCA"), 16 U.S.C. § 971, provides further authority for the Secretary to promulgate tuna conservation programs. In enacting ATCA, Congress gave the Secretary of State authority to participate in ICCAT. See 16 U.S.C. §§ 971c, 971d(a). ICCAT, which was established to conserve tuna and "tuna-like" fishes of the Atlantic Ocean, authorizes a Commission to recommend tuna population levels that will permit the maximum sustainable catch. The Commission, in turn, established the Standing Committee on Research and Statistics ("SCRS") as its primary advisory body. A component of SCRS is a "Bluefin Tuna Working Group" that assesses ABT stock in September of even-numbered years and reports on ABT's current and predicted stock biomass⁵ status under various management alternatives. See A.R. A29. ICCAT then meets in November of even-numbered years to recommend ABT catch quotas based on the SCRS report. See A.R.

and taking into account the protection of marine ecosystems; (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery." 16 U.S.C. § 1802(28).

⁵Biomass is the amount of living matter present in a specific habitat.

A8; A.R. A34. ICCAT's recommendations become binding if no participating country formally objects. See A.R. 37, at art. VIII, ¶ 3; A.R. C8, at 32; A.R. 152a, ch. 1, at 29.

ATCA directs the Secretary to issue and enforce regulations consistent with ICCAT's objectives. See 16 U.S.C. § 971d. In addition, ATCA provides that "no regulation promulgated under this section may have the effect of increasing or decreasing any allocation of quota of fish or fishing mortality level to the United States agreed to pursuant to a recommendation of the Commission." 16 U.S.C. § 971d(c)(3)(K). In November 1998, ICCAT adopted the Commission's recommended ABT rebuilding program. See A.R. 152a, ch. 3, at 16-20. This rebuilding program sought to reach the maximum sustainable yield within twenty years by setting ABT's total allowable catch ("TAC"), including dead discards, at 2,500 metric tons ("mt") annually for all participating nations, of which the United States is allotted 1,387 mt. See A.R. 152a, ch. 3, at 17-19. In determining the total allowable catch required to achieve the maximum sustainable yield, SCRS considered two alternative models. See A.R. A21, at 25-28. The first model, named the "Beverton-Holt" model, applied assumptions that the ABT stock could be rebuilt to the relatively high levels observed in the early 1970s and estimated the maximum sustainable yield to be 7,700 mt. See A.R. A21 at 26-28; A.R. 152a, ch. 3, at 16-17. The second model, named the "two-line" model, applied assumptions that the ABT stock could not be

rebuilt to levels much higher than those observed in the late 1970s and estimated the maximum sustainable yield to be 2,800 mt. See A.R. A21 at 26-28; A.R. 152a, ch. 3, at 16-17.

ICCAT's rebuilding program relied on the two-line model to determine the appropriate international total allowable catch for ABT. See A.R. 152a, ch. 3, at 17-20. NMFS followed ICCAT's recommendations in implementing the final HMS FMP, using the two-line model and setting the international total allowable catch at 2,500 mt, which had a 50% probability of achieving a maximum sustainable yield of 2,800 mt within twenty years. See id.

III. THE 1999 HMS FMP'S PROVISIONS TO REBUILD ABT

Plaintiff argues that the HMS FMP's total allowable catch of 2,500 mt results in a 50% probability that ABT will achieve a rebuilding target of only 93% of the ABT's maximum sustainable yield biomass ("Bmsy"). Plaintiff argues that the 93% maximum sustainable yield biomass target violates the Magnuson-Stevens Act, because defendant must rebuild an overfished species to 100% of its maximum sustainable yield biomass. Specifically, plaintiff claims that, because the HMS FMP must achieve the ABT's "optimum yield" under § 1851(a)(1), and "optimum yield" is "the amount of fish which . . . is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and [as to an overfished fishery], provides for rebuilding to a level consistent with producing the maximum sustainable yield in such

fishery," see 16 U.S.C. §§ 1802(28)(B)-(C), the HMS FMP "must set a goal of maximum sustainable yield." Pl.'s Mem. at 28.

Plaintiff claims that because the HMS FMP is inconsistent with the Magnuson-Stevens Act's language, it is arbitrary and capricious.

Defendant acknowledges that SCRS's 1998 scientific studies and projections estimated that at a 2,500 total allowable catch quota, the HMS FMP has a 50% probability of achieving 93%, rather than 100%, of the maximum sustainable yield biomass in twenty years. At oral argument, however, defendant asserted that the 93% projection is no more than a "tool" used by SCRS to allow ICCAT to make quota allocation recommendations. The HMS FMP described SCRS's report and its 93% projection in discussing ABT quota alternatives. See A.R. 152a, ch. 3, at 16-17. The Secretary never adopted or endorsed the 93% maximum sustainable yield biomass projection, however, but rather maintained 100% maximum sustainable yield biomass as its intended goal for the HMS FMP rebuilding target. See A.R. 152a, ch. 3, at 16-19. Defendant further stated that as new scientific information becomes available, the HMS FMP provides a range for quota adjustments (between 2,300 and 2,700 total allowable catch) to reach 100% maximum sustainable yield biomass within the twenty-year rebuilding period, consistent with ICCAT's recommendations. See A.R. 152a, ch. 3, at 17-19; A.R. A34, at 42, 151-52. Given that the ABT population is likely to change over the next two

decades, defendant requests deference to NMFS's decision to work within the twenty-year period toward achieving 100% maximum sustainable yield biomass with 50% certainty.

DISCUSSION

The parties have filed cross-motions for summary judgment as to certain administrative decisions in the 1999 HMS FMP. Summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment must provide the district court with a factual record sufficient to demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Specifically, the issue is whether the record supports the contention that 1999 HMS FMP's ABT regulations at issue satisfy the Magnuson-Stevens Act's substantive requirements.

I. STANDARD OF REVIEW

The HMS FMP is subject to judicial review pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1855(f), with the exception of certain foreign relations matters over which the executive branch has exclusive authority. Under the Magnuson-Stevens Act, judicial review shall be governed by the same standards as those set forth in the APA, 5 U.S.C. §§ 706(2)(A)-(D) (1994). See id. The APA directs that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions

found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In reviewing an agency's action to determine whether it was arbitrary and capricious, courts are constrained to review only those facts before the agency at the time of the action. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Id. at 744; accord Southwest Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 61 (D.C. Cir. 2000) (reversing the district court's order directing that the agency collect more evidence to support its position because the district court was empowered to decide the issue presented based solely on the information available to the agency).

A court should engage in a searching and careful review of agency action but should not attempt to substitute its own judgment for the judgment of the agency. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Because the agency is expected to have expertise in its area, a certain degree of deference is due, particularly on issues about

which experts disagree. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

Despite this deferential standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). For an agency's decisionmaking to be rational under Motor Vehicle Mfrs. Ass'n, the agency "must respond to significant points raised during the public comment period" and "consider significant alternatives to the course it ultimately chooses." Allied Local & Regional Mfrs. Caucus v. EPA, 215 F.3d 61, 80 (D.C. Cir. 2000), cert. denied, 532 U.S. 1018 (2001).

II. FIRST CLAIM FOR RELIEF

Plaintiff in its first claim for relief alleges that defendants' HMS FMP violates three sections of the Magnuson-Stevens Act, 16 U.S.C. §§ 1851(a)(1), 1853(a)(10), and 1854(e)(3), (4).⁶

A. The HMS FMP's Validity Under Sections 1851(a)(1) and 1853(a)(10)

Plaintiff claims that the HMS FMP provisions to rebuild ABT violate § 1851(a)(1) (National Standard One), which provides that

⁶ Plaintiff challenged the HMS FMP under § 1854(e)(4) in its Summary Judgment Memorandum.

"[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." Plaintiff also claims that the HMS FMP violates § 1853(a)(10), which requires that when the Secretary has determined that a particular fishery is overfished, an FMP shall "contain conservation and management measures to . . . end overfishing and rebuild the fishery." 16 U.S.C. § 1853(a)(10). The HMS FMP concluded that, consistent with ICCAT's recommendations, NMFS would implement ABT rebuilding measures that have at least a 50% probability of attaining the ABT rebuilding target. See A.R. 152a, ch. 3, at 288-90.⁷

The parties do not dispute that 93% maximum sustainable yield biomass is less than 100% maximum sustainable yield biomass. Rather, the parties dispute the context in which the 93% value should be evaluated. Plaintiff maintains that the 93% value reflects the Secretary's own formula, while defendants

⁷ Contrary to plaintiff's assertions at oral argument, this case is distinguishable from Natural Resources Defense Council v. Daley, 209 F.3d 747 (D.C. Cir. 2000). In that case, the D.C. Circuit held that NMFS's total allowable landings promulgated in a final rule for summer flounder, were unreasonable because the total allowable landings had only an 18% probability of achieving the target fishing mortality rate rather than the 50% probability required. Id. at 750, 754-56. In the instant case, NMFS implemented regulations that, according to ICCAT recommendations, will have at least 50% probability of achieving 100% ABT maximum sustainable yield biomass within twenty years. See A.R. 152a, ch. 3, at 17-18, 288-90. Plaintiff has not shown that NMFS acted unreasonably in adopting ICCAT's 2,500 mt total allowable catch with a 50% probability of achieving maximum sustainable yield biomass.

argue that the 93% is a scientific projection based on SCRS's research and does not reflect the agency's ultimate goal of achieving 100% maximum sustainable yield biomass.

The record supports defendants' argument. See A.R. A21, at 25-28 (outlining SCRS's "Projections" for rebuilding ABT). Although the HMS FMP gave a description of SCRS's report and its 93% projection, the Secretary did not endorse the 93% maximum sustainable yield biomass projection as its rebuilding target goal. See A.R. 152a, ch. 3, at 16-17. The Secretary clearly endorsed 100% maximum sustainable yield biomass as the HMS FMP's rebuilding target goal. See A.R. 152a, ch. 3, at 17-19.

Defendant further stated that as new scientific information becomes available, the HMS FMP provides a range for quota adjustments (between 2,300 and 2,700 total allowable catch) to reach 100% maximum sustainable yield biomass within the twenty-year rebuilding period, consistent with ICCAT's recommendations. See A.R. 152a, ch. 3, at 17-19; A.R. A34, at 151-52. Thus, the Secretary's HMS FMP is valid under sections 1851(a)(1) and 1853(a)(10), because the plan "intended to achieve Bmsy, with a 50 percent or greater probability, within the 20 year rebuilding period." See A.R. A34, at 42.

The record does not demonstrate that the Secretary acted unreasonably in concluding that a 2,500 mt total allowable catch, adopted according to ICCAT's recommendations, affords an optimum yield that "is consistent with producing the maximum sustainable

yield in [the ABT] fishery." 16 U.S.C. § 1802(28)(C). Plaintiff has not provided any evidence that the Secretary adopted SCRS's 93% projection as the HMS FMP's goal for rebuilding ABT biomass. There is no evidence that the HMS FMP's stated goal is inconsistent with the Magnuson-Stevens Act's requirements. In this respect, this case is distinguishable from A.M.L. International, Inc. v. Daley, 107 F. Supp. 2d 90, 95-96, 98-99 (D. Mass. 2000), where the district court held that the Secretary properly disapproved a spiny dogfish rebuilding plan, proposed by two NMFS regional councils, that had a target goal of 90% maximum sustainable yield biomass. In A.M.L. International, Inc., the 90% maximum sustainable yield biomass figure was not merely a projection by a scientific advisory body; rather, the 90% maximum sustainable yield biomass figure represented NMFS's actual target rebuilding goal. See id. Plaintiffs have not argued or cited any record evidence that the Secretary meant to use the 93% maximum sustainable yield biomass projection -- or any other figure less than 100% maximum sustainable yield biomass -- as the HMS FMP's actual rebuilding target goal for ABT. The HMS FMP is valid under the Magnuson-Stevens Act, 16 U.S.C. §§ 1851(a)(1), 1853(a)(10). Defendants' motion for summary judgment with respect to plaintiff's challenge under 16 U.S.C. §§ 1851(a)(1), 1853(a)(10) will be granted.

B. The HMS FMP's Validity Under Sections 1854(e)(3) and 1854(e)(4)

Plaintiff claims that defendant violated § 1854(e)(3), which requires defendant to "prepare a fishery management plan, plan amendment, or proposed regulations" that would "end overfishing in the fishery and rebuild affected stocks of fish" within one year of identifying a species as being overfished. 16 U.S.C. § 1854(e)(3).

The record is clear that the Secretary was twenty-six days late in preparing the draft HMS FMP. See 63 Fed. Reg. 57,093; A.R. 79a. Although defendants demonstrated that they were in the process of preparing the draft HMS FMP from September 1997 through October 1998, see A.R. 152a, at viii-ix, defendants have not provided a sufficient explanation for their failure to comply with § 1854(e)(3). See, e.g., Abramowitz v. EPA, 832 F.2d 1071, 1075, 1079 (9th Cir. 1987) (EPA exceeded its authority by approving carbon monoxide and ozone control measures without determining that these measures would attain certain air quality standards by the deadline specified in the Clean Air Act). Accordingly, plaintiff's motion for summary judgment with respect to its claim under § 1854(e)(3) will be granted.

At oral argument, plaintiff requested relief for the § 1854(e)(3) violation, citing Abramowitz as guidance. In Abramowitz, the court ordered the EPA to disapprove certain plan provisions "[b]ecause the record clearly indicate[d] that the Agency has no intention of taking final action before the statutory deadline." 832 F.2d at 1079. Here, the statute

requires that, within one year of the overfished status determination, defendants must complete a "fishery management plan, plan amendment, or proposed regulations for the fishery to which the [overfishing] identification or notice applies" 16 U.S.C. § 1854(e)(3). The parties have not pointed to any legal authority requiring defendants to complete more than a draft HMS FMP by the statutory deadline. Unlike the agency in Abramowitz, the Secretary's and NMFS's actions show that they made diligent efforts toward completing the draft HMS FMP prior to September 30, 1998. See A.R. 152a, at viii-ix. Therefore, defendant will not be ordered to disapprove any of the HMS FMP's provisions.

Plaintiff also argues that the HMS FMP violates § 1854(e)(4)(A)(i), (ii) of the Magnuson-Stevens Act, which provides,

(4) For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations . . . shall-

(A) specify a time period for ending overfishing and rebuilding the fishery that shall--

(i) be as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in

which the United States participates dictate otherwise;

16 U.S.C. §§ 1854(e)(4)(A)(i), (ii). Plaintiff claims that, because defendants' HMS FMP established a twenty-year rebuilding program, the HMS FMP violates the Magnuson-Stevens Act.

The ten-year standard is not the hard and fast rule that plaintiff has asserted. The statute provides an exception to the ten-year standard when "management measures under an international agreement in which the United States participates dictate otherwise." 16 U.S.C. § 1854(e)(4)(A)(ii). ABT management measures are subject to an international agreement which sets ABT quotas for each nation, including the United States. See A.R. A34; A.R. 152a, ch. 3, at 17-20 (ICCAT set the annual ABT quota for the United States at 1,387 mt). Importantly, ATCA's management measures dictate that the Secretary cannot implement regulations that "may have the effect of increasing or decreasing" ICCAT's ABT quota. 16 U.S.C. § 971d(c)(3)(K); see also Center for Marine Conservation v. Brown, Civ. A. No. 92-2471, 1993 WL 108944, at *1 (D.D.C. Mar. 29, 1993) ("Section 971d of ATCA makes the quotas proposed by the [ICCAT] Commission binding on the United States and directs the Secretary of Commerce to promulgate regulations 'necessary and appropriate' to carry out the recommendations" (citing 16 U.S.C.

§ 971d(c)(1))). NMFS had the authority to adopt a twenty-year rebuilding plan under § 1854(e)(4)(A)(ii)'s exception to ensure that it would comply with ATCA's management measures and ICCAT's ABT quota.⁸

Finally, in considering both the ten-year and twenty-year rebuilding program alternatives, NMFS took into account its other statutory obligations to mitigate adverse economic impacts on ABT fishing communities. See 16 U.S.C. §§ 1851(a)(8), 1854(g)(1)(C), (D); A.R. 152a, ch. 3, at 24. NMFS has the discretion to balance these competing interests in promulgating its final HMS FMP, and a reviewing court should not demand that an agency choose one plan over another to the exclusion of other statutory goals. The HMS FMP is valid under the Magnuson-Steven's Act, 16 U.S.C. § 1851(e)(4). Defendants' motion for summary judgment with respect to plaintiff's challenge under 16 U.S.C. § 1854(e)(4) will be granted.

III. SECOND CLAIM FOR RELIEF

Plaintiff in its second claim for relief alleges that defendants' HMS FMP violates two sections of the Magnuson-Stevens

⁸ Defendants have not suggested that ICCAT's recommended plan prevents NMFS from implementing a ten-year program, as plaintiff seems to argue. Rather, ICCAT's recommended plan provides a rational basis for NMFS to adopt the twenty-year program under § 1854(e)(4)(A)(ii)'s international agreement exception.

Act, 16 U.S.C. §§ 1854 (g) (1) (F), 1854 (g) (1) (G) (i), and that defendants' rulemaking decisions were arbitrary and capricious in violation of the APA, 5 U.S.C. § 706 (2) (A).

A. The HMS FMP's Validity Under Sections 1854 (g) (1) (F) and 1854 (g) (1) (G) (i)

Plaintiff claims that defendants failed to diligently pursue ABT conservation in violation § 1854 (g) (1) (F), which provides that the Secretary shall "[i]n preparing and implementing any such plan or amendment, . . . diligently pursue, through international entities (such as the International Commission for the Conservation of Atlantic Tunas), comparable international fishery management measures with respect to fishing for highly migratory species." 16 U.S.C. § 1854 (g) (1) (F). Plaintiff also claims that defendants violated § 1854 (g) (1) (G) (i), which requires the Secretary to "ensure that conservation and management measures under [section 1854 (g)] promote international conservation of the affected fishery." 16 U.S.C. § 1854 (g) (1) (G) (i). Plaintiff argues that, in order for defendant to have had a comparable measure and to "promote international conservation," NMFS must have drafted a complete ABT rebuilding plan prior to ICCAT's meeting as a basis for promoting international conservation.

Plaintiff has failed to show any legal mandate that requires the Secretary to draft a complete rebuilding plan prior to ICCAT's meeting. Nevertheless, because plaintiff's challenges under sections 1854(g)(1)(F) and 1854(g)(1)(G)(i) are nonjusticiable, there is no need to analyze them here. These Magnuson-Stevens Act provisions directly affect "when and how the U.S. will negotiate with other countries to achieve an international plan for [ABT] management," and, therefore, "the Constitution empowers neither Congress nor the courts to instruct the [executive branch] when or how to engage in international negotiations." Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1427 & nn.23-24 (M.D. Fla. 1998) (plaintiffs' challenges under sections 1854(g)(1)(F) and 1854(g)(1)(G)(i), (iii) were nonjusticiable) (citing Haig v. Agee, 453 U.S. 280, 292 (1981) ("matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference") (internal quotations omitted); 26 Weekly Comp. Pres. Doc. 1932 (Nov. 28, 1990) (presidential signing statement), reprinted in 1990 U.S.C.C.A.N. at 6304-1 (construing 16 U.S.C. §§ 1854(g)(1)(F), (G)(i) to be within the executive's exclusive authority as affecting matters of foreign relations); 32 Weekly Comp. Pres. Doc. 2040 (Oct. 14, 1996)

(presidential signing statement), reprinted in 1996 U.S.C.C.A.N. at 4120 (same)). Courts therefore have no legal basis for adjudicating whether an agency has properly implemented the mandates of sections 1854(g)(1)(F) and 1854(g)(1)(G)(i). Id. at 1427-28.

Accordingly, the requirements of sections 1854(g)(1)(F) and 1854(g)(1)(G)(i) are nonjusticiable political questions and are not subject to judicial review. Id.⁹ Defendants' motion for summary judgment with respect to plaintiff's challenges under 16 U.S.C. §§ 1854(g)(1)(F), 1854(g)(1)(G)(i) will be granted.

B. The HMS FMP's Validity Under the APA

Finally, plaintiff argues that the HMS FMP's provisions for rebuilding ABT are arbitrary and capricious in violation of the APA, 5 U.S.C. § 706, because NMFS adopted a riskier rebuilding alternative instead of the precautionary approach they endorsed initially.

⁹ Here, even if plaintiff's challenges under 16 U.S.C. §§ 1854(g)(1)(F), 1854(g)(1)(G)(i) were justiciable, defendants are entitled to summary judgment. First, plaintiff has failed to show that the Secretary has a legal obligation to draft a complete HMS FMP prior to ICCAT's meeting. Second, plaintiff has not shown that the Secretary's efforts to pursue international agreements with ICCAT and member nations were insufficient to satisfy sections 1854(g)(1)(F) and 1854(g)(1)(G)(i) of the Magnuson-Stevens Act. See Southern Offshore Fishing Ass'n, 995 F. Supp. at 1428 n.25.

Plaintiff has not shown that defendants' decisions to implement the final HMS FMP regulations were arbitrary or capricious in violation of the APA. As a preliminary matter, the Magnuson-Stevens Act itself does not mandate a "precautionary approach," nor does the Act require that NMFS consider and/or adopt every potentially less risky alternative. Nevertheless, NMFS did consider less risky alternatives, held an extended comment period, and provided rational bases and justifications for adopting the alternatives set forth in the final HMS FMP. See A.R. 152a, ch. 3, at 16-24.

Specifically, in the final HMS FMP, NMFS considered both the two-line model and the Beverton-Holt model. See A.R. 152a, ch. 3, at 16-24. NMFS determined to implement the two-line model, consistent with ICCAT's recommendations, because it implemented ICCAT's ABT quota for the United States, thus enabling NMFS to comply with ATCA's requirements as well. See id. at 17-20. In addition, NMFS considered, but rejected, alternatives to ICCAT's recommendations for a 2,500 mt total allowable catch and a 50% probability of achieving maximum sustainable yield biomass. See id. at 16-24. Finally, NMFS considered both the constant catch strategy and the constant mortality strategy. NMFS implemented the former because it determined it would be easier and less costly to administer and,

while likely to create relatively high ABT mortality in the program's earlier years, the constant catch strategy would reduce ABT mortality in later years as the stock rebuilds. See id. at 12-16.¹⁰

Defendants' decisions in implementing the final HMS FMP were not arbitrary or capricious, and plaintiff has provided no evidence to substantiate their APA claim. Defendants' motion for summary judgment with respect to plaintiff's challenge under the APA, 5 U.S.C. § 706, will be granted.

CONCLUSION

Defendants' motion for summary judgment as to plaintiff's challenges under 16 U.S.C. §§ 1851(a)(1), 1853(a)(10), 1854(e)(4), 1854(g)(1)(F), and 1854(g)(1)(G)(i), and the APA, 5 U.S.C. § 706 will be granted, and plaintiff's motion for summary judgment as to those claims will be denied. In addition, plaintiff's motion for summary judgment as to its claim under the Magnuson-Stevens Act, 16 U.S.C. § 1854(e)(3), will be granted

¹⁰ Plaintiff also argues that, to the extent that the constant catch strategy causes an ABT mortality rate exceeding "Fmsy," namely, the fishing mortality rate that would produce maximum sustainable yield, this strategy violates National Standard One, 16 U.S.C. § 1851(a)(1). Plaintiff has not supported this argument with any substantial evidence. In fact, plaintiff admits that the final HMS FMP "does not specify whether the [constant catch strategy] under the rebuilding plan would result in a fishing mortality rate less than Fmsy" and instead relies on a figure that "indicates" such a result may occur. Pl.'s Mem. at 16-17.

because defendants failed to give a sufficient explanation for their delay in issuing the draft HMS FMP. Accordingly, defendants' motion for summary judgment as to this claim will be denied, and the challenges presented pursuant to 16 U.S.C. § 1854(e)(3) will be remanded to the Secretary to provide a sufficient explanation for exceeding § 1854(e)(3)'s one-year time frame allowed for preparing a fishery management plan, plan amendment, or proposed regulations. A final order accompanies this memorandum opinion.

SIGNED this 3rd day of July, 2003.

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
NATIONAL AUDUBON SOCIETY,)
)
Plaintiff,)
)
v.) Civil Action No. 99-1707 (RWR)
)
DONALD EVANS, et al.,)
)
Defendants.)
_____)

FINAL ORDER

For the reasons set forth in the accompanying memorandum opinion, it is hereby

ORDERED that defendants' motion for summary judgment [11] as to plaintiff's claims for relief under the Magnuson-Stevens Act, 16 U.S.C. §§ 1851(a)(1), 1853(a)(10), 1854(e)(4), 1854(g)(1)(F), 1854(g)(1)(G)(i), and the Administrative Procedure Act, 5 U.S.C. § 706, be, and hereby is, GRANTED, and plaintiff's motion for summary judgment [10] as to those claims be, and hereby is, DENIED. It is further

ORDERED that plaintiff's motion for summary judgment as to its claim under the Magnuson-Stevens Act, 16 U.S.C. § 1854(e)(3), regarding defendants' delay in issuing the draft fishery management plan, be, and hereby is, GRANTED, and defendants' motion for summary judgment as to this claim be, and hereby is, DENIED. It is further

ORDERED that the challenges presented pursuant to 16 U.S.C. § 1854(e)(3) be, and hereby are, REMANDED to the Secretary for

the explanation called for in the accompanying memorandum opinion. The Secretary shall file his explanation by September 16, 2003. It is further

ORDERED that all other pending motions be, and hereby are, DENIED AS MOOT.

SIGNED this 3rd day of July, 2003.

RICHARD W. ROBERTS
United States District Judge