No. 06-622

In the Supreme Court of the United States

OREGON TROLLERS ASSOCIATION, ET AL.,
PETITIONERS

v.

CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners challenge a National Marine Fisheries Service rule that set harvest levels for the Pacific Coast ocean salmon fishery, including fall chinook salmon, for the 2005 fishing season. The questions presented are:

1. Whether the agency's finding of good cause to promulgate the rule without prior public notice and comment was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Whether the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, prohibits the agency from limiting harvest levels of naturally spawning fall chinook, as opposed to all fall chinook, including those that spawn in hatcheries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 452 F.3d 1104. The opinion of the district court (Pet. App. B1-B35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2006. On September 29, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 3, 2006, and the petition was filed on November 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act or Act), 16 U.S.C. 1801 *et seq.*, provides the legal framework for conserving and managing the Nation's coastal fisheries, preventing overfishing, and rebuilding overfished stocks. 16 U.S.C. 1801(b). To accomplish those goals, the Act establishes eight regional fishery management councils that propose fishery management plans and regulations to "achieve and maintain, on a continuing basis, the optimum yield" from fisheries. 16 U.S.C. 1801(b)(4), 1852(a)(1) and (h)(1). Council proposals must be consistent with ten National Standards set out in the Magnuson Act. 16 U.S.C. 1851(a), 1853(a)(1)(C). Relevant here are the first three standards, which provide:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
>
> (2) Conservation and management measures shall be based upon the best scientific information available.
>
> (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

16 U.S.C. 1851(a)(1), (2) and (3).

The councils submit proposed plans and regulations to the National Marine Fisheries Service (NMFS) for approval. 16 U.S.C. 1852(h), 1854(a)-(b). NMFS must approve council proposals that are consistent with the

Magnuson Act, the fishery plan, and other applicable laws. 16 U.S.C. 1854(a).

2. Since 1977, the ocean salmon fisheries off the coasts of Washington, Oregon, and California have been managed under the Pacific Coast Salmon Plan (the Fishery Plan) developed by the Pacific Fishery Management Council (the Council), which is comprised of fisheries experts nominated by NMFS, state officials from Washington, Oregon, and California, and representatives of commercial, recreational, and tribal fishing interests. See 16 U.S.C. 1852(a); 50 C.F.R. 660.402; *Parravano* v. *Babbitt*, 70 F.3d 539, 543 n.3 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). Under early versions of the Fishery Plan, the Council developed annual management measures by preparing, each year, a proposed amendment to the Fishery Plan, along with a supplemental environmental impact statement and a regulatory impact review and regulatory flexibility analysis. Those documents were then submitted to NMFS for review and approval. See Pet. App. A4.

Because that process lacked long-range perspective and proved to be too cumbersome to permit timely implementation of the annual management measures, the Council proposed and NMFS approved in 1984 a comprehensive fishery plan amendment. 49 Fed. Reg. 43,679; see *NRDC* v. *Evans*, 316 F.3d 904, 907 (9th Cir. 2003). As amended, the Fishery Plan establishes a framework of fixed management objectives combined with flexible elements to allow annual management measures to be varied to reflect changes in stock abundance and other factors without the need for plan amendments. See 50 C.F.R. 660.401-660.411. The Fishery Plan also includes data collection requirements and sets out a schedule and process to be used by the Council and

NMFS in developing and approving annual management measures. 50 C.F.R. 660.408(a); see 70 Fed. Reg. 23,054 (2005).

In 1989, the Council recommended amendments to the Fishery Plan to include a requirement, known as the escapement requirement, that at least 35,000 Klamath River fall chinook escape harvest each year to spawn on natural spawning grounds. The Klamath River fall chinook salmon is a short-lived anadromous fish that reproduces only once, shortly before dying. Klamath River fall chinook hatch in the upper reaches of the Klamath River system, or in one of two hatcheries, and migrate to the Pacific Ocean where they spend most of their adulthood. Adults typically return to their natal river or hatchery to spawn and die at the age of four, though some fish do so at three or five years of age. Both the relative and absolute abundance of fall chinook at those ages can fluctuate dramatically from year to year due to natural and human-caused environmental variation. Pet. App. A2, A6; *Parravano*, 70 F.3d at 542; 70 Fed. Reg. at 23,063. NMFS promulgated the Council's proposed amendment after providing public notice and an opportunity for comment. 54 Fed. Reg. 19,185 (1989).

3. Consistent with the Fishery Plan, the Council developed its proposed 2005 management measures through a series of published reports and public meetings in late 2004 and early 2005. Pet. App. A6-A8. The Council provided multiple opportunities for public comment, and numerous stake-holders—including petitioners, States, Indian Tribes, and recreational and commercial fishers—participated in the Council's process. See *id.* at A6-A8, B9-B11. At a public meeting in early April 2005, the Council proposed management measures designed, among other things, to limit the ocean harvest

of Klamath River fall chinook salmon in order to meet the Fishery Plan's natural-spawner escapement requirement. *Id.* at A7, B10-B11.

4. NMFS approved the Council's proposal on April 28, 2005, two weeks before the start of the 2005 harvest season. 70 Fed. Reg. at 23,056, 23,064. Pursuant to 5 U.S.C. 553(b)(B), NMFS found there was good cause to promulgate the rule without prior public notice and comment. 70 Fed. Reg. at 23,063. Section 553(b) provides that advance notice and comment is not required if "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

NMFS explained that the salmon's anadromous lifecycle, combined with potentially large fluctuations in the size of different age classes, creates significant time constraints on the regulatory process. Each year's annual management measures must be based on pre-season abundance forecasts derived from the previous year's observed spawning escapement, but those forecasts vary substantially from year to year and are not available until January and February because spawning escapement continues through the fall. The process is further complicated by the fact that four States, Canada, numerous Indian tribes, the Council, and NMFS all have management authority over these salmon, and the resulting annual management measures impact a variety of groups as well as the general public. 70 Fed. Reg. at 23,054-23,056, 23,063. Moreover, NMFS found that

> [f]ailure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose

> abundance has increased relative to the previous year thereby undermining the purpose of this agency action. For example, the 2005 forecast ocean abundance for Klamath River fall Chinook requires a reduction in the commercial season * * * [in one area] from being open from May-June in 2004 to being closed in 2005. With out [sic] these, and similar restrictions in other areas in 2005, the projected Klamath River fall Chinook escapement floor would not be met.

Id. at 23,063.

The 2005 harvest measures were published in the *Federal Register* on May 4, 2005, and took effect immediately. 70 Fed. Reg. at 23,054. The agency accepted comments on the measures for 15 days following their publication. *Ibid*.

5. Petitioners filed suit in the United States District Court for the District of Oregon, and the Yurok and Hoopa Tribes intervened as defendants. The district court granted summary judgment for NMFS. Pet. App. B1-B35. It held that NMFS' invocation of the good-cause exception to prior notice and comment was well founded because the agency described in detail "why the process for promulgating management measures for the Pacific salmon fishery is necessarily too short to allow for traditional * * * notice and comment periods and what the consequences of extending that process would be." *Id.* at B33.

Petitioners also claimed that the 2005 harvest regulation violated the Magnuson Act and National Standards Two and Three by distinguishing between natural spawners and hatchery chinook. The district court dismissed those claims as time-barred under the Magnuson Act's statute of limitations, 16 U.S.C. 1855(f)(1) and (2).

Pet. App. B15-B20. In the alternative, the court held that the claims failed on the merits, because (1) nothing in the Magnuson Act prohibited NMFS from approving management measures based on spawning behavior, (2) petitioners had not shown any reason to question the scientific bases for the regulation under National Standard Two, and (3) the regulation's approach to managing this "stock" fell within the broad discretion granted to NMFS under National Standard Three. *Id.* at B20-B22.

6. The court of appeals affirmed. Pet. App. A1-A35. It held that, to invoke the good-cause exception to prior notice and comment, an agency must "demonstrate . . . some exigency apart from generic complexity of data collection and time constraints." *Id.* at A33 (quoting *Evans*, 316 F.3d at 912). Here, the court found that NMFS had "thoroughly explain[ed] why [it] could not solicit public comment before the measures' effective date." *Ibid.* In particular, the court pointed to NMFS' findings that (1) the data on which the management measures were based did not become available until January and February because spawning escapement continued through the fall; (2) the Council's public process for developing proposed annual management measures under the Fishery Plan lasted until early April; and (3) management measures had to be in place by early May so that the spring harvest levels could be based on current data. *Id.* at A33-A34. The court also noted NMFS' finding that delaying promulgation of the 2005 management measures until later in the season would prevent the agency from meeting the Klamath River fall chinook escapement floor. *Id.* at A34.

The court of appeals disagreed with the district court's conclusion that petitioners' attack on the natural spawner escapement floor contained in the 1989 Fishery

Plan amendment was barred by the statute of limitations. Pet. App. A13-A17. But the court affirmed the district court's alternative ruling upholding the natural spawner escapement floor on the merits. It explained that nothing in the Magnuson Act prevents NMFS from distinguishing between naturally spawning and hatchery spawning chinook, and a related statute that regulates fisheries in one of the Klamath River's main tributaries specifically endorses that distinction. *Id.* at A20-A23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld NMFS' finding that, based on the facts here, the agency had good cause under 5 U.S.C. 553(b) not to provide public notice or opportunity for comment before approving the Council's proposed 2005 management measures.

a. Petitioners repeatedly cite 16 U.S.C. 1854(b)(1) for the proposition that the good cause exception of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "does not apply in this case because the Magnuson Act requires prior public notice and comment." Pet. 13-14; see Pet. 4, 6, 11, 16, 23. That argument is not properly before this Court, because petitioners did not press it below and the court of appeals did not pass upon it. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Nor do petitioners allege a circuit split concerning the interpretation of the Magnuson Act.

Moreover, petitioners incorrectly assume, without explanation or support, that the 2005 harvest measures were issued under Section 1854(b)(1), and that the APA's good cause exception was therefore inapplicable.

In fact, the 2005 measures were issued under a different section of the Magnuson Act, 16 U.S.C. 1855(d), which grants the Secretary authority "to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter." See 70 Fed. Reg. at 23,063. Under that provision, the Secretary may promulgate regulations "in accordance with section 553 of Title 5," including its good-cause exception. 16 U.S.C. 1855(d).

b. Petitioners contend (Pet. 12, 13) that the time constraints cited by NMFS do not constitute good cause under the APA because they are "artificial." Such a fact-bound question does not warrant this Court's review.

In any event, the court of appeals' ruling is correct. The time constraints faced by NMFS resulted from the salmon's life cycle and the Council's procedural duties under the Fishery Plan. The data necessary to set harvest levels were not available until January or February, and NMFS could not act until the Council made its recommendation following a public hearing process that culminated in early April. Because the salmon harvest season began in early May, the agency had only one month to act—too short a time to permit NMFS to provide public notice and comment before adopting the Council's proposal. Pet. App. A33-A34.

Petitioners do not dispute those facts; instead, their characterization of the resulting time constraints as artificial is based solely on their contention that NMFS provided prior notice on annual harvest regulations for the West Coast salmon fishery between 1978 and 1983. Pet. 13. Petitioners argue that NMFS abandoned that approach merely because it was "too cumbersome," and they assert that "no reason exists now" to prevent

NMFS from resuming its earlier practice. *Ibid.* But petitioners' characterization trivializes the significant problems that led to the adoption of the current Fishery Plan in 1984. See Pet. App. A4; 49 Fed. Reg. at 43,679 (explaining that the prior process lacked long-range perspective and was too complex, costly, and cumbersome to allow for timely implementation of the annual management measures).

Indeed, the annual management measures promulgated by NMFS in 1981, 1982, and 1983 were adopted without prior public notice as emergency interim rules. After each emergency rule took effect, NMFS conducted notice and comment rulemaking on a proposed rule that mirrored the emergency rule, and promulgated a final rule in September or October, when the fishing season was nearly over. See, *e.g.*, 48 Fed. Reg. 45,263 (1983) (final rule replacing emergency interim rule that took effect May 23, 1983); 47 Fed. Reg. 38,545 (1982) (final rule replacing emergency interim rule that took effect June 1, 1982); 46 Fed. Reg. 44,989 (1981) (final rule replacing emergency rule that took effect June 5, 1981). Far from supporting petitioners' argument, NMFS' past experiences confirm the inherent impracticality of conducting notice and comment rulemaking within the time constraints imposed by the salmon's life cycle.

Petitioners also overlook the substantial opportunities they had to comment *before* the Council submitted the 2005 plan to NMFS for approval. NMFS provided prior notice and opportunity for comment when it promulgated the Fishery Plan amendment that established the 35,000 natural spawner escapement floor. 54 Fed. Reg. at 19,185. And every year since then, petitioners and other interested persons have had prior public notice of, and multiple opportunities to comment on, the

annual management measures recommended by the Council to NMFS. Before the Council recommended management measures in 2005, for example, it published preseason reports, accepted written and oral comments, and held public hearings in three States. Pet. App. A6-A8; 70 Fed. Reg. at 23,054-23,055. Further, the management measures adopted by NMFS for 2005 were identical to those adopted by the Council at its April 2005 meeting. Pet. App. A8; 70 Fed. Reg. at 23,054. Thus, the effect of NMFS' invocation of the good cause exception was merely to deny petitioners the opportunity for *additional* prior comment on management measures that had already been subject to comment. Furthermore, petitioners have not identified *any* information that they were prevented from bringing to NMFS' attention, in 2005 or any other year, due to NMFS' invocation of the good cause exemption.

c. There is no circuit split on this question. Petitioners' contrary arguments rest on a mischaracterization of the court of appeals' decision. According to petitioners (Pet. 16, 18), the court of appeals applied a "very lax standard" that permits agencies to invoke the good-cause exception merely by making a "verbose" statement of reasons, rather than by actually demonstrating that prior notice and comment "was indeed 'impracticable.'"

That is not a fair reading of the court of appeals' decision. The court relied on its prior decisions in *NRDC* v. *Evans*, 316 F.3d 904, 912 (9th Cir. 2003), and *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429, 441-442 (9th Cir. 1993), to stress that good cause requires more than "generic complexity of data collection and time constraints." Pet. App. A33 (quoting *Evans*, 316 F.3d at 912). And it specifically found that NMFS had "thoroughly explain-

[ed] why [it] *could not* solicit public comment before the measures' effective date." *Ibid.* (emphasis added). Petitioners make no effort to explain how the court's conclusion that NMFS "could not" provide prior notice and comment could be premised on mere verbosity, rather than on the actual impracticality of providing prior notice and comment.

Read fairly, the court of appeals' decision is fully consistent with the other decisions cited by petitioners, which apply the same statutory standard to different fact patterns. Petitioners contend that the District of Columbia Circuit finds good cause only in the event of an "emergency" or "imminent hazard." Pet. 17-18 (quoting *Jifry* v. *FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005)). But while *Jifry* involved an imminent hazard, the District of Columbia Circuit noted that the good cause exception also excuses notice and comment in situations where "delay could result in serious harm." 370 F.3d at 1179. As discussed, this case satisfies that standard, because delay in promulgating the harvest measures would prevent them from taking effect at the outset of the harvest season, and could thereby prevent the escapement requirement from being satisfied. In articulating the "serious harm" standard, *Jifry* relied on a Ninth Circuit decision, *Hawaii Helicopter Operators Ass'n* v. *FAA*, 51 F.3d 212, 214 (1995).

Petitioners similarly err in arguing that the decision below is in conflict with decisions of other circuits holding that in order for prior notice and comment to be impractical, an agency must be unable to "execute its statutory duties" while providing such notice and comment. Pet. 21 (quoting *Levesque* v. *Block*, 723 F.2d 175, 184 (1st Cir. 1983)). Far from disagreeing with that stan-

dard, the Ninth Circuit adopted it in *Evans*, and even relied on the First Circuit's *Levesque* decision in doing so. *Evans*, 316 F.3d at 911. Here, in turn, the Ninth Circuit relied on its decision in *Evans*. Pet. App. A32-A33. Thus, petitioners' quarrel is not with the Ninth Circuit's legal standard, but with its application of that standard to the facts of this case—hardly a basis for this Court's review. See Sup. Ct. R. 10. Indeed, petitioners' argument (Pet. 22) that NFMS could both provide prior notice and comment and execute its statutory duties in this context is premised entirely on their inaccurate factual contention, discussed above, that "any time constraint is of NMFS' own creation."

2. Petitioners do not allege a circuit split on the second question presented, which is whether the Magnuson Act precludes NMFS from setting harvest levels that are designed to ensure the survival of a number of naturally spawning fish (as opposed to fish that spawn in hatcheries). Petitioners argue (Pet. 23-27) that NMFS decided to treat all fall chinook as a single stock, and that by doing so the agency somehow precluded itself from establishing an escapement goal for only naturally spawning fall chinook. Even accepting for the sake of argument petitioners' premise that NMFS has chosen to treat all fall chinook as a single stock, petitioners have pointed to nothing in the Magnuson Act that would prevent the agency from establishing an escapement goal for naturally spawning fish, *i.e.*, fish that spawn in nature, without the need for man-made hatcheries. See Pet. App. A20-A23, B21.

Petitioners misstate the record in arguing (Pet. 24) that NMFS arbitrarily restricted fishing by "ignoring the multitude of hatchery Chinook." The record documents that NMFS considered both hatchery spawning

and naturally spawning chinook in promulgating the 2005 harvest measures, and that the natural spawner escapement floor is intended to achieve maximum sustained yield by protecting both natural and hatchery production. Pet. App. A6, B7. In any event, petitioners' disagreement with NMFS' scientific judgment concerning the appropriate way to protect fall chinook does not warrant review by this Court—especially in light of both lower courts' agreement that petitioners presented no evidence to challenge the agency's scientific judgment. *Id.* at A24, B22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2007