

COURAGE WITHOUT CONVICTION: CAUSE FOR CHAOS IN U.S. MARINE FISHERIES MANAGEMENT

Peter Van Tuyn*

INTRODUCTION

Our oceans are in trouble. There is simply no doubt about it. Overfishing is reaching epidemic proportions worldwide. In the United States alone, at most, just over twenty percent of the nearly 1,000 federally-managed fish species are being fished in a sustainable manner.¹ Overfishing disasters are rampant throughout the United States, with marine life and fisheries-dependent human communities from New England to California feeling the pain.²

We are removing marine life from the oceans at alarming rates, including massive amounts of unintentional catch, also known as bycatch.³ Bycatch equates to an estimated twenty-five percent of the overall global catch, and many suspect that this is a conservative figure given the lack of

* Mr. Van Tuyn is an attorney in private practice in Anchorage, Alaska. He has worked with Trustees for Alaska, a nonprofit, public interest, environmental law firm for over a decade representing conservation groups and others on marine conservation issues. Prior to working with Trustees, Mr. Van Tuyn was a trial attorney with the environment division of the U.S. Department of Justice, where he specialized in wildlife and marine resources litigation. He is also an adjunct professor in the Masters in Environmental Law Program at Vermont Law School, where he teaches a course entitled "Fisheries and the Oceans."

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1. See PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 5 (2003) (detailing the existing crisis of our oceans due to government mismanagement), available at http://pewoceans.org/oceans/downloads/oceans_report.pdf; see also NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, SUSTAINING AND REBUILDING: NOAA FISHERIES 2002 REPORT TO CONGRESS: THE STATUS OF THE U.S. FISHERIES, at ii (2003) (detailing "the state of our nation's fisheries and the effectiveness of fisheries management"), available at http://www.nmfs.noaa.gov/sfa/statusoffisheries/cover_sos.pdf.

2. See Otto Pohl, *Challenge to Fishing: Keeping the Wrong Species out of Its Huge Nets*, N.Y. TIMES, July 29, 2003, at F3; see also PEW OCEANS COMM'N, *supra* note 1, at 36 (discussing collapse of fisheries off of California); Peter Shelley et al., *The New England Fisheries Crisis: What Have We Learned?*, 9 TUL. ENVTL. L.J. 221, 221-25 (1996) (explaining the decline of fishery stocks in the northwest Atlantic and its effect on the local economy); Jonathan Finer, *Fishing and Ecology Clash in New England: Ocean's Depleted Stocks Prompt Tough Decisions*, WASH. POST, Nov. 16, 2003, at A3 (detailing the economic costs on local communities from the depletion of fisheries off the New England coast).

3. See 16 U.S.C. § 1802(2) (2000) (defining "bycatch" as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards"); see also Pew Oceans Comm'n, *Areas of Inquiry: Fishing*, at <http://www.pewoceans.org/inquiry/fishing/> (last visited Feb. 4, 2004) (providing further details on bycatch).

reliable information about actual fishery catches.⁴ Species killed as bycatch can no longer fill their predator-prey roles in the oceans.⁵ In fact, “[l]eading experts say that bycatch is one of the most significant environmental and economic problems affecting marine fisheries today.”⁶

Fishing practices, pollution, and other human-generated actions are also known to impact fish habitat and to threaten marine life in the oceans.⁷ Like the land on which we live, the oceans contain a large variety of habitats, from kelp forests to eelgrass meadows, from corals reefs to underwater mountains.⁸ Like their terrestrial counterparts, these habitats support an amazing diversity of life and provide food, shelter from predators, and nursing grounds for many species of fish and other marine life.⁹

“Habitat loss is the primary factor responsible for the rapid rate of species extinctions and the global decline in biodiversity that has been witnessed in the past one hundred years.”¹⁰ Scientists have shown that commercial fishing boats using large bottom trawl nets fitted with chains, tires, and huge steel “doors” are particularly damaging to marine habitat.¹¹ The huge nets—some can be as wide as 1,300 feet across their openings, which is large enough to engulf several commercial jet airliners—are

4. PEW OCEANS COMM’N, *supra* note 1, at 42; Pew Oceans Comm’n, Areas of Inquiry, Fishing, *supra* note 3. According to the recent Pew Commission report, the United States “fail[s] to collect bycatch data in two-thirds of federally managed fisheries.” PEW OCEANS COMM’N, *supra* note 1, at 88.

5. See PEW OCEANS COMM’N, *supra* note 1, at 42–48 (outlining the many destructive effects of the by-catch problems and suggesting solutions).

6. *Id.* at 42.

7. *Id.* at 59–71 (detailing sources of pollution), 111 (recommending steps that should be taken to “regulate use of fishing gear that is destructive to marine habitats”).

8. See THE OCEAN CONSERVANCY, HEALTH OF THE OCEANS 59 (2002) (highlighting some of the components of the ocean ecosystem), available at <http://www.oceanconservancy.org/dynamic/downloads/healthOceans.pdf>.

9. See, e.g., ALASKA MARINE CONSERVATION COUNCIL, LIVING MARINE HABITATS OF ALASKA 2 (2003) (illustrating the diverse ecosystem supported by Alaska’s ocean floor).

10. PAUL K. DAYTON ET AL., PEW OCEANS COMM’N, ECOLOGICAL EFFECTS OF FISHING IN MARINE ECOSYSTEMS OF THE UNITED STATES 24 (2002), available at http://www.pewoceans.org/reports/POC_Ecoeffects_Rep2.pdf.

11. See MARINE CONSERVATION BIOLOGY INST. & AM. OCEANS CAMPAIGN, FACT SHEET: SEAFLOOR DESTRUCTION BY ROLLER AND ROCKHOPPER BOTTOM TRAWL GEAR (2002) [hereinafter MARINE CONSERVATION BIOLOGY INST.] (describing the destructive impact trawling has on the ocean floor), at <http://www.americanoceans.org/fish/ohpa-impacts.pdf>; BEN ENTICKNAP, ALASKA MARINE CONSERVATION COUNCIL, TRAWLING THE NORTH PACIFIC: UNDERSTANDING THE EFFECTS OF BOTTOM TRAWL FISHERIES ON ALASKA’S LIVING SEAFLOOR 1–2 (2002), available at http://www.akmarine.org/publications/rep_trawl_2002.pdf.

dragged across the ocean floor to catch groundfish such as cod, rockfish, and sole.¹² This fishing practice is generally called bottom trawling.¹³

Habitat damage from this commercial fishing practice can impact entire ecosystems. "Thousands of square kilometers of benthic habitat and invertebrate communities have been obliterated by trawling."¹⁴ In fact, recent data reveal that trawlers have dragged their nets over approximately "[792,994 square kilometers] of the continental shelf and slope."¹⁵

So far, the path traveled by people trying to solve the ocean crisis has been a circuitous one. The effort to protect fish habitat in the North Pacific from destructive fishing practices is an instructive and timely example of the difficulties in implementing meaningful solutions to the problems that face our oceans. Fishery managers and politicians boldly use whatever means necessary to delay and undercut legally-required habitat protections.

The moral of the story detailed below is one for all to hear: what we need is a new vision for managing human interactions with the sea. No longer should we view the oceans solely as suppliers of protein for people. The United States must embrace an ocean conservation ethic much like we have a land conservation ethic.¹⁶ As we value our national parks and wildlife refuges, so too should we value the special places that are in our other public areas—the oceans. As we use holistic-planning to manage human use of terrestrial areas, so too should we use such planning to manage human interactions with the oceans.¹⁷ In this way, we can protect all that is unique, irreplaceable, and economically valuable, for generations to come.

12. Pohl, *supra* note 2, at F3; see also ENTICKNAP, *supra* note 11, at 1–2 (describing the effects of bottom trawling on benthic communities).

13. MARINE CONSERVATION BIOLOGY INST., *supra* note 11. For a detailed description of trawling gear, see NAT'L RESEARCH COUNCIL, EFFECTS OF TRAWLING AND DREDGING ON SEAFLOOR HABITAT 14–17 (2002).

14. THE MARINE FISH CONSERVATION NETWORK, BODY OF EVIDENCE: THE FRAGILE STATE OF AMERICA'S OCEANS—A REVIEW OF RECENT SCIENCE AND A FRAMEWORK FOR RECOVERY 6 (2004) (quoting Paul K. Dayton, *Reversal of the Burden of Proof in Fisheries Management*, SCIENCE, Feb. 6, 1998, at 821).

15. NAT'L RESEARCH COUNCIL, *supra* note 13, at 37 (citing an area of 231,200 nautical miles); see also THE MARINE FISH CONSERVATION NETWORK, *supra* note 14, at 6.

16. See PEW OCEANS COMM'N, *supra* note 1, at 9 (suggesting that an ocean ethic, much like the conservation land ethic which has taken shape "provides a moral framework to guide the conduct of individuals and society"). Guideposts for our land conservation ethic were espoused by Aldo Leopold in 1948 when he challenged us to rethink our relationship to the land, writing: "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land." ALDO LEOPOLD, A SAND COUNTY ALMANAC 239 (Oxford University Press 1966) (1948).

17. See PEW OCEANS COMM'N, *supra* note 1, at vii (stating that the "root cause of this [ocean] crisis is a failure of both perspective and governance").

I. ADRIFT AND HEADED FOR THE REEF

As the fishing practice of trawling spread throughout marine waters, humans started to realize the potentially destructive nature of the practice and, in turn, started to formulate regulatory solutions. In Southeast Alaska, for example, where there is a vibrant and diverse non-trawling fishing culture, North Pacific fishery managers banned trawling.¹⁸ In other parts of the North Pacific, fishery managers put some areas that were important to crab fishers off limits to trawls because dragging huge and heavy nets across the ocean floor posed serious threats to the economically important crab population.¹⁹

North Pacific fishery managers, however, have rejected habitat protections where the benefit of doing so cannot be expressed in direct economic terms; and they have done this despite the ever-increasing body of scientific information detailing the long-term destructive nature of trawling on marine habitats.²⁰ Historically, this was due in large part to a lack of legal mandates to protect habitat and to the unique decisionmaking structure of fishery management in the United States—where industry-dominated “regional fishery management councils” are empowered to craft regulations for their own industry.²¹ The National Marine Fisheries Service (NMFS), which sits essentially adjacent to the management councils, is legally handicapped when it comes to crafting, promulgating, and implementing fishery management regulations.²² Thus, NMFS is unable to

18. NAT'L MARINE FISHERIES SERVICE ALASKA REGION, U.S. DEP'T OF COMMERCE, ALASKA GROUND FISH FISHERIES: DRAFT PROGRAMMATIC SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, at ES-21 fig.ES-2 (2003) [hereinafter ALASKA GROUND FISH FISHERIES DPSEIS], available at http://www.fakr.noaa.gov/sustainablefisheries/seis/draft0903/Exec_sum.pdf.

19. See E-mail from David Witherell, National Marine Fisheries Service (NMFS), to Cindy Hartmann et al., NMFS, Re. Essential Fish Habitat (EFH) Fishing Threats Comments! (Mar. 11, 1998), in Admin. R. Doc. A281, *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1 (D.D.C. 2000) (No. 99-CV-982) [hereinafter *Am. Oceans Campaign Admin. R.*]; see also ALASKA GROUND FISH FISHERIES DPSEIS, *supra* note 18, at ES-21 fig.ES-2 (highlighting areas in the North Pacific that restrict trawling).

20. MARINE CONSERVATION BIOLOGY INST., *supra* note 11.

21. See 16 U.S.C. § 1852(h) (2000) (authorizing Regional Fishery Management Councils to prepare “a fishery management plan” for fisheries that “require[] conservation and management”); see also JOSH EAGLE ET AL., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS 21 (2003) (noting that the “councils are dominated by fishing industry representatives and, as a result, do not enjoy the diversity of perspective necessary for good decision-making”), available at http://www.pewtrust.com/pdfs/pew_science_taking_stock.pdf; Teresa M. Cloutier, *Conflicts of Interest on Regional Fishery Management Councils: Corruption or Cooperative Management?*, 2 OCEAN & COASTAL L.J. 101, 102, 132 n.176 (1996) (discussing allegations of improper industry influence in management decisions and outlining the process and roles of interested parties in proposing regulations).

22. See 16 U.S.C. §§ 1852 (establishing regional fishery management councils and decisionmaking structure), 1854 (establishing procedures for review of fishery management plans or plan amendments by the Secretary); see also EAGLE ET AL., *supra* note 21, at 32 (reporting that while “in

offer the federal oversight necessary to police the decision-making process for improper influence.²³

II. STEAMING TO WASHINGTON

In the mid-1990s, marine conservationists descended en masse on Washington, D.C. to ensure that their voices were heard by Congress as it stood poised to reauthorize the Magnuson Fishery Conservation and Management Act.²⁴ After years of frustration, the conservationists had been unable to achieve positive change through the existing administrative processes. The goal was to amend this fundamental fishery management law with substantive legal mandates to deal with the alarming level of overfishing, bycatch, and habitat damage plaguing U.S. fisheries.²⁵

These activists did their job well. Congress made many new conservation-oriented findings when it passed the Sustainable Fisheries Act of 1996 (SFA).²⁶ These findings included the following, which were aimed at fish habitat:

Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly

theory [NMFS] enjoys the authority to oversee the councils, the procedures established by the Magnuson-Stevens Act make it difficult for NMFS to execute this authority effectively").

23. In 2003, one group of researchers determined that NMFS disapproved of "only one in every 250 measures" and concluded that NMFS' deferential approach to the regional councils does not adequately remedy "concerns" about management decisions. EAGLE ET AL., *supra* note 21, at 21, 32.

24. Magnuson Fishery Conservation Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)). The Magnuson Fishery Conservation Act was originally entitled the Fishery Conservation and Management Act of 1976, but was renamed as the Magnuson Fishery Conservation Act of 1976, in 1980. American Fisheries Promotion Act, Pub. L. No. 96-561 Title II § 238(a), 94 Stat. 3275, 3287, 3300 (1980). See also Suzanne Iudicello et al., *Putting Conservation into the Fishery Conservation and Management Act: The Public Interest in Magnuson Reauthorization*, 9 TUL. ENVTL. L.J. 339, 340-42 (1996) (noting the entry of conservation and environmental groups into the debate over the reauthorization of the Magnuson-Stevens Act).

25. S. REP. NO. 104-276, at 1 (1996), reprinted in 1996 U.S.C.C.A.N. 4073, 4073-74. While marine conservationists were certainly concerned about the heavily tilted fishery management playing field, the primary focus of the reauthorization effort was on enacting substantive legal standards governing the decisions of the regional councils and NMFS. *Id.*; see also Marian Macpherson, *Integrating Ecosystem Management Approaches into Federal Fishery Management Through the Magnuson-Stevens Fishery Conservation and Management Act*, 6 OCEAN & COASTAL L.J. 1, 12 (2001) (providing background on events leading up to the passage of the Sustainable Fisheries Act of 1996).

26. Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3559 (1996) (codified at scattered sections of 16 U.S.C.). The SFA reauthorized and amended the Magnuson Fishery Conservation Act and was the source of the new conservation-minded provisions. Macpherson, *supra* note 25, at 12 ("[T]he SFA represented a true paradigm shift away from viewing fish as a resource for extraction to fish as a component of a larger ecological system.").

threatened as a consequence of . . . direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels.²⁷

A national program for the conservation and management of the fishery resources of the United States is necessary . . . to facilitate long-term protection of essential fish habitats . . .²⁸

One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.²⁹

Based on these findings, Congress declared that a new purpose of the Magnuson Act is "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat."³⁰ Ironically, in light of the events described below, Congress also renamed the Magnuson Fishery Conservation Act as the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to honor Alaska's long-time Senator, Ted Stevens.³¹

In order to implement the new system, Congress mandated that fishery managers include provisions within all fishery management plans (FMPs) that "describe and identify essential fish habitat [EFH] for the fishery based on the guidelines established by the Secretary under [the Act], minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat."³² This is the "action standard" that the regional councils and NMFS must meet. Aware of the fishery managers' historic proclivity for delay, Congress also gave the Councils two years to submit EFH amendments for fishery management plans to NMFS.³³

27. 16 U.S.C. § 1801(a)(2).

28. *Id.* § 1801(a)(2).

29. *Id.* § 1801(a)(9).

30. *Id.* § 1801(b)(7).

31. Department of Commerce and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208 § 211(a) & (b), 110 Stat. 3009-32, 3009-41 (1996).

32. 16 U.S.C. § 1853(a)(7).

33. SFA § 108(b), 16 U.S.C. § 1853 note (2000). Section 108(b) reads: "Not later than 24 months after the date of enactment of this Act, each Regional Fishery Management Council shall submit to the Secretary of Commerce amendments to each fishery management plan under its authority to comply with the amendments made in subsection (a) of [section 1853]." Recall that the SFA was enacted on October 11, 1996. SFA, Pub. L. No. 104-297, § 108(b), 110 Stat. 3559, 3559 (1996) (codified at 16 U.S.C. § 1853 note).

The definition of "essential fish habitat" delineates the scope of habitat protections under the Magnuson-Stevens Act.³⁴ Congress defined this term expansively as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity."³⁵ Notably, Congress also broadly defined the term "fish" to include "finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds."³⁶

III. FISH HAVE NO SAFE HARBORS

Despite congressional passage of this new landmark conservation law, EFH provisions have wallowed in the decisionmaking process, repeatedly bouncing back-and-forth between the Councils and NMFS.³⁷ As a result, the councils have not instituted any meaningful amendments on EFH.³⁸ The North Pacific Council is no different.³⁹

In the North Pacific, NMFS focused almost exclusively on the designation and description of EFH, while deferring detailed consideration of the impacts of fishing on habitat—as well as measures to mitigate those impacts—until some undetermined second stage, to take place after the 1998 statutory deadline.⁴⁰ NMFS was clearly aware of its obligation under the law to assess the impacts of fishing on habitat, and to take action to reduce those impacts.⁴¹

The Alaska Region of NMFS, however, in close consultation with the North Pacific Council, made a deliberate decision to craft a two-stage process in which it would not amend FMPs to include provisions to minimize the impact of fishing gear on EFH within the statutory deadline.⁴²

34. 16 U.S.C. § 1802(10).

35. *Id.*

36. *Id.* § 1802(12).

37. See *Am. Oceans Campaign v. Daly*, 183 F. Supp. 2d 1, 5–9 (D.D.C. 2000) (explaining EFH implementation activities in five fishery management councils).

38. *Id.* at 5 (stating that "none [of the councils] adopted measures that would restrict fishing gear . . . to minimize adverse effects of fishing related activities on EFH").

39. *Id.* at 8–9.

40. *Id.* at 8. "The NPFMC [North Pacific Fishery Management Council] decided early on to defer consideration of fishing gear assessment and management measures until completion of the identification of EFHs." *Id.*

41. See, e.g., Essential Fish Habitat Amendment: Updated Tasking Plan 1.7 (June 26, 1997), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A138 ("[T]he Magnuson-Stevens Act requires that FMPs include management measures that minimize adverse effects [of fishing] to the extent practicable."); see also *infra* notes 43–44 and accompanying text.

42. E-mail from David Witherell, NMFS, to Cindy Hartmann et al., NMFS, Re. EFH Fishing Threats Comments! 1 (Mar. 11, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A281; see also 16 U.S.C. § 1853(a)(7) (2000) (pertaining to EFH requirements).

The North Pacific Council staffer on NMFS's EFH Team wrote the following description of the process:

I will (again) strongly advise the core team against recommending additional measures (in addition to the sitka [sic] reserve) at this time to minimize potential impacts of fishing gear. Our game plan, as laid out in the action memo and tasking plan, was approved by the Council and has gone through the public review process. In that tasking plan, we clearly spelled out that this was a two-phase process; first to identify EFH, then after to amend the FMP to minimize effects to the extent practicable.⁴³

The "tasking plan" explains this decision with alarming candor:

While the Magnuson-Stevens Act requires that FMPs include management measures that minimize adverse effects [of fishing] to the extent practicable, adding management measures is going to require considerable economic work. Therefore, it could be argued . . . that those measures will not be proposed in this first go around on EFH by October 1998, but must wait until after the EFH has been identified and approved by the Council. We simply will not have time to draft highly contentious regulatory or plan amendments on something as controversial as trawling in the [Bering Sea] in time for approval for June 1998. And it should not be done anyway, until all the information on what really constitutes EFH is compiled.⁴⁴

This decision was in all likelihood a product of the North Pacific Council's attitude towards EFH. From the beginning, NMFS staffers got the message from the Council that habitat was not a priority,⁴⁵ that it did not believe it had "any work to do in implementing EFH,"⁴⁶ and that the

43. E-mail from David Witherell, NMFS, to Cindy Hartmann et al., NMFS, Re. EFH Fishing Threats Comments! 1 (Mar. 11, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A281.

44. Essential Fish Habitat Amendment, Updated Tasking Plan 1, 7 (June 26, 1997), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A138.

45. E-mail from Cindy Hartmann, NMFS, to Lowell Fritz et al., NMFS, Re. Meeting Report with NPFMC 1-2 (Nov. 14, 1996), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A85 ("Habitat has not been [a] strong management issue for this Council.").

46. Memorandum from Steve Zimmerman, Chief, Protected Resources Management Division NMFS, to Steve Pennoyer, NMFS Administrator, Alaska Region, Re. Budget and Staffing Proposal to Implement EFH and NHP 4 (Jan. 8, 1996 [sic] (should read 1997)), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A103.

measures taken prior to passage of the SFA amendments largely satisfied its obligations to protect habitat from the impacts of fishing.⁴⁷

Following this decision, staffers from NMFS Headquarters noted the importance of regulating the effects of bottom trawl gear on habitat:

First let me say that this is one of the most politically important parts of EFH. There is a great deal of interest in this section in the environmental community and on the Hill. I have personally listened to Senator Ted Stevens, Chairman of the Senate Appropriations [sic] Committee, go on for 10 minutes on this. He said that this is why Congress passed EFH.⁴⁸

Despite this overt acknowledgement, when the initial plan came out, the analysis of fishing impacts was very general, and proposed no new measures to reduce the impact of fishing on habitat.⁴⁹ Numerous public parties sent comments critiquing the plan to the Alaska regional office of NMFS, pointing out that it was deficient in proposing new measures to reduce the impact of fishing on habitat.⁵⁰

When asked at a public meeting why NMFS was not taking measures to protect EFH in the FMP amendment, NMFS staff defended their decision by claiming that "the actual mandate by Congress doesn't call for proactive measures per se at this time."⁵¹ Subsequently, one member of the public disagreed with this conclusion, explaining that the law does in fact call for

47. E-mail from David Witherell, NMFS, to Cindy Hartmann et al., NMFS, Re. EFH Fishing Threat Comments! 1 (Mar. 11, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A281 (writing that the Northern Pacific Fisheries Council "had implemented the EFH concept well before it ever became part of the [Magnuson-Stevens Act]").

48. E-mail from Lee Crockett, NMFS-6, to Russell Bellmer, National Oceanic and Atmospheric Administration (NOAA), Re. Comments of drafts threats section 3 (Mar. 6, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A279. This particular statement also serves to emphasize the central role played by Senator Stevens in the habitat protection provisions of the SFA. *Id.*

49. Essential Fish Habitat Amendment: Updated Tasking Plan 1, 7 (June 26, 1997). in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A138.

50. *See e.g.*, Letter from Mason D. Bryant, President, Alaska Chapter, American Fisheries Society, to Steven Pennoyer, Administrator, Alaska Region NMFS 1, 2 (Apr. 27, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A341 (detailing their concern with the lack of information on "threats from fishing and non-fishing activities" and habitat protection); E-mail from Nina Mollett, NMFS, to Lori Gravel, NMFS 1 (June 16, 1999), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A571 (submitting late comments of The Marine Fish Conservation Network & American Oceans Campaign to Sue Salvesson, NMFS, outlining concerns that the environmental assessment fails to protect against adverse impacts to fish habitat).

51. Questions & Responses at the NMFS Public Meeting on the EFH Draft Recommendations, Anchorage Hilton, Anchorage, Alaska 1, 43 (Apr. 22, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A338.

protective measures within the statutory period.⁵² In the course of further questioning, a NMFS staffer explained the two-step process described above and admitted that neither NMFS nor the Council intended to comply with the law's mandate within the statutory period.⁵³

A NMFS staffer from Headquarters noted the absence of any analysis regarding the impacts on habitat from fishing gear and the necessity for instituting protective measures:

Unless an analysis is presented here or previously in the amendment and referred to, it would be difficult for anyone to evaluate the validity of the statement that the need for other protective measures, in addition to the Sitka closure, was not demonstrated from a review of the best scientific information available during development of the EFH FMP.⁵⁴

Despite these comments, the document changed very little and the version that went to the Secretary for approval contained no new measures to minimize the effects of fishing on habitat.⁵⁵ NMFS Headquarters summarily approved the amendment.⁵⁶

52. *Id.* at 44.

53. *Id.* at 45-46.

54. E-mail from James Thomas, NMFS-1, to Stephen Waste et al., NMFS, Re. Review of Amendments 1 (Apr. 27, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A342, at 1; see also E-mail and attached Memorandum from James Burgess, NMFS, to Steven Pennoyer et al., NMFS regarding F/H C [NOAA Fisheries, Office of Habitat Conservation] Comments on Alaska Regional Draft Report on the Identification and Description of EFH for the FMPs of the NPFMC (May 1, 1998), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A348, at 4 ("[T]he detailed summary of [habitat protections] already in place needs to be balanced with more explanation of new measures.").

55. Compare text accompanying *supra* notes 46-52 (summarizing history of the development of the FMP amendments and identifying comments requesting measures to protect EFH in the FMP amendment), with *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 8 (D.D.C. 2000) (stating that "[t]he final Amendment NPFMC submitted to NMFS contained very little analysis of measures that could be adopted to minimize the adverse effects of fishing on EFHs"). The Council submitted its amendments to the Secretary of Commerce for review on October 5, 1998. Notice of Approval of Amendments for Addressing EFH Requirements, 64 Fed. Reg. 20,216, 20,216 (Apr. 26, 1999).

56. Notice of Approval of Amendments for Addressing EFH Requirements, 64 Fed. Reg. at 20,216 (noting that the NMFS Regional Administrator for Alaska approved the EFH amendments on January 20, 1999); Memorandum from Garry F. Mayer, Office of Habitat Conservation, NMFS, to Rolland A. Schmitten, Assistant Administrator for Fisheries, NMFS, Re. F/H C Comments on the NPFMC EFH Amendments I, 1 (Jan. 19, 1999), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A535; Memorandum from Steven Pennoyer, Administrator, Alaska Region NMFS, to Rolland A. Schmitten, Assistant Administrator for Fisheries, NMFS, Re. Approval of EFH Amendments to North Pacific Fishery Management Council FMPs 1 (Jan. 20, 1999), in *Am. Oceans Campaign Admin. R.*, *supra* note 19, at Doc. A539.

IV. HARD PORT IN THE JUDICIARY

This recitation of how the EFH mandate had (or rather, had not) been implemented in the North Pacific illustrates the extremes to which NMFS and the Councils will go to avoid their legal duties. Marine conservationists, exhausted by the administrative shenanigans, next went to court for relief. The plaintiffs, a collaboration of environmental groups, filed their lawsuit in the United States District Court for the District of Columbia against NMFS for failing to implement the essential fish habitat provisions of the Magnuson-Stevens Act.⁵⁷

The plaintiffs alleged that NMFS was approving EFH fishery management plan amendments that did not comply with the Magnuson-Stevens Act.⁵⁸ The plaintiffs also contended that NMFS was violating the National Environmental Policy Act (NEPA) by approving these amendments without conducting adequate environmental impact analyses.⁵⁹

In deciding the first claim, the court stated that “[p]laintiffs [were] correct that the [Magnuson-Stevens Act] prohibits the two-step approach that [some of the councils] adopted.”⁶⁰ Yet, in spite of this holding on the meaning of the law, the court upheld the Agency’s actions by deferring to the Agency’s protestations that it had “limited scientific information” and already had protective measures in place.⁶¹

At the same time, the court did find that NMFS was in violation of NEPA, stating that:

It does not appear that NMFS took a “hard look” at the problem with respect to any of the [environmental assessments (EAs)]. There is no substantive discussion of how fishing practices and gear may damage corals, disrupt fish habitat, and destroy benthic life that helps support healthy fish populations. . . . There is only a minimal or vague discussion of the actual environmental consequences and impacts on the designated EFHs. In several of the EAs, NMFS simply states that no data is available, and therefore it cannot assess the environmental impact. Several EAs

57. *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 9, 16–17 (D.D.C. 2000).

58. *Id.*

59. *See id.* at 9 (noting that plaintiffs’ “second claim is that the [defendants] violated the National Environmental Policy Act (‘NEPA’) by performing limited, inadequate Environmental Assessments (‘EA’) for each of the Amendments, rather than full Environmental Impact Statements (‘EIS’)”); *see also* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C)(i–v) (2000) (requiring EIS for “major Federal actions significantly affecting the quality of the human environment”).

60. *Am. Oceans Campaign*, 183 F. Supp. 2d at 15 n.5.

61. *Id.*

merely note that further action is deferred to future amendments.⁶²

The court then ordered the Agency to prepare new environmental impact assessments for the EFH amendments.⁶³

It was certainly perplexing how the court could reach a ruling against the plaintiffs on the substantive Magnuson-Stevens Act claim and in their favor on the more procedural NEPA claim using, what was in essence, the same rather egregious set of facts. The split ruling also made appeal options more difficult.⁶⁴ Nevertheless, faced with the reality of initiating comprehensive EFH-related NEPA processes throughout the country under the court's order, NMFS agreed to a specific nation-wide EFH amendment implementation schedule, pursuant to which its final decisions would be made in 2004.⁶⁵

V. ADJUST COURSE BACK TO THE AGENCY

The court's order requires NMFS to correct its earlier missteps. Under the schedule stipulated to by the parties and approved by the court,⁶⁶ however, NMFS will not comply with the EFH provisions of the SFA until at least six years after the statutory deadline.⁶⁷ All the while, habitat destruction continues.

After some initial bickering, it publicly appeared that the Alaska region of NMFS and the North Pacific Fisheries Council were finally going to take seriously their legal obligations. First, on June 6, 2001, NMFS initiated an

62. *Id.* at 20.

63. *Id.* at 21.

64. See FED. R. CIV. P. 54(b) (2000) (stating that in the absence of an "express determination" of a final judgment as to one or more of the claims an "order or other form of decision . . . which adjudicates fewer than all of the claims . . . shall not terminate the action as to any of the claims or parties"). Note that the United States Courts of Appeals only "have jurisdiction of appeals from . . . final decisions of the district courts of the United States." 28 U.S.C. § 1291 (2000) (emphasis added).

65. See Joint Stipulation & Order, at Attach.1 (Dec. 17, 2001), *Am. Oceans Campaign v. Evans*, 183 F. Supp. 2d 1 (D.D.C. 2001) (No. 99-982 GK) (setting forth the schedule for EFH environmental impact statements).

66. *Id.* at 4 ("NMFS will prepare the EISs pursuant to this Joint Stipulation and Order in accordance with the schedule attached hereto as Attachment 1.").

67. Recall that the SFA required the Councils to submit amendments to their FMPs to comply with the new provisions in section 1853(a) by October of 1998. SFA, § 303(b), 16 U.S.C. § 1853 note (2000); see also *supra* note 31 and accompanying text (setting forth language of this provision). The schedule agreed to by the parties pursuant to the courts decision in *Am. Oceans Campaign* requires NMFS to issue a final EFH EIS in 2004. Joint Stipulation & Order, *supra* note 66, ¶ 9, at 4, Attach. 1.

environmental impact statement (EIS) process for an EFH amendment.⁶⁸ Second, on January 10, 2002, NMFS published a range of six alternatives and requested public comment on those alternatives.⁶⁹ Third, in January of 2004, NMFS published the *Draft Environmental Impact Statement for Essential Fish Habitat Identification and Conservation in Alaska* and requested comments.⁷⁰

Fishery managers identified six alternatives.⁷¹ Alternative one proposed to continue the status quo, meaning that no additional measures would be implemented to minimize the effects of fishing on EFH.⁷² In contrast, alternative six defined the opposite end of the spectrum, proposing to close substantial portions of marine waters to all gear that touches the bottom, including bottom trawl gear, pelagic (mid-water) trawl gear that actually touches the bottom (a not uncommon occurrence), pots, longlines, and dredges.⁷³ The remaining alternatives fell somewhere in between these two.⁷⁴ Marine conservationists generally supported Alternative 5B,⁷⁵ which proposed to close areas where, for example, there was high bycatch of coral and sponge at the same time as there was low catch-per-unit effort of target fish species.⁷⁶

68. Notice of Intent to Prepare a Supplemental EIS, 66 Fed. Reg. 30,396, 30,397 (June 6, 2001).

69. Groundfish Fisheries of the Bering Sea and Aleutian Islands Area and the Gulf of Alaska: Notification of Preliminary Alternative Approaches for EFH and Habitat Areas of Concern, 67 Fed. Reg. 1325, 1325-26 (Jan. 10, 2002).

70. Notice of Availability of EISs, 69 Fed. Reg. 2593, 2594 (Jan. 16, 2004); NMFS, U.S. DEP'T OF COMMERCE, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR ESSENTIAL FISH HABITAT IDENTIFICATION AND CONSERVATION IN ALASKA, at ES-1 (2004) [hereinafter NMFS, DEIS FOR ALASKA EFH]. The entire Draft Environmental Impact Statement (DEIS) can be viewed and downloaded from the NMFS Alaska Region Website. See Alaska Region, NMFS, Alaska Essential Fish Habitat Identification and Conservation, at <http://www.fakr.noaa.gov/habitat/seis/efheis.htm> (last visited Jan. 17, 2004).

71. NMFS, DEIS FOR ALASKA EFH, *supra* note 70, at ES-6 to ES-8. The DEIS lists only six alternatives, but there are actually seven different alternatives as Alternative 5 is divided into two alternatives, 5A and 5B. *Id.* at ES-7.

72. *Id.* at ES-6, 2-51.

73. *Id.* at ES-8, 2-57.

74. See *id.* at ES-6 to ES-7, 2-51 to 2-57 (providing details of Alternatives 2 through 5).

75. See, e.g., Alaska Marine Conservation Council, *Essential Fish Habitat: North Pacific Fishery Managers Vote Against Curtailing Bottom Trawling in Essential Fish Habitat* (supporting Alternative 5B), available at <http://www.akmarine.org/ourwork/efh.shtml> (last visited Jan. 22, 2004); Press Release, Oceana, Oceana's Aleutian Coral Protection Proposal Adopted by North Pacific Fisheries Council (Apr. 9, 2003) (supporting Alternative 5B), available at <http://www.oceana.org/index.cfm?sectionID=10&fuseaction=35.detail&pressreleaseID=91>.

76. NMFS, DEIS FOR ALASKA EFH, *supra* note 70, at ES-7, 2-55 to 2-57.

VI. RIDERS AND THE STORM

Senator Stevens then stepped back into the picture. He added four North Pacific fisheries-related "riders" onto the fiscal year 2004 spending bill for the Departments of Commerce, Justice, and State.⁷⁷ These riders included one that would have prohibited NMFS from spending any money to implement in the North Pacific the habitat protection provisions of the Magnuson-Stevens Act:

MARINE DESIGNATION CLARIFICATION. None of the funds appropriated under this Act or any other Act hereafter enacted may be used to implement 16 U.S.C. Sections 1853(a)(7) and 1855(b) and Executive Order 13158 with respect to any fisheries under the jurisdiction of the North Pacific Council, until the Magnuson-Stevens Fishery Conservation and Management Act is reauthorized.⁷⁸

The habitat rider went directly against Senator Stevens' oft-stated support for the regional fishery management council administrative system. It was, after all, Senator Stevens, together with Senators Kerry and Murkowski, who introduced the Sustainable Fisheries Act in the Senate and then later introduced an amendment that supplied the language for the provision on EFH.⁷⁹ More recently, in response to the May 2003 release of the Pew Oceans Commission Report entitled *America's Living Oceans*,⁸⁰ Senator Stevens stated that he was "very troubled by the apparent attacks on the Council system."⁸¹

There has of course been a great deal of speculation as to why the Senator inserted the habitat rider, and the other three fisheries related riders,

77. S. 1585, 108th Cong. §§ 901-904 (2003).

78. *Id.* § 902; see also Executive Order No. 13158, 3 C.F.R. 273, 273-76 (2001), reprinted in 16 U.S.C.A. § 1431 (2000) (pertaining to Marine Protected Areas).

79. Senators Stevens, Kerry, and Murkowski introduced the Sustainable Fisheries Act in the Senate on January 4, 1995. S. REP. NO. 104-276, at 4 (1996), reprinted in 1996 U.S.C.C.A.N. 4073, 4076. On September 18, 1996, Senator Stevens, together with Senator Kerry, proposed Amendment No. 5382, which, in part, substituted the proposed language on essential fish habitat in the bill as introduced on January 4, 1995 with the language that subsequently became section 1853(a)(7). Compare 142 CONG. REC. S10844, S10848 (Sept. 18, 1996), with 16 U.S.C. § 1853(7) (2000); see also 142 CONG. REC. S10907, S10907 (Sept. 19, 1996) (confirming request made by Senator Stevens to print a summary of Amendment No. 5382 in the record and setting forth brief background on EFH).

80. See PEW OCEANS COMM'N, *supra* note 1, at i (calling for the protection of EFH and sustainable fishing practices).

81. Press Release, Senator Stevens, Stevens Comments on Pew Ocean Commission Report (June 4, 2003), available at <http://stevens.senate.gov/pr060403.htm>. See also text accompanying *supra* note 48.

in what was seen as a must-pass spending bill.⁸² Senator Stevens himself was generally silent on why he took this rather drastic action.⁸³

Senator Stevens' silence, however, did not go "unheard" by the North Pacific Council. In October 2003, the Council chose Alternative 1—the status quo alternative—as its preferred alternative for minimizing the effects of fishing on EFH.⁸⁴ And, as if the Council's preliminary decision not to do anything to protect EFH was not enough, it went further and asserted that it would like to *decrease* the amount of area designated as EFH in the North Pacific.⁸⁵ Stevens thereafter dropped his EFH rider from the appropriations bills, stating that he was "satisfied with the direction the agency was taking, allowing bottom trawling and other fishing to continue as is."⁸⁶ His withdrawal of the rider in this context and with these comments suggests that his intent in pursuing the rider was to strong-arm the agency into doing nothing to protect EFH.

Equally troubling is the possibility that Senator Stevens' fisheries-related riders mark his desire to roll back progress made by the marine conservationists in 1996. Senator Stevens is poised to move in the 109th Congress from Chair of the U.S. Senate Appropriations Committee to Chair or ranking minority member (depending on which party controls the U.S. Senate after the November 2004 elections) of the U.S. Senate Commerce Committee, which has jurisdiction over fishery management.⁸⁷ He has

82. For example, the fact that the Senator's son, the Majority Leader in the Alaskan state Senate, works for some of the interests that stand to gain if the riders were to pass into law has not gone unnoticed. See Hal Bernton, *Crab Group Hires Son of Alaska Senator*, SEATTLE TIMES, Oct. 15, 2003, at B4 (discussing Alaska State Senator Ben Stevens' relationship with the North Pacific Crab Association); Charles Pope, *Alaska's 'SOB' Just May Get Crab Bill Passed*, SEATTLE POST-INTELLIGENCER, Oct. 29, 2003, at A13 (noting that Senator Stevens' son "is a lobbyist for the North Pacific Crab Association, which is largely underwritten by big processing companies based in Seattle"); *Crab Cartels: Stevens Pushes Plan that Gives Processors Too Much Market Power*, ANCHORAGE DAILY NEWS, Sept. 16, 2003, at B-4.

83. See, e.g., Marty Coyne, *Stevens Pushing for Controversial Fish Habitat Language*, ENV'T & ENERGY DAILY (Oct. 22, 2003) (noting that Senator Stevens has not commented on the issue), available at 10/22/03 EEP-EED art. 4 (Westlaw).

84. NORTH PACIFIC FISHERY MGMT. COUNCIL, NEWS & NOTES 3 (Oct. 2003), available at <http://www.fakr.noaa.gov/npfmc/newsletters/1003news.pdf>; see also *NMFS Takes Testimony on Proposed Trawling Policy*, ASSOC. PRESS, Jan. 16, 2004 (reporting the Council's decision to stick with existing restrictions), at 1/17/04 APWIRE 03:00:44 (Westlaw).

85. *NMFS Takes Testimony on Proposed Trawling Policy*, *supra* note 84.

86. *Id.*

87. See Senator Ted Stevens, Address to the Alaska State Legislature, Juneau, Alaska (Feb. 16, 2004) (transcript available from Senator Stevens' Website), at <http://stevens.senate.gov/legspcech021604.htm>. In his address, Senator Stevens' announced: "If I am the next chairman of the Commerce Committee, reauthorizing the Magnuson-Stevens Act and the Marine Mammal Protection Act will be among my first priorities." *Id.* Stevens also expressed his disagreement with the conclusions in the Pew Commission's report, see generally PEW OCEANS COMM'N, *supra* note 1, and went on to identify his issues with the Magnuson-Stevens Act with fashionable rhetoric: "Without further clarification of

already expressed his strong interest in presiding over the reauthorization of the Magnuson-Stevens Act under his watch.⁸⁸ At or near the helm of the reauthorization debate, Stevens would be well positioned to lead more direct attacks on the important conservation gains of the SFA.

Consequently, over seven years after the passage of the Sustainable Fisheries Act and five years after Congress mandated that EFH-specific amendments be included within FMPs, no such amendments have taken place in the North Pacific.⁸⁹

VII. A MAP FOR THE FUTURE

This story of the continuing destruction of sensitive marine habitats in the North Pacific is but one example of the difficulties of preserving marine ecosystems. Significant change in the management system is clearly necessary.

The first action, unfortunately, likely will require conservationists to engage in defensive work to preserve the conservation mandates of the 1996 SFA. Given Senator Stevens' recent anti-conservation actions, and stated intent to revisit some of the seminal decisions made in 1996,⁹⁰ a significant battle can be expected when Congress takes up reauthorization of the Magnuson-Stevens Act.

And yet, we cannot be satisfied with merely defending previous legislative gains when the situation on and in the water continues to devolve.⁹¹ As Americans, we must stand up now, before it truly is too late, and say "no more" to government-sanctioned harm to our oceans. We must commit to a new vision for managing human interactions with our oceans.

In 1969, the Stratton Commission undertook the first comprehensive review of U.S. ocean policy.⁹² Its recommendations provided the seeds for

critical terms within these acts, the massive corporate environmental complex will continue to bring lawsuits designed to shut down utilization of [Alaska's] marine resources. The best ocean policies are not determined by environmental special interest groups; they are the result of regional consensus and innovation." Senator Stevens, Address to the Alaska State Legislature, *supra*.

88. Press Release, Senator Stevens, Senator Stevens' Statement Key Note Address to the "Managing Our Nation's Fisheries" Conference (Nov. 14, 2003) [hereinafter Senator Stevens Key Note Address], available at <http://www.stevens.senate.gov/pr/11403.htm>.

89. See discussion *supra* Parts V & VI.

90. Senator Stevens Key Note Address, *supra* note 88 ("I am hopeful that we will start a national review of the Magnuson/Stevens Act.")

91. PEW OCEANS COMM'N, *supra* note 1, at v ("America's Oceans are in crisis and the stakes could not be higher."). For a more detailed discussion of the evidence supporting the Commission's conclusion and a discussion of threats to the ocean's health, see *id.* at v-viii, 35-72.

92. COMM'N ON MARINE SCIENCE, ENG'G & RES., OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION (1969) [hereinafter OUR NATION AND THE SEA], at <http://www.lib.noaa.gov/edocs/stratton/title.html>.

a new framework of laws designed to ensure the "full and wise use of the marine environment."⁹³ These laws we now know as the Magnuson-Stevens Act,⁹⁴ Marine Mammal Protection Act,⁹⁵ Coastal Zone Management Act⁹⁶ and others, which aim to deal with the marine ecosystem on issue-specific bases.⁹⁷

Over thirty years after the Stratton Commission report, the Pew Oceans Commission was created to once again conduct a comprehensive review of U.S. ocean policy.⁹⁸ The Commission was formed in recognition of the new problems facing us today and "to identify policies and practices necessary to restore and protect living marine resources in [the United States]."⁹⁹ The Pew Commission spent years gathering data on the problems facing a healthy and diverse marine environment.¹⁰⁰ In the end, it concluded that the United States "needs to ensure healthy, productive, and resilient marine ecosystems for present and future generations."¹⁰¹

To do this, the Pew Commission felt that we must: "[C]hange our perspective and extend an ethic of stewardship and responsibility toward the oceans. . . . [W]e must treat our oceans as a public trust. . . . National ocean policy and governance must be realigned to reflect and apply principles of ecosystem health and integrity, sustainability, and precaution."¹⁰²

The Pew Commission also came to the conclusion that the United States must develop new institutions to govern our relationship with the oceans.¹⁰³ Consequently, it recommended that the United States:

1. Enact a National Oceans Policy Act to protect, maintain, and restore the health, integrity, resilience, and productivity of our oceans.
2. Establish regional ocean ecosystem councils to develop and implement enforceable regional ocean governance plans.

93. PEW OCEANS COMM'N. *supra* note 1, at vii (quoting OUR NATION AND THE SEA, *supra* note 92, at 230).

94. Magnuson-Stevens Act, 16 U.S.C. §§ 1801–1883 (2000).

95. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407 (2000).

96. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2000).

97. PEW OCEANS COMM'N, *supra* note 1, at vii, 7.

98. *Id.* at viii.

99. *Id.* at ix.

100. *See id.* at 9 (noting that the Commission was formed in 2000 and detailing its research strategy).

101. *Id.* at ix. Notably, the Pew Commission also recognized that "[i]n the long term, economic sustainability depends on ecological sustainability." *Id.* at ix–x.

102. *Id.* at x.

103. *Id.*

3. Establish a national system of fully protected marine reserves.
4. Establish an independent national oceans agency.
5. Establish a permanent federal interagency oceans council.¹⁰⁴

Congress also recognized that Americans were demanding a wholesale reevaluation of U.S. ocean policy.¹⁰⁵ In response, it passed a bill to empower the President to put together a U.S. Commission on Ocean Policy (U.S. Commission) to conduct an investigation and make recommendations.¹⁰⁶ The goal of the U.S. Commission's work is to "ensure [that] our national ocean policy is coordinated, effective, and sustainable for future generations."¹⁰⁷

Members of the U.S. Commission recently stated that they will also recommend "a fairly bold shift in the way we do ocean management across the country. . . . We're talking about an eco-region approach."¹⁰⁸ Similar to the Pew Commission, the U.S. Commission will call for a change from single-species focused management to one that takes the entire ecosystem into account.¹⁰⁹ Notably, given the different political origins of each commission, statements from commissioners on the U.S. Commission indicate that they largely agree with the findings of the Pew Commission.¹¹⁰ As U.S. Commission member and former Administrator of the U.S. Environmental Protection Agency, William Ruckelshaus, stated, "[f]acts are facts, and we're operating off the same set."¹¹¹ The combined weight of these two reports will hopefully provide the necessary momentum for congressional action that will begin to restore the vitality of our oceans.

104. *Id.* at x-xi.

105. On March 29, 2000, Senator Hollings, (D-S.C.) introduced the Oceans Act of 2000, S. 2327, 106th Cong. (2000), to create a national ocean commission to evaluate existing ocean management institutions and laws and to make recommendations regarding national ocean policy. 146 CONG. REC. S1912 (Mar. 29, 2000). In introducing the bill, Senator Hollings recognized a critical problem, stating, "the oceans are integral to our lives but we are not putting a priority on finding ways to learn more about them, and what they may hold for our future." *Id.* at S1913.

106. Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644 (2000) (codified as amended at 33 U.S.C. § 857-19 note (2000)).

107. 146 CONG. REC. S1912 (Mar. 29, 2000).

108. Craig Welch, *Oceans in peril: 'We Have to Change Course.' Say Scientists*, SEATTLE TIMES, Feb. 12, 2004 (quoting Professor Marc Hershamn, Director of the School of Marine Affairs at the University of Washington and Commissioner of the U.S. Commission on Ocean Policy), available at http://seattletimes.nwsource.com/html/localnews/2001856251_ocean12m.html.

109. Miguel Llanos, *Oceans in Crisis. Will Bush Step Up?*, MSNBC, Mar. 15, 2004, at <http://msnbc.msn.com/id/4327538/> (on file with Vermont Law Review).

110. Welch, *supra* note 108.

111. *Id.* More information about the U.S. Commission on Ocean Policy is available from their website. See U.S. Comm'n on Ocean Policy, at <http://oceancommission.gov> (last visited Feb. 20, 2004).

CONCLUSION

Decisions about fishery management must be based on sound science and made according to set administrative procedures. Chaos results when decisionmakers disregard these two critical components. In effect, the checks and balances that lead to rational decisionmaking are replaced by non-uniform and well-insulated (at least from the general public) administrative and legislative action. This type of chaos was exemplified by the actions taken by NMFS, the North Pacific Council, and Senator Stevens in the story relayed above, where conflicts of interest and partisan "don't mess with my fish" bickering, have prevented systematic, science-based, precautionary management.

A new ocean ethic expressing our overarching stewardship responsibility to protect the public trust that is our oceans would provide a foundation for saving our oceans from such dangerous and short-sighted decisionmaking.¹¹² The oceans are, after all, "integral to our lives."¹¹³ A revamped management regime structured to ensure that, among other things, fishery management decisions will be made consistent with this ethic is also necessary. This is the only method by which we can "preserve the ecological benefits that we require as a species . . . and our moral obligation as the stewards of our planet."¹¹⁴

Let us work hard to ensure that we take these actions quickly, and let us hope that it is not already too late.

112. PEW OCEANS COMM'N, *supra* note 1, at 99.

113. 146 CONG. REC. S1912, *supra* note 105, at S1912 (statement of Senator Hollings).

114. PEW OCEANS COMM'N, *supra* note 1, at 98.

