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## **This Fish Smells**

### **Justifications for a New System of Management for Human Interactions With Our Seas**

**Presented to the U.S. Commission  
on Ocean Policy**

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\* This paper is a work in progress. For ease of reading, most legal and factual citations have been removed from this version. Citations are available from the author.

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**Statement by Peter Van Tuyn, Trustees for Alaska  
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**INTRODUCTION**

Management of human interactions with marine resources by the National Marine Fisheries Service and the Regional Fishery Management Councils is archaic. A survey of the recent history and ongoing practice of the management of living marine resources by these entities leads to the following observations:

- Seemingly fundamental questions about the impacts of a proposed action frequently are not asked or answered.
- Justifications or explanations for management decisions are often not presented.
- There is a lack of transparency in the NMFS decision-making process.
- Difficult conservation and management decisions are often put off until circumstances mandate that they be made.
- The express will of Congress is often ignored when management decisions are made.
- Administrative modifications of statutory duties have occurred, resulting in unsupported and vast discretion for NMFS and the Councils to make management decisions.
- Significant discretion in making decisions leaves NMFS vulnerable to undue political influence from commercial interests.
- NMFS has little political strength to accomplish its mission.

Provided below are specific examples of situations supporting these observations, starting with fisheries management and then moving into specific legal mandates to protect endangered species and marine mammals. Also covered is the general mandate to fully evaluate the environmental impacts of decisions before decisions are made. Specific North Pacific examples are provided throughout this discussion.

This discussion is followed by a summarized analysis of which factual circumstance supports which specific observation. Finally, the discussion concludes with recommendations on how to change the management system.

## **MANAGING FISHERIES**

The Magnuson-Stevens Fishery Conservation and Management Act provides the legal structure for the current system of federal fisheries management in the United States. Through the Act, Congress created eight fishery management regions throughout the coastal United States, each with its own “fishery management council.” These councils are charged with crafting “fishery management plans” (FMPs) for fisheries within their jurisdiction that require “conservation and management measures.” The makeup of the councils generally includes NMFS officials and representatives from states adjacent to the regional boundaries as well as commercial fishing interests. NMFS has the authority to approve or disapprove FMPs, but in most circumstances it cannot, by itself, craft an actual FMP. NMFS then promulgates regulations, often crafted by the Councils, to actually implement the FMPs.

Despite the prominent position the word “conservation” has in the title of the Magnuson Act, management decisions in the first 20 years of the Act focused primarily on allocation issues. In 1996, Congress attempted to force a paradigm shift in fisheries management by detailing new requirements that fishery managers must address in their management decisions. These requirements fell into the three general categories: 1) eliminating overfishing and rebuilding overfished stocks; 2) assessing and avoiding bycatch, and minimizing the mortality of bycatch which cannot be avoided and 3) describing and identifying essential fish habitat and minimizing the impacts of human activities on that habitat.

One need only look at the increasingly frequent federal fisheries disasters around the country for evidence to support the unfortunate fact that, despite Congress’ good intentions and specific directives, conservation still takes a back seat to short-term commercial interests in federal fisheries management. A close look at how NMFS and the regional fishery management councils implement the environmentally-protective provisions of this overarching fisheries management law is instructive in understanding how the great conservation promise made by Congress in the 1996 reauthorization failed in implementation.

## **OVERFISHING**

Certain fish stocks 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 threatened

This congressional finding, appearing in the 1996 reauthorization of the Magnuson-Stevens Act (known as the Sustainable Fisheries Act, or “SFA”), encapsulates the environmental problem with taking more fish from the oceans than can be regenerated by the fish populations.

Moreover, this is not a hypothetical problem. In 2001, at least 65 species of fish were being overfished. NMFS does not have enough information to determine the status of over 600 other species of fish.

In a prescient statement made in support of the SFA Senator Kerry stated that

We are precariously close to fisheries failures in many of our most commercially important fish stocks, and it is imperative that we take immediate action if we are to avert disasters such as the one that we are currently experiencing, literally living in, off the waters of New England. [the SFA] provides guidance and the tools necessary to help ensure that fishery failures will be avoided and the fish stocks can be rebuilt to provide the greatest possible economic benefit to our Nation.

Alaska’s own Representative Young also spoke on this topic:

It is crucial that the management agencies within the Federal Government be pro-active in protecting fisheries rather than attempting to address overfished stocks after they are in a crisis situation.

### ***General Management Standards***

To put action to these words Congress enacted a new, two-part, regulatory regime. The first is the threshold obligation imposed on the Councils and NMFS to identify overfishing and overfished fisheries. This identification is to be made, according to the definition of overfishing, based on a strictly biological determination -- whether fishing levels jeopardize maximum sustainable yield.

The second part of the new system is the obligation to develop and implement plans to end overfishing and rebuild affected stocks of fish as soon as possible, subject to very specific requirements, including strict statutory time periods. It is in this second phase of the system that NMFS and the Councils are allowed to consider, subject to clear limitations, more than just biological concerns, including the needs of the fishing community, in fashioning a remedial plan.

## *The Mixed Stock Fiasco*

Many fisheries throughout the United States consist of several species of fish. These species are managed together as a unit in what are generally referred to as “mixed-stock” fisheries. In the Pacific and North Pacific, for example, many of the target species taken pursuant to the Groundfish Fishery Management Plans are taken in mixed stock fisheries. The tricky part in managing such fisheries is to ensure that each of the various fish species that make up the mixed stock fishery remain healthy while simultaneously attempting to permit the continuance of commercial fishing.

As described above, NMFS created an exception to the prohibition on overfishing which allows it to permit continued fishing even when some stocks are exploited above the amount considered by scientists to be sustainable. NMFS faced pointed criticism from conservationists and others for crafting this mixed stock overfishing exception to the SFA. These folks pointed out that the exception was dangerous in the extreme to living marine resources because it allows management to ignore weak fish species taken in a mixed stock fishery. They also pointed out that it was a violation of the statute.

NMFS, however, dismissed the suggestion that the exception is imprudent and unfounded by saying that, under the critics’ view of the SFA, “the harvest of such a productive fishery would have to shut down for the decade or more it would take to rebuild what might very well be a minor, uneconomical stock of fish.”

NMFS and the Councils thus forged ahead, risking both marine life and sustainable fisheries in the process. And, as any even casual observer of fisheries management could tell you, this myopic action had disastrous consequences.

Twenty years ago a NMFS fisheries biologist stated that overfishing of West Coast rockfish meant that those fisheries were, even at that time, “beyond hope.”<sup>1</sup> Asked to look back on that prediction, the biologist, now a University professor, said that

It was easy for me to see. I just looked at the production of those species that were being harvested heavily. Their production was so low that it was obvious they would be overharvested.

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<sup>1</sup> See Easthouse, Northcoast Journal, Deep Trouble, Alarm bells sounded 20 years ago about overharvesting rockfish (July 18, 2002).

As do others familiar with the situation, he blames the management of the fishery: “The management system has really failed. It has not been able to control the declines.”<sup>2</sup>

The result is that both commercial and recreational fishing on the continental shelf, from Mexico to Alaska, could be prohibited in the next year. Because NMFS waited so long to take action, and because NMFS let the weak fish species’ populations to get so low, the rebuilding period for some of these slow-growing rockfish could be as long as 156 years, even if all fishing were to halt today. This situation will have drastic effects on humans as well: commercial fishermen no longer have fish to catch, and recreational anglers pursue their passion in other places, leaving local businesses without customers.

Time and again NMFS and the Pacific Council were faced with objective scientific information concerning the severity of the crisis, and time and again they bent to the subsequent political pressure to allow the fishery to proceed.

A similar scenario is being played out in the North Pacific. The trawl rockfish fisheries in the Gulf of Alaska and Bering Sea/Aleutian Islands are mixed stock fisheries, and they suffer from the same non-precautionary management approach.

### ***The Missing Bookend***

The SFA includes the common sense requirement that NMFS establish “objective and measurable criteria for identifying when a fishery is overfished.” NMFS guidelines to implement the SFA addressed the requirement to “end overfishing” and “rebuild affected stocks” by requiring the use of “status determination criteria” appropriate to each “-- namely one measure pertaining to the rate of fishing mortality and another measure pertaining to the size of the stock.” These “bookend” criteria are a “maximum fishing mortality threshold” and a “minimum stock size threshold”(MSST), or a “reasonable proxy” for each.

The crab, salmon and scallop FMPs in the North Pacific have overfishing definitions which include an MSST. The story is different for the groundfish fisheries, however.

A few years after the SFA was enacted, the North Pacific Council’s Science and Statistical Committee (SSC) considered two new alternative overfishing

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<sup>2</sup> See also The Daily Astorian, Is the end near? (May 29, 2002) (commenter noting that “The federal government of all parties must be held cupable. Management decisions got us into this mess ...”).

definitions put forward by NMFS in Amendments 56/56, both of which would have set MSST for Bering Sea and Gulf of Alaska groundfish stocks. The SSC stated that both alternatives were “fairly complex and difficult to compare in detail to the current approach” and recommended that the MSST alternatives be dropped from consideration because the Council’s “policy of using a biomass-based policy that reduces fishing mortality as stocks decrease in size was deliberately selected to provide for automatic rebuilding.” Despite NMFS’s determination that MSST is necessary under the statute, the SSC stated that “[t]he added complexity of a threshold policy on top of a biomass-based policy serves no useful purpose, is harder to implement, and will be harder for the public to understand.”

The Council, following the advice of the SSC, chose not to set an MSST in Amendments 56/56 and forwarded those amendments to NMFS for certification. NMFS then approved the definition. Ironically, despite repeated requests to do so, and the SSC’s apparent sensitivity to doing something easier for the “public to understand,” neither NMFS or the Council ever provided a clear explanation of why an MSST was unnecessary for the groundfish fisheries.

In the last year, faced with Endangered Species obligations, NMFS finally put an MSST in the FMP overfishing definition for pollock, atka mackerel and cod. To date MSSTs have not been placed in FMPs for any other groundfish species.

### *The “Bizarro” Case of the Summer Flounder*

Along the Atlantic coast exists a summer flounder fishery. NMFS manages it through an FMP developed in consultation with the New England, Mid-Atlantic and South Atlantic Fishery Management Councils. Unfortunately, despite its status as one of the most important commercial flounder fisheries in the United States (or, perhaps, because of this status) the summer flounder fishery has been overfished for many years.

Allowable catch levels in this fishery, as with other fisheries, are set on an annual basis and are supposed to, among other things, prevent continued overfishing of the target species. The Mid-Atlantic Council in 1999 recommended a catch level for summer flounder that had only a 3% likelihood of meeting the required standard to prevent overfishing. NMFS rejected this catch level, yet it then proposed, and ultimately approved, a catch level it calculated to have only an 18% likelihood of meeting the standard.

Conservationists thereafter challenged NMFS’ decision in court. While it took considerable time, the court ultimately agreed with plaintiffs that the 1999 catch level was “unreasonable, plain and simple.” Common sense revealed to the

court that a catch level that had only an 18% likelihood of preventing overfishing had an 82% likelihood of allowing overfishing. In a now-famous quote, the court then stated that

Only in Superman Comics' Bizarro world, where reality is turned upside down, could [NMFS] reasonably conclude that a measure that is four times as likely to fail as to succeed offers a "fairly high level of confidence."

The court went on to say that the law requires at least a 50% likelihood that a plan would prevent overfishing.

### ***Crisis as the Status Quo***

By now, the entire commercial fishing fleet, marine conservationists and much of the public are familiar with the demise of the New England groundfish fishery. For over a decade, NMFS has avoided instituting tough but necessary fishing restrictions to rebuild overfished stocks of fish. In the latest round, NMFS was faced with a decision whether to implement the overfishing and rebuilding provisions of a particularly important groundfish FMP amendment (Amendment 9), knowing that it could have significant effects on the commercial catch of groundfish.

Yet the status quo prevailed. NMFS decided not to implement the all-important provisions, forcing painful judicial review and ultimately direct judicial oversight of the fishery. As the court noted, NMFS "freely concede[s] that they have not come into compliance with the overfishing and rebuilding provisions of the SFA." Prior to its reluctant ruling that it had both the judicial authority and necessity to remedy the violations, the court bemoaned NMFS' "record of inaction and delay." As further described below, NMFS' failure directly led to an unusual and sweeping judicial order mandating that specific conservation restrictions be applied to the fishery.

### ***Serial Overfishing and Localized Depletion***

One final example returns us to the North Pacific. It comes to us through the voice of a commercial trawl fisherman who likes to describe himself as the "top predator in the Bering Sea":

A few years ago the entire Aleutian pollock [allowable catch] was taken basically out at Four Mountain, the 170 line, because it was as close to town as possible and logistics are easy. A couple of years later, people just steamed right on by Four Mountain because there wasn't much there. Then the effort was at Seguam Pass, and then a couple of years later it was at

North Head on the other side of Atka, and then the last couple of years it's been out at Tanaga. Although the TAC for the Aleutians might be entirely appropriate if effort were evenly distributed over the Aleutians, it's real evident that we're fishing one little spot at a time and knocking it down. It's a completely wrong way to go about it.<sup>3</sup>

This pattern of serial depletion has been documented for pollock in the Shelikof Strait (1981-1985, late-1990s), Bogoslof/Aleutian Basin (1987-1992), and Aleutian Islands (1990s). Thus, it would appear that the United States is continuing the style of fishing pioneered by the Japanese; fishing out one stock of fish after another as we work our way around the oceans. These observations are also quite alarming when one considers the greater ecosystem in which these huge groundfish fisheries operate.

Moreover, and as is discussed further below, depleting local stocks of fish has implications for species, such as Steller sea lions and fur seals, which rely on those fish in those locations, to meet their nutritional needs. Without close proximity to their prey bases, sea lions and fur seals must venture farther from rookeries and haulouts to feed, increasing energy expenditure and exposing them to more risk. Additionally, young sea lions and seals just learning to forage for their own food are not capable of traveling long distances in open water, and mothers with still nursing pups must stay near the onshore habitat as well.

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<sup>3</sup> Comments of Dave Fraser, Alaska Seas Marine Conservation Biology Workshop, October 6 and 7, 1997 Anchorage, Alaska, *Ecosystem-Based Management in the Bering Sea*.

## **BYCATCH**

Throughout fisheries in the United States massive amounts of non-target fish are hauled aboard fishing vessels and killed, posing risks to the health and diversity of our oceans while providing no direct economic benefit to the nation. These fish are considered the “bycatch” of a fishery, and they are caught because fishing gear or practices are often not selective in what they catch. In the North Pacific alone, hundred of millions of pounds of halibut, salmon, crab and other marine life – close to 1,000 species in all -- are indiscriminately killed as bycatch.

While many of these 1,000 species have little or no current economic value, they are valuable to the marine ecosystem. In the intricate and complex web of marine life, corals and sponges, for example, are not only marine life taken as bycatch but are also habitat for fish, crab and other marine life. When they are indiscriminately removed from the ocean the marine habitat is changed and can no longer support other marine life. Moreover, species killed as bycatch can no longer fill their predator-prey roles in the oceans.

Alaska’s Senator Stevens, Chairman of the Senate Commerce Committee, championed provisions of the SFA to minimize bycatch. It was his aim that Congress “bring a stop to this inexcusable amount of waste.” Representative Young, who introduced the bill to reauthorize the Act in the House, echoed this statement when he said that “bycatch is one of the most pressing problems facing the continuation of sustainable fisheries” and that high levels of bycatch are “clearly unacceptable.”

Yet, despite congressional attempts to force NMFS to document and minimize this wasteful and risky behavior, NMFS has near-systematically failed to give this problem the attention it deserves. Below are some examples of how NMFS treats its bycatch duties in the real world.

### ***Management Standards***

Following the lead of Senator Stevens and Representative Young, Congress expressed the bycatch reduction directives in a straightforward and common sense manner in the SFA. First, Congress established a new policy of fisheries management that "encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish . . ." In applying this policy, Congress created National Standard 9 for Fishery Management Plans, with which all FMPs must be consistent. National Standard 9 provides that

[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

Congress then stated that

[a]ny fishery management plan which is prepared by any Council . . . with respect to any fishery, shall establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority -- (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.

To ensure that its mandates were addressed by Councils in a timely manner, Congress also provided that "[n]ot later than 24 months after the date of the enactment of" the 1996 Sustainable Fisheries Act, each Council must prepare FMP amendments to this duty.

In the SFA Congress also added several provisions aimed specifically at the bycatch problem in the North Pacific. First, section 313(f) states that:

the North Pacific Council shall submit conservation and management measures to lower, on an annual basis for a period of not less than four years, the total amount of economic discards occurring in the fisheries under its jurisdiction.<sup>4</sup>

With this subsection, Congress "emphasize[d] the reduction of economic discards, or bycatch which fishermen choose not to retain," with the goal of "actual significant reduction in the total amount of economic discards in North Pacific Fisheries."

### ***NMFS Puts its Head in the Sand***

The first part of the bycatch mandate concerns the standardized reporting methodology. This common sense provision, if complied with, would provide useful information both to assess the impact a particular fishery has on the environment as well as to help develop strategies to minimize such impacts. Justifications aside, and put more simply, without measuring the extent of bycatch it is difficult, if not impossible, to take meaningful action to reduce such bycatch.

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<sup>4</sup> The MSA defines "economic discards" as "fish which are the target of a fishery, but which are not retained because they are of an undesirable size, sex, or quality, or for other economic reasons."

The continuing crisis in the New England groundfish fishery provides an example of how NMFS has treated this straightforward statutory requirement. This fishery, about which Senator Kerry spoke in his comments supporting the SFA, has been going through crisis management for over a decade. Long overfished, it also suffers from significant bycatch problems. Thus, instituting the informational component of quantifying the amount and type of bycatch would seem elemental in this fishery.

NMFS, however, has wholly failed to ask the required questions or to seek the required answers for this fishery. This failure led a federal court, just prior to issuing a nearly unprecedented court order mandating a sweep of changes to that fishery, to state that NMFS has “refuse[d] to give effect to the clear will of Congress, which expressly directed [NMFS] to more accurately measure ... bycatch.” Notably, the court also took issue with NMFS excuses for not doing so, pointing out that NMFS’ summary dismissal of new bycatch reporting measures as “impracticable and unnecessary,” was meaningless.

NMFS’ failure to ask the required questions such as how much bycatch occurs in a particular fishery is not limited to New England groundfish. In the North Pacific, where the largest fisheries in the United States is prosecuted, and where bycatch is literally measured in the millions of pounds, no new meaningful bycatch reporting methodologies have been implemented since the SFA was signed into law. While observers are present on some ships in the huge groundfish fisheries, they receive neither the resources nor the training to fully accomplish their mission.

In any event, the information that is available exposes stunning amounts of waste: groundfish (330 million pounds taken as bycatch in 1998 and 1999), halibut (over 14 million pounds in 1998 and 1999), herring (close to 2 million pounds in 1998 and 1999) and crab (well over 6 million individual crab taken in 1998). Notably, there is no reliable information available about the bycatch of marine life with no commercial value.

The situation is of such concern here in the North Pacific that the State of Alaska and non-profit NGOs have stepped in, at considerable expense, to take what raw information the agency does have (gathered using pre-SFA methodologies) and prepare summaries for use by the public and fisheries managers.

### *NMFS Tilts the Scales*

Much of the language in NMFS' guidelines concerning its bycatch duties mirrors the bycatch minimization mandate language in the statute. See 63 Fed. Reg. 24,235-36 [Admin. Rec. Doc. #3]. Significantly, however, NMFS fundamentally changed the basic thrust of the statute by inserting a requirement to consider "net benefits to the Nation" when deciding upon bycatch measures:

Any proposed conservation and management measure that does not give priority to avoiding the capture of bycatch species must be supported by appropriate analyses. In their evaluation, Councils must consider the net benefits to the Nation, which include, but are not limited to: Negative impacts on affected stocks; incomes accruing to participants in directed fisheries in both the short and long term; incomes accruing to participants in fisheries that target the bycatch species; environmental consequences; non-market values of bycatch species, which include non-consumptive uses of bycatch species and existence values, as well as recreational values; and impacts on other marine organisms.

(emphasis added). NMFS reiterated its emphasis on "net benefits" by providing that, when considering whether a particular measure minimizes bycatch "to the extent practicable" as required by the statute, Councils must "maximiz[e] net benefits to the Nation." (emphasis added).

Thus NMFS introduced in the bycatch context the age-old "net benefits" test; a test which failed to halt rampant overfishing of our nation's fisheries. The only qualifying phrase in the bycatch reduction mandate is that such measures are to be implemented "to the extent practicable." Under the common sense and legal meaning of this phrase, NMFS has discretion to reject conservation and management measures relating to bycatch only if such measures are not "performable," "feasible," or "possible." This approach is used, in part, because many of the benefits of conserving the environment, whether it be protecting water quality or minimizing bycatch, are hard to precisely quantify.

Indeed, where Congress intended to qualify its fishery management mandates with such a "net benefits" calculus, it explicitly has done so. For example, Congress used the "net benefit" standard in its definition of "optimum" (used in the "optimum yield" context). The fact that it did not explicitly so state in the bycatch context, therefore, shows that Congress did not intend for the "net benefit" standard to be used in connection with determinations concerning bycatch measures.

Commenters pointed out the problem with this approach in their comments to the draft guidelines:

[t]he central problem with the proposed guidelines [on bycatch] is that they interpret the phrase “to the extent practicable” to require a cost-benefit analysis and thus to require that short-term economic costs will be given more weight than other appropriate factors when determining whether bycatch avoidance measures are practicable. The primary problem with cost-benefit analyses is an insufficient ability to accurately quantify, and thus appropriately balance, long- and short-term conservation benefits against easily quantifiable short-term economic costs.

NMFS, however, ignored these comments, finalizing its draft approach and providing commenters with no response or justification on this point.

Inexplicably, moreover, NMFS rejected a similar approach in implementing the “essential fish habitat” provisions of the SFA, coming to precisely the opposite conclusion from the one it adopted on bycatch. In addition to bycatch minimization and prevention of overfishing mandates, Congress in the SFA included a mandate that NMFS “minimize to the extent practicable adverse effects” on essential fish habitat. (emphasis added). In response to NMFS’ proposed regulations implementing this provision of the law, several commenters noted that the proposed rule arguably required that a formal cost-benefit analysis be used to determine whether it is practicable to impose management restrictions on habitat damaging fishing activities.

NMFS then rejected this notion, stating that:

the Magnuson-Stevens Act does not require a formal cost/benefit analysis or a demonstration that the benefits of minimizing adverse impacts justifies the costs to the fishers.

NMFS also clarified the essential fish habitat rule “to avoid the interpretation that a formal cost/benefit analysis must be completed before taking action.”

Thus, the SFA provided NMFS with exactly the same standard in addressing bycatch and essential fish habitat: in both cases, protective measures are to be taken “to the extent practicable.” Yet NMFS interpreted “to the extent practicable” in two entirely different ways. With respect to bycatch, NMFS concluded that the “practicability” determination requires a “net benefit” analysis; with respect to essential fish habitat, NMFS concluded the opposite.

### ***Disasters Abound***

It is exactly this overly-broad interpretation of its discretion with whether and how to comply with statutory mandates that has led NMFS to make short-sighted management decisions. Not coincidentally, it also leaves the agency open to powerful political pressure to make such myopic decisions.

Once again, it is easiest to illustrate the problem through disasters. NMFS' handling of the New England groundfish provides a specific example. As the federal court noted late last year, it is

undisputed that after the SFA was enacted, [NMFS] did not adopt any new measures to minimize bycatch and bycatch mortality. ... Such an approach both ignores and frustrates the will of Congress. When it enacted the SFA, Congress made clear that it sought to “bring to a stop this inexcusable amount of waste.”

A few months later, in a widely reported instance, the court took the unusual step of issuing a remedial order providing detailed and significant “conservation steps to reduce overfishing and bycatch” in the New England groundfish fishery. The court was clearly uncomfortable doing this, aptly noting that it lacks the

rigorous, focused, scientific research, data and understanding which are absolutely necessary to develop long-term strategies for rebuilding stocks, preventing overfishing, and minimizing bycatch and its mortality.

In a particularly frank soliloquy, the court went on to state, moreover, that

Much of the blame for this situation can be laid at the feet of NMFS. It frequently misses its own deadlines for complying with statutory mandates, it drags its feet completing vitally significant marine research, and it is often the case that the federal courts must be called upon to force it to live up to its statutory obligations. The very fact that this Court is in the unenviable position of having to decide such an important issue on the eve of the [] deadline reflects the failure of NMFS to comply with the statute in a timely fashion.

### ***Bait and Switch in the North Pacific***

Once again, it would be a mistake to believe that the North Pacific is different in its SFA compliance than other regions of the country. Just as it was undisputed that no new bycatch measures were adopted in the New England

groundfish fishery after the SFA was enacted, so it is in the North Pacific. In fact, the chair of the North Pacific Council admitted as much in his remarks to the Pew Oceans Commission last year.

NMFS and the North Pacific Council do herald pre-SFA groundfish FMP amendments in their responses to criticism of their inaction in meeting SFA bycatch mandates. The amendments included a program called improved retention/improved utilization, which required all ships fishing in the groundfish fisheries to retain all pollock and cod caught after 1997 and all rock sole and yellowfin sole caught after 2002. The purpose of the program was to reduce the monumentally huge discard of groundfish in those fisheries – discards which occurred because the commercial fleet was killing and then dumping hundreds of millions of pounds of Pollock, cod and yellowfin and rock sole because they were the wrong size or sex.

The IR/IU program was supposed to result in less “waste” of such fish. The ships would be required to keep the fish and make some beneficial use of the previously discarded fish – primarily by turning it into fish meal. Also, because retaining less valuable fish draws resources away from catching and keeping the higher value fish, it was presumed that the ships would figure out a way to avoid catching the less desirable groundfish in the first place. This latter justification was supposed to be verified through a series of reports on the implementation of the program.

At first glance, the IR/IU program looks appealing. Almost overnight, the groundfish bycatch in these fisheries went from over 644 million pounds to 330 million pounds. Yet a deeper look reveals many flaws in this program that undercut any claim that it was a meaningful bycatch reduction measure.

First, NMFS and the Council knew that the discard of groundfish in the groundfish fisheries was so huge that it could have population-level effects if it were not accounted for in setting allowable catch levels. Under the IR/IU program this did not change – the once-discarded, now-retained fish are still dead, and thus are still factored into the allowable catch calculations. When viewed against the SFA two-part priority standard for dealing with bycatch – which requires first that bycatch be avoided and second that its mortality be minimized by returning it alive to the sea – the IR/IU program’s deficiencies are revealed. It meets neither of these standards. Under this program not one more fish is left alive in the ocean to fulfill its ecological role in that complex ecosystem.

Furthermore, the ‘promise’ of IR/IU as a bycatch reduction mechanism is further limited by the not unforeseen fact that the Council and NMFS revisited the application of the full retention requirement to rock and yellowfin sole, and have

retracted that part of the program that was to have gone into effect at the end of this calendar year.

Finally, to reiterate the point made above, neither NMFS or the North Pacific Council have instituted any meaningful FMP measures that either avoid bycatch altogether or minimize its mortality.

## ESSENTIAL FISH HABITAT

Fishing practices, pollution and other human-generated actions have long been known to impact fish habitat and to threaten marine life in the oceans. Some types of commercial fishing such as bottom trawling – where huge chain and tire-laden nets are dragged along the ocean floor to catch fish – destroy habitat considered critical to marine life. By crushing the sea floor, churning it over, or removing it as bycatch (as is the case with corals and sponges, among others), this habitat can no longer support the natural abundance of marine life that once lived there.

Knowing that these harmful practices threaten both the long and short term ability of the sea to sustain the diverse array of life found within, Congress made several findings in the SFA:

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

. . .

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.

. . .

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 in the United States.

Based on these findings, Congress declared that a new purpose of the Magnuson-Stevens Act is

to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that have the potential to affect such habitat.

Despite the new management paradigm called for in the SFA, and these strong words from Congress, NMFS has failed here in the North Pacific as well as elsewhere in the United States to implement significant new habitat protection measures.

## *Management Standards*

In order to implement the new system, Congress mandated that all fishery management plans

shall . . . 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.

This is the action standard that NMFS and the Councils must meet. Knowing NMFS' proclivity for delay, Congress also put a deadline of two years on the Council's submission of EFH amendments to NMFS.

The scope of habitat protections is delineated by the meaning of "essential fish habitat," which Congress defined expansively as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." Notably, Congress also defined the term "fish" broadly to include "finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds."

### *The "Essential Fish" Fallacy*

Unfortunately, NMFS got off on the wrong foot almost immediately in its implantations of this congressional mandate. In its regulations intended to implement this provision, NMFS used a very limited scope to its rules:

*Species covered.* An EFH provision in [a Fishery Management Plan] must include all fish species in the [Fishery Management Unit] FMU. A Council may describe, identify, and protect the habitat of species not in an FMU; however, such habitat may not be considered EFH.

Nothing in the Magnuson-Stevens Act or other law supports such a limited scope. The EFH provisions in the Magnuson-Stevens Act are not limited to simply those fish directly targeted by fishermen and managed by NMFS.

EFH must be addressed not just for FMP-managed species but also for other fish species that are important components of the same marine environment, contribute to the health of the ecosystem and fishery, and are or may be affected by activities authorized under the FMP. To do otherwise flies in the face of common sense, as well as the congressional findings and standards. It also flies in

the face of the very definition of the term “fish,” which is so expansively defined so as to include all marine life (except marine mammals and seabirds) and the term “fishery,” which is not limited to targeted and managed fish species. By placing the emphasis on two of the three words in the mandate -- “essential fish” as opposed to “essential fish habitat” – NMFS yet again undercuts the will of Congress and literally leaves non-commercial marine life without safe harbor.

### ***Fish Have No Safe Harbors***

In most of the eight fishery management regions in the country, EFH provisions have wallowed in the decisionmaking process, repeatedly bouncing back and forth between the Councils and NMFS with no meaningful amendments actually instituted.

In the Gulf of Mexico, for example, the Council bifurcated its approach to EFH, preparing draft EFH amendments that only purport to identify EFH. It stated that future amendments would be offered to meet the duty to actually minimize fishing impacts on EFH. Not content with this minimalist approach, the Gulf Council later changed the draft to state that little is known about the effects of fishing on habitat, and that management measures already in place were, in any event, sufficient to protect whatever EFH was actually in the Gulf. After voicing some objection, NMFS ultimately approved the amendment, including a provision stating that no further action to protect or conserve EFH than that which the Council had previously taken was necessary.

In New England, the Council also bifurcated its approach. It then prepared an EFH amendment which wholly failed to assess the effect of fishing gear on EFH. NMFS offered guidance to try and rectify this situation, yet the final amendment submitted by the Council to NMFS contained no assessment of fishing gear impacts on EFH. The amendment also stated that existing measures met the standards of the SFA. NMFS approved this amendment.

In the Caribbean, the Council actually identified measures that could be taken to minimize the effects of fishing on EFH, but included them only as “conservation recommendations” and not actual management measures. NMFS approved this amendment.

In the Pacific the Council essentially punted to NMFS to prepare an EFH amendment. NMFS therefore made specific recommendations to the Council on what it should do to meet its EFH obligations. NMFS stated that significant impacts to EFH might occur in the Pacific and recommended that the Pacific Council create gear performance standards to help assess impacts on EFH. The Council thereafter rejected all of NMFS’ specific recommendations due to a lack

of information concerning the impacts of fishing on EFH within the Pacific. NMFS approved the amendment despite the absence of specific impact-minimization measures.

And, last but not least, we return to the North Pacific, where more detail on the decisionmaking process serves to highlight how decisions are really made by NMFS and the Council. Here, NMFS made the decision to focus its resources almost exclusively on the designation and description of EFH, while deferring any serious 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.

While publicly available documents revealed that NMFS was aware of its obligation under the law to assess the impacts of fishing on habitat, and to take action to reduce those impacts, the Alaska Region of NMFS, in consultation with the North Pacific Council, made a deliberate decision to employ a two-stage process in which there would be no attempt to comply with the provisions of the SFA requiring that impacts of gear be minimized during the statutory time period. As the North Pacific Council staffer on NMFS' EFH Team described the process:

I will (again) **strongly** advise the core team against recommending additional measures (in addition to the sitka 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.

(emphasis added).

The “tasking plan” explains this decision with alarming candor:

While the Magnuson-Stevens Act requires the 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, as it has been above, 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 BSAI 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.

This decision may have been a product of the North Pacific Council's attitude towards EFH. From the beginning, NMFS staffers got the message from the North Pacific Council that habitat was not a priority, that it did not believe it had "any work to do in implementing EFH," and that the measures taken prior to passage of the SFA amendments largely satisfied its obligations to protect habitat from the impacts of fishing.

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 Committee, go on for 10 minutes on this. He said that this is why Congress passed EFH.

Despite this 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. Numerous parties, including the Alaska Chapter of the American Fisheries Society and NMFS Headquarters, pointed out to the Alaska Region that it had failed to propose any measures to reduce the impact of fishing on habitat.

When asked at a public meeting why NMFS was not taking measures to protect EFH in the FMP amendment, NMFS staff attempted to defend their decision by claiming that "the actual mandate by Congress doesn't call for proactive measures per se at this time." Upon further questioning and an insistence by the public that the law does in fact call for protective measures within the statutory period, a Council staffer explained the two-step process described above, admitting that neither NMFS nor the Council intended to comply with the law's mandate within the statutory period.

A NMFS staffer from Headquarters noted the absence of any analysis regarding the impacts on habitat from fishing gear and 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 scientific information available during development of the EFH FMP.

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. At this point, NMFS Headquarters failed to assert its previous objections, and approved the amendment despite its obvious failure to comply with the SFA.

This long recitation of how the EFH mandate has been implemented illustrates to what extremes NMFS and the Councils will go to avoid their legal duties. After significant legal and political wrangling over NMFS' avoidance of actually making any changes in the way fisheries are prosecuted, the agency finally agreed in writing to a specific nation-wide EFH amendment implementation schedule which has final decisions made in 2004. Thus the EFH provisions of the SFA will not be met until at least 6 years after the statutory deadline.

## **ENDANGERING OTHER LIFE AT SEA**

The above discussion illustrates the difficulty NMFS has in implementing meaningful measures to meet the environmentally-protective aspects of its fishery management mission. This difficulty extends to other laws that Congress charged NMFS with implementing, including the Endangered Species Act and the Marine Mammal Protection Act. The pattern here is the same – consumptive uses of our marine environment take precedence over protecting non-consumptive marine life. Moreover, NMFS struggles to this day with its implementation of our nation’s “charter for environmental protection:” the National Environmental Policy Act.

North Pacific-specific examples of problems with NMFS in these areas are presented below.

### **ENDANGERED SPECIES**

The Endangered Species Act reflects a Congressional commitment that protecting endangered species is “the highest of priorities.” The North Pacific contains numerous species that are listed as either threatened or endangered under the ESA. NMFS has the duty under this law as an “expert” agency to protect most of these listed species and promote their recovery to historic levels of abundance. The story of the endangered Steller sea lion is presented here as an illustration of how NMFS implements that duty.

#### ***The Missing Lion***

The North Pacific ecosystem, including the Bering Sea and the Gulf of Alaska, supports incredibly rich and diverse marine life, including marine mammals, marine birds, and an astonishing volume of fish. As in all ecosystems, these species are interconnected into a web of life that sustains the whole, including the humans who depend on it.

These North Pacific fish have become the focus of a massive fishery that catches over four billion pounds of fish per year, primarily pollock. As described above, hundreds of millions of additional pounds of non-target fish and other species also are caught, killed and discarded (“bycatch”). Coincident with the development of these fisheries, conducted mainly by trawlers that deploy huge nets capable of catching hundreds of tons in a single tow, the North Pacific

ecosystem has shown increasing signs of stress, to the point where the populations of several key species are markedly declining.

Steller sea lions inhabit coastal areas from Alaska to California, but the North Pacific is their main population center. NMFS separates the U.S. population of Steller sea lions into western (Gulf of Alaska and the Bering Sea/Aleutian Islands) and eastern (primarily Southeast Alaska and the west coast of North America) populations. The estimated western population of Steller sea lions in 1965 was about 230,000 animals, including pups. By 1996, this population had declined by 83%, to an estimate of 39,500. Within the western population's core area, from the Kenai Peninsula to Kiska Island, the population counts fell from about 140,000 animals, not including pups, to about 16,250 in 1998, a drop of 88%.

The precipitous declines in sea lions coincided in time and place with the development of high-volume trawl groundfish fisheries. According to the National Research Council,

[p]robably the most intriguing relationship between trawling and ecosystem patterns is the time-space correlation between intense trawl fishing and the declines in two marine mammal species, the Steller sea lion and the harbor seal.<sup>5</sup>

Significantly, in stark contrast to the Bering Sea and Gulf of Alaska, the relatively small eastern population of Steller sea lions is stable or increasing. These increases are particularly noticeable in Southeast Alaska, where the sea lion population grew from about 9,000 animals in the 1960s to about 14,600 animals in 1994; an increase of 62%. Similarly, harbor seals are increasing in Southeast Alaska, contrary to their drastic declines in the Bering Sea and Gulf of Alaska. Sea lions in Southeast Alaska eat much the same types of fish, primarily pollock, as sea lions in the Bering Sea and Gulf of Alaska. One notable difference between these two areas is that no high-volume groundfish trawling occurs in Southeast Alaska.

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<sup>5</sup> Unfortunately, sea lions are not the only marine mammals experiencing hard times in the North Pacific. Harbor seals have dropped by over 50% in many areas of the North Pacific. Fur seals have decreased by over 50% and are listed as "depleted" under the Marine Mammal Protection Act. Many species of marine birds also have suffered significant declines. The three species that compete most directly with the trawl fisheries for prey -- sea lions, harbor seals, and fur seals -- have suffered the most significant declines.

## *The ESA*

Section 7 of the ESA commands that:

Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of [critical] habitat of such species . . .

This section requires that an “action agency consult with an “expert” agency to determine whether a particular agency action is likely to jeopardize a listed species or adversely modify its critical habitat. The analysis and conclusions of the “expert” agency for formal consultations are packaged in a biological opinion (biop).

Because NMFS is both the “expert” agency (through its protected resources division) and the “action” agency with respect to fisheries management (through its sustainable fisheries division) it essentially consults with itself when considering whether fishery management actions jeopardize listed species or adversely modify their critical habitat.

### *“Preying” for Help*

Because of the alarming decline in its population, the sea lion was listed under the Endangered Species Act as threatened in 1990, and the western population was down-listed to endangered in 1997. Conservationists sued the agency in 1991 for, among other things, violating the Endangered Species Act (ESA), focusing on the agency’s ESA-required biological opinion (biop) analyzing the interaction between the Gulf of Alaska groundfish fishery and the sea lion. NMFS’ biops, up to that point in time, had concluded that the fishery was “not jeopardizing the continued existence” of the sea lion or adversely modifying its critical habitat. Prior to filing suit, the plaintiffs sent NMFS the required 60-day notice of intent to file suit under the ESA. NMFS thereafter prepared a new biop and, with the Council in tow, made some changes to the fishery. The lawsuit itself ultimately was lost. The changes to the fishery did not survive for long, as the agency and the Council returned to normal fishing patterns within a few years.

For the 1998 Gulf of Alaska fishery, NMFS approved a 60% increase in the allowable Pollock catch. As the sea lion population continued to plummet, conservationists once again sued NMFS for violating the ESA – though this time for both the Gulf of Alaska and Bering Sea/Aleutian Island groundfish fisheries. Again, one focus of the challenge was on NMFS’ “no jeopardy” biological

opinions evaluating the groundfish fisheries/Steller sea lion interaction. NMFS responded to the suit by seeking, and gaining from the court, a stay of the litigation while it reevaluated its compliance with the ESA. NMFS' first ESA-related action was to prepare a biological opinion examining whether or not fisheries for pollock or Atka mackerel, two main sea lion prey species, harm sea lions by competing with them for the same fish. ("Biop1"). NMFS' second ESA-related action was to prepare a biological opinion examining whether or not the entire groundfish fisheries in both the Gulf of Alaska and BS/AI were harming the sea lion ("Biop2").

In Biop1, NMFS' analysis focused on the adverse effects of fishing on the availability of sea lion prey, including localized depletions, concentrated catch in the winter season, and concentrated catch in space and in time, particularly in designated critical habitat. Based on this analysis, NMFS concluded that the pollock fishery was likely to negatively affect the ability of sea lions to survive and recover in the wild. Thus, for the first time, NMFS reached "jeopardy" and "adverse modification" conclusions in its biop with respect to the Pollock fisheries. Industry, which had intervened in the lawsuit, filed claims against the NMFS for this conclusion, a challenge that the court rejected.

Consistent with ESA requirements, once NMFS found that the pollock fisheries were jeopardizing the sea lion, it prepared "reasonable and prudent alternatives" (RPAs) which, if implemented, would avoid jeopardy. The RPAs included three "principles (temporal and spatial dispersion of fishing as well as pollock trawl exclusion zones) and gave examples of measures that would meet the "no jeopardy" objective. NMFS then gave the Council an opportunity to review and approve the RPAs, which it did after making some modifications to them. NMFS concurrently approved the final RPAs.

While agreeing with the agency's jeopardy conclusion, plaintiffs successfully challenged Biop1's Reasonable and Prudent Alternative ("RPA"). In ruling for the plaintiffs, the court noted that "the voluminous record does not contain a single sentence reflecting the *reasons* why NMFS found the final RPAs to be adequate ... NMFS has completely failed to analyze how these individual measures avoid jeopardy ...." (emphasis in original). The court also noted that NMFS was looking at the issue from a fishing rather than an endangered species perspective: "[NMFS] only looks at what would be 'consistent with past fishery practices and still provide[] a considerable reduction from the current' [catch] levels." Further, the court noted that the "Council's modifications to the RPAs aggravated this problem."

Plaintiffs also successfully challenged what purported to be a comprehensive biological opinion, ("Biop2"), intended to evaluate the combined

and cumulative effects of all of the federally-authorized groundfish fisheries on Steller sea lions and their habitat. The Court held that Biop2 violated the ESA because, among other failings, it did not consider the combined and cumulative effects of the numerous fisheries targeting sea lion prey, nor did it examine how the overall levels of catch affect Steller sea lions and their habitat. In its ruling, the court criticized Biop2 for several legal deficiencies, including its:

fail[ure] to meaningfully analyze such things as the processes by which annual catch limits are determined, the methods by which changes to these processes are implemented, the distribution of the fishery over time and space, exploitation rates, [and] overfishing levels . . . .

In addition, the court held that Biop2 did not explain or “critically analyze how core management measures such as the process for deriving acceptable biological catch, overfishing, and total allowable catch . . . relate to the conservation of the Steller sea lion.” The court also focused on Biop2’s failure to address the impacts of fishing on critical habitat designated for endangered Steller sea lions:

The requirement that an agency evaluate the effects of its actions on critical habitat is mandatory under the ESA. With respect to this crucial issue, Biop2 contains no meaningful analysis. . . . Biop2 does not even include such basic information as the estimated level of fishing in critical habitat, information that is key to analyzing the effects of fishing in those areas NMFS itself has designated as critical to sea lion recovery and survival.

As a result, the court held that NMFS was in “continuing violation of the ESA” until such time as the agency prepares “a comprehensive [biological] opinion adequately addressing the full impact of the [Fishery Management Plans].”

In response to the court’s ruling, NMFS later released a Fishery Management Plan-level biological opinion. (“FMP Biop”). The FMP Biop evaluated the effects of fishing for multiple groundfish species on the availability of fish to Steller sea lions, examining among other things, the temporal and spatial concentration of the fisheries. The FMP Biop also examined the overall fishing rate and its effect on sea lion carrying capacity.

In the FMP Biop, NMFS concluded that the groundfish fisheries were likely to jeopardize endangered Steller sea lions and adversely modify their designated critical habitat by competing with sea lions on three temporal-spatial scales: the global, the regional, and the local.

Specifically, NMFS determined that the temporal and spatial concentration of the fisheries reduced the abundance and altered the distribution of sea lion prey in a manner expected to reduce sea lion foraging effectiveness, which in turn reduces their likelihood for survival and recovery. At the global scale, NMFS noted that the status quo fishing strategy aims to reduce substantially over time the standing biomass of each exploited fish stock compared to what it would be in the absence of fishing. NMFS determined that the strategy “is reasonably likely to reduce significantly the availability of prey to other components of the ecosystem, such as Steller sea lions,” and recognized for the first time that “a link” exists between such “large-scale reduction[s] in fish biomass and the carrying capacity of Steller sea lions.” NMFS determined further that these reductions, along with other factors, “were a significant contributing factor of [sic] the reduction and current decline of the population of Steller sea lions.” Nevertheless, with regard to the jeopardy and adverse modification conclusions related to the overall fishing rate, NMFS concluded that achieving the fishing strategy’s target level for fish biomass would not cross the ESA threshold, but that exceeding the target level would.

Because the agency concluded that the fisheries violated ESA standards, the FMP Biop required the imposition of a Reasonable and Prudent Alternative, to address the adverse effects of the fisheries at the local, regional, and global scales. The RPA imposed four sets of measures: the complete closure of two-thirds of sea lion critical habitat to fishing for pollock, Pacific cod, and Atka mackerel (the three dominant sea lion prey species), both to alleviate fisheries effects and to create an “experimental design” to test the efficacy of closures; seasonal catch limits within the remainder of critical habitat to accomplish spatial distribution of the catch; a system of four seasons inside and two seasons outside critical habitat to accomplish temporal distribution of the catch; and a “global control rule” which purported to address the impacts of the overall fishing rate when fish biomass falls below the target level.

The FMP Biop and its RPA were opposed by industry. Within a month of the FMP Biop’s release, a rider was attached to appropriations legislation. See Pub. L. No. 106-554, § 209, 114 Stat. 2763 (2000). Although the language of the rider did not waive the application of the ESA to the groundfish fisheries, NMFS nevertheless interpreted the rider as allowing phased-in partial implementation of the RPA over the course of 2001. Rather than commit to implementing the FMP Biop’s RPA in 2002, NMFS instead participated in an industry-dominated committee (“RPA Committee” or “committee”) designed to develop an alternative fishing plan.<sup>6</sup> The process used by the committee to develop the alternative

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<sup>6</sup> Of the twenty-one members of the RPA Committee, eleven represented various segments of the fishing industry, six were state or federal employees, three

fishing plan for 2002 consisted largely of each industry sector putting in a proposal favored by that sector. NMFS evaluated and approved the final industry proposal in another biological opinion, issued in October 2001. (“2001 Biop”).

The industry-written plan approved in the 2001 Biop is very different from the RPA required by the Court-ordered comprehensive FMP Biop, and turns back the clock to a fishing regime similar to that which governed the fisheries prior to and in the early phases of this litigation.

Conservationists are currently challenging the FMP and 2001 Biops. The claims are as follows: First is a challenge to the conclusions of the FMP Biop and the 2001 Biop that the overall level of fishing allowed under the status quo fishery management plans, which the agency admits has affected carrying capacity for Steller sea lions, does not jeopardize the continued existence of Steller sea lions and adversely modify their critical habitat. Second is a challenge to the conclusion of the 2001 Biop that the industry fishing plan is not likely to adversely modify the designated critical habitat of the endangered western population of Steller sea lions. Finally, there is a challenge to the conclusion of the 2001 Biop that the industry fishing plan is not likely to jeopardize the survival and recovery of Steller sea lions. The court is likely to rule on these challenges before the start of the 2003 fishing season.

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represented conservation organizations, and one was an academic. See S8-20 (list of RPA Committee members).

## MARINE MAMMALS

Congress enacted the The Marine Mammal Protection Act (MMPA) in 1972 for the “paramount purpose” of protecting and conserving marine mammals. NMFS has the duty to administer the Act to protect and conserve most marine mammals in the North Pacific. The story of the Cook Inlet beluga whale is presented here as an illustration of how NMFS fulfills that duty.

### *The Smiling Whale*

Cook Inlet is a large tidal estuary approximately 220 miles long and 30 miles wide that flows into the Gulf of Alaska. It is also home to several species of marine mammals, including killer whales, harbor seals, harbor porpoises and beluga whales. The fresh and salt waters of the Cook Inlet watershed also support numerous species of fish, including several different species of trout, an anadromous forage fish called the eulachon, and all five species of salmon, millions of which return to the inlet annually.

The beluga whale is a relatively small, toothed whale with a maximum size of about 3000 pounds. Because of its upturned mouth, it is often considered the “smiling” whale. Juvenile beluga whales are gray in color, but turn white when they reach adulthood, typically at about age six. Beluga whales have a very slow rate of population growth; an increase of only about 4% per year under good conditions. The whales are highly social, and tend to feed and travel in groups of between ten and one hundred animals or more.

There are five distinct stocks of beluga whales in Alaska, with the Cook Inlet population being the most genetically distinct and reproductively isolated. NMFS has determined that the Cook Inlet beluga whale is the only population of beluga whales that inhabits the Gulf of Alaska, and that “the loss of [this] population would result in the complete loss of this species in the Gulf of Alaska, with little likelihood of immigration from other population segments into Cook Inlet.”

During the late spring and throughout the summer, Cook Inlet beluga whales congregate at river mouths in the upper inlet to feed on migrating runs of eulachon and salmon. Little is known about where Cook Inlet beluga whales spend their winters, although it appears that they do not migrate north, as do the other four Alaska populations. The only natural predator of the Cook Inlet beluga whale is the killer whale, which has been observed preying on belugas in the upper inlet, but accurate data on annual mortalities do not exist. Other natural threats include mass strandings. For instance, approximately sixty belugas stranded

themselves in Cook Inlet in July of 1999, and at least five mortalities were attributable to that event.

The annual return of the Cook Inlet beluga whale is greatly anticipated by the people of Anchorage and elsewhere in Cook Inlet. Groups of surfacing whales can be seen from downtown office buildings. Motorists heading down the Kenai Peninsula can see whales from the Seward Highway just south of Anchorage, and it is not uncommon for many vehicles to pull off the road to share in these moments.

Unfortunately, such spectacles occur with far less frequency today than in years past. Cook Inlet may have supported a population of 2000 whales or more in times past, and NMFS estimates that between 1000 and 1300 animals inhabited the inlet in the mid-1980s. Over the last two decades, however, NMFS calculates that the stock has been reduced to approximately 300 whales, which equates with 25 to 35 percent of its historical abundance.

Much of this decline can be attributed to overharvesting by Alaska Natives for subsistence and commercial purposes. NMFS estimates that the annual harvest between 1995 and 1998 averaged 78 whales, which far exceeds the reproductive capacity of the stock. The role of other factors in the decline is not yet clear.

In addition to hunting and potential impacts from oil and gas development, other human-caused threats to the Cook Inlet population of beluga whales include entanglement in commercial fishing gear, health impacts from pollutants, noise from seismic testing and other sources, and collisions with ships, motorboats, and personal watercraft.

### ***Development in and Around Cook Inlet***

Cook Inlet is bordered on the North and East by the most developed area in Alaska, which supports over half of the state's population of 600,000. Anchorage, by far the state's largest city at roughly 260,000 people, is the transportation and commercial hub of Alaska. The Municipality of Anchorage, operating pursuant to an EPA waiver, discharges into Cook Inlet some 44 million gallons a day of wastewater and sewage that receives only primary treatment (i.e., only solids are removed), even though the Clean Water Act required all publicly operated treatment works to have secondary treatment by 1977.

The Port of Anchorage is the largest seaport in the state, and accommodates containership, general cargo, and petroleum product traffic. Other oil-loading ports include those at Drift River on the west side of the inlet and Nikiski on the east.

Significant oil exploration and drilling activities occur in Cook Inlet. Oil and gas were found on the Kenai Peninsula in the late 1950s, and by the 1970s, there were fifteen offshore oil platforms, three onshore treatment facilities, and roughly 230 miles of undersea oil and gas pipelines in upper Cook Inlet. Oil production peaked in 1970 at 80 million barrels annually, but declined to about 15 million barrels annually during the 1990s. Some of the crude oil is refined at facilities on Cook Inlet, while the rest is shipped to California. The offshore oil platforms in Cook Inlet collectively discharge some 89,000 barrels of pollutant-laden waters into Cook Inlet annually.

### ***The MMPA and the ESA***

Under the MMPA, NMFS has an obligation to assess populations of marine mammals. If a population falls below a sustainable level, NMFS can designate it as “depleted” under the MMPA. Once NMFS designates a marine mammal stock as depleted it “*shall* prepare a conservation plan...as soon as possible ... except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.” NMFs must also “act expeditiously to implement each conservation plan.”

If a population of marine mammals falls even further, NMFS may consider listing it under the ESA. Such decisions are based “solely” on the “best scientific and commercial data available.” NMFS must list a species if the species faces (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.

### ***The Frowning Whale***

In 1999, NMFS initiated a status review of the Cook Inlet beluga whale under the ESA. Near that time, a coalition of conservation groups and an Alaska Native subsistence whale hunter petitioned NMFS to list the species as endangered on an emergency basis. NMFS quickly responded by taking the first step in the formal listing process: determining that such a listing “may be warranted.”

As early as 1996, NMFS realized that the Cook Inlet beluga whale population was declining significantly, and that overharvest by Alaska Natives was playing a significant role in that decline. A 1996 NMFS paper titled, “Options to Reduce the Subsistence Harvest of Cook Inlet Beluga Whales,” notes that the population was in decline, that Native hunters were taking far more whales

than the population could sustainably support, and that “a few hunters take a majority of the Cook Inlet whales and are selling (legally) the muktuk (skin with blubber attached) to other Alaska Natives through a Native market in Anchorage.” This paper outlined a number of different policy options for curtailing the hunt, yet NMFS did not implement any of them, and at least 100 more whales were killed over the next two seasons.

Finally, in February 1999, the Alaska Region of NMFS made a formal recommendation to headquarters to list the Cook Inlet beluga whale pursuant to the ESA. A supporting memo from the Protected Resources Division to the Regional Administrator makes the following observations:

This genetically isolated stock, currently estimated at 347 whales, has been declining at 15% per year since 1994. Though perhaps not the ultimate cause of the population decline, current estimated levels of annual beluga harvest can remove 20-30% of the population. At this level, this stock could be extinct within 10 years.

Protected Resources therefore recommended that NMFS pursue an immediate ESA listing.

NMFS’ Regional Administrator thereafter recommended to Headquarters that the species be listed “as soon as possible.” In addition, because the protections for whales from listing could not be put in place before that year’s hunting season, the Regional Administrator also recommended that NMFS “[s]eek a legislative action to impose a harvest moratorium or restrictions of Cook Inlet beluga whales for 1999.” Significantly, in the Region’s view these were not alternative courses of actions, but rather complementary ones. Just a week later, a memo and attached briefing paper from the Director of the Office of Protected Resources to the Deputy Administrator of the agency notes the extreme risk faced by the species and states that an ESA listing “[i]s the most effective method by which to avoid extinction.” (emphasis added).

When the top marine mammal scientists in Alaska, and the nation at large, have considered the plight of the Cook Inlet beluga whale in the context of the listing debate, all have come to the complementary conclusion that a listing is the right decision to make. These experts include the Director of the National Marine Mammal Laboratory (NMML) at NMFS, the Marine Mammal Commission, the Alaska Scientific Review Group, and a recently retired Alaska Department of Fish and Wildlife biologist who is acknowledged as the foremost expert on beluga whales in Alaska.

For example, Dr. Doug DeMaster, who is one of the agency’s leading

experts on marine mammals, stated that

while the data are not conclusive towards a listing, they are compelling. I think most knowledgeable scientists would support a listing decision in the absence of politics because of the ESA charge to err on the side of the animal; although as to whether they would go endangered vs. threatened is hard to predict. Given the [sic] this population likely has a relatively small carrying capacity and given we seem to understand the cause of the recent decline, I suppose the scales might tip towards threatened – but it would be a tough call.

The Marine Mammal Commission (“Commission”) is a federal agency organized under the Marine Mammal Protection Act that, among other things “recommends to the Secretary [of Commerce] such revisions of the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973, as may be appropriate with regard to marine mammals.” The Commission has, on no fewer than three occasions, formally recommended to NMFS that it list the Cook Inlet beluga whale under the ESA. On the last of these occasions, the Commission, upon learning in December of 1999 that NMFS intended to proceed with a depleted designation under the MMPA, wrote as follows:

Although overharvesting is the primary threat to the Cook Inlet beluga whale population, it is not the only threat. As was noted at the Commission’s annual meeting, the population, simply because of its reduced size, may be susceptible to extinction due to stochastic events such as strandings. Other possible threats to this beluga stock noted at the Commission’s meeting include oil and gas development and production and impacts from other commercial enterprises, such as operations at the Anchorage airport, which is located at the northern end of Cook Inlet.... The Marine Mammal Commission therefore recommends that the Service publish a proposed rule to list the Cook Inlet beluga stock as either endangered or threatened.

(emphasis in original).

Other forces were also hard at work, however. Concerned with the potential economic ramifications of an ESA listing, Alaska’s Congressional delegation, the State of Alaska, and other economic interests heavily lobbied NMFS not to list the Cook Inlet beluga whale. For instance, a summary of public comments on the status review notes that a Marine Mammal Protection Act

(MMPA)<sup>7</sup> listing would be favored over an ESA listing “[t]aking into account the political climate on this issue.” Similarly, handwritten notes from 1999 indicate that an ESA listing is “[l]ikely to be held up on political reasons.”

Political pressure began to build as demonstrated in an internal NMFS email message: “From the sudden flurry of calls from both NMFS personnel as well as congressional staff, I think people are beginning to get nervous about a potential listing under MMPA/ESA for CI Belugas.” That pressure becomes palpable in another message that day, which was eventually forwarded to the head of the Protected Resources Division:

Congressional staff is [sic] also renewing their interest in this matter. Dave Whaley (Rep Young) and Trevor McCabe (Sen. Stevens) have been talking to Peter Hill and myself about this issue. It is their opinion that NMFS should proceed immediately with a listing under MMPA \*\*\*NOW\*\*\*, so that we avoid being forced to go with a listing under ESA. In any case, they are pushing harder and harder for a decision from NMFS, and very soon the AK delegation will begin to call Terry Garcia [then head of NMFS] on this issue.

This pressure from the Congressional delegation apparently paid off, as an August 1999 briefing paper on NMFS’s decision to pursue an MMPA listing notes that one of the “factors which support the recommended action” is that “interest among the Alaska congressional delegation is high, which [sic] opposes an ESA listing . . . .” That same agency memo, however, notes that the Cook Inlet beluga whale “presently meets some or all of the qualifications for listing under both the ESA and the MMPA.”

Perhaps the best evidence of economic and political considerations appears in the final decision memos on ESA listing that progressed up the chain from the head of the Alaska Region, to the head of NMFS, and finally to the Under Secretary of Commerce during May 2000. In a memo recommending against listing, which constituted an unexplained complete reversal of his previous position, the Administrator of the Alaska Region wrote to the head of NMFS that “[e]conomic interests have expressed concern that a listing under the ESA would have a devastating effect on the regional economy.” The head of NMFS then wrote to the Under Secretary that “[t]he Alaska Congressional delegation have expressed interest in this finding. . . . and would likely agree with the determination [not to list].” She also noted that “[t]he State of Alaska and regional industries

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<sup>7</sup> The Marine Mammal Protection Act protects marine mammals largely by regulating direct and incidental takings, and does not contain the ESA’s mandatory consultation requirements.

have voiced opposition to listing under the ESA.”

What happens next is unclear, although the political factors discussed above likely played a part. In May 1999, NMFS was successful in securing a Congressional moratorium on subsistence hunting. The moratorium outlawed subsistence harvest of Cook Inlet beluga whales except pursuant to a valid co-management agreement between NMFS and an Alaska Native Organization. The moratorium lasted through October 1, 2000, but was subsequently extended through fiscal year 2001.

Following imposition of the moratorium, the impetus within the agency shifted from pursuing an ESA listing to instead making a “depleted” finding under the MMPA. NMFS published a proposed MMPA “depleted” rule in the Federal Register on October 19, 1999, and a final rule on May 31, 2000. In the meantime, the ESA listing languished. NMFS failed to comply with the ESA’s requirement that it publish a determination on the petition within one year of its filing, or by March 3, 2000.

NMFS finally published its “twelve-month finding” on June 22, 2000. AR-A10. Despite its acknowledgment that “[n]o other population of marine mammals is as small as the CI beluga stock and is not listed under the ESA,” and its prior internal determination that listing was warranted, NMFS found that listing the Cook Inlet beluga whale “is not warranted at this time,” citing its belief that hunting is the only significant threat to the continued existence of the species, and that an “adequate regulatory mechanism” exists to control the harvest. NMFS discussed the other potential threats to the Cook Inlet beluga whale in various levels of detail, yet, while acknowledging that there was very little data on most of those factors, nevertheless concluded that they did not present any significant extinction risk to the population.

NMFS listed the Cook Inlet beluga whale as depleted under MMPA in May of 2000. As of mid-August 2002, the Secretary has conducted minimal efforts to comply with the annual report provision and has failed completely to implement a conservation plan for Cook Inlet stock of beluga whales.

As this story demonstrates, NMFS failed in its duty to rely on science, and only science, when making this ESA listing decision – indeed, the available evidence reveals that NMFS allowed political factors to chart its course. In the end, NMFS bent to political pressure like a willow tree bends to the wind. To exacerbate the problem, NMFS has also failed to comply with its “back up” MMPA strategy: its inaction in preparing or implementing a recovery plan flies in the face of its duty to act “as soon as possible” and “expeditiously” within the meaning of the MMPA.

## NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (“NEPA”) is “our basic national charter for protection of the environment.” NEPA’s purpose is to promote efforts “which will prevent or eliminate damage to the environment,” to inform the public of environmental consequences, and to “help public officials. . . take actions that protect, restore, and enhance the environment.”

The fishery management process, with its club-like Council meetings and vast geographic coverage, is particularly well-suited to using the NEPA process to involve the public in its decisions and inform the decisionmakers of the concerns of all but the paid lobbyists and fishers who frequent fishery management council meetings. NMFS and the Councils, however, have struggled mightily with NEPA, disregarding its many benefits out of apparent concern for its resource costs, though many suspect it is also out of fear that NEPA may actually force a change in the way business is done.

Described below are two examples of how NEPA is not achieving its full vision as applied to the oceans. The first deals with a fast-developing Bush Administration end run around NEPA for the oceans; a position which NMFS apparently supports. The second is directly related to NMFS NEPA compliance in the North Pacific fishery management context, though it has significant precedential value for FMPs throughout the country.

### *The Legal Mandate*

NEPA requires that federal agencies prepare detailed environmental impact reviews for federal actions which may impact the environment. An in-depth “environmental impact statement” (EIS) is required for all “major federal actions significantly affecting the quality of the human environment.” Projects with less-than-significant impacts generally go through a less-comprehensive “environmental assessment” (EA) process. NEPA reviews should examine the direct, indirect and cumulative impacts of the proposed federal action and they should include a slate of alternatives which serve to inform the public and decisionmakers of ways in which impacts can be avoided or minimized.

Because NEPA is intended to allow for meaningful public participation in agency decisions, and inform officials making such decisions about the potential environmental impacts of an action before the agency starts down an irreversible path, it is a primary tenet of NEPA that such reviews be accomplished prior to the final agency decision. In this manner information gleaned from the NEPA process

can be used to structure (or restructure, as the case may be) agency action to be more sensitive to the environment.

NEPA also contains the common sense requirement that new environmental analyses periodically be prepared for ongoing federal actions if either of two conditions are met: 1) if the federal action changes in a manner which may change its environmental impacts and/or 2) if new information comes to light about the environmental impacts of the ongoing federal action. Both the original EIS duty, and the “supplemental” EIS duty described here apply to agency management “programs” such as FMPs. EISs prepared for such programs are commonly labeled “programmatically EISs”.

### ***The End Run***

As an initial matter, the Bush Administration, with the apparent support of NMFS, is attacking NEPA’s application to the oceans under the control of the United States. This bold move threatens the public environmental review that has become the hallmark of federal agency decisionmaking in the United States. Public comment, public scrutiny (for all but those few who can afford the time and expense of attending Council meetings) and judicial review of fishery management decisions would be all but set aside if the Administration has its way. Such a move is damaging – and ironic -- given the dysfunction in the current fisheries management regime as it will further insulate an already inaccessible process.

### ***Tunnel Vision***

NMFS and the North Pacific Fishery Management Council began managing the North Pacific groundfish fisheries after passage of the Magnuson Act in 1976. NMFS published an EIS for the Gulf of Alaska Fishery Management Plan in 1978, and an EIS for the Bering Sea Fishery Management Plan in 1981. As NMFS has noted, these Plans and their EISs addressed not only catch levels, but also where, when, and how the fish are caught, other marine animals, bycatch, habitat destruction, and socioeconomic issues.

Each of these Plans has been amended over 60 times. To encourage the development of a domestic trawl fleet, the very first amendments eliminated substantial no-trawl zones throughout the Bering Sea and Gulf of Alaska that previously had been closed to foreign trawlers to protect halibut, crab, and other resources. *Id.* The amendments since then have addressed all the Plan subjects listed above and created a hodgepodge of regulations, from allocating the trawl catch among industry sectors to attempting to reduce the impacts of trawling on marine mammals and other marine life.

The trawl fisheries and their environmental impacts have changed dramatically since the original EISs. Most important, severe declines have occurred in sea lions, harbor seals, and fur seals, all of which eat the same fish targeted by the trawlers. The size and catching capacity of the trawlers has grown immensely, accompanied by a tremendous concentration of the trawling into critical habitat areas during crucial times. In addition, the fisheries have become much more focused on roe-bearing, spawning fish, especially pollock, with significant consequences for marine mammals and for the fish stocks themselves. In the last decade the total biomass of most of the targeted fish stocks has decreased substantially, including the spawning stock which is necessary to sustain the fisheries.

Bycatch has also become a huge problem, as the trawlers catch, kill, and discard hundreds of millions of pounds of non-target animals, with impacts to marine mammals and to other fisheries such as halibut and crab. Bottom trawling, which disrupts the structure and life of the ocean floor, also has been recognized as a significant problem. As discussed above, Congress recognized and addressed these problems by amending the Magnuson Act specifically to (1) add the minimization of bycatch as a standard for all fishery management plans, (2) require submission of a new plan to minimize bycatch within two years, (3) particularly require the North Pacific Fishery Management Council to submit annual measures to lower the amount of economic discards occurring in its fisheries, and (4) require management plans to identify essential fish habitat and minimize the impacts of fishing on this habitat.

Despite these changed circumstances, for the last 20 years NMFS has authorized the fisheries pursuant to Environmental Assessments (EAs), which primarily considered the catch levels and groundfish abundance. Even NMFS' attorneys warned that these EAs were illegal because:

The primary problem with the EA . . . is that the wide range of environmental impacts that likely occur from activities authorized by the groundfish fishery regulations have never been thoroughly analyzed in any EIS.

As long ago as 1990, NMFS staff recognized that the environmental documentation supporting the Plans was “grossly inadequate,” and that “[a] thorough reassessment of the [Plans] that fully evaluates the existing fishery, environmental conditions, and cumulative effects will still be necessary to comply with NEPA.”

Despite this recognition in 1990, NMFS did not initiate the required EIS until 1997, after conservationists sent them letters demanding new EISs and detailing the reasons, mentioned above, as to why new EISs are required by NEPA. The only hint of an explanation for this prolonged failure to obey NEPA was the concern that preparing an EIS might be “unnecessarily burdensome on the minimal staff” NMFS might make available for the job.

Finally though, NMFS published a scoping notice for an EIS which would “supplement” the original EISs (thus creating an “SEIS”) and “incorporate” the Plan amendments, the annual catch-setting processes, and the processes for revising regulations. As recognized in this notice, these processes:

encompass decisions about location and timing of each fishery, harvestable amounts, exploitation rates, exploited species, groupings of exploited species, gear types and groupings, allocations, product quality, organic waste and secondary utilization, at-sea and on-land organic discard, species at higher and lower trophic levels, habitat alterations, and relative impacts to coastal communities, society, the economy, and the domestic and foreign groundfish markets.

Despite this broad scoping notice, the Draft SEIS followed the pattern of the agency’s past EAs by narrowing its scope solely to the setting of the catch levels, and constricting its range of alternatives only to three levels of catch. Thus, like the EAs, the Draft SEIS failed to analyze thoroughly “the wide range of environmental impacts that likely occur from activities authorized by the groundfish fishery regulations,” AR III, 347 at 1, including the many impacts, decisions and alternatives outlined in the agency’s own scoping notice. NMFS isolated one aspect of its management -- the catch limits -- for study and analysis and eliminated all other aspects from detailed analysis or consideration in the range of alternatives.

The artificial constriction of the scope, range of alternatives, and analyses of the Draft SEIS was troubling to many reviewers, including the Environmental Protection Agency. EPA rated the Draft SEIS “EO-2, ” for “Environmental Objections - Insufficient Information,” (its second-lowest rating), and specifically commented:

We believe that the lack of information and analysis on many species found in the ecosystem, and the limited scope of the SEIS’ proposed action alternatives to Total Allowable Catch (TAC) frustrates NEPA requirements to analyze for, and avoid or minimize direct, indirect and cumulative impacts . . . can the impact of these fisheries be avoided and minimized by just varying the TAC?”

The following NMFS admission, drawn from an internal memo summarizing critiques of its NEPA process, captures the agency's illegal approach to the EIS:

CEQ wonders why the subject of the SEIS is the setting of the TAC rather [than] a broader scope such as reconsideration of the fishery management plans with all their amendments? (NMFS had pondered that and abandoned it as being far too big an undertaking).<sup>8</sup>

NMFS thereafter published a Final SEIS on December 18, 1998. Significantly, the Final SEIS admitted that it was intended to be a "programmatically" analysis, FSEIS at 2, and specifically cited the NEPA regulation describing a program EIS as being of "broad scope." Nonetheless, the Final EIS repeated all of the deficiencies of the Draft SEIS: a narrow scope, a range of alternatives that varied only in the levels of catch, and inadequate analyses of significant environmental impacts.

Despite these inadequacies, the agency claimed that its "examination of the fishery under alternative [catch] levels would result in a practical analysis of the environmental impacts of the fishery." FSEIS at 3. In contrast, as quoted before, the more accurate explanation for these deficiencies was that "NMFS had pondered" a broad EIS addressing the full range of the fisheries' impacts and "abandoned it as being far too big an undertaking." Internal correspondence from NMFS noted that "many of [the conservationists'] comments [on the Draft SEIS] "appear valid," but that it would take "A LOT of work to upgrade EIS accordingly.")

Once again, EPA severely criticized the FSEIS. EPA's comments pointed out that, despite the public's calls for ecosystem management and protection of sensitive species, the scope was reduced only to catch variations. This also ran counter to the broad scoping notice. The EPA emphasized that NEPA mandated the inclusion of more comprehensive alternatives that "programmatically address[ed] all elements of the FMP." (emphasis added). EPA concluded "we . . . believe that the current document should not serve as a baseline for future TAC documents."

Conservationists challenged the Final SEIS in court, and the court agreed on all points with the critics of NMFS' approach. Notably the court was highly critical of NMFS' assertion that "an examination of the fishery under alternative

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<sup>8</sup> CEQ -- the Council on Environmental Quality -- is the agency responsible for overseeing NEPA compliance.

TAC levels would result in a practical analysis of the environmental impacts of the fisheries.” While the court rejected this notion on its merits, is also expressed, in strong language, its dismissal of NMFS’ argument that the court should defer to NMFS’ judgment on this point:

The SEIS completely lacks any explanation of *why* and *how* analysis of TAC levels “results in a practical analysis” of the impact of the fisheries, as governed by a myriad of regulations. ... Judicial deference to such an unexplained assertion on a critical point would render judicial review meaningless. ... The Court cannot excuse NMFS’s total failure to analyze or explain this critical point.

This ruling sent NMFS back to the NEPA drawing board. After further delay, and under the watchful eye of the court, NMFS issued a revised Draft SEIS. Unfortunately, while it was a significant step forward in terms of analyzing the impacts of the fisheries, NMFS still showed reluctance to presenting any truly reasonable alternatives to the status quo. Each of the alternatives in the revised SEIS focused on protecting one component of the environment to the exclusion of others, and without regard to the full range of the agency’s statutory mandates. For instance, only one set of alternatives, Alt. 2.1 and 2.2, seek to achieve a meaningful level of protection for Steller sea lions, as required by the Endangered Species Act (ESA).

Since the Fishery Management Plans must, as a matter of law, protect Steller sea lions, all of the alternatives must do so as well. While SEIS alternatives can and should look at various ways to provide the protection required by the ESA, each must also comply with the minimum standards of that law, as well as each of the other laws that govern management of the oceans, such as the Magnuson-Stevens Act and the Marine Mammal Protection Act. The alternatives in the second Draft SEIS did not do that.

NMFS received over 17,000 comments on this Draft SEIS, many making the point that the alternatives presented in the draft were not reasonable. After a suitable period of hand-wringing, NMFS finally agreed to, once again, review the SEIS and prepare another draft for public review and comment – this one scheduled for release sometime in 2003. Early indications are that the range of alternatives analyzed in the new draft SEIS are structured in such a manner as they also suffer from the deficiency that not one can actually be implemented as agency action.

It is worth noting that nowhere else in the nation has NMFS completed a programmatic EIS for its FMPs: the SEIS being prepared for the North Pacific groundfish fisheries is the first of its kind in the nation.

## SUMMARY

Several general observations can be made from the situations described above.

- When NMFS or the councils suspect they will not like the answer to a particular question, they will go to great lengths to ensure the question does not get asked.

This dynamic is particularly apparent in the discussions above concerning the lack of standardized bycatch reporting methodology in New England and the North Pacific, and in the systemic failure of NMFS to comply with the environmental review provisions of the National Environmental Policy Act.

- NMFS often does not provide an explicit justification for its decisions, thus providing little transparency to its decisionmaking, frustrating the public and precluding meaningful debate.

NMFS specifically was criticized for this failure by courts in the New England groundfish fishery and Steller sea lion situations described above. The examples above concerning NMFS' promulgation of the bycatch guideline and North Pacific bycatch reporting mandates also support this observation.

- NMFS often ignores the express will of Congress, and will unilaterally modify its legal duties to give itself greater discretion.

Examples supporting the first point come from New England, where the court expressly found this to be the case, as well as with NMFS' non-compliance with statutory bycatch reporting and minimization mandates and EFH mandates. A good example supporting the second point is the bycatch guideline.

- This discretion leaves NMFS vulnerable to undue political influence from commercial interests.

New England is perhaps the prime support for this observation, though other examples such as the summer flounder case illustrate it as well.

- NMFS has little political strength to accomplish its mission – it suffers from an inferiority complex created by its basement-level placement within a non-germaine federal agency.

The plight of the Cook Inlet beluga and the Steller sea lion are prime examples of how this dynamic influences specific management decisions.

Time and again NMFS and the Councils have revealed themselves to be incapable of implementing basic conservation-oriented actions when the best available information mandates such an approach. They have also failed to act in a precautionary manner where such information is not available. The overall theme from this history is readily apparent: the interests of consumptive users of the oceans repeatedly are put ahead of the protection of living marine resources.

## **RECOMMENDATIONS**

The current management U.S. regime for controlling human interactions with living marine resources is not working. Drastic change is necessary to chart a course toward a day when all life when the health and diversity of our marine ecosystems is truly the number one priority of management, with consumptive uses permitted only once its impacts to this health and diversity are avoided altogether or minimized to acceptable levels.

This change should address the problems with the current system as identified above, and come through new federal legislation which would include the establishment of a new administrative structure. Such legislation should include the following.

### **A NEW NATIONAL OCEANS POLICY**

Congress should announce a new policy aimed at protecting and restoring the health, abundance, diversity and functioning of marine life, ecosystems, food webs and habitats. Activities that may affect the ocean should not be allowed unless the proponent demonstrates that the activity will not harm the ocean, or that everything that can be done has been done to minimize the impacts of the activity on the ocean. In no case shall an activity that significantly harms the ocean be allowed. Use of the precautionary principle should also specifically be mandated.

### **DEPARTMENT OF THE OCEANS**

Congress should create a new, independent agency to implement U.S. Oceans policy, coordinate and regulate activities impacting ocean organisms, ecosystems and habitats, and to oversee and administer funding for scientific research concerning ocean ecosystems. Such a Department of the Oceans would be headed by a cabinet-level secretary and would be subdivided into divisions, including a Protected Species Division, a Marine Fisheries Division, and a Marine Ecosystem Assessment Division. There could be other divisions representing various functions of the Department.

The current Fishery Management Council system should be abolished, and management of living marine resources should be removed from NMFS and the Department of Commerce and placed within a new federal agency. NOAA and the Coast Guard should become part of the Department of the Oceans.

## **REGIONAL ECOSYSTEM PLANS**

Regional marine ecosystem plans should be prepared and implemented and would serve as the overarching management document to guide human interaction with the marine environment. Management plans for specific proposed human uses of the oceans, such as commercial fishing, would fall under the umbrella of these regional plans.

## **MARINE PROTECTED AREAS**

The new national oceans policy should authorize and obligate the Secretary to designate marine protected areas.

## **APPLICATION OF NEPA**

The new law should emphasize that the National Environmental Policy Act applies to all federal action in U.S. waters.

## **TRANSPARENCY OF DECISIONMAKING AND CITIZEN ENFORCEMENT**

The law should include provisions to ensure that an open and public process is used prior to final agency action. It should also allow for citizens to sue to enforce provisions of the law.