

**Testimony of
JACK K. STERNE
Staff Attorney, Trustees for Alaska
before the
U.S. COMMISSION on OCEAN POLICY
August 22, 2002**

Thank you, Mr. Chairman. My name is Jack Sterne, I am a staff attorney with Trustees for Alaska. You heard from our litigation director Peter Van Tuyn yesterday. My practice at Trustees is focused almost exclusively on ocean conservation issues, and I have been one of the primary lawyers in the Steller sea lion case over the course of the last four years.

First, I want to respectfully disagree with a few assertions made here yesterday, such as the notion that killer whales are responsible for the decline of almost every marine mammal in Alaskan waters, especially those that are the subject of litigation. While killer whales prey on seals, sea lions, and sea otters, we simply do not have enough baseline data to even begin to estimate what effect such predation might have on population levels. In Southeast Alaska, which has a very healthy population of orcas (and no large-scale trawl fisheries incidentally), sea lions are on the increase. We are just beginning research in the Aleutian Islands to determine how many killer whales there are, and what percentage are marine mammal eaters. The decline of the sea lion is a complex problem that likely has multiple causes. We should resist the temptation to look for single factor explanations for this or any other problem in the oceans.

I have also heard a great deal of discussion about how the pollock stocks are in such great shape and how the North Pacific has never had an overfished fish species. However, of the four major pollock stocks off Alaskan waters, only 1 out of the 4 – Eastern Bering Sea pollock – can be considered anywhere close to healthy. The other three – Gulf of Alaska, Aleutian Islands, and Bogoslof pollock – are all at or near record low levels. For instance, the Bogoslof pollock stock used to have a biomass in excess of 2 millions metric tons in the late 1980s, when it was heavily exploited, but is now somewhere close to 300,000 tons. While fishing on this stock was stopped during the last decade, it was never declared overfished, for reasons that have never been made clear. I only bring up these points to correct what I think was an overly rosy picture of management presented yesterday.

I'd now like to turn to a bigger issue, which is the very questionable constitutionality of the Council system itself, and the implications it carries for the public accountability of that system. The Department of Justice itself has noted that the regional fishery management councils are "unique creations within the federal government and present very difficult constitutional questions regarding their structure and functions."¹

The most significant constitutional infirmity in the Magnuson-Stevens Act is § 304(h), which mandates that the Secretary of Commerce can repeal or revoke a fishery management plan

¹ H. Rep. No. 104-171, at 45 (1995) (Letter from Kent Markus, Acting Asst. Atty. General, Dept. of Justice Office of Leg. Affairs, to Rep. Don Young, Chairman, House Committee on Resources).

only if a three-fourths majority of the voting members of the Council approves of such an action.² By making secretarial action subject to what amounts to a veto by the Council, this provision of the Act runs afoul of the Appointments Clause of the United States Constitution,³ which requires that any official within the federal government who exercises significant authority be appointed by one of the constitutionally prescribed methods.

The purpose of the Appointments Clause is to prevent any single branch of the government from wielding too much power in appointing federal officials, and, most importantly for our purposes, “to prevent the diversion of power to individuals not accountable to the electorate.”⁴ Thus, public accountability is paramount in our democratic system of government.

There is no question that certain members of the Councils are not appointed by one of these methods, and so they may not be delegated significant authority.⁵ Yet in § 304(h) of the Act, we have officials who are outside the federal system of government exercising supreme authority over the manner in which the Act is implemented, by virtue of their veto power over the Secretary.

Similarly, were the Secretary to decide that some type of limited access system were necessary to provide for the conservation of the resources under his control and decided to adopt such a program through a secretarial FMP or amendment to an FMP, he would be barred from doing so without the approval of a majority of the voting members of the appropriate Council.⁶

While it is admittedly rare that these provisions actually come into play directly in the day-to-day interaction between the Secretary and the Councils, they convey a potent message about the power relationships between these two bodies. It is the Councils, not the Secretary and the agency, that have the real power in the area of fisheries management, both by virtue of their veto power, and because of the limited ability of the Secretary to reject any amendment or FMP submitted by the Councils.⁷

Being keenly aware of this fact, the Secretary and NMFS behave accordingly, and have become in many ways little more than a rubber stamp for the plans put forward by the Councils.

² 16 U.S.C. § 1854(h).

³ U.S. Const. Art. II, § 2, cl. 2.

⁴ John C. Yoo, 15 Const. Comment. 87, 103 (1998), citing Freytag v. Comm. of Internal Revenue, 501 U.S. 868, 883 (1991).

⁵ See Buckley v. Valeo, 424 U.S. 1, 124-41 (1976) (per curiam).

⁶ 16 U.S.C. § 1854(c)(3). The State of Connecticut attempted to raise precisely these issues in Connecticut v. Dept. of Commerce, 204 F.3d 413, 415-17 (2nd Cir. 2000), but the Second Circuit sidestepped them on technical grounds without expressing any opinion on their merits.

⁷ 16 U.S.C. § 1854(a). While the Secretary can approve, disapprove, or partially approve or disapprove any amendment or FMP and return it to the Councils, he has no power to immediately implement necessary conservation measures unless the Council fails to act on the disapproval. Id. at § 1854(c). Since the Magnuson-Stevens Act does not spell out a timeline for action by the Councils following a disapproval, the Secretary has a powerful disincentive to disapprove any Council action, given that reverting to the status quo may actually be worse than approving an inadequate amendment forwarded by a Council.

There are far too many examples of the agency giving approval to a Council action that fails to abide by the dictates of the Magnuson-Stevens Act or the Endangered Species Act to even begin to list them all.

To give you one such example of how these power relationships play out, though, the Sustainable Fisheries Act of 1996 established new rules for determining when overfishing is occurring.⁸ NMFS interpreted these amendments to require that all FMPs have what are called minimum stock size thresholds, i.e., a biomass level below which stocks must be declared overfished, and a rebuilding plan implemented.⁹ The North Pacific Council essentially thumbed its nose at this requirement, saying we know better than NMFS how to manage the fisheries, and passed an overfishing definition amendment that failed to include these thresholds.¹⁰ Under the Council's definition, stocks could drop to 2% of virgin biomass before fishing must stop. Thus, one of the reasons there are no overfished stocks in the North Pacific is because the Council has designed a system that practically never requires it to designate anything as overfished. Despite this failure, NMFS approved the amendment anyway.¹¹ The agency has subsequently admitted that it made a mistake, and that such thresholds should be required. Because of the Council veto, however, the agency is essentially powerless to rectify its mistake by repealing or revoking that amendment, and requiring a new one that complies with the Act.

Thus, the Magnuson-Stevens Act has created the classic situation of the tail wagging the dog. It's the functional equivalent of creating a body composed of Weyerhaeuser, Boise-Cascade, and Louisiana Pacific to tell the Forest Service how much timber it is going to allow to be cut every year, and giving the agency limited authority to be able to reject those recommendations. Not only is this bad policy, but it offends our most fundamental concepts of democratic government.

So what is to be done? I believe we must start over, with a new system. First, I would take NMFS out of the Department of Commerce, which is inherently biased in favor of commercial interests and create a new Department of the Oceans, as Mr. Van Tuyn said yesterday, which is governed by a National Oceans Policy Act, which provides an overarching protective mandate governing human exploitation of the oceans, as discussed by Governor Knowles. Under such a restructuring, the federal agency in charge of fisheries must make the critical decisions about what the catch should be, where it should be caught, and which gear type is allowed to prosecute a particular fishery. In sum, NMFS, or a similar agency, must have responsibility for developing the fishery management plans.

While there may be a place for a Council-like body to help NMFS, or a similar agency, make some of these decisions, such as the allocation of resources within a particular gear group, that body must be truly advisory and it must be truly representative, rather than being dominated by monied interests as it is now. The current Council system is not adequately accountable to the public. A body of such questionable constitutionality simply cannot be allowed to wield this much

⁸ Pub. L. No. 104-297.

⁹ 63 Fed. Reg. 24212, 24218 (May 1, 1998).

¹⁰ Amendments 56/56 to the Fishery Management Plans for the Bering Sea/Aleutian Islands and the Gulf of Alaska.

¹¹ 64 Fed. Reg. 10952 (March 8, 1999).

power within our system of government. Only by restoring full management authority to the agency can public accountability be assured and the intent of the framers of the Constitution be preserved. Thank you.