

“... To the Gulf Stream Waters”*: Stewardship for Essential Fish Habitat

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* From the first verse of Woody Guthrie’s song, *This Land*.

This land is your land, this land is my land
From California, to the New York Island
From the Redwood Forest, to the Gulf stream waters
This land was made for you and me.

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I. INTRODUCTION

In Woody Guthrie’s well-known anthem to American ideals, he celebrates our freedom and the communal sharing of America’s resources. With this shared ownership comes the implication of shared responsibility and stewardship. However, as a society, we do not always act in our own long-term self-interest when it comes to management of shared natural resources. Nowhere is this disconnect more dramatic than in our efforts to regulate the impacts of our actions on the marine environment. This Article explores our capacity to provide stewardship for the marine environment, specifically focusing on the Essential Fish Habitat (EFH) provisions of our federal fisheries management regime, the Magnuson-Stevens Fishery Conservation and Management Act (MSA).¹

Part II provides an overview of the special management challenges facing stewards of the marine environment. Part III describes the decision-making infrastructure for considering impacts to fish habitat

1. 16 U.S.C. §§ 1801-1883 (2000). In light of the fact that the entire U.S. exclusive economic zone is currently designated as Essential Fish Habitat (EFH) for one or more species, EFH serves as useful proxy for the marine environment as a whole. See 50 C.F.R. § 600.815(a)(2)(ii) (2004).

that was in place prior to the enactment of the EFH provisions in 1996 and discusses the effectiveness of early efforts. Part IV discusses how the 1996 Sustainable Fisheries Act (SFA) amendments to the MSA affected the decision-making infrastructure and assesses the effectiveness of these changes. Part V concludes with observations about the relevance of the EFH requirements to broader societal efforts to protect the marine environment and lessons we can learn from the EFH implementation process as we seek continued improvements in this area.

II. BACKGROUND

The sea is a critical shared resource that provides us with life, health, and wealth. The United States Commission on Ocean Policy (Ocean Commission) recently reported:

The oceans affect and sustain all life on Earth. They drive and moderate weather and climate, provide us with food, transportation corridors, recreational opportunities, pharmaceuticals and other natural products, and serve as a national security buffer

The oceans provide tremendous value to our national economy. Annually, the nation's ports handle more than \$700 billion in goods, and the cruise industry and its passengers account for \$11 billion in spending. The commercial fishing industry's total value exceeds \$28 billion a year, the recreational saltwater fishing industry is valued at around \$20 billion, and the annual U.S. retail trade of ornamental fish is worth another \$3 billion. . . .²

It seems logical to conclude that it is in our own best interest to sustain that which sustains us. Yet, when it comes to the protection of the marine environment, we have not always provided the most effective protections. A wide array of anthropogenic effects, governed by scattered and decentralized regulatory authorities, threatens the ocean's continued ability to meet our needs.³ This wide range of activities and authorities, combined with competing policy objectives, inadequate data, and attenuated public involvement, challenge the ability of federal resource managers to achieve sound stewardship.⁴

2. U.S. COMM'N ON OCEAN POLICY, PRELIMINARY REPORT, EXECUTIVE SUMMARY, at xi (2004), at http://www.oceancommission.gov/documents/prelim_report/welcome.html.

3. The Ocean Commission also reported: "[H]uman beings also influence the oceans. Pollution, depletion of fish and other living marine resources, habitat destruction and degradation, and the introduction of invasive nonnative species are just some of the ways people harm the oceans, with serious consequences for the entire planet." *Id.*

4. To an extent, federal decision making in this area is sometimes no more than risk management. A 1993 National Safety Council report on "regulating risk" describes "the regulation of risk" as "an interaction of science, values, and economics." Thomas A. Burke,

A. *A Complex Web of Impacts and Regulations*

[The] world is all of one piece. . . . [It] is like an enormous spider web and if you touch it, however lightly, at any point, the vibration ripples to the remotest perimeter and the drowsy spider feels the tingle⁵

Almost everything we do has the potential to affect the marine environment. The range and scope of human induced impacts include activities as diverse as harvesting seafood, building and driving on roads, clearing lots for houses, sewage and waste disposal, agricultural runoff, recreational activities such as fishing and boating, commerce and shipping, and flood control activities.⁶ The simple fact of increasing human population pressure, particularly in coastal areas, and our associated needs for shelter, infrastructure, and waste disposal generates an impact on marine habitat.⁷

The structures we have in place for addressing these impacts are based on a media- and activity- specific legal program. We have separate laws addressing air pollution, water pollution, waste disposal, and human activities that modify the structure of land and water bodies.⁸ Each law

Regulating Risk: The Challenges Ahead, in REGULATING RISK: THE SCIENCE AND POLITICS OF RISK 101 (Thomas A. Burke et al. eds., 1993). This description captures the factors that must be balanced in efforts to protect the marine environment. *Id.*

5. ROBERT PENN WARREN, ALL THE KING'S MEN 188 (1971).

6. The National Marine Fisheries Service (NMFS) has identified twelve main categories of actions, in addition to fishing, that could alone affect fish habitat. 50 CFR § 600.815(a)(4) (2004). The categories include, but are not limited to: dredging; filling; excavation; mining; impoundment; discharge; water diversions; thermal additions; actions that contribute to nonpoint source pollution and sedimentation; introduction of potentially hazardous materials; introduction of exotic species; and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH. *Id.*

7. For example, the New England Fishery Management Council has stated: "The major threats to marine and aquatic habitats are a result of increasing human population and coastal development which is contributing to an increase of human-generated pollutants entering the environment." New England Fishery Mgmt. Council, Final Amendment 11 to the Northeast Multispecies Fisheries Management Plan (FMP), Amendment 9 to the Atlantic Sea Scallop FMP, Amendment 1 to the Monkfish FMP, Amendment 1 to the Atlantic Salmon FMP, and Components of the Proposed Atlantic Herring FMP for Essential Fish Habitat, at xv (vol. 1, submitted Oct. 7, 1998) (codified at 50 C.F.R. pt. 648), at Plan Amendments, <http://www.nefmc.org/habitat/index.html> [hereinafter New England Omnibus Amendment]; see also Robin Craig Kundis, *Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii*, 34 MCGEORGE L. REV. 155, 200-01 (2003) (describing literature that has "emphasized coastal populations and land-based activities as the causes of the United States' oceans' degradation, pointing out that, currently, 'more than half the U.S. population lives within 50 miles of the coastline, and much of the resulting pollution from those communities spills into the seas' and that coastal residents 'alter marine ecosystems' in 'myriad ways'").

8. See Clean Air Act (CAA) §§ 101-618q, 42 U.S.C. §§ 7401-7671q (2000); Clean Water Act (CWA) §§ 101-607, 33 U.S.C. §§ 1251-1387 (2000); Resource Conservation and Recovery Act (RCRA) §§ 1002-11011k, 42 U.S.C. §§ 6901-6992k.

contains its own set of policy objectives which are not always compatible with the goal of protecting the marine environment.⁹ This myriad of laws has resulted in a plethora of federal agencies and regulatory programs. Most of these programs are administered on a field-level and thus on a decentralized basis, and consequently result in vastly different valuations and desired outcomes that reflect the motives of several different constituencies.¹⁰

B. “The Sea Still Looks the Same”

Recognition and identification of problems in the marine environment can be further complicated by the fact that no matter what we do to it, “the sea still looks the same.”¹¹ We cannot easily see what is happening under water, and we have not made a sufficient investment in gathering the data necessary to understand it.¹² Both fishery managers and the Ocean Commission have highlighted the need for increased commitment to and funding for ocean research.¹³

C. The Role of the National Marine Fisheries Service

Within this context, the NMFS strives to improve the protection of fish habitat and seeks to infuse consideration of habitat needs into federal decisionmaking.¹⁴ NMFS is the federal agency charged with stewardship and management responsibilities for various marine natural resources and is a source of expertise on how various types of activities may affect

9. See Rachel Glickman et al., *Environmental Crimes*, 40 AM. CRIM. L. REV. 413 (2003) (citing *United States v. Ohio Barge Lines*, 432 F. Supp. 1023, 1027 (W.D. Pa. 1977) (indicating intent of section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, is safety and welfare of river traffic not environmental protection); Gerald Norlander, *May the Federal Energy Regulatory Commission Rely on Markets to Set Electric Rates?* 24 ENERGY L.J. 65, 74 (2003) (noting that the purpose of the Federal Power Act, 16 U.S.C. §§ 791a-828c (2000), is to protect utility consumers).

10. See discussion *infra* Part III.B.1 nn.32-35.

11. See Kundis, *supra* note 7, at 200 (“[M]arine . . . damage goes on largely unnoticed because it takes place beneath the deceptively unchanging blanket of the ocean’s surface. Modification of the terrestrial landscape is highly visible and has been recorded in art and writing for the last thousand years, but the sea still looks the same.”).

12. U.S. COMM’N ON OCEAN POLICY, *supra* note 2, at xii-xiii.

13. *Id.* at xii; see discussion *infra* Part III.A.

14. Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §§ 1801-1833; see also Atlantic Tunas Convention Act of 1975, 16 U.S.C. §§ 971-971i; Antarctic Marine Living Resources Convention Act, 16 U.S.C. §§ 2431-2444; Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h; National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 to 1445c-1; Endangered Species Act §§ 2-5, 16 U.S.C. §§ 1531-1544.

marine habitats.¹⁵ As a division of the National Oceanic and Atmospheric Administration (NOAA), NMFS shares in the stated mission “to assess and predict environmental changes, protect life and property, provide decisionmakers with reliable scientific information, manage the Nation’s living marine and coastal resources, and foster global environmental stewardship.”¹⁶ Since the 1970s, NMFS has promoted the protection of fish habitat through two separate strategies. First, through its fishery management program pursuant to the MSA, and second, by providing comments to other action agencies on proposed activities that could affect fish habitat pursuant to a variety of other statutory provisions.¹⁷ In 1996, Congress enacted the SFA to amend the MSA.¹⁸ These amendments strengthened NMFS’s habitat protection efforts by requiring other federal agencies to give more rigorous consideration to impacts on fish habitat and by consolidating NMFS’s coordination with other agencies on issues affecting fish habitat into the fishery management program.¹⁹

III. AGENCY DECISIONMAKING PRIOR TO THE SUSTAINED FISHERIES ACT AMENDMENTS

Despite challenges posed by lack of data and disparate regulatory programs, NMFS has been engaged in efforts to promote protection of fish habitat since the early 1970s through both the fishery management program and cooperative efforts with other agencies.

A. *The Fishery Management Program*

Since 1976, NMFS has managed federal fisheries pursuant to the MSA, a statutory regime in which regional Fishery Management Councils (Councils) take the lead in developing fishery management measures.²⁰ Pursuant to the MSA, the United States asserts exclusive

15. Nat’l Oceanic & Atmospheric Admin. (NOAA), *NOAA’s Vision and Mission*, <http://www.spo.noaa.gov/mission.htm> (last visited Oct. 24, 2004).

16. *Id.*

17. Magnuson-Stevens Fishery Conservation and Management Act, Hearing Before House Commission on Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans (Mar. 9, 2000) (statement of Penelope Dalton, Assistant Administrator for Fisheries), *at* <http://www.nmfs.noaa.gov/habitat/habitatprotection/final%20EFH%20testimony.htm> [hereinafter Hearings Testimony of Dalton].

18. Sustainable Fisheries Act (SFA), Pub. L. No. 104-297, 110 Stat. 3559 (1996).

19. *See id.*

20. MSA §§ 101-407, 16 U.S.C. §§ 1801-1883 (2000). The original version of the MSA was enacted in 1976 and called the Fishery Conservation and Management Act (FCMA). FCMA of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976). It has been renamed twice over the years: first as the Magnuson Fishery Conservation and Management Act, Pub. L. No. 96-561, § 238, 94 Stat.

fishery management authority within the United States exclusive economic zone (EEZ).²¹ Eight regional Councils composed of fishery stakeholders develop Fishery Management Plans (FMPs) which recommend fishery conservation and management measures for implementation by NMFS.²² The FMPs must adhere to the articulated “national standards” formulated for the fisheries.²³ The NMFS reviews Council-recommended actions and must approve and implement those that comply with the national standards and other applicable law.²⁴ The Councils have broad discretion in developing management strategies as long as they comply with the overriding policy objectives of the MSA.²⁵

The original purpose of the Fishery Conservation and Management Act (FCMA), which preceded the MSA, was to “Americanize” the fishing fleets in the EEZ.²⁶ It was not a conservation statute and has always included a mandate to achieve “optimum yield” from managed fisheries.²⁷ “Optimum yield” is the amount of fish that “will provide the overall greatest benefit to the nation.”²⁸ Originally, the MSA included no mandatory provisions with respect to fish habitat. Over the years, the MSA was amended to: (1) allow Councils to comment on federal agency activities that could affect fish habitat, (2) require agencies to respond when Councils commented, (3) require Councils to comment on

3275 (1980), and most recently as the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 104-208, § 211, 110 Stat. 3009 (1996).

21. The U.S. EEZ is all of the federal waters adjacent to state waters, extending from three to two hundred nautical miles offshore. Lee Benaka & Dennis Nixon, *Essential Fish Habitat and Coastal Zone Management: Business as Usual Under the Magnuson-Stevens Act*, 30 GOLDEN GATE U. L. REV. 969, 1003 n.11 (2000).

22. The eight Councils are: the New England Council, the Mid-Atlantic Council, the South Atlantic Council, the Gulf of Mexico Council, the Caribbean Council, the Pacific Council, the North Pacific Council, and the Western Pacific Council. MSA § 302, 16 U.S.C. § 1852.

23. MSA §§ 301, 303, 16 U.S.C. §§ 1851, 1853.

24. MSA § 304, 16 U.S.C. § 1854. Fishery management measures contained in approved FMPs and FMP amendments are submitted by the Councils to NMFS in the form of reports and are codified in the Code of Federal Regulations. However, the nonregulatory elements of the FMPs, such as descriptions of the fisheries, are not codified. Whether EFH descriptions should be codified has been the subject of litigation. See *Idaho County v. Evans*, CV-02-80-C-EJL, Order (D. Idaho Sept. 30, 2003). Throughout this Article, reference to the various amendments is to the supplemental documents the Councils produced that added the EFH requirements to the FMP reports.

25. MSA § 303, 16 U.S.C. § 1853.

26. See FCMA, Pub. L. No. 94-265, § 2(b)(1), 90 Stat. 331 (1976).

27. MSA § 2(b), 16 U.S.C. § 1801(b).

28. MSA § 3(28), 16 U.S.C. § 1802(28)(A). To determine “optimum yield,” the Councils were to start with the maximum sustainable long-term catch from the fishery, then “modify” that level to account for “any relevant economic, social, or ecological factor.” MSA § 3(28), 16 U.S.C. § 1802(28). Thus it was possible to calculate a level of “optimum” yield that was greater than the level of “sustainable” yield. MSA § 2(b), 16 U.S.C. § 1801(b).

agency actions that could affect anadromous fish habitat, and (4) require FMPs to include “readily available habitat information.”²⁹ However, the statute essentially retained its emphasis on obtaining socioeconomic benefits from the fishery based on Council assessments of net benefits to society. Thus, to the extent that Councils took action that restricted fishing activity in order to protect fish habitat, they did so believing that a net benefit—optimum yield—would result from the self-imposed restrictions.

In fact, the Councils did take certain actions to protect fish habitat. Prior to the enactment of the SFA, many FMPs included gear restrictions, time and area closures, and harvest limits that the Councils believed benefited fish habitat.³⁰ The Gulf of Mexico Council implemented a reef closure to protect a “stressed area” that consisted of the near-shore waters of the entire Gulf of Mexico, a shrimp fishery seasonal closure off Texas to protect small brown shrimp emigrating from nursery areas, and a prohibition on the use of certain bottom gears in the Coral FMP to prevent damage to corals.³¹ The New England Council protected 6500 square nautical miles of habitat in Georges Bank and 1200 square nautical miles in the Gulf of Maine through year-round closures, and an additional 13,000 square nautical miles in the Gulf of Maine through seasonal closures.³² The South Atlantic Council protected coral and live/hard bottom habitat by “establishing an optimum yield of zero and prohibiting all harvest or possession of these resources which serve as EFH to many managed species”; it designated the Oculina Bank a

29. See Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, 104 Stat. 4436 (1990); Pub. L. No. 99-659, 100 Stat. 3711 (1986); see also S. REP. NO. 99-67, at 13 (1990), reprinted in 1986 U.S.C.A.N. 6240, 6253; Helen M. Kennedy, Comment, *The 1986 Habitat Amendments to the Magnuson Act: A New Procedural Regime for Activities Affecting Fisheries Habitat*, 18 ENVTL. L. 339, 340, 344 (1988).

30. See New England Omnibus Amendment, *supra* note 7; South Atlantic Fishery Mgmt. Council, Comprehensive Amendment Addressing EFH in the FMPs of the South Atlantic Region (codified at 50 C.F.R. pt. 622), at <http://www.nmfs.noaa.gov/habitat/habitatprotection/profile/southatlanticcouncil.htm> [hereinafter South Atlantic EFH Amendment]; North Pacific Fishery Mgmt. Council, Amendment 55 to the FMP for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area, Amendment 55 to the FMP for Groundfish of the Gulf of Alaska, Amendment 8 to the FMP for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands, Amendment 5 to the FMP for Scallop Fisheries off Alaska, and Amendment 5 to the FMP for the Salmon Fisheries in the EEZ off the Coast of Alaska (Jan. 20, 1999) (codified at 50 C.F.R. pt. 679), at http://www.fakr.noaa.gov/habitat/efh_ea/efh_ea.pdf [hereinafter North Pacific EFH Amendments].

31. Kennedy, *supra* note 29, at 346; see Gulf of Mexico Fishery Mgmt. Council, Generic Amendment for Addressing EFH Requirements in the FMPs of the Gulf of Mexico (Oct. 1998) (codified at 50 C.F.R. pt. 622), at <http://Galveston.ssp.nmfs.gov/efh/FINALEFH.PDF> [hereinafter Gulf Omnibus Amendment].

32. New England Omnibus Amendment, *supra* note 7, at 188.

Habitat Area of Particular Concern (HAPC), and prohibited bottomfishing there.³³ The South Atlantic Council also had policies and procedures for providing comments and recommendations on nonfishing activities.³⁴ Councils also utilized their authority to comment on agency actions,³⁵ and in at least one case, a Council's comments caused a project to be more protective of fish habitat.³⁶

However, despite these early protective measures, there was a persistent dearth of information on the impacts of the fishing activities, as well as on the efficacy of the protective measures themselves.³⁷

B. The Habitat Conservation Program

Prior to 1996, NMFS was also coordinating with other federal agencies, providing information about potential impacts of proposed actions and encouraging protection of fish habitat through its Habitat Conservation Program.

1. Statutory Authorities Requiring Agency Communication

Various statutes authorize or require interagency communication and cooperation on projects that could affect fish habitat, with varying degrees of accountability. The Fish and Wildlife Coordination Act (FWCA) requires action agencies proposing to modify any body of water to first consult with other federal agencies with relevant natural resource stewardship responsibilities, including NMFS.³⁸ NMFS provides recommendations for the conservation of fish and wildlife resources, and the action agency must give "equal consideration" to the conservation of

33. South Atlantic EFH Amendment, *supra* note 30, at 1.

34. *Id.*

35. For example, the South Atlantic Council established a Habitat Advisory Panel that has provided the Council with expert recommendations on activities being considered for permitting. *Id.* With guidance from the panel, the Council developed policies on oil and gas exploration, development and transportation, dredging and dredge material disposal, submerged aquatic vegetation, and ocean dumping. *Id.*; *see also* Kennedy, *supra* note 29, at 346-48.

36. One example cited from the mid-1980s is described as follows:

[T]he Gulf Council opposed a dredged spoil site that the Army Corps of Engineers (Corps) proposed for a Corpus Christi, Texas port expansion. The [C]ouncil estimated the proposed 300-acre wetland fill would result in economic losses to the Gulf shrimp industry of \$2.65 million annually. In response to the [C]ouncil's comments, the Corps adopted an alternative disposal plan which had less adverse effects on habitat than the original plan.

Kennedy, *supra* note 29, at 346.

37. *See* New England Omnibus Amendment, *supra* note 7; South Atlantic EFH Amendment, *supra* note 30; North Pacific EFH Amendments, *supra* note 30; Gulf Omnibus Amendment, *supra* note 31.

38. 16 U.S.C. §§ 661-666(c) (2000).

fish and wildlife resources in making water resource development decisions. NMFS is also authorized to develop reports assessing possible damage to fish and wildlife resources and recommend measures that should be adopted to prevent loss or damage to the resources. Agencies must specifically consult with the NMFS if their actions have the potential to adversely affect marine and anadromous fish resources. NMFS responds with comments and recommendations to conserve the fish and their habitat. The FWCA also requires agencies to assess costs and benefits to fish and wildlife resources, and to share reports and recommendations from NMFS and other agencies with Congress.³⁹

The Federal Power Act (FPA) requires the Federal Energy and Regulatory Commission (FERC) to consider, and in some cases comply with, NMFS recommendations regarding licensing and exemptions for hydropower projects.⁴⁰ In approving licenses, FERC must include conditions that “protect, mitigate damage to, and enhance” fish habitat “based on recommendations [from NMFS].”⁴¹ If FERC and NMFS disagree about the conditions, FERC must give “due weight” to NMFS’s recommendations, expertise, and statutory responsibilities, and attempt to resolve the disagreement.⁴²

If, however, FERC determines that the recommendations are not consistent with the purposes of the FPA, it must publish the basis for that finding.⁴³ FERC must require the construction of any fishways recommended by NMFS. If FERC determines that a qualified project is exempt from licensing requirements, it must include, as a condition of the exemption, the terms that NMFS recommends as necessary to prevent loss of fish and wildlife resources.⁴⁴

NMFS may also provide comments to the United States Army Corps of Engineers (Corps) regarding modifications to navigable waterways pursuant to the Rivers and Harbors Act (RHA).⁴⁵ Under the

39. *Id.* §§ 661-662; *see also* Reorganization Plan, 15 U.S.C. § 1511 (2000) (establishing NOAA in the Department of Commerce and transferring functions and underlying authorities from other agencies to form the bases of the administration). For information about earlier transfers and consolidation of functions relating to the protection and conservation of wildlife between the Departments of Agriculture, Commerce, and Interior, *see* 16 U.S.C. § 661 Historical and Statutory notes (1997).

40. 16 U.S.C. § 803(j)(1).

41. *Id.*

42. *Id.* § 803(j)(2).

43. *Id.* § 803(j)(2)(A).

44. *Id.* § 803(j)(1).

45. Pursuant to the RHA, it is unlawful to obstruct or modify navigable waters with objects such as piers, jetties, and breakwaters, unless permitted by the Corps. 33 U.S.C. § 403 (2000).

Clean Water Act (CWA), the Secretary of the Army, through the Corps, regulates the discharge of dredge or fill material into the “waters of the United States,” which include wetlands.⁴⁶ The Corps “seeks to avoid unnecessary regulatory controls,”⁴⁷ and its policy for evaluating permit applications is that generally the permit will be issued unless it is contrary to the public interest.⁴⁸

Under section 404 of the CWA and an accompanying Memorandum of Agreement (MOA) between the Secretary of the Army and the Department of Commerce, the NMFS may comment on, and in some cases delay, proposals for dredge and fill projects.⁴⁹ The NMFS can comment on issues “directly related to the statutory mandates,” and the delay caused by this process may cause NMFS recommendations to be implemented where time is of the essence to the applicant.⁵⁰ However, if NMFS and the Corps agree with respect to habitat conservation terms, the permit approval process can be completed within ninety days.⁵¹

The MOA establishes the process by which NMFS provides comments on potential impacts of activities on fish habitat.⁵² The MOA requires that, for categories of actions identified in writing by NMFS, the Corps must provide timely notice of permit applications to the NMFS for review. NMFS and the Corps coordinate at the lowest organizational level. For issues that are directly related to a statutory mandate and cannot be resolved at that level, the MOA includes an elevation process.⁵³ Ultimately, the Corps retains final decision-making authority. However, the elevation process could result in delays beyond ninety days for the

46. CWA §§ 404(a), 502(7), 16 U.S.C. §§ 1344(a), 1362(7).

47. 33 C.F.R. § 320.1(a)(3) (2004).

48. *Id.* § 320.4(a).

49. Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States, 45 Fed. Reg. 62,732, 62,765-70 (Sept. 19, 1980) (reprinting the Memorandum of Agreement Between the Secretary of the Army and the Department of Commerce). The CWA required the Secretary of the Army to enter into agreements with the EPA Administrator, “the Secretaries of the Departments of Agriculture, Commerce, Interior and Transportation, and the heads of other appropriate federal agencies” to ensure that “needless paperwork” was not produced and there were no delays in issuing the permits. CWA § 404(q), 33 U.S.C. § 1344(q). The MOA here was one such agreement.

50. Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States, 45 Fed. Reg. at 62,766.

51. *Id.*

52. *Id.* at 62,765-70.

53. *Id.* (citing the requirement at section 1(b)). The MOA requires written documentation at each level of review. *Id.* at 62,766 (citing the requirement at section 4(f)).

issuance of a permit.⁵⁴ An eager applicant could speed the resolution of the objections by agreeing to recommended modifications.⁵⁵

2. Consultations

Pursuant to the foregoing authorities, NMFS has reviewed and commented on a number of federal agency actions since 1970, at a rate of approximately 7,000 to 10,000 per year.⁵⁶ According to at least one estimate, NMFS has provided substantive comments on approximately one quarter of these.⁵⁷ The individualized nature of the impacts at issue and the decentralized nature of regulation by various federal agencies have been obstacles to achieving any kind of centralized, coordinated decisionmaking. Nevertheless, in 1983, NMFS developed its own internal policy initiative to enhance protection of fish habitat.⁵⁸ Additionally, in the early 1990s NMFS's Habitat Conservation Program recognized that habitat loss was a leading cause of decline in fishery resource productivity and undertook additional efforts to improve coordination, including hosting a workshop.⁵⁹ Finally, critics have noted that agencies are not affirmatively obligated to notify NMFS of proposals that could affect fish habitat, and, in some cases, action agencies are not even required to respond to NMFS recommendations.⁶⁰

3. Results

For the reasons described above, it is almost impossible to conduct an accurate assessment of the effect of NMFS's comments. To do so, it would be necessary to obtain decision records from various agencies on each action for which NMFS provided comments, and to track how

54. *Id.* at 62,766-67 (citing the requirement at section 5(d)).

55. See Oliver A. Houck, *Land Loss in Coastal Louisiana: Cases, Consequences, and Remedies*, 58 TUL. L. REV. 3, 131, 138 (1983) (discussing the effectiveness of this interagency consultation process).

56. See Hearing Before the House Committee on Resources, Subcommittee on Fisheries, Wildlife, and Oceans (June 8, 1995) (statement of Nancy Foster, Deputy Assistant Administrator for Fisheries, NMFS) (on file with author); see also Hearings Testimony of Dalton, *supra* note 17.

57. Hearings Testimony of Dalton, *supra* note 17.

58. Kennedy, *supra* note 29, at 342-43.

59. See Benaka & Nixon, *supra* note 21, at 976.

60. Implementation of the Essential Fish Habitat Provisions of the Sustainable Fisheries Act, Before the House Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans (Mar. 9, 2000) (testimony of Sarah Chasis, Senior Attorney, Natural Res. Def. Council) (on file with author) [hereinafter Hearings Testimony of Chasis]. "[D]uring required environmental reviews, federal agencies did not typically focus on how proposed actions might affect marine fishery species and their habitats. In many cases where NOAA Fisheries commented to the action agency, we were unsure whether our recommendations were heeded or why they may have been rejected." Hearings Testimony of Dalton, *supra* note 17.

NMFS's comments were treated in the decision-making process. In light of the tremendous volume of consultations that take place each year and the lack of a systematized tracking program, such a methodical assessment is not possible. However, a review of available literature reveals that, in at least some cases, the NMFS's Habitat Conservation Program had an impact on decisionmaking by helping to shape project designs and by promoting greater mitigation.⁶¹

a. Case Studies

In 1996, FERC made a final licensing decision for the "Cushman Project."⁶² Although the decision was made in 1996, it referred to a process that had unfolded in the years prior to the SFA enactment. According to the congressional testimony, several agencies, including NMFS, had concerns about the proposed project.⁶³ After years of negotiations and studies, the Department of Interior and NMFS recommended the restoration of almost all river flows; construction of fish passages around dams, the purchase of thousands of acres of additional wildlife lands, and allocating millions of dollars for additional fish hatcheries.⁶⁴ FERC adopted many of the proposals.⁶⁵

Additionally, NMFS's comments can bolster the action agency's record when NMFS decides to deny a permit. For instance, in *B&B Partnership v. United States*, the Corps denied an applicant's request for a discharge permit for a planned landfill, and the applicant appealed.⁶⁶ Various agencies, including NMFS, and members of the public commented on the negative environmental impacts of the project.⁶⁷ In upholding the Corps' decision, the court concluded that "the evidence in

61. See *Fritiofson v. Alexander*, 772 F.2d 1225, 1227-30 (5th Cir. 1985) (recounting several changes to project design that the developer agreed to through discussions with NMFS prior to the onset of litigation); see also *Clean Ocean Action v. York*, 861 F. Supp. 1203, 1206-07 (D.N.J. 1994) (describing the Corps' preparation of a series of special conditions in coordination with the cooperating agencies, including NMFS, to address the discovery of dioxin in the sediments that were to be deposited in a designated "mud dump" by the Port Authority of New York and New Jersey); *Hydroelectric Relicensing Procedures, Hearing Before the Senate Energy and Natural Resources Committee, Water and Power Subcommittee*, S. HRG. 105-381, 14-15 (1997) (statement of Steve Klein, Deputy Director/Light Superintendent, Tacoma Public Utilities) [hereinafter *Hearings Testimony of Klein*].

62. *Hearings Testimony of Klein*, *supra* note 61.

63. *Id.*

64. *Id.*

65. *Id.*

66. No. 96-2025, 1997 WL 787145, at *2 (4th Cir. Dec. 24, 1997).

67. *Id.* at *4.

the record provides a rational basis for the Corps' denial of [the] application for a permit."⁶⁸

In *Quinones Lopez v. Coco Lagoon Development Corp.*, the Corps' issued a retroactive permit for the dredging and filling of wetlands without an environmental impact statement (EIS).⁶⁹ In deciding whether to issue the permit, the Corps consulted with federal agencies, including NMFS, and concluded that the ecological value of the existing wetlands was low, and that the mitigation measures included in the permit, including the construction of a replacement mangrove forest, would be more ecologically valuable than the existing wetland.⁷⁰ The low value of the existing wetlands was due, in part, to prior dredging and filling by the permit applicant, a developer.⁷¹ NMFS's comments were given weight in determining whether to consider historic values of degraded wetlands; however, the court agreed with the Corps that no EIS was necessary.⁷²

The effectiveness of NMFS's comments may also be compounded when the interested public becomes aware of the information submitted by NMFS and demands accountability from action agencies in addressing it. In *Friends of the Earth v. Hintz*, an applicant for a permit to fill wetlands agreed to "pursue" the purchase of a certain tract of land to "offset" the filling of the wetlands.⁷³ NMFS recommended that this mitigation agreement be modified to require purchase of the offset tract prior to issuance of the permit.⁷⁴ The Corps issued the permit without making NMFS's suggested modification.⁷⁵ Friends of the Earth sued on several grounds, including the reasonableness of the Corps' findings of no significant impact (FONSI), which relied on the mitigation plan that did not mandate the purchase of the mitigation site.⁷⁶ Ultimately, the permittee did make the purchase, and the court ruled this point moot.⁷⁷

b. Injunctions

In some cases, failure to address NMFS's recommendations led to an injunction prohibiting the action. In *Fritiofson v. Alexander*, the court

68. *Id.* at *16.

69. 562 F. Supp. 188 (D.P.R. 1983).

70. *Id.* at 191.

71. *Id.* at 192.

72. *Id.* at 191-92. The EFH regulations may lead to different results in future valuations of degraded wetlands because the EFH Final Rule allows for consideration of rehabilitation of degraded habitat that was historic EFH.

73. 800 F.2d 822, 825-26 (9th Cir. 1986).

74. *Id.* at 826 n.4.

75. *Id.* at 827.

76. *Id.*

77. *Id.* at 837.

cited NMFS's conclusions about impacts of proposed dredge and fill activities as a basis for enjoining the development project and ordering the Corps to conduct additional environmental impact analysis.⁷⁸ The ultimate effects of such court-ordered injunctions can vary depending on other factors, such as the political climate. The following two case studies emphasize the power of a motivated public with access to key information.

In the late 1980s, the Navy wanted to build a new homeport in the state of Washington, which required a permit from the Corps.⁷⁹ NMFS and the Fish and Wildlife Service (FWS) had actively participated and commented in early rounds of analyses and concluded that the project as recommended would pose unacceptable risks of adverse environmental consequences; nonetheless, the permit was issued.⁸⁰ A legal challenge ensued, and the court issued a permanent injunction prohibiting the Navy from expending any funds on the homeport until the Corps completed the necessary environmental analyses.⁸¹ Ultimately, the project proceeded and the homeport was completed. Ironically, there is current speculation that the homeport could be targeted for base closure.⁸²

A different outcome resulted with respect to a proposed development project along the Hudson River in Manhattan.⁸³ This case originated from a 1970s plan to build a federally funded highway and residential development along the Hudson River in Manhattan.⁸⁴ The New York Department of Transportation and the Federal Highway Administration needed a Corps permit to engage in certain dredging and filling activities.⁸⁵ The two agencies prepared their own EIS which characterized the affected marine environment as a "biological wasteland."⁸⁶ Although NMFS presented data to the Corps demonstrating the importance of the area as habitat for striped bass, the Corps did not publicize NMFS's comments or address them on the record when it adopted the applicant's EIS.⁸⁷ Several citizen groups

78. See 772 F.2d 1225, 1247-48 (5th Cir. 1985).

79. See *Friends of the Earth v. Hall*, 693 F. Supp. 904, 915-16 (W.D. Wash. 1988).

80. See *id.* at 917-18.

81. *Id.*

82. See David Ammons, *Locke, Lawmakers Hope to Shield Washington from Base Closures*, Associated Press State and Local Wire, Oct. 3, 2003.

83. See *Action for Rational Transit v. W. Side Highway Project*, 536 F. Supp. 1225 (S.D.N.Y. 1982), *aff'd in part, rev'd in part*, *Sierra Club v. United States Army Corps of Eng'rs*, 701 F.2d 1001 (2d Cir. 1983), *remanded to* 614 F. Supp. 1475 (S.D.N.Y. 1985).

84. *Sierra Club*, 614 F. Supp. at 1477.

85. See *id.*

86. *Action for Rational Transit*, 536 F. Supp. at 1229.

87. *Id.* at 1240.

opposed the plans on a variety of environmental grounds and filed suit in *Action for Rational Transit v. West Side Highway Project*.⁸⁸ A series of injunctions and remands followed, which halted the project.⁸⁹ Support for the project waned and federal funding was reallocated.⁹⁰

Thus, in some instances, an injunction did no more than delay the inevitable progression of the project as planned.⁹¹ However, the possibility remained that delay and new information generated during an injunction could lead to a reevaluation of public priorities and ultimately affect a project's outcome.⁹²

IV. THE 1996 SUSTAINABLE FISHERIES ACT AND THE ESSENTIAL FISH HABITAT PROVISIONS

In 1996 Congress overtly recognized the correlation between the various human activities contributing to the degradation of the marine environment and the negative economic consequences to fisheries. While the original goal of the FCMA, to "Americanize" the fishing industry in the EEZ, had been achieved, the anticipated stabilization of

88. See *id.* at 1231 (attacking the project for creating traffic, air pollution, and the issuance of an unlawful landfill permit).

89. See *Sierra Club*, 614 F. Supp. at 1516-17.

90. See *Roll Call: The House: Amtrak Funds*, L.A. TIMES, Sept. 22, 1985, at 4 ("[T]he House passed, 287 for and 132 against, an amendment to delete money in HR 3244 . . . that was earmarked for the Westway federal highway project in New York. Estimates are that the 4.2-mile highway on the west side of Manhattan would cost between \$2.3 billion and \$6 billion. Federal court decisions have made it virtually impossible for work to begin any time in the foreseeable future, if ever. This amendment prohibited federal funding of the Hudson River landfill that would be built to hold the highway."); see also *New York Gives up Westway Project*, WORLD NEWS DIG., Oct. 4, 1985, at 736 D2.

91. See *Friends of the Earth v. Hall*, 693 F. Supp. 904 (W.D. Wash. 1988); *Mullin v. Skinner*, 756 F. Supp. 904 (E.D.N.C. 1990). In *Mullin*, litigation fueled, in part, by NMFS's comments slowed completion of a bridge expansion. Ultimately, however, it did not stop the development and population growth at the root of the controversy. See *Mullin*, 756 F. Supp. 904; see also *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987), *rev'd by* 731 F. Supp. 1261 (E.D.N.C. 1990), *aff'd*, *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991). Virginia and North Carolina's dispute over the allocation of water resources in a man-made lake, Lake Gaston, resulted in a ten-year delay of a planned water resource project. See *North Carolina*, 665 F. Supp. at 444-45. NMFS's comments about the project's impact on striped bass habitat contributed to the court's decision to remand the Corps' FONSI. *Id.* at 443. After remand, the Corps' subsequent issuance of the permit was upheld. *North Carolina*, 731 F. Supp. at 1272. Once the Corps' issues were laid to rest, FERC challenges appeared. See *North Carolina v. Virginia Beach*, 951 F.2d 596 (4th Cir. 1991). The lower court enjoined action until the FERC permitting process was complete. See *id.* at 600. The appellate court modified the injunction allowing the portions not subject to FERC jurisdiction to proceed. See *id.* at 604-65. Subsequent challenges to FERC's decision under the CWA did not succeed. See *North Carolina v. Fed. Energy Regulatory Comm'n*, 324 F.3d 1175 (D.C. Cir. 1997).

92. See *Sierra Club v. United States Army Corps of Eng'rs*, 614 F. Supp. 1475 (S.D.N.Y. 1985).

harvest practices had not. Along with problems of overfishing and excess fishing capacity, Congress perceived that “direct and indirect habitat losses . . . [had] resulted in a diminished capacity to support existing fishing levels,” and that “one of the greatest long-term threats to the viability of commercial and recreational fisheries is . . . loss of . . . habitat[.]”⁹³ Congress declared that a national program was necessary “to facilitate long-term protection of essential fish habitats.”⁹⁴ In response to growing concern among the fishing constituencies that loss of habitat was reducing fish stocks, Congress enacted measures aimed at strengthening habitat protections through both the fishery management process itself and the interagency consultation process.⁹⁵

The SFA first defined EFH as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.”⁹⁶ It then required Councils to assimilate and use information about this habitat by requiring them to identify and describe EFH in each FMP.⁹⁷ The SFA also included for the first time a legislative mandate requiring Councils to minimize the impacts to habitat caused by fishing activities to the extent practicable.⁹⁸ Finally, it required Councils to include recommendations for “other measures” that would further encourage conservation and enhancement of EFH in their FMPs.⁹⁹

The SFA placed the interagency consultation process squarely in the context of fishery management and imposed an affirmative duty on federal action agencies to initiate the consultation and to document their responses to NMFS’s recommendations.¹⁰⁰ It also required NMFS to coordinate with other agencies to provide them with information about EFH beyond the scope of the consultations.¹⁰¹

93. SFA, Pub. L. No. 104-297, § 101(1), (3), 110 Stat. 3559, 3560 (codified as amended at 16 U.S.C. § 1801(a)(2), (9) (2000)).

94. SFA, Pub. L. No. 104-297, § 101(2), 110 Stat. 3559, 3560 (codified as amended at 16 U.S.C. § 1801(a)(6)); *see also* S. REP. NO. 104-276 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073.

95. *See* SFA, Pub. L. No. 104-297, 110 Stat. 3559 (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)).

96. MSA § 3(10), 16 U.S.C. § 1802(10) (2000) (amended by SFA, Pub. L. No. 104-297, § 102, 110 Stat. 3559, 3561 (1996)).

97. MSA § 303(a)(7), 16 U.S.C. § 1853(a)(7) (amended by SFA, Pub. L. No. 104-297, § 108(a), 110 Stat. 3559, 3574 (1996)).

98. *Id.*

99. *Id.*

100. MSA § 305(b)(2), 16 U.S.C. § 1855(b)(2) (amended by SFA, Pub. L. No. 104-297, § 110, 110 Stat. 3559, 3588-89 (1996)).

101. *Id.* According to Stacey Nathanson, this coordination requirement has resulted in a significant amount of outreach from NMFS to other action agencies prior to consultations taking place. Telephone Interview with Stacey Nathanson, Office of the General Counsel for Fisheries, Nat’l Oceanic & Atmospheric Admin. (June 21, 2004).

A. *Implementing the Fisheries Management Plan Requirements*

On December 19, 1997, NMFS promulgated an Interim Final Rule (EFH Final Rule) that provided guidance to Councils and other federal action agencies on how to comply with the new EFH requirements.¹⁰² The EFH Final Rule addressed each of the SFA mandates. The SFA required Councils to submit FMP amendments containing the required EFH provisions by October 1998.¹⁰³ In general, the Councils met that deadline and by the summer of 1999 NMFS had approved the Councils' EFH submissions for twenty-one FMPs, and partially approved Council submissions for an additional fourteen FMPs. The partial disapproval of the EFH submissions for the Gulf of Mexico and Caribbean Councils were due to a failure to identify EFH for all the species; in addition, the Mid-Atlantic Council's assessment of fishing gear impacts were disapproved.

The Gulf of Mexico Council submitted an Omnibus Amendment package applicable to all seven of its fisheries management programs: Spiny Lobster, Coastal Migratory Pelagics, Coral and Coral Reefs, Stone Crab, Shrimp, Reef Fish Resources, and Red Drum.¹⁰⁴ The Omnibus Amendment identified EFH for twenty-six representative species, approximately one-third of the total number of managed species. It also assessed the impacts of the three main types of fishing gear used in the region.¹⁰⁵ NMFS approved the EFH identifications for the twenty-six species, but found the amendment inadequate with respect to the remaining species, and determined that an assessment of the impact on EFH by the other gears used in the Gulf of Mexico should be considered in subsequent amendments as more information became available.¹⁰⁶ The Omnibus Amendment is now subject to the *American Oceans Campaign v. Daley* settlement agreement.¹⁰⁷

The Caribbean Council also submitted an Omnibus Amendment applicable to its four fisheries management programs: Queen Conch;

102. EFH Interim Final Rule, 62 Fed. Reg. 66,531 (Dec. 19, 1997). The provisions of the Interim Final Rule were finalized with little revision and published on January 17, 2002. See EFH Final Rule, 67 Fed. Reg. 2343 (Jan. 17, 2002) (codified at 50 C.F.R. pt. 600). Changes to the Interim Final Rule appearing in the Final Rule are not relevant to this discussion. For purposes of this Article, the author refers to the relevant contents of both the Interim Final Rule and the Final Rule as the "EFH Final Rule."

103. SFA, Pub. L. No. 104-297, § 108(b), 110 Stat. 3559, 3574 (1996).

104. See Gulf Omnibus Amendment, *supra* note 31.

105. Generic Essential Fish Habitat Amendment, 64 Fed. Reg. 13,363 (Mar. 18, 1999).

106. *Id.*; see Gulf Omnibus Amendment, *supra* note 31, at 22.

107. See 183 F. Supp. 2d 1 (D.D.C. 2000); Generic Amendment Addressing EFH Requirements of the FMPs of the Gulf of Mexico, 66 Fed. Reg. 15,405 (Mar. 19, 2001). For a discussion of *American Oceans Campaign v. Daley*, see *infra* Part IV.A.5.

Corals, Plants, and Invertebrates; Spiny Lobster; and Caribbean Reef Fish.¹⁰⁸ That amendment identified EFH for a representative subset of species.¹⁰⁹ NMFS partially approved the amendment for the same reasons it did the Gulf Council's.¹¹⁰ The Caribbean Council's Omnibus Amendment is also subject to the *American Oceans Campaign* remand.¹¹¹

In June 1999, NMFS approved the South Atlantic Council's EFH amendments for their existing fisheries management programs: Snapper-Grouper; Red Drum; Coral, Live/Hard Bottom; Shrimp; and Golden Crab.¹¹² In 2003, NMFS partially approved a new fisheries management program for Sargassum, but did not approve its EFH provisions.¹¹³

In April 1999, NMFS partially approved the Mid-Atlantic Council's recommended EFH amendments for its four existing fisheries management programs: Mackerel, Squid, and Butterfish; Surf Clam and Ocean Qahog; Atlantic Bluefish; Summer Flounder, Scup, and Black Sea Bass.¹¹⁴ The assessments of fishing gear impacts were disapproved.¹¹⁵ The Council has subsequently implemented two new fisheries management programs with approved EFH provisions: Tilefish approved in 2001 and Spiny Dogfish approved in September 1999.

The New England Council has seven fisheries management programs: Monkfish, Atlantic Herring, Sea Scallops, Atlantic Salmon, Deep Sea Red Crab, and Skates. NMFS approved the EFH provisions for all seven fisheries management programs.¹¹⁶ However, five are now subject to remand pursuant to *American Oceans Campaign*.¹¹⁷

108. EFH Generic Amendment to the Fishery Management Plans of the U.S. Caribbean, 64 Fed. Reg. 14,884 (Mar. 29, 1999).

109. *Id.*

110. *Id.*

111. See EFH Generic Amendment to the FMPs of the U.S. Caribbean, 66 Fed. Reg. 15,404 (Mar. 19, 2001).

112. Amendment 4 to the FMP for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (Coral FMP), 65 Fed. Reg. 37,292 (June 14, 2000).

113. See Pelagic Sargassum Habitat of the South Atlantic Region, 68 Fed. Reg. 57,375 (Oct. 3, 2003).

114. Amendment 12 to the Summer Flounder, Scup, and Black Sea Bass FMP, Amendment 8 to the Atlantic Mackerel, Squid, and Butterfish FMP, and Amendment 12 to the Atlantic Surf Clam and Ocean Quahog FMP, 64 Fed. Reg. 57,587 (Oct. 26, 1999).

115. *Id.*

116. See Amendment 1 to the Monkfish FMP to Designate EFH for Monkfish, 64 Fed. Reg. 32,825 (June 18, 1999); Atlantic Herring FMP, 65 Fed. Reg. 11,956 (Mar. 7, 2000); FMP Amendments to Designate EFH, Atlantic Salmon Overfishing Definition, and Aquaculture Framework Specification Process, 64 Fed. Reg. 19,503 (Apr. 21, 1999).

117. Supplemental Environmental Impact Statements (SEISs) for the EFH Components of the Monkfish, Atlantic Herring, and Atlantic Salmon FMPs, 66 Fed. Reg. 46,979 (Sept. 10, 2001).

The North Pacific Council has five fisheries management programs: Groundfish of the BSAI, Groundfish of the GOA, High Seas Salmon, King and Tanner Crab, and Scallops. NMFS approved the EFH amendments to each of these fisheries management programs on January 20, 1999.¹¹⁸ All are subject to the *American Oceans Campaign* remand.¹¹⁹

The Pacific Council administers three fisheries management programs: Groundfish, Coastal Pelagics, and Commercial and Recreational Salmon. NMFS approved EFH amendments for groundfish and coastal pelagics in 1999.¹²⁰ The Groundfish EFH provisions are now subject to *American Oceans Campaign*.¹²¹ NMFS approved the EFH amendment to the salmon FMP on September 27, 2000.¹²² This amendment has been subject to litigation in *Idaho County v. Evans*.¹²³

The Western Pacific Council's EFH provisions in all five of its existing fisheries management programs have been approved and are in place.¹²⁴

NMFS approved the Atlantic Highly Migratory Species fisheries management program in 1999, including EFH provisions, and is now conducting a five-year review.¹²⁵ NMFS implemented Amendment 1 to the Billfish Fisheries Management Program, including EFH provisions, on May 28, 1999, and has likewise initiated a five-year review.¹²⁶

118. Atlantic Highly Migratory Species (HMS) Fisheries FMP, Plan Amendment, and Consolidation of Regulations, 64 Fed. Reg. 3154, 3165 (Jan. 20, 1999).

119. See Fisheries of the EEZ Off Alaska, Amendments for Addressing EFH Requirements, 64 Fed. Reg. 20,216 (Apr. 26, 1999); Groundfish Fisheries of the Bering Sea and Aleutian Islands Area and the Gulf of Alaska, King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands, Scallop and Salmon Fisheries off the Coast of Alaska, 66 Fed. Reg. 30,396 (June 6, 2001).

120. Amendment 11 to the Pacific Coast Groundfish Fishery, 64 Fed. Reg. 49,092 (Sept. 10, 1999), Amendment 8 to the Northern Anchovy/Coastal Pelagri Species Fishery, 64 Fed. Reg. 69,888 (Dec. 15, 1999).

121. 183 F. Supp. 2d 1, 20 (D.D.C. 2000).

122. Amendment 14 to the West Coast Salmon Fisheries, 65 Fed. Reg. 63,047 (Oct. 20, 2000).

123. No. CV02-80-C-EJL, 2003 U.S. Dist. LEXIS 23459, at *5 (D. Idaho Sept. 30, 2003).

124. See Precious Coral Fisheries, FMP Amendment 5; Bottomfish and Seamount Groundfish Fisheries, FMP Amendment 6; Pelagic Fisheries, FMP Amendment 8; Crustacean Fisheries, FMP Amendment 10, 68 Fed. Reg. 16,754 (Apr. 7, 2003).

125. See Atlantic Highly Migratory Species; Atlantic Shark Management Measures, 68 Fed. Reg. 45,196, 45,202 (Aug. 1, 2003).

126. EIS for Amendment 2 to the FMP for Atlantic Tunas, Swordfish, and Sharks and Amendment 2 to the Atlantic Bellfish FMP, 68 Fed. Reg. 40,907 (July 9, 2003).

1. The National Marine Fisheries Service's Essential Fish Habitat Rule

With respect to the identification and description of EFH, the EFH Final Rule provided guidance on how to gather data and conduct an analysis based on available data to determine which habitat is “essential.”¹²⁷ The EFH Final Rule also directs Councils to obtain information on geographic range and habitat requirements of fish by life stage from the “best available sources,” including peer-reviewed literature, unpublished scientific reports, data files of government resource agencies, and fisheries landings reports.¹²⁸ When only incomplete data are available, the EFH Final Rule allows Councils to extrapolate habitat requirements from what is known about similar species or different life-stages. The EFH Final Rule encourages Councils to interpret the available data in a risk averse fashion.¹²⁹ The factors to be considered in identifying EFH range from ecosystem-based issues, such as species interactions and assemblages, to fishing-based issues, such as the contribution of habitat loss to reduced yields.¹³⁰ In some instances, the regulations allow or encourage the identification of historic habitat as EFH, even if it is not currently used by the species, if it could be restored within the bounds of economic and technological feasibility.¹³¹ While limiting the designation of EFH to waters of the United States and the EEZ, the EFH Final Rule allows a broader potential geographic scope for the assessment of activities that may adversely affect that EFH: “Councils may describe, identify, and protect habitats of managed species beyond the exclusive economic zone; however, such habitat may not be considered Essential Fish Habitat.”¹³²

With respect to minimizing the impacts of fishing on habitat, the EFH Final Rule prescribed a process for identifying effects caused by fishing and then minimizing those impacts to the extent practicable. The EFH Final Rule appeared to push Councils to take additional protective actions beyond what had already been done, requiring that if there was “any evidence” of a “more than minimal” adverse impact that is “not temporary in nature,” then Councils “must act to prevent, mitigate, or minimize any adverse impacts from fishing to the extent practicable.”¹³³

127. 50 C.F.R. § 600.815(a)(1)(ii) (2004).

128. *Id.*

129. *Id.* § 600.815(a)(1)(iv).

130. *Id.*

131. *Id.*

132. *Id.* § 600.805(b)(2).

133. *Id.* § 600.815(a)(2)(ii).

To this end Councils first must identify a range of potential alternatives that would alleviate impacts, then conduct a practicability analysis of the alternatives, and implement those alternatives that are necessary and practicable.¹³⁴ The rule delineates sample management measures that could be used to alleviate impacts, including gear restrictions, time/area closures, and harvest limits.¹³⁵ It also sets forth considerations that Councils should consider in assessing “practicability”: the nature and extent of the adverse impacts on the EFH, and the long- and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation.¹³⁶ Finally, the EFH Final Rule provides guidance for identifying activities other than fishing that could adversely affect the EFH, and requires FMPs to include recommendations for avoiding, minimizing, or compensating for impacts from these types of activities, particularly with respect to impacts to the HAPCs. It also clarified the geographic scope of the EFH provisions and that state-managed fisheries were included.¹³⁷

2. Identification of Essential Fish Habitat in Fisheries Management Plans: Dealing with Uncertainty

Although the requirement to identify EFH was, on its face, a purely informational task, the effect of defining an area as EFH is to subject all federal actions in that area to an EFH consultation.¹³⁸ Consequently, the Councils’ identification of EFH have been controversial.¹³⁹

Cumulatively, the FMPs identified EFH for over seven hundred species, taking into account their ecological needs at different life stages.¹⁴⁰ Despite attempts to break the EEZ into meaningful subsets for management and analysis purposes, due to a lack of science to support further refinement of the descriptions, the EFH amendments as a whole have resulted in the entire EEZ being identified as EFH for one or more managed species. For example, Amendment 11 to the Pacific Groundfish FMP approached the identification of EFH as follows: The FMP manages eighty-three species that occur throughout the EEZ during their various life stages. The Council identified the EFH as including

134. *Id.*

135. *Id.* § 600.815(a)(2)(iv).

136. *Id.* § 600.815(a)(2)(iii).

137. *Id.* § 600.815(a)(3); *see also* Idaho County v. Evans, No. CV02-80-C-EJL, 2003 U.S. Dist. LEXIS 23459 (D. Idaho Sept. 30, 2003) (establishing that geographic scope includes uplands).

138. *See* Hearings Testimony of Dalton, *supra* note 17.

139. *See id.*; *see also* EFH Final Rule, 67 Fed. Reg. 2343 pmb. (Jan. 17, 2002).

140. *See* Hearings Testimony of Dalton, *supra* note 17.

“all waters from the mean higher high water line, and the upriver extent of saltwater intrusion in the river mouths, along the coasts of Washington, Oregon, and California, seaward to the boundary of the U.S. exclusive economic zone.”¹⁴¹ The FMP identified seven distinct categories of EFH types that could be used as a basis for managing ecologically related species and habitat: estuarine, rocky shelf, nonrocky shelf, canyon, Continental slope/basin, neritic zone, and oceanic zone.¹⁴² The Gulf Omnibus Amendment identified two types of EFH, estuarine and marine, and described them as follows:

For the estuarine component, EFH is defined as all estuarine waters and substrates (mud, sand, shell, rock, and associated hard bottom communities), including the sub-tidal vegetation (seagrass and algae) and adjacent inter-tidal vegetation (marshes and mangroves). In the marine waters of the Gulf of Mexico, EFH is defined as all marine waters and substrates (mud, sand, shell, rock, hardbottom, and associated biological communities) from the shoreline to the seaward limit of the exclusive economic zone.¹⁴³

Critics have argued that identification of the entire EEZ as EFH renders the EFH provisions meaningless, as they were intended to provide for focused protections on special areas that needed it.¹⁴⁴ The agency also received comments that the designations were under-inclusive.¹⁴⁵ The agency found the broad identifications to be justified and precautionary given the lack of data.¹⁴⁶ However, NMFS did include provisions for focusing EFH protections on areas in need of special management attention, known as HAPCs in the EFH Final Rule.¹⁴⁷

NMFS has made much of this EFH information publicly available via its interactive website, where maps and other information about EFH

141. Pac. Fishery Mgmt. Council, Final Environmental Assessment/Regulatory Impact Review (EA/RIR) for Amendment 11 to the Pacific Coast Groundfish FMP, app. B, at 6-21, at www.pcouncil.org/groundfish/gffmp/gfa11/gfa11appb.pdf (Oct. 1998) [hereinafter Pacific Coast Groundfish FMP].

142. *Id.* app. B, at 6-21 to -22; *see id.* app. B, at 11-3 to -4; Assessment/Regulatory Impact Review (EA/RIR) for Amendment 11 to the Pacific Coast Groundfish FMP, 11-3 to -4 (Oct. 1998), www.pcouncil.org/groundfish/gffmp/gfa11/gfa11.pdf.

143. Gulf Omnibus Amendment, *supra* note 31, at 22-25; *see also* Approval of Amendment 1 to the Monkfish FMP, 64 Fed. Reg. 32,825 (June 11, 1999).

144. The preamble to the EFH Final Rule describes comments to this effect. *See* EFH Final Rule, 67 Fed. Reg. 2343 (Jan. 17, 2002).

145. *See id.*

146. *See id.*

147. *Id.*; *see also* 50 C.F.R. § 600.815(a)(8) (2004).

are posted.¹⁴⁸ While there are complaints about imperfections in the EFH designations, even critics recognize that as imperfect as they may be, they are “the most complete data set ever containing the habitat requirements of all managed species, the location of those habitats, and the activities that have the potential to threaten those habitats.”¹⁴⁹ Furthermore, NMFS recognizes the initial identifications of EFH as first steps in an ongoing process. NMFS is currently reviewing the initial designations in light of evolving information and pursuant to the new EISs being developed under the settlement agreement in *American Oceans Campaign*.¹⁵⁰

3. Minimization of Fishing Impacts: Dealing with Uncertainty

The requirement that FMPs minimize the impacts of fishing on EFH to the extent practicable was a new mandate—the law had never before required Councils to take such action. However, many Councils felt that they had already complied with the mandate and they cited protective measures already in place to demonstrate that fishing impacts were already being minimized to the extent practicable.¹⁵¹

The Councils generally took the position that there was not sufficient evidence linking the specific gears used in their fisheries to location-specific habitat damage to justify further restrictions on fishing. For the Pacific Coast Groundfish FMP, the Pacific Council reviewed available literature on the impacts of fishing gears to habitat, but found that because the study had been done on different types of habitat than were present in the groundfish fishery, it failed to demonstrate fishing-induced impacts. Rather than including any specific new protections in the FMP, the Pacific Council included a mechanism to allow implementation of various types of protections, such as gear restrictions, time/area closures, and harvest limits, if there was evidence of identifiable adverse impacts on habitat.¹⁵²

148. See Nat'l Oceanic & Atmospheric Admin., Nat'l Marine Fisheries Serv., *Essential Fish Habitat*, at <http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm> (last visited Oct. 22, 2004).

149. See Hearings Testimony of Chasis, *supra* note 60.

150. See *Sierra Club v. United States Army Corps of Eng'rs*, 614 F. Supp. 1475, 1477 (S.D.N.Y. 1985); see also Atlantic Highly Migratory Species, 68 Fed. Reg. 40,907 (July 9, 2003) (providing notice of intent to review EFH designations for the Atlantic Billfish FMP and the FMP for Atlantic Tunas, Swordfish and Sharks (the Highly Migratory Species FMP)). In *American Oceans Campaign v. Daley* environmental groups brought suit alleging that the approval of the EFH amendments to the FMPs violated NEPA and the FCMA by relying only on EAs rather than EISs. 183 F. Supp. 2d 1, 9 (D.D.C. 2000). The court held that the EAs were indeed inadequate. See discussion *infra* Part IV.A.5.

151. See discussion *supra* Part III.A.

152. Pacific Coast Groundfish FMP, *supra* note 141, app. B, at 11-16 to -18.

Similarly, the Gulf of Mexico Council provided a paragraph describing what is known about biological alterations that can occur due to fishing pressure, a paragraph on gear types that have direct contact with the bottom, a paragraph on uncontrollable environmental factors such as weather, and identified needs for further research.¹⁵³ The Gulf EFH amendment also described existing fishing practices and gear types, and asserted that the Gulf of Mexico Council had been protecting fish habitat since the 1970s.¹⁵⁴ The amendment described existing management measures already in place to show compliance with the recommendations in the EFH Final Rule.¹⁵⁵

In its FMP amendment, the New England Council cited to difficulties in applying research that was not correlated to the specifics of its fisheries.¹⁵⁶ It then described the types of gear used in the fisheries, and described existing management measures that protect EFH.¹⁵⁷

In the case of the FMPs developed for highly migratory species (HMS), NMFS likewise cited a lack of evidence correlating specific gear use to specific habitat impacts, and concluded that the record did not support more restrictive measures.¹⁵⁸ For example, in addressing EFH for sharks, NMFS received public comments advocating different ways to proceed in the face of uncertainty. One commentator advocated closing all shark nursing and pupping grounds based on EFH for neonate and juvenile sharks to protect juvenile sharks from indiscriminate commercial gears.¹⁵⁹ Another commentator argued that a blanket closure could not be supported based on current understanding of stock status, life histories, and defined EFH for each species.¹⁶⁰ NMFS concluded that “[c]urrently, there are insufficient data to support a closure of all EFH pupping and nursery areas. Moreover, a closure of all coastal waters would have had a severe economic impact on fishing communities.”¹⁶¹

The Environmental Protection Agency (EPA) recommended that NMFS discuss whether shark EFH was being affected by other fishery practices, and whether limitations on other fisheries would support

153. Gulf Omnibus Amendment, *supra* note 31, at 115-17.

154. *Id.* at 115, 118-22, 173.

155. *See id.*

156. *See* Amendment 1 to the Monkfish FMP to Designate EFH for Monkfish, 64 Fed. Reg. 32,825 (June 19, 1999).

157. *Id.*

158. Atlantic Highly Migratory Species, Atlantic Shark Management Measures, 68 Fed. Reg. 74,746 (Dec. 24, 2003).

159. *Id.* at 74,752.

160. *Id.* at 74,760.

161. *Id.*

higher quotas in the shark fishery.¹⁶² NMFS responded that while shark pupping and nursery habitats may be subjected to fishing impacts from gears of other fisheries, like shrimp trawling,

the degree of overlap between the various trawl fisheries and shark EFH, the extent to which habitat is altered by these gears, and the resulting impact on EFH are currently not known. Further research would be required to determine habitat-related production rates for sharks (the highest, most refined level of information available with which to identify EFH, and which is currently not available for sharks) and the potential impact of other fisheries on these production rates.¹⁶³

Thus, with limited exceptions, the new SFA mandate did not result in new measures to restrict fishing activity.¹⁶⁴

The leading exception was the South Atlantic Council's determination that additional protective measures were necessary to protect *Oculina* coral from adverse impacts of fishing gear—it recommended expansion of the *Oculina* Bank protected area. The Council noted that, “*Oculina* coral, a slow growing, delicate stony coral, is easily damaged by anchoring and use of bottom tending gear (e.g., trawls and traps). *Oculina* coral provides important habitat for snapper-grouper species and for rock shrimp and calico scallop spawning stock.”¹⁶⁵ The South Atlantic Council also recommended a voluntary vessel monitoring system (VMS) program in the shrimp fishery to support data gathering.¹⁶⁶ In addition, the NMFS HMS Division added a “precautionary recommendation to fishermen to take appropriate steps to identify bottom obstruction and ‘hangs’ to avoid setting gear in areas where it may become entangled and disturb benthic habitats, and to make diligent efforts to recover gear that is lost.”¹⁶⁷

While self-imposed constraints are a difficult proposition when the costs and benefits are not clearly delineated,¹⁶⁸ the Councils have

162. *Id.* at 74,766.

163. *Id.*

164. *See, e.g.*, Amendment 4 to the FMP for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (Coral FMP), 64 Fed. Reg. 37,082 (proposed July 9, 1999).

165. *Id.* at 37,083.

166. Amendment 4 to the FMP for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (Coral FMP), 65 Fed. Reg. 37,292, 37,294 (June 14, 2000).

167. Amendment 1 to the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks, 10-18 to -19 (Nov. 2003) (on file with author).

168. As Ralph Nader has noted in context of risk management, “[p]eople treat [threats] differently depending on whether they are voluntary [or] involuntary.” Ralph Nader, *Containing Violence by Containing Risk*, in REGULATING RISK: THE SCIENCE AND POLITICS OF RISK, *supra* note 4, at 15. Speaking in context of the need for ocean protections, Rod Fujita has noted that “extensive evidence is often required before conservation measures can be implemented.” ROD FUJITA, HEAL THE OCEAN: SOLUTIONS FOR SAVING OUR SEAS 228 (2003).

historically been proactive in protecting habitat to the extent they found necessary.¹⁶⁹ Current efforts are underway to augment the analyses addressing the minimization of fishing impacts.¹⁷⁰ For example, the Pacific Council is in the process of reviewing the impacts of gear types on habitat through the prism of a decisionmaking framework. This framework calls for data consolidation and model development to produce a foundation of information on which to base potential alternative management approaches.¹⁷¹

4. Recommendations Regarding Other Impacts

With respect to recommendations for addressing the impacts of other activities on EFH, the Councils have been more aggressive. The EFH amendments provide a wealth of recommendations for modifying the actions of other agencies, including curtailment of wetland development, provisions for adequate landfills, and better monitoring of point source pollution under the CWA.¹⁷²

169. See discussion *supra* Part III.A.

170. See *Am. Oceans Campaign v. Daley*, 182 F. Supp. 2d 1 (D.D.C. 2000) (requiring full EISs as opposed to EAs prior to adopting EFH amendments to FMPs).

171. According to Steve Copps the Pacific Council approved the data consolidation and modeling components. Telephone Interview with Steve Copps, Senior Policy Analyst, Nat'l Marine Fisheries Serv. Northeast Region (June 24, 2004). Other Councils and regions have also taken steps to gather information on gear impacts. See ALONZO HAMILTON, NAT'L MARINE FISHERIES SERV., GEAR IMPACTS ON ESSENTIAL FISH HABITAT IN THE SOUTHEASTERN REGION (Mar. 30, 2000), at <http://www.nmfs.noaa.gov/habitat/habitatprotection/images/GearImpacts.pdf>; see also MICHAEL C. BARNETTE, A REVIEW OF FISHING GEAR UTILIZED WITHIN THE SOUTHEAST REGION AND THEIR POTENTIAL IMPACTS ON ESSENTIAL FISH HABITAT (Nat'l Oceanic & Atmospheric Admin. Technical Mem. NMFS-SEFCS 449, 2001), at http://www.nmfs.noaa.gov/habitat/habitatprotection/pdf/Barnette_gear.pdf.

172. Pacific Coast Groundfish FMP, *supra* note 141, app. B, at 11-43. The Pacific Council listed eleven categories of nonfishing activities that could potentially affect EFH: dredging, filling, oil and gas exploration/production; water intake structure; aquaculture; wastewater discharge; hazardous substance release; fish enhancement structures; coastal development; introduction of exotic species; agricultural practices; removal of large woody debris; and commercial resource harvesting. The FMP described the impacts of such activities on EFH and recommended a total of sixty-one conservation measures for addressing these impacts. Recommended measures range from minimizing new dredging activity, to locating disposal sites in upland locations, curtailing new development projects in wetlands, estuaries, and bays, and pretreating effluent discharges. *Id.*

The Gulf Omnibus Amendment includes an extensive section on impacts of nonfishing activities. It features a forty-nine-page description of activities and their impacts, including: navigation projects, ports, marinas, and maintenance dredging; canals, ditches, levees, and embankments; tidal water controls; pipeline crossings and rights-of-way; impoundments and alterations of fresh water inflow; industrial/commercial operations; housing developments; oil and gas operations; agriculture and silviculture; point source discharges; hydromodifications; non point source runoff; hypoxia; entrainment, impingement, and thermal cooling water discharges; hazardous waste management; petroleum products operations; chemical contaminant spills; atmospheric deposition; blooms; and introduction of exotic species. It also includes twenty-five

In addition, the three NMFS West Coast regional offices have prepared a seventy-five-page document for use in EFH consultations that describes in detail the impacts of nonfishing activities and recommends a series of possible conservation measures.¹⁷³

5. Litigation

As discussed above, implementation of both the requirements to identify and describe EFH and the requirement to minimize the impacts of fishing to the extent practicable were affected by lack of data. The way NMFS dealt with this factual uncertainty subsequently became the subject of litigation. The developments so far support the agency's interpretations of the MSA's requirements, but one notable case identified a need for more in-depth analysis under the National Environmental Policy Act (NEPA).¹⁷⁴

American Oceans Campaign was one of the first challenges to NMFS's implementation of the SFA; there, environmental plaintiffs challenged the EFH amendments for twenty-two FMPs.¹⁷⁵ For each of the challenged FMP amendments, NMFS had prepared environmental assessments (EA) and issued FONSI's.¹⁷⁶ Plaintiffs alleged that NMFS had not considered alternative EFH designations to what the Councils had recommended, as required by NEPA.¹⁷⁷ NMFS argued that under the

pages of recommendations for addressing these nonfishing impacts. Among many other specific recommendations, the FMP includes recommendations on construction and sizes of piers; locations of marinas and boat ramps; provision of adequate trash collection facilities; acquisition of permanent upland sites for the disposal of dredged material that would not affect wetlands; alignment of cable and pipeline crossings; locations and alignments of channels; and the use of locks to connect saline and fresh waters; and a recommendation against canals that drain wetlands. Gulf Omnibus Amendment, *supra* note 31, ch. 7.2, at 174-99.

The New England Omnibus Amendment includes a detailed description of nonfishing impacts on EFH, identifying and prioritizing thirty-nine specific activities that pose chemical, biological, or physical threats to EFH, such as herbicide use, introduction of nonindigenous species, and channel dredging. New England Omnibus Amendment, *supra* note 7, at 198. It also identifies twenty-three sources of point and nonpoint source pollution, including such things as septic systems, industrial discharges, recreational boating, and wildlife feces. *Id.* at 200. It then provides extensive recommendations for addressing such threats to EFH including suggestions such as: ensure monitoring of NPDES-permitted discharges; encourage innovative ways to reduce chlorine discharges; reduce nutrient loading by discouraging the use of fertilizers, protecting open space, and utilizing buffer zones; encourage permitting agencies to require stormwater BMPs when permitting private property tie-ins to state drainage facilities.

173. NON-FISHING IMPACTS TO ESSENTIAL FISH HABITAT AND RECOMMENDED CONSERVATION MEASURES (Jeanne Hanson et al. eds., 2003), at <http://swr.nmfs.noaa.gov/EFH-NonGear-Master.pdf>.

174. NEPA §§ 101-105, 42 U.S.C. §§ 4331-4335 (2000).

175. *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 3 (D.D.C. 2000).

176. *Id.* at 17-18.

177. *Id.*

MSA, its decision-making authority with regard to Council recommendations was limited to approval, partial approval, or disapproval.¹⁷⁸ The district court found that the FMPs complied with the requirements of the MSA, but that the underlying NEPA analyses were inadequate.¹⁷⁹ The court expressed concern that NMFS did not consider alternatives to the Councils' recommended designations of EFH, nor measures for further reducing the impacts of fishing gears.¹⁸⁰ The parties subsequently reached a settlement agreement pursuant to which new NEPA analyses are being prepared for these FMPs.¹⁸¹

Developing case law on the question of whether additional mitigation measures are required to address fishing impacts indicates that courts agree that, without better data establishing stronger correlations between gear impacts and adverse effects, the status quo is judicially acceptable. In *Natural Resources Defense Council v. Evans*, the United States District Court for the Southern District of New York reviewed NMFS's approval of a tilefish FMP that imposed no restrictions on trawl gear despite evidence that trawl gear disturbs the "burrows" that are included as EFH for tilefish.¹⁸² The court found the agency's action reasonable in light of conflicting expert testimony and evidence in the record suggesting that trawl gear had been used in the tilefish habitat in the area for twenty to thirty years and tilefish still survived.¹⁸³ The court upheld the agency's determination that there was no evidence of "adverse effect," and thus no need for restrictions on the gear.¹⁸⁴

Recent cases also establish that required minimization of fishing impacts is subject to the "practicability" qualifier.¹⁸⁵ Thus, economic considerations may justifiably be factored into a Council's recommendations on the appropriate level of fishing restrictions.¹⁸⁶ In *Conservation Law Foundation v. United States Department of*

178. *Id.* at 5.

179. *Id.* at 15.

180. *Id.* at 20.

181. *See id.* at 20-22.

182. *Natural Res. Def. Council v. Evans*, 254 F. Supp. 2d 434, 437 (S.D.N.Y. 2003).

183. *Id.* at 441.

184. *Id.* at 440. *But see Am. Oceans Campaign*, 183 F. Supp. 2d at 15. In *American Oceans Campaign*, the district court found that the agency's action complied with the MSA, but violated NEPA. *Id.* Specifically, the court criticized NMFS's failure to consider alternatives to minimize the impacts of fishing. *Id.* at 20.

185. *See* MSA § 303(a)(7), 16 U.S.C. § 1853(a)(7) (2000) (mandating that FMPs "minimize to the extent practicable" the effect of fishing on EFH).

186. *See* 50 C.F.R. § 600.815(a)(2)(iii) (2004). The EFH Final Rule sets forth considerations for assessing "practicability." *Id.* The nature and extent of the adverse impacts on the EFH, and the long- and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation should be considered. *Id.*

Commerce, the United States District Court for the District of Massachusetts reviewed NMFS's annual management measures for the 2001-2002 Atlantic Sea Scallop Fishery.¹⁸⁷ The management measures maintained existing closed areas including approximately 5000 square nautical miles, and maintained effort, gear, and seasonal restrictions.¹⁸⁸ They did not, however, close additional areas as had been recommended by environmental organizations.¹⁸⁹ Environmental organizations filed suit alleging that the measures did not "minimize to the extent practicable adverse effects on . . . habitat."¹⁹⁰ Finding in favor of the agency, the court wrote: "The key word, of course, is 'practicable.' The record amply demonstrates that habitat . . . [was] considered in formulating Framework 14."¹⁹¹

Similarly, in *Conservation Law Foundation v. Mineta*, the United States District Court for the District of Columbia reviewed NMFS's action to allow increased effort and to open previously closed areas for the New England scallop fishery.¹⁹² Plaintiffs argued that NMFS had failed to adequately analyze the net effects of these two actions on EFH.¹⁹³ Ruling in favor of NMFS, the court found that the record showed that the agency had acknowledged detrimental effects of dredging on EFH, and had taken action to limit dredging to areas of less sensitivity.¹⁹⁴ In addition, the court found that the record showed that allowing dredging in the newly opened areas would reduce the total amount of dredging time in the fishery as a whole and result in benefits to habitat throughout the area.¹⁹⁵

B. *Essential Fish Habitat Consultations*

The SFA mandates that action agencies undertaking activities that "may adversely affect" EFH initiate consultations with NMFS and then exchange information about the proposed project, potential effects on habitat, and recommended conservation measures.¹⁹⁶ NMFS must then provide recommendations for habitat conservation, and the action agency

187. 229 F. Supp. 2d 29, 31 (D. Mass. 2002).

188. *Id.* at 34.

189. *Id.*

190. *Id.* (quoting MSA § 303(a)(7), 16 U.S.C. § 1853(a)(7)).

191. *Id.*

192. 131 F. Supp. 2d 19, 25 (D.D.C. 2001).

193. *Id.* at 29.

194. *Id.* at 30.

195. *Id.* at 25.

196. MSA § 305(b), 16 U.S.C. § 1855(b) (amended by SFA, Pub. L. No. § 110(b), 104-297, 110 Stat. 3559, 3588-89 (1996)).

must respond in writing within thirty days of receiving NMFS's comments, describing the mitigation measures it will implement or explaining why it will not follow NMFS's recommendations.¹⁹⁷

While the mandate for action agencies to initiate consultation is a new procedural requirement, it does not constrain an agency's discretion in making its ultimate decision beyond requiring a rational explanation of that decision on the record.¹⁹⁸ Congress did not extend the requirement to minimize the impacts on habitat to actions other than fishing. However, the consultation process provides a forum for putting information about a project's potential impacts before the appropriate decisionmaker early in the process.

1. The Consultation Process

Because an EFH consultation is essentially a documented exchange of information during an agency's decisionmaking process, in many cases mechanisms are already in place to support the consultation. However, the SFA added additional procedural and documentation requirements beyond what was previously established. The EFH Final Rule provides guidance on how this exchange takes place; it states:¹⁹⁹

The existing process must provide NMFS with timely notification of actions that may adversely affect EFH. . . . Notification must include an assessment of the impacts of the action on EFH that meets the requirements for EFH Assessments. . . . If the EFH Assessment is contained in another document, the Federal agency must identify that section of the document as the EFH Assessment.²⁰⁰

The EFH Final Rule requires that action agencies notify NMFS as early as possible—generally, at least sixty to ninety days in advance of a final decision on an action that may adversely affect EFH.²⁰¹ The action agency provides information about the proposed activity, its potential effects, and proposed mitigation in the form of an “EFH Assessment.”²⁰² NMFS then engages in varying levels of communication with the action

197. MSA § 305(b)(4), 16 U.S.C. § 1855(b)(3)-(4). Additionally, the SFA requires NMFS first to provide conservation recommendations if it becomes aware of any state or federal activity that “would adversely affect” EFH. *Id.*

198. *Compare* MSA § 305(b)(4)(B), 16 U.S.C. § 1855(b)(4)(B), *with* Endangered Species Act (ESA) §§ 2-18, 16 U.S.C. §§ 1531-1544. The ESA requires the action agency to modify or stop a proposed action if the action would adversely affect endangered species. ESA § 7, 16 U.S.C. § 1531.

199. 50 C.F.R. § 600.920 (2004).

200. *Id.* § 600.920(f)(1)(i)-(ii).

201. *Id.* § 600.920(f)(1)(i).

202. *Id.* § 600.920(g)(2)-(3).

agency regarding the information in the EFH Assessment, and ultimately provides the agency with a response which may include “conservation recommendations.”²⁰³ The statute requires the action agency to respond to the NMFS’s conservation recommendations within thirty days, describing the mitigation measures it will implement or explaining why it chose not to accept the recommendations.²⁰⁴ Alternatively, if its proposal differs from NMFS’s recommendation, the action agency must explain why and provide the scientific justification for any disagreement with NMFS. The EFH Final Rule allows NMFS to request a follow-up meeting if the conservation recommendations are not accepted.²⁰⁵

The EFH Final Rule sets forth alternative approaches for conducting the required consultations that allow for flexibility and build on existing environmental review procedures where possible.²⁰⁶ Each type of consultation begins with an “EFH Assessment” prepared by the action agency.²⁰⁷ If NMFS determines that conservation recommendations are appropriate, it will provide the recommendations to the action agency.²⁰⁸ Although states are not directly required to consult with NMFS, the EFH Final Rule clarifies that federal programs that are delegated to nonfederal entities are subject to EFH consultation at the points of delegation, and review and renewal of delegation.²⁰⁹

The EFH Final Rule identifies five potential kinds of consultation depending on the review procedures already in place, and the potential impacts posed by the type of action.²¹⁰ Agencies may: (1) incorporate EFH consultations into existing environmental review procedures if NMFS makes a “Finding” that the existing procedures will meet necessary criteria; (2) consult on an entire program of related activities through a programmatic consultation; (3) seek a General Concurrence, which requires no further consultation because the federal action is of the type that will not individually or cumulatively result in more than minimal adverse impacts to the EFH; (4) engage in abbreviated

203. *Id.* § 600.920(j)(3).

204. MSA § 305(b)(4)(B), 16 U.S.C. § 1855(b)(4)(B) (2000).

205. 50 C.F.R. § 600.920(j)(2).

206. *Id.* § 600.920(k).

207. *Id.* § 600.920(e).

208. *Id.* § 600.920(h)(3).

209. *Id.* § 600.920(a). See, for example, EPA’s delegation to the Washington Department of Ecology authority to implement certain portions of the Clean Air Act’s permitting scheme. A condition of the delegation is that the Department of Ecology provide timely notice of permit applications to NMFS and notify applicants of the potential need to consult on EFH. Partial Delegation of Authority for Prevention of Significant Deterioration of Air Quality, 68 Fed. Reg. 25,875, 25,879 (May 14, 2003).

210. 50 C.F.R. § 600.920(a)(2).

consultation; or (5) engage in expanded consultation pursuant to the procedures in the EFH Final Rule.²¹¹

a. Findings

Many agencies that do a high volume of EFH consultations have utilized the “Findings” option which allows them to integrate the EFH consultation into existing review procedures such as those required by NEPA.²¹² As of spring 2004, NMFS made approximately forty-seven Findings that the existing environmental review procedures used by various agencies could be adapted to include the required EFH consultations.²¹³ While the NMFS National Office of Habitat Conservation made several Findings, most are made at the regional level and address procedures employed by regional or district-level counterparts in other agencies.²¹⁴

With respect to Corps activities, each region has made Findings (with the exception of the newly created Pacific Islands Regional Office). Generally, the Findings are divided into two categories: one for the regulatory and permitting aspects, and the other for planning and NEPA activities. Depending on the types of activities addressed in each region, the Findings with the Corps permitting divisions state that Corps procedures under the CWA, the RHA, and/or the Marine Protection Research and Sanctuaries Act provide sufficient opportunity for EFH consultation if the procedures are modified to include the specific information required in the EFH Assessment, to provide sufficient time for NMFS review, and require the Corps to respond in writing to NMFS’s recommendations. For NEPA and planning activities, similar findings are made with respect to modification of the NEPA process to include required EFH elements.

Thus, for many agency actions, the structure of the communication process has remained the same, but has been formalized and expanded to

211. *Id.* § 600.920(a)(2).

212. Interview with Karen Abrams, National EFH Coordinator, Office of Habitat Conservation, NMFS (Oct. 2003).

213. NAT’L MARINE FISHERIES SERV., OFFICE OF HABITAT CONSERVATION, *ESSENTIAL FISH HABITAT CONSULTATION GUIDANCE* app. E (Apr. 2004), at [http://www.nmfs.noaa.gov/habitat/habitatprotection/pdf/Essential Fish Habitat%20consultation20Guidance%20v1-1.pdf](http://www.nmfs.noaa.gov/habitat/habitatprotection/pdf/Essential%20Fish%20Habitat%20consultation%20Guidance%20v1-1.pdf).

214. *See id.* Some regions have made findings for other agency processes, such as the Federal Highway Administration and its use of NEPA and/or ESA processes; for the Mineral Management Service, the Navy, the EPA, the Bureau of Reclamation, and the Forest Service to conduct EFH consultations through existing decision-making processes, and also for Bonneville Power Administration and the Breaux Act Program. *Id.*

ensure compliance with EFH requirements.²¹⁵ For example, with respect to issuance of nationwide permits under the CWA, the Corps has agreed that the Corps' General Condition 13, which states that district engineers will not respond to resource agency comments, should not apply to EFH conservation recommendations provided by NMFS.²¹⁶

NMFS has made an internal Finding with respect to coordinating its consultation duties under the EFH provisions and its consultation duties under section 7 of the ESA.²¹⁷ NMFS has found the section 7 process to provide an adequate mechanism for satisfying the EFH requirements as long as the necessary EFH timelines are met, and the EFH conservation recommendations are distinguished from the ESA's conditions and requirements.²¹⁸

b. Programmatic Consultations

NMFS has completed a total of five programmatic consultations with other agencies—three with the Corps and two with the Minerals Management Service (MMS).²¹⁹ The first programmatic consultation with the Corps was conducted at the headquarters level and addressed the Corps' process for issuing nationwide permits under section 404 of the CWA.²²⁰ The Corps accepted the two NMFS conservation recommendations, which were to (1) revise the Corps' policy of not responding to resource agency comments and (2) work cooperatively at

215. Letter from Hans Van Winkle, Brigadier General, U.S. Army, Deputy Commander for Civil Works to Dr. Andrew Kemmerer, Director, Office of Habitat Conservation, Nat'l Marine Fisheries Serv. (Nov. 3, 1999) (on file with author); Final Notice, 65 Fed. Reg. 12,818, 12,839 (Mar. 9, 2000).

216. Letter from Hans Van Winkle, *supra* note 215.

217. Memorandum from William T. Hogarth, Acting Assistant Administrator for Fisheries on the National Finding for Use of Endangered Species Act Section 7 Consultation Process to Complete Essential Fish Habitat Consultations (Feb. 28, 2001) (on file with author).

218. *Id.*

219. *See* Letter from Hans Van Winkle, *supra* note 215 (documenting the Nationwide Permits Programmatic Consultation); Letter from Andreas Mager, Assistant Regional Administrator, Habitat Conservation Division, Southeast Region, Nat'l Marine Fisheries Serv. to Mr. Chris Oynes, Regional Director, Minerals Management Service, Gulf of Mexico Outer Continental Shelf Region (July 1, 1999) (on file with author) (discussing the Gulf of Mexico Consultation); Letter from James Balsiger, Administrator, Alaska Region, Nat'l Marine Fisheries Serv., to Col. Steven Perrenot, U.S. Army Corps of Engineers, Alaska District, July 28, 2000 (on file with author) (discussing the Alaska Region Consultation); Letter from Steven Pennoyer, Administrator, Alaska Region, Nat'l Marine Fisheries Serv. to Col. Sheldon Jahn, U.S. Army Corps of Engineers, Alaska District (Mar. 31, 2000) (on file with author) (documenting the Programmatic Consultation on Anchorage Wetlands); Letter from James Balsiger, Administrator, Alaska Region, NMFS, to John Goll, Regional Director, Alaska Outer Continental Shelf Region, Minerals Management Service (July 8, 2003) (on file with author) (discussing the Cook Inlet Oil and Gas Consultation).

220. *See* Letter from Hans Van Winkle, *supra* note 215.

the district and regional levels to develop appropriate regional conditions.²²¹

The remaining two programmatic consultations with the Corps were conducted by the Alaska Region—one addresses dredge and fill activities in the city of Anchorage, and the other addresses dredge and fill activities associated with water and sanitation in Alaskan villages.²²² Both include conservation recommendations requiring setbacks from water bodies.²²³ In addition, the Alaskan Village Consultation also recommended measures to prevent leaks and spills, requirements for storage facilities, stabilization and re-vegetation of disturbed areas, and tracking and reporting.²²⁴

The consultations with the MMS address oil and gas leasing activities in the Gulf of Mexico and in the Cook Inlet area.²²⁵ They were conducted at the regional level and take slightly different approaches. The Gulf of Mexico Consultation includes prohibitions on bottom-disturbing activities within a certain distance of pinnacles, removes a certain area from the lease-sale block, requires an oil spill response strategy, and includes a variety of other protective measures and reporting requirements.²²⁶ NMFS now receives annual reports on the number and type of permits issued in each planning area, specifying how many are located in sensitive areas, and identifying any mitigation measures that took place.²²⁷ The Cook Inlet Oil and Gas Consultation includes five conservation recommendations related to drilling techniques and locations and the disposal of waste material.²²⁸

c. General Concurrences

A General Concurrence identifies specific types of actions that may adversely affect EFH but for which NMFS has determined no further

221. *See id.*

222. Letter from James Balsiger, *supra* note 219.

223. *Id.*

224. *Id.*

225. *See* Letter from Andreas Mager, *supra* note 219; Letter from James Balsiger, *supra* note 219.

226. *See* Letter from Andreas Mager, *supra* note 219, at 2.

227. *See* Letters from Chris Oynes, Regional Director, Minerals Management Service, Gulf of Mexico Outer Continental Shelf Region to Andreas Mager, Assistant Regional Administrator, Habitat Conservation Division, Southeast Region, National Marine Fisheries Service (Sept. 10, 2001) (referencing MS 5430) (on file with author); Letter from Chris Oynes, Regional Director, Minerals Management Service, Gulf of Mexico Outer Continental Shelf Region to Andreas Mager, Assistant Regional Administrator, Habitat Conservation Division, Southeast Region, National Marine Fisheries Service (July 24, 2002) (referencing MS 5430) (on file with author).

228. Letter from James Balsiger, *supra* note 219.

consultation is necessary due to the minimal nature of the impacts.²²⁹ A General Concurrence requires assessment of cumulative impacts, and requires continued tracking of cumulative impacts. Results of the tracking must be made publicly available on an annual basis.²³⁰ NMFS has undertaken two General Concurrences, both at regional levels with the Corps.²³¹ Both establish a presumption that certain activities do not require consultation, but require the Corps to notify NMFS on an action-by-action basis so it may determine if a particular activity may require additional consideration.²³² Thus NMFS continues to receive notice of each pending action, and cumulative effects are monitored, but the agency is able to reduce the workload of conducting complete consultations on each individual action.²³³

Although there is no venue for public notification and comment on EFH impacts on a case-by-case basis for activities covered by a General Concurrence, the annual reporting on cumulative impacts may produce useful, publicly available information in the future. In the upcoming months it will become apparent how effective the annual reporting of impacts on EFH will be.

NMFS issued a General Concurrence in New England for activities governed by state “programmatically general permits.” State programmatic general permits are permits issued to states pursuant to the CWA, the RHA, and/or section 103 of the Marine Protection, Research and Sanctuaries Act for activities that result in minimal environmental impacts. There are two types of programmatic general permits. Category I permits require no further authorization from the Corps, while Category II permits require Corps review and authorization. Because Category I activities do not require Corps approval, they do not trigger the need for EFH consultation. Category II activities, however, do. Examples of Category I activities include certain temporary buoys, Coast Guard approved aids to navigation, and single boat moorings not associated with any boating facility. Examples of Category II activities include minor maintenance dredging and installation of certain recreational docks and piers. NMFS issued a General Concurrence covering all activities listed as Category II within programmatic general permits issued by the Corps for Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut. The General

229. 50 C.F.R. § 600.920(g) (2004).

230. *Id.* § 600.920(g)(2)(ii).

231. *Id.*

232. *Id.*

233. *See id.*

Concurrence requires the Corps to notify NMFS in advance of each activity to allow NMFS to make a case-by-case determination on the applicability of the General Concurrence. Those actions that NMFS determines would result in more than minimal adverse effects to EFH would require individual consultation. This Generalized Concurrence was finalized on March 3, 2000.²³⁴

NMFS has issued a similar General Concurrence to the Corps in Los Angeles with respect to “minor Coastal Development activities.”²³⁵ The Corps has agreed to provide prior notice, via e-mail, to NMFS on each individual proposal. In terms of long-term tracking, the Corps has agreed to provide an annual summary of activities with geographic coordinates, specifying the number of actions and the types of habitat affected, and to provide information on total acreage affected in comparison to a baseline. The Corps states that it will make this information available to “NOAA Fisheries, the Pacific Fishery Management Council, and the public by means of NOAA Fisheries’ website on an annual basis.” Because this General Concurrence has not yet been in place for a full year, there are currently no tracking reports to review.²³⁶

d. Abbreviated or Expanded Consultations

Agency actions not covered by one of the foregoing approaches are completed as either abbreviated or expanded consultations under the general regulatory requirements of the EFH Final Rule that require an exchange of specified types of information within specified timeframes.²³⁷ According to an agency expert, these types of consultations are the most common, offer less visibility to the public, and can often be the most controversial.²³⁸ However, abbreviated and

234. ESSENTIAL FISH HABITAT CONSULTATION GUIDANCE, *supra* note 213, app. E; *see* EFH General Concurrence, 65 Fed. Reg. 8123 (Feb. 17, 2000).

235. These activities include: (1) individual, in-kind dock replacement/repair; (2) construction and/or maintenance of floating ramp structures; (3) concrete boat ramps; (4) bank stabilization measures; (5) installation and/or maintenance of buried utility lines; (6) aerial utility lines; (7) survey activities; (8) placement and/or maintenance of aids to navigation, regulatory markers, and mooring buoys; (9) temporary recreation structures; (10) placement and/or removal of shellfish enhancement devices; (11) in-kind replacement and/or repair of existing road crossings; (12) return water from an upland contained disposal area; and (13) repair, maintenance of breakwaters, jetties, and revetments.

236. *See* Letter from Rodney McGinnis, Acting Regional Administrator, Southwest Region, NMFS, to Col. Richard Thompson, District Engineer, U.S. Army Corps of Engineers, Los Angeles District (Aug. 5, 2003) (on file with author); ESSENTIAL FISH HABITAT CONSULTATION GUIDANCE, *supra* note 213, app. E.

237. *See* 50 C.F.R. § 600.920(a), (h).

238. Telephone Interview with Stacey Nathanson, *supra* note 101.

expanded consultations can be completed in conjunction with other ongoing environmental analyses even if there is no applicable Finding, and can share the degree of public visibility afforded by the other ongoing processes. New NMFS guidance documents, released in April 2004, explain how EFH analyses can be combined with a variety of other coordination activities.²³⁹

2. Tracking and Accountability

The lack of a systematized way to track consultations—both NMFS's recommendations and an agency's responses—is a continuing weakness that inhibits public understanding of EFH consultations. However, the SFA has created a foundation on which better tracking systems can be based.²⁴⁰ For instance, in the Alaska region, NMFS has taken the initiative to post its outgoing consultation letters on its website.²⁴¹ To date, two hundred fifty-five letters from NMFS to various action agencies, documenting NMFS's EFH conservation recommendations, can be accessed alphabetically by project title.²⁴² The interested public may look up a federal project proposed for the Alaska region and find out what conservation recommendations NMFS provided. Taking it a step further, the interested public could then call the agency and request information on how the recommendations were addressed. While this is not the easiest system for tracking EFH consultations, it is a step forward.

Additionally, the agencies that are utilizing the NEPA process to satisfy their EFH obligations are creating a public, though decentralized, paper trail. The Corps now regularly identifies EFH as a significant issue to be addressed when scoping and soliciting public input on EISs.²⁴³ Other agencies are highlighting the EFH issue as well.²⁴⁴

239. See ESSENTIAL FISH HABITAT CONSULTATION GUIDANCE, *supra* note 213. This document also provides examples of consultation documents. See *id.*

240. SFA, Pub. L. No. 104-297, §§ 108-110, 110 Stat. 3559, 3574-92 (1996) (codified as amended at 16 U.S.C. §§ 1853-1855 (2000)).

241. See NOAA, Nat'l Marine Fisheries Serv., *EFH Consultation and Related Correspondence*, at <http://www.fakr.noaa.gov/habitat/correspondence.htm> (last visited Oct. 22, 2004).

242. See *id.*

243. See Notice of Intent to Prepare an Environmental Impact Statement Titled: Mississippi River and Tributaries-Morganza, Louisiana to the Gulf of Mexico Hurricane Protection—Houma Navigation Canal Deepening General Reevaluation, 68 Fed. Reg. 28,200 (May 23, 2003); Intent to Prepare a Draft Environmental Impact Statement on the Future Dredging of Capron Shoal for the Fort Pierce Shore Protection Project in St. Lucie County, FL, 67 Fed. Reg. 38,078 (May 31, 2002); Intent to Prepare a Draft Environmental Impact Statement for Increasing Depths of the Existing Atchafalaya River and Bayous Chene, Boeuf and Black Project Up to 35 Feet, Including Channels in Atchafalaya Bay and the Gulf of Mexico, in

Thus, on a case-by-case basis, at least some individual actions are becoming more visible and providing more opportunity for public input. However, it is not clear that this increased visibility will lead to better accountability. Early case law has not imposed significant penalties for procedural violations of the EFH provisions.

The recent opinion in *Pacific Coast Federation of Fishermen's Ass'n v. United States Bureau of Reclamation* seems to indicate that while "failure to consult" on EFH is a judicially reviewable offense, it is not necessarily one that will result in a penalty.²⁴⁵ That case involved a dispute over the Bureau of Reclamation's regulation of water flow through the Klamath River.²⁴⁶ The main issues related to the Bureau's balancing of competing obligations to provide water to farmers, fulfill trust obligations to local Indian tribes, and comply with the ESA with respect to coho salmon.²⁴⁷ In a footnote, the court addressed a side claim by the tribes that the Bureau had failed to conduct a written EFH assessment as required by the MSA and implementing regulations.²⁴⁸ The court found that while the Bureau had not adhered to the consultation process as set forth in NMFS's regulations, NMFS had provided recommendations and the Bureau had indicated that it would accept them.²⁴⁹ The court concluded that the procedural flaw was not a breach of fiduciary duty.²⁵⁰

3. Results: Site-Specific Changes

While the SFA did strengthen the requirements to consult, as discussed above, consultations are not completely new. For these reasons, measuring the effectiveness of the new requirements is difficult. However, initial reviews indicate that the consultations are having a

Assumption, St. Mary, and Terrebone Parishes in the Vicinity of Morgan City, 67 Fed. Reg. 43,589 (June 28, 2002); Intent to Prepare a Draft Environmental Impact Statement (DEIS) for a General Reevaluation Study of Navigation Improvements at Miami Harbor, Dade County, FL, 66 Fed. Reg. 45,290 (Aug. 28, 2001).

244. See, e.g., Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Tractabel Calypso Pipeline Project, Request for Comments on Environmental Issues and Notice of a Public Scoping Meeting and Site Visit, 68 Fed. Reg. 7784 (Feb. 18, 2003) (identifying EFH as an issue during scoping by the Department of Energy).

245. No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745, at *30-*32, *69 (N.D. Cal. July 14, 2003).

246. *Id.* at *4-*6.

247. *Id.*

248. *Id.* at *63 n.12.

249. *Id.*

250. *Id.*

beneficial effect for habitat on site-specific basis.²⁵¹ One agency expert has written:

[T]he EFH consultation requirements have provided an opportunity to have more routine and detailed involvement and interactions with the U.S. Army Corps of Engineers and other action agencies. In some instances, EFH consultation provisions have provided entry into agency decision making where none may have existed previously.²⁵²

As an example, the report describes a Corps permitting decision regarding construction of a small boat harbor in the City of Port Lavaca, Texas.²⁵³ NMFS provided EFH conservation recommendations suggesting that the Corps require an increased mitigation ratio.²⁵⁴ The Corps responded that it did not intend to require the increase.²⁵⁵ NMFS then wrote back and provided scientific justification for the increase, and the Corps reversed its early decision and required the increased level of mitigation.²⁵⁶ Without the required response from the Corps, NMFS would not have had the opportunity to review and respond to the Corps' initial decision and ultimately affect the outcome.

NMFS's conservation recommendations have also led the EPA to modify proposed waivers of the CWA ocean discharge permits to strengthen protection for EFH with respect to effluent limitations, water quality and biological monitoring, and reporting requirements.²⁵⁷ Additionally, the Navy has modified proposed military training exercises off Vieques Island, Puerto Rico, to include impact avoidance measures, monitoring, mitigation of unavoidable impacts, and future coordination and planning with NMFS to address EFH concerns.²⁵⁸ In addition, the Corps has conducted geological review and required modification of dredging techniques for a project to improve access to a well site in Louisiana.²⁵⁹

Although these examples provide evidence that EFH consultations can have a beneficial effect, they do not provide any statistical evidence of whether the SFA has led to improvement over the previous

251. See Benaka & Nixon, *supra* note 21; see also Ric Ruebsamen, EFH Coordinator, Nat'l Oceanic & Atmospheric Admin. Fisheries Southeast Region, *Essential Fish Habitat Success Stories*, June 2002 (on file with author).

252. See Ruebsamen, *supra* note 251.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. See Benaka & Nixon, *supra* note 21, at 996-98.

consultation process. Such a methodical assessment is difficult to conduct due to limitations of baseline data to compare, and the continuing difficulty of obtaining current data on the thousands of agency consultations occurring at the field level all over the country.²⁶⁰ However, the NMFS Southeast Regional Office has begun collecting this type of information, and reports what could be interpreted as an increase in action agency responsiveness since implementation of the SFA.²⁶¹ Available data seem to indicate that in the Southeast region, action agencies' acceptance rate of NMFS's recommendations was seventy-two percent prior to the SFA and is now up to eighty-two percent.²⁶²

V. ASSESSMENT OF THE SUSTAINABLE FISHERIES ACT'S EFFECTIVENESS

Providing stewardship for the marine environment that sustains us in so many ways is fraught with the interrelated challenges of inadequate data, disparate management regimes, and competing public priorities. Although the SFA has had a limited effect in terms of visible changes to federal agency actions to date, it is helping us make incremental improvements towards addressing the underlying management challenges.

A. *Inadequate Data*

Through its requirements to identify and describe EFH, the SFA has improved the availability of data. Although the EFH descriptions have

260. In 2001 and 2002, the Corps processed over 85,000 permits per year for its section 404 and RHA permitting programs combined. See United States Army Corps of Eng'rs Regulatory Program, Regulatory Statistics, *All Permit Decisions FY2002*, at <http://www.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf> (last visited Oct. 24, 2004).

261. See Ruebsamen, *supra* note 251. Restrictions on interpreting the data are noted as follows:

While this certainly suggests some added value to the Essential Fish Habitat consultation provisions of the Magnuson-Stevens Act, there are caveats: (1) Factors other than Essential Fish Habitat could have influenced agency decisions, (2) the pre-Essential Fish Habitat statistics are far less complete than the Essential Fish Habitat statistics and probably somewhat less reliable, and (3) the Essential Fish Habitat acceptance percentage reflects how well the agency responded to National Marine Fisheries Service's concerns (i.e., this could represent either a rational response for rejecting National Marine Fisheries Service's recommendations or acceptance of the recommendations.).

Id. In most cases, the author notes, the recommendations were accepted. *Id.*

262. Telephone Interview with Ric Ruebsamen, EFH Coordinator, Nat'l Oceanic & Atmospheric Admin. Fisheries Southeast Region (Jan. 21, 2004).

been widely criticized, they have produced the most complete information assembled to date.

Implementation of the SFA has also highlighted areas where there are gaps in data. Efforts to identify and describe EFH were hampered by missing data. Likewise, assessments regarding the need for additional restrictions on fishing activities were influenced by missing data. Additional analysis is now underway that will allow a more informed review of these issues in the future.

B. Disparate Management Regimes

The SFA prescribes a decision-making infrastructure that injects consideration of EFH impacts into various action agency decisions. The limited data available on this point indicate that the SFA's approach may be more effective than previous provisions in terms of the numbers of agency decisions that consider EFH impacts.

It is more difficult to assess the effectiveness of the SFA consultations in modifying project plans in comparison to pre-SFA recommendations. Recent consultations have led to specific mitigation measures such as setbacks of projects from water bodies, measures to prevent leaks and spills, stabilization and revegetation of disturbed areas, and prohibitions on bottom-disturbing activities within a certain distance of pinnacles. However, these outcomes do not appear dramatically better than those achieved under previous interagency cooperation activities, such as construction of replacement habitat. This is because the SFA does not mandate that action agencies make EFH a higher priority over competing policy objectives.

Nevertheless, the technical improvements to the consultation process do hold promise. When implemented in combination with other existing procedures, such as NEPA, the consultation requirements can bring heightened public visibility and accountability to federal agencies whose actions may affect EFH. Although this accountability is undermined by the lack of an adequate tracking mechanism, it is still a major step forward. In addition, as exemplified in the Alaska Region, there is potential for using the SFA requirements as a foundation for developing a more accessible systematized tracking of consultations.

C. Competing Public Priorities

The least ambitious, and least successful, component of the SFA has been its limited approach to rationalizing competing public priorities in a

way that accounts for stewardship needs.²⁶³ The only provision directly aimed at achieving a new policy to promote EFH protection is the requirement to “minimize adverse impacts” of fishing activities on EFH “to the extent practicable.”²⁶⁴ This approach is not coextensive with the scope of the problem: it applies only to fishing activities when a much wider range of anthropogenic effects should be at issue. It also vests primary responsibility for imposing restrictions on fishing activities with the Councils themselves, even though the Councils believed they had already imposed as many restrictions as were warranted. And it includes the tremendous caveat regarding practicability.²⁶⁵

Whether one agrees or disagrees with how the Councils and NMFS have addressed the issue of fishing impacts in the face of limited information, the litigation results thus far comport with the underlying spirit of the MSA. The MSA is intended to provide discretion to the Councils and NMFS in weighing the considerations and determining the level of management that will result in net benefits to the nation.²⁶⁶ With this in mind, the results of the new analyses currently underway will be important, particularly if they demonstrate irrefutable evidence of direct causal links to negative economic consequences on fisheries.

D. Relevance to Broader Societal Efforts

Reviewing these efforts to implement the SFA can also help us learn from experience as we shape future efforts to further improve protections for the marine environment. The Councils have demonstrated through their pre-SFA activities that informed user groups will impose restrictions on their own activities when they are sufficiently convinced of the needs and benefits of such actions.²⁶⁷ However, we are also seeing through their post-SFA activities that the amount of evidence required to support such a determination must be substantial. Other sectors of the public whose activities affect the marine environment are likely to demand similar, if not greater, evidence of causal links to negative consequences on self-interests before accepting restrictions on their behavior.

263. SFA, Pub. L. No. 104-297, § 106, 110 Stat. 3559, 3570 (1996) (codified as amended at 16 U.S.C. § 1851(a) (2000)).

264. *Id.* § 106(b) (codified as amended at 16 U.S.C. § 1851(a)(8)).

265. *Id.*

266. MSA §§ 301-304, 16 U.S.C. §§ 1851-1854.

267. *See* discussion *supra* Part III.A.

VI. CONCLUSION

The complexity and magnitude of challenges to stewardship cannot be denied. Though the SFA has not yet succeeded at significantly improving protection for habitat, it continues to offer potential. It has given us the strongest framework to date for making informed decisions about actions affecting the marine environment. What we put into that framework, in terms of data, and what we demand out of it through our collective political volition will determine our ability to provide the necessary stewardship over our Gulf Stream waters and all that lies below. It will be critical to provide a basis of solid information about the cause and effect of damage to marine habitat; to provide clear links to economic consequences for the various interested constituencies; and develop the ability to publicly track and monitor federal agency decisions. If we are able to provide the necessary evidence, statutory structures are in place that permit, but do not compel, us to be good stewards. How we decide to use that authority is up to us.

In the squares of the city, in the shadow of the steeple
In the relief office, I seen my people;
As they stood there hungry I stood there asking,
Is this land made for you and me?
Nobody living can ever stop me
As I go walking that freedom highway
Nobody living can make me turn back
This land was made for you and me.²⁶⁸

268. The last two verses of *This Land*, by Woody Guthrie.