

TAKING STOCK: THE MAGNUSON-STEVENSON ACT REVISITED

BACKGROUND MATERIALS ON THE MSA

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MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT

I. Historical Background of Fisheries Management in the United States

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the primary governing law for fisheries management in the United States.¹ The MSA, as it is known today, evolved from state regulations and a series of national examinations of the management of fisheries in the United States. Over the years, the MSA has seen several amendments and continues to be the subject of contentious debate and litigation in response to rapidly evolving information and policy objectives.

a. *Before the Magnuson-Stevens Act*

Historically, U.S. fisheries were managed by an array of state regulations that primarily focused on fishing gear restrictions.² Federal trade and ship-licensing laws also had an impact on fisheries in the early 1800s.³ As early as 1870, the federal government became directly involved with fisheries management through the development of the U.S. Commission on Fish and Fisheries.⁴ However, the states retained management of coastal fisheries, while “the commission itself focused most of its attention on discovering new stocks of fish, developing innovative fishing technology, and promoting fish sales.”⁵

The U.S. Commission on Fish and Fisheries was moved around different U.S. departments, first to the Department of Commerce in 1903,⁶ then to the Department of the Interior in 1939.⁷ In 1953, Congress passed the Submerged Lands Act, which granted coastal

¹ See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891(d) (2007).

² JOSH EAGLE, ET AL., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS 8 (2003).

³ EAGLE, ET AL., *supra* note 2, at 8.

⁴ *Id.* at 9.

⁵ *Id.*

⁶ *Id.* Under the Department of Commerce, the Commission was renamed the U.S. Bureau of Fisheries.

⁷ *Id.* Under the Department of the Interior, the Commission became a division of the U.S. Fish and Wildlife Service.

states the authority to regulate fishing activities within three miles of the shore.⁸ Several years later in 1970, President Richard Nixon created the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce, which provided for the federal management of fisheries under the National Marine Fisheries Service (NMFS).⁹

b. Enactment of the Magnuson-Stevens Act

After its creation, NMFS initially focused on finding ways to help states implement better fisheries management plans in order to more effectively control coastal fish stocks.¹⁰ Of particular concern was the threat to coastal fish stocks from “massive foreign fishing fleets in waters adjacent to [] coastal areas,” which contributed to fish stock damage and interfered with domestic fishing efforts.¹¹ Led by Senator Warren Magnuson, Congress passed the Fishery Conservation and Management Act in 1976,¹² which declared a Fishery Conservation Zone (FCZ) that extended from state seaward boundaries (generally three miles offshore) to 200 miles offshore.¹³ In 1980, the act was retitled the Magnuson Fishery Conservation and Management Act in recognition of Senator Magnuson’s leadership.¹⁴ In 1996 the Act was given its current name, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA), which reflected Senator Ted Stevens’ contributions to the 1996 MSA amendments.¹⁵

⁸ See Submerged Lands Act, 42 U.S.C. §§ 1301-3015 (2000). The seaward boundaries of Texas, Puerto Rico, and the Gulf coast of Florida extend nine nautical miles seaward of the shore. *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 363 U.S. 1 (1960).

⁹ EAGLE, ET AL., *supra* note 2, at 10.

¹⁰ *Id.*

¹¹ 16 U.S.C. § 1801(a)(3) (2007).

¹² 94 Pub. L. No. 265, 90 Stat. 331 (1976).

¹³ See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891(d) (2007).

¹⁴ 96 Pub. L. No. 561, 94 Stat. 3275 (1980).

¹⁵ 104 Pub. L. No. 208, 110 Stat. 3009 (1996).

In its original 1976 draft, the MSA excluded foreign fishing fleets from U.S. waters, and encouraged the development and management of U.S. fisheries.¹⁶ The U.S. claimed exclusive authority to manage and regulate all marine life within the FCZ, except “birds, marine mammals, and highly migratory species of tuna.”¹⁷ In 1983, the MSA was amended to reflect President Ronald Reagan’s proclamation that established an Exclusive Economic Zone (EEZ), extending 200 miles seaward from shore in accordance with Part VI of the United Nations Convention on the Law of the Sea (UNCLOS).¹⁸ Since 1976, the MSA has been amended several times in response to increased scientific knowledge and evolving policy goals.

c. Amendments to the Magnuson-Stevens Act

One of the first major amendments to the MSA occurred in 1990 when tuna and other highly migratory species were brought within U.S. management authority under the MSA.¹⁹ While the MSA could have originally been interpreted and implemented in a more conservation-oriented manner, “the goal was to build domestic fisheries with a focus on efficiency and economic growth.”²⁰ After continuous signs of decreasing fish stocks, marine conservation groups insisted that the MSA be amended in order to better protect the fisheries.²¹

In 1996, Congress passed the Sustainable Fisheries Act, amending the MSA and shifting its goals from a policy focused on the fishing industry, to a policy that made fishery conservation and ecosystem protection its primary purpose.²² The most recent amendment to the MSA occurred on January 12, 2007, when President Bush signed the Magnuson-Stevens Fishery

¹⁶ See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891(d) (2007).

¹⁷ JOSEPH J. KALO, ET AL., COASTAL AND OCEAN LAW 513 (3d ed. 2002).

¹⁸ Presidential Proclamation No. 5030, 48 Fed. Reg. 10601 (Mar. 11, 1983).

¹⁹ KALO, ET AL., *supra* note 17 at 514.

²⁰ NOAA Fisheries Service, *Statement from the Director: President Bush Signs Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006*, available at http://www.nmfs.noaa.gov/mediacenter/docs/Director_Statement_011207.pdf (last visited Oct. 22, 2010) [hereinafter *Statement*].

²¹ DONALD C. BAUR, ET AL., OCEAN AND COASTAL LAW AND POLICY 280 n.67-68 (2007).

²² *Id.* at 280 n.66.

Conservation and Management Reauthorization Act of 2006.²³ Under the latest amendment, the MSA called for an immediate end to overfishing through the use of annual catch limits and accountability measures, encouraged market-based fishery management through limited access privilege programs, and mandated increased international cooperation.²⁴

II. Structure of the Magnuson-Stevens Act

a. Eight Regional Fishery Management Councils

In order to conserve and manage fish stocks and essential fish habitats, the Magnuson-Stevens Act established eight Regional Fishery Management Councils (Councils).²⁵ Each Council is charged with creating a Fishery Management Plan (FMP), holding public hearings in order to allow interested persons a chance to comment on the development of the FMPs, and setting annual catch limits for each fishery within its region.²⁶ The number of members on each Council generally depends upon the number of states and U.S. territories bordering the managed area, although certain Councils are subject to exceptions.²⁷

Each Council consists of voting and nonvoting members;²⁸ voting members are further characterized as “required” or “appointed” members.²⁹ Required Council members include the state official in charge of marine fishery management in each coastal state, as well as a NMFS regional director for the geographic area within the Council’s jurisdiction.³⁰ However, if there is more than one NMFS director within a Council’s jurisdiction, the Secretary of Commerce

²³ *Statement, supra* note 20.

²⁴ 16 U.S.C. §§ 1852(h)(5)-(7), 1854(e)(3) (2007).

²⁵ *Id.* § 1852(a)(1). The eight Regional Fishery Management Councils include: New England Council, Mid-Atlantic Council, South Atlantic Council, Caribbean Council, Gulf Council, Pacific Council, North Pacific Council, and Western Pacific Council. *Id.*

²⁶ *Id.* § 1852(h)(1), (3), (6).

²⁷ *Id.* § 1852(a)(1).

²⁸ *Id.* § 1852(b), (c).

²⁹ *Id.* § 1852(b)(1).

³⁰ 16 U.S.C. § 1852(b)(1)(A), (B) (2007).

(Secretary) decides which one will serve as the Council’s voting member.³¹ In addition to the state and federal officials, coastal state governors may nominate citizens to the Council based on their knowledge regarding the conservation and management, or commercial or recreational harvest, of fish stocks within the Council’s geographic area.³² The Secretary then decides whether the nominated citizens will become “appointed” members.³³

Nonvoting members on each Council include representatives from the U.S. Fish and Wildlife Service, U.S. Coast Guard, Marine Fisheries Commission, and U.S. Department of State.³⁴ The Pacific Council also has one nonvoting member who is appointed by the Governor of Alaska.³⁵

Each regional Council is required to create a scientific and statistical committee to help with the “development, collection, evaluation, and peer review” of information that may be used by the Council to develop and amend a management plan.³⁶ Similarly, each Council must form a fishing industry advisory committee to provide advice and assistance for the development of fishery management plans and amendments.³⁷ In addition to these two required advisory committees, Councils may establish other advisory committees, if needed, to fulfill their duties under the MSA³⁸ While the fishing industry “dominates all the nonscientific advisory groups, [] the ultimate management decisions remain with Council members themselves.”³⁹

³¹ *Id.* § 1852(b)(1)(B).

³² *Id.* § 1852(b)(2)(A).

³³ *Id.* § 1852(b)(2)(A). Appointed members “must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned.” *Id.*

³⁴ *Id.* § 1852(c)(1).

³⁵ *Id.* § 1852(c)(2).

³⁶ 16 U.S.C. § 1852(g)(1)(A) (2007).

³⁷ *Id.* § 1852(g)(3)(A).

³⁸ *Id.* § 1852(g)(2).

³⁹ EAGLE, ET AL., *supra* note 2, at 16.

III. Management Under the Magnuson-Stevens Act

a. Overall Management Scheme: FMPs, PMPs, and GIFAs

Under the MSA, Councils prepare Fishery Management Plans (FMPs) for each fishery within their respective jurisdiction that “requires conservation and management.”⁴⁰ FMPs are used to “prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of [] [fisheries].”⁴¹ Once a Council has developed the FMP or amendment for domestic and foreign fishing within a particular fishery, the Secretary must then approve, disapprove, or partially approve the FMP.⁴²

If a foreign nation requests a permit to fish in an area without any FMP, the Secretary may prepare a Preliminary Fishery Management Plan (PMP) to cover such foreign fishing activities.⁴³ Governing International Fishery Agreements (GIFAs) may be negotiated between the Secretary and foreign nations requesting to fish within the U.S. EEZ, which then must be ratified by Congress.⁴⁴ When a Council fails to develop a needed FMP, the Secretary may prepare the FMP, in which case it will cover both domestic and foreign fishing.⁴⁵

b. Magnuson-

The preparation and implementation of FMPs must be consistent with ten “national standards” (National Standards) set out in the MSA as follows: (1) prevent overfishing and achieve optimum yield for each fishery; (2) use the “best scientific information available”; (3) manage fish stocks as units and coordinate with other Councils to manage stocks within multiple jurisdictions; (4) allocate fishing privileges in a “fair and equitable” manner; (5) efficiently

⁴⁰ 16 U.S.C. § 1853(a)(1)(A) (2007).

⁴¹ *Id.* § 1853(a)(1)(A).

⁴² *Id.* § 1854(a)(3).

⁴³ *Id.* § 1821(g).

⁴⁴ *Id.* § 1821(c).

⁴⁵ *Id.* § 1854(c)(1). Fisheries that are currently managed by the Secretary include the “Atlantic swordfish, Atlantic sharks, and Atlantic billfish”; “the Western Atlantic bluefin tuna fishery is managed under the [MSA] and the Atlantic Tunas Convention Act.” DENNIS W. NIXON, ET AL., MARINE AND COASTAL LAW 305, 306 (2d ed. 2010).

manage fisheries without solely focusing on economic allocation; (6) allow flexibility for future changes that may affect conservation and management; (7) minimize costs and “avoid unnecessary duplication”; (8) consider the needs of fishing communities, encourage community participation, and “minimize adverse economic impacts on such communities”; (9) “to the extent practicable,” minimize bycatch and the mortality of unavoidable bycatch; and (10) “to the extent practicable . . . promote the safety of human life at sea.”⁴⁶

c. Provisions of Fishery Management Plans

In addition to meeting the ten National Standards, the MSA requires specific information, management objectives, and provisions to be included in each Councils’ FMPs. The MSA breaks down the FMP regulations into “required provisions”⁴⁷ and “discretionary provisions,”⁴⁸ and provides for specific deadlines⁴⁹ and “limited access privilege programs” (LAPPs).⁵⁰ As discussed in Part III(c)(i), the 2006 amendments made significant changes to FMP requirements in order to more effectively conserve and manage fisheries.

i. Required Provisions

Every FMP is required to contain specific information about the fishery for which the FMP has been established, including economic, biological, and ecological information. A description of the fishery should include, but is not limited to, the fish species, the number of vessels used, the type of fishing gear used, management costs, actual and potential revenues from the fishery, trends in landings, recreational and commercial interest in the fishery, and whether foreign fishing or Indian treaty fishing occurs for the particular species involved.⁵¹ FMPs that

⁴⁶ 16 U.S.C. § 1851 (a)(1)-(10) (2007).

⁴⁷ *Id.* § 1853(a).

⁴⁸ *Id.* § 1853(b).

⁴⁹ *Id.* § 1853 note.

⁵⁰ *Id.* §§ 1853(a)(13), 1853a.

⁵¹ *Id.* § 1853(a)(2).

are submitted to the Secretary for approval must “specify the nature and extent of scientific data which is needed for effective implementation.”⁵² The essential fish habitat for the fishery must be identified and described, and the FMP must “minimize to the extent practicable adverse effects on such habitat caused by fishing.”⁵³

Another requirement for FMPs is that Councils must “assess and specify” the maximum sustainable yield and optimum yield for the fishery, and include details about how those yields were established.⁵⁴ For each FMP, a fishery impact statement must be submitted to the Secretary and include the “cumulative conservation, economic, and social impacts, of the conservation and management measures” on fishery participants and communities, adjacent fisheries, and the safety of fishermen.⁵⁵ Also, in accordance with National Standard one, objective and measurable criteria must be included in the FMP to determine when the fishery is overfished, how to prevent or end overfishing, and how to rebuild the fishery.⁵⁶ The criteria used to make these determinations must be supported by scientific data.⁵⁷

FMPs must minimize the bycatch and the mortality of bycatch within a fishery “to the extent practicable.”⁵⁸ Councils must develop a “standardized reporting methodology” for bycatch⁵⁹ and determine the mortality of fish caught by catch-and-release.⁶⁰ This provision was added to the MSA in the 1996 amendments, as was the provision requiring the minimization of impacts of fishing and fishing gear on essential fish habitat.⁶¹ Both amendments were intended to remedy past failures of Councils to properly manage fish stocks, although the language “to the

⁵² 16 U.S.C. § 1853(a)(8) (2007).

⁵³ *Id.* § 1853(a)(7).

⁵⁴ *Id.* § 1853(a)(3).

⁵⁵ *Id.* § 1853(a)(9).

⁵⁶ *Id.* § 1853(a)(10).

⁵⁷ *Id.*

⁵⁸ 16 U.S.C. § 1853(a)(11) (2007).

⁵⁹ *Id.*

⁶⁰ *Id.* § 1853(a)(12).

⁶¹ BAUR, ET AL., *supra* note 21, at 282 n.98.

extent practicable” still provides flexibility.⁶² As discussed in Part V(b), Councils have used this language in order to “avoid gear restrictions or area closures that would be unpopular among members of the fishing community, whether such measures might be ‘practicable’ or not.”⁶³

When the MSA was most recently amended in 2006, Congress sought to prevent Councils from delaying proper management by requiring Councils, beginning in 2009, to “end overfishing immediately.”⁶⁴ Now, Councils must establish annual catch limits for U.S. commercial and recreational fisheries subject to overfishing by 2010, and for all other stocks by 2011.⁶⁵ Councils must also have measures to ensure accountability with these limits, and annual catch limits “may not exceed the fishing level recommendations of [a Council’s] scientific and statistical committee.”⁶⁶

In 2009, NMFS published guidelines for the 2006 amendments in the Federal Register, which “outline a system of catch limits, reference points and targets that can be used for each stock to prevent overfishing.”⁶⁷ This system mandates strong accountability measures and provides for scientific uncertainty when determining catch limits for a stock.⁶⁸ Fishermen have expressed their fears that the 2006 amendments are overly restrictive, based on inadequate scientific data, and may result in the closure of popular fish species.⁶⁹ While the strict legal mandates in the 2006 amendments seek to finally achieve the MSA objectives of ending

⁶² *See id.*

⁶³ BAUR, ET AL., *supra* note 21, at 282 (citing *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194 (N.D. Cal. 2002)).

⁶⁴ 16 U.S.C. § 1854(e)(3) (2007).

⁶⁵ *Id.* §§ 1853(a)(15), 1853 note (1)(A),(B).

⁶⁶ *Id.* § 1852(h)(6).

⁶⁷ National Oceanic and Atmospheric Administration, *NOAA Issues Final Guidance on Annual Catch Limits to End Overfishing*, http://www.noaanews.noaa.gov/stories2009/20090115_endoverfishing.html (last visited Oct. 11, 2010) [hereinafter *NOAA Final Guidance*]; 74 Fed. Reg. 11 (Jan. 16, 2009).

⁶⁸ *Id.*

⁶⁹ *NOAA Final Guidance*, *supra* note 67.

overfishing, fishermen are concerned that such an objective may only be feasible by completely closing certain fisheries.⁷⁰

ii. Discretionary Provisions and Limited Access Privilege Programs (LAPP)

In addition to the many FMP requirements, Councils have the authority to take other discretionary measures to conserve and manage fisheries. For example, Councils may require fishing vessels within U.S. jurisdiction, or fish processors receiving fish under an FMP, to obtain a fishing permit from the Secretary.⁷¹ Furthermore, Councils may limit fishermen to certain areas and types of vessels or gear used,⁷² establish a “limited access system” for fishermen in order to achieve optimum yield,⁷³ and require fisheries observers aboard fishing vessels in order to collect scientific data.⁷⁴

Under the 2006 amendments, another discretionary measure left to Councils is whether to manage a fishery by using a limited access privilege program (LAPP).⁷⁵ A LAPP allows a Council to allocate to “individual fishermen (or vessel owners) the privilege of catching a percentage share of the total amount of fish made available to the fishery each year.”⁷⁶ LAPP shares are not considered property, but rather are considered “a grant of permission” to the shareholder to “engage in activities permitted by such limited access privilege or quota share.”⁷⁷

Any Council utilizing LAPPs in a fishery that is overfished or subject to a rebuilding plan, must ensure that the LAPPs will assist in its rebuilding; similarly, for a fishery that is over-capacity, the LAPP must help reduce capacity.⁷⁸ The LAPP must generally promote safety,

⁷⁰ *Id.*

⁷¹ 16 U.S.C. § 1853(b)(1) (2007).

⁷² *Id.* § 1853(b)(2).

⁷³ *Id.* § 1853(b)(6).

⁷⁴ *Id.* § 1853(b)(8).

⁷⁵ *Id.* § 1853a(a).

⁷⁶ BAUR, ET AL., *supra* note 21, at 283.

⁷⁷ 16 U.S.C. § 1853a(b)(5) (2007).

⁷⁸ *Id.* § 1853a(c)(1)(A),(B).

conservation and management, as well as social and economic benefits of the fishery.⁷⁹ In addition, all LAPPs must provide for fishery monitoring and enforcement,⁸⁰ fish processing on U.S. vessels or soil,⁸¹ an appeals process for initial allocation decisions,⁸² and a system for collecting information to determine whether “illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred.”⁸³

Deciding allocation shares can be a difficult and controversial process. In developing a LAPP, Councils must use a procedure that is fair and equitable for allocating initial shares.⁸⁴ According to a technical memorandum issued by NMFS in November, 2007, “[t]wo important objectives of an initial allocation procedure are that it should be as administratively simple as possible and it should rely on generally available and transparent data.”⁸⁵ The Council “should consider the cultural and social framework of the fishery.”⁸⁶ One of the issues that can arise in LAPPs with transferable shares is a fear that share ownership might become monopolized by a few fishermen, while excluding others. Although the MSA requires conservation and management measures to be “carried out in such manner that no particular individual, corporation, or other equity acquires an excessive share of such privileges,” the MSA fails to define “excessive share.”⁸⁷

IV. Most Recent Status of U.S. Fisheries

⁷⁹ *Id.* § 1853a(c)(1)(C).

⁸⁰ *Id.* § 1853a(c)(1)(G), (H).

⁸¹ *Id.* § 1853a(c)(1)(E).

⁸² *Id.* § 1853a(c)(1)(I).

⁸³ 16 U.S.C. § 1853a(c)(1)(J) (2007).

⁸⁴ *Id.* § 1853a(c)(5)(A).

⁸⁵ National Marine Fisheries Services, *The Design and Use of Limited Access Privilege Programs* at 60, available at http://www.nmfs.noaa.gov/sfa/PartnershipsCommunications/lapp/design_and_useLAPs2007.pdf (last visited, Oct. 22, 2010).

⁸⁶ *Id.*

⁸⁷ 16 U.S.C. § 1851(a)(4) (2007).

a. *NMFS 2009 Status of U.S. Fisheries Report*

Every year, NMFS is required to report the status of U.S. fisheries to Congress and the eight regional Councils.⁸⁸ The 2009 report was based on the most current stock assessments as of December 31, 2009.⁸⁹ Fish stocks are assessed using “the best available scientific information and status determination criteria specified in a fishery management plan.”⁹⁰ NMFS assesses stocks according to standards prepared by the regional Councils; thus, the success of each Council is assessed using the goals the Councils set for themselves.⁹¹

Fish stocks are assessed using the terms “overfishing” and “overfished.” Overfishing refers to “a stock that . . . has a fishing mortality (harvest) rate above the level that provides for the maximum sustainable yield.”⁹² Overfished refers to “a stock that has a biomass level below a biological threshold specified in its fishery management plan.”⁹³ Both terms indicate that fish mortality is at a level that prevents a fishery from producing “the maximum sustainable yield on a continuing basis.”⁹⁴

Of the 522 stocks assessed in 2009, 250 stocks have a known overfishing status, while 272 stocks have overfishing thresholds that are either not defined, not applicable, or are unknown.⁹⁵ This means that the status of approximately 52% of the stocks is currently unknown.⁹⁶ Of the 250 stocks that have a known status, 15% are currently subject to

⁸⁸ *Id.* § 1851(e)(1).

⁸⁹ National Oceanic and Atmospheric Administration, National Marine Fisheries Service, *2009 Status of U.S. Fisheries*, http://www.nmfs.noaa.gov/sfa/statusoffisheries/sos_full28_press.pdf at 1 (last visited Oct. 11, 2010) [hereinafter *Status of Fisheries*].

⁹⁰ *Id.*

⁹¹ EAGLE, ET AL., *supra* note 2, at 17.

⁹² *Status of Fisheries*, *supra* note 89, at 1.

⁹³ *Id.*

⁹⁴ 16 U.S.C. § 1802(34) (2007).

⁹⁵ *Status of Fisheries*, *supra* note 89, at 5.

⁹⁶ *Id.*

overfishing.⁹⁷ Slightly more stocks have a known overfished status, 23%, while 319 stocks have overfished thresholds that are either not defined, not applicable, or are unknown.⁹⁸ Compared to the 2008 NMFS report, the percentage of stocks subject to overfishing decreased by 1% in 2009,⁹⁹ and the percentage of overfished stocks remained the same.¹⁰⁰

The 1% decrease in stocks subject to overfishing is because scup (Atlantic coast) and skate (Gulf of Maine) are no longer subject to overfishing; pink shrimp (Gulf of Mexico) was found to not be subject to overfishing because the previous assessment was invalid.¹⁰¹ According to the 2009 report, no stocks were added to the list of stocks subject to overfishing.¹⁰²

Five stocks were found to no longer be considered overfished,¹⁰³ while four other stocks were added to the overfished list.¹⁰⁴ When considering this information, it is important to realize that a “stock cannot be considered ‘rebuilt’ within the definition of the [MSA],” until the stock produces its maximum sustainable yield.¹⁰⁵ Four stocks were found to be “fully rebuilt to 100% of their [biomass maximum sustainable yield] and four other stocks had biomass levels of at least 80% of their maximum sustainable yield.¹⁰⁶

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1. Thirty-eight stocks (15%) were subject to overfishing in 2009 compared to 41 stocks (16%) in 2008. *Id.*

¹⁰⁰ *Id.* Forty-six stocks (23%) were overfished in both 2008 and in 2009, signifying no improvement. *Id.*

¹⁰¹ *Status of Fisheries, supra* note 89, at 1.

¹⁰² *Id.*

¹⁰³ *Id.* The following stocks were found to no longer be overfished: scup (Atlantic coast), winter skate (Georges Bank/Southern New England), bocaccio (Southern Pacific coast), darkblotched rockfish (Pacific coast), and sailfish (Western Atlantic). *Id.*

¹⁰⁴ *Id.* The following stocks were added to the overfished list in 2009: canary rockfish (Pacific coast), coho salmon (Washington coast), queets (Western Strait of Juan de Fuca), and petrale sole (Pacific coast). *Id.*

¹⁰⁵ EAGLE, ET AL., *supra* note 2, at 19.

¹⁰⁶ *Status of Fisheries, supra* note 89, at 2. Scup (Atlantic coast), Black sea bass (Mid-Atlantic coast), Blue king crab (St. Matthews Island), and Swordfish (North Atlantic), were found to have stocks fully rebuilt to 100% of their biomass maximum sustainable yield. *Id.*

b. Economic Status and Landings of U.S. Fisheries

The most recent landings data available from NMFS indicates that a total of over 7.8 billion pounds of fish were landed in the United States in 2009. The total landings were valued at over \$3.8 billion dollars.¹⁰⁷

The latest available information regarding fishery sales and jobs in the U.S. is from 2006. That year, “U.S. commercial and recreational fisheries generated more than \$185 billion in sales and supported more than two million jobs nationwide.”¹⁰⁸ The commercial fishing industry generated \$103 billion in sales and supported 1.5 million jobs, including “harvesters, seafood processors and dealers, seafood wholesalers and seafood retailers.”¹⁰⁹ Recreational saltwater fishing accounted for \$82 billion in sales and supported 534,000 jobs in 2006.¹¹⁰

V. Existing and Future Problems

Despite numerous amendments to the Magnuson-Stevens Act and a policy shift that currently focuses on conservation and management, the nation’s fisheries are in trouble. Many factors have contributed to declining fish stocks including inadequate, conflicting, and unclear provisions of the MSA. The structure of federal fishery management under the MSA has been criticized for giving “too much authority to those with a financial interest in any resulting fishery regulation.”¹¹¹

a. Structural Issues of the Regional Councils

The eight regional councils are composed in large part of representatives from the fishing industry, resulting in a relatively homogenous group that is “less likely to produce well

¹⁰⁷ See National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Annual Commercial Landing Statistics, http://www.st.nmfs.noaa.gov/st1/commercial/landings/annual_landings.html (last visited Oct. 11, 2010).

¹⁰⁸ NOAA Final Guidance, *supra* note 67.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ KALO, ET AL., *supra* note 17, at 533.

considered decisions than groups with diverse membership.”¹¹² When faced with difficult allocation decisions, Councils have the ability to limit conservation in order to increase catch limits.¹¹³ While NMFS is responsible for supervising the Councils, two studies showed that “[b]etween 1980 and 2000, NMFS partially disapproved only 62 of approximately 860 proposed plans, amendments, or annual specifications – resulting in a partial disapproval rate of 7 percent.”¹¹⁴

Another problem with the structure of the MSA is that the Councils are exempt from a number of federal laws that are “designed to promote beneficial regulation by ensuring objective officials, open public participation, and transparency in decision-making.”¹¹⁵ The 1996 amendments require Council members to recuse themselves before voting if they have a financial interest in the decision, and if the decision would have a “significant and predictable effect on such financial interest.”¹¹⁶ Even after recusal, members may participate in discussions regarding the decision and may even mark on the record how they would have voted.¹¹⁷ The conflict of interest rules that do apply to the Councils are significantly weaker than those that generally apply to federal agencies, and thereby threaten objective decision-making.¹¹⁸

b. Ambiguous and Conflicting Provisions

Although the 1996 amendments reflected a policy shift away from industry and towards conservation and ecosystem protection, the MSA now contains ambiguities and conflicting provisions that have spurred litigation by both industry and non-governmental groups. The federal court in Massachusetts acknowledged this policy shift in *A.M.L. International v. Daley*,

¹¹² EAGLE, ET AL., *supra* note 2, at 5.

¹¹³ *Id.*

¹¹⁴ *Id.* at 32.

¹¹⁵ *Id.* at 4. Voting members are exempt from federal conflict of interest laws of 18 U.S.C. § 208. 16 U.S.C. § 1852(j)(8) (2007).

¹¹⁶ 16 U.S.C. § 1852(j)(7)(A) (2007).

¹¹⁷ *Id.*

¹¹⁸ EAGLE, ET AL., *supra* note 2, at 5.

when the fishing industry's challenge to a quota restriction was rejected.¹¹⁹ The fishermen claimed that the FMP did not comply with National Standard Eight, which provides that "[c]onservation and management measures shall, consistent with the conservation requirements of this Act . . . take into account the importance of fishery resources to fishing communities . . . [and] minimize adverse economic impacts on such communities."¹²⁰ Data indicated that the fishery would totally collapse within two to three years unless the FMP was implemented.¹²¹ The court held that the economic consequences of a completely collapsed fishery would drastically outweigh the short-term economic disadvantages suffered by the fishermen under the FMP.¹²²

National Standard Eight tends to conflict with National Standard One, which states that "[c]onservation and management measures shall prevent overfishing."¹²³ In *Natural Resources Defense Council v. Daley*, the D.C. Circuit reversed a decision by the lower court that a FMP with an eighteen percent chance of success was sufficient.¹²⁴ The D.C. Circuit decided that National Standard One would be satisfied, however, if council management measures have a fifty-one percent chance of preventing overfishing.¹²⁵ In *Oceana Inc., v. Evans*, the court upheld an amendment to the Northeast Multispecies FMP calling for a plan that would reduce overfishing gradually in order to phase in stricter fishing limits.¹²⁶ The plaintiffs argued that "shall prevent overfishing" means FMPs must end overfishing immediately.¹²⁷ However, the

¹¹⁹ *A.M.L. Intern., Inc. v. Daley*, 107 F.Supp.2d 90, 107-08 (D.Mass. 2000).

¹²⁰ *Id.* at 103; 16 U.S.C. § 1851(a)(8) (2007).

¹²¹ *A.M.L. Intern.*, 107 F.Supp.2d at 103.

¹²² *Id.*

¹²³ *See* 16 U.S.C. § 1851(a)(1) (2007).

¹²⁴ *Natural Res. Def. Council, Inc., v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

¹²⁵ *Id.* at 754.

¹²⁶ *Oceana, Inc. v. Evans*, 2005 WL 555416, 1 (D.D.C. 2005) (slip opinion).

¹²⁷ *Id.* at 5.

court found that the plan satisfied the Standard because it sought to end overfishing.¹²⁸ Rather than close the stock, the FMP would enable fishermen to stay in business while the fishery rebuilds.¹²⁹

Not only has the requirement to prevent overfishing fueled debate, but questions have also arisen regarding the allowable timeframe Councils have to prevent or end overfishing. Section 1854(e)(4) of the MSA requires Councils to rebuild a fishery in a time period “as short as possible,” and not exceeding ten years if biologically possible.¹³⁰ However, the MSA does not specify a timeframe when a fishery is not capable of being rebuilt within ten years.¹³¹ In *National Resources Defense Council v. National Marine Fisheries Service*, the Ninth Circuit decided that the MSA gives priority to fisheries conservation rather than the short-term economic interests of the fishing industry.¹³² Although the court rejected the Pacific Council’s plan for rebuilding the darkblotched rockfish fishery because it did not satisfy the “as short as possible” language, the court likewise rejected the proposition that a stock unable to be rebuilt in ten years should automatically close.¹³³ Thus, even under the 2006 amendments which call for plans that “end overfishing immediately,”¹³⁴ there is still no clear answer as to the timeframe required for fisheries that cannot be rebuilt within a ten-year period.

In addition to preventing overfishing, another MSA National Standard pertains to bycatch reduction. National Standard Nine requires conservation and management efforts to minimize bycatch and the mortality of such bycatch, “to the extent practicable.”¹³⁵ In *Conservation Law Foundation v. Evans*, the plaintiffs argued that NMFS, in rejecting the closure of four areas to

¹²⁸ *Id.* at 15.

¹²⁹ *Id.*

¹³⁰ 16 U.S.C. § 1854(e)(4) (2007).

¹³¹ *See id.* § 1854(e).

¹³² *Natural Res. Def. Council v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005).

¹³³ *Id.* at 880.

¹³⁴ 16 U.S.C. § 304(e)(3) (2007).

¹³⁵ *Id.* § 1851(a)(9).

fishing in order to protect essential fish habitat, violated National Standard Nine.¹³⁶ Plaintiffs claimed that closure of the four areas would be beneficial to bycatch and essential fish habitat, and therefore, should be implemented.¹³⁷ The court disagreed, finding plaintiff's interpretation of the provision improperly "equate[d] 'practicability' with 'possibility.'" ¹³⁸ By using the term "practicable," Congress intended to defer to the Council's discretion in deciding how to conserve and manage the fishery.¹³⁹ In *Pacific Marine Conservation Council v. Evans*, rather than defer to Council's discretion, the Court held that the Council failed to consider "practicable" conservation and management alternatives.¹⁴⁰ By failing to consider an observer program or discard caps, the Council did not fully contemplate "practicable" bycatch reduction options.¹⁴¹

While several MSA sections have resulted in litigation, National Standard Two has been one of the more frequently contested provisions. National Standard Two mandates "[c]onservation and management measures shall be based upon the best scientific information available."¹⁴² Since scientific information is often plagued by uncertainty, Council decisions are challenged on the basis of inadequate scientific information. Both *Hadaja, Inc. v. Evans*¹⁴³ and *Midwater Trawler Cooperative v. Department of Commerce*¹⁴⁴ indicate that Councils must support their conservation, management, and allocation decisions with scientific rationale. For example, "merely stating in conclusory fashion that [a FMP] was considered in light of scientific evidence does not bring [a FMP] within the requirements of National Standard Two."¹⁴⁵ As

¹³⁶ Conservation Law Found. v. Evans, 360 F.3d 21, 23-24 (1st Cir. 2004).

¹³⁷ *Id.* at 28.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F.Supp.2d 1194, 1203 (N.D.Cal. 2002).

¹⁴¹ *Id.*

¹⁴² 16 U.S.C. § 1851(a)(2) (2007).

¹⁴³ *Hadaja, Inc. v. Evans*, 263 F.Supp.2d 346 (D.R.I. 2003).

¹⁴⁴ *Midwater Trawlers Co-Op. v. Dep't of Commerce*, 282 F.3d 710 (9th Cir. 2002).

¹⁴⁵ *Hadaja*, 263 F.Supp.2d at 354.

cases are decided, ambiguous and conflicting MSA provisions are gradually addressed but there is certainly room for improvement within the Act.

c. Looking Ahead

Given the rapidly declining state of U.S. fisheries, the need for effective conservation and management is more apparent than ever. Two of the more recent approaches used by Councils to protect fisheries are individual transferable quotas (ITQs) and sector management. ITQ systems allocate a share of the total allowable catch to each fisherman and allow fishermen to buy or lease ITQs from other fishermen.¹⁴⁶ One of the problems with this approach is deciding which fishermen get an ITQ and how much the total allowable catch will be for the fishery.¹⁴⁷ Under a sector management system, which was recently implemented by the New England Fishery Management Council, groups of fishermen voluntarily join together as permit holders to manage the allocation of fish in their sector.¹⁴⁸ The fishermen sign a binding contract that requires them to stay within the total allowable catch limit for their sector.¹⁴⁹ Potential problems may arise if fishermen are not well organized in monitoring and reporting, if one member of a sector exceeds the allocation for the group, or if a species is overfished.¹⁵⁰

Under both ITQ and sector allocation schemes, questions have arisen regarding property rights and the public trust interest in fishery resources. Both systems limit entry into a fishery, so fishermen already within the system may continue to catch fish according to the total allowable catch but new fishermen may be unable to gain entry.¹⁵¹ Since fish have historically been considered a public trust asset, one issue is whether ITQs or sectors should be considered

¹⁴⁶ UNDERSTANDING FISHERIES MANAGEMENT 26 (Ross Shotton, ed., 1999).

¹⁴⁷ *Id.*

¹⁴⁸ University of Maine School of Law Sector Workshop Blog Archive, *Intro to New England Fishing Sectors*, <http://mainelaw.maine.edu/mli/sectorWorkshop/ent02.html> (last visited Oct. 22, 2010).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Shotton, *supra* note 147 at 26.

property rights.¹⁵² If they are considered property rights, then do ITQs and sectors amount to a constitutional taking of the public trust resources?¹⁵³

Another area of uncertainty is how the application of the MSA will confront new challenges in the future such as marine spatial planning and the development of offshore energy. On July 19, 2010, President Obama signed an Executive Order establishing a National Policy for the Stewardship of the Ocean, Coasts, and Great Lakes, which was developed by the Interagency Ocean Policy Task Force.¹⁵⁴ Although NOAA is identified as a member of the task force, NMFS is not; this has sparked discussion among Councils that are concerned with participating in the development of any Coastal Marine Spatial Plans.¹⁵⁵ At a Council Coordination Committee meeting in May 2010, Council members expressed a desire “to clarify that [Coastal Marine Spatial Planning] action [does not] subvert the MSA.”¹⁵⁶

VI. Conclusion

Since passage in 1976, the MSA has remained the primary governing law for fisheries management in the United States.¹⁵⁷ While the MSA has been amended over time in response to evolving scientific, economic, and social information, new challenges lie ahead for the sustainable management of the nation’s fisheries. As the demand for fish continues to increase, both in the United States and globally, the need to properly manage and protect this valuable resource will only become more imminent.

¹⁵² *Id.* at 31.

¹⁵³ *Id.*

¹⁵⁴ The White House: Office of the Press Secretary, *Executive Order Stewardship of the Ocean, Our Coasts, and the Great Lakes*, available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans> (last visited Oct. 22, 2010).

¹⁵⁵ United States Regional Fishery Management Councils, Council Coordination Committee, *Navigating National Initiatives: Meeting Summary*, <http://www.fisherycouncils.org/correspondence/cccMtgSum510.pdf> (last visited Oct. 22, 2010).

¹⁵⁶ *Id.*

¹⁵⁷ *See* Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891(d) (2007).