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A Call to Action: Saving America's Commercial Fishermen

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A CALL TO ACTION: SAVING AMERICA'S COMMERCIAL FISHERMEN

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A former salmon fisher has fallen back on sewing nets, hoping that government disaster relief will provide her with money for education. She lost her boat, her house, and the fishing business she had hoped her son could continue.[1]

I. INTRODUCTION

As depicted in the paintings of Winslow Homer, and much like the American farmer, commercial fishermen represent a way of life revered in American culture. Unfortunately, the fisherman also shares with the farmer a common plight.[2] Rooted in a mutual reliance on Nature's dwindling resources and similarly plagued by intense government regulation of those resources, both the farmer and the fisherman face a continued struggle for survival and for financial viability within their respective ways of life.[3]

It has been generally recognized for some time that there are too many fishing boats harvesting too many fish from dangerously depleted stocks.[4] There has been little disagreement amongst the various interest groups as to the need for better conservation,[5] but as to degree and the specific remedy, there continues to be ample debate. Environmentalists, government regulators, politicians, consumers, impacted local communities, recreational anglers, seafood processors, and of course,

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[1] SUZANNE IUDICELLO ET AL., FISH, MARKETS, AND FISHERMEN: THE ECONOMICS OF OVERFISHING 1 (1999).

[2] *See generally id.*

[3] *See id.* at 27.

[4] *See id.* at 8-10.

[5] *See* Jeffrey P. Cohn, *Fish Story*, GOV'T EXEC., Apr. 1, 2000, at 35. "That marine resources need conservation few would argue." *Id.*

commercial fishermen and their families all maintain valid and intensely personal opinions as to the exact balance that needs to be established. Unfortunately, given the varied interests in conflict, efforts at resolution have been largely unsuccessful.

Specifically, it is in light of this overfishing and the need for increased conservation that the Sustainable Fisheries Act ("SFA")[6] was passed in 1996 as an amendment to the Magnuson-Stevens Act,[7] the 1976 law primarily charged with management of American coastal and ocean resources. As will be discussed, the SFA has failed not only to adequately address the problems it was implemented to resolve,[8] but has also contributed confusion to the dispute[9] by adding implementation standards that demand conservation efforts both protecting the resource and mitigating the economic effect of regulations on impacted fishing communities.[10] It is easy to envision how these two principles might be at odds.

The Magnuson Act is again before Congress in need of reauthorization,[11] and the question as to what the government will try next looms large. Pro-conservation forces have already levied extensive criticism against the National Marine Fisheries Service ("NMFS"), the Commerce Department agency charged with regulation of the country's fisheries and with SFA enforcement.[12] There is certainly the likelihood that this law, already disposed to favor conservation efforts, may actually be amended to better such environmental protections.[13] Few can find fault with the need, but one question must not be forgotten amidst the rhetoric of an improved ocean environment—a question that lies at the heart of this Note—What about the fishermen?

This Note assesses the current status of fisheries regulation and the inherent difficulties confronting commercial fishermen as they attempt to

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[6] Pub. L. No. 104-297 (1996).

[7] 16 U.S.C. § 1801 (1976).

[8] *Study Says Mismanagement of Nation's Fisheries Costing Taxpayers Millions; Rep. Gilchrest Introduces New Fisheries Bill*, U.S. NEWSWIRE, Mar. 9, 2000 [hereinafter *Study Says Mismanagement of Nation's Fisheries*].

[9] *See id.* "The vast majority of America's fishermen are trying to fish responsibly, but they are receiving mixed signals from fishery managers." *Id.*

[10] *See* Sustainable Fisheries Act § 106(b).

[11] 146 CONG. REC. S6142 (daily ed. June 29, 2000) (statement of Senator Olympia Snowe, R-Me.), *available at* http://www.legislative.noaa.gov/magstevenssenintro.htm.

[12] *See Study Says Mismanagement of Nation's Fisheries*, *supra* note 8.

[13] Cat Lazaroff, *New Law Could Save Millions Spent on Fisheries Mismanagement*, ENV. NEWS SERV., Mar. 10, 2000, at 2.

conform to a regulatory regime heavily favoring conservation. Section II lays the groundwork, establishing the necessary vocabulary to proceed with such a discussion and detailing the background regarding the industry and extent of overfishing. Section III focuses on the SFA, its flawed implementation by NMFS, and its inconsistent interpretation by the courts. Commanding significant attention will be the national standards established by the Act and how they should have been interpreted by NMFS in accounting for economic impacts in regulations of the fishing industry. Finally, Section IV concludes by evaluating a few of the popular but imperfect remedies relied on to date and by arguing for an alternative approach—a Congressionally funded buyout—that hopefully strikes the right balance between environmental protection and an industry's continued existence.

In the end it will have been readily demonstrated that the U.S. government—the Congress, NMFS, and the courts—have failed the commercial fisherman, that current policy is logically at odds with itself, and that while throwing money at a problem is not always the solution, in this matter, increased funding for scientific research, for economic analysis, and for exit subsidies represents the last, best chance to achieve an acceptable industry composition while saving our vital ocean resources. As Senator John Kerry from Massachusetts stated in 1995 when the fisheries issue took center stage with the consideration of the SFA:

> The fisheries of the United States are at a crossroads and significant action is required to remedy our fisheries management problems and preserve the way of life of our fishing communities. Fish on the dinner table is something that many Americans may have taken for granted in the past; but unless we take steps to ensure that these vital resources are conserved, they will not be there for future generations.[14]

II. BACKGROUND

There is little doubt that United States, as well as world fish stocks, are declining.[15] A NMFS report to Congress in October 1999, identified

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[14] 141 CONG. REC. S247-48 (daily ed. Jan. 4, 1995) (statement of Sen. John Kerry, D-Mass.).

[15] *NOAA, Fisheries Budget Before the Subcomm. on Fisheries Conservation, Wildlife, and Oceans of the House Comm. on Res.*, 106th Cong. (Mar. 28, 2000) [hereinafter *Subcomm. on Fisheries Conservation, Wildlife, and Oceans*] (testimony of Dr. D. James

98 species as being overfished, with 127 species not being overfished.[16] In other words, "11 percent of U.S. living marine resources are overfished or are approaching overfished, [while] 14 percent are not overfished . . ."[17] Even more troubling is the notion that the status of 75 percent of our fisheries, or 674 fish species, is currently unknown.[18] The numbers become even more alarming when focusing on specific coastal waters of the country traditionally recognized for their high concentrations of preferred fish stocks.[19] Scientists estimate that the U.S. fishery landings have room to grow by up to 3 million metric tons if only the fisheries could be rebuilt and current harvesting were adjusted to allow for such long-term potential yields.[20]

Of course, any reduction in the landings of commercial fishermen represents a blow to an industry vital to many local communities and to the U.S. economy as well.[21] In 1998, New England commercial fisheries alone landed almost 595 million pounds of fish, generating $540 million in dockside revenues and contributing substantially to the Northeastern economy.[22] On the West Coast, where reductions in groundfish stocks, such as rockfish and lingcod, have dramatically affected the landings of coastal fishermen, estimated economic losses for coastal communities in Oregon, Washington, and California range from $3 million to $15 million.[23] Nationally, "[t]he American fishing industry is a $25 billion wholesale business which employs 300,000 people, and had over $3

Baker, Undersec'y and Adm'r, Nat'l Oceanic and Atmospheric Admin., U.S. Dep't of Commerce).

[16] Donald Sutherland, *U.S. Fish Harvesters Up on Financial Rocks*, ENV'T NEWS SERVICE, Apr. 25, 2000, *available at* 2000 WL.

[17] *Hearing on the Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (Apr. 10, 2000) [hereinafter *Hearing on Magnuson-Stevens Reauthorization*] (statement of Penelope Dalton, Assistant Adm'r, Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce).

[18] Sutherland, *supra* note 16.

[19] *See Hearing on Magnuson-Stevens Reauthorization*, *supra* note 17 (statement of Penelope Dalton, Assistant Adm'r, Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce). "And in New England, the percentage of overfished stocks in 1999 was approximately 50 percent." *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Editorial, Lost At Sea: *West Coast Groundfish Stocks are Devastated By Overfishing; Magnuson-Stevens Act Needs Strengthening*, PORTLAND OREGONIAN, Mar. 27, 2000, at B6.

billion in landing revenues for 1998."[24] Additionally, recreational anglers (deep-sea fishing) caught another 312 million fish in 1998, with an unspecified but clearly discernible impact on local boating and charter businesses.[25] Overall, the U.S. is, by catch, the fifth largest fishing nation in the world, harvesting 10 billion pounds of fish annually.[26] It is also the world's third largest seafood exporter, with over $2.3 billion in exports in 1998.[27]

Pitting the conservation needs of an increasingly limited resource against the overwhelming economic and social dependence of many coastal communities on the fishing industry obviously poses a daunting challenge. It is a challenge that falls almost exclusively on the Department of Commerce's NMFS and on eight regional fishery councils, created under the 1976 Magnuson Act.[28] NMFS was at one time relegated to the collection of data other minor roles in management of the fisheries.[29] Today, however, with the adoption of the Magnuson Act and then the SFA amendments, NMFS is extremely active in the day-to-day oversight of fishing practices in the United States, issuing "more that 400 rules a year . . . governing where, when and how fishermen can fish."[30]

The regional councils actually create the Fishery Management Plans ("FMPs") determining "when, where, how and how many of each fish or related group of fish and shellfish can be caught each year."[31] Each council's plans, however, are only advisory in nature and must be approved by the Secretary of Commerce, acting through NMFS.[32] At the heart of the controversy surrounding fisheries management are these FMPs, given their "effect [on] both the survival of a species and the

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[24] Sutherland, *supra* note 16. The commercial harvest in 1998 totaled 9.6 billion pounds of fish and shellfish worth an estimated $3.7 billion. *See* Cohn, *supra* note 5.

[25] Cohn, *supra* note 5.

[26] Sutherland, *supra* note 16.

[27] *Id.* Interestingly enough, the U.S. in 1998 also incurred a $6.9 billion trade deficit in fisheries products. *See Subcomm. on Fisheries Conservation, Wildlife, and Oceans*, *supra* note 15.

[28] *See* Cohn, *supra* note 5.

[29] *See id.*

[30] *Id.* (NMFS is fourth-highest among federal agencies in the issuing of rules and regulations).

[31] *Id.*

[32] *Id.*

economic health of the fishing industry and many communities."[33] While the make-up of the regional councils originally was dominated by fishermen and others aligned with the commercial fishing industry, much has changed over the course of the past ten years.[34] Today, the councils' membership includes not only fishermen, but academics, conservationists, regional and state fishery officials, and NMFS regional directors, transforming the council process into a microcosm of the national debate raging amongst the varied interests.[35]

Obviously, underlying each of the councils' and NMFS's actions are foundations rooted in the statute which originally created the council process, the Magnuson-Stevens Act, and in its subsequent amendments, the Sustainable Fisheries Act. The Magnuson Act was adopted with two stated goals in mind.[36] First, the bill sought to exclude foreign fishermen from America's coastal waters and to encourage the development of the U.S. domestic fishing fleet and processing industry.[37] The second stated goal was to preserve the fishery stocks in U.S. coastal waters.[38] The Act sought to meet these objectives by "establishing a 200-mile fishery conservation zone and asserting U.S. management authority over fish within the conservation zone, as well as over anadromous species such as salmon throughout their migratory range."[39]

By all measures, the legislation was immensely successful in meeting its first goal—it virtually eliminated foreign fishing vessels and processors and significantly aided the development of the domestic fishing fleet.[40] For example, between implementation of the Magnuson Act and 1995, "the number of commercial groundfish vessels in New England has increased by 70 percent, and the number of fishermen has risen by 130

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[33] U.S. GENERAL ACCOUNTING OFFICE, RCED-00-69, FISHERY MANAGEMENT: PROBLEMS REMAIN WITH NATIONAL MARINE FISHERIES SERVICE'S IMPLEMENTATION OF THE MAGNUSON-STEVENS ACT (2000) [hereinafter GAO, FISHERY MANAGEMENT].

[34] *See* Cohn, *supra* note 5.

[35] *See id.* "Many Council meetings are now several days longer to provide for the level of public input generated by the imposition of new and often very complex management measures." *Hearing on Magnuson-Stevens Reauthorization*, *supra* note 17 (testimony of Thomas R. Hill, Chairman, New England Fishery Management Council).

[36] David A. Dana, *Overcoming the Political Tragedy of the Commons: Lesson Learned From the Reauthorization of the Magnuson Act*, 24 ECOLOGY L.Q. 833, 840 (1997).

[37] *Id.*

[38] *Id.*

[39] 141 CONG. REC. S247-48 (daily ed. Jan. 4, 1995) (statement of Sen. John Kerry, D-Mass.).

[40] *See id.*

percent."[41] Not surprisingly however, the second stated goal has not been achieved, as the two objectives were somewhat incompatible fundamentally and since passage of the Magnuson Act, "depletion of offshore fishery populations has worsened."[42] Part of the problem was clearly the increased size of the domestic fleet, but even more troublesome was the self-regulating power vested in the council process.[43] Recall that until very recently many of the eight regional councils "have consisted almost exclusively of commercial fishermen,"[44] and it is not surprising that as a result of this uniformity many of the councils "resisted taking effective measures to prevent or cure overfishing."[45]

III. THE SUSTAINABLE FISHERIES ACT AND NATIONAL STANDARD EIGHT

A. *The Sustainable Fisheries Act*

It was in this vein that the Sustainable Fisheries Act was passed in 1996, amending the Magnuson Act and dramatically altering the roles of both NMFS and the regional councils.[46] The SFA was an apparent attempt to remedy the conservation failures of the Magnuson Act, as "[s]tamps of conservation groups [were] imprinted upon numerous provision of the SFA."[47] There was noticeably less discretion granted the councils in responding to identified fisheries in crisis as the legislation required FMPs to rebuild stocks as quickly as possible (no longer than 10 years),[48] and required NMFS to identify and conserve "essential fish habitat" ("EFH").[49] In addition, the SFA issued a five-year moratorium on

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[41] *Id.*

[42] Dana, *supra* note 36.

[43] *See id.* at 842.

[44] *Id.*

[45] *Id.* "In some regions . . . the council members are no longer perceived as stewards of the public resource, providing fair and balanced representation, but are seen as protectors of special economic interests." 141 CONG. REC. S247-48 (statement of Sen. John Kerry, D-Mass.).

[46] *See* Dana, *supra* note 36, at 843.

[47] Shi-Ling Hsu & James E. Wilen, *Ecosystem Management and the 1996 Sustainable Fisheries Act*, 24 ECOLOGY L.Q. 799, 805 (1997). "[E]nvironmental groups representing general public sentiment were extremely active in the Magnuson Act reauthorization process." Dana, *supra* note 36, at 844.

[48] The Sustainable Fisheries Act, Pub. L. No. 104-297, § 109(e)(4)(A)(i) (1996).

[49] *Id.* § 108(a)(7).

individual fishing quotas ("IFQs"), a controversial measure designed to limit overcapacity and overcapitalization within the industry by granting quotas based on prior performance,[50] and "also established new requirements regarding bycatch—fish that fishermen catch incidentally when fishing for another species."[51]

The bycatch requirement was actually added as another "standard" to a list of seven rules promulgated in the original Magnuson Act.[52] These "national standards" were to serve as necessary conservation-based guidelines in the development of the council management plans (FMPs) and NMFS regulations.[53] In general, the conservation-friendly philosophy espoused in these original commandments was only strengthened in the SFA as several of the original standards were substantively modified.[54] Along with the bycatch standard however, two other standards were also added by the SFA, and one of them, now identified as National Standard Eight, has generated a firestorm of controversy.[55]

B. *National Standard Eight*

National Standard Eight states:

> Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.[56]

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[50] *See id.* § 108(e).

[51] Hsu & Wilen, *supra* note 47, at 805.

[52] *See id.* at 805-06.

[53] *Id.* at 802-03.

[54] *Id.* at 806. "[T]he first national standard, mandating that management achieve the 'optimum yield' from each fishery, previously defined as 'maximum sustainable yield' . . . has been altered to allow only that maximum yield be reduced by any such relevant [economic, social, or ecological] factors. This prevents councils from raising allowable harvests in response to local pressure for larger allocations." *Id.*

[55] *Hearing on Magnuson-Stevens Reauthorization*, *supra* note 17 (testimony of Paul Parker, Commercial Hook and Line Fisherman Executive Dir., Cape Cod Commercial Hook Fishermen's Ass'n, Member of the Board, Marine Conservation Network).

[56] The Sustainable Fisheries Act, Pub. L. No. 104-297, § 106(b)(8) (1996).

As is evident from the language, Congress did not intend this standard as a trump of conservation measures,[57] but as an additional barrier or protection to burdensome regulation.[58] As stated last year by Paul Parker of the Cape Cod Commercial Hook Fishermen's Association in testimony before the Senate Subcommittee on Oceans and Fisheries:

> Although economic impacts must be considered, they cannot take precedence over the Magnuson-Stevens Act's mandate to conserve fish. In an instance where several alternatives are equally protective of marine fish, but have varying degrees of adverse economic impacts to fishermen, then NMFS should choose the alternative with the least economic impact. The Regulatory Flexibility Act and National Standard 8 should not be used to undercut fisheries conservation.[59]

Still, despite the limitations expressly placed on the effect of this standard, it is clearly not to be ignored. But since 1996, the primary complaint from those within and representing commercial fishing interests has been that agency action on the part of both NMFS and the management councils has largely disregarded both National Standard Eight and the Regulatory Flexibility Act ("RFA").[60] Maggie Raymond, representing a groundfish group—the Associated Fisheries of Maine—in recent testimony given before a Senate subcommittee argued:

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[57] *See* S. REP. NO. 104-276, § 107, at 14 (1996). "This standard . . . is not intended to be used as a basis for circumventing conservation requirements." *Id.*

[58] *See Hearing on Magnuson-Stevens Reauthorization, supra* note 17 (testimony of Paul Parker, Commercial Hook and Line Fisherman Executive Dir., Cape Cod Commercial Hook Fishermen's Ass'n, Member of the Board, Marine Conservation Network).

[59] *Id.* The Regulatory Flexibility Act ("RFA") was passed in 1996 and requires the agency to perform a regulatory flexibility analysis before promulgating a final rule. The analysis must include a description of alternatives designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.
Sharon Gwinn et al., *A Review of Developments in U.S. Ocean and Coastal Law January 1-October 31, 1997*, 4 OCEAN & COASTAL L.J. 173, 202 (1999).

[60] *Review of Fishery Conservation Act Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (July 29, 1999) (testimony of Maggie Raymond, Associated Fisheries of Maine).

> This brings me to the most important point I wish to make today that being the SFA and NMFS guidelines despite the addition of National Standard 8, simply do not allow management decisions to consider the social and economic needs of fishing communities . . . . The NMFS guidelines allow consideration of the needs of fishing communities only as a means of adjusting the rebuilding period and only when that rebuilding period is less than ten years. We are very concerned that, unless the balance is restored, it will be impossible to maintain our traditional dependence upon the fisheries.[61]

The frustration expressed here has been begrudgingly recognized by NMFS, but as yet only limited changes have occurred.[62] As a result, National Standard Eight (and also the RFA) has recently served as a launching pad for several lawsuits.[63] Moreover, a Congressionally ordered General Accounting Office ("GAO") study of the problem was just completed in April, 2000.[64]

C. *GAO Report on Fishery Management*

The GAO study is particularly telling as to the nature and extent of the problems involving council incorporation of National Standard Eight. At the request of several members of Congress, the GAO investigated NMFS compliance with three provisions of the Magnuson Act, specifically focusing on NMFS's use of scientific data in regulatory

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[61] *Id.* Ms. Raymond goes on to say, "[W]e are committed to sustainable fisheries . . . [b]ut the events of the past few years and, especially, the potential impacts of the Sustainable Fisheries Act have shaken that faith and raised concerns that our community may be changed forever." *Id.*

[62] *See Hearing on Magnuson-Stevens Reauthorization*, *supra* note 17 (statement of Penelope Dalton, Assistant Adm'r, Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce) ("One of NOAA Fisheries' highest priorities is to improve our social and economic analyses."). On May 1, 1998, NMFS did promulgate guidelines for consideration of these issues, but these guidelines have been criticized as silent on the role of industry in "minimiz[ing] adverse impacts to their communities." GAO, FISHERY MANAGEMENT, *supra* note 33, at 16.

[63] *See Economics Impact of Fisheries Service Regulations Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans of the House Comm. on Res.*, 106th Cong. (Apr. 29, 1999) (statement of Penelope Dalton, Assistant Adm'r, Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce).

[64] GAO, FISHERY MANAGEMENT, *supra* note 33.

development, its implementation of the "essential fish habitat" requirements outlined in the SFA, and most notably, adherence to the principles established in National Standard Eight regarding the "economic importance of fishery resources to fishing communities as [NMFS] adopts measures to manage fishery resources."[65] Although the GAO found little wrong regarding NMFS compliance with its use of scientific data and identification of "essential fish habitats,"[66] it was extremely critical of NMFS's handling of National Standard Eight.[67]

The report began its review of Standard Eight by pointing out that "[a]lthough NMFS does consider the economic importance of fishing to fishing communities, this consideration concentrates on identifying how adversely a community would be affected by the measures and not necessarily on how to minimize that impact to provide for the sustained participation of those communities in the fishery."[68] Closely related was the GAO's criticism that NMFS guidelines regarding Standard Eight compliance do not in any way involve or provide a role for the communities affected.[69] Simply stated, the GAO asserted that the regional councils and NMFS needed to spend more time in consideration of methods or alternatives that at least had the possibility of mitigating the effects of harsh conservation measures.[70] It should also be highlighted that since the implementation of SFA in 1996 only six of the thirty-five council documents submitted to NMFS for review have been even partially disapproved on the basis of any Standard Eight deficiencies.[71]

Procedurally, the GAO also recommended that NMFS consider the economic impacts earlier in the decision-making process, noting that although the Magnuson Act does give priority to the conservation of depleted stocks, the economic impacts still had to be considered in developing conservation alternatives.[72] The GAO report found incidences where possible economic impacts were not considered at all until "after management alternatives [had] already been developed."[73]

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[65] *Id.* at 3 (Letter to Congressional Committees and Requesters).

[66] *Id.* at 3-4.

[67] *Id.* at 28.

[68] *Id.* at 15.

[69] *Id.* at 16.

[70] GAO, FISHERY MANAGEMENT, *supra* note 33.

[71] *Id.* at 17.

[72] *Id.* at 19

[73] *Id.* "In some instances, the decision-making process had progressed so far that there was little time to consider economic impacts." *Id.*

Most importantly, the GAO focused a great deal on the notion that the quality of any economic analysis was directly dependent on the availability of economic information.[74] In fact, common complainants to GAO regarding the common shortage of essential economic data were often regional council representatives, noting a general lack of data regarding: (1) crew employment information (number, payrate, and days worked); "(2) the economic relationships between those that buy the catch and those that catch it; (3) the production costs for such items as fuel, ice, equipment, and repairs; (4) the levels of debt and equity levels in the industry; and (5) the operating characteristics of import, export, and domestic markets."[75] NMFS officials also acknowledged that the "lack of basic financial data makes it difficult to demonstrate the effect of management measures on the industry and its private companies."[76]

Of course, an obvious constraint on NMFS's ability to gather data was a limited pool of funds and NMFS's failure to budget the necessary dollars to adequately address the shortcoming.[77] The GAO found that NMFS could only afford to employ thirty-three economists nationwide, who were responsible for the economic analyses required by the Magnuson-Stevens Act and National Standard Eight in addition to similar analyses required by the RFA[78] and other federal mandates affecting fisheries issues.[79] The GAO noted that despite NMFS's acknowledgement of the problem, the agency continued to budget inadequate funding to properly resolve the problem.[80]

Finally, the GAO sought to emphasize that despite the difficulty incurred in the gathering of necessary data, NMFS needed to decide whether its interpretation of National Standard Eight would be limited to the individual fisherman or to fishing communities as a whole.[81] Certainly the affects of any government regulation reach far beyond the fishermen and their families. The GAO Report emphasized that "people who are a part of the industry infrastructure that supplies the gear, the port facilities, the ice, and the fuel to the fishermen as well as other local businesses that provide general services may also experience reduced revenues or face

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[74] *Id.* at 17-19.

[75] *Id.* at 18.

[76] Sutherland, *supra* note 16.

[77] *See* GAO, FISHERY MANAGEMENT, *supra* note 33, at 18-19.

[78] The Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 (1996).

[79] GAO, FISHERY MANAGEMENT, *supra* note 33, at 18.

[80] *Id.*

[81] *Id.* at 18.

unemployment when fishing is curtailed."[82] While the GAO Report did appear to leave NMFS room to negotiate its position regarding National Standard Eight's scope, the Report's clear preference for an expansive and community-based interpretation, its unambiguous criticism of NMFS priorities in the decision-making process, and the acknowledged shortcomings of data gathering and analysis, should have been interpreted by NMFS officials as nothing short of a resounding shot across the bow.[83]

D. *Litigation*

Many of the themes brought to light in the GAO Report have readily been discussed by the few courts to review the reasonableness of NMFS's regulatory actions and their compliance with National Standard Eight and the RFA. In fact, the GAO Report briefly spotlighted two such cases.[84] NMFS officials responded by emphasizing the cases were indeed "wake-up calls" as to the need for a better accounting of the economic impacts, but they also indicated that there were several cases already decided where NMFS methodology and procedure as it relates to economic impacts were overwhelming upheld.[85] So, while many within the commercial fishing industry have in the last few years chosen to fight back by addressing their concerns to the courts, the results have been mixed at best, and only created additional confusion as the different circuits have split and gone their separate ways.

1. *North Carolina Fisheries Ass'n v. Daley*[86]

In *North Carolina Fisheries Ass'n v. Daley*, an Eastern District of Virginia Court ruled that the Secretary of Commerce had failed to comply with National Standard Eight by not conducting an appropriate economic analysis in the establishment of an annual quota for the summer flounder

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[82] *Id.* at 17-18.

[83] In its recommendations to the Secretary of Commerce and the Director of NMFS, the GAO suggested that NMFS "[d]etermine what resources [it] might redirect to help ensure that the full range of economic alternatives are considered early enough in the decision-making process to be useful in minimizing the adverse economic impacts of fishery conservation and management decisions." *Id.*

[84] *Id.* at 20-21 (The two cases are (1) *North Carolina Fisheries Ass'n v. Daley*; and (2) *Southern Offshore Fishing Ass'n v. Daley*, discussed *infra*).

[85] GAO, FISHERY MANAGEMENT, *supra* note 33, at 21.

[86] 27 F. Supp. 2d 650 (E.D.Va. 1998).

fishery,[87] despite having been ordered to do so by the same court in an earlier proceeding.[88] Apparently, in calculating the quota, NMFS utilized a stock assessment to determine the number of summer flounder in the fishery that was partly based on all reported dockside landings for a fishing year.[89] The flaw in NMFS methodology was its tendency to begin computation of the quota without the arrival of the dockside landing numbers for the immediately preceding season and its subsequent substitution of numbers from previous years.[90]

NMFS was found by the court to have formulated its 1997 quota using 1995 numbers because the 1996 numbers were not available.[91] To the extent the 1995 landing numbers included an overfished amount of 592,748 pounds more than allowed by the 1995 quota, this amount was subsequently subtracted from the 1997 quota.[92] Later the 1997 quota was again reduced because the 1996 overfish numbers eventually arrived.[93] As a result of this series of reductions, the final quota for 1997 stood at just fifty-nine percent of the original proposed quota.[94] In 1998 because of similar-type findings by the agency, double reductions again occurred, subtracting almost 400,000 pounds for 1997 averages.[95]

In establishing this quota, NMFS did not conduct what it termed an economic analysis, as required by both the RFA and National Standard Eight of the Magnuson Act, until ordered to do so by the court.[96] The economic analysis conducted, however, was extremely limited, and relied on NMFS internal criteria.[97] Specifically, one of the triggers utilized asked whether "the action result[ed] in revenue loss of more than 5 percent for 20 percent or more of the participants."[98] Curiously, NMFS's own analysis determined that fifty-seven percent of North Carolina's vessels were projected to have revenue losses of greater than five percent, and that forty-three percent of the North Carolina flounder fleet might actually

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87 *See id.*

88 *See* North Carolina Fisheries Ass'n v. Daley, 16 F. Supp. 2d 647 (E.D.Va. 1997).

89 *North Carolina Fisheries Ass'n*, 27 F. Supp. 2d at 653.

90 *See id.* at 654-58.

91 *Id.* at 654.

92 *Id.*

93 *Id.*

94 *See id.* at 656-57.

95 *North Carolina Fisheries Ass'n*, 27 F. Supp. 2d at 656-57.

96 *See id.* at 657.

97 *Id.* at 658.

98 *Id.*

experience reduced revenues of twenty-five percent or more.[99] Amazingly, despite having triggered one of its own internally-established criteria, NMFS still concluded that there were no significant economic impacts from the quota and even asserted that the previous year's overfishing would mitigate the losses any flounder fishermen suffered.[100]

The court found such analysis to be in complete violation of both the RFA and National Standard Eight of the Magnuson Act,[101] and determined NMFS actions to be both arbitrary and capricious.[102] The court went on to conclude that NMFS purposely skewed the results of the study to justify an untenable position.[103] "The so-called economic analysis was not actually what it was purported to be or ordered by this Court. It entirely failed to consider the effect on fishing communities or small entities. It failed to consider the economics as it may have affected actual fishermen."[104] Additionally, the court provided some guidance as to the limit of NMFS's power to regulate, stating:

> [t]he Secretary's authority to set quotas should serve as a regulatory guidepost for the conservation of the fishery. It should not be used as a buzzsaw to mow down whole fishing communities in order to save some fish. The Magnuson Act and the RFA were specifically enacted to avoid such a situation from happening.[105]

The Eastern District's compelling comments are more than telling. The agency's refusal to account for economic impacts was readily and repeatedly called to task by the court. The strong words and sanction on the part of the court also suggest at least an implicit duty under National Standard Eight to mitigate the damages of regulation.[106] In other words, at

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[99] *Id.* at 659.

[100] *Id.*

[101] *See North Carolina Fisheries Ass'n*, 27 F. Supp. 2d at 659-62. "After reviewing the Secretary's Analysis, this Court finds that the Secretary has completely abdicated his responsibilities under the Magnuson Act . . . . [T]he Secretary stubbornly argues that legal constraints posed by his own regulations override his clear statutory duty under National Standard 8 to minimize adverse economic impacts on communities." *Id.* at 662.

[102] *Id.* at 667.

[103] *Id.* at 667-68.

[104] *Id.* at 667.

[105] *Id.*

[106] *Id.* at 666. "[T]he purposes of National Standard 8 do not concern fishery conservation in isolation. To the contrary, the express terms of National Standard 8

least according to this court, the express requirements of National Standard Eight suggest that the livelihoods and families of fishermen must always be considered in balance with NMFS's stated goal of protecting the fish above all else.

A similar result can also be found in *Southern Offshore Fishing Ass'n v. Daley*,[107] where the U.S. District Court for the Middle District of Florida ruled that NMFS had failed to perform the necessary economic analysis to justify a fifty percent reduction in the annual shark quota.[108] Whereas the court did not fault NMFS for the conservation-based rationale utilized to warrant the restrictions, it did find that a significant, albeit small, fishing community did rely almost exclusively on the shark quota, and thus had to be accounted for in the FMP formation.[109]

Notably, the court in *Southern Offshore Fishing Ass'n* found the violation to have occurred specifically under the RFA and as a result prescribed a remedy dictated by that particular legislation.[110] Still, the court pointed out that "[t]he same remedy is appropriate for the Secretary's violation of National Standard Eight . . . ."[111] The overlapping nature of the two statutes evidenced in both cases should only add to the importance of considering such economic impacts in finalizing FMPs.

2. *A.M.L. Int'l, Inc. v. Daley*[112]

A.M.L. Int'l, Inc. represents the ultimate contrast with the ruling in *North Carolina Fisheries Ass'n*, as well as *Southern Offshore Fishing Ass'n*. The plaintiffs in *A.M.L. Int'l, Inc.* were mid-Atlantic and New England companies specializing in the harvest, processing, and export of spiny dogfish.[113] Spiny dogfish landings accounted for significant percentages of the total landings in several traditional New England fishing towns, such as Plymouth, where seventy-four percent of the total fish landed and ninety-six percent of the total pounds of fish landed were

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provide for a balancing of conservation interests against the economic rights of commercial fishermen and fishing communities." *Id.*

[107] 995 F. Supp. 1411 (1998).

[108] *See* GAO FISHERY MANAGEMENT, *supra* note 33, at 21.

[109] *Id.*

[110] *Southern Offshore Fishing Ass'n*, 995 F. Supp. at 1437.

[111] *Id.* at 1437, n.36.

[112] 107 F. Supp. 2d 90 (2000).

[113] *See id.* at 92.

spiny dogfish.[114] The suit was brought to invalidate the implementation of the NMFS-approved spiny dogfish Fishery Management Plan ("SDFMP").[115] Even before trial, it was readily conceded by the government that "the quota restrictions contained in the plan [would] likely have the effect of shutting down the spiny dogfish industry for at least the next five years."[116] So, similar to the findings in *North Carolina Fisheries Ass'n* the plaintiffs sought to have the SDFMP ruled an arbitrary and capricious action that violated both National Standard Eight of the Magnuson Act and the RFA.[117]

The district court engaged in an extremely thorough discussion of the SDFMP, NMFS's actions, and the plaintiffs' specific complaints. While some limited criticisms were leveled against the government action, the court found NMFS's actions to be appropriate within the law and granted the defendant's motion for summary judgment.[118]

Specifically addressing National Standard Eight, the court relied heavily on the explicit acknowledgement within the standard, "that deliberations regarding the importance of fishery resources to affected fishing communities 'must not compromise the achievement of conservation requirements.'"[119] The court did recognize that all other things being equal, it would find for an alternative with lower economic impacts, but that when the conservation benefits clearly favor one alternative over the other, National Standard Eight would not be relevant to the determination.[120]

The plaintiffs had contended that the SDFMP was not in compliance with the National Standard Eight because:

> (1) [T]here was no attempt to minimize economic consequences, (2) the descriptions of economic impacts, fishery demographics and the fishing communities [were] inadequate, (3) the consideration of alternative measures was inadequate, and most importantly (4) the plan shuts down an entire industry. For example, the plaintiffs assert that they will suffer revenue losses of thirty (30) to one

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[114] *Id.* at 93. "[I]n 1999, more than forty (40) percent of all fish caught by weight in the Northwest Atlantic were spiny dogfish." *Id.* at 92.

[115] *See id.* at 93.

[116] *Id.*

[117] *Id.*

[118] *See A.M.L. Int'l, Inc.*, 107 F. Supp. 2d at 108.

[119] *Id.* at 102-03.

[120] *See id.* at 103.

> hundred (100) percent, and the elimination of at least two hundred (200) jobs in the processing sector.[121]

The court however found that the economic impacts of the SDFMP were adequately accounted for and that in fact the agency had "concluded that without the measures contained in the SDFMP . . . the fishery [would] collapse completely within two or three years . . . creating drastically worse economic consequences than the temporary measures contained in the SDFMP."[122]

Additionally, the court found that NMFS and the councils had carefully evaluated twelve other alternative schemes but had concluded that the rebuilding schedule outlined in the SDFMP would produce results most consistent with the demands of the Magnuson Act.[123] The alternatives were rejected by NMFS because they did not comply fully with other requirements of the Magnuson Act, they did not provide long-term economic benefits better than the SDFMP adopted, and most notably, the alternatives did not conform to the ten-year time limit for rebuilding the fishery.[124] Finally, the plaintiff's contention that a total shutdown of the industry should be enough to trigger National Standard Eight was dispensed of by the court because National Standard Eight does not expressly prohibit a total closure of a fishery.[125]

Certainly, the court's arguments are well-taken. Still troubling, however, is the court's reliance on agency discretion in determining that the other twelve alternatives did not suffice. The basis employed by the court is obviously critical. Was the agency's SDFMP responding immediately to the gloomy two to three year prognosis of an industry crash, or the ten-year target ceiling for rebuilding fish stocks, as established by the Magnuson Act?

Also, compared with the *North Carolina Fisheries Ass'n* decision, this court could certainly be interpreted as representing the opposite position regarding the weight economic impact should garner relative to a plan's conservation effect. This Massachusetts district court concluded, "[a]s a sick person must undergo painful surgery and then convalesce for a short time in order to regain his health, a sick fishery must suffer this

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121 *Id.*

122 *Id.*

123 *Id.*

124 *See A.M.L. Int'l, Inc.*, 107 F. Supp. 2d at 103.

125 *Id.*

drastic procedure and then conserve itself for a short time in order to recover its full vitality."[126]

It is possible that a common understanding of National Standard Eight was shared by these two courts and that the results are only distinguishable on the facts and the differences in agency approach. Such a conclusion, however, would fundamentally demean the express requirement in National Standard Eight—that any FMP fully account for and minimize its actual economic impacts .[127] More likely, however, is the possibility of conflicting interpretations as to the degree of impact National Standard Eight can have on the implementation of management plans generally consistent with the other conservation-based national standards. In other words, at issue is the exact scope of the phrase "take into account."[128] Can NMFS satisfy National Standard Eight simply by considering and then discarding management options that might better minimize the economic impacts?

Whereas the court in *North Carolina Fisheries Ass'n* seemed to adopt a common sense interpretation of the standard and its scope,[129] the court in *A.M.L. Int'l, Inc.* relied on its understanding of congressional intent, stating, "[t]his terrible and unfortunate consequence, however, was readily anticipated by Congress when it amended the Magnuson-Stevens Act in 1996."[130] But the Committee Report detailing the intentions of S. 39 (Sustainable Fisheries Act) does not mention any standard necessarily trumping another.[131] Nor should it be assumed from concluding National Standard Eight does not circumvent the other national standards, that Congress intended economic impacts to be entirely secondary to conservation.[132] As Andy Rosenberg, former deputy director of NMFS,

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[126] *Id.* at 108.

[127] The Sustainable Fisheries Act, Pub. L. No. 104-297, § 106(b)(8) (1996).

[128] *See id.*

[129] 27 F. Supp. 2d 650, 661-66 (E.D.Va. 1998). The Eastern District of Virginia court presumed without discussion the necessary accounting of economic impacts, and instead focused on the scope of the phrase, "fishing community." *See id.* at 663.

[130] *A.M.L. Int'l, Inc.*, 107 F. Supp. 2d, at 107-08. "Significantly, Congress recognized that 'there is no requirement in the Magnuson-Stevens Act to require fishery management councils to try to minimize the adverse economic impacts of fisheries regulations on fishing communities . . . [It is] clear that these economic considerations are not designed to trump conservation considerations in the process of developing fishery management plans.'" *Id.* at 108 n.28 (quoting Sen. Snowe, 142 Cong. Rec. S10794, 10825 (Sept. 18, 1996)).

[131] *See* S. REP. NO. 104-276, § 107 (1996).

[132] *See* Beth Baker, *Fisheries Management Faces Many Challenges*, 50 BIOSCIENCE, Aug. 1, 2000, at 652.

has stated, "[f]irst conserve and make sure you don't overfish, but do it in a way that make[s] sense economically. You can't optimize both, but you have to consider both and look at tradeoffs."[133] Unfortunately, these tradeoffs are the subject of criticism from one side or the other, and mandating to all parties, including the courts, that both conservation and economic impacts be accounted for seems an impossible task.[134] The two goals are necessarily at odds.[135]

IV. SOLUTIONS TO RESOLVE THE IMPASSE

Of course, to focus exclusively on the Magnuson-Stevens Act's apparently mutually exclusive objectives (with the addition of National Standard Eight by the SFA), is really to miss the forest for the trees. As already emphasized, many fisheries have been severely depleted by overfishing and have been in need of protection.[136] In response, NMFS, under the auspices of the Magnuson-Stevens Act, has adopted fishery management plans that have closed specific fishing grounds, significantly limited fishing seasons, imposed catch quotas, and restricted gear types and crew sizes.[137] Obviously, all of these options implicitly translate into increased economic hardships for the fishermen affected. None of these solutions, however, appear to have worked, as the endangered status of most fisheries persists[138] and NMFS finds itself increasingly in court.[139] Why have these remedies not worked?

At the heart of the matter—NMFS and the regional councils have fundamentally misappropriated their efforts because "[d]espite these measures, too many boats are still chasing too few fish."[140] In other words, overfishing is in large part perpetuated by continued overcapacity

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[133] *Id.*

[134] *See id.*

[135] *See id.* ("Competing conservation and economic interests lead to what may be one of NMFS's worst problems—litigation.").

[136] *See Hearing on Magnuson-Stevens Reauthorization, supra* note 17 (statement of Penelope Dalton, Assistant Adm'r, Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce).

[137] *See* Donald Sutherland, *Fishy Accounting: Bankrupt Seas*, 15 EARTH ISLAND J., Sept. 22, 2000, at 26.

[138] *See Hearing on Magnuson-Stevens Reauthorization, supra* note 17 (statement of Penelope Dalton, Assistant Adm'r, Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce).

[139] Baker, *supra* note 132.

[140] Sutherland, *supra* note 137.

within the different fisheries.[141] Overcapacity is defined as "investments in fishing capacity that are currently or are likely to become idle for significant periods."[142]

The problem in NMFS's current approach[143] is really two-fold. First, by frequently overlooking overcapitalization as an issue and instead advancing the likes of the current regulatory regime, NMFS has come down decidedly in favor of conservation, in staunch denial of National Standard Eight and of the impacts such regulations have on fishing communities.[144] Jim Lone, Chairman of the Pacific Fishery Management Council, recently testified before Congress:

> However, there is a darker vision, which could easily occur if we are not able to strategically alter the course of current management. That is, we could continue attempting to manage an *overcapitalized fleet* in the face of declining resource abundance and the necessity to meet stock rebuilding mandates. This will most certainly result in even shorter fishing seasons, smaller trip limits, higher discard rates, and the continuous inability to accurately account for fishery-related mortalities. Many people now actively fishing will not be able to meet their basic financial responsibilities and will be forced from the fishery by a governed economic demise or outright bankruptcy; impacts to coastal communities dependent on [such] fisheries will be disastrous.[145]

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[141] *See* Hsu & Wilen, *supra* note 47, at 806 ("While the SFA contains some notable conservation advances, it does little to address the most fundamental cause of overfishing and waste—the chronic overcapitalization of fishing industries."). "Each time fish stocks decrease and the number of vessels remain the same the harvesting industry becomes less solvent." Sutherland, *supra* note 137.

[142] ANDREW G. READ & EUGENE H. BUCK, COMMERCIAL FISHING: ECONOMIC AID AND CAPACITY REDUCTION, CRS REPORT 97-441 ENR at 1 (1997). "In a purely static sense, overcapitalization refers to the existence of more capital applied in an industry than is necessary for the most efficient operation." *Id.* at 1 n.3.

[143] In fairness, NMFS has addressed capacity in numerous instances, as will be discussed shortly. Still, this note argues that reducing excess capacity has not yet been the fundamental focus of NMFS policies, which instead have concentrated on superficial regulations of this essentially static industry.

[144] *Hearing on the Decline of the West Coast Groundfish Fishery Before the Senate Comm. on Commerce, Science, and Transp.*, 107th Cong. (Jan. 16, 2001) [hereinafter *West Coast Groundfish Hearing*] (testimony of Jim Lone, Chairman, Pacific Fishery Management Council).

[145] *Id.* (emphasis added).

Additionally, it is noteworthy that by continuing on its current course, NMFS may actually be exacerbating the problem. By restricting when, where, and how specific species are caught, NMFS only feeds the "race for fish" mentality it is attempting to eliminate.[146]

Of course, one might expect existing NMFS restrictions to eventually take their toll—there should already be overwhelming casualties from the harsh financial impacts imposed by prior and existing NMFS regulations—a reduction in fleet capacity by attrition alone (although inconsistent with National Standard Eight). Fishermen, however, have proven to be a relatively stubborn bunch,[147] and not nearly enough fishermen have left the industry to address overcrowding.[148] For example, in the New England groundfish fishery (cod, haddock, etc.), where considerable portions of the Georges Bank, the fishery's most prized fishing area, have been closed since 1994, "[r]elatively few fishermen have surrendered their permits to catch cod and other groundfish despite page after bureaucratic page of regulations governing everything from their net size to the number of days they can spend at sea."[149]

There are of course several explanations for such sustained overcrowding within each fishery. Most notably, fishermen enjoy their jobs, "despite the boom-and-bust nature of their business and federal statistics showing that fishing is the nation's most dangerous profession."[150] Few would dispute the notion that fishing and love of the

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[146] *See* READ & BUCK, *supra* note 142, at 1 ("Attempts to regulate the total amount of fish captured (e.g., through total allowable catch ["TAC"] restrictions) may induce further investment, as the fastest vessels with the best equipment will probably fare best in the 'race for fish' that usually results from closed seasons or overall harvest quotas.").

[147] *See* Scott Harper & Lane DeGregory, *Hard Word, Little to Show—And a Foundering Future*, VIRGINIAN-PILOT, Dec. 17, 1995, at A1 ("Throughout the crisis, the notion of government limits on the number of people who can fish in the sea, of mandatory catch reports and ocean closures have chafed many New England fishermen, whose don't-tread-on-me stubbornness is renowned.").

[148] Mac Daniel, *Hanging on Rules, Fewer Fish Can't Sink Love of Profession*, BOSTON GLOBE, Nov. 19, 2000, at B1. This is not to say that actual numbers have not decreased. *But see* Harper & DeGregory, *supra* note 147. "In the 1960s, before the federal government began regulating fish, 50 processing plants were in business in Gloucester, Mass. About a dozen are left. Less than 10 years ago, 450 fishing boats docked in Gloucester's horseshoe-shaped harbor. The fleet now numbers about 125." *Id.*

[149] Daniel, *supra* note 148.

[150] *Id.*

ocean are "in your blood."[151] Also, demographics and simple economics dictate devotion to a way of life where little is required by way of education, but the pay can be exceptionally good.[152] Finally, as implied previously, the federal government actively "set the stage for today's over-sized fishing fleet . . . with the passage of the Magnuson-Stevens Act" in 1976.[153] "By chasing out the foreign boats that fished off New England's coast, and offering federal subsidies for the construction of new U.S. fishing boats, Congress fueled a great expansion . . . ."[154]

Such analysis clearly suggests NMFS and the regional councils are hurting the economic prospects of fishing communities with ineffective regulation, while at the same time violating the conservation measures of the Magnuson-Stevens Act by not addressing more enthusiastically the overcapitalization of the industry. A new approach with a new emphasis is clearly needed.

The federal government has certainly considered several other approaches in the past and implemented them, albeit somewhat imperfectly.[155] At one time or another, proposals involving economic aid (subsidies), individual transferable quotas ("ITQ"s), and direct capacity reduction, either by vessel buyback or license retirement, have been tried.[156] All three offer advantages over the current system but also have their share of critics.[157] The critical question, and the focus of this Note's concluding analysis, is which alternative is best for all parties involved and should be implemented on a more comprehensive scale.

A. *Economic Aid*

Direct economic aid has been utilized "to alleviate individual and community losses resulting from a natural disaster . . . as well as longer-developing fish stock collapses, often resulting from a combination of human action and environmental factors."[158] Such a solution, however, is

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[151] *Id.*

[152] *Id.* (quoting Andrew Rosenberg: "Many fishermen . . . have a relatively low education level, and many have been doing it for quite a while, and most of the fishermen have very high incomes . . . . So what are they going to do instead that's going to give them that kind of income with their skill levels?").

[153] *Id.*

[154] *Id.; see also* Harper & DeGregory, *supra* note 147.

[155] *See* READ & BUCK, *supra* note 142, at 2.

[156] *See id.*

[157] *See id.*

[158] *Id.*

only a short-term stop-gap, that many argue would not be necessary in a healthier, inherently more resilient industry.[159] As should be clear by such aid's primary intent, overcapacity, as the fundamental problem confronting fish stocks, is not addressed—the overcrowded fisheries are merely subsidized by the federal government so they can stay in business.[160] Critics of such efforts state that "rather than subsidizing and promoting permanent dependency by a faltering industry, the federal government should compassionately assist a reorganization of ailing elements of the fishing industry that is led by people from fishing communities and from within the fishing industry."[161] Economic aid is not the answer.

B. *Individual Fishing Quotas*

The idea behind ITQs is to prevent the tragedy of the commons—to stop overexploitation of a common resource by privatizing ownership of the resource.[162] As advocates of this alternative argue, "economic theory suggests that once fishermen have long-term property rights in the catch in a fishery, they will have a greater interest in protecting the long-term viability of the relevant fish populations."[163] The theory is sound and it certainly has the potential to address the issue of overcapacity by explicitly recognizing, and thereby limiting, the specific rights of each fisherman.[164]

Still, practical problems in implementation and enforcement, and the likely social consequences involved in this system of property rights represent significant challenges to the theory's real solvency.[165] Obviously, the fundamental question of how you divvy up the pie is at the heart of every criticism. The industry, for the most part, remains adamantly opposed to this solution because, as one commercial fisherman has stated:

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159 *Id.* at 20-21.

160 *Id.*

161 READ & BUCK, *supra* note 142, at 21.

162 *See* Dana, *supra* note 36, at 838.

163 *Id.*

164 *See* Cohn, *supra* note 5 ("The solution: Regulate the number of fish caught for specific species by assigning a limited number of licenses to individual fishermen or boats based on the number currently fishing and the allowable take.").

165 Dana, *supra* note 36, at 838.

> If IFQ/ITQs were allowed . . . and the allocations were based on catch history, which they always are, it would generate a tremendous windfall profit for the largest operators who have caused the most damage. Why would we choose to consider IFQ/ITQs now, when allocation would reward those individuals whom had contributed most to out fisheries crisis. This tremendous windfall profit would then place today's fisherman, that is waiting for the fish to recover, in the untenable position of having to sell their permit to these newly created millionaires. If this is allowed to happen, our fishery will no longer include thousands of independent operators, it will be one of tenant farmers to a handful of large corporations. IFQ/ITQs, if allowed, will do to New England fishing communities what agribusiness did to the family farmers in the 1960s and 1970s.[166]

The argument in support then is one of pure economics, whereas those opposed have continually emphasized that in pursuit of such industrial efficiency, social justice, as well as a way of life, is sacrificed. Given this Note's overarching emphasis on National Standard Eight and fairness to the fishing communities impacted by any such regulation, IFQs do not appear to be the appropriate solution either. Remarkably, Congress has agreed with this assessment repeatedly and in 1996 voted a four-year moratorium on the use of ITQs.[167] The moratorium was just recently extended.[168]

C. *Capacity Reduction*

As there is only one option left to support, this Note's advocacy of a concerted government effort to reduce capacity in all overcrowded fisheries via a buyback is somewhat anti-climatic. Still, there are numerous criticisms of this government practice, and the position must be defended.

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[166] *Hearing on Magnuson-Stevens Reauthorization*, *supra* note 17 (testimony of Paul Parker, Commercial Hook and Line Fisherman Executive Dir., Cape Cod Commercial Hook Fishermen's Ass'n, Member of the Board, Marine Conservation Network).

[167] *See* Cohn, *supra* note 5.

[168] *See West Coast Groundfish Hearing*, *supra* note 144 (testimony of Jim Lone, Chairman, Pacific Fishery Management Council).

The concept of a buyout is simple enough: fishermen are paid[169] to exit a given fishery through the purchase of their vessels or licenses. "The common objective of vessel buybacks or license retirement is the permanent withdrawal of effort (i.e. fishermen and their vessels) from a particular fishery."[170] The potential benefits are equally as obvious. As Penny Dalton, the Administrator of NMFS, has stated:

> A buyout reduces the amount of fishing pressure that potentially can be brought to bear on a stock of fish in the ocean and, therefore, reduces the risks of overfishing and fishery failures. Secondly, a buyback in a fishery that is already overfished reduces the harvest pressure in the short term and allows fishermen who have invested their lives in the fishery to leave with dignity and the ability to move on to other work.[171]

There is no more immediate solution to the affects of overcapacity then to actually reduce capacity directly.

Critical to the equation, however, is the actual reduction of effort.[172] Keep in mind that capacity does not necessarily equal effort, as removal of some fishermen from a given fishery may only prompt those remaining to harvest more.[173] Key to the success of any buyback proposal then is the continued regulation and restriction (albeit at a lesser level) of those fishermen declining the offer to exit and staying in the fishery.

Additionally, the most significant criticism of buybacks regard those capacity reduction efforts that occur in fisheries remaining open to

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[169] "In essence, there are three funding options that could come before Congress for capacity reduction programs: 1) government funding (tax payer), 2) industry funding, or 3) joint government-industry funding." DANIEL A. WALDECK & EUGENE H. BUCK, THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT: REAUTHORIZATION ISSUES FOR THE 107TH CONGRESS, CRS REPORT RL30215, at 22 (2001). This note does not address the myriad number of arguments for and against each of these funding options as buyback proposals in the past have overcome such implementation questions.

[170] READ & BUCK, *supra* note 142, at 3.

[171] Penny Dalton, *Buyback Programs Work*, USA TODAY, July 18, 2000, at 12A.

[172] *See* READ & BUCK, *supra* note 142, at 21-22.

[173] *Id.* ("Reduction in capacity may increase economic profitability for those remaining within the fishery, by concentrating harvest among fewer vessels, but capacity reduction does not assure recovery of a depleted stock because it does not necessarily reduce the total harvest.").

new entrants.[174] In other words, if the fishermen can take the money and then return to their fishery or some other overcrowded fishery, the benefit is lost.[175] Opponents readily point to the New England groundfish buyback program that occurred between 1995 and 1998 as an example of how such capacity reduction measures can fail.[176] Almost $25 million was utilized to remove seventy-nine vessels, accounting for nineteen percent of the groundfish catch.[177] "However, 62 additional vessels have become active since the buyback because no steps were taken during the program to prevent previously inactive vessels from engaging in fishing."[178] The reentries have essentially negated the positive reductions in overcapacity occurring with the initial purchase.[179] Utilizing this prior experience as a learning tool, however, the mistake is easily averted in the future. Quite simply, "[t]o have significant success, access to the fishery in question must be limited or restricted [as] buybacks/retirements are not a realistic option in fisheries that are open to new entrants."[180] It is in this vein that the GAO recently recommended the following steps be taken to insure the success of any capacity reduction program:

> Design future buyback programs to (1) restrict buyback participants from entering a fishery that has excess fishing capacity; (2) restrict the use of unused fishing permits in a buyback fishery with excess fishing capacity; (3) identify mechanisms to minimize the incentives to increase fishing capacity in a buyback fishery; and (4) develop performance measures that relate to program goals and broader legislative goals, such as the need to better manage fishing capacity and conserve fish stocks.[181]

Such criticisms then are warranted, but are indeed correctable. By carefully constructing a proposal that allows fishermen only to exit permanently, an irreversible reduction in capacity can be achieved.

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174 *See id.* at 21.

175 *See* U.S. GENERAL ACCOUNTING OFFICE, RCED-00-120, COMMERCIAL FISHERIES: ENTRY OF FISHERMEN LIMITS BENEFITS OF BUYBACK PROGRAMS (2000), at 4 [hereinafter GAO, COMMERCIAL FISHERIES].

176 *Id.* at 8.

177 *Id.* at 4.

178 *Id.*

179 *Id.*

180 READ & BUCK, *supra* note 142, at 21.

181 GAO, COMMERCIAL FISHERIES, *supra* note 175, at 17.

Additionally, capacity reduction confers benefits on both those leaving and those deciding to remain.[182] Paul Parker of the Cape Cod Commercial Hook Fishermen's Association has stated, in addressing the New England groundfish buyback:

> "[The buyback] provided a dignified way to allow fishermen who were ready to get out of the business to get out of the business and also to take their fishing boats and remove them from the fishery for the benefit of the future of our fishery and for the future of future generations of fishermen. It's a lot to ask for a man to turn his back on a life of fishing and it's important to compensate them for all the time and effort they put into building their business."[183]

Capacity reduction then at least allows the boat owners to bow out gracefully.

Of course, no plan can effectively mitigate all of the economic consequences of increased regulation, and by removing boats or licenses from a given fishery's fleet capacity, others are necessarily affected.[184] Hence, significant questions addressing "broader unemployment and other economic implications of the community, e.g. marine businesses that may suffer substantial income loss as the number of fishing vessels and processing plants declines," must not be overlooked.[185] "[E]ducational and vocational programs for the newly unemployed or bought-out maritime personnel" should necessarily be incorporated into any scheme.[186] Nevertheless, the impact on said communities will not be nearly as great as it would be if entire fisheries are permitted to sink or swim on their own.

Finally, whenever there is a play for federal dollars, the political viability of any such proposition should realistically help determine the

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[182] *See* READ & BUCK, *supra* note 142, at 4 ("The ultimate aim of most capacity reduction schemes is to improve the economics of the fishery for those fishermen choosing (and able) to remain as well as to provide some economic aid for those exiting the fishery.").

[183] David D. Haskell, *Fisheries Hooked on Permit Problem*, UNITED PRESS INT'L, Feb. 13, 2001.

[184] *See* WALDECK & BUCK, *supra* note 169, at 21 ("[C]ompensating a boat owner does not financially help the captain or crew, nor their family members, who have now lost a source of income.").

[185] *Id.*

[186] *Id.*

worthiness of the solution. It would be great if Congress tomorrow voted to provide every American $1 million each in an effort to eradicate poverty, but political common sense dictates such a solution will never occur, thus why consider it? Similarly, although not nearly as unlikely, even a partially federally-funded buyout is sure to have opponents on Capitol Hill.[187] This hurdle, however, is clearly not insurmountable.[188] Obviously, the singular message of a united constituency makes a significant impact,[189] thus "the impetus for any buyout needs to come from within the subject constituency—if they are to succeed, buyouts need to be designed and widely supported by the affected industry."[190]

In spite of everything, it should be emphasized that no proposal yet evaluated better embodies the concepts of fairness and social justice that must be protected according to National Standard Eight.[191] As stated by Glenn Roger Delaney, in testimony given before Congress:

> Congress has ingrained this policy linkage in the [Magnuson-Stevens Act] since its enactment and it was clearly reaffirmed with the addition of National Standard Eight and the provisions of 312(b) which provide authority for the development of buyback programs to achieve very specific conservation objectives in Council and State-managed fisheries. As reflected in the Act's title, fisheries conservation and management is by definition the conservation of fish through the management of fishermen—their families and communities. Socio-

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[187] *See id.*

[188] Senator Gordon Smith (R-Or.) just recently testified, "[W]e clearly need to reduce overcapacity in the groundfish fleet. While securing federal funds for vessel and permit buyback problems is an uphill battle in the Congress, it is not an insurmountable challenge—provided there is broad agreement in the industry over how to implement a buyback program." *West Coast Groundfish Hearing*, *supra* note 144 (testimony of Senator Gordon Smith).

[189] *See id.*

[190] *H.R. 3390, H.R. 3331 and H.R. 3516 and the Proposed Rule by NMFS on Time and Area Closures in the Atlantic and Gulf of Mexico to Pelagic Longline Fishing Before the Subcomm. on Fisheries Conservation, Wildlife, and Oceans of the House Comm. on Res.*, 106th Cong. (Feb. 8, 2000) [hereinafter *Hearing on Proposed Rule by NMFS on Time and Area Closures*] (testimony of Glenn Roger Delaney, Consultant to Blue Water Fishermen's Ass'n and U.S. Commissioner to ICCAT).

[191] *See id.*

> economics is a fundamental reality of fishery conservation.[192]

In other words, implicit in the management of the resource is the fundamental mandate that fishermen also be accounted for—the buyback insures that they are.

V. CONCLUSION

This Nation's fisheries are in desperate need of help, but so too are the commercial fishermen who have formed the backbone of coastal communities for hundreds of years. Mistakes have been made for sure, but at issue is a way of life forever linked with our history. Fishermen deserve our assistance.

The courts, absent clear direction from the Congress, have not been able to provide such protection, nor a path to follow. Arguably, the courts have only contributed to the confusion. The tradeoff here between conservation and economic survival is a common controversy with no easy solution.

The only answer is to avoid the problem entirely by benefiting both sides. Capacity reduction—a buyout—ensures the future survival of a renewable, but currently scarce, natural resource, while also protecting those individuals and communities that rely on the exploitation of that resource.

Make no mistake, however—everyone is to blame. Consumer demand for seafood fuels the practice and the federal government has done everything but harvest the resource itself over the course of the past twenty years. It is time to ante up.

As the 107th Congress meets to consider reauthorization of the Magnuson-Stevens Act in the next two years, it is strongly urged that, in line with the requirements of National Standard Eight, a capacity reduction program inclusive of all overcrowded fisheries be considered.

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[192] *Id.*