

ESSENTIAL FISH HABITAT: BUILDING A BARRIER TO AFFORDABLE HOUSING?

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I. INTRODUCTION

“The fish off the coasts of the United States . . . and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

.....

One of the greatest long-term threats to the viability of . . . fisheries is the continuing loss of marine, estuarine, and other aquatic habitats.”¹

.....

“The American Dream for every family has at its core a comfortable home in a safe neighborhood, a home available to buy or rent at a cost within the family budget, a home reasonably close to the wage earner’s place of work.”²

When examined separately, an individual would be hard pressed to disagree with either of the above-quoted statements of U.S.

1. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801(a) (2000).

2. Letter from Thomas H. Kean, Chairman of the Advisory Commission on Regulatory Barriers to Affordable Housing, to Jack Kemp, Secretary of Housing and Urban Development for the United States (July 8, 1991) (on file with author).

policy. While individually the policy statements and ideology embodied therein are easily agreeable to the American psyche, when read in concert, one must wonder if the policy concerns imbedded within each statement are easily reconciled with those imbedded within the other. This article attempts to address this issue, whether one of the goals of the Magnuson-Stevens Fishery Conservation and Management Act (the MSA),³ protecting Essential Fish Habitat (EFH),⁴ can be reconciled with the simultaneous goal of the National Affordable Housing Act (the AFHA),⁵ ensuring affordable housing to low- and moderate-income families.⁶

The article will provide a detailed overview of the history and controversy surrounding the 1996 EFH amendments to the MSA and the regulations that followed, along with a brief overview of the history and purpose of the AFHA. Additionally, the article will discuss the housing implications that have emerged from the MSA amendments and subsequent regulations. Because the EFH amendments to the forty existing fishery management plans (FMPs) required by the MSA are extremely in depth, covering each life stage of more than 900 managed species, any specific discussion of the FMP amendments will be limited to the Gulf of Mexico Fishery Management Council (GMFMC).⁷ My intentions in writing this article are to demonstrate that there are inherent conflicts between the goals of the MSA and the AFHA and to evoke a healthy debate as to how these conflicts might best be resolved without sacrificing the ultimate goal of either Act.

II. THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

There is no doubt that commercial and recreational fisheries in the United States are important national resources and provide substantial contributions to the coastal communities of the United States.⁸ In 1998 alone, the nation's commercial fisheries produced

3. 16 U.S.C. §§ 1801-1883 (2000).

4. *Id.* § 1801(b)(7).

5. Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §§ 12701-12899i (2000).

6. 42 U.S.C. § 12702 (2000).

7. The Gulf of Mexico Fishery Management Council is one of eight regional Fishery Management Councils established by the MSA. The councils prepare fishery plans which are designed to manage fishery resources from where state waters end out to the 200-mile limit of the Exclusive Economic Zone. Gulf of Mexico Fishery Management Council, About the Council, at <http://www.gulfcouncil.org/about.htm> (last visited Oct. 23, 2003).

8. *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of Penelope Dalton, Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration) (on file with author).

approximately \$3.1 billion in dockside revenues.⁹ “[T]he United States is the world’s fifth largest fishing nation, harvesting almost 10 billion pounds annually.”¹⁰ Additionally, in 1998 the United States’ seafood exports were valued at over \$2.3 billion, making it the third largest seafood exporter in the world.¹¹ U.S. fishery resources not only provide a valuable commercial resource for the nation, they also “provided enjoyment for over 8 million saltwater anglers who caught an estimated 312 million fish in 1998.”¹² Given the significance of this natural resource’s contribution to the nation’s economy and its recreational value to its citizens, it is no surprise that Congress has taken steps to ensure its continued viability. The result of Congressional efforts to protect this valuable resource culminated in the passage of the Fishery Conservation and Management Act in 1976.

A. Predecessors to the Current Act

In 1976, in an attempt to eliminate heavy foreign fishing in U.S. waters, Congress passed the Fishery Conservation and Management Act.¹³ This initial Act created eight regional fishery management councils that were charged with managing the nation’s fisheries through the use of fishery management plans (FMPs).¹⁴ The management of fisheries under the initial Act did not include an emphasis on habitat considerations.¹⁵ The Act merely required the councils to “initiate and maintain . . . research on the effects of habitat degradation”¹⁶ but did not require that research to be considered when drafting the FMPs. The result was that habitat was relegated to strictly a research issue as opposed to a management issue.¹⁷ By the late 1980s, as a result of signs of overfishing, parties began voicing demands that habitat issues be made a higher priority in the management of U.S. fisheries.¹⁸

In 1986, Congress acknowledged the growing habitat concerns during the reauthorization of the 1976 Act.¹⁹ As a result, the 1986 reauthorization included two provisions that addressed those

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Kristen M. Fletcher & Sharonne E. O’Shea, *Essential Fish Habitat: Does Calling it Essential Make it So?*, 30 ENVTL. L. 51, 54 (2000).

14. *Id.*

15. *Id.* at 55.

16. 16 U.S.C. § 1854(e) (1982) (subsequently repealed).

17. Fletcher, *supra* note 13, at 55.

18. *Id.*

19. *Id.*

concerns.²⁰ The first of those provisions required FMPs to include “information regarding the significance of habitat to the fishery and assessment as to the effects which changes to that habitat may have upon the fishery.”²¹ The councils, in their discretion, were to use the information to comment on proposed federal or state activities that could impact the habitat and make recommendations to the federal action agency.²² The second provision addressing habitat concerns required the relevant federal action agency to respond to the council’s comments and recommendations, when provided, within forty-five days of receipt.²³ The agency’s response was merely required to entail “a detailed response, in writing . . . regarding the matter.”²⁴ While the amendments attempted to address the issue of habitat protection, the processes required by them were often times overlooked by the relevant agencies.²⁵ Moreover, the provisions vested the councils with a broad range of discretion in deciding whether or not they would even comment on proposed actions.

In 1990, Congress again amended the Act in an attempt to strengthen the habitat provisions incorporated into the Act by the 1986 amendments. The 1990 amendments to the Act required the councils to make comments and recommendations concerning any state or federal action that would be “likely to substantially affect the habitat of an anadromous fishery resource under its jurisdiction.”²⁶ Moreover, the amendments beefed up the mandatory agency responses by requiring them to “include a description of measures being considered by the agency for mitigating or offsetting the impact of the activity.”²⁷ The amendments were an attempt by Congress to “increase the Council’s participation and influence in decisions affecting habitat critical to the survival of anadromous species.”²⁸

Since the creation of the MSA in 1976, habitat issues for the species included within the fisheries of the United States have been of increasing concern. These concerns accumulated through the

20. *Id.* at 56.

21. Fisheries Conservation and Management Act, Pub. L. No. 99-659, § 105, 100 Stat. 3706, 3711 (1986) (repealed 1996).

22. *Id.* § 104, 100 Stat. at 3706.

23. *Id.*

24. *Id.*

25. See Fletcher, *supra* note 13, at 57; Helen M. Kennedy, *The 1986 Habitat Amendments to the Magnuson Act: A New Procedural Regime for Activities Affecting Fisheries Habitat*, 18 ENVTL. L. 339 (1988).

26. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 108, 104 Stat. 4436, 4446 (1990) (repealed 1996).

27. *Id.*

28. H.R. REP. NO. 101-393, at 26 (1989).

1990s and culminated with Congress enacting the Sustainable Fisheries Act,²⁹ implementing sweeping amendments to the Act in 1996. The amendments represented an “effort to strengthen management and conservation of U.S. fishery resources.”³⁰ A significant part of this effort was directed at recognizing the significance of habitat to the management of the nation’s fishery resources and expanding “existing Federal authority to identify and protect essential fish habitat.”³¹ As discussed in more detail below, these amendments have generated much controversy and have been looked upon by some as a step in the right direction and by others as creating unnecessary regulatory burdens for private business and development.

B. The Sustainable Fisheries Act of 1996: The State of the MSA Today

The makeup of the MSA as we knew it prior to 1996 was changed substantially by the addition of three words into the language of fisheries management: Essential Fish Habitat. The Sustainable Fisheries Act’s (SFA) EFH amendments have created new regulatory procedures for federal agencies whose activities may affect EFH. Critics have referred to the amendments as the “next great ‘train wreck’ for federally permitted or funded development activities,”³² while environmentalists have praised Congressional efforts as constituting “one of the most significant pieces of environmental legislation since the Clean Water Act of 1972.”³³

1. Statutory Amendments

The EFH provisions of the SFA amendments affect “several parts of the [MSA], which combine to create a potentially powerful new tool for affecting coastal development.”³⁴ The first mention of EFH in the MSA, as amended, is found in the Purposes section of the Act where Congress declares that a purpose of the Act is to “promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other

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

30. S. REP. NO. 104-276, at 4 (1996).

31. *Id.* at 1.

32. Eldon V.C. Greenberg, *Essential Fish Habitat: A New Regulatory Hurdle for Development*, 29 ENVTL. L. REP. 10,463 (1999).

33. THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENSON ACT (Thomas E. Bigford ed., The Coastal Society Vol. 21(2) (1999) (edited statements of Ronald C. Baird from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

34. Greenberg, *supra* note 32, at 10,463.

authorities that affect or have the potential to affect such habitat.”³⁵ The amendments then go on to broadly define essential fish habitat as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.”³⁶ This definition of EFH includes all habitat used by any particular species of fish during all stages of the species’ life cycle. The Act creates no limitations as to what waters may constitute EFH and accordingly, EFH appears to include all state and federal waters within the Exclusive Economic Zone of the United States (3-200 miles offshore).³⁷

The portions of the MSA that were previously included in the Act to address habitat concerns prior to the passage of the SFA were completely revamped in 1996 to make way for habitat language intended by Congress to “improve existing requirements for the protection of fish habitat.”³⁸ The starting point of this overhaul of the existing habitat provisions was a requirement by Congress that the Secretary of Commerce, “within 6 months of [the] . . . enactment of the Sustainable Fisheries Act, establish by regulation guidelines to assist the [c]ouncils in the description and identification of [EFH] in [FMPs] (including adverse impacts on such habitat) and in the consideration of actions to ensure the conservation and enhancement of such habitat...[and] set forth a schedule for the amendment of [FMPs] to include the identification of [EFH].”³⁹ Accordingly, the FMPs created by the regional fishery councils to manage fishery resources under their jurisdiction are now required to “describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary.”⁴⁰ Additionally, the councils, within their FMPs, are directed to “minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.”⁴¹

Although the above amendments to the MSA address habitat issues and their increasing role in managing the nation’s fisheries, the meat of the EFH provisions added to the Act by the SFA represent an effort by Congress to toughen the comment, recommendation, and response procedures instituted by the 1986 amendments. Federal agencies are now statutorily required to initiate consultation with the Secretary “with respect to any action authorized, funded, or undertaken, or proposed to be authorized,

35. 16 U.S.C. § 1801(b)(7) (2000).

36. *Id.* § 1802(10).

37. *See* Greenberg, *supra* note 32, at 10,464.

38. S. REP. NO. 104-276, at 23 (1996).

39. 16 U.S.C. § 1855(b)(1)(A) (2000).

40. *Id.* § 1853(a)(7).

41. *Id.*

funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.”⁴² Prior to these amendments, the responsibility of initiating the comment and response procedures was placed squarely upon the fishery councils. This scheme resulted in a lack of comment and response partly because of the discretion given to the councils in deciding whether to even initiate consultation along with the burden placed upon the councils of having to seek out activities that could potentially affect fishery habitat and the limited resources available to the councils in shouldering that burden. The new consultation scheme enacted by the SFA shifts this burden by requiring the federal action agency whose activities may affect EFH to initiate the comment and response procedures by notifying the Secretary of Commerce. Moreover, consultation is now required for “any . . . action . . . that may adversely affect any [EFH]”⁴³ as opposed to only being required prior to the enactment of the SFA when an activity was “likely to substantially affect” EFH.⁴⁴ At the same time as the SFA amendments to the Act create a new consultation system involving the action agency and Secretary directly, the council comment and recommendation provisions previously included in the Act are preserved; the only difference is that the provision requiring an agency to respond to council recommendations was removed from the Act.

Another significant change made by the 1996 amendments relates to the response required by the action agency upon receiving recommendations from the Secretary. The time frame allotted for an agency response has been reduced from forty-five to thirty days after receiving recommendations from the Secretary.⁴⁵ The actual substance of the response required by the federal action agency has been augmented. Subsequent to the passage of the SFA, an agency’s response is not only required to include “a description of measures being proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity,”⁴⁶ but there is also a requirement “in the case of a response that is inconsistent with the recommendations of the Secretary, [that] the Federal agency shall explain its reasons for not following the recommendations.”⁴⁷ It is no longer sufficient for an agency responding to habitat concerns to merely “descri[be] . . . measures being considered by the agency for

42. 16 U.S.C. § 1855(b)(2) (2000) (emphasis added).

43. *Id.*

44. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 108, 104 Stat. 4436, 4446 (1990) (repealed 1996) (emphasis added).

45. 16 U.S.C. § 1855(b)(4)(B) (2000).

46. *Id.*

47. *Id.*

mitigating or offsetting the impact of the activity,”⁴⁸ an agency is now required to specifically address recommendations made by the Secretary along with explaining reasons for not following those recommendations.⁴⁹

2. *Legislative History of the Amendments*

Although the 1996 amendments to the MSA had the potential for significantly impacting federally permitted or funded development activities, the Act was passed “with relatively little fanfare.”⁵⁰ “Development interests, not focused on or familiar with the MSA, played little role during the legislative process.”⁵¹ Given this, it is no surprise that the law is obviously drafted very much in favor of environmental protection.⁵² One critic notes that it is “perhaps because of th[is] lack of involvement . . . [that] the EFH provisions do not contain the kind of specific agency guidance that one has come to expect in recent congressional enactments.”⁵³ This same critic notes that:

Not only is the language of the Act itself general, leaving broad discretion with the Secretary, the legislative history does little to constrain far-reaching interpretations of agency authority. The House Report merely underscores that habitat protection was a ‘key area of concern’ addressed by Congress. Likewise, the Senate Report simply emphasizes the Act’s congressional goal to ‘expand existing Federal authority to identify and protect essential fish habitat.’ Neither report elaborates significantly on the scope and effect of the new requirements.⁵⁴

The congressional floor debates on provisions of the SFA that dealt with EFH were also “unenlightening” at best, consisting “largely of generalities about the importance of habitat protection.”⁵⁵ There was slim debate as to the definition of EFH by the SFA and on exactly how that definition correlated with the overall goal of

48. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 108, 104 Stat. 4436, 4446 (1990) (repealed 1996).

49. 16 U.S.C. § 1855(b)(4)(B) (2000).

50. Greenberg, *supra* note 32, at 10,463.

51. *Id.* at 10,464.

52. *Id.*

53. *Id.*

54. *Id.* (citations omitted).

55. Greenberg, *supra* note 32, at 10,465.

maintaining a sustainable fishery. Senator John Kerry stated the obvious that “if you destroy the habitat, you destroy the nurseries and you destroy the ecosystem on which those nurseries are dependent, which then diminishes the ability to have a sustainable fishery.”⁵⁶ The Senator acknowledged a lack of scientific information regarding the relationship between habitat and fishery yields when he confirmed that “[w]e need to understand the linkage of . . . [habitat] and the role . . . [it] play[s] in the spawning of fish and of the ecosystem to the total catch that will ultimately be available.”⁵⁷ Despite the vague discussions on the importance of protecting habitat and its linkage to maintaining a sustainable fishery, “there was little or no detailed discussion during the . . . debate about how the EFH provisions would actually work in practice.”⁵⁸ One scholar who has written extensively on the subject is quoted as saying that “it is probably fair to say that the implications of the EFH provisions were not well understood by Congress.”⁵⁹ Nonetheless, the bill was passed by Congress in September of 1996 and subsequently signed into law by the President on October, 11, 1996.

C. *The EFH Regulations*

As discussed above, the 1996 amendments to the MSA created an obligation on the part of the Secretary of Commerce to promulgate regulations to provide guidance to the eight regional fishery councils in designating EFH within the waters under their jurisdiction and in identifying adverse effects on that habitat. While the 1996 amendments were passed with relatively little “fanfare,” one can hardly say the same for the resulting regulations. In this section, I will discuss the efforts that went into developing the EFH regulations promulgated by the Secretary and the various non-fishing concerns voiced during that process.

1. *Developing the Regulations*

The rulemaking process was initiated just four weeks after the SFA was signed into law. On November 8, 1996, the NMFS “published an advance notice of proposed rulemaking . . . to solicit comments to assist [the] NMFS in developing an approach for the . . . regulations.”⁶⁰ A second advance notice of proposed rulemaking

56. 142 CONG. REC. S10794, S10812 (daily ed. Sept. 18, 1996).

57. *Id.*

58. Greenberg, *supra* note 32, at 10,465.

59. *Id.*

60. Magnuson-Stevens Act Provisions; Essential Fish Habitat, 67 Fed. Reg. 2,343, 2,344

(ANPR) was published on January 9, 1997 to “announce the availability of the ‘Framework for the Description, Identification, Conservation, and Enhancement of Essential Fish Habitat’ and to solicit additional public comment.”⁶¹ This document provided a detailed outline of the proposed regulations in order to stimulate informed public comment.⁶² Subsequent to this second ANPR and during the comment period, the NMFS held “[fifteen] public meetings and numerous briefings nationwide...[before] issu[ing] an interim final rule on December 19, 1997.”⁶³

The NMFS has stated two reasons for the decision to issue an interim final rule prior to the adoption of a final rule. First, perhaps recognizing the significance of the regulation, the NMFS wanted to “provide an additional comment period to allow another opportunity for affected parties to provide input.”⁶⁴ Second, perhaps recognizing the lack of scientific information available to adequately implement the statutory amendments, the NMFS acknowledged that it thought it would be “advantageous to implement the EFH provisions of the [MSA] . . . via interim final regulations, which would afford an opportunity to gain experience adding EFH information to [FMPs] and carrying out consultations . . . with Federal and state agencies whose actions may adversely affect EFH.”⁶⁵

“The comment period on the interim final rule closed on March 19, 1998.”⁶⁶ On November 8, 1999, the comment period was reopened to “request additional public comments on four specific issues: how to improve the regulatory guidance on the identification of EFH; how to improve the regulatory guidance on minimizing the effects of fishing on EFH; whether the final rule should provide additional guidance on using existing environmental reviews to satisfy EFH consultation requirements; and whether to revise in the final rule the requirement for Federal agencies to prepare EFH Assessments.”⁶⁷ After providing five separate public comment periods for the rulemaking, totaling 270 days and encompassing approximately 3,600 written comments, the NMFS finally published its notice of the final EFH rule on January 17, 2002, with an effective date for the rule of February 19th of that same year.⁶⁸

(Jan. 17, 2002) (to be codified at 50 C.F.R. pt. 600).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. 67 Fed. Reg. at 2,344.

66. *Id.*

67. *Id.*

68. *Id.* at 2,344-45.

2. *The Language of the Regulations*

The regulations promulgated by the NMFS elaborate further on Congress' statutory definition of EFH by defining terms used by Congress in that definition. In doing so, the regulations define the term "waters" as "includ[ing] aquatic areas and their associated physical, chemical, and biological properties that are used by fish...."⁶⁹ The regulations also include within the definition of waters, "aquatic areas historically used by fish."⁷⁰ In addition, the regulations elaborate on Congress' definition by defining the term "substrate" as "includ[ing] sediment, hard bottom, structures underlying the waters, and associated biological communities."⁷¹ In response to comments received criticizing this broad interpretation of EFH, the NMFS has emphasized that the MSA imposes no geographic limitations on the designation of EFH.⁷² While conceding that upland areas cannot be designated as EFH, the NMFS has noted that activities in these areas would be subject to EFH consultation (discussed below) if it is determined that the activities may adversely affect EFH.⁷³ Critics of the regulations have noted that the expansive definition of EFH adopted by the NMFS under the regulations may exceed the Congressional authority granted to the NMFS by the MSA.⁷⁴

The heart of the new regulations passed as a result of the 1996 amendments lies in two entirely new subparts added to the regulations: Subpart J, dealing exclusively with establishing guidelines for the councils to use in identifying EFH along with adverse effects on EFH, and Subpart K, addressing the highly controversial EFH consultation procedures.⁷⁵ Subpart J of the regulations starts by attempting to clarify exactly what is considered an adverse effect for purposes of the MSA. The regulations broadly define an adverse effect as "any impact that reduces [the] quality and/or quantity of EFH . . . [which] may include direct or indirect . . . alterations of the waters or substrate and [the] loss of, or injury to . . . prey species and their habitat."⁷⁶

69. 50 C.F.R. § 600.10 (2002).

70. *Id.* (emphasis added).

71. *Id.*

72. Magnuson-Stevens Act Provisions; Essential Fish Habitat, 67 Fed. Reg. 2,343, 2,350 (Jan. 17, 2002) (to be codified at 50 C.F.R. pt. 600).

73. *See id.* at 2,350-51.

74. *See Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of Jack E. Phelps, Executive Director of the Alaska Forest Association and Member of the Essential Fish Habitat Coalition) (on file with author).

75. 50 C.F.R. § 600.805, 600.905 (2002).

76. *Id.* § 600.810(a).

The definition explicitly states that adverse effects “may result from actions occurring within EFH or outside of EFH....”⁷⁷ The NMFS has been careful to stress that although EFH may not be designated for prey species not managed under an FMP, the loss of such species through direct harm or through harm to that species’ habitat may constitute adverse effects on EFH.⁷⁸ One cannot help but wonder if this is not simply a roundabout way of designating prey species’ habitat as EFH without expressly doing so. If so, it seems that habitat used by almost every fish in the ocean would be subject to these regulations. While this will be discussed in more detail below, I cannot resist noting at this point how these provisions raise serious concerns of overreaching by the NMFS in its drafting of the rules.

In Section 600.815 of Subpart J, the regulations attempt to set forth the guidance required by the MSA in the identification and description of EFH in the various FMPs.⁷⁹ The rule emphasizes that the description and identification of EFH should be based on the often referred to, but seldom understood, concept of “best scientific information available.”⁸⁰ Neither the MSA nor the regulations provide any guidance as to what constitutes the best available scientific information.⁸¹ Nonetheless, the councils are instructed to “interpret this information in a risk-averse fashion to ensure adequate areas are identified as EFH.”⁸² This methodology of identifying EFH along with the regulations’ expansive definition of EFH has resulted in extremely broad areas being identified as EFH by the councils. A primary example of this is the GMFMC’s 1998 amendment to its FMPs identifying EFH. The 1998 amendment to the Gulf’s FMPs designated “all estuarine waters and substrates” along with “all marine waters and substrates . . . from the shoreline to the seaward limit of the [Exclusive Economic Zone]” as EFH.⁸³ This designation includes the entire Gulf of Mexico and all estuaries within that region.⁸⁴ Initial broad designations such as this have

77. *Id.*

78. See Greenberg, *supra* note 32, at 10,465; 50 C.F.R. §600.815(a)(7) (2002).

79. 16 U.S.C. § 1855(b)(1)(A) (2000); 50 C.F.R. §600.815(a) (2002).

80. 50 C.F.R. § 600.815 (4)(ii)(B) (2002).

81. See RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GEN. ACCOUNTING OFFICE, FISHERY MANAGEMENT: PROBLEMS REMAIN WITH NATIONAL MARINE FISHERIES SERVICE’S IMPLEMENTATION OF THE MAGNUSON-STEVENS ACT (2000).

82. 50 C.F.R. § 600.815(a)(1)(iv)(A) (2002).

83. Gulf of Mexico Fishery Management Council, Generic Amendment for Addressing Essential Fish Habitat Requirements in the Following Fishery Management Plans of the Gulf of Mexico 22 (1998) [hereinafter GM Generic Amendment] (on file with author).

84. An amendment to this all inclusive designation of EFH in the Gulf of Mexico was completed and proposed by the GMFMC in July of 2003, and is now in the process of being approved by the Secretary. The proposed amendment would reduce the amount of area

drawn criticism from the seafood industry and developers as “creating a burdensome regulatory environment where any activity anywhere will affect EFH for some species.”⁸⁵ In response to this criticism concerning the extremely broad designations, the NMFS has stated that the councils were “justified in designating broad areas as EFH.”⁸⁶ The basis given by the NMFS for approving these broad designations was astonishingly that “[f]or many species there is little available scientific information linking the biological requirements of managed species to specific habitats.”⁸⁷

An entirely new subset of EFH referred to as “habitat areas of particular concern” (HAPC) was created in Subpart J of the regulations.⁸⁸ The regulations recommend that designation of such habitat should be based on one or more of the following considerations: “[t]he importance of the ecological function provided by the habitat[, t]he extent to which the habitat is sensitive to human-induced environmental degradation[, w]hether, and to what extent, development activities are, or will be, stressing the habitat type[, a]nd the rarity of the habitat type.”⁸⁹ It seems strange that none of the factors directed to be used in the identification of HAPCs involve fishing activities, while development is specifically mentioned. The non-fishing industry has expressed concern with this extra-statutory classification of EFH by asking whether the NMFS has been forced to create a new category of “really essential” fish habitat as a result of the broad all-inclusive approach utilized in designating EFH.⁹⁰

Subpart J also requires that FMPs identify “activities other than fishing that may adversely affect EFH.”⁹¹ The regulation provides a non-exhaustive list of examples of such activities that includes

designated as EFH in the Gulf but would still continue to encompass a very large amount of the waters and estuaries of the Gulf. The comment period on the proposed amendment is scheduled to end on December 1, 2003. See Gulf of Mexico Fishery Management Council, Draft Environmental Impact Statement for the Generic Essential Fish Habitat Amendment to the Following Fishery Management Plans of the Gulf of Mexico (2003) [hereinafter GM EIS] (on file with author).

85. Lee Benaka & Dennis Nixon, *Essential Fish Habitat and Coastal Zone Management: Business As Usual Under the Magnuson-Stevens Act?*, 30 GOLDEN GATE U. L. REV. 969, 984 (2000).

86. Magnuson-Stevens Act Provisions; Essential Fish Habitat, 67 Fed. Reg. 2,343, 2,351 (Jan. 17, 2002) (to be codified at 50 C.F.R. pt. 600).

87. *Id.*

88. 50 C.F.R. § 600.815(a)(8) (2002).

89. *Id.*

90. See *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. 6 (2000) (statement of Jack E. Phelps, Executive Director of the Alaska Forest Association and Member of the Essential Fish Habitat Coalition) (on file with author).

91. 50 C.F.R. § 600.815(a)(4) (2002).

dredging and filling along with numerous other coastal activities outside those activities traditionally thought to be regulated by the NMFS.⁹² This authority to address non-fishing activities, such as coastal development, was one of the most hotly contested issues during the development of the final regulations.⁹³ Members of the non-fishing industry “questioned NMFS’ authority to address non-fishing activities” under the MSA.⁹⁴ The NMFS responded to the comments posed by these groups by noting that “[o]ne of the stated purposes of the Magnuson-Stevens Act is to promote the protection of EFH through the review of projects conducted under Federal permits, licenses, or other authorities that affect, or have the potential to affect, such habitat.”⁹⁵ The NMFS went on to state that “[t]hese projects include non-fishing activities.”⁹⁶ Additionally, the NMFS noted that the requirement for FMPs to identify conservation and enhancement measures was not limited by statute to addressing only fishing activities; the MSA requires consultation for “any federal action that may adversely affect EFH regardless of whether it is a fishing or non-fishing activity.”⁹⁷

Although many interested parties have questioned the authority of the NMFS to address non-fishing activities, the NMFS, through the councils, has made it clear that its authority extends to these activities. A striking example of this is seen by a cursory review of the GMFMC’s table of contents to its 1998 FMP amendment. In identifying activities with the potential to adversely impact EFH, the GMFMC devoted almost forty pages to describing various non-fishing related activities, “compared to less than ten pages devoted to fishing activities that may adversely affect [such habitat].”⁹⁸ Moreover, in addressing options to manage those activities identified as having the potential to adversely affect EFH, the Gulf’s 1998 amendment commits a single page to addressing management options for fishing activities compared with twenty-four pages dedicated to addressing non-fishing management options.⁹⁹ Although the GMFMC’s 1998 amendment was only partially approved by the Secretary as a result of this cursory dealing with fishing activities, the problem with the guidance provided to the

92. *Id.*

93. Greenberg, *supra* note 32, at 10,465.

94. Magnuson-Stevens Act Provisions; Essential Fish Habitat, 67 Fed. Reg. 2,343, 2,346 (Jan. 17, 2002) (to be codified at 50 C.F.R. pt. 600).

95. *Id.* at 2,355.

96. *Id.*

97. *Id.* at 2,357.

98. Benaka & Nixon, *supra* note 85, at 993-94; See GM Generic Amendment, *supra* note 83, at 4-5.

99. GM Generic Amendment, *supra* note 83, at 173-98.

councils by NMFS' regulations is easily seen.¹⁰⁰ Even assuming that the MSA gives the NMFS the authority to address non-fishing activities and their effects on EFH, the burden that would come with this responsibility is enormous.¹⁰¹ Between 1981 and 1996, in the five coastal states bordering the Gulf alone, more than 50,485 individual development proposals were received by the NMFS.¹⁰² A subset of 7,848 of these proposals involved over 925,181 acres of various habitats.¹⁰³

Subpart K of the final regulations passed by the NMFS addresses the consultation procedures required by the MSA.¹⁰⁴ This area of the regulations has been referred to as "combining [the] environmental assessment obligations parallel to those of the National Environmental Policy Act (NEPA) with the consultation obligations similar to those of the Endangered Species Act (ESA)."¹⁰⁵ Consultation is required by the MSA and the regulations "regarding any...actions authorized, funded, or undertaken" by a Federal agency "that may adversely affect EFH."¹⁰⁶ This requirement subjects a broad range of coastal development activities to the consultation requirement. Every development project that may adversely impact EFH and that requires a federal permit or approval (i.e., Clean Water Act (CWA) section 404 wetlands permit, CWA section 402 national pollutant discharge elimination system permit, ESA section 7 or 10 permit) or that is subsidized with federal funding (i.e. affordable housing projects) will be subject to the consultation procedures detailed in the regulations. The rules list five approaches for consultation: "use of existing environmental review procedures, General Concurrence, abbreviated consultation, expanded consultation, and programmatic consultation."¹⁰⁷ Spokespeople for the development industry have expressed concern that these consultation procedures, made mandatory by the regulations, will result in increased delays in permitting timelines with a concomitant increase in costs to developers which will inevitably be passed on to consumers through increased housing costs.¹⁰⁸ Of even more concern is the lack of a provision within the

100. Benaka & Nixon, *supra* note 85, at 993.

101. *See* Benaka & Nixon, *supra* note 85, at 994.

102. *See* GM Generic Amendment, *supra* note 83, at 162.

103. *Id.*

104. 50 C.F.R. § 600.920 (2002).

105. Greenberg, *supra* note 32, at 10,463.

106. 50 C.F.R. § 600.920(a)(1) (2002).

107. *Id.* § 600.920(a)(2).

108. THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENSON ACT (Thomas E. Bigford ed., The Coastal Society Vol. 21(2) (1999)) (edited statements of Michelle Desiderio from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

MSA or the regulations that would provide permit applicants, the conservation community or other interested, non-governmental parties the opportunity to participate in the consultation process.¹⁰⁹ “Despite complaints, [the] NMFS has made no special provision for such involvement, though it has explained that [c]ouncil deliberations are open to the public.”¹¹⁰ One commentator on the MSA has noted that this perhaps is “cold comfort for non-fishing industry groups that typically have not participated in the [c]ouncil process.”¹¹¹

For any activity determined by an agency to require consultation, the relevant federal agency is required to provide NMFS with a written assessment of the effects of the activity on EFH.¹¹² The assessment is required to contain: “[a] description of the action[, a]n analysis of the potential adverse effects of the action on EFH and the managed species[, t]he Federal agency’s conclusions regarding the effects of the action on EFH” and “[p]roposed mitigation, if applicable.”¹¹³ The timing of when the EFH assessment is required is unique in the instances of General Concurrences and programmatic consultations. In a General Concurrence (GC) scenario (see below for details), the “EFH assessment should be completed during the development of the [GC] and is not required for the individual actions.”¹¹⁴ Similarly, in programmatic consultations (see below for details), the EFH Assessment is not required for individual actions implemented under the program unless the activities are identified by the NMFS during the programmatic consultation as requiring separate EFH consultation.¹¹⁵ In an attempt to avoid duplications, the regulations provide that EFH assessments may be incorporated into documents prepared for other purposes, such as ESA biological assessments or NEPA documents, provided the assessment is clearly identified as an EFH assessment and all information required by the regulations is included.¹¹⁶

In an effort to streamline the consultation requirements and avoid duplication with other environmental reviews, the regulations state that EFH consultation should be consolidated with other environmental review procedures “where appropriate.”¹¹⁷ The

109. Greenburg, *supra* note 32, at 10,466.

110. *Id.*

111. *Id.*

112. 50 C.F.R. § 600.920(e)(1) (2002).

113. *Id.* § 600.920(e)(3).

114. *Id.* § 600.920(e)(1).

115. *Id.*

116. *Id.*

117. 50 C.F.R. § 600.920(f)(1) (2002).

regulations specify that consolidation is appropriate when: the existing process provides the NMFS with timely notification of the action (defining timely as at least sixty days notice prior to a final decision, or ninety days if the action would result in substantial adverse impacts), an assessment meeting the requirements of the EFH rules is made, and NMFS has made a finding that the existing process can be used to satisfy the requirements set forth by the MSA.¹¹⁸ As of November 1999, NMFS officials reported that “they had completed [eighteen] agreements with other agencies to establish specific procedures for using existing environmental review processes to handle essential fish habitat consultations and were working on [thirty-two] others.”¹¹⁹ The NMFS has expressed its commitment to using “existing environmental review processes . . . to ensure that [EFH] consultations are limited to actions where adverse impacts may occur.”¹²⁰ If the use of existing consultation processes is found not to satisfy the EFH consultation requirements, or if there is no existing consultation process that addresses a Federal agency’s actions, one of the remaining four approaches should be utilized.¹²¹

General Concurrences are utilized when an action “may adversely affect EFH, but for which no further consultation is . . . required because NMFS has determined . . . that it will likely result in no more than minimal adverse effects individually and cumulatively.”¹²² In order for an action to qualify for a GC, the NMFS must determine that it meets *all* of the following criteria: 1) the actions must be similar in nature and similar in their impact on EFH; 2) the actions must not cause greater than minimal adverse effects on EFH when implemented individually; and 3) the actions must not cause greater than minimal cumulative adverse effects on EFH.¹²³ Although the NMFS may initiate the issuance of a GC, the process is normally initiated when a Federal agency requests a GC for a category of its activities by providing an EFH assessment for those activities.¹²⁴ If the NMFS agrees with the agency that the activities are appropriate for a GC under the criteria discussed above, it will notify the agency that further consultation is not

118. *Id.* § 600.920(f)(1)(i)-(iii).

119. RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GEN. ACCOUNTING OFFICE, FISHERY MANAGEMENT: PROBLEMS REMAIN WITH NATIONAL MARINE FISHERIES SERVICE’S IMPLEMENTATION OF THE MAGNUSON-STEVENS ACT 25 (2000).

120. *Id.*

121. *See* 50 C.F.R. § 600.920(f)(3) (2002).

122. *Id.* § 600.920(g)(1).

123. *Id.* § 600.920(g)(2)(i)(A)-(C).

124. *Id.* § 600.920(g)(3).

required.¹²⁵ Although activities falling within the scope of a GC do not require individual EFH consultations, the activities are required to be tracked (in most cases by the Federal agency) “to ensure that their cumulative effects are no more than minimal.”¹²⁶ If the NMFS determines that the activities do not meet the criteria for issuance of a GC, it will notify the agency that another type of consultation is required.¹²⁷

Programmatic consultation (“PC”) is meant to provide a “means for [the] NMFS and a Federal agency to consult regarding a potentially large number of individual actions that may adversely affect EFH.”¹²⁸ This type of consultation is appropriate to address entire federal programs “where sufficient information is available to address all reasonably foreseeable adverse effects on EFH of [the] entire program.”¹²⁹ Again, the NMFS may initiate PC but it is traditionally requested by a Federal agency by providing an EFH assessment describing the characteristics of the program that make it appropriate for PC.¹³⁰ In response, the NMFS will provide the agency “with programmatic ... [c]onservation [r]ecommendations and, if applicable, will identify any potential adverse effects that could not be addressed programmatically and [that] require project-specific consultation.”¹³¹ Additionally, the NMFS may determine that PC is not appropriate, in which case project-specific consultation would be required.¹³² “[PCs] have been used in a few situations, such as for United States Forest Service Forest Plans.”¹³³

The two remaining types of consultation procedures are completed only when no GC, PC, or existing environmental review process is available or appropriate for a Federal agency’s actions. Abbreviated consultation is appropriate for Federal actions that “do not qualify for a [GC], but do not have the potential for causing substantial adverse effects on EFH.”¹³⁴ The regulations state that these abbreviated procedures should be used when adverse effects can be “alleviated through minor modifications” to an action.¹³⁵ Abbreviated consultation begins when a Federal agency provides the NMFS with an EFH assessment and a request for

125. *Id.*

126. *Id.* § 600.920(g)(2)(ii).

127. 50 C.F.R. § 600.920(g)(3) (2002).

128. *Id.* § 600.920(j)(1).

129. *Id.*

130. *Id.* § 600.920(j)(2).

131. 50 C.F.R. § 600.920(j)(3) (2002).

132. *Id.*

133. Kim Diana Connolly, *An Introduction to the Essential Fish Habitat (EFH) Consultation Process for the South Atlantic Region*, 11 SE. ENVTL. L.J. 1, 3 (2002).

134. 50 C.F.R. § 600.920(h)(1) (2002).

135. *Id.*

consultation.¹³⁶ The regulations state that the agency “must submit [the assessment] as soon as practicable, but at least [sixty] days prior to a final decision on the action.”¹³⁷ Upon receiving an agency’s EFH assessment, the NMFS has thirty days to respond in one of three ways: 1) if the NMFS determines that the action would not adversely affect EFH or if no recommendations are needed it will notify the agency and the agency may proceed; 2) if the NMFS believes that the action may result in substantial adverse effects on EFH the NMFS will request the agency to initiate expanded consultation procedures (discussed below); and 3) if the NMFS determines that the action may adversely affect EFH but not substantially, it will provide conservation recommendations to the agency.¹³⁸

When an action could potentially result in substantial adverse effects to EFH, the regulations require that expanded consultation procedures be utilized.¹³⁹ Expanded consultation procedures are designed to allow the NMFS and the Federal agency maximum opportunity to “work together to review the action’s impacts on EFH and to develop EFH [c]onservation [r]ecommendations.”¹⁴⁰ The expanded procedures also provide for site visits and coordination of review with the appropriate councils that could be affected by the action.¹⁴¹ Similar to the other consultation procedures, expanded consultation is initiated by the agency with the agency’s submission to the NMFS of an EFH assessment for the proposed action.¹⁴² In expanded consultations, the agency is required to submit the assessment “as soon as practicable, but at least 90 days prior to a final decision on the action.”¹⁴³ The deadline for the NMFS’ response to the agency’s assessment is increased from the period allowed for abbreviated consultation from thirty to sixty days in the case of expanded consultation.¹⁴⁴ After reviewing the assessment, the NMFS is required to provide the relevant agency with its conservation recommendations.¹⁴⁵

When any of the above-discussed consultation procedures results in the NMFS issuing EFH conservation recommendations to a Federal agency, there are certain responsibilities that are triggered

136. *Id.* § 600.920(h)(2).

137. *Id.* § 600.920(h)(4).

138. *Id.* § 600.920(h)(3),(4).

139. 50 C.F.R. § 600.920(i)(1) (2002).

140. *Id.*

141. *Id.* § 600.920(i)(3).

142. *Id.* § 600.920(i)(2).

143. *Id.* § 600.920(i)(4).

144. *Id.*

145. 50 C.F.R. § 600.920(i)(5) (2002).

on the part of the agency. Within thirty days of receiving any conservation recommendation from the NMFS, the agency is required to provide a “detailed response in writing to [the] NMFS.”¹⁴⁶ The regulations require that the response include a “description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH.”¹⁴⁷ When an agency’s response is inconsistent with the NMFS’ conservation recommendations, the response must be provided “at least 10 days prior to final approval of the action.”¹⁴⁸ Moreover, an inconsistent agency response must also explain the reasons the agency has for not following the recommendations, including “the scientific justification for any disagreements with [the] NMFS over the anticipated effects of the action and the measures needed to . . . offset such effects.”¹⁴⁹ In the case of an inconsistent agency response, the only alternative available to the NMFS for further consultation is that the Assistant Administrator for Fisheries “may request a meeting with the head of the Federal agency . . . to discuss the action and opportunities for resolving any disagreements.”¹⁵⁰

The end result of this complex system of consultation will ordinarily be a list of EFH conservation recommendations transmitted to the relevant Federal action agency by the NMFS. The interesting thing about this approach, and the thing that the NMFS has often times repeated, is that after everything is said and done, after this complex and often times lengthy consultation process has been navigated through, the recommendations made by the NMFS are just that - recommendations. There is no authority either in the MSA or in the regulations for an attempt by the NMFS at making its EFH conservation recommendations binding on an agency. Although a plain reading of the MSA and regulations reinforce the non-binding aspect of the recommendations, experience has shown just the opposite. While the NMFS has stressed that the recommendations are not binding and are issued merely to foster an understanding on the part of the agencies and developers as to how their projects may harm fish habitat,¹⁵¹ in reality these so-called recommendations have morphed into requirements. All too often permitting agencies whose granting of permits subjects them to the EFH consultation procedures are deferring to the NMFS and making its EFH conservation

146. *Id.* § 600.920(k)(1).

147. *Id.*

148. *Id.*

149. *Id.*

150. 50 C.F.R. § 600.920(k)(2) (2002).

151. See Essential Fish Habitat: Fact and Fiction, at <http://www.nmfs.noaa.gov/habitat/habitatprotection/fact&fiction.htm> (last visited Sept. 2, 2003).

recommendations conditions precedent to the granting of the permit.¹⁵²

III. THE NATIONAL AFFORDABLE HOUSING ACT

The Cranston-Gonzalez National Affordable Housing Act (AFHA)¹⁵³ was passed in 1990 as a result of an “intensive, three-year effort to review the country’s housing needs and develop a national housing policy that [could] provide more affordable housing for American families.”¹⁵⁴ The stated national goal of the AFHA is for “every American family [to] be able to afford a decent home in a suitable environment.”¹⁵⁵ The Act goes on to express that the objective of the national housing policy is to promote the goal by “strengthening a nationwide partnership of public and private institutions able ... to increase the Nation’s supply of decent housing that is affordable to low-income and moderate-income families and *accessible to job opportunities*.”¹⁵⁶ An important part of reaching this national goal of affordable housing is an effort on the part of government, state and federal, to foster a regulatory environment that does not lead to inflated housing costs by balancing the benefits achieved by regulatory hoops with the effects of those hoops on our nation’s housing costs.

Prior to the passage of the AFHA, President Bush, recognizing that the cost of housing in the nation was being driven up by unnecessary regulations at all levels of government, asked the Secretary of Housing and Urban Development to convene an Advisory Commission that could “identify regulatory barriers to affordable housing and recommend how these barriers could be removed.”¹⁵⁷ The President was concerned with “excessive rules, regulations, and red tape that add unnecessarily to the cost of housing.”¹⁵⁸ In its report to the President, the Commission noted that one of the obstacles to the goal of affordable housing was slow and overly burdensome permitting processes.¹⁵⁹ An astonishing fact noted by the Commission showed that it was not rare for a \$15,000

152. See *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of W. L. Berry, on behalf of the American Petroleum Institute) (on file with author).

153. 42 U.S.C. §§ 12701-12899i (2000).

154. S. REP. NO. 101-316, at 4 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5764.

155. 42 U.S.C. § 12701 (2000).

156. *Id.* § 12702(2).

157. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, “NOT IN MY BACK YARD” REMOVING BARRIERS TO AFFORDABLE HOUSING 1 (1991) (on file with author) [hereinafter ADVISORY COMMISSION].

158. *Id.*

159. *Id.* at 5.

surcharge to be added to the price of a \$55,000 house in Central Florida “to cover the costs of excessive regulation.”¹⁶⁰ The Commission noted that a major contributing factor of the costs and delays in permitting is environmental protection regulations.¹⁶¹ The Commission explained that considerable duplication existed between Federal and State environmental regulations which rendered the permitting process for wetlands development “unnecessarily lengthy and complicated and therefore unnecessarily expensive.”¹⁶² The Commission’s report plainly stated that “[h]ousing affordability is becoming an inadvertent casualty of environmental protection.”¹⁶³ The Commission recommended a comprehensive reform of existing environmental regulations and is in the process of implementing future regulations that would ensure the “proper consideration of housing affordability in the development and implementation of environmental protection policy.”¹⁶⁴ A result of the Commission’s efforts in identifying regulatory barriers to affordable housing was the passage of the Removal of Regulatory Barriers to Affordable Housing Act of 1992.¹⁶⁵ The stated purposes of this amendatory section of the AFHA are:

- (1) To encourage State and local governments to further identify and remove regulatory barriers to affordable housing (including barriers that are excessive, unnecessary, duplicative, or exclusionary) that significantly increase housing costs and limit the supply of affordable housing; and
- (2) to strengthen the connection between Federal housing assistance and State and local efforts to identify and eliminate regulatory barriers.¹⁶⁶

The focus of this amendment to the AFHA is obviously directed at State and local regulations while the Federal government’s role in removing regulatory barriers to affordable housing is suspiciously missing from the statutory purposes.

160. *Id.*

161. *Id.* at 6-7.

162. ADVISORY COMMISSION, *supra* note 157, at 7.

163. *Id.*

164. *Id.* at 11.

165. Removal of Regulatory Barriers to Affordable Housing Act of 1992, Pub. L. No. 102-550, 106 Stat. 3938 (1992).

166. 42 U.S.C. § 12705a (2000).

The above discussion provides a brief overview of the stated goals and purposes of the AFHA. It is by no means an all encompassing discussion of the Act and its provisions. I include this brief discussion to emphasize our nation's commitment to affordable housing and to provide a basis for my discussion of the MSA and how it affects the goal of affordable housing. The next section attempts to address and stimulate debate on just that: are the goals of the Magnuson-Stevens Fishery Conservation and Management Act and the National Affordable Housing Act compatible with one another or are they necessarily at odds and incapable of being attained simultaneously?

IV. THE EFFECTS OF THE MSA AND ITS REGULATIONS ON AFFORDABLE HOUSING

Coastal population is booming. The indicators of the growth in coastal population are staggering. The nation's "[c]oastal counties account for only 17% of the land area in the U.S., but the population outnumbers the noncoastal interior by more than sixteen million people-- more than 53% of the [total U.S.] population."¹⁶⁷ In 1960, nationally, there was "an average of 187 people per square mile of coastal land."¹⁶⁸ By 1994, that number had increased to 273 people per square mile and this number is expected to reach 327 people per square mile by the year 2015.¹⁶⁹ As the population in coastal areas increases, so does urbanization.¹⁷⁰ "People require places to live and work, requiring related services such as roads, parking lots, schools, water and sewer/water facilities, power, etc."¹⁷¹ This is supported by the fact that nationally, "coastal counties represent sixteen of the twenty counties ... with the largest number of new housing units under construction."¹⁷² Meeting these needs of the budding population in the coastal areas of our country will almost always involve the potential for affecting EFH, particularly with the expansive designations of coastal areas as EFH by the councils. Consequently, the mandatory consultation procedures laid out by the MSA and its regulations will almost certainly be invoked when the development needs of the coastal communities are being fulfilled. An additional effect of the increase in coastal population is the increased need in these communities for low and middle-

167. Donna Christie, *Managing the Coasts: Barrier Islands* (PowerPoint presentation, on file with author).

168. *Id.*

169. *Id.*

170. *See GM EIS supra* note 84, at 3-275.

171. *Id.*

172. *See Christie, supra* note 167.

income workers, such as police officers, firefighters, teachers, and other vital workers that are required for a community to function. The increased requirements for low- and middle-income workers in coastal communities will necessarily implicate the objective of the AFHA of ensuring these families with housing that is affordable as well as accessible to their jobs. And this is where the potential for conflict between the MSA and the AFHA rears its head. Can we follow the mandates of the MSA while ensuring the goals of the AFHA, or do the implications that follow from applying the MSA put the goals of the AFHA out of reach in our coastal communities?

The necessary first step in the analysis of the issue we are faced with is to ascertain whether the consultation procedures required by the MSA in fact contribute to an increase in housing costs in the areas affected by the procedures. In trying to answer this question, some historical information is helpful. Over the past twenty years, the median price of a typical new home in the United States has increased almost three-fold, escalating from \$69,300 in 1982 to \$187,600 in 2002.¹⁷³ The housing industry “point[s] to a number of factors believed to be responsible for the dramatic rise in the price of a new home” in the United States.¹⁷⁴ An increase in governmental regulations and the fees associated with those regulations is one of these factors.¹⁷⁵ A recent survey conducted by the National Association of Home Builders (NAHB) found that about “10% of the cost of building a typical new home can be attributed to regulation and regulatory delays, fees associated with building, . . . disposal of construction wastes, higher impact analysis fees and more.”¹⁷⁶ This survey also found that in some highly regulated markets, which are sure to involve coastal communities, the total costs associated with these regulations can total “20% or more of the sales price of a typical home.”¹⁷⁷ This survey was conducted prior to the effective date of the final EFH regulations. The concerns of the home building industry are that the consultation procedures mandated by the MSA and its regulations are creating additional regulatory processes that increase existing costs and delays in coastal development with little or no

173. U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, MEDIAN AND AVERAGE SALES PRICE OF HOUSES SOLD BY REGION (2003) at <http://www.census.gov/const/pricerega.pdf> (last visited Nov. 3, 2003).

174. See Nat'l Ass'n of Home Builders, *Building a Balance: Housing Affordability & Environmental Protection*, at <http://www.nahb.org/generic.aspx?genericContentID=363§ionID=128> (last visited Nov. 3, 2003).

175. *Id.*

176. *Id.*

177. *Id.*

environmental benefits added to the host of existing regulatory programs already in place.¹⁷⁸

The “maze” that is environmental regulation has resulted in significant delays in land development, not to mention the direct costs associated with obtaining regulatory approval. At the end of 1990, at the Federal level alone, housing was regulated by “upwards of 20 Cabinet departments and independent agencies, creating a regulatory maze” for developers.¹⁷⁹ Delays in housing development inevitably result in increased costs to the developer at the expense of the housing consumer.¹⁸⁰ Development industry experts are quick to point out that the consultation procedures implemented by the MSA are sure to result in increased delays for permitting development projects.¹⁸¹ This concern has been supported by the sheer number of consultations that took place during the two years subsequent to the enactment of the interim final rule. According to the NMFS, by the beginning of January of 2000, almost 5,000 EFH consultations had been completed.¹⁸² To get a feel for the enormity of the challenge facing the NMFS and Federal action agencies alike as a result of this influx of EFH consultations, it is helpful to compare the level of consultations under the MSA with that encountered under the ESA.¹⁸³ “In response to Congressional questioning in March of 1999, the National Oceanic and Atmospheric Administration [stated] that approximately 229 formal

178. See *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statements of W. L. Berry, on behalf of the American Petroleum Institute and Jack E. Phelps, Executive Director of the Alaska Forest Association and Member of the Essential Fish Habitat Coalition) (on file with author); *THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENS ACT* (Thomas E. Bigford ed., The Coastal Society Vol. 21(2) (1999)) (edited statements of Michelle Desiderio from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

179. ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., *supra* note 157, at 6-6.

180. See BERNARD J. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 60 (1979) (arguing that the regulatory system discourages negotiations with developers and works to create deadlocks at the expense of the consumer).

181. See *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of Jack E. Phelps, Executive Director of the Alaska Forest Association and Member of the Essential Fish Habitat Coalition) (on file with author); *Burden of Regulations on Small Business Before the House Subcomm. on Gov't Programs and Oversight, Comm. on Small Business*, 106th Cong. (1999) (statement of Michael T. Rose, for the National Association of Home Builders) (on file with author).

182. See *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of Jack E. Phelps, Executive Director of the Alaska Forest Association and Member of the Essential Fish Habitat Coalition) (on file with author).

183. *Id.*

and 981 informal [ESA] consultations are completed each year.”¹⁸⁴ This is less than half of the number of annual EFH consultations encountered by the NMFS.¹⁸⁵ In addition to costs resulting from delays, fees that developers must pay to biological consultants with technical expertise in the areas for which permits are required and who know how to walk a project through the bureaucracy can be astronomical.¹⁸⁶ History has shown that these increases in development costs will inevitably lead to certain responses by the development industry.¹⁸⁷ The most likely result is that housing costs will rise as the increase in development costs are passed on to the purchaser, further reducing the possibility of providing affordable housing.¹⁸⁸

Another area of concern for developers is the scope of the NMFS' conservation recommendations made in response to a finding that an activity may adversely affect EFH. Currently, there is no limit on the scope of recommendations made by the NMFS under either the MSA itself or under the regulations passed pursuant to the Act. Moreover, when creating these recommendations, there is no requirement that the NMFS establish any sort of nexus between potential adverse effects on EFH and the recommendations made in response to those effects. With the recommendations developing quickly into requirements,¹⁸⁹ the development industry is expressing fears of increased mitigation requirements which will inevitably result in higher housing costs without any sort of assurance of a commensurate environmental benefit.¹⁹⁰ There is no doubt that mitigation requirements represent significant costs to development projects through both delays and in the amount expended in actually carrying out the mitigation. While the data to determine if mitigation requirements have increased as a result of EFH conservation recommendations has not been accumulated, it is a valid concern and one that deserves attention, especially with the broad grant of authority given to the NMFS by the MSA in this area.

184. *Id.*

185. *Id.*

186. See ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., *supra* note 157, at 6-6.

187. See MARY E. BROOKS, HOUSING EQUITY AND ENVIRONMENTAL PROTECTION: THE NEEDLESS CONFLICT 34 (1976).

188. *Id.*

189. See *supra* Part II.C.2, at 21.

190. See *Burden of Regulations on Small Business Before the House Subcomm. on Gov't Programs and Oversight, Comm. on Small Bus.*, 106th Cong. (1999) (statement of Michael T. Rose, for the National Association of Home Builders) (on file with author).

Whether the addition of the EFH provisions to the MSA and the resulting consultation procedures are providing an incremental benefit to the habitat of the fisheries of the nation is also of concern to the home building industry. The contention is that existing environmental review processes more than adequately address habitat concerns. Spokespeople for the industry have asked that where existing reviews of activities are required by the Endangered Species Act, National Environmental Policy Act, Clean Water Act, and the Coastal Zone Management Act, along with other laws that provide for adequate protection of EFH, the activity should be categorically exempted from the EFH consultation procedures.¹⁹¹

While the development industry's arguments noted above are valid, the NMFS has tried to address and alleviate the concerns of the development industry and dispel some of the criticism aimed at the habitat provisions of the MSA and regulations. The overarching point that the NMFS has tried to stress is that habitat degradation poses one of the most serious threats to the Nation's fishery stock and that the EFH amendments to the MSA are a "necessary first step to habitat preservation and enhancement."¹⁹²

The NMFS has validly responded to the criticism aimed at the consultation procedures resulting from the 1996 amendments to the MSA. The NMFS has stressed that its role in providing advice and interacting with Federal agencies regarding their actions and the potential impacts on coastal habitats is nothing new.¹⁹³ Spokespeople for the NMFS have noted that the NMFS has been providing conservation recommendations to Federal agencies in accordance with existing environmental statutes for over thirty years, since its inception in 1970.¹⁹⁴ They note that the EFH consultation process "simply adds ... more formality and

191. See *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of W. L. Berry, on behalf of the American Petroleum Institute) (on file with author).

192. THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENSON ACT (Thomas E. Bigford ed., The Coastal Society Vol. 21(2) (1999)) (edited statements of Ronald C. Baird from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

193. See Tanya Dobrzynski, *Essential Fish Habitat and Home Building*, LAND DEV. MAG., Spring/Summer 2000, available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/efhandhomebuilding.htm>; THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENSON ACT (Thomas E. Bigford ed., The Coastal Society Vol. 21(2) 1999)) (edited statements of Thomas E. Bigford from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

194. See Dobrzynski, *supra* note 193; THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENSON ACT (Thomas E. Bigford ed., The Coastal Society Vol. 21(2) (1999)) (edited statements of Thomas E. Bigford from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

structure.”¹⁹⁵ The major difference in consultation from prior to the enactment of the amendments and regulations is that now *both* the agency and the NMFS are required to consider impacts on habitat and potential conservation measures and the agency is required to communicate with the NMFS regarding those considerations.¹⁹⁶ Although this is a change, the NMFS has stated it is a welcome one. Prior to the MSA, consultation procedures “[i]n many cases where [the NMFS] commented to the action agency, [it was] unsure whether [the] recommendations were heeded or why they may have been rejected.”¹⁹⁷ The MSA and regulations have addressed this issue and changed the way that the NMFS’ recommendations are required to be handled by the agency, for better or worse.

As for the criticism concerning the potential for duplication between the MSA consultation procedures and environmental reviews required by other statutes, the NMFS recognizes the concerns and is attempting to alleviate these concerns along with attempting to eliminate any potential for duplication. The NMFS has consistently stated that its “approach to the EFH consultation process is to work with Federal action agencies to build EFH considerations into the environmental reviews that are required under other laws wherever possible. [The] goal is to promote efficiency and avoid duplication.”¹⁹⁸ The words of the NMFS have been backed by action; as discussed above the NMFS has worked hard, and is continuing to work, with other agencies to reach agreements concerning the use of existing review processes to satisfy the EFH consultation requirement.¹⁹⁹ In response to the question of whether the addition of the EFH consultation process to the already existing environmental regulations is actually adding protection for the environment, the NMFS answers yes. The NMFS stresses the importance of bringing habitat to the forefront of our nation’s fisheries management, resulting in an ecosystems based approach to this management.

All of the above seem to help quell some of the criticisms launched at the EFH consultation procedures, but the real question

195. THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENS ACT (Thomas E. Bigford ed., *The Coastal Society* Vol. 21(2) 1999) (edited statements of Thomas E. Bigford from a press event on Aug. 10, 1999), available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>.

196. *See id.*

197. *Fisheries Reauthorization Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans Comm. on Resources*, 106th Cong. (2000) (statement of Penelope D. Dalton, Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration) (on file with author).

198. *Id.*

199. *See supra* Part II.C.2, at 12.

that needs to be addressed is whether this new consultation is resulting in increased housing costs and thereby hindering the goal of affordable housing. As noted above, delays in land development inevitably lead to costs. So, has EFH consultation resulted in delays? The NMFS feels that it has not, and it appears from the current state of things that the NMFS is right. In an April 2000 report to congressional committees and requesters, which were certain to include members of the development industry, in response to concerns over the implementation of the 1996 amendments and subsequent regulations, the U.S. General Accounting Office noted that there was “little evidence to indicate that the new consultation process has resulted in delayed or cancelled projects.”²⁰⁰ This report tracked ten permit applications that were submitted for EFH consultation to the NMFS’ southeast regional office in order to follow up on concerns of delays.²⁰¹ Of the ten permit applications reviewed, five received a no objection response from the NMFS within an average of nine days, three received a response from the NMFS that the project required modification within an average of twenty days, one received a do-not-issue response in twenty-seven days, and the remaining permit application received a response from the NMFS that the type of permit should be changed.²⁰² Out of these ten permit applications, all but three had permits issued within an average of eighty-four days. Two of the remaining applications remained open as of the report because of concerns independent of the NMFS, and the final application was withdrawn by the applicant.²⁰³ So the anticipated horror stories of the increase in permitting times and resulting increase in development costs have not happened since the enactment of the consultation process based on this admittedly small subset of permit applications tracked.²⁰⁴ Although the foregoing is true, it is significant to point out that these consultation requirements are still relatively new, and it may still be too early to fully identify any adverse effects on permitting timelines.²⁰⁵

Although many of the concerns of the non-fishing community about the effects of the EFH consultation procedures have not come to fruition, it appears that Congress is taking note of the chorus of criticism and making efforts to address it. On February 27, 2003,

200. RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GEN. ACCOUNTING OFFICE, FISHERY MANAGEMENT: PROBLEMS REMAIN WITH NATIONAL MARINE FISHERIES SERVICE’S IMPLEMENTATION OF THE MAGNUSON-STEVENS ACT 4 (2000).

201. *Id.* at 27.

202. *Id.*

203. *Id.*

204. *See id.* at 26.

205. *Id.*

Senate Bill 482 was introduced by Senator Collins and referred to the Senate Committee on Commerce, Science, and Transportation.²⁰⁶ A review of the language of the bill makes it obvious that its introduction is aimed at reigning in the broad designations of EFH across the country. Section 3 of the bill would add a definition of the often criticized term “best scientific information available” to provide specific guidelines for what exactly constitutes this type of information for fishery conservation and management.²⁰⁷ Additionally, a very significant change is made to the EFH language created by the 1996 MSA amendments. The definition of EFH as it stands today would be completely removed from the Act and replaced with language aimed at decreasing the broad designations of EFH. The bill defines EFH as “[those] marine waters and *discrete, unique*, benthic structures that: (A) exist within [the] exclusive economic zone, but *only in discrete areas*; and (B) have been determined under regulations issued by the Secretary to be *crucial* to spawning, breeding, and the continued production of a *specific* stock of fish.”²⁰⁸ The bill also acknowledges the Secretary’s use of “habitat area of particular concern” and defines that term legislatively as a “*discrete, vulnerable* subunit of [EFH] that is required for a stock to sustain itself.”²⁰⁹ Lastly, the bill would amend the EFH requirements for the various FMPs. In what seems an answer to EFH critics’ prayers, the requirement that FMPs describe and identify EFH would be struck from the MSA and replaced with the requirement that FMPs:

(A) Describe and identify *habitat areas of particular concern* for the fishery . . . ;

(B) minimize to the extent practicable adverse effects on *habitat areas of particular concern caused by fishing* that prevent a stock of fish from sustaining itself on a continuing basis; and

(C) identify other actions to encourage the conservation and enhancement of such habitat areas.²¹⁰

206. See Fisheries Science and Management Improvement Act of 2003, S. 482, 108th Cong. (2003).

207. See *id.* § 3.

208. *Id.* § 6 (emphasis added).

209. *Id.*

210. *Id.* § 6 (emphasis added).

This bill, if passed, would result in “essential fish habitat” being relegated to nothing more than a definition within the MSA and “habitat areas of particular concern” being elevated to the status that is currently held by EFH. The bill raises interesting questions as to whether Congress believes that the NMFS has gone too far in its attempts to address EFH and whether Congress is in agreement with the criticisms noted above. Whether this bill will be passed remains to be seen. As of August 14, 2004, the bill is still in committee and no debates or testimony have taken place.²¹¹

V. CONCLUSION

The predictions and fear that the impact of EFH would be as great as that of NEPA, the ESA, or the CWA appear to have been misplaced. The NMFS has strived to make the implementation of the EFH consultation procedures as smooth as possible, has worked to avoid duplication of efforts between these procedures and other environmental reviews, and has made every effort to educate those who are affected by their reach. As to the effects of the EFH provisions of the MSA on the affordability of housing and the AFHA, the current information and studies available suggest that the MSA and its regulations are not significantly driving up the cost of housing. While this is true, the information and studies are by no means complete. The very nature of these two Acts creates the potential for conflict; the goals of each must be carefully balanced with each other and continuing dialogue should be initiated concerning this delicate balancing. No one can deny that our nation’s fisheries are an important resource and that protecting the habitat of those fisheries is imperative, but at the same time, we must also acknowledge that protecting the affordability of human habitat is also important.

211. See *Bill Summary & Status for 108th Congress*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN00482:@@X> (last visited Oct. 25, 2004).

