Conserving Marine Habitats

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INTRODUCTION

While the oceans are mostly out of sight, and therefore mostly out of mind, they make up the majority of our environment. They are a place where industrial food production relies on hunting rather than farming. But industrial food production relies on industrial equipment such as massive bottom trawl nets and scallop dredges that scrape across the seafloor. The use of these destructive tools has been compared to using bulldozers for hunting squirrels in the forest. The resulting impact is comparable to clear-cutting forests — but could be far more devastating. In 1998, scientists estimated that every two years, destructive trawlers sweep an area equivalent to the entire world’s continental shelf. This article examines one route among many leading to the goal of conserving marine habitat: using the statutory mandate directing regional fishery management councils to protect essential fish habitat (“EFH”).

CONGRESS PUTS HABITAT INTO THE MAGNUSON-STEVENS ACT

When Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act in 1976, conservation was not the concern. Congress wanted to “Americanize the fisheries,” by kicking foreign fishing vessels out of United States waters. To regulate the newly Americanized fisheries, the Act created eight regional fishery management councils composed of fisheries stakeholders. The regional councils develop fishery management plans and implementing regulations to manage the fisheries. These plans and regulations are subject to only limited federal oversight — the National Marine Fisheries Service may disapprove a plan or regulation if it finds that the measure violates the law.

From the beginning, the Magnuson-Stevens Act gave councils the authority to “designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear.” This authority granted to the councils all the power that they needed to protect marine habitat. A council could prohibit all fishing in a sensitive habitat zone or forbid all destructive fishing gears from fishing in that zone. But most councils stood idle as the threat from destructive trawling and other destructive fishing gear became apparent over the years.

From 1976 to 1996, the councils and the federal government, aided and abetted by the fishing community, embarked on an erratic series of policies that forced the marine ecosystem and fishing communities through a cycle of environmental and economic boom and bust. First, government subsidies would bloat fishing capacity to an unsustainable level, after which regulations would belatedly, but abruptly, pull the plug on fishing, leaving environmental and economic chaos in their wake. By 1994, with the collapse of the New England groundfish fishery, reform was politically possible.

Two years later, in October 1996, Congress enacted the Sustainable Fisheries Act Amendments of 1996 to the Magnuson-Stevens Act (“SFA”). The amendments required, inter alia, that the regional councils incorporate habitat conservation measures into their fishery management plans. The intent of Congress seemed plain, to take the “may protect habitat” already in the Magnuson-Stevens Act, and change it to a “must.”

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Scientists estimated that every two years, destructive trawlers sweep an area equivalent to the entire world’s continental shelf.
afoul of the judicial reluctance to give weight to the crucial words of the EFH provision.

The golden tilefish case, *NRDC v. Evans*, concerned the impacts of destructive trawling on seafloor habitat, as golden tilefish live in burrows in the seafloor, presenting an ideal example of a species in need of protection. Moreover, there was undisputed evidence that bottom trawls physically disrupted seafloor habitat by plowing over tilefish burrows and by leaving scars on the seafloor. Yet the Mid-Atlantic Council refused to adopt any protective measures, arguing accurately that there was no scientific study one way or another as to the impacts on tilefish of having their burrows buried. *NRDC v. Evans* thus repeated on a smaller scale the argument in the initial EFH case as to whether a showing of physical disruption, as specified in the interim guidelines, was enough to show an adverse effect, or whether courts could not act unless conservationists could produce scientific evidence linking impact on habitat to injury to a commercially-fished species. This is what has been called the “dead body” standard. The tilefish court followed *AOC v. Daley* and adopted the “dead body” standard over the physical disruption standard found in the agency’s regulations. As a result, the litigation route to establishing adverse effects stalled.

*Conservation Law Foundation v. U.S. Department of Commerce* was the principal case brought in the Atlantic sea scallop fishery. It concerned a rule governing scallop fishing for the 2001 and 2002 fishing seasons. The New England Council considered three options for closing areas of the fishery to allow scallops to mature. The Council’s analysis ranked the three options as to how well they protected EFH and evaluated their short-term cost and long-term cost to the fishery. A closure in New England’s Great South Channel was ranked as having the greatest benefit to habitat, the highest short-term cost, but possibly the highest long-term benefit to the fishery. The Council rejected that alternative. Given the analysis, the case presented an opportunity to test the enforceability of the requirement to protect EFH “to the extent practicable.” Unfortunately, the First Circuit declined to attribute any force to the practicability requirement. Instead, the court declared: “We think by using the term ‘practicable’ Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.”

**Winning the Battle on Adverse Effects**

As the EISs and rulemakings recommenced, the councils and the Fisheries Service revisited the issue of adverse effects. This time, with relatively little struggle, the EISs documented the scientific consensus that destructive trawling and dredging adversely affect seafloor habitat. In fact, every single remand EIS found adverse effects.

Two events stand out. First, the Fisheries Service requested the National Academy of Sciences to investigate the effects of bottom trawling. The study unequivocally found adverse effects, concluding, for example, that “[t]rawling and dredging change the physical habitat and biologic structure of ecosystems and therefore can have potentially wide-ranging consequences.”

Second, the North Pacific Council stood alone in issuing a draft EIS that refused to find adverse effects. But a peer-review by independent scientists noted in polite academic language that it “is premature to conclude that the current level and pattern of fishing activity has minimal or temporary effects on the habitat . . .” and that in any case, the draft EIS was “at odds,” with the overall conclusion of the National Academy of Sciences report. The peer review forced the North Pacific Council to reverse course. It appears that adverse effects will no longer be a battleground.

**Trying to Protect Habitat That Is Being Fished**

As mentioned earlier, the political impetus for the conservation reforms that established EFH came out of the collapse of the New England groundfish fishery. More than ten years later, cod is still in severely bad shape. Over the years, scientists have thoroughly documented the dependence of young cod on a certain kind of rocky or gravelly seafloor habitat with living structure such as sponges. This habitat is continually pounded by destructive trawling. Oceana and other conservation groups vigorously worked to include alternatives for protecting cod habitat in the New England EISs. Unfortunately, the political situation was not yet ripe. The EISs did not take a scientific approach to identifying alternatives, but instead only examined alternatives based on historical closures enacted for other reasons. As a result, these alternatives left most cod habitat unprotected.

Eventually, the New England Council adopted one of the alternatives — a small step forward in recognizing the necessity of closures to protect habitat, but not enough to protect groundfish. Oceana sued, seeking to compel the Council to consider more scientifically designed and more protective alternatives. The court denied the claims, relying heavily on the First Circuit’s holding that the EFH provision gave the Government vast discretion.

But the process continues as the evidence grows and the philosophy and composition of the councils evolve. The New England Council is now seriously considering a proposal to protect juvenile cod EFH in the Great South Channel — the same area whose protection it earlier rejected.
Freezing The Footprint of Bottom Trawling: Protecting Habitat That Is Not Yet Being Fished

As the New England example shows, advocating that fishermen stay out of areas that they already fish is difficult. Advocates with Oceana developed the innovative, although controversial, idea of taking the path of least resistance. To understand the new strategy, it is necessary to understand that fishing is not a static activity. If one area is fished out because it is overexploited, vessels explore and move to new areas. So although it is very important to protect areas that are already subject to fishing, it is also valuable to protect areas that no one is fishing yet.

Acting on this insight, Oceana and other conservation groups in Alaska and the Pacific coast began gathering data on where vessels fished, and where they did not. Their enterprise was further bolstered by the discovery in 2001 of astonishingly beautiful gardens of deep-sea coral off Alaska’s Aleutian Islands. Conservation groups also identified other special areas off Alaska and in the Pacific, including deep-sea underwater mountains, or seamounts, that also supported special and beautiful ecological communities. Proposals based on restricting the expansion of destructive fishing and protecting special places succeeded in protecting submarine canyons in the Atlantic, more than half a million square miles of marine habitat off the Aleutian Islands, and in the Pacific.

Conclusion

The work to protect marine habitat from destructive trawling continues. Oceana is developing a comprehensive approach to halting the expansion of destructive trawling in the Atlantic. In the meantime, Oceana is advancing specific proposals to protect more deep-sea canyons and seamounts to the New England Council and Oceana is supporting the South Atlantic Council’s development of a broad-based ecosystem management plan that will protect areas of coral from North Carolina to Florida.

Endnotes: Conserving Marine Habitats

4 Watling & Norse, id. at 1190.
5 See, e.g., H.R. 94-445 (Aug. 20, 1975) at 43-44, reprinted in 1976 U.S.C.C.A.N. 593, 611-612 ("technologically sophisticated and very efficient foreign fishing vessels in waters off United States coasts" are depleting fish populations and "if such fishing pressure is not regulated and reduced immediately, irreversible damage may well be done . . . ").
6 16 U.S.C. § 1852(a) (regional councils); 16 U.S.C.§ 1854(a)-(c) (federal supervision).
10 Two Councils were exceptions. Even prior to the 1996 amendments discussed below, the South Atlantic and the West Pacific (Hawaii and Pacific Islands) Councils had largely restricted destructive trawling. See Amy Mathews Amos, MARINE FISH CONSERVATION NETWORK, RAY OF HOPE: SUCCESSES AND SHORTCOMINGS IN PROTECTING ESSENTIAL FISH HABITAT, 10, 15 (2006) (explaining that the Government spent $24.4 million to remove 79 vessels from New England fishery, but allowed 62 new vessels to become active).
15 16 U.S.C. §§ 1852(a), (b).
25 Auster & Langton, id. at 181.
26 Auster & Langton, id. at 181-82 (emphasis added).
27 Auster & Langton, id. at 182.
29 Daley, id. at 7-8.
30 Daley, id.
31 Daley, id.
32 Daley, supra note 28 at 7-8; Mathews Amos, supra note 10, at 8 (Mid-Atlantic measures disapproved).
33 See generally, Daley, supra note 28.
35 Daley, id. at 20.
36 Daley, id.
38 NRDC v. Evans, 254 F. Supp. 2d 434 (S.D.N.Y. 2003) at 437-38 (“Unquestionably, from subservible vessel research, there are trawl door patterns observed in areas with tilefish burrows . . . .”).


60 Allegra Cangelosi, Ballast Water Management Hearing: Testimony of Allegra Cangelosi, Senior Policy Analyst, Northeast-Midwest Institute before the United States House of Representatives Committee on Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation Subcommittee on Water Resources and Environment (2004).


63 Perrault & Muffett, id. at 2.

ENDNOTES: ISLANDS OF GARBAGE continued from page 63

4 Weiss, id.


ENDNOTES: CONSERVING MARINE HABITATS continued from page 70

39 NRDC, id.

40 NRDC, id. at 437.

41 NRDC, id. at 440-41.

42 In a case involving a short-term rule for the Atlantic sea scallop fishery, conservationists tried to get at the adverse effect issue by claiming that the environmental assessment violated NEPA because it did not sufficiently analyze the effects of scallop dredging on groundfish habitat. Conservation Law Foundation v. Mineta, 131 F. Supp. 2d 19, 27 (D.D.C. 2001). The same court that decided AOC v. Daley decided this case, but the court did not repeat its favorable NEPA ruling. The court held that the agency’s analysis was sufficient, but also noted that pursuant to the AOC v. Daley ruling, the agency would develop an EIS for the scallop fishery, exactly the relief the plaintiffs’ requested: Mineta, 131 F. Supp. 2d at 30 and n. 27.


45 Decision Document, id.

46 Decision Document, id.


48 Conservation Law Foundation v. Evans, id.


50 DRINKWATER, id. at 23.

51 See, e.g. OceanA v. Evans, 2005 WL 555416 at *5.


53 See, e.g., Amendment 13, id. at 22913.

54 OceanA v. Evans, 2005 WL 555416 at *5.

55 OceanA v. Evans, id. at *31.

56 See, e.g., Mathews Amos, supra note 10, at 2 (“Councils need to move beyond adopting the easiest and most obvious measures . . . .”)


ENDNOTES: WORLD NEWS continued from page 77


14 About MSC, supra note 12 (click on fisheries).


18 WalMartFacts.com, supra note 11.


20 WalMartWatch.com, id.

21 WalMartFacts.com, supra note 11.


23 Polgreen & Simons, id. 22; Dutch Company Refuses Chemical Concerns, ASSOCIATED PRESS, Sept. 25, 2006 [hereinafter Dutch Company].

24 Polgreen & Simons, supra note 22; Ian Bickerton et al., Dutch Probe Abidjan Dumping, FIN. TIMES, Sept. 26, 2006, at 3 [hereinafter Dutch Probe Dumping]; Dutch Company, supra note 23.