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A LOOK WITHIN: EXECUTIVE BRANCH AUTHORITY TO ENSURE SUSTAINABLE FISHERIES

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I. INTRODUCTION

This Article addresses the extent of federal executive branch authority to manage fisheries in the marine waters of the United States. The conventional view of this authority is that fisheries are jointly managed by the National Marine Fisheries Service (Fisheries Service)[1] and regional fishery management councils. Under this view, the Fisheries Service generally cannot make fishery management decisions of its own accord.

A review of congressional delegation to the executive branch of fishery management authority reveals that the executive has greater authority to manage fisheries than this conventional view allows. In certain circumstances, the executive can act outside the council system to ensure that commercial fisheries are conducted in a truly sustainable manner.

This Article begins with an explanation of the conventional council-dominated view of fisheries management. It then reviews the full scope of existing federal executive branch authority to manage fisheries and concludes that authority exists outside the council system for the executive to manage fisheries. This authority can be used by the executive to

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1. The Fisheries Service is a sub-agency within the National Oceanic and Atmospheric Administration (NOAA), which itself is housed within the Department of Commerce.

complement council-dominated management and may be especially useful in those situations where the council system proves incapable of making decisions that ensure the sustainability of the fishery resources of the United States.

II. THE REGIONAL FISHERY MANAGEMENT COUNCIL SYSTEM

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) provides the legal structure for the current system of federal fisheries management in the United States.[2] Through the Act, Congress created eight fishery management regions throughout the coastal United States, each with its own fishery management council.[3] The councils generally are dominated by commercial fishing interests and also include Fisheries Service officials and representatives from states adjacent to the regional boundaries. In addition, they can include other fishing interests, and, on rare occasions, non-consumptive user representatives.[4]

The regional councils are charged with crafting fishery management plans (FMPs) for fisheries within their jurisdiction that require "conservation and management measures."[5] The FMPs generally focus on a single fish species,[6] contain the "conservation and management" measures for the fisheries which they cover, including "necessary and appropriate" measures to "prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery."[7] The councils propose regulations to implement the FMPs to the Fisheries Service.[8]

In turn, the Fisheries Service reviews council-prepared FMPs for consistency with the Magnuson Act and other laws.[9] The Fisheries Service has the authority to approve, disapprove, or partially approve FMPs.[10] If the Fisheries Service disapproves or partially approves an FMP, the relevant council is provided an opportunity to submit a revised FMP to the

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2. 16 U.S.C. §§ 1801-1883 (2000).

3. *Id.* § 1852(a)(1).

4. *Id.* § 1852(b); JOSH EAGLE ET AL., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS 12-13 (2003).

5. 16 U.S.C. § 1852(h).

6. *See, e.g.,* Fishery Management Plans, NOAA Fisheries, http://www.nmfs.noaa.gov/sfa/domes_fish/FMPS.htm (last visited Oct. 18, 2008) (listing all Fisheries Management Plans (FMPs) and illustrating that the vast majority focus on a single-species).

7. 16 U.S.C. § 1853(a)(1)(A).

8. *Id.* § 1853(c).

9. *Id.* § 1854(a).

10. *Id.* § 1854(a)(3).

Fisheries Service.[11] The Fisheries Service follows a similar process for council-proposed regulations that implement the FMPs.[12] If the Fisheries Service prepares the FMP, it also prepares the regulations to implement the FMP.[13]

III. CONVENTIONAL VIEWS ON THE STRUCTURE OF THE UNITED STATES' FISHERY MANAGEMENT SYSTEM

Fisheries management in the United States' exclusive economic zone (EEZ) is generally, although not exclusively, conducted using the regional fishery management council process. In general, the Fisheries Service has taken the view that any regulation should come through the councils and the species-based FMPs.[14]

This dynamic can also be seen in the Fisheries Service essential fish habitat rulemaking. Despite the fact that in this rulemaking the Fisheries Service "embrace[d] [ecosystem] concepts" in the Magnuson Act,[15] it put these concepts into action only by "urg[ing] Councils to seek environmental sustainability in fishery management, *within the current statutorily prescribed fishery management framework (i.e., management by FMPs).*"[16] Consequently, it appears that the Fisheries Service has taken a narrow council-limited view of its fishery management authority.

The focus of the industry-dominated council system on the extractive use of living marine resources through largely single-species FMPs minimizes the consideration of larger-scope conservation issues that the

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11. *Id.* § 1854(a)(4). The same process is followed for amendments to FMPs. *See id.* § 1854.

12. *Id.* § 1854(b).

13. *Id.* § 1854(c).

14. *See* Monica B. Goldberg, *Optimum Yield: A Goal Honored in Breach, in* MANAGING MARINE FISHERIES IN THE UNITED STATES: PROCEEDINGS OF THE PEW OCEANS COMMISSION WORKSHOP ON MARINE FISHERY MANAGEMENT 14 (2002) (explaining that Fisheries Service "officials and their defenders sometimes point to the [Magnuson Act's] provision that the Secretary of Commerce may only approve, partially approve, or disapprove [FMPs] in order to support their view that [the Fisheries Service] lacks the power to take proactive management steps").

15. Comments and Responses to NMFS Proposed Regulations for Implementing Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 67 Fed. Reg. 2343, 2349 (Jan. 17, 2002).

16. *Id.* at 2349 (emphasis added). The comment also notes that the Interim Final Rule to Implement the Essential Fish Habitat Provisions of the Magnuson Act includes similar language. *Id.* (referencing Interim Final Rule to Implement the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 62 Fed. Reg. 66,531, 66,532-33 (Dec. 19, 1997)).

Magnuson Act was intended to address.[17] This has led some commenters to advocate for substantial reform to the council system.[18]

IV. GENERAL EXECUTIVE AUTHORITY FOR FISHERY MANAGEMENT

The executive's authority to manage fisheries is broader than that exercised to date, and includes the ability to enact policies more generally applicable than the conservation and management measures processed through the traditional council FMP system. This conclusion is based on a broad historical grant of authority over commercial fisheries that survives the Magnuson Act of 1976 and the Magnuson Act's broad grant of authority to the Secretary within the EEZ. This Section discusses this authority, beginning with a historical review of the sources of executive branch fishery management authority and an examination of how the judiciary might treat the exercise of such authority.

A. Historical Review of Fishery Management Authority

Recognizing the importance of fish and fishing to the United States, Congress created the Office of the U.S. Commissioner of Fish and Fisheries in 1871.[19] The Act, entitled "Joint Resolution for the Protection and Preservation of the Food Fishes of the Coast of the United States," provided for investigation into the decline of fish numbers and authorized the adoption of appropriate protective measures.[20] The Commission was

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17. *See, e.g.*, PAUL DAYTON ET AL., ECOLOGICAL EFFECTS OF FISHING IN MARINE ECOSYSTEMS OF THE UNITED STATES 31-32 (2002); *see also* EAGLE ET AL., *supra* note 4, at 37-38; D. L. Allison, *Problems with U.S. Ocean Governance and Institutional Structures: The Impact on Waters, Fish and Fisheries in the U.S. Exclusive Economic Zone*, *in* MANAGING MARINE FISHERIES IN THE UNITED STATES: PROCEEDINGS OF THE PEW OCEANS COMMISSION WORKSHOP ON MARINE FISHERY MANAGEMENT 25 (2003) ("In pursuit of short-term economic gains, fishery managers have allowed fishing in excess of the levels that can maintain healthy ecosystems.").

18. *See, e.g.*, EAGLE ET AL., *supra* note 4, at 3 ("[T]hirty years of experience with the council system suggests that reform is now needed."); DAYTON ET AL., *supra* note 17, at 31-32; U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (2005); PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS, CHARTING A COURSE FOR SEA CHANGE, A REPORT TO THE NATION 47 (2003).

19. Also known as the U.S. Fish Commission.

20. [I]t shall be the duty of said commissioner to prosecute investigations and inquiries on the subject, with the view of ascertaining whether any and what diminution in the number of the food fishes of the coast and the lakes of the United States has taken place; and, if so, to what causes the same is due; *and also whether any and what protective, prohibitory, or precautionary measures should be adopted in the premises*; and to report upon the same to Congress.

transferred to the newly established Department of Commerce and Labor[21] and renamed the Bureau of Fisheries in 1903.

In 1939, the Bureau of Fisheries was moved from the Department of Commerce to the Department of the Interior. At the same time, the Bureau of Biological Survey was moved from Agriculture to Interior. These two Bureaus became part of the new Fish and Wildlife Service in 1940.[22] President Franklin Delano Roosevelt's message accompanying the reorganization noted that this move "concentrated in one department the two bureaus responsible for the conservation and utilization of the wildlife resources of the Nation."[23] In addition, President Roosevelt explained that "[o]n the basis of experience gained since this transfer, [he found] it necessary and desirable to consolidate these units into a single bureau to be known as the Fish and Wildlife Service."[24]

In 1956, Congress passed the Fish and Wildlife Coordination Act, giving the Secretary of Interior broad authority over the commercial fisheries of the United States. The Act noted in the Declaration of Policy that fish, shellfish, and wildlife resources are capable of being maintained and greatly increased with proper management.[25]

The Act identified among the needs of the fishing industry "resource management to assure the maximum sustainable production for the fisheries."[26] All functions and responsibilities placed in the "Department of the Interior or any official thereof by this Act shall be included among the functions and responsibilities of the Secretary of the Interior, as the head of the Department."[27] It expressly authorized the Secretary to use

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H.R.J. Res. 22, 41st Cong., 16 Stat. 593-94 (1871) (emphasis added). The executive appears to have equated authority granted under this law to "adopt[]" protective measures with "regulating the fishery and cultivating this supply in the interest of conservation." U.S. GOV'T MANUAL 107 (1935). This provides the basis for the Bureau's regulation of a number of fisheries. *See id.*

21. In 1913, the Department of Commerce and Labor became the Department of Commerce.

22. Reorganization Plan No. III of 1940, 5 Fed. Reg. 2107 (June 30, 1940), *reprinted in* 5 U.S.C. app. at 78 (2000), *and in* 54 Stat. 1231 (1941).

23. *Id.* This responsibility for "conservation" over all wildlife resources thus appears to be vested in the precursor agencies to the NOAA long before the 1956 Fish and Wildlife Act. Fish and Wildlife Act of 1956, ch. 1036, § 2, Pub. L. No. 84-1024, 70 Stat. 1119 (codified as amended at 16 U.S.C. §§ 742a-j (2000)) (placing power in the Bureau of Commercial Fisheries, which, as detailed below, was then transferred to the Secretary of Commerce when the Bureau became NOAA Fisheries).

24. Reorganization Plan No. III of 1940, 5 Fed. Reg. at 2107.

25. Fish and Wildlife Act of 1956, § 2.

26. *Id.*

27. *Id.* § 3(c).

"general administrative authority consistently with the terms of this Act as he shall find necessary to carry out the provisions of this Act effectively and in the public interest."[28] The Act explicitly captured for the Department of the Interior what later became the function of the Secretary of Commerce, i.e., actions that "relate primarily to the development, advancement, management, conservation, and protection of commercial fisheries."[29]

The Department of the Interior divided fisheries duties between the Bureau of Commercial Fisheries and Bureau of Sport Fisheries and Wildlife.[30] The Bureau of Commercial Fisheries was tasked with "those matters to which this Act applies relating primarily to commercial fisheries, whales, seals, and sea lions, and related matters."[31] The Secretary was tasked with taking "such steps as may be required for the development, management, advancement, conservation, and protection of wildlife resources through research, acquisition of refuge lands, development of existing facilities, and other means."[32]

In 1966, the United States established a fisheries zone of nine miles contiguous to its three-mile territorial sea.[33] Legislative history for that Act indicates that from 1966 until March 1, 1977, the United States did not recognize the right of any coastal nation to regulate fish beyond twelve miles from its shores.[34]

In 1969, the Stratton Commission Report, "Our Nation and the Sea" recommended a new oceanic and atmospheric agency.[35] In 1970, the National Oceanic and Atmospheric Agency (NOAA) was created, and the functions of the Bureau of Commercial Fisheries[36] were moved back to the Department of Commerce.[37] All functions[38] vested by law in the Bureau of

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28. *Id.* § 3(f).

29. *Id.* § 6(a).

30. *Id.* § 3(a).

31. *Id.* § 3(d)(1).

32. *Id.* § 7(a)(5).

33. An Act to Establish a Contiguous Fishery Zone Beyond the Territorial Sea of the United States, Pub. L. No. 89-658, 80 Stat. 908 (1966).

34. H.R. REP. NO. 94-445, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 599.

35. *See generally*, STRATTON COMMISSION, OUR NATION OF THE SEA: A PLAN FOR NATIONAL ACTION (1969).

36. The Bureau of Sport Fisheries and Wildlife remained in the Department of the Interior and retained responsibility for managing national wildlife refuges. 16 U.S.C. § 742b(c).

37. Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (Oct. 3, 1970), *reprinted in* 5 U.S.C. app. at 189 (2000), *and in* 84 Stat. 2090 (1971); *see also* Exec. Order No. 11,564, 35 Fed. Reg. 15,801 (Oct. 6, 1970).

38. *But see* Reorganization Plan No. 4 of 1970, Fed. Reg. at 15,627 (reserving four express functions that are not relevant here).

Commercial Fisheries of the Department of the Interior or in its Secretary, along with functions from several other departments, were transferred to the Secretary of Commerce, where it remains to this day.[39]

In 1976, the U.S. Congress passed the Magnuson Act to, among other things, "take immediate action to conserve and manage the fishery resources found off the coasts of the United States."[40] The Magnuson Act asserted exclusive fishery management authority "in the manner provided for in this Act" throughout the "fishery conservation zone."[41] This was a bold move to drastically extend the same jurisdiction that the United States had previously claimed out to twelve miles.

The extension of jurisdiction beyond the twelve-mile limit included fisheries management in areas that were the subject of international dispute, i.e., the area between the territorial sea boundary and the newly defined "fishery conservation zone." This allowed the United States to set up an allocation system for dealing with foreign vessels, a system that would give priority to U.S. fishermen.

There is no language in the Magnuson Act that restricts or repeals the previously existing conservation and management authority of the Secretary of Commerce over commercial fisheries. Instead, the Act states as its purpose the need to extend the United State's fisheries conservation and management authority out to 200 miles, while at the same time setting up the Regional Council System to deal with FMPs and allocation of fisheries' resources. The 1996 amendments to the Magnuson Act also granted the Secretary the unambiguous authority to promulgate regulations "to carry out any . . . provision of this chapter."[42] In addition, these amendments added provisions dealing with executive authority to protect essential fish habitat; some protections which are clearly designed to be implemented outside of the council system.

The 1996 findings relating to habitat state that:

> Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly

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39. *Id.*

40. 16 U.S.C. §§ 1801-1883 (2000).

41. *Id.* § 1812; *see also id.* § 1811 (defining "Fishery Conservation Zone"*); but see* Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1956) (replacing the original definition of the fishery conservation zone with the definition of the Exclusive Economic Zone (EEZ), incorporated in the 1983 Presidential Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983), declaring the EEZ generally as that area offshore of the United States from three to 200 miles).

42. 16 U.S.C. § 1855(d).

> threatened as a consequence of . . . direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels. A national program for the conservation and management of the fishery resources of the United States is necessary to . . . facilitate long-term protection of essential fish habitats . . . .[43]

Moreover, the amendments state that "[o]ne of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats."[44] Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.[45] Based on these findings, Congress declared that it was a purpose of the Magnuson Act "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat."[46]

Essential fish habitat and related terms are defined broadly in the Magnuson Act. For example, the definition of essential fish habitat encompasses both "waters and substrate."[47] Adverse effects on essential fish habitat are also broadly defined, and include the loss of prey.[48]

As one way of protecting habitat, Congress directed the Fisheries Service and the councils, through the FMP process, to describe and identify essential fish habitat in FMPs, and to minimize impacts on such habitat caused by fishing.[49] Congress also established a consultation process for the Fisheries Service to review non-fishing impacts to essential fish habitat from federal action.[50] At the same time, Congress provided that "[t]he Secretary shall review programs administered by the Department of

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43. *Id.* § 1801(a).
44. *Id.*
45. *Id.*
46. *Id.* § 1801(b).
47. *Id.* § 1802(10).
48. Loss of prey may be an adverse effect on [essential fish habitat] and managed species because the presence of prey makes waters and substrate function as feeding habitat, and the definition of [essential fish habitat] includes waters and substrate necessary to fish for feeding. Therefore, actions that reduce the availability of a major prey species, either through direct harm or capture, or through adverse impacts to the prey species' habitat that are known to cause a reduction in the population of the prey species, may be considered adverse effects on [essential fish habitat] if such actions reduce the quality of [essential fish habitat]. . . .

50 C.F.R. § 600.815(a)(7) (2007).
49. 16 U.S.C. § 1853; *see also id.* § 1855.
50. *Id.* § 1855(b)(1)(D)(2).

Commerce and ensure that any relevant programs further the conservation and enhancement of essential fish habitat."[51] This granted broad authority to the Secretary to ensure conservation and enhancement of essential fish habitat.

The plain meaning of this provision does not qualify the Secretary's ability to take action on Commerce Department programs that impact essential fish habitat. Indeed, the plain language, including the terms "shall" and "ensure," mandates that the Secretary do so.[52]

Further, as noted above, the Secretary is empowered to promulgate regulations "to carry out any . . . provision of this chapter."[53] The law is clear that:

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," . . . the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."[54]

Consequently, as fishery management is a Department of Commerce program, authority appears to exist for the Secretary to act unilaterally to protect essential fish habitat.

Despite the seemingly clear grant of authority by this provision and the general regulatory authority conferred by Congress, there is some tension between sections 1855(d) and 1855(b)(1)(B). Section 1855(b)(1)(B) provides that:

> The Secretary, in consultation with participants in the fishery, shall provide each Council with recommendations and information regarding each fishery under that Council's authority to assist it in the identification of EFH, the adverse impacts on that habitat, and the actions that should be considered to ensure the conservation and enhancement of that habitat.[55]

This section suggests that the Secretary's ability to influence fishing-related impacts on essential fish habitat provisions must be done through the councils.

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51. *Id.* § 1855(b)(1)(C).

52. United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (providing that plain and unambiguous statutory language is to be followed).

53. *Id.* § 1855(d).

54. Mourning v. Family Publ'ns Servs., Inc., 411 U.S. 356, 369 (1973) (footnotes and citations omitted).

55. 16 U.S.C. § 1855(b)(1)(B).

Although sections 1855(d) and 1855(b)(1)(B) appear inconsistent, the former has a program-wide focus, while the latter is fishery specific. For example, if the Secretary has fishery-specific concerns, she must go through the normal council process. If, however, the Secretary has program-wide essential fish habitat fishery management concerns under the Magnuson Act, then she has authority to act unilaterally to ensure that all fishery management programs "further the conservation and enhancement of essential fish habitat."[56]

This latter interpretation is supported by the absence of any qualifications regarding the application of essential fish habitat provisions to specific Commerce Department programs. The section merely states that "The Secretary shall review programs administered by the Department of Commerce," and does not include a qualifier such as "non-fishing-related programs," or the simpler "other programs."[57] The Senate and House Reports providing legislative history on section 1855(b) do not expand on the meaning of this provision,[58] and no cases to date have directly dealt with it.[59]

B. Analysis of the Extent of General Secretarial Authority to Manage Fisheries

To summarize, in 1871, Congress gave the executive authority to determine "whether any and what protective, prohibitory, or precautionary measures should be adopted" to protect the numbers of fish.[60] In the 1956 Fish and Wildlife Coordination Act, Congress expressly delegated general administrative authority to the Secretary to be used "consistently with the terms of this Act as he shall find necessary to carry out the provisions of this Act effectively and in the public interest."[61] The Bureau of Fisheries

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56. *Id.*

57. Note that the interpretation espoused here does create a distinction in authority between Department of Commerce programs (where authority would be broad) and other federal agencies (where authority would be consultative).

58. *See* S. REP. NO. 104-276, at 24-25 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4097-98; H.R. REP. NO. 104-171, at 34-35 (1995).

59. Successful use of the broad essential fish habitat authority to take a precautionary approach is predicated on the definition of essential fish habitat, which is a council-specific action. 16 U.S.C. §§ 1853(a)(7), 1855(b)(1)(A). Consequently, the council system is still important to defining the portal through which this authority could be used by the Secretary.

60. H.R.J. Res. 22, 41st Cong., 16 Stat. 593-94 (1871).

61. Fish and Wildlife Act of 1956, ch. 1036, § 3(f), Pub. L. No. 84-1024, 70 Stat. 1119, 1112 (codified as amended at 16 U.S.C. §§ 742a-j (2000)).

was, in part, tasked with "resource management to assure the maximum sustainable production for the fisheries."[62]

Executive branch reorganization moved these functions to the Fisheries Service, and no later executive or congressional act modified these authorities. One possible exception, however, is the 1976 Magnuson Act, through which Congress exerted exclusive fishery conservation and management authority over a wide swath of ocean along the United States coasts and provided that it shall be exercised "in the manner provided for in this Act."[63] Through the Magnuson Act, it appears that the Act actually took the Secretary's existing authority, and extended it to new areas for the Secretary to regulate. Thus, the Secretary has broader authority over marine conservation than has been exercised in the past.

As an initial matter, it would appear that the only potentially qualifying language in the Magnuson Act—"in the manner provided for in this Act"—does not serve to limit previous authority of the Secretary. This is because other provisions of the Magnuson Act support the continued grant of broad secretarial authority. For example, the purposes of the Magnuson Act are stated broadly and in a manner consistent with previous laws.[64] Furthermore, while the Magnuson Act has a large focus on the council-Fisheries Service management plan system, it also provides that the "responsibility of [the] Secretary" goes beyond FMP-related actions, such as promulgating regulations to implement FMPs.[65] Finally, even if one were to conclude that the 1976 law implicitly repealed the previous scope of the Secretary's authority,[66] Congress gave that authority back in 1996

62. *Id.* § 2(3)(c).

63. 16 U.S.C. § 1801.

64. *Compare* 16 U.S.C. §§ 1801(b)(1)-(2), *with* Fish and Wildlife Act § 3 (addressing scope of authority to manage fish) *and* Act of Oct. 14, 1966, Pub. L. No. 89-658, 80 Stat. 908 (1966) (establishing a contiguous fishery zone beyond the territorial sea of the United States).

65. *See* 16 U.S.C. § 1855(d).

66. The law disfavors a conclusion that the Magnuson Act repealed authority the Secretary of Commerce had in 1976: "It is a cardinal principle of construction that repeals by implication are not favored." United States v. Borden Co., 308 U.S. 188, 198 (1939); *see, e.g.*, Nigg v. U.S. Postal Serv., 501 F.3d 1071, 1077 (9th Cir. 2007) (stating that repeal by implication is disfavored and that "the intention of the legislature to repeal must be clear and manifest") (internal quotations omitted). Absent clear intent, an implied partial repeal will be found only in the face of an "irreconcilable conflict," Estate of Bell v. Comm'r, 928 F.2d 901, 903 (9th Cir. 1991) (quotation marks omitted), or "clear repugnancy," United States v. Fausto, 484 U.S. 439, 453 (1988), or undue interference. Radzanower v. Touche Ross & Co., 426 U.S. 148, 156 (1976). Such conflict or repugnancy does not exist here.

when it added language that gave the Secretary the authority to "carry out any other provision of this chapter."[67]

C. Presidential Actions on Marine Conservation

President George W. Bush issued an executive order ending the commercial catch of striped bass and red drum in federal waters.[68] He based this executive order on general authority derived from "the Constitution and the laws of the United States of America."[69] This general authority also exists for the President to use similarly broad authority for other fishery policy actions.

In an analysis of presidential action, the Office of Legal Council has also addressed the extent of executive authority over the EEZ. It concluded that the United States has sufficient "control" over the EEZ for the President to invoke the Antiquities Act for the purposes of protecting the marine environment.[70] Thus, the President, through exercise of executive authority that is derived separately from the Magnuson Act, may take broad conservation actions in the EEZ.

D. Judicial Review of the Secretary's Ability to Exert Broad Authority

The discussion above indicates that Congress has granted the Secretary authority to manage fisheries beyond the limitations of the council system. At the same time, the judiciary is the final arbiter on issues of statutory construction,[71] and an exertion of broad authority that bypasses the council system could be subject to legal challenge. Therefore, in deciding whether such authority exists, it is appropriate to consider how a court would address the issue.

The judiciary must reject administrative constructions that are contrary to clear congressional intent: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the

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67. 16 U.S.C. § 1855(d).

68. Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007) (referencing, among other laws, Magnuson Stevens Fishery Conservation and Management Act, the Atlantic Coastal Fisheries Cooperative Management Act, and the Atlantic Striped Bass Conservation Act).

69. *Id.*

70. OFFICE OF LEGAL COUNSEL, ADMINISTRATION OF CORAL REEF RESOURCES IN THE NORTHWEST HAWAIIAN ISLANDS (2000), http://www.usdoj.gov/olc/coralreef.htm (last visited Nov. 12, 2008).

71. INS v. Cardoza-Fonseca, 480 U.S. 421, 447 (1987) (quoting Chevron, U.S.A. Inc., v. Nat. Res. Def. Council, 467 U.S. 837, 843 n.9 (1984)).

precise question at issue, that intention is law and must be given effect."[72] When congressional intent is not clear, the judiciary's review of an administrative construction is much more deferential: "where the 'statute is silent or ambiguous *with respect to the specific issue,* the question for the court is whether the agency's answer is based on a *permissible construction* of the statute.'"[73] As the U.S. Supreme Court more recently put it in *United States v. Mead*, when Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[74] The Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."[75] Additionally, the "fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[76] The approach has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other.[77]

The *Mead* Court also summed up the deference due to an agency, even if the legislative delegation to an agency on a particular question is implicit:

> Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not

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72. *Id.* at 447-48.

73. NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987) (emphasis added) (quoting *Chevron,* 467 U.S. at 843). There is a school of thought that the courts should not apply the principle of deference (typically called "*Chevron* deference" after the above-referenced seminal case in the field) to agency interpretations of their own authority or jurisdiction. *See* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1530 (2000). In general, however, courts have allowed for deference in review of such agency interpretations.

74. United States v. Mead, 533 U.S. 218, 227-28 (2000) (citations omitted).

75. *Id.*

76. *Id.*

77. *Id.* (citations omitted).

> actually have an intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.[78]

Consistency of agency interpretation is a factor in determining the degree of deference owed to an agency's exercise of authority. The Secretary is not disqualified from changing interpretations. When this happens, "the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."[79] At the same time, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[80] When an agency's position shifts, courts must consider the facts of individual cases in deciding how much weight should be attributed to the agency's views.[81]

As applied here, and with the caveat that the facts of specific circumstances are critical to understand and evaluate, an action by the executive to ensure that fisheries are managed in a sustainable manner could survive judicial scrutiny. As an initial matter, as the discussion above addresses, the historical grant of authority is clear for the executive to manage fisheries in a precautionary and sustainable manner.[82] This authority has not been superseded by any act of Congress since those early grants of authority, and indeed has actually been advanced.[83] Furthermore, there are no clear expressions of congressional intent to the contrary.[84]

The tension discussed above between two essential fish habitat-related provisions in the Magnuson Act—one of which appears to provide authority to the executive to act unilaterally to protect essential fish habitat, and another which appears to limit the exercise of this authority to action taken through the council system—may be seen as introducing some ambiguity into the

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78. *Id.* at 229 (internal quotation marks and citations omitted).
79. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (citations omitted).
80. *Id.*
81. *Id.*
82. *See supra* Part IV.A, and notes 22, 30 & 31 and accompanying text.
83. *See supra* Part IV.A, and notes 42-44 and accompanying text.
84. *Cardoza-Fonseca*, 480 U.S. at 447-48.

statutory language.[85] Yet, strictly read, section 1855(b)(1)(B) only concerns fishery-specific impacts on essential fish habitat. So long as the executive recognizes and does nothing contrary to this limitation, there will be no tension between statutory sections. Additionally, as fishery-specific actions to protect essential fish habitat are only a subset of possible precautionary marine conservation-related actions that could be taken by the executive, it is also not a meaningful limitation on executive authority in this area.

The broad grant of authority to conserve fisheries is clear. The Fisheries Service's historical interpretation of its authority, as generally limited to actions taken through the council system, should not present a roadblock to executive action.[86] So long as the executive's action is based on existing authority, a court should not interfere.[87]

V. CONCLUSION

General authority exists for the executive branch to implement fishery conservation and management measures in federal waters independent of the council process. This authority stems from the original broad grant of authority from Congress to the executive; authority which was reinforced and advanced through subsequent congressional action regarding fishery conservation and management. Consequently, should the executive find that circumstances exist that are anathema to a sustainable interaction between fishing and the marine environment, it generally can act independently of the regional fishery management council system to redress that situation.

85. *See supra* Part I.A, and note 56.

86. *See supra* Part III; United States v. Mead, 533 U.S. 218, 227-28 (2000).

87. NLRB v. United Food and Commercial Workers Union, 484 U.S. 112, 123 (1987); *see also* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993).