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FISHING FOR PROTECTION AT CASHES LEDGE: THE INEFFECTIVE HABITAT
PROTECTION MEASURES OF AMERICA'S OCEANS

*Ryan P. Woodward**

*“UNLESS someone like you cares a whole awful lot,
nothing is going to get better. It’s not.”*

-DR. SEUSS, THE LORAX¹

I. INTRODUCTION

The concern over habitat protection is not a new concept. The dangers of global warming and its effect on polar bear habitats has been a common outcry over the last decade. The destruction of rainforests and the displacement of several animal species is a global story that has been around even longer. Yet, the endangerment of underwater habitats in our oceans gains little notoriety. Perhaps ocean habitat protection is overlooked because it seems that our oceans contain an abundance of fish, but in fact, some species' existence is being threatened. Cod stock populations in New England have recently hit an all-time low, requiring an emergency order to stop all Cod fishing in New England waterways.² Some fear the Cod stock may never return.³ The depleted fish stock issue is not new to the rich fishing waters of New England, where there have been significant losses of fish stock, especially Cod, over the last four decades. In the 1970s, Congress blamed overfishing as the main cause of depleted fish stocks and enacted legislation in an effort to rebuild them.⁴

In 1976, Congress passed the Fisheries and Conservation Management Act, later named the Magnuson-Stevens Act (MSA).⁵ They sought to better the fisheries by establishing fishing guidelines aimed at reducing overfishing with a focus on the protection of marine habitats.⁶ The ultimate goal of returning fish stocks to flourishing numbers has failed. Today, fish stocks are still

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¹ DR. SEUSS, THE LORAX (Random House 1999) (1971).

² Anne Mostue, *Feds Shut Down Cod Fishing Off New England Coast*, WGBH NEWS, Nov. 10, 2014, <http://wgbhnews.org/post/feds-shut-down-cod-fishing-new-england-coast-0> [hereinafter Mostue].

³ See Sean Cosgrove, *Habitat Protection Works for Now and for the Future*, TALKING FISH, Jul. 16, 2014, www.talkingfish.org/protecting-ocean-ecosystems/habitat-protection-works-for-now-and-for-the-future [hereinafter Cosgrove].

⁴ Eric Schwaab, *The Magnuson Act Thirty-Five Years Later*, 17 ROGER WILLIAMS U. L. REV. 14, 15-17 (2012).

⁵ Magnuson-Stevens Act (MSA), Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801-1884 (2006)). (Originally called the Fisheries Conservation and Management Act, it later became known as the Magnuson-Stevens Act after Congress reauthorized it in 2007. The Act created the Exclusive Economic Zone (EEZ), stretching American control of the oceans to 200 miles and stressed importance of the fish stocks and conservation).

⁶ See Michael C. Laurence, *A Call to Action: Saving America's Commercial Fishermen*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 825, 830 (2002) [hereinafter Laurence].

down and the need for habitat protection is great.⁷ Money, politics, legislation and other unforeseen circumstances have hindered protection efforts. It would seem that there has been a lack of enforcement of the MSA guidelines.⁸ Other habitat protection legislation efforts have been of little use as evidenced by the lack of protected waters in the hallowed fishing waters of Maine.⁹ Protection efforts, if any, for marine habitats in New England are actually reactionary efforts, guided by a primary goal of increasing fish stocks. This may be better explained by looking at a developing controversy over the last year concerning a small marine habitat within the Gulf of Maine, Cashes Ledge, and the ability of regional fishery management councils to strip Cashes Ledge of its protection from dangerous fishing methods.¹⁰

This comment will reflect the current debate of Cashes Ledge as an example to the effectiveness of the MSA and other legislation. Part II will consider the background of the MSA and Cashes Ledge. Part III will look at both sides of the debate over Cashes Ledge, namely the view of the fisherman and the view of conservationism. Part III will conclude with the likely course of action the fishery council anticipates regarding the protection of Cashes Ledge in the coming months.

Part IV of the comment will critique the system of habitat protection through the MSA and fishery management councils. It will look at the inefficiencies in regulations and management of councils, in addition to ineffective legislation that governs the councils as a possible reason for why there is little habitat protection. Part V of the comment will look outside the MSA to the effectiveness of other legislation, like the Antiquities Act and the Marine Sanctuary Act. It will consider the likelihood of successfully providing protection to areas like Cashes Ledge. Part VI of the comment will conclude that given the current legislation, the lack of interest, and the lack of conservation efforts, there is likely very little to nothing that can be done to protect marine environments like Cashes Ledge. The startling fact that change is unlikely should call for swift action and new legislative efforts aimed towards a stronger conservation mindset among those in control of America's oceans and marine habitats.

II. BACKGROUND

Regulations concerning the protection of fishing stocks and habitat protection have not always been in place. Overfishing by American fishermen and foreign fishing industries in the early and middle parts of the 20th century depleted fish stocks in American waters, especially in the cooler regions of New England. Concern for the fishing industry made way for the MSA,¹¹ to

⁷ See Eric A. Bilsky, *Conserving Marine Habitats*, 7 SUSTAINABLE DEV. L. & POL'Y 67, 70 (2006) [hereinafter Bilsky].

⁸ Peter H. Morris, *Monumental Seascape Modification Under the Antiquities Act*, 43 ENVTL. L. 173, 187-89 (2013) [hereinafter Morris].

⁹ Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 746 (2003) [hereinafter Owen].

¹⁰ See Kevin Miller, *Conflict Looms Over Effort to Reopen Protected Gulf of Maine Fishing Ground*, PORTLAND PRESS HERALD, Jan. 6, 2015, <http://www.pressherald.com/2015/01/06/conflict-looms-over-effort-to-reopen-protected-gulf-of-maine-fishing-ground/>.

¹¹ 16 U.S.C. §§ 1801-1884.

further American territorial rights in the ocean and to establish a system to implement conservation efforts aimed at improving fish stocks and protecting marine environments.¹²

Years later in 1996, the Sustainable Fisheries Act (SFA)¹³ was enacted by Congress over concern that the MSA was unable to protect fish habitats.¹⁴ It was believed that the MSA was supporting fishing practices that were actually defeating any conservation efforts of the MSA.¹⁵ Fish stocks, including Cod, were at all-time lows in the 1990s prompting change in areas like overfishing and habitat protection.¹⁶ With the SFA, Congress had the foresight to note that long-term fishing strategies, like trawling, was having a direct impact on the loss of fish habitats and the decline of fish populations.¹⁷ Congress set out guidelines for fisheries to follow to identify Essential Fish Habitats (EFH), to minimize the adverse effects of fishing to EFHs, and to conserve these habitats.¹⁸

The MSA made way for the creation of the National Fisheries Management Council (NFMCC), which is divided into regional councils responsible for identifying issues and recommending plans for ocean management.¹⁹ These plans involve a lot of research and time for public comment. A regional council's actions are reviewed and ultimately approved by the Secretary of Commerce, through the National Ocean and Atmospheric Administration (NOAA).²⁰ Examples of council plans are boat size, fishing equipment standards, time at sea quotas, and identifying and protecting EFH.²¹ These plans must meet the standards established in the MSA.²² This paper will focus primarily on the balance of conservation of marine habitats with Standard 1: Optimum Yield.²³

¹² *Id.*

¹³ Sustainable Fisheries Act (SFA), Pub. L. No. 104-297, 110 Stat. 3559 (1996) (codified as amended at 16 U.S.C. §§ 1801-1884 (2006)).

¹⁴ *Id.*

¹⁵ Roger Fleming, *Habitat Protection Under the Magnuson-Stevens Act: Can it Really Contribute to Ecosystem Health in the Northwest Atlantic?*, 12 OCEAN & COASTAL L.J. 43, 52 (2006) [hereinafter Fleming, *Habitat Protection*].

¹⁶ *Id.* at 50.

¹⁷ Roger Fleming, *Twenty-Eight Years and Counting: Can the Magnuson-Stevens Act Deliver on Its Conservation Promise?*, 28 VT. L. REV. 579, 588 (2004) [hereinafter Fleming, *Twenty-Eight Years*].

¹⁸ Fleming, *Habitat Protection*, *supra* note 15, at 50-54; *see* 16 U.S.C. § 1802(10) (2007) (defining EFH as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity”).

¹⁹ 16 U.S.C. §§ 1852-1853 (2007) (the regional councils are: New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific and Western Pacific).

²⁰ 16 U.S.C. § 1854.

²¹ *See* 16 U.S.C. § 1853.

²² 16 U.S.C. § 1851; 50 C.F.R. §§ 600.310-.355 (2009) (the ten standards: Optimum Yield, Scientific Information, Management Units, Allocations, Efficiency, Variations and Contingencies, Costs and Benefits, Communities, Bycatch, and Safety of Life at Sea). *See* Schwaab, *supra* note 4, at 17-18.

²³ 50 C.F.R. § 600.310; 16 U.S.C. § 1851(a)(1) (conservation and management measures shall prevent overfishing and achieve optimum yield from each fishery). *See generally* 16 U.S.C. § 1801(b) (promote protection of EFH).

The MSA Standard 1 is viewed as the priority standard and possibly why it is listed first.²⁴ It places an emphasis on having conservation and management plans achieving the “optimum yield” or landing the most fish possible in accordance with the other standards, such as science and bycatch requirements. There appears to be an internal conflict built into the Standards, as the MSA stresses the importance of conservation and protecting EFH. It appears however, that the main goal of the MSA is not conservation of the environment, but the importance of managing fish populations for human extraction on a sustainable basis.²⁵ The MSA’s success lies in the ability of fishery councils to manage this conflict. This dilemma is currently displayed in a small region of the Gulf of Maine against the technologies of fishermen.

The fishing industry uses an assortment of equipment and means to catch fish. One of these means is by way of trawling and it is also one of the most dangerous for ocean habitats. With trawling, a large weighted net is pulled across the ocean floor in an attempt to catch groundfish by collecting everything in its way.²⁶ In New England, the New England Fishery Management Council (NEFMC) has been attempting to strengthen the fish stocks of many types of groundfish, most famously Cod.²⁷ The decline of Cod was recognized in the creation of the MSA and has continued to be a problem for the NEFMC.²⁸ In an attempt to further strengthen Cod numbers, the NEFMC implemented an amendment that banned trawling in an area inside the Gulf of Maine called Cashes Ledge in 2003.²⁹

²⁴ Margreta Vellucci, *Fishing for the Truth: Achieving the “Best Available Science” by Forging a Middle Ground Between Mainstream Scientists and Fishermen*, 30 ENVIRONS ENV'T. L. & POL'Y J. 275, 281-282 (2007).

²⁵ See generally William J. Chandler, *The Future of the National Marine Sanctuaries Act in the Twenty-First Century* (May, 2006) (unpublished M.A. dissertation, Johns Hopkins University) (available at http://mcbi.marine-conservation.org/publications/pub_pdfs/Chandler_2006.pdf) [hereinafter Chandler].

²⁶ *Destructive Fishing*, MARINE CONSERVATION INSTITUTE, www.marine-conservation.org/what-we-do/program-areas/how-we-fish/destructive-fishing/ (last visited Mar. 4, 2015).

²⁷ *Northeast Multispecies*, NEFMC, www.nefmc.org/management-plans/detail/northeast-multispecies (last visited Mar. 13, 2015) (listing the groundfish species the NEFMC manages: cod, haddock, flounder, pollock, plaice, hake, halibut, redfish, wolfish, and pout).

²⁸ See, e.g., Shannon Carroll, *Sector Allocation: A Misguided Solution*, 17 OCEAN & COASTAL L.J. 163, 167-173 (2011) [hereinafter Carroll]; Peter Shelley, *Have the Managers Finally Gotten it Right?: Federal Groundfish Management in New England*, 17 ROGER WILLIAMS U. L. REV. 21, 21-22 (2012) [hereinafter Shelley] (pointing out the rise and fall of the Cod stock in New England from before the MSA to the 2000s and the stock may not be rebuilt until 2026).

²⁹ David Abel, *In a briny preserve, fish and controversy thrive*, THE BOSTON GLOBE (July 13, 2014), www.bostonglobe.com/metro/2014/07/12/cashes-ledge-long-closed-fishing-may-reopen/qXVEiew2rFXIHIVsdLaJtM/story.html [hereinafter Abel]; Fisheries of the Northeastern U.S., 50 C.F.R. § 648.81 (2003); Northeast Multispecies Fishery Management Plan Amendment 13, New England Fishery Management Council 86 (Dec. 18, 2003) (available at www.nefmc.org/library/amendment-13) [hereinafter Amendment 13] (stating year round closures in Cashes Ledge will help build the Cod stock).

Cashes Ledge is 550 square miles of ocean that consists largely of an underwater mountain range.³⁰ The highest point, Ammen Rock, sits a mere 40 feet from the surface of the ocean.³¹ Since the sunlight is able to reach the elevated ocean floor and the ocean currents flow forcefully around the mountain range, there exists a unique kelp forest that is the largest of its kind in the Atlantic Ocean.³² The mountains and kelp provide food, safety, and an abundant spawning environment for many species, including Cod.³³ The NEFMC initiated its trawling ban on Cashes Ledge to protect both an abundant juvenile Cod population and a large marine environment, in accordance with the MSA.³⁴ The ban has been in effect for 12 years, and now the NEFMC is reconsidering that ban to open trawling to Cashes Ledge with the Omnibus Habitat Amendment 2 (OHA2).³⁵

The NEFMC (and other councils) are required to update their habitat management measures and review essential fish habitat rules to minimize adverse fishery effects and areas where actions are needed for conservation of fish habitats.³⁶ The NEFMC's OHA2 focuses on the Habitat Area of Particular Concern (HAPC)³⁷ and protecting groundfish. Over the last few years, the NEFMC has gathered information for several proposed amendments to management plans in the Gulf of Maine and has opened those plans to the public for comment. Several areas governed by the NEFMC are affected by this amendment³⁸, but currently no one area is drawing as much attention as the proposals to the Cashes Ledge HAPC.

The amendment lists four alternatives to Cashes Ledge: keep Cashes Ledge a closed area, open the Ledge to no fishing restrictions, and two modifications to Cashes Ledge that redefine the area's boundaries.³⁹ Though one of the alternatives listed is to fully open Cashes Ledge to fishing, a further look shows the estimated effects of that alternative are detrimental to conservation and economic efforts of the fishery.⁴⁰ That alternative is listed because the council is mandated by law to disclose all possibilities, even if one of those possibilities has no chance of being implemented.⁴¹ This law is not the MSA, but the National Environmental Policy Act (NEPA) and its regulations

³⁰ *Cashes Ledge Fact Sheet*, CONSERVATION LAW FOUNDATION, www.clf.org/cashes-ledge (last visited Mar. 4, 2015) [hereinafter *Cashes Ledge Fact Sheet*].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* See also Amendment 13, *supra* note 29, at 86, 93.

³⁵ Abel, *supra* note 29; NEW ENGLAND FISHERY MANAGEMENT COUNCIL, OMNIBUS HABITAT AMENDMENT 2 (available at www.nefmc.org/library/omnibus-habitat-amendment-2) (last visited Mar. 4, 2015) [hereinafter OHA2].

³⁶ *Conservation Law Foundation v. Mineta*, 131 F. Supp. 2d 19, 21 (D.D.C. 2001); *Conservation Law Foundation v. Evans*, 209 F. Supp. 2d 1, 5 (D.D.C. 2001) (both cases stating Fishery Councils efforts to conserve and manage are done through Fishery Management Plans (FMP) that must adhere to the MSA); 16 U.S.C. § 1852(h)(1) (a function of a council is to develop FMPs).

³⁷ See OHA2, *supra* note 35 (HAPC- Habitat Area of Particular Concern, areas designated as HAPC get "more careful evaluations of the impact of all potential activities to fishing in that area").

³⁸ *Id.* (other areas: Jeffreys Bank, Georges Bank, Machias (near Canada line of EEZ) and Stellwagen Bank).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Telephone Interview with Michelle Bachman, Fishery Analyst, New England Fishery Management Council (Mar. 27, 2015) [hereinafter Telephone Interview with Michelle Bachman].

on providing Environmental Impact Statements (EIS).⁴² The NEFMC will not open all of Cashes Ledge to fishing, however, it is strongly preferred among council members to modify and shrink the protected area, opening a portion of previously protected habitat to fishing.⁴³ This proposal has now stirred a debate amongst the fishing industry and conservationists on the best use of Cashes Ledge and how it should be managed.

III. CASHES LEDGE DEBATE

A. *Fishermen's View*

Fishing is a \$5 billion industry and New England fishermen account for over \$1 billion a year of that total revenue.⁴⁴ There is no question the fishing industry is motivated by money, and the more fish they catch, the more money that can be made. Providing for more areas to fish would naturally lead to more opportunities for profit.

However, in recent years, much attention has been directed to decreased fish stocks and potential remedies. The biggest impact to the fishermen has been the implementation of catch limits,⁴⁵ greatly lowering the amount of certain fish that can be caught. Catch limits are quotas of fish stocks that cannot be exceeded, causing a race among fishermen before the limit is reached. In addition, the NEFMC has created a sector allocation program.⁴⁶ This essentially is a community share program for fishermen allowing them to buy and sell fishing privileges inside a designated area. Though the sector allocation has some critics,⁴⁷ it, alongside a catch limit program, restricts and manages a fisherman's quota.

The fishermen argue the economic impact of the increased attention to conservation is devastating. They stress the result of more protected areas and reduced catch limits of certain stocks in the fishing waters of their communities reduces their ability to continue to make a living.⁴⁸ This may not be the case for every fisherman. However, the scallop industry, which is accomplished through trawling,⁴⁹ is doing quite well even with reduced days at sea and catch

⁴² National Environmental Policy Act, 40 C.F.R. §1502 (2014) (EIS provides list of environmental impacts and alternatives).

⁴³ Telephone Interview with Michelle Bachman, *supra* note 41.

⁴⁴ U.S. DEPT. OF COMMERCE, NOAA TECHNICAL MEMORANDUM NMFS-F/SPO-137, FISHERIES ECONOMICS OF THE UNITED STATES 2012 (2012) (stating U.S. fishermen landed over \$5 billion in 2012, with New England fishermen responsible for over \$1 billion in 2012).

⁴⁵ 16 U.S.C. § 1853(a)(15); *see* Shelley, *supra* note 28, at 29-30 (the MSA Reauthorization mandated catch limits to prevent overfishing).

⁴⁶ 50 C.F.R. § 648.

⁴⁷ Carroll, *supra* note 28, at 189-192 (stating the sector program: has no cap quota allocations, will likely lead to excessive consolidation, high costs for maintaining the program, and little legal recourse for affected groups, although with a voluntary program, many are left with no choice but to join).

⁴⁸ Paul Bagley, *Don't Forget About the Fishermen: In the Battle over Fisheries Conservation and Management a Conservation Ethic has Trumped Economic Concerns of the Community-or has it?*, 36 SUFFOLK U.L. REV. 765, 778-781 (2003) [hereinafter Bagley].

⁴⁹ *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 212 (D.D.C. 2005), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

limits.⁵⁰ Regardless, fishing communities also point out that the conservation efforts proposed under the Standards of the MSA are at the expense of another Standard to ensure no severe economic losses to any fishery.⁵¹ It is argued that a new re-centered focus on ocean conservation is leaving many fishermen to question if it is putting them out of a job.⁵²

Additional arguments made by the fishermen community to remove the fishing ban at Cashes Ledge focus less on income and more on recent legislation enacted by NFMC. Having a strictly regulated quota, they state all fishermen should be allowed access to all waters in order to achieve their quotas faster. When fishermen go to where the fish are and achieve their quotas faster, this results in fewer days at sea, which uses less fuel-producing environmental benefits and lowered costs to the fishing industry.⁵³ Fishing bans limit the fishermen's search to areas where no or few fish are located, which wastes valuable time and resources.

B. Conservationist View

Conservationists believe the Cashes Ledge fishing ban should remain in place largely to protect the marine habitat.⁵⁴ Cashes Ledge has one of the largest kelp forests in the Atlantic Ocean, harboring many species of animal and plant life.⁵⁵ The protective environment found here is a reason for the increased number of species, including Cod, which have diminishing numbers along the coast, yet gather in large numbers at Cashes Ledge.⁵⁶ The rocky mountain ranges, strong ocean currents and proximity to sunlight, create a home for plankton, sponges, and kelp not seen elsewhere in New England, and existing only rarely in other areas of the Atlantic Ocean.⁵⁷

When closed to fishing and trawling, scientists are able to study this unique environment in a near "untouched-by-man" setting.⁵⁸ Scientists have flocked to Cashes Ledge to study this marine environment, including important studies conducted on juvenile Cod populations and their increasing numbers despite drastic decreases throughout the Gulf of Maine.⁵⁹ Conservationists urge that any fishing in Cashes Ledge, especially trawling, will have devastating effects on the

⁵⁰ John Dyer, *Scallops giving New Bedford fishermen a welcome break*, THE BOSTON GLOBE, (Dec. 1, 2013), www.bostonglobe.com/business/2013/12/01/scallops-bringing-decent-living-new-bedford-fishermen/P9WxPWhm05vYN5xaBSZY8I/story.html.

⁵¹ Laurence, *supra* note 6, at 832-834; 50 C.F.R. § 600.345; 16 U.S.C. § 1851 (MSA Standard 8 - Conservation efforts should take into account fishing communities and the sustained participation of such communities and minimize the economic impact to them).

⁵² Bagley, *supra* note 48, at 783-785.

⁵³ See Abel, *supra* note 29; Mostue, *supra* note 2.

⁵⁴ *Cashes Ledge*, NEW ENGLAND OCEAN ODYSSEY, www.newenglandoceanodyssey.org/tag/cashes-ledge/ (last visited Sept. 12, 2014) [hereinafter NEW ENGLAND OCEAN ODYSSEY]; *Cashes Ledge Fact Sheet*, *supra* note 30; Cosgrove, *supra* note 3.

⁵⁵ *Cashes Ledge Fact Sheet*, *supra* note 30.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See generally JONATHAN H. GRABOWSKI, GULF OF MAINE RESEARCH INSTITUTE, EVALUATION OF CLOSED AREAS: CASHES LEDGE AS JUVENILE COD HABITAT (2010).

ecosystem, taking hundreds of years for the marine environment to rebuild itself.⁶⁰ To protect an area like Cashes Ledge, conservationists desire not only to keep the fishing ban on trawling in place, but seek to implement permanent protection.⁶¹ Protection of ecologically important areas as well as key spawning areas of commercially valuable fish, like the Cod, would only enhance the conservation efforts of a fishery under the MSA.⁶²

C. Council Decision

The NEFMC decision on trawling in Cashes Ledge has taken a backseat to the news released in November 2014 that Cod population in the Gulf of Maine is at an all-time low.⁶³ Emergency regulations were set in place to ban all Cod fishing in the Gulf of Maine and focus shifted to tighter regulations of other fish species that may result in unnecessary bycatch of Cod, such as in the important lobster industry.⁶⁴ This news is shocking to the fishing industry but, unfortunately, enforces the notion that the goal of the MSA is not being achieved nearly 40 years after its inception.

The NEFMC's OHA2 project, is now entering its tenth year, although the original projection was only five years.⁶⁵ What was once expected to conclude in the Fall of 2014 most likely will not be approved by the council until at least the Summer of 2015, and then take an estimated seven months for final approval by the Secretary of Commerce.⁶⁶ The public comment period concluded in January 2015, and now those waiting for answers will continue to wait as the NEFMC considers its alternatives.⁶⁷ Currently, the preferred course of action is to slightly shift and shrink the protected zone of Cashes Ledge.⁶⁸ The primary goals of this action would be to focus conservation and protection of Cashes Ledge on the shallower portions of the region, while opening up fishing to the deeper areas surrounding the ledge.⁶⁹ This is because the habitat provided by Cashes Ledge is largely concentrated on the slopes of the Ledge and not on the flatter ocean bottom surrounding Cashes Ledge.⁷⁰ Any impact of the public comments to change the plans for Cashes Ledge will not be known until later this year.

Conservation efforts appear to be a secondary thought to the fishing industry, and fish stocks are being depleted further. As long as fish stocks are in danger, like the Cod in New England, any proposed habitat changes by the NEFMC will most likely be persuaded by efforts to better the fish stocks, which is not necessarily a primary objective of protection and conservation

⁶⁰ *Cashes Ledge Fact Sheet*, *supra* note 30.

⁶¹ *Id.*; NEW ENGLAND OCEAN ODYSSEY, *supra* note 54.

⁶² Chandler, *supra* note 25, at 103.

⁶³ Mostue, *supra* note 2.

⁶⁴ Emergency Gulf of Maine Cod Management Measures, 79 Fed. Reg. 67362-01 (Nov. 13, 2014) (*amended* 80 Fed. Reg. 11331-01 (Mar. 3, 2015)).

⁶⁵ Telephone Interview with Michelle Bachman, *supra* note 41; 16 U.S.C. § 1852(h)(7)(a) (5 year period for FMP); *see also* Cosgrove, *supra* note 3.

⁶⁶ Telephone Interview with Michelle Bachman, *supra* note 41.

⁶⁷ *Id.*

⁶⁸ *Id.*; OHA2, *supra* note 35.

⁶⁹ Telephone Interview with Michelle Bachman, *supra* note 41.

⁷⁰ *Id.*

of the habitat.⁷¹ The NEFMC's decision in regards to Cashes Ledge and OHA2 in the coming months will be based more on rebuilding the fish stocks than on the conservation of Cashes Ledge. Therefore, it may be assumed that the council, for the time being, will most likely not change or even slightly reduce the protections of Cashes Ledge. It seems that Cashes Ledge can be afforded some protection only until fish stocks are back to a healthy level, and then the council will readdress the situation.

IV. FAILURE OF REGULATION OR LEGISLATION

The NEFMC (and all the other councils) faces a dilemma of trying to balance protecting the fishing industry and protecting marine habitats. There are several examples of conservation groups challenging different fishery councils over proposed amendments. Courts concluded that the councils were arbitrary and capricious in either the undesired effect of the enacted amendment or failed to conduct proper research before the management plan was made; these undesired effects and research deal with environmental, habitat, or science effects.

The councils' decision to ban fishing in Cashes Ledge was originally focused on addressing the severely depleted stock of Cod in New England waters.⁷² Today's issue of whether or not the fishing ban will be removed was temporarily set aside as the council takes more initiative in matters that concern fish stock, per the MSA.⁷³ Does that mean if Cod stocks return to safe fishing levels, then Cashes Ledge will be a flourishing fishing zone once again? Are there no adequate measures to conserve this area permanently? Why is there no definite, immediate remedy to these issues, leaving fishermen and conservationists pondering if there will ever be an end to this struggle?

Answers to these questions are difficult and may be a result of faulty regulation by the councils and poor legislation in ocean management. Unfortunately, many groups have fought the councils, NOAA, and the Secretary of Commerce over their regulations. These battles have led to many legal actions challenging the numerous regulations imposed on ocean management and fishery control. Cashes Ledge may end up in litigation to seek finality on the actions the council has or has yet to impose on the zone. Looking back at some of these cases over the last twelve years might indicate the workings of the council and any potential outcome to Cashes Ledge.

A. *Poor Regulation*

1. Case Studies

The Administrative Procedure Act grants the ability to challenge agency decisions and a Court can reverse agency actions mostly on the grounds that they were arbitrary and capricious.⁷⁴ Due to the scientific nature of NFMC actions and the standard of review in agency matters, the

⁷¹ *Id.*; OHA2, *supra* note 35.

⁷² *See* Amendment 13, *supra* note 29, at 86.

⁷³ Emergency Gulf of Maine Cod Management Measures, 79 Fed. Reg. at 67362-01; Telephone Interview with Michelle Bachman, *supra* note 41.

⁷⁴ Administrative Procedure Act, 5 U.S.C. § 706 (2014); *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 211 (D.D.C. 2005) *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

courts defer many times to the councils.⁷⁵ But that does not deter a possibility of litigation. Any rulings on Cashes Ledge could be challenged as arbitrary and capricious by either side of this dispute. Of course, not every agency decision is found to be arbitrary. In similar matters involving parts of the MSA or SFA, councils have been found not to be arbitrary and their rules have been allowed to stay.

For example, in 2001, the District Court found the NEFMC did not act arbitrarily in amendments it had made concerning the scallop industry.⁷⁶ In 1994, the NEFMC closed off areas to dredging due to the decrease in groundfish stocks.⁷⁷ It also implemented a gradual decrease in the number of days at sea allowed for scallop fishing.⁷⁸ The effect was a quicker than expected rise in the scallop population, therefore the NEFMC amended its plan and increased the days at sea allowed for scallop fishing.⁷⁹ The Conservation Law Foundation (CLF) challenged the NEFMC in court alleging that the Council's plan did not allow them to increase the days at sea requirement, scientific research did not support the Council's findings, and opening scallop dredging would have an adverse impact on the rest of the groundfish stocks.⁸⁰ The Court found the science gathered by the NEFMC was sufficient, supported the amendment and, therefore, the NEFMC did not act arbitrarily.⁸¹

More recently in 2009, the NEFMC still faced concerns of overfishing groundfish.⁸² In that year, the NEFMC amended its groundfish regulations in accordance with the reauthorized MSA and developed strict Annual Catch Limits (ACL) on many groundfish species.⁸³ A couple years later, the NEFMC observed that stocks were still being overfished with the ACLs in place. Therefore, in 2012, the NEFMC set stricter ACLs to go into effect the following year.⁸⁴ Two states challenged the Council's decisions claiming that the stricter ACLs would in fact decimate the fishing industry and violate the MSA in using improper scientific methods and failing to take into account the interests of fishing communities.⁸⁵ Yet, the Court again found that the Council's actions were reasonable and based on proper science and management decisions.⁸⁶

The Court's reliance and deference to agency decisions support the difficult task of challenging a fishery management council as they attempt to balance conservation of ocean habitats with the management of the regulation of fish stocks. It would then appear that on a controversial decision faced by the NEFMC, on a matter like the regulation of Cashes Ledge, the courts would defer to the councils.

⁷⁵ *Id.* at 212 (“[T]his Court will not second guess an agency decision or question whether the decision made was the best one. This is particularly the case when the Court is evaluating the [council’s] scientific determinations, as opposed to simple findings of fact.”).

⁷⁶ *Conservation Law Foundation v. Mineta*, 131 F. Supp. 2d 19, 30 (D.D.C. 2001).

⁷⁷ *Id.* at 22.

⁷⁸ *Id.*

⁷⁹ *Id.* at 23.

⁸⁰ *Id.* at 25-28.

⁸¹ *Id.* at 26, 30.

⁸² *Massachusetts v. Pritzker*, 10 F. Supp. 3d 208 (D. Mass. 2014).

⁸³ *Id.* at 213.

⁸⁴ *Id.* at 214.

⁸⁵ *Id.*

⁸⁶ *Id.* at 220, 223-224.

However, the councils have been found to be arbitrary and capricious on several matters when issuing regulations per the MSA or SFA. This may be due to several issues in legislation that will be looked at further in this comment. Today, it appears that council actions have been denied for being arbitrary for failure to provide conservation actions. For instance, it has long been established that groundfish stocks have been overfished. In 2001, many conservation groups challenged the actions of the NEFMC and the Secretary of Commerce for approving the NEFMC actions that have not stopped the overfishing issue in New England waters.⁸⁷ The SFA was put into place to help the MSA promote better efforts to stop overfishing.⁸⁸ The SFA requires councils to activate management plans that will stop overfishing, rebuild depleted stocks, and account for bycatch.⁸⁹ Conservationists brought action to the Secretary of Commerce in light of reports that overfishing still existed in 1999, giving proof that amendments and frameworks developed by the NEFMC and approved by the Secretary were in violation of the SFA.⁹⁰ The Court found the Council's efforts were arbitrary and contrary to the MSA and SFA because they failed to introduce any measures to minimize bycatch according to the provisions of the SFA.⁹¹

More recently, in 2011, the NEFMC initiated amendments to the Herring Fishery Plans.⁹² These Plans were developed to add protections for the herring population, but before final approval, the amendment was altered to only address Atlantic herring and leave out other species of herring.⁹³ Environmentalists challenged the NEFMC on the premise that leaving out other herring species and failing to set adequate catch limits violated the MSA and faulted the NMFS for not reviewing the NEFMC more carefully.⁹⁴ The Court agreed. It found that though the councils have the power to address different stocks and protection measures under the MSA, it then falls to the NMFS to ensure council actions properly adhere to the standards of the MSA.⁹⁵ Here, the NMFS allowed the Council's plan to pass even though herring was not an overfished stock and not subject to stricter scrutiny. The NMFS must oversee all actions by the councils concerning all stocks for their conservation and management.⁹⁶

Not all challenges refer to the MSA. Several other acts have been authorized by Congress that govern actions of the councils. These acts will not be discussed in any detail in this comment, except for stating the fact that other councils are often accused of violating various acts such as the National Environmental Protection Act (NEPA), the Marine Mammal Protection Act (MMPA), or the Endangered Species Act (ESA). The multitude of legislation will be addressed later, but recent cases show how the multiple regulations greatly affect the councils.

One brief example is seen in *Intertribal Sinkyone Wilderness Council v. NMFS*, where the NMFS was challenged for its decision to authorize the Navy's use of sonar in waters off the coast of Washington citing studies that said the sonar was unlikely to harm endangered species in the

⁸⁷ Conservation Law Foundation v. Evans, 209 F. Supp. 2d 1, 8 (D.D.C. 2001).

⁸⁸ *Id.* at 6.

⁸⁹ *Id.*

⁹⁰ *Id.* at 7-8, 12.

⁹¹ *Id.* at 14-15.

⁹² Flaherty v. Bryson, 850 F. Supp. 2d 38, 45 (D.D.C. 2012) (referring to Amendment 4 of the Atlantic Herring Fishery Management Plan).

⁹³ *Id.* at 45-46.

⁹⁴ *Id.* at 46.

⁹⁵ *Id.* at 53-56.

⁹⁶ *Id.*

area.⁹⁷ The plaintiffs showed that the NMFS failed to address several studies that pointed the opposite.⁹⁸ The Court found the NMFS violated the Endangered Species Act in failing to use the best science available to address the primary concern of the use of sonar on protected animals.⁹⁹

These cases tend to favor a deference to the councils in most areas of their regulations as expected; however, there are examples where agency action was deemed excessive, arbitrary, or in violation of acts, in part or whole. Therefore, regardless of the intent of a council for how it regulates and manages its fishery plans, its decisions will be scrutinized and any future action by the NEFMC regarding Cashes Ledge is likely to face opposition. Any chance of predicting the outcome based on case law is difficult in light of the range of cases in similar matters over a variety of laws in place. It will most likely be determined by the legal teams, as they are all very case specific in determining the effectiveness of the various regulations put forth by any fishery management council.

2. Science

The MSA calls for a “best science available” approach in Standard 2,¹⁰⁰ and this term is left vague.¹⁰¹ This approach has been challenged many times and seems to be a conflict between many groups as to what is the best solution for various environmental concerns. As seen earlier, an action was brought against the NMFS for authorizing Naval sonar use despite scientific studies that showed the sonar use was unsafe for some animals.¹⁰² This controversy is not a remote issue. It arises most often in part to a legislation issue that will be addressed further in this comment. A council’s choice on which scientific study to use will certainly be scrutinized by those affected. To minimize this scrutiny, NOAA could step in during the oftentimes lengthy process of a council’s management decisions coming to fruition. Yet, the MSA does not require NOAA to undergo independent scientific studies.¹⁰³ This step alone could help lessen the chance of litigation or the concern of a council’s choice of studies to favor their own agendas. Deciphering which science is the best is most often why courts tend to defer to the councils. The innate dilemma of conservation versus optimum yield further stretches the battles of scientific study.

3. Council Makeup

Some have suggested that part of the blame of council decisions and failure in the conservation realm are due in part to the construction of a council.¹⁰⁴ At one time, nearly all council

⁹⁷ *Intertribal Sinkyone Wilderness Council v. NMFS*, 970 F. Supp. 2d 988, 995-996 (N.D. Cal. 2013).

⁹⁸ *Id.* at 998.

⁹⁹ *Id.* at 1001-1002.

¹⁰⁰ 16 U.S.C. § 1851(a)(2); 50 C.F.R. § 600.315 (Conservation and Management measures shall be based upon the best scientific information available).

¹⁰¹ Mariyetta Meyers, *Maximizing Scientific Integrity in Environmental Regulations: The Need for Congress to Provide Guidance When Scientific Methods are Inadequate or When Data is Inconclusive*, 12 ANIMAL L. 99, 106 (2005) [hereinafter Meyers].

¹⁰² *Intertribal Sinkyone Wilderness Council v. NMFS*, 970 F. Supp. 2d 988, (N.D. Cal. 2013).

¹⁰³ Meyers, *supra* note 101, at 111.

¹⁰⁴ Fleming, *Habitat Protection*, *supra* note 15, at 85.

members were fishermen or had experience in the fishing industry.¹⁰⁵ This is effective in the many regulations made benefiting the fishing industry as fishermen understand the business best. When it comes to conservation, fishermen are unlikely to have the same viewpoint as an environmental scientist. The MSA does not require a blend of backgrounds to constitute the council, only that each individual must have some knowledge in conservation and management or the harvest of the fishery resource in their geographic area.¹⁰⁶ Providing more balanced fishery councils, which would ideally include fishermen, conservationists, and environmentalists, would have the potential to better meet all of the MSA standards; their differences could also delay or stall progress. Some councils have addressed the fact that views are often polarized and have added conservationists, academics, and state officials¹⁰⁷ and still failed to obtain a balanced council. The diverse opinions and political views are reportedly making hearings and decisions on ocean management much more time consuming.¹⁰⁸ These delays based on different ideologies and political backgrounds not only exist at the council level, but also throughout the many agencies involved up to final approval.¹⁰⁹

4. Council Attitude

The councils may be biased towards fishing due to their makeup. Regardless, they have a history of refusing Congressional directives. In what could be seen as either furthering the fishing industry or failing to admit failure, many councils rebuked Congressional mandates on conservation following the SFA.¹¹⁰ Some councils claimed they had previously considered all habitat protections and would not revisit them, while others deferred creating habitat protection plans or never created new plans.¹¹¹

The problem here is twofold; not only can councils seemingly pursue their own objectives, but there is also not enough recourse against them when they do. A council can choose whatever scientific study to assist passing a management plan and ignore a stronger conservationist study. Conservationists and other groups can bring suit against the councils, but the courts often defer to the councils, thus creating a potentially biased council attitude. For example, councils have used the excuse that there is inadequate science to be certain of the adverse effects of some fishing to the environment.¹¹² When the issues revolve around key concepts like “adverse effect” or “science,” courts defer to the council’s interpretation of these words as Congress did not provide for specific definitions.¹¹³ Conservationists struggle against the priority Standard for optimum yield made more difficult against a biased council towards the fishing industry.

B. *Poor Legislation*

¹⁰⁵ Laurence, *supra* note 6, at 830.

¹⁰⁶ 16 U.S.C. § 1852(b)(2)(A).

¹⁰⁷ See Laurence, *supra* note 6, at 830.

¹⁰⁸ See *id.* at 830 n.35.

¹⁰⁹ Telephone Interview with Michelle Bachman, *supra* note 41.

¹¹⁰ See Conservation Law Foundation v. Evans, 209 F. Supp. 2d 1, 8 (D.D.C. 2001).

¹¹¹ Bilsky, *supra* note 7, at 68-69.

¹¹² *Id.*

¹¹³ Meyers, *supra* note 101, at 107.

1. Science Standard

As previously explained, the MSA calls for a standard of the “best science available” to be used in accordance with any council plan, yet this has not been defined.¹¹⁴ Many disputes that arise in the courts are centered around this concept of what is the best science available. At odds against each other is the conservationist’s view of the best science available to protect marine areas and the fishermen’s view of best science available to progress the fishing industry. These groups represent different viewpoints and offer different evidence to support them, and NOAA, under the Magnuson-Stevens Act, is under no duty to do their own independent research.¹¹⁵ This lack of scientific certainty adds fuel to the confusion for issues facing groups like the NEFMC. No independent research can lead a Fishery Council to favor one side or the other, and in most cases that ends up in support of the fishing industry.

Mariyetta Meyers addressed this issue of scientific integrity in an article and considered the need for Congress to amend the MSA.¹¹⁶ Her comment compared Congress’ approach with the International Dolphin Conservation Program Act (IDCPA) where Congress required the Agency to conduct independent scientific studies guided by a more specific science standard.¹¹⁷ Furthermore, for the scenarios where science does not fully address the issue, better guidelines should be enacted to aid agencies in dealing with “unclear science or competing objectives.”¹¹⁸

To date, Congress has reauthorized the Magnuson-Stevens Act but has not addressed the science issues. In the next reauthorization,¹¹⁹ it could aid in the conflict currently found among the NMFS. By conducting their own research, councils like NEFMC, could potentially avoid lawsuits challenging the arbitrariness of science. More importantly, a Congressional plan (if possible) could deal with the internal competing objectives of the fishing industry and conservation would alleviate concerns that a council decision violated the MSA since the councils would be following required steps.

2. Multitude of Laws

¹¹⁴ *Id.* at 106.

¹¹⁵ *Id.* at 111. *See* 50 C.F.R. § 600.315(b).

¹¹⁶ Meyers, *supra* note 101, at 127.

¹¹⁷ *Id.* at 117-119 (stating Congress’ more specific scientific research instructions involving types of studies needed and certain timeframes for those studies). *See also* IDCPA, 16 U.S.C. §§1411-1418.

¹¹⁸ Meyers, *supra* note 101, at 116 (stating Congress should have directives to conduct additional research studies if needed, how to proceed if science is inconclusive, and if still uncertain, fisheries should favor conservation over the fishing industry).

¹¹⁹ *See* Press Release, H.R. Comm. on Natural Resources, Chairman Hastings: Increased Flexibility Needed to Ensure the Magnuson-Stevens Act is Benefiting Fish, Fishermen (May 29, 2014), (available at <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=381462> (stating Congress recognizes the MSA does not work for some and that it needs changes, but no full reauthorization has been done at this time. Some bills have been brought up, but do not address the changes needed in this comment, regarding concerns over language used in the MSA)).

The MSA and SFA are the primary sources of legislation concerning ocean management.¹²⁰ As discussed earlier, the fishery management councils also face regulations from the National Environmental Protection Act, the Marine Mammal Protection Act, and the Endangered Species Act. It would be a challenge for any fishery council to effectively manage their region, while meeting the requirements of these five acts, producing optimum yield of fish stocks, producing a stellar example of conservation efforts. However, this list is not exhaustive; there are also executive orders, the National Ocean Policy, the Coastal Zone Management Act, the Clean Water Act, the Coastal Barrier Resources Act, the National Wildlife Refuge System Administration Act, the National Invasive Species Act, various State laws, and more.¹²¹ This hodge-podge of laws¹²² is a myriad of rules and regulations that may work well individually, but as a group leaves America with no universal ocean management policy. Instead, it leaves America with an assortment of repetitive laws, frustrating a seemingly simple task of habitat protection.

C. Conservation

A shift in focus centered more on conservation and habitat protection of marine resources needs to occur within the current system to more easily protect an area like Cashes Ledge. The first change must be with Congress. There simply is not enough support in Washington to push for more ocean management. Many ocean management laws have tried but failed to survive Congress due to limited chances at change or a lack of monetary support for existing programs.¹²³ Policies seem to follow money and ocean preservation is not a money business. Yet in light of historic depleted fish stocks, and scientists saying certain stocks may be unrecoverable, now more than ever may be the time to consider putting serious restrictions on the fishing industry. Paying fishermen for a time not to fish was once an option,¹²⁴ although unsuccessful at the time, this plan could be altered to work now. Further bans on fishing, like the Cod ban in New England, may also be options. A more conservationist approach, contrary to MSA Standard 8¹²⁵ requires a delicate balance of the Standards for the NMFS to negotiate. The shift towards conservation could also force fishermen to become better stewards.

After the focus is removed from generating profits, can effective ocean management policies be enacted? New ocean planning needs to be centered on the protection of vital marine

¹²⁰ Telephone Interview with Michelle Bachman, *supra* note 41.

¹²¹ Jason Patlis, *The National Marine Sanctuary System: The Once and Future Promise of Comprehensive Ocean Governance*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10932, 10942-10957 (2014) [hereinafter Patlis].

¹²² Chandler, *supra* note 25, at 87.

¹²³ See Angela T. Howe, *The U.S. National Ocean Policy: One Small Step for National Waters, but will it be the Giant Leap Needed for Our Blue Planet?*, 17 OCEAN & COASTAL L.J. 65, 96 (2011).

¹²⁴ 16 U.S.C. § 1861a(b) (The MSA authorizes a buyback plan to pay for a fishing vessel or their fishing license to help reduce overfishing, rebuilding stocks, or assisting conservation of the fishery); *Buyback Programs*, NOAA, <http://www.nmfs.noaa.gov/sfa/Part2cont.pdf> (last visited Apr. 8, 2015) (details accounts of past buyback programs).

¹²⁵ 16 U.S.C. § 1851(a)(8); 50 C.F.R. § 600.345 (Conservation and Management measures shall take into account fishing communities and minimize the economic impact to such communities); *see also* Laurence, *supra* note 6, at 832-833.

ecosystems and fish habitats. In time, fish stocks may be strong enough to endure fishing. These changes may be too drastic to be done in a future reauthorization of the MSA. Rather than fixing multiple flawed parts of the MSA, a new ocean management policy, which addresses these flaws, needs to be created.

History has shown the ineffectiveness of the MSA, and in New England especially, its original intentions have failed. President Obama has introduced a planned National Ocean Policy,¹²⁶ yet it still focuses on the economy of the ocean rather than the protection of it.¹²⁷ Any final adopted National Ocean Policy would be a start to the protection that many marine habitats need to aid in the rebuilding of many fish stocks. In hopes of not repeating the past, any future ocean policy needs to be ecosystem based. Furthermore, it needs to balance the many responsibilities current ocean management already has under one law without internalized conflicts.¹²⁸ Any future ocean policy needs to look at the bigger picture and how to best plan and organize ocean management; such a policy should consider things like recreational fishing versus commercial fishing, scientific research, energy development, and mining,¹²⁹ while also recognizing the importance of a healthy ecosystem for these activities, and the protection of marine habitats as a centerpiece for management.¹³⁰ Other concerns for a better ocean policy would be the separation of conservation decisions from the fishing management decisions and rid councils from the built-in conflicts of the MSA Standards.¹³¹ This would involve separating the NEFMC of its responsibility of both habitat protection and fishery management. Lastly, to reduce the repeated attempts at fixing overfishing and risk having to consider opening banned fishing zones, better accountability needs to be implemented at the fishery level to enable easier enforceability of catch limits.¹³²

For Cashes Ledge, the MSA brings uncertainty, confusion, and likely no protection. A universal ocean policy that addresses the major concerns for Cashes Ledge would hopefully be one that protects habitats first as a means of preserving fish stocks, while eliminating the red tape involved in agency decisions regarding ocean management and habitat protection.

V. ALTERNATIVES TO COUNCIL ACTION

Not only is there an internal conflict within a fishery council's management regulations, it is a lengthy process from the time a plan is researched and approved at the council level until it moves up the ranks for final approval from the Secretary of Commerce. Rather than the lengthy process to amend the MSA or the NOAA/NMFS regulations, this part of the comment will look at legislations already in effect in the United States that could potentially eliminate the conflicting issue of regulating the fishing industry at the Council level, in special habitats like Cashes Ledge.

¹²⁶ National Ocean Council, National Ocean Policy Implementation Plan (2013), (available at <https://www.whitehouse.gov/administration/eop/oceans/implementationplan>).

¹²⁷ *Id.* at iii, 5-8.

¹²⁸ *Community harvesters want port protections, sound science in Magnuson renewal*, SEAFOOD NEWS, Sept. 10, 2014, <http://www.savingseafood.org/management-regulation/community-based-commercial-harvesters-want-port-protections-sound-science-in-magnuson-re.html>

¹²⁹ See Fleming, *Twenty-Eight Years*, *supra* note 17, at 610-611.

¹³⁰ *See id.*

¹³¹ *Id.* at 612.

¹³² *Id.* at 614.

A. *Antiquities Act*

The Antiquities Act was created in 1906 out of a need to protect American archeological sites and artifacts.¹³³ It authorizes the President to declare areas of scientific or historic interest as national monuments,¹³⁴ which in many cases are later turned into national parks or memorials by Congress.¹³⁵ The use of the Antiquities Act authorizes the President to immediately protect an area, bypassing Congress.¹³⁶ Such popular attractions that have been protected are the Grand Canyon and the Statue of Liberty.¹³⁷

Presidents have made much use of the Antiquities Act and applied it to marine areas as well. Reefs and habitats from Hawaii and California and many others have been declared protected by the Antiquities Act.¹³⁸

Since its enactment, nearly every President has used the Antiquities Act to protect an area or landmark.¹³⁹ However, there is no set criteria for what constitutes a President to use the Antiquities Act. Are the many qualities of Cashes Ledge enough to make this President or the next declare it a national monument? Consider when President G.W. Bush made the Papahānaumokuākea Marine National Monument in Hawaii. He was protecting a coral reef, 1,750 marine species not found anywhere else, a rich history of Hawaiian indigenous communities, and 140,000 square nautical miles.¹⁴⁰ The 550 square miles of unique kelp forest and Cod habitats of Cashes Ledge seem minor to that; however, in light of the record low Cod stock, the area could possibly garner the attention of the president. If the president chose to invoke the Antiquities Act for Cashes Ledge, it would be unlikely for him to be met with challengers as no court has rejected a presidential declaration to date.¹⁴¹

A president's use of the Antiquities Act may or may not be politically motivated to bypass stalled efforts of conservation in Congress. Whatever a president's motives, the results are fast. Speed is the strongest point for the Antiquities Act and that may be something future conservation policies need to address. Current guidelines and regulations of the NMFS require a process that takes time and is subject to multiple reviews and possible litigation. During that time, current fishing procedures are resulting in overfishing and unacceptable bycatch amounts. If the right

¹³³ *Antiquities Act*, NATIONAL PARK SERVICE, www.nps.gov/archeology/sites/antiquities/about.htm (last visited Mar. 5, 2015).

¹³⁴ *Id.* See Antiquities Act, 16 U.S.C. §§ 431-433 (2006).

¹³⁵ See Morris, *supra* note 8, at 195-196.

¹³⁶ See Howe, *supra* note 123, at 81 (highlighting President G.W. Bush's use of the Antiquities Act to protect a reef that legislators had been trying to protect for over five years).

¹³⁷ See *Antiquities Act*, WILDERNESS.ORG, <http://wilderness.org/article/antiquities-act> (last visited Mar. 5, 2015) [hereinafter WILDERNESS].

¹³⁸ Morris, *supra* note 8, at 193-194 (President Kennedy used it to protect a reef in the Virgin Islands; President Clinton used it to protect all reefs and shoreline habitats of California's coast, and President G.W. Bush used it on one of the largest coral reefs around Hawaii).

¹³⁹ WILDERNESS, *supra* note 137.

¹⁴⁰ Morris, *supra* note 8, at 203-206.

¹⁴¹ *Id.* at 191 (stating the Antiquities Act has rarely been challenged, and when it was first addressed, the precedent set by the President's use of the Act was enough for the Supreme Court to invalidate the challenge).

channels were made to a president who was not afraid of going against the New England fishing industry, Cashes Ledge and similar areas could get instant protection. We would not wait more than five years on potential amendments from councils to find out whether or not trawling and fishing would resume, thereby risking potential habitat destruction.

As good as the Antiquities Act seems, nothing is without flaws. The Antiquities Act is subject to some criticism over its potential use on marine environments as it was initially created for land protection.¹⁴² The Antiquities Act offers quick protection, but leaves management and enforcement in doubt¹⁴³ and does not mention protection of any resources found in the waters.¹⁴⁴ Additionally, Congress has transferred many protected monuments to the National Park Service for management and NOAA, through the Marine Sanctuaries Act, has assumed control over one marine designation under the Antiquities Act.¹⁴⁵ Either way, it took acts of Congress, pursuant to presidential action, to secure management for these areas. Congress can also remove or reduce designations made by the president.¹⁴⁶ It is likely, however, Congress would address these issues individually as they arose if Cashes Ledge and similar areas were afforded protection under the Antiquities Act. But for how long and to what extent it would be managed and fully protected is unknown. It may be best though, to use the Antiquities Act to provide instant protection on areas like Cashes Ledge while Congress addresses the other issues in the MSA, the Marine Sanctuary Act, and other similar Acts.¹⁴⁷ It is possible that more protective designations of marine monuments would force Congress to initiate increased and concentrated efforts into ocean issues.

B. *National Marine Sanctuary Act*

The National Marine Sanctuaries Act,¹⁴⁸ enacted in 1972, allows the Secretary of Commerce, through NOAA, to designate and manage marine sanctuaries in the form of coral reefs, sunken historical vessels, and unique habitats.¹⁴⁹ Before a sanctuary is officially designated, however, it must survive NOAA factors, congressional approval, notice and comment rulemaking, a second trip through Congress, other affected agencies, and the Regional Fishery Management Council for any potential issues with the fishing industry.¹⁵⁰ This lengthy process may point to the

¹⁴² See Patlis, *supra* note 121, at 10950.

¹⁴³ *Id.*

¹⁴⁴ Chandler, *supra* note 25, at 126.

¹⁴⁵ See generally Patlis, *supra* note 121, at 10950; *Legislation*, NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION NAT'L MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/about/legislation/welcome.html> (last visited Sept. 26, 2014), [hereinafter *Legislation*, NOAA].

¹⁴⁶ Morris, *supra* note 8, at 195.

¹⁴⁷ See *id.* at 208.

¹⁴⁸ National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (2006).

¹⁴⁹ *Legislation*, NOAA, *supra* note 145; 16 U.S.C. § 1433.

¹⁵⁰ Morris, *supra* note 8, at 184-186; Patlis, *supra* note 121, at 10936-10938.

reason that there are only thirteen National Marine Sanctuaries¹⁵¹ compared to over 100 national monuments.¹⁵²

A sanctuary designation would protect areas like Cashes Ledge from the destruction of the seabed,¹⁵³ preserve the waters for species dwindling in numbers, like the Cod, and keep the areas open as classrooms for scientists and playgrounds for divers.¹⁵⁴ The Sanctuary Process, at one time, involved NOAA keeping a Site Evaluation List (SEL) for ongoing considerations of designating an area a national sanctuary.¹⁵⁵ The designation process took much longer than expected¹⁵⁶ and like with the MSA, communicating up the chain to the Secretary of Commerce added difficulties and delays.¹⁵⁷ NOAA deactivated the SEL system in 1995 citing a need to be revised.¹⁵⁸ It was still deactivated in 2013 when Peter Morris wrote his article on the need for the Antiquities Act to be used to protect sanctuary sites until something could be done to address some issues in the Sanctuaries Act.¹⁵⁹

Since the Morris article, NOAA established the public nomination process of a marine sanctuary effective in June 2014.¹⁶⁰ The process does not replace the SEL, but is similar to a program in place before SEL. Communities are asked to send a nomination to NOAA based on several factors: special significance of natural resources, maintenance of critical habitat, potential tourism that depends on conservation of the area, opportunity for marine science research and education, how current or future use threatens the area's resources, and community based support.¹⁶¹

Speed is still not a quality of the sanctuary process. After nomination, the proposal will be reviewed two separate times by NOAA before possible acceptance.¹⁶² An acceptance does not mean designation; it only means the nominated area is placed on an "inventory" that will then need to go through the whole congressional method before actually becoming a national marine

¹⁵¹ *Frequently Asked Questions*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NATIONAL MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/about/faqs/welcome.html#4> (last visited Sept. 26, 2014) [hereinafter *Frequently Asked Questions*, NOAA].

¹⁵² *Monument Designation FAQs*, THE WILDERNESS SOCIETY, <http://wilderness.org/article/existing-monuments> (last visited Mar. 5, 2015).

¹⁵³ *Regulations*, NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION NAT'L MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/protect/regulations/welcome.html> (last visited Mar. 5, 2015). See Office of National Marine Sanctuaries Regulations, 15 C.F.R. § 922.

¹⁵⁴ *Frequently Asked Questions*, NOAA, *supra* note 151.

¹⁵⁵ Morris, *supra* note 8, at 183.

¹⁵⁶ Owen, *supra* note 9, at 725-726.

¹⁵⁷ See Patlis, *supra* note 121, at 10937.

¹⁵⁸ Morris, *supra* note 8, at 183.

¹⁵⁹ *Id.* at 208.

¹⁶⁰ Patlis, *supra* note 121, at 10959; Re-Establishing the Sanctuary Nomination Process, 79 Fed. Reg. 33851 et seq. (June 13, 2014).

¹⁶¹ *Id.*

¹⁶² *Sanctuary Nomination Process*, NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION NAT'L MARINE SANCTUARIES, www.nominate.noaa.gov (last visited Mar. 5, 2015).

sanctuary. This could take years. At the time this article was written, one nomination was under NOAA review, two have already been declined, and two have passed as successful nominations.¹⁶³

Speed is not the only concern of the Sanctuary Act. The fact that only thirteen sanctuaries have been established in nearly forty years is more likely attributable to the ambiguous nature of the Sanctuary Act, due to an internal battle for resource protection.¹⁶⁴ An example of its ambiguity concerns the fact that it states NOAA “may designate” a sanctuary; however, it implies there is no guarantee or obligation to actually establish a sanctuary.¹⁶⁵ Many conflicting viewpoints are involved in the process, political or not, especially in regards to the use restrictions of certain protected areas.¹⁶⁶ The Sanctuary Act has been routinely underfunded¹⁶⁷ and has had little use as the MSA gained strength in managing ocean policy.¹⁶⁸ Though it has protected some areas, it is oftentimes seen as insufficient¹⁶⁹ in overall protection and preservation, since the thirteen sanctuaries are not nearly as protected as a national park.¹⁷⁰ Use of the Sanctuary Act for areas like Cashes Ledge would have to survive the nomination process, the approvals of NOAA and the Secretary of Commerce, battles through political views, and shortages of funding before even having a chance of becoming a sanctuary. Even if the proposed sanctuary survived these challenges, there is still no guarantee of permanent protection. That chance seems even slimmer when considering the intra-departmental conflicts arising within NOAA as it governs both the sanctuary system and the fishery management system. Just as the MSA appears to have a built-in controversy, likewise NOAA is forced to consider sanctuaries that might oppose fishery management plans.¹⁷¹ Any proposal to consider Cashes Ledge a sanctuary would likely be challenged by the NEFMC under this premise.¹⁷²

C. Which one?

The Antiquities Act is an example of one of the many laws that allows protection, but the Sanctuary Act was designed with the purpose to do more for areas like Cashes Ledge. It was created as an attempt to harmonize ocean management in the United States¹⁷³ with purposes of permanently protecting marine environments, managing sanctuaries and supporting scientific

¹⁶³ *Nominations*, NAT’L OCEANIC AND ATMOSPHERIC ADMINISTRATION NAT’L MARINE SANCTUARIES, www.nominate.noaa.gov/nominations/ (last visited Mar. 5, 2015) (NOAA has successful nominations of Malloys Bay in the Potomac River and Lake Michigan; they have declined nominations for Eubalaena Oculina in Florida and the Aleutian Islands in Alaska; at this time they are reviewing a nomination for Chumash Heritage in California).

¹⁶⁴ Chandler, *supra* note 25, at 17.

¹⁶⁵ Owen, *supra* note 9, at 720; *see* 16 U.S.C. 1433(a).

¹⁶⁶ Patlis, *supra* note 121, at 10940-10941; *see* Chandler, *supra* note 25, at 17.

¹⁶⁷ Patlis, *supra* note 121, at 10941.

¹⁶⁸ Chandler, *supra* note 25, at 106.

¹⁶⁹ *Id.* at 22.

¹⁷⁰ *Id.* at 3.

¹⁷¹ Morris, *supra* note 8, at 186.

¹⁷² Telephone Interview with Michelle Bachman, *supra* note 41.

¹⁷³ Owen, *supra* note 9, at 718.

research.¹⁷⁴ The Sanctuary Act has its limits and obstacles,¹⁷⁵ but should be the starting point for the preservation and protection of marine areas. The new public notice and comment rules are the start to a much needed change in the Sanctuary Act to achieve its original goals.¹⁷⁶ More change is necessary as ocean management is in need of more conservation-led legislation in today's world. The Sanctuary Act has been critiqued for over ten years as insufficient and in need of amendment, and the only significant change has been an added proposal system. To achieve what the Sanctuary Act is capable of would call for more drastic action. Similar to possible changes to the MSA, shifting the designative authority to either Congress or the people in a more streamline effective manner, and leaving only the duty of management and protection to NOAA, could lead the way for more sanctuaries,¹⁷⁷ perhaps even the Cashes Ledge Sanctuary.

VI. CONCLUSION

Cashes Ledge may be a great example of the dilemma facing ocean management and habitat protection in our country. Unfortunately, it would be a surprise to see the implementation of a permanent protection plan. The NMFS has many responsibilities, governed by many regulations, yet, a seemingly simple task of preserving Cashes Ledge is swallowed in controversy. Controversy may be beneficial to the protection of areas like Cashes Ledge because its needed protection would not be possible without first having such controversy.¹⁷⁸

The MSA governs most of what a fishery council can do, yet the Act itself leads to multiple lawsuits and indecisions over conservation among their fishery management plans. Conservation under the MSA seems to only concern the conservation of fish stocks and any habitat protection is done only as a means to replenish depleted stocks. To regain its status as a major impact on conservation efforts, the MSA needs to be drastically modified. Legislative amendments need to address the conflicts amongst the Standards themselves, especially in regards to conservation of habitats. More specific definitions and procedures need to be added to facilitate fishery council management. These changes need to happen not only to address the lack of habitat protection, but the ongoing depletion of fish stocks, like the Cod. As the MSA stands now, fishery councils are taking reactive measures to fishery problems and areas, like Cashes Ledge, are only receiving protection due to the safe havens it provides. When, or if, stocks like Cod return to normal, Cashes Ledge will likely not get any protection from the MSA as the NEFMC now interprets it.

The MSA fails to offer habitat protection to Cashes Ledge, while other acts and statutes also fail to offer broad protection of this area. The Antiquities Act can provide instant protection, but that protection may get lost in uncertain management or deleted by an act of Congress. The Marine Sanctuaries Act was designed to protect areas like Cashes Ledge. However, it is unlikely to get the protection afforded to a marine sanctuary due to the extensive approval process, in addition to the intra-departmental politics within NOAA.

As circumstances stand today, it is unlikely that Cashes Ledge will get the permanent protection it deserves. This fault in the system exemplifies that the current system is not working, legislation needs to be amended, and more importantly, a conservationist mindset needs to replace

¹⁷⁴ Patlis, *supra* note 121, at 10936.

¹⁷⁵ *See id.* at 10937.

¹⁷⁶ *Id.* at 10959.

¹⁷⁷ Owen, *supra* note 9, at 756.

¹⁷⁸ Owen, *supra* note 9, at 757.

the money-making ideals of our policymakers. If these measures are not taken, we will find that we acted too late to protect our marine environments, to strengthen our oceans and fish stocks, and that ultimately, we failed to keep our oceans flourishing with life.