



Marine Resources Committee Newsletter

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CO-CHAIRS' COMMENTS

**Patrick A. Flanigan
Mike Wascom**

Marine Resource Committee Co-Chairs

Both of this newsletters' articles, by Bradley P. Harris and Chad J. McQuire and by Mike Mastry, respectively, relate to issues and recommendations made in the U.S. Oceans Commission and Pew Ocean Commission Reports. These reports prominently discuss management of large marine ecosystems and fisheries resources and the use of regional ocean councils to address such issues.

The reports discuss the possibility of using the Regional Fishery Management Council (RFMC) model as a starting point for councils that address federal, state, and local ocean issues as a collaborative process. The fact that the RFMCs still struggle with ecosystem and jurisdictional issues after thirty-two years raises the issue of their usefulness as models for Regional Ocean Councils.

We thank our authors for sharing their time and articles for the newsletter issue. Our Marine Resources Committee Newsletter is a perfect opportunity to you to contribute you expertise in an issues(s) with other committee members. We welcome all submissions. For further information on submitting an article contact our newsletter editor, Robin Craig, at rcraig@law.fsu.edu.

Best wishes.

FLORIDA'S COMMERCIAL SHARK FISHING INDUSTRY SEEKS DECLARATION OF FISHERY FAILURE UNDER THE MAGNUSON-STEVENSONS ACT DUE TO REGULATORY RESTRICTIONS

Mike Mastry

When Congress passed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (the Magnuson-Stevens Act) it included a small yet potentially far-reaching amendment to Section 312(a). This section provides for fisheries disaster relief to an affected state or fishing community when the Secretary of Commerce (the Secretary) determines that the state or community has suffered a commercial fishery failure. Prior to amending the Magnuson-Stevens Act in 2006, Section 312(a) provided that a fishery failure could result from natural causes, man-made causes beyond the control of fishery managers to mitigate through conservation and management measures imposed to protect human health or the marine environment, or from undetermined causes. In amending Section 312(a), Congress included "regulatory restrictions" among the man-made causes that are beyond the control of fisheries managers to mitigate through conservation and management measures as events that qualify for disaster relief funding.

By including regulatory restrictions among the causes for which disaster relief can be provided to a state or fishing community under the Magnuson-Stevens Act,

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Congress seems to have recognized that in some situations the federal regulations that govern a fishery can be so burdensome and have such a devastating economic effect that the viability of the regulated community could be placed in jeopardy. An example of such a situation is illustrated through the commercial shark fishing/processing community in the state of Florida, which is attempting to be the first such community to receive federal disaster aid as a result of regulatory restrictions.

Florida's commercial shark fishermen make up more than 50 percent of the nationwide fleet. Moreover, the majority of the shark fin and meat processors in the United States are located in Florida. Historically, Florida's commercial shark fishing industry has been economically vibrant, with the height of the industry's success coming in the mid-1990s when commercial landings exceeded 80 million pounds and produced revenues of nearly \$22 million annually. In addition, revenue from shark fin and meat processors exceeded \$5 million per year during that time. Shark landings and revenue numbers remained strong and fairly stable until 2000, when the federal government, acting through the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS), initiated a series of regulations that culminated in November 2007 with a regulatory closure of the industry that will allow zero landings (and zero revenues) during the first several months of 2008.

With the federal regulations that the government began to implement in the early 2000s, the commercial shark fishing industry saw a dramatic decline in landings and a corresponding industry wide decline in revenues derived from those landings. In 2001, restrictive federal harvest quotas resulted in annual catch and annual revenues declining from nearly 35 million pounds and \$11 million in 2000 to approximately 15 million pounds and \$7 million in 2001 (a 67 percent drop from 1996 levels). Shark fin and meat dealers and processors also saw a decline in revenues during that same period of time. For the next five years the harvesting quotas and, hence, revenues remained fairly stable, hovering between approximately 12-15 million pounds and \$6-\$8 million annually. During this period of time, members within Florida's commercial shark

fishing industry continued to derive their income from bringing the available quota to market.

In 2007, the federal government sharply decreased the landings quota available to industry participants, resulting in great economic hardship to Florida's commercial shark fishing industry. This sharp decrease in available quota was caused largely by a governmental data processing error in calculating the amount of sharks that had been harvested in 2006, which caused NMFS to allow the 2006 shark fishery to remain open long after the available quota had been harvested, resulting in large quota overages. Under the federal regulatory scheme governing the commercial shark fishery, any quota overages from a fishing season in one year (the year is equally divided into three fishing seasons or "trimesters") are deducted from the available quota for the corresponding season during the following year. Therefore, due to the 2006 overages, very little of the 2007 shark quota was available for harvest by industry participants. During the first four months of 2007 in the Gulf of Mexico (which is where the majority of the sharks are harvested and the harvesting is carried out primarily by Florida fishermen), the commercial Large Coastal Shark fishing season was open for only the first fifteen days of January and the available quota was reduced from 222.8 tons in 2006 to 62.3 tons in 2007.

Then, in November 2007, NMFS published the available quotas and open seasons for the first two trimesters of 2008. Although there was at least some quota available to be harvested, NMFS chose not to allow commercial harvest of the quota and closed the first and second trimesters of 2008 to commercial harvest altogether. As a result of these regulatory restrictions, the commercial shark fishers and processors within the state of Florida are seeking a declaration of a commercial fishery failure and disaster relief funding based upon the amended language of section 312(a) of the Magnuson-Stevens Act.

The first step to obtaining disaster relief under the Magnuson-Stevens Act is the making of a request to the Secretary that a fishery failure be declared. Pursuant to Section 312(a), such a request can be made by either the fishing community or, as has been

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The online versions of the publications contains all the articles found in the paper copies, created in .pdf format.

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the practice in past fishery disaster relief situations, from the governor of an affected state. Florida's commercial shark industry has formally requested that Florida Gov. Charlie Crist seek a declaration of fishery failure from the Secretary and federal disaster relief due to the regulatory restrictions that have been placed on the fishery. Gov. Crist then asked the Florida Fish and Wildlife Conservation Commission (FWC) to look into the industry's request and report back to him with recommendations.

The FWC conducted an extensive review of the history and current state of Florida's shark fishing industry and produced a detailed report on the industry from 1950 to present. The issue was also taken up by the FWC and public comments were heard at its recent commission meetings on Feb. 7, 2008. There the public was strongly in favor of the need for disaster relief and commission members voted to support the industry's request and recommend to Gov. Crist that he seek a declaration of fishery failure and disaster relief funding from the federal government on behalf of Florida's commercial shark industry.

Subsequently, on Feb. 29, 2008, Gov. Crist sent a letter to the Secretary formally requesting that he approve federal fisheries disaster relief for Florida's many fishermen and processors engaged in the commercial shark industry. In his letter, Gov. Crist points out that such relief is warranted and meets the requirements of Section 312(a), and he specifically states that "the quota system in place for the commercial fishery has resulted in severe economic hardship" to Florida's commercial shark fishers and processors. Although Gov. Crist's formal request of the secretary is good news for members of Florida's commercial shark industry, and it marks the passage of the industries first significant hurdle in the process of obtaining federal relief, it seems that the real battle still lies ahead.

The difficulty of obtaining a declaration from the Secretary that a fishery has suffered a failure due to regulatory restrictions is illustrated by the recent request made by the governor of Massachusetts and several other New England states on behalf of the members of New England's commercial fishing

industry. There, it was clearly illustrated that due to regulatory restrictions placed on the fisheries in New England the commercial fishers were undergoing great financial hardship. The request of the governors, which had the full support of Sens. John Kerry and Edward Kennedy, was denied by the Secretary in October 2007. Subsequently, a resolution was unanimously passed by the U.S. Senate and forwarded to the Secretary requesting that he reconsider his decision concerning the denial of the requested relief. Nevertheless, within hours of the transmission of a resolution supported by every member of the U.S. Senate, the Secretary, through NOAA, reiterated the denial and maintained that the commercial fisheries of New England are not failing and no disaster relief would be forthcoming.

If this result is any indication of the probability of success for Florida's commercial shark fishing industry, it seems the Secretary is not likely to find that Florida's shark fishery has suffered a failure and that no disaster funding should be provided, even though relief may actually be warranted. The ramifications of a finding to the contrary would be tremendous and one need not stretch their imagination too far to envision the tidal wave of requests for relief due to overly burdensome regulatory restrictions that would flood the federal government if the Secretary finds that such relief is warranted in this instance.

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LIKE TO WRITE?

The Marine Resources Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors or identifying issues, please contact Robin Craig at (850) 644-0726 or rcraig@law.fsu.edu.

OPERATIONAL ISSUES IN U.S. FISHERIES MANAGEMENT: WHAT ARE SOME OF THE MAJOR SCIENTIFIC, POLITICAL, AND LEGAL HURDLES TO IMPLEMENTING ECOSYSTEM-BASED MANAGEMENT?

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Introduction

The purpose of this article is to identify a number of issues regarding U.S. fisheries management that are currently being explored by the authors. The main categories of issues, from a legal context, are as follows: (1) Can ecosystem-based management be operationally implemented in a scientifically-sound manner under current regulatory practice?, (2) Is the current scope of judicial review constructive in furthering ecosystem-based management goals?, and (3) Is there a need to consider ecosystem-based property interests in order to properly protect fishery resources? The hope in identifying these perceived issues to a wider legal audience is to obtain input from academics and practitioners in the legal field.

Questions for Review

Issue No. 1: Can ecosystem-based management (EBM) be operationally implemented in a sound scientific manner under current regulatory practice?

The operational issues impeding movement U.S. fisheries from present management practices towards EBM are substantial. They include conflicting management objectives, present jurisdictional boundaries and management units, and most importantly, a high degree of uncertainty about fundamental marine ecosystem processes.

Objectives: The Magnuson Act (MSA) establishes maximum sustainable yield (MSY) as the standard for fisheries sustainability. 16 U.S.C. 1802(3)(33)(B). MSY is based on principle of surplus stock production as a function of stock size and has units of biomass (weight). EBM essentially reverses the order of management priorities to start with the ecosystem rather than the target species and as of yet has no general underlying principles or standard units for management (Pikitch, *et al.* (2004): *Ecosystem-Based Fishery Management*, Sci. 305 (5682), 346).

Boundaries and units: Present international and domestic jurisdictional boundaries (e.g., EEZ, COLREGs), and regional fishery management areas (those areas managed by the eight regional councils) may be problematic for EBM. While these boundaries generally serve for fish stock management, they do not reflect ecosystem processes. For example, Gulf Stream waters cross three management regions (south Atlantic, mid-Atlantic, and New England). Furthermore, the MSA limits NOAA Fisheries to consultation authority over other federal or state agency actions which may impact fisheries.

Uncertainty: Shifting from single or multiple species management to EBM dramatically increases the uncertainty facing fishery managers. Ultimately, EBM is about predicting how an ecosystem will behave under a given amount of anthropogenic disturbance (in this case, fish extraction). At continental shelf scales (10^2 - 10^5 km²), where most U.S. fisheries occur, even the most basic ecosystem components (e.g., benthic substrates) are largely unstudied. Understanding temporal and spatial characteristics of these components is foundational to uncovering the links between fish production and ecosystem function. For the past thirty years, NOAA Fisheries has conducted surveys towards the stock assessment objectives established by the MSA. The agency and Regional Fishery Councils rely heavily on these survey time-series for predicting fish stock status and setting harvest regulations. Despite some recent changes in terminology (some fisheries trawl surveys are now referred to as “ecosystem surveys”), the sampling designs and devices (e.g., otter trawls) ultimately determine the state of information, which presently

illuminates very little about the ecosystems intended for management.

Issue No. 2: Is the current scope of judicial review constructive in furthering ecosystem-based management goals?

The shift in approach to managing U.S. fisheries resources presents scientific, political, and legal challenges. The present standard of review (arbitrary and capricious) and doctrine of deference towards federal agency actions may constitute a problem in the changing arena of fisheries management. Constraining legal review to the bureaucratic process and overlooking the substantive content of federal agency actions preempts rigorous review of federal actions critical to achieving reasonable fishing regulations promulgated under the EBM approach.

One suggestion may be congressional alteration of the legislative mandates under the MSA to allow for broader judicial review. Congress may also opt to specifically outline agency responsibilities under the MSA to clearly demarcate responsibilities for EBM implementation. Both of these suggestions would allow for a more meaningful judicial review of the scientific basis for the agency's ecosystem decision-making. Such review may draw heavily on the academic community where the majority of ecosystem research has been conducted.

Issue No. 3: Is there a need to consider ecosystem-based property interests in order to properly protect fishery resources?

A final question to consider is how to frame the ecosystem interest at stake in fisheries management. Should ecosystems be given an elevated property interest similar to more traditionally recognized interests? Maybe ecosystem-based management would be easier if the ecosystem itself were given the same level of property right as other resources, for example, target fish species. By doing so, the federal and state governments, as public trustees of the marine environment, can more effectively create controls to protect the ecosystem resource. In addition, an economic valuation of the ecosystem may also be

possible through property-status recognition, allowing for competing interests to create fisheries resolution strategies based on a clearly defined economic continuum. Moreover, by establishing a property right in the ecosystem resource, legal mechanisms can more easily reconcile the competing interests involved.

Conclusion

Current fisheries management in the United States is at an important turning point. There are operational questions as to whether ecosystem management can be implemented successfully. Questions regarding the scientific basis, current judicial review limitations, and the "property interest" relating to marine ecosystems should be discussed in order to move towards an efficient and effective fisheries management regime.

*The authors welcome the comments and questions from readers. **Brad Harris** can be reached at bharris@umassd.edu. **Chad McGuire** can be reached at cmcguire@umassd.edu.*

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Calendar of Section Events

**Global Warming II: How the Law
Can Best Address Climate Change
(36th National Spring Conference
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June 6, 2008

Baltimore, Maryland

(Cosponsored with the ABA Standing
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ABA Annual Meeting

Aug. 7-12, 2008

New York, New York

16th Section Fall Meeting

Sept. 17-20, 2008

Phoenix, Arizona

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