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# AMERICAN LOBSTER FISHERY MANAGEMENT UNDER THE ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT ACT: AN ATTEMPT AT COOPERATIVE FISHERY JURISDICTION

*Erik T. Barstow\**

## I. INTRODUCTION

After the elections in 1994, the Republican party cited their newly gained power over the Senate and the House of Representatives<sup>1</sup> as a call by Americans for smaller government, deregulation, and a return of power to the states. Political leaders from both sides of the aisle responded in kind, albeit with varying degrees of deference to existing federal based power. In step with this federalist mandate, in late February and early March of 1995, President Bill Clinton announced the Regulatory Reinvention Initiative, to reform the federal regulatory system.<sup>2</sup>

Fishery management has become a proving ground of this regulatory reform and the call for return of power to the states. In 1996 the Atlantic lobster fishery became the target of this emerging federalism. Lobster fishery management, it is contended, is a prime example of a federal regulatory scheme that is better suited to state management. As a result, in late March 1996, the National Marine Fisheries Service (NMFS) an-

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1. The Republican party last gained control over both the Senate and the House of Representatives in 1946. Edmund L. Andrews, *Giving Business a Chance to Test the Wings of Deregulation*, N.Y. TIMES, Jan. 2, 1996 at C1.

2. Greg Pierce, *President Battles GOP Rule Freeze, Offers Own Plan to Ease Regulation*, WASH. TIMES, Feb. 22, 1995, at A6.

President Clinton ordered review of agency regulations with an eye towards eliminating regulatory measures that are outdated or in need of reform. This review is to consider whether the goals of a particular regulation could be achieved in "more efficient, less intrusive ways," as well as consideration of whether states or local governments could do the job. *Id.*

nounced its intention to withdraw approval of the federal Fishery Management Plan for the American Lobster Fishery (Lobster FMP) and implementing regulations.<sup>3</sup> Conservation and management of the lobster fishery, proposed the NMFS, could be managed by the states through the Atlantic States Marine Fishery Commission (ASMFC).<sup>4</sup> The NMFS called upon the ASMFC to further develop its lobster coastal management plan (CMP) and to develop regulations under the authority of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA).<sup>5</sup>

NMFS cited the President's Regulatory Reinvention Initiative as a reason for its withdrawal<sup>6</sup> of approval of the existing Lobster FMP.<sup>7</sup> NMFS also determined that withdrawal of the Lobster FMP would not compromise the identified resource management and conservation objectives for the fishery.<sup>8</sup> NMFS further supported its action by asserting that withdrawal of the Lobster FMP appeared necessary due to increasing concerns regarding whether the FMP was consistent with Magnuson Act national standards.<sup>9</sup> As a final reason for its action, NMFS expressed its intention that federal management of the American lobster fishery be consistent with state lobster management programs.<sup>10</sup>

Despite being heralded as a shift to state management, a detailed analysis of the management scheme provided under the ACFCMA shows that while authority for development of the lobster plan lies with the states, via the ASMFC, there remains a significant role for the federal government acting through the Secretary of Commerce. In fact, withdrawal of approval of the Lobster FMP and its implementing regulations presents opportunities for state and federal cooperation in management of the lobster fishery. The

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3. American Lobster Fishery; Removal of Regulations 61 Fed. Reg. 13,478 (1996) (to be codified at 50 C.F.R. pt. 649) (proposed Mar. 27, 1996).

4. *Id.* at 13,478-79.

5. *Id.* The NMFS specifically noted that recent amendments to the ACFCMA now provided for "state compliance to coastal management plans implemented by the ASMFC and, therefore, is a more appropriate vehicle to support the effective implementation of these plans." *Id.* at 13,479. See *infra* Part II.C.2, for discussion of implementation of federal regulations under the ACFCMA.

6. American Lobster Fishery; Removal of Regulations, 61 Fed. Reg. 13,478.

7. The existing Lobster FMP was promulgated pursuant to the Magnuson Fishery Conservation and Management Act (Magnuson Act). See *infra* Part III.B, for a complete discussion of the Lobster FMP under the Magnuson Act.

8. American Lobster Fishery; Removal of Regulations, 61 Fed. Reg. at 13,478.

9. *Id.* at 13,479. See *infra* note 98 for a discussion of the Magnuson Act national standards.

10. American Lobster Fishery; Removal of Regulations, 61 Fed. Reg. 13,478 (1996) (to be codified at 50 C.F.R. pt. 649) (proposed Mar. 27, 1996).

ACFCMA presents novel management opportunities by reducing constraints on the exercise of state jurisdiction over federal waters, as well as by providing the NMFS with greater authority to affect state activities within state waters. Indeed, it is this "blurring" of jurisdictional boundaries that has provided the opportunity at hand. The ability of ASMFC to utilize the enhanced cooperative and jurisdictional authority of state and federal agencies in the management of the lobster fishery may serve as a model for future management of other fisheries. The ASMFC plan will test the willingness of the federal government to serve merely as a conduit for state management measures without overstepping its apparently enlarged authority within state waters.

The states, for their part, must exercise sound judgment in the development of an appropriate lobster management regime. Moreover, the states must prove their ability to reach consensus on an ASMFC plan. In order to achieve the goals of the new regulatory regime, the federal government, acting in large part through the NMFS, must conform its regulations and enforcement actions to the ASMFC plan while not arbitrarily exercising such power in a fashion that violates state sovereignty. If successful, their management approach may serve as a model for future fishery management efforts.

The purposes of this Comment are three-fold. Part II of this Comment will explore the legislative enactments that have provided the basis for cooperative jurisdiction in fishery management. Part II.A discusses how state and federal authority as originally codified in the Magnuson Act was sharply delineated, and how that delineation gradually gave way to the cooperative management approach embodied in the ACFCMA. The 1996 Amendments to the Magnuson Act, while not directly implicated in the lobster scenario, further compliment the shift towards cooperative jurisdiction, as detailed in Part II.B. Part II.C will closely examine the ACFCMA, the foundation for future lobster fishery management, from the creation of the ASMFC to the Act's specific provisions for state and federal cooperation in fishery management.

The second purpose of this Comment is to review the history of lobster fishery management, from the roots of the Magnuson Act FMP through the decision to withdraw it. Part III.A will outline the basic approach to fishery management under the Magnuson Act before turning to the particulars of the federal lobster fishery management plan under Part III.B. Part III.C will discuss the ultimate failure of Amendment Five to the Lobster FMP which was in large part the impetus for the decision to withdraw the plan, as detailed in Part III.D.

The final purpose of this Comment is to raise questions concerning potential conflicts that may arise in the transition of lobster fishery management to the ASMFC. Part IV considers two specific obstacles that must be overcome in order to achieve the desired level of state and federal cooperation in fishery management. The effects of these obstacles will be weighed and likely resolutions will be suggested; but most important will be the identification of issues the resolution of which will determine the future success of the plan.

## II. LEGISLATION AND THE TRANSITION TO COOPERATIVE FISHERY MANAGEMENT JURISDICTION

The withdrawal of the Lobster FMP reflects a fundamental shift in the federal approach to fishery management. National political and societal forces, coupled with the failures of the regional council system implemented under the Magnuson Act, led to a reassessment of the division of state and federal authority over fishery management. Indeed, the decision to withdraw the Lobster FMP and transition management of the fishery to the states, via the ASMFC, was made possible due to legislative changes in fishery management jurisdiction. Coupled with the developing trend of returning regulatory power to the states was the enduring belief that the lobster fishery, as with other fisheries, had to be managed in a comprehensive and coordinated manner. In order to provide such management for an entire fishery the rigid traditional federal-state jurisdictional lines needed to be modified and loosened. The regulatory promulgation and enforcement provisions of the ACFCMA represent a unique and promising approach to cooperative jurisdiction and management methods. Recent amendments to the Magnuson Act reflect the inclination towards state and federal cooperation by extending greater authority to the states for fisheries management within the exclusive economic zone (EEZ).

An exploration is provided below of the specific legislative enactments that provide the legal basis for greater cooperation in fishery management. First, the traditional concept of fishery management jurisdiction, which predated and was ultimately codified in the Magnuson Act, will briefly be discussed. Next, in order to identify on a broader scale the movement towards cooperative jurisdiction, the 1996 Amendments to the Magnuson Act will be considered. Finally, and of most relevance to the particulars of lobster fishery management, the provisions of the ACFCMA that provide for the implementation and enforcement of management plans for interstate as well as EEZ waters will be described.

### A. *Traditional Fishery Jurisdiction Under the Magnuson Act*

The Magnuson Act, prior to the 1996 Amendments, codified a standing jurisdictional division between “state waters,” wherein the state exercised primary fishery management authority, and “federal waters” over which the federal government exercised primary fishery management authority. One of the underlying purposes of the Magnuson Act was to ensure minimum standards<sup>11</sup> for the preservation and revitalization of identified fisheries. In order to achieve this goal, a uniform and standardized procedural approach to fishery management was required. Congress apparently deemed it necessary to maintain the historically established jurisdictional divide between state and federal waters to ensure the acceptance of such an approach.

The Magnuson Act, as originally enacted, provided that the federal government of the United States “will exercise . . . sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone” (i.e. federal waters).<sup>12</sup> State jurisdiction, and state interaction with federal jurisdiction is addressed in section 1856 of the Act.<sup>13</sup> Section 1856 essentially codified the 1941 U.S. Supreme Court decision of *Skiriotes v. Florida*.<sup>14</sup> The implications of the *Skiriotes* decision were that there was to be no jurisdictional overlap between the fishery regulatory activities of the federal government and the states. The general tenor of section 1856, prior to the 1996 Amendments,<sup>15</sup> was to codify this proposition while preserving modest scope for state regulations.

Section 1856, as originally enacted, provided that, “nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.”<sup>16</sup> This general rule is subject to certain exceptions listed in subsection (b), discussed in the following paragraph.<sup>17</sup> Pre-Amendment section 1856 specifically delineated the boundaries to which state jurisdiction and authority shall extend. Any waters adjacent to a state and completely enclosed by the boundaries of the

11. See *infra* note 98.

12. 16 U.S.C. § 1811(a) (1994).

13. *Id.* § 1856.

14. 313 U.S. 69 (1942).

15. Hereinafter reference to § 1856 as it stood prior the 1996 Amendments will be indicated by the preface “pre-Amendment.”

16. 16 U.S.C. § 1856(a)(1) (1994).

17. *Id.*

“territorial sea” of the United States are under the adjacent state’s authority.<sup>18</sup> Certain particular geographic areas are also specified in the section.<sup>19</sup> Finally, there is one extra-territorial provision for state authority, although it is negatively expressed. A state maintains regulatory authority over any fishing vessel which is registered under the laws of that state even when the vessel travels outside the normal state jurisdictional boundaries.<sup>20</sup>

Certain exceptions were also provided to allow encroachment of federal regulations in state waters. The exceptions may be invoked by the Secretary of Commerce based on his findings made pursuant to appropriate notice and hearing.<sup>21</sup> Under certain conditions the Secretary may regulate a fishery within the boundaries of a state, pursuant to a fishery management plan and regulations implemented in pursuance thereof.<sup>22</sup> The conditions require that the regulated fishery be one which is predominately engaged in the EEZ and beyond<sup>23</sup> and for which a fishery management plan is established and implemented. Second, the Secretary must determine that the state, subject to control, has taken action or failed to take action which will substantially and adversely affect the execution of the fishery management plan.<sup>24</sup> Once the Secretary has assumed control of a particular fishery within state waters, the state must apply to the Secretary in order to regain authority over that fishery.<sup>25</sup> Once the Secretary determines that the causes underlying the assumption of control over the fishery in state waters no longer persist, the Secretary must cease federal regulation of the fishery within the state’s boundaries.<sup>26</sup>

Fishery jurisdiction, as originally delineated under the Magnuson Act, consisted of rigidly drawn boundaries that did not reflect the management related parameters of a particular fishery, but rather the historical legal development of the boundary between federal and state authority. Generally speaking, that boundary lay on the outer edge of the territorial sea. The most significant overlap of authority favored the federal government, and it provided for an abrogation of state authority rather than an attempt at

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18. *Id.* § 1856(a)(2)(A).

19. *Id.* § 1856(a)(2)(B), (C).

20. *Id.* § 1856(a)(3). Stating, in the positive, that a state may not regulate a fishing vessel outside of its boundary if the vessel is not registered under the laws of that state. *Id.*

21. *Id.* § 1856(b)(1). Hearings must be provided in accordance with 5 U.S.C. § 554 (1994).

22. 16 U.S.C. § 1856(b)(1)(B) (1994).

23. *Id.* § 1856(b)(1)(A).

24. *Id.* § 1856(b)(1)(B).

25. *Id.*

26. *Id.*

cooperative jurisdiction. Furthermore, a state's only ability to regulate beyond its territorial sea lay in its power to regulate fishing vessels licensed under its laws, regardless of location. Such was the state of fishery jurisdiction despite obvious interest and specialized knowledge of any given state in fishery management well beyond its territorial sea, and despite the ability of the federal government to coordinate the self-tailored management efforts of the various states.

### *B. The 1996 Magnuson Act Amendments*

The 1996 Magnuson Act amendments post-date the decision to withdraw the Lobster FMP, and therefore, were in no way implicated in the initial determination. The amendments are, nevertheless, important in considering the underlying shift to cooperative management. It is quite likely that passage of the ACFCMA in 1993, and the lobster fishery situation as a whole, served as an impetus for the 1996 Magnuson Act Amendments. This conjecture is based upon the emphasis in the 1996 amendments on federal and state cooperative fishery management. This emphasis is particularly evident in the expanded authority of the states to regulate fishing activities outside of the traditional state waters. On the other hand, the 1996 Amendments have further complicated the transition to ASMFC management of the lobster fishery by requiring the regional councils to promulgate pro-active management measures for overfished fisheries. This particular aspect of the 1996 Amendments is addressed at greater length in Part IV.A.

State authority to regulate fishing vessels outside the boundaries of the state was the subject of substantial change. Section 1856(a)(3) of the Magnuson Act, was modified significantly and now articulates in the positive a state's authority to regulate vessels outside of its boundaries given specific circumstances.<sup>27</sup> The first set of circumstances requires, as with the pre-Amendment version, that the vessel be registered under the laws of the state.<sup>28</sup> Furthermore, one of two additional requirements must be met: Either (1) no fishery management plan or pertinent Federal regulations exist with regards to the fishery in which the vessel is engaging; or, (2) the laws and/or regulations of the state must be consistent with the federal FMP or regulations applicable to the fishery in which the vessel is

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27. *Id.* § 1856 (a)(3).

28. *Id.* § 1856(a)(3)(A).

operating.<sup>29</sup> The 1996 Amendments provided a second significant expansion of potential state authority over a fishery that extends into federal waters. States may now regulate fishing vessels outside the boundaries of the state when the management plan, for the fishery in which the vessel is operating, "delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan."<sup>30</sup> While not specifically addressed in the provision, presumably the FMP could simply delegate management authority to various states without providing an underlying framework of a specific management plan. No standards for measuring consistency of state laws and regulations would exist in such a situation.<sup>31</sup> If the Secretary determines certain state measures are inconsistent with the relevant FMP, the Secretary must notify the state and the appropriate Council and then provide the state with the opportunity to correct the inconsistency.<sup>32</sup> Failure by the state to correct such inconsistencies would result in suspension of the state's authority until corrective measures were taken and approved by the Secretary and the Council.<sup>33</sup>

Essential to the analysis under either section 1856(a)(3)(A) or (B), is the concept of "consistency" of state regulations. Any state regulation which either regulates vessels, licensed under its law, or which is an exercise of authority delegated to the state by a federal FMP, must be consistent with any existing FMP for the targeted fishery. Congressional hearings shed light on the primary intent underlying this requirement and the extent to which states may regulate consistently with existing federal regulations. A colloquy between Senator Snowe of Maine and Senator Stevens of Alaska, the author of the amendment, is particularly interesting as Senator Snowe specifically mentioned Maine's efforts in the area of lobster management. Senator Snow, after delineating several of Maine's specific lobster regulations, questioned whether Maine's regulations, that were more stringent than the regulations promulgated pursuant to the federal lobster management plan, would continue to be considered "consistent" with the Lobster FMP, under the intent of the amendment's author.<sup>34</sup>

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29. *Id.* § 1856(a)(3)(A)(i), (ii).

30. *Id.* § 1856(a)(3)(B).

31. Nonetheless, because the state authority would derive from a Magnuson Act FMP, any state management measure would presumably still be required to comply with Magnuson Act national standards.

32. 16 U.S.C. § 1856(a)(3)(B).

33. *Id.*

34. 142 CONG. REC. S10,911 (1996) (statement of Sen. Stevens).

Senator Stevens responded affirmatively, stating that his amendment would protect "the existing authority of States to impose more stringent regulations which are not inconsistent with a management plan on its vessel in the Federal zone."<sup>35</sup> Senator Stevens continued by noting that more stringent state regulations which were considered to be consistent prior to the amendment would continue to be considered consistent.<sup>36</sup> Thus, a state may, consistent with the Congressional intent underlying the amendment, impose more stringent regulations over federal waters pursuant to authority vested by the amendment than are imposed by the federal regulations.

These two changes to state jurisdiction under the Magnuson Act reflect the underlying movement towards cooperative federal-state jurisdiction. Indeed, they evidence support for a return of fishery management authority to the states as exemplified by the lobster fishery scenario. The amended Act, however, provides for such delegation to the state to be executed within the parameters of the Magnuson Act. A federal FMP can delegate management authority to a state, but require certain minimum standards by providing for them within the framework of the FMP. In this manner the federal government may provide goals and guidelines for management of a particular fishery while leaving the specific methods to state and even local determination. An interesting question is whether this approach would have been an effective alternative for lobster fishery management rather than withdrawal of the FMP in favor of ASMFC management.

### *C. Cooperative Management Under The Atlantic Coastal Fisheries Cooperative Management Act*

The Atlantic Coastal Fisheries Cooperative Management Act<sup>37</sup> is the central piece of legislation underlying the future management of the American Lobster fishery. Under the ACFCMA the pertinent states are empowered to manage a given fishery resource via the Atlantic States Marine Fishery Commission. Because the ACFCMA predates the 1996 amendments to the Magnuson Act, at the time of the decision to withdraw the Lobster FMP the ACFCMA provided the only legislative basis for a shift of management authority to those states active in the lobster fishery. Indeed, the ACFCMA is rather unique in its approach to fishery jurisdiction

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35. *Id.*

36. *Id.*

37. 6 U.S.C.A. §§ 5101-5108 (West 1985 & Supp. 1997).

and its provisions for cooperative management, not only between the several states but also between the states and the federal government.

1. *The Atlantic States Marine Fishery Commission*

The ASMFC was created in 1942 by an interstate compact (Compact), with the consent of Congress, between nine Atlantic coast states: Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, and Virginia.<sup>38</sup> Congressional consent to the Compact was originally limited to fifteen years.<sup>39</sup> Article II of the Act granting consent to the Compact provided that any state contiguous to the member states and “riparian upon waters frequented by anadromous fish, flowing into waters under the jurisdiction of any of the aforementioned states” was allowed to become a member of the ASMFC.<sup>40</sup> In accordance with this provision the states of Connecticut, Pennsylvania, North Carolina, South Carolina, Georgia, Florida, as well as the District of Columbia entered into the compact at a later date.<sup>41</sup> In granting consent to the addition of these states to the Compact, Congress also repealed the fifteen year time limit on the Compact, allowing for indefinite life.<sup>42</sup>

The purpose of the Compact is to promote “better utilization” of the marine, shell, and anadromous fisheries of the Atlantic seaboard by joint development of fishery protection plans.<sup>43</sup> The Compact does not authorize the signatory states to limit the production of fish or fish products in order to fix prices or perpetuate a monopoly in the fishing industry.<sup>44</sup> The ASMFC consists of three representatives of each member state: (1) The executive officer of the state administrative agency in charge of fishery conservation; (2) A member of the state legislature designated by the Commission or Committee on Interstate Cooperation of the state; (3) A

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38. An Act Granting the Approval and Consent to an Interstate Compact Relating to the Better Utilization of the Fisheries (marine, shell and anadromous) of the Atlantic Seaboard and Creating the Atlantic States Marine Fisheries Commission, Pub. L. No. 77-539, 56 Stat. 267 (1942). [hereinafter “Interstate Compact Consent Act”].

39. *Id.*

40. *Id.* at art. II.

41. *See* An Act Granting the Consent and Approval of Congress to an Amendment to the Atlantic States Marine Fisheries Compact and Repealing the Limitation of the Life of such Compact, Pub. L. No. 81-721, Pub. L. No. 81-721, 64 Stat. 467 (1950).

42. *Id.* at Amendment I, § 3.

43. Interstate Compact Consent Act, *supra* note 38, art. I, 56 Stat. 267.

44. *Id.*

citizen of the state who has knowledge and interest in the "marine fisheries problem" as appointed by the Governor of the state.<sup>45</sup>

Article V of the Act granting consent to the compact provided a specific internal structure for the commission and for actions to be taken by the ASMFC. A chairman and vice-chairman are elected by the Commission, and other officials and employees may be appointed and discharged as necessary to carry out the purposes of the compact.<sup>46</sup> The ASMFC is empowered to found offices to carry out its business and may meet at any time or place, but is required to meet at least once a year.<sup>47</sup> In order for any general action to be taken by the ASMFC it must be approved by affirmative vote by a majority of the states present at a given meeting and action in regards to any fishery must be approved by a majority vote of those states which have an interest in the relevant species.<sup>48</sup>

Under the Interstate Compact Consent Act, the ASMFC's role was completely advisory. The Commission's power was limited to making recommendations in order to coordinate the preservation efforts of the individual states in their exercise of police power over state waters.<sup>49</sup> State police power under the Tenth Amendment is the traditional basis for fishery conservation and management measures in state waters.<sup>50</sup> Any attempts by a state to extend its fishery regulatory jurisdiction beyond its state waters were subjected to a two prong test.<sup>51</sup> The state must first show that it had a "legitimate interest" in regulating "high sea fisheries" and second, it had to demonstrate a sufficient basis for asserting jurisdiction over the fishermen.<sup>52</sup> Advisory opinions of the Compact were intended to unify state approaches to fishery management and to assert common interests in both state and federal waters fisheries. Lacking any direct regulatory authority, however, the ASMFC's recommendations had limited influence upon

45. *See id.* art. III. If a person cannot be identified under either of the first two categories, such a person shall be appointed by the Governor of the state. *Id.*

46. *See id.* art. V, at 268.

47. *Id.*

48. Interstate Compact Consent Act, *supra* note 38, art. IV, 56 Stat. at 268.

49. *Id.*

50. Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641, 649 (1982). *See, e.g.,* Alaska v. Arctic Maid, 366 U.S. 199 (1961); Lawton v. Steele, 152 U.S. 133 (1894); Manchester v. Massachusetts, 139 U.S. 240 (1891).

51. Greenberg & Shapiro, *supra* note 50, at 650.

52. *Id.*

fishery conservation and management. The ACFCMA<sup>53</sup> was designed to eliminate the impotence of the ASMFC.

## 2. *Atlantic Coastal Fisheries Cooperative Management Act*

The ACFCMA,<sup>54</sup> enacted in 1993, dramatically changed the nature and authority of the ASMFC. Congressional findings cited in the ACFCMA reflect Capitol Hill's perception not only of the current state of Atlantic coastal fisheries management, but also the political climate of 1993. Among the findings was that the absence of management authority in one central government entity had lead to "disparate, inconsistent, and intermittent State and Federal regulation[s]" over Atlantic coastal fishery resources.<sup>55</sup> The findings also state that the responsibility for Atlantic coastal fishery management should reside with the states, and that states should discharge their responsibilities and cooperative efforts of fishery management via the ASMFC.<sup>56</sup> Congress concluded with the ominous yet accurate assertion that Atlantic State fishery resource conservation and management is in the national interest.<sup>57</sup>

The stated purpose of the ACFCMA is to support and encourage interstate conservation and management of Atlantic coastal fishery resources through development, implementation, and enforcement of coastal fishery management plans.<sup>58</sup> A coastal fishery management plan (CMP), the equivalent of a Magnuson Act FMP, is the ACFCMA's term for an ASMFC plan for the management of a coastal fishery resource.<sup>59</sup> The ACFCMA explicitly addresses the issue of Federal and state cooperation in Atlantic coast fishery management. Specifically, the Act provides for the development of federal regulations by the Secretary of Commerce to support Commission management efforts.<sup>60</sup>

The ACFCMA specifically anticipates the dual presence of a Magnuson Act FMP and a ACFCMA management scheme with regards to

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53. 16 U.S.C. § 5101-5108 (1994).

54. *Id.*

55. *Id.* § 5101(a)(3).

56. *Id.* § 5101(a)(4).

57. *Id.* § 5101(a)(6).

58. *Id.* § 5101(b).

59. 16 U.S.C. § 5102(1) (1994).

60. *Id.* § 5103(a). The section continues by stating that such programs are to include "activities to support and enhance State cooperation in the collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning." *Id.*

the waters of the EEZ. It is the hierarchical relation of these two potentially conflicting management vehicles that serves to explain the NMFS's decision to withdraw the Lobster FMP. The power of the NMFS to implement federal EEZ regulations complimentary to an ACFCMA management plan is contingent upon the absence of a Magnuson Act FMP for the targeted fishery.<sup>61</sup> Furthermore, any such regulations may only be implemented after consultation with the appropriate regional fishery council,<sup>62</sup> in this case the New England Fishery Management Council (NEFMC), and all regulations must be consistent with the Magnuson Act national standards.<sup>63</sup> The ACFCMA provides that should FMP and CMP regulations co-exist for the same fishery, regulations issued pursuant to the Magnuson Act shall supersede ACFCMA regulations.<sup>64</sup> The trumping of an ACFCMA management plan by a Magnuson Act FMP makes clear the need to withdraw the Lobster FMP in order to provide management authority to the Commission.

The political and legislative forces driving the decision by NMFS to withdraw the Lobster FMP were complex. These forces most likely included the well documented failures of the regional fishery management process.<sup>65</sup> The nation's political climate, however, should not be overlooked. An emerging federalism grew out of a popular call to the federal government to look to state and local bodies for solutions to regionalized problems and to empower those bodies to enact such solutions. Fishery management was included in this movement. In order to empower states with the ability to exercise fishery management not only within their territorial seas but also within the EEZ, traditional rules of federal-state jurisdiction needed to be reworked. Furthermore, to allow the federal government to assure regulatory compliance, not only in federal waters but also in state waters, fishery management jurisdictional boundaries needed to be modified.

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61. *Id.* § 5103(b)(1).

62. *Id.* § 5103(b)(1). See discussion *supra* Part II .C.3 and accompanying notes, which explores the substantive provisions of the ACFCMA in greater detail.

63. *Id.* § 5103(b)(1)(B). See *infra* note 98.

64. *Id.*

65. See, e.g., Peter Shelley, *et al.*, *The New England Fisheries Crisis: What Have We Learned?* 9 TUL. ENVTL. L.J. 221 (1996) (in particular Section IV.C.& D); Teresa M. Cloutier, *Comment, Conflicts of Interest on Regional Fishery Management Councils: Corruption or Cooperative Management*, 2 OCEAN & COASTAL L.J. 101 (1996).

### 3. *Cooperative Jurisdiction Under the ACFCMA*

The ACFCMA is a unique legislative enactment in that it specifically anticipates and provides for cooperative management efforts between the ASMFC states and the federal government in Atlantic coastal fishery management.<sup>66</sup> The Act takes two significant steps beyond mere federal recognition of interstate cooperative efforts at fishery management. First, and more significant in terms of the concept of overlapping jurisdiction, it provides a vehicle for the promulgation of complementary regulations over federal waters.<sup>67</sup> Second, the Act provides for federal enforcement measures to ensure compliance with coastal fishery management plans developed by the ASMFC.<sup>68</sup> Both of these aspects are important indicators of the shift toward cooperative fishery management jurisdiction. The disciplined utilization of both provisions will be necessary to ensure effective management of the American lobster fishery, and to demonstrate the appropriateness of this management model for other fisheries.

Section 5103 of the ACFCMA is the centerpiece of the Act's cooperative management scheme, indeed the section's title indicates as much: "State-Federal cooperation in Atlantic coastal fishery management."<sup>69</sup> The provision begins by requiring the Secretary of Commerce, in conjunction with the Secretary of the Interior, to develop and implement a program that will support the interstate management efforts of the ASMFC.<sup>70</sup> Specifically, the program is required to "support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning."<sup>71</sup>

The ability to promulgate regulations in support of ASMFC management plans is granted in section 5103(b). A important caveat begins this section; the Secretary of Commerce may implement such complementary regulations in the absence of an "approved and implemented" Magnuson Act FMP.<sup>72</sup> It is this requirement that precipitated the need to withdraw the Lobster FMP in order to effectively pass management authority to the ASMFC. Additionally, the Secretary must consult with the regional

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66. 16 U.S.C. § 5103 (1994).

67. *See id.* § 5103(b).

68. *See id.* §§ 5104(b), (c), 5105.

69. *Id.* § 5103.

70. *Id.* § 5103(a).

71. *Id.*

72. 16 U.S.C. §§ 5103(b) (1994).

council prior to implementation of such regulations.<sup>73</sup> Finally, any regulations implemented to effectuate the ASMFC plan within federal waters must meet two additional requirements. One, the regulations must be "compatible with the effective implementation" of the Commission plan; and two, all regulations must be consistent with the Magnuson Act national standards.<sup>74</sup> Section 5103 continues to note that the federal regulations may include provisions recommended by the ASMFC, which in practice seem likely to be the primary basis for the regulations.<sup>75</sup> If regulations implemented pursuant to a Magnuson Act/ Council FMP and regulations issued under the ACFCMA should come into conflict, the FMP regulations supersede those issued under the ACFCMA.<sup>76</sup> Enforcement of regulations issued pursuant to this section is assured by incorporation of the Magnuson Act enforcement provisions.<sup>77</sup> While a reading of section 5103 implies a continuing deference to particular aspects to the Magnuson Act, the underlying intent indicates a bold move towards greater state participation and authority in fishery management. Removal of Council based management plans provides the opportunity for state formulated plans via the ASMFC. As noted above, the decision by NMFS to withdraw the Lobster FMP, contingent upon development by the ASMFC of its own lobster management plans, was an integral part of the shift to greater state control over the lobster fishery. For the first time the states have a quasi-independent vehicle to exert broad jurisdictional authority over fisheries in federal waters, through development of ASMFC management plans and issuance of federal regulatory recommendations to the Secretary of Commerce. The posture with which the Lobster FMP was withdrawn, contingent upon development of an ASMFC CMP, intimates that, so long as the ASMFC successfully formulates a management plan, the transformation from recommendation to regulation will be but a formality.

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73. While there are no specifications as to what "consultation" with the Council must entail, it is presumably something short of the complicated and burdensome approval necessary for council action with regard to one of its own FMP's.

74. 16 U.S.C.A. § 5103(b)(1)(A), (B) (West 1985 & Supp. 1998). This language, amended from "necessary to support" to "compatible with" seems to afford the Secretary greater discretion. See *infra* note 98 for summary of national standards.

75. *Id.* § 5103(b) (1996).

76. *Id.* This provision appears redundant in light of the apparent requirement that there exist no Council developed FMP.

77. *Id.* § 5103(b)(2). This clause specifically refers to Magnuson Act sections which delineate prohibited acts, civil penalties, criminal offenses, civil forfeitures, and enforcement measures. See 16 U.S.C. §§ 1857-1861 (1994).

The second significant jurisdictional aspect of the ACFCMA relates to enforcement of Commission fishery management plans once developed and implemented. The ACFCMA specifically provided for and was intended to encourage the development of management plans, not only for the state waters of the various ASMFC states, but also for federal waters.<sup>78</sup> This approach appropriately seeks to manage a particular fishery as a complete entity, rather than as divided among a series of fishery jurisdictions delineated by historical legal boundaries. These jurisdictional boundaries, however, have provided the basis of authority for enforcing the implemented regulatory measures. It is fairly accurate to say that prior to AFCMA each state maintained responsibility for fishery management within its territorial sea, while the federal government enforced fishery regulation within federal waters. Attempts to reach cooperative agreements on uniform management approaches, in particular between multiple states, faced the insurmountable problem that any one state could not effectively enforce provisions of a cooperative plan.

Recognizing this flaw of traditional inter-state agreements, Congress provided specific enforcement provisions within ACFCMA. Each of the ACFCMA states are required to implement and enforce the provision of any CMP within the plan's specified time period.<sup>79</sup> The Act contains a reach-back provision that requires the Commission to establish time-frames for state implementation of CMPs in existence prior to enactment of the ACFCMA.<sup>80</sup> Once implemented, the ASMFC must review at least annually each states' implementation and enforcement of the CMP to determine whether every state is in compliance.<sup>81</sup> The results of the compliance reviews are to be submitted to the Secretaries of Commerce and Interior.<sup>82</sup>

In the event of non-compliance with a plan's provisions by one of the ASMFC states, the federal authority is then invoked to assure adequate measures are taken to reach compliance, and if necessary, to exact punitive measures on the non-complying state. If it finds that a state has failed to enact, implement, and enforce laws or regulations as required to conform with the provisions of the FMP, the Commission "shall" determine that the state is not in compliance.<sup>83</sup> Upon such a determination the Commission

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78. See 16 U.S.C. § 5103(a), (b) (1994).

79. *Id.* § 5104(b)(1).

80. *Id.* § 5104(b)(2).

81. *Id.* § 5104(c).

82. *Id.*

83. *Id.* §§ 5105(a) 4102(10).

must notify the Secretaries of Commerce and Interior of such conclusion within ten working days.<sup>84</sup>

The Secretary of Commerce, upon receiving notice of a state's non-compliance, is then required to take certain steps to compel state compliance. Within thirty days after receiving the notification from the Commission, the Secretary must review the determination of non-compliance, and then must independently reach a conclusion as to whether the state has failed to implement the particular management plan.<sup>85</sup> The Secretary must also determine whether the specific measures that the state has failed to implement are "necessary for the conservation of the fishery in question."<sup>86</sup> In reaching his findings, the Secretary of Commerce must consider the comments offered by the non-complying state as well as provide the state with the opportunity to meet with the Secretary concerning its comments.<sup>87</sup> Additionally, the Secretary may seek and consider not only the comments of the Commission, but also those of the Regional Council.<sup>88</sup>

### III. LOBSTER MANAGEMENT UNDER THE MAGNUSON ACT FMP AND THE DECISION TO WITHDRAW THE LOBSTER FMP

In order to understand the transition of lobster fishery management authority, it is important to review the history of lobster fishery management. Part III.A sets forth the basic elements of a fishery management plan under the Magnuson Act. Part III.B explores the particular historical facts behind the promulgation of the Magnuson Act lobster management plan. Next, Part III.C tells the story of the Amendment Five debacle that ultimately sounded the death knell of the Lobster FMP. Finally, the decision process behind the withdrawal of the Lobster FMP is presented in Part III.D.

#### A. *Fishery Management Plans Under the Magnuson Act*

The failure of the Lobster FMP was in large part due to the failures of

84. *Id.* § 5105(b). The notification shall include the reasons underlying the determination and "an explicit list of actions" the non-complying state must take in order to comply with the plan. The offending state is also to receive the notice. *Id.*

85. 16 U.S.C. § 5106(a) (1994).

86. *Id.*

87. *Id.* § 5106(b).

88. *Id.*

the Regional Fishery Management Council process, thus the first step to understanding these failures is by establishing the procedures.

### *I. Magnuson Act Fishery Management Generally*

Two general purposes were encompassed in the Magnuson Act,<sup>89</sup> the first, and of most significance to this Comment, was to extend United States jurisdiction of marine fishery regulation out to 200 nautical miles from the coast, the exclusive economic zone.<sup>90</sup> Secondly, the Act sought to control foreign access to resources in this zone.<sup>91</sup> Implicit in the decision to vest the federal government with control over fishery management in the EEZ was a significant reduction in the role of the states in coastal fishery management.<sup>92</sup> This shift in fishery management authority immediately implicated issues of federalism.<sup>93</sup>

The Magnuson Act vests the Secretary of Commerce with general authority over the implementation of the Act. The Secretary acts through the National Oceanic and Atmospheric Administration (NOAA) and its subsidiary the NMFS.<sup>94</sup> Conservation and management measures for any particular fishery are generally entrusted to eight Regional Management councils subject to the approval of the Secretary of Commerce.<sup>95</sup> Councils

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89. The Magnuson Act was enacted in 1976 as the Fishery Management and Conservation Act. In 1980, the late Senator Warren G. Magnuson's (WA) name was added to the law, he was the original sponsor of the law in the Senate. Catherine E. Decker, *Issues in the Reauthorization of the Magnuson Fishery Conservation and Management Act*, 1 OCEAN & COASTAL L.J. 323, n.1 (1995). See Pub. L. No. 96-561, § 238, 94 Stat. 3300 (amending 16 U.S.C. § 1801).

The Magnuson Act dramatically changed the federal-state relationship with regards to fishery management. See generally, Greenberg, *supra* note 49. The Act extended United States fishery management jurisdiction to 200 miles offshore (now known as the exclusive economic zone. Decker at 323.

90. Decker, *supra* note 89, at 327.

91. *Id.*

92. Ms. Decker notes four other significant changes in fishery management as a result of the Magnuson Act in addition to the reduced role of the states. *Id.* at 329-30. They are, significant control over foreign fishing, the introduction of the concept of "Optimum Yield," exception of highly migratory species from scope of the Act, and the establishment of the regional councils. *Id.* at 330-34.

93. For discussion of the initial issues of federalism raised by enactment of the Magnuson Act, and the subsequent emergence of federalism in the field of fishery management, see Greenberg, *supra* note 49.

94. Robert J. McManus, *America's Saltwater Fisheries: So Few Fish, So Many Fishermen*, 9 NAT. RESOURCES & ENV'T 13, 14 (1995).

95. *Id.* at 14. McManus notes that while the Act dictates that the councils include

are required to develop an FMP for every fishery in their region "that requires conservation and management."<sup>96</sup> Essentially, the Magnuson Act creates a two-tiered decision making mechanism that calls on the regional councils to develop management strategies consistent with the Act while requiring the Secretary of Commerce to review FMP's and implement necessary regulations.<sup>97</sup> The Magnuson Act requires that every FMP developed must comply with seven "national standards."<sup>98</sup> These standards

several federal and state fisheries officials, the majority of council members are appointed by the Secretary of Commerce who selects from lists provided by governors of the states comprising the region. *Id.* The Magnuson Act provides the broad requirement that council members be "knowledgeable" about fisheries management. *Id.* (citing 16 U.S.C. § 1852(b)(2)(A)).

96. 16 U.S.C. § 1852(h) (1994).

97. William R. Rogalski, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 169-170 (1980-81).

98. 16 U.S.C. § 1851(a) (1994). The "National Standards" can be summarized as follows:

- 1) Conservation and management measures shall prevent overfishing while continually achieving optimum yield from each fishery.
- 2) Conservation and management measures shall be based on the best scientific information available.
- 3) An individual stock of fish shall be managed as a unit, and interrelated stocks of fish managed in close coordination, to the extent practicable.
- 4) Conservation and management measures shall not discriminate between residents of different states. If allocation of fishing rights is necessary it must be "(A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges."
- 5) Conservation and management measures shall promote efficient use of fishery resources where practicable except that no measure may be solely based on economic allocation.
- 6) Variations among and contingencies in various fisheries, fishery resources, and catches shall be considered in conservation and management measures.
- 7) Conservation and management measures shall minimize costs and avoid unnecessary duplication to the extent possible.

*Id.*

These standards had a significant impact on the underlying rationale for withdrawal of the Lobster FMP and will remain important in the analysis of the appropriateness and potential effectiveness of lobster management under the ACFCMA. Additionally, three more standards were added with the passage of the Sustainable Fisheries Act of 1996:

- (8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained

promote uniformity and consistency in fishery management.

## 2. *Fishery Management Plan Implementation Process*

The identification by a regional council of a fishery in need of conservation and management sets in motion a complex set of procedural steps for the development of an FMP. Public hearings must be conducted "at appropriate times and in appropriate locations in the geographical area concerned" so as to allow for comment by interested parties on the development of the FMP.<sup>99</sup> Once developed, the FMP is submitted to the Secretary of Commerce for review.<sup>100</sup> Additionally, the council must submit on a continual basis any periodic reports it finds appropriate as well as any requested by the Secretary of Commerce.<sup>101</sup> In addition to the FMP, the council must also submit proposed regulations necessary or appropriate to the implementation of the FMP.<sup>102</sup>

The process of review and implementation begins upon receipt of the FMP by the Secretary. The Secretary first must perform an initial evaluation of the plan to determine whether it is consistent with the national standards and is of sufficient substance to warrant review.<sup>103</sup> An FMP that satisfies this initial evaluation is then subject to a more detailed review to ensure compliance not only with the Magnuson Act national standards, but also with other provisions of the Act and any other applicable law.<sup>104</sup> The Secretary of Commerce is further required to publish a notice in the Federal Register concerning the management plan and requesting comments and

participation of such communities, and (B) to the extent practicable, minimize adverse economic impact on such communities.

9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

16 U.S.C.A. § 1851(a)(8), (9), (10) (West 1985 & Supp. 1997).

99. *Id.* § 1852(h)(3). To complicate matters the "geographical area concerned" may include areas subject to the authority of another council if the concerned fishery is migratory. Before conducting hearings in an area covered by another council, that other council must be consulted. *Id.*

100. *Id.* § 1852(h)(1).

101. *Id.* § 1852(h)(4).

102. *Id.* § 1853(c). Proposed regulations are then subject to action by the Secretary under §§ 1854 and 1855 of the Act. *Id.*

103. 16 U.S.C. § 1854(a)(1)(A) (1994).

104. *Id.* § 1854(a)(1)(B).

pertinent data for a sixty-day period beginning upon the receipt of the proposed FMP.<sup>105</sup> Within fifteen days of the receipt of the plan from the regional council the Secretary must make any necessary changes to the FMP and then publish in the Federal Register the proposed regulations for the implementation of the management plan.<sup>106</sup>

Action is required by the Secretary of Commerce on any FMP that the submitting council characterizes as final.<sup>107</sup> Failure by the Secretary to notify the submitting council of disapproval of part or all of the plan within sixty days, or notice from the Secretary that the FMP is not disapproved, results in the FMP going into effect.<sup>108</sup> A determination by the Secretary that the submitted plan is not in conformance with applicable law requires that the Secretary notify the council of his intent to disapprove all or part of the plan.<sup>109</sup> The council may then submit a revised plan or amendment to the proposed plan in order to bring it into conformance.<sup>110</sup> Submission of a new plan by the council reinitiates the process of Secretarial review.<sup>111</sup>

In specific situations the Secretary of Commerce is empowered by the Magnuson Act to prepare and implement FMPs for identified fisheries. The Secretary is authorized to develop an FMP with respect to any fishery only if the appropriate council fails to develop and submit a plan and such fishery requires conservation and management; or, if after disapproval of an FMP the council fails to submit a revised plan.<sup>112</sup> Additionally, the Secretary may, upon finding that "an emergency exists involving any fishery, . . . promulgate emergency regulations necessary to address the emergency."<sup>113</sup> An FMP developed by the Secretary must be submitted to

105. *Id.* § 1854(a)(1)(C). The Act requires that the Secretary "take into account" the comments and data received from "interested persons." *Id.* at § 1854(a)(2)(a).

106. *Id.* § 1854(a)(1)(A).

107. *Id.* § 1854(a)(3)(A).

108. *Id.* § 1854(b)(1)(A), (B).

109. *Id.* § 1854(b)(2). The written notice must specify the law with which the plan is inconsistent, the nature of the inconsistency, and recommendations of steps that could be taken by the council to bring the plan into conformance with the applicable law. *Id.* § 1854(b)(2)(A-C).

110. *Id.* § 1854(b)(3). A revised plan must be accompanied by modified proposed regulations to implement the plan as well. *Id.*

111. *Id.* § 1854(b)(3)(B), (C). This process of council plan development, secretarial review and disapproval, and council revision and amendment may repeat itself ad infinitum. *Id.* § 1854(b)(3)(C)(ii).

112. *Id.* § 1854(c)(1)(A), (B). See Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 57 (1st Cir. 1993) (challenge to Secretarial agreement to consent decree regarding FMP for New England fishery).

113. *Id.* § 1855(c). See Parravano v. Babbitt, 837 F. Supp. 1034, 1041 (N.D. Cal.

the appropriate regional council for comments, and both a Secretarial FMP or emergency regulations must be in compliance with the Act's national standards.<sup>114</sup>

### 3. *Fishery Management Plan Policy*

The Magnuson Act expresses the distinct purpose of conserving and managing fishery resources found off the United States Coast.<sup>115</sup> The Act serves as a mandate in that "the United States claims, and *will* exercise in the manner provided for in this chapter, sovereign rights and *exclusive fishery management authority* over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone."<sup>116</sup> Congress' use of compulsory language requiring exclusive federal management over the EEZ imposes a requirement upon on the Secretary of Commerce. Indeed, the obligation of the federal government to manage federal water fisheries has been affirmed by the (now defunct) House Committee on Merchant Marine and Fisheries.<sup>117</sup>

Fishery Management Plans developed either by a regional council or the Secretary of Commerce<sup>118</sup> pursuant to the Magnuson Act are required to contain certain provisions.<sup>119</sup> Management and conservation measures included in the FMP must be "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing, and to protect, restore, and promote the long-term health and stability of the fishery."<sup>120</sup> Additionally, as noted previously, every FMP must meet the seven national standards, as well as provide a description of the fishery. The FMP must

1993) (challenge to Secretary's emergency regulation reducing Klamath chinook ocean harvest rate); *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 925 (E.D. N.C. 1995) (challenge to Secretary's emergency rule temporarily closing scallop fishery in federal waters of the coast of Alaska).

114. 16 U.S.C. § 1854(c)(2)(A), (B) (1994). *See also* *Parravano v. Babbitt*, 837 F. Supp. at 1044-45.

115. 16 U.S.C. § 1852(h)(1) (1994).

116. *Id.* § 1811(a) (emphasis added).

117. H.R. REP. NO. 97-438 at 6 (1982).

118. Under the Magnuson Act, the Secretary of Commerce is empowered to prepare a fishery management plan, subject to the national standards, in the following situations: (1) The appropriate regional council fails to develop and submit to the Secretary a FMP for a fishery in need of conservation and management, 16 U.S.C. § 1854(c)(1)(A); or, (2) the Secretary disapproves of a submitted plan and the appropriate council fails to submit a revised plan or amendment. *Id.* § 1854(c)(1)(B).

119. *Id.* § 1853(a).

120. *Id.* § 1853(a)(1)(A).

assess and specify the present and likely future condition of the maximum sustainable yield and optimum yield<sup>121</sup> from the fishery.<sup>122</sup> Fishery management plans must also “assess and specify” various technical aspects concerning the capacities of the fishing fleets harvesting the managed species.<sup>123</sup>

The Magnuson Act specifically provides certain provisions that may be utilized in a management plan at the discretion of the developing council or Secretary of Commerce.<sup>124</sup> An FMP may require that fishing vessels, vessel operators, or any United States fish processor obtain a permit or pay fees to the Secretary to engage in harvesting or processing of the managed species.<sup>125</sup> Management plans may establish fishing zones and periods in which fishing activities shall be restricted or forbidden, or require that only certain types of vessels or gear be used.<sup>126</sup> FMPs may designate catch limitations which are “necessary and appropriate for the conservation and management of the fishery.”<sup>127</sup> Systems to limit access to the protected fishery may also be developed subject to certain consideration.<sup>128</sup> A plan may also make certain provisions for the collection of data relevant to the management and conservation of the fishery, including requiring that observers be allowed on fishing vessels.<sup>129</sup> Finally, and what might have constituted a relevant option for allowing greater state input to the federal Lobster FMP, federal fishery management plans may incorporate relevant conservation and management measures of coastal states nearest to the fishery, so long as such measures are consistent with the national standards.<sup>130</sup>

121. *Id.* § 1853(a)(3). Optimum yield is defined as the amount of fish “which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational activities” and “which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.” *Id.* § 1802(21).

122. 16 U.S.C. § 1853(a)(1)(C), (a)(3)-(4) (1994).

123. *Id.* § 1853(a)(4). *See id.* § 1853(a)(5)-(8) for additional requirements of fishery management plans.

124. *Id.* § 1853(b).

125. *Id.* § 1853(b)(1)(A)-(C). Such fees or permits are applicable to fishing in federal waters or processing of fish subject to a FMP taken from federal waters. *Id.*

126. *Id.* § 1853(b)(2), (4).

127. *Id.* § 1853(b)(3). Various factors are listed as possible bases for catch limitations, including: area, species, size, number, weight, sex, incidental, catch and total biomass. *Id.*

128. *Id.* § 1853(b)(6).

129. *Id.* § 1853(b)(8). *See also* §1853(b)(7), (9).

130. *Id.* § 1853(b)(5).

*B. Federal Lobster Fishery Management Plan*

The Lobster FMP was prepared by the New England Fishery Management Council (NEFMC) and approved and implemented in 1983.<sup>131</sup> The NEFMC represents the states of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and exercises authority over "fisheries in the Atlantic Ocean seaward of such States."<sup>132</sup> The American lobster fishery is pursued primarily in Atlantic waters off the coasts of the states from Maine to Virginia.<sup>133</sup> Lobster management measures for state waters, out to three miles from the coast, are enacted by the several states.<sup>134</sup> The federal Lobster FMP was developed to support state management efforts and to provide for coordinated management of the American lobster fishery across its geographical range.<sup>135</sup> In fact, regulations implementing the Lobster FMP defer to existing state management measures by specifically providing that no federal regulation would supersede a more restrictive state measure.<sup>136</sup>

Following is a survey of three major targets of regulation in the federal FMP. The measures cited are indicative of management and conservation techniques, but by no means are exhaustive of the full range of measures implemented under the Lobster FMP. Indeed, the Lobster FMP regulations represented a broad array of management and conservation practices.<sup>137</sup> The first category of management measures addressed the "lobsterer" and his or her vessel. One of the primary control mechanisms instituted by the lobster management regulations was a vessel permitting scheme.<sup>138</sup> Lobster

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131. American Lobster Fishery; Removal of Regulations, 61 Fed. Reg. 13,478 (1996) (to be codified at 50 C.F.R. pt. 649) (proposed Mar. 27, 1996).

132. 16 U.S.C. § 1852(a)(1) (1994). The council is comprised of 17 voting members, 11 of whom are appointed by the Secretary of Commerce, at least one from each state. *Id.*

133. NATIONAL MARINE FISHERIES SERVICE ENVIRONMENTAL ASSESSMENT AND REGULATORY IMPACT REVIEW: WITHDRAWAL OF SECRETARIAL APPROVAL OF THE FISHERY MANAGEMENT PLAN FOR THE AMERICAN LOBSTER FISHERY, at 2, March, 1996 [hereinafter REVIEW].

134. *Id.*

135. *Id.*

136. 50 C.F.R. § 649.3 (1996).

137. Many of the regulations noted are the result of Amendment Five to the Lobster FMP implemented on July 20, 1994. See *infra* III.C and accompanying notes for a more detailed discussion of Amendment Five.

138. 50 C.F.R. § 649.4 (1996). The present permitting scheme provided for implementation of a limited access system phased in over three distinct periods. (1) 1994 vessel permits, (2) permitting for 1995, and (3) vessel permit eligibility for 1996 and beyond. *Id.* § 649.4(a), (b).

FMP regulations further required that any "operator of a vessel of the United States that fishes for, possesses, land American lobsters, in or harvested from the EEZ." must obtain an "operator's permit" as of January 1, 1995.<sup>139</sup> Permitting requirements provided indirect controls on the lobster fishery by extending to lobster dealers as well.<sup>140</sup>

A second area of regulations in the Lobster FMP related to specific prohibitions in the practice of lobster fishing. Prohibitions included<sup>141</sup> the retention of a lobster that fails to meet the minimum carapace length set forth elsewhere in the regulations,<sup>142</sup> maintaining possession of any berried female lobster,<sup>143</sup> and retention of any "V-notched" female lobster.<sup>144</sup> Any violation of the permit requirements noted in the previous paragraph were also deemed unlawful.<sup>145</sup> Interestingly, though perhaps not surprisingly, lobster FMP regulations sought to protect management and conservation officials by making it illegal to "assault, resist, oppose, harass, intimidate, or interfere with" any NMFS approved observer in the exercise of a "search, inspection, investigation, or seizure" pursuant to the plan's regulations.<sup>146</sup> Requirements for harvesting and landing of lobster were more specifically delineated in a different portion of the regulations. In addition to specifying carapace length, section 649.20 addressed lobster mutilation, berried female lobsters, and the forbidden practice of "scrubbing," used to remove eggs from berried females.<sup>147</sup>

The third major focus of regulations in the Lobster FMP related to lobstering gear. Implementing regulations specify particular criteria for the identification of gear used in the harvesting of lobsters. All lobstering gear used in the EEZ that was not permanently attached to a vessel was required to be "legibly and indelibly" marked by either a number assigned by the

139. *Id.* at § 649.5. The regulation exempts parties or boats in possession of six or fewer lobsters per person not intended for sales. *Id.* § 649.5(a). Notably, the regulation also does not apply to operators of vessels that fish exclusively in state waters. *Id.*

140. *Id.* at § 649.6

141. *Id.* at § 649.8. *See id.* for complete coverage of illegal practices.

142. *Id.* at § 649.8(a)(1). The minimum length is currently 3.25 inches long. *Id.* § 649.20(b).

143. *Id.* at § 649.8(a)(3). In order to discourage attempts to escape this prohibition, the regulations also make it unlawful to remove the eggs from any berried lobster, and even prohibit the landing or possession of a lobster by any person that has come in contact with substances used to remove lobster eggs. *Id.* § 649.8(a)(4).

144. *Id.* § 649.8(a)(5).

145. *Id.* § 649.8(b).

146. *Id.* § 649.8(c)(6).

147. *Id.* § 649.20(b)-(e).

regional director, and/or any identification marking required by the vessel's port state.<sup>148</sup> Lobster pot trawls consisting of three or fewer pots were required to be marked with a single buoy.<sup>149</sup> Trawls consisting of more than three posts were required to have a radar reflector and a single flag attached to the western-most end of the trawl, while the eastern-most end needed only the radar reflector.<sup>150</sup>

Trawl lines were limited to one and one half nautical miles in length.<sup>151</sup> Lobster FMP regulations further demanded that every lobster trap deployed in the EEZ be built with "escape vents in the parlor section of the trap."<sup>152</sup> Traps that were not properly identified or constructed were subject to seizure and disposal.<sup>153</sup>

### C. *The Amendment Five Debacle*

#### 1. *The Impetus for Amendment Five*

Essential to understanding the decision to move away from Magnuson Act federal lobster fishery management is a review of the failed attempt to revamp the Lobster FMP with Amendment Five. This Amendment would have been a significant alteration of the lobster management plan, and grew out of the efforts of the Lobster Industry Working Group (LIWG).<sup>154</sup>

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148. *Id.* § 649.21(a).

149. *Id.* § 649.21(b)(1). Inshore lobster pots, those generally used in state waters, weigh between 50 and 60 pounds. EARL L. DOLIBER, *LOBSTERING INSHORE AND OFFSHORE* 43, (1973). Most lobster fishers fish an average of 250 traps when hauling single traps and 300-400 when using trawls. Trawls are essentially a series of lobster pots strung along a common line. Offshore pots are often five feet in length, forty-four inches wide, with a height of eighteen inches. They weigh around 100 pounds. *Id.* at 63, 65. In addition to the size differences as compared to inshore traps, offshore traps use twelve inch entry rings (for lobster entry) as opposed to the five inch rings used in inshore traps. *Id.* at 65. The use of trawls is more common in offshore lobstering where between ten and fifty traps, approximately twenty fathoms apart, are attached to one line that has water surface buoys at each end. *Id.* at 66.

150. 50 C.F.R. § 649.21(b)(2) (1996). The regulation specifies the type and dimensions of the radar reflectors to be used.

151. *Id.* § 649.21(b)(3).

152. *Id.* § 649.21(c). Escape vents must either be rectangular with an unobstructed opening of not less than one and seven-eighths inches by five and three quarters inches or two circular openings of not less than two and three-eighths inches in diameter. *Id.* § 649.21(c)(i), (ii).

153. *Id.* § 649.21(e).

154. NEW ENGLAND FISHERY MANAGEMENT COUNCIL, *AMENDMENT #5 TO THE AMERICAN LOBSTER FISHERY MANAGEMENT PLAN INCORPORATING A FINAL SUPPLEMENTAL*

LIWG was formed by representatives of the U.S. lobster industry, which in the spring of 1992 began developing a comprehensive statement of management principles.<sup>155</sup> The statement was submitted to the Lobster Oversight Committee as well as to the NEFMC.<sup>156</sup> The NEFMC subsequently accepted the industry plan as the basis for Amendment Five in January, 1993.<sup>157</sup>

The LIWG plan, as embodied in Amendment Five, affirmed the elements of the existing measurement regime, but sought to impose several additional management measures. Notably, the Amendment Five summary stated that “[t]he proposed new actions are intended to apply only in the EEZ.”<sup>158</sup> Ironically, the NEFMC also stated that “[f]uture complementary management action may occur in territorial waters through state initiatives and/or under the auspices of the Atlantic States Marine Fisheries Commission (ASMFC).”<sup>159</sup> The NEFMC developed Amendment Five upon the premise that management should account for the social, cultural, and economic differences in the various regions across which the lobster fishery is prosecuted, thus allowing for different management approaches by area.<sup>160</sup>

The proposed Amendment Five in part reaffirmed the provisions of Amendment Four which had been implemented on December 27, 1991.<sup>161</sup> Amendment Four established the minimum carapace size of three and one-quarter inches, rescinded the scheduled size increase, provided a new definition of overfishing, and formally documented a concern that the offshore lobster stock was overfished.<sup>162</sup> The NMFS approved Amendment Four, but with the significant proviso that a more comprehensive amendment be submitted by December 27, 1991.<sup>163</sup> The response to that proviso

ENVIRONMENTAL IMPACTS STATEMENT: Volume I, at 2 (Jan. 24, 1994) [hereinafter AMENDMENT FIVE].

155. *Id.* Development of the statement was done with the aid of the University of New Hampshire Office of Sea Grant.

156. *Id.*

157. *Id.*

158. *Id.* at 1. This is unnecessary language because, absent unique circumstances, the Magnuson Act Lobster FMP had no authority to reach state waters in any event. It is, indeed, use of the ACFCMA as a management vehicle and the 1996 Magnuson Act amendments that provide the basis for the cooperative jurisdiction addressed in Part II.C.3.

159. *Id.*

160. REVIEW, *supra* note 133, at 3.

161. *Id.* (citing 57 Fed. Reg. 214 (1991)).

162. *Id.* Implementation of these carapace minimum length measures is at 50 C.F.R. § 649.20(b)(1) (1996).

163. REVIEW, *supra* note 133, at 3.

was proposed Amendment Five.

## 2. *Substantive Provisions of Amendment Five*

Under the proposed Amendment Five, the NEFMC planned to implement a new data collection system which would have included an expanded weighout system, vessel logbooks, and sea sampling.<sup>164</sup> The new data collection system would have relied on fishery managers and lobster fishermen alike and would have provided the necessary information for accurate stock assessment.<sup>165</sup> Specifically, the data would have allowed the NMFS and the states to "concentrate resources" appropriately to "specific problems concerning lobster biology, seasonal movements and stock intermixture, and pre-recruit indices, among others."<sup>166</sup>

Operator permits were also addressed in proposed Amendment Five. The relevant provision included a requirement that all vessels engaged in the commercial lobster fishery in the EEZ possess an NMFS-issued permit.<sup>167</sup> Vessel operators who were engaged in the commercial fishery were immediately eligible for a permit, subject to certain requirements primarily related to the application process.<sup>168</sup> Additionally, the proposed Amendment stated that a permit was to be non-transferable, and operators were to have it available at all times for inspection.<sup>169</sup> In addition to lobster fishing vessel permits, the proposed Amendment addressed dealer permits as well. A NMFS Lobster Dealer Permit was to have been required of any dealer of American lobster.<sup>170</sup>

Implementation of Amendment Five would also have initiated a

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164. AMENDMENT FIVE, *supra* note 154, at 4. The proposed Amendment noted that existing data systems implemented by the various states have provided much of the necessary information for lobster fishery management, but cited the need for "uniform data collection." *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 13. Permit holders were subject to various permit sanctions for violations of lobster fishing regulations. "Party and charter boats" engaged in the recreational lobster fishery in the EEZ were exempted from the permit requirement, provided that no lobster be bartered or offered for sale, and further that no more than six lobsters per person on board be landed. *Id.*

168. *Id.* at 13-14.

169. *Id.* at 14.

170. *Id.* Dealer Permits would be issued for a period from January 1 through December 31 of each year. Again, these permits were non-transferable and were to be maintained at the place of business. Dealers, too, could be held accountable for fishing regulation violations and were subject to permit sanctions. *Id.*

moratorium on the issuance of new vessel permits.<sup>171</sup> Specifically, no new vessel permits were to have been issued to vessels that were not already in possession of a valid Federal lobster permit and actively landing lobsters, or to vessels or fishermen which were not in possession of a Federally endorsed state permit and actively landing lobsters.<sup>172</sup> The NEFMC intended on reviewing the effects of the moratorium during the third year thereof, to determine whether the intended effects were realized.<sup>173</sup> The moratorium would have continued for five years from the date of implementation of Amendment Five, but the Council could have chosen to extend it for a specified period of time or to terminate it, subject to consistency with the stock-rebuilding program.<sup>174</sup>

### 3. *The Stock Rebuilding Program & Effort Management Teams*

Central to proposed Amendment Five, and of greatest significance, was the comprehensive stock-rebuilding program. This provision of the proposed Amendment is also central to the topic of this Comment, as the program sought to better recognize the regionalized needs and problems of the lobster fishery, and attempted to induce cooperation among the various states and the federally created NEFMC. Proposed Amendment Five would have created a framework process to institute a lobster stock rebuilding program in the EEZ with the intent that the several states would introduce similar measures in state waters.<sup>175</sup> Implementing regulations recognized four regions: Area 1 was to be the near shore EEZ waters of the Gulf of Maine; Area 2 would be the near shore EEZ waters of Southern New England; Area 3 was the offshore waters in the EEZ; and, Area 4 would be the near shore EEZ waters of the middle Atlantic.<sup>176</sup> This regional approach to conservation and management was intended to better address the specific needs of each area and respond to the various environmental and

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171. *Id.*

172. *Id.* The specifications stated were subject to various considerations and the guidelines for the control date specified subsequently in the Amendment provision. Exempt from the moratorium were recreational boats subject to the same requirements as provided for operator permits. *Id.* The control date was determined to be March 25, 1992. *Id.* at 15.

173. *Id.* at 15.

174. *Id.* Upon expiration of the moratorium the Council could authorize the issuance of new permits subject to any qualifying guidelines the Council determined appropriate. *Id.*

175. REVIEW, *supra* note 133, at 3. The stock rebuilding framework regulations were implemented into the Lobster FMP at 50 C.F.R. § 649.42 (1996).

176. 50 C.F.R. § 649.42(b)(1)-(4) (1996). (setting forth specific latitudinal and longitudinal points for each area).

economic forces unique to each region. Tailor-made management programs for each area would, it was hoped, foster stronger regional support.<sup>177</sup>

The stock rebuilding framework also created Effort Management Teams (EMT).<sup>178</sup> The EMTs were a unique, and somewhat ingenious, mechanism to ensure regional input into lobster fishery management. An EMT was created for each of the four regions noted above and charged with the responsibility of making recommendations for stock rebuilding to the NEFMC.<sup>179</sup> EMTs were to consist of a common, core group of NMFS, state, and NMFC representatives<sup>180</sup> in an attempt to encourage action and compliance by including all interested players in the lobster fishery. Furthermore, each EMT was required to "consult with lobster fishermen operating within each Management area . . . with the intent of reaching consensus regarding the specific measures to be applied in each area."<sup>181</sup>

A deadline of January 20, 1995 was set for the submission of the EMT recommendations to the NEFMC.<sup>182</sup> The Council was required to adopt or modify the recommendations and then submit to the Secretary corresponding management measures in compliance with the Lobster FMP objectives by July 20, 1995.<sup>183</sup> Failure of the NEFMC to meet this deadline would allow the Secretary of Commerce to determine whether a secretarial amendment to the FMP was needed.<sup>184</sup> While the various EMTs submitted their recommendations by the set deadline, the NEFMC failed to meet the July 20th deadline due to the unwillingness of state directors from Maine, New Hampshire, Rhode Island, and Connecticut to implement measures in support of a Council amendment.<sup>185</sup> The NMFS had previously indicated to the NEFMC that its support of an amendment implementing stock rebuilding measures, such as proposed Amendment Five, was predicated

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177. REVIEW, *supra* note 133, at 3.

178. 50 C.F.R. § 649.42(c).

179. *Id.* § 649.42(c)(1), (3).

180. AMENDMENT FIVE, *supra* note 154, at 22.

181. *Id.* at 22-23. Potential measures to be implemented under the framework process were listed as: a minimum and maximum size limit; trap limits; seasonal closures; closed areas or zones; restrictions on allowable fishing times; restrictions on allowable catches; additional gear restrictions; and, "[a]ny other restrictions" necessary for reducing or controlling lobster mortality rates. *Id.* at 22-25.

182. 50 C.F.R. § 649.42(c)(3) (1996).

183. REVIEW, *supra* note 133, at 3.

184. *Id.*

185. *Id.* at 4. Bear in mind this failure of *state officials* to compromise on management and conservation measures that were generally accepted as necessary. This reality of proprietary state interests stalemating the fishery management process is explored in more detail, *infra*.

on state participation in the administration of the amendment and implementation of complimentary state programs.<sup>186</sup> The failure of the states to reach consensus on complimentary programs, and the resulting lack of support of the NMFS sounded the death knell for Amendment Five.

The failure of Amendment Five is of great significance in most part due to what it attempted to reach; a system of co-operative management between the federal agencies, the NEFMC, and the relevant state parties. Amendment Five would have required the states to rely on the federally created NEFMC for its directives and for the implementation of local recommendations, a relationship not without antagonism. Furthermore, a lack of initiative for agreement and consequences for failure, as between the states, was reflected in the inability of Maine, New Hampshire, Rhode Island, and Connecticut to adopt measures in support of the NEFMC Amendment. The model of fishery management based on power centered with the federal government and siphoned down to a state and local level had failed for the lobster fishery. It became apparent that a paradigm of management was necessary wherein the states, holding a vested interest in the lobster fishery, more directly wielded regulatory and jurisdictional power.

#### *D. Withdrawal of the Lobster FMP*

In the aftermath of the failures under Amendment Five, the NMFS and Secretary of Commerce determined that the Lobster FMP was not meeting Magnuson Act objectives of conservation and management. As a result, the NMFS published an advance notice of proposed rulemaking (ANPR), dated September 18, 1995, that discussed two options for action on the Lobster FMP.<sup>187</sup> The first option, the one selected and the subject of this Comment, was the withdrawal of the Secretary of Commerce's approval of the Lobster FMP and its implementing regulations.<sup>188</sup> The second option, seemingly never seriously considered, was to prepare a Secretarial amendment to the existing Lobster FMP, in accordance with national standards and pursuant to the Magnuson Act.<sup>189</sup> Ultimately the environmental review of the proposed action assessed three possible alternatives.<sup>190</sup> The

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186. *Id.* at 3.

187. *See* Management Options for the American Lobster Fishery, 60 Fed. Reg. 48,086 (1995) (to be codified at 50 C.F.R. pt. 649) (proposed Sept. 18, 1995).

188. *Id.* at 48,087.

189. *Id.*

190. REVIEW, *supra* note 133, at 5.

Review prefaced discussion of the three alternatives with the stated objective of "eliminat[ing] Federal regulations that cause unnecessary duplication and, where possible, to allow state or local governments to administer programs."<sup>191</sup> A possible Secretarial amendment to the existing Lobster FMP was discarded as an option. The first alternative was to take no action and leave the current FMP status quo.<sup>192</sup> Withdrawal of the federal Lobster FMP was particularized into two options.

The first withdrawal option was to withdraw approval of the Lobster FMP with no requirement that regulations promulgated by the ASMFC be in place.<sup>193</sup> This option allowed for the possibility that the American Lobster Fishery in the EEZ would, at least for a time, stand completely unregulated.

The second, and preferred alternative, was to withdraw the Lobster FMP and implementing regulations contingent upon the implementation of a lobster management plan proposed by the ASMFC, pursuant to newly granted regulatory compliance powers under the ACFCMA.<sup>194</sup> This alternative was ultimately selected.

Generally, the NMFS cited several reasons for the withdrawal of the Lobster FMP. As noted above, Presidential regulatory reform provided an impetus for the action as the NMFS argued that the Lobster FMP and enforcing regulations could be eliminated without compromising resource management and conservation objections.<sup>195</sup> NMFS further stated that the American lobster fishery is primarily prosecuted in state waters, and that pursuant to recent amendments to the ACFCMA, regulation can now be achieved under the compliance authority included in that Act.<sup>196</sup> Furthermore, NMFS asserted that they could no longer ensure that the Magnuson Act FMP is or can be amended to be consistent with Magnuson Act national standard one, that requires conservation and management measures to prevent overfishing.<sup>197</sup> The NMFS concluded the ASMFC is in a better

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191. *Id.* If the content of the quoted language sounds familiar, recall the discussion of President Clinton's regulatory reform initiative, *supra* note 2.

192. REVIEW, *supra* note 133, at 5.

193. *Id.*

194. *Id.* at 5.

195. *American Lobster Fishery; Removal of Regulations*, 61 Fed. Reg. 13,478 (1996) (to be codified at 50 C.F.R. pt 649) (proposed Mar. 27, 1996).

196. *Id.*

197. *Id.* at 13,479. A compelling issue that remains unaddressed is whether or not withdrawal of an existing FMP for failure to meet a national standard, rather than amending the plan to make it consistent, complies with the letter or intent of the Magnuson Act.

position to address the admittedly overfished conditions of the lobster stocks unhindered by the NEFMC process.<sup>198</sup>

According to the NMFS, withdrawal would also ensure consistency with national standard seven, which requires that conservation and management measures minimize costs and avoid unnecessary duplication where practicable.<sup>199</sup> Greater regulatory authority vested in the states under the ACFCMA was deemed by NMFS to provide a more effective vehicle for coastal fishery management, and Magnuson Act FMP regulations would therefore constitute an unnecessary duplication.<sup>200</sup> Under ACFCMA, the NMFS continued, the ASMFC could promulgate complimentary Federal regulations, thereby maintaining effective management of federal water lobster fisheries.<sup>201</sup>

NMFS also noted that concurrent withdrawal of Lobster FMP regulations and implementation of the ACFCMA lobster CMP and implementing regulations would provide a seamless transition.<sup>202</sup> The NMFS tempered its endorsement of the action by noting that, while states would enjoy greater flexibility in lobster fishery management under the ACFCMA, there would be no short term decrease in lobster fishing activity or gear deployment.<sup>203</sup> The NMFS asserted that in the long term, this option would be more likely to reduce lobster fishing activity due to the ASMFC's ability to act without the burdens of the regional council process.<sup>204</sup> Nevertheless the NMFS pointed out that "[t]here is no guarantee that the ASMFC will be successful."<sup>205</sup>

Despite the lack of certainty that lobster fishery management under the ASMFC would be any more effective than future amendments to the Lobster FMP, the Secretary of Commerce and the NMFS adopted a position in support of withdrawal of the FMP, based on the reasoning stated above, and assertions of positive economic and social impact. The Secre-

198. *Id.*

199. *Id.* National standard seven appears in 16 U.S.C. § 1851(a)(7) (1994).

200. REVIEW, *supra* note 133, at 4-5.

201. *Id.*

202. *Id.* at 8. This assertion seems to presuppose a certain degree of consistency between the existing Magnuson Act FMP regulations and those that would be implemented under the ACFCMA.

203. *Id.*

204. *Id.*

205. REVIEW, *supra* note 133, at 8. The NMFS continued to note that while the decision would not change the current status of the fishery, it *may* change the federal activity under which it is being implemented, and that the implementations of regulations under the ACFCMA might require its own "formal consultation." *Id.*

tary published notice of the withdrawal contingent upon implementation of regulations under the ACFCMA. An amendment to the ACFCMA in the fall of 1996 has set the stage for the transition of lobster fishery management to the ASMFC.<sup>206</sup> Under the amendment, if a CMP for the lobster fishery is not implemented by December 31, 1997, then the Secretary of Commerce must issue interim regulations by March 1, 1998 to regulate the landing of lobsters in the EEZ.<sup>207</sup> Specific temporary limits are set forth in the amendment and the Secretary is required to monitor lobster landings on a timely basis and if necessary implement other conservation regulations.<sup>208</sup> Thus, the stage has been set for American lobster fishery management to commence under the ACFCMA.

#### IV. THE FUTURE OF LOBSTER FISHERY MANAGEMENT — A PRECARIOUS BALANCE OF POWER

Having explored the legislative enactments allowing for the shift of management authority to the states as well as the history behind the decision to withdraw the Magnuson Act FMP, the question remains as to whether this attempt to cooperatively manage the species will succeed. The ramifications of the success or failure of state management of the American Lobster Fishery under the ACFCMA will reach beyond the lobster fishery. Should this experiment prove successful, its regionalized approach to fishery management will likely be applied to other fisheries which Council developed FMPs have failed to adequately conserve.

Regionalized, and even localized, management of fishery resources holds great promise because it places conservation authority and responsibility in the hands of those closest to the resource. The benefits of doing so are twofold. First, those who interact daily with the fishery are in a better position to assess its health and identify those elements causing the greatest harm. This aspect should assist in the development of appropriate particularized management efforts. The second benefit is that those closest to the fishery, who depend upon it for their livelihood and as a stay of local and state economy, presumably have the most to lose should the fishery collapse. Ideally, this factor will ensure that necessary conservation measures will be timely taken and will look to maximize the long term

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206. Transition to Management of American Lobster Fishery by Commission, Pub. L. No. 204-308, § 101(a) (codified at 16 U.S.C.A. § 5107b(a) (West 1985 & Supp. 1998)).

207. *Id.*

208. *Id.* § 5107b(a), (b).

health of the fishery. Despite these seemingly obvious advantages of the cooperative approach to lobster fishery management under the ACFCMA, there exists problematic issues arising from the Act's provisions for cooperative jurisdiction. This section identifies one present and one potential issue for consideration that may arise under ASMFC management of the lobster fishery and suggests what impact they may have. Ultimate resolution of these conflicts, however, will only come with time, and perhaps litigation.

### A. *The Balance of Power*

Withdrawal of the Lobster FMP has been characterized in this Comment as part of a transition of authority to the states comprising the ASMFC. While in a general sense, and relative to the split of management authority under the Magnuson Act, this may be accurate, the division between state and federal authority as exercised under the ACFCMA is not so clear-cut. Rather, while the ACFCMA provides the vehicle for greater state management authority over EEZ waters, it also empowers the federal government with greater authority over state waters as well.<sup>209</sup> It is this bilateral extension of both state and federal authority that has given rise to what this Comment has termed cooperative jurisdiction. The balance struck, at first blush, has great promise; states are given greater ability to develop appropriate conservation and management efforts over fisheries which are vital to their economy and way of life, while the federal government will play the role of police officer, stepping in only when a state fails to meet its obligations in implementing a management measures or when such measures fail to assure effective conservation of the lobster fishery.<sup>210</sup>

The balance struck may prove to be difficult to maintain. Two particular aspects of this equilibrium are explored below. The first element to throw the scales off kilter came in the form of the 1996 amendments to the Magnuson Act. Increased responsibilities on the part of the regional councils to address overfished species in their geographical regions inhibits the abdication of fishery management authority absent certainty that measures are in place to conserve the threatened species. The identification of the lobster fishery as overfished mandates action on the part of the NEFMC as the responsible council. A hands-off transfer of management

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209. See *supra* Part II.C.3 and accompanying notes, addressing the concept of cooperative management jurisdiction under the ACFCMA.

210. See *id.*

authority to the ASMFC no longer appears possible; the NEFMC must either assure that the ASMFC plan will adequately address the lobster fishery or the Council must take independent steps. Part IV.A.1 demonstrates that the NEFMC is attempting to do both and assesses the likely outcome of this present challenge to ASMFC management of the lobster fishery. The second potential thumb on the scales that threatens the delicate balance of power under the ACFCMA is the expanded federal authority in state waters. Part IV.A.1 examines the Secretary of Commerce's powers in state waters under the ACFCMA and highlights potential areas of conflict.

### 1. *The Impact of the 1996 Amendments to the Magnuson Act*

The first conflict that has arisen in the ASMFC's assumption of control over the lobster fishery centers on the need for promulgation of complimentary regulations for federal waters. In particular, the 1996 amendments to the Magnuson Act have dramatically changed the dynamics of regulatory authority and responsibility between the NEFMC and the ASMFC. Generally, in order for the states' lobster management plan to effectively address lobster management and conservation for the entire fishery, including both across state territorial boundaries as well as beyond the territorial sea into federal waters, such complimentary regulations must be promulgated. The ACFCMA does not require the Secretary of Commerce to implement complimentary regulations, but rather provides that the Secretary "may implement regulations to govern fishing in the exclusive economic zone."<sup>211</sup> Furthermore, the decision whether to implement such regulations can only come after a determination that the regulations are necessary to support the ACFCMA management plan and that they are consistent with the Magnuson Act national standards.<sup>212</sup> Thus, the Secretary, acting through the NMFS or the NEFMC, is left with a great deal of discretion regarding whether complimentary regulations will be implemented, and if so what specific measures will be used.<sup>213</sup>

Indeed, recent events indicate that this aspect of the transition to ASMFC is providing the most controversy. The 1996 Amendments to the Magnuson Act, addressed in Part II.B, *supra*, enacted as the Sustainable

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211. 16 U.S.C. § 5103(b) (1994).

212. *See supra* note 98 for the text of these standards.

213. The ACFCMA provides that federal regulations may include measures recommended by the ASMFC, and as noted earlier this is likely to be the source for most if not all regulatory provisions. 16 U.S.C. § 5103(b) (1993).

Fisheries Act (SFA),<sup>214</sup> have placed the NMFS and the ASMFC at a crossroads. The amendments that have most directly affected the transition of lobster fishery management are those made to section 1854 of the Magnuson Act.<sup>215</sup> The following explanation of these particular amendments sets the stage for the current challenge to ASMFC management of the lobster fishery. Under the Amendment, the Secretary is required to report annually to Congress and the regional Councils on the status of fisheries within each Council's geographical area of authority.<sup>216</sup> If a management plan or international agreement exists for a particular fishery the criteria included in such plan or agreement shall be used to determine whether the fishery is overfished.<sup>217</sup> The amendment continues to state that if the Secretary determines, "based on trends in fishing effort, fishery resource size, and other appropriate factors," the fishery will become overfished within two years then it shall be classified as "approaching a condition of being overfished."

Upon the determination that a fishery is overfished the Secretary is required immediately to notify the appropriate Council to request that action be taken to cease overfishing and to initiate conservation and management measures.<sup>218</sup> The following mandate for action on the part of the designated regional Council is what has created a new tension in the attempt to transition lobster fishery management to the ASMFC. The Council, once notified, must prepare a fishery management plan, a plan amendment, or proposed federal regulations for the identified fishery.<sup>219</sup> Such response must "end overfishing in the fishery and . . . rebuild affected stocks of fish;"<sup>220</sup> or in the case of a fishery approaching an overfished condition, prevent future overfishing from occurring.<sup>221</sup>

The Amendment provides further specification for actions proposed to address an identified fishery. Proposed action must first specify a time frame for the cessation of overfishing and rebuilding of the fishery, taking into account the status and biology of the fish stock, the fishing community needs, recommendations from international organizations, and the interac-

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214. Pub. L. No. 104-297, 110 Stat. 3559 (1996).

215. See 16 U.S.C.A. § 1854(e) (West 1985 & Supp. 1997).

216. *Id.* § 1854(e)(1).

217. *Id.*

218. *Id.* § 1854(e)(2).

219. *Id.* § 1854(e)(3).

220. *Id.* § 1854(e)(3)(A).

221. *Id.* § 1854(e)(3)(B).

tion of the fishery with the overall marine ecosystem.<sup>222</sup> Furthermore, such time period must not exceed ten years unless particular circumstances such as the biology of the fish stock or other environmental conditions require more time.<sup>223</sup> Failure by the appropriate Council to submit an appropriate plan, amendment, or regulations within one year of notification triggers a requirement that the Secretary take the necessary action.<sup>224</sup> Finally, once a plan, amendment, or regulations has been implemented, the Secretary must review the action at routine intervals no longer than two years apart.<sup>225</sup>

On September 30, 1997 the NMFS issued its first annual list of overfished fisheries which included the American lobster fishery.<sup>226</sup> Under the SFA, therefore, the NEFMC, as the responsible council, is compelled to address the overfished state of the lobster fishery by either preparing a new lobster FMP or implementing other federal regulations. Ideally, and consistent with the transition to ASMFC management, the NEFMC would approve the ASMFC plan and seek federal implementation of its provisions.

The most recent developments in the ASMFC plan are embodied in Amendment Three to the CMP.<sup>227</sup> Amendment Three sets forth not only particular gear and lobster take requirements, but also specifies throughout the document the recommendations to the Secretary of Commerce for complimentary actions for federal waters.<sup>228</sup> The NEFMC, however, expressed concern over Amendment Three and its ability to address the overfished condition of the lobster fishery.<sup>229</sup> In particular, George Liles,

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222. *Id.* § 1854(e)(4)(A)(i).

223. *Id.* § 1854(e)(4)(B)(ii).

224. *Id.* § 1854(e)(5).

225. *Id.* § 1854(e)(6).

226. American Lobster; Intent to Prepare an Environmental Impact Statement, 62 Fed. Reg. 54,834-02 (1997) [hereinafter Intent to Prepare EIS].

227. ATLANTIC STATES MARINE FISHERY COMMISSION, DRAFT AMENDMENT #3 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR LOBSTER (1997). The Amendment was produced June 30, 1997, and was the subject of public hearings during August and September of 1997. *Id.*

228. *Id.* § 3.10. Generally, the Commission recommends that the Secretary: (1) maintain a moratorium on new federal permits; (2) maintain current federal regulations; (3) require that fishermen comply with state law for landing lobsters in the state where landed, regardless of where the lobsters were caught; (4) implement any coastal measures included in the ASMFC plan in federal waters. Further recommendations were currently being sought by way of public comment at issuance of Amendment Three. *Id.*

229. See Intent to Prepare EIS, *supra* note 226, at 54,835; see also Letitia Baldwin, *States, Feds at Odds Over Lobster Crisis Regulators: Plan Inadequate*, BANGOR DAILY NEWS, Nov. 5, 1997, available in 1997 WL 11885615; John Richardson, *States Rush to Fix*

a National Marine Fisheries spokesman, stated, “[t]he concern is the proposed traps limits in three years’ time would have brought fishing to a level that is still above the amount of gear that most fishermen have in the water [today].”<sup>230</sup>

As a result of the NEFMC’s concern with the adequacy of the ASMFC plan and in light of the Council’s mandate under the SFA to address the overfished lobster fishery the NMFS faced a “difficult dilemma.”<sup>231</sup> The NMFS, therefore, decided it had to move forward with the process of implementing conservation and management measures for the American lobster fishery.<sup>232</sup> The Service did so despite admitted confusion as to which was the appropriate regulatory authority to act under, the Magnuson Act or the ACFCMA.<sup>233</sup> In accordance with the decision to move forward, the NMFS published a Notice of Intent to prepare an Environmental Impact Statement (EIS) on October 22, 1997.<sup>234</sup> In addition to the measures included in the ASMFC’s Amendment Three, the NMFS considered a number of its own conservation measures, for example: (1) Effort caps based on historical trap numbers or a flat cap, with possible consideration of areas fished; (2) a trap reduction to 1991 fishing levels; (3) a percent cap on landings based on total reported landings in previous years, or a flat cap based on duration of fishing trip; (4) a prohibition on EEZ lobster taking or possession in the EEZ; (5) applying current federal regulations to the EEZ via the ACFCMA; or (6) taking no action and maintaining the status quo.<sup>235</sup> In addition, all of the Amendment Three measures will be assessed during the EIS process.<sup>236</sup>

Although the 1996 Amendments to the Magnuson-Stevens Act clearly complicated the assumption of lobster fishery management by the ASMFC, the states were able to develop Amendment Three to address the NMFS’s concerns. With the support of the NMFS, the ASMFC approved Amendment Three on December 12, 1997.<sup>237</sup> Because NMFS participated in the development of the lobster plan, it could not develop its own regulations until the plan was completed. After the Amendment was approved, NMFS

*Lobstering Rules After U.S. Agency Threatens to Do it*, PORTLAND PRESS HERALD, Oct. 28, 1997, at 1A.

230. Baldwin, *supra* note 230.

231. Intent to Prepare EIS, *supra* note 226, at 54,835.

232. *Id.*

233. *Id.*

234. *See id.* at 54,834-36.

235. *Id.* at 54,835-36.

236. *Id.* at 54,836.

237. 63 Fed. Reg. 10,154-02 (1998).

began developing regulations under section 804(b) of the ACFCMA.<sup>238</sup> The SFA's amendment to the ACFCMA, however, required the Secretary to issue interim regulations by March 1, 1998, if the final regulations had not been issued under section 804(b) by December 31, 1997. Because its final regulations had not been issued to meet the December 31 deadline, NMFS issued an interim rule to implement Congressionally mandated regulations contained in the SFA on March 2, 1998.<sup>239</sup> The interim rule placed a flat cap on landings in the EEZ based upon the duration of the fishing trip.<sup>240</sup>

Noting that Amendment Three is a "comprehensive plan" for managing the lobster fishery in state and federal waters, NMFS announced on January 15, 1999, that it was once again proposing to withdraw its approval of the American Lobster FMP and to remove existing regulations under the Magnuson-Stevens Act.<sup>241</sup> NMFS also proposed to implement the measures already in place under the Magnuson-Stevens Act, as well as implement new measures under the authority of the ACFCMA.<sup>242</sup> Some of the new measures proposed, consistent with the ASMFC's recommendations in Amendment Three, include the designation of lobster management areas, restrictions on fishing gear, and tagging requirements for lobster traps.<sup>243</sup> Perhaps even more significant than the regulations themselves is NMFS's conclusion that implementing regulations under section 804(b) of the ACFCMA instead of under the Magnuson-Stevens Act "is the best option to encourage and expedite partnership in state and Federal jurisdictional waters" in order to protect the American Lobster.<sup>244</sup> This strong and decisive language clearly indicates the willingness of NMFS to rest lobster management in the hands of the states.

### 3. *Enlarged Federal Authority in State Waters*

The second issue that grows from this balance of power inherent in the cooperative jurisdiction of the ACFCMA pertains to the Secretary of Commerce's powers. Under the ACFCMA the Secretary has enlarged powers in the state waters of the ASMFC states. The ACFCMA grants

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238. *Id.*

239. *Id.*

240. *Id.*

241. 64 Fed. Reg. 2708-01 (1999).

242. *Id.* to be codified at 50 CFR 697.

243. *Id.*

244. *Id.*

the Secretary of Commerce authority to take action within state waters which is likely to raise concerns of state sovereignty. The most significant power invested in the Secretary is the ability to impose a moratorium on fishing in the targeted fishery in the waters of a state that is deemed out of compliance with the ASMFC.<sup>245</sup> Violation of a moratorium placed on a fishery in a state's territorial sea may lead to federal civil and/or criminal penalties.<sup>246</sup>

Obviously, the imposition of a moratorium by the federal government on state waters, at the very least, gives rise to adversarial posturing between the penalized state and the federal government that is the antithesis of the cooperative environment that the ACFCMA seeks to promote. Furthermore, it is likely to create tension between the penalized state and the other ASMFC states that, as is discussed in the following paragraph, must determine non-compliance. Both levels of animosity would likely inhibit future development of management and conservation measures.

Additionally, and perhaps more interesting from a legal standpoint, is the potential implication of the Tenth Amendment. State control over and responsibility for fishery management in state waters is well established.<sup>247</sup> A Secretarial moratorium on state waters arguably is a federal impingement of state sovereignty and rights as guaranteed by the Tenth Amendment to the United States Constitution.<sup>248</sup> In a situation where a Secretarial imposed moratorium were to take place pursuant to the lobster management plan developed by the ASMFC, it is probable, absent quick remedial efforts by the state, that such a moratorium would be challenged on Tenth Amendment grounds. Congress has historically been able to exercise broad regulatory power over fishery management pursuant to the Commerce Clause, which would weigh in favor of constitutionality.

Furthermore, coupling Commerce Clause power with the contingent nature of the Secretarial authority under the ACFCMA provides greater support for the Act in the face of a Tenth Amendment challenge. The Secretary exercises the authority to impose the moratorium, but only upon the finding of state non-compliance by the Commission.<sup>249</sup> The Secretary

245. 16 U.S.C. § 5106(c) (1994). *See also supra* Part II.C.3 and accompanying notes.

246. 16 U.S.C. § 5106(f). The ACFCMA incorporates the civil and criminal penalties set forth in the Magnuson Act. *Id.* §§ 1858 & 1859.

247. *See supra* Part II.A and accompanying notes.

248. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

249. *See* 16 U.S.C. §§ 5105, 5106 (1994).

of Commerce does not determine whether or not a state has failed to implement an ASMFC management plan, this is done by the Commission. Thus, ASMFC states monitor the efforts of partner states and report non-compliance to the Secretary in order to seek responsive action.<sup>250</sup> Only after receiving notification from the Commission can the Secretary review the determination of non-compliance<sup>251</sup> and then impose a moratorium if necessary.<sup>252</sup> Finally, the states, acting through the Commission, can withdraw the determination of non-compliance upon finding that the offending state has taken remedial measures, and notify the Secretary of such withdrawal.<sup>253</sup> While the punitive measures are indeed imposed by the federal government, via the Secretary of Commerce, the ability to do so is contingent upon action by the Commission, comprising fellow states entered into under a voluntary inter-state compact. While not dispositive of the constitutional issue of the Tenth Amendment, it certainly would impact a court's analysis of the issue.

Analysis of the Tenth Amendment implications in the ACFCMA could constitute a complete article in and of itself and is well beyond the scope of this Comment.<sup>254</sup> It suffices, for purposes of this Comment, to identify the issue and acknowledge it is a constitutional challenge likely to be resolved only in a court of law. Certainly, should the matter arise in the context of litigation, the outcome will have a profound effect on future attempts for state and federal cooperative jurisdiction in fishery management and conservation.

#### IV. CONCLUSION

Withdrawal of the Magnuson Act Lobster FMP in favor of state management under the ACFCMA is a fascinating and important situation in fishery management. The historical background illuminates the failures of the Magnuson Act regional council management system as well as the various entities that have a significant interest in the lobster fishery specifically and fishery management in general. The shift in management authority is important in that if it proves successful it will serve as a

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250. *Id.* § 5105(b).

251. *Id.* § 5106(a).

252. *Id.* § 5106(c).

253. *Id.* § 5105(c).

254. For a recent United States Supreme Court analysis of the Tenth Amendment issue and guidance as to how the ACFCMA might be construed, *see* *New York v. United States*, 505 U.S. 144 (1992).

paradigm for future fishery management efforts. If unsuccessful, many more questions will arise as to what methods are necessary for conservation of America's fisheries.

While ASMFC management of the American Lobster fishery has been repeatedly characterized as a transition to state management, this Comment demonstrates that it is a more complicated proposition. Fishery management under the ACFCMA is actually a result of cooperative jurisdiction, where the traditional strict separation of federal and state jurisdiction is blurred and both powers extend into one another to some degree. It is this overlap of authority that perhaps will provide a system of checks and balances sufficient to ensure that not only are conservation and management measures developed and implemented, but are also adhered to. In the final analysis, however, success would do much more than serve to validate a philosophical or political approach to fishery management, it will save the American Lobster.

