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Atlantic States Marine Fisheries Commission: Getting a Grip On Slippery Fisheries Management

Joseph A. Farside Jr.

Roger Williams University School of Law

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Atlantic States Marine Fisheries Commission: Getting a Grip On Slippery Fisheries Management

Coastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States . . . are of substantial commercial and recreational importance and economic benefit to the Atlantic coastal region and the Nation.¹

I. INTRODUCTION

The recent 2004 Ocean Commission Report recommended that Congress grant the Gulf States Marine Fisheries Commission (GSMFC) and Pacific States Marine Fisheries Commission (GSMFC) the same regulatory authority that Congress granted to the Atlantic States Marine Fisheries Commission (ASMFC or Commission) in 1993:

Congress should develop new statutory authority, similar to the Atlantic Coastal Fisheries Cooperative Management Act, to support and empower the Gulf States and Pacific States Fisheries Management Commissions. All interstate management plans should adhere to the national standards in the Magnuson-Stevens Fishery Conservation and Management Act and the federal guidelines implementing these standards. States should participate in the development of the guidelines to ensure they are applicable to interstate

1. Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. § 5101(a)(1) (2000). Nationwide, estimates indicate that “recreational fishing supported nearly 350,000 jobs and generated \$30.5 billion for the economy.” NOAA: *Anglers Releasing Fish, Supporting Jobs*, 66(1) SALT WATER SPORTSMAN, Jan. 2005, at 34.

plans.²

The ASMFC received full regulatory authority in 1993 and continues to successfully reverse declines of economically and ecologically valuable fish species in state jurisdictional waters along the Atlantic Coast. Beginning with regulatory authority over striped bass in 1984,³ the ASMFC became responsible for the management of numerous other fish species such as bluefish, weakfish, summer flounder, black sea bass, scup, and tautog in 1993. As this Comment will demonstrate, the ASMFC, with regulatory authority, effectively continues to restore many important coastal fish stocks to sustainable levels through a conservative scientific approach to fisheries utilization. Similar results could be achieved for Gulf Coast and Pacific Coast fish species should Congress grant regulatory authority to the GSMFC and PSMFC as recommended by the U.S. Commission on Ocean Policy. However, before Congress grants similar regulatory authority to the GSMFC and PSMFC, a closer examination of the ASMFC's authority is necessary to correct apparent flaws in its internal decision-making structure and processes.⁴

Part II of this Comment presents an overview of the national fisheries management structure, providing the context in which the ASMFC's role fits. Part III demonstrates that the ASMFC, with regulatory authority over member states, successfully manages coastal fisheries resources while the GSMFC and PSMFC, without regulatory authority, are unsuccessful. Part IV enumerates important ASMFC procedural and substantive rules, identifies flaws in the decision-making processes of the Commission, and uses a recent New Jersey appeal as a case study

2. An Ocean Blueprint for the 21st Century: Final Report of the U.S. Commission on Ocean Policy – Pre-Publication Copy 241 (2004), http://www.oceancommission.gov/documents/prepub_report/pre_pub_fin_report.pdf [hereinafter Ocean Commission Report]. The Commission's Report represents only the second set of such recommendations for a national ocean policy in the nation's history.

3. See discussion *infra* Part III.A.1.

4. One main concern is that political persuasion will skew the actions and decisions of commissioners regarding fishery-management measures, especially allocation issues, away from the proper basis for fishery-management decisions: sound science. See MANAGING OUR NATION'S FISHERIES: PAST, PRESENT, AND FUTURE 153-54 (David Witherell ed., 2004) [hereinafter MANAGING OUR NATION'S FISHERIES].

to demonstrate the shortcomings of fishery management regulation development within the Commission. Part V urges Congress to grant regulatory authority to the GSMFC and PSMFC, but only after recognizing and addressing the problems apparent within the ASMFC. Part VI concludes that successful ASMFC management is not devoid of dangerous non-science influences, which must be checked by a respected appeals process within the Commission.

II. OVERVIEW OF NATIONAL FISHERIES MANAGEMENT

Congress passed the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) in 1976 to address the alarming decline in many coastal fishery resources precipitated by decades of unregulated commercial and recreational fishing.⁵ The Magnuson Act governs fisheries in federal waters, or the Exclusive Economic Zone (EEZ).⁶ In addition, the Magnuson Act created eight Regional Fisheries Management Councils to incorporate the viewpoints of many stakeholders, including commercial and recreational fishermen, as well as environmental and consumer groups, into regional fishery decision-making.⁷ The Regional Fisheries Management Councils work to represent the interests of their respective coastal regions and create Fishery Management Plans (FMPs) for each federally-managed fish species existing within a regional Council's jurisdiction.⁸ FMPs must comply with the ten national standards for fishery conservation and management as set forth in the Magnuson Act.⁹

5. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801(b)(1) (2000) ("It is therefore declared to be the purposes of the Congress in this chapter - (1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States. . . .").

6. *Id.* § 1801(b)(1)(A).

7. *Id.* § 1801(b)(5) (noting the function of the Regional Fishery Management Councils is to involve participation by State and regional "fishing industry, consumer and environmental organizations, and other interested persons" in fishery management, including assessments of the "social and economic needs of the States").

8. Sharon R. Siegel, Note, *Applying the Habitat Conservation Model to Fisheries Management: A Proposal for a Modified Fisheries Planning Requirement*, 25 COLUM. J. ENVTL. L. 141, 146 (2000).

9. 16 U.S.C. § 1851(a). The Magnuson Act proscribes 10 standards for fishery conservation and management:

(1) Conservation and management measures shall prevent

Although the national fisheries management structure under the Magnuson Act draws some criticism, many managers claim that, under the Magnuson Act, overfishing has been drastically slowed or reversed due to Council management.¹⁰

overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall 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, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (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 participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts 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.

Id.

10. MANAGING OUR NATION'S FISHERIES, *supra* note 4, at 152-53.

The Magnuson Act reserved fishery regulation within state jurisdictional waters to the respective states.¹¹ State waters normally include rivers, estuaries, and coastal waters from the shoreline to three miles seaward, or the EEZ's shoreward boundary. Florida and Texas are exceptions, where state jurisdiction extends from the coast to nine miles seaward into the Gulf of Mexico, shoreward of the EEZ.¹² States are free to implement various regulatory and enforcement practices to manage fisheries in state waters, including statutes, conservation and management regulations, and judicial decisions.¹³ Depending on the state, these devices may be used to tighten or relax conservation requirements or enforcement measures with regard to fish species within state waters.¹⁴

Migratory fish, however, do not recognize the boundaries between state jurisdictional waters, and frequently move between waters belonging to several different states. Obviously, with such movement, fishery resources can be exposed to several different fishery regulation schemes, varying by state.¹⁵ The result of varying harvests on "mature or spawning stocks in one jurisdiction [is] reduce[d] recruitment¹⁶ and long term abundance in neighboring jurisdictions."¹⁷ Excessive harvest of fish stocks in one or several jurisdictions could deprive more conservative, neighboring jurisdictions of their access to the coastal fishery resource.¹⁸ Without cooperative management, hypothetical fishermen in state A may be permitted by law to take ten (10) fish

11. See 16 U.S.C. § 1856(a)(1), (a)(2)(A); *New York v. Evans*, 162 F. Supp. 2d 161, 163 (E.D.N.Y. 2001).

12. John Alton Duff & William C. Harrison, *The Law, Policy, and Politics of Gillnet Restrictions in State Waters of the Gulf of Mexico*, 9 ST. THOMAS L. REV. 389, 393 (1997) [hereinafter Duff & Harrison].

13. Sarah Bittleman, *Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues*, 9 TUL. ENVTL. L.J. 349, 359 (1996).

14. See *id.*

15. See RICHARD K. WALLACE & KRISTEN M. FLETCHER, UNDERSTANDING FISHERIES MANAGEMENT 26 (2d ed. n.d.)

16. "Recruitment" is the ability of a fish stock to reproduce and protect young fish until they reach maturity. See *id.* at 43.

17. ADVISORY COMMITTEE OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION, INTERSTATE FISHERIES OF THE ATLANTIC COAST 5 (Paul E. Hamer et al. eds., 1991) [hereinafter INTERSTATE FISHERIES OF THE ATLANTIC COAST].

18. *Id.*

per day of a specific fish species, while fishermen in state B are permitted to take twenty (20) fish per day of the same species. Such regulatory inconsistency completely undermines state A's conservation efforts by allowing fishermen in state B to remove the very fish that state A seeks to preserve, and removes any incentive for state A to remain more conservative in its regulations.¹⁹ Unfortunately, this fragmented regulatory scheme currently exists among states bordering both the Gulf of Mexico and the Pacific Ocean. The states bordering the Atlantic Ocean are the only coastal states acting under an enforceable cooperative management scheme.

A. Congress created the three regional Commissions to work within the national structure

Congress created the three Commissions, the ASMFC,²⁰ the GSMFC,²¹ and the PSMFC²² prior to 1950. The Commissions were created to promote "the better utilization" of coastal Atlantic, coastal Pacific, and Gulf of Mexico fisheries. The Commissions provided a means for joint fisheries management development by member states for the "promotion and protection" and "prevention of the physical waste" of interjurisdictional fisheries residing in the waters of a Commissions' member states.²³

The Commissions' original purpose was to provide coastal states an opportunity to act cooperatively in developing fishery regulations for migratory stocks.²⁴ States consenting to their regional Commission Compact were to use their coastal Commission as a vehicle for joint management of important

19. See 16 U.S.C. § 5101(a)(5).

20. Atlantic States Marine Fisheries Commission Compact, Pub. L. No. 77-539, 56 Stat. 267 (1942) [hereinafter ASMFC Compact], available at <http://www.asafc.org/publications/reviseCompactRules&Regs0304.pdf>.

21. Gulf States Marine Fisheries Commission Compact, Pub. L. No. 81-66, 63 Stat. 70 (1949) [hereinafter GSMFC Compact], available at <http://www.gsmfc.org/compact.html>.

22. Pacific States Marine Fisheries Commission Compact, Pub. L. No. 80-232, 61 Stat. 419 (1947) [hereinafter PSMFC Compact], available at <http://www.psmfc.org/> (follow "Publications & Maps" hyperlink; then follow "PSMFC Compact" hyperlink).

23. GSMFC Compact, 63 Stat. at 70 (art. I); PSMFC Compact, 61 Stat. at 419-20 (art. I); ASMFC Compact, 56 Stat. at 267 (art. I).

24. Elizabeth C. Scott, Note, *Managing the Maine Lobster Fishery: An Evaluation of Alternatives*, 20 VA. ENVTL. L. J. 573, 583-84 (2001).

coastal fisheries with other member states rather than continuing to promulgate regulations state by state.²⁵ Thus, Congress designed the Commissions to serve as sounding boards capable of representing the various fishery interests and to protect the common good with regard to fisheries.²⁶

Each Commission operates an Interstate Fisheries Management Program (Program) to “promote the conservation of . . . fishery resources . . . based on the best scientific information available, and provide adequate opportunity for public participation.”²⁷ Through the Program, the Commissions carry out their primary function of making joint fishery regulation recommendations to the member states through detailed FMPs, outlining the optimal regulatory approach for each individually managed fish species. Theoretically, if every state implemented its Commission’s recommended FMP for each species, the coastal stock would be managed as one ecologically related group of populations. To achieve this goal, and in an effort to “promote the conservation” of fishery resources,²⁸ the Commissions perform fact-finding and deliberation incorporating both the best scientific information available as well as regional public comment to arrive at the most appropriate regulatory measures for each species.²⁹ The sum of a Commission’s FMPs, one for each species, would represent a comprehensive management structure for all coastal fisheries governed by the individual commissions, comprising the best management scheme for targeted species because species would be managed as a coastal interjurisdictional resource rather than a resource belonging to individual states.

25. *Id.* at 583-84; *see, e.g.*, ASMFC Compact, 56 Stat. at 267 (art. II) (“This agreement shall become operative . . . as to those states executing it whenever any two or more of the [coastal states] have executed it . . .”); *id.* at 269 (Art. XII) (“This compact shall continue in force and remain binding upon each compacting state until renounced by it.”).

26. Scott, *supra* note 24, at 583-84.

27. *See, e.g.*, ATLANTIC STATES MARINE FISHERIES COMMISSION, INTERSTATE FISHERIES MANAGEMENT PROGRAM CHARTER, § 1(b)-(c)(2002), available at <http://www.asmfc.org/publications/isfmpCharter03.pdf> [hereinafter ASMFC Charter].

28. *See, e.g.*, ASMFC Charter, *supra* note 27, § 4(g).

29. Scott, *supra* note 24, at 584.

Although the Commissions' jurisdiction for fishery regulation is mainly constrained to fisheries existing within state waters, the Commissions work jointly with the Regional Councils established by the Magnuson Act to establish similar FMPs for fisheries existing abundantly in both state waters and the federal exclusive economic zone (EEZ). For example, Congress directs the ASMFC to consult with the appropriate Regional Councils³⁰ to develop FMPs complementary to those developed by the Council(s) regulating the same species in nearby federal waters.³¹ Congress even directs the ASMFC to create a joint FMP to be implemented in both state waters and nearby federal waters for a species in the absence of an equivalent FMP by the appropriate Regional Council. Because it will reach into federal waters, such an FMP must comply with the ten national standards set forth in the Magnuson Act.³²

B. All three commissions only served advisory roles until 1993

Congress designed the three Commissions to serve only advisory roles in the management of fishery resources in state waters, and to be powerless to compel member states to adopt the recommendations formed by the Commission as the preferred fishery management regulations for individual fish species.³³ Essentially, even after Congress created the three regional Commissions, member states were no more obligated to cooperatively manage migratory fish stocks as they were prior to the creation of the Commissions. The same remains true today for GSMFC member states and PSMFC member states. The ASMFC member states,³⁴ however, are required to follow regulatory

30. Examples of two Regional Councils under the Magnuson Act with which the ASMFC cooperates are 1) the New England Fishery Management Council (NEFMC) and 2) the Mid-Atlantic Fishery Management Council (MAFMC). The Magnuson Act requires these Councils to develop FMPs for federal waters or economic exclusive zone (EEZ).

31. 16 U.S.C. § 5104(a)(1).

32. *Id.* § 5103(b)(1)(B); see *supra* text accompanying note 9 for a list of the ten FMP standards set forth in the Magnuson Act.

33. Scott, *supra* note 24, at 584.

34. The ASMFC member states are: Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. ASFMC Charter, *supra* note 27, § 8(II).

recommendations developed by the Commission.

C. *Congress granted the ASMFC complete regulatory authority in 1993*

Between 1950 and 1984, the ASMFC served only an advisory role in fisheries regulation development to its member states. In 1984, in response to the Atlantic striped bass crisis,³⁵ Congress passed the Atlantic Striped Bass Conservation Act,³⁶ giving the ASMFC regulatory authority only over the coastal management of striped bass. Then, in 1993, Congress made a finding that the then-existing scheme of state-by-state regulation of other species was inadequate to address the migratory nature of fishery resources along the Atlantic coast:

[b]ecause no single governmental entity has exclusive management authority for Atlantic coastal fishery resources, harvesting of such resources is frequently subject to disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation and sustainable use of such resources and to the interests of fishermen and the Nation as a whole.³⁷

Based on this finding, Congress passed the Atlantic Coastal Fisheries Cooperative Fisheries Management Act,³⁸ delegating regulatory authority to the ASMFC over *all* important migratory fish stocks of the Atlantic coast³⁹ and requiring that the Commission design fishery management plans (FMPs) for those important migratory species to be followed by the states.⁴⁰ Each

35. See discussion *infra* Part III.A.1. In the early 1980s, Atlantic striped bass were feared by many to be on a course for extinction by the beginning of the 21st century.

36. 16 U.S.C. § 5151.

37. 16 U.S.C. § 5101(a)(3).

38. 16 U.S.C. §§ 5101 – 5108.

39. Species currently regulated by the ASMFC are: American Eel, American Lobster, Atlantic Croaker, Atlantic Herring, Atlantic Menhaden, Atlantic Sturgeon, Black Sea Bass, Bluefish, Horseshoe Crab, Northern Shrimp, Red Drum, Scup, Shad and River Herring, Spanish Mackerel, Spiny Dogfish and Coastal Sharks, Spot, Spotted Seatrout, Striped Bass, Summer Flounder, Tautog, Weakfish, and Winter Flounder. Atlantic States Marine Fisheries Commission, Managed Species, <http://www.asmfc.org/> (follow “Managed Species” hyperlink).

40. 16 U.S.C. § 5104(a)(1).

FMP must include a list of all states required to comply with the plan, and every listed state must adopt, implement, and enforce the measures delineated in the FMP.⁴¹ In other words, the ASMFC must develop FMPs for each migratory fish species in need of cooperative regulation, and member states are obligated to implement the regulations contained in the FMPs developed by the ASMFC for each species.

The Secretary of Commerce enforces FMPs developed by the ASMFC. The ASMFC monitors state compliance with FMPs for each species. States achieve compliance individually by implementing into state law the regulations recommended by the ASMFC for each managed species.⁴² If the ASMFC finds that a state is not in compliance with the current FMPs for a particular species, the ASMFC reports to the Secretary of Commerce who, in turn, may impose a moratorium on fishing for the species in question in the waters of the non-compliant state.⁴³ Thus, if the ASMFC found a member state in non-compliance with the FMP or summer flounder, for example, the Secretary of Commerce could impose the federally-enforced moratorium on all targeted fishing of summer flounder, causing stress on local fisheries-dependent economies and angering commercial and recreational fishermen. Therefore, the moratorium threat deters member states from choosing not to comply with ASMFC fishery management plans, and allows the ASMFC to regulate migratory fishery resources more effectively than it would without such regulatory authority over the states.

41. *Id.* § 5104(b).

42. States employ varying methods of promulgating fishery regulations. Some states, like New Jersey, require an act of the state legislature to change existing fishery regulations for striped bass, but allows the New Jersey Department of Environmental Protection to make changes to fishery regulations for other New Jersey species in the New Jersey Administrative Code without an act of the state legislature. *See, e.g.*, N.J. STAT. ANN. §§ 23:5-44-45.1 (West 1997 & Supp. 2005).

43. 16 U.S.C. § 5106(c)(1).

III. THE REGULATORY ROLE OF THE ASMFC, UNLIKE THE ADVISORY
ROLES OF THE GSMFC AND PSMFC, PROVIDES EFFECTIVE COAST-
WIDE FISHERY MANAGEMENT

*A. Demise of critical species has been stopped or reversed by the
ASMFC*

The ASMFC currently manages more than twenty fish and shark species of varying ecological and economic importance.⁴⁴ The ASMFC gained regulatory authority over Atlantic striped bass in 1984 and regulatory authority over summer flounder in 1993, both very important species economically and ecologically for the Atlantic seaboard. Regulatory authority enabled the ASMFC to slow drastic declines of both striped bass and summer flounder stocks, and to restore both species to historic levels.

1. Atlantic striped bass fully recovered under ASMFC management

Atlantic striped bass are an important migratory coastal commercial and recreational fishery resource⁴⁵ that utilize the nursery and brackish areas of rivers and estuaries to spawn in late spring and early summer.⁴⁶ Chesapeake Bay, Delaware Bay, Hudson River, and Roanoke River/Albemarle Sound are the four major estuarine systems that contribute juvenile striped bass to the coast-wide stock.⁴⁷ Striped bass provided an important fishery resource until the mid-1970s when annual landings⁴⁸ began to decrease dramatically. Estimates in 1985 indicated that the striped bass coastal stock plummeted to only 600,000 individual

44. See *supra* text accompanying note 39.

45. John P. Almeida, Note, *Nonpoint Source Pollution and Chesapeake Bay Pfiesteria Blooms: The Chickens Come Home to Roost*, 32 GA. L. REV. 1195, 1215 (1998).

46. See INTERSTATE FISHERIES OF THE ATLANTIC COAST, *supra* note 17, at 77.

47. *Id.*; FISHERIES MANAGEMENT REPORT NO. 24 OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION: AMENDMENT 5 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STRIPED BASS § 3 (March 1995) [hereinafter *Striped Bass Amendment 5*](stating that the Hudson River, Delaware Bay, Chesapeake Bay, and Albemarle Sound were producer areas).

48. "Landings" are "fish taken from the water and placed on shore; harvest." INTERSTATE FISHERIES OF THE ATLANTIC COAST, *supra* note 17, at 126.

fish swimming the Atlantic coast.⁴⁹

In 1981, the ASMFC responded conservatively to the sharp decline in striped bass abundance by recommending size limits, bag limits, and spawning area closures to reduce fishing mortality.⁵⁰ However, states were not required to adhere to the recommendations, restricting the effectiveness of the ASMFC management plan. The Atlantic Striped Bass Conservation Act⁵¹ of 1984 cured these implementation and enforcement problems by giving the ASMFC its first regulatory powers over striped bass.⁵² Through the Atlantic Striped Bass Conservation Act, Congress recognized the importance of cooperative management for the striped bass stock.⁵³ The Atlantic Striped Bass Conservation Act gave the ASMFC the authority to determine whether coastal states had adopted necessary regulations to restore striped bass populations and whether states were enforcing those regulations.⁵⁴ Congress authorized the Secretary of Commerce to enforce ASMFC findings of state noncompliance with the coastal FMP for striped bass by means of a fishing moratorium on striped bass.⁵⁵ Thus, the threat of a moratorium encouraged states to comply with ASMFC regulations, where a finding of non-compliance and resulting moratorium would cause millions of dollars of lost business at tackle stores, marinas, and seafood markets.

49. See FISHERY MANAGEMENT REPORT NO. 41 OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION: AMENDMENT 6 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STRIPED BASS 1 (Feb. 2003), available at <http://www.asmfc.org/> (follow "Managed Species" hyperlink; then follow "Striped Bass" hyperlink; then follow "Amendment 6 to the Interstate Fishery Management Plan for Atlantic Striped Bass (February 2003)" hyperlink) [hereinafter Striped Bass Amendment 6].

50. INTERSTATE FISHERIES OF THE ATLANTIC COAST, *supra* note 17, at 79. Minimum size limits prevent fishermen from taking fish smaller than a scientifically-determined critical size that allows for reproduction. Bag limits prevent fishermen from removing more individual fish than that scientifically determined to be a safe level of harvest for the re-growth of the stock. Spawning area closures are timed to allow spawning fish to carry out reproductive activities with minimal disturbance.

51. Atlantic Striped Bass Conservation Act, 16 U.S.C. § 5151-58. (2000).

52. INTERSTATE FISHERIES OF THE ATLANTIC COAST, *supra* note 17, at 79.

53. 16 U.S.C. § 5151(b) (the purpose of Congress is "to support and encourage...effective interstate action regarding the conservation and management of the Atlantic striped bass").

54. *Id.* § 5153(a)(1), (2).

55. *Id.* § 5154(a).

Following passage of the Atlantic Striped Bass Conservation Act in 1984, the Atlantic striped bass populations fully recovered, and fishermen now report record numbers of striped bass.⁵⁶ The total coastal striped bass population increased from 600,000 fish in 1984 to 45.6 million fish in 2001, while fishing mortality remains below the ASMFC target.⁵⁷ Congress' decision to mobilize an enforceable cooperative interstate management effort through the ASMFC played a significant role in the unprecedented reversal of the disastrous decline in striped bass abundance.⁵⁸

2. ASMFC successfully manages summer flounder

The summer flounder fishery, which reached historic lows in the early 1990s, provides another example of the effectiveness of the ASMFC's regulatory role. In 1990, coastal commercial landings declined to 9.3 million pounds, while coastal recreational landings reached a low in 1989 of 3.2 million pounds.⁵⁹ The ASMFC (managing flounder in state waters) in cooperation with the Mid-Atlantic Fishery Management Council (managing flounder in the federal EEZ) imposed annual commercial and recreational coastal quotas translating into minimum size limits and bag limits on harvested flounder, and data-collection and record-keeping requirements on dealers and processors of summer flounder.⁶⁰ The Atlantic Coastal Fisheries Cooperative Management Act required ASMFC member states to begin implementing and enforcing the Commission's summer flounder regulations in 1993, and states continue to implement various amendments and addendums to the summer flounder FMP. Evidence shows that summer flounder stocks are recovering under ASMFC management: since 2001, coastal commercial summer flounder landings have topped 13.8 million pounds each year, and

56. Almeida, *supra* note 45, at 1215.

57. Striped Bass Amendment 6, *supra* note 49, § 1.2.2.

58. Almeida, *supra* note 45, at 1215-16.

59. TONI KERNS, 2004 REVIEW OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION FISHERY MANAGEMENT PLAN FOR SUMMER FLOUNDER § III (2004), available at <http://www.asmfc.org/speciesdocuments/sfscupbsb/summerflounder/annualreports/fmpreviews/04fmpreview.pdf>.

60. *Id.* § VI. Minimum size limits set a minimum length for landed fish, and bag limits restrict the total number of fish that can be taken by each individual per day.

recreational landings reached 11.6 million pounds in 2003.⁶¹

B. GSMFC and PSMFC do not effectively manage coastal fisheries without regulatory authority

Unlike the ASMFC with regulatory authority, the GSMFC and PSMFC cannot successfully design FMPs which are then implemented and enforced by their member states, preventing meaningful impact by those Commissions on their respective region's coastal fisheries. For example, the lack of regulatory authority prevents the PSMFC from taking control of the spiny dogfish problem in the Pacific Northwest, and prevents the GSMFC from uniting the over-reactive response to public outcry in the Gulf states over gill-net fishing.

1. Spiny dogfish are actively managed by the ASMFC, while PSMFC is powerless to compel management by Pacific states

Spiny dogfish are small sharks valuable for their meat, fins, liver, cartilage, and hides, and were at one time widely abundant in the North Atlantic and North Pacific Oceans along the coast of the United States.⁶² However, similar to many other commercially desirable fish species, the use of trawls, gillnets, line gear, and recreational harvest decimated many populations of spiny dogfish causing near total collapse in most populations.⁶³ Northwest Atlantic spiny dogfish stocks are considered overfished, and Northeast Pacific stocks are severely depleted; significant Northeast Pacific stock data lacks because the PSMFC and Pacific states fail to focus on the species.⁶⁴

In 2000, the ASMFC took emergency action along the Atlantic coast to close state waters to commercial spiny dogfish harvest when the state's individual management measures were inadequate.⁶⁵ This action allowed the ASMFC time to develop an

61. *Id.* § III.

62. Sonja Fordham & Coby Dolan, *A Case Study in International Shark Conservation: The Convention on International Trade in Endangered Species and the Spiny Dogfish*, 34 GOLDEN GATE U. L. REV. 531, 551-53, 555 (2004).

63. *Id.* at 553.

64. *See id.* at 557-58, 560, 563.

65. MEGAN GAMBLE, TINA MOORE & GREG SKOMAL, REVIEW OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION'S INTERSTATE FISHERIES MANAGEMENT PLAN FOR SPINY DOGFISH, 2003-2004 FISHING YEAR, § I (2004), available at <http://www.asmfc.org/speciesdocuments/dogfish/annualreports/>

FMP to slow the decline of spiny dogfish, and the Commission planned to further tighten spiny dogfish regulations based on the results of recent data gathered in late 2004.⁶⁶ ASMFC efforts to conserve spiny dogfish in state waters led to a determination in 2004 that, although the species was considered overfished, “overfishing” was no longer occurring, and mortality rates along the Atlantic coast were reduced enough to allow the population to grow.⁶⁷

Meanwhile, in contrast to populations in the Atlantic, the Pacific states (with the exception of Washington’s efforts to close spiny dogfish fishing during the time of spiny dogfish “pupping,” or reproduction periods in the Puget Sound) show little evidence of managing spiny dogfish.⁶⁸ Unquestionably, the presence of an enforceable cooperative management scheme on the Pacific Coast would benefit the spiny dogfish population by providing a mechanism for biologists to identify the necessary regulatory measures for spiny dogfish recovery, and compelling PSMFC member states to implement the appropriate FMP developed by the PSMFC. A PSMFC with regulatory authority would remedy the failure of the individual Pacific states to address the unglamorous spiny dogfish as an important component to the coastal ecosystem just as the ASMFC compelled state action on the spiny dogfish on the Atlantic coast.

2. A powerless GSMFC was unable to unify Gulf states’ reactions to public outcry demanding gillnet bans in Gulf waters

Commercial gillnet fishing in the Gulf of Mexico is primarily governed by state law because most commercial gillnet fishing occurs within state waters, as opposed to federal waters farther offshore.⁶⁹ In the early 1990s, conservationists in Florida

fmpreviews/spinydogfish03-04fmpreview.pdf [hereinafter ASMFC Spiny Dogfish FMP].

66. *Id.* § I; see Fordham & Dolan, *supra* note 62, at 560.

67. ASMFC Spiny Dogfish FMP, *supra* note 65, § IV.

68. Fordham & Dolan, *supra* note 62, at 563.

69. Duff & Harrison, *supra* note 12, at 393. Keep in mind that Florida and Texas state waters in the Gulf of Mexico extend to nine miles seaward into the Gulf (most state waters only extend to three miles seaward), where federal jurisdiction begins. Thus, Florida and Texas have greater impact on coastal fisheries in the Gulf than do other Gulf states because state waters include many more square ocean miles than other coastal states. *See id.*

petitioned for, and eventually gained, a ban on commercial gillnet fishing in Florida's waters to preserve fish species such as red drum and seatrout.⁷⁰ Recreational fishermen and conservationists pushed for Florida to follow Texas' lead in banning commercial gillnetting of desirable fish species, and the public outcry gained momentum and political support.⁷¹ The perception that commercial gillnet fishing would increase in states with more relaxed gillnet regulations as gillnet fishermen were forced out of more heavily regulated states caused inconsistent gillnet restrictions among the Gulf states.⁷²

Florida ignored the GSMFC's admonition that commercial gillnets were not scientifically shown to be destructive enough to warrant a gillnet ban in Florida waters. In this situation, public outcry may have overwhelmed sound science as the basis for the fishery management decision. Commercial fishermen resisted the legislation, insisting that fish stocks were healthy, and many scientists agreed.⁷³ Before Florida enacted its gillnet ban, the GSMFC passed a resolution stating that Florida's "proposed net ban referendum has not been evaluated on the basis of scientific information through the appropriate fishery management agencies."⁷⁴ The GSMFC was unconvinced at the time that gillnets caused any irreparable harm to saltwater fish stocks.⁷⁵

While the Commissions are commonly perceived as conservation vehicles, they must also promote the "better utilization" of fisheries. In the opinion of the GSMFC, Florida banned its commercial gillnet fishing industry in the Gulf without a proper scientific basis. Such a decision impacts the economies of coastal towns. Because the GSMFC lacks regulatory authority over member states, Florida acted unilaterally without consulting neighboring states sharing fishery resources, which may cause

70. *Id.* at 392-93 (Florida banned commercial gillnets in 1994).

71. *Id.* at 394-95.

72. *See id.* at 395. The gill-net example is most useful if viewed as an indication of the lack of fishery-management uniformity resulting from a powerless GSMFC, rather than as a debate of whether conservationist or commercial interests should be favored in this particular fishery-management scheme.

73. *Id.*

74. *Id.* at 396, quoting GULF STATES MARINE FISHERIES COMMISSION, RESOLUTION ON THE FLORIDA NET BAN REFERENDUM (1994).

75. *Id.* at 396-97.

neighboring Gulf states to prematurely relax their gillnet regulations because of the perceived conservation that Florida's gillnet ban provides.

IV. ASMFC PROCEDURAL AND SUBSTANTIVE RULES PROVIDE MODEL ELEMENTS AND LESSONS LEARNED FOR POTENTIAL GSMFC AND PSMFC DECISION-MAKING STRUCTURE.

A. *ASMFC membership and decision-making structure, rules, and regulations*

The ASMFC Compact⁷⁶ allows member states consenting to the Compact to follow a uniform FMP for fisheries that migrate along the coast, thus uniformly managing the fishery as a coastal stock instead of on a state-by-state basis.⁷⁷ Congress declared that “[t]he failure by one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of Atlantic coastal fisheries, and can discourage other States from fully implementing coastal fishery management plans.”⁷⁸

Each ASMFC member state appoints three commissioners to the ASMFC; the delegation must include the executive officer of the state's fishery resource management agency, a member of the state's legislature or his proxy, and a gubernatorial appointee with knowledge of marine fisheries issues.⁷⁹ These three state delegates form the state's quorum at Commission meetings, and decide how their member state will vote on fishery management motions.⁸⁰ In addition to the voting member states, the United

76. ASMFC Compact, 56 Stat. at 267.

77. ASMFC Compact, amend. I, Pub. L. No. 81-721, 64 Stat. 467 (1950) (referring to Amendment One).

78. 16 U.S.C. § 5101(a)(5). See discussion *supra* Part II.

79. ASMFC Compact, 56 Stat. at 267-68 (art. III).

80. Atlantic States Marine Fisheries Commission Rules and Regulations art. III § 1 (1996), available at <http://www.asmfmc.org/> (follow “Publications” hyperlink; then follow “ASMFC Compact: Rules & Regulations (revised December 2003)” hyperlink) [hereinafter ASMFC Rules and Regulations]; see *supra* text accompanying note 34 (listing of ASMFC member states). When any member states' quorum decides to make a motion to introduce or change a particular management measure with regard to a managed fish species, and that motion is seconded by a different state, a vote of member states is taken to decide whether a motion will pass or fail. The vote of each member state is determined by the position of the state's three delegates to the Commission; whichever position two of the three state's delegates take

States Fish and Wildlife Service, the National Marine Fisheries Service, the Potomac River Fisheries Commission and the District of Columbia are also voting members, and may vote on any matter affecting their respective jurisdictions.⁸¹

1. *Procedural rules for fishery-management decision-making*

a. *Motions and votes are required for major decisions*

The ASMFC Compact requires an affirmative vote of a majority of member states on recommendations regarding a species in which a member state has an interest.⁸² States have an "interest" in a species if a particular species is customarily found in the state's waters, if the species spawns in the territorial waters of the state, or if the citizens of the state have taken five percent or more of the total Atlantic coast catch of that species for the five preceding years.⁸³ Commissioners discuss motions for the addition of new fishery management measures or alteration of existing fishery management measures and work to refine the motions' language. States then vote on the motion, each state representing one vote, and the new or changed fishery management measures become binding on all member states when a majority of member states approve the motion.⁸⁴

determine whether a member state votes for or against a particular motion. ASMFC Rules and Regulations, *supra*, art. III § 1.

81. ASMFC Charter, *supra* note 27, § 3(a)(2)-(3).

82. ASMFC Compact, 56 Stat. at 268 (art. VI) ("No recommendation shall be made by the Commission in regard to any species of fish except by the affirmative vote of a majority of the compacting states which have an interest in such species. The Commission shall define what shall be an interest.").

83. ASMFC Rules and Regulations, *supra* note 80, art. VI § 5(a-c) ("A state shall be deemed to have an interest in a fishery if, according to the latest published statistics or available records of the National Marine Fisheries Service or equivalent state statistics, it meets any of the following criteria: (a) such fish are found customarily in its territorial water; (b) such fish are customarily or periodically in the territorial waters of such state for the purpose of spawning or in transit to and from spawning grounds; or (c) the citizens of the state are recorded as having taken 5 percent or more of the total Atlantic coast catch of the species of fish in any of the five preceding years.").

84. *Id.* at art. III § 2; ASMFC Compact 56 Stat. at 268 (art. VI).

b. *Major decisions are made available for public comment*

The Atlantic Coastal Fisheries Cooperative Management Act and the ASMFC Charter require that fishery-management decisions involve adequate public disclosure and comment.⁸⁵ The Commission must provide the public an opportunity to review and comment upon the problems and alternative solutions addressed by a Public Information Document as well as drafts of amendments to FMPs which must be made "widely available" to the public.⁸⁶ Because each state with an interest in a regulated fish species votes to approve the measures contained in an FMP, draft documents of FMPs containing several different allocation options for the state are circulated to several public hearings within each state. The Commission considers public comments when it votes on the final FMP or amendment FMP document for each species. This procedural measure allows the public in each state to express whether they would like to be more or less conservative while staying within the scientifically permissible limits for fishery regulation of that species as determined by the Commission.⁸⁷

85. 16 U.S.C. § 5104(a)(2)(B) (directing the ASMFC to establish procedures to ensure that there is adequate opportunity for public participation in the plan preparation process, including a minimum of four public hearings and procedures for consideration of written comments from the public); ASMFC Charter, *supra* note 27, § 1(c) ("It is the policy of the Commission that its Interstate Fishery Management Program . . . provide adequate opportunity for public participation.").

86. ASMFC Charter, *supra* note 27, § 6(c)(3)-(8) ("The Management Board/ Section shall . . . ensure that the public has an opportunity to review and comment upon the problems and alternative solutions addressed by the Public Information Document."); *Id.* § 6(c)(8)(ii) (" . . . The Commission will make the draft FMP or amendment and the accompanying Public Information Document widely available to the public, including fishermen, consumers, [and] government agencies and officials . . . throughout the geographic range of the draft FMP or amendment.").

87. *See id.* State constituents may be allowed to choose between allocation options for a species. For example, the public may be left to decide whether the state should allow individual fishermen to capture two fish at twenty-eight inches each, one fish at thirty-four inches with a second at twenty-four inches, only one fish at twenty-eight inches, and so on. No state may adopt an allocation option that is less conservative than scientifically determined to be in the best interest of that species' coastal stock. *See id.*

c. *Annual reviews of FMPs provides adaptive management*

Plan Review Teams for each species review the species' FMP annually and report to each species' ASMFC Management Board, addressing the status of the fishery, the status of the FMP, and the success of the FMP in reaching its goals.⁸⁸ This annual review provision prevents an ineffective FMP from remaining in place too long, and allows each respective Management Board to frequently assess whether an amendment FMP is needed to achieve fishery management goals. Also, an emergency action provision in the ASMFC Charter allows the Commission to address serious unforeseeable threats to fishery resources or to the public health without requiring strict adherence to the procedural and substantive decision-making rules.⁸⁹

2. *Substantive rules for fishery-management decision-making*

a. *Decisions based upon "best scientific information available"*

FMPs shall be based on the "best scientific information available."⁹⁰ Data reflecting the current state and future trends of a fishery should be most influential in ASMFC management decisions. This "best science" rule replaces less reliable non-scientific motivations in fishery management negotiation and thus prevents arbitrary fishery management decision-making within the Commission. As discussed *infra*,⁹¹ courts have applied a relaxed standard when scrutinizing whether the ASMFC has used the "best scientific information available," and will usually allow more conservative fishery regulations than dictated by science to compensate for scientific uncertainty.⁹²

88. *Id.* § 6(c)(2).

89. *Id.* § 6(c)(10). Emergency action may only be taken after a two-thirds vote of member states, and public comment must be held immediately following the decision to invoke emergency action. *Id.*

90. 16 U.S.C. § 5104(a)(2)(A); ASMFC Charter, *supra* note 27, § 6(a)(2).

91. See discussion *infra* Part IV.A.2.a.i.

92. See, e.g., *Fishermen's Dock Coop. v. Brown*, 75 F.3d 164, 165 (4th Cir. 1996).

i. Courts define the "best science" rule broadly

Many ASMFC rules respecting fishery management remain untouched by courts. However, the United States Court of Appeals for the Fourth Circuit interpreted the "best science" rule in *Fishermen's Dock Cooperative, Inc. v. Brown*.⁹³ In *Fishermen's Dock*, the Fourth Circuit reversed the decision by the United States District Court for the Eastern District of Virginia⁹⁴ to invalidate an ASMFC-promulgated FMP for summer flounder (state waters) in cooperation with the Mid-Atlantic Fishery Management Council (for federal waters). In *Fishermen's Dock*, a coalition of commercial fishermen sued the Secretary of Commerce for enforcing a summer flounder FMP which increased the yearly coastal quota by only twenty-eight percent (28%) when scientific estimates indicated that summer flounder stocks could tolerate as much as a fifty-six percent (56%) increase in landings.⁹⁵ The plaintiff fishermen argued that the more conservative FMP violated the "best scientific information available" rule because the record showed that flounder stocks scientifically could tolerate a larger quota.⁹⁶

The District Court initially required the ASFMC to increase the quota by fifty-six percent because scientific estimates indicated that summer flounder stocks could tolerate such an increase, disallowing the more conservative quota promulgated by the Commission.⁹⁷ On appeal, the Fourth Circuit held that the District Court's narrow interpretation of the "best scientific information available" rule was incorrect; a broader interpretation

93. *Id.*

94. *Fishermen's Dock Coop. v. Brown*, 867 F. Supp. 385 (E.D. Va. 1994), *rev'd* 75 F.3d 164 (4th Cir. 1996).

95. 75 F.3d at 166. The ASMFC and the Mid-Atlantic Fisheries Management Council both agreed to increase the yearly coastal quota from 12.5 million pounds in 1993 only to 16 million pounds in 1994 (twenty-eight percent increase) when scientific estimates indicated that summer flounder stocks could tolerate quotas up to 19 million pounds (fifty-six percent increase), based on recruitment levels in each of the previous five years. *Id.*

96. See discussion *supra* Part IV.A.2.a. Both the Magnuson Act (management in federal EEZ) and Atlantic Coastal Cooperative Fisheries Management Act (management in state waters) require that fishery-management development employ the "best scientific information available."

97. *Fisherman's Dock*, 75 F.3d at 169 (allowing a larger quota and more harvestable fish for commercial fishermen).

was necessary to allow for consideration of both the vast uncertainty involved with fluctuations in fish populations, and the range of reasonable and rational decisions of fishery-management developers who employ their expertise to choose the most desired management measures for continued population growth.⁹⁸ The Fourth Circuit reversed the decision of the District Court on the basis of the four rational reasons for electing to implement the more conservative commercial quota for summer flounder offered by the ASMFC and the Council.⁹⁹

Thus, it appears unlikely that the "best science" rule will restrict the ASMFC from promulgating allocation measures in FMPs that are *more conservative* than scientific estimates indicate are tolerable. More conservative FMPs should fail only, as the Fourth Circuit reasoned in *Fishermen's Dock*, if the FMP is unreasonably and irrationally too conservative with respect to the scientific state of the fishery at that time.¹⁰⁰ The Fourth Circuit correctly noted the uncertainty involved with fishery science; the District Court in *Fishermen's Dock* seemingly ignored this concept. Generally, more conservative management measures should decrease chances that a stock's yearly fishing mortality rate will exceed the stock's recruitment, and further improve the population's opportunity to grow.

However, courts should apply the "best science" rule more strictly to ASMFC decisions that are *less conservative* than scientific estimates indicate are tolerable by fish stocks. Fishery-management decisions less conservative than those dictated by

98. *Id.* at 171-72.

99. *See id.* at 171. The four reasons were:

first, the truncated age structure of the summer flounder population, which magnified the risk to target F involved in any overestimate of the size of the recruitment class; second, the general proposition that a lower recruitment estimate provided a higher probability of assuring that actual F would turn out to be less than or equal to target F; third, the recognition that certain assumptions underlying the estimate of the flounder stock size might be overly optimistic; and, fourth, the belief that, since target F was to decrease significantly in 1996, it was better to deal with the current uncertainty in recruitment estimates by erring on the conservative side rather than risking an exacerbation of the painful quota decrease that had to come soon in any case.

Id.

100. *See id.* at 171-72.

relevant science could be immediately disastrous because of scientific uncertainty, unlike more conservative measures. In sum, courts should hold fishery regulations that are *less* conservative than those dictated by the best scientific information available to be per se invalid, forcing fishery-managers to use caution in final FMP decisions.

b. Fair and equitable allocation of fishery resources

The ASMFC Charter requires that fishery resources be fairly and equitably allocated or assigned among the states.¹⁰¹ This standard prohibits member states from exploiting advantageous fishery resource circumstances, such as increased coastal species abundances in state waters during spawning periods. Management of coastal fisheries as a coastal resource demands that all states receive equal access to the resource. Unequal allocation of fishery resources among the states would, positively or negatively, impact coastal economies in states where allocation is expanded or restricted. Furthermore, the “fair and equitable” rule prevents states from removing more than their determined share of the coastal fishery resource as deemed appropriate by the Commission, thus protecting the availability of the resource for other states.

B. Effective compliance monitoring and federal enforcement are essential

All ASMFC member states must implement fishery regulations for each species in compliance with that species’ FMP as designed by the Commission.¹⁰² The ASMFC must monitor state compliance.¹⁰³ The ASMFC Management Boards¹⁰⁴ review a

101. ASMFC Charter, *supra* note 27, § 6(a)(7)(ii).

102. 16 U.S.C. § 5104(b)(1); ASMFC Charter, *supra* note 27, § 7(a).

103. 16 U.S.C. § 5104(c); *Medeiros v. Atl. States Marine Fisheries Comm’n*, 327 F. Supp. 2d 145, 147 (D. R.I. 2004).

104. Within the ASMFC, each managed fish species is regulated by its own, individual “Management Board” which consists only of the member states where the particular species is known to spawn or reside. The Management Board is responsible for all decisions regarding management and regulation of its particular species. A species’ management board meets to review the new scientific findings and technical suggestions for future regulations of the species. For example, the striped bass Management Board makes motions and votes only on striped bass issues. ASMFC Charter, *supra*

state's compliance (or non-compliance) report for each particular species annually, and, if necessary, will alert the Commission's Policy Board¹⁰⁵ of a state's non-compliance.¹⁰⁶ If the Policy Board agrees with a Management Board that a state is not in compliance with an FMP, the entire Commission will consider the evidence and vote on whether to notify the Secretary of Commerce (Secretary) of a state's non-compliance, or to allow more time for non-compliant states to achieve compliance.¹⁰⁷

If the Secretary receives notification of a state's non-compliance, s/he must decide whether to impose a moratorium on the fishery in question within that state. After the ASMFC notification, the Secretary then decides (1) whether s/he agrees with the Commission that a state failed to comply with the FMP and (2) whether the particular measures of the FMP that the state failed to implement are necessary for the conservation of the species in question.¹⁰⁸ In the event both prongs are satisfied, the state may defend its position to the Secretary.¹⁰⁹ If the Secretary's opinion on non-compliance remains unchanged after the state's defense, s/he "shall" impose a moratorium within six months after his final decision.¹¹⁰ The non-compliant state may negate an impending or existing moratorium by satisfying the Commission that it has achieved compliance with the relevant FMP.¹¹¹

C. Appeals process for aggrieved states is ineffective unless respected

The ASMFC recently developed a formal appeals process for aggrieved states to address procedural or substantive aspects of FMP decision-making. This appeals process differs from appeals challenging ASMFC findings of non-compliance.¹¹² Instead, this

note 27, § 4

105. The ASMFC "Policy Board" is a reviewing body consisting of ASMFC commissioners that oversees the general operations of the many different management boards for the different species. ASMFC Charter, *supra* note 27, § 3.

106. ASMFC Charter, *supra* note 27, § 7(c).

107. *Id.* § 7(d)-(e).

108. 16 U.S.C. § 5106(a); *Medeiros*, 327 F. Supp. 2d at 147.

109. *Medeiros*, 327 F. Supp. 2d at 147.

110. 16 U.S.C. § 5106(c)(1).

111. *Id.* § 5106(c)(2).

112. ASMFC Charter, *supra* note 27, § 7(g) ("A State which disagrees with

process allows states to appeal to the ASMFC Policy Board if they are “aggrieved by an action of the [Species] Management Board”¹¹³ as provided by the ASMFC Charter.¹¹⁴ This long-overdue appeals process provides a potential remedy to those states with a viable claim against a species’ Management Board for procedural or substantive ASMFC rules violations during FMP development.

The ASMFC approved the new appeals process guidelines in August 2004. To begin, aggrieved states may only appeal management measures established through an FMP or amendment on the following grounds: 1) decision appealed is not consistent with the FMP; 2) decision resulted from a failure to follow process; 3) decision resulted from insufficient, inaccurate, or incorrect application of technical information; 4) decision resulted from inadequate addressing of historical landings period; or if 5) the management measures resulted in unforeseen consequences.¹¹⁵ The aggrieved state must demonstrate that all other options to gain relief at the management board level have been exhausted.¹¹⁶ The three chairmen will only forward the appeal to the Policy Board for comprehensive review if an initial screen of the state’s appeal results in a determination that the disputed issues fall within one of the five previously described categories.¹¹⁷ A majority vote by the Policy Board is required to recommend corrective action to the Management Board, which would involve necessary substantive changes in an FMP or action to ensure that procedural aspects were followed in FMP development.¹¹⁸ As discussed *infra*, commissioners’ respect for the

a Management Board’s failure to find a State out of compliance may appeal that finding to the ISFMP Policy Board. . .”).

113. See *supra* text accompanying note 104 (explaining “Management Boards”).

114. ASMFC Charter, *supra* note 27, § 4(h).

115. ATLANTIC STATES MARINE FISHERIES COMMISSION, APPEALS PROCESS 1-2 (approved by the ISFMP Policy Board, August 18, 2004) (setting forth the substantive and procedural rules of the new appeal process).

116. *Id.* at 2.

117. See *id.* at 2-3. The “Chairmen” are the current ASMFC Chairman, the ASMFC Vice-Chairman, and immediate past Chairman. As described, they first review the state’s appeal to verify that the issues are appealable issues before forwarding it to the Policy Board for review. *Id.*

118. *Id.* at 3. Membership on the ISFMP Policy Board is comprised of all member states, as represented by each state’s three commissioners, a representative from the National Marine Fisheries Service, a representative

substantive and procedural rules of the ASMFC will determine the effectiveness of the new appeals process.¹¹⁹

D. Flaws in Commission decision-making must be addressed

The ASMFC must maintain integrity throughout fishery-management development because its decisions become binding on member states and the voting procedure used to finalize FMPs is inherently inadequate to uphold the procedural and substantive rules described above.¹²⁰ In 2004, the State of New Jersey challenged what it claimed to be serious procedural and substantive violations of ASMFC rules in the decision-making process. The circumstances of the appeal clearly demonstrate the shortcomings in the Commission's FMP development.

1. New Jersey's 2004 Striped Bass Amendment 6 Appeal

New Jersey appealed several ASMFC Atlantic Striped Bass Management Board (Striped Bass Board) decisions regarding Amendment 6 to the FMP for Atlantic Striped Bass (Amendment 6) in November 2004. New Jersey challenged Board action where the Board finalized FMP measures without a proper motion,¹²¹ finalized FMP measures without prescribed public comment,¹²² and allocated fishery resources unfairly and inequitably.¹²³

a. Circumstances giving rise to New Jersey's appeal

As part of the striped bass FMP, the Striped Bass Board formally designated the Delaware Bay and Hudson River as "producer areas" in 1995 along with the Chesapeake Bay and Albemarle Sound because of their contributions as spawning habitat.¹²⁴ For the next ten years, the Striped Bass Board managed striped bass in "coastal areas" differently from striped

of the United States Fish and Wildlife Service. The ISFMP Policy Board also includes representatives from the Potomac River Fisheries Commission and the District of Columbia, when species under those jurisdictions are implicated. See ASMFC Charter, *supra* note 27, § 3(a).

119. See discussion *infra* Part IV.D.2.

120. See discussion *infra* Part IV.D.1.a.

121. See discussion *supra* Part IV.A.1.a.

122. See discussion *supra* Part IV.A.1.b.

123. See discussion *supra* Part IV.A.2.b.

124. Striped Bass Amendment 5, *supra* note 47, § 3.

bass in the four major producing areas; fishermen in “producer areas” could take smaller, more abundant resident striped bass than fishermen in “coastal areas.”¹²⁵

During 2002, the Striped Bass Board revised striped bass regulations and developed Amendment 6 to the Striped Bass FMP (Amendment 6). The public commented only on a Public Hearing Draft of Amendment 6 that included abundant language indicating that the Delaware and Hudson estuaries would remain “producer areas” along with the Chesapeake Bay and Albemarle Sound under Amendment 6.¹²⁶ Thus, the public never commented on proposed measures that involved any removal of “producer area” status.

After the public comment period ended, the Striped Bass Board passed a vague motion in December 2002 that would govern striped bass management for the next several years.¹²⁷ According to the language of this motion, the recreational harvest limits on striped bass for all member states were to remain at the “. . . level

125. “Producer areas” are designated to allow anglers near nursery habitat to take one of the more abundant smaller (twenty inches) striped bass because larger fish are rarely available in that area. Fishermen in “coastal areas,” areas other than “producer areas,” must only take larger fish. Such an allocation option biologically causes no harm to the coastal stock.

126. Public Hearing Draft of Amendment 6 to the Interstate Fishery Management Plan for Atlantic Striped Bass §§ 1.1.1, 1.1.2., 1.4.1.2, 2.1.1, 3.2 (July 2002) [hereinafter Amendment 6 Public Hearing Draft]. *Id.* at 57. (For example, section 3.2 included the following language: “Since the VPA must be tuned with fishery-independent data, it is critical that all major producer areas (Hudson River, Delaware River, Chesapeake Bay, and Albemarle Sound/Roanoke River) are surveyed annually for spawning stock assessment.”).

127. Atlantic States Marine Fisheries Commission Striped Bass Management Board Meeting Minutes, Dec. 19, 2002, at 40 [hereinafter Minutes, Dec. 19, 2002]. The motion read: “Move that the coastal commercial quota will be restored to the base period average, 1972 to 1979, with the stipulation that Delaware will maintain its current commercial quota. The coastal recreational measures will be maintained at the level authorized in Amendment 5, two fish at 28 inches, and the current Chesapeake Bay mortality rate will not exceed F equals 0.27.” *Id.* The motion was approved 9-4, with New Jersey opposing. *Id.* at 57. (Even the Striped Bass Board Chairman failed to initially understand the motion, then offered his own clarification: “[I] think that previous motion, at least the way it stands right now, that was approved, it presumes that we’re at – I assume it presumes that we’re at the 20/28 [inch] scenario, which we have had under Amendment 5. . . .”).

authorized in Amendment 5. . . .” New Jersey interpreted this language to indicate that Delaware Bay and Hudson River regulations would not change from Amendment 5 to Amendment 6; the State understood that Delaware Bay and the Hudson River would maintain “producer” status. Even the ASMFC acknowledged that the motion conveyed a perception that “the [Striped Bass Management] Board was implementing status quo,” and that perception “came from the Advisory Panel’s recommendation, and the majority of public comments, favoring status quo for allocation to the recreational fishery.”¹²⁸ These internal observations by the ASMFC validate New Jersey’s assessment of the motion.

However, after the Striped Bass Board passed the December 2002 motion, a single ASMFC commissioner, unhappy with the “producer area” versus “coastal area” method of striped bass management for Delaware Bay and Hudson River, personally instructed the striped bass Plan Development Team¹²⁹ to eliminate those two estuaries from “producer” status, impacting Delaware Bay and Hudson River allocation.¹³⁰ Apparently, the Board used this vague language to exercise significant latitude in drastically changing the coastal management structure under Amendment 6 without confronting the necessities of a more specific motion.¹³¹

128. Atlantic States Marine Fisheries Commission Interstate Fisheries Management Program Policy Board: Atlantic Striped Bass: Clarification on Changes to the Interstate Fishery Management Program from Amendment 5 to Amendment 6, at 1 (Aug. 27, 2003) (on file with the Author and with the ASMFC) [hereinafter ISFMP Policy Board Clarification Document].

129. The Plan Development Team is a staff that is responsible for creating the actual Amendment documents.

130. Atlantic States Marine Fisheries Commission Striped Bass Management Board Meeting Minutes, Feb. 24, 2003, at 18 [hereinafter Minutes, Feb. 24, 2003] (Referring to the ongoing dispute about the “producer area” language, an ASMFC staff member stated: “[S]taff was given explicit direction. . . that producer areas were to be eliminated from the document. We will no longer be using the term ‘producer area.’”); Minutes, Dec. 19, 2002, *supra* note 127, at 59 (The actual instruction to stricken the terms “producer area” from the FMP document was given by one of New York’s three commissioners to the ASMFC: “I went so far, in fact. . . as to tell my staff member on the [Plan Development Team]. . . that when the final version of the text of Amendment 6 came to me. . . if I found the words ‘producer area’ in it anywhere, there was going to be hell to pay because it doesn’t exist and we’ve got to stop using those terms.”).

131. ISFMP Policy Board Clarification Document, *supra* note 128, at 1.

New Jersey's Commissioners sought clarification and re-introduction of the "producer area" issue at subsequent meetings for more complete deliberation, but the Striped Bass Board repeatedly ignored New Jersey's concerns.¹³² The removal of "producer status" from the final Amendment 6 document was significant because the resulting allocation measures required fishermen in previous "producer area" New Jersey waters to adhere to the coastal allocation measures, disallowing fishermen to take smaller fish and forcing them to harvest only larger fish. However, the Striped Bass Board allowed Chesapeake Bay and Albemarle Sound to maintain an "exemption" to the coastal requirement without explanation; thus, fishermen in those areas could continue to harvest smaller fish. Allocation measures are critical issues in FMP development, and the discrete removal of "producer status" from the FMP impacts allocation among states; allocation decisions should never occur without strict adherence to governing rules and procedures.

The Striped Bass Board approved Amendment 6 in February 2003, removing the Delaware Bay and Hudson River from "producer area" status for the first time in eight years.¹³³ It contained provisions exempting the Chesapeake Bay and Albemarle Sound from the coastal requirements, and even relaxed requirements on Delaware Bay commercial fishermen (as opposed to recreational fishermen) without a motion, without public comment, and, New Jersey claimed, in violation of the "fair and equitable" rule.¹³⁴ The next three subsections will explore these

132. Minutes, Feb. 24, 2003, *supra* note 130, at 9-13. New Jersey's Commissioners to the ASMFC argued that the December 2002 motion was inconsistent with the language of the actual Amendment 6 document and without any proper justification; the Commissioners expressed displeasure that these changes were never made available for public comment in New Jersey, and that these changes were in no way the intent or within the possibilities contemplated by New Jersey on these issues. *Id.* at 12-13. New York's Commissioner defended the action of removing "producer area" language from the Amendment 6 document. *Id.* at 19. Finally, the Chairman ended the debate without resolution by simply determining New Jersey's clarification motions to be "out of order." *Id.* at 17.

133. See Striped Bass Amendment 6, *supra* note 49.

134. See *generally*, Minutes, Dec. 19, 2002, *supra* note 127 (these crucial pre-Amendment 6 meeting minutes indicate no motion or discussion of any motion proposing to remove "producer area" status, exempt the Chesapeake Bay or Albemarle Sound, or to relax harvest requirements for Delaware Bay

violations of ASMFC rules by the Striped Bass Board during Amendment 6 development.

b. Changes in “producer” status violated procedural requirement of a motion and vote

The ASMFC’s Striped Bass Board failed to follow Commission procedure when it approved the Amendment 6 FMP, eliminating the “producer area” versus “coastal area” method of striped bass management and awarding unexplained exemptions allowing Chesapeake Bay and Albemarle Sound fishermen to harvest smaller striped bass without a proper motion and vote. Article VI of the ASMFC Compact always requires an affirmative vote of a majority of compacting states on issues involving a recommendation regarding a species in which a compacting state has an “interest.”¹³⁵ New Jersey clearly has an “interest” in striped bass: striped bass are customarily found in New Jersey waters, striped bass spawn in New Jersey waters, and New Jersey citizens have taken more than five percent of the coastal catch of striped bass annually.¹³⁶ Therefore, Article VI required a motion and vote on the “producer area” and exemption issues involving changes to striped bass regulations in New Jersey waters.

Here, the Striped Bass Board never made a motion nor took a vote on these critical allocation issues impacting fishermen in New Jersey waters in Delaware Bay and Hudson River. The Striped Bass Board never passed a motion explicitly removing “producer area” status from Delaware Bay and Hudson River. Similarly, the Striped Bass Board never passed a motion exempting the Chesapeake Bay and Albemarle Sound estuaries from the more stringent, conservative coastal recreational requirement, while imposing the more stringent coastal requirement in the two northernmost producing estuaries, Delaware Bay and Hudson River.

commercial fishermen).

135. ASMFC Compact 56 Stat. at 268 (art. VI); *see supra* text accompanying note 83; *see also* discussion *supra* Part IV.A.1.a.

136. ASMFC Rules and Regulations, *supra* note 80, art. VI § 5(a-c); *see supra* text accompanying note 83. New Jersey undoubtedly has an “interest” in striped bass under these rules.

The ASMFC motion and vote requirement for major fishery management decisions should ensure each state an opportunity to present its viewpoint on the proposed management measure on the record to the other member states. A complete public record of the decision-making process preserves the integrity and legitimacy of the resulting regulations because the impacted citizens of member states can review their state's stance on an issue, and the underlying basis for final fishery-management regulations approved by a formal vote of member states. This, in turn, preserves accountability within the Commission; states against which promulgated regulations are binding should have a say in the decision. Here, New Jersey fishermen lost their opportunity to keep smaller, more abundant fish in nursery habitats, and the Striped Bass Board deprived the State of the opportunity to debate the new regulation on the record. The Striped Bass Board's neglect of the motion and vote rule prevented New Jersey's commissioners from representing the State's position on the issues, violating the ASMFC Compact. The ineffectiveness of the motion and vote rule will continue if not enforced within the ASMFC.

c. Changes in "producer" status violated procedural requirement of public comment

The ASMFC's Striped Bass Board failed to follow Commission procedure when it approved the Amendment 6 FMP, eliminating the "producer area" versus "coastal area" method of striped bass management and awarding unexplained exemptions allowing Chesapeake Bay and Albemarle Sound fishermen to harvest smaller striped bass without allowing for public comment on the issues. The ASMFC Charter requires adequate public disclosure and public comment on FMP amendments;¹³⁷ the public must have an opportunity to review and comment upon the problems and alternative solutions addressed in the draft amendment document.¹³⁸

137. ASMFC Charter, *supra* note 27, § 1(c); *see* discussion *supra* Part IV.A.1.b.

138. ASMFC Charter, *supra* note 27, § 6(c)(3-8); *see id.* § 6(c)(8)(ii) ("[T]he Commission will make the draft FMP or amendment and the accompanying Public Information Document widely available to the public, including fishermen, consumers, government agencies and officials. . . throughout the

The Striped Bass Board never circulated an Amendment 6 public comment document mentioning any FMP option involving the removal of “producer area” status from any estuary, nor any option that would manage the Chesapeake Bay and Albemarle Sound producing areas completely differently from the similar Delaware Bay and Hudson River producing areas.¹³⁹ In contradistinction, the public comment document emphasized that “producer area” designations would be retained under Amendment 6.¹⁴⁰ Thus, elimination of “producer area” status from established striped bass spawning habitat and the subsequent exemption granted for Chesapeake Bay and Albemarle Sound relaxing striped bass harvest limits in those waters occurred without public disclosure or comment.¹⁴¹

Similar to the motion and vote rule discussed *supra*, the public disclosure and comment rule preserves accountability in Commission decision-making because it helps expose the proposed FMP measures to scrutiny before they become binding. Without public disclosure, commissioners’ decisions escape the important check of public scrutiny where minimal other checking forces exist. The Striped Bass Board’s failure to make these issues available for proper public comment thus removed an important check on the ASMFC decision-making process.

geographic range of the draft FMP or amendment.”).

139. See Amendment 6 Public Hearing Draft, *supra* note 126, at 32-39. None of the listed FMP options in the draft document involved these changes. *Id.* Instead, the 2002 draft document involved allocation options that included different size and bag limits for producer versus coastal areas, as well as options that would create *uniform* regulations for producer and coastal areas. *Id.*

140. *Id.* §§ 3.2, 4.0, at 23. The public comment draft document listed the Chesapeake Bay, Delaware Bay, and Hudson River as “major producer areas” in section 3.2 and throughout section 4.0. *Id.* “Producer area” language also exists in the public comment draft in places where it was omitted in the final version of Amendment 6. Language such as “Jurisdictions bordering producer areas...shall be responsible for conducting...stock assessment surveys...,” and “producer area” language throughout the options for allocation changes suggested at least that, even if regulations in “producer areas” changed, that the “producer area” designations would remain as they had from Amendment 4 to Amendment 5. See *id.* §§ 3.2, 4.0, at 32-39.

141. See *generally id.* (never mentioning these allocation or management options throughout the document).

d. *Exemptions and Delaware Bay commercial regulations violated the substantive "fair and equitable" rule*

The ASMFC's Striped Bass Board, without explanation, failed to adhere to the substantive requirement that fishery resources be fairly and equitably allocated or assigned among the states when it exempted (and thus reduced minimum size limits in) the Chesapeake and Albemarle Sound without exempting similar estuaries in the Delaware Bay and Hudson River.¹⁴² The Commission had previously determined that all four estuaries made significant contributions to the coastal stock as "producer areas."¹⁴³ However, under Amendment 6, only fishermen in Chesapeake and Albemarle waters may harvest smaller, more abundant fish in those nursery areas, while fishermen in similar Delaware Bay and Hudson River may not. The Striped Bass Board must remedy this violation of the "fair and equitable allocation" rule.

The Striped Bass Board also violated the "fair and equitable allocation" rule by allowing Delaware Bay *commercial* fishermen to harvest twenty inch striped bass in Delaware Bay while limiting *recreational* fishermen in the same waters to a regulation equivalency of two-fish per individual at twenty-eight inches.¹⁴⁴ This exemption only favored Delaware because New Jersey disallows any commercial harvest of striped bass. Thus, Delaware received the unfair benefit of smaller, more abundant fish, while recreational fishermen, mainly from New Jersey, were restricted to harvest of only larger fish. The "fair and equitable allocation" rule, if respected, should protect member states from the political influences that produce this type of unfair allocation.

2. *Suggestions for correcting flaws in ASMFC decision making*

The ASMFC Policy Board disagreed with New Jersey's arguments on all issues described above, and denied all requests

142. ASMFC Charter, *supra* note 27, § 6(a)(7)(ii).

143. Striped Bass Amendment 5, *supra* note 47, § 3.

144. Minutes, Feb. 24, 2003, *supra* note 130, at 10-15. The Delaware Bay commercial exemption for fish caught as bycatch in shad-gillnets was granted because a Delaware commissioner believed that the consequence of the change in regulations to fish larger than 20 inches "...would be a drastic change in Delaware's commercial fishery." *Id.* at 8-9. The Striped Bass Board was sympathetic, and allowed the exemption. *Id.* at 10-15.

for relief.¹⁴⁵ The new ASMFC appeals process will fail to increase the procedural and substantive soundness of management board decision-making and will fail to decrease political influence within Commission processes if the Commission fails to take appeals seriously. The appeals process should help maintain practical and pragmatic fishery management decision-making, minimizing the non-science based influences on commissioners.

Two significant flaws will prevent an effective appeals process. First, many ASMFC commissioners are non-lawyers, and thus do not exercise legal judgment in an adjudicatory role, nor are they always cognizant of the implications of their decisions as precedent for the future of successful fisheries regulation. Second, Policy Board members are the same people who sit on a species' Management Board and helped architect the very regulatory measures appealed by the aggrieved state. As a result, bias and prejudice likely influence the fate of an appeal.

The ASMFC can address these flaws by adding an arbitration group to Commission staff. Arbitrators would be lawyers familiar with fisheries law and management, and would be called upon by the Commission when necessary to adjudicate appeals. Member states would consent to defer to the judgment of the arbitration group in appeal situations. The aggrieved state and the opposing species Management Board would perform their own fact finding and each present the arbitrators with a comprehensive appeal document and supporting materials. The arbitrators would then apply governing Commission rules from the ASMFC Compact, Rules and Regulations, or Charter to the facts, and decide the issues. Without such neutral adjudication, and without enforceable substantive and procedural rules, the member states cannot expect the decision-making process to be devoid of pressures not directly related to achieving successful fishery conservation.

These measures will benefit the FMP development process. First, enhanced rule clarity will result, enabling commissioners deciding on FMPs at the species management board level to vote on motions in compliance with ASMFC guidelines. Second, an effective appeals process will keep contentious fishery

145. Interstate Fisheries Management Program Meeting Summary, Nov. 11, 2004, on file with the ASMFC, and with the Author.

management issues, especially those regarding allocation, out of courts and in the hands of fishery managers where they belong. Fishery managers frequently struggle with litigation that delays the fishery management process, and an effective appeals process within the ASMFC would eliminate much of the need for parties to litigate management issues.

V. CONGRESS SHOULD GRANT SIMILAR REGULATORY AUTHORITY TO
GSMFC AND PSMFC

*A. Evidence demonstrates the potential Commission effectiveness
with regulatory authority*

The monumental restoration of the coastal striped bass population, as well as successful summer flounder fishery management, both demonstrate the ASMFC's effectiveness with regulatory authority. The ASMFC also actively manages several other coastal species, including recent FMP development for the unglamorous spiny dogfish.¹⁴⁶

In contrast, the powerless GSMFC failed to compel uniformity over its member states regarding coastal commercial gillnet regulations. This management scheme, unlike that involved with the ASMFC, will lead to inconsistent management of critical Gulf coastal fisheries. Also, the PSMFC fails to properly manage spiny dogfish in the Pacific because, even if the PSMFC developed a spiny dogfish FMP, it would not be binding on the Pacific States.

Therefore, Congress should grant similar regulatory authority to the Gulf States Marine Fisheries Commission and the Pacific States Marine Fisheries Commission.¹⁴⁷ The resulting uniformity in coastal fishery management regulations across the member states of each commission will effectively conserve and promote the utilization of the many migratory species residing in state waters along the coast. The GSMFC and PSMFC should both follow the general model created by the ASMFC for fishery-management development; both the GSMFC and PSMFC Compacts already mirror that of the ASMFC. However, the recently implemented ASMFC appeals process should be refined

146. See *supra* text accompanying note 39.

147. Ocean Commission Report, *supra* note 2, Recommendation 19-10 at 241.

before adopted by GSMFC and PSMFC,¹⁴⁸ a meaningful appeals process will help to maintain the fishery management decision-making focus on sound science, preventing other influences from infiltrating the decision-making process and hindering effective fishery management along the coasts.

B. Commission authority is insulated from state challenges that the FMP is "unfavorable"

Whereas courts should be receptive to state claims alleging substantive and procedural violations of decision-making rules by Commission,¹⁴⁹ courts should not be receptive to states claiming only that they "disfavor" a Commission-promulgated FMP. For example, in *Connecticut v. Daley*,¹⁵⁰ Connecticut sued the Secretary of Commerce (Secretary) challenging the final decisions of the ASMFC and the Mid-Atlantic Fisheries Management Council not to implement a coastal quota system in Amendment 10 of the summer flounder FMP in 1997. Connecticut claimed that the resulting Amendment severely restricted summer flounder landings in Connecticut.¹⁵¹ The court noted that the decisions of the Secretary of Commerce to implement FMPs designed by the Regional Councils and the ASMFC should receive appropriate deference because Congress charges these entities with the responsibility of employing their expertise to make policy judgments and establish appropriate management measures based on evaluations of relevant scientific evidence.¹⁵² The court then proceeded to examine whether the actions of the Secretary in enforcing the FMP were arbitrary and capricious.¹⁵³

148. See discussion *supra* Parts IV.C., IV.D.2.

149. New Jersey's 2004 appeal presents examples of the types of substantive and procedural issues that, if unresolved, courts should be receptive to adjudicating. See discussion *supra* Part IV.D.1

150. 53 F. Supp. 2d 147, 159 (D. Conn. 1999).

151. *Id.* at 153, 159.

152. See *id.* at 157-58. The Secretary has broad discretion when using his expertise to promulgate regulations implementing FMPs, and courts generally may only consider "whether this discretion was exercised rationally and consistently with the standards set by Congress." *Id.* at 157 (quoting *Louisiana v. Baldrige*, 538 F. Supp. 625, 628 (E.D. La. 1982)).

153. *Daley*, 53 F. Supp. 2d at 158 (seeking to determine whether the administrative record was so devoid of justification for these FMP measures that that the Secretary's decision to implement them was "necessarily arbitrary and capricious").

While the Magnuson Act charges the Regional Councils with making policy judgments on fishery management in the EEZ, the Atlantic Coastal Fisheries Cooperative Management Act similarly charges the ASMFC with making policy judgments on fishery management in state waters to be implemented by the states and enforced by the Secretary. In sum, ASMFC decisions, through the Secretary, should receive deference by courts similar to that applied to decisions of the Regional Councils created under the Magnuson Act. In *Daley*, the court correctly deferred to the decisions of both the ASMFC and the Mid-Atlantic Fisheries Management Council to reject Connecticut's proposed quota for summer flounder management, and determined that the Secretary's decision to enforce these FMPs was not arbitrary or capricious.¹⁵⁴

C. *Lack of individual "standing" should further insulate Commission authority*

The United States District Court for the District of Rhode Island in *Medeiros v. Atlantic States Marine Fisheries Commission*¹⁵⁵ recognized but was not required to decide the issue of whether the Tenth Amendment could invalidate the ASMFC's coastal fishery-management scheme. In *Medeiros*, a plaintiff otter-trawl fisherman from Rhode Island challenged ASMFC lobster regulations limiting lobsters caught by non-trap methods.¹⁵⁶ Amendment Three to the American Lobster FMP contained more relaxed regulations for fishermen using traps to catch lobsters and more stringent regulations for fishermen using non-trap methods, such as the plaintiff's otter-trawl method.¹⁵⁷ The Commission promulgated more stringent lobster regulations

154. *Id.* at 174 (the Secretary's decision was adequately supported by the record).

155. 327 F. Supp. 2d 145 (D. R.I. 2004).

156. *Id.* at 148.

157. *Id.* at 147-48. In response to an over-fished lobster population, Amendment 3 restricted the trap-method of lobster fishing by increasing the minimum size limit for lobsters, reduced the number of traps fished per vessel, reduced maximum trap volume, and increased the size of escape vents. *Id.* at 150. However, Amendment 3 also limited non-trap fishermen to no more than 100 lobsters per day, and this rule became applicable coast wide once the ASMFC motioned for and voted on this regulation. *Id.* at 147-48; see also discussion *supra* Part IV.A.1.a.

for “non-trap” fishermen to limit fishing effort and protect the fishery from efforts of the non-trap sector where non-trap fishermen normally target other fish species.¹⁵⁸ Rhode Island voted in favor of the FMP and adopted the new regulations in 2001.¹⁵⁹

Plaintiff alleged that Amendment Three violated the Tenth Amendment because Congress “impermissibly” required the state to impose “federal regulations” within state waters.¹⁶⁰ With regard to the Tenth Amendment claim, the court found the Supreme Court’s holding in *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*¹⁶¹ controlling, where the Supreme Court held that private parties lacked standing to raise a Tenth Amendment claim without accompanying representation from the state.¹⁶² Thus, the plaintiff’s claim in *Medeiros* similarly failed.¹⁶³

However, individual challenges of ASMFC regulations are unique because member states have an opportunity to vote in favor of or against proposed FMPs, and FMPs become binding even over states that actually *voted against* a particular FMP if a majority of member states approve the FMP.¹⁶⁴ Previously, the Supreme Court declined to address the issue of whether a citizen had standing to challenge a federal measure imposed on the state after the state first *approved* the federal measure, and circuit courts are split on the issue.¹⁶⁵ Circuit disagreement on whether standing exists when a state voted *in favor* of a federally-imposed regulation should signal even sharper disagreement on whether

158. *Medeiros*, 327 F. Supp. 2d at 150.

159. *Id.* at 147-48.

160. *Id.*

161. 306 U.S. 118 (1939).

162. *Medeiros*, 327 F. Supp. 2d at 148.

163. *Id.* at 154.

164. See discussion *supra* Parts IV.A.1.a., IV.A.1.b. States opposing an FMP are still required to implement the plan in their state if a majority of the voting states approve the FMP.

165. *Medeiros*, 327 F. Supp. 2d at 153 (“Recently, the Supreme Court granted certiorari with regard to, but ultimately declined to address the question of whether private plaintiffs have standing to assert states’ rights under the Tenth Amendment where the states’ legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question.” “The Court of Appeals for the First Circuit has not addressed whether private litigants may pursue Tenth Amendment claims. Other circuit courts which have considered the issue are in disagreement.” (citation omitted)).

standing exists when a private citizen challenges a Commission FMP imposed on a member state that *voted against* the FMP. A decision on this issue will undoubtedly impact the scope of Commissions' regulatory authority.

Currently, the Tenth Circuit as well as United States District Courts in the Districts of Vermont, Rhode Island, and Louisiana all follow the Supreme Court's directive in *Tennessee Electric* that individual claimants lack standing to challenge a federal regulation under the Tenth Amendment.¹⁶⁶ These courts correctly preserve such challenges for the states because the political processes of the respective states should determine whether or not to challenge a federal regulation under the Tenth Amendment. While other courts choose to find private party litigant standing under similar circumstances,¹⁶⁷ they base their holdings on faulty reasoning from prior Supreme Court cases taken out of context.¹⁶⁸

Only the states themselves possess the requisite standing to raise a Tenth Amendment challenge against a federal regulatory scheme. However, states are not likely to challenge ASMFC regulatory authority under the Tenth Amendment because, according to the ASMFC Compact and Atlantic Coastal Fisheries Cooperative Management Act, states may still completely withdraw their consent to the ASMFC Compact if states fail to satisfactorily rectify their grievances against the Commission.¹⁶⁹

166. See *United States v. Parker*, 362 F.3d 1279 (10th Cir. 2004); *Mountain States Legal Found. v. Costle* 630 F.2d 754 (10th Cir. 1980); *Vt. Assembly of Home Health Agencies v. Shalala*, 18 F. Supp. 2d 355 (D. Vt. 1998); *Gaubert v. Denton*, 1999 WL 350103 (E.D. La. 1999), *aff'd*, 210 F.3d 368 (5th Cir. 2000).

167. See *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700 (7th Cir. 1999); *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004) (holding that private party litigants only need to comply with the normal rules of standing, and are not precluded from doing so in the absence of the state or its officers).

168. For a much more elaborate discussion of these unique standing issues under ASMFC regulatory authority, see Joseph Farside, *Fishery Resources Belong to Everyone: Why Courts Should Deny Standing to Private Party Claims that Coastal Fishery Regulations Violate the Tenth Amendment* (2005) (unpublished paper on file with author).

169. Prior to deciding to withdraw from the Commission, states may utilize a new, internal ASMFC appeals process for aggrieved states, or states may attempt to sue the ASMFC under typical APA – type claims challenging possible abuses of discretion by the Commission. See discussion *supra* Parts IV.C, IV.D.

Private party actions brought solely under the Tenth Amendment against unsatisfactory fishery management decisions promulgated by the ASMFC lack standing because private party options to completely invalidate ASMFC regulatory authority should be limited to utilization of the state's political process to persuade state officials to seek redress against ASMFC action unfavorable to the state's citizenry.¹⁷⁰ Fishery resources are managed by the states for the good of the general constituency, not for the benefit of individuals. This lack of private-party litigant standing to challenge the Commission's regulatory authority under the Tenth Amendment should help insulate the regulatory structure from litigation and other disruption from aggrieved individuals as fishery management decisions are developed for the future of the nation's coastal fisheries.

VI. CONCLUSION

While the Atlantic States Marine Fisheries Commission successfully manages fish species, commissioners must adhere more strictly to commission decision-making rules and regulations to prevent politics from causing fishery-management judgments to deviate from the solid foundation of sound science. Without a respected appeals process within each Commission, commissioners' decisions and motivations regarding coast-wide fishery management may go unchecked. However, the demonstrated success of the ASMFC with regulatory authority, and the necessity of a coast-wide fishery management program on

170. Support for this proposition exists in a D.C. Circuit Court of Appeals case where the court held that plaintiffs' Tenth Amendment claim failed because the certification regulations contemplated voluntary participation on the part of state and local officials, and the certification regulations did not command the states' officers to administer or enforce a federal regulatory program. *Lomont v. O'Neill*, 285 F.3d 9, 13-15 (D.C. Cir. 2002) (the court decided against the private party plaintiffs on the merits, but without reaching the issue of private party litigant standing). Other support was derived from a Tenth Circuit case that found no Tenth Amendment violation of a federal regulation where the states were directed to negotiate in good faith with Indian tribes to form an interstate compact, but were not *required* to form an enforceable compact. *Ponca Tribe v. Oklahoma*, 37 F.3d 1422, 1432-34 (10th Cir. 1994).

both the Gulf Coast and Pacific Coast should compel Congress to grant similar regulatory authority to the Gulf Coast and Pacific Coast Marine Fisheries Commissions.

Joseph A. Farside, Jr.*

* Juris Doctor Candidate, Roger Williams University School of Law; M.S., Rutgers University (*Environmental Science*); B.A., Franklin and Marshall College (*Biology*). Thanks first to my parents, Karen and Joe Sr. for their unconditional love and encouragement; and to my advisor, Professor Kristen Fletcher; Dr. William Goldfarb; N.J. Department of Environmental Protection Division of Fish and Wildlife; Professor Cecily Banks; and Seth Laver.

