

Legal Framework for U.S. Management of the American Eel

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The 30,000-Foot View

- Multi-actor governance framework
- States retain management authority within their territorial sea from shore to 3 nautical miles (unless State action infringes upon federal Fisheries Management Plan) or within EEZ where no FMP exists. TX, PR, and FL gulf coast retain authority to 9 n.m.
- States coordinate efforts through ASMFC
- Federal jurisdiction extends from 3 to 200 n.m. offshore, claims exclusive management of resources in EEZ.
- Federal councils manage fisheries in federal waters
- Federally-recognized tribes, as sovereigns, regulate resources on their lands

Evolution of Federal Law

- 1976: Magnuson Fisheries Conservation & Management Act
 - Purpose: regulate fishery resources in federal waters off the coasts of the United States. 16 U.S.C. § 1801 *et seq.* Basis for fisheries governance in the EEZ.
 - Creates eight Regional Fishery Management Councils that promulgate Fishery Management Plans. 16 U.S.C. § 1852. FMPs must be consistent with National Standards for fishery management and conservation set forth in 16 U.S.C. § 1851.
 - Fisheries off Atlantic Coast managed by three councils: New England, Mid-Atlantic, and South Atlantic. 16 U.S.C. § 1852(a)(1)-(3)
 - Final FMP approval by Commerce Secretary. 16 U.S.C. § 1854(a).
 - May apply in state waters via preemption.
- 1996: Sustainable Fisheries Act – removal of discretion on “overfished” fisheries.
- 2006: Reauthorization Act – less discretion when overfished

Federal Councils

- Conserve and manage fishery resources from 3 to 200 miles offshore
- Develop & propose FMPs for fisheries under their jurisdiction, submit FMPs to NMFS, which may then adopt them through notice and comment rulemaking. 16 U.S.C. §§ 1852-54. Secretary gives deference to FMC plans. The measures must comply with certain national standards, 16 U.S.C. § 1853, and are subject to judicial review in the district courts, 16 U.S.C. §§ 1855(f).
- Emergency regulations can also bypass the traditional management scheme with a minimum of formalities. 16 U.S.C. § 1855(c). Used when, for example, there's only one reasonable way (e.g. state by state quota) of effectively enforcing the quota.
- Originate amendments to FMPs subject to NOAA fisheries assessment. 16 U.S.C. § 1852
- FMCs have voting members from states, public (e.g., commercial & recreational fishing, NGOs, academic), NMFS. Non-voting members are ASMFC, USCG, US FWS, and US State Dept. 16 U.S.C. § 1852(a)(1)

Other Potentially Applicable Federal Laws

- Endangered Species Act. 16 U.S.C. § 1531 *et seq.*
- NEPA: requires federal agencies to consider environmental impacts of federal “actions”. 42 U.S.C § 4321 *et seq.*
- Lacey Act. 16 U.S.C. § 3371 *et seq.*

State & Tribal Legal Framework

- States generally have authority over fishing within the boundaries of the state, which for most states extends 3 miles seaward from the coast. 16 U.S.C. § 1856(a)(1)-(2)
- Tribes – as sovereigns, can regulate non-member access to resources on their land
- ASMFC: states delegate their authority via interstate compact
- State constitutions, statutes, regulations, common law

Atlantic States Marine Fisheries Commission

- 1942: Formed by a congressionally-approved interstate compact. Pub.L. No. 77–539.
- Composed of three representatives from each state (and D.C.) on the eastern seaboard : state legislator, the head of the state agency responsible for fishery management, and a gubernatorial nominee with “knowledge of and interest in the marine fisheries problem.” See *id.* at Art. III.
- 1993: Atlantic Coastal Fisheries Cooperative Management Act – ASMFC responsible for preparing and adopting CMPs for “coastal fishery resources.” 16 U.S.C. § 5104(a)(1).
- ASMFC “shall consult with appropriate Regional Councils to determine areas where such [CMP] may complement Council [FMPs].” 16 U.S.C. § 5104(a)(1). The Secretary has authority to work principally through the ASMFC when developing new regulations for the EEZ. 16 U.S.C. § 5103.

Maine Statutes: 12 M.R.S. § 6501, et seq.

- Regulate licenses: eel harvesting, elver fishing
 - Use of state-issued swipe card required for eel sale/transfer
- Set sale and purchase rules
- Set fees
- Designate open season
- Commercial gear (eel pot, dip net, elver fyke net, Sheldon trap)
- Personal use gear (spear, harpoon, trap, hook and line)
- Designate closed areas (e.g. within 150' of dam with fishway)
- Authorize Marine Resources Commissioner to set individual quotas, overall state quota (so long as annual landings < ASMFC annual quota). Elvers: requires allocation of 21.9% of annual quota to federally-recognized tribes (6505-A)
- Establish of Eel and Elver Management Fund

Enforcement & “Elver”-Stage Learnings

- *United States v. Sheldon*. US alleges that for two years, Sheldon was driving between South Carolina and Maine buying and selling illegally harvested elvers in violation of the Lacey Act. “I could get in a jam if I know that eels that you’re selling are coming from another state,” Sheldon told an undercover investigator posing as an eel fisherman in 2013. The government says it sold him roughly \$49,000 worth of elvers that agents portrayed as being obtained illegally, although those elvers were actually obtained legally.
- *State v. Stanley*, 2015 ME 56. State charged Stanley only with “fishing for elvers within 150 feet of a dam with a fishway,” but the court found Stanley guilty of fishing for elvers within 150’ of a fishway, not a dam. Stanley acquitted on appeal.
- *Bailey v. Dept. of Marine Resources*, 2015 ME 128. DMR set Bailey’s 2014 elver fishing quota at 4 pounds. He received his swipe card on March 31, 2014. Maine Law Court concluded that this was a “final agency action” and that Bailey’s failure to appeal it within 30 days as required by 5 M.R.S. § 11002(3) required dismissal of his claim.

Thank you!