

The EEZ Solution to Striper Management: Why the Federal Government Should Ban the Commercial Harvest of Striped Bass Once and For All

“The price in its numbers the adult striper has paid for its migratory compulsion is a price beyond counting Who can ever measure the numbers that were taken by the . . . fleets that made landfall in the New World only to find the harbors writhing with the silver-sided splashings of stripers . . . ? And will there ever be any counting of the stripers stop netted in tidal coves, their gleaming carcasses . . . left . . . by the thousands for colonial farmers to hoist to handbarrows for their trip to the corn fields and their burial there? And, as the nation grew, who . . . ever conceived of a system that would tabulate the depredations of two centuries of recreational, sport, and meat fishing . . . ? No, there is no way the fare charged the striper for its annual trips can ever be computed.”¹

I. INTRODUCTION

The striped bass has long been a symbol of America’s coastal bounty.² During his maiden voyage into the Chesapeake Bay in 1608, Captain John Smith observed of the striped bass, “I myself at the turning of the tyde have seen such multitudes that it seemed to me that one mighte go over their backs drisho’d.”³ Despite historical accounts of a seemingly limitless resource, even the earliest colonists had the foresight to limit their harvest of striped bass.⁴ Most notably, in 1639, the striped bass became the impetus for America’s first fisheries law when the General Court of the Massachusetts Bay Colony banned the practice of fertilizing cornfields with the discarded frames of the fish.⁵

1. JOHN N. COLE, STRIPER: A STORY OF FISH AND MAN 39-40 (1st ed. 1978).

2. See DICK RUSSELL, STRIPER WARS: AN AMERICAN FISH STORY 13-14 (2005) (discussing historical abundance of striped bass and significance in development of nation); see also 16 U.S.C. § 5151(a)(1) (2006) (acknowledging historical importance of striped bass). Puritan settlers likely dined on striped bass at the first Thanksgiving, and access to the abundant resource helped sustain Plymouth Colony during its first lean winters. See RUSSELL, *supra*, at 13-14.

3. See RUSSELL, *supra* note 2, at 13 (recounting John Smith’s early encounters with striped bass).

4. See NICK KARAS, THE STRIPED BASS 166-67 (2d ed. 1993) (summarizing development of early striped bass legislation).

5. See *id.* at 165-66 (quoting law of Massachusetts Bay Colony).

And it is forbidden to all men, after the 20th of next month, to employ any codd or basse fish for manuring the ground, upon paine that every pson, being a fisherman, that shall sell or employ any such fish for that end, shall loose the said privilege of exemption from public charges, & that both

More recently, states along the Atlantic seaboard have taken a decidedly less cautionary approach to striped bass management than their colonial predecessors.⁶ During the latter half of the twentieth century, the combined effects of rampant overfishing and the loss of viable spawning habitat took a disastrous toll on the striped bass population.⁷ By the 1980s, the droves of striped bass that once astounded the early colonists had all but vanished from the Atlantic coastline.⁸

Even when the reasons for the decline had become evident, attempts to curtail the coast-wide overharvest of striped bass were hindered by traditional fisheries management practices, which afforded individual states complete discretion in managing coastal fish stocks.⁹ Under this disjointed approach, a patchwork of local regulations emerged that collectively offered little protection for migrating striped bass.¹⁰ In effect, rather than viewing the striped bass population as a collective resource in need of sustainable management, the Atlantic states simply vied amongst each other for the largest commercial take as the fish traveled up and down the coast.¹¹

In the years leading up to the striped bass collapse, a multistate fisheries advisory commission known as the Atlantic States Marine Fisheries Commission (ASMFC) attempted to cure the prevailing jurisdictional

fisherman, or others who shall use any kind of said fish for that purpose, shall forfeit for every hundred of such fish so employed for manuring ground twenty shillings & portionally for a less or greater number; pvided, that it shall be lawful to use the heads and offal of such fish for corne, this notwithstanding.

Id.

6. See *id.* at 166-67 (discussing lack of effective striped bass management during majority of twentieth century).

7. See 16 U.S.C. § 5151(a)(3) (2006) (noting increased fishing pressure as factor in decline of striped bass population); see also KARAS, *supra* note 4, at 185-89 (citing additional factors contributing to increased striped bass mortality in 1970s). In 1979, as a response to dwindling striped bass numbers, Congress appropriated funds for an emergency study to determine the causes of the decline. See Anadromous Fish Conservation Act, Pub. L. No. 96-118, 93 Stat. 859 (1979) (codified as amended at 16 U.S.C. § 757b (2006)); see also KARAS, *supra* note 4, at 184. The study ultimately named a variety of contributing factors, including contamination of spawning areas, predation, detrimental water use practices, disease, and exploitation. See KARAS, *supra* note 4, at 185-89.

8. See NAT'L MARINE FISHERIES SERV., ATLANTIC STRIPED BASS BIOMASS AND LANDINGS, http://www.nmfs.noaa.gov/fishwatch/images/atl_striped_bass_chart_bio_gif (last visited Apr. 3, 2011) (indicating striped bass biomass in early 1980s at lowest levels in recorded history).

9. See *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) (acknowledging states maintain power to regulate coastal fisheries in absence of conflicting federal legislation); see also Eldon V.C. Greensberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in the Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641, 649-50 (1982) (explaining traditional role of individual states in managing coastal fisheries).

10. See KARAS, *supra* note 4, at 173 (discussing traditional disparity among state striped bass regulations). Karas observes that prior to the 1980s population crash, the conflicting scheme of state striped bass regulations was "more irksome than protective." See *id.*

11. See *id.* at 166-67 (describing unrestrained interstate competition for resource under traditional striped bass regulatory scheme).

disconnect by formulating a model set of uniform striped bass regulations for coast-wide implementation.¹² In its finished form, the ASMFC's striped bass plan recommended that the Atlantic states adopt a series of strict conservation measures aimed at restoring and maintaining a sustainable fishery along the eastern seaboard.¹³ By the time the striped bass population began showing pronounced signs of collapse in the 1970s, however, the ASMFC's attempts at implementing the plan failed due to its lack of direct regulatory authority over the individual Atlantic states.¹⁴

Recognizing the futility of managing a migratory resource with a collection of distinct and often conflicting state regulations, Congress intervened at the peak of the population collapse by enacting the Atlantic Striped Bass Conservation Act of 1984 (Striped Bass Act).¹⁵ The Striped Bass Act empowered the ASMFC to implement and enforce its proposed regulations and threatened any noncompliant state with a complete federal moratorium on its striped bass fishery.¹⁶ The remarkable resurgence of striped bass that ensued distinguished the ASMFC's interstate collaboration as a model for successful coastal fisheries management.¹⁷ From a constitutional perspective, however, the Striped Bass Act represented an unprecedented intrusion by Congress into the state-controlled realm of coastal fisheries.¹⁸

Having rescued the striped bass from extinction with the aid of Congress, the ASMFC gradually relaxed its restrictions on the rebounding striped bass fishery to the extent that today, the Atlantic states once again exercise significant regulatory discretion within state waters.¹⁹ Consequently, a series of

12. See ATL. STATES MARINE FISHERIES COMM'N, INTERSTATE FISHERIES MANAGEMENT PLAN FOR THE STRIPED BASS (1981) [hereinafter ASMFC 1981 PLAN], available at <http://www.asmfc.org> (follow "Managed Species" hyperlink; then follow "Striped Bass" hyperlink; then follow "Fishery Management Reports" hyperlink; then follow "Fishery Management Plan for Striped Bass (October 1981)" hyperlink). The goal of the ASMFC's 1981 plan was "[to] perpetuate the striped bass resource in fishable abundance throughout its range and generate the greatest possible net economic and social benefits from its harvest and utilization over time." *Id.* at 1-3.

13. See *id.* at 1-4 to -7 (proposing strategies for curtailing striped bass collapse); see also *infra* Part II.C (providing details of ASMFC's proposed conservation measures).

14. See Joseph A. Farside, Jr., Note, *Atlantic States Marine Fisheries Commission: Getting a Grip on Slippery Fisheries Management*, 11 ROGER WILLIAMS U. L. REV. 231, 239 (2005) (discussing ASMFC's lack of regulatory authority prior to enactment of Striped Bass Act).

15. See Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613, 98 Stat. 3187 (1984) (codified as amended at 16 U.S.C. §§ 5151-5158 (2006)). The purpose of the Striped Bass Act is to provide "effective interstate action regarding the conservation and management of the Atlantic striped bass." 16 U.S.C. § 5151(b) (2006).

16. See 16 U.S.C. § 5154 (2006) (providing procedure, penalties, and enforcement mechanisms for striped bass moratorium).

17. See John P. Almeida, Note, *Nonpoint Source Pollution and Chesapeake Bay Pfiesteria Blooms: The Chickens Come Home to Roost*, 32 GA. L. REV. 1195, 1218-20 (1998) (describing interstate striped bass solution as exemplary approach for curing pollution issues in Chesapeake Bay).

18. See RUSSELL, *supra* note 2, at 145 (describing unprecedented nature of federal striped bass initiative).

19. See ATL. STATES MARINE FISHERIES COMM'N, FISHERY MANAGEMENT REPORT NO. 41: AMENDMENT 6 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STRIPED BASS 35 (2003) [hereinafter

conflicting striped bass regulations has reemerged, including, most notably, state laws that allow the large-scale commercial harvest of striped bass in the waters of seven ASMFC-member states.²⁰ Meanwhile, in adjacent offshore waters, federal regulations flatly prohibit the commercial harvest of striped bass.²¹ In the face of this conflicting regulatory scheme, anglers along the Atlantic Coast have begun to decry a lack of striped bass that is ominously reminiscent of the 1980s population crash.²² Now, with another crash looming, and in light of the ASMFC's sluggish response to what appears to be a population freefall, this Note argues that the fate of the striped bass may once again depend on federal intervention.²³

Part II.A of this Note traces the development of coastal fisheries law, both from state and federal perspectives, and explains how migratory fish have historically been subject to conflicting management schemes upon crossing the arbitrary demarcation between state and federal waters.²⁴ Part II.B details current striped bass legislation and offers insight into the fish's lifecycle in order to illustrate the unique challenges of managing a species that knows no jurisdictional boundaries.²⁵ Part II.C describes the federal government's renewed interest in conserving the striped bass population, exhibited most recently in a 2007 executive order that reiterated the ban on harvesting striped

ASMFC AMENDMENT 6], available at http://www.ct.gov/dep/lib/dep/fishing/fisheries_management/StripedBassAmendment6.pdf (providing procedure for approval of alternative state striped bass regulations). Amendment 6, the current governing amendment to the ASMFC's Interstate Fishery Management Plan for Atlantic Striped Bass, allows individual states to submit proposed regulatory changes to the ASMFC for compliance review. See *id.* Once approved, the state is free to implement the proposed changes as controlling law within state waters. See *id.*; see also, e.g., CONN. AGENCIES REGS. § 26-159a-2(b) (2010) (prohibiting sale of striped bass taken in Connecticut state waters); 322 MASS. CODE REGS. 6.07 (2010) (providing state regulations for Massachusetts striped bass fishery); N.Y. COMP. CODES R. & REGS. tit. 6, § 40.1(j) (2010) (providing commercial striped bass regulations for New York territorial waters); R.I. GEN. LAWS § 20-4-9 (2010) (announcing minimum size requirements for possession of striped bass in Rhode Island state waters).

20. See ATL. STATES MARINE FISHERIES COMM'N, 2009 REVIEW OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION FISHERY MANAGEMENT PLAN FOR ATLANTIC STRIPED BASS 17 (2009) [hereinafter ASMFC 2009 REVIEW], available at <http://asmfc.org/speciesdocuments/stripedbass/reports/fmpreviews/sbfpmpreview2009.pdf> (listing Atlantic states with commercial striped bass fishery).

21. See 50 C.F.R. § 697.7(b) (2009) (prohibiting harvest or possession of striped bass within EEZ); see also NAT'L MARINE FISHERIES SERV., 2007 BIENNIAL REPORT TO CONGRESS ON THE PROGRESS AND FINDINGS OF STUDIES OF STRIPED BASS POPULATIONS 9 (2007) [hereinafter NMFS BIENNIAL REPORT], available at http://www.nmfs.noaa.gov/sfa/state_federal/docs/100508_striped_bass_report_sept5.pdf (providing details of federal striped bass ban in effect since 1990).

22. See, e.g., Beth Daley, *Casting Blame in Striper Dispute*, BOS. GLOBE, Feb. 7, 2010, at B1, available at http://www.boston.com/news/local/massachusetts/articles/2010/02/07/drop_in_striper_stocks_puts_recreational_commercial_fishermen_at_odds (discussing warning signs of impending striped bass problems); Gene Mueller, *Rockfish Numbers May Be Questionable*, WASH. TIMES, Mar. 5, 2008, at C2 (questioning health of current striped bass population); Ted Williams, *Striper Signals*, FLY ROD & REEL, July/Sept. 2009, at 16-17, available at <http://www.flyrodreel.com/node/13223> (citing evidence of potential striped bass crash).

23. See *infra* Part III.

24. See *infra* Part II.A.

25. See *infra* Part II.B.

bass in federal waters.²⁶ Part II.D examines the standards that govern preemption of state law under the Supremacy Clause, with a focus on cases that address the hierarchy of state and federal fisheries regulations.²⁷ Finally, Part III explains how and why the federal government should preempt state laws that allow the commercial harvest of striped bass in order to prevent another population crash.²⁸

II. HISTORY

A. The Development of Modern Fisheries Law: State Versus Federal Jurisdiction

As early as 1891, in *Manchester v. Massachusetts*,²⁹ the United States Supreme Court declared that the several states retained the right to regulate fisheries within their respective coastal waters in the absence of conflicting federal legislation.³⁰ The foundation for this right was the notion that a state, in a proper exercise of police power, should have the authority to preserve a natural resource for the common good.³¹ While the *Manchester* holding technically remains valid today, the breadth of this police power is geographically constrained by the modern demarcation between state and federal waters.³² With few exceptions, the states' seaward boundaries are uniformly fixed at a distance of three geographical miles offshore.³³ Beyond this three-mile band of "territorial sea," state police power abruptly gives way to a comprehensive scheme of federal fisheries legislation.³⁴

The centerpiece of this federal legislation is the Magnuson-Stevens Fishery

26. See *infra* Part II.C.

27. See *infra* Part II.D.

28. See *infra* Part III.

29. 139 U.S. 240 (1891).

30. See *id.* at 266 (announcing regulatory authority over coastal fisheries retained by individual states absent affirmative congressional legislation); see also U.S. CONST. amend. X (stating powers not delegated to federal government by Constitution reserved to individual states).

31. See *Manchester*, 139 U.S. at 265 (declaring state may take measures to preserve shared resource for benefit of citizens); accord *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284-85 (1977) (noting state's right to regulate fisheries based on police power, not ownership of fish stocks). The *Douglas* Court further maintained that neither the states nor the federal government has a legitimate claim of ownership of fish stocks. See 431 U.S. at 284. As support for this proposition, the Court referenced Justice Oliver Wendell Holmes's statement in *Missouri v. Holland* concerning the states' purported ownership of migratory birds: "[t]o put the claim of the State upon title is . . . to lean upon a slender reed." See *id.* at 284 (quoting *Missouri v. Holland*, 252 U.S. 416, 434 (1920)).

32. See 16 U.S.C. § 1811(a) (2006) (vesting federal government with fisheries management authority beyond demarcation of state waters); see also *United States v. Louisiana*, 363 U.S. 1, 24 (1960) (confirming seaward boundaries for coastal states).

33. See *Louisiana*, 363 U.S. at 24 (stating seaward boundary for state waters generally at three geographical miles).

34. See 16 U.S.C. § 1811(a) (2006) (declaring exclusive federal authority over fish and fisheries resources in waters beyond territorial sea).

Conservation and Management Act of 1976 (Magnuson Act).³⁵ The Magnuson Act was Congress's response to the modern threat of large-scale fisheries depletion.³⁶ Prior to the enactment of the Magnuson Act, increased fishing pressure from foreign fleets placed an enormous strain on domestic fish stocks.³⁷ Regulations on the high seas, where they existed at all, were rarely enforced due to both jurisdictional confusion and Congress's failure to implement an effective policy for combating unsustainable fishing practices.³⁸ With many coastal fisheries on the verge of collapse in the 1970s, Congress set out to affect fundamental changes in fisheries management with the Magnuson Act.³⁹

Congress drafted the Magnuson Act with two overarching goals in mind: to curb the overexploitation of the nation's fish stocks by foreign fleets, and to reconcile conflicting domestic fisheries regulations among the states.⁴⁰ To accomplish these goals, Congress sought to clarify the jurisdictional confusion that had long plagued effective fisheries management in United States waters.⁴¹ Accordingly, the immediate effect of the Magnuson Act was to define an extended zone of federally regulated water known as the Exclusive Economic Zone of the United States (EEZ).⁴² Beginning at the three-mile boundary of

35. Magnuson-Stevens Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1882 (2006)).

36. See Greensberg & Shapiro, *supra* note 9, at 658-59 (discussing purpose and scope of Magnuson Act). Because nations traditionally viewed fisheries as inexhaustible resources, a comprehensive legislative response to fisheries depletion is a genuinely modern concept. See *id.* at 645-46.

37. See 16 U.S.C. § 1801(a)(3) (2006) (describing congressional findings underlying Magnuson Act).

Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

Id.; see also Greensberg & Shapiro, *supra* note 9, at 647 (detailing dramatic increase in foreign fishing pressure leading up to enactment of Magnuson Act).

38. See 16 U.S.C. § 1801(a)(2) (2006) (noting inadequacies of prevailing fishery management practices prior to Magnuson Act); see also Greensberg & Shapiro, *supra* note 9, at 641-42 (discussing muddled state of fisheries management prompting enactment of Magnuson Act).

39. See 16 U.S.C. § 1801(c)(1) (2006) (stating Congress's intent to amend federal fisheries management policy with Magnuson Act); see also Peter Van Tuyn & Valerie Brown, *A Look Within: Executive Branch Authority to Ensure Sustainable Fisheries*, 14 OCEAN & COASTAL L.J. 1, 2 (2008) (noting Magnuson Act provided revised legal structure for federal fisheries management). Congressional findings made in conjunction with the Magnuson Act noted that "[c]ertain stocks of fish have declined to the point where their survival is threatened." 16 U.S.C. § 1801(a)(2) (2006).

40. See Greensberg & Shapiro, *supra* note 9, at 658 (discussing goals of Magnuson Act).

41. See 16 U.S.C. § 1801(a)(6) (2006) (acknowledging pressing need for comprehensive, national program for sustainable maintenance of nation's fishery resources).

42. See 16 U.S.C. § 1811(a) (2006) (establishing federal authority over fisheries within EEZ). The original text of the Magnuson Act referred only to a general federal conservation zone; however, in 1983, Congress amended the statute's language to include the phrase "Exclusive Economic Zone" after President Ronald Reagan designated the area as such by presidential proclamation. See *id.*; Proclamation No. 5030, 48

each state's territorial sea, the EEZ extends offshore to 200 nautical miles.⁴³ Within the EEZ, the Magnuson Act vests the federal government with the exclusive authority to impose fisheries regulations—including seasonal closures, gear restrictions, and commercial harvest quotas—on a species-by-species basis.⁴⁴

In order to facilitate the complex task of regulating numerous species over a large expanse of ocean, the Magnuson Act further divided the EEZ into a series of eight fishery management regions, each represented by separate fishery management councils.⁴⁵ These councils formulate specialized fishery management plans for target species within their respective regions.⁴⁶ Procedurally, the Magnuson Act requires that the Secretary of Commerce approve and implement any proposed management plan or subsequent amendments.⁴⁷ Approved management plans become controlling law within the EEZ and preempt any conflicting state laws that would otherwise apply to a particular fishery.⁴⁸

Fed. Reg. 10,605 (Mar. 10, 1983) (proclaiming and affirming rights and jurisdiction within Exclusive Economic Zone).

43. See Proclamation No. 5013, 48 Fed. Reg. 10,605, 10,605 (Mar. 10, 1983) (establishing EEZ boundaries).

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

Id.

44. See 16 U.S.C. § 1811(a) (2006) (declaring exclusive federal authority within EEZ). This exclusive federal authority extends to the regulation of specific procedures, including “the type and quantity of fish harvested, fishing and processing methods employed, the number of participants, [and] the duration and range of the fishery.” *Id.* § 1852(b)(2)(B)(i).

45. See *id.* § 1852(a) (mandating formation of regional fishery councils). The eight regional councils are the New England Council, the Mid-Atlantic Council, the South Atlantic Council, the Caribbean Council, the Gulf Council, the Pacific Council, the North Pacific Council, and the Western Pacific Council. *Id.* § 1852(a)(1)(A)-(H).

46. See *id.* § 1852(h). “Each Council shall . . . (1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary” *Id.* See generally Van Tuyn & Brown, *supra* note 39, at 2-3 (detailing functions and procedures of regional councils).

47. See 16 U.S.C. § 1854(a) (2006) (providing procedure for approval and implementation of fishery management plans).

48. See *Se. Fisheries Ass’n v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992) (asserting Congress intended to occupy entire field of EEZ fisheries management with Magnuson Act); *Vietnamese Fishermen Ass’n of Am. v. Cal. Dep’t of Fish & Game*, 816 F. Supp. 1468, 1476 (N.D. Cal. 1993) (stating Magnuson Act preempts conflicting state law as applied within EEZ).

B. *Along Came a Striper*

1. *The Striped Bass: Jurisdictional Wanderer*

The Atlantic striped bass is a perennial wanderer, and its migratory inclinations make it a poor candidate for the traditional system of state-by-state regulation.⁴⁹ Over the course of the striper's yearlong migratory cycle, a majority of the population embarks on a journey that crosses up to a dozen territorial sea borders and includes frequent forays into the EEZ.⁵⁰ Each spring, the bulk of the adult fish on the migratory circuit stop over in the Chesapeake Bay to spawn in one of its many tributary rivers.⁵¹ When spawning is complete, adult stripers exit the Chesapeake nursery and resume a northward trek that, for some, will reach the northernmost Maine harbors or beyond to the shores of Nova Scotia.⁵² To the delight of anglers along the Atlantic Coast, striped bass repeat this cycle yearly.⁵³

From a fisheries management standpoint, distinguishing the striped bass as a migratory resource is critical to drafting effective fisheries legislation.⁵⁴ As a result of the striper's migratory tendencies, one state's efforts to manage the fishery within its own territorial waters directly impact all other states along the migratory route.⁵⁵ For example, if a single Atlantic state departs from the coast-wide norm and increases the maximum allowable take of striped bass by an additional fish per angler, per day, the potential result is thousands of adult striped bass that never reach their spawning grounds in the Chesapeake.⁵⁶ Over time, the compounded effect is that untold thousands of would-be offspring never reach anglers along the eastern seaboard or have a future opportunity to

49. See KARAS, *supra* note 4, at 173 (arguing effective program for migratory striped bass management must be national or international in scope); see also ASMFC 1981 PLAN, *supra* note 12, at 1-7 (stating long-term, sustainable striped bass fishery depends on cooperation between Atlantic states).

50. See KARAS, *supra* note 4, at 173 (describing migratory route of striped bass). Striped bass "on a migratory binge" routinely cross twelve state borders in a single summer. *Id.*

51. See *id.* at 53-54 (discussing spawning cycle of striped bass).

52. See *id.* at 173 (describing northernmost limits of striped bass migration). Striped bass of all age and size classes tend to migrate northward in spring and early summer and southward in late summer and fall. See ASMFC AMENDMENT 6, *supra* note 19, at 4. While staging for the spring spawn, adult fish generally winter off of the Outer Banks of North Carolina. See *id.*

53. See Mass. Dep't of Fish & Game, Div. of Marine Fisheries, Species Profiles—Striped Bass, available at <http://www.mass.gov/dfwele/dmf/recreationalfishing/stripedbass.htm#profile> (last updated May 16, 2007) (noting immense popularity of recreational striped bass fishery). The Massachusetts Department of Fish and Game points out that striped bass are "one of the most avidly pursued of all coastal sport fish." *Id.*

54. See 16 U.S.C. § 5151(a)(4) (2006) (recognizing need for inter-jurisdictional management of migratory striped bass).

55. See *id.* (acknowledging "national interest" in effective coordination of striped bass management).

56. See ASMFC 2009 REVIEW, *supra* note 20, at 18 (summarizing recreational striped bass size and bag limits among Atlantic states in 2008). With a two-fish limit, recreational anglers in Massachusetts harvested an estimated 343,347 striped bass in 2008. *Id.* at 22. A theoretical increase to a three-fish limit would have resulted in the additional harvest of 171,673 adult striped bass. *Id.*

spawn.⁵⁷

The fact that striped bass are an immensely valuable economic resource further complicates the task of coast-wide management.⁵⁸ Each year, anglers pursuing striped bass for pure recreation generate hundreds of millions of dollars in state revenues for the Atlantic states.⁵⁹ Likewise, the sale of striped bass in the seven coastal states that allow commercial fishing represents a smaller, yet significant source of income.⁶⁰ With this valuable revenue source literally free-swimming along the coast, a natural tension exists between conservation and the pressure state lawmakers feel to maximize home-state access before neighboring states can benefit from the migratory overflow.⁶¹ The striper collapse of the 1980s demonstrates that a get-it-while-you-can mentality indeed exists and, moreover, poses a legitimate threat to the migratory fishery.⁶²

2. Early Attempts at an Interstate Striper Solution

Long before Congress created a comprehensive fisheries management plan for EEZ waters with the Magnuson Act, the Atlantic states attempted to address collective action predicaments in the territorial seas by forming the ASMFC.⁶³ Established in 1942 and still in existence today, the ASMFC is an interstate compact comprised of representatives from each of the fifteen Atlantic coastal

57. See *id.* (providing detailed striped bass harvest estimates for Atlantic states); see also KARAS, *supra* note 4, at 56-59 (explaining striped bass fecundity and spawning cycle).

58. See 16 U.S.C. § 5151(a)(1) (2006) (acknowledging economic benefit of striped bass fishery to Atlantic states and nation); see also ASMFC 1981 PLAN, *supra* note 12, at 1-2 to -3 (noting high price paid for striped bass on commercial market hinders effective self-regulation by states). See generally SOUTHWICK ASSOCS., INC., THE ECONOMICS OF RECREATIONAL AND COMMERCIAL STRIPED BASS FISHING (2005) [hereinafter SOUTHWICK STUDY], available at <http://www.stripersforever.org/info/Stripers.pdf> (analyzing economic impact of striped bass fishery on economies of Atlantic states).

59. See SOUTHWICK STUDY, *supra* note 58, at 15 tbl.6 (estimating coast-wide retail sales from recreational fishery at over 2.4 billion dollars in 2003).

60. See *id.* (placing figure for sales related to commercial fishery at over 43 million dollars in 2003). The Atlantic states that still maintain a commercial striped bass fishery are Massachusetts, Rhode Island, New York, Delaware, Maryland, Virginia, and North Carolina. *Id.* at 14. Proponents of an outright ban on the commercial sale of striped bass argue that the potential value of a single striped bass in the wild far outweighs that of a dead fish at market. See *id.* at 15 (comparing value, per pound, of recreationally-caught versus commercially-caught striped bass).

61. See Nelson Bryant, *Maryland Weighs Bass Plan*, N.Y. TIMES, Sept. 23, 1984, at 56 (noting fierce interstate competition for resource). Maryland anglers, faced with state-mandated catch restrictions at the peak of the striped bass collapse in 1984, expressed the common sentiment that “[a]ny catch we forgo . . . simply means more stripers for fishermen in the other states.” See *id.*

62. See *id.* (noting anglers’ tendency to resist disparate fisheries regulations among neighboring states); see also *infra* Part II.B.2 (discussing interstate stalemate preventing immediate regulatory change at outset of 1980s striped bass crash).

63. See Atlantic States Marine Fisheries Compact, Pub. L. No. 77-539, 56 Stat. 267 (1942), amended by Pub. L. No. 81-721, 64 Stat. 467 (1950) (establishing ASMFC for interstate management of territorial sea along Atlantic Coast).

states.⁶⁴ With the approval and funding of Congress, the ASMFC's mission is to "promote the better utilization of the fisheries . . . of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries."⁶⁵

Due to the striper's immense popularity as a sport fish at the inception of the compact, the fledgling ASMFC immediately turned its focus to a plan for sustaining a long-term, viable striped bass fishery along the Atlantic Coast.⁶⁶ Beginning in the 1950s, the ASMFC, in conjunction with the United States Fish and Wildlife Service, sponsored a series of preliminary studies aimed at achieving a better understanding of the impact of the individual Atlantic states on the striper population as a whole.⁶⁷ During the late 1970s, the ASMFC concentrated on turning this data into a sensible interstate fishery management plan for striped bass—a plan similar to the regional plans that the Magnuson Act had recently mandated for target species within the EEZ.⁶⁸ The ASMFC finalized its first official plan in 1981, just as the feared collapse of the striped bass population was becoming a reality.⁶⁹

At first glance, the ASMFC's 1981 plan, released on the eve of catastrophe, appeared to be as well formulated as it was timed.⁷⁰ Not only did the plan employ the best available fisheries science of the day, but it also demonstrated great foresight in its focus on rebuilding and maintaining a future spawning stock of striped bass.⁷¹ Under the terms of the 1981 plan, the ASMFC urged

64. *See id.* (naming original ASMFC-member states). The current 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. *See* ATLANTIC STATES MARINE FISHERIES COMMISSION, <http://www.asmfc.org> (follow "About Us" hyperlink) (last visited Apr. 5, 2011) (providing updated list of ASMFC-member states).

65. *See* Atlantic States Marine Fisheries Compact, Pub. L. No. 77-539, 56 Stat. 267 (1942), *amended by* Pub. L. No. 81-721, 64 Stat. 467 (1950).

66. *See* KARAS, *supra* note 4, at 171 (describing ASMFC's early attempts at coordinating striper research and conservation among states).

67. *See id.* at 171 (discussing scope of ASMFC's research projects throughout 1950s). *See generally* ATL. COAST COOP. STRIPED BASS PROGRAM, MORPHOMETRIC STUDY OF THE STRIPED BASS, *ROCCUS SAXATILUS* (1957) (compiling results of early research by ASMFC and United States Fish and Wildlife Service).

68. *See* ATL. STATES MARINE FISHERIES COMM'N, HISTORICAL TIMELINE OF ASMFC MILESTONES (2010) [hereinafter ASMFC TIMELINE], *available at* <http://www.asmfc.org/commissionerManual/All%20Other%20Sections/2b.%20ASMFC%20Timeline.pdf> (recounting development of striped bass fishery management plan in late 1970s); *see also* ASMFC 1981 PLAN, *supra* note 12, at 2-4 (acknowledging similarity between ASMFC striped bass plan and Magnuson Act regional plans).

69. *See* ASMFC 1981 PLAN, *supra* note 12, at 2-1. In 1973, the coast-wide commercial harvest of striped bass totaled 14.7 million pounds. *Id.* By 1979, the total commercial catch had declined precipitously to 3.1 million pounds, the lowest recorded total in thirty years. *Id.*

70. *See id.* at 1-1 (noting steady decline of striped bass population leading up to publication of ASMFC's plan).

71. *See id.* at 2-7 (listing ASMFC's priority research areas). Although the ASMFC acknowledged statistical gaps in its 1981 findings, the body of available information was nevertheless "considerable." *See id.* In order to ensure a sustainable fishery in the future, the ASMFC emphasized a number of priority research areas, including: developing uniform controls and monitoring both commercial and recreational harvests; determining rates of natural-versus-fishing mortality; estimating the relative contribution of each striped bass

states to increase size limits, decrease daily bag limits, and eliminate fishing pressure in known spawning areas.⁷² Yet for all of the strengths of the plan's holistic approach, it contained a fatal flaw: as a mere interstate compact, the ASMFC still lacked the regulatory authority to force individual states to comply.⁷³

This weakness effectively sidelined the ASMFC's workable interstate solution as the striped bass slipped further toward extinction.⁷⁴ By the fall of 1983, the coast-wide commercial harvest of striped bass had plummeted from a high of fifteen million pounds ten years earlier to a dismal two million pounds.⁷⁵ That same year, fisheries biologists reported that the Chesapeake Bay—the spawning ground for up to ninety percent of Atlantic striped bass—had produced virtually zero new fish.⁷⁶ In spite of these dire statistics, the Atlantic states still failed to reach a consensus on how, or even whether it was necessary, to reduce overall fishing mortality.⁷⁷

3. Congress Takes a Dip in the Territorial Sea

The striped bass collapse of the 1980s pitted the Atlantic states against each other in a scramble for a solution.⁷⁸ With each state seemingly unwilling to acknowledge its own role in the collective overharvest of striped bass, the resulting stalemate exacerbated the exact inconsistencies in state fisheries policies that both the Magnuson Act and the ASMFC had intended to cure.⁷⁹ Even at the brink of extinction, it seemed that effective interstate regulation of striped bass would be impossible as long as the fish had a price on its head.⁸⁰

spawning area to the overall population; and evaluating naturally occurring environmental factors affecting spawning success. *See id.* at 2-7 to -8.

72. *See id.* at 1-4 to -7 (summarizing ASMFC's recommended conservation measures for state implementation).

73. *See* ASMFC 1981 PLAN, *supra* note 12, at 2-6 (noting ASMFC's lack of authority to implement or enforce striped bass management plan). The initial ASMFC plan suggested a number of methods for implementing the proposed regulatory changes across the various territorial sea borders. *See id.* (describing enforcement options). Nevertheless, the ASMFC ultimately conceded that "[n]one as yet has inspired any degree of consensus among the states." *Id.* at 2-7.

74. *See* Farside, *supra* note 14, at 233 (discussing ASMFC's inability to implement initial plan in midst of stock's continued decline).

75. *See* Philip Shabecoff, *Biologists Say Emergency Action is Necessary to Save Striped Bass*, N.Y. TIMES, Dec. 13, 1983, at B9 (noting rapid decline of commercial striped bass fishery during early 1980s).

76. *See id.* (reporting grim results of annual Chesapeake Bay young-of-year striped bass survey in 1983).

77. *See id.* (summarizing state-by-state compliance with initial ASMFC plan). Even at the peak of the striper collapse in 1983, Delaware, New Jersey, and North Carolina, for instance, had yet to adopt any meaningful restrictions on the striped bass harvest. *See id.*

78. *See id.* (noting widespread disagreement among Atlantic states over striper solution).

79. *See supra* notes 36-41 and accompanying text (discussing goals of Magnuson Act); *see also* ASMFC 1981 PLAN, *supra* note 12, at 1-3 (explaining challenges of managing fishery already subject to regulation by twelve states). The ASMFC's initial plan maintained: "[g]iven the particular public interests and stock characteristics within each state, defining measures for management of this common resource requires that concessions be made on all sides." ASMFC 1981 PLAN, *supra* note 12, at 1-3.

80. *See* ASMFC 1981 PLAN, *supra* note 12, at 1-3 (questioning potential for effective self-regulation of

As the ASMFC noted in its 1981 plan, “[t]he high prices paid for striped bass provide strong incentive to continue fishing despite the reduced numbers of fish available.”⁸¹

Fortunately for the striped bass, the post-Magnuson Congress appreciated the need for comprehensive fishery management plans.⁸² While the ASMFC initially regarded striped bass management as beyond the scope of federal Magnuson Act authority due to the fish’s typical predomination in territorial waters, Congress, it turned out, was unwilling to remain idle while a symbol of the nation’s maritime heritage disappeared forever.⁸³ Accordingly, in 1984, Congress stepped into the interstate regulatory fray and enacted the Striped Bass Act.⁸⁴

The Striped Bass Act immediately empowered the ASMFC to enforce state compliance with its recommendations for size and harvest limits.⁸⁵ Even today, states that fail to comply with the ASMFC’s management plan and any subsequent amendments face a complete federal closure of their state fishery.⁸⁶ Such a closure would subject noncompliant states to the loss of millions of dollars in revenues from tackle sales, travel expenses, charter boat fees, and other activities related to the striped bass fishery.⁸⁷ In essence then, the Striped Bass Act provided the ASMFC plan with the necessary bite by using the threat of federal sanctions to mandate a curative measure that many Atlantic states had been unwilling to impose themselves.⁸⁸ The result was groundbreaking in

striped bass by states).

81. *Id.*

82. *See* 16 U.S.C. § 1801(a)(5) (2006) (acknowledging sustainable nature of fisheries under sound management).

83. *See id.* § 1856(a)(1) (stating Magnuson Act shall not extend or diminish state jurisdiction within state’s respective boundaries); *see also* ASMFC 1981 PLAN, *supra* note 12, at 2-2 (noting management jurisdiction for striped bass traditionally resided with states). Despite the traditional limitations on federal interference with inshore fisheries, congressional findings made during the peak of the striped bass collapse illustrated Congress’s resolve to save the striped bass: “Atlantic Striped bass are of historic commercial and recreational importance and economic benefit to the Atlantic coastal States and to the Nation It is in the national interest to implement effective procedures and measures to provide for effective interjurisdictional conservation and management of this species.” *See* 16 U.S.C. § 5151(a) (2006).

84. *See* Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613, 98 Stat. 3187 (1984) (codified as amended at 16 U.S.C. §§ 5151-5158 (2006)).

85. *See* 16 U.S.C. § 5153(a)(1) (2006) (mandating annual state-by-state audit of compliance with ASMFC management plan).

86. *See id.* § 5154 (providing procedure for federal moratorium). The statute instructs: “if the State is not in compliance, the Secretaries [of State and Interior] shall declare jointly a moratorium on fishing for Atlantic striped bass within the coastal waters of that coastal State.” *Id.* § 5154(a).

87. *See* SOUTHWICK STUDY, *supra* note 58, at 15 (detailing economic value of recreational striped bass fishery); *see also* Farside, *supra* note 14, at 242 (discussing economic consequences of state noncompliance with ASMFC plan).

88. *See* Farside, *supra* note 14, at 242 (describing Striped Bass Act as solution to ASMFC’s initial implementation and enforcement problems). In describing the failings of the ASMFC plan prior to the enactment of the Striped Bass Act, one commentator remarked that “[i]t had no real teeth.” *See* RUSSELL, *supra* note 2, at 133.

the scope of federal fisheries law, as Congress had never before sought to intervene in a fishery based primarily in state territorial waters prior to the enactment of the Striped Bass Act.⁸⁹

C. *The State of Striper Law Today*

By all accounts, Congress's intervention at the peak of the striped bass collapse was as effective as it was groundbreaking.⁹⁰ By January of 1995, Atlantic striped bass numbers rebounded to near historic levels, and the ASMFC declared the stocks fully recovered.⁹¹ That same year, in response to the resurgence, the ASMFC approved an amendment to the 1981 plan that relaxed the mandatory state requirements for striped bass size and bag limits.⁹² Subsequent amendments to the original plan have since granted the Atlantic states considerable discretion to promulgate their own striped bass regulations as long as they are deemed equivalent to the ASMFC management plan.⁹³ This renewed discretion, however, has led to the reemergence of disjointed state regulations reminiscent of the pre-1980s fishery.⁹⁴

89. See RUSSELL, *supra* note 2, at 145 (describing unprecedented nature of federal striped bass initiative). The ASMFC's initial striped bass plan, published three years prior to the enactment of the Striped Bass Act, noted that the federal government traditionally had no jurisdiction over striped bass management because the majority of the population resides within state territorial waters. See ASMFC 1981 PLAN, *supra* note 12, at 2-2 to -3. Accordingly, the ASMFC acknowledged that voluntary state compliance would be the most likely method for implementation. See *id.* at 2-6.

90. See ASMFC AMENDMENT 6, *supra* note 19, at iv (stating recovery under ASMFC plan most significant in history of coastal fisheries management); see also Almeida, *supra* note 17, at 1215-16 (recounting unequalled success of Congress and ASMFC in reversing environmental disaster with striped bass plan); Farside, *supra* note 14, at 243 (noting Congress's pivotal role in successful reversal of striped bass decline).

91. See ATL. STATES MARINE FISHERIES COMM'N, FISHERIES MANAGEMENT REPORT NO. 24: AMENDMENT #5 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STRIPED BASS ii (1995) [hereinafter ASMFC AMENDMENT 5], <http://www.asmfc.org> (follow "Managed Species" hyperlink; then follow "Striped Bass" hyperlink; then follow "Fishery Management Reports" hyperlink; then follow "Amendment 5 to the Interstate Fishery Management Plan for Atlantic Striped Bass (March 1995)" hyperlink) (stating striped bass population deemed recovered as of January 1, 1995). According to ASMFC statistics, the total number of striped bass caught and released by anglers along Atlantic Coast increased from 384,222 in 1983 to 9,743,862 in 1995. See ASMFC 2009 REVIEW, *supra* note 20, at 23.

92. See ASMFC AMENDMENT 5, *supra* note 91, at 31-36 (increasing size-limit threshold and relaxing harvest caps for state compliance); see also ASMFC TIMELINE, *supra* note 68 (describing timing and effect of Amendment 5 on ASMFC striped bass management plan); Tommy Hine, *Bass Fishermen Get Their Fill: Nine Years After Closure, New Limits Open to Debate*, HARTFORD COURANT, Apr. 28, 1995, at C5, available at http://articles.courant.com/1995-04-28/features/9504280467_1_striped-bass-daily-limit-bass-fishery (discussing negative public reaction to ASMFC increases to size- and bag-limit thresholds); Gene Mueller, *Amendment 5 Has Anglers Fearful for Rockfish Survival*, WASH. TIMES, Mar. 27, 1995, at B11 (criticizing Amendment 5).

93. See ASMFC AMENDMENT 6, *supra* note 19, at 35 (defining requirements for alternative state striped bass regulations). According to the "Management Program Equivalency" provision in Amendment 6, states must demonstrate that alternative regulations are equivalent to the standards recommended by the ASMFC. See *id.*

94. See ASMFC 2009 REVIEW, *supra* note 20, at 18 (providing state-by-state summary of recreational striped bass regulations for 2008). For example, in 2008, Massachusetts allowed recreational anglers two fish per day at a minimum length of twenty-eight inches; Maine allowed a single fish at least forty inches or, in the

The single greatest disconnect in the current scheme of striped bass management is in the commercial fishery.⁹⁵ Today, five out of the twelve ASMFC states with a stake in the fishery have declared the striped bass a gamefish—a status that precludes commercial harvest or sale entirely.⁹⁶ The remaining seven states, in contrast, support active commercial fisheries for striped bass.⁹⁷ The combined ASMFC-allocated quota for the commercial states results in the annual harvest of more than seven million pounds of striped bass.⁹⁸ Surprisingly, this figure is nearly identical to the average yearly commercial harvest during the thirty years preceding the 1980s population crash.⁹⁹

This substantial commercial pressure—the majority of which targets the most ecologically valuable breeding-age fish—comes at a time when striped bass numbers are dwindling once again.¹⁰⁰ According to the ASMFC's 2009 Stock Assessment Report, the overall population of breeding-age fish declined roughly thirty-seven percent between 2005 and 2008.¹⁰¹ In a 2011 press release, the ASMFC further conceded that the overall recreational harvest of striped bass declined by sixty-six percent between 2006 and 2009.¹⁰² Meanwhile, Maryland's two most recent Young-of-Year Indices (YOY) predict that the number of newborn stripers produced in the Chesapeake has

alternative, one fish between twenty and twenty-six inches; New Hampshire allowed one fish at twenty-eight inches or greater and an additional fish between twenty-eight and forty inches. *Id.*

95. *See id.* at 17 (summarizing coast-wide commercial regulations).

96. *See id.* (listing ASMFC states prohibiting commercial harvest of striped bass). The current gamefish states are Maine, New Hampshire, Connecticut, New Jersey, and Pennsylvania. *Id.*

97. *See supra* note 60 (listing ASMFC states supporting commercial striped bass fishery within territorial waters).

98. *See* ASMFC 2009 REVIEW, *supra* note 20, at 19 (compiling coast-wide commercial harvest totals during post-recovery years). *See generally* ATL. STATES MARINE FISHERIES COMM'N, 2010 WINTER MEETING SUMMARY (2010) [hereinafter ASMFC 2010 WINTER MEETING], <http://www.asmfc.org> (follow "Press Releases" hyperlink; then follow "2010 Press Releases & Meeting Summaries" hyperlink; then follow "ASMFC Winter Meeting Press Releases, Summaries and Motions" hyperlink) (discussing ASMFC's recent attempts to increase state commercial quotas).

99. *See* ASMFC 1981 PLAN, *supra* note 12, at 2-1 (reporting average annual commercial striped bass landings of 7.8 million pounds between 1949 and 1979).

100. *See* Matt Boutet, *Where are all the North Coast Stripers?*, THE DRAKE, Fall/Winter 2009, at 26 (questioning health of Atlantic striped bass fishery); Williams, *supra* note 22, at 16-17 (citing factors indicating impending striped bass crash).

101. *See* ATL. STATES MARINE FISHERIES COMM'N, 2009 STOCK ASSESSMENT REPORT FOR ATLANTIC STRIPED BASS 7-8 (2009) [hereinafter ASMFC 2009 STOCK ASSESSMENT], <http://www.asmfc.org> (follow "Managed Species" hyperlink; then follow "Striped Bass" hyperlink; then follow "Stock Assessment Reports 2009" hyperlink) (assessing striped bass abundance and mortality rates). Despite the glaring downward trend in population abundance, the ASMFC maintains that according to its own biological thresholds, "the striped bass stock complex is not overfished and overfishing is not occurring." *See id.* at 1.

102. *See* Press Release, Atl. States Marine Fisheries Comm'n, ASMFC Atlantic Striped Bass Board Initiates Addendum to Reduce Fishing Mortality (Mar. 24, 2011) [hereinafter ASMFC 2011 Press Release], available at <http://www.asmfc.org> (follow "Press Releases" hyperlink; then follow "ASMFC Atlantic Striped Bass Board Initiates Addendum to Reduce Fishing Mortality" hyperlink) (describing recent downward trends in striped bass landings).

plummeted to pre-crash levels.¹⁰³ This marked decline in all year classes has recently spurred considerable public debate, including a push by a number of concerned business owners and recreational angling groups for more restrictive state regulations.¹⁰⁴ In Massachusetts, for instance, lawmakers recently considered and rejected proposed legislation that would have banned the commercial harvest of striped bass in state waters and halved the daily bag limit for recreational anglers.¹⁰⁵

Back in federal waters, a complete federal ban on the harvest or possession of striped bass within the EEZ has remained in effect since 1990.¹⁰⁶ Although in 2003 the National Marine Fisheries Service (NMFS), at the request of the ASMFC, announced that it was considering proposed rulemaking to reopen the EEZ to a targeted striped bass fishery, the proposal was short-lived.¹⁰⁷ The NMFS ultimately abandoned the proposal in 2006 after receiving a flood of negative responses during the public comment period.¹⁰⁸ The following year,

103. See MD. DEP'T OF NATURAL RES., 2010 YEAR IN REVIEW: CHESAPEAKE, http://www.dnr.state.md.us/fisheries/fishingreport/yir_index.asp?d=yir10&page=chesapeake (last visited Apr. 9, 2011) (reporting 2010 YOY of 5.6, below long-term average of 11.6); *MD 2008 YOY, STRIPERS FOREVER*, http://www.stripersforever.org/Info/Stripers_Research/I010CD677 (last visited Apr. 9, 2011) (providing Maryland YOY indices from 1954 to 2008); see also ASMFC 2009 STOCK ASSESSMENT, *supra* note 101, at 2 (noting stark decline in Maryland YOY). The ASMFC reports that the 2008 Maryland YOY represents the lowest figure since the early 1990s. See ASMFC 2009 STOCK ASSESSMENT, *supra* note 101, at 2.

104. See Daley, *supra* note 22, at B1 (discussing recent public concern and push for Massachusetts legislation banning commercial striped bass fishery).

105. See H. 796, 2009 Gen. Ct., 186th Sess. (Mass. 2009) (proposing ban on commercial harvest and reduction of recreational harvest of striped bass in Massachusetts). The proposed bill was titled "An Act Relative to the Conservation of Atlantic Striped Bass." *Id.* See generally Doug Fraser, *Patrick: Bass Bill is Dead in the Water*, CAPE COD TIMES, Jan. 10, 2010, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100121/NEWS/1210315> (discussing impetus for Massachusetts gamefish bill).

106. See 50 C.F.R. § 697.7(b) (2009) (prohibiting harvest or possession of striped bass within EEZ). The federal striped bass regulations state, in pertinent part:

[I]t is unlawful for any person to do any of the following: (1) Fish for Atlantic striped bass in the EEZ. (2) Harvest any Atlantic striped bass from the EEZ. (3) Possess any Atlantic striped bass in or from the EEZ, except in the following area: The EEZ within Block Island Sound, north of a line connecting Montauk Light, Montauk Point, NY, and Block Island Southeast Light, Block Island, RI; and west of a line connecting Point Judith Light, Point Judith, RI, and Block Island Southeast Light, Block Island, RI. Within this area, possession of Atlantic striped bass is permitted, provided no fishing takes place from the vessel while in the EEZ and the vessel is in continuous transit. (4) Retain any Atlantic striped bass taken in or from the EEZ.

Id.; see also NMFS BIENNIAL REPORT, *supra* note 21, at 9 (stating EEZ striped bass closure effective since 1990).

107. Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 43,074-01 (proposed July 21, 2003) (withdrawn Sept. 14, 2006, at 71 Fed. Reg. 54,261) (requesting public comment on reopening targeted striped bass fishery within EEZ).

108. See Withdrawal of a Notice of Intent to Prepare an Environmental Impact Statement, 71 Fed. Reg. 54,261 (Dep't of Commerce Sept. 14, 2006) (declining consideration of reopening striped bass fishery within EEZ). "Public comments overwhelmingly indicated that the public disagreed with the Option Paper's conclusion that there would be no increase mortality if the EEZ were opened. The public believes that if the EEZ were opened that mortality would increase substantially." *Id.* at 54,262.

in a decisive response both to the NMFS proposal and renewed concerns about the health of the striped bass fishery, President George W. Bush issued Executive Order 13,449, which declared the striped bass a federally protected gamefish.¹⁰⁹ The Order fortified the existing striped bass closure in the EEZ and stated the federal government's intent "to conserve striped bass . . . for the recreational, economic, and environmental benefit of the present and future generations of Americans."¹¹⁰ The practical effect of the Order, nevertheless, was simply to reinforce the existing jurisdictional contradiction, for under the current state-federal dichotomy, striped bass are still subject to conflicting regulations each time they cross the demarcation between territorial water and the EEZ.¹¹¹

D. EEZ Preemption Principles

The Supremacy Clause of the United States Constitution declares that in a conflict between state and federal law, federal law must prevail.¹¹² Elaborating on this fundamental constitutional principle, the Supreme Court has determined that federal preemption may arise in three specific contexts. First, Congress may indicate an express intent to preempt any state law within a particular field.¹¹³ Second, Congress may imply such intent where the existence of comprehensive federal legislation obviates the need for additional state legislation in the particular field.¹¹⁴ Lastly, federal law preempts state law where compliance with both laws is impossible or where compliance with the state law would otherwise frustrate a congressional objective.¹¹⁵

109. Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007), *reprinted in* 16 U.S.C.A. § 5151 (West 2010). The Order further states that the Secretary of Commerce—the party Congress vested with federal fisheries authority pursuant to the Magnuson Act—shall "encourage . . . State designation as gamefish where the State determines appropriate under applicable law." *Id.* 60,531.

110. *Id.*; see also NMFS BIENNIAL REPORT, *supra* note 21, at 10 (describing executive order as attempt to strengthen existing striped bass conservation efforts within EEZ).

111. Compare Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007), *reprinted in* 16 U.S.C.A. § 5151 (West 2010) (affirming ban on harvest and possession of striped bass within EEZ), and 50 C.F.R. § 697.7(b) (2009) (prohibiting harvest or possession of striped bass within EEZ), with 322 MASS. CODE REGS. 6.07 (2010) (allowing state-regulated commercial fishery in Massachusetts territorial waters), and N.Y. COMP. CODES R. & REGS. tit. 6, § 40.1(j) (2010) (providing commercial striped bass regulations for New York territorial waters).

112. See U.S. CONST. art. VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." *Id.*

113. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (outlining principle of express field preemption); *Pac. Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (stating Congress may supplant state law by indicating preemptive intent in express terms).

114. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (maintaining state law impliedly preempted where comprehensive federal regulation leaves no room for supplemental legislation).

115. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (stating preemption implied where simultaneous compliance with both state and federal law physically impossible); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (asserting state law impliedly preempted where compliance provides obstacle to Congress's purposes and objectives). To determine whether a state law provides a sufficient

Prior to the Magnuson Act, in *Skiriotos v. Florida*,¹¹⁶ the Supreme Court directly confronted the issue of whether states have the authority to enforce their own fisheries laws beyond the seaward boundary of state waters.¹¹⁷ The *Skiriotos* Court focused specifically on a Florida statute that prohibited the use of deep-sea diving equipment for the commercial harvest of sponges.¹¹⁸ As a preliminary matter, the Court pointed out that Florida had a legitimate interest in maintaining a healthy sponge fishery within its territorial waters and, relying on its prior holding in *Manchester*, reiterated the notion that it was firmly within Florida's police power to do so.¹¹⁹ The *Skiriotos* Court then added considerable gloss to the traditional state police power, asserting that in the absence of conflicting federal legislation, a state has the authority to regulate the conduct of its own citizens in extraterritorial waters.¹²⁰

Thirty-five years after *Skiriotos*, the Magnuson Act's grant of federal authority in the EEZ offered courts a renewed impetus to consider whether the revised federal scheme preempts state laws that purport to apply beyond a state's territorial waters.¹²¹ The answer, despite the Magnuson Act's sweeping preemptive language, is not always clear-cut.¹²² For example, a number of courts have grappled with a lone statutory exception to the Magnuson Act's broad grant of federal authority that provides a strong argument against wholesale preemption of state law within the EEZ.¹²³ Specifically, 16 U.S.C. §

obstacle to warrant federal preemption, courts will examine the purpose and intended effect of the applicable federal statute in its entirety. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (discussing standards for analyzing implied federal preemption of conflicting state law).

116. 313 U.S. 69 (1941).

117. See *id.* at 74-75 (stating issue before Court).

118. See *id.* at 70 n.1 (quoting language of Florida statute at issue). Rather than limiting its prohibitions strictly to Florida's territorial waters, the language of the Florida statute broadly referred to "the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida." See *id.*

119. See *id.* at 75 (citing *Manchester v. Massachusetts*, 139 U.S. 240, 266 (1891)) (describing permissible scope of state police power with respect to proper maintenance of sponge fishery).

120. See *Skiriotos*, 313 U.S. at 79. The *Skiriotos* Court maintained that where federal authority is lacking, "the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances." *Id.*

121. See 16 U.S.C. § 1811(a) (2006) (granting federal government sovereign rights and exclusive authority over fisheries resources within EEZ); see also, e.g., *Se. Fisheries Ass'n v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992) (assessing validity of Florida Spanish mackerel regulation as applied to state-registered vessels in EEZ); *Davrod Corp. v. Coates*, 971 F.2d 778, 784 (1st Cir. 1992) (examining Magnuson Act's preemptive effect on Massachusetts squid regulations as applied to vessels within EEZ); *Vietnamese Fishermen Ass'n of Am. v. Cal. Dep't of Fish & Game*, 816 F. Supp. 1468, 1469 (N.D. Cal. 1993) (addressing California regulation purporting to extend state gillnet ban to EEZ).

122. Compare *Chiles*, 979 F.2d at 1509 (maintaining Congress intended to occupy entire field of EEZ fishery management with Magnuson Act), with *State v. Hayes*, 603 A.2d 869, 871 (Me. 1992) (determining Maine's enforcement of more restrictive lobster laws within EEZ not contrary to congressional objective). See generally Alexandra M. Renard, Note, *Will Florida's New Net Ban Sink or Swim?: Exploring the Constitutional Challenges to State Marine Fishery Restrictions*, 10 J. LAND USE & ENVTL. L. 273, 300-01 (1995) (discussing courts' lack of consensus on preemptive effect of Magnuson Act).

123. See *infra* note 126 and accompanying text (discussing potential statutory basis for application of state law within EEZ).

1856(a)(3) provides that “[a] State may regulate a fishing vessel *outside the boundaries of the State* . . . [if] [t]he fishing vessel is registered under the law of that State.”¹²⁴ Congress, like the *Skiriotes* Court, carefully limited this exception to situations where no conflicting federal law applies.¹²⁵ Nevertheless, courts that deny the Magnuson Act’s absolute preemptive effect point to this single qualified exception as evidence of Congress’s intent to stop short of occupying the entire field of fisheries management within the EEZ.¹²⁶

Even conceding that states retain limited concurrent authority within the EEZ, however, courts have unanimously confirmed that such authority fails in the presence of a conflicting federal law.¹²⁷ Under this settled principle, state laws that allow commercial striper fishing in territorial waters have no force in the EEZ.¹²⁸ Because state and federal striper laws are entirely antithetical as applied to the EEZ, the federal commercial ban necessarily prevails under the “physical impossibility” prong of an implied preemption analysis.¹²⁹ Moreover, 16 U.S.C. § 1856(a)(3) expressly prohibits such a direct conflict with a federal law, even in the partially exempted context of state-registered vessels.¹³⁰ Keeping in mind these geographical constraints on state authority, this Note turns to the unresolved issue of whether federal striped bass regulations, currently enforced only within the EEZ, may extend their

124. 16 U.S.C. § 1856(a)(3) (2006) (emphasis added).

125. See *id.* § 1856(a)(3)(A) (precluding state regulation in presence of applicable federal regulations); see also *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941) (limiting state’s extraterritorial authority where conflicting federal law applies). Specifically, Congress qualified the sole exception to exclusive federal authority within the EEZ by permitting state regulation only where “[state] laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.” See 16 U.S.C. § 1856(a)(3)(A) (2006).

126. See, e.g., *Coates*, 971 F.2d at 786 (determining section 1856(a)(3) expressly confirms continued state regulatory authority in offshore waters); *La. Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439, 443 (E.D. La. 1996) (stating Magnuson Act preserves limited state authority within EEZ, as indicated by section 1856(a)(3)); *Hayes*, 603 A.2d at 870 (interpreting section 1856(a)(3) as expressly preserving concurrent state authority within EEZ); see also Renard, *supra* note 122, at 300 (addressing potential statutory basis for concurrent state and federal jurisdiction within EEZ).

127. See, e.g., *Vietnamese Fishermen Ass’n of Am. v. Cal. Dep’t of Fish & Game*, 816 F. Supp. 1468, 1476 (N.D. Cal. 1993) (asserting state law in conflict with Magnuson Act fails when applied to EEZ); *Se. Fisheries Ass’n v. Mosbacher*, 773 F. Supp. 435, 440 (D.D.C. 1991) (stating Magnuson Act, while not expressly preemptive, supplants state law where dual compliance impossible); *Living v. Davis*, 465 So. 2d 507, 509 (Fla. 1985) (basing valid extraterritorial enforcement of Florida shrimp regulation on lack of conflict with federal regulations).

128. See *supra* note 111 and accompanying text (describing conflict between state and federal striper regulations).

129. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (basing implied preemption on physical impossibility of compliance with both state and federal laws); *Vietnamese Fishermen Ass’n*, 816 F. Supp. at 1475 (invalidating state gillnet ban based on incompatibility with more permissive federal net regulations); see also *supra* notes 112-115 and accompanying text (summarizing current preemption standards).

130. See 16 U.S.C. § 1856(a)(3) (2006) (requiring consistency between federal and state regulations governing state-registered vessels).

preemptive reach into the territorial sea.¹³¹

III. ANALYSIS

A. *The Failing Logic of Current Striper Law*

The bifurcation of state and federal fisheries management compromises effective, uniform striped bass management for the sake of preserving an outmoded facet of state police power.¹³² Under the existing management scheme, regulations in seven Atlantic states stand in direct conflict with the federal government's policy of striped bass conservation.¹³³ In Massachusetts, for instance, a licensed commercial fisherman is free to harvest and sell striped bass taken in state waters, yet if the same angler crosses the three-mile mark and enters the EEZ, possession or pursuit of a striped bass is a federal offense.¹³⁴

The fallacy of this inconsistent approach is that the very striped bass the federal commercial ban intends to protect roam freely between state and federal waters.¹³⁵ While the divergent regulations may suggest otherwise, there exists no independent population of striped bass that limits its travels exclusively to the EEZ.¹³⁶ Accordingly, the fact that such an extreme regulatory shift—from conservation to exploitation—hinges on an arbitrary jurisdictional divide defies the conventions of modern fisheries science.¹³⁷ Indeed, a similar dichotomy between state borders nearly led to the demise of the striped bass during the 1980s.¹³⁸ A more rational approach acknowledges the fact that striped bass, as

131. See Renard, *supra* note 122, at 301 (questioning outer limit of Magnuson Act's preemptive reach).

132. See Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613, § 2, 98 Stat. 3187 (1984) (current version at 16 U.S.C. § 5151(a) (2006)). Prior to the 1997 amendments, congressional findings accompanying the Striped Bass Act articulated the fundamental challenge to effective striped bass management:

Because no single government entity has full management authority throughout the range of the Atlantic striped bass, the harvesting and conservation of these fish have been subject to diverse, inconsistent, and intermittent State regulation that has been detrimental to the long-term maintenance of stocks of the species and to the interests of fishermen and the Nation as a whole.

Id.

133. See *supra* Part II.C (detailing incoherent state of current striped bass regulations).

134. See Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007), *reprinted in* 16 U.S.C.A. § 5151 (West 2010) (affirming federal commitment to continued closure of EEZ striped bass fishery); 50 C.F.R. § 697.7(b) (2009) (prohibiting harvest or possession of striped bass within EEZ); see also 322 MASS. CODE REGS. 6.07 (2010) (allowing commercial harvest of striped bass in Massachusetts territorial waters).

135. See *supra* notes 50-53 and accompanying text (discussing migratory range of striped bass).

136. See ASMFC AMENDMENT 6, *supra* note 19, at 4 (noting transient nature and mixed origin of Atlantic striped bass stocks).

137. See *id.* at 19 (stating revised objectives of ASMFC striped bass plan). Amendment 6, the current governing amendment to the ASMFC's striped bass plan, "strives, to the extent practical, to maintain coastwide consistency of implemented measures." *Id.*

138. See *supra* notes 77-81 and accompanying text (discussing regulatory inconsistencies leading to

a collective migratory stock, require uniform regulation throughout their entire range.¹³⁹

B. Today's ASMFC Has Lost Sight of Its Mission

One aspect of the states' historical police power that should not be overlooked is its history as an ineffective tool for managing striped bass.¹⁴⁰ Indeed, the ASMFC was formed in part to solve the problem of the states' collective inability to manage migratory striped bass.¹⁴¹ Upon finalizing its 1981 striped bass plan, the ASMFC maintained that its recommended conservation measures provided "the best hope for effective regional management of the species."¹⁴²

Notwithstanding its initial success in thwarting the demise of the striped bass, the ASMFC has since relaxed its regulatory grip and, consequently, its effectiveness.¹⁴³ Through its consistent pattern of liberalizing size- and bag-limit thresholds for the recreational fishery, the ASMFC has inched ever closer to granting states unfettered discretion in managing striped bass.¹⁴⁴ In addition, the ASMFC's surprising attempts in 2010 to initiate coast-wide increases in commercial quotas—even in the face of clear evidence of a population freefall—evidences a glaring disconnect with the realities of the health of the fishery.¹⁴⁵ Indeed, it was not until 2011 that the ASMFC finally acknowledged that the sixty-six percent decline in recreational landings between 2006 and 2009 provided cause for concern.¹⁴⁶ In a press release dated March 24, 2011, the ASMFC announced a plan to initiate a draft addendum to Amendment Six,

collapse of striped bass population in the 1980s).

139. See ASMFC 1981 PLAN, *supra* note 12, at 1-3 (acknowledging existence of collective migratory stock of Atlantic striped bass). The original ASMFC plan insisted that "close cooperation" is essential to the effective management of migratory striped bass. See *id.* at 1-7.

140. See Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613, § 2, 98 Stat. 3187 (1984) (current version at 16 U.S.C. § 5151(a) (2006)) (acknowledging historical failure of "intermittent State regulation" of striped bass).

141. See *supra* notes 63-65 and accompanying text (discussing formation and purpose of ASMFC); see also KARAS, *supra* note 4, at 171-72 (noting concerns about health of striped bass population prompted formation of ASMFC).

142. See ASMFC 1981 PLAN, *supra* note 12, at 2-9 (encouraging state implementation of proposed striped bass conservation measures).

143. See ASMFC AMENDMENT 6, *supra* note 19, at 35 (providing revised protocol for state implementation of alternative regulatory measures); ASMFC AMENDMENT 5, *supra* note 91, at 31-35 (relaxing state regulatory requirements for first time following recovery of striped bass stocks in 1995); see also HINE, *supra* note 92, at C5 (discussing public reaction to ASMFC's increases in commercial quotas and reductions to minimum length requirements); Mueller, *supra* note 92, at B11 (criticizing ASMFC's initial efforts to ease striped bass restrictions through Amendment 5).

144. See *supra* note 143 (describing ASMFC's history of relaxing state regulations with Amendments 5 and 6).

145. See ASMFC 2010 WINTER MEETING, *supra* note 98, at 9 (reporting ASMFC's successful 2010 motion to initiate striped bass quota increases in all commercial states).

146. See ASMFC 2011 Press Release, *supra* note 102, at 1 (indicating need for sudden decrease in striped bass mortality).

the current governing amendment to its Striped Bass Fishery Management Plan, with the proposed goal of reducing overall striped bass mortality by up to forty percent.¹⁴⁷ Even if approved by the required majority of ASMFC-member states, the proposed addendum would have no practical effect until the 2012 season.¹⁴⁸ With catch rates now plummeting at such a dramatic rate, the ASMFC's recent proposal comes late in the game.¹⁴⁹

Even with a potential change on the horizon, the ASMFC's official stance remains that "the striped bass stock complex is not overfished and overfishing is not occurring."¹⁵⁰ Barring immediate action, the existing striped bass regulatory scheme—with its jumble of inconsistent state laws and equally discordant federal commercial ban—will remain a glaring departure from the ASMFC's original unified vision.¹⁵¹ A coast-wide ban on the commercial harvest of striped bass, however, would revitalize the ASMFC's vision and align the Atlantic states with the federal government's conservation-minded goals.¹⁵² Furthermore, such a plan would complement steps that the five gamefish states have already taken voluntarily.¹⁵³ Although Massachusetts was the most recent state to consider gamefish status on its own accord, the proposed legislation predictably failed in the absence of an ASMFC mandate.¹⁵⁴ As a result, the door remained open for the loss of yet another million pounds of valuable spawning stock from the already depleted Atlantic striped bass population.¹⁵⁵

C. Pressing the Limits of Preemption to Save the Striped Bass

If the ASMFC persists with its unresponsive approach, the continued survival of the striped bass may depend on the federal preemption of state laws that perpetuate the large-scale commercial fishery within state territorial waters.¹⁵⁶ Such a move would comport with established preemption principles,

147. See *id.* (explaining goals of proposed Draft Addendum III).

148. See *id.* (discussing potential timeline for implementing ASMFC's proposed changes). The ASMFC indicates that proposed changes would take effect, at the earliest, in time for the 2012 fishing season. See *id.*

149. See *id.* (reporting sixty-six percent decline in recreational catch over three-year period).

150. ASMFC 2009 STOCK ASSESSMENT, *supra* note 101, at 1.

151. See *supra* Part II.C (detailing inconsistencies among current striped bass regulations); see also ASMFC 1981 PLAN, *supra* note 12, at 1-7 (explaining need for inter-jurisdictional cooperation across entire range of striped bass).

152. See Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007), reprinted in 16 U.S.C.A. § 5151 (West 2010) (urging states' support of federal striped bass conservation policy, including state designation as gamefish).

153. See *supra* note 96 and accompanying text (listing gamefish states).

154. See *supra* notes 104-105 and accompanying text (discussing proposed Massachusetts striped bass legislation); see also Fraser, *supra* note 105 (arguing Massachusetts gamefish bill likely doomed from start).

155. See ASMFC 2009 REVIEW, *supra* note 20, at 24 tbl.8 (listing ASMFC-allotted commercial quotas for Atlantic states). In 2009, the Massachusetts striped bass quota exceeded 1.1 million pounds. *Id.*

156. See Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963) (suggesting preemption of state law more likely where achieving uniform regulation essential to national interest); Hines v. Davidowitz,

as the Supreme Court has repeatedly stated that federal preemption of a state law is implied—notwithstanding a lack of express preemptive language in a federal statute—when compliance with the state law frustrates a congressional objective.¹⁵⁷ And while the Striped Bass Act indeed lacks express preemptive language, the statute unequivocally affirms Congress’s objective of encouraging “effective interstate action regarding the conservation and management of the Atlantic striped bass.”¹⁵⁸ Moreover, the federal government has subsequently expressed its view on “effective” action by twice banning commercial striped bass fishing in the EEZ—by congressionally-backed mandate in 1990 and by executive order in 2007.¹⁵⁹ Meanwhile, the continued decline in striped bass numbers is strong evidence that limiting strict conservation measures to a mere portion of the fish’s range is undermining this federal aim.¹⁶⁰

That the federal commercial ban ostensibly applies solely within the EEZ belies the fact that the federal government’s true interest is in the striped bass population as a whole.¹⁶¹ Whether or not Congress intended to control the full scope of fisheries management within the EEZ, courts consistently afford Congress regulatory deference where a federal management plan for a particular species is already in place.¹⁶² In the present case, the federal government’s striped bass policy and attendant regulations have long been established.¹⁶³ The interests served by the federal plan become no less compelling when a striped bass wanders out of the EEZ and into a state’s

312 U.S. 52, 66-67 (1941) (explaining preemption of state law hinges on degree of conflict with federal objective).

157. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (stating preemption implied where state law undermines purpose and intended effect of federal statute); see also *Hines*, 312 U.S. at 67 (maintaining state law preempted where compliance hinders full purpose and objective of Congress).

158. See 16 U.S.C. § 5151(b) (2006) (stating purpose of Striped Bass Act).

159. See Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007), reprinted in 16 U.S.C.A. § 5151 (West 2010) (reaffirming ban on targeted striped bass fishery within EEZ); NMFS BIENNIAL REPORT, *supra* note 21, at 9 (describing federal ban on harvest and possession of striped bass within EEZ, effective since 1990); see also *supra* notes 106-110 and accompanying text (discussing development and scope of federal striped bass regulations).

160. See ASMFC 2011 Press Release, *supra* note 102, at 1 (acknowledging recent decline in overall striped bass abundance); see also *supra* note 22 (addressing widespread concern about current health of striped bass stocks).

161. See 16 U.S.C. § 5151(a)(4) (2006). “It is in the national interest to implement effective procedures and measures to provide for effective interjurisdictional conservation and management of this species.” *Id.* (emphasis added).

162. See *Vietnamese Fishermen Ass’n of Am. v. Cal. Dep’t of Fish & Game*, 816 F. Supp. 1468, 1475 (N.D. Cal. 1993) (determining state gillnet ban preempted in EEZ, notwithstanding less restrictive nature of federal regulations); Se. *Fisheries Ass’n v. Mosbacher*, 773 F. Supp. 435, 440 (D.D.C. 1991) (asserting where jurisdictional conflict arises, state and federal fisheries regulations cannot coexist).

163. See 16 U.S.C. § 5151(a)(4) (2006) (codifying Congress’s goal of striped bass conservation as of 1984); see also Exec. Order No. 13,449, 72 Fed. Reg. 60,531 (Oct. 20, 2007), reprinted in 16 U.S.C.A. § 5151 (West 2010) (reiterating federal striped bass policy in 2007). See generally ASMFC TIMELINE, *supra* note 68 (recounting historical milestones in striped bass management).

territorial waters.¹⁶⁴

The executive branch focused squarely on these territorial waters in 2007 when President Bush's executive order urged all coastal states to implement gamefish status for striped bass.¹⁶⁵ Despite its precatory tone, the formal executive request affirms that the federal interest in preserving striped bass transcends the arbitrary boundary of the EEZ.¹⁶⁶ Furthermore, the order reiterates the notion that effective striped bass management, like the fish itself, knows no jurisdictional boundaries.¹⁶⁷ The method for achieving the appropriate inter-jurisdictional balance has not changed since the time of the first striper collapse: it requires uniform regulation and an overall reduction in striped bass mortality.¹⁶⁸ Such efforts, however, seem destined to fail as long as seven Atlantic states continue to authorize the harvest of millions of pounds of striped bass in the very shadow of the EEZ.¹⁶⁹

D. Statutory Authorization for Mandatory Coast-Wide Gamefish Status May Already Exist

Even if the federal government had not provided a basis for implied preemption by repeatedly affirming its conservation-minded striped bass policy, the Magnuson Act, by its own express terms, contemplates the application of federal fisheries regulations within territorial waters.¹⁷⁰ Specifically, 16 U.S.C. § 1856(b)(1) provides that if a state takes action that interferes with a federal fisheries plan, the Secretary of Commerce may initiate efforts to regulate that particular fishery within state waters.¹⁷¹ And while the

164. See 16 U.S.C. § 5151(a) (2006) (providing congressional findings pursuant to Striped Bass Act). Congress refers to "Atlantic striped bass" as a single, collective population and, furthermore, addresses the importance of the entire stock to the nation as a whole. See *id.*

165. See Exec. Order No. 13,449, 72 Fed. Reg. 60,531, 60,531 (Oct. 20, 2007), reprinted in 16 U.S.C. § 5151 (West 2010) (urging state designation as gamefish where state deems appropriate).

166. See *id.* The Executive Order acknowledges the need for widespread cooperation among "State, territorial, local, and tribal governments, the private sector, and others." *Id.*

167. See ASMFC 1981 PLAN, *supra* note 12, at 1-3 (noting striped bass subject to various state and federal regulations over course of coastal migration); see also KARAS, *supra* note 4, at 173 (discussing need for uniform striped bass regulations on national, or even international level).

168. See ASMFC 1981 PLAN, *supra* note 12, at 1-3 (suggesting effective management requires more than unilateral participation by one of many governing bodies). The ASMFC's 1981 plan further insisted that "[g]iven the particular public interests and stock characteristics within each state, defining measures for management of this common resource requires that concessions be made on all sides." *Id.*

169. See ASMFC 2009 REVIEW, *supra* note 20, at 19 (compiling annual catch totals for Atlantic commercial states). The combined annual harvest for the seven commercial states currently exceeds 7 million pounds. *Id.*

170. See Renard, *supra* note 122, at 301-02 (discussing limits of Magnuson Act's preemptive effect in state waters).

171. See 16 U.S.C. § 1856(b)(1) (2006) (providing exception to general rule of state authority in territorial waters). The statute provides:

If the Secretary finds . . . (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone

Magnuson Act limits secretarial action to fisheries based predominately in the EEZ, reports of a relative proliferation of striped bass in EEZ waters suggest that striped bass could eventually meet this qualification.¹⁷² At a minimum, this explicit reservation of federal authority is an additional indication that states should not rule out the potential for federal intervention in the ongoing striped bass debate.¹⁷³

IV. CONCLUSION

A mere twenty years after making the most significant recovery in the history of managed fisheries, striped bass stocks are slipping once again. In the brief period since the last recovery, the fish's enduring migratory path has not changed, but the law has. Today, the ASMFC's insistence on liberalizing its formerly strict regulatory guidelines allows the Atlantic states to assert a dangerous amount of discretion in striped bass management. As a result, striped bass regulations in the territorial seas have become increasingly permissive even as the outlook for the population becomes increasingly dim. Add to this disturbing trend a federal policy that discourages the harvest of striped bass altogether, and the current state of striper law is as discordant as it was prior to the 1980s crash.

The key to saving the striped bass in the 1980s was strict, uniform conservation measures, and a similar approach is desperately needed today. The Striped Bass Act succeeded at its outset only because it forced collective concessions in the striped bass harvest. The underlying story of the Striped Bass Act, however, serves as a reminder that to expect the states to take the necessary action on their own accord is both impractical and unrealistic.

During the 1980s, meaningful regulatory change ultimately required federal intervention—even as the striped bass faced utter extinction. Today, the ASMFC has purportedly adopted this intervening role, yet its failure to react to the latest striped bass decline casts doubt on the continued effectiveness of the

and beyond such zone; and (B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan; the Secretary shall promptly notify such State . . . of his intention to regulate the applicable fishery *within the boundaries of such State.*"

Id. (emphasis added).

172. See Withdrawal of a Notice of Intent to Prepare an Environmental Impact Statement, 71 Fed. Reg. 54,261-01 (Dep't of Commerce Sept. 14, 2006) (declining to pursue reopening striped bass fishery within EEZ). The NMFS's withdrawal statement noted "the clear public perception that large trophy sized fish congregate in the Exclusive Economic Zone." *Id.* Consequently, the NMFS concluded that in light of such an aggregation of striped bass within the EEZ, reopening the area to targeted fishing pressure "might markedly increase striped bass mortality above the already elevated current rates." *See id.*

173. See Renard, *supra* note 122, at 301-02 (suggesting potential preemptive effect of section 1856(b)(1) within state waters). Although no court has specifically addressed the preemptive effect of section 1856(b)(1), the mere existence of the provision indicates that states "should not and can not disregard the potential reach of the [Magnuson Act] within their own, presumably sheltered, territorial waters." *Id.* at 301.

interstate compact. Perhaps the ASMFC is too busy reveling in its past success to acknowledge its current failure; or maybe the allure of short-term commercial profits is once again proving to be more tempting than long-term sustainability. Either way, little time remains to speculate about the reasons for the ASMFC's complacency while the fate of the striped bass hangs in the balance. If the ASMFC continues its sluggish response to the downward trend in the striped bass fishery, the last hope may once again lie in the federal government. And given Congress's past involvement in the interstate striped bass saga, federal intervention is not out of the question. Moreover, today, unlike the period preceding the 1980s crash, the federal policy of striped bass conservation is explicit. The fact that many state regulations now run counter to this federal policy provides a legitimate basis for preemption. Should federal intervention once again be required, however, one can only hope that the striped bass is capable of yet another miraculous recovery.

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