CLF NMFS AND LAWSUITS

Conservation Law foundation has been suing NOAA since 1991. In 2001 during a speech to an audience in Phoenix, Arizona concerning the cost/benefit of litigation in fishery management, entitled *Ten Years 'After The Fall': Litigation and Groundfish Recovery in New England*, Peter Shelley, attorney and current president of the Conservation Law foundation, refers to the National Marine Fisheries Service as *"... A kind of bumbling adolescent"* and CLF, the adult, had to step in with a lawsuit to straighten out and save the fishing industry and the agency from its adolescent ineptitudes. This paternalistic role became the paradigm for the Conservation Law Foundation's behavior toward the Fishing industry and The National Marine Fisheries Service, which is evident in CLF's current legal machinations.

But it wasn't just about groundfish it was more about CLF gaining a seat at the bargaining table in terms of fishery management, it was also about, in Shelley's words *"...our suit was the first suit that tried to look at the Magnuson-Stevens Act itself and determine which statutory requirements in the Act actually had teeth."*

Shelley also talks about the first litigation CLF ever did as an organization in 1977 when they partnered with fishermen to fight the oil and gas drilling proposed on Georges Bank. From Shelley's paper, *"Our co-plaintiffs and principal strategic partners in that litigation were the fishermen of New England, particularly the Gloucester fishermen's wives, although others supported us as well."*

He goes on to say this was important for CLF for two reasons it gave them legal standing to go into court and, *"Fighting to guarantee the real-world economic benefits from the fishery on Georges Bank gave CLF's position a gravity that we could not have brought to bear on our own as an environmental organization."* In fact it gave CLF, as an organization, the gravity it did not have on its own.

CLF sued NMFS by way of demanding an end to overfishing, and then after essentially turning on their former fishermen clients, Shelley declared that fishermen hated them, but that NMFS loved them. "After" that marriage took "The Fall", after the lawsuit for more draconian regulations and management plans for achieving management goals(which were not yet defined and nobody had any idea of their meaning or definition, no less how to implement any consequent management actions), at this juncture Shelley lays out the strategy for CLF's future, namely suing NMFS forever. He then makes four "points" regarding the benefits of litigation and reasons that because of its inherent impotence, *"...NMFS looked for a lightning rod to take the political heat for them, so that they could do what everyone knew had to be done: cut back the fishing effort dramatically."* (We should be eternally grateful, along with NMFS, to Peter and Co. for this fortuitous and enlightened action.)

Litigation is a benefit he contends first, to counter the lack of *"...consensus in the regulated community. Those being regulated did not agree that the management measures were necessary or proper. The importance of this credibility problem cannot be overstated, as the fishing community has an enormous capacity to sabotage management plans if they do not believe in them at some fundamental level."* (I was wondering where that feudalism term "regulated community" came from.)

Second point for the benefits of litigation---and this is one of my favorites, *"...is that fishermen take everything very personally."* And hold on to your chair, *"Unlike the steel industry or some other mature industry, fisheries management is personal, and it is personal to the scientists in NMFS as well. Again,*

going back to the developmental theory, it is similar to dealing with an adolescent. They take it personally when you try to tell them they cannot do something. A general lack of sophistication and their extreme reactions to challenges make fisheries groups and NMFS very challenging parties to work with." (God, this is precious, isn't it?)

Third point: *"the Magnuson-Stevens Act is set up in a way that is very difficult to attack. The amount of discretion that is vested in the agency is enormous. The Magnuson-Stevens Act's purposes are contradictory. The language is obscure. The only people who truly love fishery models are the modelers themselves. Trying to get a judge to understand maximum sustainable yield is virtually impossible.* (Yes indeed, we need Shelley, now more than ever, to intervene and make it all "certain"---if only he could have been in on the writing of the law.)

Number Four: *"... is that litigation does not target all the right parties." And "It would be wonderful to take the councils to court directly. Moreover, it would be a very illuminating process for the councils to actually have to do the legal paperwork themselves, to justify their decisions before a judge, and to have to produce the science that supposedly is behind some of the cockamamie management decisions they make. How can an eighteen percent likelihood of success in meeting statutory requirements in summer flounder be an acceptable plan? That is lower than the odds of a coin toss! In any event, it would be wonderful to be able to drag the councils into court, but the statute is not set up that way. As a result, one of the things all of us on the conservation side have to live with in the short-term is that we may be weakening NMFS by litigating against them. Our strategy in the long-term is worth it in our view, because better plans will be produced and the rule of law will become more familiar in fisheries management. But we know in the short-term we are undermining NMFS, because we have to blame them, as they are the responsible agency that approves the regulations based on the council's planning choices."*

He then states more arguments for litigation: "*So what are some of the arguments in favor of litigation? First and foremost in my mind, litigation produces power parity, which is critical in the long run. Fisheries management involves the regulation of the economic development of a publicly-owned resource that has many other public interests attached to it beyond harvesting fish. Getting parity in the decision-making process with respect to the resource means having power. The only way the conservation community has to gain any power in the currently biased system is to go to the courts."*

Second, *"There is a second reason to go to the courts, which is to obtain a proper interpretation of the Magnuson-Stevens Act itself. The courts are the legitimate vehicle in the American democratic system for interpreting statutes. Maybe the Constitution that set up this system of checks and balances is not economically cost-effective or maybe there are high transaction costs in the constitutional scheme, but the courts are still the place that you go to have the law interpreted. Although the Magnuson-Stevens Act has been in existence for more than thirty years, many of the fundamental statutory provisions have never been interpreted by the one body that is constitutionally empowered to do so. Courts are inevitably going to be the interpreters of the law." (Yeah that's right, the hell with the constitution and Congressional representative government, go "tell it to the judge"---especially if we know her.)*

"Third, litigation makes a point that no other approach can make, which is that non-commercial interests have standing, as there are other public interests in the ocean. Before conservation organizations began litigating in New England, we were not welcome at the planning table. Our comments were ignored. Actually, they are still ignored, and most of the discussions center around allocations of fishing effort

between groups of fishermen." And later in the paragraph, the Nixonian punch line, "People now know that they have to deal with us as equal partners in the fisheries discussions.

Fourth*, "The next point is that litigation produces cover for politically weak agencies. NMFS has never successfully developed a political constituency in Congress."* He then goes after Barney Frank, *"The next point is that litigation produces cover for politically weak agencies. NMFS has never successfully developed a political constituency in Congress. Let me give you one example illustrating this fact. Representative Barney Frank (D -Ma.) scores one hundred percent every year on the League of Conservation Voters ballot as an environmentalist. At the same time, to my knowledge, Representative Frank has never supported one single management plan that promoted fishery conservation in New England. He opposes every serious effort to conserve fish. For some reason, he thinks that fishermen, including the scallop fleet, which is a pretty economically well-off group of businesses, are the "little guys" who are getting pushed around by the bad federal agency and the fish-hugging environmentalists. He is vitriolic toward conservationists in the press and, at budget time with NMFS, I am sure he is miserable. Access to the courts to redress and re-balance injuries to unrepresented or underrepresented interests is an American tradition. I do not feel bad about that."*

"The fifth reason to litigate is that litigation is newsworthy. Our objective is to build a political constituency for a healthy ocean. That is why the Conservation Law Foundation takes the positions it takes and does the advocacy work it does. That is why foundations support sustainable fishery management support groups like the CLF, and that is why we go to court. We do not go to court just to win a motion or a case. We are trying to build a political constituency for the ocean. The only news outlets that cover council meetings are the Commercial Fisheries News and the National Fisherman. Their coverage is pretty obscure, at a micro-level, and uninteresting to most people. Bringing a lawsuit on the other hand guarantees front page headlines. That placement and exposure gives the conservation community an opportunity to explain to the American people, who are incredibly ignorant about the marine system, about what actually is going on in our oceans. Generating a newsworthy event gives us an opportunity to educate the public."

"The last point he makes is the piece de resistance: "And the last reason I would give you, and this is a pure ego statement, because there are many other factors and players producing the result, is that litigation works. If I had the chart of the groundfish stock status in New England to reference here, the downward spiral, which was significant for the years proceeding our lawsuit, came to a stop two years after our lawsuit. Now all the stocks that were the subject of our litigation are rebuilding at different biological rates, but they are all on positive inclines. The scallop fishery, which was slowly going bankrupt in New England, because of overharvesting, has reopened and is bringing in millions of dollars of new revenues. This is a direct result of the closures that came from the CLF lawsuit. Litigation works, and I am not one to knock something that works in the world of fishery management that is otherwise so fanciful." (Oooh, Steady Now!)

Now I realize that this speech was given to a roomful of mostly lawyers and also it was given twelve years ago, but I didn't make any of this up! I'm not that creative---or sarcastic. Shelley's speech can be seen as a comprehensive statement of the attitudes, strategies, and current behavior of this "non-profit". It was difficult not to make more underline emphases and wise cracks, but I believe the hubris and the paternalistic posture of this group speaks for itself.

I will include the link below, and the little video, "A Fish Story" that sets the stage for it all.

http://mainelaw.maine.edu/academics/oclj/pdf/vol07_1/vol7_oclj_21.pdf

http://www.youtube.com/watch?v=M5K4xMjFWK8