

# THE CENTENNIAL SHAKEUP; IS THE NATIONAL PARK SERVICE LOSING ITS ABILITY TO MANAGE AND CREATE AQUATIC PRESERVES?

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## I. INTRODUCTION

One hundred years ago, Congress enacted the National Park Service Organic Act in order to establish the National Park Service, whose mission is to conserve park resources and provide for their use and enjoyment in such a manner that would leave them unimpaired for future generations.<sup>1</sup> For the past century, the National Park Service has enjoyed broad discretion in using its authority to make regulations necessary and proper for the use and management of the parks, including their designation and management of marine protected areas within the parks.<sup>2</sup> In

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1. National Park Service Organic Act, 16 U.S.C. § 1 (1916), *amended by* Pub. L. No. 113-287, § 7 (2014).

2. Jennifer Wolff, *Gateway Added to System of Marine Protected Areas*, NPS (Jun. 22, 2010), <https://www.nps.gov/gate/marine-protected-area.htm>.

recent years, however, there has been a movement in our Nation's legislature to limit the authority of the National Park Service in maintaining the parks, specifically in regard to marine protected areas.<sup>3</sup>

While the Park Service celebrated its centennial year, two different pieces of proposed legislation threatened to take away its power to manage the marine protected areas, as a result of an interest in commercial and recreational fishing opportunities.<sup>4</sup> This issue appears at the intersection of various legal frameworks, including the National Park Service's Organic Act, local government structure and regulation by state fish and wildlife agencies, and the framework for fishing management set up by the Magnuson-Stevens Fishery Conservation and Management Act. While the National Park Service may now implement marine protected areas without interaction with these other two bodies, the proposed legislation would require formal consultation and coordination with these bodies, undermining the original mandate of the Park Service and creating greater obstacles to its mission of conservation and protection.

This article begins by examining the National Park Service's mission. By exploring its inception and structure, this article identifies the requirements the National Park Service must meet in managing the parks, the powers the statute confers for regulating use of the parks, and how these powers are now being challenged by Congress. This article will then review the use of marine protected areas (MPAs) to implement the National Park Service's mission. After establishing the Service's management power, this article will explore the statutory character of the Magnuson-Stevens Act and how this Act interplays with the state fish and wildlife service. Then, this article will highlight the challenges to the National Park Service's power through a case study of the Biscayne Bay Aquatic Preserve and current legislation that challenges its implementation. Finally, this article will suggest ways to solve these challenges and move forward with better park management of MPAs in the future.

Specifically, this article will encourage commercial fishing interests to pull support from the currently proposed legislation, allowing the National Park Service to continue its mission to conserve special marine places. In the alternative, this article will suggest a change in the regulatory framework of the Regional Fishery Management Councils in order to balance conservation

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3. See Access for Sportfishing Act of 2016, S. 3099, 114th Cong. (2016); Conserving Our Reefs and Livelihoods Act of 2016, H.R. 5771, 114th Cong. § 302 (2016).

4. S. 3099; H.R. 5771.

and commercial interests in the future application of the new legislation. The first of these suggested changes would take the form of organizing a subcommittee focused on regulating fishing restrictions within National Park jurisdictions with a mandated voting membership for conservation and science interests. The more aggressive suggestion is the proposal for an amendment to the Magnuson-Stevens Act to create a greater opportunity for conservation interests to become a part of the decision-making process.

## II. THE NATIONAL PARK SERVICE

### *A. Purpose and Legislative History*

Operating under the Department of the Interior, the National Park Service has spent the past century preserving special places across the United States.<sup>5</sup> Servicing over 331 million visitors every year in 417 parks, the National Park Service continues to protect its original mission of maintaining and protecting national parks for the enjoyment of all American citizens.<sup>6</sup> The 417 parks maintained by the National Park Service range from historical sites and battlefields to preserves, seashores, and recreation areas.<sup>7</sup> While the National Park Service may house the lowest point in the Western Hemisphere, many of its parks contain top tier attractions, including 18,000 miles of trails, the highest point in North America, and the World's largest living things.<sup>8</sup>

The origins of the National Park Service began in 1872 when Yellowstone National Park was designated as the first public park to be placed under the exclusive control of the Secretary of the Interior.<sup>9</sup> This moment began a movement towards conserving natural spaces that led to the National Park Service we know today.<sup>10</sup> The following years saw the addition of more national parks and monuments, all leading up to the landmark signing of the National Park Service Organic Act in 1916.<sup>11</sup>

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5. NAT'L PARK SERV., NATIONAL PARK SERVICE OVERVIEW (2017), <https://www.nps.gov/aboutus/news/upload/NPS-Overview-12-05-17.pdf>.

6. *Id.*

7. *Id.*

8. *Id.* (The lowest point in the Western Hemisphere, located in Death Valley National Park, is the Badwater Basin at 282 feet below sea level; the highest point in North America is Denali in Denali National Park at 20,320 feet; and the largest living things are the Great Sequoia trees).

9. *History*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/history.htm> (last visited Mar. 1, 2018) [hereinafter *National Park Service History*].

10. *Id.*

11. 16 U.S.C. § 1 (1916).

Some of these additions include Yosemite National Park, which was established in 1890.<sup>12</sup> This addition to the collection of National Parks was added by the designation of Chickamauga and Chattanooga as the first national military park.<sup>13</sup> The national park system continued to grow even before it was named through Congress's actions, including adding famous parks such as Gettysburg National Military Park in 1895, and allowing presidents the authority to designate national monuments through the Antiquities Act of 1906—many of which would be managed by the National Park Service.<sup>14</sup>

After the National Park Service was formed, subsequent legislation granted the Park Service even greater power and jurisdiction; it has also been delegated the responsibility of preserving some of the United States' most unique places. Congress has continued this delegation in huge areas.<sup>15</sup> What first started as the preservation of a single park, has evolved into a national system of preserving ecosystems, cultural and historical sites, and the animals that call these places home.<sup>16</sup>

### *B. National Park General Management Plans*

At the root of the operations of every national park is the general management plan. The general management plan creates the broad umbrella of goals that a National Park would like to implement in the next ten to fifteen years.<sup>17</sup> The management plans clearly defines the condition or resources the park would like to achieve; defines the necessary conditions for visitors to understand and enjoy the park's resources; identifies the management activities, visitor use, and development appropriate for the park; and identifies indicators and standards for maintaining the desired conditions.<sup>18</sup>

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12. Dr. Harry A. Butowsky, *History and Definition of the Names of Historical Units Within the National Park System*, NAT'L PARK SERV. (Sept. 3, 2013), <http://npshistory.com/publications/butowsky6/index.htm>.

13. *Id.*

14. *Id.*; see also Antiquities Act of 1906, 16 U.S.C. § 431 (1906), amended by Pub. L. No. 113-287, § 7 (2014).

15. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

16. See generally Butowsky, *supra* note 12. This evolution can also be seen in the statutes passed to expand the Park Services powers, see National Historic Preservation Act, Pub. L. No. 89-665, 16 U.S.C. § 470 (1966); Volunteers in Parks Act of 1969, 16 U.S.C. § 18g (1969), amended by Pub. L. No. 113-287, § 7 (2014); National Trails Systems Act, 16 U.S.C. § 1241 (1968).

17. NAT'L PARK SERV., MANAGEMENT POLICIES 2006, 23 (2006).

18. *Id.* at 22–23.

Prepared by a collaborative team comprised of park staff, landscape architects, community planners, nature and cultural specialists, environmental design specialists, and many more, the general management plans are an embodiment of a park's future.<sup>19</sup> Not only do they provide guidance for how parks will meet their responsibilities in preserving the areas, but they also map out how the parks will be used recreationally.<sup>20</sup>

Designed to carry out the park's founding purpose and needs, the management plan consists of a thorough analysis of available actions the park may take in the future, and how best to implement these action choices. General management plans are organized in accordance with several oversight documents, including the National Environmental Policy Act of 1969, the National Park Service's *Management Policies 2006*, and the National Park Service Director's Order 12: *Conservation Planning, Environmental Impact Analysis, and Decision-making*.<sup>21</sup>

These documents work to ensure that the National Park Service, especially through its parks management plans, bases all of its management decisions on scientifically sound information, and that resource preservation is placed at the very top of the priority list.<sup>22</sup> Through developing strategies for park management that take into account the park itself, the surrounding region, and the common management direction of all parks and districts, the management plan is designed to improve all aspects of the preserved ecosystems located in and around the park.<sup>23</sup>

Statutorily guided by the National Park System Development Program under 16 U.S.C. § 1a-7, general management plans must include a wide range of information compiled through an expansive process of scientific research, site planning, and public participation.<sup>24</sup> Under this code section, a general management plan must include the actions the park would like to take in preserving the area's resources; indicate the types of development associated with the public enjoyment and use of the parks; identify and implement visitor carrying capacities for all areas of the park; and indicate potential modifications to the external boundaries of the park and the reasons for such modifications.<sup>25</sup>

The National Park Service itself mandates even more extensive requirements. All parks must include a cost-benefit analysis of

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19. *Id.* at 23.

20. *Id.* at 22.

21. See S. 3099, 114th Cong. (2016); H.R. 5771, 114th Cong. § 302 (2016); NAT'L PARK SERV., *supra* note 17.

22. See generally sources cited *supra* note 21.

23. See generally sources cited *supra* note 21.

24. 16 U.S.C. § 1a-7 (1916), *amended by* Pub. L. No. 113-287, § 7 (2014).

25. *Id.*

proposed actions and their alternatives to show that the proposed action is the most scientifically and fiscally sound, as well as demonstrating public support for the action.<sup>26</sup> A park must also provide extensive mapping of the park's management zones and in most cases prepare an environmental impact statement (EIS) in accordance with NEPA guidelines.<sup>27</sup> This extensive list of requirements is used to ensure that the general management plan is fleshed out into a well-rounded set of governing instructions that may take the park many years into the future.

Across every aspect of a park's planning process, public involvement is welcomed in many ways. Members of the public, including "existing and potential visitors, park neighbors, American Indians, other people with traditional cultural ties to lands within the park, concessioners, cooperating associations, other partners, scientists and scholars, and other government agencies" work alongside National Park Service staff to ensure that the future vision of the park is one with widespread public support.<sup>28</sup> The National Park Service then utilizes this involvement to share information about legal and policy mandates; learn about personal values of visitors and other interest groups; and to build support for implementing plans among different interest groups, ranging from park visitors to members of Congress.<sup>29</sup> It is from the basis of this public involvement that has spurred the National Park Service to tackle increasing problems within our parks, especially in the case of preserving MPAs.

### III. MARINE PROTECTED AREAS

#### *A. The evolution of Marine Protected Areas in National Parks*

MPAs are defined as areas of the oceans or Great Lakes that are designated for protecting a conservation purpose.<sup>30</sup> The areas can include a wide range of habitats and uses; generally, the main purpose for establishing MPAs is to protect ecosystems and to preserve cultural resources found in such areas.<sup>31</sup>

At the highest level, MPAs are managed by the National MPA Center, established in 2000 by Executive Order 13158.<sup>32</sup> Working

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26. *Id.*

27. NAT'L PARK SERV., *supra* note 17, at 24.

28. *Id.* at 23.

29. *Id.*

30. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., BUILDING THE NATIONAL SYSTEM OF MARINE PROTECTED AREAS (2013) [hereinafter BUILDING MARINE PROTECTED AREAS].

31. *Id.* at 2.

32. Exec. Order No. 13158, 65 Fed. Reg. 105, 34909 (2000).

within the National Oceanic and Atmospheric Administration's division of the Office of National Marine Sanctuaries, the National MPA Center aims to work closely with local jurisdictions, tribes, fishery management councils, and other interests group to develop a comprehensive national system of MPAs.<sup>33</sup> Their goal—to represent the United States' diverse marine ecosystems through conservation and protection—mirrors the goals of the National Park Service, making them great partners in the conservation of some of the nation's most unique marine areas.<sup>34</sup>

One of the largest campaigns the National Park Service has to create MPAs is the preservation of coral reef ecosystems.<sup>35</sup> As a result of overfishing, coral bleaching, impaired water quality, and other recreation impacts, the status of coral reefs in the United States has been in a gradual decline for years.<sup>36</sup> In response to this gradual degradation, the Department of the Interior and the National Park Service set a policy goal of preserving coral reef areas and other important environmental habitats through the National Park system.<sup>37</sup>

Currently, about 41% of U.S. marine waters are MPAs, and the National Park Service manages 8% of this makeup with 34 national systems.<sup>38</sup> These areas house diverse fish populations, coral reef environments, and other biological diversity that the National Park Service has found especially worthy of protection and conservation.<sup>39</sup> The goal of these MPAs is to combat the adverse effects of human activity on ocean ecosystems, usually implementing management strategies to limit and coordinate the allowable uses for MPAs.<sup>40</sup>

### *B. Management Strategies for Marine Protected Areas*

Strategies for managing MPAs range from designating no take areas, uniform multiple use areas, zone multiple use areas, zoned no take areas, no access areas, and no impact areas.<sup>41</sup> Of these designations, the “no take” areas are the least restrictive, prohibiting the extraction or significant destruction of natural and

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33. See BUILDING MARINE PROTECTED AREAS, *supra* note 30.

34. *Id.*

35. *Coral Reefs*, NAT'L PARK SERV., <http://www.nature.nps.gov/water/coralreefs/> (last visited April 30, 2018).

36. *Id.*

37. *Id.*

38. *Analysis of U.S. MPAs*, NATIONAL MARINE PROTECTED AREAS CENTER, <https://marineprotectedareas.noaa.gov/dataanalysis/analysisus/> (last visited April 30, 2018).

39. See BUILDING MARINE PROTECTED AREAS, *supra* note 30, at 2.

40. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., DEFINITION & CLASSIFICATION SYSTEM FOR U.S. MARINE PROTECTED AREAS 4 (2011).

41. BUILDING MARINE PROTECTED AREAS, *supra* note 30, at 3.

cultural resources, while still allowing human access and some potentially harmful uses.<sup>42</sup> “No impact” areas also allow human access, but prohibit all activities that may harm the site’s resources and the “ecological and cultural services they provide.”<sup>43</sup> This limit on activities includes outlawing resource extraction of any kind—such as mining or fishing—and a ban on pollutant discharge, disposal of materials, and alteration or disturbance of the cultural or natural environment and the natural processes that support them.<sup>44</sup> Zones designated “no access” restrict all human access to an area, aiming to prevent ecological disturbance.<sup>45</sup> These zones may allow for specially permitted access for activities such as research, monitoring, or restoration.<sup>46</sup> Many MPAs located in National Parks limit the recreational activities that can occur, including restricting recreational fishing while still allowing activities such as swimming, diving, etc.<sup>47</sup>

In most instances, MPAs use scientific data to decide the best conservation measures that should be put into place in a certain protected area.<sup>48</sup> While this may be as simple as setting catch limits or sectioning off a portion of the MPAs as a no take zone, it may also be necessary to mandate no impact areas in order to allow ecosystems to revitalize and replenish to the levels necessary for ongoing conservation.<sup>49</sup> This determination plays into the National Park’s decisions in implementing MPAs, characterizing the way the National Park Service will use its power under the Organic Act to limit fishing within their jurisdictions.<sup>50</sup>

#### IV. NATIONAL FISHERY MANAGEMENT

##### *A. The Magnuson-Stevens Fishery Conservation and Management Act*

Outside of National Park boundaries, fishery management across the nation’s federal waters is managed by the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”). Passed originally in 1976, the Magnuson-Stevens Act delineates U.S. fishery jurisdiction to two hundred meters off

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42. NAT’L OCEANIC AND ATMOSPHERIC ADMIN. 40, *supra* note , at 5.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *What is a Marine Protected Area?*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (Oct. 10, 2017), <https://oceanservice.noaa.gov/facts/mpa.html>.

48. BUILDING MARINE PROTECTED AREAS, *supra* note 30, at 4.

49. *Id.* at 5.

50. *Id.*

the coast and has created the eight Regional Fishery Management Councils that implement fishing regulations through fishery management plans (FMPs).<sup>51</sup>

The Magnuson-Stevens Act was amended in 1996 with the passage of the Sustainable Fisheries Act.<sup>52</sup> This amendment created definitions for several key terms of the act, including the term “overfished” and set forth criteria for when regional councils must take action upon determining that an area is “overfished”.<sup>53</sup> The amendment also added the protection of “essential fish habitat” as a statutory goal throughout the implementation and enforcement of FMPs.<sup>54</sup>

Among its stated purposes, the Act aims to “take immediate action to conserve and manage the fishery resources found off the coasts of the United States” and to “promote the protection of essential fish habitat in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.”<sup>55</sup> The Act’s other stated purposes include the implementation of international fishing agreements; the implementation of FMPs; the establishment of the Regional Fishery Management Councils; the promotion of commercial and recreation fishing under sound conservation and management principles; and the development of underutilized areas in the United States for fisheries.<sup>56</sup> These purposes are meant to guide the Act’s overall actions, including those actions implemented by the eight Regional Fishery Management Councils.<sup>57</sup>

The most recent amendment to the Act was the result of the Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2006, which introduced the idea of ecosystem-wide management strategies for FMPs.<sup>58</sup> The reauthorization addressed the need for a regional cooperative research and monitoring program and a regional ecosystem study.<sup>59</sup> This change brings a more scientific lens to the organization or fishery management plans, and ensures that measures are based on the

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51. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 (2007).

52. Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3560 (1996).

53. *Id.* §§ 3562, 3575, 3584–85.

54. *Id.*

55. 16 U.S.C. § 1801.

56. *Id.* § 1801(b).

57. *Id.*

58. Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (2006).

59. *See generally id.* § 3581.

best scientific information available by encouraging the Regional Fishery Management Councils to be a proactive body researching the issues firsthand.<sup>60</sup>

The Magnuson-Stevens Act includes numerous provisions to improve fishery management strategies across the nation; the reality, however, is not as bright as the language of the statute may appear. While the statute envisioned a fair and balanced approach to fishery management, the reality shows slow progress and an overwhelming allotment of commercial fishing interests in the membership of the Regional Fishery Management Councils.<sup>61</sup>

### *B. Regional Fishery Management Councils*

The Magnuson-Stevens Act sets forth ten national standards that are implemented in fishery management, including criteria to determine what actions a regional council should take in implementing its FMPs.<sup>62</sup> Other standards include mandating the regional councils to ensure their measures are based on the best scientific information available and that overfishing be prevented, while also achieving the optimum yield for each fishery.<sup>63</sup> The standards also mandate that the councils promote cost-minimization and variance allowances.<sup>64</sup> It is the council's responsibility to work within these standards and create a FMP for their region.<sup>65</sup>

The council, made up of federal and state representatives and political appointees, works to set catch limits for each fishery, gear restrictions for different groups, and allocation of catch between different sectors.<sup>66</sup> A concern over the makeup of these councils has grown in recent years; however, as special interests, such as commercial fishing interests, appear to have captured the regional councils, influencing voting behavior and management plans without a fair and balanced approach to conservation and management.<sup>67</sup> The concept of capture, "occurs when the clientele of a public agency comes to control the agency. . . ."<sup>68</sup> This result

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60. *See id.*

61. *See generally* Thomas A. Okey, *Membership of the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?*, 27 MARINE POL'Y 193 (2002).

62. 16 U.S.C. § 1851 (2007).

63. *Id.*

64. *Id.*

65. *Id.* § 1851.

66. *See Okey, supra* note 61, at 194.

67. *See id.* at 193–94.

68. Craig W. Thomas, et al., *Special Interest Capture of Regulatory Agencies: A Ten-Year Analysis of Voting Behavior on Regional Fishery Management Councils*, 38 POL'Y STUDY J. 447, 448 (2010).

deflects the agency's behavior from its mandated objectives, instead reducing the cost of compliance and creating more lenient regulations.<sup>69</sup> A ten-year study on fishery management councils found that commercial fishing interests have captured state agencies, leading to an unfair representation of such interests within the council.<sup>70</sup>

The council has mandatory appointments along with the voting members, and various at-large positions.<sup>71</sup> Voting members of the council are comprised of the regional director of the National Marine Fisheries Service for the geographic area, multiple state agency representatives, and other voting members appointed by the Secretary pursuant to political nominations by the Governor of the respective states falling under the regional council in question.<sup>72</sup> The statute states that members of the council that are appointed must be individuals who are knowledgeable regarding the conservation and management, or the commercial or recreational harvest of fishery interests in the geographic area.<sup>73</sup> Further, the statute clarifies that, to the extent practicable, the Secretary shall ensure the fair and balanced apportionment of the active participants in the commercial and recreational fisheries under the jurisdiction of the council.<sup>74</sup> However, the statute does not mandate a corresponding balance between scientific and conservation interests.<sup>75</sup>

One of the largest issues with the makeup of council bodies is that, although the language of the statute seems to favor equal interests within councils, the reality shows a domination by commercial fishing interests over any others, such as recreational, scientific, and conservation interests.<sup>76</sup> Specific makeup of the councils shows that, since the National Oceanic and Atmospheric Administration's 2015 Report to Congress, commercial fishing interests make up 46% of all councils, while recreational interests make up only 29% of the makeup, and all "other interests" such as scientific, government, and conservation interests combined make up the last 25%.<sup>77</sup> Further, other than a special provision of the

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69. *Id.*

70. *Id.* at 461. The study found that state agency capture was shown to be present in ten of the sixteen models tested, and concluded that the gubernatorial nomination process promotes the capture of state agencies. *Id.*

71. 16 U.S.C. § 1852.

72. *See Id.*

73. *Id.*

74. *Id.*

75. *See Id.*

76. Okey, *supra* note 61, at 196–99.

77. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., 2015 REPORT TO CONGRESS ON THE DISCLOSURE OF FINANCIAL INTEREST AND RECUSAL REQUIREMENTS FOR REGIONAL FISHERY MANAGEMENT COUNCILS AND SCIENTIFIC AND STATISTICAL COMMITTEES AND

Gulf of Mexico Regional Fishery Management Council, there is no requirement that governors nominate anyone representing public interests such as conservation.<sup>78</sup> This lack of oversight has led to the underrepresentation of conservation-orientated interests on councils that make large decisions about the future and implementation of marine ecosystems nationwide.<sup>79</sup>

Conservation interests are also excluded from the statutory provisions for nonvoting members.<sup>80</sup> The nonvoting members of the councils consist of the regional director of the United States Fish and Wildlife Service, the commander of the Coast Guard for the given district, the Executive Director of the Marine Fisheries Commission for the geographical area, and one Department of State representative.<sup>81</sup> This lack of balance in representation of interests demonstrates the challenge conservation interests within fisheries face to weigh in on matters and to create a thriving fish population for the future, as they lack membership even in potentially persuasive non-voting capacities as well.

## V. MANAGEMENT OPPOSITION

### A. Case Study: Biscayne Bay Aquatic Preserve

From its beginning as a national monument in 1968, Biscayne Bay expanded into a national park whose borders grew even further during its first decade of existence.<sup>82</sup> The park contains evidence of 10,000 years of human history, including spots visited by past presidents to shipwrecks, which once sailed with pirates on board.<sup>83</sup> The park not only preserves this history, but also a wide network of mangrove forests and a large portion of our Florida coral reef system.<sup>84</sup> Currently managed by a comprehensive management plan passed in 1983, the national park is faced with a new commercial and conservation environment that was not encompassed in the past plan—calling for a new management instrument to streamline their operations moving forward.<sup>85</sup>

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APPORTIONMENT OF MEMBERSHIP OF THE REGIONAL FISHERY MANAGEMENT COUNCILS 13 (2016).

78. 16 U.S.C. § 1852.

79. Okey, *supra* note 61, at 199.

80. *See* 16 U.S.C. § 1852.

81. *Id.*

82. *Biscayne National Park: History & Culture*, NAT'L PARK SERV. (Dec. 21, 2017), <https://www.nps.gov/bisc/index.htm>.

83. *Id.*

84. *Id.*

85. *See* NAT'L PARK SERV., BISCAYNE NATIONAL PARK: FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT i (2015) [hereinafter BISCAYNE NATIONAL PARK].

Park officials report that Biscayne Bay has been affected by an increase in population surrounding the park, differing visitor use patterns, and the fact that new recreational activities have been implemented in the park.<sup>86</sup> In addition to these new conditions, greater scientific understanding of resource management and conservation has led the National Park Service to believe a change in management planning in order to help implement new strategies.<sup>87</sup> The beginning of this change was implemented in August of 2011, when the first draft of the general management plan was released to the public.<sup>88</sup>

One of the greatest issues facing the park is the general decline of their coral reef systems.<sup>89</sup> Based on a study done by the National Park Conservation Association in 2006, the decline in the park's coral reef population has a cascading effect on mangrove, seagrass, and hardbottom ecosystems located within and around the park that are highly interconnected and interdependent.<sup>90</sup> Studies have also shown the coral reef system in Biscayne Bay had dropped from 29% to 11% of coral cover on the transitional bank-barrier.<sup>91</sup> These reefs—home to over 200 species of marine organisms—face decline based on human activity, urban pollution, and overfishing.<sup>92</sup> This issue helped spur the drafting of Biscayne National Park's new general management plan.

In the following fifteen years, the general management plan has undergone public hearings, revisions, and over 32,000 public comments.<sup>93</sup> One of the largest measures commented on during the public comment period was the proposal to create a marine reserve zone within the park.<sup>94</sup> The first draft of this proposal was met with 18,000 comments, which noted both the positive and negative implications of instituting a marine reserve zone where fishing of any kind would be prohibited.<sup>95</sup> As a result of this comment period, the National Park Service then drafted and went through the process of getting public input on eight different alternative options for management of the marine reserve before settling on its final management approach.<sup>96</sup>

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86. *Id.*

87. *Id.*

88. *Id.*

89. Bob Janiskee, *Threats to the Parks: Biscayne National Park*, NAT'L PARK TRAVELER (June 20, 2008), <http://www.nationalparkstraveler.com/2008/06/threats-parks-biscayne-national-park>.

90. *Id.*

91. *Id.*

92. *Id.*

93. See BISCAYNE NATIONAL PARK, *supra* note 85, at i.

94. *Id.*

95. *Id.*

96. *Id.* at i–ii.

The final proposal for the marine reserve still centers around a no fishing zone, which would aim to increase fish populations within the park as well as having the benefit of “spilling over” into areas outside of the marine reserve.<sup>97</sup> In its proposed management plan, the National Park Service argues that a no fishing area is the most effective policy for reducing mortality—outpacing other methods like catch and release allowances or slot limits—and that the no fishing zone will help preserve the opportunity for park visitors to enjoy the coral reef ecosystem.<sup>98</sup> The park would continue to host recreational activities such as boating, swimming, snorkeling, and glass bottom boat viewing.<sup>99</sup>

While fishing is prohibited within the proposed marine reserve for both recreational and commercial fishing parties, the ability to spearfish lionfish and other invasive species would be preserved within the zone.<sup>100</sup> The National Park Service, using the authority to designate areas in which fishing may be limited, prohibited, or otherwise regulated under 16 U.S.C. 410gg-2, sets forth its proposed management plan after careful consultation with the state of Florida regarding the marine reserve.<sup>101</sup> While the National Park Service and the State of Florida work together in managing Biscayne Bay’s fishing interests in areas where state land was donated to the National Park, the area of the proposed marine reserve is not located within these boundaries and does not have to be in conformance with Florida state law.<sup>102</sup>

As a result of the final management plan, the area to be conserved would make up 6% of the park’s waters.<sup>103</sup> With the overwhelming support of the public in favor of taking action to restore the coral reef ecosystem, the National Park Service’s final management plan provides a gradual implementation of the no fishing marine reserve zone that will work to improve the declining reef condition.

### *B. Challenging Legislation*

After the fifteen years of planning described above, the proposed marine reserve in Biscayne Bay faces opposition from the very same body that gave the National Park Service the power to create one in the first place. In the previous legislative session,

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97. *See id.* at 123.

98. *Id.* at i.

99. *Id.*

100. *Id.* at 68.

101. *Id.* at i.; 16 U.S.C. 410gg-2 (1980).

102. BISCAYNE NATIONAL PARK, *supra* note 85, at 138.

103. *Id.*

Congress had before it two proposals for legislation that would prevent the implementation of Biscayne's new management plan and similar plans across the nation.<sup>104</sup> While one of these pieces of legislation was specifically targeted towards the Biscayne project<sup>105</sup>, the other threatened the ability of the entire National Park Service to set aside special marine ecosystems as MPAs in the future.<sup>106</sup>

The first piece of legislation, known as the "Access for Sportfishing Act of 2016" or Senate Bill 3099, was aimed at enhancing saltwater fishing opportunities by blocking the creation of the proposed no fishing zone in the marine reserve.<sup>107</sup> Proposed by Senators Rubio and Nelson of Florida, the act imposed restrictions on the National Park Service's ability to create and manage the proposed marine reserve.<sup>108</sup>

Section two of the proposed legislation focused solely on the management measures in Biscayne, stating that: "the Secretary of the Interior may not implement or enforce any restrictions on recreational fishing, charter fishing, or commercial fishing in any portion of Biscayne National Park, developed as part of any general management plan, FMP, or other measure adopted after December 31, 2014."<sup>109</sup> This language is the exact opposite of the Secretary's current power under 16 U.S.C. 410gg-2, which gives the Secretary the power to regulate fishing areas and make fishing prohibited or limited within those areas.<sup>110</sup>

The legislation did hold an exception under which the National Park Service may still restrict fishing, if the restrictions are developed in formal coordination and consultation with Florida Fish and Wildlife Conservation Commission (FWC), based on the best scientific research available, and the least restrictive measure for effective fish conservation and management.<sup>111</sup> The requirement for consultation with FWC intertwines two Regional Fishery Management Councils through which FWC represents the state of Florida. This unnecessary entanglement with FWC and the regional council creates a burden on the National Park Service that would hinder their conservation mandate. Further, under the currently proposed management plan, the National Park Service already sets a policy goal to consult with FWC on all management

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104. S. 3099, 114th Cong. (2016); H.R. 5771, 114th Cong. § 302 (2016).

105. S. 3099, 114th Cong. (2016).

106. H.R. 5771, 114th Cong. § 302 (2016).

107. S. 3099, 114th Cong. (2016).

108. *Id.*

109. *Id.*

110. 16 U.S.C. 410gg-2 (1980).

111. S. 3099, 114th Cong. (2016).

policies, as well as coordinating with them on issues involving waters donated to Biscayne national park by the State of Florida.<sup>112</sup>

Many non-governmental organizations (NGOs) have become publically opposed to the proposed legislation, arguing it cuts against the National Park Service's mission set forth in its organic act to conserve park resources in order to leave them unimpaired for future generations.<sup>113</sup> NGOs also argue that the legislation hinders the National Park Service from upholding Biscayne's own founding legislation, which allows for fishing regulation "in the interest of sound conservation."<sup>114</sup> For these NGOs, the proposed legislation highlights the issue of legislators putting private interests, such as commercial fisheries, above the need for conserving and protecting special marine places.<sup>115</sup>

The first piece of legislation, Senate Bill 3099 purports to be the lesser of two evils, limiting only one specific proposal for the creation of a MPA.<sup>116</sup> Taken into consideration with the other legislation on the floor, however, Senate Bill 3099 could be viewed as the first step toward a trend of overregulation that will limit the National Park Service's ability to protect and conserve special marine ecosystems across the country.

The second piece of legislation, found in § 302 of the Conserving Our Reefs and Livelihood Act of 2016 (CORAL Act), sets out to limit the National Park Service's ability to implement fishing restrictions in any state or territorial water across the United States.<sup>117</sup> While this proposal was narrower in scope than S.B. 3099, it was leagues broader in its application, applying to every area of the National Park Service's jurisdiction over water located within its park boundaries.<sup>118</sup>

Section 302 of the CORAL Act mimics the language of S.B. 3099, stating that:

the Secretary of the Interior may not implement or enforce any restrictions on recreational fishing, charter fishing, or commercial fishing access restrictions in any State or Territorial marine waters within the jurisdiction of the National Park Service developed as part of any general management plan adopted after December 31, 2014.

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112. BISCAYNE NATIONAL PARK, *supra* note 85, at 123.

113. Letter from Kristen Brengel, Vice President, Nat'l Parks Conservation Ass'n, to Senator Bill Nelson (Sept. 2016).

114. *Id.*

115. *See id.*

116. S. 3099, 114th Cong. (2016).

117. H.R. 5771, 114th Cong. § 302 (2016).

118. *Id.*

The Act, similar to S.B. 3099's structure, holds an exception.<sup>119</sup> Specifically, it would not apply to any restrictions of recreation or commercial fishing that are developed as part of a FMP, which are established in coordination with the fish and wildlife management agency of the state, based on the most recent scientific information available, and represent the least restrictive measures necessary.<sup>120</sup>

The effect of this legislation on the National Park Service's ability to implement MPAs would be high, especially given the issue of Regional Fishery Management Councils and state agencies that may be captured by commercial fishing interests.<sup>121</sup> This legislation cuts against the very mission of the National Park Service to conserve and protect special areas in order to leave them unimpaired for future generations by forcing the National Park Service to take commercial interests into account and undercutting its overall goals.<sup>122</sup>

## VI. THE ART OF COMPROMISE; SUGGESTIONS MOVING FORWARD

### *A. Respecting the Park's Authority*

At the base of this legislation is the possibility of the National Park Service losing the power to protect certain spaces within its jurisdiction. While Biscayne Bay is only one example, the threat to conservation efforts with National Park waters translates to an overreaching violation of its ability to meet its founding mission to conserve and protect our national parks leaving them unimpaired for future generations.

This Article suggests that commercial interests pull their support from the proposed legislation, allowing the National Park Service to continue to create MPAs like Biscayne Bay Aquatic Preserve in the future. The designation and implementation of such spaces—while they may limit the short-term economic success of commercial fisheries—allow for a thriving ecosystem where many fish species may flourish, forestalling collapse of fisheries and benefitting commercial fisherman and fishing consumers in the long-term.<sup>123</sup>

The fish habitat preserved through designating these spaces provides for spillover effects that have positive impacts on the

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119. *Id.*

120. *Id.*

121. Okey, *supra* note 61, at 193.

122. *See supra* note 1, and accompanying text.

123. BISCAYNE NATIONAL PARK, *supra* note 85, at 123.

number of fish available in areas around and outside of the MPAs, actually resulting in an overall economic benefit.<sup>124</sup> Like the court found in *A.M.L. International, Inc. v. Daley*, sometimes it is necessary to restrict short-term economic gain in order to prevent the dangers of overfishing and the loss of fish population in the future, which will have an even greater impact than the loss presented by the implementation of the MPA.<sup>125</sup> By repopulating overfished species within National Park waters, these MPAs not only combat a general decline in fish populations across the Nation's waters, but also provide economic incentives for growth through tourism and recreational opportunities.

Without support from commercial interests pushing legislation like the proposals highlighted in this Article, it is unlikely that Congress would pursue limiting the National Park's jurisdiction in a way that has never been done before.<sup>126</sup> The current actions run contrary to the previous delegations of power to the National Park Service throughout history; moreover, creating a cumbersome, multi-agency regulatory scheme is far less appealing without private interests pushing for that very outcome.

Even further, commercial interests should use their influence within the Regional Fishery Management Councils to promote the conservation of habitat and species within MPAs and National Parks in order to promote a healthy overall ecosystem. By creating these spaces and allowing them to thrive under FMPs, the councils would help maintain fishing populations well into the future.

### *B. Representing the Conservation Interest*

This article proposes, in the alternative, that the regional marine fishery councils create a subcommittee to focus on fishery planning within the jurisdiction of national parks. The council, to meet the requirements of a fair and balanced apportionment of interests, would be comprised of an eleven-member body, with one seat for the federal representative within that region, one seat for the state representative for the state fish and wildlife service, one seat for a National Park Service representative, and the other seats split evenly between commercial fishing interests, recreational fishing interests, and conservation and science

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124. *Id.*

125. *A.M.L. Int'l, Inc. v. Daley*, 107 F. Supp.2d 90 (2000).

126. *See generally*, Antiquities Act of 1906, 16 U.S.C. § 431 (1906), *amended by* Pub. L. No. 113-287 (2014); Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487 (1980); National Historic Preservation Act, Pub. L. No. 89-665, 16 U.S.C. § 470 (1966); Volunteers in Parks Act of 1969, 16 U.S.C. § 18g (1969), *amended by* Pub. L. No. 113-287, § 7 (2014); National Trails Systems Act, 16 U.S.C. § 1241 (1968).

interests. This council would allow the current legislation to move forward while ensuring that conservation interests are still represented in implementing MPAs.

This proposal limits the commercial fishing interests at play within the Regional Fishery Management Council, which would likely be one of the greatest impediments to MPAs being implemented in the future. This median step seems like an approach that allows the council, and the fish and wildlife agency of each respective state, to have input in the regulation of fishing with national park jurisdictions, while also achieving a balance that also brings conservation voices to the table.

By balancing these voices with recreational and commercial interests, the proposed subcommittee would give the oversight suggested by the legislation a channel in which to operate alongside the National Park Service. This streamlined body would also limit the negative impacts of bifurcating MPA planning, where planning and enforcement obligations would become split between the National Park Service and the Regional Fishery Management Councils.

### *C. Pushback for Greater Reform*

If the currently proposed legislation moves forward and a friendlier alternative is not implemented, a call for changing the makeup of the Regional Fishery Management Councils is the inevitable next step for those non-governmental organizations with an interest in seeing MPAs implemented in the future. By delegating the authority to create such spaces away from National Parks and into the realm of the regional councils, the legislation highlights the effect that the capture by commercial fishing interests has on the development and implementation of FMPs. This is another example of why the voices pushing for council reform should be answered.

In moving for reform of the Regional Fishery Management Councils, a proposal would need to strive to meet the fair and balanced approach set forth in the language of the Magnuson-Stevens Act.<sup>127</sup> In reaching this goal, an equal apportionment of commercial and recreational fishery interests should be mandated and enforced. This apportionment would fall within the plain language of the statute, which requires: “The Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other

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<sup>127</sup> Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1852 (2007).

basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council.”<sup>128</sup>

This would combat the current situation of commercial interest dominated councils, which gives the power to regulate to those originally sought to be regulated under the act.<sup>129</sup> By lessening the majority of commercial interest on the councils, a greater arena for management strategies and ideas that appeal to a broader range of individuals would be possible. Further, the Secretary of Commerce should keep an interest in ecosystem-wide growth at the forefront in their decisions to nominate discretionary members from the list of governor’s nominees to expand the discussion even more broadly.

In addition to this equal distribution of interests, the 1996 amendment’s focus on conservation efforts should be incorporated into the makeup of Regional Fishery Management Councils by allowing nongovernmental organizations to petition for an opportunity to take part in Fishery Management development and implementation strategies.<sup>130</sup> While under the current system, a state Governor may nominate such interests for voting seats, such an occurrence is rare, leading to the minimal representation of “other” interests other than commercial and recreational fishery interests in voting seats. This interaction by conservation interests would need to take the form of placing them in positions of council staff, administration, or even by allowing conservation interests to take a part in the scientific and advisory panels envisioned by the statute.<sup>131</sup>

As a final step to ensure that conservation interests are brought into play and balanced alongside scientific information and different interests, National Standard 3 should be amended to incorporate an ecosystem-wide management of fish within a fishery management region. The current language, which mandates that fish within a species be treated as a singular unit, allows for regulations that may not take the entire ecosystem into consideration.<sup>132</sup> This approach can lead to the loss of other fish populations as a result of the species interactions on an ecosystem-wide basis.

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128. *Id.* § 1852(b)(2)(B).

129. See Shepherd R. Grimes, *The Federal Regional Fishery Management Councils: A Negotiated Rulemaking Approach to Fisheries Management*, 6 OCEAN & COASTAL L. J. 187 (2001).

130. See Sustainable Fisheries Act of 1996, 110 Stat. 3560 (1996).

131. 16 U.S.C. § 1852.

132. *Id.* § 1851.

While these steps generally involve the enforcement of provisions that are already present in the legislation, even greater changes are necessary to combat the ossification of the National Park Service's ability to implement MPAs. These changes, taking the form of an amendment to the Magnuson-Stevens Act, would call for an active voting membership for conservation and science interests on the council. These voting members would be able to shift the conversation, generally dominated by the economic interests of the commercial fishing industry, to wider topics like ecosystem-wide management and the best practices for conservation in different circumstances.

Under the current regulatory scheme, commercial interests enjoy broad discretion in shaping and implementing the FMPs that guide the actions of all eight regional fishery management councils. If the current environment of commercial interests standing in the way of conservation interests continues, change will be mandated. It may be in the best interest of commercial fishers to take steps to encourage better conservation approaches such as the implementation of MPAs and ecosystem based management, which will help to insure that they continue to enjoy the powers they have become accustomed to.

In the current climate, with an ongoing discussion about the reauthorization of the Magnuson-Stevens Act occurring on Capitol Hill,<sup>133</sup> the time for the Regional Fishery Management Councils to correct their actions is dwindling. Conservation interests and other groups who do not agree with the current makeup of the councils and the guidance provided by the legislature in the act itself will have the opportunity to call for widespread reform, and that opportunity should not be allowed to silently pass by. Such reform could take the form of any of the alternatives discussed within this section or even more stringent reform presented by non-governmental organizations who believe the time of commercial interest dominated management has come to an end.

The changes discussed herein are a large step in order to combat the inconvenience of preventing National Parks from limiting fishing with their boundaries; however, this problem highlights a broad history of placing commercial interests over conservation policy that should be called into question. If a new conversation point is needed to create an atmosphere where a balance between private interest and conservation efforts can be

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133. Jason Huffman, *Magnuson Stevens Fight to Resume Early in 2018*, UNDERCURRENTNEWS (Dec. 21, 2017), <https://www.undercurrentnews.com/2017/12/21/magnuson-stevens-fight-to-resume-early-in-2018/>.

met, it makes sense to base this motivation on a challenge to one of the nation's oldest and most publically beloved agencies—the National Park Service.

## VII. CONCLUSION

The implementation of a MPA within a National Park functions at the intersection of several regulatory regimes, with voices on all sides pushing for different outcomes. Currently, the voices of commercial interests seem to be the loudest, pushing for limiting the designation of MPAs within National Parks by limiting the National Park Service's authority to implement such spaces and proposing an entanglement with the regional fishery management councils moving forward.

This paper proposes that commercial fishing interests and conservation interests find a way to move forward together, allowing for the conservation of fish species and special ecosystems that would benefit everyone moving forward. If such compromise is not possible, however, this paper advocates a push for legislative reform that would prevent commercial fishing interests impeding the implementation of such spaces in the future.

In the current legislative climate, with the opportunity for the Magnuson-Stevens Act to be amended and the National Park Service celebrating its one-hundredth year of preserving special places across the nation for the use and enjoyment of future generations, it is clear some action must be taken. What action that is, however, is dependent on how far commercial interests are willing to go towards creating a better ocean ecosystem for everyone.