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Zachary Klein:

Welcome back to Season 2 of the National Sea Grant Law Center's Law on the Half Shell podcast. In case you're new to the podcast, or just need a gentle reminder, my name is Zachary Klein. I am one of the Law Center's Ocean and Coastal Law Fellows, and it is my pleasure to be your host this season while my colleagues and I shed some light on the unique legal issues that the COVID-19 pandemic has caused for America's coastal communities. So far, this season, we've covered cruise lines and the seafood industry. Today, we're pivoting slightly to the world of fishing.

Zachary Klein:

Fishing in federal U.S. waters is governed by the Magnuson-Stevens Fishery Conservation and Management Act, which you'll learn more about in this episode. Spoiler alert, the Magnuson-Stevens Act allows the U.S. government to decide how many fish we can catch every year, who is allowed to catch those fish, and how fishing records are monitored for accuracy to ensure that there will continue to be fish for us to catch in the future. All of these components of the statutes were affected to some degree by COVID-19.

Zachary Klein:

On today's episode, Olivia Deans, my fellow Ocean and Coastal Law Fellow at the National Sea Grant Law Center will lead us in a conversation concerning some of the surprising ways in which the pandemic has affected the management of federal fisheries. Without further ado, let's cast our line with Olivia, and find out what stories and lessons she'll help us reel in on today's episode.

Olivia Deans:

Today on the podcast, we're going to be discussing COVID's impact on the Magnuson-Stevens Act and fishery management in general. I think COVID's impact to the Magnuson-Stevens Act and fishery management is a really good example of how regulatory frameworks can adapt, and need to adapt, to unexpected events. Specifically, we'll get into the need for flexibility to quota share transfers and the national observer program. Joining me today is Stephanie Otts, the Director of the Law Center. She has many years of experience working with fishermen and familiarity with the Magnuson-Stevens Act. Stephanie, I like to think about the Magnuson-Stevens Act as the main tool for federal management of fisheries. I know for me, in law school, we didn't really touch on it a lot. I think I learned that, basically, it's about protecting the long-term sustainability of fisheries. I think it's a lot more complex than that. I've really started to learn more about it, but I don't know. Would you say that's accurate? How would you describe the Magnuson-Stevens Act?

Stephanie Otts:

Yeah. Olivia, no, I think that's a great question. I think of the Magnuson-Stevens Act, the statute itself, a bit of the tip of the iceberg, where the real meat of what's going on you often don't see. Fisheries management happens across the country in different regions, and on an ongoing basis. As you

mentioned, the Magnuson-Stevens Act is the primary federal law governing fisheries management in federal waters. Those are the waters that are further out to sea than the state coastal waters, which are usually zero to three nautical miles out from shore. Then from three to 200 nautical miles is federal waters.

Olivia Deans:

Okay. Yeah. A lot of area, it sounds like it covers, and I've heard that some states have more areas than others. Can you explain why that is?

Stephanie Otts:

Yes, that is a really fascinating story. I encourage anyone who is interested to google and learn a little more. Due to some quirks of history and successful litigation, in the early 1900s, when the coastal states and the federal government were kind of battling out who should have jurisdiction over our coastal waters, the states of Florida and Texas were able to argue that they should have a broader, or wider, coastal zone to manage. For Florida, off the west coast of Florida into the Gulf of Mexico, and Texas, they actually have nine miles of coastal waters that they're able to regulate. This was partly due to the fact that Texas claimed nine miles while it was an independent republic for a few years there when they, I guess, left Mexico, or seceded from Mexico. Then Florida also had, under Spanish treaties, claimed more.

Olivia Deans:

Okay. Interesting. Yeah. I think it sounds like it can get pretty complex. Like you were saying, it's definitely a mix between federal management, but it also impacts state management like that.

Stephanie Otts:

Right. Yeah. As we all know, fish don't know where these jurisdictional lines are. Fish stocks, obviously, do move between state and federal waters. Fisheries management is really complex because you have to take into the dynamics of the ecosystem itself and the fish stocks, but you also have these overlays of federal and state jurisdiction.

Olivia Deans:

How does that management work? What is the main framework for how that happens?

Stephanie Otts:

Yeah. The Magnuson-Stevens Act established a process by which it established eight regional Fishery Management Councils. It divided the United States up into eight regions, and then assigned a council that is made up of individuals with a stake in the fishery. Council members include federal and state officials, but also commercial and recreational fishermen. The councils are charged with developing Fishery Management Plans to manage the stocks under their jurisdiction. I think the easiest way to think about a Fishery Management Plan is this is where the councils are going to say who can fish, where, with what gear, and how much fish everybody can take. It is really laying out that plan.

Olivia Deans:

It sounds like these plans can get very detailed then for the fisheries. I think that's interesting how you pointed out that it's made up of different stakeholders. To me that's really interesting to just ... It's so

challenging to balance all of these interests. I appreciate that there's a lot of different views that can work together to make these complicated plans.

Stephanie Otts:

Yeah. The councils are assisted in their efforts by a range of committees that are made up of experts in different fields. For instance, there's a statistical committee that kind of really crunches the numbers about what the status of the fish stocks are. Then all those expertise from those committees feeds up, and helps the actual council members make those decisions about what the management should look like.

Olivia Deans:

Yeah. Yeah. That's so interesting. I definitely think it can get complex. We've talked about this, but that sort of highlights why it's challenging for the law to adapt to COVID, and these events, when you have these really complex plans and a lot of people involved.

Stephanie Otts:

Yes. If you think about it, for those that aren't familiar with the process, the councils will develop a plan, which is written like a report. The councils themselves don't have any independent authority to impose these requirements on the fishermen participating in the fishery. NOAA, the National Oceanic and Atmospheric Administration, has to implement the plans for the councils. That means they have to publish regulations actually setting forth the requirements and the mandates to carry out whatever the councils would like to do. Regulations can take a long time to get through the process. You have to publish them, accept public comments, and then publish some final regulations. When you're looking at something that could take a year or two to get in place, it's hard to change those quickly if something comes up that wasn't anticipated.

Olivia Deans:

Yeah. I'm sure COVID, none of us anticipated it. It's really interesting to see that dynamic playing out, right now. What impacts from COVID have you heard about to the Magnuson-Stevens Act, or just through fisheries in general?

Stephanie Otts:

Really big picture. Of course, COVID hit the fishing industry hard, like it did every industry. No one was really sure whether it was safe to go out on a boat with, maybe, 10 other people. Then there were also impacts on the supply chains, either because the restaurants were closed and weren't buying the amount of sea food that they normally did. Then there were also some things that were very unique, and I think, specific to the way that fishing is just conducted in the United States. I remember, early in the pandemic, hearing stories about people who were participating in Alaska fisheries, but were not from Alaska. I had never thought about that. There was a news story about people who lived in New York, and then just went to Alaska for a month to participate in, I think, it maybe was the salmon fishery. When the travel restrictions started to be put into place because of the pandemic, then people couldn't move around.

Stephanie Otts:

Another example of this that predates the pandemic is, I don't know how many of our listeners may watch *The Deadliest Catch*, but those individuals that are participating in the crab fishery, a lot of their families live in Seattle, or the Pacific Northwest, because Dutch Harbor, Alaska is very isolated. They don't live there year-round. Until the pandemic, I had never really thought about what would happen if you weren't able to travel to the location where you actually conducted the fishing.

Olivia Deans:

Yeah. Same with me. I never would've really thought about that. You mentioned having to fish for quota shares. Could you talk a little bit more about that?

Stephanie Otts:

Yeah. One aspect of, I don't know, I don't want to call it modern fishery management, but the current fisheries management in the United States has moved away from what used to be called a race for the fish, where the fishing season would just open, and anybody who had a boat, and permission to go out and fish, could just go out. That led to a lot of management problems. One, it wasn't as easy to track how many fish all of those boats were catching. Sometimes, in a season, they caught more fish than the agencies wanted them to. They had to shut the season down early. Also, there were a lot of safety concerns, as you mentioned. If the weather is bad, but the season is going to be short, you have to go out anyway. There was concerns just about not being able to really delay fishing activity to when it was safer.

Stephanie Otts:

As an alternative, some fisheries have gone to what is known as a quota system, where each participant in the fishery receives a certain amount of fish that they're allowed to catch during a particular season. It's known as a quota. Each year the councils will determine the overall quota for fisheries. Let's say we're fishing for halibut, and we're able to catch 500,000 pounds of halibut. They will then divide that 500,000 pounds among all of the licensed participants in the halibut fishery, usually based on past participation in the fishery. Some people might get a 100,000 that they're allowed to try to catch, and some might get 50 or more, but everybody's kind of divided up.

Stephanie Otts:

In those quota systems, once they're established and the participants are all set, that quota is what the participant gets. One of the things that came up in COVID is, "okay, what if you're a holder of this quota, but you can't get to Alaska to fish?" One, your quota would go to waste, and you wouldn't get the income from the year because you weren't able to fish. There's also some potential consequences for not using that quota. There were some things already in the law to try to provide some flexibility to quota systems. For instance, the halibut and sablefish fishery in Alaska already had a provision on the books that allowed a temporary transfer for medical purposes. Let's say that a captain, or a crew member, who had a quota share got sick, or their family member got sick, and they couldn't fish that year, they could temporarily transfer their quota to somebody else who could. That wasn't written for what was coming up in COVID. Right? Where the individuals weren't sick, but couldn't travel due to government restrictions.

Olivia Deans:

Right. Interesting. Yeah. What happened? Did the agency react at all to that problem?

Stephanie Otts:

Yes. NOAA, when the seasons were starting to come online, they were able to enact emergency regulations, which means that they didn't have to go through that full one to two year process. They needed to get something in place quickly to enact emergency regulations to allow temporary transfers of quota to other licensed participants in the fishery so that those fish could be caught and the income from that not lost.

Stephanie Otts:

One of the ongoing concerns with quota share programs is when they're put into place those quotas become valuable. The fish have economic value. If you're able to fish for them, that's something that people will pay for. Not every quota program allows the transfer of your quota rights freely, but some do. There's the concern that it will result in what's known as consolidation of the fleet, which simply means that if you have 1,000 boats participating in a fishery before a quota share program, you're probably going to end up with less boats participating afterwards. Some people aren't going to have enough quota to make it economically worthwhile. They either sell their quota, or it gets transferred to other participants. You just end up losing boats out of the fleet. The reason why the agency doesn't have that many exemptions to these transfer requirements is because they want to try to avoid excess consolidation of the fleets. They made these temporary. They were doing emergency rules to allow these temporary transfers to deal with COVID, but not making them permanent. There could be unintended consequences if you allow quota to be freely traded.

Olivia Deans:

I wouldn't have thought of that really. And it'll be interesting to see how this plays out in the long-term, and to see what happens.

Stephanie Otts:

You know why you may not want quota to be freely traded is there can be concerns that the people that have the money to buy the quota might not be the people who are fishing. I think it was good that the agency was able to get these temporary transfer provisions in place to help fishing participants deal with the COVID Pandemic. You don't want to make a permanent decision in that type of crisis because you don't really know what the long-term impact might be.

Olivia Deans:

Yeah. I agree. Hopefully, we'll learn some lessons from this process and how it went. It definitely illustrates the complexity in trying to change the law, and also have it do its job, and do what it's established to do. What are some other fishery management impacts you heard about from COVID?

Stephanie Otts:

Yeah. I think the other category of impacts that interested me was COVID impacts on the Fishery Observer Program. Fishery observer refers to an individual that goes out on the boat with the fishing crew to observe, just like what its name says. They can be there for different reasons. Observer programs vary by the fishery for what the observer is looking for. The observer might be there to ensure that no more fish are caught than are supposed to be, but they are more often there to monitor for interactions with other protected species. They may be there to ensure that, or document interactions with whales or dolphins, and to assure that any equipment or techniques that are supposed to be used

are abided by by the fishing crew, or by catch of other species such as birds, or things like that. It's a pretty challenging job, if you can imagine. If you could put yourself in their position, there's a person who is a stranger, probably, to this fishing crew, that is there to keep their eyes on what they're doing. I've always thought that was an interesting position to be put in.

Olivia Deans:

Yeah. I imagine it could be a little awkward, at the least, but I'm glad we have that safety net to monitor these programs, and I'm sure help inform these Fishery Management Plans.

Stephanie Otts:

I think it's a really interesting program. The observers are trained to monitor and collect data, and so it doesn't necessarily have to be negative for the fishing crews. It could help the fishing crews document that there aren't negative interactions with certain species, and help to build trust among regulators and the regulated community. With COVID, it became a workplace safety issue for NOAA, and the agency. Right? Was it going to be safe to send observers out on fishing boats in the middle of the COVID Pandemic?

Olivia Deans:

Yeah. At the time, I wouldn't have wanted to invite people over to my work or my home. You don't really want a lot of people that have the potential to spread the virus coming on your boat. I definitely understand the rationale there.

Stephanie Otts:

Yeah. I think the observer program had the same challenge as the actual fishery, as well, in the sense that some of the trained observers may not have lived in the communities where the boats were leaving from. They also, not only might have had concerns for their own personal safety, they may not have been able to get to where they needed to be to join the fleet.

Olivia Deans:

Yeah. Yeah. A lot of challenges, certainly. How did they deal with that? What did the agency do?

Stephanie Otts:

One thing I forgot to mention is that some observer programs are required by law. A fishing boat has to have an observer anytime they go out to fish. Other programs are voluntary. Of course, that would add a layer of complexity to the response to COVID right. If it was a voluntary program, maybe you could just say, "well, okay, for the next couple of months, you don't have to have an observer." For the mandatory programs, if the observer wasn't on board that would potentially open the fishing captain, or crew, whoever's responsible for ensuring compliance with the law, that they're not in compliance. Similar to the temporary rules for quotas, NOAA did take emergency action to waive observer coverage requirements. I think we all heard about the transmission of COVID on cruise ships. There was a lot of uncertainty about what safety protocols you could use on a fishing vessel.

Olivia Deans:

It gets so challenging when there's that amount of unpredictability involved. Then you have the law, it doesn't change easily. Yeah. Definitely difficult to work with those two issues.

Stephanie Otts:

Yeah. The agency's first emergency action was actually in March of 2020. They moved pretty quickly. That was really at the beginning of the pandemic that they waived those requirements, but they were always meant to be temporary. Of course, in March, we had no idea how long the pandemic might last. The agency did have to extend those emergency measures to continue the waiver of observer requirements in September. The pandemic just wasn't going away, and it still wouldn't really be safe to have observers on the vessels. Then, finally, in March, they did adopt an interim final rule. That's a rule that is a bit more formal and permanent than these emergency actions, which would put in place authority to waive observer requirements on a case-by-case basis in response to the pandemic. That rule is still in effect.

Olivia Deans:

Interesting. That authority to make these changes, and have this flexibility, is that built into the Magnuson-Stevens Act or the regulations, or do you know if this has ever been done before?

Stephanie Otts:

I actually don't know. We didn't get a chance to really do that much research into, historically, how the observer program operates, but it was my understanding that there was not an existing mechanism by which the agency could just say, "no, you don't have to have observer coverage on your vessel." This may be one of those opportunities for the law to learn and to be better prepared in the future. It's important to build flexibility into our regulations and our legal frameworks because we don't know what might be coming down the road. It's always hard for regulators. I mean, the example I gave with the quota share program, they had thought about a medical emergency, and how that might impact somebody's ability to fish, but it was a pretty narrow exemption, for a medical emergency for the individual fishing, or an immediate family member.

Stephanie Otts:

They didn't anticipate what might happen, understandably, if there was a pandemic that shut everything down. I think that's the real challenge for the law and policy makers is "we can anticipate some scenarios and try to build in flexibility for those scenarios that we think about." When something comes along that was unanticipated, then it's a real challenge sometimes to get the regulations adapted, to prevent harm or reduce burdens, that need to be adjusted.

Olivia Deans:

Right. Yeah. Totally. Yeah. We talk about the impacts to coastal communities and fisheries as a whole, but it really astounds me how COVID has specifically affected these management statutes, and changed the way they need to operate for these fishermen. It's been really interesting to follow along.

Stephanie Otts:

Yeah. One thing, I think, has been interesting for us is there may be need to be flexible for other changing conditions that are not related to a health crisis. There are impacts on fisheries from the changing climate and changing environmental conditions. We may be able to learn lessons from the flexibility and adaptation that happened during COVID-19 to maybe build better systems, management structures, for fish stocks and fisheries moving forward.

Olivia Deans:

We talked about the quota share transfers, and the observer program coverage changes. What would you say are the main takeaways from this episode, or the main lessons we've learned, about how COVID has impacted fishery management?

Stephanie Otts:

Well, I think, for me, one of the main takeaways is that the participation in U.S. fisheries is actually very national in scope. Really, until COVID, I just thought of fishing communities being these historic places in the country, say New Bedford, Massachusetts, or Homer, Alaska, or Biloxi, Mississippi, and that you kind of think that all of the people who are fishing in those fisheries in the Gulf of Mexico, in New England, and Alaska are from that area. I think COVID really highlighted, to those of us not involved in commercial and recreational fishing, that's not the case. People are traveling all over the country to participate. The takeaway from that is that if you have an event that really is of national impact, it's going to have ripple effects throughout the entire industry.

Stephanie Otts:

It seems, at least from the legal perspective, from what we saw, just tracking the regulations as it came out, is that NOAA and the National Marine Fishery Service really did respond quickly to try to mitigate and address these issues that COVID-19 was raising in the industry. They took action to allow transfer of quotas. They took action to address the questions with the observer programs. I think we'll be able to learn a lot as we find out did those changes help. Did they do what they needed to?

Olivia Deans:

Yeah. Yeah. Like you said, we probably won't have a complete picture of this until years after the pandemic. We're not there yet, so it'll be interesting to follow along. I'm excited that at the Law Center we get to do this and follow these issues. Yeah. Is there anything else you would like to add?

Stephanie Otts:

No, I think that's it. Yeah. I'm with you. I think what we're trying to highlight in the podcast is just the wide diversity of legal issues that can come up in a situation like this. Before the pandemic, if you had asked me what the impact on fisheries would've been, I don't know that I would have said there needs to be flexibility in transfer of quotas. It's just very informative to watch and see what happens.

Zachary Klein:

It's clear that the collision of COVID and U.S. fisheries has taught us much about the need for flexibility within our legal frameworks, in more ways than one. Whether it's fishing quotas or fishery observers, the Magnuson-Stevens Act, and the various activities it regulates, have proven to be a microcosm for how the Nation and the world have constantly needed to adapt on the fly throughout the pandemic.

Zachary Klein:

Thanks from all of us at the National Sea Grant Law Center for joining us for Episode 4 of Law on the Half Shell's second season. You can be notified when Episode 5 is available by subscribing to Law on the Half Shell on Apple podcasts, Spotify, or wherever you listen to podcasts. I'd be remiss not to mention that you can keep up with all the latest at the National Sea Grant Law Center by liking us, or following us, on Facebook, LinkedIn, and Twitter. Thanks again for joining us, everyone. Until next week.

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