

## **THE LEGAL IMPLICATIONS OF ESTABLISHING A PILOT COOPERATIVE SECTOR IN THE FLUKE FISHERY OF RHODE ISLAND**

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### **INTRODUCTION**

This paper explores the legal implications, under Rhode Island's Constitution, General Laws and case law, of the "Rhode Island Fluke Conservation Cooperative Sector Allocation Pilot Program" proposal by a group of fishermen in Rhode Island.<sup>1</sup> To place the proposed sector pilot in context, this paper will begin with a brief overview of marine fishery management in the United States and where state-level regulations fit into the framework. With this management outline in place, the goals and objectives of the proposed fluke sector pilot program will be considered, with a limited discussion of sectors and how they are being incorporated into fisheries management plans. The discussion of fisheries management and sectors will be limited and is not intended to be a comprehensive history, as the main purpose of this paper is to analyze Rhode Island state laws. The primary focus will be on the constitutionality of and statutory authority to modify and create state fisheries licensing schemes. The legal implications for the Rhode Island Department of Environmental Management (DEM), the lead state fisheries management agency, in regard to implementing regulations for this sector will be examined.

### **FISHERIES MANAGEMENT GENERAL OVERVIEW**

The complexity of fishery management derives from the mobility of fish, which travel without regard to jurisdictional lines and boundaries. While this paper focuses on the state laws of Rhode Island, these laws are best understood when placed in context within the federal legislation and regulatory format that is in place. The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (known as the Magnuson-Stevens Act, and referred to herein as MSA) is the primary federal marine fisheries management legislation aimed at protecting and creating sustainable coastal fishery resources through established National Standards.<sup>2</sup> The MSA created the National Marine Fisheries Service (NMFS), an agency within the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), which is responsible for the marine resources within the federal Exclusive Economic Zone (EEZ), waters located 3-200 miles offshore.<sup>3</sup> To carry out this duty more efficiently, the MSA also established eight Regional Fishery Management Councils, each responsible for creating specific federal fishery management plans (FMP) to manage fisheries by species or groups of species, and are subject to the approval and execution by NMFS.<sup>4</sup>

The fluke fishery at issue here is co-managed at the federal level through FMPs by the Mid-Atlantic Fisheries Management Council (MAFMC) and at the state level through the

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<sup>1</sup> The Rhode Island Commercial Fisherman's Association, *Proposed RIMFC Action: Approval of the Rhode Island Fluke Conservation Cooperative Sector Allocation Pilot Program* (2008), <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCRIMFC.pdf>.

<sup>2</sup> 16 U.S.C.A. §§ 1801-1803 (2006). The Magnuson-Stevens Fishery Conservation and Management Act was originally passed in 1976 and went through two major amendments, the Sustainable Fisheries Act of 1996 (SFA) and then the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSA).

<sup>3</sup> § 1801.

<sup>4</sup> *Id.*; Interjurisdictional Fisheries Definitions 16 U.S.C.A. § 4102 (1996).

Atlantic States Marine Fisheries Commission (ASMFC).<sup>5</sup> After these FMPs are established, the annual commercial quota is distributed to the states based on a percentage; Rhode Island's current share is 15.7% of the total allocation.<sup>6</sup> Once Rhode Island receives its allocated quota, the DEM, with advice from the Rhode Island Marine Fisheries Council (RIMFC), executes specific state management measures within the structure of the interstate FMPs.<sup>7</sup> The DEM is the regulatory agency appointed by the General Assembly to manage the state's marine fisheries.<sup>8</sup>

## RHODE ISLAND FLUKE CONSERVATION COOPERATIVE SECTOR

In January 2008, a group of Rhode Island Commercial Fishermen's Association (RICFA) fishermen joined together, creating the Rhode Island Fluke Conservation Cooperative (RIFCC).<sup>9</sup> The RIFCC presented a plan to the DEM "to develop, establish, and manage a rights based management solution to a well documented regional [fluke] bycatch problem."<sup>10</sup> While Rhode Island currently has no statutory provision for the formation and operation of fishery sectors, this type of management is not a new concept in fisheries management. This management style incorporates quasi-property rights for individuals, communities, or associations, and is referred to by different names: sectors, Limited Access Privilege Programs (LAPPs), catch shares, and harvesting cooperatives.<sup>11</sup>

In general, before a fishery season begins, a sector would be allocated an aggregate total allowable catch (TAC) for a period of time and is often granted flexibility in how the group manages and catches their quota. Such a quasi-property right for individuals discourages the "race-to-the-fish" behavior, an unfortunate result of many management plans.<sup>12</sup> Rather, there is an incentive, for the individuals allocated a dedicated quota of fish, to approach the fishery in a more stewardship manner, attempting to maintain a stable, sustainable fishery to maximize annual profits.<sup>13</sup> Sector management allows fishermen to develop management systems among themselves, which appear to be more flexible and responsive to various conditions and circumstances than any regulations handed down by governmental body.<sup>14</sup> In exchange for a guaranteed amount of the fishery quota, members of the sector sign a binding contract making them jointly and severally liable to the terms and conditions of the sector's operational plan. The creation of a sector comes with several disadvantages to its members: additional expenses to

<sup>5</sup> National Marine Fisheries Service, Final Report, *Implementing the Sustainable Fisheries Act*, 3 (June 2003), [http://www.nmfs.noaa.gov/sfa/SFA-Report-FINAL7\\_1.pdf](http://www.nmfs.noaa.gov/sfa/SFA-Report-FINAL7_1.pdf).

<sup>6</sup> 50 C.F.R.648.100(d)(1)(i) (2008).

<sup>7</sup> R.I. Gen. Laws §§ 20-2.1-1(4) (Supp. 2002); 20-3-2 (1956).

<sup>8</sup> *Id.* § 20-2.1-1 (Supp. 2002).

<sup>9</sup> The Rhode Island Commercial Fisherman's Association, *Proposed RIMFC Action: Approval of the Rhode Island Fluke Conservation Cooperative Sector Allocation Pilot Program* 4 (2008), <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCRIMFC.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> For various views and a more in depth discussion on quasi-property rights fisheries management see Christopher Costello et al., *Can Catch Shares Prevent Fisheries Collapse?*, Science, Sept. 19, 2008, Vol. 321 (Magazine) at 1678 – 81; Andrew Kitts et al., *The Evolution of Collaborative Management in the Northeast USA Tilefish Fishery*, Science Direct - Marine Policy 31, July 3, 2006, 192-200.

<sup>12</sup> National Marine Fisheries Service, Final Report, *Implementing the Sustainable Fisheries Act*, 26 (June 2003), [http://www.nmfs.noaa.gov/sfa/SFA-Report-FINAL7\\_1.pdf](http://www.nmfs.noaa.gov/sfa/SFA-Report-FINAL7_1.pdf).

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 26.

cover the cost of organizing and running the group, the potential for additional regulatory requirements, and the risk of enforcement of punishment or termination due to a breach by another member.

Although sectors are not new, and more sectors are now being considered at the federal level, there are only a limited number actually operating in the United States and none in Rhode Island.<sup>15</sup> Comparing the proposed RIFCC sector against several established federal sectors, can lead to a better understanding of the various issues for the sectors themselves regarding, the authority for forming and operating, choice of corporation formation, enforcement, liability, and antitrust issues. Unfortunately, an in-depth comparison and analysis is beyond the scope of this paper. A more limited comparison of the authority to establish sectors can be made with the similarly-situated Hook sectors out of Cape Cod, Massachusetts which are managed by the New England Fishery Management Council (NEFMS).<sup>16</sup>

The Georges Bank Cod Hook Sector (GBH sector) refers to the NEFMC's Amendment 13 to the Multispecies FMP as the authority and reason behind the sector formation.<sup>17</sup> In drafting Amendment 13, NEFMC found authority to construct and authorize sectors in the revised MSA rules for the development and implementation of LAPPs.<sup>18</sup> The *Oceana, Inc.* court explicitly stated that although the approval of Amendment 13 was being challenged for various deficiencies, none of the parties in the suit had objected to the creation of the GBH sector under Amendment 13.<sup>19</sup> The court continued, declaring that it could find no "legal deficiency involving the sector program" under Amendment 13.<sup>20</sup> Finding such approval in the courts and authority under the MSA to authorize sectors, NEFMC is currently considering up to 19 new sectors in Amendment 16, and had to exclude even more proposals for lack of time and resources.<sup>21</sup> If the fluke fishery was managed by the NEFMC, a pilot fluke sector could be considered for inclusion in such amendments at the regional level. However, the NEFMC has no authority over the fluke fishery, which as stated above, is jointly managed by the MAFMC and the ASMFC, in a separate and distinct manner than groundfish.<sup>22</sup>

With no current federal statutory authority to form a sector in the fluke fishery, the RIFCC has requested that DEM, in distributing the federally granted state fluke quota, allocate

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<sup>15</sup> See Commercial Fisheries News, *Groundfish Amendment 16 – New England Council Votes to Consider 19 Sector Proposals, ACLs, AMs*. Vol. 34, Number 12 (August 2007)[http://www.fishnews.com/cfn/editorial/editorial\\_8\\_07/New\\_England\\_council\\_votes\\_to\\_consider\\_19\\_sector\\_proposals\\_ACLs\\_AMs.html](http://www.fishnews.com/cfn/editorial/editorial_8_07/New_England_council_votes_to_consider_19_sector_proposals_ACLs_AMs.html)

<sup>16</sup> See Sector Allocation 50 C.F.R. § 648.87 (2008).

<sup>17</sup> *Id.*; see Georges Bank Cod Hook Sector, *Fishing Year 2007 – 2008 Operations Plan and Agreement* (April 10-12, 2007), [http://www.ccchfa.org/pages/4/70/pages/files/GBFGS\\_2007\\_Annual\\_Report.pdf](http://www.ccchfa.org/pages/4/70/pages/files/GBFGS_2007_Annual_Report.pdf).

<sup>18</sup> See Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 13 69 Fed. Reg. 22906 (April 27, 2004) (codified at 50 CFR § 648).

<sup>19</sup> *Oceana, Inc. v. Evans*, No. Civ.A.04-0811(ESH), 2005 WL 555416, at \*1, \*6 n.9 (D.D.C. March 9, 2005).

<sup>20</sup> *Id.*

<sup>21</sup> New England Fishery Management Council, *Council Report* (September 2008), [http://www.nefmc.org/actions/council\\_reports/council-report-sept08.pdf](http://www.nefmc.org/actions/council_reports/council-report-sept08.pdf); see Commercial Fisheries News *Groundfish Amendment 16 – New England Council Votes to Consider 19 Sector Proposals, ACLs, AMs*. Vol. 34, Number 12 (August 2007) [http://www.fishnews.com/cfn/editorial/editorial\\_8\\_07/New\\_England\\_council\\_votes\\_to\\_consider\\_19\\_sector\\_proposals\\_ACLs\\_AMs.html](http://www.fishnews.com/cfn/editorial/editorial_8_07/New_England_council_votes_to_consider_19_sector_proposals_ACLs_AMs.html)

<sup>22</sup> National Marine Fisheries Service, Final Report, *Implementing the Sustainable Fisheries Act*, 3 (June 2003), [http://www.nmfs.noaa.gov/sfa/SFA-Report-FINAL7\\_1.pdf](http://www.nmfs.noaa.gov/sfa/SFA-Report-FINAL7_1.pdf).

an aggregate percentage of the state quota to RIFCC to manage among its members.<sup>23</sup> The RIFCC's proposals to the DEM and its "Operations Plan and Agreement" are very similar, and some sections identical, to the GBH sector's operations and documents.<sup>24</sup> Included in the RIFCC proposal are the goals of the sector; promoting fishery stewardship, economic efficiency and stability and ecological conservation.<sup>25</sup> When creating new management plans, the DEM must consider potential economic and social impacts and "to the maximum extent feasible[,] employ methodologies that are consistent with those employed by the National Marine Fisheries Service"<sup>26</sup> Given the likely economic and social implications on the local fishing community of the proposed sector pilot, it would be logical for the DEM to model its own sector regulations after existing federal regulations to expedite the process in a reasonable manner.

## APPLICATION OF RHODE ISLAND CONSTITUTION AND GENERAL LAWS

### Rhode Island Constitutional Issues

As a coastal state with a rich fishing history, the importance of fish in Rhode Island is evidenced by the broad legislative coverage of commercial and recreational fisheries.<sup>27</sup> Rhode Island's Constitution maintains that "[t]he people shall continue to enjoy and freely exercise all the rights of fishery."<sup>28</sup> This right to fish has been tempered by the duty imposed on the General Assembly to "provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state."<sup>29</sup> The General Assembly may accomplish its conservational duty through implementation of laws and regulations with the goal of "preservation, regeneration and restoration of the natural environment of the state."<sup>30</sup> Inevitable conflicts between the rights of an individual to fish commercially and the responsibility of the General Assembly to regulate have long been resolved in favor of the General Assembly's power to create, in accordance with the Rhode Island Administrative Procedure Act (APA), any regulatory system that it deems appropriate, limited only by the United States Constitution.<sup>31</sup>

In response to declining fisheries, increasing moratoriums, and more restrictive federal and regional management, the state undertook an extensive process to restructure its commercial

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<sup>23</sup> *Id.* at 4.

<sup>24</sup> See GBH Sector, *Operations Plan and Agreement*, 1-20; Rhode Island Fluke Sector, *2009 Fishing Operations Plan and Agreement*, 1-20 (Aug. 12, 2008) <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCAgmnt.pdf>; The Rhode Island Commercial Fisherman's Association, *Proposed RIMFC Action: Approval of the Rhode Island Fluke Conservation Cooperative Sector Allocation Pilot Program* 1-20 (2008), <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCRIMFC.pdf>.

<sup>25</sup> RICFA, *Proposed RIMFC Action* 8.

<sup>26</sup> Rhode Island Department of Environmental Management, Division of Fish and Wildlife Rules and Regulations Governing the Management of Marine Fisheries, Rule 6.2-2(e) (December 7, 2007).

<sup>27</sup> See R.I. Const. art. I, § 17; R.I. Gen. Laws §§ 20-1 to 20-12 (1956). For a comprehensive discussion of the history of Rhode Island fisheries see Dennis Nixon, *The Legal and Regulatory Environment of Fisheries Licensing in Rhode Island*, 49-MAY RIBJ 11, 11 – 15; 42 – 44 (2002).

<sup>28</sup> R.I. Const. art. I, § 17.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See *Riley v. Rhode Island Dept. of Environmental Management*, 941 A.2d 198, 205 (R.I. 2008); *Opinion to the Senate*, 87 R.I. 37, 39 (1958) ("the power of the legislature to regulate fisheries in the waters of this state is plenary, and is no longer open to question." (internal citations omitted)); *Cherenzia v. Lynch*, 847 A.2d 818 (R.I. 2004).

licensing system.<sup>32</sup> In 2002, the General Assembly passed the Commercial Fishing Licenses Act, found in the General Laws under chapter 20-2.1.<sup>33</sup> The Act allows for the restriction of entry into the state's commercial fisheries through "a system of adaptive management" with the goal to conserve and manage the state's fisheries in a sound manner that is compatible with existing federal, regional, and interstate management schemes.<sup>34</sup> In order to accomplish the goals and principals set out in the new act regarding participation, area closures, by-catch minimization, and other restrictions, the DEM was granted the power to make rules and establish a commercial licensing system. The primary state statute at issue when analyzing the legal implications of the proposed fluke sector is chapter 20-2.1 covering commercial fishing licenses.<sup>35</sup>

While chapter 20-2.1 has received minimal judicial review in the past seven years, the Rhode Island Supreme Court recently considered the constitutionality of this limited-access commercial licensing scheme in *Riley v. Rhode Island Dept. of Environmental Management*.<sup>36</sup> Riley sued the DEM after being denied a principle effort license but was granted a less desirable entry-level license, claiming in part that the statute was unconstitutional.<sup>37</sup> The court disagreed and found that this limited licensing statute was in accordance with both the due process and equal protection provisions of the Rhode Island and United States Constitutions.<sup>38</sup> In upholding chapter 20-2.1, the court found that the General Assembly had established legitimate "goals of conservation and concern for the viability of the fishing industry" and confirmed the General Assembly's constitutional duty to preserve the state's fisheries for the public good.<sup>39</sup> The court found that Riley had no fundamental right of fishing under the DEM's licensing scheme, and that the method of distributed permits did not discriminate against any class of citizens.<sup>40</sup>

Based on this confirmation of the plenary power of the General Assembly to establish rational licensing regulations, there would likely be no real constitutional issue with implementing new licensing schemes, such as the RIFCC's proposal for a pilot sector in the state's fluke fishery. License holders, not a part of the initial pilot, may contend that they are part of a discriminated class of citizens, not given the same flexibility to fish as the sector members, but such constitutional arguments would seem to carry no weight after *Riley*.<sup>41</sup> Depending on how DEM implements a new pilot sector for the 2009 fishing year, there may be obstacles within the state's general laws and the agency's own rules and regulations, specifically the control date provisions.<sup>42</sup>

## **Department of Environmental Management Fisheries Management Plans**

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<sup>32</sup> See Margaret E. Petruny-Parker, *Development of the "Commercial Fishing Licenses Act of 2002" - A New Approach*, 8 RWULR 135, 135 – 162 (2002).

<sup>33</sup> R.I. Gen. Laws § 20-2.1-1 (Supp. 2002).

<sup>34</sup> *Id.* § 20-2.1-2(6) (Supp. 2002).

<sup>35</sup> *Id.* § 20-2.1-2 (Supp. 2002).

<sup>36</sup> *Id.* 20-2.1 (Supp. 2002); 941 A.2d 202.

<sup>37</sup> *Riley*, 941 A.2d at 201-2.

<sup>38</sup> *Id.* at 203.

<sup>39</sup> *Id.* at 212.

<sup>40</sup> *Id.* at 211.

<sup>41</sup> See *id.*

<sup>42</sup> See R.I. Gen. Laws § 20-2.1-2.9(4)(ii) (Supp. 2002); Rhode Island Department of Environmental Management, Division of Fish and Wildlife Rules and Regulations Governing the Management of Marine Fisheries, Rule 6.1-9 (December 7, 2007).

The state's legislative findings for the entire Fish and Wildlife Title, broadly states that animals within the state lands and waters are "precious, renewable, natural resources" and should be "developed, preserved, and maintained" by means of "enlightened management techniques."<sup>43</sup> The statute does not specifically define what would qualify as an "enlightened management technique[.]" but does go on to elaborate that fishery and wildlife management techniques "should be pursued utilizing *modern scientific techniques*."<sup>44</sup> The General Assembly assigns this task of using "enlightened" or informed, scientifically-based management to the DEM.<sup>45</sup>

The General Assembly restricts this broad language in the Commercial Fishing Licenses Act, and acknowledges that the state's "statutes and programs for marine fisheries management and licensure developed over time and need to be brought up-to-date and made adaptable to changing conditions and circumstances."<sup>46</sup> All management changes need to be made in regard to specific conditions and circumstances, which are enumerated in section 20-2.1-9 and include social, economic, and environmental interests.<sup>47</sup> The state's social concerns include the level of access the state's citizens will have to the commercial fisheries, the safety of those fishing commercially, and how various limits, closures and restrictions will affect commercial license holders.<sup>48</sup> While the state also has an interest in maintaining a viable economy by producing an "optimum yield from each fishery[.]" this cannot be the sole purpose of any management measure.<sup>49</sup> To maintain an "optimum yield from each fishery" and create a sustainable livelihood for current and future commercial fishermen, fisheries must be managed with an ecological mindset.<sup>50</sup> Ecological goals of the state include "conservation and management measures" to prevent over-fishing, reduce bycatch, and where "by-catch cannot be avoided, minimize the mortality of the by-catch."<sup>51</sup> As addressed earlier, the proposed RIFCC fluke sector has the potential to meet these social, economic and ecological interests of the state.<sup>52</sup>

With these state interests guiding the policy behind new licensing developments, the DEM must proceed by way of "adaptive management," defined in the agency's own Rules and Regulations as a "formal process for continually improving management policies and practices by learning from their outcomes."<sup>53</sup> The definition clarifies that this style of management will take the form of "ongoing analysis of ... values and objectives regarding the fisheries."<sup>54</sup> It also recognizes that the decision making process will unavoidably contain uncertainties and that "where feasible, modeling of management options and testing of models prior to significant

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<sup>43</sup> R.I. Gen. Laws § 20-1-1(a) (1956).

<sup>44</sup> *Id.* § 20-1-1(b) (1956) (emphasis added).

<sup>45</sup> *Id.* § 20-2.1-2.

<sup>46</sup> *Id.* § 20-2.1-1(7) (Supp. 2002).

<sup>47</sup> *Id.* § 20-2.1-2-9.

<sup>48</sup> *Id.* § 20-3.2-2 (2003).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See The Rhode Island Commercial Fisherman's Association, *Proposed RIMFC Action: Approval of the Rhode Island Fluke Conservation Cooperative Sector Allocation Pilot Program* 8 (2008), <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCRIMFC.pdf>.

<sup>53</sup> Rhode Island Department of Environmental Management, Division of Fish and Wildlife Rules and Regulations Governing the Management of Marine Fisheries, Rule 5.3 (December 7, 2007).

<sup>54</sup> *Id.*

management” is desirable, as well as direct feedback from practice to policy.<sup>55</sup> Although, there are no explicit statutory provisions for research programs regarding commercial fisheries, the “testing of models prior to significant management” provision provides an avenue for such an experimental sector pilot.<sup>56</sup> Implementing a one-year RIFCC sector “pilot” while making no commitments to any permanent changes, would appear to be a prudent method of trying out new management plans before making permanent changes.

## Control Dates

If the DEM establishes a fluke sector pilot and allocates a percentage of the state’s quota based on historic landing data, similar to existing federal regulations and as suggested in RIFCC proposal, there would be a strong argument that such management methodology violates the state’s general laws regarding control dates.<sup>57</sup> Deciding the allocation of fluke on the history of prior member’s landings could be perceived, as a violation of the statutory requirement that all “control dates” must be prospectively made.<sup>58</sup> The statute explicitly states, “retroactive control dates are prohibited and shall not be used or implemented, unless expressly required by federal law, regulation or court decision.”<sup>59</sup> As defined in DEM’s posted Rules and Regulations, a “control date” is “a cut off date for establishing eligibility criteria for future access to a fishery” and gives the general public adequate notice of impending changes in the licensing scheme.<sup>60</sup> A literal reading of the statute would imply that by granting a percentage of fluke to RIFCC for the 2009 season based on the sector members’ landing records from the past five seasons, the DEM would be directly violating the “prospective control date” requirements.

However, looking beyond the language of the statute, and focusing on the policy reasons, such a pilot sector for the 2009 season would not necessarily violate the statute. The rationale behind the control dates requirement is to give public notice,

“that access to, and levels of participation in, a fishery may be restricted and that entrance into, or increases in levels of participation in a fishery after the control date may not be treated in the same way as participation in the fishery prior to the control date.”<sup>61</sup>

The current regulations for the restricted finfish, include an “Exit/Entry Ratio” which is “[a] formula established by regulation for a fishery...identif[y]ing] the number of new fishing licenses in each category that will be issued for each one that is retired and surrendered to the Department.”<sup>62</sup> The current exit/entry ratio for the restricted finfish is the issuance of one new

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See R.I. Gen. Laws § 20-2.1-2.9(4)(ii) (Supp. 2002); The Rhode Island Commercial Fisherman’s Association, *Proposed RIMFC Action: Approval of the Rhode Island Fluke Conservation Cooperative Sector Allocation Pilot Program 4* (2008), <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCRIMFC.pdf>.

<sup>58</sup> R.I. Gen. Laws § 20-2.1-2.9(4)(ii).

<sup>59</sup> *Id.*

<sup>60</sup> Rhode Island Department of Environmental Management, Division of Fish and Wildlife Rules and Regulations Governing the Management of Marine Fisheries, Rule 5.17 (December 7, 2007).

<sup>61</sup> R.I. Gen. Laws § 20-2.1-2.9(4)(ii).

<sup>62</sup> DEM Rules and Regulations 6.1-10.

endorsement for every five actively fishing endorsements that retire.<sup>63</sup> Because, the fluke fishery is already restricted, and each of the proposed sector members currently holds a valid permit within the fluke sector, the fishery would not drastically change or expand to include more members; there is still a limit on the number of new endorsements according to the previously established ratio.<sup>64</sup> As explained in *Riley*, granting access to restricted fisheries on a first-come, first served basis, does not constitute discrimination.<sup>65</sup> Here, where fishermen already have access to the fluke fishery, and the question is on the effect of grouping them together, not granting new licenses, there would effectively be no change in the participation in the fishery. While the pilot may still be considered a per se violation, the end result may not undermine the statute's underlying rationale because the fluke fishery is, and is likely to continue, as a restricted finfishery.

The "control dates" for the proposed sector would be used more as data management in computing what percentage of the state's fluke quota would be allocated to the sector. If, after implementing the one-year pilot, DEM wanted to create permanent sector regulations and encourage the creation of more cooperative sectors, the control date requirement would still not necessarily pose a problem. Those actively fishing should already be on notice of the significance DEM places on data records, given the number of rules devoted to data reporting, which reflects the importance of maintaining and reporting accurate data. The consequences of noncompliance are strict.<sup>66</sup> Data reporting is required of everyone holding a commercial fishing or dealer license and any failure "to report required information in a timely fashion or who files a false report shall be subject to suspension or revocation."<sup>67</sup> Such failures could also result in a denial to renew a license.<sup>68</sup> In general, it would be advantageous and prudent for fishermen to maintain back logs of what they catch, discard, and sell, as such records may be required by the DEM for various reasons. For example, to gain priority over others in the issuance of licenses, license holders may show that they have been "actively participating" in the fishery, "demonstrat[ing] by dated transaction records that they have fished at least seventy-five (75) days in the proceeding two years."<sup>69</sup> Because commercial license holders should have a record of their past landings for various reasons, such control date requirements, in reality, should not be an obstacle to the formation of a sector.

Even if fishermen actively participating in the fluke fishery do not have a landings record for their vessel, the DEM should have records of such information. Beginning January 1, 2003, the DEM was statutorily required to "develop and implement...an electronic license system for commercial fishing licenses."<sup>70</sup> This electronic system was designed in part to create a database of landings history by species and effort, which would help in the management of fisheries.<sup>71</sup> It would follow that, as of December 31, 2008, there should be an easily retrievable record of landings that occurred within the state for the past six years. The DEM's Rules and Regulations

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<sup>63</sup> *Id.* 6.1-10(a).

<sup>64</sup> See Rhode Island Fluke Sector, *2009 Fishing Operations Plan and Agreement* (Aug. 12, 2008), <http://www.dem.ri.gov/programs/bnatres/fishwild/pdf/FCCAgmnt.pdf>.

<sup>65</sup> See *Riley v. Rhode Island Dept. of Environmental Management*, 941 A.2d 198, 205 (R.I. 2008).

<sup>66</sup> See *id.*

<sup>67</sup> DEM Rules and Regulations 6.6-1(a); 6.6-1(e).

<sup>68</sup> *Id.* 6.6-1(e).

<sup>69</sup> *Id.* 5.1; 6.7-5(c).

<sup>70</sup> R.I. Gen. Laws § 20-3.1-6 (Supp. 2002).

<sup>71</sup> *Id.*



state that “[d]ata will be collected, managed and disseminated according to the coastwide minimum protocols of the Atlantic Coastal Cooperative Statistics Program (ACCSP)” and such data “may be used for management purposes by any properly designated State or federal agency.”<sup>72</sup> As an authorized state fisheries management agency, the DEM has confidential access to the ACCSP data and receive a breakdown of landings caught by individual vessels.

In circumstances where no new fluke endorsements are available and the agency has access to vessels’ records of past landings, there is less chance of a statutory breach under the prohibitive control date requirement. During or after the one-year pilot, if DEM wanted to make sectors a enduring part of commercial licensing plans, the agency could modify control date regulations to give public notice that the development of more sectors within the fluke fishery would be encouraged in the future, and lay out the requirements. Should sectors become a permanent part of the limited access, regulations authorizing sectors might need to incorporate access rules for those with less than five years of active participation in the fishery. While DEM may decide to model its own regulations after existing federal sector regulations, the agency would not obligated to use the same requirements, but would be free to implement different rules for allowing participation in a sector and granting an allocation based on a method other than a landings record of five years.

## CONCLUSION

While Rhode Island could decide to wait for sectors to be implemented at the regional level through the appropriate councils, such a passive approach is counter to both federal and state mandated conservation requirements.<sup>73</sup> With so many competing interests involved with commercial fisheries, any changes to fishery management will inevitably be a highly contentious issue. It seems doubtful after *Riley* that the proposed sector pilot would be deemed inappropriate within the already heavily regulated commercial fisheries.<sup>74</sup> Such sector pilots would likely be upheld under judicial review after *Riley*’s confirmation of the General Assembly’s plenary power to carry out conservational measures to protect the state’s fisheries for the public good, as long as the control date provisions in the state general laws are not found to be an issue.<sup>75</sup> After assessing the various interests at stake and by using adaptive management when incorporating sectors into the management of the state’s commercial fisheries, the DEM is not bound in succeeding years by any changes it may make for the 2009 season. Considering the scientific recommendations that sectors provide positive social, economic, and ecological benefits, the existence of thriving sectors, and consideration of more federal level sectors, experimenting with this one sector pilot would be a prudent and practical first step towards implementing sectors in Rhode Island’s state commercial fisheries.

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<sup>72</sup> DEM Rules and Regulations 6.6-3(a); 6.6-3(b).

<sup>73</sup> See Magnuson-Stevens Fishery Conservation and Management Reauthorization Act 16 U.S.C.A. §§ 1801-1803 (2006); R.I. Const. art. I, § 17; R.I. Gen. Laws § 20-1-1(a) (1956).

<sup>74</sup> See *Riley v. Rhode Island Dept. of Environmental Management*, 941 A.2d 198, 205 (R.I. 2008).

<sup>75</sup> See *id.*; R.I. Gen. Laws § 20-2.1-2.9(4)(ii) (Supp. 2002).