Sea Turtle Mediated Negotiations: A New Approach

Jay S. Johnson*

The Kemp's ridley sea turtle is an endangered species whose numbers have dwindled from 40,000 nesting females seen on a single day on one Mexican beach in 1947 to 542 nesting females last year. The turtle breeds only on this one beach. (A few occasional nests may occur elsewhere, but they have never been successfully established.) The Kemp's ridley is the only sea turtle that nests exclusively in the daytime, thus making it particularly susceptible to predation by humans looking for eggs. Unrestricted Mexican egg-taking during the 1940s and 50s is probably responsible for the major share of its population reduction.

A nice correlation exists between the disappearance of this sea turtle and the growth of the Texas brown shrimp fishery. Exactly parallel with the growth of the fishery, turtle populations declined. I don't think, however, that shrimp trawlers can be blamed for the entire problem. Nevertheless, the number of nesting females is now critically low, and if something isn't done, it is likely that the Kemp's ridley will soon become extinct. It may be too late already.

It had been known for some time (although not scientifically documented) that sea turtles are captured frequently by shrimp trawlers and that shrimpers are probably a significant source of turtle mortality. The National Marine Fisheries Service a number of years ago began work on a device that would help prevent capture of sea turtles. We developed a device that would exclude sea turtles very effectively, and began selling it to the industry. It wasn't an attractive device for a shrimper to have to pull, and they didn't use it. We went back to the drawing boards to try to make it more attractive. We incorporated some features that would make shrimping more economical--or so we thought. We made modifications in the device that would exclude finfish as well as turtles. (In some of the fisheries where finfish are not a desired bycatch, we thought that the industry might use the device because it would reduce the weight of non-target species in the bag. That would allow trawl arms to spread more widely for a longer period of time, thus increasing the shrimp catch.) That modification did not work out any better than the first effort, and very few fishermen used the device to improve their economic situation. Some have used it to exclude cannonball jellyfish--probably fewer than 500 vessels during various parts of the season.

---

* Assistant General Counsel for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C. 20230. This is an edited transcript of a talk. The views expressed herein do not necessarily reflect those of any government agency.

We called it a "Turtle Excluder Device" or a "Trawl Efficiency Device"--a "TED." Our message probably did have some beneficial effect on turtle populations. Nevertheless, after a number of years of trying, it became apparent last year that the shrimp industry would not voluntarily use this device. Under pressure from the environmental community, we developed regulations that would require its usage. These draft regulations were given to representatives of industry and of the major environmental organizations last August. As a result, they demonstrated a unique coalition in opposition to what the government proposed. Left to our own devices, we came up with a solution that was acceptable to no one.

Thereupon, at the request of industry and the environmentalists, we initiated a mediation process. This was our first entry into the process of negotiated rulemaking. Some other agencies have had experience with this, and a couple of law review articles have been written on it. [L. Susskind & G. MacMahon, "The Theory and Practice of Negotiated Rulemaking," 3 Yale Journal on Regulation 133 (1985); H. Perritt, Jr., "Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States," 74 Georgetown Law Journal 1625 (1986)--ed.] Both the industry and the environmental groups were invited to send representatives. We ended up with the following cast of characters: Bob Jones, who is the head of the Southeastern Fisheries Association (he later elected to have his lawyer, Eldon Greenberg, represent that organization in the negotiations); David Eymard, past president to the Texas Shrimp Association; Tee John Mialjevich, a shrimper and a shrimpers' representative from the Cajun territory of Louisiana; Chuck Lyles, a former government bureaucrat who is currently the executive director of the Louisiana Shrimp Association; and two "real-life" shrimpers, Robin Sanders from South Carolina and Leonard Crosby from Georgia.

On the environmentalist side was Mike Weber, representing the Center for Environmental Education. He brought with him not one but two lawyers, who had prior association with fisheries interests: Vance Hughes, former head of the Justice Department's Wildlife and Natural Resources section, and George Manning, former staff director for the House Merchant Marine and Fisheries Committee. Mike Bean represented the Environmental Defense Fund. Milton Kaufmann, very prominent in the Monitor International Fund for Animals, has a state department background. And finally we had a representative from Greenpeace, Bruce Jaildagian.

We had a series of four meetings starting in New Orleans, proceeding from there to Jekyll Island, Georgia (a very nice place for a vacation). We went to Washington, D.C. for one meeting because the environmentalists complained that their travel budget was being drained. And we had the final meeting down in Houston in December.

I might add that these two groups hired a professional mediator--a labor/management negotiator who had represented some fishing unions. That person--Gary Kotter--is also a member of the North Pacific Fishery Management Council, so he brought with him some understanding of the government's role in fishery regulation. He began the meeting by identifying a single objective everybody could agree to. (I recommend this as the first stage of any mediation or negotiation: determine where you have common ground.)

The first series of meetings were essentially for gathering and presenting data. Without exception, everyone agreed that we should be trying by whatever means possible to prevent the extinction of the Kemp's ridley sea turtle and to prevent other sea turtles from becoming further endangered. Another objective was to minimize adverse affects on the economics of the shrimp industry as much as possible. That was a secondary consideration, however; everyone agreed that we had to do something about the turtle first.

There was a tremendous desire for information. NMFS scientists first presented information on nearly every sea turtle sighting and capture in our records--where it occurred, when it occurred, how it occurred--absolutely any information we had. The first two meetings were devoted to presenting that information and identifying the need for more. And NMFS continued to supply information throughout the negotiation process. The government took no other role, nor did we indicate what we wanted in the way of the regulation--except that we wanted an immediate solution. And for that reason, we just stood back and let the environmentalists and the industry have a go at each other.

The process functioned this way: one side made a proposal and the other side responded, until finally we got to a common meeting ground. At a few stages in the process one side threatened to walk out. They were persuaded by their colleagues to come back to the table, and we were thus able to conclude the agreement.

The agreement was reduced to written form over a couple of weeks; it took a little time to compile all the agreements in one document. It was then submitted to the representatives for ratification. All except one signed it. Mr. Tee John Mialjevich, who represents Concerned Shrimpers of Louisiana, refused, and he is now campaigning against the agreement. We have published the proposed regulation in the Federal Register and are now in the public comment period.

Briefly, the regulations require use of one of four devices that have demonstrated capability to exclude sea turtles. One is the device that NMFS developed in one of several forms, either with or without the finfish excluder mechanism. Another was developed in Cameron, Louisiana with Sea Grant participation. A third was developed in Matagorda, Texas, again with Sea Grant

help. A fourth--the Georgia Jumper--is a modification of a device long used by Georgia shrimpers to exclude jellyballs. The last is a fairly simple device, and it is amazing to me that many Louisiana shrimpers who already own one did not know that they need make no further investment to comply with the regulations.

There is a lot of doubt about whether the devices work in saving turtles, whether turtles are caught in shrimp nets, and whether shrimpers lose or gain shrimp when using the device. All I can say is that the negotiations used the best data that exist. Not that we don't need better data (and we're going to spend more time and money to get it). But it's what we have now and we should go forward with it.

Any of the four approved devices can be used. There is a slightly larger size requirement in the Atlantic than in the Gulf because larger turtles are found there. The regulations are phased in over three years, beginning first with offshore shrimp fisheries in the Gulf and South Atlantic. Beginning July 15 of this year (if the regulations are not modified as a result of all the comment), the offshore fishermen from Texas/Mexico border to Mobile Bay will be required to use TEDs if they are fishing inside the 10-fathom contour. We will not go out with a dipstick and measure how deep the water is. We approximated the 10-fathom contour by a series of geographical coordinates and drew a broken line along the coast. If you are fishing inside that line you need to use the device; if you are outside you won't--even if the water depth is slightly more or slightly less than 10 fathoms.

In the Fort Meyers to Key West fishery of Florida the same kind of requirement exists, up to 10 fathoms. On the East Coast, essentially all the fishing occurs close to shore. As a result, there was no need to place a limit on depth. The groups simply agreed that TEDs will be required in the offshore fishery all the way out to 200 miles. That will be a year-round requirement in the Fort Meyer/Key West area and the Cape Canaveral area. North of Cape Canaveral TEDs will be required from May to September, and in the Texas/Louisiana area from March through November. TEDs will not be required during seasons when very little shrimping occurs. (It is something of an embarrassment that we acceded to Louisiana's request to have December, January, and February not covered, only to find out later that Louisiana Parks and Wildlife apparently closes the fishing season then. We should have had representatives of state governments at the negotiations as well as the federal government to provide us with details on state fishing regulations.)

We also had a problem with representation. The vehemence of the opposition of Mr. Tee John Mialjevich and his membership has been absolutely amazing. I have never seen more people get involved in any fishery issue--ever. He invited us to come down and address an annual convention of shrimpers in Thibodaux, Louisiana, which is an hour and a half southwest of here. We did, and when we arrived in town we found that state police had

marked off all the roads. There were big signs--"TED Meeting"--leading to a civic auditorium that Washington, D.C might be proud to have. The building was filled to capacity, and perhaps 25 percent more for our presentation. We also had public hearings in Louisiana that took place earlier this week.

I can summarize the attitude of Louisiana shrimpers who oppose these regulations thus: (a) We don't catch turtles; (b) TEDs don't work; or (c) we can't make money if we use them. These devices are very inexpensive to purchase. The cheapest one is probably less than $100; the most expensive is about $400. They last a couple of years, so this is not a significant objection. The primary objection is not to the cost of the device, but rather the expected loss of shrimp. The shrimpers are convinced that shrimp catch will be diminished with the devices.

Unfortunately, we have not yet conducted tests in Louisiana waters to demonstrate otherwise. We will be doing so next month, and we will learn one of two things. We may learn that the devices don't work in Louisiana waters, in which case we have a problem. Or we may learn that there really are turtles in Louisiana waters, in which case the shrimpers have a problem. Our data indicate that turtles will be found in Louisiana waters, because we know they occur in offshore waters. We know that the Kemp's ridley eats mostly blue crab, and we know that blue crab are found in internal waters of Louisiana. If crabs are there, we expect the turtles to be found there as well. In other parts of the country where we have better data, we have found turtles in channel waters. We did get a report from one recreational shrimper who caught a turtle in Lake Pontchartrian. It turned out to be a Kemp's ridley. So we have at least one data point from Louisiana waters.

I guess I'll stop here. I suggest that the next time we negotiate a mediated solution, we seek representatives who in fact have the authority to bind their respective organizations. The industry requested this mediation; they sent their representatives. For the most part their representatives signed, but now the industry associations have backed off and have repudiated the agreement. Both Texas Shrimp and Louisiana Associations have withdrawn their support.

I don't think that a protest is the way to stop the government from going forward. Too much momentum exists right now. The regulation probably won't be modified significantly, but the Endangered Species Act might. This is a sensitive issue that happened to arise at a time when the Endangered Species Act was up for reauthorization. I sometimes think that the biggest danger to an endangered species is to have the case for an exception presented while Congress is considering amending the Act. It may well be that Congress will do something to stop these regulations from entering into force. I am not expecting this, but it is certainly a possibility.

MASGC-W-87-001 C3

Conference on Gulf & South Atlantic Fisheries:

CIRCULATING COPY
Sea Grant Depository

LAW & POLICY

March 18-20, 1987
New Orleans, Louisiana

LOUISIANA SEA GRANT LEGAL PROGRAM OF
THE LOUISIANA SEA GRANT COLLEGE PROGRAM
COASTAL AND MARINE LAW RESEARCH PROGRAM OF
THE MISSISSIPPI-ALABAMA SEA GRANT CONSORTIUM

PROCEEDINGS

M. Casey Jarman
Daniel K. Conner
Editors

LOUISIANA SEA GRANT College Program

Mississippi-Alabama Sea Grant Consortium

Michael W. Wascom
Frederick C. Whitrock
Co-Sponsors

$ 5.00

MASGP-87-013

PROCEEDINGS

CONFERENCE ON GULF & SOUTH ATLANTIC FISHERIES: LAW & POLICY

March 18-20, 1987
Royal Sonesta Hotel
New Orleans, Louisiana

Sponsored by
Louisiana Sea Grant Legal Program
Mississippi-Alabama Sea Grant Consortium

Prepared by
Coastal & Marine Law Research Program
Law Center
University, MS 38677
July, 1987

M. Casey Jarman
Daniel K. Conner
Editors

MASGP-87-013

This publication has been produced in cooperation with Louisiana Sea Grant and the Mississippi-Alabama Sea Grant Consortium under administration of Grants No. NA85AA-D-SG141 and NA81AA-D-00050 from NOAA's Office of Sea Grant in the U.S. Department of Commerce. The U.S. Government is authorized to produce and distribute reprints for governmental purposes notwithstanding any copyright notation that may appear hereon.

TABLE OF CONTENTS

Page		
iv	Preface	M. Casey Jarman Daniel K. Conner Coastal and Marine Law Research Institute, University of Mississippi
1	Welcoming Comments	Jack R. Van Lopik Dean, Center for Wetland Resources, Director, Louisiana Sea Grant College Program, Louisiana State University
3	Fisheries Legislative Initiatives for the 100th Congress	William E. Evans Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Washington, D.C.
10	Fisheries Jurisdiction in the Gulf and the South Atlantic	Michael W. Wascom Sea Grant Legal Program and Coastal Fisheries Institute, Louisiana State University
24	Interjurisdictional Conflicts: How Conservation Programs are Compromised by the Political Process	Jay S. Johnson Assistant General Counsel for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C.
35	The Public Trust Doctrine and Fisheries Management in the Exclusive Economic Zone	M. Casey Jarman Director, Coastal and Marine Law Research Program, Mississippi - Alabama Sea Grant Consortium, University of Mississippi
40	The Consistency of United States Domestic Fisheries Law with the United Nations Law of the Sea Treaty	Miranda Wecker Associate Director and Staff Attorney, Council on Ocean Law, Washington, D.C.
48	The Florida Marine Fisheries Commission: Status of Spanish Mackerel and Redfish Litigation	Charles L. Shelfer Florida Marine Fisheries Commission

59	Commercial - Recreational Fisheries Litigation in Florida	Kenneth G. Oertel Oertel & Hoffman, P.A., Tallahassee, Florida
65	Conflicts Between Fisheries	Maumus F. Claverie, Jr. Attorney, New Orleans, Louisiana
70	Fisheries Management and Economic Efficiency: Implications for the Gulf of Mexico Region	Walter R. Keithly and Michael Wascom Coastal Fisheries Institute Center for Wetland Resources Louisiana State University
85	Fisheries Management: Conservation Versus Efficiency	Jerry E. Clark and Gary C. Matlock Texas Parks and Wildlife Department
100	Needs Within the Commercial Seafood Industry	Brian E. Perkins Seafood Technologist, Alabama Sea Grant Extension Service
108	Lacey Act Amendments of 1981	Fred C. Whitrock Sea Grant Legal Program, Louisiana State University
121	Lacey Act Enforcement in the Texas Gulf: A Sociological Analysis	Ben M. Crouch and Mark Miller Department of Sociology, Texas A & M University
136	Fishery Law Enforcement in the Gulf of Mexico	Lt. Commander John Byrd, USCG Eighth Coast Guard District, New Orleans, Louisiana
140	Aquaculture Initiatives in North Carolina	Walter F. Clark Ocean and Coastal Law Specialist, UNC Sea Grant College Program, North Carolina State University
147	A Survey and Ranking of Impediments to Marine Aquaculture in Coastal States	Robert Neikirk Student Research Assistant and Masters Candidate, Virginia Institute of Marine Science, College of William and Mary; Bartlett Theberge Professor and Chairman, Department of Ocean and Coastal Law, Virginia Institute of Marine Science, School of Marine Science

159	Legal Constraints to Marine Aquaculture at the State Level: The Virginia Example	Bartlett Theberge Professor and Chairman, Department of Ocean and Coastal Law, Virginia Institute of Marine Science, School of Marine Science; Robert C. Neikirk Student Research Assistant and Masters Candidate, Virginia Institute of Marine Science, College of William and Mary
170	Tax Law Changes: The 1986 Federal Tax Act and Implications for the Fishery Industry	Norman K. Bender Program Leader, Sea Grant Marine Advisory Program, Cooperative Extension Service, University of Connecticut
179	"Dockominiums"	Robert I. Reis Professor and Director, New York Sea Grant Law Program, State University of New York School of Law
205	Economic Analysis for Resolving Disputes Between Commercial and Recreational Fisheries	Trellis G. Green and Edward Nissan Department of Economics, University of Southern Mississippi
222	Limited Entry	Nancy Diamond Research Assistant, University of Oregon Ocean and Coastal Law Center
234	Sea Turtle Mediated Negotiations: A New Approach	Jay S. Johnson Assistant General Counsel for Fisheries, National Oceanic and Atmospheric Administration, U. S. Department of Commerce, Washington, D.C.
239	Marine Insurance: A Look Ahead	Dennis W. Nixon Graduate Program in Marine Affairs, University of Rhode Island

PREFACE

Conferences on fisheries law and policy are not a new idea. The University of Washington School of Law began its annual series of Fishery Law Symposiums in 1982, and in 1986 the Marine Law Institute of the University of Southern Maine followed suit in sponsoring a Conference on East Coast Fisheries Law and Policy. The former, held in Seattle, is mostly concerned with fishery management and trade issues of the Pacific coast, while the latter covered the same for the North Atlantic seaboard. Until now, the substantial contribution of the South Atlantic and the Gulf of Mexico to the nation's fisheries resources has lacked a forum for discussion of legal and policy issues.

The time had clearly come to provide such a forum. A discussion of the issues and an airing of differences in the context of law and policy was long overdue. The Gulf Coast and South Atlantic--until recently perhaps the most placid of the nation's shorelines in terms of fishery resource conflicts--erupted in controversy during 1986. Fishery managers everywhere know that their craft is never a smooth process, and is never entirely free of controversy. Yet if one were to judge by the relative calm of the fishery management process in the Gulf and South Atlantic in 1985 and the years preceding, it would have been hard to predict the vehemence of the discussion that surrounded volatile issues such as redfish management and the possibility of requiring Turtle Excluder Devices (TEDs) on shrimp trawlers.

This Conference, held in New Orleans from March 18 through March 20, 1987, presented an opportunity, not only to air our differences and to learn from past mistakes, but also to tabulate our accomplishments. Our presentations are of uniformly high quality, and reflect the experiences and studies of those actively involved in fishery resource issues. Most of our presenters were lawyers, as befitted a Conference devoted to discussion of law and policy. Yet we have valuable contributions also from non-lawyers: from resource managers, economists, extension specialists, and enforcement agents. A diverse collection, yet one that is representative of the diversity of the resource itself, of those who pursue it for a living, and those charged with responsibility for its management.

The editors of these proceedings and the hosts of the Conference itself wish to thank the Sea Grant Directors of their respective states, James Jones and Jack Van Lopik for their support and for underwriting the cost of this gathering of experts and students, thereby making it possible. Thanks are due also to Mike Wascom, Director, and Fred Whitrock, Associate Attorney, of the Louisiana Sea Grant Legal Program, Louisiana Sea Grant College Program, for their help in soliciting and rounding up these papers, and for co-sponsoring the Conference.

M. Casey Jarman
Daniel K. Conner
Editors
July, 1987