Legal and Policy Challenges of Marine Protected Areas

Kristen M. Fletcher, The University of Mississippi

Reprinted from Proceedings of the 12th Biennial Coastal Zone Conference held in Cleveland, Ohio, July 15-19, 2001

Sea Grant
MASGP-01-019
LEGAL AND POLICY CHALLENGES OF MARINE PROTECTED AREAS

Kristen M. Fletcher, Mississippi-Alabama Sea Grant Legal Program

Keywords: Marine Protected Areas, Marine Reserves, law, policy

In February of 2000, the Marine Conservation Biology Institute and The Cousteau Society released a report calling for the establishment of a National System of Marine Protected Areas in the United States. In May of 2000, President Clinton signed Executive Order 13158 calling for the creation of a comprehensive system of Marine Protected Areas (MPAs). Drawing on the existing local, state and federal MPAs, the Order seeks to strengthen the management and protection of existing MPAs, establish new or expanded MPAs, develop a national system of MPAs, and compel Federal agencies to avoid causing harm to MPAs. The broad definition of MPA as “any area of the marine environment reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein” potentially includes many sites in U.S. waters.

While the terms “Marine Reserves” and “Marine Protected Areas” have been used synonymously, the terms can actually refer to marine areas that serve different functions and are governed by distinct regulations. For instance, one MPA may restrict certain types of fishing gear while another may prohibit fishing altogether. Categories of protected areas can range from strictly protected wilderness areas to multiple-use areas. Such areas are often proposed as components of fisheries management to enhance the long-term sustainable exploitation of fishery resources or rebuild depleted stocks and to protect particularly delicate areas or previously exploited areas. For example, fishery management councils have proposed closing areas to assist in the rebuilding of particular species of managed fish.

According to the Executive Order, a comprehensive network will be established, explaining the different areas which are set aside as MPAs. But, how may such areas be established? Does the necessary legal authority exist at a local, state, regional, or federal level? Finally, what does it mean to establish an MPA? Declaring an MPA requires enabling legislation to establish the authority to create such an area, jurisdiction over resource conservation and exploitation, a management plan, and enforcement mechanisms. Legal and policy questions exist regarding aspects of MPA planning, including the wide variety of legal parameters for MPAs and how a national system of MPAs will frame the future of U.S. habitat management.
ENABLING LEGISLATION
Depending upon the agency overseeing the creation of an area and the location of the area, enabling legislation may be necessary to establish authority to create and manage an MPA. Some states are taking the lead in enacting legislation which directs the marine resources or natural resources and environment departments to study the need for marine reserves and to establish them when necessary. The definition of a marine reserve or MPA is a critical beginning to the overall success of an MPA program and must delineate the myriad uses and limitations that can be incorporated into an area.

A definition such as that used in Executive Order 13158 includes a broad range of resources from “cultural” to “natural.” Enabling legislation may limit the creation to particular resources such as fish stocks or coral reefs but often will be broad in order to allow the acting agency to determine what resources need protection in particular areas and how to design an MPA to meet those needs. Enabling legislation should also provide guidance for the development of criteria to be used to establish marine reserves.

In other cases, the legislation may exist that grants authority to particular agencies or subagencies. For example, the Magnuson-Stevens Fishery Conservation and Management Act provides that a federal fishery management plan may designate zones where fishing may be limited or shall not be permitted with specified types of fishing vessels or gear or may prescribe other measures or restrictions “necessary for the conservation and management of the fishery.” These provisions grant the regional fishery management councils the authority to include MPAs within management plans and provide for the associated regulations and restrictions necessary to implement such marine reserves.

JURISDICTION
The agencies that claim jurisdiction in the location of the MPA must have guidelines on how to work together to plan for the MPA and manage it in the future. Legislation may also be necessary to delineate an agency’s jurisdiction.

In many cases, an MPA will overlap federal and state waters, a local port authority, or even two regional management subagencies. The overlay of jurisdiction should be noted in a management plan, as described below, but must also allow for one agency to take a lead role in the creation of a management body for the MPA or for the management of the area itself.

MANAGEMENT PLAN
Many early MPAs did not have clearly defined management objectives but recent creations show the trend of devising a management plan to lay out priority needs for particular areas and the primary methods of management from limits on harvesting natural resources to limits on
motorized crafts entering the area. Because MPAs are sometimes established as extensions of terrestrial protected areas, the management plans of national, state or local parks can sometimes be utilized as models in the protection of marine areas.

However, legal challenges may exist in marine areas because of the public trust interest in access and preservation of marine resources. Because the public has a right of navigation in most areas, the development of a management plan can undergo political pressures to allow particular user groups into the area. To design a successful management plan, an MPA team must understand the ecological needs of an area and be equipped to defend the exclusion of particular uses.

ENFORCEMENT
Finally, the effectiveness of an MPA will depend up on the ability to enforce limits within its borders. MPAs can benefit from the increase in availability of marine-related technology, such as GIS technology or the global positioning satellite network, that allow for vessels' positions to be monitored automatically. Technology is already in use around the Great Barrier Reef in Australia and the Georges Bank off the coast of Maine. This type of technological enforcement can save money that would otherwise have to be spent on fishery patrol vessels. The creation of the federal system of MPAs will hopefully assist in the dispersal of this technology to MPAs across the nation for the most efficient enforcement of MPAs.

Kristen M. Fletcher
Mississippi-Alabama Sea Grant Legal Program
518 Law Center
University, MS 38677
(662) 915-7775
kfletch@olemiss.edu