

An alternative to precaution



By David E. Frulla and Shaun M. Gehan

Once upon a time, it is said, fishermen could escape stricter regulation by arguing the science was too uncertain to impose economic hardship. Neither the law, fisheries managers, nor the courts accept this argument anymore.

In fact, the pendulum may have swung to the point where the conservation argument that cutbacks are required “until we know for sure” often wins the day. More specifically, the so-called “precautionary principle” holds that regulatory action can be justified because greater harm can be averted this way than by waiting for elusive or nonexistent certainty.

For U.S. fisheries, application of the precautionary principle isn’t required by U.S. law, though it’s recommended by the U.N.

Just because it’s impossible to count the fish in the sea doesn’t and shouldn’t mean that rational conservation and management measures can’t be imposed. Deferring hard choices well past the point when management options are few to none doesn’t help fish or fishermen. That’s the uneasy tension in how U.S. marine fisheries are managed, though council scientific and statistical committees are treating the new Magnuson-Stevens Act edict to set catch limits that prevent overfishing as a requirement to treat any level of uncertainty as a justification for significant reductions from biologically allowable

catch levels. For example, the Atlantic herring quota is set to be reduced by 40 percent because of uncertainty, not because of overfishing.

Generally set in counter pose to the precautionary principle is art of cost-benefit analysis. Proponents of cost-benefit analysis generally hold that regulation should not be undertaken on the basis of possible detriments but, as resources are finite, regulation should be justified by a quantitative and qualitative assessment of regulatory costs and benefits. Such assessments are designed to assist administrations in setting priorities and directing resources toward those initiatives producing the greatest benefit per unit of cost.

President Obama has appointed Professor Cass Sunstein to be the director of the Office of Management and Budget’s Office of Information and Regulatory Affairs.



One of the nation’s foremost proponents of cost-benefit analyses, Sunstein was the president’s law school classmate at Harvard and teaching colleague at the University of Chicago Law School.

While perhaps obscure within the U.S. government’s organizational chart, OIRA serves as a gatekeeper over agency regulatory efforts for a presidential administration. In the President George W. Bush years, OIRA took an active role in regulatory policy setting. Indeed, the last administration was widely criticized for using OIRA to delay or stop significant regulations. Notably, few if any, of these interventions were in aid of the fishing industry.

Among his first acts in office, around the time he nominated Dr. Sunstein to head the office, President Obama took the rare step of soliciting public comment on OIRA’s role, almost as if he were considering a regulation itself. This was also about the same time that he nominated Jane Lubchenco to head NOAA, herself a proponent of a precautionary approach to marine resource management.

For example, in an interview for the 2002 PBS documentary “Empty Oceans, Empty Nets,” Lubchenco stated: “The oceans and the life in them are too valu-

able to risk losing. Instead of assuming that there is no consequence or that things can always rebound, we need to be much more cautious in our activities and err on the side of protecting ocean resources for the future.”

Clearly, there will be vigorous debate. Lubchenco is not the administration’s only proponent of precautionary regulation. Lisa Heinzerling, the EPA’s associate administrator for the Office of Policy, Economics, and Innovation and, arguably, this administration’s second in command for climate change, is one of the most noted scholars and authors supporting the precautionary principle.

Long before Heinzerling and Sunstein took jobs with the same administration, they often butted heads over this issue. Heinzerling has called Sunstein’s cost-benefit analysis “an exercise in moral bankruptcy.” Sunstein has called Heinzerling’s vision of the precautionary principle “utterly incoherent.”

As of this column’s writing, we have yet to see the administration’s refinements to the regulatory review process. Given the sweeping nature of pending fishery management initiatives, the resolution of the battle between the precautionary principle and OIRA’s regulatory role, including its use of cost-benefit analysis, should be of some interest.

These initiatives include a proposed closure of the South Atlantic red snapper fishery — and all others that incidentally take red snapper — as well as a controversial new groundfish management scheme and herring cuts impacting the lobster and mackerel fishery in the Northeast, and broader efforts to zone the marine environment and institute catch shares on a broad scale.

This is a matter worth staying tuned to, no matter how remote it may seem to your workaday lives. It would be good to know that the industry has allies during this time when the outlook is otherwise dark. **NF**

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