

# BLOOD IN THE WATER: SHARK FEEDING, TOURISM, AND THE LAW

BY

CATHERINE MACDONALD\* & ANDREW CARTER\*\*

*Shark tourism has become a significant driver of tourist dollars both in the United States and abroad over the past few decades, with shark provisioning (feeding), often used by shark tour companies to attract sharks for easy viewing. While shark tourism may provide economic incentives to protect vulnerable or endangered shark populations in some cases, feeding sharks to bring them into view has both ecological and safety implications, and impacts remain contested among scientists and environmentalists. This Article explores the legal implications of shark tourism, feeding activities, and the historical doctrine of ferae naturae. It also analyzes two case studies in Florida and Hawaii where tourism-related shark feeding bans engendered legal and political opposition, as well as difficulties in enforcement. As tourism activities become more popular, coastal communities in the United States and around the world have an increasing need to come to terms with the legal and governance challenges of wildlife tourism activities.*

---

\*Dr. Catherine Macdonald, Lecturer in the Department of Marine Ecosystems and Society at the University of Miami's Rosenstiel School of Marine and Atmospheric Science, and Director of Field School, a marine science research and education organization.

\*\*Dr. Andrew Carter, J.D., Lecturer at the Abess Center for Ecosystem Science and Policy, Senior Conservation Policy Analyst at the Center for Conservation Innovation, Defenders of Wildlife, and affiliate faculty in the Department of Environmental Science and Policy, George Mason University.

I.	INTRODUCTION .....	288
	A. <i>Methods</i> .....	289
	B. <i>Shark Feeding Tourism and Economic Valuation</i> .....	290
II.	LEGAL IMPLICATIONS OF SHARK FEEDING.....	292
	A. <i>Governmental Liability for Shark Bites</i> .....	292
	B. <i>Jurisdictional Issues</i> .....	297
III.	CASE STUDY 1: FLORIDA .....	300
	A. <i>Florida Legal Precedents for Liability Associated with Shark Attacks</i> .....	301
	B. <i>History of the Florida Ban</i> .....	303
	C. <i>The Industry's Proposed Self-Regulation</i> .....	306
	D. <i>Legal Basis for Regulation by the Florida Fish and Wildlife Commission</i> .....	308
	E. <i>The Administrative Hearing Complaint: The Industry Appeals</i> .....	312
	F. <i>A Second Attempt to Derail the Rule: The Industry Brings a Civil Suit</i> .....	315
	G. <i>Enforcing the Feeding Ban in Florida</i> .....	317
IV.	CASE STUDY 2: HAWAII .....	319
	A. <i>Hawaii's Legislative Ban on Shark Feeding</i> .....	319
	B. <i>Enforcing the Shark Feeding Ban in Hawaii</i> .....	322
V.	CONCLUSION .....	323

## I. INTRODUCTION

In recent years, a number of researchers have suggested that shark-based ecotourism can play an important role in advancing legal protections for sharks and other vulnerable species of elasmobranch. It has been argued that shark ecotourism can create economic incentives that encourage governments and individuals to protect sharks from anthropogenic threats including overfishing, finning, and indiscriminate use of longlines.<sup>1</sup> In spite of concerns about the potential effects of feeding sharks on both public safety and animal health, studies attempting to assess the effects of shark-based tourism on shark

---

<sup>1</sup> See, e.g., Austin Gallagher & Neil Hammerschlag, *Global Shark Currency: The Distribution, Frequency, and Economic Value of Shark Ecotourism*, 14 CURRENT ISSUES IN TOURISM 797, 797 (2011); Gabriel Vianna et al., *Socio-economic Value and Community Benefits from Shark-Diving Tourism in Palau: A Sustainable Use of Reef Shark Populations*, BIOLOGICAL CONSERVATION, Jan. 2012, at 267. For a review of anthropogenic threats from tourism on shark species generally, see Christine A. Ward-Paige, *The Role of the Tourism Industry*, in SHARKS: CONSERVATION, GOVERNANCE AND MANAGEMENT 157, 157 (Erika Techera & Natalie Klein eds., 2014).

behavior and well-being are equivocal.<sup>2</sup> Most report some behavioral changes in participating sharks, but the significance and severity of these changes is the subject of intense and ongoing debate.<sup>3</sup>

Despite a lack of clear evidence that shark tourism creates a hazard for participants or the general public, the economic benefits associated with shark ecotourism still appear to be too small to secure the future of shark species—or even of shark ecotourism as a commercial activity—and fail to account for the potential opportunity costs associated with increases (or perceived increases) in shark attack risk due to such activities. In response to concerns over the marine conservation impacts of shark feeding, as well as the health and safety of human beings who come into contact with sharks attracted by feeding activities, some state and local governments have instituted, or considered instituting, legal bans on commercial shark feeding.<sup>4</sup> These concerns are undoubtedly related not just to possible safety risks, but also to the concomitant potential tort liability for governmental entities managing the waters in which humans and sharks may interact.

This Article investigates the interlocking legal, economic, and conservation issues surrounding the implementation of such regulation. In the first section, we provide an overview of shark ecotourism and legal risks which may arise for the state as a result. This section discusses legal and economic reasons that the implementation of bans on shark tourism by many U.S. states and municipalities was predictable (and, perhaps, inevitable). The second section provides an exploration of two case studies based on introductions of shark feeding bans. The first case study, in Florida, traces the failure of a small but relatively organized and well-funded local shark tourism industry to avoid being regulated out of legal existence. This case study demonstrates the potential for lengthy and contentious debates both in and out of court to which such regulations may lead. The second case study, in Hawaii, focuses on some of the difficulties associated with effectively enforcing such a ban once it becomes law.

### A. Methods

This Article is based on legal research into the risks shark tourism might pose to states, utilizing legal databases and a range of primary

---

<sup>2</sup> Austin J. Gallagher et al., *Biological Effects, Conservation Potential, and Research Priorities of Shark Diving Tourism*, BIOLOGICAL CONSERVATION, Apr. 2015, at 366.

<sup>3</sup> See, e.g., R. Karl Laroche et al., *Effects of Provisioning Ecotourism Activity on the Behaviour of White Sharks Carcharodon Carcharias*, MARINE ECOLOGY PROGRESS SERIES, May 24, 2007, at 199; Eric Clua et al., *Business Partner or Simple Catch? The Economic Value of the Sicklefins Lemon Shark in French Polynesia*, 62 MARINE & FRESHWATER RES. 764, 767 (2011); Juerg M. Brunnschweiler & Adam Barnett, *Opportunistic Visitors: Long-Term Behavioural Response of Bull Sharks to Food Provisioning in Fiji*, PLOS ONE, Mar. 13, 2013, at 1.

<sup>4</sup> Sarah Kearte, *Should the US Ban Shark Feeding?*, EARTH TOUCH NEWS (Nov. 8, 2016), <https://perma.cc/72CS-QQCA>.

source documents. For in-depth information on the Florida ban, the Florida Fish and Wildlife Conservation Commission (FFWC) provided hundreds of pages of minutes, memoranda and other documents in response to our requests, related to the policy and legal issues around shark tourism. Additional historical information was gathered from news coverage of these events in both Florida and Hawaii.

### *B. Shark Feeding Tourism and Economic Valuation*

Estimates suggest that marine tourism and ecotourism are an important and growing part of the global tourism economy, with nature-based “ecotourism” activities worth an estimated \$10 to \$17.5 billion per year worldwide.<sup>5</sup> In a marine context, it has been suggested that ecotourism may serve to generate funds for research and conservation, raise the profile of targeted habitats or species, and create economic rationales for conservationist policies.<sup>6</sup> Non-governmental organizations increasingly view such tourism as both a conservation and “pro-poor” development strategy.<sup>7</sup>

While the economic values associated with shark tourism are relatively modest in comparison to ecotourism globally, at an estimated \$314 million per year, they are still significant enough to support an estimated 10,000 jobs globally.<sup>8</sup>

There are significant debates about the usefulness of economic measures in calculating the “value” of a species, and particularly the value of individual animals participating in tourism.<sup>9</sup> This is in part a practical matter—for example, published analyses of the economic value of sharks for consumption or tourism often fail to account for the value people may place on the mere existence of sharks, or the ecological contributions sharks make to maintaining healthy ocean ecosystems, both of which may constitute a meaningful portion of the total estimated value of a population.<sup>10</sup>

---

<sup>5</sup> DAVID A. FENNELL, ECOTOURISM: AN INTRODUCTION 163 (1999); MARK ORAMS, MARINE TOURISM: DEVELOPMENT, IMPACTS AND MANAGEMENT 83 (1999).

<sup>6</sup> Erlet Carter, *Between the Devil and the Deep Blue Sea: Dilemmas for Marine Ecotourism*, in MARINE ECOTOURISM: ISSUES AND EXPERIENCES 37, 39 (Brian Garrod & Julie C. Wilson eds., 2003); Clem Tisdell & Clevo Wilson, *Wildlife-Based Tourism and Increased Support for Nature Conservation Financially and Otherwise: Evidence from Sea Turtle Ecotourism at Mon Repos*, 7 TOURISM ECON. 233, 233 (2001).

<sup>7</sup> Caroline Ashley & Dilys Roe, *Making Tourism Work for the Poor: Strategies and Challenges in Southern Africa*, 19 DEV. SOUTHERN AFR. 61, 62, 63, 67 (2002).

<sup>8</sup> Andrés M. Cisneros-Montemayor et al., *Global Economic Value of Shark Ecotourism: Implications for Conservation*, 47 ORYX 381, 381 (2013).

<sup>9</sup> James Catlin et al., *Valuing Individual Animals Through Tourism: Science or Speculation?*, 157 BIOLOGICAL CONSERVATION 93, 93 (2013).

<sup>10</sup> FLORIDA FISH & WILDLIFE CONSERVATION COMMISSION, PUBLIC COMMENT: SHARK FEEDING WORKSHOP 3 (July 25, 2000). For a broad discussion of the problem of valuing individual animals, see J. Catlin et al., *Valuing Individual Animals Through Tourism: Science or Speculation?*, 157 BIOLOGICAL CONSERVATION 93, 93–98 (2013). See also R. Bandara & C. Tisdell, *Comparison of Rural and Urban Attitudes to the Conservation of*

Other authors have taken issue with the very idea of using economic valuation as a conservation tool, suggesting the ethical and moral arguments for conservation are weakened when economic rationalism is emphasized as a motive to conserve nature.<sup>11</sup> The reality that many tourist uses of species and areas are harmful to wildlife or ecosystems, or are incompatible with other uses or mutually exclusive, further complicates estimates of value, given that (for example) shark tourism and beach tourism may have difficulty operating in the same areas.<sup>12</sup> There is also considerable doubt about the impact of these activities on the attitudes and behaviors of participants, with some authors arguing that tourism experiences can lead to pro-environmental behaviors,<sup>13</sup> while others are more skeptical that these experiences create lasting attitudinal or behavioral changes in most participants.<sup>14</sup> Potential impacts would presumably be closely linked to the educational content and quality of the tourism experience, which will also inevitably vary, based both on operator resources and customer preferences.<sup>15</sup>

There is a good deal of contention about the impacts of shark feeding tourism on both humans and sharks. Those who feel that it can meaningfully contribute to conservation point to a dearth of evidence that shark feeding causes serious, harmful ecological impacts, highlight the role of economic valuation as a tool for encouraging governments to protect sharks, and report, generally anecdotally, that direct experiences with sharks can change people's views about them. Those who are less sanguine observe that a lack of proof of harm does not necessarily represent a lack of harm, that habituation and feeding of terrestrial predators is widely understood to be inadvisable, and that the public relations gains of sharks as a result of tourism are speculative.<sup>16</sup> In this data-limited setting, debates are more likely to be based on emotions or opinion than on available facts, and in the absence

---

*Asian Elephants in Sri Lanka: Empirical Evidence*, 110 *BIOLOGICAL CONSERVATION* 327, 341 (2003) (describing a study on local attitudes towards elephants, where the animals' non-use economic value was not considered by locals).

<sup>11</sup> E.g., Oliver Krüger, *The Role of Ecotourism in Conservation: Panacea or Pandora's Box?*, 14 *BIODIVERSITY & CONSERVATION* 579, 594–95 (2005); Douglas J. McCauley, *Selling Out on Nature*, 443 *NATURE* 27, 27–28 (2006); Jack Coburn Isaacs, *The Limited Potential of Ecotourism to Contribute to Wildlife Conservation*, 28 *WILDLIFE SOC'Y BULL.* 61, 61 (2000).

<sup>12</sup> *ECOTOURISM: ISSUES AND EXPERIENCES* 40, 45 (Brian Garrod & Julie C. Wilson eds., 2003).

<sup>13</sup> Andrés M. Cisneros-Montemayor et al., *supra* note 8, at 386.

<sup>14</sup> Clem Tisdell & Clevo Wilson, *Ecotourism for the Survival of Sea Turtles and Other Wildlife*, 11 *BIODIVERSITY & CONSERVATION* 1521, 1524 (2002); Liam David Graham Smith et al., *The Impacts of Profound Wildlife Experiences*, 24 *ANTHROZOÖS* 51, 60–61 (2011).

<sup>15</sup> Chris Ryan et al., *The Gaze, Spectacle and Ecotourism*, 27 *ANNALS TOURISM RES.* 148, 158–59 (2000); Roy Ballantyne et al., *Tourists' Support for Conservation Messages and Sustainable Management Practices in Wildlife Tourism Experiences*, 30 *TOURISM MGMT.* 658, 663 (2009).

<sup>16</sup> Mark B. Orams, *Feeding Wildlife as a Tourism Attraction: A Review of Issues and Impacts*, 23 *TOURISM MGMT.* 281, 284, 288 (2002).

of scientific consensus, policymakers are likely to act based on local or regional political and legal realities.<sup>17</sup>

## II. LEGAL IMPLICATIONS OF SHARK FEEDING

The risk of an unprovoked shark bite occurring is low: in 2019 only 64 cases were reported worldwide, out of 105 bites total.<sup>18</sup> Yet many governmental agencies may be unwilling to tolerate even this low risk, particularly in areas that are comparative “hotspots” for shark bite incidents.<sup>19</sup> For example, in 2019, 51% of unprovoked shark bites in the United States occurred in Florida, with 9 out of 21 bites occurring in Volusia County alone.<sup>20</sup> Furthermore, even where risks are low, governments reliant on beach tourism dollars may want to avoid making the presence of sharks in the area public information, and face possible perceptions that beaches are unsafe. Finally, although this is contested, some recent research suggests a modest increase in unprovoked shark bites in recent decades, which is not fully explained by increases in human or shark populations.<sup>21</sup>

While a full discussion of the relevant legal issues would take up multiple volumes, the two primary legal issues implicated are: 1) the liability of governmental entities for shark injuries, the potential risks of which might give rise to a ban on shark provisioning tourism; and 2) jurisdictional issues relating to the ability of a specific governmental entity to implement and enforce such a ban.

### *A. Governmental Liability for Shark Bites*

Governmental entities at the federal, state, and local level may face potential liability for animal attacks that occur in areas over which they have control, though whether liability attaches depends on the law of

---

<sup>17</sup> David Jolly, *Priced Off the Menu? Palau's Sharks Are Worth \$1.9 Million Each, a Study Says*, N.Y. TIMES (May 2, 2011), <https://perma.cc/M7DM-8P3S>.

<sup>18</sup> We follow the generally accepted conventions of marine science, defining “unprovoked” attacks as “incidents where an attack on a live human occurs in the shark’s natural habitat with no human provocation of the shark.” International Shark Attack File: *Yearly Worldwide Shark Attack Summary*, FLA. MUSEUM, <https://perma.cc/KWY2-4R8K> (last visited Jan. 25, 2020). These may be distinguished from attacks where the victim provoked the shark in some manner, such as divers grabbing a shark, anglers attempting to remove a fishing hook from a shark’s mouth, or divers feeding sharks or spearfishing near them. *See id.* We also attempt, where practical, to refer to shark “bites” rather than shark “attacks” as more accurately representing shark–human interactions. Christopher Neff & Robert Hueter, *Science, Policy, and the Public Discourse of Shark “Attack”: A Proposal for Reclassifying Human-Shark Interactions*, 3 J. ENVTL. STUD. & SCI. 65 (2013).

<sup>19</sup> *See* Neff & Heuter, *supra* note 18, at 71–72.

<sup>20</sup> International Shark Attack File, *supra* note 18.

<sup>21</sup> *See* Daryl McPhee, *Unprovoked Shark Bites: Are They Becoming More Prevalent?*, 42 COASTAL MGMT. 478, 479 (2014). *But see also* Francesco Ferretti et al., *Reconciling Predator Conservation with Public Safety*, 13 FRONTIERS ECOLOGY & ENV’T 412, 413 (2015).

the jurisdiction as well as the specific factual circumstances surrounding a given incident. Such liability would typically take the form of an action for negligence, which occurs with the existence (and violation of) a legal duty to use care, proximately causing injury to another.<sup>22</sup> Landowners generally are liable for negligence for failing to maintain their premises in a safe condition, though the exact duty may differ in some jurisdictions based on the status of the person coming onto the land.<sup>23</sup> In most cases, however, there is at minimum a duty to warn licensees and invitees of dangerous conditions if such conditions are known.<sup>24</sup>

In the American civil court system, there are two primary hurdles a defendant must pass to successfully sue the state for damages arising from a shark bite in state-controlled areas. First is the doctrine of sovereign immunity, codified in both federal law as well as individual state laws in various forms, which immunizes the “sovereign”—whether federal, state, tribal, or local government—from being sued without its consent, even if liability could be established.<sup>25</sup> Absolute immunity against any court action existed at the federal level until 1887, when Congress authorized contract actions;<sup>26</sup> subsequently, in 1946, Congress passed the Federal Tort Claims Act that waived immunity for certain claims arising from actions taken by government employees in the scope of their employment.<sup>27</sup> Most state governments have since followed suit, implementing their own waiver of sovereign immunity, though the exact format differs from state to state.<sup>28</sup> The different statutory and common-law mechanisms governing sovereign immunity at the federal, state, and local levels are complex and a full discussion would go well beyond the scope of this paper.<sup>29</sup> However, both at the federal and state level, either the statutes or the courts have generally restricted such waivers to “operational” functions as opposed to “planning,” or “discretionary” functions, to avoid allowing courts to “second guess policy decisions that are more properly made by the legislature . . .”<sup>30</sup> To put it plainly, governmental entities are given discretion to decide how things are to be

---

<sup>22</sup> 57A AM. JUR. 2D *Negligence* § 5 (2019).

<sup>23</sup> For a discussion of the evolution of premise liability generally, see Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1051 (2009).

<sup>24</sup> Restatement (Second) of Torts §§ 341, 341A (Am. Law Inst. 1975); 62A AM. JUR. 2D *Premises Liability* § 548 (2019).

<sup>25</sup> Katherine Florey, *Sovereign Immunity’s Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 765 (2009).

<sup>26</sup> Cassandra R. Cole & Chad Marzen, *A Review of State Sovereign Immunity Statutes and the Management of Liability Risks by States*, J. INS. REG., Dec. 1, 2013, at 45, 47.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 48.

<sup>29</sup> For an overview and discussion of state sovereign immunity statutes, see for example *id.* at 46–82. For a history (and criticism) of sovereign immunity generally in the United States, see for example Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–24 (2001).

<sup>30</sup> Florey, *supra* note 25, at 791.

done at a policy level without oversight by the courts. Once they have made a policy decision, however, they can be held responsible by the courts for negligently implementing that policy.<sup>31</sup> In theory, this provides absolute protection of policy decisions; however, in practice the boundary between “operational” and “planning” has been frequently blurry and uncertain.

Second, even where sovereign immunity has been waived, the governmental actor faces the same judicial determination of liability as any other landowner. Under Anglo-American common law principles, liability generally does not attach to any landowner for unforeseen attacks by wild animals under the doctrine of *ferae naturae*, which holds that a landowner cannot be held liable for the act of a wild animal, provided the landowner cannot be considered to own or intentionally harbor the animal and did not introduce the non-native wild animal to the area.<sup>32</sup> However, even if the doctrine protects the landowner from liability for the actions of the animal, the landowner still may be liable for a more generalized failure to maintain the property free of dangerous conditions (or failure to warn visitors of those conditions).<sup>33</sup>

The only reported United States case found to address liability for shark attacks specifically is *Wamser v. City of St. Petersburg*.<sup>34</sup> On August 3<sup>rd</sup>, 1969, a 13-year-old boy was bitten on the foot and leg by a shark four feet in length while he was swimming about twenty-five feet from shore on a public beach in Saint Petersburg, Florida, near a lifeguard station.<sup>35</sup> Subsequently, the victim’s family filed suit against the City of Saint Petersburg for failing to adequately warn them about the risk of shark attack on city beaches.<sup>36</sup> Although there had been no previous recorded attacks at this beach, the family presented affidavits claiming that both shore patrol boats and local fishermen were aware that sharks sometimes approached beaches closely there.<sup>37</sup> However, lifeguards and beach managers had no knowledge of a potential shark threat and were not aware of previous shark sightings, except for having investigated a few reports that turned out to be bottlenose dolphins.<sup>38</sup> The trial court granted summary judgment to the defendant city, reasoning that it could not be held responsible for the actions caused by a wild creature in its natural habitat.<sup>39</sup> Upon appeal, the Florida Second District Court of Appeals ruled that the city was under no obligation to

---

<sup>31</sup> *See id.*

<sup>32</sup> *Hanrahan v. Hometown Am., L.L.C.*, 90 So. 3d 915, 916 (Fla. Dist. Ct. App. 2012).

<sup>33</sup> *See, e.g., Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732, 733 (Fla. Dist. Ct. App. 2012).

<sup>34</sup> 339 So. 2d 244, 245 (Fla. Dist. Ct. App. 1976).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 246.

<sup>38</sup> *Id.* at 245.

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



seek out information on a threat with no history of occurrence in that locale.<sup>40</sup> The court raised the *ferae naturae* doctrine, holding that

The rule is that generally the law does not require the owner or possessor of land to anticipate the presence of or guard an invitee against harm from animals *ferae naturae* unless such owner or possessor has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality.<sup>41</sup>

This decision has since been viewed as providing significant protection against liability related to shark attacks for municipalities maintaining public beaches—provided that they post warnings on beaches where a risk of attack is known to exist.<sup>42</sup> However, the *Wamser* court did not address sovereign immunity because it did not apply at the time; while the Florida Constitution established absolute sovereign immunity for the state and its political subdivisions,<sup>43</sup> when the attack occurred the Florida Supreme Court had allowed recovery against municipal corporations without distinguishing between operational and planning functions.<sup>44</sup> This would be changed by the sovereign immunity waiver statute in 1975, which expressly protected municipalities through sovereign immunity (except, of course, where it was waived) and instituted the operational/planning distinction.<sup>45</sup>

Despite sovereign immunity and the *ferae naturae* doctrine, shark feeding tourism could conceivably impose liability on both state and local governments that did not take steps to protect or warn the public. There are several cases involving incidents outside the United States where liability was acknowledged in somewhat similar circumstances. A resort in Acapulco was successfully sued after a shark attack for failing to warn guests that hotel garbage was discharged into the ocean, potentially attracting sharks and conditioning them to feed in that area.<sup>46</sup> Similarly, following an attack in which a New York man lost his leg while vacationing in Grand Bahama, the victim sued on the grounds that the resort had failed to warn him of shark feeding tourism taking place a mile offshore, contending that he would not have gone swimming in the ocean had he been aware of this activity.<sup>47</sup> The victim had previously said he would consider settling the case for between \$3 and

---

<sup>40</sup> *Id.* at 246.

<sup>41</sup> *Id.*

<sup>42</sup> *Hanrahan*, 90 So. 3d 915, 918 (Fla. Dist. Ct. App. 2012).

<sup>43</sup> FLA. CONST. art. X, § 13.

<sup>44</sup> *Woodford v. City of St. Petersburg*, 84 So. 2d 25, 26–27 (Fla. 1955).

<sup>45</sup> FLA. STAT. ANN. § 768.28 (1975).

<sup>46</sup> This was in some ways an important test case; as lawyer Harry Lipsig acknowledged, people initially thought he was “mad,” and a common initial response was “[w]ho are you going to sue? The shark?” Patricia Morrisroe, *Samurai Lawyer*, N.Y. MAG., Apr. 5, 1982, at 38.

<sup>47</sup> John Marzulli, *Shark Victim’s 25M Bite N.Y. Banker Suing Resort After Losing Part of Leg*, N.Y. DAILY NEWS (Dec. 1, 2003), <https://perma.cc/AE4E-4X4N>.

\$6 million.<sup>48</sup> Although both of these cases entailed lawsuits against private entities, not states, they emphasize the extent to which knowledge of shark feeding and associated risks can potentially create significant liability, and point to the reasons (financial and practical) that may lead to settlements even in cases a plaintiff would not be likely to win.

Cases involving activity that attracts other potentially dangerous animals may also provide insight into governmental liability for shark attacks. For example, several courts have addressed the issue of liability over bear attacks, including situations somewhat analogous to feeding activities, in terms of both the *ferae naturae* doctrine and sovereign immunity. For example, the Supreme Court of Alaska's decision in *Carlson v. State*<sup>49</sup> provides an analysis of both sovereign immunity as well as the doctrine of *ferae naturae* in regards to an animal attack, albeit a terrestrial one. In that case the appellant was attacked by a bear that had been attracted by overflowing drums of litter on a state roadside turnout.<sup>50</sup> While the state had generally stopped arranging for trash collection from roadside turnouts on October 1<sup>st</sup> of each year, there appeared to be no written policy governing such collection.<sup>51</sup> The victim sued the state, alleging that it had negligently failed to collect the trash or warn the public about bears in the area attracted to the trash, but the trial court granted summary judgments to the state, holding that the decision to halt trash collection on October 1<sup>st</sup> was a discretionary act protected by sovereign immunity.<sup>52</sup>

The Supreme Court of Alaska overturned the ruling, finding that while the decision not to maintain highway turnouts in the winter might be a policy decision immune from liability, decisions about how exactly to cease trash pick-up were operational in nature, and liability could attach under Alaska's codified waiver of sovereign immunity.<sup>53</sup> The court then addressed whether the judgment (if not its reasoning) could still be upheld under the alternate grounds that even if sovereign immunity did not attach, the state was not liable for negligence.<sup>54</sup> The court rejected the state's argument that liability did not exist under the doctrine of *ferae naturae*, finding that the appellant alleged liability not because the state was in possession or control of the bear, but rather because the state knew a dangerous condition existed but failed to either correct it or warn people of the danger.<sup>55</sup> The court then sent the issue back to the trial court for disposition under those guidelines.<sup>56</sup>

---

<sup>48</sup> *Id.*

<sup>49</sup> *Carlson v. Alaska*, 598 P.2d 969, 973–74 (Alaska 1979).

<sup>50</sup> *Id.* at 971.

<sup>51</sup> *Id.* at 972.

<sup>52</sup> *Id.* at 970.

<sup>53</sup> *Id.* at 973; *see also* ALASKA STAT. ANN. § 09.50.250 (West 2019).

<sup>54</sup> *Carlson*, 598 P.2d at 973.

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

<sup>56</sup> *Id.* at 974.

Similarly, liability for shark bites against federal, state, or local governments would depend on the specific facts of the incident.<sup>57</sup> Failure to implement a feeding ban at a policy level (such as through legislation or formal administrative rules) would likely be considered a discretionary function firmly within the purview of the other branches of government and thus immune from suit.<sup>58</sup> However, where a plaintiff could convince a court that failures to prevent a shark attack arose from a negligent action taken in the implementation of an otherwise protected policy decision, the governmental unit might not be immune from suit.<sup>59</sup>

Even where a governmental unit reasonably believes itself to be protected under sovereign immunity, or exercises great care, the cost of defending itself against an unsuccessful suit may still be high. For smaller municipalities especially, the cost of losing a wrongful death or negligence suit might lead to millions of dollars in damages that it does not have available, particularly in jurisdictions where waiver of sovereign immunity has not been coupled with a damages cap or a prohibition on punitive damages.<sup>60</sup> Furthermore, shark feeding bans may represent a more desirable option than posting signs warning about potential shark activity—which, from the state’s perspective, might be a legally prudent move, but in many locations would be economically unfeasible if it kept away beach-going tourists.

### *B. Jurisdictional Issues*

Once a governmental unit has decided to implement a ban or limit on shark feeding, the next step is for that unit to determine the extent to which it has the authority to pass such a ban, and the manner in which best to do it.<sup>61</sup> Such regulation of coastal waters and activities is complicated by overlapping jurisdictions on the part of federal, state,

---

<sup>57</sup> See, e.g., *Wamser v. City of St. Petersburg*, 339 So. 2d 244, 246 (Fla. Dist. Ct. App. 1976); *Carlson*, 598 P.2d at 974–75.

<sup>58</sup> *Carlson*, 598 P.2d at 972.

<sup>59</sup> *Id.* at 972–73.

<sup>60</sup> While numerous states have instituted caps on damages and/or a prohibition on punitive damages, many states lack one or both of those features. See *State Sovereign Immunity and Tort Liability*, NCSL.ORG, <https://perma.cc/XA4N-ZZ73> (last updated Sept. 8, 2010). For example, Florida limits damage recovery against the state and its subdivisions to \$300,000 absent legislative approval of a higher amount and does not allow punitive damages. FLA. STAT. § 768.28(5) (2019). Given that Florida premises liability case verdicts frequently extend into several millions of dollars, but 84 of Florida’s 410 municipalities have budgets of less than \$5 million a year for fiscal year 2019–2020, the potential savings could be existentially significant. *Top 50 Premises Liability Verdicts in Florida in 2018*, TOPVERDICT **Error! Hyperlink reference not valid.** (last visited Jan. 25, 2020); *Local Government Financial Reporting*, FLA. OFFICE OF ECON. & DEMOGRAPHIC RESEARCH, <https://perma.cc/V9X2-KTGK> (last updated Jan. 27, 2020). Even where municipalities have insurance coverage for premise liability, verdicts that exceed coverage could be devastating, and large claims could lead to significantly increased premiums.

<sup>61</sup> See *Carlson*, 598 P.2d at 973.

and municipal governments and agencies.<sup>62</sup> The federal government has broad authority to enact and enforce laws and regulations governing use of coastal resources through article I, section 8, clause 3 of the United States Constitution, which grants Congress the power “[t]o regulate Commerce . . . among the several States.”<sup>63</sup> The Supreme Court has held on numerous occasions that this grants the federal government ultimate authority over navigable waters.<sup>64</sup> For example, in *Gilman v. Philadelphia*, it held that “[t]he power to regulate commerce comprehends the control for that purpose . . . all the navigable waters of the United States . . . they are the public property of the nation . . .”<sup>65</sup> At the present time, it has instituted no direct federal ban on shark feeding, although one was introduced by Florida Senator Bill Nelson as part of the federal Access for Sportfishing Act of 2016.<sup>66</sup> Section 3 of the bill contains the following provision:

[I]t is unlawful for any person—

(1) to engage in shark feeding; or

(2) to operate a vessel for the purpose of carrying a passenger for hire to any site to engage in shark feeding or to observe shark feeding . . . .

The term ‘shark feeding’ means the introduction of food or any other substance into the water to feed or attract sharks for any purpose other than to harvest sharks.<sup>67</sup>

Should such a ban ultimately pass, it would preempt any state- or local-level bans through the Supremacy Clause of the U.S. Constitution.<sup>68</sup>

For state and local governments and agencies, jurisdictional boundaries can prevent regulation or enforcement of feeding bans; such limitations became issues in both of the case studies discussed below. The Federal Submerged Lands Act of 1953 gave states title to both land underlying navigable waters as well as the natural resources (including specifically marine life) to a distance of no more than three geographical

---

<sup>62</sup> U.S. COMM’N ON OCEAN POL’Y, REVIEW OF U.S. OCEAN AND COASTAL LAW 2–3 (2004), <https://perma.cc/6XDY-DCH6>.

<sup>63</sup> See U.S. CONST. art. I, § 8, cl. 3, 10 (depending on the specific law at issue, Congress’ power to regulate coastal areas may also arise under other, albeit more narrow, Constitutional provisions, such as its authority to pass laws regulating customs and tariffs, naval forces, and treaties, and to “define and punish . . . Felonies committed on the high Seas.”).

<sup>64</sup> See, e.g., *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

<sup>65</sup> *Id.* at 713, 724–25.

<sup>66</sup> S. REP. NO. 114-388, § 3, at 4 (2016).

<sup>67</sup> *Id.* at 7 (as elsewhere, this law framed the feeding of sharks for the purpose of “harvesting” them as an acceptable behavior, while feeding them for viewing or recreational purposes would have become a federal offense).

<sup>68</sup> U.S. CONST., art. VI, cl. 2.

miles (or, for Gulf Coast waters, three leagues or nine miles).<sup>69</sup> This may require more creative approaches of indirect regulation, such as refusing to grant commercial licenses to dive operators who feed sharks, even if the feeding is outside the boundaries controlled by local or state governments.

In the absence of federal action, Congress has allowed the states to institute their own coastal regulation (except, of course, where such regulation would conflict with existing federal law). The Coastal Zone Management Act of 1972 put in place a shared management framework for coastal areas that explicitly allowed and encouraged state and local management activities to protect marine resources.<sup>70</sup> Furthermore, where Congress has not either explicitly or implicitly preempted an area from state regulation, individual states also have broad police powers to regulate the general welfare of their inhabitants, which includes protecting their environment and the safety and health of persons.<sup>71</sup> In turn, state governments frequently delegate these powers to both state agencies and local municipal governments, though the extent to which such powers can be delegated, exercised, or withdrawn differ from state to state, as do how narrowly or broadly state courts will interpret powers so delegated.<sup>72</sup> Just as federal law can preempt state law, state law can preempt conflicting laws and regulations enacted by local governments.<sup>73</sup>

Authority at the state or local level is dependent on the states' constitutional or statutory provisions governing the delegation of power.<sup>74</sup> The justification behind a shark feeding ban may also be relevant to that determination; in a jurisdiction where the state government retains strong control over environmental regulation but delegates police powers concerning safety more liberally, a feeding ban created purely for the purpose of protecting sharks might be found to be outside a municipality's power to enact, while a feeding ban intended to protect the safety of beachgoers might not be. Furthermore, counties and municipalities within the same state may have differing levels of police power depending on the legislative history of that state.<sup>75</sup> For example, counties in Florida that have adopted what are called home-rule charters (in essence, county-level constitutions), have greater local authority than those counties that have not.<sup>76</sup> Similarly, while the state may delegate some rulemaking powers to administrative agencies (for

---

<sup>69</sup> 43 U.S.C. §§ 1311, 1312 (2002).

<sup>70</sup> 16 U.S.C. § 1452 (1972).

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

<sup>72</sup> See J.F. ZIMMERMAN, *STATE-LOCAL RELATIONS: A PARTNERSHIP APPROACH* 4 (1995).

<sup>73</sup> *Preemption Conflicts Between State and Local Governments*, BALLOTEDIA, <https://perma.cc/K39B-3S3D> (last visited Nov. 11, 2019).

<sup>74</sup> JON D. RUSSELL & AARON BOSTROM, *AM. CITY COUNTY EXCHANGE WHITE PAPER, FEDERALISM, DILLON RULE AND HOME RULE* 2–3 (2016), <https://perma.cc/S8QB-YE3D>.

<sup>75</sup> See George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, 643–45 (1993).

<sup>76</sup> *Id.* at 679 n.174, 704 n.311.

example, state agencies regulating environmental matters), the scope of such powers are usually narrowly construed by courts; an agency cannot take actions unless it has been clearly given the authority to do so.<sup>77</sup>

### III. CASE STUDY 1: FLORIDA

In 2000 and 2001, the FFWC became embroiled in a debate about whether or not they should ban the feeding of sharks in state waters.<sup>78</sup> Although the term used to describe the practice they intended to regulate varied—the February 2001 meeting was overwhelmingly about “shark” or “predator” feeding, while the September 2001 meeting talked primarily about “fish feeding” (sharks are of course cartilaginous fish, but in the minutes they are sometimes still identified separately, i.e., “fish” and “shark” feeding)—ultimately the Commission seems to have settled on the more general “marine life feeding.”<sup>79</sup>

It seems clear, however, that regardless of terminology, the real target of the ban was unequivocally shark feeding. The role of a proposed ban in protecting “human safety” was consistently an important theme in FFWC meetings<sup>80</sup>—one that would hardly seem necessary if the purpose of banning marine life feeding were the avoidance of aggressive or unnatural behaviors in small reef fish incapable of causing meaningful harm to humans. In total, 93% of the mentions in FFWC meeting minutes of animals/categories associated with the ban can be applied to sharks (Sharks (55%), Fish (25%), “Predator” (13%)) (Figure 1).<sup>81</sup>

---

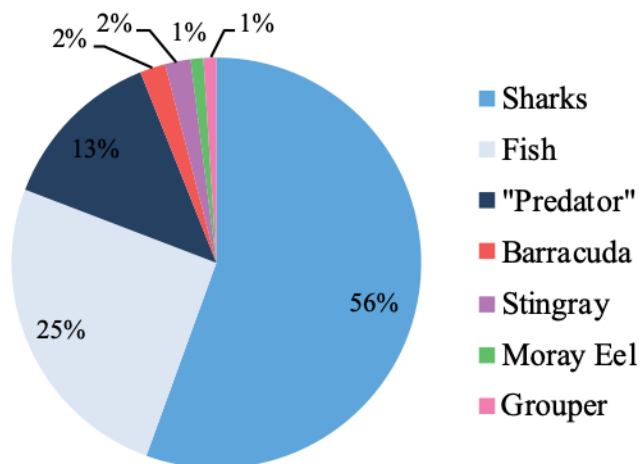
<sup>77</sup> ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 139–40 (2009).

<sup>78</sup> See generally FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 22 (Feb. 2–4, 2000); FLA. FISH AND WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 17–19 (Sept. 6–8, 2000); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 21–27 (May 23–25, 2001); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 20–23 (Sept. 5–7, 2001); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 17–20 (Oct. 31–Nov. 2, 2001).

<sup>79</sup> See FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 22 (Feb. 2–4, 2000); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 20–23 (Sept. 5–7, 2001).

<sup>80</sup> See FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 22 (Feb. 2–4, 2000); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 17 (Sept. 6–8, 2000); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 23–24 (May 23–25, 2001); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 22 (Sept. 5–7, 2001); FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 18 (Oct. 31–Nov. 2, 2001).

<sup>81</sup> See *infra* Figure 1 comparing the number of occurrences of the words “shark,” “fish,” “predator,” “barracuda,” “stingray,” “moray eel,” and “grouper” in the meeting minutes *supra* note 78.



**Figure 1. Percentage Relevant Terms in FFWC Minutes**

Although the shark feeding debate would be revisited by the Commission over years of meetings, and Commissioners and staff would listen to many hours of public debate on the topic and receive multitudes of letters in support of and opposition to a ban,<sup>82</sup> the passage of a ban on feeding sharks in Florida waters was nearly inevitable. Florida case law created a specter of state and local liability should the Commission fail to act;<sup>83</sup> while any action which was stringent enough to provide reasonable liability protection would likely be unacceptable to the dive industry.<sup>84</sup> It seems as though the core of this debate was not truly about what was good for sharks, marine resource users or marine ecosystems—even if one believes the end results achieved those goals—but about what best protected state and local governments from potential liability associated with shark bites.

#### *A. Florida Legal Precedents for Liability Associated with Shark Attacks*

As discussed above, *Wamser* suggests that where a governmental unit is aware of the presence of sharks, failure to take action might lead to liability.<sup>85</sup> While the *Wamser* court found lack of knowledge of sharks in the area protected the city in that case, it also suggested that where

<sup>82</sup> FLA. FISH & WILDLIFE CONSERVATION COMM'N, MINUTES OF THE COMMISSION MEETING 17 (Sept. 6–8, 2001).

<sup>83</sup> See *infra* Part V.A.

<sup>84</sup> FLA. FISH & WILDLIFE CONSERVATION COMM'N, MINUTES OF THE COMMISSION MEETING 18 (Sept. 6–8, 2001).

<sup>85</sup> *Wamser*, 339 So. 2d 244, 246 (Fla. Dist. Ct. App. 1976).

the governmental unit *was* aware of the presence of sharks, it might be liable for failing to warn the public or take other steps to reduce the risk of danger.<sup>86</sup>

Another Florida case, *Florida Department of Natural Resources v. Juan A. Garcia, Jr.*<sup>87</sup> (*Garcia*) provides an example of the potential issues facing policymakers in Florida when managing (and regulating) coastal recreational areas.<sup>88</sup> In that case, the appellee was injured when he dove and struck his head on debris remaining in the water following the demolition of a South Beach pier, rendering him quadriplegic.<sup>89</sup> The trial court found in favor of the state on summary judgment, finding that the state had no duty of care to swimmers since it had not publicly designated the beach as a swimming area, and in any event the state had delegated any duty to maintain the area to the city of Miami Beach.<sup>90</sup> The Third District Court of Appeals overturned that ruling, finding that a non-delegable duty of care extended to a “body of water . . . held out to be a public swimming area and/or commonly used by the public as a swimming area.”<sup>91</sup> The Florida Supreme Court affirmed, confirming that

a government entity operating a public swimming area will have the same operational-level duty to invitees as a private landowner—the duty to keep the premises in a reasonably safe condition and to warn the public of any dangerous conditions of which it knew or should have known.<sup>92</sup>

The Florida Supreme Court rejected the state’s argument that a formal designation as a public swimming area was necessary before the duty to maintain the swimming area arose,<sup>93</sup> though it disagreed with the Third District that mere “common[] use” of an area for swimming created the duty, instead requiring the government entity to either represent to the public it was a swimming area or let the public believe it to be one.<sup>94</sup> Under the logic employed by the Florida Supreme Court in this case, it seems that the state could be held liable for a shark bite which took place near an area in which shark feeding ecotourism was conducted, assuming the state knew of the conduct of such feeds and was aware they could theoretically create risks for beach users. Moreover, *Garcia* demonstrates that such liability would not necessarily be restricted to occurrences at public beaches formally set aside for swimming, but also could extend to areas that the governmental entity either explicitly or

---

<sup>86</sup> *Id.*

<sup>87</sup> 753 So. 2d 72, 75 (Fla. 2000).

<sup>88</sup> *Id.* at 75.

<sup>89</sup> *Id.* at 73–74.

<sup>90</sup> *Id.* at 74.

<sup>91</sup> *Id.* (quoting *Garcia v. State Dept. of Nat. Res.*, 707 So. 2d 1158, 1159 (Fla. Dist. Ct. App. 1998)).

<sup>92</sup> *Garcia*, 753 So. 2d at 75.

<sup>93</sup> *Id.* at 75–76.

<sup>94</sup> *Id.* at 76.



implicitly (for example, by providing public beach access) holds out as a place for the public to swim.

### *B. History of the Florida Ban*

The debate over shark feeding at the initial meetings of the FFWC was highly contentious and was often framed as a question of the “rights” of divers or the “safety” of other marine resource users, with both pro- and anti-ban activists making claims about the malfeasance of their opponents.<sup>95</sup> Ban advocates claimed that shark feeding was strictly a commercial venture performed without concern for the potential harms being done to animals,<sup>96</sup> while ban opponents claimed they were interested in educating the public and that ban advocates were trying to prey on public fears of shark attack to their own ends.<sup>97</sup> One dive operator, Jeff Torode, claimed his former friend David Earp (a commercial lobster diver and a leader of the pro-ban Marine Safety Group) had gotten involved in the debate in an effort to prevent the (dive industry-backed) creation of marine protected areas in locations where shark feeding dives took place, which would then be off-limits to commercial and recreational fishing.<sup>98</sup>

A fact-finding workshop on the issue of predator feeding took place on October 29<sup>th</sup>, 1999.<sup>99</sup> The FFWC staff recommendations associated with this workshop noted that the public controversy over the practice had “surfaced at the same time as dive tour operators and conservation groups began to advocate setting aside areas in Broward County waters as marine, ‘no take’, reserves.”<sup>100</sup> These proposed reserves were met with opposition from spear fishing, recreational, and commercial fishing interests who felt that it favored divers over other marine resource users.<sup>101</sup> The report further observed: “[s]taff believes that, in part, the organized opposition to fish feeding dives has its roots in the controversy over marine reserves.”<sup>102</sup> However, in spite of “linkage between [shark feeding and the creation of marine reserves],” FFWC staff recommended that the Commission “consider the policy implications of continuing, prohibiting, or regulating dive feeding excursions” solely on the basis of questions around feeding practices.<sup>103</sup>

---

<sup>95</sup> Dana Canedy, *Shark Trips Lure Tourists, But the Critics Are Circling*, N.Y. TIMES (Apr. 16, 2001), <https://perma.cc/TF5D-T6MH>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, BROWARD CTY. FEEDING DIVE EXCURSIONS DIV. OF MARINE FISHERIES, COMMISSION BACKGROUND BRIEFING MEMORANDUM (Jan. 7, 2000).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Against this highly charged backdrop, during meetings occurring from February 2–4, 2000, FFWC Commissioners voted to have staff draft a rule to ban feeding of marine life in state waters.<sup>104</sup> Discussion focused largely on the risks or potential risks to human safety that might result from these practices, and on the question of whether shark feeding was likely to make predators more aggressive towards humans.<sup>105</sup> This decision was later reconsidered following lobbying by the dive industry, and Commissioners sought other potential solutions.<sup>106</sup>

At the next meeting of the FFWC, the Commissioners were unable to reach consensus on moving forward with a ban, due to a “lack of scientific data to demonstrate human safety is a factor to consider in fish feeding, or whether the practice is detrimental to fish.”<sup>107</sup> A motion was passed to suspend the rule-making process to allow pro- and anti-ban activists to work together to create industry guidelines to be considered at the May 2001 FFWC meeting.<sup>108</sup>

At this point, largely as a result of the activities of pro-ban activists in the Marine Safety Group, many municipalities in South Florida began to consider the question of shark feeding dives, potential liability, and whether their police powers and ability to pass ordinances to protect public safety might allow them to regulate or ban the practice in local waters.<sup>109</sup> Florida’s Municipal Home Rule Powers Act grants municipalities broad police powers where state and county law does not pre-empt them,<sup>110</sup> and Florida courts have recognized this can extend to regulating marine resources. In *State v. Leavins*,<sup>111</sup> a state appeals court held that “[t]he protection of valuable marine resources is a valid, and indeed inescapable, exercise of the state’s police power.”<sup>112</sup> Similarly, in *Moviematic Industries Corp. v. Board of City Commissioners of Metropolitan Dade County*,<sup>113</sup> the Florida Third District Court of Appeals concluded that “preservation of the ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare,” upholding a county zoning decision instituting a building moratorium in a certain area.<sup>114</sup> Therefore, in the absence of

---

<sup>104</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 22 (Feb 2–4, 2000).

<sup>105</sup> *Id.*

<sup>106</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 17–19 (Sept. 6–8, 2000).

<sup>107</sup> *Id.* at 19.

<sup>108</sup> *Id.* at 19–20.

<sup>109</sup> *See, e.g.*, DEERFIELD BEACH CITY COMM’N, MINUTES OF THE COMMISSION MEETING (Sept. 19, 2000).

<sup>110</sup> FLA. STAT. § 166.021 (2019).

<sup>111</sup> 599 So. 2d 1326 (Fla. Dist. Ct. App. 1992).

<sup>112</sup> *Id.* at 1336.

<sup>113</sup> 349 So. 2d 667 (Fla. Dist. Ct. App. 1977).

<sup>114</sup> *Id.* at 669.

other action, municipalities could be justified in regulating the practice of marine feeding using police powers.

On February 11<sup>th</sup>, 2001, the City of Deerfield Beach passed an ordinance “prohibiting the feeding of marine wildlife in proximity to the public beach.”<sup>115</sup> On March 8<sup>th</sup>, the Town of Hillsboro Beach followed suit, making it “unlawful” for any person to “feed marine wildlife within 1500 feet of the mean high tide water line adjacent to the shoreline in the Town of Hillsboro Beach,” or for “the owner or operator of any vessel to permit or assist any passenger on that vessel in the feeding of marine wildlife” within the same limit.<sup>116</sup> However, this rule also specified: “Nothing in this section shall be construed to prohibit the use of bait or chum in the course of any lawful fishing activity or harvesting of marine wildlife pursuant to all applicable state and federal regulations.”<sup>117</sup> This exemption of fishing practices, which will also be seen in many other rules and laws addressing the question of shark feeding, was necessary for the purpose of an ordinance, as the State of Florida preempts local regulation of fishing, limiting local power in this matter.<sup>118</sup> The fact that more stringent regulation of shark fishing in Florida was not considered at this time and that there was minimal discussion of shark population trends suggests that the central basis of concern was not potential impacts of shark feeding tourism on the ecological or biological health of shark populations but was instead focused in large measure on the human safety risks and liability potentially imposed.

Other municipalities which did not take the step of banning or regulating the practice sought alternate methods for minimizing liability risk by making their concerns about shark feeding known.<sup>119</sup> The Lighthouse Point City Commission, uncertain whether it had the legal authority to ban shark feeding, opted instead to consider creating an ordinance refusing to grant an occupational license to any dive operator using city waterways or docks who wished to conduct shark feeding.<sup>120</sup> The City of Delray Beach did not act to regulate the practice itself, but wrote to the FFWC asking that the FFWC “prohibit or appropriately regulate” feeding of marine life, and making explicit the basis of their concern: “While we understand that dive tour operators bring a certain number of tourists into our state and our area, certainly many times more tourists come to enjoy our beaches. Anything that might create the perception that our beaches are unsafe is surely to be

---

<sup>115</sup> DEERFIELD BEACH CITY COMM’N, MINUTES OF THE COMMISSION MEETING (Feb. 6, 2001).

<sup>116</sup> HILLSBORO BEACH TOWN COMM’N, MINUTES OF THE COMMISSION MEETING (Mar. 8, 2001).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; see also FLA. STAT. § 166.021 (2019).

<sup>119</sup> See, e.g., LIGHTHOUSE POINT CITY COMM’N, MINUTES OF REGULAR CITY COMMISSION MEETING (Mar. 13, 2001), <https://perma.cc/3ZEJ-8Q3J>.

<sup>120</sup> LIGHTHOUSE POINT CITY COMM’N, MINUTES OF REGULAR CITY COMMISSION MEETING (Mar. 13, 2001), <https://perma.cc/54AS-L44W>.

avoided at all costs.”<sup>121</sup> The City of Fort Lauderdale would later take a similar approach to the problem, passing a resolution urging the FFWC to “enact an administrative rule prohibiting the feeding of sharks and other marine life.”<sup>122</sup>

### *C. The Industry’s Proposed Self-Regulation*

In May of 2001, the Global Interactive Marine Experiences Council (GIMEC)—an organization made up of both feeding dive operators and large dive industry players like the Dive Equipment and Marketing Association (DEMA)—presented their proposed guidelines to the Commission.<sup>123</sup> Although these guidelines were supposed to be created in consultation with those in opposition to marine feeding, FFWC minutes note that “[c]oordinated consultation with and involvement of all the principle [sic] parties were largely unsuccessful.”<sup>124</sup> Some of these industry drafted guidelines were viewed as acceptable by the Commission—for example, the training to be provided to staff running feeding dives, or the methodology proposed for reporting and tracking injuries associated with shark feeding dives.<sup>125</sup> However, there remained several significant areas of contention, most notably questions about:

- 1) [C]onflicts with other [marine resource] users
- 2) [M]inimum distance from swimming beaches
- 3) [L]ist of feeding locations and suggested feeding zones
- 4) [S]pecies allowed to be fed or species prohibited from feeding
- 5) [H]and-feeding or other feeding that associated food directly with humans<sup>126</sup>

The Commissioners asked their staff to expand or alter the proposed GIMEC guidelines to address these additional concerns.<sup>127</sup> The Commissioners also raised the possibility of limiting entry to the industry to control the number of operators offering marine feeding

---

<sup>121</sup> Letter from David Schmidt, Mayor, Delray Beach, Fla., to Florida Fish & Wildlife Conservation Commission (May 4, 2001) (on file with author).

<sup>122</sup> FT. LAUDERDALE RES. NO. 01-172 (2001); *see also* FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 19 (Oct. 31–Nov. 2, 2001).

<sup>123</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 21 (May 23–25, 2001).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 21–22.

<sup>126</sup> *Id.* at 26.

<sup>127</sup> *Id.*

experiences, perhaps through a permitting system.<sup>128</sup> The Commissioners were told by the General Counsel to the FFWC that a rule limiting entry would not be strictly resource based (e.g., would regulate industry, rather than the behavior of industry in relation to wildlife) and thus might not fall within their mandate to regulate wildlife.<sup>129</sup>

Staff of the Department of Marine Fisheries drafted revised guidelines addressing the areas which the commission felt were unsatisfactorily addressed by the GIMEC proposal. The following is a summary of their proposals:

- 1) Conflicts with other [marine resource] users
  - Avoiding sites used by other marine resource users
  - Limits on when feeds could take place
  - No feeds permitted to take place within 600 feet of an anchored boat or dive buoy
- 2) Minimum distance from swimming beaches
  - Minimum of one mile from swimming beaches
- 3) List of feeding locations and suggested feeding zones
  - Sandy areas
  - Areas not utilized by other resource users
  - Minimum distance of 100 feet from natural reefs
- 4) Species allowed to be fed or species prohibited from feeding
  - No direct feeding [e.g., hand or spear feeding] of any species
  - If a shark other than nurse shark over five feet appears, termination of the feed
  - If behavior of marine animals is or becomes aggressive, termination of the feed
- 5) Hand-feeding or other feeding that associated food directly with humans
  - No handling of marine species
  - No direct feeding (hand, spear) of marine species
  - A container of bait emitting scents/oils to be used as attractant<sup>130</sup>

---

<sup>128</sup> See *id.* at 25–26.

<sup>129</sup> *Id.* at 26.

<sup>130</sup> FLA. FISH & WILDLIFE CONSERVATION COMM'N, BEST MANAGEMENT PRACTICES AND GUIDELINES FOR INTERACTIVE MARINE EXPERIENCES (Aug. 10, 2001).

These alternative proposals were not considered acceptable by the dive industry, which responded with suggestions and alternatives on seven issues.<sup>131</sup> According to meeting minutes, “[f]ive of the suggested alternatives would be less conservative than those offered by the Commission and are not recommended” by FFWC staff.<sup>132</sup> Representatives of the dive operators responded that “adherence to the Commission-revised guidelines would nearly close marine-life feeding dives in Florida.”<sup>133</sup> Later in the meeting, Commissioners directly asked Bob Harris, the lawyer representing DEMA, whether the dive industry would comply with the Commission’s revised guidelines.<sup>134</sup> He “responded that they would not because it would put all four operators out of business.”<sup>135</sup>

*D. Legal Basis for Regulation by the Florida Fish and Wildlife Commission*

This impasse was clearly foreseen by the FFWC Commissioners, and it was highly likely that the Commission planned to move forward with a ban on marine life feeding prior to the September 5<sup>th</sup> meeting.<sup>136</sup> On August 28<sup>th</sup>, the General Counsel to the FFWC sent the Executive Director a memo detailing the basis of FFWC authority to regulate or prohibit marine life feeding.<sup>137</sup> The FFWC derived such authority from article IV, section 9, of the Florida Constitution, which reads in part: “The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life . . . .”<sup>138</sup> This memo argued that this constitutional mandate “gives the agency broad authority to regulate the behavior of people for the protection and benefit of the state’s marine resources” and that it also “invests the Commission with the authority to regulate human behavior vis-à-vis wildlife or marine life *solely to assure the safety of those humans.*”<sup>139</sup> Public safety concerns were in fact an important rationale for the passage of several previous FFWC rules, including a prohibition on using elephants for public rides “without first

---

<sup>131</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 21 (Sept. 5–7, 2001).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 23.

<sup>135</sup> *Id.*

<sup>136</sup> CHRISTOPHER L. PEPIN-NEFF, FLAWS: SHARK BITES AND EMOTIONAL PUBLIC POLICYMAKING 84–85 (2019).

<sup>137</sup> Office of the Gen. Counsel, Fla. Fish & Wildlife Conservation Comm’n, Memorandum on FWCC Authority to Regulate or Prohibit Marine Life Feeding 1 (Aug. 28, 2001).

<sup>138</sup> FLA. CONST. art. IV, § 9.

<sup>139</sup> Fla. Fish & Wildlife Conservation Comm’n, *supra* note 137, at 1.

obtaining special authorization.”<sup>140</sup> The memo concluded that a rule prohibiting the feeding of marine life within state waters was within the authority afforded by the Commission’s constitutional mandate.<sup>141</sup>

Historically, bans on feeding of wildlife have taken a variety of forms. Some such laws are federal, like the Marine Mammal Protection Act of 1972, which interprets “feeding or attempting to feed” a wild marine mammal as “harassment” constituting a form of “take.”<sup>142</sup> Similar protections exist for all animals listed under the Federal Endangered Species Act<sup>143</sup> (ESA). At the time of writing, only one species of shark which is frequently a focus of dive tourism, the scalloped hammerhead (*Sphyrna lewini*), is listed under the ESA,<sup>144</sup> though other species have been unsuccessfully proposed for listing.<sup>145</sup> In Florida, feeding of wildlife has also sometimes been disallowed by rule, such as Rule 68A-4.001, which reads:

(3) Intentionally placing food or garbage, allowing the placement of food or garbage, or offering food or garbage in such a manner that it attracts coyotes, foxes or raccoons and in a manner that is likely to create or creates a public nuisance is prohibited

(4)(a) Intentionally feeding bears is prohibited except as provided for in this Title.

(b) Placing food or garbage, allowing the placement of food or garbage, or offering food or garbage that attracts bears and is likely to create or creates a nuisance is prohibited after receiving prior written notification from the Commission.

(5) The intentional feeding or the placement of food that attracts pelicans and modifies the natural behavior of the pelican so as to be detrimental to the survival or health of a local population is prohibited.

(6) The intentional feeding of sandhill cranes is prohibited.<sup>146</sup>

Such prohibitions have also been created by a combination of FFWC rule and legislative law, as in the prohibition on feeding alligators and crocodiles, covered in Rule 68A-25.001 (“No person shall intentionally

---

<sup>140</sup> FLA. ADMIN. CODE ANN. 68A-6.0042 (2018) (effective Feb. 1, 1998) (repealed 2019).

<sup>141</sup> Fla. Fish & Wildlife Conservation Comm’n, *supra* note 137, at 2.

<sup>142</sup> 16 U.S.C. §§ 1362(18)(A)(ii), 1372(a) (2006); 50 C.F.R. § 216.3 (1995) (clarifying what constitutes a take under the Marine Mammal Protection Act).

<sup>143</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); *Summary of the Endangered Species Act*, EPA, <https://perma.cc/TF54-XYZT> (last updated July 5, 2019).

<sup>144</sup> See 50 C.F.R. § 223.102 (2017) (listing scalloped hammerhead sharks as threatened under the ESA).

<sup>145</sup> Endangered and Threatened Wildlife; 90-Day Finding on Petitions to List the Dusky Shark as Threatened or Endangered Under the Endangered Species Act, 78 Fed. Reg. 29,100, 29,100 (May 17, 2013).

<sup>146</sup> FLA. ADMIN. REG. § 68A-4.001(3)–(6) (Feb. 11, 2018).

feed, or entice with feed, any crocodilian . . .”),<sup>147</sup> and a textually similar Florida Statute.<sup>148</sup>

It seems clear that the FFWC had a strong argument that the regulation of marine feeding fell within FFWC authority, however it was less obvious what role (if any) the Florida legislature or local governments might have to play. Several municipalities had already passed ordinances moving marine life feeding away from public beaches,<sup>149</sup> and these laws might or might not be at risk of being invalidated as infringing on the Commission’s constitutional authority. In the case of *City of Miramar v. Bain*,<sup>150</sup> the court held that when local governments exercise their police powers (in *Miramar*, regulating land use through zoning) in a way that affects subjects under the Commission’s jurisdiction, the court will attempt to harmonize local ordinance and the Commission rule.<sup>151</sup> However, in the holding the court ruled that “[a] legislative enactment or municipal ordinance . . . if in conflict with the regulations of the [Florida Fish and Wildlife Conservation] Commission must give way to the Constitutional mandate establishing the Commission.”<sup>152</sup> Thus, while a local ordinance employing municipal police powers to limit shark feeding dives might be permissible in the absence of a Commission rule, it would likely be pre-empted by such a rule if they were not in agreement.

Around this time, State Representative Charles Justice of St. Petersburg announced his intention to introduce a bill in the Florida State Legislature to prohibit marine life feeding.<sup>153</sup> He had previously gone on the record saying “[t]his has the potential to affect tourism, with all these people getting bitten by sharks,” and that he felt “the Legislature should make the final decision on it”.<sup>154</sup> Shark diving operator Jeff Torode was particularly critical of this approach, telling a reporter from *The Independent* “We are just the scapegoats out here. The politicians are saying, ‘We are going to be the saviours, we are going to rescue Florida’s tourism and make it safe again.’ Well, it’s all bullshit.”<sup>155</sup> In terms of legislative authority to make such a decision, in article IV, section 9 of the Florida State Constitution, the Legislature is given authority to “enact laws in aid of the commission.”<sup>156</sup> If the Commission were to not act to regulate marine feeding, it therefore might be constitutional for the legislature to pass a law prohibiting the

---

<sup>147</sup> FLA. ADMIN. CODE ANN. R. § 68A-25.001 (May 18, 2006).

<sup>148</sup> FLA. STAT. § 372.667(1) (2006).

<sup>149</sup> DEERFIELD BEACH CITY COMM’N, *supra* note 115.

<sup>150</sup> 429 So. 2d 40 (Fla. Dist. Ct. App. 1983).

<sup>151</sup> *Id.* at 43.

<sup>152</sup> *Id.* at 42.

<sup>153</sup> PEPIN-NEFF, *supra* note 136, at 81.

<sup>154</sup> Julie Hauserman, *No Teeth in New Shark Dive Rules*, ST. PETERSBURG TIMES, 1B (Aug. 25, 2001).

<sup>155</sup> David Osborne, *Shark Practice*, THE INDEP. (Sept. 1, 2001), <https://perma.cc/4FGZ-PV87>.

<sup>156</sup> FLA. CONST. art. IV, § 9.



practice, assuming it relied on traditional police powers belonging to the state. However, it seems clear that any law passed by the State Legislature or local governments could be superseded by Commission action on the basis of their constitutional authority to regulate wildlife.

The Commission's authority in this matter would soon be put to the test. Following the dive industry's refusal to adhere to the Commission's proposed rules, the Commissioners acted almost immediately, passing a motion to "direct staff to prepare a rule to ban the practice of marine-life feeding by divers," allowing for no further public comment or discussion, a decision that would be criticized (and defended), as well as litigated.<sup>157</sup> On September 24<sup>th</sup>, the President of the Florida Association of Dive Operators sent an open letter to the Florida Fish and Wildlife Commission in which he compared the September 6<sup>th</sup> decision to move forward with the proposed ban to the September 11<sup>th</sup> terrorist attacks and the activities of the Third Reich, concluding,

I do feel sorry for you commissioners and all involved in your decision . . . .  
I know you are in personal turmoil. You know you made the wrong decision for America and for American freedom. America knows you made the wrong decision . . . we will fight back and . . . we will prevail. The right outcome, the honest outcome, the just outcome will prevail.<sup>158</sup>

Although there was significant discussion of the potential economic impacts of this decision on the four operators then running shark feeding dives, and on Florida tourism more generally, when the proposed rule appeared in the *Florida Administrative Weekly* on September 28<sup>th</sup>, the estimated regulatory cost calculated a loss of income for the operators of between \$660 and \$1,320 per week per business—for a total maximum yearly loss of no more than \$274,560, or \$68,640 per year per operator.<sup>159</sup> This loss estimate further assumed that these businesses would allow their boats and staff to sit idle, rather than replacing feeding dives with other (perhaps less profitable) dive activities.<sup>160</sup>

On October 9<sup>th</sup>, Commission staff appeared before the Florida House Natural Resources Committee, where some members of the Committee urged the Commission to postpone making a final decision about the ban, and where the dive industry agreed to provide funding for research about the impacts of marine feeding—specifically, to address the question “[d]oes marine-life feeding alter shark

---

<sup>157</sup> FLA. FISH & WILDLIFE CONSERVATION COMM'N, MINUTES OF THE COMMISSION MEETING 23 (Sept. 5–7, 2001).

<sup>158</sup> Letter from Spencer Slate, President, Florida Association of Dive Operators, to Florida Fish & Wildlife Conservation Commission (Sept. 24, 2001) (on file with author).

<sup>159</sup> Fish & Wildlife Conservation Commission, Rule No. 68B-5.005, *Divers: Fish Feeding Prohibited; Prohibition on Fish Feeding for Hire*, 27 FLA. ADMIN. WEEKLY 4510, 4511 (Sept. 28, 2001).

<sup>160</sup> *Id.*

behavior?”<sup>161</sup> The offer to fund this study further clarifies that the purpose of the rule, regardless of the terms used to describe it, was a ban on shark feeding as a potentially dangerous activity and that any other environmental or educational considerations were, at best, secondary.<sup>162</sup>

On November 1<sup>st</sup>, the Commission took up the issue of marine life feeding for the final time, presenting the proposed rule, which would “prohibit the practice of divers feeding fish” as well as “the operation of any vessel for hire for the purpose of carrying passengers to any site to observe fish feeding.”<sup>163</sup> On October 19<sup>th</sup>, DEMA lawyers had filed both an Administrative Hearing complaint and a lawsuit in Florida Circuit Court in Leon County, trying to prevent the proposed rule from being enacted.<sup>164</sup> At the November 1<sup>st</sup> meeting, commissioners enquired of their General Counsel whether legal challenges to the rule impacted their ability to act on the proposed rule, and were told they did not.<sup>165</sup> Dive industry representatives speaking against the rule again asserted that “[i]t is a person’s right to feed marine life,” while also reiterating their eagerness to sponsor a study on the impacts of marine feeding and their willingness to continue to work on revising proposed guidelines.<sup>166</sup>

The Commission was further advised that members of the Florida House Natural Resources Committee had requested that they delay action until completion of the industry funded study, which was estimated to require a minimum of one year to complete.<sup>167</sup> The Commissioners were not receptive, declaring that the process had adequately taken into account public input and that there was sufficient scientific evidence on the potential harm of feeding wildlife to justify action.<sup>168</sup> The Commission voted six-to-one to pass the rule; Commissioner Huffman, who voted against the ban, had repeatedly claimed it would be “an unnecessary blow to tourism.”<sup>169</sup>

### *E. The Administrative Hearing Complaint: The Industry Appeals*

In the October 19<sup>th</sup>, 2001 complaint to the Division of Administrative Hearings, DEMA lawyers alleged that the Commissioners had exceeded the scope of their authority:

---

<sup>161</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, MINUTES OF THE COMMISSION MEETING 17, 19 (Nov. 1, 2001).

<sup>162</sup> *Id.* at 18–20

<sup>163</sup> *Id.* at 17.

<sup>164</sup> Petition, Diving Equip. & Mktg. Ass’n v. Florida (Fla. Div. of Admin. Hearings Oct. 19, 2001); Petition, Complaint for Declaratory Judgment, Diving Equip. & Mktg. Ass’n v. Florida (Fla. 2d Cir. Ct. Oct. 19, 2001) (No. 01-CA-2553).

<sup>165</sup> FLA. FISH & WILDLIFE CONSERVATION COMM’N, *supra* note 161, at 17.

<sup>166</sup> *Id.* at 18.

<sup>167</sup> *Id.* at 19.

<sup>168</sup> *Id.* at 19–20.

<sup>169</sup> Dana Canedy, *Florida Curbs the Operators of Popular Shark Excursions*, N.Y. TIMES, A1 (Sept. 7, 2001), <https://perma.cc/7N5D-GQHL>.

The purpose of the rule as stated by the Commission is to ensure public safety, which is a legislative function not delegated to the Commission by the legislature. The Commission's function is limited to issues affecting marine life, its health and maintenance.<sup>170</sup>

The complaint further asserted that (among other things) the Commission had failed to consider the impact of the rule on small businesses or explore ways to mitigate such impacts, as required under section 120.54(3)(b) of the Florida Administrative Code; failed to provide detailed written explanation of the facts and circumstances justifying the proposed rule; failed to send written notice of the rule to the Office of Tourism, Trade, and Economic Development to allow them to review and offer regulatory alternatives; and failed to conduct a public hearing on the rule prior to scheduling the rule for final adoption.<sup>171</sup> The complaint further alleged that there was no rational basis for the rule, claiming that

Commission members and staff have admitted on the record that the reason for the rule is the “perception” and not due to a public safety problem. Commission members and staff have admitted on the record that there is less than discernible detrimental impact of marine life feeding on marine life.<sup>172</sup>

This complaint was a compilation of every possible error that could have been made regarding the rule, assuming it was subject to the Administrative Procedure Act.<sup>173</sup> The FFWC countered that rules promulgated under its constitutional authority were tantamount to legislative acts and were not subject to Administrative Review under Chapter 120.<sup>174</sup>

The decision of the Administrative Hearing Judge on whether or not the case would be heard hinged on one important issue: whether the Commission's actions were based on statutory authority (and thus subject to review under the Administrative Procedures Act) or whether the rule was based solely on the Commission's constitutional authority, and therefore not subject to APA review.<sup>175</sup>

---

<sup>170</sup> Petition, *supra* note 164, at 16.

<sup>171</sup> *Id.* at 17–18.

<sup>172</sup> *Id.* at 19.

<sup>173</sup> *Id.* at 16–21.

<sup>174</sup> Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 3–4, *Diving Equip. & Mktg. Ass'n v. Florida* (Fla. Div. of Admin. Hearings Oct. 25, 2001) (No. 01-4027RP); The Florida Constitution explicitly gives FFWC the duty to “exercise the regulatory and executive powers of the state with respect to . . . marine life . . .” FLA. CONST. art. IV, § 9.

<sup>175</sup> The Florida Administrative Procedure Act, FLA. STAT. ch. 120, provided and still provides that challenges to agency rules are first appealed administratively. FLA. STAT. § 120.56 (2019). Given the FFWC's unique quasi-independent authority to directly regulate marine life pursuant to the Florida Constitution, civil and administrative courts had held that such exercise of constitutional authority did not qualify as an agency action

DEMA lawyers argued that the Commissioners had regularly referenced commission authority to regulate on issues concerning the health of marine resources in Fla. Stat. section 370.025 as a source of their authority in this matter.<sup>176</sup> This statute (enacted by the legislature) reads, in part,

All rules relating to saltwater fisheries adopted by the commission shall be consistent with the following standards:

(a) The paramount concern of conservation and management measures shall be the continuing health and abundance of the marine fisheries resources of the state<sup>177</sup>

Because the Commission had cited a legislative statute as a basis of their authority in this matter, DEMA lawyers claimed it was both disingenuous and inaccurate to now argue that the rule was exempt based on the constitutional authority of the Commission.<sup>178</sup> However, in Fla. Stat. section 20.331(9)(c), the Commission has only 14 duties or responsibilities it considers “statutory” in nature.<sup>179</sup> None of these statutory responsibilities are marine life feeding, and therefore FFWC claimed rulemaking about marine feeding was constitutional in nature and not subject to APA review.<sup>180</sup> The relevant statute reads: “The commission’s statutory duties or responsibilities include, but are not limited to: [the following . . .]” and specifies that the Commission shall follow the provisions of Chapter 120 when adopting rules in the performance of statutory duties.<sup>181</sup> DEMA lawyers used this ambiguity to argue that the marine life feeding rule was statutory rather than constitutional in nature.<sup>182</sup>

DEMA lawyers cited the case *Florida Fish and Wildlife Conservation Commission v. Caribbean Conservation Corp.*,<sup>183</sup> in which

---

subject to the Florida Administrative Procedure Act because it was “tantamount to legislation.” *Airboat Ass’n of Florida v. Florida Game & Fresh Water Fish Com’n.*, 498 So. 2d 629, 630 (Fla. Dist. Ct. App. 1986); *see also* *Osborne v. Florida Game & Fresh Water Fish Com’n.*, 3 F.A.L.R. 1483-A (Fla. Div. of Admin. Hearings Feb. 25, 1981). The Florida legislature subsequently distinguished the Commission’s direct constitutional authority from specific statutory authority granted in certain matters, with only actions taken under statutory authority subject to the Florida Administrative Procedure Act. FLA. STAT. 20.331(6) (2001).

<sup>176</sup> Petitioners’ Response to Respondent’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 4, *Diving Equip. & Mktg. Ass’n v. Florida* (Fla. Div. of Admin. Hearings Nov. 7, 2001) (No. 01-4027P).

<sup>177</sup> FLA. STAT. § 379.2401(3)(a) (2019).

<sup>178</sup> Petition, *supra* note 164, at 20–21.

<sup>179</sup> FLA. STAT. § 20.331(9)(c) (2019).

<sup>180</sup> Respondent’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 174, at 4.

<sup>181</sup> FLA. STAT. § 20.331(9)(c).

<sup>182</sup> Petition, *supra* note 164, at 19–20.

<sup>183</sup> *Fla. Fish & Wildlife Conservation Comm’n v. Caribbean Conservation Corp.*, 789 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 2001).

the appellate court decided that the regulatory authority of the Marine Fisheries Commission (predecessor to the FFWC) to enact rules related to endangered species was statutory in nature (as laid out in Chapter 99-254, Laws of Florida) and was therefore subject to Chapter 120 review, because such authority was shared with other agencies.<sup>184</sup> However, FFWC argued that Fla. Stat. section 370.025(4)(a) limits the applicability of this decision, as it specifies that:

the commission has full constitutional rulemaking authority over marine life . . . except for:

(a) Endangered or threatened marine species for which rulemaking shall be done pursuant to chapter 120<sup>185</sup>

FFWC lawyers thus argued that this decision was limited in scope to endangered species specifically and that the decision could therefore not be applied to marine life feeding.<sup>186</sup> On November 8<sup>th</sup>, 2001, the Administrative Hearing complaint was dismissed for lack of subject matter jurisdiction pursuant to section 370.025(4).<sup>187</sup>

#### *F. A Second Attempt to Derail the Rule: The Industry Brings a Civil Suit*

On December 14<sup>th</sup>, 2001, DEMA lawyers filed a request for an injunction for emergency relief in an attempt to prevent the rule from going into effect until the legal challenge had been ruled on.<sup>188</sup> Circuit Court Judge L. Ralph Smith, Jr. refused to grant the injunction on two grounds.<sup>189</sup> He observed that the rule had been approved by the Commission on November 1<sup>st</sup>, and that the plaintiffs had waited more than 45 days to file for emergency relief.<sup>190</sup> He determined that the “[p]laintiffs’ delay does not create an emergency.”<sup>191</sup> The injunction was also refused on the grounds that the plaintiffs had failed to demonstrate “that they have a substantial likelihood of success on the merits of the underlying declaratory action.”<sup>192</sup> Further, they had not addressed “their failure to avail themselves of their administrative remedies.”<sup>193</sup>

---

<sup>184</sup> Petitioners’ Response to Respondent’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 176, at 5–6.

<sup>185</sup> FLA. STAT. § 370.025(4)(a) (2019).

<sup>186</sup> Respondent’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 174, at 2–3.

<sup>187</sup> Order Closing File at 1, Diving Equip. & Mktg. Ass’n v. Florida (Fla. Div. of Admin. Hearings Nov. 8, 2001) (No. 01-4027RP).

<sup>188</sup> Plaintiff’s [sic] Motion for Temporary Injunction at 2–3, Diving Equip. & Mktg. Ass’n v. Florida (Fla. Cir. Ct. Dec. 14, 2001) (No. 01-2553).

<sup>189</sup> Order Denying Temporary Injunction at 2, Diving Equip. & Mktg. Ass’n v. Florida (Fla. Cir. Ct. Dec. 18, 2001) (No. 01-2553).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Thus their petition was found to be “facially insufficient” and the law went into effect as planned on January 1<sup>st</sup>, 2002.<sup>194</sup>

The plaintiffs followed that with a Complaint for Declaratory Judgment, which went even further than the brief filed with the Division of Administrative Hearings, requesting a declaratory judgment “that the proposed rule is invalid and unconstitutional because . . . the rule was adopted without any basis factually, scientifically, and logically” and claiming that “[t]he agency proposes to act without any colorable legal authority.”<sup>195</sup> The FFWC moved for summary judgment on the case.<sup>196</sup> Summary judgment would hinge upon whether or not a rational basis standard<sup>197</sup> applied to acts of the Legislature was the appropriate standard for judicial evaluation of the rule or whether the far more stringent standard for review of agency decisions under Fla. Stat. section 120.68(7) applied.<sup>198</sup>

The Commission argued that given their constitutional mandate, FFWC rules are “tantamount to legislative acts” and therefore have a strong presumption of validity.<sup>199</sup> Under this standard, the FFWC need only demonstrate that some rational basis for the rule exists—without even being required to demonstrate that such rational basis was the true reason for the rule’s creation.<sup>200</sup> In the final judgment, the court agreed that “the Commission is not an agency as defined in the APA and its actions are not reviewable under that act,” and that rulemaking was therefore in fact “tantamount to a legislative act.”<sup>201</sup>

The court went on to insist that “[t]he rational basis need not be readily apparent, nor must the state produce evidence to support the classification made.”<sup>202</sup> The court cited *Heller v. Doe*,<sup>203</sup> noting “the classification ‘may be [legitimately] based upon rational speculation unsupported by evidence or empirical data.’”<sup>204</sup> Therefore, the evidentiary burden was on the plaintiffs to “negate every conceivable basis which might support [the classification]”, whether or not the basis

---

<sup>194</sup> *Id.*

<sup>195</sup> First Amended Complaint for Declaratory Judgment at 15, *Diving Equip. & Mktg. Ass’n v. Florida* (Fla. Cir. Ct. Feb. 13, 2002) (No. 01-CA-2553).

<sup>196</sup> Defendant’s Motion for Summary Judgment at 1, *Diving Equip. & Mktg. Ass’n v. Florida* (Fla. Cir. Ct. Sept. 16, 2003) (No. 01-CA-2553).

<sup>197</sup> Following federal courts, Florida courts apply a rational basis standard when determining the validity of a statute or other government act if the challenged action does not implicate a suspect (or quasi-suspect class) or infringe on a fundamental right. *Fla. High Sch. Activities Ass’n v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).

<sup>198</sup> Summary Final Judgment at 8, *Diving Equip. & Mktg. Ass’n v. Florida* (Fla. Cir. Ct. Feb. 5, 2004) (No. 01-CA-2553).

<sup>199</sup> Defendant’s Motion for Summary Judgment *supra* note 196, at 5–7.

<sup>200</sup> Summary Final Judgment, *supra* note 198, at 8.

<sup>201</sup> Summary Final Judgment, *supra* note 198, at 2 (quoting *Airboat Ass’n of Florida v. Florida Game & Fresh Water Fish Com’n.*, 498 So. 2d 629, 632 (Fla. Dist. Ct. App. 1986)).

<sup>202</sup> *Id.* at 7–8.

<sup>203</sup> 509 U.S. 312, 320 (1993).

<sup>204</sup> Summary Final Judgment, *supra* note 198, at 7–8.

has a foundation in the record.”<sup>205</sup> In order to be rejected by the court, there must be no possible rational basis for support of the rule, not simply a dispute over related facts.<sup>206</sup>

The final ruling by Judge Janet E. Ferris on February 5<sup>th</sup>, 2004, determined that the rule banning the feeding of marine life was a “valid exercise of the Commission’s constitutionally delegated authority,” and that it had demonstrated that there was a rational basis for the rule and for a “prohibition against divers, as opposed to others, feeding fish.”<sup>207</sup> Although the court allowed the dive operators to submit expert affidavits criticizing FFWC’s conservation expert, it found that under the rational basis test they failed to create a “genuine dispute of material fact.”<sup>208</sup>

Plaintiffs also argue that the rule is, in reality, designed to protect people from shark attacks and that the Commission has no authority to adopt rules for public safety. The court need not address the scope of the Commission’s power in this respect because the rule itself clearly comes within the Commission’s constitutional authority to regulate marine life.<sup>209</sup>

Summary judgment was accordingly granted, and although DEMA appealed, the judgment of the Circuit Court was upheld on appeal.<sup>210</sup> At the time of this decision, the rule had already been law for several years.<sup>211</sup> However, as we will see, there is a significant difference between *passing* and *enforcing* rules or statutes governing the practice of marine life feeding.

### *G. Enforcing the Feeding Ban in Florida*

The ban on feeding marine life in Florida has proven consistently challenging to enforce. In March of 2014, dive operators were criminally charged with violating the ban after undercover Palm Beach County sheriff’s deputies allegedly observed (and filmed) these operators feeding sharks in state waters.<sup>212</sup> The legal issues of the case centered around the exact jurisdictional location of boats and divers, but the operator clearly and publicly expressed the intention to continue offering feeding dives regardless of legal penalties<sup>213</sup>—which, based on what he was

---

<sup>205</sup> *Id.* at 8 (quoting *Tiedemann v. Dep’t of Mgmt. Services*, 2003 WL 22901053 (Fla. Dist. Ct. App. 2003)).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 9.

<sup>208</sup> *Id.* at 6.

<sup>209</sup> *Id.* at 8.

<sup>210</sup> *Diving Equip. & Mktg. Ass’n v. Florida*, 2005 Fla. App. LEXIS 1577 (Jan. 25, 2005).

<sup>211</sup> FLA. ADMIN. CODE ANN. r. 68B-5.005 (2020).

<sup>212</sup> David Fleshler, *South Florida Dive Operators Charged with Shark Feeding*, SUN SOUTH FLA. SENTINEL (Mar. 20, 2014), <https://perma.cc/S3L5-KGFX>.

<sup>213</sup> *Id.*

charged with (second-degree misdemeanors), would lead to maximum penalties of \$500 in fines or 60 days in jail.<sup>214</sup>

Other operators responded to the ban by moving their shark feeding dives offshore into Federal waters, or offering week-long live-aboard dive trips during which shark feeds take place in international waters or in the territorial waters of the Bahamas, where shark feeding is legal.<sup>215</sup> One of these companies, operating out of West Palm Beach, had a passenger die of exsanguination following a bull shark bite sustained during a feeding dive in February of 2008.<sup>216</sup> A second death on the same boat in 2014 led to at least one call for a ban on shark feeding tourism in the Bahamas.<sup>217</sup> Two owners of shark feeding tourism operations were bitten seriously enough to require significant medical treatment, with one airlifted to a medical center in Florida in 2017, and the other injury occurring off West End, Bahamas in 2011.<sup>218</sup> The Bahamas has previously banned commercial fishing for sharks, in large part based on their tourism value, which is estimated at US \$78 million per year in the Bahamas.<sup>219</sup>

Even within the waters immediately surrounding Florida, the marine feeding ban has caused considerable difficulty, given the patchwork of management jurisdictions. As we have seen, state law now bans feeding marine wildlife in waters controlled by the State of Florida.<sup>220</sup> Within marine National Parks controlled by the National Park Service (NPS), the Code of Federal Regulations, title 36, section 2.1, subsection (a)(1)(i) prohibits “[p]ossessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state, [any] [l]iving or dead wildlife or fish” located within national parks, making shark feeding impermissible there.<sup>221</sup> However, in the case of federally protected near-shore waters administered by the National Oceanic and Atmospheric Administration (NOAA), including the one-third of the Florida Keys National Marine Sanctuary (FKNMS) which lies more than three miles offshore, the rules of FFWC are preempted by federal regulation.<sup>222</sup> As of February 2020 there are no regulations prohibiting the feeding of marine life in the federal portion of FKNMS, where at least one operator continues feeding and handling sharks and other

---

<sup>214</sup> *Id.*

<sup>215</sup> Denise Maycock, *Expert Calls for Shark Dive Ban After Fatality*, TRIB. (July 18, 2014), <https://perma.cc/5EEW-XWEJ>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Kimberly Miller, *Charter Captain Known to Hand-Feed Sharks Suffers Bite*, PALM BEACH POST (May 31, 2017), <https://perma.cc/59M3-T5ET>.

<sup>219</sup> Gallagher & Hammerschlag, *supra* note 1, at 807–08.

<sup>220</sup> Fleshler, *supra* note 212.

<sup>221</sup> 36 C.F.R. § 1002.1 (1996).

<sup>222</sup> Fla. Keys Nat’l Marine Sanctuary, *Florida Keys National Marine Sanctuary Management*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://perma.cc/GX2S-9UBN> (last visited January 20, 2020).



marine species.<sup>223</sup> This operator, pictured in his own advertisements holding and restraining sharks and moray eels and feeding a barracuda with his mouth,<sup>224</sup> is technically in compliance with the Commission rule.

#### IV. CASE STUDY 2: HAWAII

Concurrently with the development of Florida's ban on shark feeding, the state of Hawaii also took notice of the practice, and the Hawaii Department of Land and Natural Resources (DLNR) held a hearing on the possibility of instituting a ban on January 14<sup>th</sup>, 2002.<sup>225</sup> In both Florida and Hawaii, the "problem" being regulated was a relatively minor one—only a few dive operators in each state had been identified as participating in the feeding of marine life—and the DNLNR similarly "felt it is desirable to take a proactive approach and prohibit such activities before they become established in Hawaii."<sup>226</sup> The stated motive for the ban was avoiding potential safety risks to participants and to other marine recreationists.<sup>227</sup>

##### *A. Hawaii's Legislative Ban on Shark Feeding*

On June 6<sup>th</sup>, 2002, the Hawaii Legislature passed legislation contending that "[a]ttacks on people involved in feeding operations have been documented, and entrained sharks may pose a generally increased risk of attacks on individuals not involved in feeding operations."<sup>228</sup> The law stipulates that "it shall be unlawful for any person to conduct any activity related to the feeding of sharks in state marine waters" except:

(b) Persons may engage in the feeding of sharks for traditional Hawaiian cultural or religious practices; provided that the feeding is not part of a commercial activity.

(c) Persons engaged in the taking of marine life that results in captured, injured, or dead fish being incidentally eaten by sharks shall not be considered in violation of this section; provided that the purpose of the taking of marine life is not the feeding of sharks.<sup>229</sup>

---

<sup>223</sup> National Oceanic and Atmospheric Administration Rules, 79 Fed. Reg. 33,851, 33,860 (June 13, 2014).

<sup>224</sup> *Captain Slate's Scuba Adventures*, CAPTAINSLATE.COM, <https://perma.cc/957D-L76V> (last visited Jan. 25, 2020).

<sup>225</sup> Diana Leone, *Land Board Readies Hearings on Hawaii Shark-Feeding Ban*, HONOLULU STAR BULL. NEWS (Jan. 12, 2002), <https://perma.cc/274D-WB5F>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> S.B. 2613, 21st Leg., Reg. Sess. (Haw. 2002).

As in Florida, the concern about a public hazard did not extend to fishing methods, even those which have the potential to expose humans to shark-related risk or to condition sharks to behave unnaturally.<sup>230</sup>

Tour operators attempted to skirt the Hawaiian Legislature's ban by travelling outside state waters for the purposes of conducting shark feeding dives.<sup>231</sup> The Hawaii representatives in the U.S. House of Representatives responded by amending the 2006 renewal of the Magnuson-Stevens Fishery Conservation and Management Act to read:

Except to the extent determined by the Secretary, or under State law, as presenting no public health hazard or safety risk, or when conducted as part of a research program funded in whole or in part by appropriated funds, it is unlawful to introduce, or attempt to introduce, food or any other substance into the water to attract sharks for any purpose other than to harvest sharks within the Exclusive Economic Zone seaward of the State of Hawaii and of the Commonwealths, territories, and possessions of the United States in the Pacific Ocean Area.<sup>232</sup>

By banning the practice of shark feeding in both state and federal Pacific waters off Hawaii, the state sought to close potential loopholes under which commercial shark feeding operations could continue; however, in spite of a ban encompassing both state and federal waters, there are significant barriers to prosecution of violators, who must definitively be identified as illegally feeding sharks in an exact jurisdiction (state or federal waters) in order for prosecution to be practical.<sup>233</sup>

The support of the rights of fishing interests also reiterates a major complaint of feeding ban opponents in Florida—that attracting sharks with bait for the purpose of observing them is illegal, while identical behaviors for the purpose of killing sharks remained perfectly permissible under state law.<sup>234</sup> This made claims that commercial shark feeding is offensive to native Hawaiians appear slightly less credible to ban opponents.<sup>235</sup> Native Hawaiians may consider sharks to be *aumakua* (guardian spirits) and Hawaiian religious or cultural practices may include reverence for sharks as demi-gods or ancestral spirits.<sup>236</sup>

---

<sup>230</sup> *Id.*

<sup>231</sup> Leone, *supra* note 225.

<sup>232</sup> Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 U.S.C. § 1866 (2012).

<sup>233</sup> See Mike Mastery, *Extraterritorial Application of State Fishery Management Regulations under the Magnuson-Stevens Fishery Conservation and Management Act: Have the Courts Missed the Boat?*, 25 UCLA J. ENVTL. L. & POL'Y 1, 225–26 (2006).

<sup>234</sup> In Florida, at least, the FFWC ultimately resolved this inconsistency by subsequently banning shark feeding from shore for fishing purposes. See FLA. ADMIN. CODE ANN. r. 68B-44.009 (2019).

<sup>235</sup> Associated Press, *Hawaiian Shark Tours Attract Critics*, NBC NEWS, **Error! Hyperlink reference not valid.** <https://perma.cc/J7MS-4UYU> (last visited Feb. 1, 2020).

<sup>236</sup> Ann LoLordo, *Sharks Taking a Bite out of Hawaiian Water Sports, Stirring Controversy*, BALTIMORE SUN (Nov. 26, 1992), <https://perma.cc/78YR-HT84>.

One pro-ban activist noted that “[t]he cultural concern is that they [dive operators] are profiting from our Hawaiian aumakua,” and that this constitutes “a direct slap in the face to Native Hawaiians as we are taught to leave [sharks] be.”<sup>237</sup> There is a strong argument for respecting these cultural practices and beliefs, however, under Hawaiian law, shark viewing tours that do not feed sharks are perfectly legal<sup>238</sup> (and this pro-ban organization claims to have no objection to the shark tourism industry, provided it complies with the feeding ban).<sup>239</sup> They are thus arguing a relatively internally inconsistent proposition: that shark viewing is culturally permissible, so long as chumming does not take place, but impermissible when it does; while both commercial and recreational fishing for sharks, including chumming, is also acceptable.<sup>240</sup>

Nor were bans on shark feeding in both state and federal waters adequate to end the practice of shark feeding in Hawaiian waters; four years later the State Legislature would again consider relevant legislation, this time “[u]rging the Department of Land and Natural Resources to adopt rules to enforce the ban on shark feeding for the safety of the people of Hawaii and preservation of its marine ecosystem.”<sup>241</sup> This legislation acknowledged that the DNLNR “has expressed concerns over the enforceability and nominal penalties of the statutory prohibition,”<sup>242</sup> but made clear that the Legislature expected action from the DLNR, and that rules should:

Prohibit commercial use of shark cages or other devices designed to place humans in close proximity to sharks for the purpose of feeding them;

Prohibit the use of public harbors and facilities, such as parks, piers, docks, and ramps, by shark tour operators using such cages;

Prohibit the transportation of commercial shark feeding cages through state waters; and

Stringently enforce the law prohibiting the feeding of sharks in the waters of Hawaii<sup>243</sup>

This legislation went on to provide that should the DNLNR decline to adopt such rules, they are “urged to make specific recommendations to

---

<sup>237</sup> Jade Eckhart, *North Shore Community Stands up Against Shark Feeding Tours in Haleiwa*, HAW. INDEP. (Feb. 25, 2010), <https://perma.cc/9V9J-YGSP>.

<sup>238</sup> HAW. REV. STAT. ANN. § 188-40.6 (West 2019).

<sup>239</sup> Eckhart, *supra* note 237.

<sup>240</sup> See *supra* notes 237–239 and accompanying text; *Testimony in Opposition to HB 578 to the Committee on Water, Land, Agriculture, and Ocean Resources*, Reg. Sess. 2001, 26th Sess. 4 (Haw. 2001).

<sup>241</sup> H.R. 279, 25th Leg., Reg. Sess. (Haw. 2010).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

the Legislature for the revision of the applicable state statutes to promote enforcement of the prohibition against the feeding of sharks and provide adequate deterrence from violation of existing statutes.”<sup>244</sup> In both Florida and Hawaii, conflicts arose not only over the right course of action to manage shark feeding tourism, but about who had the regulatory authority to act. The DNLR has since adopted the original legislative language from the bill passed in 2002 as HRS 188-40.6.<sup>245</sup>

### *B. Enforcing the Shark Feeding Ban in Hawaii*

As Hawaii’s demands on the DNLR demonstrate, enforcing a ban on a marine activity is difficult, particularly when the proposed penalties are relatively modest. Despite the practice having been banned by the Legislature in 2002,<sup>246</sup> during the 2010 Legislative Session, Hawaiian lawmakers considered seven different bills intended to terminate or further restrict shark feeding tourism.<sup>247</sup> Failed bills sought to “ban tours that feed sharks, outlaw the use of cages for people to get closer to sharks and block the use of state harbors and parks for the tours.”<sup>248</sup> Among the failed legislation was House Bill 2583, which would have dramatically increased the penalties for shark feeding, making violations punishable by a fine between \$5,000 and \$15,000, as well as by possible vessel forfeiture.<sup>249</sup> It was passed by the House and Senate, but vetoed by Governor Linda Lingle.<sup>250</sup>

It seems reasonable to say, therefore, that the Hawaii ban (in spite of making shark feeding an offense under both state and federal law) has not proven to be a tremendous success. Both Hawaii Shark Encounters and North Shore Shark Adventures currently offer shark trips in Hawaiian waters and claim that they don’t “feed” sharks—though Hawaii Shark Encounters has acknowledged “a small amount of fish scraps is used to attract sharks close to the cage for easy viewing and photography,”<sup>251</sup> in potential violation of both state and federal law.<sup>252</sup>

---

<sup>244</sup> *Id.*

<sup>245</sup> HAW. REV. STAT. § 188-40.6 (2019).

<sup>246</sup> Travis Kaya, *Shark Feeding Issue Sure to Surface Again*, STAR ADVERTISER (July 12, 2010), <https://perma.cc/9SUA-AKHE>

<sup>247</sup> *Stiffer Penalties for Shark Feeding Draw Backing of Tour Opponents*, HONOLULU STAR BULL. NEWS (May 3, 2010), <https://perma.cc/B36A-TU9S>.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> H.B. 2583, 25th Leg., Reg. Sess. (Haw. 2010).

<sup>251</sup> Christie Wilson, *Shark-Cage Dive Tours Little Risk to Public Safety Hawaii, Study Finds*, HONOLULU ADVERTISER (May 15, 2009), <https://perma.cc/J4ZY-ULM5>.

<sup>252</sup> Gordon Y.K. Pang, *Judge Tosses Shark-Feeding Suspects’ Cases*, HONOLULU STAR ADVERTISER (Jan. 21, 2011), <https://perma.cc/WD4S-XHS9>.

Charges against five employees of these two companies were filed in Hawaiian District Court in January of 2011.<sup>253</sup> Defense attorney Ken Kuniyuki responded, claiming that there was “no legal or factual basis for this law at all,” and that the DNLNR had either overreacted or was scapegoating the defendants, subsequently telling newspapers that the charges were “a petty misdemeanor, and there’s only a fine involved here and yet DLNR sent three or four armed people to serve these penal summons which is certainly a waste of DLNR resources.”<sup>254</sup>

The charges were dismissed after NOAA officials, who had assisted the state in investigating possible violations, refused to release details about the “secret law enforcement GPS” used to track the location of shark feeding boats.<sup>255</sup> The charges were dependent on proving that the feeding took place within state jurisdiction (within three miles of the shore) so when the judge rejected the GPS evidence, prosecutors for the case requested the dismissal of charges they could no longer prove.<sup>256</sup> Opponents of shark feeding were “hopeful authorities will try the case again in federal court” since feeding in federal waters is also illegal—however, without definitive proof of location, federal charges were similarly unlikely.<sup>257</sup>

The issue of shark feeding and regulation continues to be a contentious one in Hawaii. Research and shark tagging partnerships with the University of Hawaii have allowed currently active shark feeding eco-tours to affiliate themselves with University research, exempting them from the feeding ban, which does not apply to federally funded scientific research.<sup>258</sup> At least one opponent of shark feeding appears to have abandoned hope that legal remedies can resolve the issue: in January and March of 2011, there were three separate arson incidents targeting tour boats belonging to North Shore Shark Adventures, causing estimated total damage of approximately \$550,000 to three different boats.<sup>259</sup>

## V. CONCLUSION

Although there are many technical difficulties associated with enforcing a ban on commercial shark feeding, actually preventing shark feeding is only part of the purpose of such bans. Another significant motive is the need to protect the state, agencies and local governments (who now “know” about a potential risk) from liability associated with

---

<sup>253</sup> *Id.*

<sup>254</sup> *Shark Tour Employees Charged with Illegal Shark Feeding*, HAW. NEWS NOW, <https://perma.cc/FPJ4-47J2> (last visited Feb. 1, 2020).

<sup>255</sup> Pang, *supra* note 252.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Audrey McAvoy, *Hawaii Shark Tours Continue, Despite Feeding Laws*, FOSTER’S DAILY DEMOCRAT (Apr. 9, 2010), <https://perma.cc/X7GQ-VSQA>.

<sup>259</sup> Gregg Kakesako, *Third Shark Tour Boat Burns*, HONOLULU STAR ADVERTISER (Mar. 26, 2011), <https://perma.cc/JZ8K-RZ9Z>.

shark feeding. The bans discussed here are likely to beget further bans and regulations, as increasing knowledge about the “risks” which shark feeds might present expands the threat of liability. These risks led the Cayman Islands, Guam, New Caledonia, and Western Australia to ban or limit the practice of shark feeding in their territorial waters.<sup>260</sup>

The wellbeing of sharks, while not ignored by decision makers, has clearly not driven consideration of the issues discussed in this paper. Both the scientific and social impacts of shark feeding ecotourism have been substantively debated, with some scientists and conservationists hoping it will further shark conservation,<sup>261</sup> while others remain skeptical of the stability and strength of the incentives shark tourism creates to enact lasting protections for sharks.<sup>262</sup> While there are cases in which shark ecotourism has been a catalyst for lifting communities out of poverty and generating well-paying local jobs,<sup>263</sup> there are also cases in which local people have felt deprived of access to valuable traditional shark fisheries without compensation.<sup>264</sup>

This paper has attempted to illustrate by example some of the reasons that shark ecotourism is likely to be subject to regulation in many of the places where it currently exists, making it an uncertain mechanism for the future of shark conservation, as well as to illuminate the difficulties involved in creating and implementing such regulation. Based on these case studies, it appears that both shark dive operators and ban proponents are only nominally debating the issue of shark feeding. In Florida, the issue became a proxy war for the conflict between “consumptive” and “non-consumptive” marine resource users,<sup>265</sup> while in Hawaii the debate over shark feeding took a similar shape, but also encompassed the role of sharks in Hawaiian culture, becoming a flash point for questions about identity, belonging and the rights of different user groups.<sup>266</sup> In both of these case studies, fundamentally human issues have been sometimes awkwardly grafted onto

---

<sup>260</sup> Karen N. Topelko & Philip Dearden, *The Shark Watching Industry and its Potential Contribution to Shark Conservation*, 4 J. ECOTOURISM 108, 118 (2005); GUAM CODE ANN. tit. 5, § 63114.3 (2019); *New Caledonia Bans Shark Fishing*, SCI. X NETWORK (Apr. 24, 2013), <https://perma.cc/D2J5-2ETV>; Natalie Paris, *Shark Tourism Banned in Western Australia*, TELEGRAPH (July 9, 2012), <https://perma.cc/23UZ-NHVV>.

<sup>261</sup> Thurston Hatcher, *Florida Panel Embraces Ban on Shark Feeding*, CABLE NEWS NETWORK LP (Sept. 7, 2001), <https://perma.cc/8GRU-N9Z6>.

<sup>262</sup> D.S. Shiffman & R.E. Hueter, *A United States Shark Fin Ban Would Undermine Sustainable Shark Fisheries*, 85 MARINE POLY 138, 138–39 (2017).

<sup>263</sup> See, e.g., J.M. Brunnschweiler, *The Shark Reef Marine Reserve: A Marine Tourism Project in Fiji Involving Local Communities*, 18 J. SUSTAINABLE TOURISM 29, 29 (2010).

<sup>264</sup> N. Rodríguez-Dowell et al., *Property Rights-Based Management: Whale Shark Ecotourism in Bahia de los Angeles, Mexico*, 84 FISHERIES RES. 119, 120 (2007).

<sup>265</sup> See Topelko & Dearden, *supra* note 260, at 122–23.

<sup>266</sup> See Chelsea Jensen, *Bill Would Protect Sharks in Hawaii Waters*, THE GARDEN ISLAND (Mar. 10, 2018), <https://perma.cc/DHT9-ZK98>; Nathan Eagle, *Fiji is Showing off its Sharks—Should Hawaii Do the Same?*, HONOLULU CIVIL BEAT (Jan. 17, 2017), <https://perma.cc/4YKP-KVFB>.

conversations about sharks.<sup>267</sup> However, in order to address both social and ecological questions in more productive ways, a frank discussion about what shark ecotourism can and cannot do and an exploration of the unspoken subtext of these legal debates is necessary.

---

<sup>267</sup> ANTHONY J. FEDLER, *THE ECONOMIC IMPACT OF SHARK DIVING IN FLORIDA* 4–5 (2017).