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## LEGAL ISSUES

### Always Look a Gift Terrapin on the Plastron

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“To keep every cog and wheel is the first precaution of intelligent tinkering”, so thought the father of wildlife ecology Aldo Leopold. In retrospect, the legislation adopted by the 2006 Maryland General Assembly to preserve the

State’s iconic diamondback terrapin (*Malaclemys terrapin*) may have had all the right legislative cogs and wheels. The 2007 legislative lobbying effort might have been one of those situations requiring intelligent or at least experienced

tinkering. For the third consecutive year the Maryland State legislature intervened in the management of the terrapin. However, the terrapin legislation adopted in 2006 may have been the better statute.

The 2007 terrapin legislation did in fact impose an indefinite ban on commercial harvest, but the minimum conservation measures crucial to sustaining wild terrapin populations were removed from statute. The fate of the terrapin resource rests with the regulatory agency which, for all intents and purposes, has been stripped of its traditional fishery management authority. The psychological ramifications of tinkering with traditional authority are difficult to forecast, but history would suggest that benign neglect may be a far more insidious exploitation of a natural resource.

Since the 2007 harvest ban was signed into law, the regulatory agency has rescinded a proposal for additional protective regulations and nothing is proposed to save the terrapin from the rest of us. The diamondback is off the market and out of the harvest basket, but not necessarily out of the proverbial net. It's still too early to tell, but it might have been wiser to play the aces we were dealt in 2006 before leaping into another political frenzy.

### **Pre-2006 Terrapin Conservation**

An assessment of Maryland's terrapin statute and current conservation efforts is incomplete without a quick review of previous terrapin laws, Maryland's legislative process, and a few extraneous or serendipitous details.

The terrapin resource was once so valuable as to have its own separate chapter in the State law; it was also defined as a "fish" and remains classified as such in Maryland statute. In the last 100 years, Maryland's conservation law has evolved and gradually assigned the bulk of interpretation and discretion to the regulatory level, i.e. the State's Department of Natural Resources, Fisheries Service. This is an improvement over times when only the elected body could make decisions in conservation. If regulatory agencies have insufficient authority or are out of step with public sentiment, the legislature may always step in, but only during their annual 90 day convention. Such was the case with terrapins. The State DNR was unable to protect the terrapin resource sufficiently against increased commercial exploitation so the State legislature intervened in 2005, 2006, and 2007.

Despite numerous scientific studies and peer-reviewed literature documenting the impacts of by-catch mortality, there were none investigating the extent or implications of direct fishing mortality from the commercial terrapin harvest. Previously, the science community had dealt with the commercial harvest in the abstract and/or suggested shifts in seasons and size limits. Up until 2006, none had directly addressed the commercial terrapin harvests.

The popular media began issuing reports of an increasing global demand for US turtles by 2000. Typically, with other economically-important commercial species, science

or management agencies conduct "fishery independent" investigations which are used to document the validity of official harvest reporting from the fishing industry. By 2001, there was abundant anecdotal evidence indicating that Maryland's hallmark reptile was staring down the barrel of infinite global demand. After a special funding request to assess the terrapin population was denied by the Maryland legislature, the Governor devised the Diamondback Terrapin Task Force in 2001. Since no fishery independent data was available or underway from any other independent source, the primary recommendation of the Governor's Task Force in 2001 was an immediate moratorium in the commercial terrapin fishery.

In 2003, preliminary "fishery-independent" data indicated an increase in commercial harvests and significant inconsistencies between the official terrapin harvest reports compiled by the DNR and the terrapin purchases conducted independently. These independent findings on the commercial terrapin fishery were presented at the 2004 Diamondback Terrapin Workshop in a presentation entitled "Turtles in the Midst".

In response to the mounting anecdotal concerns, the 2005 Maryland General Assembly attempted to address the developing terrapin crisis in a bill that directed the DNR to adopt the recommendations of the 2001 Governor's Diamondback Terrapin Task Force Report. The legislative effort failed.

### **The 2006 Terrapin Legislation**

Perhaps more than science, a front page article in the January 22, 2006 issue of the Washington Post directly influenced on the Maryland General Assembly to intervene again. In response to public concern, a harvest prohibition bill was introduced in the 2006 legislative session. Although the bill was modified by the bill sponsor to appease the Department of Natural Resources, the amended bill turned out to be a much more formidable law for terrapin conservation. In adopting the 2001 Governor's Diamondback Terrapin Task Force Report, the 2006 legislation was sound and retained the traditional authority of the fisheries agency.

Unfortunately, the terrapin legislation which was adopted in 2006 was entirely misinterpreted by the management agency and underutilized by the conservation and science communities. While the 2006 law was not the harvest prohibition originally introduced, it was a goldmine for comprehensive, sustained conservation for the diamondback terrapin, more than sufficient to end the harvest indefinitely and hold the regulatory agencies accountable over the long term.<sup>1</sup>

As mandated by the 2006 law, fisheries administrators proposed amended terrapin regulations in May 2006. The agency was expected to close the terrapin fishery via their regulatory authority in advance of the scheduled harvest

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<sup>1</sup> Findings of an independent legal review by the law firm of Wilmer Hale

season. As a means to offset the economic impact the Terrapin Institute offered an unprecedented compensation package to terrapin harvesters and buyers.<sup>2</sup>

When the regulations proposed in 2006 did not include the harvest prohibition, the science community and other conservation organizations were expected to object vehemently on principle and reject the proposal. After all, there was no debate over the futility of a commercial harvest in terrapins, particularly in recent years in which harvests increased five fold and the wild population in a long-term study had dropped to a quarter of its former size. Furthermore, the species had collapsed once already during twenty years of harvest pressure in the later days of the 20<sup>th</sup> century<sup>3</sup>, providing sound historical reference and abundant evidence.

By July of 2006, many terrapin advocates seemed to acquiesce along traditional regulatory lines and Rituals of Crises. The “science community” and others endorsed a continued harvest in July of 2006, supported the agency’s proposal to lower the minimum size limit for terrapins, and sent another 10,000 terrapins off to market during the 2006 harvest season, August through October 2006. The DNR press release issued August 2, 2006 included the following: “The scientific community is pleased with these regulations and feel they are an important step towards improved terrapin conservation and management,” said Associate Professor of Biological Sciences and a Terrapin Researcher. “We applaud the efforts of DNR to address the concerns of the 2001 Diamondback Terrapin Task Force.” The endorsement and applause was particularly baffling as only a few months ago, March 2006, the same “science community” had testified before a State legislative committee and provided compelling scientific evidence “Why we should ban the commercial harvest of diamondback terrapins”<sup>4</sup>.

### Unintended Consequences

Typically, the “unintended consequences” of management decisions take years to manifest. However, in just a few short months, miscalculations began to add up for terrapins and other turtle species in Maryland. A November 1, 2006 article in the Baltimore Sun<sup>5</sup> - *Farm points way out of turtle trap: Amid new curbs on catching turtles, Rodney Lewis raises lots of his own* – indicated that as a result of the 2006 regulations “more people are getting into the business, and that means more pressure on the turtles.”

According to the article, State agency records indicated prior to the 2006 regulations that “Fewer than 10 watermen in Maryland admitted catching terrapin.” However, in the summer of 2006, “that number tripled to 32, when the

state imposed the new regulations and required a special terrapin license.” The director of the State’s DNR fisheries programs said the state never meant to stimulate more terrapin harvesting but acknowledged they were aware of the growing market for smaller turtles: “We have heard that the taking of small terrapins is fostering a pet trade, and we don’t want that.”

Despite its own records and anecdotal evidence advising against a continued commercial harvest of terrapins, apparently the State applied sustainable yield concepts typically used to establish “fishing mortality” in fish species. Without baseline data, appropriate harvest data and a limited entry on terrapin harvesters the management strategy was doomed at inception. Terrapins are not fish.

A few months later, the State’s official terrapin harvest reports indicated that the amended regulations had in fact facilitated a “twenty fold” increase in terrapin harvests as reported in a February 7, 2007 article in the Baltimore Sun - “Terrapin catch raises alarms: State considers ban on diamondback trapping as harvest leaps twenty-fold”. According to the article “The regulatory effort “totally backfired”. The terrapin expert who advised Maryland on the 2006 rules “thought [the new regulations] would essentially close down the fishery.”

The problem is that the 2006 regulations were based on traditional agency speculation and fisheries management theory, not fundamental turtle conservation theory, commercial market data or predictable harvesters’ behavior. **There were virtually no reliable science data available to justify the scheme.**

The new rules merely shifted the harvest pressure from adult females to the male terrapin population and to all juvenile terrapins. To compensate, harvesters simply apply more fishing pressure by setting more gear. The 2006 terrapin regulations which lowered the size limit and concentrated the harvest season down from nine months to three months, had essentially put the entire wild terrapin population on sale for a limited time only. From a fundamental retail perspective, Maryland’s 2006 terrapin regulations were more a classic merchandizing mechanism to reduce stocks on hand than a strategic conservation measure implemented to preserve a wild species in decline.

### 2007 Terrapin Legislation

After the “unintended consequences” of 2006 regulations were publicized, a reconstituted terrapin lobby drafted new language and found a new legislative sponsor to introduce another terrapin bill to the 2007 General Assembly. DNR announced that a harvest moratorium was imminent and promised to conserve the terrapin resource. The newly elected governor announced his commitment to saving the terrapin, but wanted to keep the agency’s traditional regulatory authority intact. The Terrapin Institute opted to support the new governor and urged the new terrapin lobby to leave the 2001 Terrapin Task Force Recommendations in

<sup>2</sup> Letter to the Governor

<sup>3</sup> The Terrapin King, Chesapeake Bay Magazine, April 2005

<sup>4</sup> Testimony

<sup>5</sup> Baltimore Sun

the law. A much different terrapin law was approved in the final hours of the 2007 legislative session.

Ideally, State legislation should be easy to interpret and impartial. Unfortunately, the 2007 terrapin legislation may be ambiguous, biased, and without sufficient consideration to practical implementation, enforcement, or conservation. In its adopted version, the 2007 terrapin legislation eliminates commercial harvesters and specifically protects the rights of scientists, collectors, and incidental catchers. Everyone is now entitled by law to collect up to three terrapins from the wild even though we have no idea how many terrapins remain in the wild.

The amended terrapin statute does not prohibit “the incidental catch of diamondback terrapin, provided the diamondback terrapin are returned immediately to the water”. In this context the term “immediately” is confusing. Does “immediately” mean as soon as the terrapin becomes “incidental catch” or as soon as the catcher discovers the incidental catch? The last minute amendment to allow continued terrapin farming does not seem to alarm the bill drafters, although no one can explain what this means to the wild resource.

The greatest disappointment or inexplicable tinkering in the 2007 bill is the deletion of the specifics of the “2001 Governor’s Diamondback Terrapin Task Force”. The more neutered and apparently confusing term “conservation” replaces the specifics of the Task Force in the statute.

## **Conclusion**

Before a packed State House which included two terrapins from the National Aquarium collection, Governor O’Malley signed the bill into law. Maybe the terrapin describes it best: judging from the front page photos, one of the terrapins looks relieved while the other appears dazed and confused. This is likely as good as it is going to get for a long time, so we’ll make the best of it.

The commercial terrapin fishery is finally closed (but could always be overturned in future legislative sessions) and there may be an intra-agency struggle brewing over which authority will eventually save the terrapin, the classic Fisheries Service or the Wildlife and Heritage Service. Nevertheless, there is reason for hope with the new hand we’ve been dealt.

In October of 2006, a vigilant and persistent DNR police force achieved an enforcement hat-trick by confiscating and repatriating over 200 hundred terrapins from an unlicensed vendor which resulted in an unprecedented conviction and hefty fine on judgment day. Although by-catch mortality, destruction of nesting beaches, and poaching continues and not all agency personnel are feeling the love, it looks as though other turtle species in Maryland may be getting some much needed protection. Note to the turtle advocacy, management, and science communities: be careful what you wish for, endeavor to understand every cog and wheel, and think before tinker.

## **Gopher Tortoise Uplisted to Extinction?**

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The Florida Fish and Wildlife Conservation Commission (FWC) at its 12 September meeting voted to uplist the gopher tortoise, *Gopherus polyphemus*, as threatened throughout its range in Florida. That is the good part, however. FWC did not revise the new management plan to include proper methods or financing or relocation as the primary conservation tool for the tortoise. This means that current rules are still in effect. These regulations do not call for recipient sites to meet any minimal standards; permanent protection or management of the site or even development in the future are not required for owners of these sites. Meanwhile, efforts to find large landowners willing to take tortoises and relocate them based on what is effective in accordance with current research are hampered because the financing of perpetual management and conservation easements is still up in the air. The FWC has agreed to come back to the Commission with solutions to these and other key components of the plan by the first quarter of 2008. Meanwhile, FWC stands to lose 15% of its budget. If left

as is, the management plan and budget will in fact make this management plan a blueprint for the extinction of the gopher tortoise in Florida.

The Gopher Tortoise Conservation Initiative (GTICI) has provided an economic plan that if adopted could possibly pay for the entire conservation program for gopher tortoises, and possibly pay for the management of over 87,000 acres of tortoise habitat in state conservation lands. Some of these lands are just a few years away from being so neglected that they will no longer be a suitable habitat for tortoises.

FWC has promised to address the major issues related to relocation, such as single-family-home development where tortoises have essentially no protection. At least 70,000 tortoises each year are being ignored on 146,000 units/year statewide, and a wide variety of other issues are key to the success or failure of this effort.

“If conservation is to be successful in perpetuity, it must be embraced by the community culture, be useful to the people and be economically self sustainable.”