AMENDMENT ONE OF THE ATLANTIC STATES MARINE FISHERIES COMPACT AS A BASIS FOR UNIFORM STATE FISHERIES REGULATION

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J. E. M.
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INTRODUCTION

Management of migratory fishes by the states has always been difficult. Certain marine and anadromous species spend at least part of their life cycle beyond the jurisdiction of any single state and the circumstances under which an individual state can regulate the taking of fish beyond its territorial limits are extremely limited.[1] Further, state regulatory efforts have too often been inconsistent and a hinderance to the efficient harvesting of a particular fishery.[2] To overcome these problems requires coordinated regional management either by groups of states, the states and the federal government, or by international agreement, depending on the fishery involved. This concept of coordinated regional fishery management is mandatory under the Fisheries Conservation and Management Act of 1976,[3] which provides the structure for coordinating state, federal, and international interests involved in fisheries management.

The Fisheries Conservation and Management Act will probably not, however, end the need for regional fishery management by the states. The federal legislation, as will be discussed later, is primarily directed toward fish harvested beyond state territorial waters or in international waters. There are species, for example south Atlantic shrimp and menhaden, that are caught primarily inshore.[4] The existing need for regional management of species such as these remains largely unaddressed by the Fisheries Conservation and Management Act and should be resolved by the states themselves. Further, the Act leaves some power in the hands of the states over those species which are harvested beyond state territorial waters, power thich can most effectively be exercised by groups of states acting in concert.[5] Therefore, the need for coordinated regional fisheries management by the states will remain, despite the Fisheries Conservation and Management Act. A possible candidate to fill

this need on the Atlantic seaboard is Amendment One[6] of the Atlantic States Marine Fisheries Compact.[7]

The purpose of this study is to examine how Amendment One and the Compact itself can be used to facilitate regional management of selected fisheries. The study will concentrate first on the authority of the states to regulate fisheries on a regional basis after enactment of the Fisheries Conservation and Management Act and then on the legal requirements for utilizing the Amendment One process for coordinated regional management in light of its legislative history. Further, an analysis will be made of Amendment One's use by Maine, Massachusetts and New Hampshire to regulate the northern shrimp fishery. The study will conclude with a suggested approach to the use of Amendment One which could be uniformly adopted by interested states.

PART I

Preliminary Considerations Affecting State Fisheries Management on A Regional Basis

(A) The Effect of The Fishery Conservation and Management Act of 1976 on State Power to Regulate Marine Fisheries

To a great extent the future utility of Amendment One as a Vehicle for regional fisheries management by the states is dependent on the degree to which state authority to regulate fishing has been preempted by the Fisheries Conservation and Management Act. The statute extends the territorial jurisdiction of the United States over most fisheries to 200 miles from the coast[8] and creates regional fisheries management councils which must develop management plans for all fisheries in their

geographical area.[9] The plans, after approval by the Secretary of Commerce, become federal law.[10] The statute also provides for allocation of catches between United States and foreign fishermen.[11] Since the regional councils have a mandatory duty to develop management plans for all fisheries within their areas, this could preempt to some degree the authority of the states to regulate fishing. For this reason, the provisions of the Act, especially its treatment of state power, must be examined.

The only express statement in the Fisheries Conservation and Management Act on state regulatory authority over fisheries is contained in section 306, which provides as follows:

> (a) IN GENERAL. -- Except as provided in sub-section (b), nothing in the Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state.
> (b) EXCEPTION. -- (1) If the Secretary finds, after notice and an opportunity for hearing in accordance with section 554 of title 5, United States Code, that --
>
> (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and
> (B) any state has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;
>
> the Secretary shall promptly notify such State and the appropriate council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan.
> (2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall

promptly terminate such regulation.

Of significance is this section's declaration that nothing in the Act is intended to either diminish or enlarge the authority of a state within its boundaries and that the states retain authority to extraterritorially regulate vessels registered in the regulating state. This suggests that, except for the limited circumstances described in section 306(b), the Fisheries Conservation and Management Act is not meant to drastically affect existing state regulatory authority over fisheries. Section 306 suggests, then, that the authority of the states to engage in coordinated regional management inside the three mile limit will remain largely unaffected by the Act. Extraterritorially, however, there are significant changes. The Act has substantially altered the historical federal-state allocation of responsibilities over fisheries management beyond state waters. Before its passage, the federal government, while having authority to regulate fishing by United States vessels beyond state boundaries, had not exercised its power and the only effective controls had been individual state extraterritorial regulation.[12] By the passage of the Fisheries Conservation and Management Act, Congress chose to fill this regulatory void by creation of a series of regional councils with authority to develop management plans applicable from the seaward boundaries of the coastal state to the 200 miles extended jurisdiction line. Since the councils have an affirmative duty to formulate plans for all fisheries within their regions,[13] broad exercise of their powers could potentially eliminate entirely the need for coordinated regional management by the states themselves for fisheries beyond state waters. In such a case, the individual states presumably could still

regulate the activities of their own vessels beyond state waters under section 306 of the Act, however all other vessels would be controlled by federal regulations developed by the appropriate regional council and promulgated by the Secretary of Commerce. Any need for individual states to coordinate their extraterritorial regulations to achieve regional uniformity would then become unnecessary.

That the regional councils will fully utilize their authority under the Act, however, is uncertain. The Fisheries Conservation and Management Act, while providing that the regional councils may comprehensively regulate fishing beyond state territorial waters, does not compel them to do so.[14] While all fisheries within a particular council's territorial boundaries must be the subject of a management plan, the plans at a minimum must only include a description of the fishery, its probable maximum and optimum sustainable yields, an assessment of the amount of the catch available for harvest by foreign vessels, and measures which are necessary for the conservation and management of the fishery.[15] In the discretion of the councils, the plans may additionally contain season limitations, gear restrictions, catch and size limits, and require a permit to fish.[16] Thus, it is possible that the regional councils will not directly regulate all fisheries but act only as information gathering bodies on catch limits and optimum yields in order to regulate overfishing by foreign vessels. If that is the case, the regional councils may not necessarily become involved in directly regulating domestic fishing vessels, or they may choose to regulate comprehensively some but not all fisheries, or they may choose to establish season closings but leave unaddressed problems of gear and size limitation. The point to emphasize is that there may be substantial gaps in the comprehensive-

ness of regulation by the regional councils which perhaps could be legitimately addressed by the states, acting either individually or collectively on a regional basis. It may be possible to have some degree of regional council regulation for a particular fishery and supplemental extraterritorial state regulation on a regional basis covering those needs not addressed by the council. Even after the Fisheries Conservation and Management Act, then, coordinated regional fisheries management by the states, both inside and outside state territorial waters, seems possible.

A second area of potential coordinated regional action by the states under the Act also exists. Under section 303(b) (5), the regional councils have the discretion to incorporate into their management plans for particular fisheries "--the relevant fishery conservation and management measures of the coastal states nearest to the fishery." The obvious purpose of this provision is to provide coordination between state and federal regulation of a particular fishery. Under this provision it would be possible for a group of states to adopt coordinated regulations for a particular fishery, allowing the councils in turn to look to the states as a source of substantive regulations for their regional management plans. While not direct regulation, this approach allows the states a means of influencing the councils and through them the ultimate content of federal regulations.

After passage of the Fisheries Conservation and Management Act a role for regional fisheries management efforts by the states appears to exist. The Act seems to leave room for such actions within state waters, extraterritorially when the regional councils have not themselves already adopted regulations, and as a source of uniform regulations which the

councils can refer to in formulating management plans. These possibilities remain, of course, speculative and subject to the degree of regulatory aggressiveness exhibited by the regional councils. Perhaps it is safe to state at this point only that the Fisheries Conservation and Management Act leaves a potentially significant role for regional fisheries management by the states. The various methods of filling that role will next be examined.

(b) Coordinated Regional Fisheries Management By the States: Compacts, Uniform State Laws, and Reciprocal Agreements

There are several means by which the states can manage fisheries on a regional basis, specifically the Amendment One process,[17] coordinated adoption of uniform state laws,[18] and reciprocal agreements between state fisheries management agencies to adopt uniform regulations.[19] Some of these techniques have already been exhaustively studied[20] and it is beyond the scope of this study to make an indepth comparative analysis. There are, however, several major considerations worth emphasizing since they are of relevance to any decision to choose among the three alternatives. Since each of the methods can be the basis for regional fisheries management, the choice among them depends largely on ease of implementation, legality, and efficiency of administration once enacted. These factors will be explored in rather summary fashion before turning to a detailed analysis of the Amendment One process itself.

With regard to ease of implementation, there is little to differentiate among the Amendment One process, adoption of uniform state laws, and reciprocal agreements. Obviously, any approach which does not require additional action by state legislatures to implement regional regulations would offer a major advantage, however none of the methods

apparently qualify on this point. As will be discussed later, widespread use of the Amendment One process would, at a minimum, require adoption of Amendment One in those states which have not as yet acted on it.[21] Further, the legislative history of the congressional consent to Amendment One suggests that, even in those states which have adopted it, additional state legislative action will be necessary before it can be legally used for regional fisheries management.[22] The situation is not significantly different either for adoption of uniform state laws and regulations or reciprocal agreements. The former approach would, of course, require additional legislation in those states where fisheries management agencies have only limited authority to promulgate regulations themselves.[23] Similarly, while some states have already passed statutes authorizing their fisheries management agencies to enter into reciprocal agreements, some of the statutes restrict these agreements to matters other than actual regulation and would require amendment or revision before they could be used for regional regulation.[24] Further, a number of states, even if they were to legislatively authorize reciprocal agreements, would also have to substantially broaden the authority of their fisheries management agencies to allow them to promulgate regulations. On balance, at least along the Atlantic coast, state legislatures have retained much of the authority to regulate fishing and have not been willing to delegate broad regulatory powers to administrative agencies. Because of this, there is no single means of achieving regional fisheries management which will not require significant additional legislative authorization.

The second consideration is the legal risk associated with each of the alternatives. Here there may be a slight advantage to using the

Amendment One process. It is an established procedure, already consented to by Congress and involves little legal risk. A slightly greater degree of risk may be associated with the use of reciprocal agreements. They may in fact be technically subject to the congressional consent requirements of true interstate compacts, since they are a form of interstate agreement,[25] and consequently could be challenged on that basis by adversely affected parties. With regard to adoption of uniform state laws, there is essentially no risk. Numerous uniform state laws exist, a prime example being the Uniform Commercial Code, and their enactment has not been challenged.

The third factor of importance is administrative efficiency. This is difficult to assess accurately without specific information regarding the internal operating procedures and limitations of the various state fisheries management agencies, however there are some relatively obvious points which can be made here. First, use of the Amendment One process and with it the resources of the Atlantic States Marine Fisheries Commission will permit coordination of policy by an agency whose expertise is in the area of coordination of diverse state fisheries management efforts. This may not only take some of the administrative burden of achieveing regional regulation off the states, but also provide an agency with direct responsibility for information transfer and coordination of efforts. Further, the Executive Director of the Atlantic States Marine Fisheries Commission is a member of each Atlantic coast regional council under the provisions of the Fisheries Conservation and Management Act.[26]

This may facilitate cooperation between the states and the federal government andprovide a means for the states to influence federal policies.

In summary, these seem to be the major distinctions among Amendment One, uniform state laws, and reciprocal agreements as vehicles for regional fisheries regulation by the states. The differences do not appear major and in the last analysis, perhaps the choice among them will most be affected by political considerations and the relative efficiency of administration of the various methods. In view of the above discussion, the Amendment One process, while suffering some of the same disadvantages as the other methods, specifically difficulty of implementation, has essentially no legal risk associated with its use and offers some apparent advantages with regard to administration.

PART II

Amendment One of the Atlantic States Marine Fisheries Compact as a Basis for the Regional Regulation of Fisheries

(A) The Evolution of the Atlantic States Marine Fisheries Compact

(1) The Original Atlantic States Marine Fisheries Compact Basic Purposes and Powers

The history, purposes, powers, and method of operation of the Atlantic States Marine Fisheries Compact[27] and its executive body, the Atlantic States Marine Fisheries Commission, have been exhaustively treated elsewhere and only a few points regarding the compact and the Commission itself need reemphasis here.[28] The compact, which was eventually adopted by all Atlantic coastal states, was enacted primarily to further interstate cooperation in fisheries management. As originally consented to by Congress, its stated purpose is " . . . to promote the better utilization of the fisheries, marine, shell, and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause."[29] The business of the compact is administered by a commission composed of an executive director and three voting representatives from each of the member states.[30] Legally, the commission is an agency of each of the compacting states, deriving its powers solely from the legislatures of the compacting states.[31] Under the terms of the compact, the Atlantic States Marine Fisheries Commission is authorized to determine methods, practices, and circumstances which can further conservation and prevent waste of Atlantic coast fisheries.[32] It has the express power to recommend coordination of the member states' police powers to further conservation, recommend legislation

dealing with fisheries, and to consult with appropriate state agencies.[33]

When Congress originally authorized the states to enter into negotiations for a fisheries compact, it authorized the states not only to form a compact for cooperative, mutual efforts in fisheries research, but for regulation as well.[34] Further, the extent of the compact's powers over "fishing" included the power to regulate the fishing for or the taking of any species, suggesting that Congress appproved broad authority to regulate all aspects of fishing, including licensing, methods of taking, size limitations, landing regulations, and length of seasons. This original congressional authorization to include regulatory powers in the compact was not immediately utilized by the states. Because of political considerations, the compacting states were unable to agree that regulatory powers should be included in the original compact.[35] As finally passed by the states and consented to by Congress, the Atlantic States Marine Fisheries Compact in its unamended form provided only for cooperative research and consultation among the states, but not for joint fisheries regulation.

(2) Amendment One: The Addition of the Power to Regulate

While the compacting states initially could not agree on the question of regulatory powers, the inability of individual states to manage fisheries remained a problem. For this reason a subsequent effort to each agreement on the issue of regulation was successful. After a period of negotiations, Amendment One to the Atlantic States Marine Fisheries Company was enacted by Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, New Jersey, Pennsylvania, Virginia, and North Carolina. It was consented to by Congress in 1950[36] in the following form:

AMENDMENT NUMBER 1

The States consenting to this amendment agree that any two or more of them may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating States with respect to specific fisheries in which such States have a common interest. The representatives of such States on the Atlantic States Marine Fisheries Commission shall constitute a separate section of such Commission for the exercise of the additional powers so granted provided that the States so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the States participating therein of any of their privileges or powers or responsibilities in the Atlantic States Marine Fisheries Commission under the general compact.

Sec. 2. Without further submission of such amendment to the Atlantic States Marine Fisheries Compact, the consent and approval of Congress is hereby given to the States of Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, Georgia, and Florida, now parties to the Atlantic States Marine Fisheries Compact, and to the State of Vermont when it shall enter such compact for the purpose of better utilization of its anadromous fisheries, to enter into such amendment as signatory States and as parties thereto, in addition to the States which have now ratified the amendment.

Sec. 3. The first section of Public Law 539 of the Seventy-seventh Congress (56 Stat. 267) is hereby amended by striking out "(which shall be operative for not more than fifteen years from the date of the enactment of this Act)"; Provided, That nothing in this compact shall be construed to limit or add to the powers or the proprietary interest of any signatory State or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by a signatory State imposing additional conditions and restrictions to conserve the fisheries.

Sec. 4. The right to alter, amend, or repeal the provisions of this Act is hereby expressly reserved.

Approved August 19, 1950.[37]

The language of Amendment One clearly authorizes two or more individual states to act on a regional basis, through the Commission, to regulate fisheries. Several questions, however, are immediately raised concerning precisely how such regional management must be accomplished. First, does adoption of Amendment One bestow any additional powers on the enacting

states which they did not possess prior to its adoption? Second, and of most importance, does adoption of Amendment One by a group of states automatically empower the Commission, acting through the state commissioners, to undertake regulation, or is some additional action, perhaps additional legislation, by the states necessary? Third, does Amendment One establish as a precondition to regulation, the mandatory appropriation of funds, even in situations where expenses can be met from existing appropriations? These and other questions relevant to the use of Amendment One for the purpose of regional fisheries management will be considered in the following sections.

(B) The Legal Prerequisites for Utilization of Amendment One

(1) Powers Conferred on the States by Amendment One

What additional powers, if any, are conferred on the states by the adoption of Amendment One is reasonably clear from an examination of the congressional consent hearings on Amendment One. A major concern of the interests opposing consent was that approval of Amendment One would give the compacting states additional power to regulate beyond their territorial waters, an area where commercial fishing previously had been only minimally controlled.[38] It is quite clear that Congress' response to this concern, the addition of language to Amendment One that its adoption would " . . . neither add to or take away from the powers of the states . . .,"[39] was intended to emphasize that the states were indeed receiving no additional regulatory powers.[40] Amendment One, instead of conferring new powers on the states, merely allowed them to regulate on a regional basis through a multi-state agency, an objective which, before

the amendment, could only have been accomplished through uniform state laws or reciprocal agreements.

A related issue is the question of exactly what powers the compacting states may exercise under Amendment One. Again, the language added to Amendment One by Congress suggests that a state may delegate to the Atlantic States Marine Fisheries Commission via Amendment One only those powers the state possesses and which may be constitutionally delegated. Thus, there seemingly would be no problem with using Amendment One for regional control of season closings, gear, landing restrictions, size limitations, and even uniform licensing since all these controls are undoubtedly within the powers of the individual states. There may, however, be constitutional prohibitions on the exercise of certain powers on an interstate basis. Specifically, several states have debt limitation restrictions and require a public referendum before additional debt may be incurred.[41] Should a state be forced to finance its Amendment One activities through debt financing, an unlikely possibility at this point, it could be constitutionally prohibited from using such funds until its own internal constitutional conditions are met.[42]

(2) Exercise of Regional Regulatory Powers Under Amendment One

The most critical question involving Amendment One is precisely how a group of states must proceed on a regional basis under Amendment One. Does its adoption alone empower the states to regulate fisheries on a regional basis or is some additional action necessary? A precise answer unfortunately cannot be determined because state legislative histories of the adoption or rejection of Amendment One by individual states are not available. The body

of information which is available, however, collectively suggests that adoption of Amendment One alone does not carry with it a delegation of powers to any state administrative agency or executive officer authorizing regional regulatory activities.

Several factors support this conclusion. First, the language of Amendment One itself suggests only an authorization of regional regulation but not an actual delegation of regulatory authority. The provision expressly states that " . . . any two or more (consenting states) may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency withsuch powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating states . . . "[43] The plain meaning of this language is that Amendment One is not self-executing; that is, it only allows the participating states to confer regulatory powers on the Commission, but itself delegates no such powers. This interpretation is indirectly supported by the legislative history of the congressional statute consenting to state adoption of Amendment One. At the hearings on the provision, then secretary and treasurer of the Atlantic States Marine Fisheries Commission, Mr. Wayne Heydecker suggested that the states which had enacted Amendment One viewed it as a device which permits them to regulate jointly if they later chose to do so.[44] The inference to be drawn from this testimony is that additional state action, other than the adoption of Amendment One, is required before two or more states can utilize the Atlantic States Marine Fisheries Commission as a regulatory agency.

Unanswered by this congressional legislative history, however, is the question of exactly what additional "state" action must be taken and who must take it to implement Amendment One. Several alternatives are plausible, among them additional legislation. Short of that, the Governor may be able to utilize Amendment One, or the director of a State marine fisheries agency or the Atlantic States Marine Fisheries Commission commissioners from each individual state may have authority to act regionally through Amendment One. There is at least a suggestion in the Amendment One congressional consent hearings that this further state action must be legislative.[45] It was the position of John Bindloss, Chairman of the Commission that before the Atlantic States Marine Fisheries Commission could acquire regulatory powers from the states, the states would first have to adopt Amendment One and, second, pass additional legislation formally delegating regulatory powers to the Commission. There was, however, no corroboration of this position by any member of Congress and, on balance, the congressional legislative history suggests that Congress simply did not address this point.

If this conclusion is correct and there is no established position on how the individual states must implement the Amendment One process, how regulatory authority must be delegated to the Commission becomes a question of the law of each individual compacting state. Because of the unavailability of state legislative histories on this point other sources of authority must be looked to in order to determine an answer. A starting point is the general law of delegation of power to administrative agencies. Clearly, the Atlantic States Marine Fisheries Commission is a multi-state agency, an agency of each compacting state.[46] To exercise regulatory powers under Amendment One, the Commission must first have such powers properly delegated to it and the source

of the delegation must ultimately be the state legislatures of the participating states themselves. This legislative delegation could be the statute adopting Amendment One itself, since an argument can be fashioned that by adopting Amendment One, a state legislature at the same time is delegating authority to participate in regional regulation to an appropriate state agency. Other possibilities include statutes specifically delegating such regulatory powers or general delegation statutes conferring certain powers on state fisheries agencies or state commissioners to the Commission. From the perspective of the general law of delegation of powers of and the language of existing state statutes, none of these seems likely.

While the constitutional limits on legislative delegation have been largely settled for federal law,[47] state law is more unclear. It was long the view of most courts that, whatever powers a legislature chooses to delegate, the delegation of powers must be sufficiently circumscribed by legislative standards to adequately control administrative discretion.[48] There are several valid reasons supporting the requirement of precise standards, among them guidance for administrative action, prevention of administrative usurpation of legislative power, and limiting the extension of administrative discretion beyond the boundaries intended by the legislature.[49]

In recent years, however, persuasive arguments have been leveled at the legislative standards doctrine.[50] It has been pointed out that the traditional view that definitive legislative standards control administrative discretion has never worked and in fact should not work. First, administrative agencies are continually confronted with changing conditions and legislative bodies simply do not have the necessary information to fix guidelines which can both guide and control administrative action. Second, the courts themselves have often paid mere lip service to the standards doctrine in the area of

administrative law but have totally ignored it in other areas, such as the control of prosecutorial discretion. Because of these considerations, the argument has been made that emphasis should be placed on proper administrative safeguards and procedures to protect the interests of those affected by administrative action and not on the existence of legislative standards. In light of these considerations two possibilities can be immediately ruled out. First, as discussed earlier, the adoption of Amendment One by a state legislature apparently is not at the same time a delegation of the power to regulate to any state administrative body. In every state which has adopted Amendment One, the adopting statutes leave totally unaddressed the myriad specific regulatory details which must be resolved before regulation could be initiated. Species, seasons, sizes, methods of taking, and other legitimate topics of regulatory concern are simply not touched upon by the statutes adopting Amendment One. By even the most liberal standards, relying on these statutes as the source of the delegation of regulatory powers would not pass constitutional muster. Clearly, a source of authority other than the Amendment One adoption statutes themselves must be identified. Further, at least among the Atlantic seaboard states, there are no statutes specifically delegating broad regulatory authority to the Commission itself.

As possible sources of delegation, this leaves only statutes delegating general authority to state fisheries agencies or Atlantic States Marine Fishery Commission commissioners. Such statutes exist in all states which have adopted Amendment One and therefore are the most likely candidates as sources of regulatory authority. A survey of these statutes, however, reveals no express delegation of authority, either to state fisheries agencies

or Commission commissioners, which could empower either body to act on the state's behalf to exercise regulatory authority through the Commission.[51] Nor is it likely that these statutes could be found to imply such authority. Indeed, to conclude that such authority exists would be inconsistent with the position taken by several state legislatures on the extent of powers they have chosen to delegate to their own fisheries agencies. Several states which have adopted Amendment One have been quite restrictive with regard to the powers that they have delegated to their fisheries agencies. For example, the legislature of Maine does not allow even its own agency to establish size limits and methods of taking, preserving these decisions as legislative prerogatives.[52] It would be inconsistent to have a state fisheries agency with greatly restricted powers, but a multi-state agency, not subject to the same political constraints, with much greater discretionary powers. Further, a state agency or group of commissioners could not redelegate to the Atlantic States Marine Fisheries Commission more power than they themselves have been given by the legislature.

At the minimum, in those states whose fisheries agencies themselves have very limited powers, there probably has been no general delegation of power to any state body to act on the state's behalf to proceed with regulation through the Atlantic States Marine Fisheries Commission. In those states which have delegated broad general powers to their fisheries agencies, a similar conclusion is likely. In such states, either the fisheries agency or the Commission commissioners would have to have implied authority to act through the Commission for the purposes of regulation. Again, general constitutional restrictions on delegation of power to administrative agencies argue against such implied authority being upheld by the courts. This conclusion should be tested, however, by attorneys-general opinions in each state.

These considerations suggest that before Amendment One can be employed as a means of achieving uniform regional regulation of fisheries, additional state action, most probably legislative, will be necessary before the Amendment One process can be used. The general law of delegation of powers to administrative agencies, especially when compared with the restrictive position several states have taken on powers delegated to their own fisheries agencies, argues against the likelihood that courts would find express or implied authorization for any state agency or body of commissioners to regulate fisheries through Amendment One under existing state statutes.

(3) Appropriation of Funds for Amendment One Regulatory Activities

The final issue involving the basic conditions of Amendment One use involves the extent to which participating states have an obligation to appropriate funds when employing Amendment One.[53] A question arises whether this appropriation is mandatory in all cases or applicable only when extra expenses are incurred which cannot be paid for out of the regular annual state appropriations to the Commission. While nothing in the legislative history sheds any light on this point, the latter position seems more reasonable. The probable purpose of the appropriation requirement was to insure that those states not using Amendment One not be required to support activities from which they would derive no benefit. This suggests that states using Amendment One are required to appropriate additional funds only to the extent necessary to defray administrative costs which cannot be met from regular annual appropriations, or to defray extraordinary costs such as enforcement personnel, vessels, and other equipment.

(C) The Mechanics of the Amendment One Process in Regional Regulation of Fisheries

There remain to be considered several important aspects of the Amendment One process as a vehicle for joint state regulation of fishery resources. Assuming there must be additional express delegation of authority before the states can utilize Amendment One, the details of the delegation process should be examined. Also of importance are procedures for adoption of regulations by the Atlantic States Marine Fisheries Commission and various problems associated with enforcement of duly promulgated regulations. Each of these areas merit some extended treatment.

(1) State Authorization to Utilize Amendment One: The Delegation Problem

If the conclusion developed earlier that an additional legislative delegation of authority will probably be necessary to implement the Amendment One process is correct, a major threshhold issue of relevance is the extent to which state regulatory powers may constitutionally be delegated to an administrative agency, in this case the Atlantic States Marine Fisheries Commission. There are two specific delegation issues which are of particular importance to the successful use of Amendment One. First is the extent to which interest groups who will be subject to administrative regulations can vote on those regulations. Second is whether a legislature may delegate authority to an administrative agency to impose discretionary fines.

With regard to the first issue, because of the separation of powers doctrine, a legislative body's authority to delegate its legislative power to private entities and allow them to engage in a law making function is severely limited.[54] As a result, legislative schemes which have attempted to vest regulatory or rule-making power in an administrative agency made up largely of the same interests which are to be regulated have not been upheld. For example, a milk price board composed of milk producers,[55] a

board with authority to regulate timber management practices on private land made up entirely of members of the timber industry,[56] and a board of dry cleaners whose purpose was to regulate minimum price schedules for dry cleaners[57] have all been held unlawful by the courts on several grounds. First has been the requirement that legislative power must be exercised either by the legislature or by a publicly oriented administrative agency. Second, significant due process problems exist when regulation by direct competitors of regulated parties is permitted. Problems of fairness and impartiality taint the regulatory process in such instances and are sufficient to invalidate it. There are several specifically identifiable factors in the cases which are of significance here. One is the extent of the delegation. If power has been delegated to a private body to establish regulations, subject to the approval or disapproval of a state agency, the fact that the state agency has no authority to promulgate independently its own regulations, but only power to approve or disapprove, is a negative factor.[58] Further, the extent of the private interests involved in the regulatory process is important. If the regulatory body is composed entirely of private interests, or they constitute a majority, the delegation has been held invalid. Finally, the extent to which the interest of members of the regulatory body and the interests of regulated parties overlap is significant. Apparently prohibited are those situations where members of an industry seek to impose regulation on their direct competitors.

The second major area of concern with regard to delegation is whether an administrative agency may be authorized to impose penalties whose amounts are determined by its discretion. Normally, the legislature itself determines the amount of fines for violations of administrative regulations, while delegating authority to the administrative agency to establish what conduct

shall be prohibited. Where a different format has been used, for example, authorizing an agency to impose fines varying from $100 to $1000 in its discretion, the legality of the delegation is unclear. While a few such delegations have been upheld,[59] there remains substantial authority that the power to levy discretionary penalties cannot be delegated to an administative agency.[60] Even in those situations where administrative authority to impose discretionary fines has been upheld, the legislatures themselves have enumerated specific factors which the agency must consider in arriving at an appropriate penalty.[60a] The problem, even where discretionary administrative fines have been permitted, is to insure that the delegation is clearly limited by appropriate legislative standards and that appropriate procedural safeguards have been adopted by the agency. As a practical matter, there is at present enough uncertainty surrounding this particular issue that it seems advisable to avoid the problem by establishing fines legislatively.

Both of these issues are of some significance to Amendment One utilization. While currently, commercial Fisheries representatives on the Commission are possible, their percentage representation is limited by the Atlantic States Marine Fisheries compact itself.[61] While the current makeup of the Commission is satisfactory, an increase in representation of commercial fishing interests would not be advisable. Of the factors the courts have identified as casting suspicion on the validity of the delegation of regulatory power to administrative agencies, the only one present with the Commission's makeup is the possible existence of some commissioners who represent commercial fishing interests. Currently, they cannot, however, constitute even a majority of the membership of the Commission. Further, it is not clear that in every case of potential regulation the commercial interests on the Commission could find themselves regulating direct competitors. The situation to be avoided seems to be

one where a majority of the members of the Commission who are voting on a particular regulation are also in direct competition with the affected fisherman; for example, lobster interests regulating the taking of lobsters. Such a situation does not arise and no change should be contemplated which could cause problems in this area, under present Commission membership rules.

The second area, discretionary administrative fines, is probably of greater potential risk. As discussed above, the state of the law in this area is unclear and for this reason fines for violations of Commission regulations should be set by legislative action.

(2) Problems of Voting on and Promulgating Commission Regulations

The Commission bylaws now provide that voting on Commission business, either by the entire Commission or by section, shall be by states and that a majority vote is sufficient to decide a particular issue.[62] This means, for example, that should three states choose to form a section for the purpose of regulating under Amendment One, the votes of any two states would be sufficient to adopt a uniform regulation. There may, however, be problems associated with use of this voting procedure for adoption of regulations as opposed to other types of Commission business. Under present bylaws a regulation is adopted by a majority vote of the states of the section and the regulation would legally bind all states, even those opposing its enactment. This situation arises because the obligations assumed under an interstate compact are contractual and binding on all parties unless the contract itself, in this case the compact, is terminated.[63] Should a state feel that it could not live with Commission regulation that opposes its interests, its recourse would be either withdrawal of authority for the Commission to regulate the particular matter in question on its behalf or the more drastic step of total withdrawal from the Amendment One process.

Obviously it would advisable to avoid the necessity for such drastic action, either by not introducing controversial regulations for Commission action or by adoption of a different voting procedure for regulations. One possible approach might be to require a unanimous vote by all states of the regulatory section or to abandon voting by states and require a two thirds vote of the commissioners from each state. In any case, to avoid potentially damaging situations, thought should be given to a voting procedure which does not confront an individual state with the necessity of withdrawing from the Amendment One process or being bound by a regulation which it feels unacceptable.

Another area of concern in promulgation of regulations is the question of what procedures, such as notice and hearings, should be followed to avoid due process problems in adopting regulations. Notice, hearing, and administrative appeal requirements vary widely from state to state for the adoption of administrative regulations. Ideally, states participating in the Amendment One process should agree on a uniform procedure for promulgation of regulations. Failing that, however, the Commission, as an agency of each participating state, apparently would be bound by the procedural requirements affecting other administrative agencies in each state. This suggests that the Commission may have to follow different procedures in different states. Given such a situation, the course easiest to follow would be to do in all states what the state with the most rigid procedural requirements demands.

(3) Problems of Enforcement and Prosecution

Given current financial resources, enforcement of fisheries regulations is not possible by the Commission itself and must remain a responsibility

of the individual states. There are a variety of ways the enforcement problem could be handled. Simplest from the standpoint of legality would be the utilization of joint patrols made up of enforcement officers from each state affected by a Commission regulation. This would allow violators always to be arrested by an official of the violator's state and assure strict compliance with the Skiriotes doctrine which allows extraterritorial jurisdiction by a state only over its own residents. Indeed, after the enactment of the Fisheries Management and Conservation Act of 1976, joint patrols may be necessary to enforce Commission regulations extraterritorally. Section 306 of the Act preserves state extraterritorial jurisdiction but only over vessels registered in the enforcing state. This may mean for example, that should North and South Carolina adopt uniform regulations under Amendment One, a South Carolina officer could not seize a vessel registered in North Carolina which is in violation of a Commission regulation.

Should, however, joint patrols not prove feasible, two other methods of enforcement may be possible. First, it may be possible to use Amendment One to achieve regional vessel registration; if a vessel is registered in one state of a Commission section, it could be treated as registered in all section states. Since vessels under this procedure would be registered in all states of the particular Commission section, enforcement officers of any section state could potentially make arrests and be within the language of Section 306 of the Fisheries Management and Conservation Act. Another possible method would be to have each state of a Commission section recognize, for the limited purpose of enforcing Commission regulations, officers of other section states as its own enforcement officers. The effect of this would be always to have the arresting officer an officer of the violator's state, again strictly complying with both Skiriotes and section 306 requirements.

One final possibility is for the states to delegate authority to the Commission to enforce its regulations and then for the Commission to recognize enforcement officers of all participating states as the Commission's agents. Since, legally, the Commission is an agency of each participating state, its agents are also agents of each participating state. This apparently would allow any enforcement officer in his status as a Commission agent, to arrest violators regardless of their residency. All of these schemes are potentially useful for enforcing Commission regulations wherever violations may occur. Other than the joint patrol concept, however, they are all of uncertain legal risk and should be carefully studied before adoption.

Prosecution of violations presents fewer problems. Commission regulations are simultaneously regulations of each state participating in the Amendment One regulatory process. Thus, violation of a Commission regulation would be a violation of the law of each participating state and prosecution procedures and penalties would be governed by the procedures of the prosecuting state.[64] Technically, it would be possible, then, to commit a crime in more than one state for a single violation. If, for example, a Maine fisherman violated a Commission mesh size regulation recognized by Maine, New Hampshire, and Massachusetts, the violation occurring in Massachusetts waters, the violator could conceivably be prosecuted in both Maine and Massachusetts. While strictly not raising a double jeopardy problem, there seems little to be gained from such a possibility and multiple prosecution should be avoided.

All of the factors discussed -- delegation, promulgation procedures and enforcement -- directly affect the validity of regulations decreed

under Amendment One. How they have been addressed in actual use of the Amendment One process by the states of Massachusetts, Maine, and New Hampshire will be examined next.

Part III

An Analysis of Amendment One Use

(A) Amendment One in Practice: The Northern Shrimp Section of the Atlantic States Marine Fisheries Commission

To date, the only utilization of Amendment One as a vehicle for regional fisheries regulation has been in the management of the northern shrimp (Panalus borealis) fishery. The catch from this particular fishery has steadily expanded from around 352,000 pounds in 1962 to more than 25,000,000 pounds in early 1970's.[65] Because of this tremendous increase in landings, peak capacity apparently was reached in 1969.[66] Since then, northern shrimp have been overfished. Northern shrimp is a common fishery of Maine, Massachusetts, and New Hampshire, with most of the catch coming from the Gulf of Maine. The fishery is valued at greater than 10 million dollars annually and is of importance to the coastal economies of the three states.[67]

In the face of evidence of overfishing and depletion through the taking of younger year shrimp with smaller mesh nets, the Atlantic States Marine Fisheries' Commission and the fisheries agencies of the three interested states agreed that mesh size restrictions for smaller shrimp were necessary to conserve the fishery. Beginning in 1972, discussions were initiated to determine a feasible means of adopting uniform mesh size regulations. Early in the discussions, consideration was given to potential use of Amendment

One to accomplish this objective since it had been adopted by all three states. There was, however, uncertainty, first with regard to the legality of adopting regulations under Amendment One without additional authority from state legislatures and, second, over the actual mechanics of promulgating regulations.

Because of continuing concern over the authority of the Commission to act in the absence of express legislative authorization and because of the desire to avoid an adverse court decision should arrests be made, attorneys-general opinions as to the legality of using Amendment One were sought in Maine and New Hampshire. The opinions in the respective states were conflicting. The Maine Attorney General felt that the Maine legislature had in fact already delegated authority to Maine's Atlantic States Marine Fisheries Commission commissioners to adopt fisheries regulations under Amendment One.[68] The two statutes referred to by the Attorney General were 12 Maine Revised Statutes Annotated S4613 and S4653. Section 4613 is Maine's adoption of Amendment One itself, while section 4653 enumerates the powers delegated to Maine's commissioners to the Atlantic States Marine Fisheries Commission. It provides that the commissioners have "--- all the powers provided for in said compact and all the powers necessary or incidental to the carrying out of said compact."[69] On its face this statute merely recognizes that the commissioners have the authority to exercise whatever functions necessary to carry on the work of the compact. The question not addressed by the Maine Attorney General is how this particular language specifically authorizes the commission itself to regulate.

This omission is unfortunate because section 4653 is capable of another interpretation. As discussed earlier, Amendment One was apparently intended

to be permissive; that is, it allows the states to regulate jointly fisheries of common concern but does not compel regulation or actually empower any agency to regulate. Until the states make the additional decision to so regulate, the state commissioners need to do only those things which are provided for in the original Atlantic States Marine Fisheries Compact prior to its amendment. In other words, until a state decision to use Amendment One is made, the commissioners have no powers to promulgate regulations. Thus, the statute's language that the commissioners have all powers " --- necessary and incidental --- " to carrying out the compact could only include the power to regulate, if a prior state decision to regulate jointly had been made. As developed earlier, such a decision most probably must be legislative and not administrative. Otherwise, section 4653 would in effect first authorize the Maine commissioners to decide to regulate jointly with other states under Amendment One, and then to proceed to promulgate regulations. Nothing in section 4653 supports such a broad grant of authority to the commissioners.

Indeed, such broad authority was expressly repudiated by the Maine legislature in another statute specifically dealing with northern shrimp regulation by Atlantic States Marine Fisheries Commission itself, 12 Maine Revised Statutes Annotated S4062. By section 4062, the Maine legislature in 1973 adopted northern shrimp controls, including interim mesh size restrictions, and established penalties for violations. Under section 4062(4), the statute was to remain in force " --- until optimum mesh size is established by regulations of the Atlantic States Marine Fisheries Commission under 4313 and 4653 or the Commissioner of Marine Resources."[70] This section expressly delegated power to the Commission, through Amendment One, to adopt a uniform mesh size for northern shrimp. After its passage, Maine's commissioners, under section

4653, were authorized to act as necessary through the Commission for the purpose of determining an optimum mesh size. This statutory pattern is consistent with the conclusion that the decision to utilize Amendment One requires first a legislative act and that the Maine legislature has reserved for itself the power to decide under what circumstances Amendment One will be used. If that were not the case, and Maine's commissioners already possessed the authority to decide when to utilize Amendment One under section 4653, there would be no need for section 4062(4) since the commissioners would already have the power to adopt uniform mesh size regulations. Viewed from this perspective, the Maine Attorney General's opinion seems incorrect. The Maine legislature acted, after his decision, to delegate authority to the Commission, an act which is inconsistent with the opinion's conclusion. The Maine commissioners do not in fact appear to have independent authority to utilize Amendment One without prior action of the Maine legislature.

Two additional points support this conclusion. First, as discussed earlier, the general law of delegation of powers to administrative agencies requires either that the delegation have definite legislative standards to guide and limit administrative discretion or at least the existence of appropriate administrative safeguards to protect the interests of regulated parties. Section 4653 seems to meet neither test and attempts to regulate based on it alone are consitutionally suspect. Second, the Maine marine fisheries agency itself has extremely limited authority to promulgate fisheries regulations.[71] It is highly unlikely that the Maine legislature would restrict the authority of its own marine fisheries agency but give virtually unlimited discretion under section 4653 to a multi-state agency to engage in regulatory activities. All these considerations suggest that Maine's

commissioners have no independent authority to utilize Amendment One, that decision apparently having been reserved to the Maine legislature.

In comparison, the New Hampshire Attorney General took the position that the New Hampshire legislature, merely by adopting Amendment One, had not authorized any state agency or entity to utilize Amendment One for regional regulation.[72] The opinion further concludes that the decision to utilize Amendment One is reserved to the legislature alone. Of significance is the fact that New Hampshire has a statutory provision identical to 12 Maine Revised Statute Annotated S4653, giving the New Hampshire commissioners all "--- necessary and incidental powers ---" needed to carry out the compact. Apparently the New Hampshire Attorney General was not asked and did not render an opinion as to the significance of this provision, however, based on the tenor of the existing opinion, it seems likely that he would not have agreed with the Maine opinion.

Massachusetts, in comparison to Maine and New Hampshire, has adopted Amendment One but has no statute analagous to 12 Maine Revised Statute Annotated 4653 which specifically grants powers to its state commissioners. Apparently the Massachusetts Attorney General has not as yet given an opinion as the legal significance of the adoption of Amendment One.

It was with this background of statutory authority and attorneys-general opinions that representatives of the three states proceeded with joint regulation of northern shrimp in the Gulf of Maine. Actual regulation was approached in a dual fashion. First, each state individually promulgated identical interim northern shrimp mesh size regulations. Maine accomplished this by statute;[73] Massachusetts and New Hampshire proceeded by administrative

regulations promulgated by their respective fisheries management agencies.[74] Thus, by November, 1973, Maine, Massachusetts, and New Hampshire had independently enacted uniform northern shrimp regulations.

In addition to this uniform action by the three states individually, they also attempted to proceed jointly under Amendment One. A northern shrimp section of the Commission was established at the Atlantic States Marine Fisheries Commission annual meeting in October, 1973, for the purpose of adopting joint regulations. In November, 1973, the commissioners from the three states met and promulgated interim mesh size restrictions for northern shrimp using Amendment One which were identical to the restrictions already adopted by the states independently. As a practical matter, the Commission asked the individual states to act as its enforcement arm and, since no extraordinary expenses were incurred, the states were not asked and did not appropriate any additional funds for this particular Amendment One activity. On June 1, 1975 the Commission's optimum net size restrictions became effective.

Apparently, the only enforcement experience under the interim and optimum mesh size regulations occurred in May, 1974 when fishermen from Massachusetts were arrested and charged with violating the interim mesh size regulation. The four boats carrying the allegedly illegal nets were at the time of arrest unloading northern shrimp at Three Rivers Custom House Wharf, Portland, Maine. The defendants pleaded guilty to the charge and paid a fine of $500 each, so the legality of the arrests was not litigated.[75]

Two other regulations were subsequently enacted by the Northern Shrimp Section of the Commission in reliance on Amendment One. On June 23, 1975 the section prohibited the taking, landing, or processing of northern shrimp without a permit from July 5, 1975 to September 27, 1975. Later the section

agreed to close the northern shrimp season on April 15, 1976, again prohibiting processing after April 15 without a permit from the appropriate state agency. The rationale for the regulations was that closed seasons during these periods were necessary to prevent depletion of stocks. Unlike the mesh size regulations, the season closing regulations were apparently not preceeded by the state marine fisheries agencies promulgating independently their own season closings. There has been no enforcement experience as yet under these regulations.

(B) The Validity of Northern Shrimp Amendment One Regulations

Based on the discussion in Part II, the attempted regulation of northern shrimp under Amendment One by Massachusetts, Maine, and New Hampshire appears not be be valid. The legislative history of the congressional consent to state adoption of Amendment One, its language, the action of the Maine legislature and general delegation law all collectively suggest that before regulations can be adopted by using Amendment One, state legislation must be passed authorizing its use and establishing standards for its application. Clearly this was not done in every case for the northern shrimp regulations and consequently the Commission itself was apparently powerless to adopt regulations. This seems to be the case even though the Maine legislature itself delegated authority to the Commission to establish optimum mesh sizes for the taking of northern shrimp[76] since neither the New Hampshire nor the Massachusetts legislatures followed suit. Amendment One specifically requires that regulation must be by two or more states[77] and since only one state had authorized use of Amendment One, this condition was not fulfilled. In the case of the season closing regulations apparently none of the three states took legislative action.

A second questionable area involves the promulgation procedure. Even assuming the Commission had authority to regulate, the regulations may not

have been properly adopted. The Commission, as an agency of each state, must follow procedures for adopting administrative regulations which govern other state agencies, even if they all are different. If this was not done the regulations would be invalid even if properly authorized.

Interestingly enough, however, the state as opposed to the Commission northern shrimp mesh size regulations appear valid. All were duly promulgated in each individual state and have the effect of establishing a uniform regulation binding fishermen of the three states. Consequently, arrests for violations of the state mesh size regulations would be valid, but arrests for the identical regulation, promulgated by the Commission, would be apparently invalid. The season closing regulations, since not individually adopted by the states and not properly adopted by the Commission, seem unenforceable.

Part IV

Proper Utilization of Amendement One. A Suggested Approach

Even with the passage of the Fisheries Conservation and Management Act, Amendment One may be useful for the joint state fisheries regulation. From an examination of Amendment One's legislative history, its previous application, and the general law pertaining to delegation of powers and interstate compacts, some suggestions can be made regarding Amendment One's proper utilization. The decision to use Amendment One apparently must be based on state legislative authorization. In order to satisfy constitutional requirements concerning delegation of power to administrative agencies this legislation must delegate in a proper manner authority to an appropriate state agency or body to regulate via the Amendment One process. Proper

delegation encompasses not only an express grant of authority to participate in regulatory activities, but appropriate standards and safeguards to guide the regulators, limit their discretion, and safeguard the interests of those affected by the regulations. The most likely candidates to exercise Amendment One power in each state are the state Atlantic States Marine Fisheries Commission commissioners themselves. They are representative of the spectum of interests involved in commercial fishing, are familiar with the Commission and most likely are the group contemplated by Congress and the states to exercise Amendment One powers. Further, to avoid the necessity of the Commission having to follow different procedures in promulgating regulations in each state, as was the case for northern shrimp, a uniform procedure fixed by statute ideally should be agreed on by all states employing Amendment One. This could minimize the risk of invalidating regulations on procedural grounds.

These points can readily be addressed in a single statue, appropriately modified to meet the political demands of the states involved. Decision will have to be made in each state regarding the extent to which regulatory powers will be conferred on the Commission. Efficiency argues for a broad delegation of power to regulate a variety of fisheries and fishing conditions. Political considerations, however, may outweigh notions of expediency since there are widespread feelings that multi-state agencies should have limited powers as well as the view that fisheries managment itself is best kept as a legislative prerogative. These points will have to be worked out on a state to state basis, but they should not affect the basic framework for Amendment One regulation.

With these considerations in mind, a suggested statute for utilizing Amendment One for promulgating uniform regulations is as follows:

(Sec. 101) The Atlantic States Marine Fisheries Commission commissioners of this state are authorized to act jointly with appropriate officials of other states to form a section of the Atlantic States Marine Fisheries Commission, pursuant to Amendment One of the Atlantic States Marine Fisheries Compact, for the purpose of adopting uniform regulations for size, seasons, methods of taking, landing, or processing for any of the following fisheries:

_____, _____, _____, _____,

Sections of the Commission for the purpose of adopting uniform regulations shall only be formed after a finding by the commissioners that a need for such regulation exists in order to conserve a fishery and prevent waste. The commissioner's finding shall be submitted to the Governor, the committees of the legislature responsible for fisheries management, and the Director of the state fisheries management agency.[78]

(Sec. 102) Regulations promulgated under the authority of this chapter shall be adopted only after 30 days notice in newspapers of general circulation in the state, and

after a public hearing. On adoption, regulations shall be filed with the Secretary of State.

(Sec. 103) All regulations duly promulgated under this chapter shall become the law of this state on their effective date. Violation of any regulation adopted under this chapter shall be punishable by a fine of not less than _____ nor more than _____, imprisonment for a term not exceeding _____, and forfeiture of catch and gear.

(Sec. 104) Enforcement of regulations promulgated under this chapter shall be by duly constituted law enforcement officers of this state. For the limited purpose of enforcement of such regulations, law enforcement officers of this state shall be agents of the Commission and all Commission law enforcement agents shall be treated as agents of this state.

While this statute is by no means intended to be a comprehensive treatment, it does address the basic problems involved in Amendment One regulation and can serve as a basic model which can be expanded on. In essence the statute treats the Commission as an agency of the state and authorizes the Commission, acting through state commissioners to adopt regulations after following a uniform procedure. The statute requires as a precondition proof of the need for interstate cooperation and conveying of the evidence to appropriate state officials and legislative committees. However, the commissioners are free to proceed unless the legislature affirmatively acts to withdraw their authority. This procedure may serve to make the

idea of delegating regulatory powers to a multi-state agency politically more acceptable. The statute also treats Commission regulations as state regulations and establishes penalties for violations, clarifying the legal status of a regulation of a multi-state agency. Finally, the enforcement section provides that enforcement will be by state officials acting as agents of the Commission and that all agents of the Commission are agents of the state. In effect, arrests by law enforcement officers of another state would be arrests by agents of the violator's state of residency. This complies with the court decisions and should allow extraterritorial enforcement without the need for joint patrols.

Conclusion

The fisheries Conservation and Management Act of 1976 has significantly altered the traditional roles of the states and the federal government in fisheries management. Even after its passage, however, there remains a potentially significant role for state fisheries regulation on a regional basis. Amendment One of the Atlantic States Marine Fisheries Compact is a means of accomplishing regional regulation where necessary. Its utilization, however, will apprently require additional legislative action by interested states and, ideally, uniform procedures for adoption of Amendment One regulations should be agreed on by the states. The validity of existing Amendment One regulations for northern shrimp is in doubt because of failure to address these points. Amendment One's future use should be preceeded by the enactment of uniform legislation properly establishing the Commission's authority to regulate.

Footnotes

1. Skiriotes v. Florida, 313 U.S. 69 (1941) established that the states may exercise extraterritorial jurisdiction over their own fishermen on the high seas unless preempted by federal law. See also The Hamilton, 207 U.S. 398 (1907). It is clear the Skiriotes applies only to the authority of a state to regulate its own residents beyond territorial waters. Control of non-residents and, in some cases, is restricted even within territorial waters. cf. Toomer v. Witsell, 334 U.S. 385 (1948) and Takahasui v. Fish and Game Commission of California, 334 U.S. 410 (1948) which suggest that discrimination against non-resident fishermen in state territorial waters must be reasonable and related to the needs of the state. These decisions cast doubt on the continued validity of McCready v. Virginia, 94 U.S. 391 (1876) which established that the states have essentially plenary power over fish and game and could even totally prohibit their taking by non-residents.
2. For a comprehensive discussion of this point see Council of State Government, To Stem the Tide; Effective State Marine Fisheries Management (1975). See also H. Knight and J. Lambert, Legal Aspects of limited Entry for Commercial Marine Fisheries (1975) for a comprehensive discussion of the use of limited entry laws as a means of increasing efficiency.
3. 16 U.S.C. 1801 et. seq. (Supp. 1976) (hereafter referred to as the Fisheries Conservation and Management Act).
4. By tonnage, menhaden is the largest fishery along the Atlantic coast while the shrimp catch has the largest dollar value. Both are caught largely inshore. For a discussion of shrimp management, see South

Carolina Wildlife and Marine Resources Department, the Shrimp Fishery of the South Atlantic United States: A Regional Management Plan (ed. by P. Eldridge and S. Goldstein), Tech. Report No. 8 (1975).

5. Section 306 of the Act provides that the states have authority to regulate their own vessels beyond territorial waters.
6. Act of Aug. 19, 1950, ch. 763 S 1-4, 64 Stat. 467.
7. Act of May 4, 1942, ch. 283 S 1-4, 56 Stat. 267.
8. Sec. 101. Under Sec. 102, the United States exercises exclusive jurisdiction over all fish within the 200 mile fishery conservation zone created by sec. 101, all anadromous species throughout their migratory range, except when they are within the jurisdiction of another nation, and all continental shelf fishery resources beyond the fishery conservation zone.
9. Sec. 302, 303.
10. Sec. 305, 307.
11. Sec. 201-205.
12. See Skiriotes v. Florida, 313 U. S. 69 (1941) and the discussion in n. 1.
13. Sec. 302(h) (1).
14. Sec. 303.
15. Sec. 303(a).
16. Sec. 303(b)
17. Amendment One contemplates use of the Atlantic States Marine Fisheries Commission as a regional regulatory body authorized to promulgate regulations binding in each participating state. For general treatment of the use of interstate compacts as the basis for regional governmental activities, see W. Barton, Interstate Compacts in the Political Process (1965); R. Leach and R. Suggs, Jr., The Administration of Interstate

Compacts (1959); F. Zimmerman and M. Wendell, The Interstate Compact since 1925 (1950); Frankfurter and Landis, A Study in Interstate Adjustments, 34 Yale L. J. 685 (1935); Leach, The Federal Government and Interstate Compacts, 29 Ford. L. Rev. 421 (1961).

18. Adoption of uniform state laws has been utilized widely to achieve coordinated treatment of issues of national concern. Prominent examples include the uniform Commercial Code and the Uniform Reciprocal Enforcement of Support Act.

19. Reciprocal agreements would allow state fisheries management agencies themselves to achieve coordination by authorizing the agencies to agree to promulgate uniform regulations.

20. See To Stem the Tide: Effective State Marine Fisheries Management, supra n. 2; H. Knight and T. Jackson, Legal Impediments to the Use of Interstate Agreements In Coordinated Fisheries Management Programs: States In the N.M.F.S. Southeast Region (1973).

21. At present, Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, New Jersey, North Carolina, Pennsylvania, and Virginia have adopted Amendment One.

22. For a discussion of this point see the text accompanying N. 43-52, infra.

23. For example, the South Carolina legislature has delegated little authority to the South Carolina Department of Wildlife and Marine Resources beyond implementation and enforcement of legislatively established directives.

24. See, e.g. N. Car. Gen. Stat. S S 113-223, 304 (1973).

25. See on this point La Rue, Interstate Cooperation and An Interstate Judiciary, 27 Wash. and Lee L. Rev. 1, 9-13 (1970). For additional general treatment of the difficult issue of whether an interstate

agreement requires congressional consent, see Bruce, The Compacts and Agreements of States With One Another and With Foreign Powers, 2 Minn. L. Rev. 500 (1918); Dunbar, Interstate Compacts and Congressional Consent, 36 Va. L. Rev. 753 (1950); Reisman and Simson, Interstate Agreements in the American Federal System, 27 Rutgers L. Rev. 70 (1973).

26. Sec. 302(c) (1) (c).

27. Act of May 4, 1942, ch. 283 X 1-4, 56 Stat. 267.

28. See, e.g., W. Barton, supra n. 17, at 22-23; R. Leach and R. Suggs, Jr., supra n. 17, at 167-176; W. Barton, A Case Study of the Atlantic States Marine Fisheries Compact (unpublished M.A. Thesis, Fla. State Univ., 1963).

29. Atlantic States Marine Fisheries Compact, (hereafter referred to as Compact), Art. I.

30. Id., Art. III.

31. People v. Central Railroad, 79 U.S. 455 (1870); Delaware River and Bay Authority v. New Jersey Public Employment Commission, 112 N.J. Super. 160, 270 Atl. 2d 704 (1970); Henderson v. Delaware River Joint Toll Bridge Commission, 326 Pa. 475, 66 Atl. 848 (1949).

32. Compact, Art. IV.

33. Id.

34. H. J. Res. 302, June 8, 1940, 76th Cong., 3rd Sess.

35. For a discussion of this point, see W. Barton, supra n. 17, at 22-24.

36. Act of Aug. 19, 1950, ch. 763 S S 1-4, 64 Stat. 467.

37. Id.

38. See Hearings on H.R. 7887 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 81st Cong. 2d Sess., at 125-127 (1950).

39. Act of Aug. 19, 1950, ch. 763, S 3, 64 Stat. 467.

40. Hearings, supra n. 38 at 131-134, 136.

41. See, e.g. Va. Const., Sec 184a.

42. For general treatment of these problems, see Dixon, Constitutional Bases for Regionalism: Centralization, Interstate Compact, Federal Regional Taxation, 33 Geo. Wash. L. Rev. 47, 70 (1964).

43. Act of Aug. 19, 1950, ch. 763 S 1, 64 Stat. 467.

44. Hearings, supra n. 38, at 122, 136.

45. Hearings, supra n. 38, at 136-137.

46. See the authorities cited in n. 31.

47. U. S. v. Southweatern Cable Co., 392 U.S. 157 (1968); Permian Basin Area Rate Cases, 390 U.S. 747 (1968); American Trucking Association v. Atchison, Topeka, and Santa Fe RR Co., 387 U.S. 397 (1967).

48. For an excellent discussion of this point and advocacy of its continued usefulness, see Merrill, Standards, A Safeguard for the Exercise of Delegated Power, 47 Neb. L. Rev. 469 (1969).

49. Id. at 475.

50. Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713, (1969).

51. See, e.g., 12 Me. Rev. Stat. Ann. 4653 (1974) which delegates to the Maine commissioners all powers "necessary and incidental" to carrying out the business of the Atlantic States Marine Fisheries Compact.

52. See, e.g., 12 Me. Rev. Stat. Ann. S S 4002 (1974) (season closing for scallops); 4062 (net size for shrimp); 4202 (restrictions on the use of other trawls); 4205 (size limits on other trawlers).

53. Act of Aug. 19, 1950, ch. 763, S 1, 64 Stat. 467.

54. For a discussion of this point, see K. Davis, Administrative Law Treatise, S 2.02 (1959).

55. Johnson v. Michigan Milk Marketing Board, 259 Mich. 644, 259 N.W. 346 (1940).

56. Bayside Timber Co. v. Board of Supervisors of San Mateo County, 20 Cal. App. 3d. 1, 97 Cal. Rptr. 431 (Cal. App. 1st. Dist., 1971).

57. State Board of Dry Cleaners v. Thrift-O-Lux Cleaners, 40 Cal.2d 436, 254 P.2d 29 (1953).

58. Bayside Timber Co. v. Board of Supervisors of San Mateo County, supra n. 56.

59. City of Waukegan v. Pollution Control Board, 57 Ill.2d. 120, 311 N.E. 2d 146 (1974); Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969); Wycoff v. Public Service Comm., 13 Utah 2d 123, 369 P.2d 283 (1962): Roby v. Hollis, 84 Wash.2d 88, 500 P.2d 97 (1972); General Drivers and Helpers Union Local 662 v. Wisconsin Employment Relations Bd., 21 Wis.2d 242, 124 N.W.2d 123 (1963).

60. Two recent decisions are Broadhead v. Monaghen, 238 Miss. 239, 117 So.2d. 881 (1960); State ex rel Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

60a. See City of Waukegan v. Pollution Control Board supra n. 59, where the fact that the Illinois legislature had directed that reasonableness of emission, character of the injury, value of the polluting source, and its suitability of location influenced the court's decision to uphold discretionary administrative fines.

61. Compact Art. III.

62. Rules and Regulations, Atlantic States Marine Fisheries Commission, Art. III, Sec. 2.

63. See F. Zimmerman and M. Wendall, supra n. 17 at 54-55 for further discussion

64. For an example of criminal prosecution by an interstate agency see People v. Malmud, 164 N.Y.S.2d 204 (1957).

65. Wigley, Fishery for Northern Shrimp, Pandalus borealis, in the Gulf of Maine, 35 Marine Fisheries Review 9, 10 (1973.

66. Id. at 11.

67. Id. at 9.

68. Letter from Lee M. Schepps, Ass't Attorney General of Maine to Dr. W. M. Lawrence, Atlantic States Fisheries Commission, May 21, 1973 (in response to a request for a legal opinion on Amendment One from the Maine Department of Sea and Shore Fisheries).

69. 12 Me. Rev. Stat. Ann. S 4653 (1974).

70. Id., S 4062(4).

71. See n. 52 for representative examples of legislative restrictions.

72. Letter from Warren B. Rudman, Attorney General of New Hampshire to Bernard W. Corson, Director, New Hampshire Fish and Game Department, Aug. 24, 1973.

73. 12 Me. Rev. Stat. Ann. S 4062 (1974).

74. The New Hampshire Regulation became effective on Nov. 20, 1973; the Massachusetts regulation became effective on Sept. 21, 1973.

75. Warden's Report of Prosecution, State of Maine Department of Marine Resources, by R.H. Fogg, May 1, 1974, Docket No. 19084.

76. 12 Me. Rev. Stat. Ann. S 4062(4) (1974).

77. Act of Aug. 19, 1950, ch. 763, S 1, 64 Stat. 467.

78. The intent of this provision is simply to provide interested governmental officials and bodies notice of the forthcoming action should a legislature desire to prevent the commissioners from proceeding, it would have to take affirmative legislative steps to bar further action.