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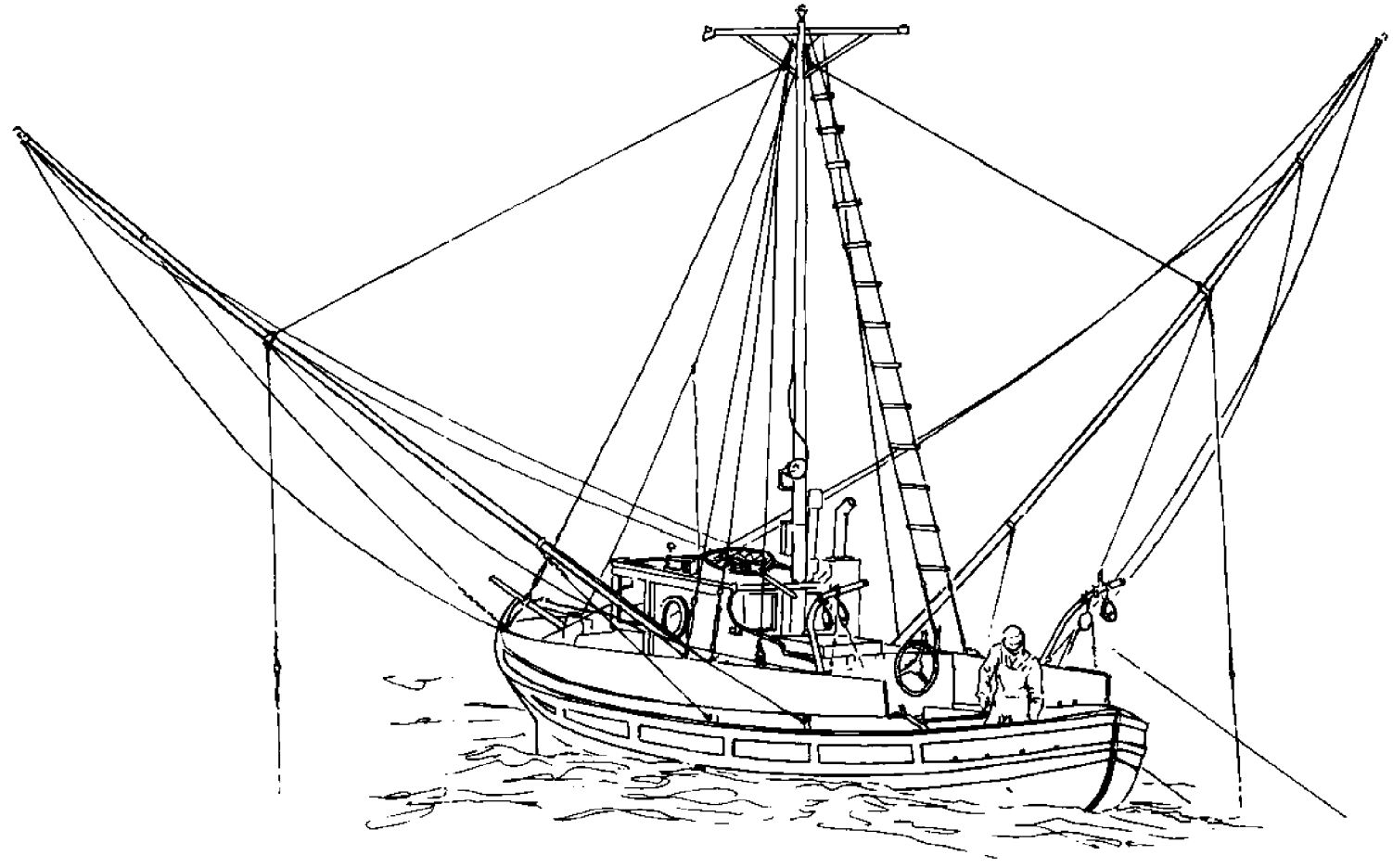
FEDERAL FISHERIES MANAGEMENT

A Guidebook to the Fishery Conservation and Management Act



Ocean and Coastal Law Center
University of Oregon Law School
1983

FEDERAL FISHERIES MANAGEMENT

A Guidebook to the Fishery Conservation and Management Act

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EDITORS PREFACE

The Fishery Conservation and Management Act of 1976 (FCMA) has turned out to be one of the most controversial and confusing pieces of federal legislation in recent memory. The controversy is inevitable, but in this handbook we try to do something about the confusion.

We hope that this book will communicate effectively to a broad range of readers, but especially to those who are most affected by the workings of the bureaucratic machine created by the FCMA. In drafting the various chapters, the authors tried to keep two hypothetical readers in mind. One is a commercial fisherman, a person whose livelihood is directly regulated by the FCMA. The main text of each chapter was written with this reader in mind. The other hypothetical reader is a lawyer with no special training in fisheries law but who may be confronted with fisheries management problems through his clients. The notes at the end of each chapter, which contain citations to authorities and occasional further explanation, are written for this reader. Of course, the fact that we limited our list of imagined readers to two was a drafting device only; our goal is to provide useful information and analysis to seafood processors, fisheries managers, legislators, the interested public, and all sorts of people who are neither fishermen nor lawyers.

All readers should note that the handbook might well be termed a "Northwest Edition"--two of our chapters are concerned with the organizations and activities of the two regional fishery management councils governing the waters off the Pacific Coast and off Alaska, without similar treatment of any of the other six regional councils. We make no excuse for this other than the good one that our expertise is limited to these areas. We encourage and invite institutions in other parts of the country to add chapters on the councils in their regions and to make any appropriate use of the more general chapters in our book.

Finally, we would like to make some well deserved acknowledgements. The following people have made substantial contributions to the writing of the book and can be considered its true authors: Donald Hornstein, Meg Reeves, Steve Balagna, Glen Thompson and Ken Schoolcraft. We also thank Marilynn Howard for her typing and patience, and Charlie Jackson for assisting in the publication details and providing the artwork on the cover and in the text.

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Jon Jacobson
Kevin Davis

September 1, 1982

FOREWORD

The locating, catching, and consuming of marine fish has been of importance to people of the world for countless centuries. Early settlers of what is now the United States relied on fish for sustenance and trade, and Americans have cared about maintenance of the stocks ever since. Fish are now a worldwide commodity, and who does what to them when, where, and for how much influences all of us.

There have been agreements and disagreements over fisheries jurisdiction around the world for a very long time, some being resolved at the negotiation table, some in the courts, while others remain unresolved. But that is not too surprising considering the many different values associated with controlling the harvest and eventual use of the more than 70 million metric tons of fish produced annually in the world today. Some nations receive value from catching, processing, and consuming the product. Others control such activities off their respective coasts although not actively participating in one or more of them. Many mutually beneficial arrangements for resource use have been implemented successfully all over the world, recognizing different national needs.

After World War II the United States became much more actively involved in national and international fisheries matters. A few highly respected U.S. fisheries scientists with great skills in negotiation and persuasion and personal characteristics of leadership, determination, imagination and initiative had an amazing influence on the trend of fisheries development and management around the world. The most active and best known included Wib Chapman, Don McKernan, and Benny Schaefer. Those three, with the able assistance of many others, including leaders from within the fishing industry, plowed new ground in fisheries jurisdiction. More international fisheries commissions were formed, many bilateral agreements were developed with measured success, and the efforts culminated in the passage of the Magnuson Fishery Conservation and Management Act of 1976. There was an inherent feeling of caring about how fish and

fishermen were considered, treated, and controlled. Unified control and management became necessary with the future of many fish populations in the balance. Several stocks were being depleted, and more appeared destined for similar treatment. The need was too great and too pressing to ignore any longer.

The final stages in the development and initial implementation of the Act were exciting times for all who were involved. The openness of the discussions at the national and international levels was mutually beneficial and productive. The many views of domestic and foreign interests that were sought, received, and included helped immeasurably. Such communication, cooperation, and flexibility established a pattern to follow.

The MFCMA is clearly the most significant fisheries legislation in the history of our country. Irrespective of the size of fleets, number of fishermen, or amount of catch, with enactment of the Act, the United States became the world leader in firmly establishing a sound foundation for rational marine fisheries management. Supporters and detractors watched with interest and skepticism, waiting for hesitant implementation, unjustified treatment, international legal challenges or major foreign national non-compliance. Implementation was remarkably smooth considering the scope, significance, and precedent-setting aspects.

The Act was and still is a remarkable piece of legislation. For a law so comprehensive, its initial version had surprisingly few shortcomings, considering the varied and at times conflicting positions and goals of the state and federal governments, commercial and recreational fishermen, and other components of the domestic industry.

The law can justifiably be described as bold, assertive, imaginative, unique, pioneering, and self-serving. There was both strong support and vigorous opposition at home and abroad at all levels of industry and government, including Presidential opposition right up to and through passage and initial implementation. The story is a remarkable example of American ingenuity, determination, and intestinal fortitude. Where else can relatively few determined individuals take on the Administration, international protocol, and the prevailing international fisheries views and through a unilateral declaration create a management system that works, is respected, is followed, and is adopted in principle by most of the other leading fisheries nations of the world? Like so many other events in U.S. history, the people fought for what they believed in, and, when necessary, compromised their own needs to accommodate the requirements of others from within the U.S. and around the world.

Several key concepts provide for and permit the success achieved to date. The priorities are resource first, domestic fishermen second, and other nationals third. Use of the best

available scientific data is mandatory. For the first time, social, economic, and ecological factors are required to be considered along with biological information. The Act addresses the varying needs of all domestic fishermen and gives a significant role to the interested public. Other nations have a meaningful role. Treating others as you want to be treated has been a well-accepted philosophy in some circles for over two thousand years, and has been built into the management process from the beginning. No one is excluded from participating unless there are resource shortages. National standards for management are established. Consideration of the needs of others and flexibility are built into implementation. Serious punitive measures are included only for significant violations, not just to antagonize potential domestic and foreign participants. There were many who felt during the MFCMA development stages that elimination or management of only foreign fleets was necessary and the domestic fishermen should be left alone. Congress wisely covered all users of the resource, but with options to treat them differently based on factual and policy determinations under broad general guidelines reflecting the nation's overall interest. Experience has demonstrated the wisdom of that critical decision. More fishery management plans now govern domestic than foreign fishing.

Implementation has not progressed without difficulties, bitter controversies, failures, successes, and changes in the law itself, as well as changes in approaches to regulation and in the regulations themselves. Nobody said or thought it would be easy, and it hasn't been. Some changes were made in administrative provisions of the Act by Congressional amendment after initial passage but before implementation, to permit orderly transition from a relatively loose system to an iron-clad one that applies to domestic and foreign fishermen operating on two-million square miles of the oceans. Requirements regarding the payment of fees, the issuance of permits, and the posting of permits in the wheelhouses before fishing were waived to assure timely implementation on March 1, 1977. The very quick action by the Congress on these specific details was in itself an impressive demonstration of what can be done in an emergency when those involved are convinced of the need for action and care enough to accomplish it.

Good as the law is, there is no certainty that it will continue to be a success. It must do the job for the resources and for the people. There will always be valid complaints about various provisions in the law, in its resultant administrative regulations, or in its implementation, but these should not be deterrents. The MFCMA is becoming a way of life, and a better one than existed without it. It should not be taken for granted or assumed that it automatically will continue to be successful. There is a requirement for constant interest, dedication, and involvement by the Council members, staffs, and the affected public, and each should serve as a check on the other. The

fisheries world is watching, participating, and judging. It is vital to present and future generations that the verdict be favorable and supportive. I am convinced it will be.

I believe the future for the Magnuson Fishery Conservation and Management Act will be positive and encouraging. Problems will continue to arise, as they do with any far-reaching program involving so many conflicting philosophies, needs, and desires. After extensive experience, debate, and soul searching, changes will be made in this Constitution for managing fish just as changes were made in the Constitution for managing people adopted 200 years before. There is too much to lose to revert to pre-MFCMA approaches. Continuation on the present course will be a smoother and more productive approach than any other. The resources and the users deserve our collective best efforts to assure that the Act continues to work. And it will work because the participants will want it to, notwithstanding continuing objections to parts of it.

Robert W. Schoning
Former Director
National Marine Fisheries Service

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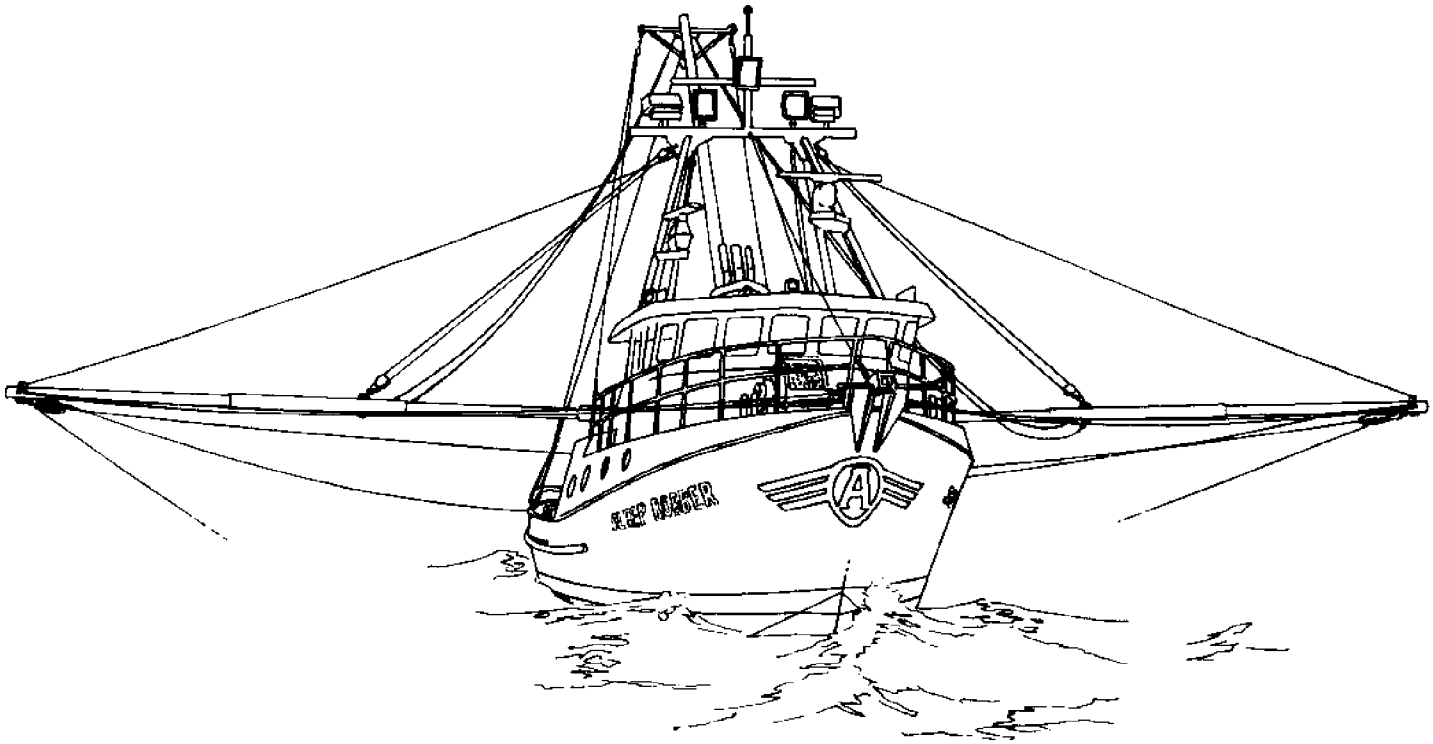


Introduction

CHAPTER 1

Passage of the Fisheries Conservation & Management Act of 1976 (FCMA)[1] marked a significant step in both the domestic and the international law of fisheries management. With this step, the United States changed the posture of fisheries management at home and abroad. Here in the United States the federal government appeared, for the first time in any significant fashion, as an overseer of domestic fisheries management. On the international scene, the United States' unilateral extension of fisheries jurisdiction to 200 miles, controversial at the time the FCMA was passed, precipitated a flood of similar claims worldwide. It is important to have some understanding of the law of fisheries management before 1976 to fully appreciate the significance of the FCMA on both domestic and international fronts.

Before 1976, fisheries regulation in the wide oceans beyond narrow territorial seas was primarily governed by international law. International law has two primary sources, international agreements (such as treaties), and custom. Each source has played a role in the course of world fishery management.

International agreements bind the nation parties (but only those parties) much as contracts bind individuals. International agreements did not play a significant role in international fishery management until the 20th century.

Customary international law, on the other hand, is an evolutionary process by which the law develops as significant numbers of states engage in practices that eventually gain world-wide acceptance. The practice must be carried on for a sufficient time period for the custom to become law. In contrast to international agreements, customary rules bind all nations. As the debates prior to the passage of the FCMA illustrate, it is often difficult to determine whether a rule of customary law exists.[2]

Custom was the parent of the dominant rule of fisheries management prior to World War II, freedom of fishing on the high seas. A territorial sea of three miles from shore was acknowledged as exclusively within the sovereignty of the coastal nation. The rest of the world's oceans were high seas, and fishermen of the world had virtually unregulated access to them. The rule of freedom of fishing was based on the notion that fish were a common property resource, not "owned" until captured. As a result, exploitation of high seas fishery resources involved basically unregulated competition among nations and fishermen. This scheme was satisfactory while the demand for fishery products remained at a level which did not result in exploitation of a given population over its maximum sustainable yield (MSY).[3] Toward the end of the nineteenth century, however, it was apparent that some stocks were dangerously overfished, and after World War II improved fishing technology and human population increases caused a tremendous rise in fishing effort. Nations recognized that fish were not an unlimited resource, and that some limitations on freedom of fishing were necessary. The history of fisheries management since World War II is a chronology of attempts to define and enforce appropriate limitations.

Two approaches emerged as nations of the world searched for a solution to the problem of overfishing and stock depletion.[4] Some nations chose to unilaterally extend fisheries management jurisdiction beyond their territorial seas. Others took a more cooperative tack; nations participating in a specific fishery were sometimes able to agree to self-imposed regulatory schemes. The approach chosen by the United States was dictated in part by the peculiar nature of the U.S. fishing industry. Major United States post-World War II fishing fleets

can be divided geographically into those fishing three areas, the Northwest Atlantic Ocean, the Northeast Pacific Ocean, and waters off Latin America.[5] Each group presented different problems for the United States in its attempts to develop an effective fisheries policy.

Fishing grounds in the Northwest Atlantic, off eastern Canada and the U.S., were rich in haddock, cod, halibut, hake and pollock. The area had been fished traditionally by U.S. coastal fishermen and Western European distant water fishermen. Overfishing in this area became apparent in the 1930's but a treaty to deal with the problem did not enter into force until 1950. This treaty established one of the best known of the fisheries commissions, the International Commission for the Northwest Atlantic Fisheries (ICNAF).

The Northeast Pacific harbored, among others, valuable salmon stocks. United States and Canadian coastal fishermen had traditionally exploited this resource. During the 1930's, the United States was troubled by the entrance of the Japanese into the North Pacific salmon fishery, particularly by the depletion to an unacceptable level of Bristol Bay salmon stocks. When Japan emerged as a defeated nation after World War II, it was not in a position to bargain effectively for its fishing rights. The result was Japan's participation in the International Convention for the High Seas Fisheries of the North Pacific Ocean, and its acquiescence in what became known as the "abstention principle." Under the Convention, which entered into force in 1953, Japan agreed to abstain from fishing for salmon, halibut, or herring off the North American coast east of 175° west longitude. Voluntary abstention in the absence of international agreement was never widely practiced, and consequently has not developed into an international customary law rule for fisheries management.

The third major U.S. fishing group is the distant water tuna and shrimp fishermen who have fished the waters off Latin American countries since the 1930's. The divergent interests of these groups complicated the United States' choice between the two possible regulatory approaches. Fishermen who worked the coastal waters of the United States favored unilateral U.S. extension of fisheries jurisdiction as a means of protecting their interests. In contrast, distant water fishermen favored a treaty approach, since extension of U.S. fisheries jurisdiction would likely be matched by an extension of jurisdiction by Latin American countries, resulting in a loss of access of their Latin American fishing grounds. Furthermore, U.S. global interests, especially in freedom of navigation on the high seas so important to commerce and military strategy, might have been harmed by extension of fisheries jurisdiction. The government feared interference with this freedom if fisheries jurisdiction beyond the territorial sea was recognized for coastal nations. As a result, the United States chose to pursue a treaty-making course

of bilateral or multilateral agreement, and refused to acknowledge the right of any nation to unilaterally extend its fishery management authority.

World conditions and United States interests after World War II pointed to treaty-making as the wisest course to pursue in regulating fishery resources. Events since that time have caused a dramatic reversal in United States fishery policy. With the passage of the Fishery Conservation and Management Act, the United States came full circle to a policy of recognizing and participating in broad extensions of offshore fisheries management jurisdiction, with preferential rights for coastal nations in exchange for responsible management of the resource within the extended fisheries management zones.

I. The Evolution Of Extended Fisheries Zones

The year 1945 is an appropriate starting point for tracing the origins of extended fisheries jurisdiction. In September of that year President Truman issued two proclamations concerning ocean resources. One extended sovereign rights for the purpose of exploring and exploiting the resources of the continental shelf. This extension of limited sovereign rights was eventually followed by the nations of the world and was codified in the 1958 Convention on the Continental Shelf.

The other proclamation was President Truman's response to the Japanese harvest of Bristol Bay salmon mentioned above. It was a statement of policy authorizing the United States to establish fishery "conservation zones" off its coasts. Any fishery involving other nations, however, required mutual agreement on a regulatory scheme. The Fisheries Proclamation was carefully drafted to make clear that it was not an extension of sovereignty, or even of fisheries jurisdiction if not agreed to by all participating parties.

Not a single conservation zone was ever established, but the Fisheries Proclamation produced some unexpected results. To the dismay of U.S. distant water fishermen, it precipitated a series of varying claims of sovereignty of extended fisheries jurisdiction by some Latin American countries. Most notable were the claims of the so-called "CEP" countries, Chile, Ecuador, and Peru, who asserted sole sovereignty and jurisdiction out to 200 miles off their coasts in the Declaration of Santiago in 1952. These countries, either deliberately or inadvertently, misconstrued the Truman Proclamations as precedent for their claims. The United States protested the claims of the CEP countries, and U.S. tuna fishermen continued to fish off their coasts. The CEP countries took action to enforce their claims to sovereignty, and thus began the series of confrontations in the Southeast Pacific which has spanned the last three decades.

Despite the Latin American claims, the United States and most of the international community continued to oppose unilateral extension of sovereign rights or fisheries jurisdiction. The United States actively utilized the treaty-making process in an attempt to conserve the fishery resources off its coasts.[6]

In 1958 the international community adopted four treaties, collectively known as the Geneva Conventions on the Law of the Sea, at the First United Nations Law of the Sea Conference. Certain provisions of each of the Conventions bear on the issue of fisheries management. The Convention on the Territorial Sea and Contiguous Zone[7] is notable in its failure to establish an agreed maximum breadth for the territorial sea, although by that time a twelve-mile limit, or a three-mile territorial sea with an additional nine mile fishery management zone, were widely supported. The Convention on Fishing and Conservation of the Living Resources of the High Seas[8] allowed coastal nations a restricted right to regulated fisheries in adjacent areas of the high seas, but this convention has never been a significant tool for fisheries management because many of the major fishing nations did not ratify it. The Convention on the High Seas[9] codified the concept of freedom of the high seas, including freedom of fishing, qualified only by the conservation measures required by the Fishing Convention and the duty to give reasonable regard to the interest of other states in exercising the freedoms of the high seas. Finally, the Convention on the Continental Shelf[10] included "sedentary species" of living resources within the exclusive continental shelf jurisdiction of the coastal state.

The 1958 Conference failed to resolve the issues of territorial sea breadth or the fishery management authority of coastal nations. Consequently, the Second Law of the Sea Conference convened in Geneva in 1960. No agreement was reached at this conference, and these issues remained unresolved.

In 1966 the United States retreated somewhat from its prior position on extension of coastal nation fishery management jurisdiction by passing the Bartlett Act.[11] Congress acted in response to growing pressure from the fishing industry for some abatement of the tremendous increase in foreign fishermen off U.S. coasts. Under the Act, the United States claimed authority to exclude foreign fishermen from a newly created fishery zone extending nine miles past the territorial sea, subject to continued fishing by nations the United States recognized as having traditional rights within the zone.

This extension of fisheries jurisdiction beyond territorial waters was the first appearance of the federal government on the domestic fishery management scene, but at that point the federal involvement was minimal. The federal government did not attempt to regulate domestic fishermen under the Act. It acted merely

as a caretaker in the nine mile contiguous zone, enforcing the Bartlett Act against foreign fishermen illegally within the zone. The individual states continued to regulate all fishing activity off their coasts out to three miles and the fishing activities of their citizens in the contiguous zone and beyond.

In 1970 the United Nations General Assembly decided, for various reasons, to convene another conference on the Law of the Sea. The first substantive session of the Third Law of the Sea Conference met in Caracas in June, 1974. One of the controversial issues before the Conference was the extent of coastal nation jurisdiction over offshore fishery resources. Initially, the United States opposed any extension of fishery jurisdiction beyond twelve miles. Strong naval interests, the need to import energy and raw materials by water, and distant water fishing interests appeared to dictate continued U.S. support for the broadest possible freedoms of the high seas.

As the Conference progressed it became clear that, for the most part, the world community supported extension of the territorial sea to 12 miles and creation of an economic zone (including fisheries jurisdiction) extending 200 miles from shore. In spite of its concerns, the United States capitulated on this point and shifted its attention to the content of the legal regime within the limits of the zone. The U.S. position on fisheries recognized the preferential right of coastal nations to take fish within the zone in return for responsible management of the fishery resources, but also required that foreign nations be allowed to take whatever fish the coastal state did not utilize.

The Caracas session in 1974 did not produce a new Law of the Sea Treaty, nor did the Geneva session in 1975. Although a consensus emerged favoring extension of fisheries jurisdiction to 200 miles, demands for a "package treaty" covering all aspects of ocean resource exploitation prevented treaty adoption even as to agreed-upon issues. The negotiators appeared deadlocked, and only the most optimistic saw a treaty in the near future.[12]

Meanwhile, the tremendous influx of foreign fishermen off U.S. coasts, accompanied by over-exploitation of several stocks valuable to U.S. fishermen, caused escalating pressure on Congress for remedial action. The National Marine Fisheries Service (NMFS) of the Department of Commerce estimates that 20% of all marine fisheries in the temperate and subarctic shelf areas of the world (where most of the fisheries are located) are within 200 miles of the U.S. coasts. Despite this abundant resource and continually increasing domestic demand for edible fish products, the domestic fish harvest remained stable while the foreign harvest increased tremendously, resulting in a significant U.S. fish trade deficit.[13] The U.S. fishing industry had difficulty competing with foreign fishermen, whose distant water

fleets carry the most technologically advanced equipment, making them extremely efficient. Entry into U.S. coastal waters by these large and efficient foreign vessels caused the U.S. fishing industry, already burdened by numerous marginal operations, to suffer further decline. Moreover, many fish stocks in U.S. coastal waters were seriously threatened by the increased fishing effort.[14] With the Law of the Sea negotiations in a stall, the stage was set for unilateral extension of fisheries jurisdiction by the U.S.

II. Passage Of The FCMA

Congress first seriously considered extension of fisheries jurisdiction to 200 miles in 1974. Three Senate committees, Commerce, Foreign Relations, and Armed Services, held hearings on a 200-mile bill. The Senate passed the bill despite an unfavorable report by the Foreign Relations Committee, and opposition by the Departments of State and Defense. The House held hearings on a similar bill, but took no action before the close of the 93d Congress.

Efforts to extend fisheries jurisdiction continued in the next session of Congress. The House Committee on Merchant Marine & Fisheries held hearings on H.R. 200 in March, 1975. Senate committees on Commerce, Foreign Relations and Armed Services held hearings on a similar bill, and once again the Foreign Relations Committee reported unfavorably.[15] Nonetheless, the Senate passed S. 961 on January 28, 1976, and the House passed H.R. 200 on October 9, 1975. Both houses then passed the Conference Committee's compromise bill, which was somewhat reluctantly[16] signed into law by President Ford on April 13, 1976.

Proponents of the legislation had pointed to the overall ineffectiveness of the 22 international fisheries agreements to which the United States was a party.[17] Enforcement of these agreements was generally left to each signatory nation, with the result that the agreements were seldom properly enforced. In further support of their position, proponents relied upon indications from the Third Law of the Sea Conference negotiations that the world community was ready to accept extension of coastal nation fisheries jurisdiction out to 200 miles. They argued, in effect, that 200-mile fishery jurisdiction was developing into a rule of customary international law.

Proponents and opponents of the 200-mile bill generally agreed that coastal nation management of fisheries was best for the resources. The real debate was over the advisability of unilateral action. The United States had consistently denied the right of coastal nations, including the CEP countries, to extend fisheries jurisdiction beyond 12 miles. The Foreign Relations Committee and the Departments of State and Defense saw potential adverse impacts of unilateral action on Law of the Sea negotiations, and preferred to wait for treaty ratification.

The decision to delay implementation of the FCMA until March, 1977, was an accommodation of those who hoped the Summer 1976 Law of the Sea session in New York would produce a treaty.

III. Overview Of The FCMA

The FCMA is sometimes referred to as the 200 mile bill, but strictly speaking it does not create a "200 mile limit." To begin with, the fishery conservation zone (FCZ) established by the FCMA is not 200 miles wide, but instead extends 197 miles from the seaward boundary of the three mile territorial sea. The states retain management authority within the territorial sea unless state action infringes substantially upon a federal fishery management plan. Thus to the extent that the FCMA establishes a zone, it is a 197-mile zone.

Secondly, fishery management authority is not limited to 200 miles from shore in the case of continental shelf species and anadromous species. The United States claims the right to manage all living resources of the continental shelf, even if beyond 200 miles, and anadromous species throughout their range unless the fish are within another nation's territorial sea or fishery conservation zone. In that sense, the law extends some regulatory authority beyond 200 miles.

Thirdly, the FCMA does not claim to regulate highly migratory species (defined as tuna) at all, and thus does not regulate all fish within the FCZ.

Finally, and most important, the FCMA as passed did not authorize exclusion of foreign fishermen from a fishery within the FCZ unless domestic fishermen harvested the optimum yield of that fishery. Recent amendments to the Act, however, have provided for an accelerated phase-out of the foreign fleet under certain circumstances.

The FCMA establishes a management scheme designed to regulate domestic and foreign fishing within the FCZ through development of fishery management plans for the various fisheries. The mechanism established to draft these plans is the regional management council, a unique creature of the FCMA designed to represent federal, regional, state and local interests in the decision-making process. Eight regional fishery management councils are established to cover the coastal United States. Each Council must conform its fishery management plans to seven national standards aimed at effective conservation of U.S. fishery resources. Each fishery management plan must be approved by the Secretary of Commerce.

One of the Council's most significant functions is establishment of the optimum yield for each fishery. The optimum yield figure not only sets the upper limit of allowed domestic harvest in that fishery, but by subtracting the estimated

domestic harvest from optimum yield, the Council arrives at the total allowable level of foreign fishing (TALFF) for that fishery. It is then up to the Secretaries of State and Commerce to allocate the TALFF among foreign fishermen. The concept of optimum yield is treated more thoroughly in chapter two.

Because of the numerous fishery agreements to which the United States was a party when the FCMA was passed, the Secretary of State was directed under the Act to review all existing agreements and renegotiate those that were inconsistent with the FCMA. A nation not a party to an existing agreement was required to negotiate a governing international fishery agreement (GIFA) with the United States if it wished to fish within the FCZ. The nation was then required to apply to the State Department for a permit for each vessel it wished to participate in a given fishery.

The regional management councils, working in conjunction with National Marine Fisheries Service, have made progress in implementing the FCMA. As of May 15, 1982 twenty-two fishery management plans and preliminary management plans were in effect and others were in various stages of preparation. As a result, fishing patterns off U.S. coasts have changed dramatically since 1976. Foreign fishing has dropped and the percentage of total catch taken by U.S. fishermen has increased.[18]

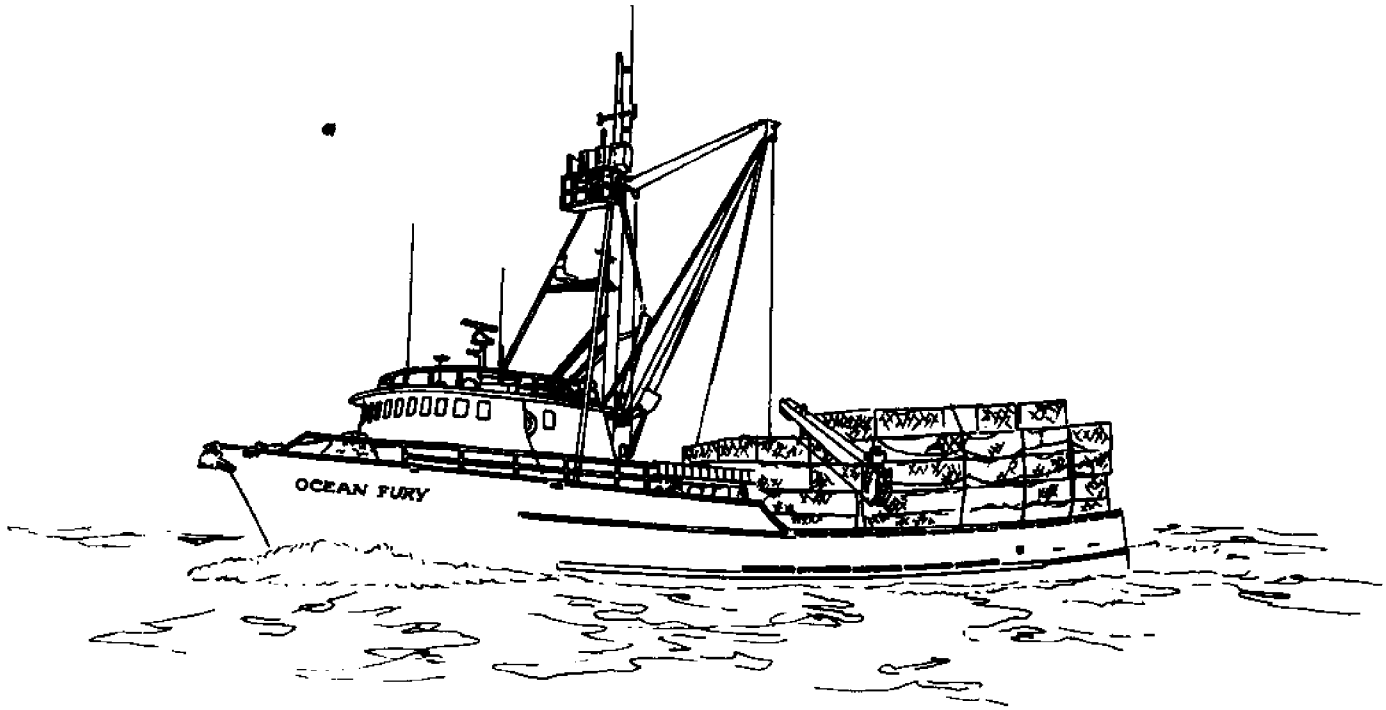
Implementation of the FCMA is not without its problems, however. The United States Comptroller General has identified as problem areas the limited biological and socioeconomic data upon which to base fishery management plans; limited public involvement, understanding and acceptance; the time consuming process involved in developing and approving a plan; jurisdictional problems between state and federal authorities; and limited long-range planning.[19]

Difficulties should be expected in implementing any new statutory scheme. Those listed above do not undercut the significance of the FCMA as a resource management tool. The FCMA is unique among domestic laws aimed at conservation of a living resource. First, the regional management council blend of federal, state and local representatives is not found in any other U.S. regulatory scheme. Second, regulation of fisheries has traditionally been the exclusive province of the individual states, and the laws of adjacent states were not well coordinated. Management of individual fish stocks on a regional basis, without regard to state boundaries, is generally accepted as the best method of conserving the fishery resource, but the approach is unprecedented among U.S. conservation laws. The FCMA is thus something of a maverick in the area of living resource management.

This handbook explains the operation of the FCMA. Chapter two tells how the FCMA deals with foreign fishing within the

FCZ, including a discussion of optimum yield and joint ventures. Chapter three treats the composition and operation of a regional management council, with particular reference to the Pacific and North Pacific Councils. Chapter four will follow the creation and implementation of a typical fishery management plan. Chapter five examines the operation of the Act's enforcement mechanisms with respect both to foreign and domestic fishermen.

It is too early to gauge the long-term effects of the FCMA on either the United States' fishermen or its fish stocks. Nonetheless, the FCMA is a crucial beginning if the United States is to conserve its valuable fishery resources.



Foreign Fishing

CHAPTER 2

I. Introduction

The emergence of a worldwide fishing industry, characterized by substantial mobility and technological sophistication, dramatically transformed the concepts of fisheries management in the U.S., and resulted in Congress' enactment of the Fishery Conservation and Management Act of 1976 (FCMA).[1] To understand how the Act currently affects foreign fishing within the Act's newly established "200-mile" Fishery Conservation Zone (FCZ),[2] it is necessary to examine what the Congress was trying to achieve when it enacted the FCMA.

Between 1938 and 1973 the volume of fish harvested off the United States tripled, increasing from approximately 4.4 billion

pounds to 11.8 billion pounds, while the landings of American vessels remained virtually constant, increasing from 4.3 to 4.7 billion pounds.[3] In 1973, foreign fishermen took nearly seventy percent of the commercial fish harvest off U.S. coasts.[4] At the time of congressional debate on the Act, approximately sixteen important species of fish off the U.S. coast were judged to be over-fished by U.S. scientists.[5] While U.S. fish harvests remained relatively constant, the United States more than doubled its consumption of fish products; the increase represented imported fish products, much of which had been caught from U.S. coastal waters.[6] All of this had a significant impact not only on the fishery stocks but on the U.S. balance of trade deficit and on the economic well-being of the American fishing industry.

Since 1948 the United States had concluded over twenty international fishing agreements in an effort to conserve fish stocks and protect the domestic fishing industry.[7] These international conservation efforts proved generally ineffective in preventing either depletion of fish stocks or deterioration of the American fishing industry.[8]

Recognizing that a successful conclusion to the Third United Nations Law of the Sea Conference was not imminent,[9] Congress responded to this deteriorating situation by enacting the Fishery Conservation and Management Act of 1976.

While the desire to control foreign fishing fleets was part of the reason for enacting the FCMA,[10] Congress recognized that it was neither practical nor desirable to exclude all foreign fishing. This was true because of several reasons. At the time of enactment, it was felt by Congress that it would be a violation of international law to totally exclude foreign fishing within the 200-mile limit.[11] Further, Congress recognized that a prohibition of all foreign fishing within 200 miles of the U.S. coast would severely impact the U.S. distant water shrimp and tuna fleets if it resulted in retaliatory denial of access to foreign fishing grounds.[12] Finally, Congress felt a moral obligation to permit foreign fishing due to the role of fish as an important source of protein for many nations of the world.[13]

The legislators' intent in enacting the FCMA was to limit both domestic and foreign fishing to the optimum yield of the resource. As Senator Warren Magnuson, a principal sponsor of the FCMA, stated: "Emphasis was on conservation and management, not exclusion."[14] Like the previously enacted Coasting and Fishing Act,[15] the FCMA does, however, prohibit foreign fishing within state boundaries.[16] As will be discussed later in this chapter, subsequent amendments to the FCMA in 1980,[17] which establish a mechanism for an accelerated phase out of foreign fishing within the FCZ, indicate Congress' changing perception as to the role of foreign fishing under the FCMA.[18]

While foreign fishing may not have been eliminated by Congress' passage of the FCMA in 1976, it is now subject to U.S. controls, which are considered necessary to achieve the Act's primary goals of conservation and management of the fishery resources off our coasts. This chapter discusses the controls that foreign fishing fleets are subject to when fishing within the 200-mile zone created by the Fishery Conservation and Management Act of 1976.

Briefly stated, the basic organizational framework of the regulation of foreign fishing imposed by the FCMA is as follows: In order for a foreign vessel to qualify for fishing in the fishery conservation zone, the foreign government sponsoring the foreign fishing vessel must: (1) be a party to an existing fishery treaty or agreement, or a "governing international fishery agreement" (GIFA) negotiated pursuant to the Act;[19] (2) extend similar privileges to U.S. fishing vessels;[20] and (3) apply for and obtain an annual permit from the Secretary of State for each applicant vessel it represents.[21] The GIFA and corresponding vessel permit establish "conditions and restrictions" on foreign fishing for the nation and the individual fishing vessel.[22] Part II of this chapter will discuss GIFA negotiation and review process and the conditions that a foreign nation agrees to when it enters into a GIFA.

The Secretary of State, after consultation with the Secretary of Commerce, issues permits for foreign fishing pursuant to a GIFA depending on the extent to which an allocation of the target stock is available.[23] If the optimum yield (OY) for the target fishery stock as predicted by the Regional Council[24] is greater than the U.S. harvesting capacity,[25] the surplus may be then made available to foreign interests and is considered to be the "total allowable level of foreign fishing" (TALFF).[26] Since the total amount of foreign fishing is dependent upon the levels determined for optimum yield and domestic harvesting capacity, the criteria and considerations used to define these concepts are of crucial importance to foreign fishing interests. Part III of this chapter will examine the calculations of optimum yield and domestic harvesting capacity for a fishery.

The surplus or total allowable level of foreign fishing is then allocated among the qualified foreign applicants by the Secretary of Commerce according to specific criteria.[27] The allocation process and the criteria considered are examined in Part IV.

In 1978 Congress passed an amendment to the FCMA [28] which created a United States processor preference for American-harvested fish similar to the fishermen's priority in the fishery conservation zone. However, the amendment also specifically authorized joint ventures, in which foreign processing vessels can receive from U.S. fishing vessels that part of the domestic harvest which U.S. processors have no capacity or intent to

process.[29] The background of the joint ventures amendment, its implementation and effect on foreign fishing are discussed in Part V of this chapter.

Under the FCMA, those engaged in foreign fishing may be charged "reasonable" nondiscriminatory licenses fees based upon the cost of management, research, administration, enforcement, and other factors relating to the conservation and management of fisheries.[30] Amendments to the Act in 1980 increased the permit fees for foreign fishermen and required that each foreign fishing vessel pay the cost of providing a United States observer aboard that ship.[31] The fees and the observer-program are examined in Part VI of this chapter.

II. GIFA'S

Under the Fishery Conservation and Management Act, each nation wishing to fish within the Fishery Conservation Zone (FCZ) or for anadromous species[32] or for sedentary continental shelf fishery resources[33] must enter into a Governing International Fishery Agreement (GIFA) with the U.S.[34] or renegotiate an existing international fishery agreement to conform to GIFA requirements.[35] Upon expiration of the existing international fishery agreement, the foreign nation must negotiate a GIFA if it desires continued access to the exclusive fishery zone.[36] Permits for individual vessels will be issued only to fishing vessels of nations that are parties to a GIFA with the United States.[37]

By entering into a GIFA, the foreign nation acknowledges the exclusive management authority of the United States as set forth by the Act.[38] The GIFA must also include a binding commitment on the part of the foreign nation and each of its fishing vessels to comply with a wide range of conditions including all regulations promulgated by the Secretary of Commerce pursuant to the Act and regulations promulgated to implement any applicable fishery management plan.[39]

Some of the terms and conditions which the GIFA must impose on a foreign nation and its vessels are specified by the Act. Each foreign fishing vessel wishing to fish within the fishery conservation zone must first obtain a permit from the Secretary of Commerce[40] and prominently display it on the wheelhouse of the vessel.[41] Transponders or other appropriate position-fixing devices must be installed and maintained on the foreign vessels.[42] The foreign nation must assist U.S. enforcement of fishery regulations by permitting the Coast Guard to board and inspect its fishing vessels at anytime, and to make arrests and seizures of the vessel if violations are found.[43] By becoming a party to a GIFA, the foreign nation permits a U.S. observer to be stationed aboard each of its fishing vessels and agrees to pay for the cost of such observers.[44] Fees required for individual fishing permits must be paid in advance.[45] To insure

that the foreign nation and its fishing fleet are not immune from legal action in U.S. courts, the GIFA must require that the foreign nation and owners of the foreign fishing vessels maintain agents within the U.S. who are authorized to receive and respond to any legal process.[46] The GIFA also requires the foreign nation to assume responsibility for any gear loss or damage suffered by U.S. fishermen which was caused by the foreign nation's fishing vessels.[47] The foreign nation also agrees that its vessel owners and operations will limit their annual harvest to an amount which does not exceed that nation's allocation of the total allowable level of foreign fishing (TALFF).[48] Finally, the GIFA must require the foreign nation to enforce all of the above conditions and restrictions against its nationals, as well as any conditions and restrictions that might be applicable to each individual vessel pursuant to that vessel's permit.[49]

Under the FCMA, the U.S. Department of State is responsible for negotiating GIFA's with foreign countries wishing to fish within the FCZ.[50] Once a GIFA has been negotiated and signed, the President is required to submit it to Congress.[51] The agreement takes effect sixty days thereafter, unless it is disapproved by a joint "fishery agreement resolution" originating in either House of Congress.[52] Although an acceleration process is not specifically provided for in the Act, Congress has made GIFA's effective prior to the end of the sixty-day period by taking affirmative action to that effect in the form of a joint resolution.[53]

The Fisheries Conservation and Management Act states that it is the "sense of Congress" that the GIFA's "include a binding commitment, on the part of such foreign nation and its fishing vesels," to comply with the specified conditions and restrictions of the Act.[54] The use of the term "sense of Congress" indicates Congress' recognition that the formation and control of international fishery agreements is not clearly within its power. The uncertainty is due to the unsettled application of the separation of powers doctrine in the field of foreign affairs.

Treaties are the only form of international agreement specifically provided for in the U.S. Constitution. Article II, Section 2 of the Constitution requires that treaties be negotiated by the executive branch of the federal government and ratified by the President with the advice and consent of the Senate.[55] The GIFA's are, however, not "treaties," but are "executive" agreements.[56] The process for adoption of GIFA's therefore differs in several ways from that required by the Constitution for the adoption of treaties. First, Congress has imposed conditions and guidelines[57] which must be included in the agreements negotiated by the Secretary of State.[58] The President and the State Department are thus purportedly constrained in their ability to consider other aspects of foreign

policy to the derogation of the Act's goals of conservation and management of the fishery resources. Another difference is that the GIFA's are subject to the approval of both houses of Congress, not just the Senate.[59] Therefore Congress is more actively involved in the negotiation process of GIFA's than it is with treaties.[60]

The Act also contains a further restraint on the ability of the State Department to negotiate GIFA's with nations seeking to qualify for fishing in the FCZ. As an incentive for foreign governments to conclude agreements that insure access for the U.S. distant water fishing fleet to foreign fishing zones, the Act provides that foreign fishing will not be authorized for vessels of any nation unless that nation extends substantially the same fishing privileges to vessels of the United States as the United States extends to foreign fishing vessels.[61] The effect of this "reciprocity provision" may actually be only illusory since the nations wishing to fish in the U.S. fishery conservation zone may not have fishery resources desired by the U.S. distant water fleet.[62]

At the present time, GIFA's have been concluded with Bulgaria, Cuba, the European Economic Community, or EEC (France, Federal Republic of Germany, Ireland, Italy), the German Democratic Republic, Japan, Poland, Republic of Korea, Romania, Spain, Taiwan, the U.S.S.R. and the Faroe Islands (signed by Denmark, the Faroe Islands and the United States).[63]

The agreement with the EEC presented certain special problems, since not all of the EEC members had traditionally fished off U.S. coasts. But the Community had adopted a common fishery policy and at the same time had established its 200-mile Conservation and Management Zone. An agreement with the EEC as a whole was therefore unavoidable. While the agreement theoretically applies to all members of the EEC, fishing rights were granted in the first place to those of its members who had fished in American waters in the past.[64] In addition to gaining recognition of the U.S. fishery conservation zone, the EEC GIFA also fulfilled another purpose of the Act by protecting the interests of the American distant-water fishing fleets. The agreement was important to the United States in that "approximately 100 U.S. shrimp trawlers fish in waters off French Guiana which lie in the EEC zone."[65]

Mexico signed a Governing International Fisheries Agreement on August 26, 1977, but decided to terminate the agreement on June 29, 1980. One of the major reasons for the decision of the Mexican Government to terminate the GIFA was the failure of its squid fishery to receive allocations of squid from the United States.[66]

III. Optimum Yield

As the Mexican squid fishermen have realized, the critical condition for foreign access to a fish stock, even if a GIFA has been signed and approved, is the existence of a surplus of fish over and above what the U.S. domestic fleet will harvest. If the predicted "optimum yield" of a fishery, as determined by the appropriate Regional Fishery Management Council, is greater than U.S. harvesting capacity, the surplus is then made available to foreign fishing.[67] The calculation of "optimum yield" is of crucial importance to domestic as well as foreign fishermen. Nearly all of the specific criteria set forth in title III of the Act, governing promulgation of fisheries management plans and their review by the Secretary of Commerce, are designed to insure the achievement of the goal of optimum yield, which is considered "the underlying management concept" of the Act.[68] Yet the optimum yield concept has been criticized for its apparent failure to establish adequate guidelines for decision-making. As one commentator states: "The nebulous nature of this standard . . . renders it ineffective in providing a basis for decision-making. 'Optimum yield' becomes merely a 'best' yield, to be defined on an ad hoc basis by decision-makers."[69]

The concept of "optimum yield" is defined by the FCMA as

> the amount of fish --
>
> (A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and
>
> (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factors.[70]

This concept represents a fundamental change from the traditional management objective of maximum sustainable yield (MSY) used over the past several decades.[71] The MSY from a fishery is the largest annual catch or yield (in terms of weight of fish) caught by both commercial and recreational fishermen that can be taken continuously from a stock under existing environmental conditions.[72] The concept of MSY is based on observations that up to a point, the more fish of a given species are caught, the more fish, by weight rather than numbers, there are to catch. The reasoning is that when fish are harvested, more food resources are available to be used more efficiently by the remaining fish stock. Thus they grow faster. As fishing effort increases, the catch increases up to a point of leveling off. Beyond this point, increased fishing results in a declining catch. Therefore the fish stock produces its greatest harvestable surplus when it is at some intermediate level of abundance.[73]

As a goal of fisheries management, the concept of MSY has been criticized by biologists and economists because of its narrow biological basis.[74] The criticisms of MSY as a fisheries management goal include its failure to account for ecological factors, and to accommodate economic and social interests. As one fisheries expert noted in 1974: "Few would now defend the MSY as an abstract concept providing the ideal theoretical guide to management objectives."[75]

An inherent shortcoming of the strict MSY standard is its failure to account for ecological interrelationships between species. The MSY concept does not consider whether two species compete for the same food source, or engage in a predator-prey relationship, and therefore the respective yields of the related species often cannot be maximized simultaneously.[76] The MSY standard also fails to address the situation of incidental by-catches where, due to the close physical proximity of the stocks, the fishing of one stock at MSY levels may produce destructively high catches of the other.[77]

Some of the strongest arguments against the MSY concept have come from economists. Due to the fact that fisheries have been traditionally regarded as a common property resource with open accessiblity, fishing at the level of MSY results in indirect encouragement of overfishing in the economic sense accompanied by substantial economic waste.[78] The primary shortcoming of MSY -- or any other purely physical objective -- is that it is subject to the principle of diminishing marginal returns.[79] As fishing approaches MSY, the yield increases very slowly with increases in effort. In terms of additional effort required to harvest it, the last ton of fish caught costs many times the average cost per ton. The costs of the effort exerted to take these last few fish, in capital and labor, would be much better used elsewhere in the economy, according to the economic analysis. The economic defects of a strict MSY standard can result in social problems affecting the welfare of the fishing industry and coastal fishing regions.[80]

One commentator has suggested that the deficiencies of a purely biological goal, such as MSY, adopted without regard to its associated costs and benefits, could be best illustrated by applying them to terrestrial resources.[81] If states were to adopt a goal of maximizing the sustainable yield from an acre of ground, they might produce several times as many bushels of wheat, rice, or corn from an acre of ground. But this could only be done by incurring costs that would be much greater than the revenues gained, or by diverting scarce labor or capital away from other more profitable or productive activities. Similarly, say the economists, it makes little sense to base fisheries management upon a goal of maximum sustainble yield without regard to the costs and revenues associated with that level of production.

Congress recognized the ecological and socio-economic shortcomings of the MSY concept as a management objective when it adopted "optimum yield" (OY) as the goal for fisheries management under the FCMA.[82] However, Congress did not abandon the MSY concept, but instead defined optimum yield to include MSY as the "basic standard of reference" as modified by the relevant economic, social and ecological factors.[83] This definition reflects Congress' recognition that the concept of maximum sustainable yield can be a very valuable management tool towards meeting the Act's goals of conservation and management of fish stocks.[84] A management system was envisioned where the MSY would be established for each managed species, then OY would be set as a carefully defined deviation from MSY in order to respond to the unique ecological, economic and social problems of that fishery or region.[85] The importance of MSY as a conservation goal for overfished stocks[86] was noted in the Senate Report: "Although it may be conceivable that a situation may occur in which a yield higher than the maximum sustainable yield might be defensible, this would seem rare and should be only temporary. In almost every other instance, the optimum yield should be equal to or below the maximum sustainable yield."[87]

The Act states that the optimum yield is to be set as the amount of fish which is the MSY as modified by any relevant economic, social, or ecological factor.[88] While designed to overcome the economic, social and ecological defects of management under a strict MSY concept, the Act itself does not provide any guidelines as to what factors should be considered or how much weight should be given to them. The guidelines promulgated by the National Marine Fisheries Service (NMFS) and the National Oceanic and Atmospheric Administration (NOAA) provide that the concept of optimum yield should take into account the economic well-being of the commercial fishermen and the interests of the recreational fishermen as well as habitat quality and the national interest in conservation and management.[89] According to the NOAA and NMFS guidelines, the OY concept must recognize resource uses and values other than harvesting, such as the importance of quality to the recreational fishing experience and the need for fisheries products. Furthermore, OY must be recognized as a dynamic concept. The OY for a specific fishery may be valid only for a limited time because of changing conditions of the fishery resource or desires of the users. Therefore, periodic adjustments of the harvest quotas, rates and methods may be needed so that the OY will achieve the long term objectives of the Act.[90]

Each Regional Fishery Management Council is responsible for annually determining the optimum yield for each fishery subject to its management.[91] According to NOAA and NMFS, the Councils are to undertake this task with the assistance of the Councils' scientific and technical advisory groups, users of the resource, and the general public.[92] The Councils are to be influenced by both regional objectives and national considerations[93] in

determining the relative weights of the elements of the OY determination. Since regional objectives of fisheries management may conflict with one another, priority decisions must also be made by the Council in developing objectives.[94]

The resulting OY determination can be defined in a number of ways: (1) as a number which functions as a quota (e.g., Atlantic groundfish, Tanner crab, Pacific salmon, Gulf of Alaska groundfish); (2) as a description incorporating biological characteristics (stone crab, Gulf of Mexico shrimp); (3) as a percentage of another species in the management unit; (4) as a result of a model or formula using environmental or biological characteristics (original FMP for Atlantic herring); or (5) as a range with a yearly fixed point (northern anchovy).[95] The list is not exclusive, as there may be other ways to specify optimum yield.

The complexities involved in arriving at an OY determination can be demonstrated by the 1977 Fisheries Management Plan for Salmon Fishing Off the Coasts of Washington, Oregon, and California. The Plan notes that, since the growth rate exceeds the natural mortality rate in the ocean, the existence of major ocean fisheries results in millions of pounds, not numbers, of salmon production lost annually. The reasoning is as follows: When the salmon are in the ocean the growth rate exceeds the mortality rate and hence the total biomass of the stock is always increasing. It is not until the salmon re-enter fresh water on their spawning migration that the mortality rate starts to exceed the growth rate (and hence the total biomass of the stock begins to decrease). Therefore, achieving maximum yield levels in pounds of salmon would require the elimination of ocean troll and sport fishing and allowing the taking of all fish only at or near the river mouths. The Plan deviates from MSY by maintaining ocean troll and sport fisheries, but with reduced fishing rates to provide increased availability of salmon to "inside" fisheries and spawning escapements.

The Salmon Plan projected optimum yields of 12 to 18 percent below MSY.[96] The reasons for proposing a harvest of less than MSY were (1) high recreational values; and (2) the higher market value per pound for troll, relative to net-caught, Columbia River fall chinook (due to both real and perceived quality differences and different market channels).[97]

The Plan notes that other considerations involved in preserving ocean troll and sports fisheries to achieve OY included (1) the availability of salmon over a longer annual time period and in greater variety with an ocean troll fishery; (2) less dislocation and community impact that would result from immediate elimination of troll fishery and charter boat industries, which form significant sectors of coastal employment alternatives; and (3) preservation of a lifestyle represented by troll fishing and charter boat operations, since these are activities that are accessible with modest capital investments.[98]

The Plan's recommendation of reduced fishing rates to increase availability of fish to "inside" fisheries and spawning escapements to achieve OY was justified by several factors. These included (1) a projection that reduced catches of depleted fish stocks will provide increased salmon production over the long term; (2) legal rulings that require certain quantities of fish to be provided for treaty Indian fisheries; and (3) a desire to reverse past trends that had resulted in the brunt of conservation restrictions falling on inside fisheries in order to assure that adequate spawning escapements are provided.[99]

The 1977 Salmon Plan is an example of a recommended OY which is less than MSY and based on consideration of high recreational and economic values, with some sociological factors also included. The plan noted that due to the state of current technology and availability of data, direct quantification of all the factors is not possible. Therefore the final determination of OY was arrived at by a consensus of "the professional judgments and experience of the working team who prepared the plan, the Scientific and Statistical Committee, and the Council."[100]

Although OY has so far been discussed in reference to purely domestic concerns, the Council's determination of OY for a fishery is of great concern to foreign fishing interests. This is because the level of allowable foreign fishing is that portion of the optimum yield which will not be harvested by U.S. vessels.[101] Since the economic, sociological and ecological factors are often incapable of quantification, the Council could possibly use these factors to justify an optimum yield determination at lower than MSY but with an actual goal of effectively reducing or eliminating foreign fishing for the managed fishery. The vague nature of the optimum yield standard would make it difficult to prove that reduction of foreign fishing was the actual intent of the OY set by the Council.

The determination of OY and the existence of a surplus for foreign fishing quickly resulted in several controversies between the U.S. fishing industry and the federal government. One controversy occurred in 1978 when the North Pacific Council set the OY for the C. opelia species of tanner crab in the area north of 58° N latitude. According to fisheries scientists, the MSY for the fishery was estimated at an annual harvest of 102,000 metric tons (m/t). U.S. fishermen, however, were not going to fish for this stock and instead were expected to harvest 40,381 m/t of C. bairdi tanner crab and 10,000 m/t of C. opelia tanner crab south of 58° N latitude. Because there were no plans by American fishermen to harvest C. opelia tanner crab north of 58° N, the entire amount of the OY level (102,000 m/t)--if the Council set OY as being equal to MSY--would be available as surplus for foreign fishing. However, the North Pacific Council set the OY for this fishery at only 15,000 m/t. The 87,000 m/t reduction below MSY was justified by the Council on ecological and economic grounds.[102] Ecological concerns, such as maintaining a food

supply of tanner crab for marine mammals, were mentioned. The major justification, however, was clearly economic. The Council stated that the OY was reduced in an effort to prevent foreign fishing fleets, mainly the Japanese, from flooding the world market with tanner crab, and thus reducing the world market price.[103] It was felt by the Council that reduced foreign fishing would result in a tighter supply and higher market price and thus spur the growth of the U.S. tanner crab fishery. The Council reasoned that, by creating a more favorable balance of trade with Japan, and by promoting U.S. industry growth into fisheries of underutilized species, its action was fulfilling two policies of the Act.[104]

The Secretary of Commerce, who must ultimately approve all management plans,[105] denied approval when the plan was first proposed, on the basis that there was inadequate evidence to indicate that a higher OY would depress the price of tanner crab and adversely affect the U.S. industry. However, the concept that market competition by foreigners could be a valid economic modifier of MSY for determining OY was not disapproved. The Secretary ultimately approved the plan on the basis of a later memorandum submitted by the North Pacific Council which contained statements from noted economists, fish processors and fishermen.

The rationale used by the North Pacific Council could lead to further reductions in foreign fishing through the use of low OY levels. The market competition rationale resulted in a drastic amendment to the Tanner Crab Fisheries Management Plan (FMP) in 1981, in which foreign fishing for both species of tanner crab was eliminated completely. Under the amendment, the OY for both species is equal to the domestic annual harvest (OY=DAH), up to the limit of the acceptable biological catch.[106] The C. opelia tanner crab fishery in the Bering Sea will provide an example of the effect of the new amended OY. The 1981 FMP projects an acceptable biological catch of 41,300 m/t, yet the previous year's domestic harvest was only 17,900 m/t.[107] Although the domestic harvest may increase,[108] it is doubtful whether U.S. vessels can harvest the entire 23,400 m/t difference. The result is that a large amount of harvestable protein is left in the ocean, arguably violating a moral obligation to produce food and possibly international law as well.[109]

Another controversy concerning OY ultimately led to the first judicial decision on the Fisheries Conservation and Management Act within a year of its passage. When the FCMA was passed, the New England Regional Council was unable to prepare a management plan for the Georges Bank herring stock before the March 1, 1977, implementation date of the Act. In such a situation, the Secretary of Commerce is authorized to prepare a management plan.[110] In the plan, the Secretary of Commerce, Juanita Kreps, noted that a healthy stock of herring would consist of 350,000 to 500,000 m/t and would yield an MSY of 100,000 to 150,000 m/t.[111] The Secretary determined that the present size of the

herring stock was much smaller -- 218,000 m/t[112] and was 7,000 m/t below the level at which recruitment failure was feared.[113] The Secretary set the 1977 OY level at 33,000 m/t, with 12,000 m/t for domestic harvest and 21,000 m/t for foreign fishermen. She projected that this OY figure would allow a 10 to 13 percent increase in the herring stock within a year, bringing the stock to a level of 247,000 m/t by 1978.[114] The Secretary acknowledged that the OY figure corresponded exactly to the herring quota adopted by the International Convention for the Northwest Atlantic Fisheries (ICNAF) in December, 1976.[115]

In Maine v. Kreps,[116] the State of Maine alleged that the OY figure was too high and violated the Act. The state's primary contention was that where an area's stock is so depressed as to be unable to maintain MSY, the Act required an OY figure that would rebuild the stock as rapidly as possible, and no foreign fishing should be allowed. The State also argued that general foreign policy considerations are impermissible OY criteria, so that the Secretary could not rely upon the international consequences of permitting foreign fishing as one of the beneficial jusifications of an OY figure. The issue before the federal Court of Appeals was whether the determination of OY could include not only a consideration of economic, social and ecological factors, but foreign policy factors as well.

The Court of Appeals for the First Circuit ultimately upheld the Secretary's OY determination. The court noted that the Act's strong conservation goals clearly precluded the setting of an OY which would permit overfishing.[117] However, the court found nothing in the Act which prescribed a particular annual rate at which depleted stocks should be rebuilt, and found that a ten percent increase in the stock was not "too slight to promote the purposes of the Act."[118] The court also found that nothing in the Act declared that foreign fishing was to be halted when fish stocks were incapable of sustaining the MSY. Finally, the court noted that the part of the OY definition which calls for "the greatest overall benefit to the Nation with particular reference to food production"[119] was broad enough to allow the Secretary to bring foreign policy implications related to fishing into her OY determination.[120]

The court noted that the national benefits that would result from cooperating with other nations could include the benefits from scientific research conducted by foreign vessels; the negotiating needs of the United States at the Law of the Sea Conference; the need to gain the cooperation of other nations in international fishery conservation; considerations related to the needs of the U.S. distant water fleets; and foreign fishing trade benefits.[121] However, the court qualified its view. Noting that the Act's specific language is "national interest with particular reference to food production," the court stated that the international considerations that can be given weight in determining the OY for a fishery are limited and must relate to

fishing and fish, and to other activities and products pertaining to the food supply. To illustrate this limitation, the court noted that the nation's fisheries could not be swapped for a world banking agreement.

Although the Maine v. Kreps decision was attacked by those who thought the FCMA had eliminated foreign policy considerations in fisheries management,[122] the case may be of limited precedential value. First, the State of Maine conceded that the OY did allow for some rebuilding of the herring stock, thereby observing the Act's goals of conservation and management. Second, due to the time constraints present during the Act's implementation, the case presented the unusual situation of the Secretary of Commerce preparing the fishery management plan instead of the Regional Council. Management plans prepared by the Regional Councils will probably be more responsive to the needs and desires of the domestic fishing industry. This can be exemplified by the approach taken by the North Pacific Council in determining the OY level for the tanner crab fishery.[123] Third, the Secretary and the court were both heavily influenced by the fact that the Act had just recently become law. The court stated it was appropriate to honor the commitments to other nations by using the same quota as that previously allowed by ICNAF since it was a "transitional year" and the commitments preceded in part the passage of the Act and preceded entirely the implementation of the Act.[124] The court cautioned that such reasons may not be acceptable at a later date, noting that "[w]hat is reasonable now may be less so later."[125] Thus, since the Act has now been in effect for several years, the case may be of limited precedential value.

IV. TALFF And Its Allocation

As previously noted, the Fishery Conservation and Management Act of 1976 provided that the total allowable level of foreign fishing (TALFF) for a fishery within the U.S. fishery conservation zone is limited to the portion of the optimum yield which will not be harvested by U.S. vessels.[126] The extent to which U.S. fishing vessels will harvest in a particular fishery within a given year is commonly termed the domestic annual harvest (DAH) and, like the optimum yield, is also determined by the Regional Councils.[127] The Secretarial guidelines require the Councils, when determining domestic annual harvest, to consider commercial, recreational, subsistence, and Treaty Indian fishing.[128]

Although the FCMA was viewed primarily as a conservation and management measure, it was hoped that an absolute U.S. preference to the fishery resources within the FCZ would provide a foundation for the substantial growth and development of the U.S. fishing industry.[129] The absolute preference formula for TALFF, along with the Act's other provisions, were intended to spur a rapid expansion of the U.S. fishing industry, provide jobs, transform the U.S. into a net exporter of fish products, and

reduce the U.S. balance of trade deficit. In 1980, however, Congress assessed the performance of the U.S. fishing industry since the enactment of the FCMA and was disappointed with what it found. Three years after the enactment of the FCMA, U.S. fishermen harvested only 33 percent, by volume, and 66 percent, by value, of the total catch in the FCZ. Taking into account a decreased total harvest since 1976, the U.S. displacement of foreign fishing in the FCZ had been only one percent per year, by volume, and less than 3 percent per year, by value.[130]

Congress also determined that the Act had not improved the fisheries trade deficit. While the growth in exports of fish products had been substantial, the increase in imports was even greater, growing from $1.6 billion in 1976 to $3.8 billion in 1979. The result was a fisheries trade deficit of $2.7 billion in 1979, which represented approximately 10 percent of the total U.S. negative trade balance. Domestic landings accounted for only about 40 percent of the total U.S. consumption of edible and industrial fish products. Thus, with 20 percent of the world's fishery resource located in the FCZ of the U.S. and under U.S. control and management, the country was still a substantial net importer of fish products.[131]

Congress recognized that as long as foreign nations were permitted to continue a high level of fishing in the U.S. zone, much of it subsidized, while U.S. fish exporters were denied access to important foreign markets, the United States would be unable to achieve full development of its fishing industry. In response to these problems, Congress amended the FCMA with the enactment of the American Fisheries Promotion Act of 1980 (1980 Act).[132] The American Fisheries Promotion Act was designed by Congress to promote the development of the U.S. fishing industry by increasing its share of the total harvest in the FCZ and encouraging greater access of U.S. fish products to foreign markets.[133]

Section 230 of the 1980 Act amended Section 201(d) of the FCMA to provide the Regional Councils with an alternative formula for determining the total allowable level of foreign fishing for a managed fishery. Under the new provision, each fishery management council can choose whether to continue with the previously established system (TALFF = OY - DAH) or adopt a new formula which provides for a phased reduction of foreign fishing in a fishery.[134] For each season and each fishery, the council can choose the system it determines in its discretion to be more advantageous.

The new reduction formula provides that, as U.S. fishing increases to specified levels in the fishery, the level of foreign fishing in that fishery will be reduced by an even greater increment. The Act's reduction formula defines the term "base harvest" of a fishery as the TALFF for that fishery in 1979.[135] The "calculation factor" equals 15 percent of the base

harvest (15 percent of the 1979 TALFF).[136] The first phased reduction will occur when U.S. fishermen increase their catch in that fishery by an amount equal to a certain percentage of the calculation factor. There are three such thresholds and three corresponding levels of reduction of foreign fishing: If U.S. fishermen increase their harvest from 25 up to 50 percent, from 50 up to 75 percent, or from 75 percent or more of the calculation factor in a fishery, the TALFF will be reduced by an amount equal to 5, 10, or 15 percent, respectively, of the 1979 TALFF for that fishery.[137] Each time a threshold is achieved, that level of U.S. harvest will be the base upon which an additional increase in U.S. fishing will have to be achieved to attain the threshold for a further percentage reduction of the TALFF.[138]

To illustrate how the reduction factor amount is computed, assume that the TALFF for a particular fishery in 1979 was 10,000 metric tons and the U.S. catch was 1,000 tons. The "base harvest" is 10,000 tons and the "calculation factor" is equal to 15 percent of the base harvest, or 1,500 tons. To achieve the first percentage reduction of TALFF in accordance with the formula, the U.S. catch would have to increase by 375 tons (25 percent of the calculation factor) over its 1979 level, for a total U.S. catch of 1,375 tons. The reward for U.S. fishermen the next year would be a reduction of TALFF by 500 tons (5 percent of the base harvest). This reduction would be in addition to the reduction attributable to the actual increase in the U.S. catch. Therefore, the TALFF for the next year would be 9,125 tons (10,000 tons, minus the sum of 375 tons, which represents the actual increase in the U.S. harvest, and the 500-ton reward). The United States fishermen would then have, in essence, a 500-ton reserve, into which they could increase their harvest. Further such reductions of TALFF would be triggered by additional U.S. catches meeting the 375-ton target level.

In accordance with the formula, additional larger increases in the U.S. catch would result in additional larger reductions of TALFF. If the U.S. fishermen increased their catch by 750 tons (50 percent of the calculation factor) over their harvest level when they achieved the earlier threshold, the TALFF would be reduced the following year by an additional 1,000 tons (10 percent of the base harvest) plus a reduction equal to the actual increase in performance, 750 tons. TALFF would thus be lowered by 1,750 tons to a level of 7,375 tons.

If it is determined by the appropriate regional council that U.S. vessels will be unable to harvest any portion of the amount reserved from TALFF under the reduction formula, the Secretary of State may release that portion to foreign fishing.[139] If, however, it is determined by the Secretary of Commerce, on the basis of recommendations of the regional council, that the release of all or part of the unused reserve amount to foreign fishing would be detrimental to the development of the U.S. fishing industry,

the release will be withheld until the following year.[140] It is intended by the drafters of the Act that in determining whether the release would be detrimental to the U.S. fishing industry, the Secretary follow the advice of the councils and base the finding of detriment on economic and social data, including the effect of the release on the marketing of U.S. fish products.[141] A possible scenario in which the release of the unused reserve amount might not be found to be detrimental to the U.S. fishing industry would be if the U.S. was to secure a specific concession from the foreign nation that would increase U.S. harvesting or processing capacity, or would increase the market opportunities for U.S. harvested or processed fish.[142]

The American Fisheries Promotion Act's "reduction formula" for calculating TALFF can be seen as a compromise between those interests which sought to impose strict exclusion of foreign fishing[143] or mandatory reductions of the level of foreign fishing[144] and those interests which viewed such reductions as contrary to the principles of optimum yield and full utilization endorsed at the Law of the Sea Conference.[145] The reallocation provision is seen as being consistent with the principle of optimum utilization since the portion of the reserve amount which is not harvested by U.S. vessels is released to foreign fishing the following year.[146]

Once the TALFF for a fishery is established by a regional fishery management council in its fishery management plan (whether by application of the OY minus DAH formula or the "reduction factor amount" formula), the Secretary of State, in cooperation with the Secretary of Commerce, must allocate the TALFF among the foreign nations which have signed GIFA's and wish to harvest that particular fishery. The number of factors which the Secretary must consider in determining the allocation among foreign nations was increased from four to eight by the American Fisheries Promotion Act of 1980.[147] In allocating the allowable level of foreign fishing, the Secretary shall consider whether the applicant nation:

(1) imposes tariff or non-tariff barriers on the importation of U.S. fish products or otherwise restricts the market access of U.S. fish products,
(2) is assisting U.S. fisheries development through the purchase of U.S. fisheries products,
(3) has cooperated in the enforcement of U.S. fishing regulations,
(4) requires fish harvested from the FCZ for its domestic consumption,
(5) is minimizing gear conflicts with U.S. fishing vessels, and transferring harvesting and processing technology to the U.S. fishing industry,

(6) has traditionally engaged in fishing for the species being applied for,
(7) has cooperated in fisheries research.[148]

The Secretary may also state separately such other matters as the Secretary of State and Secretary of Commerce deem appropriate.[149]

The extent of traditional fishing, contribution to research, and cooperation in enforcement are factors which were present in the FCMA when it was enacted in 1976. Although not defined in the Act, the Senate Commerce Committee has defined traditional foreign fishing as "long standing, active, and continuous fishing for a particular stock by citizens of a foreign nation."[150] Nations which have continually fished on a particular stock for 10 or 15 years in compliance with any applicable international agreements would have a preference in allocation over those nations which have only recently begun to fish.[151]

Contribution to research and cooperation in enforcement are factors designed to encourage foreign nations to comply with the provisions of the Act. Thus it is to a foreign nation's advantage to enforce U.S. fishery regulations against its own nationals.

The American Fisheries Promotion Act added the factors that now require the Secretary to place a strong emphasis on the linkage between allocations of the TALFF and the willingness of foreign nations to provide improved export opportunities for U.S. fish products, purchase more U.S. fish exports, and transfer technology to the U.S. fishing industry. It is expected that nations that reduce tariff and non-tariff trade barriers on U.S. fish exports will receive appropriate considerations in return on their TALFF allocations.[152] It is also expected that nations that are unwilling to assist and encourage U.S. exports will have their allocations reduced or terminated. The importance of the market access factors is expressed in the 1980 House Report: "While cooperation of foreign states with the U.S. in FCMA enforcement and conservation is essential and in fisheries research is important, market access is the touchstone."[153]

There are two other factors that the Secretary of State will consider. The recognition of the domestic consumption by foreign nations of fish harvested by their own vessels in the U.S. zone is intended to insure that the basic nutritional requirements of those nations are considered.[154] As a final factor, the Secretary of State may consider such other matters as are deemed appropriate. While the parameters are not defined, this factor has been relied on to ban Soviet fishing in the U.S. zone because of the Soviet invasion of Afghanistan and to ban Polish fishing after the imposition of martial law in Poland.

The State Department has recently modified its foreign

fishing allocation policy. Under the new policy, which took effect in January, 1982, the initial TALFF allocations will be announced in January. However, each foreign nation will be allowed to catch only 50 percent of its initial allocation. In April, a portion of the next 25 percent will be released to each nation depending on the nation's cooperation and adherence with the TALFF criteria such as enforcement, research, trade barriers, export policies, etc. The remaining 25 percent will be released in July.[155] The new policy enables the State Department to have greater flexibility in basing TALFF allocations on the foreign nation's cooperation with U.S. law.

To receive an allocation of the total allowable level of foreign fishing, each nation which has entered into a GIFA must apply to the Secretary of State on an annual basis for a permit for each vessel that wishes to engage in fishing within the zone.[156] The permit applications must be stock-specific and provide detailed information about the fishing effort to be undertaken by the vessel, including information about tonnage, capacity, processing equipment and fishing gear.[157] The applications must identify the ocean area, season or period during which the fishing will occur, and the estimated amount of the tonnage of fish which will be harvested in each fishery by the vessel or received at sea from U.S. vessels pursuant to a joint venture.[158] The permit application must be published in the Federal Register, with copies provided to the Secretary of Commerce, the appropriate regional management council, the Secretary of Transportation (for the Coast Guard), the House Committee on Merchant Marine and Fisheries, and the Senate Committees on Commerce and Foreign Relations.[159]

After receipt of regional management council comments, and after consultation with the Department of State and with the Coast Guard, the Assistant Administrator of the National Marine Fisheries Service (whose responsibility has been designated by the Secretary of Commerce) may approve an application if he determines that the fishing described in the application meets the requirements of the Act.[160] Although each application is considered on its own merits, the National Marine Fisheries Service (NMFS) has generally applied the following guidelines: (1) applications by vessels for species or fisheries not covered by a fishery management plan or for which there is no applicable national allocation will be disapproved; (2) applications by vessels with overdue assessed fines will be disapproved; and (3) recommendations for disapproval based on a vessel's record of violations will receive favorable consideration until a system is developed to exclude culpable masters and fish managers.[161] The National Marine Fisheries Service states in its guidelines that applications will generally not be disapproved solely for the purpose of limiting the number of vessels in a fishery.[162]

The Secretary of Commerce is authorized to establish the conditions and restrictions to be included in each permit.[163]

The permit must include all the requirements of any applicable fishery management plan and all the requirements set out in the foreign nation's GIFA.[164] The permit must also include the condition that it is valid only for the specific vessel for which it is issued.[165] If the permit is for a foreign processing vessel that is participating in a joint venture, the permit must state the maximum amount or tonnage of U.S. harvested fish it may receive at sea from U.S. vessels.[166] Permits for all other vessels must include the restriction that the vessel may not receive at sea any U.S. harvested fish.[167] The Secretary of Commerce may also attach additional conditions and restrictions to permits when it is deemed necessary and appropriate. Generally, additional conditions and restrictions will not be employed as a substitute for management measures in the applicable FMP or appropriate foreign fishing regulations, but will be temporarily employed to cover new situations not adequately addressed in plans and regulations until they can be appropriately dealt with.[168]

Fees must be paid to the Secretary of Commerce by the owner or operator of each vessel that receives a permit.[169] The types and schedules of fees applicable to foreign fishing will be discussed in Part IV of this chapter, infra.

Finally, a permit may be revoked, suspended or modified if the permitted vessel has been used in the commission of an offense prohibited by Section 307 of the Act or if a civil penalty imposed under Section 308 or a criminal penalty imposed under Section 309 has not been paid.[170]

V. Joint Ventures

A joint venture has been described as a mutual contribution of assets to a joint collaboration by two or more separate legal entities.[171] In the fisheries field, a "joint venture" is typically an arrangement where fish harvested by U.S. fishermen are sold and delivered to foreign processing vessels operating within the U.S. fishery conservation zone.

Prior to the passage of the FCMA in 1976, countries such as Japan, Korea, Poland, and the U.S.S.R. relied upon extensive, technologically advanced, distant-water fishing fleets to supply fish products. In these nations, fish products provide a major portion of the nation's protein and are also a major export. The anticipated phase down of fishing opportunities in the FCZ under the FCMA presented a threat to the economies and food producing abilities of these countries because their fleets were not well suited for other fisheries in other areas. International joint ventures involving United States fishermen and foreign processing vessels are seen by these foreign nations as a possible way to guarantee an adequate supply of fishery products while at the same time protect the enormous investment in their distant-water vessels.[172]

Although international joint ventures are common as fisheries operations in other parts of the world,[173] this type of joint venture had never been proposed for U.S. fishermen prior to the enactment of the FCMA. The FCMA of 1976 defined "fishing vessels" for purposes of the Act to include processing and support ships[174] and therefore subjected them to the permit system applicable to all foreign fishing vessels.[175] The FCMA as originally enacted did not address the possibility of foreign processing ships conducting fishing operations with U.S. fishermen. In the spring of 1977, two applications for foreign processing ships to receive U.S. harvested fish were received and denied by the regional councils. NOAA decided that the regional councils should not take final action on the joint venture proposal until a national policy on joint ventures could be developed.[176]

United States shoreside processors opposed the joint venture proposal as being merely a means to circumvent the FCMA and continue foreign domination of certain United States fisheries. More importantly, the opponents argued, onshore processors cannot compete with foreign processing vessels that are not subject to United States wage requirements, anti-pollution laws, and OSHA safety and health regulations.[177] New investment necessary for development of processing capacity for underutilized species would be discouraged because of the competitive disadvantage. Opponents also noted that joint ventures would adversely affect the U.S. gross national product (GNP). For example it has been estimated that three pounds of whole fish caught by American fishermen and sold to a foreign processing ship contribute about 18 cents to the GNP. If the same amount were processed in a domestic shoreside facility, it would contribute at least 50 cents to the GNP.[178]

American fishermen who favored joint venture arrangements noted that joint ventures had been proposed only for species for which there was little or no United States processing capacity.[179] United States fishermen had traditionally avoided species such as hake and pollock because of the low value and lack of processors or markets. Joint ventures would transfer the technology necessary for U.S. fishermen to harvest new fisheries and provide an immediate market.[180] United States processors have never been convinced that U.S. fishermen possessed the experience or technology to catch economically significant amounts of underutilized species. Proponents argued that joint ventures would actually aid in the development of both fishermen and processors by giving the fishermen experience in new fisheries and by creating confidence in the processors that an adequate supply of the underutilized species will be available to justify new investment and market expansion.[181]

After extensive public hearings the Department of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), issued proposed regulations which would have allowed

joint ventures only if it could be shown that the American processing capacity in the area was inadequate to process the optimum yield allowed by the FMP, and that the foreign vessels had the capability and intent to process the fish.[182] However, on May 12, 1978, NOAA retracted the proposed regulations due to the comments received after the release of the proposal. In its retraction, NOAA agreed with many of the public comments which argued that the Secretary of Commerce lacked authority under the FCMA to favor U.S. processors over foreign processors in granting permits.[183] According to NOAA, the Secretary could adopt a policy or permit approval system based only upon factors relating to the conservation and management requirements of the Act and not on the basis of an economic preference for U.S. processors.[184]

The complete reversal of policy enlarged the so-called loophole in the FCMA. Response to the policy reversal was swift. Domestic fish processors filed two suits challenging the validity of the May 12 policy.[185] Both houses of Congress reacted to NOAA's withdrawal of the proposed regulations. On August 28, 1978, the Processor Priority Amendment of 1978 was signed into law.[186]

The 1978 amendments to the FCMA clarified the Congressional intent that all segments of the United States fishing industry, including processors, are to be within the jurisdiction and protection of the FCMA.[187] In effect, the amendments created a three tiered priority system for access to the fishery resources.[188] First priority is given to the United States fishing industry for fish harvested and processed domestically. The second preference is given to joint ventures in which United States harvested fish is delivered at sea to foreign processing vessels. The lowest priority is given to foreign harvested fish.[189] Under this system, permits for foreign processing vessels to participate in joint ventures can be issued only for that part of the optimum yield of a fishery which will not be utilized by United States processors.[190] Thus the formula for foreign processing vessels is optimum yield (OY) minus domestic annual processing (DAP).

The 1978 joint venture amendments require a foreign nation to submit a permit application to the Secretary of State in order to enter into a joint venture.[191] The application is transmitted to the appropriate Regional Council for comments[192] and then to the Secretary of Commerce.[193] The Secretary of Commerce must deny the application if it is determined that U.S. fish processors have the capacity and intent to process all U.S. harvested fish from the fishery concerned.[194] If the Secretary determines that U.S. fish processors do not have the capacity and the intent to process all U.S. harvested fish from a particular fishery, the Secretary may approve the permit.

The amendments also require that certain information concerning the processing industry be included in the fishery

management plans prepared by the regional councils. The fishery management plans must now include an assessment of the "capacity and extent to which United States fish processors will process United States harvested fish."[195]

With respect to the determination of U.S. processing capacity and intent for a particular fishery, there are several factors that may be considered. The determination must not be simply an ascertainment of the maximum potential physical productivity of U.S. processing units.[196] There must also be a showing of demonstrated intent of the U.S. processors to utilize the particular fish species. One measure of intent is the extent to which U.S. fish processors have processed a species of fish in the past. Other factors include the existence of contracts or agreements with fishermen for the purchase of particular species, and evidence of expansion of facilities to accommodate the processing of particular species.[197] The geographical location of the processor may also be considered since some underutilized species of fish deteriorate rapidly and require almost immediate processing to maintain quality.[198]

The determination of U.S. capacity and intent does not, however, require a showing of an ablity to outbid the price or other contract provisions offered by foreign processors.[199] Therefore, U.S. processors are given an absolute monopoly, regardless of the price offered by foreign processors, for those fish species which the U.S. processing industry has developed the capacity to process the total harvest. Among the species which are clearly not within the scope of joint ventures are salmon, king crab, halibut, surf clams, menhaden, lobster, and shrimp.[200]

In the case of species for which the United States' processing capacity is relatively low, such as hake, pollock, and squid, the domestic processing capacity must be ascertained in order to determine whether any of the domestic annual harvest (DAH) will be available for joint ventures.[201] The limiting factor in harvesting underutilized species has generally not been insufficiency of stocks or lack of skill and technology, but simply an absence of markets and correspondingly low prices. The domestic processing capacity has, in effect, determined the domestic annual harvest (DAH) for underutilized species. When joint ventures provide additional markets, the effect on the domestic annual harvesting capacity of U.S. fishermen is hard to determine. Proponents of joint ventures assert that when availablity of markets is the major limiting factor, the DAH should be calculated by simply adding the domestic processing capacity and the amount of fish that can be processed by joint ventures. Processors disagree with this method because it automatically creates allocations for joint ventures without providing any priority or protection for United States processors.[202]

Although the U.S. processors are technically given a priority for all the fish that they have the capacity and intent to process, it will be very difficult for them to expand their capacity to meet new markets when there is direct competition from joint ventures. Studies have shown that even when a joint venture and onshore processors pay the same price per pound of fish, it is more profitable for U.S. fishermen to deliver their harvested fish to the joint venture due to a more favorable ratio of fishing time to delivery time, more efficient delivery techniques, and savings on fuel and ice.[203] It is not necessary for U.S. fishermen to fulfill the requirements of U.S. processors before fish can be delivered to foreign processing vessels pursuant to an approved joint venture arrangement. Likewise, U.S. fishermen have the right to refuse to deliver to U.S. processors if they are dissatisfied with the terms offered by the processors.[204] Therefore, for underutilized species the amendments may establish a processor priority for fishery allocations, but they do not guarantee that anticipated levels of fish will be delivered to the processors. Given the inherent competitive advantage of the foreign processing vessels and the flexibility of U.S. fishermen to switch to more profitable fisheries, it is difficult to determine whether the priority given to processors of underutilized species is of any advantage at all.

It must be noted that, although the U.S. fishermen and fish processors of underutilized species are dependent upon each other, their interests conflict. While competition between processors causes the captive U.S. market for fully utilized species to be a fair one for fishermen, the situation concerning underutilized species is different. Without external competition from joint ventures, the relatively few domestic processors of underutilized species would be able to subject the fishermen to unilaterally established terms and conditions.

There are ways, however, that the processor priority may be protected in a particular area. The Secretary of Commerce may impose on foreign fishermen quota limitations consistent with fishery management plans and "any other condition or restriction related to fishery conservation and management which . . . [is] necessary and appropriate."[205] The additional conditions are generally time, area and gear restrictions to reduce by-catch. While the language of the FCMA relates such conditions and restrictions on foreign fishing to conservation and management of the fishery resource,[206] the legislative history of the joint venture amendments states that the conditions and restrictions should also be imposed to achieve the objectives of the amendments.[207] The Senate Report, for example, states that in order to foster the development of onshore processing facilities, the Secretary may consider imposing geographical restrictions on areas in which foreign processing vessels may operate.[208] Therefore it can be argued that "fishery management" should be defined broadly to achieve the amended purpose of the FCMA "to encourage the development of fisheries which are currently

underutilized or not utilized by the United States fishing industry. . . ."[209]

While time and area restrictions of foreign processing vessels may be appropriate to protect the domestic processor priority in a given area, they must be viewed also as restrictions on U.S. fishermen. Due to the conflicting interests of U.S. fishermen and processors of underutilized species, the role of joint ventures in U.S. fisheries policy has not yet been settled.

Joint ventures were originally viewed by many as an interim step towrads a totally domestic fishing industry.[210] The natural progression was to be from total foreign domination, to joint ventures where U.S. fishing vessels would supply foreign processors, to full domestic control with U.S. fishing vessels supplying U.S. processors. However, the recent growth in joint venture arrangements and their importance to U.S. fishermen raise doubts as to whether joint ventures are only a temporary phase in U.S. fishing.

Joint venture operations began on a small scale in 1978 with U.S. fishermen participating in two joint ventures on the Pacific Coast. The first was Marine Resources Company, an American corporation formed by Bellingham Cold Storage of Washington, and Sovryflot, a special agency of the Soviet Ministry of Fisheries.[211] The other original joint venture was between the Korean Marine Industry Development Corporation and R.A. Davenny and Associates of Alaska.[212]

Joint ventues did not increase significantly until the American Fisheries Promotion Act of 1980 was passed.[213] The American Fisheries Promotion Act initiated what has become known as the "Fish and Chips" policy, which ties allocations of TALFF to the degree to which foreign nations cooperate with and assist the U.S. fishing industry.[214] In 1981, Poland, West Germany, Japan and other nations joined Korea and the Soviet Union in launching joint ventures in an attempt to secure allocations of underutilized species, mainly Alaskan bottomfish.[215] The combination of a U.S. excess of modern, high-priced and often heavily mortgaged fishing vessels, and a foreign surplus of fish processing vessels which had been idled by the advent of 200-mile-limit laws, when joined with the incentive of the Fish and Chips policy, produced a boom in joint ventures operations. Alaskan trawl production increased more than 500 percent during the three-year period of 1979 through 1982.[216] Seventy-six percent of the 118,000 metric tons produced by Alaskan trawlers during a ten-month period ending in October, 1981, was represented by joint venture deliveries.[217] Recent studies estimate that by 1987 Alaskan joint venture production could reach 750,000 metric tons per year while joint ventures on the lower Pacific Coast could reach 200,000 metric tons per year.[218]

The most successful of the joint ventures is the Marine

Resources operation, a 50-50 joint equity venture which purchases bottomfish from U.S. fishermen to be processed aboard leased Soviet processing vessels. The finished product is then sold on the international market.[219] In 1981, Marine Resources bought 80,000 metric tons of bottomfish from U.S. fishermen and helped offset the United States negative trade balance by 20 million dollars.[220]

According to the company, the Marine Resources joint venture experience also illustrates how joint ventures can benefit domestic processors of underutilized species. Both the harvesting and processing sectors have benefitted from the learning of new skills, the transfer of technology, and the demonstration that U.S. fishermen can catch and deliver large volumes of non-traditional species.[221] Domestic processors have been able to take advantage of the joint ventures' experiments in new fisheries without risking any initial investments of their own.[222] Due to the demonstrated results of the joint ventures, U.S. fishermen are now providing a steady supply of bottomfish to a new onshore processor,[223] and an American trawler-processor has begun operations in the Gulf of Alaska.[224]

The Joint Venture Amendments, which created a processor priority for species which are not fully utilized, while at the same time attempting to maintain a fair market for U.S. fishermen, has not spawned a tremendous expansion of U.S. processing capacity. Dr. Pereyra, the manager of the successful Marine Resources joint venture, argues that this lack of expansion should not be blamed on the existence of joint ventures, but rather on the fact that the U.S. processors must compete with the world market.[225] With the advent of the "Fish and Chips" policy of the American Fisheries Promotion Act of 1980 and its linkage of international trade and tariff barriers to TALFF allocations,[226] U.S. processing of underutilized species may soon become competitive on the world market, which will, in turn, allow for the U.S. processing industry to expand its capacity.

VI. Observer Program and Foreign Fishing Fees

There are two more provisions of the Fisheries Conservation and Management Act which must be complied with in order for a fishing vessel to fish within the U.S. fisheries conservation zone. The owner/operator of a foreign fishing vessel must allow a U.S. observer to be placed aboard the vessel and he must pay certain fees in advance. These provisions have recently been amended as a result of Congress' efforts to improve the monitoring and control of foreign fishing activities.

Observer Program

The 1976 Fishery Conservation and Management Act states that it is the sense of Congress that Governing International Fishing Agreements (GIFA's) contain a binding commitment on the part of

foreign fishing nations to permit U.S. observers aboard their vessels and that the United States be reimbursed for the cost of such observers.[227] Thus, the GIFA's served as the original basis for placing observers aboard foreign fishing vessels and billing the foreign fishing nation for the cost of the observer coverage.

The observer program has two broad objectives, which are to collect biological data on foreign fisheries conducted within the U.S. Fishery Conservation Zone, and to provide a "compliance presence" aboard the foreign fishing vessels.[228]

The biological data collection aspect of the program is essential to accomplishing the FCMA's purpose of conservation and management of U.S. fishery resources. The observers collect basic biological data used to assess the species, age, and sex characteristics of the foreign harvest, the quantity and type of fish harvested, and the amount of effort necessary to accomplish the harvest.[229] The data collected, along with other information, may be used to establish maximum sustainable yield (MSY) and optimum yield (OY) levels. The observers may also collect biological data such as the incidence of marine mammals, which may be relevant to other U.S. laws and regulations.[230]

The observers also have a compliance function in that they can witness and document violations of foreign fishing regulations. The documentation is used to substantiate charges of violations and to justify penalties assessed for violations.[231] Observer reports have also been used to justify the seizure of foreign fishing vessels.[232] Observers have been effective in detecting and deterring violations by foreign fishing vessels involving the unlawful retention of prohibited species, excess by-catch and quota violations, use of unlawful gear, and requirements concerning the failure to return certain prohibited species to the water with a minimum of injury.[233] These regulatory requirements are vital to the implementation of fishery management plans and are difficult to enforce using other techniques.

It must be noted, however, that although the observers have an important role in insuring compliance with U.S. fishing laws and regulations, they do not have enforcement authority and must summon the Coast Guard for immediate action on serious violations.[234] The observer should be viewed, not as a resident arresting officer, but as a source of information or a permanent witness on whose reports action can be taken.[235]

The owner/operator of the foreign fishing vessel to which an observer is assigned is required to provide, at his own cost, onboard accommodations for the observer which are equivalent to those provided to the officers of that vessel.[236] The owner/-operator must also allow the U.S. observer to use the vessel's communications equipment and personnel as necessary to transmit

and receive messages.[237] The use of the vessel's navigation equipment must be available to the observer in order to determine the vessel's position.[238] The owner/operator of the vessel must provide all other reasonable assistance to enable the observer to carry out his duties[239] and it is unlawful for any person to forcibly assault, resist, oppose, impede, intimidate or interfere with an observer placed aboard a foreign vessel.[240]

The cost of the observer program is borne by the foreign fishing interests. The owner/operator of each foreign fishing vessel to which an observer is assigned must pay the total costs of placing the observer aboard, including the observer's salary, per diem, transportation to and from the vessel, and overhead costs.[241]

Prior to the enactment of the American Fisheries Promotion Act of 1980, the receipts collected from foreign fishing vessels for the cost of observers were deposited in the general treasury.[242] Therefore the observer program, while not costing the U.S. taxpayers, still had to compete with other National Marine Fisheries Service programs for funding and personnel.

Since the observer program was not mandatory and was in competiton for funding through the appropriations process, full observer coverage was never realized. Although the United States had the authority to place an observer aboard every foreign fishing vessel operating within the 200-mile fishery conservation zone, 20 percent observer coverage was considered by the National Marine Fisheries Service to be statistically sufficient to meet the objectives of the program.[243]

The amount of foreign fishing operations actually covered by observers has declined steadily since the FCMA took effect. In 1979, U.S. observers were aboard foreign fishing vessels only 18 percent of the time they were fishing in the U.S. fishery conservation zone.[244] In 1980 the observer coverage of foreign fishing operations slipped to an average of only 14 percent.[245]

During this same period, the number and severity of violations of fishing regulations by foreign vessels increased. In 1979, there were 382 reported incidents of violation of foreign fishing regulations.[246] Of this number, twelve were major violations involving the attempted concealment of total catches by erroneous entries into ships' logs. The violations represented underlogging in amounts ranging from 25 to 60 percent of the total catch on board and attempted retention and concealment of several thousand metric tons of fish.[247] According to the National Marine Fisheries Service, the extent of the violations indicated a "formidable and possibly pre-planned effort at noncompliance" with the regulations[248] and a serious threat to the effective management of the fishery resources.[249]

Domestic fishermen became very frustrated at the reluctance

of the National Marine Fisheries Service to enlarge the observer program, which would, at no cost to the U.S. taxpayer, help control the problem of overfishing by the foreign nations. In 1980, Congress reacted to this situation by passing the American Fisheries Promotion Act of 1980.[250] Section 236 of the Act, which took effect on January 1, 1982, requires that a United States observer be stationed aboard each foreign fishing vessel engaged in fishing within the FCZ.[251] There are few exceptions to the full observer coverage requirement. The Act permits the Secretary of Commerce to waive the observer requirement in cases where it might be more efficient to station one observer aboard a foreign "mother ship" to document the catches from all the harvesting vessels supplying her[252] and in instances in which the conditions aboard the vessel might jeopardize the health or safety of an observer.[253] The Secretary may also waive the observer requirement in instances where the foreign vessel will be engaged in fishing for such a short time in the fishery conservation zone that the placing of an observer aboard would be impractical.[254] This provision was included to handle some fisheries of the South Pacific, where foreigners fish in the U.S. zone for only a few days out of a year. The Secretary may also waive the observer requirement when, "for reasons beyond the control of the Secretary," an observer is not available.[255]

The Act requires each foreign vessel to pay a surcharge sufficient to cover all the costs of providing an observer aboard that ship.[256] The payments are not deposited in the Treasury, however, but deposited in a special Foreign Fishing Observer Fund established in the U.S. Treasury.[257] Sums in the Fund are made available to the Secretary to finance the costs of the full observer coverage program. Therefore the observer program is now completely financed and supported by the foreign fishing vessels.

With a mandate of 100 percent observer coverage by a program completely funded by foreign fishing vessels, it was expected that full observer coverage would occur on the January 1, 1982, effective date.[258] However, as of February, 1982, observer coverage is not expected to be greater than 10 percent for the 1982 calendar year.[259] The reason is due to two provisions in the Act which effectively weaken the full observer coverage mandate. The first is a provision that allows the Secretary of Commerce to fail to place observers on all vessels if, "for reasons beyond the control of the Secretary, an observer is not available."[260] The other provision allows the Secretary to make payments from the Foreign Fishing Observer Fund to cover the cost of the observer program "only to the extent and in the amounts provided for in advance in appropriation Acts."[261] Due to these provisions, the full observer coverage mandate can be thwarted by the Office of Management and Budget's failure to recommend in the national budget enough money to keep the observer force at full strength. Such a situation is "beyond the control" of the Secretary of Commerce, and the full observer coverage is waived.[262]

Foreign Fishing Fees

In addition to paying a surcharge to cover the costs of a U.S. observer, owner/operators of a foreign fishing vessel must prepay certain other fees to the U.S. in order to fish in the U.S. fisheries conservation zone.[263] The condition is statutorily required by the FCMA and is also a required condition of the GIFA signed by each foreign nation.[264]

Under the original FCMA, the Secretary of Commerce was given the authority to charge "reasonable fees" to the owner/operators of foreign fishing vessels which have received permits.[265] The FCMA also required that the fees be applied non-discriminatorily to each foreign nation.[266] As enacted in 1976, the FCMA did not establish the fee levels, but left it to the Secretary's discretion. The FCMA did, however, list several factors that the Secretary could consider in determining the levels of the foreign fishing fees.[267] The Secretary could take into account the cost of carrying out the provisions of the Fishery Conservation and Management Act with respect to foreign fishing, including the cost of management, fisheries research, administration and enforcement.[268]

The fee schedule established by the Secretary of Commerce, through the Director of the National Marine Fisheries Service, provided for two types of fees: permit fees and poundage fees. The permit fee was dependent upon the type and tonnage of the foreign vessel.[269] Each foreign vessel engaged in catching activities had to pay an annual fee of one dollar per gross registered ton. Processing vessels were charged an annual fee of fifty cents per gross registered ton with a maximum fee of $2,500. Each vessel engaged in support activities was charged an annual fee of two hundred dollars.

Under the schedule adopted by the Secretary, each foreign nation was also required to pay an annual poundage fee on the entire national allocation. The poundage fee was set at 3.5 percent of the actual landed value per metric ton of the allocated species.[270] The value of the fish was based on the dockside price received by U.S. fishermen for the most recent year that such data was available. An appropriate foreign dockside price was used for species which were not landed in the U.S.

Although the Secretary was not restricted by any statutory requirements on setting the set fee schedule, several points were considered in practice.[271] The Secretary first noted that, based on the analysis of earnings of foreign fishing operations in the U.S., a reasonable upper limit on fees should be five percent of the ex-vessel value. Fees at this level could tax away all the net revenues of the average foreign fishing vessel operation. The Secretary also noted that the fee level established by the U.S. could be used as a basis by other countries

for assessing fees on U.S. fishermen in foreign waters. A further consideration of the Secretary was the observation that if foreign fishing were totally banned, a large percentage of the costs of administering the FCMA would still remain. The long-term interest in conservation of the fishery resources would still require resource investigations, stock assessments and management costs. The cost of enforcement would still be significant since the Fishery Conservation Zone would have to be policed to insure the exclusion of foreign fishing vessels. It was estimated by the National Marine Fisheries Service that $70 million of the projected $92 million total required for management costs in 1977 would have to be borne by the United States even in the absence of foreign fishing.[272]

The permit fees and poundage fees which were established in 1977 for the FCMA's initial implementation year were continued through 1980 without any major changes except for the 1979 addition of an annual surcharge of up to 20 percent of each nation's permit fee and poundage fee (but not to the observer fee).[273] The annual surcharge is used to capitalize the Fishing Vessel and Gear Damage Compensation Fund, which is used to compensate U.S. fishermen operating in the U.S. Fishery Conservation Zone whose vessels are lost or damaged because of foreign vessel activities, or whose fishing gear is lost or damaged by any foreign or domestic vessel.[274] The annual surcharge is in two installments. The first installment of 10 percent is payable when the permit fee and poundage fee is paid. The amount of the second installment is reduced or waived if actual claims indicate that the total claims against the fund will not be as high as originally estimated.[275]

In 1980 Congress expressed its discontent with the schedule of permit fees and poundage fees for foreign fishing by establishing a new set of fees for permits issued to foreign fishermen after 1980. Section 232 of the American Fisheries Promotion Act of 1980[276] requires that the ratio of the volume of the foreign harvest in the FCZ to the volume of the total harvest in the FCZ and U.S. territorial waters be used to determine the proportional share of the total costs of administering and enforcing the FCMA which must be paid by foreign fishermen.

The new fee schedule was due to the dissatisfaction of those who felt that the former fee schedule was too favorable to foreign fishermen. For example, it was noted that in 1979 foreign fishermen took 34 percent of the value of the total fish harvest in the FCZ, which was worth $470 million. Yet the fees paid by the foreign fishermen amounted to only 12 percent of the $160 million total cost of administering the FCMA.[277] At a time when many U.S. fishermen were encountering economic difficulties, the fee schedule was seen by many as, in effect, a subsidy of foreign fishing efforts.

Congress also took notice of the fact that other coastal nations required far greater compensation from foreign fishermen

for the privilege of operating within their 200-mile zones. Although the types and amounts of foreign fishing fees charged by other nations varied widely, it was concluded that no country charged foreign fishermen less than the United States did.[278]

Since administration, research and enforcement bear a reasonable relation to the volume of fish harvested, the new fee schedule insures that the foreign fishermen will pay a fair share of the costs of the FCMA.[279] Congress recognized the difficulty in distinguishing between FCMA costs attributable to the FCZ and those extending to the U.S. territorial sea. Therefore the new fee schedule charges foreign fishermen an amount which corresponds to their share of the volume of the total harvest from 0 to 200 miles rather than the total harvest in the 3 to 200 mile FCZ alone. The difference is significant. For example, in 1979 the foreign harvest was 67 percent of the total catch in the FCZ but only 39 percent of the total harvested from 0 to 200 miles.[280] Based on the new formula for foreign fishing fees, foreign fishermen would have had to pay $63 million in 1979, which is considerably more than the $18.5 million they paid under the former fee schedule.

The new fee schedule did not go into effect until January 1, 1982. For 1981, the American Fisheries Promotion Act provided that the then existing fee schedule be raised to an amount equal to 7 percent of the ex-vessel value of the total 1979 foreign harvest.[281] The 1980 Act further provides that fees collected under both the interim 1981 schedule and the later permanent schedule are to be transferred to the fisheries loan fund established under Section 4 of the Fish and Wildlife Act of 1956.[282]

The Act did not establish the manner in which the fees should be collected, as Congress intended to give the Secretary the maximum amount of flexibility.[283] For 1981, the Secretary revised the vessel permit fee to a flat fee of fifty dollars per vessel regardless of its type or operation.[284] For 1982, the vessel permit fee was increased to sixty dollars per vessel.[285]

In 1981, the method of charging poundage fees for the amount allocated to each foreign nation was changed. It was acknowledged that the prior practice of charging a flat 3.5 percent of the published U.S. price for all species for which domestic markets existed did not accurately reflect the international value of certain species.[286] For 1981 a specific dollar amount per metric ton was established as the poundage fee for each allocated species.[287] The 1981 value of each species was determined. For certain species, prices which blended U.S. and foreign prices were set when the U.S. price did not reflect the international value.[288] The poundage fee was then set at 3.5, 7, or 10 percent of the 1981 value.[289] The rate of 7 percent was applied to most species. The 3.5 percentage rate was used when 7 percent would possibly prevent the achievement of the optimum yields of

marginally profitable species. The 10 percent rate was used when 7 percent would be so low as to conflict with sound conservation and management, including such economic considerations as whether the species is one that the U.S. wishes to export.[290]

It is important to understand the basis of the 1981 interim fee schedule since the National Marine Fisheries Service chose to use the 1981 poundage fees as a reference level for the 1982 poundage fees.[291] Unlike the practice of previous years, the 1982 poundage fees are not directly related to U.S. ex-vessel or other prices.

To establish the 1982 fees at the level required by Section 232 of the American Fisheries Promotion Act, the National Marine Fisheries Service first calculated the total Federal costs incurred by the National Marine Fisheries Service, by other elements of the National Oceanic and Atmospheric Administration, by the Coast Guard, and the State Department in administering the FCMA. For 1982, the total costs were calculated at $112,901,000.[292]

The next step was to determine the "foreign catch ratio." In this calculation, the U.S. domestic catch included the domestic catch of fish harvested within the three-mile territorial sea, the U.S. recreational catch, and domestic catches delivered at sea to foreign processing vessels pursuant to joint ventures.[293] For 1982, the total volume of the foreign harvest was calculated to be 30.7 percent of the total volume of fish harvested in U.S. territorial waters and the Fishery Conservation Zone.[294]

The foreign catch ratio of 30.7 percent was then applied to the total costs of administering the FCMA ($112,901,000) to find the foreign fee collection target for 1982 of $34,660,607 (30.7 percent of $112,901,000). The total amount of permit application fees, $78,000, was then subtracted from this amount. Thus it was calculated that Section 232 of the American Fisheries Promotion Act required foreign fishing vessel owners to pay a total of $34.6 million in 1982 fees in addition to permit application fees.[295]

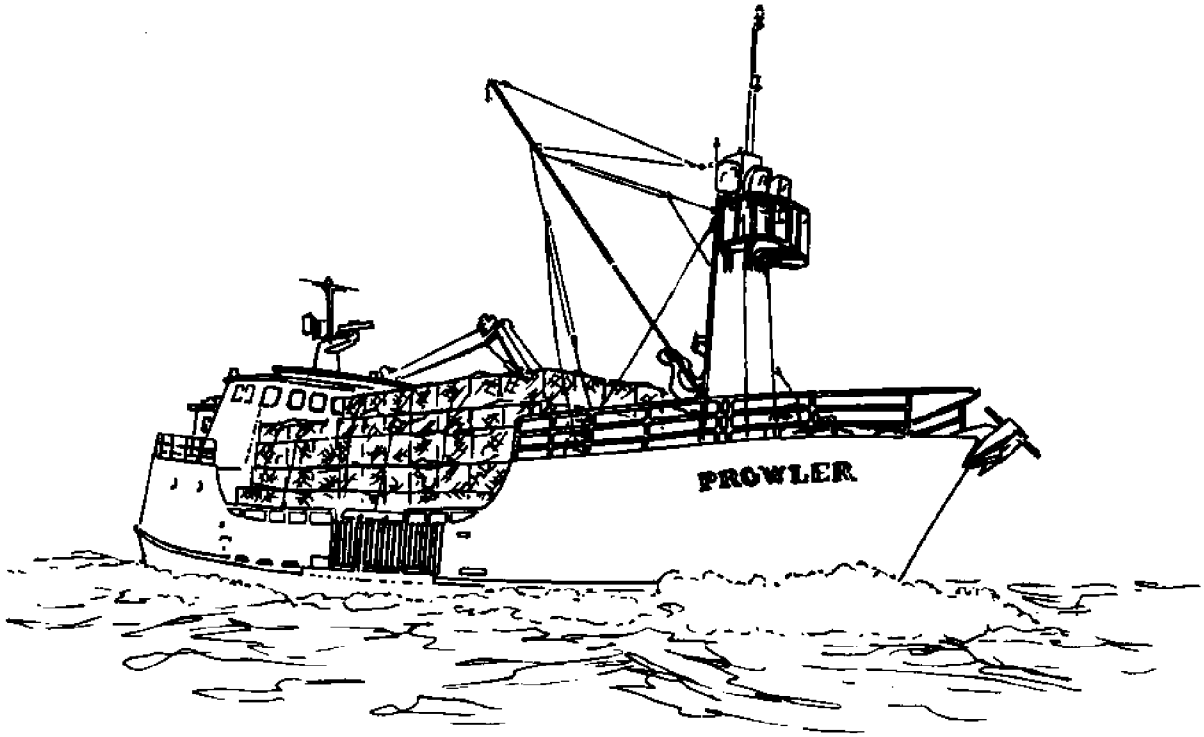
The 1982 poundage fees for each species were figured by multiplying each 1981 species fee by a factor of 1.65 in order to attain the fee collection target of $34.6 million.[296] (The factor of 1.65 was derived by dividing the fee collection target of $34.6 million by the anticipated 1982 catch at the 1981 fee levels.)

The fees paid for allocations of Pacific ocean perch exemplify the increased fees paid by foreign fishermen under the new fee schedules. In 1980, the poundage fee for Pacific ocean perch was 3.5 percent of the U.S. ex-vessel value per metric ton. Using values based on U.S. landings in Alaska, the 1980

value was $397 per metric ton and the poundage fee was $13.90 per metric ton.[297] In 1981, the fee was increased under the interim fee schedule to a set dollar amount of $44 per metric ton.[298] For 1982, the fee schedule was established to have foreign vessels pay for their share of the administration costs of the FCMA. Under the 1982 fee schedule, the poundage fee for Pacific ocean perch was increased to $73 per metric ton.[299]

The method used to calculate the 1982 fee schedule will likely be continued in future years. This is because the fee system is considered to satisfy several criteria: it is consistent with the requirements of the FCMA, Governing International Fishery Agreements, and other applicable law; it recovers the costs of the FCMA; it is easy to administer; and it minimizes disruption of traditional fishing practices, existing markets and consumer demand.[300]

Finally, it should be noted that while the new fee schedule insures that foreign fishermen pay a fair share of the costs of administering the FCMA, the amount required to be paid by foreign fishermen will steadily decrease in the future years. As the level of foreign fishing decreases due to the increased role of joint ventures and the phased reduction formula of Section 230 of the American Fisheries Promotion Act of 1980,[301] the American taxpayers will have to bear a proportionally increased share of the costs of administering the FCMA. It is possible that Congress may be called on in the future to respond to the decreased revenues from foreign fishing fees.



Fisheries Managers: Regional Fishery Management Councils and the States

CHAPTER 3

When the idea of a law to establish a Fisheries Conservation Zone (FCZ) really began to take shape, its sponsors were confronted with a unique problem: how to establish a fisheries management system that had the benefit of federal resources, the force of federal law, yet was sensitive to special local and regional needs. It was obvious that if the new attempt at management was to succeed it would have to earn the respect and cooperation of the people directly involved, the fishermen. In addition, any management scheme would have to deal with dozens of different and biologically complex fisheries. Further, the needs of consumers and the general public would have to be considered for management to have a chance for success. When the Fishery Conservation and Management Act (FCMA) was passed in 1976, its authors envisioned the solution to these problems in

the creation of the Regional Fishery Management Council (RFMC) system.[1]

The RFMC system is a unique combination of local and federal expertise. It is designed to consider the social and economic needs of the fishermen and fishing communities, the biology of each species under consideration, and the national and even international interests of fishery product consumers. RFMC's are a creative solution to the complexities of national fisheries management.

I. The Regions

The FCMA divided up United States coastal waters beyond three miles according to patterns of domestic commercial fishing, the ranges of some fish stocks, administrative convenience and preexisting political boundaries. The division created eight ocean regions to be managed by eight Regional Councils in cooperation with the federal government. The Regional Councils are made up largely of representatives from the local communities of the states adjacent to the ocean area to be managed.[2] In this way the FCMA attempts to keep management decisions in the hands of those who know the local and regional needs best.

The Regional Councils and constituent states are:

New England Council

Maine
New Hampshire
Massachusetts
Rhode Island
Connecticut

Mid-Atlantic Council

New York
New Jersey
Delaware
Pennsylvania
Maryland
Virginia

South Atlantic Council

North Carolina
South Carolina
Georgia
Florida

Caribbean Council

Virgin Islands
Commonwealth of Puerto Rico

Gulf Council

Texas
Louisiana
Mississippi
Alabama
Florida

Pacific Council

California
Oregon
Washington
Idaho

North Pacific Council	Western Pacific Council
Alaska	Hawaii
Washington	American Samoa
Oregon	Guam

Of special interest here are the Pacific and North Pacific Councils.

II. The Councils

The Pacific Council is made up by law of thirteen voting members. Eight of the voting members are chosen from a list of local individuals knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest of the fishery resources off Oregon, Washington, and California. These individuals are nominated by their peers and placed on a list by the governors of their states. The governors then submit the lists of qualified individuals (not less than three for each council vacancy) to the Secretary of Commerce who selects the Council members. The secretary is required to choose at least one member from each state in the region. The other five voting members of the Pacific Council are specified by law. These five members are (1) the principal state official with marine fishery management reponsibility and expertise in each constituent state, and (2) the regional director of the National Marine Fisheries Service for the geographical area.[3]

The North Pacific Council has eleven voting members, seven of which are nominated by their peers and appointed by the Secretary of Commerce in the manner described for the Pacific Council. Of these seven, five must be from Alaska and two from Washington. The remaining four members are (1) the principal state officials with marine fishery management responsibility and expertise from Oregon, Washington and Alaska, and (2) the director of the National Marine Fisheries Service for Alaska.[4]

Besides voting members, each Council has a number of non-voting members who provide additional expertise and help coordinate when council decisions have an impact on other state or federal agencies. These non-voting members as designated by the FCMA are (1) the regional director, for the area concerned, of the United States Fish and Wildlife Service or his designee, (2) the Commander of the Coast Guard District for the area concerned or his designee, (3) the director of the Marine Fisheries Commission for the area concerned, if any, or his designee, and (4) a representative of the United States Department of State. A special provision of the FCMA creates an additional non-voting position on the Pacific Council to be filled by an appointee of the Governor of Alaska.[5]

The current members of the Pacific and North Pacific Councils are listed in Appendix A at the end of this chapter.

III. Council Responsibilities

The Councils have primary responsibility for the management of offshore fisheries in their regions.[6] Even so, management is designed to be a cooperative effort of the Councils and the Secretary of Commerce. The role of the Secretary of Commerce will be described in greater detail in the next chapter.

The management of a fishery is normally initiated by the creation of a Fishery Management Plan (FMP). It is a Council's responsibility to identify fisheries in its jurisdiction which need management and to gather the best information available on the biology of the stocks and the sociologic and economic characteristics of the fishery. When the necessary information is in hand the Council determines the "optimum yield" for the fishery, the extent of domestic harvesting and processing capacity and any surpluses to be made available to foreign fishermen and processors. A Council must also take extensive public testimony so that all interested persons have an opportunity to be heard during the development of an FMP. All of this is synthesized into the Fishery Management Plan, which also includes any regulatory measures necessary in the view of the Council for conservation and management of the stocks under consideration. The FMP is then forwarded to the Secretary of Commerce for review. If the Secretary finds the FMP is consistent with certain basic standards[7] specified in the FCMA, the Plan is approved and implemented. If not, the Plan is returned to the Council for revision. This summary of the FMP process is explained in greater detail in the next chapter, along with special information for those who would like to influence the shape or particulars of an FMP.

Besides the difficult task of preparing FMP's initially, a Council must monitor and revise the plans as conditions in the fishery change. This continuing management responsibility covers all aspects of an FMP.

In addition the Councils have various administrative duties, including review and comment on foreign fishing applications and preparation of periodic reports on Council activities.[8]

IV. The Scientific and Statistical Committees

The huge amount of complex information necessary for intelligent fishery management requires cooperative involvement by experts in various fields such as biology, sociology, economics and law. In recognition of this the FCMA provided for the establishment of Scientific and Statistical Committees

(SSC's) under the direction of the Regional Councils.[9]

The SSC's do not dilute the management authority of the Councils. They are a helping hand in areas not generally or necessarily in the fields of expertise of Council members. They assist in the development, collection and evaluation of such statistical, biological, economic, social and other scientific information that may be relevant to the development or revision of a Fishery Management Plan. The decision-making authority remains with the Council. A listing of members of the Pacific and North Pacific Council's SSC's is contained in Appendix B.

V. The Advisory Panels

The Councils may create other Advisory Panels as necessary or appropriate to assist in carrying out Council functions.[10] These Advisory Panels are in addition to, not in lieu of, the SSC's. Although they have no independent authority, they are relied on extensively by the Councils in the preparation of FMP's and amendments.

The Advisory Panels provide the Councils additional input from those involved with various aspects of fishing. They are generally made up of participants (or their representatives) in various fisheries, commercial and recreational. Panel membership also normally includes consumer and environmental representation to help balance the perspective.

There is no established form for Advisory Panels and consequently Panels for the Pacific and North Pacific Councils have taken different forms. The Pacific Council has individual Advisory Panels for each fishery under management or consideration for management. The North Pacific Council has only one Advisory Panel to assist it in management of all fisheries for the region.

The Advisory Panels provide a convenient and effective conduit for interested persons to influence Council decisions. Since most Panel members come from the fishing communities they are accessible to fishermen and others who cannot otherwise find time to travel to Council meetings. And, since they are generally involved in some phase of the industry, they are familiar with the problems of fishermen and processors. Industry participants should get to know their representatives on the Advisory Panels to insure that their opinions are taken into account in the decision-making process. Appendix C contains the names, addresses, and industry affiliations of Advisory Panel members for both the Pacific and North Pacific Councils.

VI. Plan Development Teams

The Pacific and North Pacific Councils both receive additional assistance in the management plan preparation process from Plan Development Teams (PDT's). A team is formed for each fishery under consideration for management from a list of nominees submitted by the respective SSC's. These nominees are from state and federal conservation agencies, universities, and private institutions, or individuals known to possess specific expertise considered helpful for the preparation of a management plan. The Council selects the PDT members, who are responsible for organizing the plan and its contents in accordance with a standard outline.[11]

The Council, with input from the public, the Advisory Panel, and the SSC's, direct the PDT's and provide guidance as to the shape the final product, the management plan, is to take.

VII. Council Staff

The members of SSC's, Advisory Panels and Plan Development Teams are all appointed by the Councils they serve.

A Council can also hire an administrative staff consisting of an executive director and such full- or part-time employees as are necessary.[12] The duties of administrative personnel are to maintain an office and conduct the day-to-day business of the Council. They are a support group that insures the smooth operation of the Council. Responsibilities include budget preparation, financial management, procurement, coordination of planning efforts, liaison between Advisory Panel(s), SSC, and PDT(s), maintenance of Council records, correspondence, preparation of required Council reports, and other administrative activities. The staff is also an outlet for information on Council activities. Any question about the status of management plans, future meetings, field hearings or other council activities can usually be answered by contacting the administrative staff of a Council. For a more continuous supply of information interested persons can have their names put on a regular mailing list. For more information on how to contact the administrative staffs of the Pacific and North Pacific Councils, see Appendix D.

VIII. Other Assistance

The Councils may also call on the services of federal employees from other agencies from time to time and under certain circumstances. For example, the Councils often need legal advice, which is provided by National Oceanic and Atmospheric Administration staff attorneys. Another example is the assistance and information provided by the National Marine Fisheries Service in such areas as research and foreign fishing.

IX. Who Pays the Bill?

The cost of maintaining the Councils is borne by the federal government through the Department of Commerce. Only the voting members of the Councils and administrative staff are paid directly for their services. Others--for example, the non-voting members of the Councils, the legal counsel provided by NOAA, and members of SSC's associated with universities--receive compensation from their regular employers while on Council related business. Still others, such as some members of the advisory panels, may work without any salary compensation at all. On the other hand, all Council members, SSC and advisory panel members, and Council staff are reimbursed in one way or another by the federal government for actual expenses, such as travel and hotel accommodations, incurred on Council business.

X. State Jurisdiction Overlap

The FCMA's allocation of management jurisdiction between the states and the federal system seems simple until one looks closely. The FCMA created for exclusive fisheries jurisdiction a band 197 miles wide measured from the seaward boundary of the Pacific Coast states. For this Fisheries Conservation Zone, management authority was seemingly put in federal hands to be exercised through the Regional Council system.

The states have traditionally exercised fisheries management authority within their boundaries, which, again, is out to three miles from shore for Alaska, Oregon, Washington, and California. In addition, the states in the past have exercised some authority beyond their boundaries.[13] Until the passage of the FCMA the states could regulate directly, beyond three miles, (1) their own citizens and (2) vessels registered under state law.[14] The states have also regulated indirectly fishing beyond three miles by means of landing laws.[15] A typical landing law prohibits possession within the state's boundaries of, say, salmon under a minimum size; under such a law a fisherman would effectively be prohibited from catching undersize salmon outside of state jurisdiction because he could not bring the fish back into the state to be sold and processed.

During the early 1970's some states, including Alaska and Oregon, began to claim nontraditional fisheries jurisdiction beyond the state boundaries. Laws were enacted and regulations adopted which purported to control fishing as far as two hundred miles to sea.[16] These attempts at direct regulation departed from the norm in that they were without regard to a fisherman's citizenship or a vessel's registration. They differed from landing-law-type regulation in that, for example, it was not only illegal to possess an undersize salmon in the state; it was also purportedly illegal under state law to catch

it outside the state's seaward boundary.

The question that remains is: has the FCMA changed the extent of the coastal states' fisheries management jurisdiction? Some parts of the Act are clear and others are not. As already mentioned, the Act set up the Regional Councils to manage the FCZ. As for the states, the Act says that "nothing in this Act shall be construed as extending or diminishing the jurisdiction of any state within its boundaries."[17] The FCMA does not claim under normal circumstances to usurp the power of the states within three miles, or to give the states any additional powers in those waters.

The one situation under which a Regional Council, in conjunction with the Secretary of Commerce, can reach into state waters to manage a fishery is when both of the following conditions occur:

(1) An FMP is in place for a fishery which is engaged predominately in the FCZ, and

(2) A state has taken or failed to take an action which will substantially and adversely affect the carrying out of the FMP.[18]

Under such a situation and under strict procedural safeguards[19] the Secretary of Commerce can take over management within state boundaries, except for "internal waters." "Internal waters" are presumably those waters landward of the boundary from which the territorial sea is measured.[20] This exempts bays, rivers, streams and lakes from federal fisheries management under any circumstances, at least under the FCMA.

The main confusion arises with the provision of the Act that states: "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."[21] Despite all the care that went into drafting this law, no one knows exactly what this means.

Any attempt at defining the extent of a state's post-FCMA power to regulate fisheries in the FCZ requires a short digression into constitutional law. The Constitution of the United States gives to the federal government the power to regulate interstate commerce.[22] It has been recognized at least since 1891 in many cases that fishing is properly considered interstate commerce[23] and as such is subject to federal regulation. In the absence of federal regulation, the states are free to regulate fisheries,[24] subject to some limitations unimportant here. This was the situation prior to the enactment of the FCMA in 1976; states could manage all offshore fishing in their own waters, fishing by their own citizens and vessels everywhere, the fishing by all vessels that landed fish

in their ports, and in some cases attempted to regulate the fishing of out-of-state vessels and citizens outside their boundaries regardless of where the fish were landed.

Under the Constitution's Supremacy Clause, state laws must yield when they are in conflict with federal law or when Congress has indicated an intent to occupy a field exclusively. [25] Did Congress intend by enacting the FCMA to pre-empt totally the states traditionally exercised fisheries jurisdiction? Obviously they did not intend such a result inside territorial waters. For waters beyond three miles it also seems clear that at least some continued state regulation was anticipated; the specific provision allowing state regulation of state-registered boats is evidence of that. In addition, it can hardly be supposed that Congress felt its stated purpose of conserving fishery resources would be advanced by eliminating the only controls in place for most of the many American fisheries. It was known at the time the FCMA was enacted that federal regulation of fisheries would replace state controls on a fishery-by-fishery basis, possibly taking years to complete. It is doubtful that the intent was to eliminate all state controls at once and thereby subject fisheries not yet under federal control to possible overfishing and irreparable harm.

Acceptance of the premise of shared jurisdiction clears the situation only slightly. The problem becomes one of determining whether state regulations conflict with federal regulations to the extent they must fall under the rules of pre-emption. A number of questions still remain. For example, where a Regional Council has not promulgated a management plan for areas beyond three miles, does a state stand in the same position as before the FCMA or is it restricted by the FCMA to regulating only boats registered under state law?

It can be argued that passage of the FCMA gives to the Department of Commerce only the power to regulate fisheries and that where no FMP is in place that power has not been exercised. In other situations it is commonly understood that, where an agency is given the power to regulate but has not yet exercised that power, the states are free to continue their otherwise proper regulation of the activities in question because there is no state/federal conflict. [26] In the case of fisheries regulation, that would include at least direct regulation of state citizens and vessels and indirect regulation of all fishing that can be reached by landing laws. By various routes, this is the result reached by all the Pacific states. Without confronting the ambiguity of the FCMA the states have continued with roughly the same pre-FCMA regulatory schemes for fisheries where no FMP is in place. Some states have nonetheless felt compelled to recognize at least the possibility that a true test of the law would limit their jurisdition to state registered vessels even where no FMP is in place. Oregon leg-

legislation, for example, claims that Oregon's citizens, vessels, and anyone delivering to an Oregon port, if in compliance with other Oregon laws, are "registered" within the meaning of the FCMA.[27] California has reached a similar result by judicial decision that the requirement of state "registration" is satisfied by the issuance of state commercial fishing licenses.[28] Whether or not such boot-strapping techniques could withstand a challenge in federal court remains to be seen.

Perhaps the most difficult situation is encountered in the situation of a fishery for which a federal fishery management plan is in place and the FCMA's pre-empting restrictions on state power clearly apply. Could a State still regulate its vessels beyond three miles under the FCMA's "registration" provision? The first question that is confronted is: what does it mean for a vessel to be "registered under the laws" of a state? Neither the FCMA nor its recorded legislative history provide a real clue to the meaning, and no federal court, to whom the last word belongs in interpreting federal laws, has yet heard a case involving this part of the FCMA. Until such a definition is provided by a federal court the states may, for purposes of their own law at least, define registration as they see fit. Oregon's definition is one possible approach. The position taken by the California Supreme Court in a recent case was that a vessel licensed to fish commercially is "registered" in California even though it is a federally documented vessel not registered under California's own documentation laws.[29] Washington and Alaska do not deal specifically with the term "registration," but their continued expression of broad regulatory powers implies they view "registration" in terms at least as broad as do Oregon and California.

If we ignore the problem of defining "registration" and assume that a state has jurisdiction over a particular vessel, there is still a problem that takes us back to the doctrine of federal pre-emption. How consistent with federal regulation must state regulation be in a fishery for which a federal management plan is in place? If a state regulation for fishing in the FCZ is less restrictive than the federal regulation, the state regulation clearly must fall under the rules of federal pre-emption. The argument can be made that the literal wording of the FCMA preserves the states traditional jurisdiction over its own vessels, and there is some support for this line of reasoning in the legislative history of the act. On the other hand, reading the language of the act and the legislative history in the light of the overall purposes of the act and the evils sought to be remedied lead to the conclusion that pre-emption results. As stated by Terry Leitzell, then head of the National Marine Fisheries Service, in an August 1980 letter to Alaska Representative Don Young:

> The FCMA recognizes both the importance of

> fishing to the coastal States and its importance to the Nation. It leaves management of fishing in territorial waters generally to the individual States, and recognizes State interest in management of the FCZ by providing for State participation on the Regional Councils. It also recognizes that fishery management in the FCZ, if it is to be effective, must both consider and transcend State boundaries and local concerns. Hence, it calls for management in the FCZ to be pursuant to FMPs that are fishery-wide, and to be consistent with national standards. FMPs developed for the FCZ jointly by the several States through Regional Council participation, which address in a unified manner regional concerns affecting the citizens and resources of more than one State, would be of little value were each State, acting independently, to regulate fishing of its own registered vessels in the FCZ in a manner contrary to such management plans. We do not believe the FCMA allows such a result.

Where the state regulation is the same as the federal regulation, no inconsistency exists and the state regulation may remain in effect. This is the situation commonly found in the Pacific and North Pacific Regions where the states and the Regional Council have cooperated and acted more or less uniformly.

The third situation is where a state regulation for fishing in the FCZ is more restrictive than the federal regulation. Must the state regulation fall because it is different from the federal regulation? It depends. If the purpose of the permissive federal regulation would be defeated by the state's enforcement of its more restrictive regulations then the state rule would probably fall. For example, if a permissive federal rule is aimed at taking advantage of a strong year class of small shrimp that would otherwise be lost to natural predators, then a state rule which restricts fishing to larger shrimp would defeat the purpose of the federal rule and would probably not be permitted. On the other hand, if a federal rule permits a limited harvest of small shrimp to protect them so that they can grow and reproduce, then a state regulation protecting them even more would probably be permitted. The purpose of the federal rule, protection of the year class, would in this latter example not be defeated but would actually be enhanced.

Readers are reminded that the problems outlined here are only potential problems. The Regional Councils and the states have so far been able to work together successfully and, except for a single case in California, the basis for state participation in fisheries management under the FCMA has not been tested. It is hoped that the Commerce Department will make efforts to better define the allocation of jurisdiction between the

states and the federal government. Unless they do the confusion will probably be cleared up over a period of time in the courts at great expense to fishermen and state and federal governments.

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CHAPTER III

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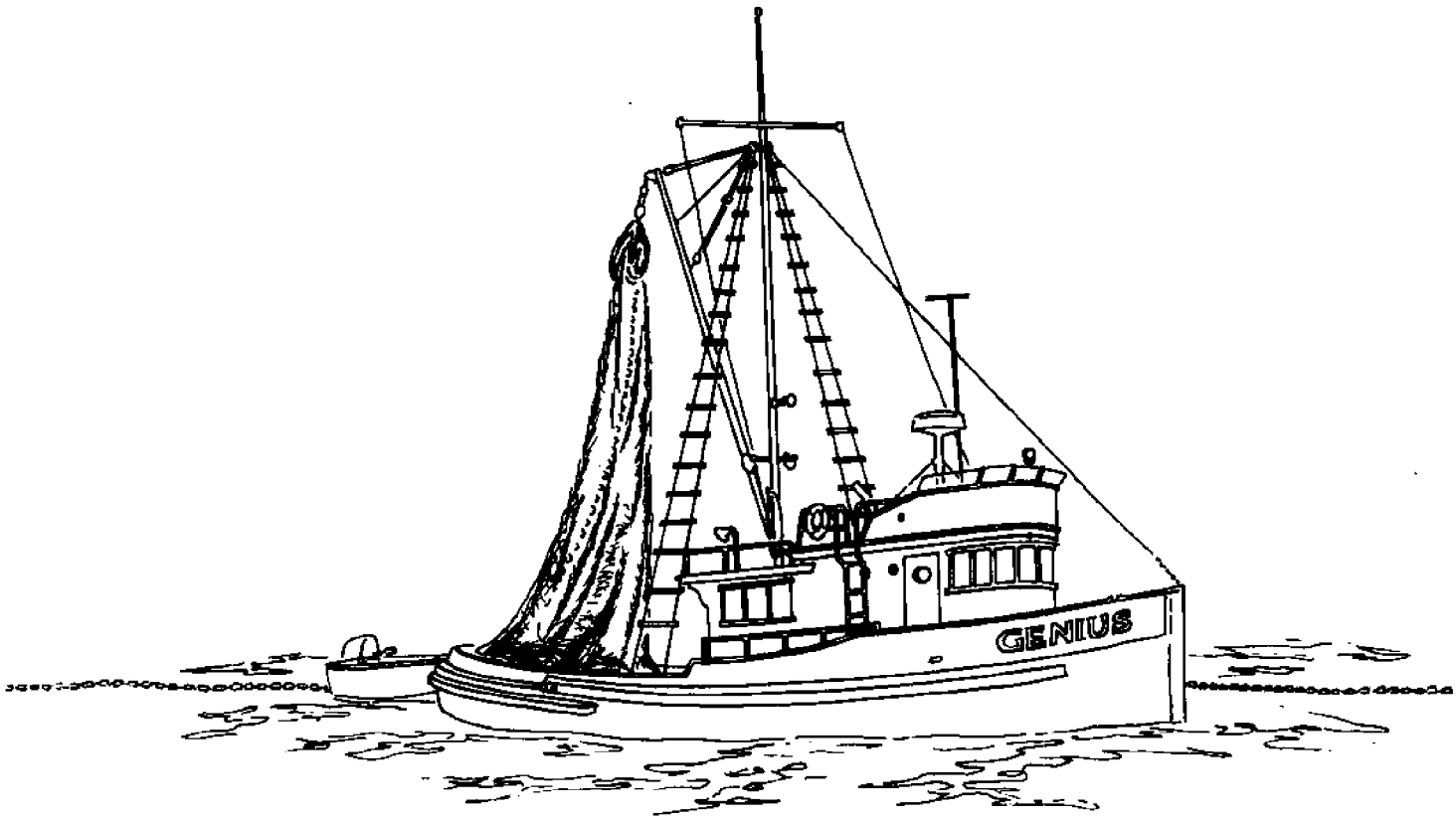


Fishery Management Plans

CHAPTER 4

The Regional Councils provide comprehensive fishery management through the Fishery Management Plan process. A Fishery Management Plan (FMP), the end product of months and sometimes years of planning, can perhaps be best described by detailing the process by which it is produced. This chapter attempts to break down the planning process into seven phases, with special attention given to the points at which fishermen or other interested persons can influence management decisions. Each planning phase is described in text and illustrated by an accompanying flowchart. Although they can be confusing, this chapter makes use of abbreviations and acronyms commonly used by those in the fisheries management business. Familiarity with the use of such bureaucratic language will be an increasingly important skill for those in the fishing industry who want to

OVERVIEW OF FISHERY MANAGEMENT PLAN PROCESS

(See Appendix A for explanation of abbreviations)

PHASE I *Pre-Planning*	PHASE II *Draft FMP Development*	PHASE III *Public Review And Council Adoption*	PHASE IV *Secretarial Review*	PHASE V *Regulation Promulgation*	PHASE VI *Continuing Fishery Management*	PHASE VII *FMP Amendments*
Identification of FMU (Council) Decision to initiate planning activities (Council) Work plan activities (Preparation—Council) (Processing—NMFS) (Approval—NOAA)	Preparation of DFMP incorporating DEIS and regulatory analysis (Council) Preparation of draft proposed regulations Review and approval of DEIS (Review—NMFS) (Approval-NOAA)	Publication of DFMP availability in Federal Register (NMFS) Publication of hearings in Federal Register (NMFS) Public review period Public hearings (Council) Agency advance review of DFMP—Comments to Council (DOC Chief Economist, NOAA, NMFS, CG & DOS) Compilation and assessment of public and agency comments (Council) Preparation of FMP (Council) Approval and submission of FMP (Council)	Secretarial Review of FMP (NMFS) FMP approval, partial disapproval or disapproval (NMFS) Consultation—if partial or disapproval—and possible resubmission (Council, NMFS) Preparation of Proposed Regulations (NOAA, NMFS) Publication of approved FMP in Federal Register (NMFS)	Publication of proposed regulations (NMFS) Public review of FMP and proposed regulations Compilation and assessment of public comments—preparation of final regulations (NMFS) Final consistency review of proposed regulations with FCMA (NOAA, NMFS) Approval of final regulations and regulatory analysis (NOAA) Publication of final regulations in Federal Register (NMFS) FEIS notice of availability in Federal Register (NMFS) 30 day "cooling off" period Regulations effective	Implementation of management measures other than regulations (Council, SOC, NOAA, Sec. of Com., NOAA, NMFS and others) Implementation of FMP monitoring procedures as specified in FMP (Council, NMFS) Refinements to regulations, i.e., notice actions, regulatory changes (Council, NMFS)	Decision to amend FMP (Council) Application of "Significance" under NEPA and EO 12291 (Council) Concurrence with Council determination (NOAA, NMFS) Preparation of FMP amendment (Council) Restarts all or portions of FMP process depending on whether NEPA/EO 12291 will be followed

understand the governmental forces that control them. Included at the end of the chapter is a summary of the abbreviations used in text and on the charts (see Appendix A).

The most significant opportunities for influencing marine fisheries management occur even before the seven phase planning process begins. As described in Chapter 3, the Regional Council is made up largely of individuals from the region.[1] All persons interested in the course of marine fisheries management should be aware that the initial step in placing Council members is one of the best chances for having a voice in the planning process. When there is a vacancy on a Council, interested groups should nominate a qualified representative to fill the vacant Council position. The nominating letter is submitted to the governor of the nominee's state. The governors of the states in the region submit lists of nominees to the Secretary of Commerce, who selects the new Council member.[2] Interested persons can influence this choice by writing the Secretary of Commerce suggesting who should be selected from the lists submitted.

A similar political process exists for seating advisory panel members.[3] When a vacancy exists on an advisory panel the interested public should nominate representatives to the Councils. Since the Councils ultimately select from a group of nominees, letters to them in support of a particular candidate can also be an effective way of insuring special interest representation.

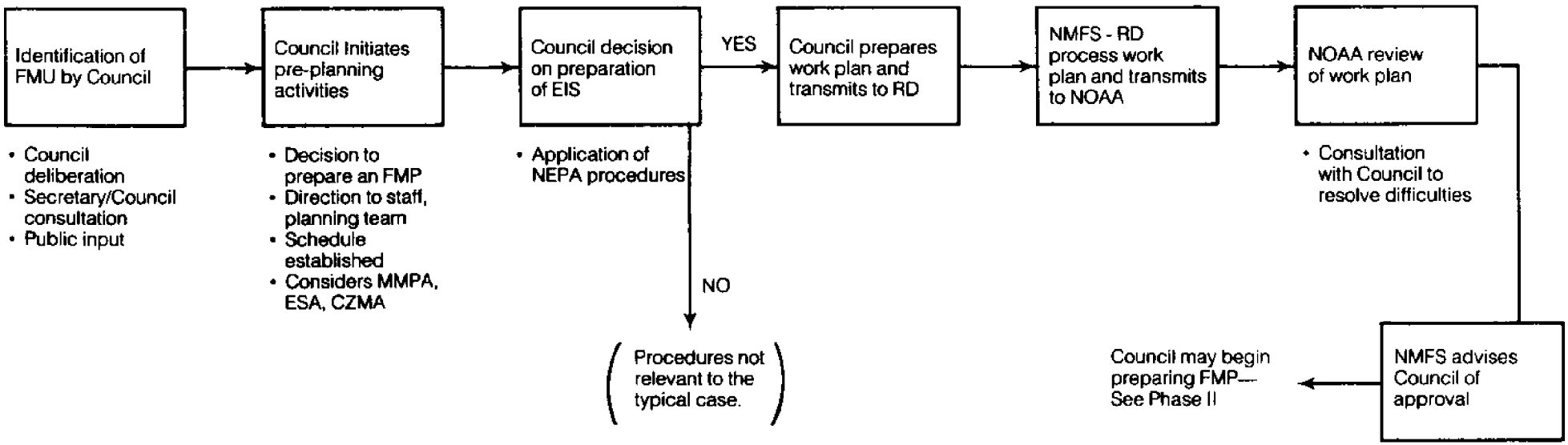
The entire Regional Council System and Fishery Management Plan process is designed to insure that local interests and concerns are dealt with. Participation in the seating of Council personnel is one way to insure that the purpose of the design is fulfilled.

Phase I: Pre-Planning

The FCMA does not require an FMP for every fishery.[4] Fishery experts generally agree not all fisheries are in need of management. However, a fishery not presently in need of management may need it later. It may be appropriate to initiate the planning process for such a fishery to insure orderly development. It may also happen that single stocks of fish are not individually in need of management but as a group can be usefully regulated.[5]

During Phase I of the FMP process the Council must identify a fishery management unit (FMU).[6] An FMU can be a single species, several species, or single or several species divided by ranges or even harvest methods.[7] The Council then determines whether or not management is necessary or appropriate.

PHASE I—PRE-PLANNING



(See Appendix A for explanation of abbreviations)

Laws other than the FCMA affect the planning process.[8] For example, the Council must determine in Phase I whether their planning activities require the preparation of an environmental impact statement (EIS) in accordance with the National Environmental Policy Act (NEPA).[9] Typically the decision is affirmative, although there are procedures for planning activities where the preparation of an EIS is not necessary. The typical FMP process is expanded to comply with NEPA requirements.[10]

The Endangered Species Act (ESA) also affects the process. Councils are required to consult with the National Marine Fisheries Service (NMFS) or Fish and Wildlife Service, depending on the species involved, if an FMP may effect a threatened or endangered species.[11] The agency consulted issues an opinion as to whether or not the proposed FMP is likely to jeopardize the continued existence of a listed species. Appropriate measures are incorporated into the plan being developed depending upon the opinion received.

The Marine Mammal Protection Act (MMPA)[12] must also be considered by the Councils. The MMPA requires that the Secretary of Commerce not authorize any activity the result of which is the reduction of a marine mammal species below its optimum sustainable population.[13] Although the MMPA places no specific obligations on the Councils, a Council should provide adequate information in FMP's and EIS's to inform the Department of Commerce, which eventually must approve any plan of any potential conflicts between an FMP and the MMPA.[14]

The Coastal Zone Management Act (CZMA) requires that federal activities that affect the coastal zone be consistent with approved state management plans to the maximum extent practicable.[15] While the coastal zone does not extend beyond the territorial sea, management activities in the Fishery Conservation Zone may impact the coastal zone. For example, expanded domestic harvest of Pacific hake prompted by restrictions on foreign fishing might spur development in some ports of processors and boat building concerns. During the pre-planning phase the Regional Council must consider their proposed Fishery Management Plan's impact, if any, on the coastal zone. The Council must submit to its constituent states a determination that there is no conflict with an approved coastal zone plan. If a state disagrees with a consistency determination, mediation is available.[16]

When a Council, with approval of the NMFS and the National Oceanic and Atmospheric Administration (NOAA), determines that an FMU needs regulation, a work plan is prepared. The work plan is designed to help focus a Council's attention on significant problems in the fishery during the planning process. It also provides a tentative schedule for development of the FMP.[17] The work plan is prepared by the Council, processed by the National Marine Fisheries Service and approved by a NOAA administrator.[18]

Phase II: Draft Fishery Management Plan Development

Phase II is initiated when a Council begins preparation of its first draft of the FMP. The Council directs the plan development team (PDT) during the development of the Draft Fishery Management Plan (DFMP). With input from the scientific and statistical committee, the advisory panel(s), the NMFS and others, the Council leads the PDT in the Draft Plan development.

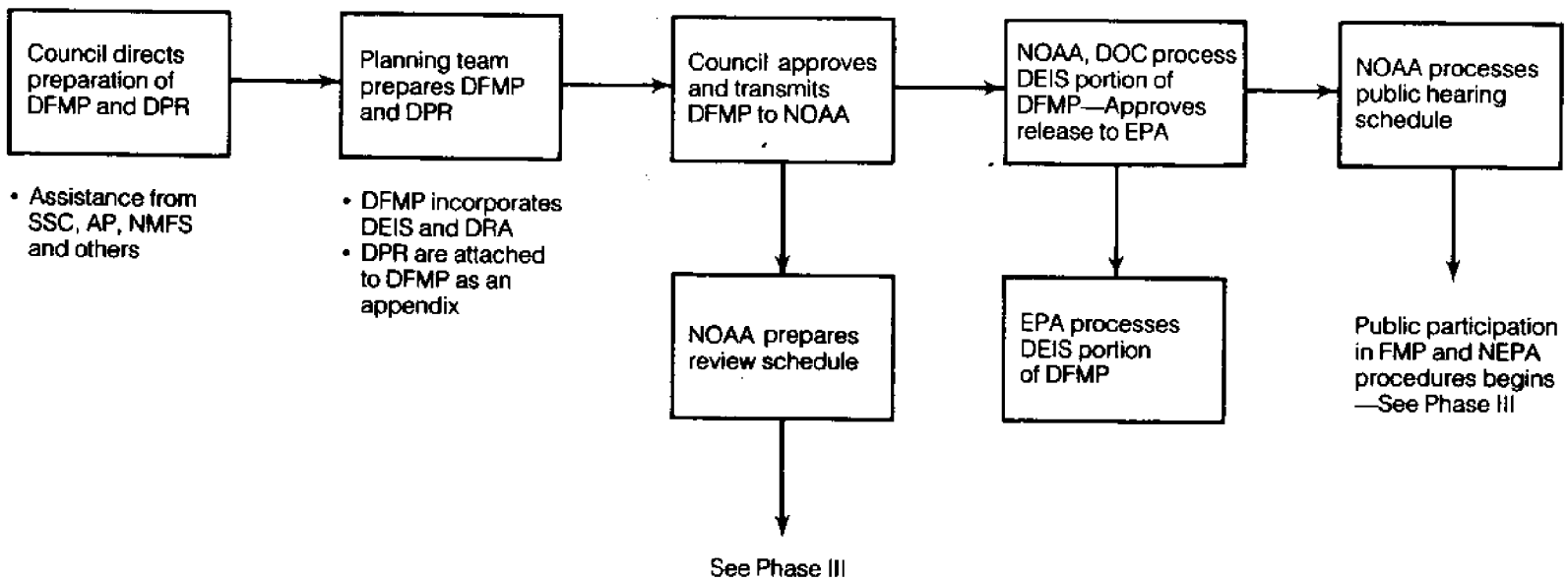
At this planning stage there are two other documents which must be produced to satisfy the requirements of the law. NEPA procedures require a Draft Environmental Impact Statement (DEIS). The DEIS, like the final EIS, must include a detailed statement on "(1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[19] Although the DEIS and the DFMP (like the EIS and FMP) are legally distinct, NEPA regulations allow combining them in a single document to avoid duplication.[20]

In an effort to curb unnecessary and burdensome federal regulation, President Reagan issued an executive order in 1981 aimed at improving procedures for adopting new regulations.[21] Since an FMP is eventually implemented by Department of Commerce regulations, the DFMP, which includes proposed regulations, must comply with the exectuve order. During Phase II of the planning process the Council must prepare an analysis of proposed (draft) regulations. The draft regulations analysis (DRA) is intended to justify the proposed regulations and to provide a full explanation of the impacts of the proposed management measures on commercial and recreational fishermen, consumers, processors and others.[22] The draft regulations analysis is included in the same document as the draft fishery management plan and the draft environmental impact statement. Reviewers are thus provided with a single document which satisfies the requirements of various federal laws.

The DFMP is ideally a multi-year plan for management that can be "fine tuned" without the need for a formal amendment. Formal amendments can take up to a year to process and are costly and inefficient. The key at this point is to write into the DFMP enough flexibility to respond to changes in the fishery by amending regulations without having to formally amend the entire plan.[23]

The Commerce Department has developed a standard format for FMP's which is generally followed when DFMP's are prepared. The format is recommended but not required. If any portion of the

PHASE II—DRAFT FMP DEVELOPMENT



(See Appendix A for explanation of abbreviations)

standard format is inappropriate for any plan, the responsible Council may modify the format accordingly. Typically, however, the format listed is followed quite closely:[24]

1. Cover Sheet: Provides identification of the plan, the subject fishery, and the responsible Council.

2. Summary of the DFMP.

3. Table of Contents.

4. Introduction: Describes development of DFMP by the Council and overall management objectives.

5. Description of Stocks(s):

   i. Species or Group of Species and Their Distribution: A biological description and the geographical distribution of the species or group of species comprising the FMU as identified by the Council.
   ii. Abundance and Present Biological Condition of Specie(s) in FMU.
   iii. Ecological Relationship of the stock(s) with other fish, animals, or plants, including discussion of relevant food chain and predator-prey relationships.
   iv. Estimate of MSY: Specifies the maximum sustainable yield of the stock(s) based upon the best scientific information available.
   v. Probable Future Condition: Future conditions of stock(s) if present conditions and trends continue.
   vi. Other.

6. Description of Habitat:

   i. Conditions of Habitat: Describes the habitat, factors affecting its productivity, and probable future condition if present condition and trends continue.
   ii. Habitat Areas of Particular Concern: Identifies and describes the habitat areas which are of particular concern because of a requirement in the life cycle of the stocks(s)--e.g., spawning grounds, nurseries, migratory routes, etc. Areas which are currently or potentially threatened with destruction or degradation are identified.
   iii. Habitat Protection Programs: Description of programs to protect or restore the

habitat of the stock(s) from destruction or degradation, including the relationship of any approved Coastal Zone Management Programs in the affected state(s). The plan proposed by a Council should be consistent with any such approved program.

7. Fishery Management Jurisdiction, Law and Policies:

   i. Management Institutions: The institutions which have fishery management authority over the stocks(s) throughout their range.
   ii. Treaties or International Agreements: Describes applicable treaties with foreign nations or international fishery agreements which affect the FMU, either directly or indirectly.
   iii. Federal Laws, Regulations, and Policies: Impact of any applicable federal laws, regulations, etc.
   iv. State Laws, Regulations, and Policies.
   v. Local and Other Applicable Laws: Includes any Indian treaty fishing rights embodied in treaties, case law, or other agreements.

8. Description of Fishing Activities Affecting the Stocks(s) Comprising the Management Unit:

   i. History of Exploitation: Summarizes the historial fishing practices both foreign and domestic. Identifies past user groups, vessel and gear types and quantities, and fishing areas.
   ii. Domestic Commercial and Recreational Fishing Activities: Gives a complete description of current domestic fishing activities involving the management unit. Includes commercial, recreational, subsistance and Treaty Indian fishing. The description includes, where applicable--
      a. Participating user groups.
      b. Vessels and gear.
      c. Employment in recreational and commercial sectors.
      d. Fishing and landing areas utilized throughout the range of the stock(s).
      e. Conflicts among domestic fishermen involving competition for fishing areas, gear damage, etc.
      f. Amount of landings/catches.
      g. Assessment and specification of U.S. harvesting capacity.

h. Assessment and specification of U.S. processing capacity.
i. Assessment and specification of the extent, on an annual basis, to which U.S. vessels will harvest the optimum yield as specified by the Council.
j. Assessment and specification of extent to which U.S. processors will process fish caught by U.S. fishermen in the FCZ.

iii. Foreign Fishing Activities: A description of current foreign fishing activities. Includes, where applicable—
a. Participating nations.
b. Vessels, harvesting and support, and fishing gear.
c. Fishing and landing areas.
d. Enumeration of landings and value as distributed among the stock(s) comprising the FMU.

iv. Interactions Between Domestic and Foreign Participants in the Fishery.

9. Description of Economic Characteristics of the Fishery:

i. Domestic Harvesting Sector: Ex-vessel values of the catch. Method of value determination. Economic statistics for commercial fleet including gross income, investment costs and revenues, measurement of effort, measurement of efficiency and measurement of productivity. Economic statistics of recreational fishing including investment, revenues and tourism.

ii. Domestic Processing Sector: Describes the wholesale products and their value. Specifies the capacity of the processing sector, as well as the degree of its dependence upon products from the fishery.

iii. International Trade: Describes the international trade in relevant fishery products. Discusses existing and proposed international business arrangements affecting the stocks(s).

10. Description of Businesses, Markets and Organizations Associated with the Fishery:

i. Relationships Among Harvesting, Brokering and Processing Sectors.

ii. Identification of Fishery Cooperatives or Associations.

iii. Labor Organizations Involved in Harvesting and Processing.
iv. Foreign Investment In Domestic Sectors of Fishery.

11. Description of Social and Cultural Framework of Domestic Fishermen and Their Communities.

i. Ethnic Character, Family Structure and Community Organization.
ii. Age and Education Profiles of Fishermen.
iii. Employment Opportunities and Unemployment Rates: Identifies employment opportunities in the fishery, in other fisheries and in non-fishing related work in the geographical area concerned. Compares current unemployment rate among fishermen and the applicable labor force in the same area. Describes relationship of seasonality in fishing employment to alternate forms of employment or to unemployment.
iv. Recreational Fishing: Describes the social and cultural characteristics of fishermen who participate in the recreational sector of the fishery. Identifies the social and cultural benefits generated by the recreational sector of the fishery.
v. Economic Dependence on Commercial or Marine Recreational Fishing and Related Activities: Describes economic dependence of fishermen and others on the fishery, including fishery related activities--e.g., gear manufacture and repair.
vi. Distribution of Income Within the Fishery Communities.

12. Determination of Optimum Yield (OY):

i. Specific Management Objectives.
ii. Descriptions of Alternatives: Describes the alternative OY's considered and their advantages and disadvantages.
iii. Analysis of Beneficial and Adverse Impacts of Potential Mangement Option: Considers various conservation and management measures to determine which are appropriate to achieve the optimum yield.
iv. Tradeoffs Between the Beneficial and Adverse Impacts of the Preferred or Optimal Management Option.
v. Specification of Optimum Yield: The amount of fish, with respect to the yield from the fishery, which will provide the greatest overall benefit to the nation.

13. Measures, Requirements, Conditions or Restrictions Specified to Attain Management Objectives:

i. Permits and Fees (Discretionary).
ii. Time and Area Restrictions (Discretionary).
iii. Catch Limitations:
  a. Total Allowable Level of Foreign Fishing (TALFF).
  b. Types of Catch Limitation (Discretionary): Whether limitations are based on areas, species, size, numbers, weight, sex, incidental catch, total biomass or other factors.
iv. Types of Vessels, Gear, and Enforcement Devices (Discretionary): Plan may prohibit, limit, condition or require the use of specified types and quantities of fishing gear, vessels, equipment, including devices to facilitate enforcement.
v. State, Local, and Other Laws and Policies (Discretionary): The plan may incorporate (consistent with the FCMA) the relevant fishery conservation and management measures of the coastal states nearest the fishery.
vi. Limited Access Systems (Discretionary):
  a. Present participation in the fishery.
  b. Historical fishing practices in, and social and economic dependence on the fishery.
  c. Economics of the fishery.
  d. Capability of vessels used in the fishery to engage in other fisheries or pursuits.
  e. Cultural and social framework relevant to the fishery.
  f. Why other management measures are inadequate for conservation and management of the fishery.
  g. Any other relevant considerations.
vii. Habitat Preservation, Protection, and Restoration: Where the Secretary of Commerce does not have the authority to implement habitat preservation, protection, or restoration measures, the appropriate state, federal, or international entity will be informed of the need and proposed measures.
viii. Development of Fishery Resources: A Plan may identify those fishery resources associated with the stock(s) which are underutilized or not utilized by U.S. fishermen.

14. Specification and Source of Pertinent Fishery Data:

    i. General: Specification of pertinent data to be submitted by participants in the fishery.
    ii. Domestic and Foreign Fishermen: Includes information as to type and quantity of gear, catch by species in numbers of fish or weight, fishing effort, fishing areas, time of fishing, number of hauls, etc.
    iii. Processors: Plan should specify information that must be submitted by fish buyers, processors, etc.

15. Relationship of the Recommended Measures to Existing Applicable Laws and Policies:

    i. Other FMP's.
    ii. Treaties or International Agreements.
    iii. Federal Law and Policies.
    iv. State, Local, and other applicable law and policies.

16. Council Review and Monitoring of the Plan: Discusses generally the procedures the Council and its advisory groups would use to review and revise the Plan.

17. References Cited in the Plan.

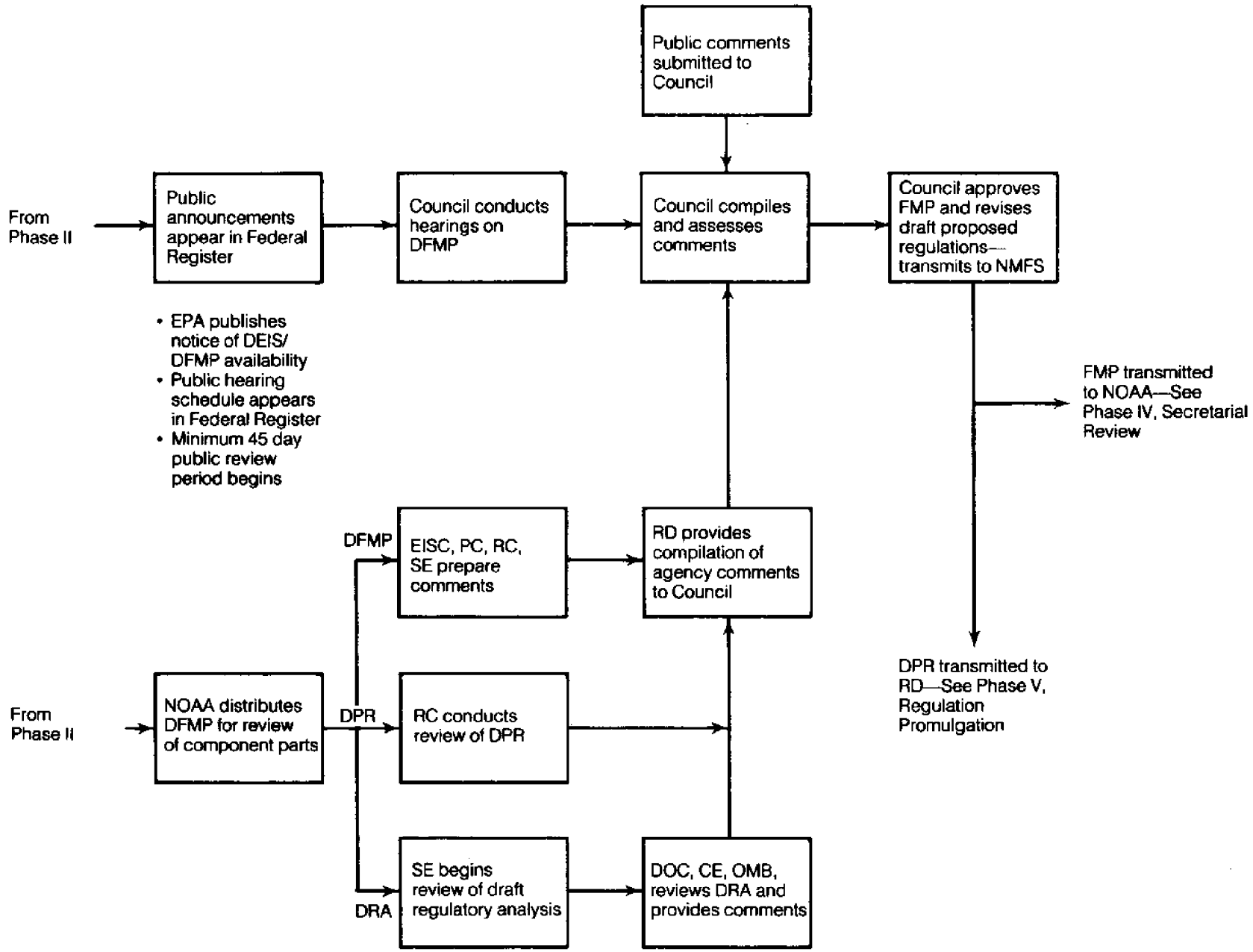
18. Appendix: Sources of Data and Methodology.

Phase III: Public Review and Council Adoption

This phase begins with the completion of the DFMP. Public announcements appear in the Federal Register and elsewhere of availability of the DFMP (which includes the DEIS and an analysis of the draft regulations). Announcements are also made of the schedule for public hearings on the proposed FMP. These announcements start a minimum 45-day review period[25] which typically lasts from 45 to 70 days.

During the public review period there are multiple opportunities for input on changes to be made in the DFMP. Generally there are several hearings where the concerned public can voice their opinions before the Council as to proposed management measures.[26] In addition to hearings before the Council there are sometimes specially scheduled hearings to accommodate large numbers of participants in various locations. All testimony is recorded and is part of the record upon which the final FMP is based.

PHASE III—PUBLIC REVIEW AND COUNCIL ADOPTION



(See Appendix A for explanation of abbreviations)

The public may also during this period submit letters to the Council concerning the DFMP. Letters can be more convenient than oral testimony and just as valuable. The DFMP is only a proposal so it is at this point that members of the interested public should make their wishes known. All parts of the DFMP are subject to change, including the proposed regulations, the determination of optimum yield, even the fishery management unit or the decision to regulate at all.

During the public review period, the DFMP is also being reviewed by various federal officials. At NMFS the DFMP is reviewed by an Environmental Impact Statement Coordinator, a Plan Coordinator, a Regulations Chief and a Staff Economist. These officials review the DFMP for completeness and potential problems. The DFMP is also reviewed at this stage by NOAA General Counsel for Fisheries and by a Department of Commerce Chief Economist. Comments from all these reviewers are transmitted by NMFS to the Council to point out major issues which could preclude approval at a later stage and also to provide general commentary on the Plan.

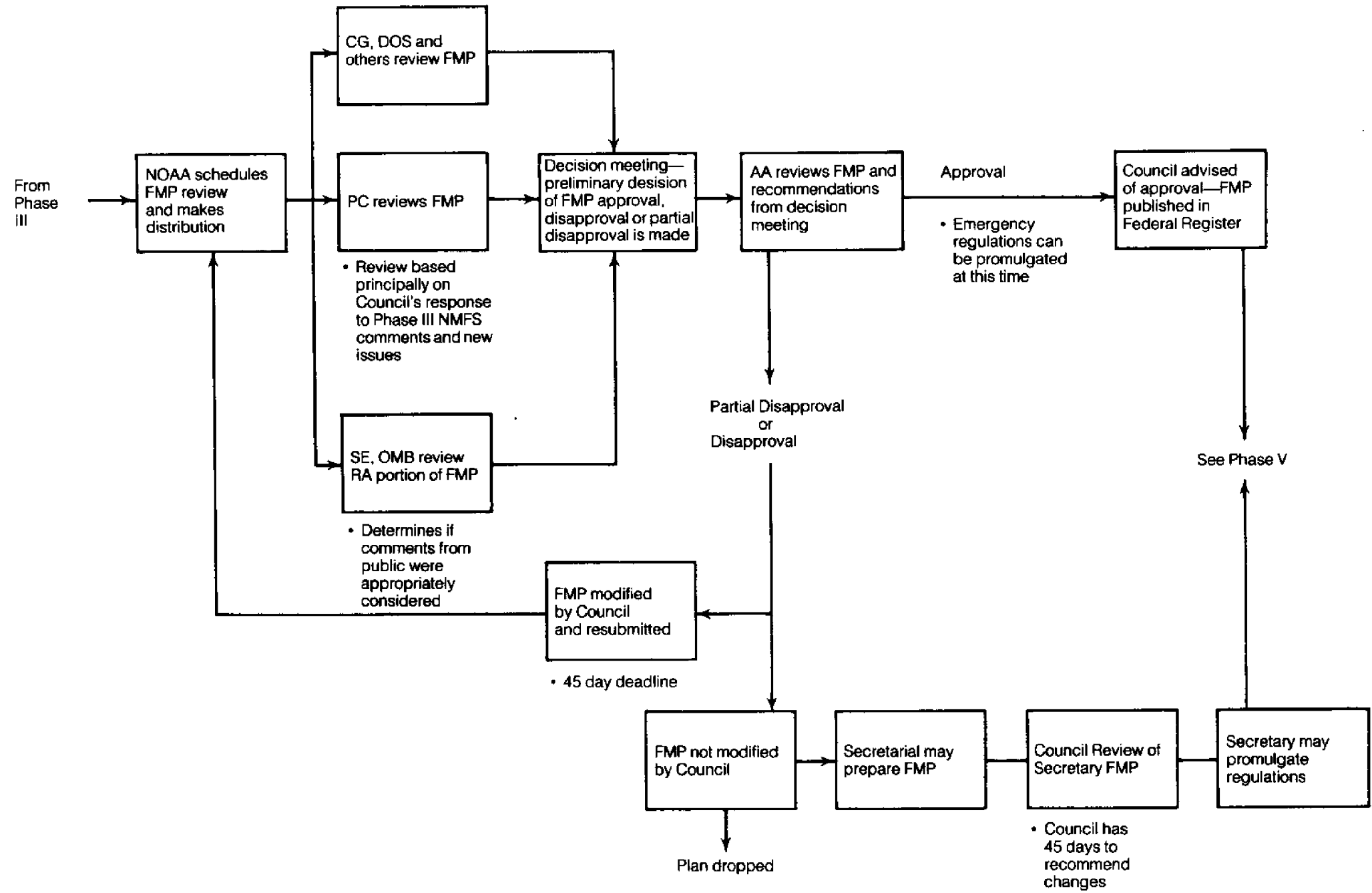
It is the Council's job to compile and assess comments from all sources.[27] During this period decisions are made on changes to the DFMP and proposed regulations. Often a DFMP undergoes several revisions. If the revisions are substantial, each revision undergoes another round of review by the public and aforementioned federal officials. In this way most problems are eliminated from the plan and compromises are struck, where possible, before it progresses to Phase IV. When the Council is satisfied with the metamorphosis of the plan, it is approved and thereafter designated an FMP.

Phase IV: Secretarial Review

In this phase of the FMP process, the Council-approved plan is forwarded to the NMFS. NMFS officials distribute the FMP for review by the Office of Management and Budget (OMB) for compliance with the President's E.O. 12,291, officials from the Coast Guard for matters with respect to enforcement at sea, the State Department for matters with respect to foreign fishing, and the NMFS Plan Coordinator and Staff Economist.[28] The responses of these reviewers are considered at a meeting, coordinated by NMFS, where an initial decision on approval, partial disapproval, or disapproval is made. The results of this meeting are drafted into a memo of recommendation to the Secretary of Commerce.

The FCMA gives the final responsibility of approving, partially disapproving, or disapproving any FMP to the Secretary of Commerce.[29] The Secretary has chosen to delegate this authority to the Administrator for NOAA, an agency within the department of Commerce. In turn, the NOAA Administrator has redelegated the approval to his Assistant Administrator for

PHASE IV—SECRETARIAL REVIEW



Fisheries, who is also the Director of the National Marine Fisheries Service. It is to this official that the FMP and accompanying recommendations are submitted for a final decision.

The Assistant Administrator for Fisheries (AA) has a standard of review for FMP's that is established in the FCMA. To meet approval, an FMP must first be consistent with the seven national standards[30] for FMP's, which are:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

(2) Conservation and management measures shall be based on the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable promote efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fishery resources and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

The AA must also find the FMP consistent with other provisions of the act, and other applicable law. Other applicable law includes other Acts of Congress (e.g., NEPA, MMPA, CZMA), treaties and executive orders.

If the AA finds the plan inconsistent with any of the

established criteria, he may partially disapprove or disapprove the FMP. The Council is then notified of changes necessary to make the FMP acceptable. The Council has 45 days to modify and resubmit the FMP. The revised FMP is again reviewed by the AA.[31]

If the Council does not resubmit a modified FMP either the plan is dropped or, in the event of an emergency in the fishery, the Secretary of Commerce (through the AA) may prepare his own FMP.[32] In the typical case either the original or revised and resubmitted FMP is approved. The public is notified by the FMP and accompanying proposed regulations being published in the Federal Register.

Phase V: Regulation Promulgation

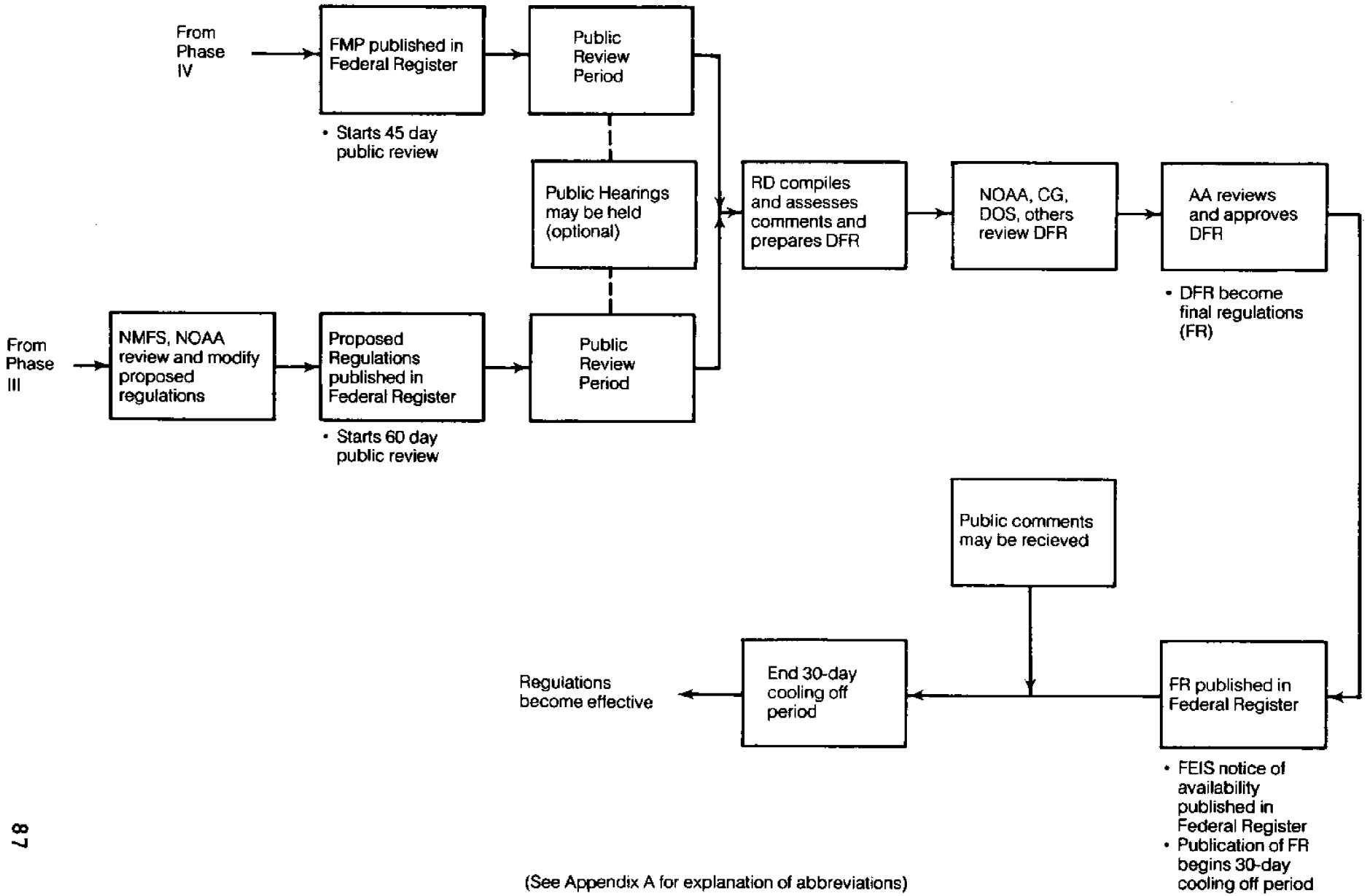
The notice of approval in the Federal Register opens another opportunity for public participation in the FMP process. The NMFS distributes the FMP to federal agencies and the public who commented on the DFMP and draft regulations. The public has 45 days to submit comments on the FMP[33] and 60 days to comment on the proposed implementing regulations.[34] Optional public hearings may also be held depending on the degree of public interest. The comments of the public during this review period should be directed to the Regional Director for NMFS in the region in which the Council is operating.[35]

Again the FMP and proposed regulations are transmitted to the AA along with a compilation and assessment of public and official comments and an NMFS recommendation.[36] Exact procedures in the event of disapproval at this point have not been established; however, the FMP would probably be returned to the Council for more work. In the more typical situation the AA approves the FMP and the proposed regulations become at this point final regulations.

The final environmental impact statement (FEIS) must be published at about the same time as the final regulations.[37] This is generally no problem since the EIS and FMP are parts of a single document. The NMFS Environmental Impact Statement Coordinator processes the document and the Environmental Protection Agency publishes notice of the FEIS in the Federal Register, typically at the same time the FMP and final implementing regulations are published.

When the FMP and regulations are submitted to the Federal Register for publication there begins a 30-day "cooling off" period.[38] Public comments are again taken on recommended changes in the final regulations although, at this late stage in planning, changes in the final regulations are infrequent. At the end of the 30-day period the FMP implementing regulations become effective.

PHASE V—REGULATION PROMULGATION



(See Appendix A for explanation of abbreviations)

Phase VI: Continuing Fishery Management

Once the FMP is in place the job of fishery management is just beginning. Management becomes an ongoing process which requires continuing involvement by the Council, the various federal entities involved in the plan's formation, and also by the public.

The cornerstone of Phase VI is the FMP and implementing regulations. Ease and success in continuing management depend on the foresight involved in the plan's development. If the plan provided for flexibility in continuing management, the process is streamlined.

The ingredients of continuing management are monitoring, refinement and revision.

Monitoring

Monitoring for changes in conditions in the fishery is done by the Council, NMFS, the constituent states of the region, universities and others. Typically the FMP provides a basis and schedule for the monitoring effort so that research priorities are based on management problems.[39] Some interested parties initiate monitoring activities on their own.

The FMP monitoring efforts can encompass such diverse topics as stock assessments, catch data, statistical compilation, biological research, socio-economic studies and habitat protection.[40] By keeping track of changing conditions in the fishery the FMP can be fine tuned according to changing needs.

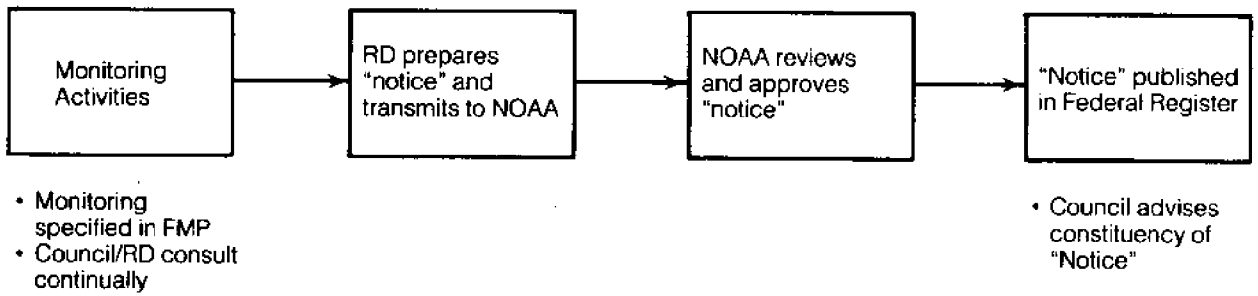
Refinement

Refinement of an FMP normally is accomplished two ways; notice actions and regulatory changes. Notice actions are preplanned on the basis of situations expected (during the earlier planning stages) to occur in-season. For example, if management tools for a fishery include area closures when the catch reaches a certain level, the FMP will say so. Then, when the catch reaches the predetermined level the plan provides procedures to follow for notifying fishermen and establishing the closures. Notices are published in the Federal Register to announce these kinds of regulatory actions; hence the term "notice actions." Notice actions range from simple fishery openings and closures to reserve releases to foreign fisheries or reallocation of resources among foreign fishermen.[41] The Councils usually also advise their constituencies of these notice actions.

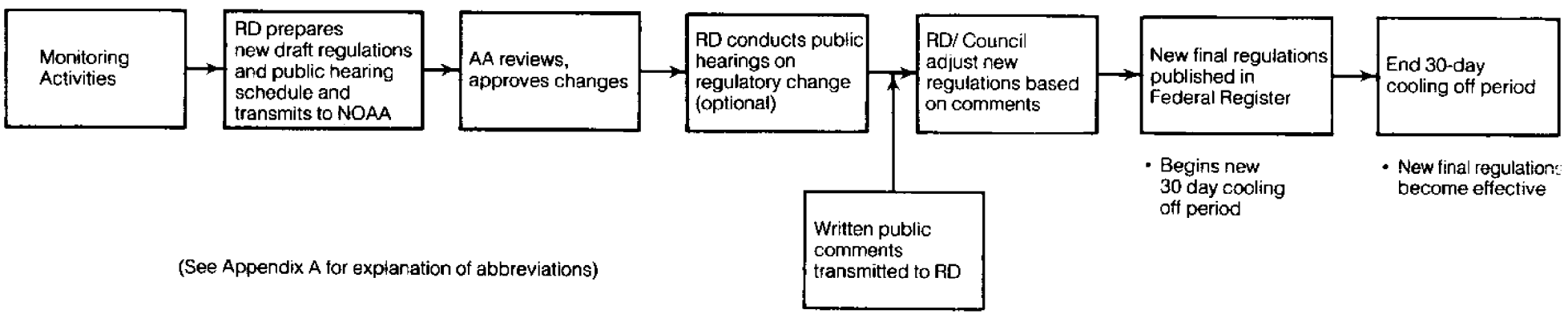
Regulatory changes, actions based on criterion established in the FMP, can cover such things as season adjustments, catch per boat or rod, quotas, gear restrictions, and even modifications of the optimum yield if based on predetermined formulas or procedures.[42]

PHASE VI—CONTINUING FISHERY MANAGEMENT—REFINEMENT

NOTICE ACTIONS



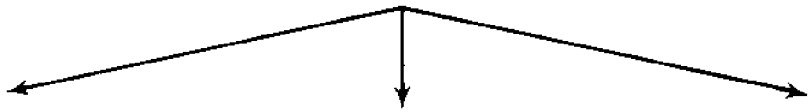
REGULATORY CHANGES



(See Appendix A for explanation of abbreviations)

PHASE VI—CONTINUING FISHERY MANAGEMENT (cont'd)

APPROVED FISHERY MANAGEMENT PLAN
AND IMPLEMENTING REGULATIONS



MONITORING
Who
- Council
- NMFS
- States
- Universities
- Other

What
- Stock assessment
- Catch data
- Statistical compilation
- Biological research
- Socio-economic studies
- Habitat protection
- Information and education

How
- Prescribed conditions or circumstances for monitoring, e.g., log books, data surveys

REFINEMENT
(Secretary obliged to implement in accord with approved FMP)

A Notice Actions (situations expected to occur during season—no policy related judgments)
- Reserve releases
- Fishery openings and closures
- Foreign reallocation

B Regulatory Changes
- Fishery season adjustments
- Catch per boat/rod, quotas
- Modification in OY
- Gear restrictions

REVISION
- Type and extent of change that will activate formal amendment procedures, e.g.,
  a.) Change of objectives
  b.) Attainment of objectives
  c.) Major changes to OY
  d.) Major changes in management measures
- Procedures for evaluating management effectiveness
- Procedures/ criteria for assessing significance under NEPA and EO 12291

(See Appendix A for explanation of abbreviations)

Appropriate regulatory changes are prepared by NMFS in response to needs discovered in the monitoring process. The AA reviews and typically approves the changes, which are then published in the Federal Register. Here again an opportunity for public input opens up. The Regional Director of NMFS has the option of holding public hearings on the regulatory changes and usually does so if public interest runs high. The public may in any case write to the Regional Director and to the Council with comments on the regulatory changes. This public input is compiled and is used in a meeting between the Regional Director and the Council in modifying the regulatory changes. NMFS then publishes the final regulations (as altered) in the Federal Register. Submission for publication begins another 30-day period for public response which typically ends with the new regulations becoming effective.

Revision

The type and extent of changes in the fishery determine whether FMP alterations can be handled by refinement or whether revisions are necessary. The kinds of changes which generally activate formal amendment procedures include changes in management objectives, attainment of objectives, major changes in OY, or major changes in management measures.[43] Revision by formal amendment procedures is the topic of Phase VII.

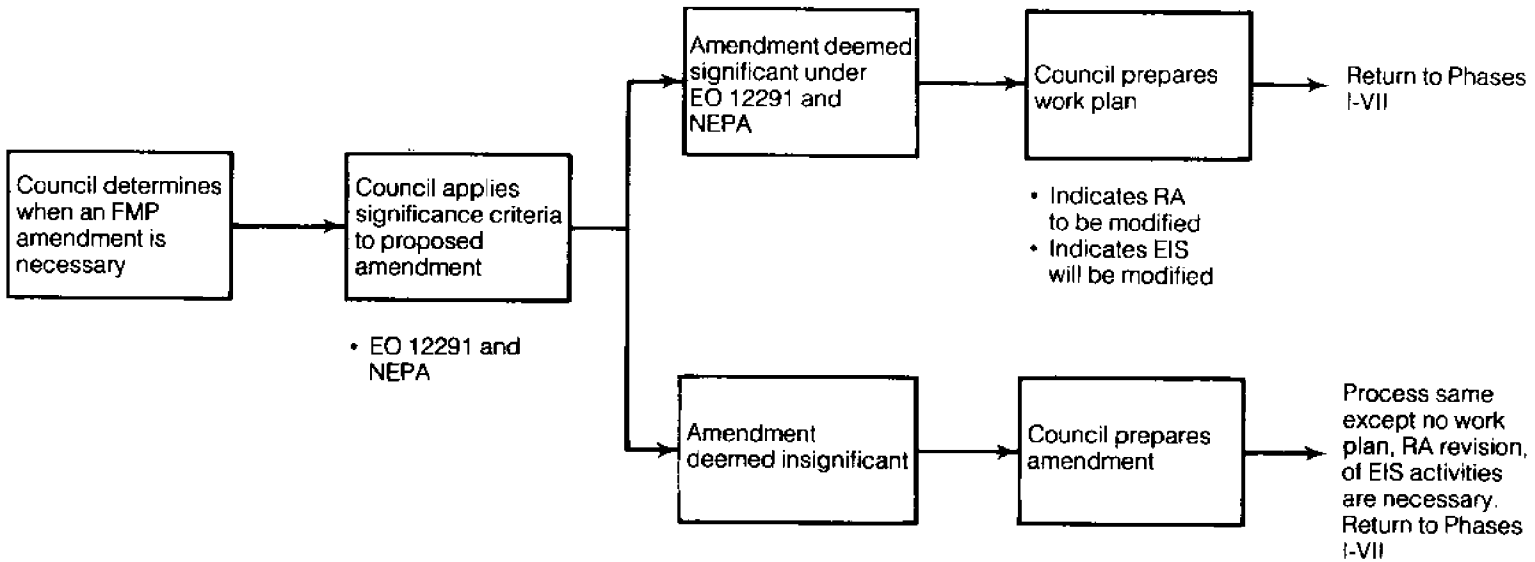
Phase VII: FMP Amendments

Councils have full discretion to initiate amendment actions. The FCMA merely directs the Councils to "review on a continuing basis, and revise as appropriate, the assessments and specifications made . . . with respect to optimum yield . . . and the total allowable level of foreign fishing" and to prepare and submit to the Secretary of Commerce from time to time such amendments to each FMP as necessary.[44] Ideally an FMP prescribes conditions and circumstances under which it intends FMP amendment to occur.

When the decision has been made by a Council to amend an FMP it must then determine if the proposed changes are "significant" within the meaning of NEPA and the Presidential order regarding federal regulations. If the proposed changes are deemed significant, the Council must proceed through the entire FMP process again, beginning with the preparation of the work plan.

If the changes are deemed insignificant the FMP process is repeated except that no work plan is necessary, a new regulatory analysis is unnecessary, and no new EIS activities are required.[45]

PHASE VII—FMP AMENDMENT



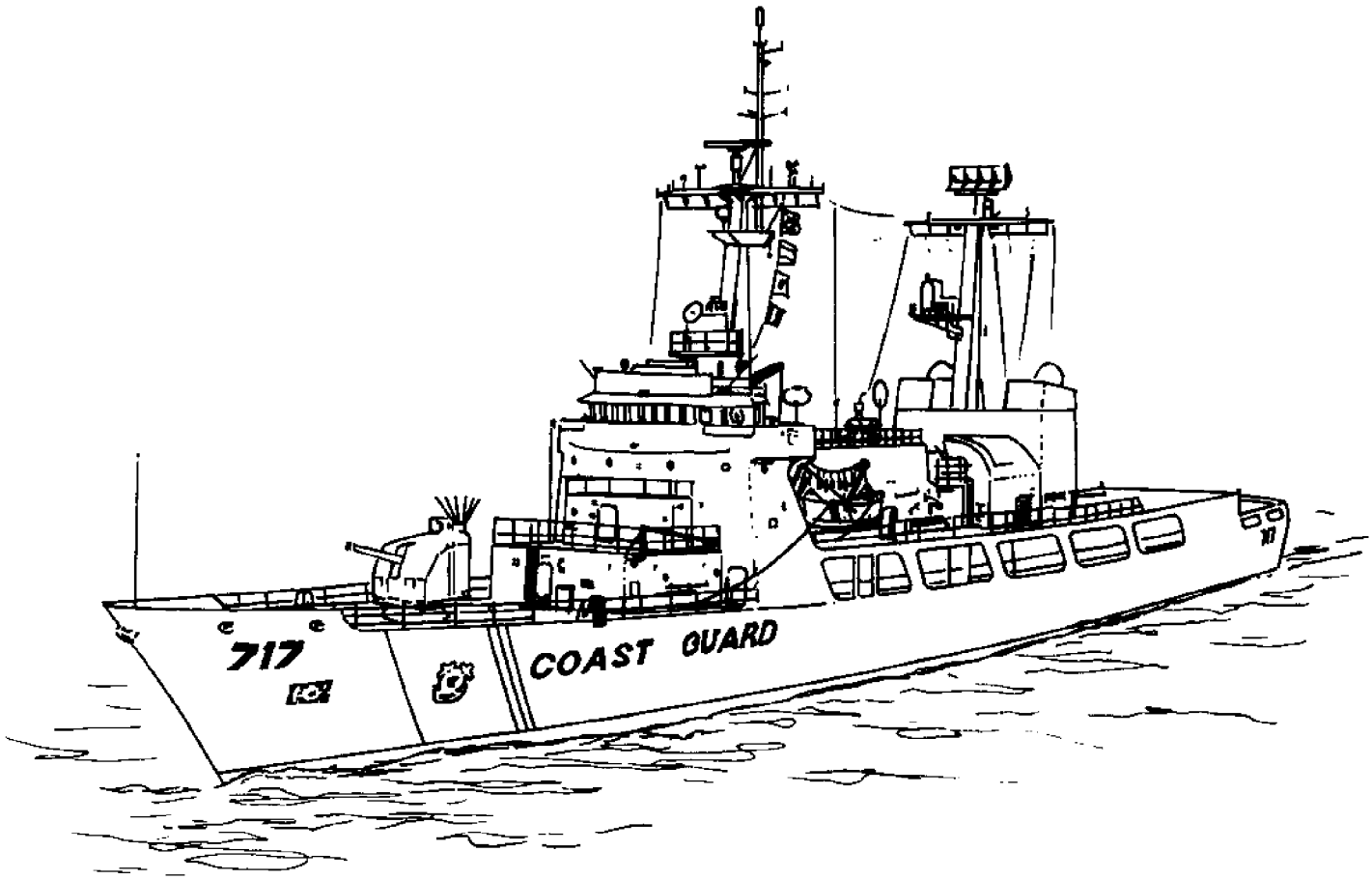
(See Appendix A for explanation of abbreviations)

CHAPTER IV

APPENDIX A

Summary of Abbreviations

AA	=	NOAA Assistant Administrator For Fisheries (who also is Director of the NMFS)
AP	=	Advisory Panel
CE	=	Chief Economist for Department of Commerce
CG	=	U.S. Coast Guard
CZMA	=	Coastal Zone Management Act
DEIS	=	Draft Environmental Impact Statement
DFMP	=	Draft Fishery Management Plan
DFR	=	Draft Final Regulations
DOC	=	Department of Commerce
DOS	=	Department of State
DPR	=	Draft Proposed Regulations
DRA	=	Draft Regulations Analysis
EIS	=	Environmental Impact Statement
EISC	=	NMFS Environmental Impact Statement Coordinator
E.O. 12,291	=	Executive Order 12,291: President Reagan's Regulatory Review Process
EPA	=	Environmental Protection Agency
ESA	=	Endangered Species Act
FCMA	=	Fishery Conservation and Management Act
FEIS	=	Final Environmental Impact Statement
FMP	=	Fishery Management Plan
FMU	=	Fishery Management Unit
FR	=	Final Regulations
MMPA	=	Marine Mammal Protection Act
NEPA	=	National Environmental Policy Act
NMFS	=	National Marine Fishery Service
NOAA	=	National Oceanic and Atmospheric Administration
OMB	=	Office of Management and Budget
OY	=	Optimum Yield
PC	=	Plan Coordinator (NMFS)
PDT	=	Plan Development Team
RC	=	Regulations Chief (NMFS)
RD	=	Regional Director (NMFS)
SE	=	Staff Economist (NMFS)
SSC	=	Scientific and Statistical Committee



Enforcement

CHAPTER 5

The FCMA establishes a legal regime enforceable throughout an oceanic area roughly one-third the land mass of the continental United States. Because of the practical difficulties of patrolling such a vast area and the legal issues which inhere in the Act's administrative, civil, and criminal sanctions, no management problem looms larger to conservationists and fishermen than that of enforcement. This chapter analyzes the Act's enforcement provisions from three perspectives. First, it describes the Act's overall enforcement scheme. Next, it focuses on several particularly significant provisions. Finally, it analyzes the possibility of conflict between the Act's warrantless search provision and the Fourth Amendment of the federal Constitution.

I. The Overall Scheme

The core of the Act's enforcement provisions are found in 16 U.S.C. §§ 1857-1861. The first of these sections (§1857) spells out the Act's basic prohibitions. The next three sections (§§1858-1860) establish penalties for violations. Section 1858 establishes a system of civil penalties (fines). Section 1859 classifies certain serious violations as criminal offenses. Section 1860 provides for civil forfeitures of a violator's vessel, gear, and catch. Finally, section 1861 places general enforcement responsibility on the United States Coast Guard and the Secretary of Commerce, delineates the powers of enforcement officers (including their authority to board, search, seize, and arrest), and establishes a system of discretionary citations that are, in effect, simply warnings.

It may be helpful to arrange the various sanctions into an enforcement heirarchy. Minor or technical violations of the Act will likely result in mere citation. More serious violations will result in fines or forfeiture of gear, catch and even the vessel. Finally, acts such as forcible interference with enforcement officers are criminal offenses and punishable by fines, imprisonment or both.

The civil and criminal penalties in sections 1858-1861 are applicable to both foreign and domestic fishermen. Additionally the Act provides for two types of indirect sanctions which are applicable only to violations by foreign vessels or nations. First, section 1824(b)(12) grants the Secretary of Commerce the power to revoke, suspend, or restrict a foreign vessel's permit for failure to comply with prohibitions of section 1857, or for nonpayment of civil or criminal fines. Second, section 1821(c)(4)(C) requires foreign nations with which we have Governing International Fisheries Agreements (GIFAs) to "take appropriate steps" under their own laws to insure that their nationals comply with all regulations promulgated pursuant to the FCMA.

It is worth reiterating that while there exist unique sanctions which apply only to foreign fishermen, the FCMA's basic enforcement scheme applies to both foreign and domestic vessels. In fact, United States vessels have received 772 of the nearly 1200 violations charged under the Act. The FCMA was clearly designed to apply to domestic as well as foreign fishermen.

What is Illegal Under the Act?

As a starting point, section 1857 makes it unlawful for any person to violate the Act's provisions, any regulation or permit issued pursuant to the Act, or any part of an applicable GIFA. More specifically, section 1857(1) lists several categories of prohibited conduct which apply to "any person," both foreign and domestic. Additionally, section 1857(2) makes it illegal for

any foreign vessel to fish within the 200-mile conservation zone without a valid permit.

Section 1857(1) specifies prohibitions which can be grouped into three categories. The first category (section 1857(1)(B)) makes it illegal to fish after the revocation or suspension of a permit issued under the Act. Although this prohibition obviously applies to foreign fishermen, it may apply to domestic fishermen as well. Section 1853(b)(1) authorizes any management plan to require permits of United States vessels fishing or wishing to fish within the conservation zone. If a Fisheries Management Plan (FMP) contains such a provision, domestic fishermen would be subject to civil sanctions for fishing during periods of revocation or suspension. It should be noted that this prohibition extends to "support" vessels and activities as well. For example, the broad definitions of "fishing" and "fishing vessel" in sections 1802(10),(11) would make it illegal for a person whose permit has been revoked or suspended to use a vessel to supply another fishing vessel with fuel or provisions or to transfer fish from a vessel to shore facilities.[1]

A second, somewhat-related prohibition is detailed in section 1857(1)(G). This provision makes it illegal to "ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this Act" or its implementing regulations, permits, or GIFA's. Although this prohibition reiterates the proscription of "support" activities mentioned above, its scope is much broader. In particular, section 1857(1)(G) is not restricted to activities done in conjunction with a fishing vessel. As a result, a person far inland who transports, purchases or even possesses "illegal" fish has violated the statute. This violation is underscored by the strict liability imposed by section 1857. Section 1857 violations do not require elements of wilfulness, intent, or even knowledge. Amendments to the Act, which would have inserted the phrase "knowingly and willingly" were defeated in Congress. The violator's mental element, however, does become relevant in determining the level of civil penalties or forfeiture settlements. More attention is given to the "mental element" question later in this chapter.

A third category of section 1857 prohibitions can be generally labeled, "interference with enforcement." These provisions carry the Act's most serious consequences. Subsections 1857(1)(D),(E),(F), and (H) make it illegal to deny an authorized officer permission to board; to forcibly oppose, intimidate or assault an officer in the conduct of his search or inspection; to resist a lawful arrest for a section 1857 violation; or to interfere, delay, or prevent (by any means) the apprehension or arrest of another person, knowing that the other person has violated the Act. For violations of section 1857(1)(D), (E), (F), or (H) there may be six months' imprisonment, a fine of $50,000, or both. If, during a violation of these provisions, a

dangerous weapon is used or an officer placed in fear of imminent bodily injury, section 1859(b) allows 10 years' imprisonment, fines of $100,000, or both. More attention is given later in this chapter to questions of the requisite "force" to trigger certain of these provisions and to the "mental element" needed to convict a person for a criminal offense under the Act. At this point, however, it is worth noting that all of the section 1857 prohibitions, including those which describe criminal offenses, apply to crew members as well as to masters of vessels. While the older Bartlett Act was applicable only to masters, the FCMA section 1857 provisions apply to "any person" which the Act defines to include "any individual."

Who Enforces the Act?

Section 1861(a) places general enforcement responsibility with both the Coast Guard and the Secretary of Commerce. Both agencies, however, may make agreements to use the resources of other federal agencies (including the Department of Defense) and of state agencies in enforcing the Act. As a result, it is possible that fishing vessels may be boarded by personnel of state departments of Fish and Wildlife seeking to enforce the provisions of the federal Act.

What Are Enforcement Officers Authorized To Do?

Section 1861(b) outlines the powers of authorized officers. It allows for arrests of persons, with or without a warrant, who an officer has "reasonable cause to believe" has violated one of the section 1857 prohibitions. The section also authorizes officers, again with or without a warrant, to "board, and search or inspect, any fishing vessel" subject to the provisions of the Act. Although it is likely that the practical difficulties of obtaining a timely warrant at sea provide the type of circumstances under which warrantless arrests or searches can be made, it is not at all clear that arrests and searches may be made free from the U.S. Constitution's Fourth Amendment requirement of probable cause. Section 1861(b)(1)(A) allows for warrantless arrests if based on "reasonable cause," a requirement that is unexplained in the Act's legislative history but which seems to track the constitutional requirement. Section 1861(b)(1)(B), on the other hand, authorizes warrantless searches without mention of probable cause. Moreover, section 1857(1)(D) and Section 1859(a) make it a criminal offense to refuse to permit an officer permission to board and search. The constitutionality of the Act's search provisions is discussed later in this chapter.

Section 1861 grants officers several other powers, particularly the power to seize vessels, fish, or other evidence. Section 1861(b)(1)(C) provides for the seizure of a fishing vessel (including its gear and cargo) that "reasonably appears" to have been used in the violation of any of the Act's

provisions. Section 1861(b)(1)(D) authorizes the seizure of fish (wherever found) taken or retained in violation of the Act. It should be noted that section 1860(e), dealing with civil forfeitures, establishes a rebuttable presumption that all fish found on board a seized vessel are "taken or retained in violation of the Act." Section 1861(b)(1)(E) allows officers to seize any other evidence related to the violation of the Act's provisions. All arrests, searches and seizures are authorized under the Act to be made with or without a warrant.

Section 1861(b)(3) additionally empowers officers to exercise "any other lawful authority." While it is unclear what powers this provision sought to confer, at least two enforcement techniques are likely possibilities. First, the clause might be used to support the use of force in making arrests. As a general rule, officers may use whatever force is reasonably necessary to make an arrest, but they must not use excessive or unnecessary force. Further distinctions are drawn depending on whether the force used is "deadly force" and whether it is being used to arrest for a felony or a misdemeanor. Whatever the "lawful" amount of force, however, section 1861(3) seems sufficiently broad to authorize its use.

A second section 1861(3) power might be the exercise of the right of hot pursuit. Hot pursuit is the right of a coastal nation to chase and arrest a violator of its coastal laws beyond waters subject to its jurisdiction. Although the FCMA does not expressly confer this right on enforcement officials, Congress undoubtedly knew of its use under the Bartlett Act[2/] and Congressional silence on the subject should not be taken to imply disapproval. Instead, frequent reference in the FCMA's legislative history to the Act's "adequate" enforcement authority might be read in conjunction with the broad language of section 1861(b)(3) to authorize a relatively common enforcement technique known to Congress to have been useful in past fishery management enforcement.

When Are Citations Issued?

Section 1861(c) authorizes enforcement officers to issue citations, at their discretion, in lieu of arrests or seizures for violations of the Act. Citations are written notice that a violation has been documented and a warning that future offenses may be dealt with more severely. If the offending vessel holds a permit, the citation is noted on it. In any case, records of all citations are kept by the National Marine Fisheries Service.

Citations are issued for "minor or technical violations" although the Act's regulations fail to define what "minor" infractions are. It has been suggested that unintentional first offenses such as good faith reliance on erroneous navigational charts or failure to display a permit in the proper manner are citable violations. On the other hand, intentional offenses

such as impeding an enforcement official have been described as more serious violations. Although the officer's discretion in issuing citations is not necessarily restricted by the offender's mental intent, consideration of such a factor would be consistent with the consideration given to "degree of culpability" in fixing the severity of civil penalties under section 1858(a). There may be violations which are so serious, however, that the offender's good faith or lack of intent would be irrelevant. As the regulations currently stand, the officer's judgment on issuing a citation is quite broad.

Generally, issuance of a citation means that other forms of penalties are inappropriate. Section 1860(a) explicitly states that acts for which citations are sufficient sanctions are exempt from the Act's provisions for civil forfeitures. This express exemption, however, is absent from the Act's provisions for civil penalties (fines). Arguably, the Act can be read to authorize civil fines for violations which had already resulted in citations. The implementing regulations help to clarify this possibility. Under the Department of Commerce regulations,[3/] issuance of a citation usually means that other penalties are inappropriate, but additional penalties are allowed when further investigation or later review indicates that violations are more serious than initially believed. Additional penalties are also permissible if later investigation reveals that citations are inadequate to "serve the purposes of the Act." Consequently, it would seem that even the civil forfeiture provisions might be imposed if the initial citation is later determined to have been an "insufficient" sanction.

Citations may be appealed within 60 days of issuance by filing an application for review with the NMFS Regional Director nearest the place where the citation was issued. The application must set forth reasons which make review appropriate "in the interest of justice." By the terms of the Act, the Director's decision is final and unappealable.

Civil Penalties

Any person found to have violated one of the section 1857 prohibitions is subject to a fine which can range as high as $25,000 for each violation. Moreover, each day of a continuing violation constitutes a separate offense. In determining the actual amount of the fine, however, the Secretary of Commerce must take into account the "nature, circumstances, extent, and gravity of the acts committed and, with respect to violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."

The procedure by which civil penalties are assessed is relatively straightforward. The "violator" receives a notice of violation which contains a concise statement of facts believed to show a violation, reference to the specific statutory

provision at issue, and the amount of the proposed penalty. The notice may also contain an initial proposal for compromise or settlement. The "violator" then has 45 days in which to respond. He may ask that no penalty be assessed or that the amount be reduced, and he may admit or contest the legal sufficiency of the charges. At the end of this 45-day period, the NMFS assesses the amount of the penalty and serves a notice of assessment on the "violator."

If the "violator" is unsatisfied with the Director's action, he may file a dated written request for a hearing.[4] The Director is free to modify or remit a civil penalty at any time. If, at the end of the hearing process, a "violator" is still unsatisfied with the civil penalty, section 1858(b) provides for appeals to an "appropriate court of the United States," which probably means a federal district court.[5]

In the event an assessment is not timely paid, section 1858(c) authorizes the Attorney General to recover the amount in federal district court. Although the Act itself does not impose an automatic statutory lien on an offending vessel, such vessels can be attached in the Attorney General's action for recovery. Moreover, if a foreign vessel fails to pay a civil penalty, section 1824(b)(12) requires the Secretary of Commerce to impose additional sanctions, which may include revocation or modification of the vessel's permit.

Civil Forfeitures

In the past, vessel forfeiture was the chief means by which federal fishing laws were enforced. Under the FCMA, however, forfeiture is only one of several possible penalties. Moreover, under the Secretary's 1981 regulation, forfeiture is ranked third in order of severity of the Act's four penalty categories. Thus it would seem that forfeiture will be sought mostly for serious or repeated violations. Nonetheless, the Act's forfeiture provision is cast in very broad language.

As we have seen, section 1861 authorizes enforcement officers to seize a fishing vessel (together with its fishing gear, furniture, appertenances, stores, and cargo) which reasonably appears to have been used in violation of the Act. Officers may also seize illegally taken and retained fish; there is a rebuttable presumption that all fish found on board a seized vessel were illegally taken or retained. Section 1860 makes such vessels and fish subject to judicial forfeiture.

Once all or part of a vessel or catch is seized, the Attorney General can begin forfeiture proceedings in federal district court. If judgment is entered for the United States, forfeiture orders are governed by those provisions of the custom laws relating to the disposition of forfeited property, proceeds from the sale of forfeited property, remission or mitigation of

forfeitures, and the compromise of claims.

A person whose vessel or catch is seized subject to forfeiture may file a petition for relief with the appropriate Regional director of NMFS within 60 days. The petition may be for interim release of the seized property, for mitigation or total remission of the property. An investigation is made of the petition after which the Director decides the matter. The Director may mitigate or remit the forfeiture if he finds that the underlying violation for which it was incurred was committed without willful negligence or intent. He may also remit or mitigate if "other circumstances exist which justify" such action. In either case, discontinuance of forfeiture proceedings may be conditional on the payment of a specified amount of money. Similarly, section 1860(d) provides for a postponement in the forfeiture process upon the receipt of a satisfactory bond or other security. Seized fish may be sold, subject to court approval, for not less than fair market value. The proceeds are then deposited with the court pending disposition of the forfeiture proceeding.

Criminal Offenses

Section 1859(a) makes it a criminal offense to commit any act prohibited by subsections 1857(1)(D), (E), (F), or (H), which relate to interference with enforcement, or by section 1857(2), which proscribes foreign fishing without a permit. As has already been mentioned, such offenses are punishable by a fine of up to $50,000, imprisonment for up to six months, or both. If a violator uses a dangerous weapon or places an officer in fear of imminent bodily injury, the penalties become even more severe.

Although NMFS's policy is to vigorously enforce the Act, it would seem that criminal penalties should be reserved for only the most aggravated offenses. This would be consistent with the international trend toward decriminalization of fisheries offenses reflected in the new Convention (treaty) recently adopted by the Third United Nations Conference on the Law of the Sea.[6]

Permit Sanctions

In addition to the formal civil and criminal penalties spelled out in the Act, the 1977 regulations authorize permit sanctions for any section 1857 violation or for the nonpayment of civil or criminal fines. Under these regulations[7] the Director of NMFS may revoke, suspend, or modify a permit and may even prohibit the issuance of a permit in future years. These sanctions apply to foreign vessels which hold section 1824 permits and also to domestic vessels which might hold a section 1853(b)(1) permit required of vessels by a FMP for their fishery. In either case, the regulations provide for notice and hearing procedures governing the Director's imposition of

sanctions.

II. Particulars

Mental Element for Violations of the FCMA

In general, no particular mental element, or mens rea, is required in order for an accused violator to be found guilty of one of the section 1857 offenses. One violates the Act regardless of intent, wilfulness, negligence or even knowledge. (An exception is section 1857(1)(H) which proscribes interference with another's arrest knowing that the other person has violated the Act.) At first glance, this blanket liability may seem somewhat harsh, especially for a person found guilty of merely possessing illegal fish under section 1857(1)(G). This harshness is modified by consideration of an offender's "degree of culpability" in assessing civil penalties and of "wilful negligence or intent" in considering remission or mitigation of forfeitures. Interestingly, there is no similar consideration explicitly required in establishing criminal fines or imprisonment under section 1859(b), the Act's harshest sanctions.

The question arises: can one be found to violate the Act and perhaps imprisoned, without any mens rea element defined in an offense? As a general proposition, a mens rea element is the rule rather than the exception in Anglo-American criminal jurisprudence. There is an equally well-established principle, however, that the constitutional requirement of due process is not violated merely because mens rea is not specified as an element of a crime.[8] This is especially true of statutes which are "essentially regulatory,"[9] a statutory category into which the FCMA clearly falls.

The discretion to exclude mens rea elements from offenses is broad, but it is not unbounded. In Holdridge v. United States,[10] Judge, now Justice, Blackmun established certain factors which must be present for a statute constitutionally to exclude a mens rea element from its offenses. These requirements include that the statute be basically policy-oriented, that it establish a reasonable standard, and that it prescribe penalties which are relatively small and which do not "gravely besmirch" a person's reputation.

The Holdridge factors were applied in one of the last of the fishing enforcement cases under the now-repealed Bartlett Act. In United States v. Ayo-Gonzalez,[11] the federal court of appeals upheld the forfeiture of a foreign vessel and criminal conviction of its master in the absense of any proof of culpability or fault. At issue was fishing by a Cuban vessel within the 12-mile Contiguous Zone as proscribed by the Bartlett Act. The vessel's captain claimed that he had innocently and inadvertantly drifted into the Contiguous Zone only after having lost contact with his fleet's larger vessel, upon which he

depended for navigational information. He attacked the constitutionality of a statute which fixed criminal penalties on a person who did not even know he was violating the Act. Applying the Holdridge criteria, however, the court found that the Bartlett Act was a policy-oriented statute, set reasonable standards, established maximum penalties (including imprisonment for up to one year) which were relatively light and which did not "gravely besmirch" or do "grave damage" to an offender's reputation. Although a similar constitutional attack has not yet been made on the FCMA, it is likely that the reasoning of Ayo-Gonzalez would control.

It seems that Congress intended to exclude mens rea elements from the FCMA's section 1857 prohibitions. In light of the Act's reference to "degree of culpability" in section 1860-(a), the absence of similar reference to a mental element in section 1857 is conspicuous. Moreover, Congress expressly rejected an amendment which would have prefaced section 1857 conduct with a "knowingly and willingly" requirement. Given rather clear legislative intent and the Holdridge, Freed, and Ayo-Gonzalez decisions, it seems that one may violate the Act regardless of intent, negligence, or even knowledge.

How Much "Force" is Required to Trigger Violations of Section 1857(1)(E)?

Section 1857(1)(E) makes it unlawful for any reason to "forcibly assault, resist, oppose, impede, intimidate or interfere" with an officer in the conduct of his search or inspection. The adverb, "forcibly," should be read as modifying all of the verbs and not simply "assault."[12] The most significant legal question associated with this provision is how much force is required before one "forcibly" violates the Act? The question is of more than academic importance given the Act's reservation of severe penalties for more "serious" violations.

The necessary quantum of force is obviously a question of degree. In United States v. Bamberger,[13] the court found that an analogous provisions of the Federal Criminal Code did not mean to "sweep in all harassment of government officials involving 'laying a finger' on them. Nor is it used to penalize frustrating an official, without more, even if that action is deliberate." Perhaps the best indication of the "necessary" amount of force is developed by specific examples. In United States v. Frizzi,[14] spitting in an officer's face was held to be "forcible assault." In Bamberger, the physical restraining of a prison guard and removal of keys constituted sufficient "force." In Carter v. United States,[15] accelerating a car while a federal officer was attempting to enter and search was enough to sustain a conviction for "forcible" resistance. Finally, in United States v. Goodwin,[16] the court had no difficulty in finding "kicking and flailing" as constituting sufficient force. At the other end, the court in United States v.

Cunningham,[17] suggested that mere deception of an officer or mere refusal to unlock a door through which federal agents sought entry did not constitute forcible acts.

Courts are divided over whether threats of force are themselves forcible acts. Cunningham concluded that threats were not forcible events. In Bamberger, however, the court held that although an implied threat of force in the indefinite future did not constitute a violation, a person who has the "present ability to inflict bodily harm upon another and wilfully threatens or attempts to inflict bodily harm, may be found guilty of forcibly assaulting such person."

III. The Warrantless Search Provision

Section 1861(b)(1)(B) authorizes officers, with or without warrant, to "board, and search or inspect, any fishing vessel which is subject to the provisions of this Act." Conspicuously missing from this authorization is the requirement that the boarding officer have probable cause to believe that a violation has occurred. "Reasonable cause" is required in section 1861 (b)(1)(A) for an officer to make a warrantless arrest and in section 1861(b)(1)(C) before all or part of a vessel may be seized. The Act's warrantless search provision thus raises two issues.[18] First, is it always permissible to search without a warrant? Second, in a warrantless search, does the Fourth Amendment require that an officer have at least reasonable cause to believe a violation has occurred? These basic issues, in turn, raise yet a third issue: the applicability of Constitutional protections to foreign vessels.

As a starting point, the protections of the Fourth Amendment apply to searches of both domestic vessels[19] and foreign vessels.[20] Once aliens become "subject to liability under United States law, they also have a right to benefit from its protection."[21] The Fifth Circuit Court of Appeals has concluded, in particular, that the applicability of the Fourth Amendment was "not limited to domestic vessels or to our citizens; once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment."[22]

As a general proposition, the Fourth Amendment requires an enforcement officer to obtain a warrant based on probable cause to believe an illegal act has occurred before conducting a search.[23] To this general rule, however, there are many exceptions. The warrant requirement has been excused when the search involves an automobile, is incident to a lawful arrest, is conducted in hot pursuit of a criminal suspect, involves crucial circumstances of officer safety or destruction of evidence, is an administrative search or is made at a border. Although warrantless searches under the FCMA might fit under more than one of these exceptions, it seems to fit most clearly under the

exception for "administrative searches." This categorization is significant because administrative searches may sometimes be constitutionally conducted with neither a warrant nor probable cause.

Searches pursuant to regulatory authority have become more prevalent in this era of regulatory agencies. Four cases mark the contours of the constitutional challenges that have been raised against warrantless administrative searches. In Camara v. Municipal Court,[24] and See v. City of Seattle,[25] the U.S. Supreme Court held that individuals must be protected from arbitrary intrusions by government inspectors making searches with neither warrants nor probable cause. To this rule, however, the Court in Camara alluded to exceptions for "certain carefully defined classes of cases." In Colonnade Catering Corp. v. United States[26] and United States v. Biswell,[27] the Supreme Court defined two of these exceptions--searches of the liquor industry and the firearms industry--where neither warrants nor probable cause is necessary. The Colonnade and Biswell exceptions were justified in light of the history of pervasive regulation of the liquor and firearms businesses. By the Court's analysis, individuals in these businesses cannot reasonably have the same expectations of privacy as they could in other endeavors. Fourth Amendment protection is therefore correspondingly less than that articulated in the Camara and See cases.

The question thus becomes, is fishing also a "pervasively regulated industry" within the meaning of the Biswell and Colonnade exceptions? Although distinctions can be drawn, courts seem to be answering the question affirmatively. In State v. Mach,[28] the Washington Court of Appeals held squarely that commercial gillnet fishing had a history of regulation which subjected gillnet fishermen to warrantless searches under the Biswell doctrine. The Mach court referred to several other state court decisions which had also described fishing as a heavily regulated industry.[29]

At issue in Mach were warrantless searches pursuant to state fishing regulations (the Fourth Amendment applies to the states as well as the federal government). In United States v. Tsuda Maru,[30] a federal district court upheld warrantless searches of foreign vessels under the FCMA. Significantly, the court held that the "federal interests present and the pervasive and historical regulation of fishing bring this case well within the exception to the warrant requirement defined in [Biswell] and [Colonnade]." The facts in Tsuda Maru deserve careful attention. On January 26, 1979, the Japanese vessel "Tsudu Maru" was boarded and inspected by Coast Guard and National Marine Fisheries Service personnel within the FCZ off Alaska. This search was made without a warrant and there was no indication that the boarding officers had probable cause to suspect a violation of the act. During the inspection, the officers discovered intentional underlogging of incidental catch (by

comparing the ship's cumulative catch log with their estimates of the amount of frozen fish stored on the ship) and recommended seizure of the ship to their superiors. Approval was given and the ship was seized and taken to Kodiak, Alaska. After its arrival in Kodiak, the ship was subject to three additional searches, each more thorough than the initial inspection at sea. Concerning this sequence of events, the court concluded, "after the initial boarding and inspection . . . the Coast Guard and other enforcement personnel had probable cause to justify the seizure and subsequent searches . . . . ." The court's holding is somewhat cryptic in that it fails to explain why probable cause was needed for the latter three searches if FCMA searches fall so clearly within the Biswell and Colonnade exception. Nonetheless, the court's holding clearly infers that probable cause was not needed to justify the initial inspection at sea. To this extent, Tsuda Maru is consistent with Mach and other state court decisions which have also upheld warrantless, non-probable-cause searches pursuant to fishing regulation.

A second justification for warrantless searches, applicable to foreign vessels only, is that the operators of such vessels have consented to such searches in advance. In a 1980 FCMA case, United States v. Kaiyo Maru Number 53,[31] a federal district court held that, since owners or operators of foreign vessels must agree as a condition to their fishing permits to allow boarding and inspection of their vessels by authorized U.S. officers, such boardings and inspections or searches may be constitutionally conducted without a warrant. It is not at all clear, however that withholding fishing privileges until constitutional rights are waived is in itself permissible.[32]

Fishing enforcement searches, though fitting within the Fourth Amendment's administrative search exception, are not without restraints. Specific searches need not be based on probable cause, but an administrative warrant may be required of the overall administrative plan of which the specific search is a part. The purpose of a general administrative warrant is to insure that searches are made pursuant to neutral criteria and are reasonable in scope. This, in turn, may require regulatory bodies such as Regional Councils to develop enforcement plans and search procedures which limit a boarding officer's discretion. Additionally, there seem to be direct constitutional boundaries to fishing enforcement searches. The Tsuda Maru court noted that the scope of the search is implicitly restricted to those areas of the ship which must be inspected to enforce fishing regulations. The court assumed "this would exclude living quarters and the crew's personal property where the expectation of privacy is entitled to more weight."

IV. Conclusion

While the legal issues are intricate and not yet fully resolved, it is the practical difficulties of enforcement across

broad expanses of open ocean that are the primary concern of those charged with insuring that the Act's mandates are obeyed. A faltering economy and associated budget cuts at all levels of government are reflected in diminishing resources available to enforcement agencies. Five years of success in the Act's implementation would appear to justify continued allocation of the resources necessary to achieve effective enforcement, the obvious key to future success of the FCMA.

END NOTES: Introduction

CHAPTER 1

1. 16 U.S.C. §§ 1801-1882 (1976 & Supp. V 1981) [hereinafter cited as FCMA].

2. This discussion of the role of international law in fisheries management is based on G. KNIGHT, MANAGING THE SEAS LIVING RESOURCES 17 (1977), a brief but comprehensive overview of fisheries management up to and including the FCMA.

3. Maximum sustainable yield is the highest point to which a given fishery can be harvested on an indefinite basis without reducing the size of the stock to an unacceptable level. Id. at 8. For a more detailed discussion of the concept, see F. CHRISTY & A. SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES: SOME PROBLEMS OF GROWTH AND ECONOMIC ALLOCATION 6-16 (1965).

4. See G. KNIGHT, THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT 3 (1975).

5. Hollick, The Roots of U.S. Fisheries Policy, 5 OCEAN DEV. & INT'L L. 61-97 (1978). This article presents a detailed analysis of U.S. fisheries policy up through the 1958 Law of the Sea Conference, with a particularly helpful section on the extended jurisdiction claims of Latin American countries.

6. For information regarding specific international fishery agreements, see F. CHRISTY & A. SCOTT, supra note 3, at 192-214; A. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES: A STUDY OF REGIONAL FISHERIES ORGANIZATIONS (1973). For information on international agreements to which the United States was a party in 1975, see Jacobs, United States Participation in International Fisheries Agreements, 6 J. MAR. L. & COM. 471-529 (1975).

7. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (in force Sept. 10, 1964).

8. Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (in force March 20, 1966).

9. Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (in force Sept. 30, 1962).

10. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (in force June 10, 1964).

11. Bartlett Act, Pub. L. No. 89-658, 80 Stat. 908 (1966) (repealed 1976). The Bartlett Act was repealed by the FCMA.

12. A Law of the Sea treaty was finally adopted in the spring of 1982. Due primarily to objectionable provisions relating to mining of the seabeds, however, the United States did not vote for the treaty. Nevertheless, the treaty's provisions on fisheries management, especially the 200-mile Exclusive Economic Zone, are widely regarded--even by the U.S.--as reflective of current customary international law. See Third United Nations Conference on the Law of the Sea, Draft Convention on the Law of the Sea, arts. 55-75, U.N. Doc. A/CONF. 62/L.78 (1981).

13. U.S. GENERAL ACCOUNTING OFFICE, THE U.S. FISHING INDUSTRY--PRESENT CONDITION AND FUTURE OF MARINE FISHERIES 13 (1976). This report is a very detailed analysis of the condition of the U.S. fishing industry prior to the FCMA.

14. Atlantic: Haddock, Herring, Yellowtail Flounder; Pacific: Mackerel, Sablefish, Shrimp; Atlantic (but not Gulf of Mexico): Menhaden; Atlantic and Pacific: Halibut.

Alaska pollock (Pacific), yellowfin sole (Pacific) and hake (Pacific) were listed as species which were overfished, but of less significance to U.S. fishermen. S. REP. NO. 416, 94th Cong., 1st Sess. 16 (1975) reprinted in LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, OCEAN AND COASTAL RESOURCES PROJECT, 94th Cong., 2d Sess., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 670 (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY].

15. The Foreign Relations Committee reported unfavorably because adoption of the bill was inconsistent with existing U.S. legal obligations, particularly the 1958 Convention on the High Seas. The Committee was further concerned that the bill would undermine treaty negotiation efforts at the Third Law of the Sea Conference. S. REP. NO. 459, 94th Cong., 1st Sess. 5 (1975), reprinted in LEGISLATIVE HISTORY, supra note 14, at 587.

16. President Ford made the following statement upon signing the FCMA into law:

> I am today signing a bill which provides a comprehensive domestic and international program for the conservation and management of our fisheries.
> * * *
>
> Some specific aspects of this legislation require comment. I supported this legislation on the condition that the effective date of the legislation would be delayed so that the Law of the Sea Conferene could complete its work and to permit sufficient time for a proper transition.
>
> The tasks of continuing our negotiating efforts at the Law of the Sea Conference and at the same time establishing new fishery plans issuing hundreds of new fishing permits and negotiating specific fishery agreements with foreign governments will require substantial resources in excess of those presently allocated to international fisheries affairs. The Departments of State, Commerce, and Transportation must do their best to implement the act fully. Since available resources are finite, however, it is possible that full implementation may take more time than is provided in the act.
>
> I am concerned about our ability to fulfill the tasks in the time and manner provided in the act. I am particularly anxious that no action be taken which would compromise our commitment to protect the freedom of navigation and the welfare of our distant water fisheries. Surely we would not wish to see the United States engaged in international disputes because of the absence of needed flexibility.
>
> Additionally, I am concerned about four specific problem areas which are raised by this legislation:

> First, absent affirmative action, the subject bill could raise serious impediments for the United States in meeting its obligations under existing treaty and agreement obligations;
>
> Second, the bill contemplates unilateral enforcement of a prohibition on foreign fishing, for native anadromous species, such as salmon, seaward of the 200-mile zone. Enforcement of such a provision, absent bilateral or multilateral agreement, would be contrary to the sound precepts of international jurisprudence;
>
> Third, the enforcment provisions of H.R. 200 dealing with the seizure of unauthorized fishing vessels, lack adequate assurances of reciprocity in keeping with the tenets of international law; and
>
> Fourth, the measure purports to encroach upon the exclusive province of the Executive relative to matters under international negotiations.
>
> Although these matters are of major importance, I am hopeful they can be resolved by responsible administrative action and, if necessary, by curative legislation. Accordingly, I am instructing the Secretary of State to lead Administration efforts towards their effective resolution.

Statement By The President Upon Signing H.R. 200 Into Law, 94th Cong., 1st Sess. (1975), reprinted in LEGISLATIVE HISTORY, supra note 14, at 34.

17. For a helpful discussion of the arguments for and against passage of the FCMA, see the report of the Senate Commerce Committee, S. REP. NO. 416, 94th Cong., 1st Sess. (1975), reprinted in LEGISLATIVE HISTORY, supra note 14, at 653.

18. U.S. DEPT. OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, FISHERIES OF THE UNITED STATES, 1980 (1981). These reports are an excellent source of data on the U.S. fishing industry.

19. UNITED STATES GENERAL ACCOUNTING OFFICE, PROGRESS AND PROBLEMS OF FISHING MANAGEMENT UNDER THE FISHERY CONSERVATION AND MANAGEMENT ACT 14 (1979).

END NOTES: Foreign Fishing

CHAPTER 2

1. 16 U.S.C. §§ 1801-1882 (1976 & Supp. V 1981) [hereinafter cited as FCMA].

2. Id. at § 1812. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured. Id. at § 1811. In effect, therefore, the fishery conservation zone is a 197-nautical-mile zone contiguous to the present three-mile territorial sea.

3. Magnuson, The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries, 52 WASH. L. REV. 427, 431 (1977).

4. Id. at 431.

5. Id. at 432.

6. Id. at 431.

7. For a list of these agreements, see S. REP. NO. 416, 94th Cong., 1st Sess. 66-60 app. (1975) reprinted in LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, OCEAN AND COASTAL RESOURCES PROJECT, 94th Cong., 2d Sess. (1975), A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 653, 720-23 (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY].

8. For example, during the ten year period ending in 1976, the size of certain herring stocks in the Georges Bank fishing area off New England had declined by more than eighty percent. U.S. DEPT. OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT/PRELIMINARY FISHERY MANAGEMENT PLAN FOR THE ATLANTIC HERRING FISHERY OF THE NORTHWESTERN ATLANTIC 68 (1977) [hereinafter cited as ATLANTIC HERRING FMP].

Whereas in 1960 United States vessels had harvested 88% of the total fish catch from Georges Bank, by 1972 the U.S. catch had decreased to only 10% of the total fish catch. S. REP. NO. 416, supra note 7, at 15, reprinted in LEGISLATIVE HISTORY, supra note 7, at 669.

9. See, H.R. REP. NO. 445, 94th Cong., 1st Sess. 29 (1975), reprinted in LEGISLATIVE HISTORY, supra note 7, at 1051, 1080.

10. FCMA, supra note 1, at § 1801(a).

11. In 1974, the International Court of Justice in the Fisheries Jurisdiction Cases, 1974 I.C.J. 3, declared Iceland's fifty mile extension of its fishery zone invalid under international law because its claim was for exclusive fishing rights rather than preferential rights.

12. Senate Debate and Passage of H.R. 200 (S. 961), 94th Cong., 2d. Sess. (1976) reprinted in LEGISLATIVE HISTORY, supra note 7, at 22, 265 (statement of Senator Hollings).

13. Id., reprinted in LEGISLATIVE HISTORY, supra note 7, at 228, 440-41 (statements of Senators Magnuson and Gravel).

14. Magnuson, supra note 3, at 435.

15. An Act of Registering and Clearing Vessels, Regulating the Coastal Trade, and for Other Purposes, ch. 8, 1 Stat. 305 (1793). Section 1 of this Act corresponds with 46 U.S.C. § 251 (1976). Under the Coasting and Fishing Act, U.S. fishermen have the exclusive right to fish within three miles of the U.S. coast line. Aside from a prohibition on the direct landing of fish in the United States by foreign vessels, the law is without sanctions.

16. FCMA, supra note 1, at § 1857(2)(A). Foreign fishing within state waters is now punishable by a fine of not more than $100,000 or imprisonment for not more than 1 year, or both. Id. at § 1859(b).

17. Section 230 of the American Fisheries Promotion Act of 1980, Pub. L. No. 96-561, 94 Stat. 3296 [hereinafter cited as AFPA], amends section 201(d) of the FCMA, supra note 1, at 1821(d).

18. See infra notes 126-38 and accompanying text.

19. FCMA, supra note 1, at § 1821.

20. Id. at § 1821(f).

21. Id. at § 1824.

22. Id. at §§ 1821(c), 1824.

23. Id. at § 1824.

24. Id. at § 1853(a)(3).

25. Id. at § 1853(a)(4).

26. Id. at § 1821(d).

27. Id. at § 1821(e).

28. Joint Venture Amendment, Pub. L. No. 95-354, 92 Stat. 519 (1978).

29. FCMA, supra note 1, at § 1824(b)(6)(B)(i).

30. Id. at § 1824(b)(10).

31. AFPA, supra note 17, at §§ 232, 236.

32. Included within the Act's jurisdiction are anadromous species such as salmon which spawn in U.S. waters and migrate out to sea. FCMA, supra note 1, at § 1812(2).

33. The Act also extends to 31 species of coral, crustaceans, mollusks, and sponges, which are listed as Continental Shelf fishery resources, even if found in waters beyond the FCZ. Id. at §§ 1801(b)(1), 1802(4), 1812. Other sedentary species may be added to the list in the future by the Secretary of Commerce. Id. at § 1802(4).

34. Id. at § 1821(a),(c).

35. Id. at §§ 1821(a),(b), 1822(b),(c).

36. Id. at § 1821(b).

37. Id. at § 1824(b).

38. Id. at § 1821(c).

39. Id. at § 1821(c)(1).

40. Id. at § 1821(g)(2).

41. Id. at § 1821(c)(2)(A)(iii).

42. Id. at § 1821(c)(2)(C).

43. Id. at § 1821(c)(2).

44. Id. at § 1821(c)(2)(D). Under 1980 amendments to FCMA, a United States observer is to be stationed aboard each foreign fishing vessel engaged in fishing in the FCZ unless the Secretary of Commerce determines that it would be impractical or dangerous to do so. AFPA, supra note 17, at 236 (amending FCMA, supra note 1, at § § 1821). The observer program is discussed in Part VI of this chapter.

45. FCMA, supra note 1, at § 1821(c)(2)(E).

46. Id. at § 1821(c)(2)(F).

47. Id. at § 1821(c)(2)(G).

48. Id. at § 1821(c)(3). For a discussion of TALFF and its allocation among foreign nations, see Part III of this chapter.

49. FCMA, supra note 1, at §§ 1821(c)(4), 1824(b)(7).

50. Id. at § 1822(a)(2).

51. Id. at § 1823.

52. Id. at § 1823(d).

53. Due to the delay in obtaining GIFA's with foreign nations wishing to fish in the U.S. fishery conservation zone and the delay in transmitting the signed GIFA's to the Congress, it became apparent to Congress in February, 1977, that the 60 day Congressional GIFA review period would not be completed before the March 1, 1977, implementation date of the FCMA. Congress responded with a joint resolution, approved on February 21, 1977,

which gave congressional approval to governing international fishery agreements negotiated with Bulgaria, Taiwan, the German Democratic Republic, Russia, and Poland, before the lapse of the 60 day review period. Fishery Conservation Zone Transition Act, Pub. L. No. 95-6, § 2, 91 Stat. 14 (1977).

54. FCMA, supra note 1, at § 1821(c).

55. The Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

56. See generally Note, Congressional Authorization and Oversight of International Fishery Agreements Under the Fishery Conservation and Management Act of 1976, 52 WASH. L. REV. 495 (1977).

57. FCMA, supra note 1, at § 1821(c).

58. Id. at § 1822(a)(2), (c)(2).

59. Id. at § 1823.

60. The congressional role in prior fishery agreements had been limited to an after-the-fact examination: the agreements were not subject to ratification because they were not submitted to the Senate as treaties. A House report on an earlier version of the Act reported that, because of the perceived failure of the previous agreements,

> there is an overwhelming need to insure that the utterly bankrupt negotiating procedures of the past decade are not repeated after enactment of this Act. No longer will it be necessary for the United States to go, hat in hand, to foreign capitals to give concessions in return for minimal recognition of conservation principles by the many foreign nations fishing off our shores . . . .
> . . . .
> . . . [T]hese procedures [for congressional review of GIFA's] recognize that the oversight role of Congress cannot be effectively undertaken unless there is adequate review and deliberation before these amendments become a reality.

H.R. REP. NO. 445, supra note 9, at 59-60, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1112.

61. FCMA, supra note 1, at § 1821(g).

62. The illusory effect of reciprocity provision as a method to insure access for the U.S. distant water fleet was recognized by Senator Stevens of Alaska:

> It is to me . . . a principle of reciprocity but not reciprocity of one nation to the other . . . . [W]e must keep in mind that the South American fleets do not fish off the shores of Russia. We do, however, fish off the shores of some South American nations. It is not really reciprocity on a bilateral or multilateral basis. It is reciprocity in a statement of principle rather than anything else.

Senate Debate and Passage of H.R. 200, supra note 12, reprinted in LEGISLATIVE HISTORY, supra note 7, at 228, 417 (statement of Senator Stevens).

63. U.S. DEPT. OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, CALENDAR YEAR 1979 REPORT ON IMPLEMENTATION OF THE FISHERY CONSERVATION ACT OF 1976, at 1 (1980) [hereinafter cited as 1979 REPORT].

64. Department Reviews Developments in International Fisheries Policy, 76 DEP'T ST. BULL. 175, 177 (1977) (statement by Rozanne L. Ridgway, Deputy Assistant Secrtary for Oceans and Fisheries Affairs).

65. Provisional Limits Established for Fishery Conservation Zone, 76 DEP'T ST. BULL. 273, 273 (1977) (statement by Frederick Z. Brown, Director, Office of Press Relations).

66. 81 DEP'T ST. BULL. 31 (L982).

67. FCMA, supra note 1, at § 1853(a)(4).

68. H.R. REP. NO. 445, supra note 9, at 29, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1098.

69. Christy, The Fishery Conservation and Management Act of 1976: Management Objectives and Distribution of Benefits and Costs, 52 WASH. L. REV. 657, 658 (1977).

70. FCMA, supra note 1, at § 1802(18).

71. COUNCIL ON ENVIRONMENTAL QUALITY, MANAGEMENT AND STATUS OF U.S. COMMERCIAL MARINE FISHERIES 27 (1981).

72. 50 C.F.R. § 602.2(b)(2) (1981).

73. Zuboy & Jones, Everything You Always Wanted to Know About MSY and OSY (But Were Afraid to Ask), NOAA TECHNICAL MEMORANDUM NMFS F/SEC-17, June 1980, at 2.

74. See, e.g., J. GULLAND, THE MANAGEMENT OF MARINE FISHERIES 108 (1974).

75. Id.

76. See generally, S. REP. NO. 416, supra note 7, at 21, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1099.

77. HOUSE REPORT NO. 445, supra note 9, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1051, described a situation involving haddock in the Northwest Atlantic, in which severe overfishing had driven the stock close to extinction. The report noted that a zero quota for haddock would not permit the species to restore itself since haddock was incidentally caught in the harvest of other species in the Northwest Atlantic. Accordingly, the harvest of other species must be reduced below MSY to reduce the incidental catch of haddock. Id. at 47 reprinted in LEGISLATIVE HISTORY, supra note 7, at 1099.

78. See, e.g., S. REP. NO. 416, supra note 7, at 21, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677 ("use of the [MSY] objective in fisheries management may lead to substantial economic waste").

79. See, e.g., J. GULLAND, supra note 74, at 108.

80. See, e.g., S. REP. NO. 416, supra note 7, at 18, reprinted in LEGISLATIVE HISTORY, supra note 7, at 673 ("[m]any coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources").

81. F. CHRISTY, ALTERNATIVE ARRANGEMENTS FOR MARINE FISHERIES: AN OVERVIEW 23 (1978).

82. See, e.g., S. REP. NO. 416, supra note 7, at 21, reprinted in LEGISLATIVE HISTORY, supra note 7, at 676; H.R. REP. NO. 445, supra note 9, at 47, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1098.

83. FCMA, supra note 1, at § 1802; see, e.g., S. REP. NO. 416, supra note 7, at 22, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677.

84. H.R. REP. NO. 445, supra note 9, at 47-48, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1098-99.

85. Id.

86. The House Report defines a fish stock as depleted when MSY "has been exceeded and yields are currently less than MSY . . . ." H.R. REP. 445, supra note 9, at 95, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1149.

87. S. REP. NO. 416, supra note 9, at 22, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677.

88. FCMA, supra note 1, at § 1802(18)(B). Note that the Act directs NOAA and the Councils to modify, but not necessarily ignore or supersede, MSY.

89. 50 C.F.R. § 602.2(b)(3) (1981). The national interest in conservation and management of the fisheries is expressed in section 2 of the FCMA, supra note 1, at § 1801, and the national standards in section 301(a) of the FCMA, id. at § 1851(a).

90. 50 C.F.R. § 602.2(b)(3) (1981). See also 1979 REPORT, supra note 63, at 11.

91. FCMA, supra note 1, at § 1853(a).

92. 50 C.F.R. § 602.2(b)(4) (1981).

93. The national considerations are those set forth in section 3(18) of the Act. FCMA, supra note 1, at § 1802(18).

94. 50 C.F.R. § 602.2(b)(4) (1981).

95. 1979 REPORT, supra note 63, at 11.

96. The plan projected optimum yields of 18.0 million pounds for Columbia River fall-run chinook (4.3 million pounds less than MSY) and 31.3 million pounds for the five coho stocks (3.9 million pounds less than MSY). FINAL ENVIRONMENTAL IMPACT STATEMENT/FISHERY MANAGEMENT PLAN FOR COMMERCIAL AND RECREATIONAL SALMON FISHERIES OFF THE COASTS OF WASHINGTON, OREGON AND CALIFORNIA, April 1977, at 22.

97. Values under the plan included an estimated $19.9 million for Columbia River fall-run chinook ($6.2 million more than the MSY value of $13.7 million), and $45.3 million for the five coho stocks ($8.8 million more than the MSY value of $34.7 million). Id.

98. Id. at 22-23.

99. Id. at 23.

100. Id.

101. FCMA, supra note 1, at § 1821(d).

102. Letter from Jim H. Branson, Executive Director of the North Pacific Council, to Mr. David H. Wallace, Acting Assistant Administrator for Fisheries, NOAA, NMFS (Feb. 27, 1978).

103. Id.

104. Id.

105. FCMA, supra note 1, at § 1854(a)(2).

106. FISHERY MANAGEMENT PLAN FOR THE COMMERCIAL TANNER CRAB FISHERY OFF THE COAST OF ALASKA, July 1, 1981, at F-13 through F-15. "Acceptable biological catch" is defined as a seasonally determined catch that may differ from MSY for biological reasons. It may be lower or higher than MSY for species with fluctuating recruitment or may be set lower than MSY to rebuild overfished stocks. Id. at 2-3.

107. Id. at F-12.

108. The Tanner Crab FMP reported a 40% increase in the number of new boats entering the U.S. tanner crab fishery. Id. at F-15.

109. Article 61(2) of the newly adopted Convention on the Law of the Sea states that coastal nations "shall promote the objective of optimum utilization of the living resources in the [200-mile] exclusive economic zone." While the Convention is not yet in force, this "full utilization" principle is arguably currently binding customary law.

110. FCMA, supra note 1, at § 1821(h).

111. Maine v. Kreps, 563 F.2d 1043, 1048 (1st Cir. 1977).

112. The figure was subsequently revised by the National Marine Fisheries Service to an initial size of 234,000 m/t for the 1977 herring stock. Id. at 1048 n.7.

113. Id. at 1048. Recruitment failure occurs when a fish stock cannot survive natural mortality fluctuations, even in the absence of fishing.

114. Id.

115. ATLANTIC HERRING FMP, supra note 8, at 70. The United States withdrew from ICNAF on December 31, 1976, two months before the Act took effect.

116. 563 F.2d 1043 (1st Cir. 1977).

117. Id. at 1049.

118. Id. at 1048-49.

119. FCMA, supra note 1, at § 1802(18)(A).

120. Maine v. Kreps, 563 F.2d at 1049-50.

121. Id. at 1054-55.

122. See Comment, Foreign Fishing Quotas and Administrative Discretion Under the 200-Mile Limit Act, 58 B. L. REV. 95-126 (1978).

123. See text accompanying notes 102-09 supra.

124. Maine v. Kreps, 563 F.2d at 1055-56.

125. Id. at 1056.

126. FCMA, supra note 1, at § 1821(d).

127. Id. at § 1853(4)(A).

128. 50 C.F.R. § 602.3(c)(8)(ii) (1981).

129. H.R. REP. NO. NO. 1138, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 HOUSE REPORT].

130. Id. at 17.

131. Id. at 17-18.

132. Pub. L. No. 96-561, Title II, pt. C, 94 Stat. 3296 (1980) (codified in scattered sections of 16 U.S.C.).

133. 1980 HOUSE REPORT, supra note 129, at 23.

134. FCMA, supra note 1, at § 1821(d)(2). The 1980 Act, as passed, was a compromise version of H.R. 7039. As reported by the Committee on Merchant Marine and Fisheries, H.R. 7039 mandated that TALFF would be the lesser of (1) the allowable level of foreign fishing under the OY system of FCMA, or (2) the fishing level as determined by a complex foreign fishing phaseout formula. 1980 HOUSE REPORT, supra note 129, at 8.

135. FCMA, supra note 1, at § 1821(d)(1)(A).

136. Id. at § 1821(d)(1)(C).

137. Id. at § 1821(d)(1)(D).

138. Id.

139. Id. at § 1821(d)(4).

140. Id.

141. 126 CONG. REC. H9401 (daily ed. Sept. 23, 1980) (remarks of Rep. Forsythe and Rep. Breaux).

142. Id. at H9402 (remarks of Rep. Forsythe).

143. See American Fisheries Promotion: Hearings on H.R. 7039 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 2d Sess. 43 (1980) (statement by Rep. James Weaver) [hereinafter cited as 1980 HEARINGS]. Congressman Weaver had proposed that all foreign vessels be excluded from fishing within 40 miles offshore.

144. The "phaseout reduction" formula of H.R. 7039, as reported by the Committee on Merchant Marine and Fisheries, required a mandatory 15% reduction of the 1979 TALFF for the 1981 harvesting season with further reductions based on U.S. harvesting performance. It also mandated that the amount calculated as the TALFF for a fishery be lesser amount of either the OY minus DAH formula or the "phase out reduction" formula. 1980 HOUSE REPORT, supra note 129, at 8.

145. See id. at 70-72 (dissenting view of Rep. Paul N. McCloskey, Jr.).

146. 126 CONG. REC. H9395 (daily ed. Sept. 23, 1980) (remarks of Rep. Breaux).

147. AFPA, supra note 17, at § 231(a) (amending the Fisheries Conservation and Management Act of 1976, 16 U.S.C. § 1821(e)(1) (1976)).

148. FCMA, supra note 1, at § (1821(e)(1)(A)-(G).

149. Id. at § 1821(e)(1)(H).

150. S. REP. NO. NO. 416, supra note 7, at _____, reprinted in LEGISLATIVE HISTORY, supra note 7, at 680.

151. Id.

152. 126 CONG. REC. H9396 (daily ed. Sept. 23, 1980) (remarks of Rep. Breaux).

153. 1980 HOUSE REPORT, supra note 129, at 33.

154. 126 CONG. REC. H9396 (daily ed. Sept. 23, 1980) (remarks of Rep. Breaux).

155. See MARINE FISH MGMT., Dec. 1981, at 6-7; see also PAC. FISHING, Feb. 1982, at 12.

156. FCMA, supra note 1, at § 1824(b)(1).

157. Id. at § 1824(b)(3).

158. Id.

159. Id. at § 1824(b)(4).

160. Id. at § 1824(b)(6).

161. U.S. DEPT. OF COMMERCE, NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, FISHERY CONSERVATION AND MANAGEMENT ACT (FCMA) OPERATIONS HANDBOOK, at III-4. (1980) [hereinafter FCMA OPERATIONS HANDBOOK].

162. Id. at III-5.

163. FCMA, supra note 1, at § 1824(b)(7).

164. Id. at § 1824(b)(7)(A), (C). For the requirements set out in the GIFA, see supra text accompanying notes 38-49.

165. FCMA, supra note 1, at § 1824(b)(7)(B).

166. Id. at § 1824(b)(7)(E).

167. Id. at § 1824(b)(7)(F).

168. FCMA OPERATIONS HANDBOOK, supra note 161, at III-5.

169. FCMA, supra note 1, at § 1824(b)(10).

170. Id. at § 1824(b)(12).

171. Tomlinson & Brown, Joint Ventures with Foreigners as a Method of Exploiting Canadian Fishery Resources Under Extended Fisheries Jurisdiction 5 OCEAN MGMT. 251, 253 (1979).

172. See Kaczinski, Joint Ventures in Fisheries between Distant-water and Developed Coastal Nations: An Economic View, 5 OCEAN MGMT. 39, 41, 45 (1979).

173. Id.

174. FCMA, supra note 1, at § 1802(11).

175. Id. at § 1821(a)(3).

176. NOAA published a notification of proposed rulemaking regarding joint ventures in the FCZ. 42 Fed. Reg. 30,875 (1977).

177. See H.R. REP. NO. 1334, 95th Cong., 2d Sess. 6 (1978) [hereinafter cited as 1978 HOUSE REPORT]. As an example of the disparate wage scales, it was reported that some foreign fish processors pay their workers 30 per hour, while the average U.S. wage for seafood processing in February and March of 1978 was $4.54 per hour.

178. Fishery Conservation and Managment Act Oversight Hearings Before the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 2d Sess. 86-94 (1978) (statement of Lee Wedding) [hereinafter cited as Senate Oversight Hearings.]

179. Id. at 233 (statement of Dr. Walter Pereyra).

180. Id.

181. Public Hearings on Joint Venture Regulations, Mar. 13, 1979 (statement of Dr. Walter Pereyra). See 44 Fed. Reg. 7708 (1979).

182. See National Marine Fisheries Service Proposed Interim Policy, 43 Fed. Reg. 5398 (1978).

183. 43 Fed. Reg. 20,532 (1978).

184. Id; see also Senate Oversight Hearings, supra note 178, at 16-17 (statement of James P. Walsh, Deputy Administrator, NOAA).

185. Tom Lazzio Fish Co. v. Kreps, No. 78-0914 (D.D.C. filed May 19, 1978); Pacific Seafood Processors Ass'n v. Kreps, No. C78-3135 (W.D. Wash. filed May 23, 1978). With the passage of the FCMA amendments, the causes of action have become moot.

186. Pub. L. No. 95-354, 92 Stat. 519 (1978) (codified in scattered sections of 16 U.S.C.).

187. Id. at § 2 (amending FCMA supra note 1, at § 1801(a)(7), (b)(6)).

188. See 1978 HOUSE REPORT, supra note 177, at 6; SEN. REP. NO. 935, 95th Cong., 2d Sess. 5 (1978) [Hereinafter cited as 1978 SENATE REPORT].

189. Id.

190. FCMA, supra note 1, at § 1824(b)(6)(B)(ii).

191. Id. at § 1824(b)(3).

192. Id. at § 1824(b)(5).

193. Id. at § 1824(b)(4).

194. Id. at § 1824(b)(6)(B).

195. Id. at § 1853(a)(4)(C) - (a)(5).

196. 1978 SENATE REPORT, supra note 188, at 5.

197. 1978 HOUSE REPORT, supra note 177, at 9; 1978 SENATE REPORT, supra note 188, at 5.

198. See 1978 HOUSE REPORT, supra note 177, at 9.

199. Id. at 10.

200. Id. at 6; 1978 SENATE REPORT, supra note 188, at 5-6.

201. FCMA, supra note 1, at §§ 1824(b)(6)(B)(ii), 1853(a)(4)(C).

202. Letter from Edward W. Furia to Terry L. Leitzell (June 4, 1979) (comments on Guidelines for Development of Fishery Management Plans, 44 Fed. Reg. 7708 (1979)).

203. Presentation to the North Pacific Fisheries Management Council on the Subject of Joint Ventures by Sig Jaeger, Mgr., North Pacific Fishing Vessel Owners Association, (Aug. 5-6, 1977).

204. See 1978 HOUSE REPORT, supra note 177, at 9-10.

205. FCMA, supra note 1, at § 1824(b)(7)(F).

206. Id.

207. 1978 SENATE REPORT, supra note 188, at 4.

208. Id.

209. FCMA, supra note 1, at § 1801(b)(6).

210. See 1978 SENATE REPORT, supra note 188 at 5; Sullivan, Future is Clouded by Lack of Policy on Foreign Fishing, NAT'L FISHERMEN, Jan. 1982, at 72.

211. Christy, Regulation of International Joint Ventures in the Fishery Conservation Zone, 10 GA. J. INT'L & COMP. L. 85, 98-99 (1980).

212. Id.

213. See supra text accompanying notes 126-170.

214. See, e.g., FCMA, supra note 1, at § 1821(e)(1)(A), (B), (E).

215. See Chandler, Pacific Joint Ventures Catching On; Problems Slow Progress in Alaska, NAT'L FISHERMAN, Jan. 1981, at 16, 52; Sabella, Joint Ventures: Enormous Promise and Broken Promises, PAC. FISHING, Jan. 1982, at 35.

216. Sabella, supra note 215, at 39.

217. Id.

218. Id.; Joint ventures have also been initiated on the Atlantic Coast, though on a smaller scale. See, e.g., Sullivan, supra note 210.

219. U.S.-Soviet Fishing Agreement Hearings before the House Comm. on Merchant Marine and Fisheries, 96th Cong., 2d Sess. 402 (1980) (statement by Dr. Walter T. Pereyra) [hereinafter cited as Pereyra 1980 Statement].

220. Sabella, supra note 215, at 37.

221. Pereyra 1980 Statement, supra note 219, at 404.

222. Dr. Pereyra has noted that Marine Resources Co. has allowed members of the U.S. processing industry to board the leased Soviet processing vessels to observe the processing techniques which are necessary for a product to be internationally marketable. Id. at 404.

223. Christy, supra note 211, at 97 n.81.

224. Chandler, Arctic Trawler's First Voyage Turns Skeptics Into Believers, NAT'L FISHERMAN, Nov. 1980, at 1.

225. Frozen Fish vs. Cold War, Marine Resources Roots for Detente, PAC. FISHING, Apr. 1980, at 41.

226. See supra text accompanying notes 126-70.

227. FCMA, supra note 1, at § 1821(c)(2)(D).

228. 50 C.F.R. § 611.8 (1978); see also U.S. DEPT. OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, CALENDAR YEAR 1980 REPORT ON THE IMPLEMENTATION OF THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 37-38 (1981) [hereinafter cited as 1980 REPORT].

229. FMCA OPERATIONS HANDBOOK, supra note 161, at III--7.

230. 1980 REPORT, supra note 228, at 38.

231. FCMA OPERATIONS HANDBOOK, supra note 161, at III-7.

232. Id.

233. Id.

234. See 1980 REPORT, supra note 228, at 38; see also 42 Fed. Reg. 17,895 (1977).

235. See Fidell, Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot, 52 WASH. L. REV. 513, 576 (1977).

236. 50 C.F.R. § 611.8(a)(1) (1981).

237. Id. at § 611.8(a)(3).

238. Id. at § 611.8(a)(4).

239. Id. at § 611.8(a)(5).

240. Id. at § 611.8(c).

241. Id. at § 611.

242. 1980 REPORT, supra note 228, at 38.

243. American Fisheries Promotion: Hearings on H.R. 7039 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 2d Sess. 52 (1980) (statement of Richard Frank, Administrator of NOAA).

244. 1979 REPORT, supra note 63, at 29.

245. 1980 REPORT, supra note 228, at 80.

246. 1980 HOUSE REPORT, supra note 129, at 33-34.

247. Id.

248. Id.

249. 1979 REPORT, supra note 129, at 9.

250. American Fisheries Promotion Act of 1980, Pub. L. No. 96-56, tit. II, pt. C., 94 Stat. 3296 (1980) (codified in scattered sections of 16 U.S.C.).

251. Id. at § 236(1) (amending the FCMA, supra note 1, at § 21, § 1821).

252. Id. at § 236(2)(A) (codified at FCMA, supra note 1, at § 1821(i)(2)(A)).

253. Id. at § 236(2)(B)(ii) (codified at FCMA, supra note 1, at § 1821(i)(2)(B)(ii)).

254. Id. at § 236(2)(B)(i) (codified at FCMA, supra note 1, at § 1821(i)(2)(B)(i)).

255. AFPA, supra note 17, at § 236(2)(C) (codified at FCMA, supra note 1, at § 1821(i)(2)(C)).

256. Id. at § 236(3) (codified as FCMA, supra note 1, at § 1821(i)(3)).

257. Id. at § 236(4) (codified at FCMA, supra note 1, at § 1821(i)(4)).

258. Sullivan, Loophole in Breaux Bill Prolongs Shortchanging of Observer Program, NAT'L FISHERMAN, Feb. 1982, at 12.

259. Id.

260. AFPA, supra note 17, at § 236(2)(C) (codified at FCMA,

supra note 1, at § 1821(i)(2)(C)).

261. Id. at § 236(4) (codified at FCMA, supra note 1, at § 1821(i)(4)).

262. As of February 1982, the Reagan administration's budget item for observers calls for an expenditure of one million dollars, which is enough to keep observation at a level of between 8 and 10 percent. Sullivan, supra note 259, at 12.

263. FCMA, supra note 1, at § 1821(c)(2)(E).

264. Id.

265. Id. at § 1824(b)(10).

266. Id.

267. Id.

268. Id.

269. 42 Fed. Reg. 8176 (1977); see also 50 C.F.R. § 611.22 (1979); 50 C.F.R. § 611.22 (1980).

270. Id.

271. 41 Fed. Reg. 55,296 (1976).

272. Id.

273. See 50 C.F.R. § 611.22(c) (1979). Section 10 of the Fishermen's Protective Act of 1967, 22 U.S.C. § 1980 was amended in 1978 by Public Law 95-376, § 3(a), 92 Stat. 714, 715 (1978), to create the Fishing Vessel and Gear Damage Compensation Fund.

274. Fishermen's Protective Act of 1967, 22 U.S.C. § 1980(b) (Supp. V 1981). Section 10(b)(1)(B) of the Act, 22 U.S.C. § 1980(b)(1)(B) (Supp. V 1981), was amended in 1980 by § 241 of the American Fisheries Promotion Act of 1980, Pub. L. 96-561, title II, § 241, 94 Stat. 3300, 3301 (1980), to exclude compensation for gear which is lost or damaged due to the "acts of God." Section 10(b)(1)(B) now provides that "there shall be a rebuttable presumption that any damage, loss or destruction of fishing gear is attributable to another vessel." 22 U.S.C. § 1980(b)(1)(B) (Supp. V 1981).

275. 50 C.F.R. § 611.22(c) (1979). The second installment was waived in 1979. See 1979 REPORT, supra note 63, at 2.

276. AFPA, supra note 17, at § 232 (amending § 204(b)(10) of the FCMA, supra note 1, at § 1824(b)(10)). Foreign fishing fees are established by making the following calculation:

$$\frac{\text{volume of foreign harvest in FCZ (3-200 miles)}}{\text{volume of total harvest (U.S. and foreign 0-200 miles)}} \times \text{Total cost of administering and enforcing the FCMA}$$

277. 1980 HOUSE REPORT, supra note 129, at 35-36.

278. Id. at 36.

279. Id.

280. Id.

281. AFPA, supra note 17, § 232(a).

282. Id. at § 232. The fisheries loan fund established under section 4 of the Fish and Wildlife Act of 1956 (codified at 16 U.S.C. § 742(c) (1976 & Supp. V 1981)) is a revolving fund used by the Secretary of the Interior to make loan for the financing and refinancing of the cost of purchasing, equipping, maintaining, repairing, or operating of new or used commercial fishing vessels or gear.

283. See 1980 HOUSE REPORT, supra note 129, at 48.

284. 50 C.F.R. § 611.22(a)(1) (1981).

285. 47 Fed. Reg. 625 (1982).

286. 45 Fed. Reg. 74,948 (1980).

287. 50 C.F.R. § 611.22(a)(2) (1980).

288. 45 Fed. Reg. 74,948 (1980).

289. 46 Fed. Reg. 2079 (1981).

290. Id.; see also 45 Fed. Reg. 74,948 (1980).

291. See 46 Fed. Reg. 55,731 (1981).

292. Id.

293. Id.

294. 47 Fed. Reg. 626 (1982).

295. Id.

296. Id.

297. 50 C.F.R. § 611.22(a)(2)(i), (b) (1980).

298. 50 C.F.R. § 611.22(a)(2)(i) (1981).

299. 47 Fed. Reg. 629 (1982) (amending 50 C.F.R. § 611(a)(2)(i)).

300. See 46 Fed. Reg. 55731 (1981).

301. See supra text accompanying notes 134-46.

ENDNOTES: Fishery Management Regional Fisheries Management Councils and the States

CHAPTER 3

1. See Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1852 (1976 & Supp. V 1981) [hereinafter cited as FCMA].

2. Id. The intent of Congress was made clear during Senate debates: "[W]e have attempted to balance the national perspective with that of the individual States. We firmly believe that this institutional arrangement is the best hope we can have of obtaining fishery management decisions which in fact protect the fish and which, at the same time, have the support of the fishermen who are regulated." Senate Debates on S.B. 961, 94th Cong., 1st Sess. (1975), reprinted in LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, OCEAN AND COASTAL RESOURCES PROJECT, 94th Cong., 2d Sess. (1975), A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT of 1976, at 955 (Comm. Print 1976) (remarks of Sen. Magnuson).

3. FCMA, supra note 1, at § 1852.

4. Id.

5. Id. at § 1852(h).

6. Id. at § 1851.

7. Id. at § 1852(h).

8. Id. at § 1852(g)(1).

9. Id. at § 1852(g)(2).

10. 50 C.F.R. § 602.4 (1979).

11. FCMA, supra note 1, at § 1852(f).

12. Id. at § 1852(d).

13. See Skiriotes v. Florida, 313 U.S. 69 (1941).

14. The basis for such extra-territorial management has been the states traditional police power. For the states to adequately and effectively control fishing within their boundaries they have found it necessary to reach outside as well. See Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936); Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400 (1934); Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. 2d 56, 130 P.2d 256 (1942); Frach v. Schoetler, 46 Wash. 2d 281, 280 P.2d 1038 (1955).

15. See State v. Bundrant, 546 P.2d 530 (Alaska 1976); Frach v. Schoettler, 280 P.2d 1038 (Wash. 1955); Johnson v. Gentry, 30 P.2d 400 (Cal. 1934).

16. See, e.g., OR. REV. STAT. §§ 506.750.-.751; ALASKA ADMIN. CODE 5, § 07.100 (1969).

17. See FCMA, supra note 1, at § 1856(a) (emphasis added).

18. Id. at § 1856(b) (emphasis added).

19. Administrative Procedure Act, 5 U.S.C. § 554 (1976 & Supp. V 1981); FCMA, supra note 1, at § 1856(b).

20. Although the FCMA does not define "internal" waters and the topic is not one dealt with in the legislative history, the presumption made here seems to be most consistent with the overall scheme of the FCMA. In fact, the same presumption has been made implicitly by the Pacific Council in its management of salmon.

21. See FCMA, supra note 1, at § 1856(a).

22. U.S. CONST. art. I, §8, cl. 3.

23. Manchester v. Massachusetts, 139 U.S. 240 (1891).

24. Id.

25. U.S. CONST. art. VI, cl.2. Very rarely does federal law occupy a legal field completely. See H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); Hart, The Relation Between State And Federal Law, 54 COLUM. L. REV. 489 (1954).

26. The inquiry in every case is the congressional intent. Seldom does the mere delegation of authority act to preempt otherwise valid state regulation. See Rich v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

27. OR. REV. STAT. § 508.265 (1981).

28. See People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, cert. denied, 449 U.S. 839 (1980).

29. Id.

END NOTES: Management Plans

CHAPTER 4

1. See Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1852 (1976 & Supp. V 1981) [hereinafter cited as FCMA]. For a list of current members of the Pacific and North Pacific Councils, refer to Chapter III.

2. FCMA, supra note 1, at § 1852(b)(C).

3. See 50 C.F.R. § 601.22(e) (1979).

4. Although the point is not specifically made in the language of the FCMA a liberal reading of 16 U.S.C. § 1801 (1976 & Supp. V 1981) concerning findings, purposes and policies leads to that conclusion. The Commerce Department has taken the same position. See NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OPERATIONAL GUIDELINES FOR THE FISHERY MANAGEMENT PLAN PROCESS 12 (1978) [hereinafter cited as GUIDELINES].

5. See id.

6. Id. at 12-13.

7. For example, the Pacific Council has elected to manage five species of salmon under a single management plan. The complexities created by such an approach would pale before the task of trying to manage them under separate plans. See PACIFIC FISHERY MANAGEMENT COUNCIL, PROPOSED PLAN FOR MANAGING THE 1980 SALMON FISHERIES OFF THE COASTS OF CALIFORNIA, OREGON AND WASHINGTON (1980). The Pacific Council has also proposed managing pink shrimp under a single plan despite the fact that shrimp within its jurisdiction occur in ten discrete and widely separated "beds". Suggestions that the beds may be biologically separable have been taken into consideration, but the fact that the shrimp fleet is highly mobile and most boats harvest from two or more beds indicates the desireability of comprehensive management. See PACIFIC FISHERY

MANAGEMENT COUNCIL, DRAFT FISHERY MANAGEMENT PLAN FOR THE PINK SHRIMP FISHERY OFF WASHINGTON, OREGON AND CALIFORNIA (1980).

8. Fishery management plans must be consistent with the requirements of "any other applicable law." FCMA, supra note 1, at § 1853(a)(C).

9. 42 U.S.C. §§ 4321-4347 (1976 & Supp. V 1981) [hereinafter cited as NEPA].

10. See 50 C.F.R. § 601.21(b)(1) (1980); GUIDELINES, supra note 4, at 13.

11. Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1976 & Supp. V 1981); 50 C.F.R. § 402.04 (1979).

12. 16 U.S.C. §§ 1361-1407 (1976 & Supp. V 1981).

13. Id.; Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297 (D.D.C.), aff'd in part, rev'd in part, revised in part, 540 F.2d 1141 (D.C. Cir. 1976). See generally Nafziger, Management of Marine Mammals After the Fisheries Conservation and Management Act, 14 WILLAMETTE L.J. 153 (1978).

14. See GUIDELINES, supra note 4, at 15-16.

15. Coastal Zone Management Act, 16 U.S.C. § 1456 (1976 & Supp. V 1981); 50 C.F.R. § 601.21(3) (1980).

16. See 15 C.F.R. § 930.43 (1979).

17. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

18. GUIDELINES, supra note 4, at 17-18.

19. NEPA, supra note 9, at § 4332(C).

20. 40 C.F.R. § 1506.4 (1979).

21. See supra note 17.

22. Id.

23. See 50 C.F.R. § 602.2(g)(2); GUIDELINES, supra note 4, at 20.

24. See 50 C.F.R. § 602.4 (1979).

25. Id. at § 1500.9(f) (1979).

26. See FCMA, supra note 1, at § 1852(h)(3); 50 C.F.R. § 602.5(a)(5) (1979).

27. GUIDELINES, supra note 4, at 27-29.

28. Id. at 31-33.

29. FCMA, supra note 1, at § 1854(a).

30. Id. at § 1851.

31. Id. at § 1854(b).

32. Id. at § 1854(c)(B).

33. Id. at § 1855(a).

34. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

35. For comments with respect to a Pacific Council's plan and implementing regulations, write Donald Johnson, Regional Director, National Marine Fisheries Service, 1700 Westlake Avenue North, Seattle, Washington, 98109. For comments with respect to a North Pacific Council's plan and implementing regulations, write Harry L. Rietze, Regional Director, National Marine Fisheries Service, Federal Building, 709 West Ninth Street, PO Box 1668, Juneau, Alaska 99802.

36. FCMA, supra note 1, at § 1855(c).

37. GUIDELINES, supra note 4, at 15.

38. See Administrative Procedure Act, 5 U.S.C. § 553(d) (1976); 40 C.F.R. 1506.10 (1979).

39. See GUIDELINES, supra note 4, at 39-41.

40. Id.

41. Id.

42. Id.

43. Id. at 44-45.

44. FCMA, supra note 1, at § 1852(h)(5); 50 C.F.R. § 602.5(d) (1979).

45. See GUIDELINES, supra note 4, at 44-45.

END NOTES: Enforcement

CHAPTER 6

1. See 50 C.F.R. § 611.2(r)(3)(ii)(iii) (definition of "fishing").

2. In United States v. Fishing Vessel Taiyo Maru No. 28, 395 F. Supp. 413 (D. Me. 1975), a federal district court upheld the right of hot pursuit and arrest of a Japanese trawler beyond the then-existing 12-mile Contiguous Fisheries Zone. For a discussion of hot pursuit and other aspects of enforcement under the FCMA, see generally Fidell, Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot, 52 WASH. L. REV. 513 (1977).

3. 50 C.F.R. § 621.2(b) (1981).

4. The precise regulatory formalities concerning this request, and the conduct of the hearing itself, are detailed at 50 C.F.R. § 621.21-.56 (1981).

5. See Fidell, supra note 1, at 548-49.

6. The Convention was adopted in the spring of 1982 by a vote of 130 for, 4 against, and 17 abstentions. The U.S. voted against adoption and is not likely to sign or ratify the document in the near future. Nevertheless, the fishing provisions of the treaty are widely viewed as being reflective of customary international law. The Convention as adopted has not been put in final form and has not been given a United Nations Document Number, but its essential provisions may be found in the Convention on the Law of the Sea and Resolutions 1 Through 4, United Nation's Working Paper Number 1, June 4, 1982.

7. 50 C.F.R. § 621.51-.56 (1981).

8. United States v. Freed, 401 U.S. 601, 613 n.4 (1971).

9. Morisette v. United States, 342 U.S. 246 (1952). In United States v. Dotterweich, 320 U.S. 277 (1943), the Supreme Court found that individuals could be found guilty of violating the Food, Drug and Cosmetic Act even though "consciousness of wrong-doing be totally wanting." Id. at 284. Later, in Lambert v. California, 355 U.S. 225 (1957), Justice Douglas concluded that "[t]here is wide latitude in lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." Id. at 228.

10. 282 F.2d 302 (8th Cir. 1960).

11. 536 F.2d 652 (5th Cir. 1976).

12. This follows from the court's conclusion in Long v. United States, 199 F.2d 717 (4th Cir. 1952), where the court held that a similar prohibition in the Federal Criminal Code should be read such that the adverb "forcibly" modifies the entire string of verbs which included "assaults, resists, opposes, impedes,intimidates or interferes." Id. at 719.

13. 452 F.2d 696 (2d. Cir. 1971).

14. 491 F.2d 1231 (1st Cir. 1971).

15. 231 F.2d 232 (5th Cir. 1956).

16. 440 F.2d 1152 (3d Cir. 1976).

17. 509 F.2d 961 (D.C. Cir. 1975).

18. The practical result of a finding that a search violates the guarantees of the Constitution's Fourth Amendment is that any evidence found as a result of the search is subject to the exclusionary rule. That is, the evidence will be inadmissible at a subsequent trial. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961).

19. United States v. Odneal, 565 F.2d 598 (9th Cir. 1977).

20. United States v. Cortes, 588 F.2d 106 (5th Cir. 1979).

21. Id. at 110.

22. United States v. Codera, 585 F.2d 1252 (5th Cir. 1978).

23. See, e.g., Jones v. United States, 362 U.S. 257 (1960).

24. 387 U.S. 523 (1968).

25. 387 U.S. 541 (1968).

26. 397 U.S. 72 (1970).

27. 406 U.S. 311 (1972).

28. 23 Wash. App. 113, 594 P.2d 1361 (1979).

29. Paladini v. Superior Court, 178 Cal. 369, 173 P. 588 (1918); State v. Marconi, 113 N.H. 426, 309 A.2d 505 (1973); State v. Westside Fish Co., 31 Or. App. 299, 570 P.2d 401 (1977).

30. 470 F. Supp. 1223 (D. Alaska 1979).

31. 503 F. Supp. 1975 (D. Alaska 1980).

32. See generally United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 282 U.S. 311, 328-329 (1931); Western Union v. Kansas, 216 U.S. 1, 47-48 (1910); Western Union v. Foster, 247 U.S. 105,115 (1917).