

FEDERAL FISHERIES MANAGEMENT

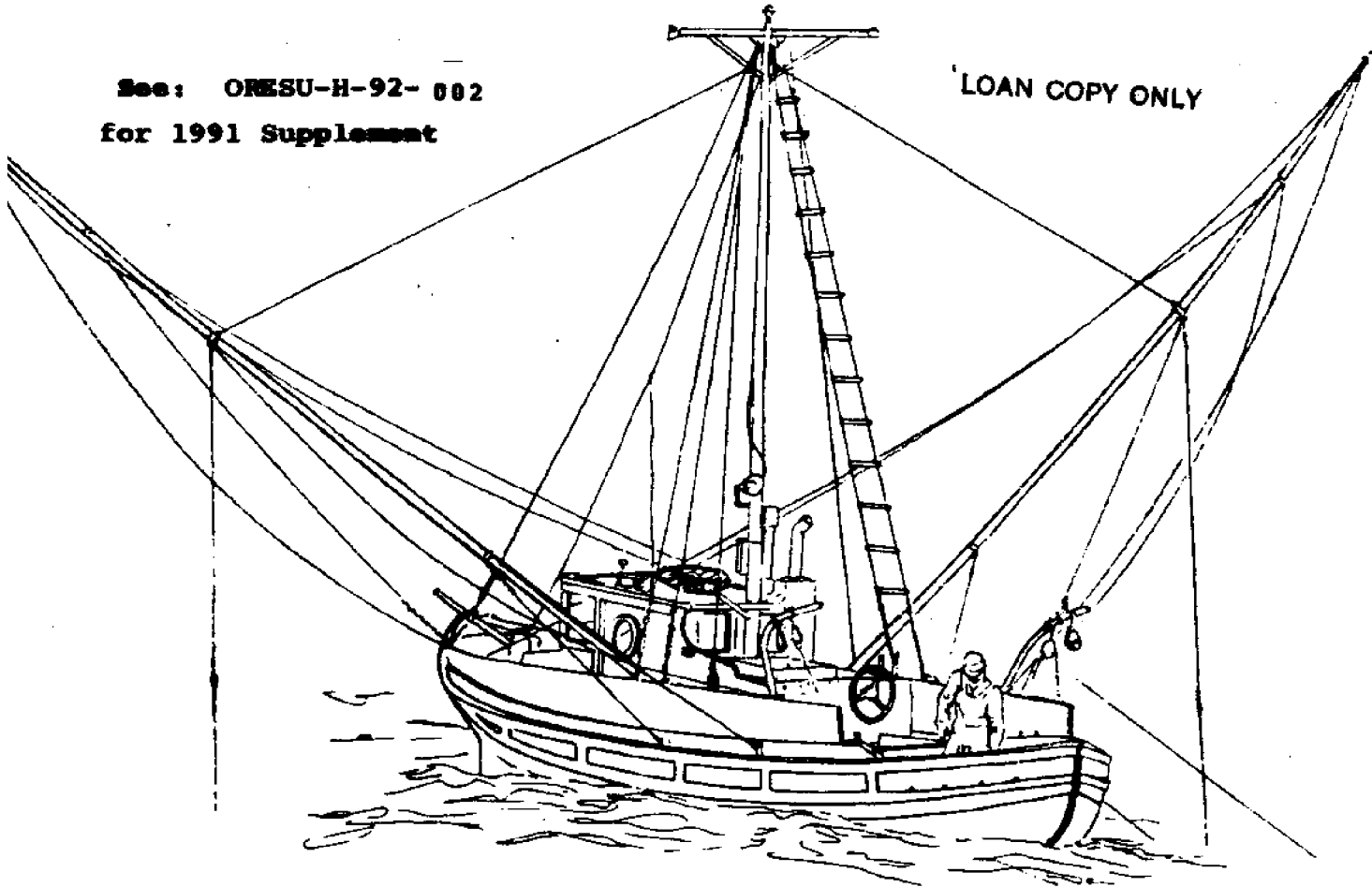
LOAN COPY ONLY

ORES-U-H-85-001 C2

A Guidebook to the Magnuson Fishery Conservation and Management Act

See: ORESU-H-92-002
for 1991 Supplement

LOAN COPY ONLY



NATIONAL SEA GRANT DEPOSITORY
PELL LIBRARY BUILDING
URI, NARRAGANSETT BAY CAMPUS
NARRAGANSETT, RI 02882

Jon Jacobson, Daniel Conner,
and Robert Tozer
Editors

Ocean and Coastal Law Center
University of Oregon Law School
1985

FEDERAL FISHERIES MANAGEMENT

LOAN COPY ONLY

A Guidebook to the
Magnuson Fishery Conservation
and Management Act

CIRCULATING COPY
Sea Grant Depository

1985 Revised Edition

NATIONAL SEA GRANT DEPOSITORY
PELL LIBRARY BUILDING
URI, NARRAGANSETT BAY CAMPUS
NARRAGANSETT, RI 02882

Jon Jacobson, Daniel Conner,
and Robert Tozer
Editors

Ocean and Coastal Law Center
University of Oregon Law School
Eugene, Oregon

January 1985

Funding for this book was provided
by the National Sea Grant College Program
through the program at Oregon State University,
Corvallis, Oregon

This work is a result of research sponsored by NOAA Office
of Sea Grant, U.S. Department of Commerce, under Grant No.
NA 81AA-D-00086 (Project No. R/PPA-21). The U.S. Government
is authorized to produce and distribute reprints for
governmental purposes notwithstanding any copyright notation
that may appear hereon.

The Oregon State University Sea Grant College Program is
supported cooperatively by the National Oceanic and
Atmospheric Administration, U.S. Department of Commerce,
by the State of Oregon, and by participating local governments
and private industry.

Jon Jacobson is Professor of Law at the
University of Oregon and Co-Director
of the Ocean and Coastal Law Center
Daniel Conner and Robert Tozer are research assistants
for the Ocean and Coastal Law Center.

Additional Copies of this Guidebook (ORESU-H-85-001)
are available from:
Ocean & Coastal Law Center
University of Oregon Law School
Eugene, OR 97403

Price of the Guidebook is \$5.00

Preface to Revised Edition

Such is the pace of federal fisheries law that the original edition of the Guidebook was outdated even as it was being published. This revised edition incorporates the 1983 amendments to the Fishery Conservation and Management Act, together with regulations in effect as of mid-1984. Its loose-leaf format will permit convenient and inexpensive updating of Guidebook material.

The scope of the revised edition has been expanded somewhat to include recent developments in federal law that are peripheral yet possibly of great importance to future implementation of the FCMA. Most importantly, these include the interlock between the FCMA and the Coastal Zone Management Act, how each of these Acts bears upon CZMA "federal consistency" provisions, and also the possible effect on the FCMA of the Supreme Court's ruling on the unconstitutionality of the "legislative veto."

Another new feature of this edition is its "pan-Pacific" emphasis, with coverage expanded to include fisheries in the vast portion of the Pacific governed by the Western Pacific Fishery Management Council. Also new is a table of operational or proposed fishery management plans for the jurisdictional areas of the three Pacific Councils.

Special acknowledgements for this revision are due to Willy Weigand and Mike Pugh for their research assistance, and also to Helen Newman and Nancy Farmer for patiently retyping the manuscript.

Jon Jacobson
Daniel Conner
Robert Tozer

January 1, 1985

EDITORS PREFACE

The Magnuson 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 Guidebook 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 provisions of 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 fishery management problems in serving his or her clients. The notes at the end of the book contain citations to authorities and occasional further explanation and are written for this reader. Of course, our limitation of the list of supposed readers to two was a drafting device only; our ultimate goal is to provide useful information and analysis to seafood processors, fishery managers, legislators, the interested public, and all sorts of people who are neither fishermen nor lawyers.

All readers should note that the Guidebook 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 Marilyn 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.

A special thanks is due the National Sea Grant Program administered through Oregon State University for financial support and publication assistance.

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. Recognizing different national needs, many mutually beneficial arrangements for resource use have been implemented successfully all over the world.

After World War II the United States became much more actively involved in national and international fisheries matters. A few highly respected United States fishery 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 includes 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 (FCMA). 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 FCMA is clearly the most significant fisheries legislation in the history of our country. Irrespective of the size of fleets, number of fishermen, or quantity of catch, with enactment of the FCMA 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. Considering the scope, significance, and precedent-setting aspects of the Act, implementation was remarkably smooth.

The FCMA 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 fishing nations of the world? Like so many other events in United States history, people fought for what they believed in and, when necessary, compromised their own needs to accommodate the requirements of others from within the United States 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 domestic and foreign participants. During the FCMA development stages, many felt that elimination or management was necessary only for foreign fleets, and that the domestic fishermen should be left alone. Congress, however, wisely extended coverage to 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 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 both 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 become deterrents to future refinement. The FCMA 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. It requires constant interest, dedication, and involvement by the Council members, staffs, and the affected public, and each should serve as a check on the interests of the other. The fisheries world is watching, partici-

pating, 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 governing people adopted 200 years before. There is too much to lose to revert to pre-FCMA approaches. Continuation on the present course will be a smoother and more productive approach than any other. The resources and the users both deserve our collective best efforts to assure that the Act continues to work. And it will work, notwithstanding continuing objections to parts of it, because the participants will want it to.

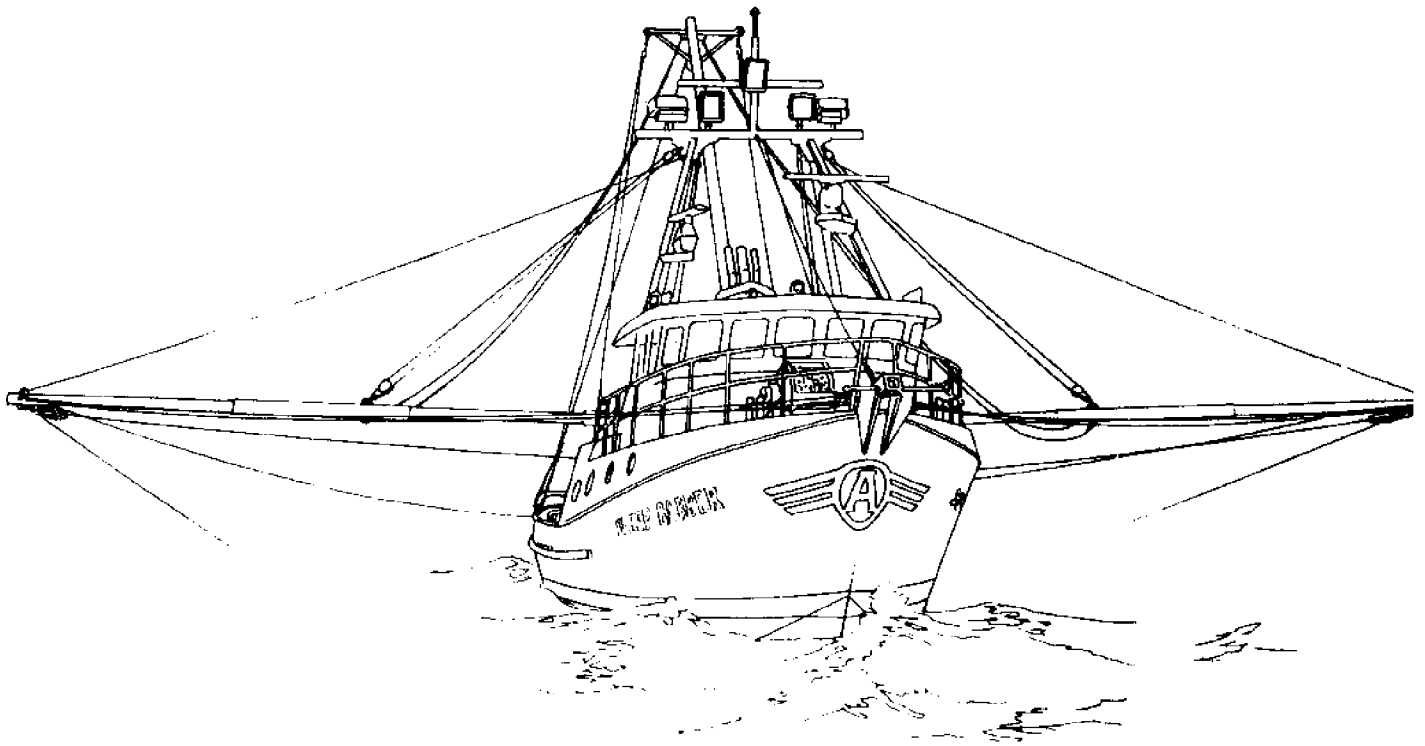
Robert W. Schoning
Former Director
National Marine Fisheries Service

CONTENTS

	Preface to Revised Edition	iii
	Editors' Preface	iv
	Foreword	vi
CHAPTER 1	Introduction.....	1
	I. The Evolution of Extended Fisheries Zones....	4
	II. Passage of the FCMA.....	7
	III. Overview of the FCMA.....	8
	IV. The United States "Exclusive Economic Zone": A Short Comment.....	10
CHAPTER 2	Foreign Fishing.....	11
	I. Introduction.....	11
	II. GIFAs.....	14
	III. Optimum Yield.....	17
	IV. TALFF and Its Allocation.....	24
	V. Joint Ventures.....	30
	VI. Observer Program and Foreign Fishing Fees....	36
	A. Observer Program.....	36
	B. Foreign Fishing Fees.....	40
CHAPTER 3	Fisheries Managers: Regional Fishery Management Councils and the States.....	43
	I. The Regions.....	44
	II. Composition of the Councils.....	45
	III. Council Responsibilities.....	46
	IV. The Scientific and Statistical Committees....	47
	V. The Advisory Panels.....	47
	VI. Plan Development Teams.....	48
	VII. Council Staff.....	48
	VIII. Other Assistance.....	49
	IX. Who Pays the Bill?.....	49
	X. State Jurisdiction Overlap.....	49

XI.	Fishery Management Plans and Federal Consistency Under the Coastal Zone Management Act.....	53
APPENDIX A	56
	North Pacific Fishery Management Council.....	57
	North Pacific Scientific and Statistical Committee Members.....	60
	North Pacific Advisory Panels.....	61
	Pacific Fishery Management Council.....	63
	Pacific Scientific and Statistical Committee Members	66
	Pacific Advisory Panels.....	67
	Western Pacific Fishery Management Council.....	73
	Western Pacific Scientific and Statistical Committee Members.....	76
	Western Pacific Advisory Panels.....	77
CHAPTER 4	Fishery Management Plans.....	82
	Flow Chart: Overview.....	83
Phase I:	Pre-Planning.....	84
	Flow Chart.....	86
Phase II:	Draft Fishery Management Plan Development	87
	Flow Chart.....	89
Phase III:	Public Review and Council Adoption.....	90
	Flow Chart.....	91
Phase IV:	Secretarial Review and Regulation Promulgation.....	92
	Flow Chart.....	94
Phase V:	Continuing Fishery Management.....	95
	Flow Chart.....	97
Phase VI:	FMP Amendments.....	98
	Flow Chart.....	99
APPENDIX B-1	Summary of Abbreviations.....	101
B-2	Sample Format for FMP.....	102
B-3	FMP Status Report.....	108
CHAPTER 5	Enforcement.....	110
I.	The Overall Scheme.....	111
	A. What is Illegal Under the Act?.....	111
	B. Who Enforces the Act?.....	113
	C. What are Enforcement Officers Authorized To Do?.....	113
	D. When Are Citations Issued?.....	114
	E. Civil Penalties.....	115
	F. Civil Forfeitures.....	116
	G. Judicial Interpretation of Forfeiture Provisions.....	117

	H. Criminal Offenses.....	118
	I. Permit Sanctions.....	118
II.	Particulars.....	118
	A. Mental Element for Violations of the FCMA.....	118
	B. How Much "Force" is Required to Trigger Violations of Section 1857(1)(E)?.....	120
	C. The Warrantless Search Provision.....	120
III.	Conclusion.....	123
END NOTES	Chapter 1.....	125
	Chapter 2.....	130
	Chapter 3.....	148
	Chapter 4.....	154
	Chapter 5.....	158



Introduction

CHAPTER 1

Passage of the Magnuson Fisheries Conservation and Management Act of 1976 (FCMA)^{1/} marked a significant step in both domestic and international law of fisheries management. With this bold stroke, the United States changed the posture of fisheries management policy at home and abroad. The United States federal government, for the first time in any significant fashion, took on the role of 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. To fully appreciate the significance of the FCMA on both domestic and international fronts, it is important to have some understanding of the law of fisheries management before 1976.

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

International agreements bind nation parties (but only those parties) much as contracts bind individuals. Such agreements played no significant role in international fisheries management until the twentieth century.

Customary international law, on the other hand, is the result of an evolutionary process. It is a consequence of a significant number of nation-states engaging in practices that eventually gain world-wide acceptance. The practice must continue for a sufficient time for the custom to become law. In contrast to international agreements, customary law binds all nations. As congressional 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 ancestor of the dominant rule of fisheries management -- freedom of fishing on the high seas. Prior to the early part of this century, a territorial sea of three nautical miles from shore was widely acknowledged as exclusively within the sovereignty of each coastal nation. The rest of the world's oceans were termed high seas, to which fishermen of the world enjoyed virtually unregulated access. This 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 proceeded under a regime of unregulated competition among nations and fishermen. This scheme usually proved satisfactory so long as demand for fishery products remained at a level that did not result in exploitation of a fish population over its maximum sustainable yield (MSY).^{3/}

Toward the end of the nineteenth century, however, it became apparent that some stocks had been dangerously overfished, and after World War II improved fishing technology and growth of human population together caused an unprecedented increase in fishing effort. Many nations recognized that fish were not an unlimited resource and that some limitations on freedom of fishing had become necessary. The history of fisheries management since World War II is a chronology of attempts to define and enforce appropriate limitations.

As nations of the world searched for a solution to the problems of overfishing and stock depletion, two approaches emerged.^{4/} Some nations chose to extend unilaterally fisheries management jurisdiction beyond their territorial seas. Others preferred a more cooperative approach -- that is, nations participating in a specific fishery were sometimes able to agree on self-imposed regulatory schemes. The approach the United States

chase was dictated in part by the peculiar nature of its fishing industry. 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 United States are rich in haddock, cod, halibut, hake, and pollock. The area traditionally had been fished by United States coastal and Western European distant-water fishermen. Overfishing in this area became apparent in the 1920s, but no treaty dealt with this problem until 1950. This treaty established one of the best known international fisheries management bodies, the International Commission for the Northwest Atlantic Fisheries (ICNAF).

The Northeast Pacific is the home of valuable salmon stocks. United States and Canadian coastal fishermen had exploited this resource since the nineteenth century. During the 1930s United States officials were troubled by the entrance of the Japanese into the North Pacific salmon fishery, and particularly by the depletion of Bristol Bay salmon stocks. Emerging from World War II as a defeated nation, Japan was not then in a position to bargain effectively for its fishing rights. One result was Japan's participation in the International Convention for the High Seas Fisheries of the North Pacific Ocean, and its acquiescence in what has become known as the "abstention principle." Under that 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 probably not developed into an international customary law rule for fisheries management.

A third major United States fishing group is comprised of distant water tuna and shrimp fishermen who have fished the waters off Latin American countries since the 1930s.

Divergent interests of these three groups complicated the choice of two possible regulatory approaches. Fishermen who worked the coastal waters of the United States favored unilateral United States extension of fisheries jurisdiction as a means of protecting their interests from encroachment of foreign distant-water fishermen. In contrast, U.S. distant-water fishermen favored a treaty approach, since extension of fisheries jurisdiction would require the United States to recognize similar extensions of jurisdiction by Latin American countries, resulting in a loss of access to important high seas fishing grounds. Furthermore, United States global interests, especially in the freedom of navigation on the high seas so important to commerce and military strategy, might have been compromised by extension of fish-

eries jurisdiction. The government feared eventual interference with this freedom if fisheries jurisdiction beyond the territorial sea were recognized for coastal nations. As a result, the United States chose to pursue a course of bilateral or multi-lateral agreement and refused to acknowledge the right of any nation unilaterally to extend its fishery management authority.

World conditions and United States interests after World War II thus suggested treaty-making as the wisest course to pursue in regulating fishery resources. Events since that time, however, have caused a dramatic reversal in United States fishery policy. With the passage of the FCMA, the United States has come full circle to a policy of recognizing and participating in broad extensions of offshore fisheries management jurisdiction, giving preferential rights to 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 claimed for the United States exclusive jurisdiction for the purpose of exploring and exploiting the resources of the continental shelf off the coast of the United States. Many of the nations of the world eventually followed this extension of limited sovereign rights beyond the three-mile territorial sea, and it was codified in the 1958 Convention (treaty) 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" in the high seas outside its territorial seas. 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 under the second Truman Proclamation, but the Fisheries Proclamation produced some unexpected results. To the dismay of United States distant-water fishermen, it helped to precipitate a series of varying claims of sovereignty or extended fisheries jurisdiction by some Latin American countries. Most notable were the claims of the "CEP" countries -- Chile, Ecuador, and Peru -- who in the 1952 Santiago Declaration asserted the right of coastal nations to exclusive resource jurisdiction out to 200 miles off their coasts. These countries, either deliberately or inadvertently, misconstrued the Truman Proclamations as precedent for their claims. The United States, of course, protested the claims of the CEP countries, and United States tuna fishermen continued to

fish off the coasts of these countries, provoking them to take action to enforce their 200-mile claims. Thus began a series of confrontations in the southeast Pacific that has spanned the last three decades.

Despite Latin American claims, the United States and most of the international community continued to oppose unilateral extensions of fisheries jurisdiction. Instead, the United States chose to use 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 in Geneva. Certain provisions of each of the Conventions bear on the issue of fisheries management. The Convention on the Territorial Sea and Contiguous Zone^{7/} was notable for 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 "contiguous" fishery management zone) had widespread support. The Convention on Fishing and Conservation of the Living Resources of the High Seas^{8/} allowed coastal nations a restricted right to regulate 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 allowed by the Fishing Convention and the duty to give reasonable regard to the interests of other nations 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 nation.

The 1958 Conference failed to resolve the issues of territorial sea breadth or the fishery management authority of coastal nations. Partly as a result of this failure, the Second Law of the Sea Conference convened in Geneva in 1960. No agreement was reached at this conference, however, 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 increase in foreign fishing off United States coasts. Under the Act, the United States claimed authority to exclude foreign fishing vessels from a newly created "contiguous" fishery zone extending nine miles beyond the three-mile 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 significant intrusion of the federal government into domestic fishery management. Yet at that point, federal involvement was slight. The federal government made no attempt to regulate domestic fishing under the Act; instead it acted merely as a caretaker in the nine-mile contiguous zone, enforcing the Bartlett Act against foreign fishing vessels illegally within the zone. The individual states continued to regulate all fishing activity off their coasts out to three miles, and also the fishing activities of their citizens in the contiguous zone and beyond.

In 1970 the United Nations General Assembly decided 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 nature and extent of coastal nation jurisdiction over offshore fishery resources. Initially, the United States opposed any extension of fishery jurisdiction beyond twelve miles. As before, strong naval interests, the need to import energy and raw materials by water, and distant-water fishing interests combined to dictate continued United States 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. Despite its reservations, the United States capitulated on this point, and instead shifted its attention to the substance of the proposed legal regime governing the zone. The United States recognized the preferential right of coastal nations to take fish within the zone in return for responsible management of the fishery resources, but also demanded that foreign nations be allowed to take whatever fish the coastal nation did not utilize.

The Caracas session of the Third Conference produced no new Law of the Sea Treaty, nor did the Geneva session in 1975. Although a consensus was emerging that favored extension of fisheries jurisdiction to 200 miles, demands for a "package treaty" covering all aspects of ocean use prevented treaty adoption. The negotiators seemed deadlocked, and only the most optimistic saw a treaty in the near future.^{12/}

Meanwhile, the influx of foreign fishing vessels off United States coasts, accompanied by over-exploitation of several stocks valuable to United States fishermen, caused escalating pressure on Congress for remedial action. The National Marine Fisheries Service (NMFS) of the Department of Commerce estimates that 20 percent 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 United States coasts. Despite the availability of this abundant resource and the continually increasing domestic demand for edible fish products, the domestic fish harvest had remained stable for many years. The foreign

harvest in these waters had, in contrast, increased dramatically, resulting in a significant United States fish trade deficit.^{13/} The United States fishing industry was increasingly unable to compete with foreign fishing vessels, whose distant-water fleets often carry the most technologically advanced equipment and are extremely efficient. By the middle 1970s, entry into United States coastal waters by these large and efficient foreign vessels had caused the United States fishing industry, already burdened by numerous marginal operations, to suffer further decline. Moreover, many fish stocks in United States coastal waters were seriously threatened by increased fishing efforts.^{14/} With the Law of the Sea negotiations stalled, the stage was set for the United States to unilaterally extend its fisheries jurisdiction.

II. Passage of the FCMA

Congress first seriously considered extension of fisheries jurisdiction to 200 miles in 1974. The Commerce, Foreign Relations, and Armed Services committees of the Senate held hearings on a 200-mile bill. Despite an unfavorable report by the Foreign Relations Committee and opposition by the Departments of State and Defense, the Senate passed the bill. 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 and 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 signed into law by President Ford on April 13, 1976.^{16/}

Proponents of the legislation pointed to the overall ineffectiveness of the 22 international fisheries agreements to which the United States was at that time 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 of the bill 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 concerned 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 foresaw a potentially adverse impact 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 to those who hoped the summer 1976 Law of the Sea session in New York would produce a treaty. This hope was unrealized, and the FCMA became U.S. law on March 1, 1977.

III. Overview of the FCMA

The FCMA is sometimes referred to as the "200-mile Act," but strictly speaking it does not create a 200-mile zone. First, the fishery conservation zone (FCZ) established by the FCMA is not 200 miles wide, but rather 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.

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

Third, the FCMA exempts highly migratory species (defined as tuna) from its regulatory coverage, and thus does not apply to all fisheries that occur within the FCZ.

Finally, and most important, the FCMA as originally passed did not authorize exclusion of foreign fishermen from a fishery within the FCZ unless domestic fishermen possessed the capacity to harvest 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 that require management. The mechanism established to draft these plans is the regional management Council, a unique creation of the FCMA that is designed to represent federal, regional, state, and local interests in the decision-making process. Eight regional fishery management Councils have been established to cover the coastal regions of the United States. Each Council must conform the provisions of its fishery management plans to seven national standards aimed at effective conservation of fishery resources. Each fishery management plan must, in addition, be approved by the Secretary of Commerce.

One of the Council's most important tasks is to establish the optimum yield (OY) for each fishery. The OY figure not only sets the upper limit of allowed domestic harvest in that fishery, but also it determines the degree of foreign fishing allowed in the FCZ. By subtracting the estimated domestic harvest from OY the Council arrives at the total allowable level of foreign fishing (TALFF) for that fishery. The Secretaries of State and Commerce then allocate the TALFF among foreign fishing vessels. (The concept of optimum yield is treated more thoroughly in Chapter Two.)

Because the United States was a party to 22 international fisheries agreements at the time the FCMA was passed, Congress directed the Secretary of State 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. That nation was then required to apply to the State Department for a permit for each vessel it wished to have participate in any fishery.

The eight regional management Councils, working in conjunction with National Marine Fisheries Service, have made substantial progress in implementing the FCMA. As of May 15, 1984 twenty-five fishery management plans and preliminary management plans were in effect and twenty-nine others were in various stages of preparation. As a result, fishing patterns off United States coasts have changed dramatically since 1977, when the FCMA went into effect. Foreign fishing has dropped and the percentage of total catch taken by United States fishermen has increased.^{18/}

Implementation of the FCMA has not been without problems, however. The United States Comptroller General has identified as problem areas the limited availability of biological and socio-economic 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 the limited degree of long-range planning.^{19/}

Difficulties should be expected in implementing any new statutory scheme. Those listed above are not exhaustive, but they do not detract from the significance of the FCMA as a resource management tool, for 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 United States regulatory scheme of national scope. Second, regulation of fisheries has traditionally been the exclusive province of the individual states, and historically the resource conservation laws of adjacent states have not been well coordinated. Management of fish stocks on a regional basis, minimizing the effect of state boundaries, is now widely accepted as essential to effective conservation of the fishery resource. Yet the approach is not yet

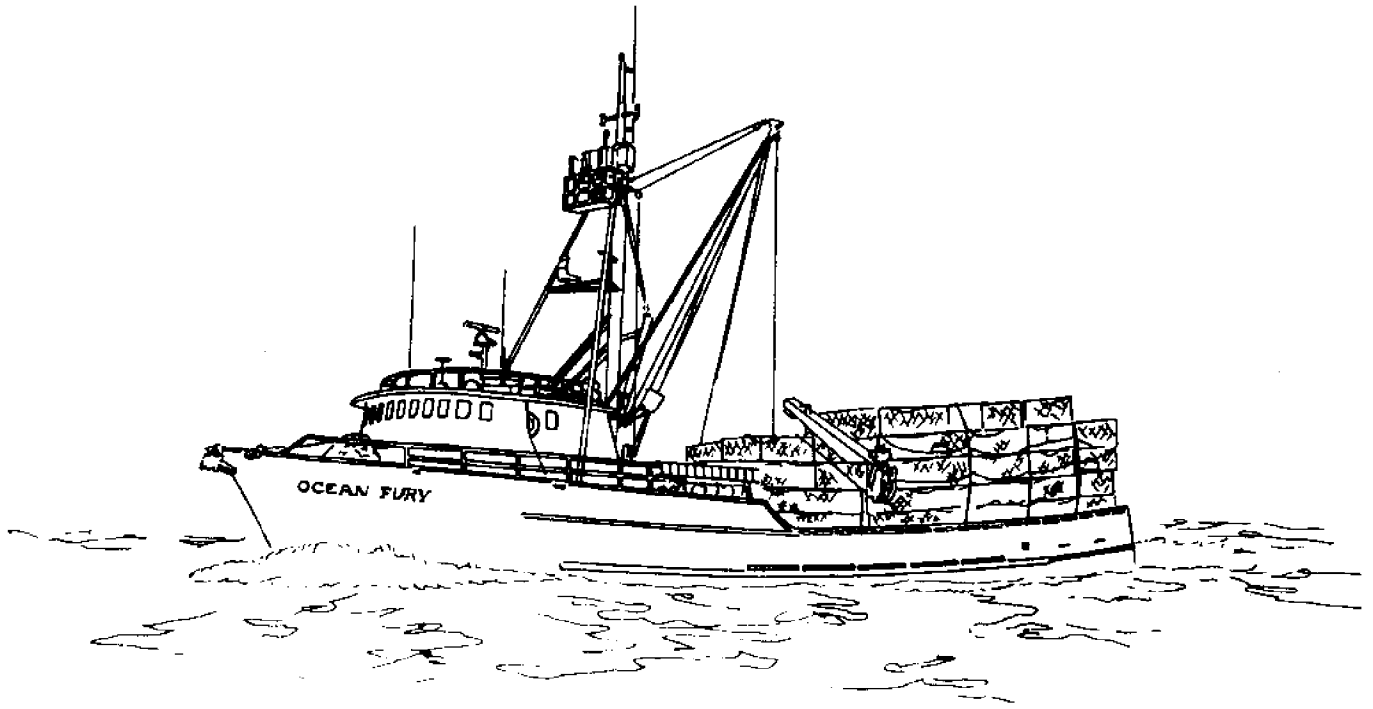
widespread in United States conservation law. Thus, the FCMA still represents something of an anomaly in the law of living resource management.

This Guidebook explains in detail the operation of the FCMA. Chapter Two tells how the FCMA deals with foreign fishing within the FCZ, and includes a discussion of optimum yield and joint ventures. Chapter Three treats the composition and operation of a regional management Council, with particular attention to the Pacific, North Pacific, and Western Pacific Councils. Chapter Four follows 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.

IV. The United States "Exclusive Economic Zone": A Short Comment

The Third United Nations Conference eventually did adopt a new treaty in 1982. This comprehensive agreement endorses 200-mile "Exclusive Economic Zones" (EEZs) for coastal nations. The treaty would allow each coastal country sovereign rights for the purpose of managing fisheries and other resources within its EEZ. The U.S. has rejected the 1982 treaty because of objections to its provisions on mining the deep seabed.

Nevertheless, on March 10, 1983, President Reagan issued Presidential Proclamation 5030, which unilaterally claims for the United States a 200-mile EEZ.^{20/} Within this zone, the Proclamation asserts, the United States has, by customary international law, sovereign rights over both living and non-living resources. While there might exist an academic distinction between the FCMA's claim to exclusive management jurisdiction for off-shore fisheries and the EEZ Proclamation's assertion of "sovereign rights" over living resources, it is not at all clear that any practical distinction exists. At present, the FCMA continues to be the foundation for United States fisheries management out to 200 miles from shore. Congress is, however, considering new legislation to implement the EEZ Proclamation.^{21/} If enacted, such a law might well modify some aspects of the operation of the FCMA.



Foreign Fishing

CHAPTER 2

I. Introduction

The emergence of a highly mobile and technologically sophisticated worldwide fishing industry dramatically transformed concepts of fishery management in the United States and resulted in Congress' enactment of the Magnuson Fishery Conservation and Management Act of 1976 (FCMA).^{1/} To understand how the FCMA currently affects foreign fishing within the "200-mile" Fishery Conservation Zone (FCZ),^{2/} it is necessary to examine congressional purpose in enacting the FCMA.

Between 1938 and 1973 the quantity 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 only from 4.3 to

4.7 billion pounds.^{3/} In 1973, foreign fishermen took nearly seventy percent of the commercial fish harvest off United States coasts.^{4/} At the time of congressional debate on the Act, approximately 16 important species of fish off the United States coast were judged over-fished.^{5/} While domestic fish harvests remained relatively constant, the United States more than doubled its consumption of fish products. The increase in consumption was met by imported fish products, much of which had been caught in United States coastal waters.^{6/} All of this had a negative impact not only on the health of marine fishery stocks, but also on the United States balance of trade and on the economic well-being of the American fishing industry.

Between 1948 and 1975 the United States concluded over 20 international fishing agreements in an effort to conserve fish stocks and protect the domestic fishing industry.^{7/} These international conservation efforts, however, generally proved ineffective in preventing further depletion of fish stocks or economic 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, Congress responded to this deteriorating situation^{9/} by enacting the Fishery Conservation and Management Act of 1976.

The desire to control the domestic impact of foreign fishing was part of the reason for enacting the FCMA.^{10/} Congress nevertheless recognized that it was neither practical nor desirable to exclude all foreign fishing from the FCZ of the United States. At the time of enactment, Congress felt that to exclude foreign fishing totally within the 200-mile zone would violate international law.^{11/} Furthermore, Congress recognized that a prohibition of all foreign fishing within 200 miles of the United States coast might have severe consequences on the United States distant-water shrimp and tuna fleets if prohibition should result in retaliatory denial of access to foreign fishing grounds.^{12/} Finally, Congress acknowledged a moral obligation to permit foreign fishing within the FCZ because of the important role of fish as a source of protein for many nations of the world.^{13/}

Congressional intent in enacting the FCMA was thus not to exclude foreign fishing within the FCZ entirely, but rather 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 on exclusion."^{14/} Like the Coasting and Fishing Act enacted long ago,^{15/} the FCMA does, however, prohibit foreign fishing within state boundaries.^{16/} As discussed later in this chapter, the 1980 amendments to the FCMA^{17/} establish a mechanism for accelerated phaseout of foreign fishing within the FCZ, indicating a changing perception of Congress regarding the proper role of foreign fishing within the FCZ.^{18/}

While foreign fishing was not eliminated by enactment of the

FCMA in 1976, it is now subject to United States control. This chapter discusses the regulations that govern foreign fishing fleets fishing within the 200-mile FCZ.

In order for a foreign vessel to qualify for fishing in the FCZ, 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 United States 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 the GIFA negotiation and review process and also the conditions to which a foreign nation agrees 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 United States harvesting capacity,^{25/} the surplus may be then made available to foreign fishing interests and is designated as the "total allowable level of foreign fishing" (TALFF).^{26/} Since the total amount of foreign fishing depends 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 Secretary of State then allocates among qualified foreign applicants the surplus or total allowable level of foreign fishing, according to specific criteria.^{27/} The allocation process and criteria will be examined in Part IV.

In 1978 Congress passed an amendment to the FCMA^{28/} that created preference for American processors of fish harvested in the FCZ. The amendment also specifically authorized "joint ventures," by which foreign processing vessels can receive from United States fishing vessels that part of the domestic harvest which United States processors have no capacity or intent to process.^{29/} The background of the "joint ventures" amendment and its implementation and effect on foreign fishing will be discussed in Part V of this chapter.

Under the provisions of the FCMA, those engaged in foreign fishing may be charged "reasonable" nondiscriminatory license fees based upon the cost of management, research, administration, enforcement, and other factors relating to the conservation and management of fisheries.^{30/} The 1980 amendments increased the

permit fees for foreign fishing vessels and required that each vessel pay the cost of providing an American observer aboard that ship.^{31/} The fees and the observer program will be examined in Part VI of this chapter.

The 1983 amendments to the FCMA distinguish foreign recreational from commercial fishing.^{32/} The amended FCMA allows foreign recreational fishing within the FCZ and state waters if the vessels are not operated for profit. Previous requirements of a GIFA, a specified allocation, and permits have been eliminated. Foreign vessels must, however, comply with applicable federal and state laws, any applicable fishery management plan, and also other conditions deemed appropriate by the Secretary and the Governor of the appropriate coastal state. Most coastal states have licensing or other requirements that will apply.

II. GIFAs

Under the Fishery Conservation and Management Act, each nation seeking to fish within the FCZ or for anadromous species^{33/} or for "sedentary" continental shelf fishery resources^{34/} must enter into a "Governing International Fishery Agreement" (GIFA) with the United States^{35/} or renegotiate an existing international fishery agreement to conform to GIFA requirements.^{36/} Upon expiration of the existing international fishery agreement, the foreign nation must negotiate a GIFA if it desires continued access to the FCZ.^{37/} Permits for individual vessels will be issued only to fishing vessels^{38/} of nations that are parties to a GIFA with the United States.

By entering into a GIFA, the foreign nation acknowledges the exclusive management authority of the United States as set forth by the Act.^{39/} 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.^{40/}

The FCMA specifies some of the terms and conditions that the GIFA must impose on a foreign nation and its vessels. Each foreign fishing vessel seeking to fish within the FCZ, for example, must first obtain a permit from the Secretary of Commerce^{41/} and, having obtained it, must prominently display it on the wheelhouse of the vessel.^{42/} Transponders or other appropriate position-fixing devices must be installed and maintained on the foreign vessels.^{43/} The foreign nation must assist enforcement of fishery regulations by permitting the Coast Guard to board and inspect its fishing vessels at any time and to make arrests and seizures of the vessel if violations are found.^{44/} On becoming a party to a GIFA, a foreign nation must permit a United States observer to be stationed aboard each of its fishing vessels and must agree to pay for the cost of each observer.^{45/} Fees required for individual fishing permits must be paid in ad-

vance.^{46/} To ensure that the foreign nation and its fishing fleet may not claim immunity from legal action in United States courts, the foreign nation and owners of the foreign fishing vessels must maintain within the United States agents authorized to receive and respond to legal process.^{47/} The foreign nation must also assume responsibility for gear loss or damage suffered by United States fishermen that was caused by the foreign nation's fishing vessels.^{48/} The foreign nation must also agree that its vessel owners and operators will limit their annual harvest to a quantity not to exceed that nation's allocation of the total allowable level of foreign fishing (TALFF).^{49/} Finally, the GIFA requires 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.^{50/}

Under the FCMA, the Department of State is responsible for negotiating GIFAs with foreign countries that seek to fish within the FCZ.^{51/} Once a GIFA has been negotiated and signed, the President is required to submit it to Congress.^{52/} The agreement takes effect 60 days after submission, unless disapproved by a joint "fishery agreement resolution" originating in either House of Congress.^{53/} Although the FCMA does not expressly provide for an acceleration process, Congress has in the past made GIFAs effective prior to the end of the 60-day period by taking affirmative action to that effect in the form of a joint resolution.^{54/}

It should be noted, however, that the FCMA's provision for legislative veto of GIFAs is now constitutionally suspect. Recently the Supreme Court declared unconstitutional certain provisions of the Aliens and Nationality Act, which authorized Congress to invalidate, by resolution, an action of the executive branch.^{55/} The scope of this holding has not yet been established, but the continued viability of the FCMA's legislative veto provision appears in doubt.

The FCMA states that it is the "sense of Congress" that GIFAs "include a binding commitment, on the part of such foreign nation and its fishing vessels," to comply with the specified conditions and restrictions of the Act.^{56/} The use of the term "sense of Congress" suggests Congress' recognition that the formation and control of international fishery agreements does not lie clearly within its constitutional power. This uncertainty is a consequence of unsettled application of the separation of powers doctrine in the field of foreign affairs.

Treaties are the only form of international agreement for which the Constitution specifically provides. 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.^{57/} GIFAs are, however, not "treaties," but rather are "executive agreements."^{58/} The process for adoption of GIFAs

therefore differs in several ways from that required by the Constitution for the adoption of treaties. First, Congress has imposed conditions and guidelines^{59/} that must be included in the agreements negotiated by the Secretary of State.^{60/} The President and the State Department are thus purportedly constrained in their ability to consider other aspects of foreign policy to the detriment of the Act's goals of conservation and management of the fishery resources. Another way the provisions of the FCMA differ from constitutional requirements for treaties is that the GIFAs are subject to the approval of both houses of Congress, not just the Senate.^{61/} Congress is therefore more actively involved in the negotiation process of GIFAs than it is with treaties.^{62/}

The FCMA also contains a further restraint on the ability of the State Department to negotiate GIFAs with nations seeking to qualify for fishing in the FCZ. As an incentive for foreign governments to conclude agreements that ensure access to foreign fishing zones for United States distant-water fishing fleets, 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.^{63/} The effect of this "reciprocity provision" may actually be slight, because nations seeking to fish in the United States FCZ often do not have fishery resources desired by the United States distant-water fleet.^{64/}

As of November 1984, GIFAs have been concluded with Bulgaria, Cuba, the European Economic Community (France, Federal Republic of Germany, Ireland, Italy), the Faroe Islands (signed by Denmark, the Faroe Islands and the United States), the German Democratic Republic, Japan, Mexico, Norway, Poland, Portugal, Republic of Korea, Romania, Spain, Taiwan, and the U.S.S.R.^{65/} GIFAs concluded with Cuba and Mexico have expired or been terminated.

Mexico signed a Governing International Fishery 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/}

The agreement with the European Economic Community (EEC) has presented certain special problems, because not all of the EEC members have traditionally fished off United States coasts. However, the Community as a whole adopted a common fishery policy and at the same time 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, priority fishing rights have been granted to those of its members who have fished in United States waters in the past.^{67/}

In addition to gaining recognition of the United States FCZ, the GIFA negotiated with the EEC fulfilled another purpose of the Act by protecting the interests of the United States distant-water fishing fleets. The agreement with the European Economic Community was thus advantageous to the United States in that it protected the interest of "approximately 100 U.S. shrimp trawlers that fish in waters off French Guiana which lie in the EEC zone."^{68/}

III. Optimum Yield (OY)

The critical requisite 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 United States domestic fleet will harvest. Only when the predicted "optimum yield" of a fishery, as determined by the appropriate regional Fishery Management Council, is greater than United States harvesting capacity can the surplus be made available to foreign fishing vessels.^{69/} The calculation of "optimum yield" is thus of crucial importance to both domestic and foreign fishermen. Nearly all of the specific criteria set forth in Title III of the FCMA, which govern promulgation of fishery management plans and their review by the Secretary of Commerce, are designed to ensure achievement of the goal of optimum yield, "the underlying management concept" of the Act.^{70/} 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."^{71/}

The FCMA defines the concept of "optimum yield" 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 factor.^{72/}

This concept represents a fundamental change from the traditional management objective of "maximum sustainable yield" (MSY) used for many years.^{73/} The MSY of a fishery is the largest annual catch or yield (in terms of weight of fish) that can be taken continuously from a stock under existing environmental conditions.^{74/} The concept of MSY is thus based on the observation that (up to a point) the more fish of a given species that are caught, the more fish (by weight rather than numbers) there are to catch. When surplus fish are harvested, more food resources are available to be more efficiently consumed by the remaining fish stock. Thus the remaining fish grow faster than if no har-

vest had occurred. As fishing effort increases, however, the catch increases only up to a point where it begins to level off. Beyond this point, increased fishing effort results in a declining catch. Therefore, a fish stock produces its greatest harvestable surplus when it is at some intermediate level of abundance.^{75/}

As a goal of fishery management, the concept of MSY has been criticized by biologists and economists because of its narrow biological basis.^{76/} The criticisms of MSY as a fishery management goal include its failure to account fully for ecological relationships and to accommodate economic and social interests. As one fishery expert noted in 1974: "Few would now defend the MSY as an abstract concept providing the ideal theoretical guide to management objectives."^{77/}

An inherent shortcoming of the strict MSY standard lies in its failure to account for ecological interrelationships among species. The MSY concept, for example, does not consider whether two targeted species might compete for the same food source or engage in a predator-prey relationship, making it impossible to maximize respective yields of the related species simultaneously.^{78/} The MSY standard also fails to address the situation of incidental 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.^{79/}

Some of the strongest arguments against the MSY concept have come from economists. Because fisheries have traditionally been regarded as a common property resource with open accessibility, fishing at the level of MSY often results in indirect encouragement of overfishing accompanied by substantial economic waste.^{80/} The primary shortcoming of MSY -- or any other purely quantitative objective -- is that it is subject to the economic principle of diminishing marginal returns.^{81/} As fishing approaches MSY, the yield increases very slowly with larger increases in effort. In terms of the additional effort required to harvest it, the last ton of fish caught costs many times the average cost per ton. The costs in capital and labor expended to take these last few fish would be put to much better use elsewhere in the economy, according to this economic analysis. The economic effects of a strict MSY standard thus can result in social problems affecting the welfare of the fishing industry and the economics of coastal fishing regions.^{82/}

One commentator has suggested that the deficiencies of a purely biological goal (such as MSY) adopted without regard to its associated costs and benefits can be best illustrated by applying them to land-based resources.^{83/} If states, for example, were to adopt a goal of maximizing sustainable yield from an acre of ground, they might produce several times as many bushels of wheat, rice, or corn than that acre might normally produce. But this could be achieved only by incurring costs that would greatly exceed the revenues gained, or by diverting scarce labor

or capital away from other more profitable or productive activities. Similarly, say many economists, it makes little sense to base fishery management upon a goal of maximum sustainable 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 a goal for fishery management under the FCMA.^{84/} The MSY concept, however, was not abandoned; instead, optimum yield was defined to include MSY as the "basic standard of reference," as modified by relevant economic, social, and ecological considerations.^{85/} This definition reflects Congress' recognition that the concept of MSY can continue to be a valuable management concept for meeting the Act's goals of conservation and management of fish stocks.^{86/} A management system was envisioned whereby the MSY would be established for each managed species; then OY would be set as a carefully calculated deviation from MSY designed to include consideration of the unique ecological, economic, and social problems of that fishery or region.^{87/} The importance of MSY as a conservation goal for depleted stocks^{88/} was noted thus 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."^{89/}

The FCMA is designed to overcome defects of management under a strict MSY concept; however, it does not provide guidelines regarding 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 OY should take into account the economic well-being of commercial fishermen and the interests of recreational fishermen, as well as habitat quality and the national interest in conservation and management.^{90/} According to the NOAA and NMFS guidelines, the OY concept must account for resource uses and values other than harvesting, such as the importance of the quality of the recreational fishing experience and also the need for fishery by-products. Furthermore, OY must be treated as a dynamic concept. The OY for a specific fishery may be valid only for a limited time because of changing ecological conditions or desires of the users. Therefore, periodic adjustments of harvest quotas, rates, and methods may be needed^{91/} that the OY will achieve the long-term objectives of the Act.

Each regional Fishery Management Council is responsible for annually determining the optimum yield for each fishery subject to its management authority.^{92/} According to the NOAA and NMFS guidelines, the Councils must undertake this task with the assistance and advice of scientific and technical advisory groups, users of the resource, and the general public.^{93/} The Councils

are to consider both regional objectives and the national interest^{94/} in determining the relative weights of the elements of the OY calculation. Because regional objectives of fisheries management may conflict, the Councils must also decide priorities.^{95/}

The resulting OY determination can be defined in a number of ways. For example, (1) as a number that functions as a quota (e.g., fishery management plans for Atlantic groundfish, Tanner crab, Pacific salmon, Gulf of Alaska groundfish); (2) as a description incorporating biological characteristics (e.g., 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 (e.g., original fishery management plan for Atlantic herring); or (5) as a range with a yearly fixed point (e.g., northern anchovy).^{96/} This list is by no means exclusive, and there may be other ways to calculate OY.

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

The Plan projected an OY of 12 to 18 percent below MSY.^{97/} A harvest of less than the MSY was proposed for two primary reasons: (1) the high recreational value of the ocean fishery; and (2) the higher market value for ocean-caught Columbia River fall chinook (due both to perceived quality differences and different marketing channels).^{98/}

The Plan noted other considerations involved in determining the OY for Pacific salmon: (1) the availability of salmon over a longer annual time period and in greater variety in an ocean troll fishery; (2) a lesser degree of socio-economic dislocation would thus result than with immediate elimination of the troll fishery and charter boat industries, both of which offer significant coastal employment alternatives; and (3) the desirability of preserving the lifestyle represented by troll fishing and charter boat operations, because they are activities accessible with modest capital investments.^{99/}

The Plan's OY recommendation of reduced ocean fishing rates to increase spawning escapements and availability of fish to "inside" fisheries was deemed justified for several reasons: (1) a projection that reduced catches of depleted fish stocks would provide increased salmon production over the long term; (2) federal court rulings that require certain quantities of fish to be provided for treaty Indian fisheries; and (3) a desire to reverse past trends that had shifted the burden of conservation restrictions to inside fisheries.^{100/}

The 1977 Salmon Plan is thus a splendid example of a recommended OY that is less than MSY, and also of an OY based on consideration of relevant recreational, sociological, and economic values. The Plan noted, however, that precise quantification of all relevant factors is not possible because of limitations of currently available technology and data. The final determination of OY was therefore achieved 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."^{101/}

Although OY has so far been discussed only with reference to domestic concerns, the Council's determination of OY for a fishery is also of great concern to foreign fishing interests, because the level of allowable foreign fishing is that portion of OY that will not be harvested by United States vessels.^{102/} Since the economic, sociological, and ecological components of a fishery are often not amenable to precise quantification, the Council might also use these considerations to justify an OY determination that is lower than the MSY, but with an actual and unstated goal of reducing or eliminating foreign fishing for the managed fishery. The discretionary nature of the OY standard might thus make it difficult to prove that reduction of foreign fishing was the actual intent of the Council.

The Councils' determinations of OY and the existence of surpluses for foreign fishing have resulted in several disagreements between the United States fishing industry and the federal government. One controversy occurred in 1978 when the North Pacific Council set the OY for the C. opelio species of tanner crab in the area north of 58° N latitude. According to fishery scientists, the MSY for the fishery was estimated at an annual harvest of 102,000 metric tons (m/t). United States fishermen, however, had no plans 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. opelio tanner crab south of 58° N latitude. Because American fishermen had no plans to harvest C. opelio tanner crab north of 58° N latitude, the entire quantity of the OY level would thus be available as surplus for foreign fishing. However, the North Pacific Council set the OY for this fishery at only 15,000 m/t, justifying the 87,000 m/t reduction below MSY on ecological and economic grounds.^{103/} Ecological concerns, such as maintaining a food supply of tanner crab for marine mammals, were mentioned. The major justification, how-

ever, seemed clearly economic, since 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, thus reducing world market price.^{104/} It believed that reduced foreign fishing would result in a tighter supply and higher market price, and would thus spur the growth of the United States tanner crab fishery. The Council reasoned that, by creating a more favorable balance of trade with Japan and by promoting United States industry growth into fisheries of underutilized species, its action was fulfilling two specific policies of the FCMA.^{105/}

The Secretary of Commerce, who must ultimately approve all management plans,^{106/} denied approval when the tanner crab FMP was first submitted, on the grounds that evidence was inadequate to indicate that a higher OY would depress the price of tanner crab and adversely affect the United States industry. However, the concept that market competition by foreigners could be a valid economic modifier of MSY for determining OY was not specifically disapproved. The Secretary ultimately approved the Plan on the basis of a later memorandum submitted by the North Pacific Council that contained supporting statements from noted economists, fish processors, and fishermen.

The rationale used by the North Pacific Council could thus lead to further reductions in foreign fishing through the use of OY levels lowered by policy judgments. The market competition rationale just discussed resulted in a drastic amendment to the Tanner Crab Fishery Management Plan in 1981, in which foreign fishing for both species of tanner crab was eliminated completely. Under the amendment, the OY for both species was set as equal to the domestic annual harvest (OY=DAH), up to the limit of the acceptable biological catch.^{107/} The *C. opelio* tanner crab fishery in the Bering Sea provides an example of the effect of the newly amended OY. The 1981 FMP projected an acceptable biological catch of 41,300 m/t, yet the previous year's domestic harvest was only 17,900 m/t.^{108/} Although the domestic harvest may increase,^{109/} it is doubtful whether United States vessels can harvest the entire difference of 23,400 m/t. A large quantity of harvestable protein is thus left in the ocean, arguably violating a moral obligation to produce food and possibly also violating international law.^{110/}

Another controversy concerning OY ultimately led to the first judicial decision on the FCMA within a year of its passage. When the FCMA was enacted, the New England 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 was authorized to prepare a provisional management plan.^{111/} In the provisional plan thus promulgated, 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.^{112/} The Secretary determined that the present size of the

herring stock was much smaller -- 218,000 m/t^{113/} and was 7,000 m/t below the level at which recruitment failure was threatened.^{114/} 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.^{115/} 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.^{116/}

In Maine v. Kreps,^{117/} the state of Maine alleged that the OY figure was too high and violated the provisions of the FCMA. The state's primary contention was that where an area's stock is so depressed as to be unable to maintain the MSY, the Act requires selection of an OY figure that would rebuild the stock as rapidly as possible, and that 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 consider international consequences of permitting foreign fishing in selecting an OY figure. Thus, the issue before the federal court of appeals was whether the determination of OY could include not only economic, social, and ecological considerations, but foreign policy as well.

The Court of Appeals for the First Circuit upheld the Secretary's OY determination. The court noted that the Act's strong conservation goals clearly precluded the setting of an OY that would permit overfishing.^{118/} However, the court found nothing in the FCMA that prescribed a particular annual rate at which depleted stocks should be rebuilt, and found that a 10 percent increase in the stock was not "too slight to promote the purposes of the Act."^{119/} 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 that calls for "the greatest overall benefit to the Nation, with particular reference to food production"^{120/} was broad enough to allow the Secretary to bring foreign policy considerations related to fishing into her OY determination.^{121/}

The court noted that national benefits that would result from cooperating with other nations might include sharing of scientific research conducted by foreign vessels; recognition of negotiating needs of the United States at the Law of the Sea Conference; the cooperation of other nations in international fishery conservation; consideration of the needs of United States distant-water fleets; and foreign fishing trade benefits.^{122/} However, the court qualified its view of the scope of these benefits. Noting that the Act's specific language refers to "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 or to other activities and prod-

ucts pertaining to food supply. To illustrate this limitation, the court observed that the nation's fisheries could not be swapped for a world banking agreement.

The Maine v. Kreps decision was attacked by those who thought the FCMA had eliminated foreign policy considerations in fisheries management.^{123/} The case, however, may ultimately prove 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 an unusual situation in which the Secretary of Commerce rather than the regional Council prepared the fishery management plan. Management plans prepared by the regional Councils would presumably 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, discussed above.^{124/} Third, the Secretary and the court were both heavily influenced by the novelty of the FCMA. The court stated that it was appropriate to honor the commitments to other nations by using the same quota as that previously allowed by the International Convention for the Northwest Atlantic Fisheries, since it was a "transitional year" and because the commitments preceded in part the passage of the Act and preceded entirely its implementation.^{125/} The court, however, cautioned that such reasons might not be acceptable at a later date, noting that "[w]hat is reasonable now may be less so later."^{126/}

IV. TALFF And Its Allocation

As previously noted, the Fishery Conservation and Management Act provides that the "total allowable level of foreign fishing" (TALFF) for a fishery within the United States fishery conservation zone is limited to the portion of the optimum yield (OY) that will not be harvested by United States vessels.^{127/} The extent to which United States fishing vessels will harvest in a particular fishery within a given year is commonly termed the "domestic annual harvest" (DAH). Like the OY, it is also determined by the regional Councils.^{128/} The Secretarial guidelines require the Councils, when determining DAH, to consider commercial,^{129/} recreational, subsistence, and treaty Indian fishing.

Although the FCMA was intended primarily as a conservation and management measure, many hoped that absolute United States priority to the fishery resources within the FCZ would provide a foundation for substantial growth and development of the domestic fishing industry.^{130/} A desirable by-product of the absolute preference formula for TALFF, along with the Act's other provisions, would be a rapid expansion of the domestic fishing industry, providing jobs, transforming the United States into a net exporter of fish products, and reducing the balance of trade deficit. In 1980, however, Congress assessed the performance of

the domestic fishing industry since the enactment of the FCMA and was disappointed with what it found. Three years after the enactment of the FCMA, United States 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 domestic displacement of foreign fishing in the FCZ had amounted to only 1 percent per year by volume, and less than 3 percent per year by value.^{131/}

Congress also concluded that the Act had not ameliorated 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. This latter figure represented approximately 10 percent of the total trade deficit. Domestic landings accounted for only about 40 percent of the total United States consumption of edible and industrial fish products. Thus, with 20 percent of the world's fishery resources under United States control and management, the country was still a substantial net importer of fish products.^{132/}

Congress recognized that as long as foreign nations were permitted to continue a high level of fishing -- much of it subsidized -- in the FCZ of the United States, while domestic 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 American Fisheries Promotion Act of 1980 (1980 Act).^{133/} The 1980 Act was designed to promote development of the United States fishing industry by increasing its share of the total harvest in the FCZ and encouraging greater access of domestic fish products to foreign markets.^{134/}

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 elect whether to continue with the previously established system (TALFF = OY - DAH) or whether to adopt a new formula that provides for phased reduction of foreign fishing in a fishery.^{135/} The Council can, in its discretion, choose the system it determines to be more advantageous to domestic fishing interests for each season and fishery.

The new reduction formula provides that, as United States 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 1980 Act's reduction formula defines the "base harvest" of a fishery as the TALFF for that fishery in 1979.^{136/} The "calculation factor" equals 15 percent of the base harvest (15 percent of the 1979 TALFF).^{137/} The first phased reduction would occur when United States fishermen increase their catch in that fishery by an amount equal to a certain percentage of the calculation factor. The 1980 Act provides for three such

thresholds and three corresponding levels of reduction of foreign fishing. If United States fishermen should 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.^{138/} Each time a threshold is achieved, that level of domestic harvest will become the base upon which any additional increase in domestic fishing may be used to achieve a further percentage reduction of the TALFF.^{139/}

To illustrate how the reduction factor quantity is computed, assume that the TALFF for a particular fishery in 1979 was 10,000 metric tons and the domestic catch was 1,000 tons. The "base harvest" is thus 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 domestic catch would have to increase by 375 tons (25 percent of the calculation factor) over its 1979 level, for a total domestic catch of 1,375 tons. The reward for United States fishermen the next year would be a reduction of TALFF by 500 tons (5 percent of the base harvest). This reduction would occur in addition to the reduction attributable to the actual increase in the United States catch. Therefore, the TALFF for the following year would be 9,125 tons (10,000 tons, minus the sum of 375 tons -- which represents the actual increase in the domestic harvest -- and the 500-ton reward). United States fishermen would then have, in essence, a 500-ton reserve from which they could increase their harvest. Further reductions of TALFF would be triggered by additional domestic catches that meet the 375-ton target level.

In accordance with this formula, incremental increases in the domestic catch would result in correspondingly larger reductions of TALFF. If United States fishermen should increase their catch by 750 tons (50 percent of the calculation factor) over their harvest level of the earlier threshold, the TALFF would then 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 reduced by 1,750 tons to a level of 7,375 tons.

If the appropriate regional Council should determine that United States vessels will be unable to harvest any portion of the quantity of fish reserved from TALFF under the reduction formula, the Secretary of State may release that portion to foreign fishing.^{140/} If, however, the Secretary of Commerce should determine, on the basis of recommendation of the regional Council, that the release of all or part of the unused reserve to foreign fishing would be detrimental to the development of the domestic fishing industry, the release may be withheld until the following year.^{141/} The drafters of the 1980 Act intended that, in determining whether the release might be detrimental to the domestic fishing industry, the Secretary should follow the advice

of the Councils and base any finding of detriment on economic and social data, including the effect of the release on the marketing of domestic fish products.^{142/} A possible scenario in which release of the unused reserve might not be found detrimental to the domestic fishing industry would occur if the United States were to secure a specific concession from a foreign nation that would increase United States harvesting or processing capacity, or would increase the market opportunities for domestically harvested or processed fish.^{143/}

The 1980 Act's "reduction formula" for calculating TALFF can thus be seen as a compromise between those interests that sought to impose strict exclusion of foreign fishing^{144/} or mandatory reductions of the level of foreign fishing^{145/} and those interests that viewed such reductions as contrary to the principles of optimum yield and full utilization as endorsed by the Law of the Sea Conference.^{146/} The compromise reallocation provision is thus seen as consistent with the principle of optimum utilization, because the portion of the reserve that is not harvested by United States vessels is released to foreign fishing the following year.^{147/}

Once the TALFF for a fishery is established by a regional fishery management Council (whether by application of the OY minus DAH formula or by the "reduction factor amount" formula), the Secretary of State, in cooperation with the Secretary of Commerce, must allocate the TALFF among the foreign nations that have signed GIFAs and wish to harvest that particular fishery. The 1980 Act increased the number of criteria that the Secretary must consider in determining the allocation among foreign nations. 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 United States fish products or otherwise restricts the market access of United States fish products;
- (2) is assisting United States fisheries development through the purchase of United States fisheries products;
- (3) has cooperated in the enforcement of United States fishing regulations;
- (4) requires fish harvested from the FCZ for its domestic consumption;
- (5) is minimizing gear conflicts with United States fishing vessels and transferring harvesting and processing technology to the United States fishing industry;
- (6) has traditionally engaged in fishing for the species being applied for; and
- (7) has cooperated in fisheries research.^{148/}

Other matters as the Secretary of State and Secretary of Commerce deem appropriate may be stated separately.^{149/}

The extent of an applicant nation's traditional fishing, contribution to research, and cooperation in enforcement are criteria that were present in the FCMA as enacted in 1976. Although not defined in the Act, "traditional foreign fishing" has been defined by the Senate Commerce Committee as "long-standing, active, and continuous fishing for a particular stock by citizens of a foreign nation."^{150/} Nations that have continually fished on a particular stock for 10 or 15 years in compliance with applicable international agreements would thus have a preference in allocation over those nations that have only recently begun to fish.^{151/}

Contribution to research and cooperation in enforcement are criteria designed to encourage foreign nations to comply with the provisions of the Act. Thus it is advantageous for a foreign nation to enforce United States fishery regulations against its own nationals.

The American Fisheries Promotion Act of 1980 added criteria 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 domestic fish products, purchase more United States fish exports, and transfer technology to the United States fishing industry. It is expected that nations that reduce tariff and non-tariff trade barriers on United States fish exports will in turn receive appropriate concessions on their TALFF allocations.^{152/} It is also expected that nations unwilling to assist and encourage United States exports will have their allocations reduced or terminated. The importance of the market access factors in the calculation of TALFF is stated in the 1980 House Report: "While cooperation of foreign states with the United States in FCMA enforcement and conservation is essential and in fisheries research is important, market access is the touchstone."^{153/}

There are two other criteria that the Secretary of State may consider. The needs of foreign nations for the basic nutritional requirements of their citizens may be considered in setting the TALFF in the FCZ of the United States.^{154/} As a final criterion, the Secretary of State may consider such other matters as are deemed appropriate. While the limits of this discretion have not been defined, this criterion has been used to ban Soviet fishing in the FCZ because of the Soviet invasion of Afghanistan, and also to ban fishing by Polish vessels after the imposition of martial law in Poland.^{155/}

Recent (1983) amendments to the FCMA^{156/} give the State Department greater flexibility in basing the TALFF allocations on the degree of a foreign nation's cooperation with the United States law. Foreign allocations are now affected in two additional ways.^{157/} First, the carry-over from year-to-year is now discretionary: the deferred quantity of the annual fishing level now "may" (rather than "shall") be allocated in the following year.^{158/} Second, the "partial allocation process" that the

National Marine Fisheries Service (NMFS) and the State Department adopted as policy in 1982 is now formally incorporated into the Act.^{159/} Thus, the aggregate allocation made to each foreign nation is calculated at the start of each year. The original release (by the Department of State) may be no more than 50 percent of this aggregate. This preliminary release is apportioned (with a written explanation of the basis of the calculation) among the various fisheries in which the nation participates, but the allotment to each fishery need not be proportionate. That is, any percentage of a single fishery may be allocated initially, provided that no more than 50 percent of the aggregate allocation for the nation in question is released at that time. In April of each year a further portion of the next 25 percent will be released to each nation, depending on its cooperation with and adherence to TALFF criteria such as enforcement, research, trade barriers, and export policies.^{160/} The remaining 25 percent will be released in July of each year.

To receive an allocation of the TALFF, each nation that has entered into a GIFA must apply annually to the Secretary of State for a permit for each vessel seeking to fish within the FCZ.^{161/} The permit applications must be "stock-specific" (i.e., they must identify the target fishery), and they must provide detailed information about the anticipated fishing effort, including information about tonnage, capacity, processing equipment, and fishing gear.^{162/} Applications must identify the season or period during which the fishing will occur, the location, and the estimated amount of the tonnage of fish that will be harvested in each fishery by the vessel, or received at sea from United States vessels pursuant to a joint venture.^{163/} The permit application must be published in the Federal Register, with copies provided to the Secretary of Commerce, the appropriate regional Council, the Secretary of Transportation (for the Coast Guard), the House Committee on Merchant Marine and Fisheries,^{164/} and the Senate Committees on Commerce and Foreign Relations.

After receipt of regional Council comments, and after consultation with the Department of State and with the Coast Guard, the Assistant Administrator of NMFS (whose responsibility has been designated by the Secretary of Commerce) may approve an application if he or she determines that the fishing described in the application meets the requirements of the Act.^{165/} Although each application is considered on its own merits, 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 ships' masters and fish managers from participation.^{166/} In its guidelines NMFS has stated that applications will generally not be disapproved solely for the purpose of limiting the number of vessels in a fishery.^{167/}

The Secretary of Commerce is authorized to establish the conditions and restrictions to be included in each permit.^{168/} A permit may be granted only when all the requirements of any applicable fishery management plan and all the requirements set out in the foreign nation's GIFA are satisfied.^{169/} The permit is valid only for the specific vessel for which it is issued.^{170/} If the permit is issued to a foreign processing vessel that is participating in a joint venture, it must state the maximum quantity or tonnage of domestically harvested fish the foreign vessel may receive at sea from United States vessels.^{171/} Permits for all other vessels must include the restriction that the vessel may not receive at sea any domestically harvested fish.^{172/} The Secretary of Commerce may also attach additional conditions and restrictions as necessary and appropriate, but these will generally not be employed as a substitute for management measures in the applicable FMP or appropriate foreign fishing regulations. They may, however, be temporarily employed to respond to new situations not adequately addressed in plans and regulations.^{173/}

The owner or operator of each vessel that receives a permit must pay the appropriate fee to the Secretary of Commerce.^{174/} (Types and schedules of fees applicable to foreign fishing are discussed in Part VI of this chapter.)

Finally, a permit may be revoked, suspended, or modified at any time 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.^{175/} These and other offenses and penalties are addressed in Chapter Five on enforcement of the FCMA.

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.^{176/} In the fisheries field, a "joint venture" is typically an arrangement whereby fish harvested by United States fishermen are sold and delivered to foreign processing vessels operating within the FCZ of the United States.

Prior to passage of the FCMA in 1976, countries such as Japan, Korea, Poland, and the U.S.S.R. relied heavily upon their own technologically advanced distant-water fishing fleets to supply fish products. In these nations, fish products provide a major portion of the protein supply, and are also a major export. Because their fleets were not well suited for other fisheries in other areas, the anticipated reduction of fishing opportunities in the FCZ presented a threat to the economy and food-producing ability of these countries. Foreign nations such as these often see international joint ventures involving United States fishermen and foreign processing vessels as a way to guarantee an adequate supply of fishery products while at the same time protecting the enormous investment in their distant-water

vessels.^{177/}

Although international joint ventures in fishery operations are common in other parts of the world,^{178/} this type of joint venture had never been proposed or undertaken by United States fishermen prior to enactment of the FCMA. For purposes of the Act, "fishing vessels" were defined to include processing and support ships,^{179/} and these were therefore subjected to the permit system applicable to all foreign fishing vessels.^{180/} The FCMA as originally enacted did not address the possibility of foreign processing ships conducting cooperative fishing operations with United States fishermen. Thus, in the spring of 1977, when two applications for foreign processing ships to receive domestically harvested fish were received, they were denied by the regional Councils concerned. NOAA, however, decided that no regional Council should take final action on a joint venture proposal until a national policy could be developed.^{181/}

Domestic shoreside processors opposed the joint venture proposal as a mere subterfuge to circumvent the provisions of the FCMA and continue foreign domination of certain fisheries. More importantly, opponents argued, onshore processors cannot compete with foreign processing vessels not subject to United States wage requirements, anti-pollution laws, and safety and health regulations.^{182/} 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 gross national product (GNP). It has been estimated, for example, 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 quantity were processed in a domestic shoreside facility, it would contribute at least 50 cents to the GNP.^{183/}

In contrast, United States fishermen who favored joint ventures noted that they had been proposed only for species for which there was little or no domestic processing capacity.^{184/} United States fishermen have traditionally avoided fish such as pollock and whiting (formerly known as hake), because of their low economic value and lack of processing or marketing outlets. Joint ventures would provide the opportunity for United States fishermen to harvest new fisheries and develop an immediate market.^{185/} Domestic processors have never been convinced that American fishermen possess the experience or technology to catch economically significant quantities of underutilized species. Proponents thus argued that joint ventures would actually aid in the development of both the fishing and processing industries in two ways: by giving fishermen experience in new fisheries, and by creating confidence among processors that an adequate supply of underutilized species will be available to justify new investment and market expansion.^{186/}

After extensive public hearings, the Department of Commerce, through the National Oceanic and Atmospheric Administration

(NOAA), issued proposed regulations that would have allowed joint ventures only upon a showing that domestic processing capacity in a fishery 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.^{187/} However, on May 12, 1978, NOAA retracted the proposed regulations because of negative comments received after release of the proposal. In its retraction, NOAA expressed its agreement with many comments arguing that the Secretary of Commerce lacked authority under the FCMA to favor domestic over foreign processors in granting permits.^{188/} According to NOAA, the Secretary had authority to 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 economic preference for domestic processors.^{189/}

This sudden reversal of policy enlarged a so-called loophole in the FCMA. Response was swift, as domestic fish processors filed two suits challenging the validity of the May 12 reversal.^{190/} Both Houses of Congress quickly responded to NOAA's withdrawal of the proposed regulations. On August 28, 1978, the Processor Priority Amendment of 1978 was signed into law.^{191/}

The 1978 amendments to the FCMA clarified congressional intent that all segments of the United States fishing industry -- including processors -- are to fall within the jurisdiction and protection of the FCMA.^{192/} In effect, the amendments created a three-tiered priority system for access to United States fishery resources.^{193/} First priority is given to the United States fishing industry for fish harvested and processed domestically. Second preference is given to joint ventures in which domestically-harvested fish are delivered at sea to foreign processing vessels. Lowest priority is given to foreign-harvested fish.^{194/} Under this system, joint venture permits for foreign processing vessels can be issued only for that part of the optimum yield of a fishery that will not be utilized by domestic processors.^{195/} Thus the formula for allocation to foreign processing vessels is now optimum yield (OY) minus domestic annual processing (DAP).

The 1978 amendments require a foreign nation to submit a permit application to the Secretary of State in order to enter into a joint venture.^{196/} The application is transmitted to the appropriate regional Council for comment,^{197/} and then to the Secretary of Commerce for approval.^{198/} The Secretary of Commerce must deny the application if he or she determines that domestic fish processors have the capacity and intent to process all domestically harvested fish from the fishery concerned.^{199/} If the Secretary determines that the requisite capacity and intent is lacking, he or she may approve the permit.

The amendments also require that certain information concerning the processing industry be included in the fishery management plans (FMPs) prepared by the regional Councils. The FMPs must now include an assessment of the "capacity and extent to

which United States fish processors will process United States harvested fish."^{200/}

Several criteria may be considered in determining domestic processing capacity and intent for a particular fishery. The determination must not rest simply on ascertaining the maximum potential physical productivity of domestic processing units.^{201/} There must also be a showing of demonstrated intent of the domestic processors to utilize the particular fish species. One measure of intent is found in the extent to which domestic fish processors have processed a fish species in the past. Other considerations include the existence of contracts or agreements with fishermen for the purchase of the harvest of particular species, as well as evidence of expansion of facilities to accommodate processing of those species.^{202/} Geographical location of the processor may also be considered, because some underutilized fish species deteriorate rapidly after harvest and require almost immediate processing to maintain quality.^{203/}

Determination of domestic capacity and intent does not, however, require a showing of ability to outbid the price or other contract provisions offered by foreign processors.^{204/} Therefore, if the domestic processors are able to process the entire harvest, they are given absolute priority for processing that species, regardless of the price they offer. Among the species that are clearly not within the scope of joint venture provisions are salmon, king crab, halibut, surf clams, menhaden, lobster, and shrimp.^{205/}

In the case of fisheries for which domestic processing capacity is relatively low -- such as whiting, pollock, and squid -- domestic capacity must be ascertained in order to determine whether any of the domestic annual harvest (DAH) will be available for joint ventures.^{206/} The limiting factor in harvesting underutilized species has typically not been insufficiency of stocks or lack of skill and technology, but rather an absence of markets and correspondingly low prices. Thus for underutilized species domestic processing capacity has, in effect, determined domestic annual harvest (DAH). When joint ventures provide additional markets, the net effect on the domestic annual harvesting capacity of United States fishermen is hard to determine. Proponents of joint ventures assert that when availability of markets becomes the major limiting factor, the DAH should be calculated simply by adding together the domestic processing capacity and the quantity of fish that can be processed by joint ventures. But because this method automatically creates allocations for joint ventures without providing any priority or protection for the United States processing industry, processors disagree.^{207/}

Although domestic processors are technically given priority for all fish that they have capacity and intent to process, it may nevertheless be difficult for them to expand capacity to meet new markets because of the direct competition from joint ven-

tures. Studies have shown that even when a joint venture operation and onshore processors pay the same price per pound of fish, it is more profitable for domestic fishermen to deliver their harvested fish to the joint venture because of a more favorable ratio of fishing time to delivery time, more efficient delivery techniques, and savings of fuel and ice.^{208/} The FCMA does not require fishermen to fulfill the requirements of domestic processors before fish can be delivered to foreign processing vessels pursuant to an approved joint venture arrangement. In fact, United States fishermen have the right to refuse to deliver to domestic processors if they are dissatisfied with terms offered by the processors.^{209/} Therefore, the 1978 amendments may establish a processor priority for fishery allocations of underutilized species, but they do not guarantee that anticipated levels of fish will be delivered to the processors. Given the competitive advantage of foreign processing vessels and the flexibility of domestic 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 further that although United States fishermen and fish processors of underutilized species are mutually dependent upon each other, their interests often conflict. While competition between processors creates a fair market for fully utilized species, the situation is different for underutilized species. Without external competition from joint ventures, the relatively few domestic processors of underutilized species would be able to subject fishermen to unilaterally established terms and conditions.

There are ways, however, that processor priority may be protected. 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."^{210/} The additional conditions have usually been time, area, and gear restrictions designed to reduce incidental catch. While the language of the FCMA requires that such conditions and restrictions on foreign fishing be related to conservation and management of the fishery resource,^{211/} the legislative history of the joint venture amendments suggests that conditions and restrictions should also be imposed to achieve the objectives of those amendments.^{212/} 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 where foreign processing vessels may operate.^{213/} It can therefore be persuasively argued that "fishery conservation and management" should be defined broadly enough 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"^{214/}

While time and area restrictions on foreign processing vessels may be appropriate to protect the domestic processor prior-

ity in a given area, they must also be viewed as restrictions on domestic fishermen. Because of the conflicting interests of domestic fishermen and processors of underutilized species, the role of joint ventures in United States fisheries policy has not yet been settled.

Joint ventures were originally regarded as an interim step towards a totally domestic fishing industry.^{215/} A natural progression was intended to take place from total foreign domination, to joint ventures whereby domestic fishing vessels would supply foreign processors, to full domestic control with United States fishing vessels supplying United States processors. However, the continuing growth in joint venture arrangements and their increased importance to domestic fishermen raise doubts about whether joint ventures are destined to remain only a temporary phase in the United States fishing industry.

Joint venture operations began on a small scale in 1978 with United States fishermen participating in two joint ventures on the Pacific coast. The first such venture was undertaken by Marine Resources Company, a partnership of an American corporation, Bellingham Cold Storage of Washington, and Sovryflot, a special agency of the Soviet Ministry of Fisheries.^{216/} The other was formed between the Korean Marine Industry Development Corporation and R. A. Davenny and Associates of Alaska.^{217/}

Although the foundations had been laid, joint ventures did not catch on until after the passage of the American Fisheries Promotion Act of 1980.^{218/} The 1980 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 United States fishing industry.^{219/} By 1981, Poland, West Germany, Japan, and other nations had joined Korea and the Soviet Union in launching joint ventures to secure allocations of valuable underutilized species, mainly Alaskan bottomfish.^{220/} The combination of an excess of modern, high-priced, and often heavily mortgaged U.S. fishing vessels, and a surplus of foreign processing vessels that had been idled by the advent of the 200-mile FCZ, joined with the incentive of the fish and chips policy and produced a boom in joint venture operations. Alaskan trawl production increased more than 50 percent during the three-year period of 1979 through 1982.^{221/} Seventy-six percent of the 118,000 metric tons caught by Alaskan trawlers during a ten-month period ending in October, 1981 was delivered to joint venture operations.^{222/} 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.^{223/}

The most successful of the joint ventures was also the first to begin operation (the Marine Resources operation mentioned above), a 50-50 joint equity venture that purchases bottomfish from United States fishermen to be processed aboard leased Soviet processing vessels. The finished product is then sold on the

international market.^{224/} In 1981, Marine Resources bought 80,000 metric tons of bottomfish from domestic fishermen and helped offset the United States trade deficit by 20 million dollars.^{225/}

According to company spokesmen, the Marine Resources joint venture experience also illustrates how joint ventures can benefit domestic processors of underutilized species. Both harvesting and processing sectors have benefitted from learning new skills, transferring technology, and demonstrating that United States fishermen can indeed catch and deliver large quantities of non-traditional species.^{226/} Domestic processors have also been able to take advantage of the joint ventures' development of new fisheries without risking any initial investments of their own.^{227/} Because of the demonstrated success of joint ventures, United States fishermen are now providing a steady supply of bottomfish to a new onshore processor,^{228/} and a U.S. trawler-processor has begun operation in the Gulf of Alaska.^{229/}

Although the joint venture amendments created a processor priority for species not fully utilized, while at the same time attempting to maintain a fair market for United States fishermen, they have not spurred the tremendous expansion of domestic processing capacity that some expected. Dr. Walter Pereyra, manager of the Marine Resources joint venture, argues that this lack of expansion should not be blamed on the existence of joint ventures, but rather on the economic reality that domestic processors must compete on the world market.^{230/} Even if this view is correct, 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,^{231/} domestic processing of underutilized species may soon become competitive on the world market, which will in turn allow for the United States processing industry to expand its capacity.

VI. Observer Program and Foreign Fishing Fees

A foreign vessel fishing within the FCZ of the United States must comply with two other provisions of the FCMA. The owner or operator of a foreign fishing vessel must allow a United States observer to be placed on board and must pay certain related fees in advance. These provisions have recently been amended as a result of Congress' efforts to improve monitoring and control of foreign fishing activities.

A. Observer Program

The FCMA as originally enacted in 1976 states that Congress intended that Governing International Fishing Agreements (GIFAs) include a binding commitment on the part of foreign fishing nations to permit United States observers aboard their vessels, and to reimburse the United States for the cost of these observers.^{232/} Thus, the terms of the original negotiated GIFAs placed observers aboard foreign fishing vessels and billed the

foreign fishing nation for the cost of the observer coverage.

The observer program has had two broad objectives: to collect biological data on foreign fisheries conducted within the FCZ of the United States, and to provide a "compliance presence" aboard the foreign fishing vessels.^{233/}

The data collection aspect of the observer program has been useful in accomplishing the FCMA's purpose of conservation and management of fishery resources. Observers collect biological data that is in turn used to assess the species, age, and sex composition of foreign harvest, the quantity and type of fish harvested, and the degree of effort expended to gather the harvest.^{234/} The data collected, together with other available information, may be used to establish maximum sustainable yield (MSY) and optimum yield (OY) levels. Observers may also collect biological data -- such as the population and distribution of marine mammals -- that may be used in the enforcement of other United States laws and regulations.^{235/}

In addition to data gathering, observers also have an enforcement function in that they can witness and document violations of foreign fishing regulations. Documentation may be used to substantiate charges of violations and to levy penalties.^{236/} Observer reports have even been used to justify seizure of foreign fishing vessels.^{237/} Observers on foreign vessels have been effective in detecting and deterring violations involving unlawful retention of prohibited species, excess incidental catch, quota violations, use of unlawful gear, and failure to return certain prohibited species to the water with a minimum of injury.^{238/} Regulatory monitoring is vital to implementation of fishery management plans. Without it, regulations are very difficult to enforce.

It must be noted, however, that although observers play an important role in ensuring compliance with United States fishing laws and regulations, they have no enforcement authority. Instead, they must summon the Coast Guard for immediate action on serious violations.^{239/} The observer should thus be viewed not as a resident enforcement officer but as a permanent witness on whose reports action can be taken.^{240/}

The owner or operator of a foreign fishing vessel to which an observer is assigned must provide, at his own expense, on-board accommodations for the observer that are equivalent to those provided to officers of that vessel.^{241/} The owner or operator must also allow the observer to use the vessel's communication equipment and personnel as necessary to transmit and receive messages.^{242/} Use of the vessel's navigation equipment must also be available to the observer in order to determine the vessel's position.^{243/} The owner or operator of the vessel must also provide all other reasonable assistance to enable the observer to carry out his or her duties.^{244/} It is unlawful for any person to forcibly assault, resist, oppose, impede, intimi-

date, ^{or} 245/ interfere with an observer placed aboard a foreign vessel.

The cost of the observer program is borne by foreign fishing interests. The owner or 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, transportation to and from the vessel, and overhead costs. 246/

Prior to enactment of the American Fisheries Promotion Act of 1980, receipts collected from foreign fishing vessels for the cost of observers were deposited in the general treasury. 247/ The observer program, while not a burden on United States taxpayers, still had to compete with other uses of the funds thus collected.

Since observer placement was not mandatory and had to compete for funding through the general appropriations process, full 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 FCZ, the National Marine Fisheries Service (NMFS) until recently considered 20 percent observer coverage to be statistically sufficient to meet the objectives of the program. 248/

The proportion of foreign fishing operations actually covered by observers declined steadily over the years. In 1979, United States observers were placed aboard foreign fishing vessels only 18 percent of the time. 249/ By 1980 observer coverage of foreign fishing operations had slipped to an average of only 14 percent. 250/

During this same period, the number and severity of violations of foreign fishing regulations increased. In 1979, there were 382 reported violations. 251/ Twelve of these were major violations involving attempted concealment of total catch by erroneous entry into the ship's log. These violations included underlogging by 25 to 60 percent of the total catch on board and attempted retention and concealment of several thousand metric tons of fish. 252/ According to NMFS agents, the extent of the violations indicated a "formidable and possibly pre-planned effort at non-compliance" with the regulations, 253/ and a serious threat to effective management of fishery resources. 254/

Domestic fishermen expressed vigorous frustration at the reluctance of NMFS to expand the observer program. The fishermen believed expansion would, at no cost to United States taxpayers, help control overfishing by foreign nations. In 1980, Congress responded by passing the American Fisheries Promotion Act. 255/ Section 236 of that 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. 256/ A few exceptions to the full coverage requirement exist. 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,^{257/} and also in instances in which conditions aboard the vessel might jeopardize the health or safety of an observer.^{258/} The Secretary may also waive the observer requirement in instances where the foreign vessel will be engaged in fishing for such a short period of time in the FCZ that placing an observer aboard would be impractical.^{259/} This provision was included to accommodate some fisheries of the South Pacific, where foreigners fish in the FCZ of United States territories for only a few days of the year.

The Act requires each foreign vessel to pay a surcharge sufficient to cover all costs of providing an observer.^{260/} Payments are no longer deposited in the general treasury; instead, they are now deposited in a special Foreign Fishing Observer Fund.^{261/} The Fund is available to the Secretary to finance the cost of full observer coverage. The observer program is now directly financed and supported by foreign fishing vessels.

With a mandate of 100 percent observer coverage, it was expected that full compliance would be achieved by the January 1, 1982 effective date.^{262/} However, coverage did not meet that expectation, mostly because of the effect of two provisions in the Act that weakened the mandate. The first allowed the Secretary of Commerce to decline to place observers on any vessel if, "for reasons beyond the control of the Secretary, an observer is not available."^{263/} The other provision allowed the Secretary to draw upon the Foreign Fishing Observer Fund "only to the extent and in the amounts provided for in advance in appropriation Acts."^{264/} Because of the combined effect of these provisions, the full observer coverage mandate could have been thwarted by failure of the Office of Management and Budget to budget enough money to keep the observer force at full strength. Such a situation is, of course, "beyond the control" of the Secretary of Commerce, and full observer coverage might have been waived for both reasons.^{265/}

In response to this apparent loophole, Congress passed a supplemental amendment^{266/} in 1982, adding a new subsection to ensure 100 percent observer coverage regardless of the availability of observer funds.^{267/} The new subsection directs the Secretary to establish a pool of qualified observers available on call for foreign fishing vessels. When funding appropriations are insufficient to enable the Secretary to provide each applicant vessel with an observer, the vessel must contract with an individual from the pool. An applicant vessel will pay the observer directly according to a reasonable fee schedule established by the Secretary.^{268/} Funding shortfalls have now been removed as a reason "beyond the control of the Secretary."^{269/} As a result of the amendment, observer coverage rose from 32 percent in 1982, to 48 percent in 1983, to 100 percent in

1984.^{270/}

In the 1983 amendments, Congress expanded the scope of duties to be performed by observers at the expense of the fishing permit applicant. The foreign vessel now will also absorb costs of necessary data processing associated with the functions of the observer,^{271/} which have also been expanded beyond mere compliance monitoring. Observers may now carry out scientific experiments or programs not directly related to the fishery under supervision, but related in general to the conservation and management of living resources, as the Secretary deems appropriate.^{272/} Additionally, the 1983 amendments provide that administrative costs of monitoring the observer program will be borne by foreign vessels fishing in the FCZ.^{273/}

B. Foreign Fishing Fees

In addition to paying a surcharge to cover the costs of an observer, the owner or operator of a foreign fishing vessel must prepay certain fees in order to fish in the FCZ of the United States.^{274/} Both the FCMA and the GIFA signed by each foreign nation require them.^{275/}

Under the FCMA as originally enacted, the Secretary of Commerce was given authority to charge "reasonable fees" to the owner or operator of a foreign fishing vessel that has received a permit. The original provisions also required that the fees be applied to each foreign nation in a non-discriminatory fashion. The FCMA established no fee levels, leaving them to the Secretary's discretion, but listed several criteria that could be considered in determining foreign fishing fees. The Secretary could, for example, take into account the cost of carrying out the provisions of the FCMA with respect to foreign fishing, and could consider the costs of management, fishery research, administration, and enforcement.^{276/}

The fee schedule established by the Secretary of Commerce, through the Director of the National Marine Fisheries Service, provides for two types of fees: permit fees and poundage fees. As of January 1984, permit fees were set at \$86 per vessel.^{277/} A poundage fee is charged to foreign vessels according to a schedule that varies with the fishery and species involved.^{278/} Foreign vessels that pay a poundage fee also pay a surcharge equal to 4 percent of the poundage fee.^{279/} This surcharge may be reduced or waived if the Fishing Vessel and Gear Damage Compensation Fund is sufficiently capitalized or increased to as much as 20 percent if necessary to maintain capitalization of the fund.^{280/} Fee schedules and surcharges are subject to change from year to year.

The method of calculating fees has evolved significantly since the FCMA was first enacted, and may change from year to year. As an example of how the process works, we discuss the computations used to establish the 1982 fees at the level re-

quired by Section 232 of the American Fisheries Promotion Act of 1980. The National Marine Fisheries Service first calculated the total costs incurred by themselves, by other departments of the National Oceanic and Atmospheric Administration, by the Coast Guard, and by the State Department in administering the FCMA. For 1982, total costs were calculated at \$112,901,000.^{281/}

The next step of the process was to determine the "foreign catch ratio." In this calculation, domestic catch must first be tallied. United States domestic catch included fish commercially harvested within the three-mile territorial sea, the United States recreational catch, and the domestic catches delivered at sea to foreign processing vessels pursuant to joint venture agreements.^{282/} For 1982, the total volume of the foreign harvest was calculated at 30.7 percent of the total volume of fish harvested within United States territorial waters and the FCZ.^{283/}

The foreign catch ratio of 30.7 percent was then applied to the total cost 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 dollar amount of permit application fees, \$78,000, was then subtracted from this figure. Thus it was calculated in 1982 that Section 232 of the American Fisheries Promotion Act required foreign fishing vessel owners to pay a total of \$34.6 million in fees in addition to permit application fees.^{284/}

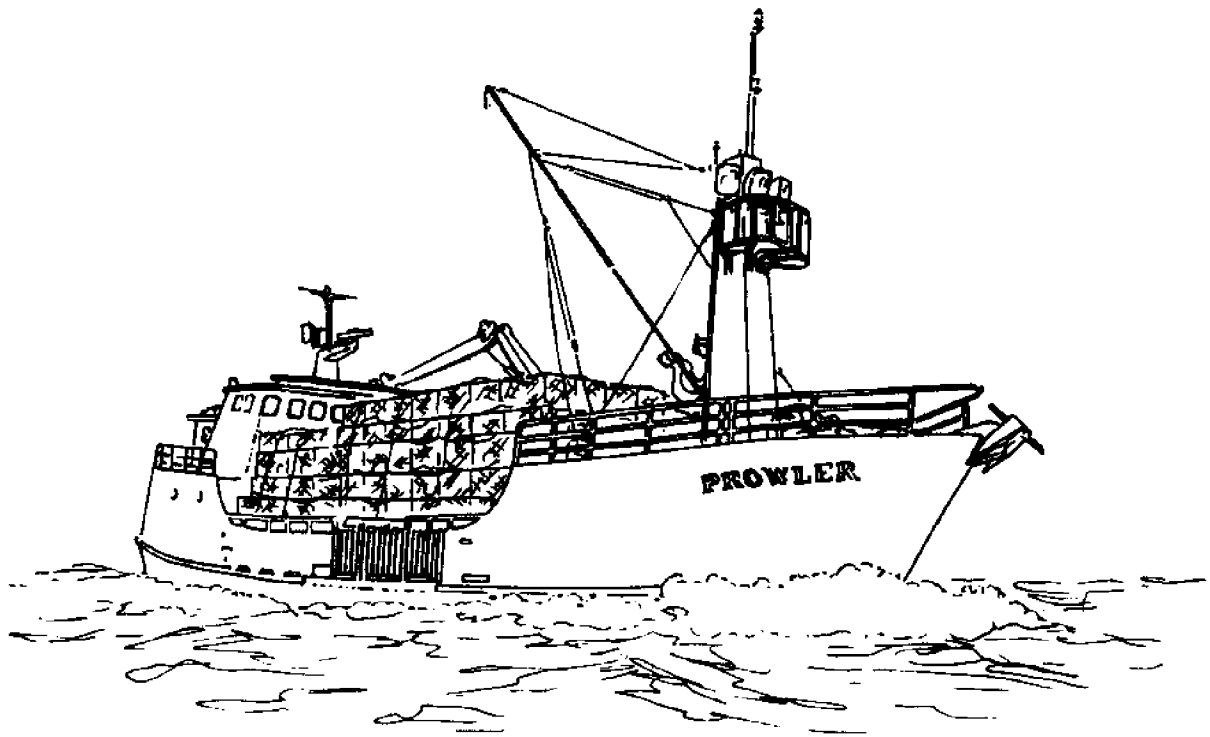
The 1982 poundage fee for each species was calculated by multiplying each 1981 species fee by a factor of 1.65, in order to attain the fee collection target of \$34.6 million.^{285/} The factor of 1.65 was derived by dividing the fee collection target of \$34.6 million by the anticipated 1982 catch at the 1981 fee levels.

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 United States ex-vessel value per metric ton. Using values based on domestic landings in Alaska, the 1980 value was \$397 per metric ton and the poundage fee was \$13.90 per metric ton.^{286/} In 1981, the fee was increased under the interim fee schedule to a set dollar amount of \$44 per metric ton.^{287/} But in 1982, a new fee schedule was established so that foreign vessels might pay for more of their share of administration costs of the FCMA. Thus, under the 1982 fee schedule, the poundage fee for Pacific ocean perch was further increased to \$73 per metric ton. This was increased to \$93 per metric ton in 1983.^{288/}

The method used to calculate the 1982 fee schedule will likely be continued because the system is considered satisfactory from several standpoints. It is consistent with the requirements of the FCMA, GIFAs, and other applicable law. Moreover, it helps to recover the costs of the FCMA, is easy to administer, and

minimizes disruption of traditional fishing practices, existing markets, and consumer demand.^{289/}

Finally, it should be noted that while the current fee schedules help to ensure that foreign fishermen pay a fair share of the costs of administering the FCMA, the absolute dollar amount required from foreign fishermen will steadily decrease in the future. As foreign fishing in the FCZ decreases because of the increased role of joint ventures and the phased reduction formula of Section 230 of the American Fisheries Promotion Act,^{290/} taxpayers will have to bear an increased share of the costs of administering the FCMA. It is likely that in the future Congress will have to deal with 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 Fishery Conservation Zone (FCZ) began to take shape, its sponsors confronted a unique problem: how to establish a management system that has the benefit of federal financial and manpower resources, the force of federal law, and sensitivity to special local and regional needs. For the new attempt at comprehensive management to succeed, it had to earn the respect and cooperation of the people most directly involved -- the fishermen. In addition, any successful management scheme had to be applied to a variety of different and biologically complex fisheries. The interests of consumers and the general public also needed to be considered. When the Magnuson 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 system.^{1/}

The regional system is an imaginative combination of local and federal expertise. Designed to consider the social and economic needs of fishermen and fishing communities, the biological needs of each species under consideration, and the national and international interests of fishery product consumers, regional Fishery Management Councils are a creative solution to a complex national fisheries management problem.

I. The Regions

The provision of the FCMA that created the regional Councils divided up United States coastal waters in the FCZ according to several criteria. These included patterns of domestic commercial fishing, the range of some fish stocks, administrative convenience, and pre-existing political boundaries. The Act created eight ocean regions, each managed by one of the eight regional Councils in cooperation with administrative agencies of the federal government. The regional Councils are comprised largely of representatives from local communities in states adjacent to the ocean region. In this way the FCMA attempts to place management responsibility in the hands of those who best know the local and regional needs.^{2/}

The regional Councils and their constituent states are as follows:

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

Washington
Idaho
Oregon
California

North Pacific Council

Alaska
Washington
Oregon

Western Pacific Council

Hawaii
American Samoa
Guam
Commonwealth of the
Northern Mariana Islands

Of special interest in this Guidebook are the Pacific, the North Pacific, and the Western Pacific Fishery Management Councils. (PFMC, NPFMC, and WPFMC respectively).

II. Composition of the Councils

The PFMC is by law made up 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 Washington, Oregon, and California. Candidates for voting membership are nominated by their peers and placed on a list by the governors of their state. The governors then submit the lists of qualified individuals (not fewer than three for each council vacancy) to the Secretary of Commerce, who makes the selection. The Secretary is required to choose at least one member from each state in the region, but may determine that any nominated individual is not qualified and may ask the appropriate governor for additional justification or for a revised list.^{3/} A member of any Council may be removed "for cause" by a two-thirds vote of the voting members of the Council and subsequent action of the Secretary. A Council recommendation must be in writing and must set forth reasons for removal.^{4/} The other five voting members of the PFMC are specified by law. They are the principal state official with marine fishery management responsibility and expertise in each of the four constituent states, and the regional Director of the National Marine Fisheries Service (NMFS) for the geographical area.^{5/}

The NPFMC has eleven voting members, seven of whom are nominated by their peers and appointed by the Secretary of Commerce in the manner described above. Of these seven, five must be from Alaska and two from Washington. The remaining four members are: the principal state officials with marine fishery management responsibility and expertise from Oregon, Washington, and Alaska; and the Director of the NMFS for Alaska.^{6/}

The WPFMC has thirteen voting members, eight of whom are Secretarial appointees. (Four of the Secretarial appointees are obligatory members of the Council, one from each state or territory.) Four other members are the principal state or territorial official with marine fishery management responsibility, and the last is the regional Director of NMFS. All other United States possessions or protectorates in the Pacific are placed within the WPFMC's area of authority.^{7/}

In addition to voting membership, each Council has a specified number of non-voting members who provide additional expertise and coordination when Council decisions affect other state or federal agencies. Non-voting members designated by the FCMA are: (1) the regional Director for the area concerned of the United States Fish and Wildlife Service, or his or her designee; (2) the Commander of the Coast Guard District for the area concerned, or his or her designee; (3) the Director of the Marine Fisheries Commission for the area concerned (if any), or his or her designee; and (4) a representative of the United States Department of State.^{8/} A special provision of the FCMA creates an additional non-voting position on the PFMC to be filled by an appointee of the Governor of Alaska.^{9/}

The current members of the PFMC, NPFMC and WPFMC are listed in Appendix A at the end of this Chapter.

III. Council Responsibilities

Each Council has primary responsibility for managing its region's offshore fisheries that require management.^{10/} Even so, management is designed to be a cooperative effort between the Councils and the Secretary of Commerce. The role of the Secretary 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 the fisheries in its jurisdiction that need management, and to gather the best information available on the population biology of the stocks and the social and economic characteristics of those fisheries.^{11/} When the necessary information is obtained, the Council determines the "optimum yield" for the fishery in question, the extent of domestic harvesting and processing capacity, and any surplus that may be made available to foreign fishermen and processors. The Council must also take extensive public testimony so that all interested persons have an opportunity to be heard during the development of an FMP. The Council may conduct hearings outside of its area of responsibility, with the consent of the Council of primary jurisdiction, to the extent that "the fish in the fishery concerned migrate into, or occur in, that area or if the matters being heard affect fishermen of that area."^{12/} All meetings of a Council and its subsidiary bodies must be open to the public, unless only internal matters are discussed. Timely public notice must be given, minutes must be kept, and opportunity provided for oral or written comment.^{13/} The above requirements do not apply in situations where the Council declares an emergency.^{14/}

This procedure results in the FMP, which includes any regulatory measures that the Council decides is necessary for conservation and management of the fish stocks under consideration. A completed FMP is forwarded to the Secretary of Commerce for review. If the Secretary finds that the FMP is consistent with

certain basic standards specified in the FCMA,^{15/} the FMP is approved and implemented. If not, it is returned to the Council for revision. (This summary of the FMP process is explained in greater detail in the next chapter, which also contains special information for those who would like to influence the shape or particulars of an FMP.)

In addition to the difficult task of initially preparing an FMP, a Council must monitor and revise the FMP as conditions in the fishery change. This continuing management responsibility covers all aspects of an FMP. The Councils also have various administrative duties, including review and comment on foreign fishing applications, and preparation of periodic reports on Council activities.^{16/}

IV. The Scientific and Statistical Committees

The large amount of complex information necessary for intelligent fishery management requires the cooperative involvement of experts in various fields, such as biology, sociology, economics, and law. In recognition of this, the FCMA provides for the establishment of a Scientific and Statistical Committee (SSC) for each regional Council.^{17/}

The SSC is under the direction of a Council and does not dilute the management authority of the Council. Instead, it provides a "helping hand" in areas not generally or necessarily in the expertise of Council members. The SSC assists in the development, collection, and evaluation of statistical, biological, economic, social, and other scientific information that may be relevant to the development or revision of an FMP.^{18/} The decision-making authority itself remains with the Council. Current SSC members for the PFMC, NPFMC and WPFMC are listed in Appendix A.

V. The Advisory Panels

The Councils must create Advisory Panels as necessary, or appropriate to assist in carrying out Council functions.^{19/} These Advisory Panels are created in addition to, not in lieu of, an SSC. Although Advisory Panels have no independent authority, the Councils rely on them extensively in preparing FMPs and amendments.

The panels provide the Councils with additional information and advice from those involved with various aspects of fishing. Panels are usually made up of participants (or their representatives) in various fisheries, commercial and recreational. Panel membership may include consumer and environmental representatives to help balance commercial interests.

No mandatory form exists for Advisory Panels. Consequently they have taken a variety of forms. The PFMC, for example, sets up individual panels for each fishery under management or under

consideration for management. The NPFMC, on the other hand, has only one Advisory Panel to assist it in management of all fisheries for the region.

The panels provide a convenient and effective conduit whereby interested persons may influence Council decisions. Most panel members live in fishing communities; they are accessible to fishermen and others who cannot otherwise find time to travel to Council meetings. And, because they are usually involved in some part of the industry, panel members are often familiar with problems of fishermen and processors. It is wise for industry participants to become acquainted with their representatives on the Advisory Panels to ensure that their opinions are taken into account in the decision-making process. Appendix A contains the names, addresses, and industry affiliations of current Advisory Panel members for the PFMC, NPFMC, and WPFMC.

VI. Plan Development Teams

The PFMC and NPFMC receive additional assistance in the management plan preparation process from Plan Development Teams (PDT). A PDT is formed for each fishery under consideration for management from a list of nominees submitted by the respective SSC. These nominees are affiliated with state and federal conservation agencies, universities, and private institutions, or are unaffiliated individuals known to possess specific expertise considered helpful for the preparation of an FMP. The Council selects the PDT members, who are responsible for organizing the FMP and its contents in accordance with procedural guidelines.^{20/}

The Council, with advice from the public, the Advisory Panel, and the SSC, directs the PDT and provides guidance on how the final product, the FMP, is to take shape.

VII. Council Staff

The members of Scientific and Statistical Committees, Advisory Panels, and Plan Development Teams are all appointed by the Council that they serve. A Council may also hire an administrative staff consisting of an executive director and such full- or part-time employees as are necessary.^{21/} The duties of administrative personnel include maintaining an office and conducting the day-to-day business of the Council. They are a support staff that helps to ensure the smooth operation of the Council. Responsibilities may include budget preparation, financial management, procurement, coordination of planning efforts, acting as liaison between panels, SSCs, and PDTs, maintenance of Council records, correspondence, preparation of required Council reports, and similar administrative activities. The staff also serves as the outlet for information on activities. Any question about the status of FMPs, future meetings, field hearings, or other Council activities can usually be answered by the administrative staff of a Council. For a regular supply of information, interested persons may have their names placed on a mailing list. For more

information on how to contact the administrative staffs of the PFMC, NPFMC, and WPFMC, see Appendix A.

VIII. Other Assistance

The Councils may also call on the services of federal employees from other agencies. For example, the Councils often need legal advice, which may be provided by National Oceanic and Atmospheric Administration (NOAA) staff attorneys. NMFS may also provide technical assistance and information.

IX. Who Pays the Bill?

The Department of Commerce bears the cost of maintaining the regional Councils. Only the voting members of a Council and the administrative staff are paid directly for their services. Others -- for example, non-voting Council members, legal counsel provided by NOAA, and members of SSCs associated with universities -- receive compensation from their regular employers while on Council-related business. Still others, such as some panel members, may work without any salary at all. The federal government, however, reimburses all Council members, SSC and panel members, and staff for actual expenses (such as travel and hotel accommodations) incurred on Council business.

X. State Jurisdiction Overlap

The FCMA allocates fisheries management jurisdiction between the states and the Federal government. As explained in Chapter 1, the FCMA created a 197 mile wide FCZ, beginning three miles from the coastline. The federal management authority in the FCZ is exercised through the regional council system.

The Constitution of the United States gives the federal government the power to regulate interstate commerce.^{22/} It has been recognized since 1891 that fishing is properly considered an activity of interstate commerce, and as such is subject to federal regulation.^{23/} In the absence of federal regulation, states were free to regulate marine fisheries.^{24/}

States have traditionally exercised exclusive fishery management within their boundaries -- in internal waters and in the three mile "territorial sea." In the past, states also exercised some authority beyond three miles,^{25/} but the states could directly regulate only its own citizens and vessels licensed by the state.^{26/} They could indirectly regulate fishing beyond three miles by means of landing laws.^{27/} A typical landing law prohibits possession of a fish under minimum size within the state's boundaries. Such a law effectively prohibits the sale of an undersized fish, whether or not the fish was caught within state boundaries.

During the early 1970's some states (including Alaska and Oregon), claimed extended fishery jurisdiction beyond three

miles. These states enacted laws and adopted regulations purporting to control fishing as far as two-hundred miles from shore.^{28/} This direct regulation disregarded a fisherman's citizenship and the vessel's licensing, and was a dramatic expansion of state authority. The FCMA was in part a response to this trend, domestically and internationally, and it altered the federal/state relationship. The question is, to what extent has it been changed?

Under the Constitution's Supremacy Clause,^{29/} state laws cannot be applied when they are in conflict with federal law. Sometimes this conflict is obvious. More often than not, lawyers will argue that the state law is not "preempted" because it does not conflict with the law or the scheme of exclusive federal regulation.^{30/} This can be termed the "conflict" element of preemption. Another element is the extent of preemption intended by Congress when it passed the FCMA.

Under normal circumstances, the FCMA makes no claim to preempt the power of the states, nor does it give the states any additional powers. The FCMA provides that "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."^{31/} However, a regional Council (or the Secretary of Commerce) may manage a fishery in state waters when both of the following conditions are fulfilled:

- (1) When an FMP is in place for a fishery that occurs predominately in the FCZ and
- (2) A state has taken or failed to take an action that will substantially and adversely affect the implementation of the FMP.^{32/}

In such a situation and under strict procedural safeguards,^{33/} the Secretary of Commerce may preempt state management within three miles, but not in "internal" waters.^{34/} Internal waters include those waters landward of the boundary from which the territorial sea is measured; that is, internal bays, rivers, streams and lakes.^{35/} This preemption must cease if the reasons for preempting no longer exist.^{36/}

Confusion arises with this provision, section 1856(a), of the FCMA:

"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."^{37/}

By enacting this provision, Congress did not intend to totally preempt traditional state jurisdiction. On its face, the FCMA

does prohibit direct or indirect regulation of non-citizens and out-of-state vessels beyond three miles. It clearly anticipates a shared jurisdiction over the FCZ, as long as state regulation only affects citizens and state-registered vessels. This scheme of shared jurisdiction serves to complicate fisheries management. It would seem that "state control only" or "federal control only" would be the easiest scheme to administer. A hybrid raises questions of interpretation -- usually settled in agency adjudications or in court.

One question of interpretation arises when a regional Council has not yet promulgated an FMP. Does a state enjoy the same regulatory authority over the FCZ that it had before the FCMA, or does section 1856(a) limit that authority to citizens and state-registered vessels? States have continued to apply their pre-FCMA regulations to fisheries for which there is no FMP. This continued regulation has not been challenged by the federal government.

In this case, a state has three arguments in its favor. The first is that the "agency preemption" section discussed above only applies when an FMP is in place. This would imply that the preemption procedure is unavailable when there is no FMP. The state would argue that Congress did not provide for such a procedure because it did not intend to preempt unless an FMP was in place.

Secondly, in other areas of administrative law, courts have decided that when an agency is delegated the power to regulate, but has not exercised that power, states are free to continue their otherwise proper regulation.^{38/} The state would argue that federal power has not been exercised, and because there was no "federal law" in place, there is no conflict and no preemption.

This would be an appealing argument were it not for the clear language of section 1856(a). As the federal attorney would argue, "If the Congress intended this section to apply only when an FMP was in place, they would have used those words." Undoubtedly, "[n]o State may directly or indirectly regulate" means what it says, and goes beyond mere delegation of authority that still needs to be exercised.

The third argument is that there is no valid reason to prohibit states from managing a fish stock that is otherwise unmanaged, that such prohibition is contrary to the conservation and management purposes of the FCMA, and that section 1856(a) should be interpreted to apply only when an FMP is in place. In fact, this argument is probably the explanation for the lack of a federal challenge. Any decision to challenge state regulations would suggest jurisdictional turf battles rather than the best interests of fisheries conservation and management.

A second question of interpretation arises when an FMP is in effect, and the FCMA's preemption provision clearly applies.

When this is true, states may regulate only citizens and state-registered vessels in the FCZ. Two legal issues present themselves. First, what constitutes "registration under the laws" of a state? And secondly, what regulation of state-registered vessels will "substantially and adversely affect the implementation of the FMP?"

Neither the FCMA nor its legislative history provide any convincing clue to the meaning of the registration phrase, and no federal court has decided a case involving its meaning. Until it is clarified, it seems that states may define registration as they see fit. The states of Oregon and California expanded their definition of "registered" to include any vessel fishing pursuant to a state fishing license.^{39/} Alaska and Washington continue to apply broad regulatory powers, suggesting that both states define registration in much the same way.^{40/}

Assuming that these definitions are valid, regulations that are applied to state-registered vessels won't be upheld if the FMP is adversely affected. Certainly, if the state regulation is less protective of the fishery resource, more protective of coastal economies, or otherwise directly in conflict with the FMP, the language of the FCMA and subsequent practice almost guarantees a finding of preemption. The sense of the FCMA was summarized by Terry Leitzell, then Director of NMFS:

"[The FCMA] 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.... FMPs developed for the FCZ jointly by the several States...address in a unified manner regional concerns...[and] would be of little value were each State, acting independently, to regulate fishing...in the FCZ in a manner contrary to such management plans."^{41/}

What if a state regulation does not substantially differ from its federal counterpart? This is the situation contemplated by the FCMA, and is normally the case. When regulations agree with each other, no conflict exists and the state regulations remain valid and in effect.

The third possibility is when the state regulation is more protective of the fishery resource -- for example, shorter seasons or lower quotas. Must the regulation fall because it differs from the FMP? Attorneys answer "it depends." If the purpose of the "less protective" federal regulation would be frustrated by the state regulation, then it would probably be preempted.^{42/} For example, suppose that a federal rule is aimed at exploiting a large supply of small shrimp that might otherwise be

lost to natural predators. A state rule that restricts fishing to larger shrimp would defeat the purpose of the federal rule. On the other hand, suppose that a federal rule permits only a limited harvest of small shrimp in order to protect the growth and reproduction of the fishery. Then, arguably, a state regulation that imposes even lower quotas does not conflict with the purpose of the federal rule. Even though the particulars may differ, the end is better served.

Many legal issues pertaining to federal/state relationships remain unresolved, and will be answered by subsequent practice, clarifying legislation or court interpretation.^{43/} The law is in a state of flux and is subject to rapid change. The following presents a summary of the law of fishery jurisdiction as it stands in late 1984.

Within the FCZ, federal authority is dominant. State regulation is allowed only when: (1) there is no conflict with any federal statute, FMP or regulation; and (2) the vessels affected are "registered" under the law of the state; and (3) the state can sufficiently justify its regulation of fishing in the FCZ;^{44/} and (4) the state regulation neither discriminates against non-residents nor places an undue burden on interstate commerce.^{45/} Within the territorial sea, state jurisdiction and authority is preserved except under the conditions specified in section 1856(b) of the FCMA (the agency preemption section). Accordingly, state regulation will be preempted only when: (1) there is an approved FMP governing the fishery in question; and (2) the fishery is located predominately in the FCZ; and (3) the state regulation substantially and adversely interferes with implementation of the FMP.

XI. Fishery Management Plans and Federal Consistency Under the Coastal Zone Management Act

The Coastal Zone Management Act of 1972 (CZMA)^{46/} presents related jurisdictional problems between the states and the federal government. The problems under the CZMA are conceptually the opposite of those under the preemption doctrine. Section 307(c)(1) of the CZMA requires that every federal agency "conducting or supporting activities directly affecting the coastal zone" shall "to the maximum extent practicable, [be] consistent with approved state [coastal zone] management programs."^{47/} Some states have asserted that this provision requires regional Councils to act consistently with state fishing laws in drawing up an FMP.^{48/}

The statutory language raises three important questions regarding the interaction between the FCMA and the CZMA: (1) Do FMPs "directly affect" the coastal zone? (2) What are the legal requirements of "consistent to the maximum extent practicable?" (3) Who determines what is consistent? Each of these questions is discussed in turn.

The National Oceanic and Atmospheric Administration administers both the FCMA and the CZMA. In 1982 NOAA Administrator John Byrne suggested that FMPs "directly affect" the coastal zone when "the fishery resource to be managed by the FMP [also] is found in state waters, the fish caught under the FMP are landed in the state, and there are other effects on the natural resources of the coastal zone."^{49/}

Byrne's suggestion that FMPs might directly affect the coastal zone must be evaluated, however, in light of the recent Supreme Court decision in Department of Interior v. California.^{50/} In refusing to extend the CZMA section 307(c)(1) consistency requirements to cover Outer Continental Shelf (OCS) lease sales, the Court considered the legislative history of the CZMA and noted that "every time it faced the issue in debate, Congress deliberately and systematically insisted that no part of the CZMA was to extend beyond the 3-mile territorial limit."^{51/} Furthermore, the Court construed the "directly affecting" language narrowly, finding that it was "aimed [solely] at activities conducted by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act."^{52/} Although the Court's opinion is expressly limited to federal activities associated with an OCS oil and gas lease sale, it nevertheless seems to suggest that under certain circumstances FMPs will not "directly affect" the coastal zone so as to trigger the consistency provisions of section 307(c)(1) of the CZMA.^{53/}

The second major consistency issue is deciding when an FMP is consistent "to the maximum extent practicable" with a state's Coastal Zone Management Program (CZMP).^{54/} The statute does not define this phrase; therefore, it will be defined by federal agencies, state law, and when the issue is litigated, by the courts.

NOAA's CZMA regulations only require consistency with "the enforceable, mandatory policies of the [state coastal] management program."^{55/} Provisions that are in the nature of recommendations or goals only need to be given "adequate consideration." Usually, CZMPs contain general statements about fishery management, if they mention it at all. Only a few CZMPs contain detailed provisions or specific policies. Consequently, it is often a simple matter for NOAA and the regional Councils to give a CZMP "adequate consideration," and to demonstrate that the FMP furthers the state's policies.

Some states, however, utilize a "network" approach to coastal zone management that relies heavily on existing coastal-related regulations (including fishing regulations) and specific policy statements and incorporates both into the CZMP. It is sometimes difficult to determine which laws have been incorporated into the CZMP and consequently which laws should be considered in making a consistency review of an FMP. Moreover, there is little guidance to be found within either the FCMA or

CZMA implementing regulations to aid in a determination of how consistency requirements are to be met.

Implementing regulations do, however, suggest that the consistency requirement was intended to be a significant limitation on agency discretion. One effect has been to compel federal agencies "whenever legally permissible, to consider state [coastal] management programs as supplemental requirements to be adhered to"^{56/}

As a result of the decision in Department of Interior v. California, NOAA has undertaken a comprehensive review of consistency standards found in its regulations.^{57/} In addition, legislation has been introduced in both houses of Congress seeking to amend section 307(c)(1).^{58/}

Although neither the CZMA nor the FCMA is explicit regarding who determines whether federal action is consistent with the state program, such authority has been held to reside in the executive branch of the federal government.^{59/} That is, the appropriate federal agency will determine whether its action is consistent with a state's CZMP, subject to judicial review.^{60/}

The interaction between FMPs promulgated by the regional Councils under the provisions of the FCMA, and state fishing laws and regulations incorporated in state coastal zone management programs under the provisions of the CZMA has been a source of debate for several years. Important questions have arisen concerning the application of consistency requirements in section 307(c)(1) of the CZMA to FMPs. The full implications of the consistency requirements remain to be worked out. The regional Councils can facilitate a clearer understanding of the requirements by developing an adequate record of their consistency determinations and by making logical decisions supported by that record. In order for a consistency determination to survive judicial review, Councils should clearly state the statutory basis for determining that an FMP either is, or is not, consistent with state law and regulations. In addition, a Council must be specific in explaining its decisions on the relationship between federal and state law.

Even so, careful attention to proper procedure by the regional Councils may not be enough. Final decisions on pending cases, a clearer articulation of regulations by NOAA, and perhaps even a statutory amendment may be necessary to achieve a workable application of the overlapping provisions of the FCMA and CZMA.

APPENDIX A

Fishery Management Council Personnel

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

605 West Fourth Avenue
Anchorage, Alaska 99510
Mailing Address: P.O. Box 103136
Anchorage, Alaska 99510
Telephone: (907) 274-4563
 PTS 271-4064

STAFF

(As of January 1984)

Executive Director.....Jim H. Branson
Deputy Director.....Clarence Pautzke
Administrative Officer.....Judy Willoughby
Plan Coordinator.....Steve Davis
Plan Coordinator.....Jim Glock
Plan Coordinator.....Jeff Povolny
Special Advisor.....Ron Miller
Economist.....Doug Larson
Executive Secretary.....Helen Allen
Bookkeeper/Secretary.....Becky Wetzler
Secretary.....Peggy Hough

LEGAL COUNSEL

Patrick J. Travers, NOAA General Counsel,
Alaska Region
P. O. Box 1668
Juneau, AK 99802
Telephone: (907) 586-7414

North Pacific Fishery Management Council, Cont'd.

COUNCIL MEMBERS
(As of February 1984)

*ARNAUDO, Ray

Office of Fisheries Affairs
Bureau of Oceans &
International Environmental
& Scientific Affairs
Department of State
Washington, D.C. 20520
(202) 632-5690

BROOKS, James

Alternate for Robert McVey
Nat'l Marine Fisheries Serv.
P.O. Box 1668
Juneau, AK 99802
(907) 586-7221

BUDD, Choate (CDR)

Alternate for Richard Knapp
17th Coast Guard District
P.O. Box 3-5000
Juneau, AK 99802
(907) 586-7363

CAMPBELL, James O. (Chairman)

840 K Street, Suite 200
Anchorage, AK 99501
(907) 274-6581

COLLINSWORTH, Don W.

Alaska Dep't of Fish & Game
P.O. Box 3-2000
Juneau, AK 99802
(907) 465-4100

*DAWSON, Chris

Alternate for Ray Arnaudo
Office of Fisheries Affairs
Bureau of Oceans &
International Environmental
& Scientific Affairs
Department of State
Washington, D.C. 20520
(202) 632-5690

DIDONATO, Gene

Alternate for Bill Wilkerson
Washington Dep't of Fisheries
115 Gen'l Administration Bldg.
Olympia, WA 98501
(206) 753-6600 or 753-6716

DONALDSON, Dr. John R.

Or. Dep't of Fish & Wildlife
P.O. Box 3503
Portland, OR 97208
(503) 229-5551

*HARVILLE, Dr. John P.

Pacific Marine Fisheries Comm.
528 S.W. Mill Street
Portland, OR 97201
(503) 229-5840 or FTS 424-5840

HEMPHILL, Sara

750 W. 2nd Avenue
Anchorage, AK 99501
(907) 279-8313

LOKKEN, Harold E. (Vice-Chrmn)

Fishermen's Terminal,
C-3, Room 219
Seattle, WA 98119
(206) 283-0758

*LUCAS, Robert (RADM)

17th Coast Guard District
P.O. Box 3-5000
Juneau, AK 99802
(907) 586-7347

MACE, Robert U.

Alternate for John Donaldson
8825 Highbanks Road
Central Point, OR 97502
(503) 664-4724

*Non Voting Members

North Pacific Fishing Management Council, Cont'd.

Council Members, Cont'd.

McVEY, Robert W.
Nat'l Marine Fisheries Serv.
P. O. Box 1668
Juneau, AK 99802
(907) 586-7221

WILKERSON, Bill
Washington Dep't of
Fisheries
115 Gen'l Administration Bldg.
Olympia, WA 98501
(206) 753-6623

*NELSON, Jon M.
Alternate for Robert Putz
U.S. Fish & Wildlife Serv.
1011 East Tudor Road
Anchorage, AK 99503
(907) 786-3539

WINTHER, John R., Jr.
P. O. Box 863
Petersburg, AK 99833
(907) 772-4754

PENNOYER, Steve
Alt. for Don Collinsworth
Alaska Dep't of Fish & Game
P.O. Box 3-2000
Juneau, AK 99802
(907) 465-4100

PETERSEN, Rudy
6533 Seaview N.W.
Seattle, WA 98117
(206) 784-5818

*PUTZ, Dr. Robert E.
U.S. Fish & Wildlife Serv.
1011 E. Tudor Road
Anchorage, AK 99503
(907) 786-3543

SPECKING, Keith
Box 18
Hope, AK 99605

STEPHAN, Jeffrey R.
United Fishermen's Marketing
Ass'n
P. O. Box 1035
Kodiak, AK 99615
(907) 486-3453

*Non Voting Members

North Pacific Fishery Management Council, Cont'd.

SCIENTIFIC AND STATISTICAL COMMITTEE MEMBERS
(As of February 1984)

ARON, Dr. William
NW & Alaska Fisheries Center
2725 Montlake Blvd. East
Seattle, WA 98112
(206) 442-4760

AUSTIN, Dennis
Alternate for Alan Millikan
Washington Dep't of Fisheries
M-1 Fisheries Center WH-10
University of Washington
Seattle, WA 98195
(206) 543-4682

BALSIGER, Jim
Alternate for William Aron
NW & Alaska Fisheries Center
2725 Montlake Blvd. East
Seattle, WA 98112
(206) 442-4760

BEVAN, Dr. Donald E.
Fisheries Center, Room 204
U. of Washington WH-10
Seattle, WA 98195
(206) 442-7421 or FTS 399-7421

BURGNER, Dr. Robert L.
Fisheries Research Institute
260 Fisheries Center
U. of Washington WH-10
Seattle, WA 98195
(206) 543-4650

BURNS, John J.
Alaska Dep't of Fish & Game
1300 College Road
Fairbanks, AK 99701
(907) 452-1531

CLARK, Dr. John
Alaska Dep't of Fish & Game
P.O. Box 3-2000
Juneau, AK 99802
(907) 465-4210

HREHA, Larry
Or. Dep't of Fish & Wildlife
53 Portway Street
Astoria, OR 97103
(503) 325-2462

LANGDON, Dr. Steve
University of Alaska
3211 Providence Drive
Anchorage, AK 99503
(907) 786-1723

LECHNER, Jack
Alaska Dep't of Fish & Game
P.O. Box 686
Kodiak, AK 99615
(907) 486-4791

MARASCO, Richard, Vice-Chrmn.
NW & Alaska Fisheries Center
2725 Montlake Blvd. East
Seattle, WA 98112
(206) 442-7719 or FTS 399-7719

McCRARY, Jerry
Alternate for Jack Lechner
Alaska Dep't of Fish & Game
P.O. Box 686
Kodiak, AK 99615
(907) 486-4791

MILLIKAN, Alan E.
Washington Dep't of Fisheries
M-1 Fisheries Center WH-10
University of Washington
Seattle, WA 98195
(206) 543-4682

RIGBY, Phil
Alternate for John Clark
Alaska Dep't of Fish & Game
P.O. Box 3-2000
Juneau, AK 99802

ROBINSON, Jack
Alternate for Larry Hreha
Or. Dep't of Fish & Wildlife
Marine Science Dr., Bldg. #3
Newport, OR 97365
(503) 867-4741

ROSENBERG, Donald H. (Chrmn.)
Alaska Sea Grant College
Program
University of Alaska
590 University Ave., Suite 102
Fairbanks, AK 99701
(907) 474-7086

North Pacific Fishery Management Council, Cont'd.

ADVISORY PANEL MEMBERS
(As of February 1984)

ALVERSON, Robert D.
Chairman
Fishing Vessel Owners' Ass'n
Fishermen's Terminal
Building C-3, Room 232
Seattle, WA 98119
(206) 284-4720

BARKER, Pat
Box 56
Bethel, AK 99559
(907) 543-2503

BLAKE, Robert
Cordova Aquatic Marketing
Ass'n
P.O. Box 939
Cordova, AK 99574
(907) 424-3447 or 424-3682

BODDY, A.W. "Bud"
Vice-Chairman
1700 Glacier Avenue
Juneau, AK 99801
(907) 586-1885

BURCH, Alvin
Alaska Shrimp Trawlers Ass'n
P.O. Box 991
Kodiak, AK 99615
(907) 486-3910

COLLIER, Barry
North Pacific Fishing Vessel
Owners' Ass'n
Fishermen's Terminal
Building C-3, Room 218
Seattle, WA 98119
(206) 285-3383

COTTER, Larry
c/o ILWU
307 South Franklin
Juneau, AK 99801
(907) 586-6642

FISHER, R. Barry
Box 144, Star Rt. South
South Beach, OR 97366
(503) 867-6143

FOSTER, Jesse
Quinhagak, AK 99655
(907) 556-8220

IVANOFF, Weaver
Norton Sound Fisherman's Co-op
Box 113
Unalakleet, AK 99684
(907) 624-3622

JOLIN, Ron B.
Box 2022,
Kodiak, AK 99615
(907) 486-5949

JORDAN, Eric
P.O. Box 3133
Sitka, AK 99835

KURTZ, Joseph A.
6535 Seaview Ave. N.W.
Seattle, WA 98107

LAUBER, Richard B.
Pacific Seafood Processors
P.O. Box 1625
Juneau, AK 99802
(907) 586-6366

LECTURE, John G.
Seafood Producers Cooperative
2875 Roeder Avenue
Bellingham, WA 98225
(206) 733-0120

LEWIS, Raymond P.
4920 122nd Avenue S.E.
Bellevue, WA 98006

O'CONNELL, James
c/o National Bank of Alaska
P.O. Box 600
Anchorage, AK 99510
(907) 276-1132

O'HARA, Daniel J.
P.O. Box 148
Naknek, AK 99633
(907) 246-4470

North Pacific Fishery Management Council, Cont'd.

Advisory Panel Members, Cont'd.

PHILLIPS, Jack O.
P.O. Box 777
Pelican, AK 99832
(907) 735-4261

RAWLINSON, Don
c/o Peter Pan Seafoods, Inc.
1000 Denny Bldg.
6th & Blanchard
Seattle, WA 98121

SAMUELSEN, H. Harvey
P.O. Box 18
Dillingham, AK 99576

SMITH, Walter J.
Alaska Fishermen's Union
2505 First Ave., Room 3
Seattle, WA 98121
(206) 623-2981

STEWART, Thomas L.
Petersburg Vessel Owners Ass'n
Box 134
Petersburg, AK 99833

VASKA, Anthony
Nunam Kitlutsisti
Pouch V
Juneau, AK 99811

WOJECK, Edward J.
Alaska Trollers Ass'n
205 N. Franklin Street
Juneau, AK 99801
(907) 586-9400

PACIFIC FISHERY MANAGEMENT COUNCIL

526 S.W. Mill Street
Portland, Oregon 97201
Telephone: (503) 221-6352
 FTS 423-6352

STAFF

(As of January 1984)

Executive Director.....Joseph C. Greenley
Administrative Officer.....Gerald L. Fisher
Staff Officer (Marine Fisheries).....Henry O. Wendler
Staff Officer (Salmon).....Robert T. Gunsolus
Staff Economist.....Dorothy M. Lowman
Executive Secretary.....Wanda C. Dierman
Secretary.....Debbie K. Thomas
Administrative Technician.....Violet E. Spinks
Part-Time Typist.....Carol M. Knutson

LEGAL COUNSEL

Douglas Ancona, NOAA General Counsel,
Northwest Region
7600 Sand Point Way N.E.
BIN C15700
Seattle, WA 98115
Telephone: (206) 527-6075
 FTS 446-6075

Pacific Fishery Management Council, Cont'd.

COUNCIL MEMBERS
(As of January 1984)

ARNAUDO, Ray
Office of Oceans and
Fisheries Affairs
U.S. Dep't of State, Rm 5806
Washington, D.C. 20520
(202) 632-5690
Designee: Ms. Chris Dawson
(202) 632-5690

CARPER, H.D.
Calif. Dep't of Fish & Game
1416 Ninth Street
Sacramento, CA 95814
(916) 445-3535
Designee: Robert Fletcher

COLLINSWORTH, Dr. Don W.
Alaska Dep't of Fish & Game
P.O. Box 3-2000
Juneau, AK 99802
(907) 465-4100
Designee: Guy Thornburgh
(907) 465-4100

CONLEY, Jerry M.
Idaho Fish & Game Dep't
600 S. Walnut
Boise, ID 83707
(208) 334-3771 FTS 554-3771
Designee: Monte Richards

CRUTCHFIELD, Dr. James A.
(Vice Chairman)
Institute for Marine Studies
University of Washington
Seattle, WA 98105
(206) 543-0111

DONALDSON, Dr. John R.
(Chairman)
Or. Dep't of Fish & Wildlife
P.O. Box 3503
Portland, OR 97208
(503) 229-5406
Designee: Harry Wagner
(503) 229-5669

EASLEY, George "Joe"
Otter Trawl Commission
250 36th Street
Astoria, OR 97103
(503) 325-3384

GALLETTI, Abel C.
1729 East 21st Street
Los Angeles, CA 90058
(213) 744-1830

KANEEN, Robert
5230 Appian Way
Long Beach, CA 90803
(213) 438-7553

KELLY, Allan L.
11300 N.E. Halsey
Portland, OR 97220
(503) 256-4347

*COMMANDER, ADM. C.E. LARKIN
Coast Guard Pacific Area
Government Island
Alameda, CA 94501
(415) 437-3552 FTS 536-3552
Designees:
Rear Adm. Harold Parker, Jr.
13th Coast Guard District
Federal Building
915 - Second Avenue
Seattle, WA 98104
(206) 442-5078 FTS 392-5078

Rear Adm. Frederick Schubert
11th Coast Guard District
400 Ocean Gate
Long Beach, CA 90822
(213) 590-2211

KRUSE, Thomas E.
Nat'l Marine Fisheries Serv.
7600 Sand Point Way N.E.
BIN C15700
Seattle, WA 98115
(206) 527-6150 FTS 446-6154

*Non Voting Members

Pacific Fishery Management Council, Cont'd.

Council Members, Cont'd.

McMINDS, Guy
Quinault Tribal Office
P.O. Box 67
Taholah, WA 98587
(206) 276-8211, Ext. 278

SCHWARZ, Richard
Rt. 4, Box 192
Idaho Falls, ID 83402
(208) 523-6241 FTS 583-0091

*SIX, Lawrence D.
Executive Director, Pacific
Marine Fisheries Comm'n
528 SW Mill Street
Portland, OR 97201
(503) 229-5840
Designee: Dr. John Harrville

*STEUCKE, Wally
Assistant Regional Director
U.S. Fish & Wildlife Serv.
Suite 1692, 500 Lloyd Bldg.
Portland, OR 97232
(503) 231-6118
Designee: John L. Savage
(503) 231-6216

THOMAS, Roger
P.O. Box 1967
Burlingame, CA 94010
(415) 348-2107

WILKERSON, William
Wash. Dep't of Fisheries
115 Gen'l Admin. Bldg.
Olympia, WA 98504
(206) 753-6623
Designee: Frank Haw

*Non Voting Members

Pacific Fishery Management Council, Cont'd.

SCIENTIFIC AND STATISTICAL COMMITTEE MEMBERS
(As of January 1984)

BARRETT, Dr. Izadore
Southwest Fisheries Center
Nat'l Marine Fisheries Serv.
P.O. Box 271
La Jolla, CA 92038
(619) 453-2820 FTS 893-6235

BAXTER, Jack
Calif. Dep't of Fish & Game
245 West Broadway
Long Beach, CA 90801
(213) 590-5117

BEVAN, Dr. Donald E. (Chrmn)
College of Fisheries
A-204 Fisheries Center WH-10
University of Washington
Seattle, WA 98195
(206) 543-4270 FTS 399-7421

DAVIS, Shannon W.
The Research Group
P.O. Box 813
Corvallis, OR 97339
(503) 758-1432

GRAYUM, Michael
N.W. Indian Fisheries Comm.
2625 Parkmont Lane SW Bldg. C
Olympia, WA 98502
(206) 352-8030

HAYES, Dr. Murray
Northwest & Alaska
Fisheries Center
Nat'l Marine Fisheries Serv.
2725 Montlake Blvd. E.
Seattle, WA 98112
(206) 442-7719 FTS 399-7736

HUPPERT, Dr. Daniel D.
Southwest Fisheries Center,
Nat'l Marine Fisheries Serv.
P.O. Box 271
La Jolla, CA 92038
(619) 453-2820 FTS 893-6261

KING, Dr. Dennis M.
E.R.G. Pacific, Inc.
11100 Roselle St., Suite 100
San Diego, CA 92121
(619) 224-3653

LOEFFEL, Robert E.
Research Laboratory
Or. Dep't of Fish & Wildlife
Marine Science Drive
Newport, OR 97365
(503) 867-4741

MILLER, Dr. Marc L.
Institute for Marine Studies
U. of Washington, HA-35
Seattle, WA 98105
(206) 543-7004

POLLARD, Herbert A., II
Idaho Dep't of Fish & Game
600 Walnut Street
Boise, Idaho 83707
(208) 334-3791 FTS 554-3791

SEKULICH, Dr. Paul
Wash. Dep't of Fisheries
115 Gen'l Admin. Building
Olympia, WA 98504
(206) 753-6756

VENRICK, Dr. Elizabeth
Scripps Inst. of
Oceanography-A001
La Jolla, CA 92093
(619) 452-2068 or
(619) 452-2866

Pacific Fishery Management Council, Cont'd.

ANCHOVY PLAN DEVELOPMENT TEAM MEMBERS
(As of January 1984)

KLINGBEIL, Richard A.
Calif. Dep't of Fish & Game
245 West Broadway
Long Beach, CA 90802
(213) 590-5186

HUPPERT, Dr. Daniel D.
Southwest Fisheries Center
Nat'l Marine Fisheries Serv.
P.O. Box 271
La Jolla, CA 92038
(619) 453-2820 FTS 893-6261

MacCALL, Alec D.
Southwest Fisheries Center
Nat'l Marine Fisheries Serv.
P.O. Box 271
La Jolla, CA 92038
(619) 453-2820 FTS 898-6221

MATHISEN, Dr. Ole A.
School of Fisheries & Science
University of Alaska
11120 Glacier Highway
Juneau, AK 99801
(907) 789-2101

METHOT, Dr. Richard
Southwest Fisheries Center
Nat'l Marine Fisheries Serv.
P.O. Box 271
La Jolla, CA 92038
(619) 453-2820 FTS 893-6225

Pacific Fishery Management Council, Cont'd.

ANCHOVY ADVISORY SUBPANEL MEMBERS
(As of January 1984)

BOZANICH, Lawrence
(Wetfish Fisherman)
Fishermen's Co-op Ass'n
Berth 73
San Pedro, CA 90731
(213) 832-5377

VERNA, William J.
(Bait Hauler)
D.B.A. "Foxy Wop"
7890 E. Spring Street 11-F
Long Beach, CA 90815
(213) 437-9856

BUNTEN, Cedric (Chairman)
(Dealer)
Harbor Trading Company
555 W. Ninth Street
San Pedro, CA 90731
(213) 548-1439

YELUSICH, Capt. Vince
(Offshore Fisherman)
P.O. Box 2046
Monterey, CA 93940
(408) 372-5604 (Home)
(408) 373-6490

IZOR, Russell A.
(Sport Fisherman)
1640 - 255th Street
Harbor City, CA 90710
(213) 539-0915

MONTI, Joseph
(Labor)
Fisherman & Allied Workers
Union, Local 33 ILWU
806 S. Palos Verdes Street
San Pedro, CA 90731
(213) 833-1391

NIZETICH, Anthony
(Processor)
Star Kist Foods, Inc.
582 Tuna Street
Terminal Island, CA 90731
(213) 548-4411

NOTT, William A.
(Charterboat Operator)
Sportfishing Association of
California
555 E. Ocean Blvd, Suite 700A
Long Beach, CA 90802
(213) 432-2316

SOULE, Dr. Dorothy
(Air & Water Quality)
2361 Hill Drive
Los Angeles, CA 90041
(213) 743-2053

Pacific Fishery Management Council, Cont'd.

GROUND FISH MANAGEMENT TEAM MEMBERS
(As of January 1984)

FRANCIS, Dr. Robert
Northwest & Alaska Fisheries
Center
Nat'l Marine Fisheries Serv.
2725 Montlake Blvd. E.
Seattle, WA 98112
(206) 442-0822 FTS 399-4624

JOW, Tom
Marine Resources Region
Calif. Dep't of Fish & Game
411 Burgess Drive
Menlo Park, CA 94025
(415) 326-0324

SILVERTHORNE, Dr. Wesley
Southwest Region,
Nat'l Marine Fisheries Serv.
300 S. Ferry Street
Terminal Island, CA 90731
(213) 548-2518 FTS 796-2518

LENARZ, Dr. William
Southwest Fisheries Center
NMFS Tiburon Lab
3150 Paradise Drive
Tiburon, CA 94920
(415) 435-1007

MILLIKAN, Alan (Chairman)
Wash. Dep't of Fisheries
M-1 Fisheries Center WH-10
Univ. of Washington
Seattle, WA 98195
(206) 543-4583

ROBINSON, Jack
Or. Dep't of Fish & Wildlife
Marine Science Dr., Bldg. 3
Newport, OR 97365
(503) 867-4741

Pacific Fishery Management Council, Cont'd.

GROUND FISH ADVISORY SUBPANEL MEMBERS
(As of January 1984)

ARNOLD, Richard
(Pot Fisherman)
P.O. Box 436
Gleneden, OR 97388
(503) 765-2933

BLUE, Bill
(California Commercial
Fisherman)
436 Yerba Buena,
Morro Bay, CA 93402
(805) 772-7506

BORNSTEIN, M. Jay
(Processor)
Bornstein Seafoods, Inc.
P.O. Box 188
Bellingham, WA 98227
(206) 734-7990

BRAY, Pansy
(Consumer)
107 Chenault
Hoquiam, WA 98550
(206) 532-2758

HALLAM, Jerry K.
(Trawler)
Coast Draggers Ass'n
P.O. Box 343
Aberdeen, WA 98520
(206) 532-7474

HAMPTON, Thomas
(Charterboat Operator)
379 112th, S.E.
Bellevue, WA 98004
(206) 455-4478

HANSEN, Donald K.
(Charterboat Operator)
Dana Wharf Sportfishing
34675 Golden Lantern
Dana Point, CA 92629
(714) 496-5794

LEIPZIG, Peter
(Trawler)
Fishermen's Marketing Ass'n
#2 Commercial St. Wharf
Eureka, CA 95501
(707) 442-3789

MARCHEL, Walter
(Charterboat Operator)
P.O. Box 1451
Newport, OR 97365
(503) 265-5631

NICHOLS, Steve
(Trawler)
2 Halsey #2
Astoria, OR 97103
(503) 325-7015

PAVELEK, Henry
(Sport Fisherman)
N.W. Steelheaders
32566 Peoria Road
Albany, OR 97321
(503) 753-6384

PONTS, James
(Longliner)
801 Alder Street
Fort Bragg, CA 95437
(707) 964-4622

THOMAS, Jerry
(Processor)
Eureka Fisheries, Inc.
P.O. Box 217
Fields Landing, CA 95537
(707) 443-1673

Pacific Fishery Management Council, Cont'd.

SALMON PLAN DEVELOPMENT TEAM MEMBERS
(As of January 1984)

BOYDSTUN, L.B.

Calif. Dep't of Fish & Game
Suite B, 1701 Nimbus Road
Rancho Cordova, CA 95670
(916) 355-7045

HENRY, Dr. Ken (Chairman)

Northwest & Alaska Fisheries
Center

Nat'l Marine Fisheries Serv.
2725 Montlake Blvd. E.
Seattle, WA 98112
(206) 442-5428 FTS 399-5428

KAISER, Rod

Or. Dep't of Fish & Wildlife
Marine Science Dr., Bldg. 3
Newport, OR 97365
(503) 867-4741

LINCOLN, Rich

Wash. Dep't of Fisheries
115 Gen'l. Admin. Bldg.
Olympia, WA 98504
(206) 753-5684

MORISHIMA, Dr. Gary

5281 West Mercer Way
Mercer Island, WA 98040
(206) 232-6365

ROTH, Tim

U.S. Fish & Wildlife Serv.
9317 N.E. Hwy. 99, Suite 1
Vancouver, WA 98665
206) 696-7605 FTS 422-7605

SALMON ADVISORY SUBPANEL MEMBERS

ANDERSON, Philip

Washington Charterboat
Operator
Washington Street Commercial
Passengers Fishing Ass'n
P.O. Box 696
Westport, WA 98595
(206) 268-9141 or
(206) 268-9150

FRAZELL, Robert E.

Oregon Troller
Professional Fisherman's
Alliance
P.O. Box 3176
Coos Bay, OR 97420
(503) 888-3106

Pacific Fishery Management Council, Cont'd.

Salmon Advisory Subpanel Members, Cont'd.

GEORGE, Levi

(Columbia River Indian)
P.O. Box 151
Toppenish, WA 98948
(509) 865-5121 FTS 446-8592

GRADER, W.F. "Zeke"

(California Troller)
Pacific Coast Federation of
Fishermen's Ass'ns, Inc.
P.O. Box 1626
Sausalito, CA 94965
(415) 332-5080

GUTH, Norman

(Idaho Inland Sport
Fisherman)
P.O. Box D
Salmon, ID 83467
(208) 756-3279

HAAS, Roger

(Private Aquaculture)
Silverking Oceanic Farms
P.O. Box 2184
Santa Cruz, CA 95060
(408) 438-7721

HOLDER, Barney

(California Charterboat
Operator)
8628 Thors Bay Road
El Cerrito, CA 94530
(415) 235-5751

HUBBARD, Richard (Chairman)

(California Inland Sport
Fisherman)
Pacific S.W. Forest
Experiment Station
P.O. Box 245
Berkeley, CA 94701
(415) 486-3286

JONES, Chris

(Washington Troller)
P.O. Box 990
Port Townsend, WA 98368
(206) 784-2907

JORDAN, Dan

(California Indian)
P.O. Box 38
Hoopa, CA 95546
(916) 625-4453

MARTIN, Kent O.

(Gillnetter)
P.O. Box 80
Skamokawa, WA 98647
(206) 795-3910

SMITS, Ted A.

(Washington Processor)
Pacific Seafood
Processors Association
1620 S. Jackson Street
Seattle, WA 98144
(206) 328-1205

VOSS, Charles

(Washington Inland Sports
Fisherman)
Northwest Steelheaders
P.O. Box Q
Woodland, WA 98674
(206) 225-8665

WARRENS, Frank

(Oregon Charterboat
Operator)
50 N.W. 20th Avenue
Portland, OR 97209
(503) 228-6607

WILKINS, Mrs. Caroline

(Consumer)
3311 N.W. Roosevelt
Corvallis, OR 97330
(503) 752-5708

ZUANICH, Robert P.

(Puget Sound Net Fisherman)
Purse Seine Vessel Owners
Association
1111 N.W. 45th Street
Seattle, WA 98107
(206) 783-7733

WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL

1164 Bishop Street, Suite 1405
Honolulu, Hawaii 96813
Telephone: *(808) 523-1368 (808) 523-1360
(808) 523-1369 (808) 531-7166
Telex: 7431871 (unattended)
* Answered by Code-A-Phone evenings and weekends

STAFF

(As of March 1984)

Executive Director.....Kitty M. Simonds
Assistant to Executive Director.....vacant
EconomistJustin Rutka
BiologistPaul Bartram
Fiscal Officer.....Michael P. LaPorte
SecretaryJane N. Nakamura
Clerk-Typist.....Ellen Reformina

LEGAL COUNSEL

Martin B. Hochman, NOAA General Counsel,
Southwest Region
300 S. Ferry Street, Room 2013
Terminal Island, CA 90731
Telephone: (213) 548-2756

WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL

COUNCIL MEMBERS
(As of January 1984)

VOTING MEMBERS

APPOINTED MEMBERS:

HAWAII

AGARD, Louis K., Jr.
55 South Kukui Street
Apt. D404
Honolulu, Hawaii 96813
(808) 538-6677
(1982-1985)

NISHIHARA, Gertrude I.
98-223 Puaalii Street
Aiea, Hawaii 96701
(808) 488-6016
(1983-1986)

YEE, Wadsworth Y.H. (Chrmn.)
Grand Pacific Life Insurance
Company
888 Mililani Street
Honolulu, Hawaii 96813
(808) 548-5101
(1981-1984)

GUAM

GUERRERO, Betty S.
P.O. Box 1097
Agana, Guam 96910
(671) 632-5393
(1981-1984)

SMITH, Robert D.
P.O. Box 8467
Tamuning, Guam 96911
(671) 646--7095
(1982-1985)

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

(To be appointed)

AMERICAN SAMOA

REID, Peter E.
(Vice Chairman)
GHC Reid & Co., Inc.
P.O. Box 1478
Pago Pago, Am. Samoa 96799
(684) 633-1211
(1982-1985)

STEVENSON, Dr. Paul
Department of Education
Pago Pago, Am. Samoa 96799
(684) 633-1246
(1983-1986)

DESIGNATED STATE OFFICIALS

KAMI, Harry T. (Vice Chrmn.)
Div. of Aquatic and
Wildlife Resources
P.O. Box 23367, GMF
Guam, M. I. 96921
(671) 734-3944

Western Pacific Regional Fishery Management Council, Cont'd.

Designated State Officials, Cont'd.

SAKUDA, Henry M.
Dep't of Land & Natural
Resources
1151 Punchbowl Street
Honolulu, Hawaii 96813
(808) 548-4000

SESEPASARA, Henry S.
Office of Marine Resources
Government of Am. Samoa
P.O. Box 3730
Pago Pago, Am. Samoa 96799
(684) 633-4456

NMFS REGIONAL DIRECTOR

FULLERTON, E. Charles,
Regional Director
Southwest Region, NMFS
300 South Ferry Street
Terminal Island, CA 90731
(213) 548-2575

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

(State official to be
designated)

NON-VOTING MEMBERS

ARNAUDO, Raymond V.
Office of Fisheries, BOIESA
Department of State
Washington, D.C. 20520
(202) 632-5690

R. ADM. ROBBINS, Clyde E.
Commander, U.S.C.G.
14th Coast Guard District
Prince Kuhio Federal Bldg.
Honolulu, Hawaii 96850
(808) 546-5531

MARMELSTEIN, Allan D.
U.S. Fish & Wildlife Serv.
P. O. Box 50167
Honolulu, Hawaii 96850
(808) 546-5608

Western Pacific Regional Fishery Management Council

SCIENTIFIC AND STATISTICAL COMMITTEE

(As of April 1984)

CALLAGHAM, Dr. Paul
(Chairman)
College of Business and
Public Administration
University of Guam
UOG Station
Mangilao, Guam 96913
(671) 646-5841

DAVIDSON, Dr. Jack
Sea Grant Programs
University of Hawaii
1000 Pope Road, Rm. 220
Honolulu, Hawaii 96822
(808) 948-7031

DAXBOECK, Dr. Charles
Pacific Gamefish Foundation
P.O. Box 3189
Kailua-Kona, Hawaii 96740
(808) 329-6105

KATEKARU, Alvin Z.
Division of Aquatic Resources
State of Hawaii
1151 Punchbowl Street
Honolulu, Hawaii 96813
(808) 548-3894

LARSON, Kenneth O., LL.M.
Department of Legal Studies
University of Guam
Box 5103, UOG Station
Mangilao, Guam 96913
(671) 789-2371

PARRISH, Dr. James D.
Hawaii Cooperative Fishery
Research Unit
University of Hawaii
2538 The Mall
Honolulu, Hawaii 96822
(808) 948-8350

SHOMURA, Richard S.
Honolulu Laboratory
Southwest Fisheries Center
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1211

SUMIDA, Gerald A., Esq.
Carlsmith, Carlsmith et al
190 South King Street
Suite 2200
Honolulu, Hawaii 96813
(808) 523-2500

WASS, Dr. Richard C.
Refuges & Wildlife Resources
U.S. Fish & Wildlife Service
P. O. Box 50167
Honolulu, Hawaii 96850
(808) 546-5608

Western Pacific Regional Fishery Management Council, Cont'd.

PLAN DEVELOPMENT TEAM MEMBERS

(As of November 1983)

PELAGICS
BILLFISH MANAGEMENT

BRILL, Dr. Richard W.
(Chairman)
Southwest Fisheries Center
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1225

AMESBURY, Dr. Steven S.
Marine Laboratory
University of Guam
UOG Station
Mangilao, Guam 96913
(671) 734-2421

KAWAMOTO, Paul
Div. of Aquatic Resources
State of Hawaii, DLNR
1151 Punchbowl Street
Honolulu, Hawaii 96813
(808) 548-5920

SKILLMAN, Dr. Robert
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1214

WETHERALL, Dr. Jerry
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1258

BOTTOMFISH/SEAMOUNT
GROUNDFISH
MANAGEMENT UNIT

KATEKARU, Alvin Z.
(Chairman)
Division of Aquatic Resources
State of Hawaii, DLNR
1151 Punchbowl Street
Honolulu, Hawaii 96813
(808) 548-3894

KAWAMOTO, Kurt
91-1104 Alana Street
Ewa, Oahu, Hawaii 96706
(808) 681-3594

POOLEY, Samuel G.
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1216

RALSTON, Dr. Steve
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1257

UCHIDA, Richard
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1259

Western Pacific Regional Fishery Management Council, Cont'd.

Plan Development Team Members, Cont'd.

CRUSTACEANS
SPINY LOBSTER MANAGEMENT UNIT

GILMARTIN, Dr. Wm. G.
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1249

KATEKARU, Alvin Z.
Div. of Aquatic Resources
State of Hawaii, DLNR
1151 Punchbowl Street
Honolulu, Hawaii 96813
(808) 548-3894

MacDONALD, Dr. Craig
Ocean Resource Office, DPED
State of Hawaii
P. O. Box 2359
Honolulu, Hawaii 96804
(808) 548-2358

POLOVINA, Dr. Jeffrey
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1218

UCHIDA, Richard
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1259

PRECIOUS CORALS
MANAGEMENT UNIT

GRIGG, Dr. Richard W.
Chairman
Hawaii Institute of Marine
Biology
P. O. Box 1346
Kaneohe, Hawaii 96744
(808) 247-6631

HIDA, Tom
Honolulu Laboratory
Nat'l Marine Fisheries Serv.
P. O. Box 3830
Honolulu, Hawaii 96812
(808) 943-1219

Western Pacific Regional Fishery Management Council, Cont'd.

ADVISORY PANEL
(As of April 1984)

KENJI EGO, CHAIRMAN (Hawaii)
JOHN R. EADS, VICE CHAIRMAN (Guam)

Hawaii

<u>PELAGICS</u>	<u>BOTTOMFISH/ SEAMOUNT GROUND FISH</u>	<u>CRUSTACEANS</u>	<u>PRECIOUS CORALS</u>
Sutherland, James (Chairman)	Chairman (vacant)	Inouye, Jed (Chairman)	Goto, Frank (Chairman)
Ashford, Clinton	Choy, Wm. (Maui)	Naftel, Skip	Sharp, Herbert
Cooper, Alika	Eguchi, Dennis (Kauai)	Ohai, Nephi	
Fithian, Peter	Farm, Frank		
Freitas, Rockne	Fukuda, Robert		
Ho, Winfred	Hookala, Maka		
Kinney, Jerry	Maeda, Wilfred		
Kinney, Richard	Takenaka, Brooks		
Parker, George	Yee, Jeffrey		
Penrose, Alton			
Rice, H. Freddy			
Sato, Warren			
Spinney, Charles			
Witten, James			

American Samoa

Makaiwi, Melvin	Kitiona, Fa'atauva'a	Hall, Roy
Meridith, Manu	McCoy, Frank	Puleyasi, Sam
	Meredith, Amituana'i	
	Pedro, Paul	

Guam

Bordallo, Paul	Cushing, Frank	Topasna, Albert	Randall, Richard
Campbell, Robert	Quinata, Jose		
	Sakamoto, Richard		
	Yamamoto, Wilfred		
	Yamanaka, Robert		

Saipan

Tenorio, Norman

Western Pacific Fishery Management Council, Cont'd.

ADVISORY SUBPANELS
KENJI EGO, CHAIRMAN/JOHN EADS, VICE CHAIRMAN

Pelagics Advisory Subpanel (18) (James Sutherland, Chairman)

James W. Sutherland - Exec. Director, Hawaiian Int'l Billfish Ass'n
Clinton Ashford - Sport Fisherman; Attorney
Paul J. Bordallo - President, Marianas Boats and Motors, Inc.
Robert Campbell - Recreational Fisherman; Marianas Divers, Agana, Guam
Alika Cooper - Commercial Fishing Entrepreneur, Hilo
Peter S. Fithian - Chairman, Hawaii Int'l. Billfish Ass'n
Rockne Freitas - President, Basin Marine; President, Ice Inc.
Winfred E.S. Ho - Chairman, Hawaii Invitational Allison Tuna Tournament
Jerry Kinney - Commercial Fishing Entrepreneur
Richard Kinney - Comm. Fisherman; Pres., Lehua Fishing Corp.;
Owner/Captain, F/V Lehua
Melvin Makaiwi - Star of the Sea Fisheries, Pago Pago
Manu Meredith - Shorecaster; Ass't Cashier, Bank of Hawaii, Pago Pago
George S. Parker - Owner-Operator, Charterboats, Kona
Alton C. Penrose - Int'l Game Fish Ass'n Representative, Kona
H. Frederick Rice, Jr. - Owner-Mgr., FR Quarter Horse Ranch;
Big Game Fisherman, Kona
Warren Sato - Vice Pres., Marine Distribution Center, SERVCO
Charlie Spinney - Commercial Fishing Charter Boat Owner/Captain
Jim Witten - Vice President, AMFAC; Recreational Fisherman

Bottomfish/Seamount Groundfish Advisory Subpanel (18) (Chairman-vacant)

Wm. Choy - Comm. Fisherman; Mbr. Maui Fishing Coop; St. Coord. Council
Frank Cushing - Univ. Marine Lab Tech.; Part-Time Comm. Fisherman
Dennis Eguchi - Commercial Fisherman; Mbr. NAVI Divers Ass'n
Frank Farm - Comm. Fisherman; Pres., Hawaii Council of Diving Clubs
Robt. Fukuda - Area Manager, Dept. of HUD; Recreational Fisherman
Fa'atauva'a Kitona - Commercial Fisherman, Pago Pago, Am. Samoa
Maka Hookala - Boat Owner; Commercial Fisherman
Wilfred I. Maeda - President, Maeda Fish Market, Ltd.
Frank McCoy - Comm. Fisherman; Sea Grant Agent, Am. Samoa
Amituana'i Meredith - Senate Ec. Dev. Comm; Doryboat Owner, Am. Samoa
Paul Pedro - Baitfish Project Manager, Government of Am. Samoa
Jose S. Quinata - Fisherman, Hydrological Technician, Guam
Richard Sakamoto - Marine Technician, University of Guam
Brooks Takenaka - Fisheries & Aquaculture Specialist;
Assistant Manager, United Fishing Agency
Norman Tenorio - Recreational Fisherman; VP Joeten Motors Co., CNMI
Wilfred Yamamoto - VP/Gen. Mgr., Bank of the Orient; Sports Fisherman
Robert Yamanaka - Commercial Fisherman, Guam
Jeffrey M.J. Yee - Charterboat Captain, Honolulu

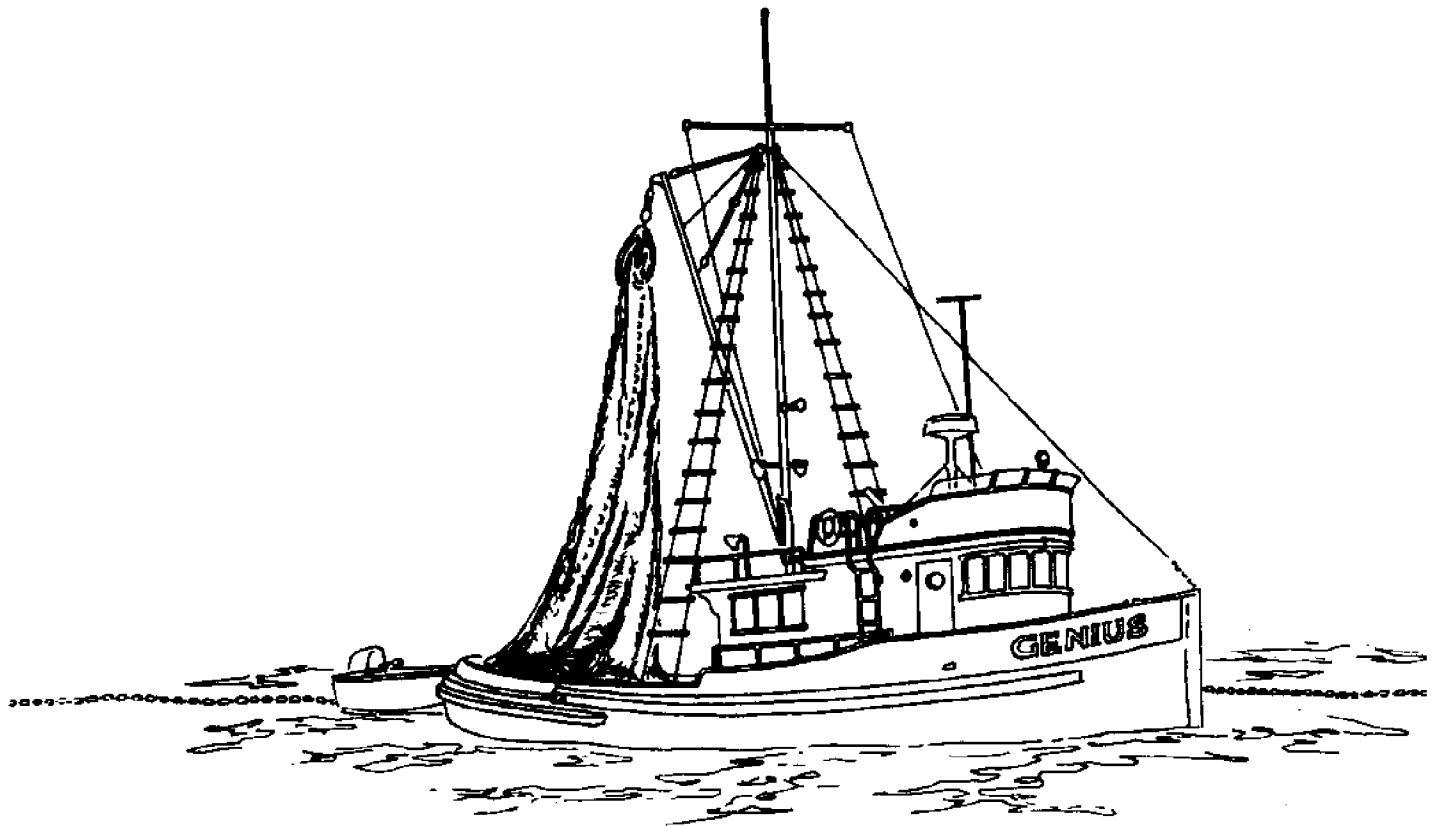
Western Pacific Fishery Management Council, Cont'd.
Advisory Subpanel Members, Cont'd.

Crustacean Advisory Subpanel (4) (Jed Inouye, Chairman)

Jed Inouye - Commercial Fishing Entrepreneur
Gary L. Naftel - President, Easy Rider Corporation;
Boat Owner/Operator, Honolulu
Nephi Ohai - Owner/Operator of several fishing boats, Honolulu
Albert Topasna - Commissioner of Umatac, Guam

Precious Corals Advisory Subpanel (5) (Frank Goto, Chairman)

Frank Goto - Fishmarket Wholesaler
Roy Hall - Attorney, Pago Pago, American Samoa
Sam Puleyasi - Commercial Fisherman; Electronics Teacher, Am. Samoa
Community College
Richard H. Randall - Assistant Biology Professor, Univ. of Guam
Herbert C. Sharp - Edward D. Sultan Jewelry Co., Honolulu



Fishery Management Plans

CHAPTER 4

The regional Fishery Management 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 best be described by detailing the process by which it is produced. This chapter breaks down the planning process into six phases, with special attention given to the points at which fishermen and other interested persons can influence management decisions. Each planning phase is described in the text, and is illustrated by an accompanying flowchart. Although they can be confusing, this chapter makes use of abbreviations and acronyms commonly used by fisheries managers. Familiarity with such bureaucratic language is an important skill for those who want to understand the governmental forces that control their actions. A glossary of acronyms and abbreviations is included in Appendix B-1.

PHASE I Pre-Planning	PHASE II Draft FMP Development	PHASE III Public Review And Council Adoption	PHASE IV Secretarial Review and Regulation Promulgation	PHASE V Continuing Fishery Management	PHASE VI FMP Amendments
<p>Identification of FMU (Council)</p> <p>Decision to initiate planning activities (Council)</p> <p>Decision to prepare EIS or EA (Council)</p> <p>Work plan activities (Council prepares) (NMFS processes) (NOAA approves)</p>	<p>Preparation of DFMP incorporating DEIS and regulatory analysis (Council)</p> <p>Preparation of draft proposed regulations</p> <p>Processing of DEIS (Council approves) (NMFS reviews) (NOAA approves) (EPA processes and release to public)</p>	<p>Publication of DFMP availability in Federal Register (NMFS)</p> <p>Public Hearing Schedule appears in Federal Register</p> <p>Public review period</p> <p>Public hearings (Council)</p> <p>Agency review—Comments to Council</p> <p>Compilation and assessment of public and agency comments (Council)</p> <p>Revision of DFMP (if necessary)</p> <p>Approval and submission of FMP (Council)</p>	<p>Formal review (NMFS)</p> <p>FMP approval or disapproval</p> <p>Consultation and possible resubmission</p> <p>Publication of proposed regulations (NMFS)</p> <p>Public review of FMP and proposed regulations</p> <p>Compilation and assessment of public and agency comment—preparation of final regulations</p> <p>Approval of final regulations and regulatory analysis (NOAA)</p> <p>OMB final review</p> <p>Final rules (FMP and Regulations) published in Federal Register</p> <p>Cooling off period</p> <p>Rules effective</p>	<p>Implementation of FMP monitoring procedures as specified in the FMP</p> <p>Refinements to regulations, i.e. notice actions, regulatory changes, emergency actions (Council, NMFS)</p>	<p>Decision to amend FMP (Council)</p> <p>Application of "significance" under NEPA and E.O. 12,291 (Council)</p> <p>Preparation of FMP amendment (Council)</p> <p>Return to Phases I-IV</p>

SEE APPENDIX B-1 FOR EXPLANATION OF ABBREVIATIONS

The most significant opportunities for influencing fisheries management occur before the six-phase planning process begins. As described in Chapter 3, the regional Council is composed of individuals from the region.^{1/} All persons interested in the course of marine fisheries management should be aware that the placement of council members is one of the best chances to influence the planning process. When there is a vacancy on a Council, interested groups should nominate a qualified^{2/} representative to fill it. The nominating letter is submitted to the governor of the nominee's state. The governors in the region then submit lists of nominees to the Secretary of Commerce, who appoints the new Council member.^{3/} Interested persons can influence this choice by writing to the Secretary of Commerce and suggesting who should be selected from the lists submitted.

A similar process exists for seating advisory panel members.^{4/} When a vacancy exists on an advisory panel, the public should nominate representatives by contacting Council representatives. Because the Council selects the panel members from the group of nominees, letters to the Council in support of a particular candidate can be an effective way of ensuring special interest representation.

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

Phase I: Pre-Planning

The FCMA does not require an FMP for every fishery,^{5/} and experts generally agree that not all fisheries need management. However, a fishery not presently in need of management may need it later. When regulation becomes necessary to ensure orderly development of a fishery, the planning process is initiated. These regulations are not limited to single stocks of fish; sometimes regulation by group is more appropriate.

During Phase I of the FMP process, the Council must identify a fishery management unit (FMU).^{6/} It can be a single species, or several species; or it may be limited to certain ranges or harvest methods.^{7/} If the Council decides that regulation is necessary, it must determine whether the planning activities require the preparation of an Environmental Impact Statement (EIS).^{8/}

Typically, the decision to prepare an EIS is affirmative. If so, a "notice of intent" is published in the Federal Register, and public comment on the proposed EIS is considered by the Council.^{9/} On the other hand, a Council may decide that its action will result in no significant impact to the environment, and proceed on the basis of an Environmental Assessment

(EA).^{10/} The EA process provides no opportunity for public hearings.

When a Council determines that an FMU needs regulation, a work plan is prepared. It is designed to help focus attention on significant problems of the fishery, and to provide a timetable for the planning process.^{11/} The work plan is prepared by the Council, processed by the National Marine Fisheries Service (NMFS), and approved by the National Oceanic and Atmospheric Administration (NOAA).^{12/}

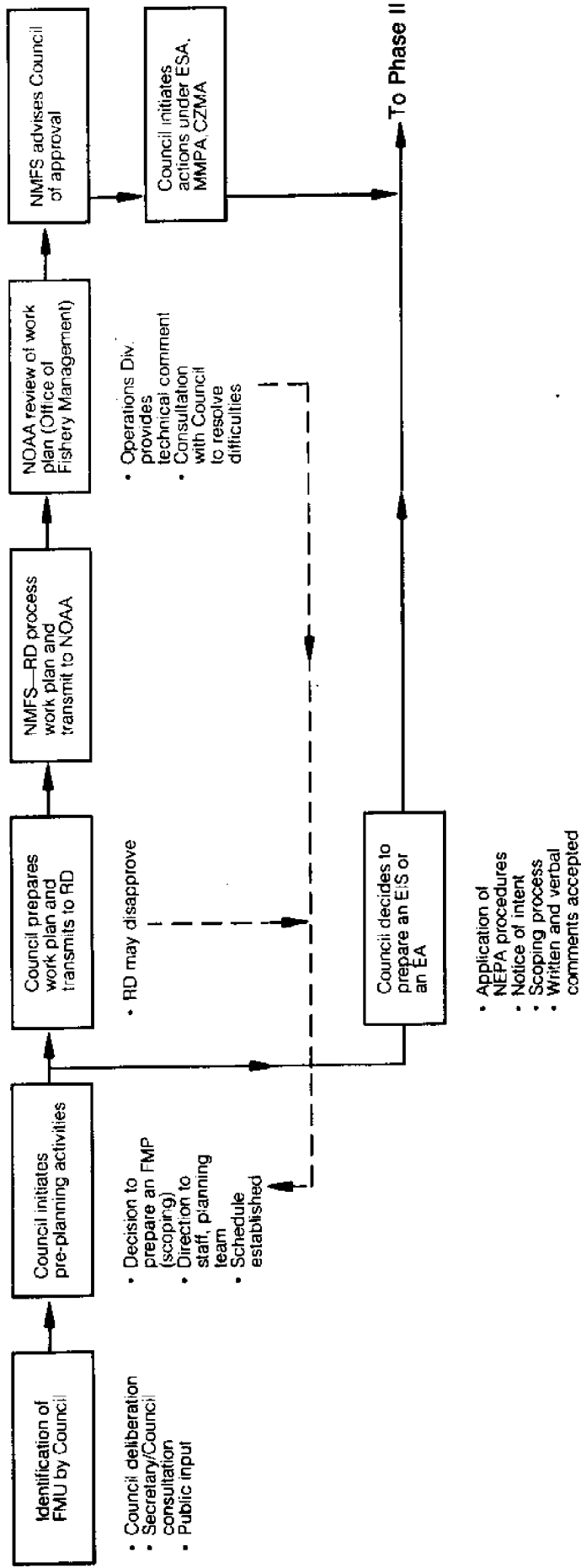
Laws other than the FCMA and the National Environmental Protection Act (NEPA) affect the planning process.^{13/} These laws include the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the Coastal Zone Management Act (CZMA).

The ESA^{14/} requires that the Council consult with NMFS or the Fish & Wildlife Service, depending on the species involved, if an FMP may affect a threatened or endangered species.^{15/} The agency consulted issues an opinion as to whether or not the proposed FMP is likely to jeopardize the continued existence of the listed species. If there is a likelihood of jeopardy, the FMP cannot be approved.^{16/}

The MMPA^{17/} must also be considered by the Council. It requires the Secretary of Commerce to refuse to authorize any activity that results in the reduction of a marine mammal species below its optimum sustainable population.^{18/} Although the MMPA places no specific obligations on the Council, the Council should provide adequate information in the FMP and EIS to inform the Department of Commerce of any potential conflicts between the FMP and the MMPA.^{19/}

The CZMA^{20/} requires federal activities that affect the coastal zone to be consistent with approved state management plans, to the maximum extent practicable.^{21/} While the coastal zone does not overlap the three-mile jurisdiction of the state, management activities in the Fishery Conservation Zone (three miles to two hundred) may affect the coastal zone. For example, expanded domestic harvest of Pacific whiting prompted by reductions in foreign fishing might spur development of land-based processors, port facilities, and service industries. During phase I, the regional Council must consider the impact of the proposed FMP 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,^{22/} and lawsuits occasionally result.

PHASE I—PRE-PLANNING



(See end of this chapter for explanation of abbreviations)

Phase II: Draft Fishery Management Plan Development

Phase II begins with the preparation of the Draft Fishery Management Plan (DFMP). The Council directs the plan development team during the development of this first draft, aided by input from the scientific and statistical committee (SSC), the advisory panel(s) (AP), NMFS and others.

At this planning stage, there are five documents that must be prepared in order to satisfy requirements of the law. The first is the DFMP. The second is the draft proposed regulations (DPR). The third, a draft environmental impact statement (DEIS), is required by NEPA. 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 and resources which would be involved in the proposed action should it be implemented."^{23/}

Although the DEIS and DFMP are legally distinct (likewise the EIS and FMP), NEPA regulations allow combining them in a single document to avoid duplication.^{24/}

Because a DFMP is eventually implemented by Department of Commerce regulations, the DFMP must comply with Executive Order 12291. This order requires the Council to prepare a Draft Regulatory Impact Review (DRIR) if the regulation is likely to result in a significant adverse effect on the economy.^{25/} The Regulatory Flexibility Act similarly requires the preparation of an Initial Regulatory Flexibility Analysis (IRFA) if the agency believes that the regulation would result in a significant economic impact on a substantial number of "small entities."^{26/}

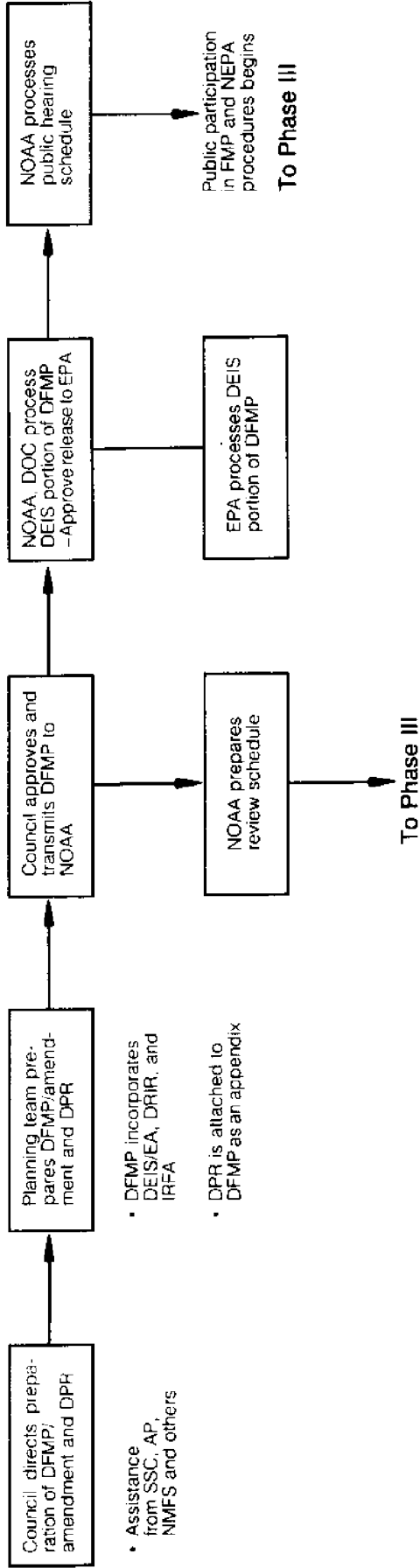
These documents are intended to justify and fully explain the impacts of the FMP on fishermen, processors, consumers, and others,^{27/} and are initially published in the Notice of Proposed Rulemaking. They are also included in the same document as the DFMP, the DPR, and the DEIS. Reviewers are thus 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 require the same procedure as an FMP, and are costly and inefficient. The key is to write into the DFMP enough flexibility to respond to minor changes in the fishery. This is

achieved by amending the regulations, rather than the entire plan.^{28/}

The Commerce Department developed a standard format for FMP's which is generally followed by the Councils, even though it is not mandatory. The standard format^{29/} is set forth in appendix B-2, although NOAA has decided that formal regulatory guidance is no longer necessary.^{30/}

PHASE II—DRAFT FMP DEVELOPMENT



Phase III: Public Review and Council Adoption

This phase begins with the completion of the DFMP and related documents. Public announcements appear in the Federal Register and elsewhere of the availability of the DFMP, and announcements are also made of the schedule for public hearings. The announcements begin the minimum 45-day review period.

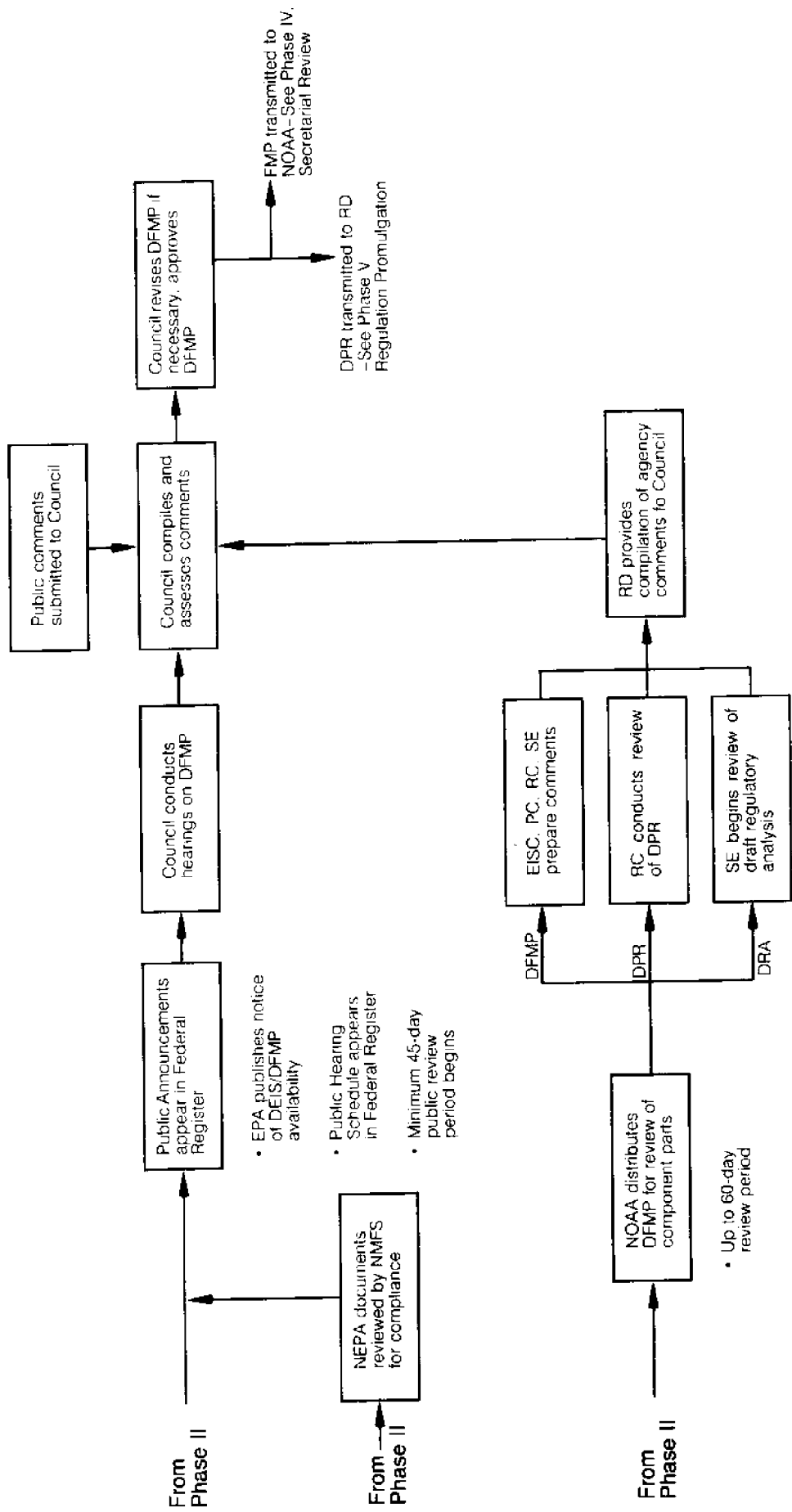
Because the DFMP is only a proposal, public comment is important to the Council. All parts of the DFMP are subject to change, including the decision to regulate at all. During the public review period there are several opportunities for input on changes to be made in the DFMP, and it is the best time to effectively influence the regulatory process.

First, there are usually several hearings where the public may voice its opinion to the Council concerning the proposed management measures. In addition, there are specially scheduled hearings in various locations to accommodate large numbers of participants, if necessary.^{31/} The public may also submit letters to the Council: letters can be more convenient than oral testimony, and just as valuable. All public comment is recorded and becomes part of the record upon which the proposed FMP will be based.

During the public review period, various federal officials review the DFMP for completeness and potential problems. At NMFS, the DFMP is examined by an Environmental Impact Statement Coordinator, a Plan Coordinator, a Regulations Chief, and a staff Economist. At NOAA, the Office of Fisheries Management and the General Counsel for Fisheries prepare commentary, as does the Department of Commerce Chief Economist. Comments from all these reviewers are transmitted by NMFS to the Council, along with an "issues letter." This letter points out major issues which may preclude approval at a later stage, and also provides general discussion of the plan.

It is the Council's job to compile and assess comments from all sources, and to modify the DFMP as necessary.^{32/} It will often be revised several times. If the revision is substantial, it too will undergo review as above. In this way, most problems are eliminated from the plan and compromises are struck before Phase IV begins. When a Council is satisfied with the metamorphosis of the plan, it is approved and thereafter designated as an FMP. For the current status of FMP's as of March 1984, see Appendix B-3.

PHASE III—PUBLIC REVIEW AND COUNCIL ADOPTION



Phase IV: Secretarial Review and Regulation Promulgation

At the time the FMP package is submitted for final agency review, it must contain all of the necessary documents.^{33/} If so, the regional office of NMFS will distribute the FMP package to appropriate agencies for review.^{34/} This is "Day 1," and it marks the beginning of the 75-day public comment period and the maximum 110-day review/approval period.^{35/} The focus of this review is on three documents: the FMP, the Proposed Regulations (PR), and the EIS. While review occurs simultaneously, the deadline for action on each differs.

Action begins with review of the PR by the Regional Director (RD), the Regulations Division of NOAA, and the NOAA General Counsel's office. This review intends to catch all noticeable inconsistencies, errors of fact or law, or format problems, and the PRs are modified if necessary. The regulations are then published in the Federal Register, thirty days after their distribution (Day 30). The public then has 45 days to comment on the PR, FMP or EIS, and public hearings may be held.

Meanwhile, a multitude of offices and agencies review the package, and they send their comments to the RD. Comments on the FMP and EIS from the NMFS Washington, D.C. office are due by day 40, and comments on the proposed regulations from NMFS, NOAA, Department of Commerce and the Office of Management and Budget (OMB) are due on day 54. The RD then has four weeks to consider public and agency comments, meet with various NMFS officials, and to approve or disapprove the FMP package.

The FCMA gives the final responsibility of approving or disapproving any FMP or part thereof to the Secretary of Commerce.^{36/} This power has been administratively delegated to the Regional Director of NMFS, thus all comments on the package should be directed to the RD.

The standard of review is established in the FCMA. In order to be approved, an FMP must be consistent with seven national standards for FMPs, 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.

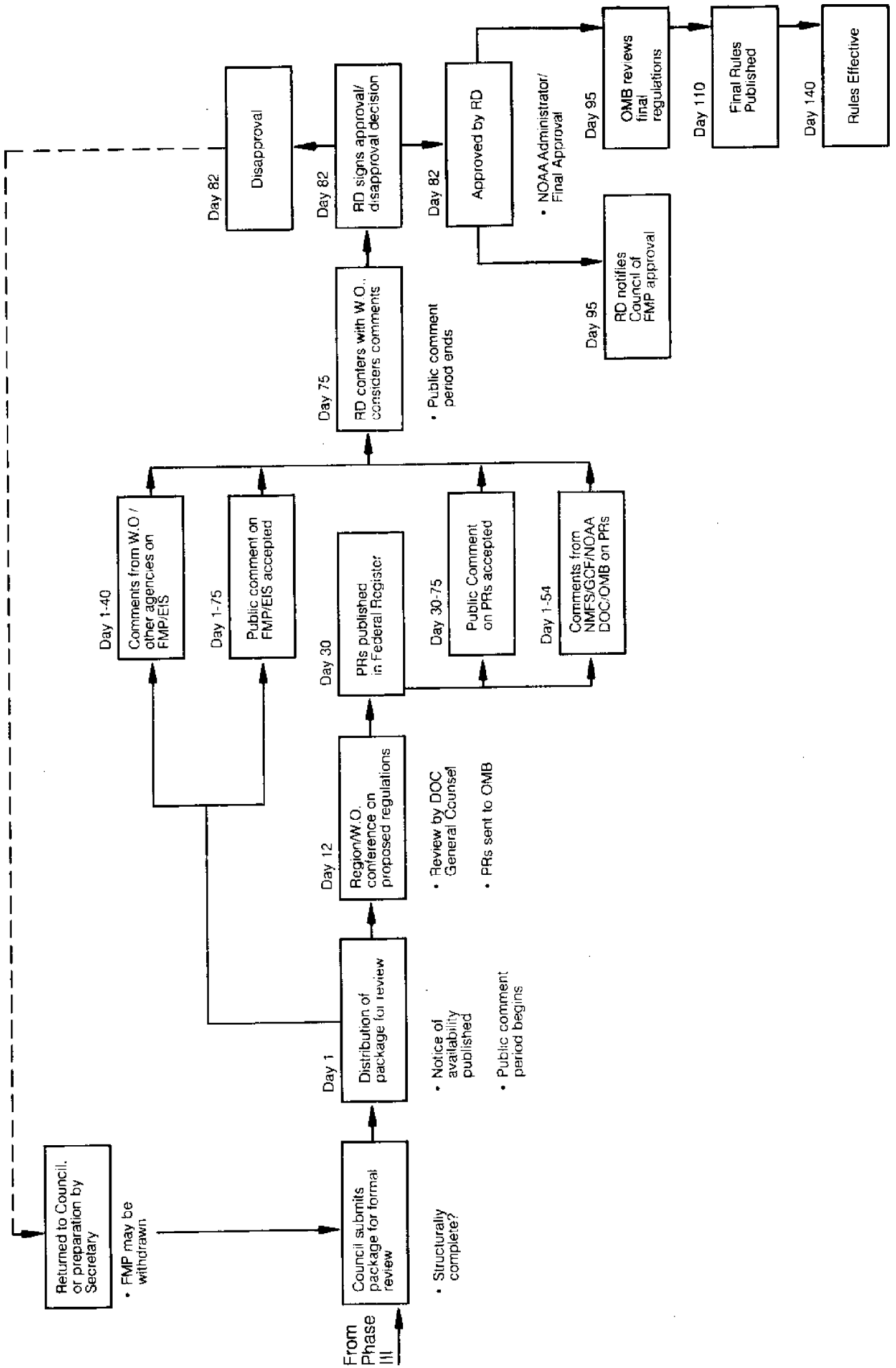
(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.^{37/}

The RD must also find that the FMP is consistent with other provisions of the act, and other applicable law,^{38/} including treaties and executive orders.

If the RD finds that the plan is inconsistent with any of the above, the Council must be notified in writing by day 95, or else the FMP automatically takes effect and must be implemented.^{39/} The written notice must identify the inconsistency and make recommendations for further action by the Council.^{40/} The Council then modifies and resubmits the FMP, and it goes through a truncated public/agency review period of sixty days.^{41/} If the Council does not modify the package, the plan is either withdrawn or the Secretary of Commerce may prepare the FMP.^{42/}

If the RD approves the package, as is most often the case, it is sent to the NOAA Administrator for final approval. When the FMP is approved, the Council is notified. The regulations are sent to OMB for a final review, and the package is published in its final form on Day 110. After publication, there is a thirty day "cooling-off" period,^{43/} after which the FMP and its regulations become effective.

PHASE IV—SECRETARIAL REVIEW



Phase V: Continuing and Emergency Fishery Management

The cornerstone of Phase V is the FMP and implementing regulations. Ease and success in continuing management depend on the foresight involved in the plan's development. Thus, if the plan provided for flexible continuing management, the administrative process is streamlined. This is the essence of the Framework FMP concept. These Framework Plans enable adjustments and changes to be made rapidly and conveniently by the Regional Offices.^{44/}

Once the FMP is in place the job of fishery management and public oversight is just beginning. Management becomes an ongoing process which requires continuing involvement by the Council, the various federal entities involved, and also by the public. The ingredients of continuing management are monitoring, adjustment 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 method of monitoring, so that research priorities are based on management problems.^{45/}

The monitoring efforts may encompass such diverse topics as stock assessments, catch data, statistical compilation, biological research, socio-economic studies and habitat protection.^{46/} By keeping track of changing conditions in the fishery, the FMP can be fine-tuned according to changing needs.

Adjustment

Adjustment of an FMP is normally accomplished in one of three ways: through notice actions, regulatory changes, or emergency actions. Notice actions are pre-planned and have been anticipated in an FMP, based on expected in-season occurrences. For example, if the FMP includes area closures when a quota is filled, it will also provide procedures for notifying fishermen when that level is reached and thus close the area. Notices are published in the Federal Register to announce these regulatory actions; hence the term "notice actions." Notice actions range from simple openings and closures to releases of reserve stocks to foreign fisheries.^{47/} The Councils usually also advise their constituents of these actions.

Regulatory changes are actions based on FMP criteria and can cover such things as season adjustments, quotas, catch per boat or rod, gear restrictions, and even modifications of optimum yield if based on predetermined formulas.^{48/} While notice actions implement a regulation, regulatory changes are amendments to the regulation. This means that regulatory changes must go through the normal rule-making schedule (but not the full FMP amendment process) (see Phase IV).

Regulatory changes are initiated by the Council by determining which change is most appropriate and most likely to correct the problem. The Council then submits a proposed recommendation to the RD, and it is published in the Federal Register. The Council holds a hearing for public comment, accepts written and oral testimony for 15 to 30 days, and then prepares a final recommendation. This is given to the RD and is published as a final rule.

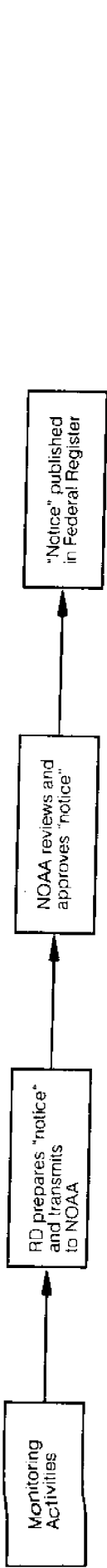
Emergency actions are required if a Council finds that an emergency exists and if the Secretary of Commerce is requested to promulgate such by a unanimous Council vote.^{49/} While the implications of the new emergency provision have not been fully explored, it is clear that an emergency rule may be promulgated without opportunity for public comment and is effective immediately after publication. For this reason, an emergency action should be used only in extreme circumstances.^{50/}

Revision

The type and extent of changes in the fishery determine whether FMP alterations can be handled by adjustment or whether revision is necessary -- that is, whether the refinement is within the original FMP framework or not. 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. Revision by formal amendment is the topic of Phase VI.

PHASE V—CONTINUING AND EMERGENCY FISHERY MANAGEMENT—ADJUSTMENT

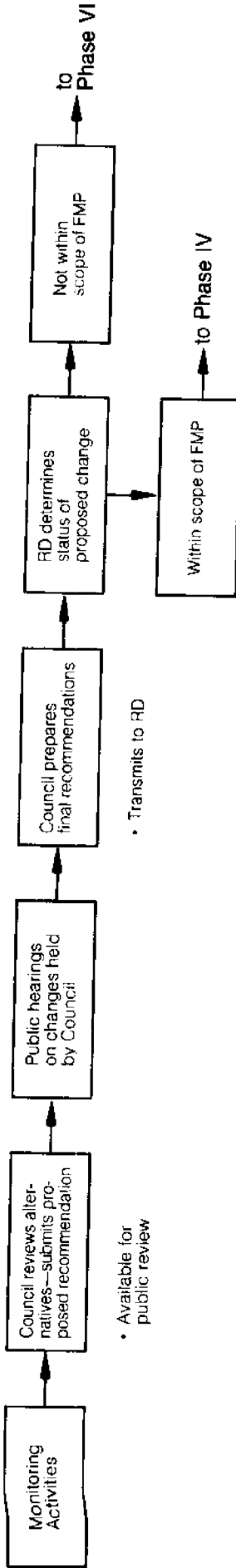
Notice Actions



- Monitoring specified in FMP
- Council/RD consult continually

- Council advises constituency of notice

Regulatory Changes

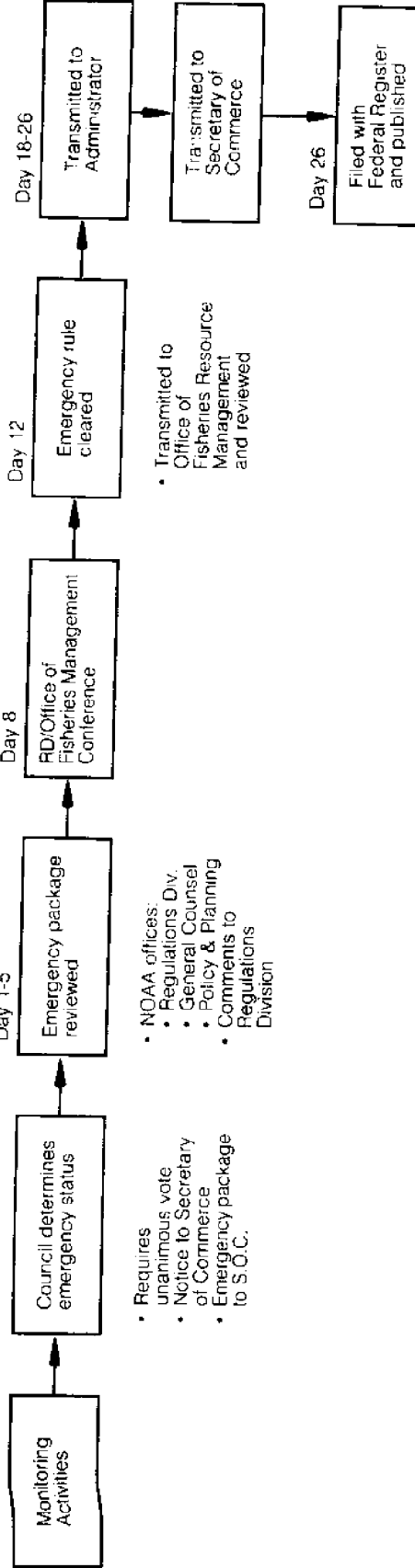


- Available for public review

- Transmits to RD

- Regulatory amendment

Emergency Actions



- Requires unanimous vote
- Notice to Secretary of Commerce
- Emergency package to S.O.C.

- NOAA offices:
 - Regulations Div.
 - General Counsel
 - Policy & Planning
 - Comments to Regulations Division

- Transmitted to Office of Fisheries Resource Management and reviewed

Day 1-5

Day 8

Day 12

Day 18-26

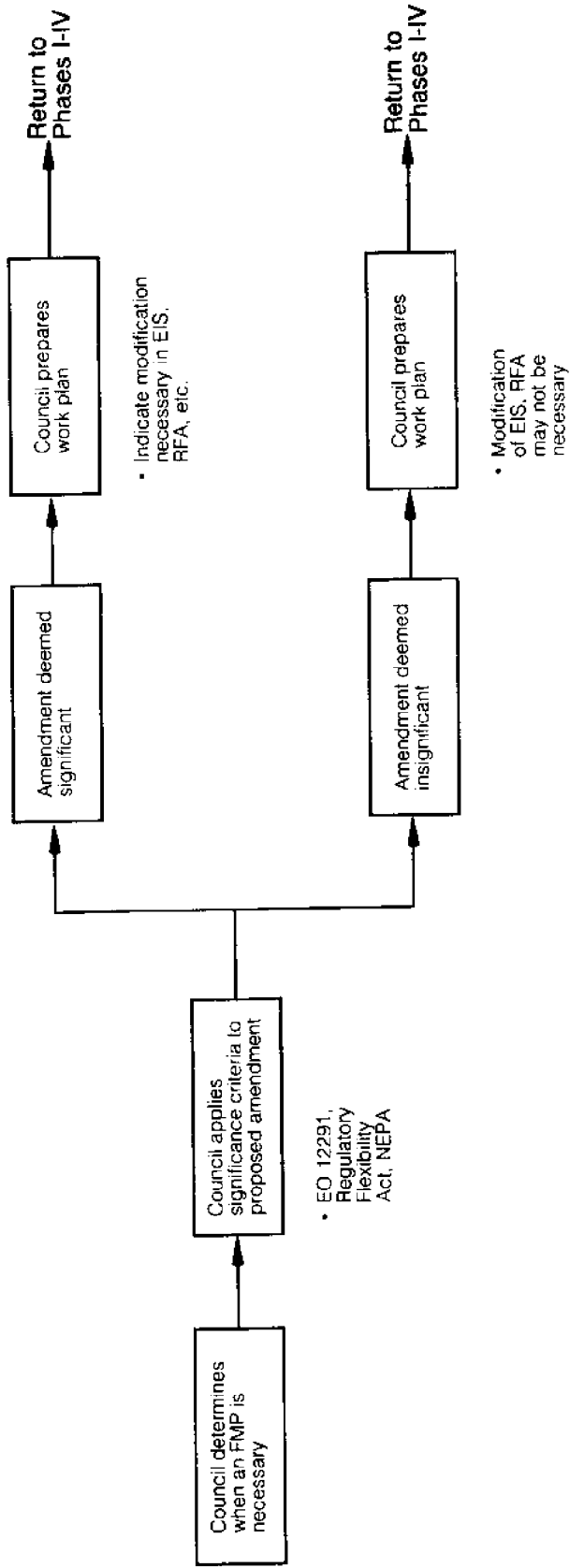
Day 26

Phase VI: FMP Amendments

Councils have full discretion to initiate the amendment process. The FCMA merely directs the Councils to "review on a continuing basis, and revise as appropriate, the assessments and specifications made," and to prepare and submit to the Secretary of Commerce "from time to time, such amendments to each such plan as are necessary."^{51/} Ideally, an FMP prescribes conditions and circumstances under which the Council intends to amend the plan.

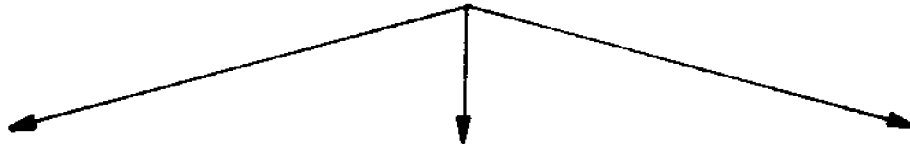
When the decision has been made to amend the FMP, the Council must then determine if the proposed changes are "significant" for the purposes of NEPA and Executive Order 12291. If they are considered significant, the Council must proceed through the entire FMP process, beginning with the preparation of a work plan. If the changes are insignificant, the process is repeated with certain exceptions. First, the Regulatory Flexibility Act and E.O. 12291 would be satisfied without further documentation. Also, if the amendment is within the scope of alternatives addressed in the previous EA/EIS, then no additional environmental documents are needed.^{52/}

PHASE VI—FMP AMENDMENT



PHASE VI -- CONTINUING FISHERY
MANAGEMENT

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

C Emergency Actions

- . Promulgated by S.O.C.
- . Requires finding of emergency by Council, by unanimous vote

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

APPENDIX B-1

SUMMARY OF ABBREVIATIONS

DOCUMENTS

EA	=	Environmental Assessment
EIS	=	Environmental Impact Statement (DEIS is the draft version)
FMP	=	Fishery Management Plan (DFMP is the draft version)
FR	=	Final Regulations
PR	=	Proposed Regulations
RFA	=	Regulatory Flexibility Analysis (IRFA is the initial version)
RIR	=	Regulatory Impact Review (DRIR is the draft version)

OFFICES AND OFFICERS

AP	=	Advisory Panel
DOC	=	Department of Commerce
EISC	=	Environmental Impact Statement Coordinator
EPA	=	Environmental Protection Agency
GCF	=	General Counsel for Fisheries (NMFS)
NMFS	=	National Marine Fisheries Service
NOAA	=	National Oceanic and Atmospheric Administration
OMB	=	Office of Management and Budget
PC	=	Plan Coordinator
RC	=	Regulations Chief (NMFS)
RD	=	Regional Director (NMFS)
SE	=	Staff Economist (NMFS)
SSC	=	Scientific and Statistical Committee
W.O.	=	Washington Office (NOAA)

STATUTES

CZMA	=	Coastal Zone Management Act
ESA	=	Endangered Species Act
FCMA	=	Magnuson Fishery Conservation and Management Act
MMPA	=	Marine Mammal Protection Act
NEPA	=	National Environmental Policy Act
RFA	=	Regulatory Flexibility Act

MISCELLANEOUS

FMU	=	Fishery Management Unit
MSY	=	Maximum Sustained Yield
OY	=	Optimum Yield
TALFF	=	Total Allowable Level of Foreign Fishing

APPENDIX B-2

Sample FMP Format

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 Stock(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 stock(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.

iv. Other.

7. Fishery Management Jurisdiction, Law, and Policies:

- i. Management institutions: The institutions which have fishery management authority over the stock(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, regulations, and policies: Includes any Indian treaty fishing rights embodied in treaties, case law, or other agreements.

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

- i. History of exploitation: Summarizes the historical 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, subsistence 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.
 - v. Domestic processing capacity.
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 stock(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 the 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.
 - vii. Other.
12. Determination of optimum yield (OY):
- i. Specific management objectives.
 - ii. Descriptions of alternatives: Describes the alternative OYs considered and their advantages and disadvantages.
 - iii. Analysis of beneficial and adverse impacts of potential management option: Considers various conservation and

management measures to determine which are appropriate to achieve the optimum yield.

- iv. Trade-offs between the beneficial and adverse impacts of the preferred or optimal management option(s).
 - 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, and 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.
 - ix. Management costs and revenues.
 - x. Other.
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 harvesters: 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 FMPs.
 - 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 that the Council and its advisory groups would use to review and revise the Plan.
17. References cited in the Plan.
18. Appendix:
- i. Sources of data and methodology.
 - ii. List of public meetings and summary of proceedings.

APPENDIX B-3

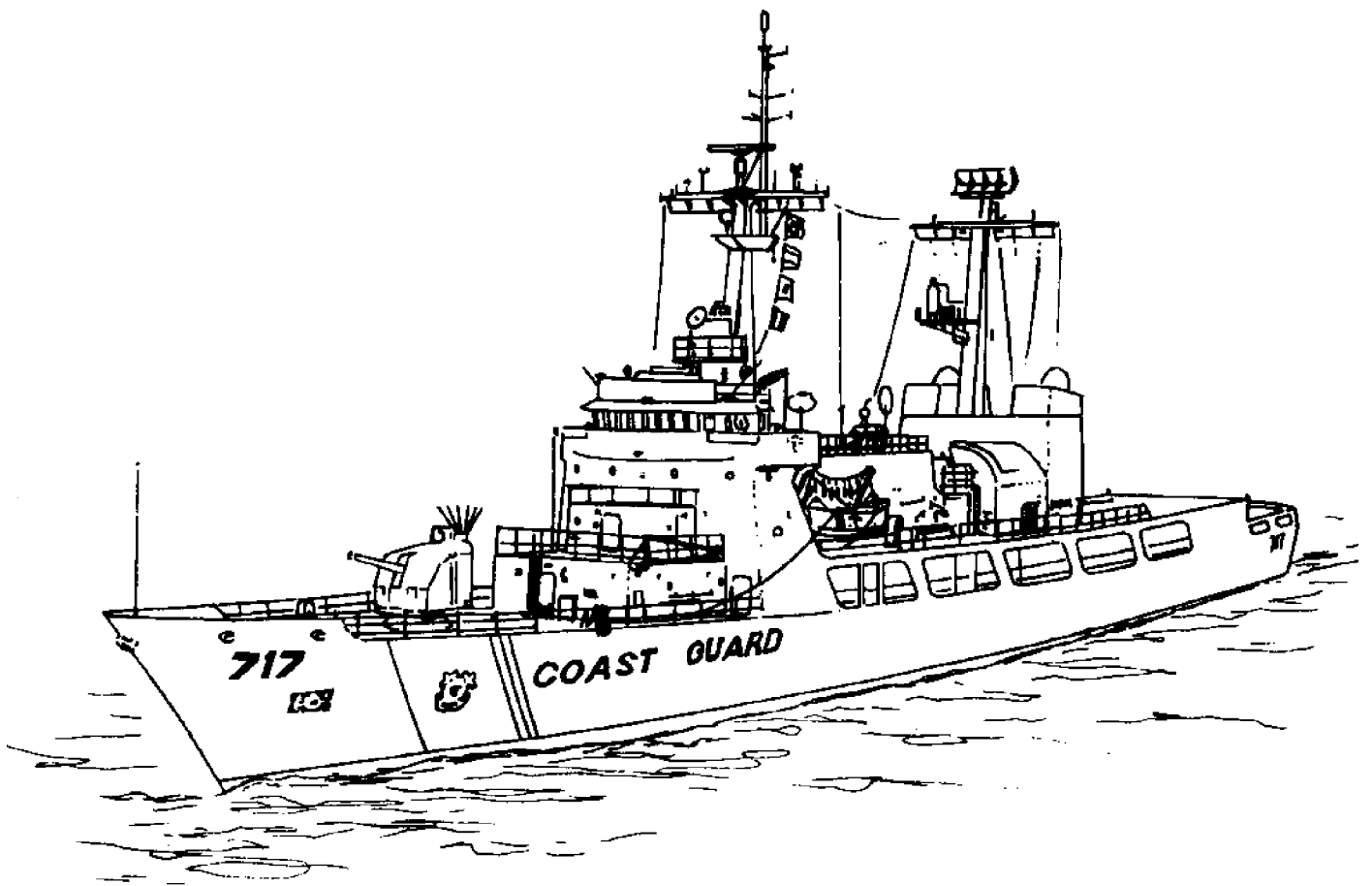
Fishery Management Plan Status Report

(As of March 1984)

	Council Preparing Plan or Amendment	Public & NMFS Review of Draft	Plan Submitted for Sec. Review	Proposed Regulations Issued	Approval/Disapproval Decision Made	Final Regulations Published	Plan Implemented
PACIFIC FISHERY MANAGEMENT COUNCIL							
Anchovy Framework Plan (Implemented 1978) (5 subsequent amendments)	x	x	x	x	x	x	x
Pacific Coast Groundfish Plan (Implemented 1982) (1 subsequent amendment)	x	x	x	x	x	x	x
Washington, Oregon, and California Salmon Plan (Implemented 1977) (Amended annually since 1978)	x	x	x	x	x	x	x
1984 Regulations (Framework Plan in preparation)	N/A	x	x	x	x	-	-
NORTH PACIFIC FISHERY MANAGEMENT COUNCIL							
Bering Sea Groundfish Plan (Implemented 1982) (8 subsequent amendments)	x	x	x	x	x	x	x
Bering/Chukchi Sea Herring Plan (Adopted by Council 1983, review by Secretary pending)	x	x	-	-	-	-	-
Gulf of Alaska Groundfish Plan (Implemented 1978) (13 subsequent amendments)	x	x	x	x	x	x	x
High Seas Salmon Plan (Implemented 1979) (2 subsequent amendments)	x	x	x	x	x	x	x
King Crab Framework Plan (adopted by Council 1981, review by Secretary pending)	x	x	x	x	-	-	-
Tanner Crab Plan (Implemented 1978) (10 subsequent amendments)	x	x	x	x	x	x	x
WESTERN PACIFIC FISHERY MGMT. COUNCIL							
Billfish Plan	x	-	-	-	-	-	-
Bottomfish Plan	x	x	x	x	x	x	x
Precious Corals Plan (Implemented 1978)	x	x	x	x	x	x	x
Spiny Lobster Plan (Implemented 1981) (2 subsequent amendments)	x	x	x	x	x	x	x

-structurally incomplete-

-disapproved by Secretary, under Council review-



Enforcement

CHAPTER 5

The FCMA establishes a legal regime enforceable throughout an oceanic area nearly as large as the land mass of the continental United States. Because of the practical difficulty of patrolling such a vast area and the legal issues raised by the Act's administrative, civil, and criminal sanctions, enforcement is a major fishery management problem. This chapter analyzes the enforcement provisions of the Act in three parts. First, it describes the overall enforcement scheme of the FCMA. 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 United States Constitution.

I. The Overall Scheme

The enforcement provisions of the FCMA can be found in Title 16 of the U.S. Code, sections 1857 through 1861. The first of these sections (1857) spells out the basic prohibitions of the Act. 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, describes the power of enforcement officers (including their authority to board, search, seize, and arrest), and allows the use of discretionary citations that are, in effect, simply warnings.

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

The civil and criminal penalties in sections 1858-1861 are applicable to foreign and domestic fishermen. Additionally, the FCMA provides for two types of indirect sanctions that 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 whom we have Governing International Fisheries Agreements (GIFAs) to "take appropriate steps" under their own laws to ensure that their nationals comply with all regulations promulgated pursuant to the FCMA.

It is worth reiterating that while there exist unique sanctions that apply only to foreign fishermen, the FCMA's basic enforcement scheme applies to foreign and domestic vessels. In fact, United States vessels have been charged with 2,132 of the 3,689 violations asserted under the Act through March 1984.

A. What is Illegal Under the Act?

Section 1857 makes it unlawful for any person to violate provisions of the FCMA, 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 that 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 prohibited acts that can be grouped into three categories. The first category makes it illegal to fish after the revocation or suspension of a permit issued under the Act. This prohibition obviously applies to foreign fishermen and 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 seeking to fish within the conservation zone. If a Fishery Management Plan (FMP) contains such a provision, domestic fishermen are subject to civil penalties for fishing with a revoked or suspended permit. It should be noted that section 1857(1) also applies to "support" vessels and activities. For example, the broad definitions of "fishing" and "fishing vessel" in sections 1802(10) and (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 and related prohibited act 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 GIFAs. 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. Section 1857 imposes strict liability: violations do not require elements of willfulness, intent, or even knowledge. Amendments that would have inserted the phrase "knowingly and willingly" to this section were defeated in Congress. The violator's mental element, however, does become relevant in determining the level of civil penalties and in forfeiture settlements. More attention is given to the "mental element" question later in this chapter.

A third category of section 1857 prohibited acts can be labeled under the general category "interference with enforcement." Violation of this provision carries the most serious consequences found in the FCMA. 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 or her 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 a provision of the Act. Violations of section 1857(1)(D), (E), (F), or (H) may result in six months' imprisonment, a fine of \$50,000, or both. If, during a violation of these provisions, a dangerous weapon is used or an enforcement officer is 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 degree of "force" required to

trigger certain of these provisions. It is worth noting that all of the section 1857 prohibitions, including those that describe criminal offenses, apply to crew members as well as to masters of vessels. While the older Bartlett Act (now superseded by the FCMA) was applicable only to masters, the FCMA section 1857 provisions apply to "any person," which the Act defines to include "any individual."

B. Who Enforces the Act?

Section 1861(a) places general enforcement responsibility on the Coast Guard and the Secretary of Commerce. Both agencies, however, may agree 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 who are enforcing the federal Act.

C. What Are Enforcement Officers Authorized To Do?

Section 1861(b) describes the power of authorized officers. It allows arrests, with or without a warrant, of persons whom an officer has "reasonable cause to believe" have violated section 1857. Section 1861(b) authorizes officers, 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 United States 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 legislative history of the FCMA but which seems to parallel the constitutional requirement. Section 1861(b)(1)(B), on the other hand, authorizes warrantless searches without mention of probable or "reasonable" cause. This is important to fishermen because section 1857(1)(D) and section 1859(a) make it a criminal offense to refuse an officer permission to board and search. The constitutionality of the warrantless search provisions of the Act is discussed later in this chapter.

Section 1861 grants officers other powers, the most comprehensive of which is the power to seize vessels, fish, or other evidence. Section 1861(b)(1)(A)(iii) 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 provisions of the Act. Section 1861(b)(1)(A)(iv) authorizes the seizure of fish (wherever found) taken or retained in violation of the Act, and 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)(A)(v) allows officers to seize any other evidence related to the violation.

Section 1861(b)(1)(C) additionally empowers officers to exercise "any other lawful authority." While it is unclear what powers this provision seeks to confer, at least two enforcement techniques are likely possibilities. First, the clause can 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 may be drawn depending on whether the force used is "deadly force" and whether it is used incident to an arrest for a felony or a misdemeanor. Whatever the "lawful" degree of force, however, section 1861(b)(1)(C) seems sufficiently broad to authorize its use.^{2/}

A second section 1861(b)(1)(C) power might be the exercise of the customary right of "hot pursuit," which refers to the recognized 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^{3/} and Congressional silence on the subject should not be used to infer disapproval. Instead, frequent reference in the legislative history of the FCMA to "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.

D. 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 also 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 (NMFS).

Citations are issued for "minor or technical violations," although NMFS regulations fail to define what "minor" infractions are. Unintentional first offenses such as good faith reliance on erroneous navigational charts or failure to display a permit in the proper manner are usually citable violations. On the other hand, intentional offenses such as impeding an enforcement official are more serious. Although the officer's discretion in issuing citations is not necessarily exercised according to the offender's intent, such action is consistent with the consideration given to "degree of culpability" in fixing the severity of civil penalties under section 1858(a). Some violations might be so serious, however, that the offender's good faith or lack of intent would be irrelevant. But as the regulations currently stand, the officer's judgment in 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 forfeiture. This express exemption, however, is absent from the provisions of the FCMA for civil penalties (fines). Arguably, the Act can be read to authorize civil fines for violations that had already resulted in citations. The implementing regulations help to clarify this possibility. Under NMFS regulations,^{4/} issuance of a citation usually means that other penalties are inappropriate. But additional penalties may be allowed when further investigation or later review finds violations to be more serious than initially believed, or if later investigation reveals that citations are inadequate to "serve the purposes of the Act." Consequently, the civil penalty and 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." Under the provisions of the Act, the Director's decision is final and unappealable.

E. Civil Penalties

Any person found to have violated one of the section 1857 prohibitions is subject to a fine 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 the 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 that contains a concise statement of facts believed to constitute 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 or she may ask that no penalty be assessed or that the amount be reduced and may admit or contest the legal sufficiency of the charges. At the end of this 45-day period, 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 or she may file a dated written request for a hearing.^{5/} The Director is free to modify or remit a civil penalty at any time. In 1983, the Act was amended^{6/} to include new section

1858(e), which grants the Secretary power to subpoena witnesses or evidence necessary for the conduct of a civil enforcement hearing. If, at the end of the hearing process, a "violator" is still unsatisfied with the civil penalty, section 1858(b) provides for appeal to an "appropriate court of the United States," which means a federal district court.

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.

In January 1983 NMFS began enforcing the remedies provided under section 1858(c) in earnest. One goal of this stepped-up enforcement was to collect more than \$330,000 in outstanding fines owed by about 60 commercial fishermen in New Jersey, Virginia, North Carolina, and Delaware who had violated the FCMA. There is, in addition, reported to be over \$500,000 in uncollected fines and penalties assessed against foreign fishing vessels. NMFS officials have stated their intent to revoke fishing permits and seize assets, including vessels, necessary to recover the assessed amounts.

F. Civil Forfeitures

In the past, vessel forfeiture had been the chief means of enforcing federal fishing laws. Under the FCMA, however, forfeiture is only one of several possible penalties. Ordinarily, forfeiture will be sought only for serious or repeated violations. Nonetheless, the forfeiture provision of the FCMA allows broad prosecutorial discretion, and every violator is potentially subject to forfeiture.

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

After seizure of a vessel or catch, the Attorney General may begin forfeiture proceedings in federal district court. If judgment is entered for the United States, forfeiture orders are governed by those provisions of United States customs laws relating to the disposition of forfeited property.

A person whose vessel or catch has been seized subject to

forfeiture may file within 60 days a petition for relief with the appropriate Regional Director of NMFS. The petition may be for conditional release of the seized property, for mitigation, or for total remission of the property. The Director decides the matter after investigation of the petition. The Director may mitigate or remit the forfeiture if he or she finds that the underlying violation was committed without willful negligence or intent. He or she may also remit or mitigate if "other circumstances exist which justify" such action. In either case, discontinuance of forfeiture proceedings may be conditioned on the payment of a specified amount of money. Similarly, section 1860(d) provides for a postponement in the forfeiture process upon receipt of a satisfactory bond or other security. Once a vessel owner has supplied a bond or security for the release of a seized vessel under the provisions of section 1860(d), the owner is deemed to have consented to the court's in rem jurisdiction, and as a consequence waives any further jurisdictional defenses.^{9/} Seized fish may be sold, subject to court approval, for not less than fair market value. Alternatively, for ease of administration or to avoid delays and spoilage of perishable fish due to inadequate storage facilities, the government may seize all the proceeds from the alleged wrongdoer's sale of the fish.

G. Judicial Interpretation of Forfeiture Provisions

As explained above, the government is authorized by section 1860 of the FCMA to seize a vessel under certain conditions. All or any part of the vessel may be forfeited in a civil proceeding in connection with a serious violation. However, a federal court in United States v. Daiei Maru No. 2^{10/} recently limited the government's power to assess penalties. The court held that although the Act permits a monetary penalty to be assessed against only part of a vessel (and her fishing gear, furniture, appurtenances, stores, and cargo), the statute does not allow a court to enter an in personam (personal) judgment against the owners of a vessel in order to hold the owners liable for the amount of the partial forfeiture.

The Daiei Maru No. 2 was arrested by Coast Guard personnel within the Fishery Conservation Zone (FCZ) for alleged violations of the FCMA, including failure to stop when instructed to do so,^{11/} interference by the vessel with its search and apprehension,^{12/} and discrepancies in the logging of the daily catch.^{13/} On the basis of these violations, the government claimed that the vessel was subject to forfeiture under the Act, and that the owners were also personally liable for a monetary penalty equal to the value of the vessel with her fishing gear, furniture, appurtenances, stores, and cargo. The court held that although the Act provides a comprehensive scheme of penalties for FCMA violators, it does not authorize an in personam action against a vessel owner in a forfeiture proceeding. The court suggested that if forfeiture does not provide an adequate remedy, the government is permitted under NMFS regulations^{14/} to assess a civil fine against the owners.

H. Criminal Offenses

Section 1859(a) makes it a criminal offense to commit any act prohibited by subsections 1857(1)(D), (E), (F), or (H), all of which relate to interference with enforcement. 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. A violation of section 1857(2), which proscribes foreign fishing without a permit, may be punished by a fine not to exceed \$100,000.

While the policy of NMFS is to enforce the Act vigorously, criminal penalties are usually reserved for the most aggravated offenses. This policy is consistent with the international trend toward decriminalization of fishery-related offenses, as reflected in the treaty recently adopted by the Third United Nations Conference on the Law of the Sea.^{15/}

In United States v. Marunaka Maru No. 88^{16/}, for example, a Japanese vessel was alleged to have committed a series of egregious offenses, including fishing in the FCZ without a permit, refusing admittance to a Coast Guard boarding party, attempting to evade seizure, and positioning to ram the pursuing Coast Guard vessel. Yet following the vessel's seizure, the United States Attorney elected to initiate an in rem proceeding seeking forfeiture of the vessel and its catch. It thus appears that under certain circumstances even the most flagrant violators may be subject only to civil liability rather than criminal prosecution.

I. Permit Sanctions

In addition to the formal civil and criminal penalties spelled out in the Act, NMFS regulations authorize permit sanctions for any section 1857 violation, or for the nonpayment of civil or criminal fines. Under these regulations^{17/} 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 holding section 1824 permits and to domestic vessels that hold a section 1853(b)(1) permit required by a Fishery Management Plan. In either case, the regulations provide for notice and hearing procedures that govern the Director's imposition of sanctions.

II. Particulars

A. 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 may violate a provision of the Act regardless of intent, willfulness, negligence, or even knowledge.^{18/} (An exception is found in section 1857(1)(H), which proscribes interference with another's arrest knowing that

the other person has violated a provision of the Act.) At first glance, this strict liability may seem somewhat harsh, especially for a person found guilty of merely possessing illegal fish under section 1857(1)(G). This apparent harshness, however, is modified by provisions for consideration of an offender's "degree of culpability" in assessing civil penalties and of "willful negligence or intent" in considering remission or mitigation of forfeitures. Significantly, section 1859(b), which contains the criminal provisions of the Act, requires no similar consideration.

As a general proposition, a mens rea element is a necessary part of an offense in Anglo-American criminal jurisprudence. An equally well established exception says that the constitutional requirement of due process is not violated merely because mens rea is not specified as an element of a crime.^{19/} This is especially true of statutes that are "essentially regulatory in nature,"^{20/} a statutory category into which the FCMA clearly falls.

The discretion to exclude mens rea elements from offenses is broad but not unbounded. In Holdridge v. United States,^{21/} Judge (now Justice) Blackmun established certain constitutional requirements for an Act that excludes a mens rea element from its offenses. These requirements are that the statute be basically policy-oriented, that it establish a reasonable standard, and that it prescribe penalties that are relatively small and that do not "gravely besmirch" a person's reputation.

The Holdridge test was applied in one of the last of the fishing enforcement cases to arise under the now-repealed Bartlett Act. In United States v. Ayo-Gonzalez,^{22/} the federal court of appeals upheld the forfeiture of a foreign vessel and criminal conviction of its master in the absence of any proof of culpability or fault. The case involved a Cuban vessel illegally fishing within the 12-mile Contiguous Zone, as proscribed by the Bartlett Act. The vessel's captain claimed that he had innocently and inadvertently drifted into the Contiguous Zone only after having lost contact with the fleet's larger vessel that was relied on for navigational information. He attacked the constitutionality of a statute that fixed criminal penalties on a person who did not even know that he was violating the Act. Applying the Holdridge criteria, however, the court upheld the conviction and held that the Bartlett Act was a policy-oriented statute, that it set reasonable standards, and that it established maximum penalties (including imprisonment for up to one year) that were relatively light and 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 Holdridge would control.

B. 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 or her search or inspection. The adverb "forcibly" should be read as modifying all of the verbs, and not simply "assault."^{23/} 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 in view of 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, a federal court of appeals found that an analogous provision 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."^{24/} Thus mere, harassment is not forcible interference. Perhaps the best indication of the "necessary" amount of force is seen in specific examples. In United States v. Frizzi,^{25/} spitting in an officer's face was held to be "forcible assault." In Bamberger, the physical restraint of a prison guard and removal of keys constituted sufficient "force." In Carter v. United States,^{26/} accelerating a car while a federal officer was attempting to enter and search it was enough to sustain a conviction for "forcible" resistance. Finally, in United States v. Goodwin,^{27/} the court had no difficulty in finding "kicking and flailing" as constituting sufficient force. On the other hand, the court in United States v. Cunningham,^{28/} 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. In Bamberger, however, the court agreed with the assertion 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 willfully threatens or attempts to inflict bodily harm, may be found guilty of forcibly assaulting such person.

C. The Warrantless Search Provision

Section 1861(b)(1)(A)(ii) authorizes officers, with or without a 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 must have probable cause to believe that a violation has occurred. "Reasonable grounds" are required in section 1861(b)(2) for an officer to make a warrantless arrest. The Act's warrantless search provision thus raises two

issues.^{29/} First, is it permissible to search without a warrant under all circumstances? Second, in a warrantless search, does the Fourth Amendment require that an officer have probable cause to believe that a violation has occurred? These issues, in turn, raise yet a third fundamental issue: the applicability of Constitutional protections to foreign vessels. That issue is discussed first.

As a starting point, the protections of the Fourth Amendment apply to searches of domestic vessels^{30/} and foreign vessels.^{31/} Once aliens become "subject to liability under United States law, they also have a right to benefit from its protection."^{32/} 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."^{33/}

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.^{34/} There are, however, many exceptions to this rule. The warrant requirement has been excused when the search is incident to a lawful arrest, is conducted in hot pursuit of a criminal suspect, involves critical circumstances pertaining to officer safety or potential destruction of evidence, or when it is an administrative search or is made at a border. A warrantless search under the FCMA is most likely an "administrative search," even though it might fit other categories. This is important because administrative searches may be constitutional with neither a warrant nor probable cause.

Searches pursuant to regulatory authority have become more prevalent as regulatory authority has grown, and case law has grown with it. In Camara v. Municipal Court,^{35/} and in See v. City of Seattle,^{36/} the United States Supreme Court held that a warrant was necessary, but that it could be based upon a showing that the warrant was part of a neutral enforcement plan. Probable cause to believe that a violation of law occurred does not seem necessary to obtain a warrant. Collonade Caterina Corp. v. United States^{37/} and United States v. Biswell^{38/} held that there was no warrant necessary for inspections in highly regulated industries: Collonade involved the liquor industry and Biswell involved firearms. The Court found that individuals involved in these industries cannot reasonably have the same expectations of privacy as individuals in different trades, in light of the pervasive regulation of firearms and alcohol.

The question thus arises: is fishing also a "pervasively regulated industry" within the meaning of the Biswell and Collonade exceptions? Courts are answering the question in the affirmative. In State v. Mach,^{39/} the Washington Court of Appeals held that commercial gillnet fishing has a history of regulation that subjects gillnet fishermen to warrantless

searches under the Biswell doctrine. The Mach court relied on several decisions in other state courts that had also treated fishing as a heavily regulated industry.^{40/}

In United States v. Tsuda Maru, 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]."^{41/} The facts in Tsuda Maru deserve careful attention. On January 26, 1979, the vessel was boarded and inspected by Coast Guard and NMFS personnel within the FCZ off Alaska. Officials conducted the search without a warrant, and there was no indication that the boarding officers had probable cause to suspect a violation of the Act. The officers determined that a violation of the FCMA had occurred, and they seized the vessel. After its arrival in Kodiak, the ship was searched three more times. Concerning this sequence of events, the court concluded that "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 last three searches if probable cause wasn't necessary for the first search. Nonetheless, the court clearly suggests that probable cause^{42/} was not needed to justify the initial inspection at sea.

In a recent United States Supreme Court case, United States v. Villamonte-Marquez et al.,^{43/} the court held that vessels in inland waters are subject to suspicionless boarding by the Coast Guard. This case involved a boarding made in order to inspect documents, as authorized by Title 19 of the U.S. Code, section 1581(a) (The Tariff Act of 1930). While this decision is not determinative of a case arising under the FCMA, it is strongly suggestive of a judicial approval of suspicionless searches. However, there are distinct differences between the statutes that might compel a different conclusion.

Section 1581 of the Tariff Act of 1930 authorizes customs officers to "at any time go on board of any vessel...at any place...and examine the manifest and other documents." Section 1861 of the FCMA authorizes officers to "board, and search or inspect, any fishing vessel." The FCMA differs from the Tariff Act in two respects. First, in the opinion of the majority, the words "at any time" and "at any place" confer express authority to board without suspicion. Such words are lacking from the FCMA. Secondly, the FCMA authorizes much more extensive and intrusive action by an officer. Authority to board and examine documents is much different than "searching and inspecting." The Tariff Act recognizes this distinction: section 1595, pertaining to searches and seizures, requires that an officer "have cause to suspect" a violation of the law, and that he or she must obtain a warrant to search.

The Villamonte-Marquez court relied heavily on the fact that the First Congress clearly authorized suspicionless boarding in a statute that is a "lineal ancestor" to the Tariff Act. The First Congress has no relevance to interpretations of the FCMA, for the subject matter and language of the statutes are not comparable.

Two circumstances point to the validity of suspicionless searches under the FCMA. The first is the commercial nature of the vessel, which arguably is entitled to less protection from suspicionless searches, as in Collonade. The second is the necessities of enforcement: "The nature of waterborne commerce in waters providing ready access to open sea"^{44/} is an important circumstance according to the court. At this time, however, it is not clear if the FCMA authorizes suspicionless searches.

A second justification for not having a warrant, applicable to foreign vessels only, is that the operators of such vessels have consented to warrantless searches. In a 1983 case, United States v. Kaiyo Maru No. 53,^{45/} the Ninth Circuit Court of Appeals held that, because owners or operators of foreign vessels must agree to allow boarding and inspection of their vessels by authorized U.S. officers as a condition of their FCMA permits, such boardings and inspections or searches are constitutional without a warrant.^{46/}

If the constitutionality of warrantless searches of fishing vessels is settled, the scope of such searches is less so. Fishing enforcement searches are not without limit. Specific searches might not need to 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 ensure 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 that limit a boarding officer's discretion. Additionally, there are distinct constitutional limits of the scope of fishing enforcement searches. Both the Tsuda Maru and Kaiyo Maru No. 53 courts noted that the scope of the search is implicitly restricted to those areas of the ship that must be inspected to enforce fishing regulations. Presumably this would exclude living quarters and the crew's personal property where the expectation of privacy is entitled to more protection.

III. Conclusion

The legal issues concerning enforcement of the provisions of the FCMA are intricate and not yet fully resolved. Yet the practical difficulties of enforcement across broad expanses of open ocean are of primary concern to those charged with ensuring that the mandates of the FCMA are obeyed. An unsteady economy and budget cuts at all levels of government are reflected in diminishing resources available to enforcement agencies. Eight years of success in the implementation of the Act would appear to jus-

tify continued allocation of the financial 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 (1982) [hereinafter cited as FCMA].
2. This discussion of the role of international law in fisheries management is based on G. KNIGHT, MANAGING THE SEA'S 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 a level where replacement can no longer occur. 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, ED., 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 claims of extended jurisdiction 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). The Bartlett Act was repealed by the FCMA in 1976.
12. The Conference finally adopted the Law of the Sea treaty 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 and has refused to sign it. 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 United Nations, The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea (Official Text) (1983).
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. The following stocks were considered seriously overfished: 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 also listed as species that 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 believed that 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 Conference 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 enforcement 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).
20. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). The President simultaneously issued a policy statement, which can be found in Weekly Comp. Pres. Docs., Mar. 14, 1983, at 383.
21. S. 750, 98th Cong., 1st Sess., March 10, 1983; H.R. 2061, 98th Cong., 1st Sess., Mar. 11, 1983.

END NOTES: Foreign Fishing
CHAPTER 2

1. 16 U.S.C. §§ 1801-1882 (1982) [hereinafter cited as FCMA].
2. Id. § 1811. "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. In effect, therefore, the FCZ 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 NO. 653, 720-23 (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY].
8. For example, during the 10-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

80 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]. In 1960 U.S. vessels had harvested 88 percent of the total fish catch from Georges Bank, but by 1972 the U.S. catch had decreased to only 10 percent 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 § 1801(a).
11. In 1974, the International Court of Justice in the Fisheries Jurisdiction Cases, 1974 I.C.J. 3, declared Iceland's 50-mile fishery zone invalid under international law because its claim was for exclusive, rather than preferential, fishing 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 228, 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. coastline. Aside from a prohibition on the direct landing of fish in the U.S. by foreign vessels, the law is without sanctions.
16. FCMA § 1857(2)(A). Foreign fishing within state waters is now punishable by a fine of not more than \$100,000. Id. § 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 § 1821(d).
18. See infra notes 133-155 and accompanying text.

19. FCMA § 1821(c).
20. Id. § 1821(g).
21. Id. § 1824.
22. Id. §§ 1821(c), 1824.
23. Id. § 1824.
24. Id. § 1853(a)(3).
25. Id. § 1853(a)(4).
26. Id. § 1821(d).
27. Id. § 1821(e).
28. Joint Venture Amendment, Pub. L. No. 95-354, 92 Stat. 519 (1978).
29. FCMA § 1824(b)(6)(B)(i).
30. Id. § 1824(b)(10).
31. AFPA, §§ 232, 236.
32. See FCMA §§ 1821(i), 1857(2). Pub.L. No. 97-453 and 96 Stat. 2481 (1982)
33. Included within the Act's jurisdiction are anadromous species such as salmon, which spawn in U.S. waters and migrate out to sea. FCMA § 1812(2).
34. 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. §§ 1801(b)(1), 1802(4), 1812. Other sedentary species may be added to the list in the future by the Secretary of Commerce. Id. § 1802(4).
35. Id. § 1821(a), (c).
36. Id. §§ 1821(a), (b), 1822(b), (c).
37. Id. § 1821(b).
38. Id. § 1824(b).
39. Id. § 1821(c).
40. Id. § 1821(c)(1).

41. Id. § 1821(g)(2).
42. Id. § 1821(c)(2)(A)(iii).
43. Id. § 1821(c)(2)(C).
44. Id. § 1821(c)(2).
45. Id. § 1821(c)(2)(D). Under 1980 amendments to the 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 § 236 (amending FCMA § 1821). The observer program is discussed in Part VI of this chapter.
46. FCMA § 1821(c)(2)(E).
47. Id. § 1821(c)(2)(F).
48. Id. § 1821(c)(2)(G).
49. Id. § 1821(c)(3). For a discussion of TALFF and its allocation among foreign nations, see Part III of this chapter.
50. FCMA §§ 1821(c)(4), 1824(b)(7).
51. Id. § 1822(a)(2).
52. Id. § 1823.
53. Id. § 1823(d).
54. Due to the delay in obtaining GIFAs with foreign nations seeking to fish in the U.S. FCZ and the delay in transmitting the signed GIFAs to Congress, it became apparent to Congress in February 1977 that the 60-day congressional GIFA review would not be completed before March 1, 1977, the implementation date of the FCMA. Congress responded with a joint resolution, approved on February 21, 1977, that gave congressional approval to GIFAs negotiated with Bulgaria, Taiwan, the German Democratic Republic, the Soviet Union, and Poland, before the lapse of the 60-day review period. See Fishery Conservation Zone Transition Act, Pub. L. No. 95-6, § 2, 91 Stat. 14 (1977).
55. Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983).
56. FCMA § 1821(c).

57. 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.
58. 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).
59. FCMA § 1821(c).
60. Id. § 1822(a)(2), (c)(2).
61. Id. § 1823.
62. Past fishing agreements were not subject to ratification because they had not been submitted to the Senate as treaties; the congressional role was limited to an after-the-fact examination. 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 now fishing off our shores

These procedures [for congressional review of GIFAs] 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.

63. FCMA § 1821(g).
64. The illusory effect of a reciprocity provision as a method to ensure 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 our shores and we 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).

65. Letter from William G. Gordon, Assistant Administrator for Fisheries, National Marine Fisheries Service (April 24, 1984).
66. 81 DEP'T ST. BULL. 31 (1982).
67. Department Reviews Developments in International Fisheries Policy, 76 DEP'T ST. BULL. 175, 177 (1977) (statement by Rozanne L. Ridgway, Deputy Assistant Secretary for Oceans and Fisheries Affairs).
68. Provisional Limits Established for Fishery Conservation Zone, 76 DEP'T ST. BULL. 273 (1977) (statement by Frederick Z. Brown, Director, Office of Press Relations).
69. FCMA § 1853(a)(4).
70. H.R. REP. NO. 445, supra note 9, at 29, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1098.
71. Christy, The Fishery Conservation and Management Act of 1976: Management Objectives and Distribution of Benefits and Costs, 52 WASH. L. REV. 657, 658 (1977).
72. FCMA § 1802(18).
73. COUNCIL ON ENVIRONMENTAL QUALITY, MANAGEMENT AND STATUS OF U.S. COMMERCIAL MARINE FISHERIES 27 (1981).
74. 50 C.F.R. § 602.11(c) (1983).
75. 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.
76. See, e.g., J. GULLAND, THE MANAGEMENT OF MARINE FISHERIES 108 (1974).
77. Id.

78. See generally, S. REP. NO. 416, supra note 7, at 21, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677.
79. H.R. REP 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.
80. 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").
81. See, e.g., J. GULLAND, supra note 76, at 108.
82. 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 on fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources").
83. F. CHRISTY, ALTERNATIVE ARRANGEMENTS FOR MARINE FISHERIES: AN OVERVIEW 23 (1973).
84. See, e.g., S. REP. NO. 416, supra note 7, at 21, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677; H.R. REP. NO. 445, supra note 9, at 45, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1098.
85. FCMA § 1802; see, e.g., S. REP. NO. 416, supra note 7, at 22, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677.
86. H.R. REP. NO. 445, supra note 9, at 47-48, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1098-99.
87. Id.
88. The House Report defines a fish stock as depleted when MSY "has been exceeded and yields are currently less than MSY" Note that the Act directs NOAA and the Councils to modify, but not necessarily ignore or supersede, MSY. H.R. REP. 445, supra note 9, at 95, reprinted in LEGISLATIVE HISTORY, supra note 7, at 1149.

89. S. REP. NO. 416, supra note 9, at 22, reprinted in LEGISLATIVE HISTORY, supra note 7, at 677.
90. 50 C.F.R. § 602.11(e) and 602.10(b)(1) (1983). 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).
91. 50 C.F.R. § 602.11(b) (1983). See also 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 11 (1980) [hereinafter cited as 1979 REPORT].
92. FCMA § 1853(a).
93. 50 C.F.R. § 602.2(b)(4) (1981).
94. The "national considerations" are those set forth in section 3(18) of the Act. FCMA, supra note 1, at § 1802(18).
95. 50 C.F.R. § 602.11(e) (1983).
96. See also 1979 REPORT, supra note 91, at 11.
97. 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.
98. 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.
99. Id. at 22-23.
100. Id. at 23.
101. Id.
102. FCMA § 1821(d).

103. 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).
104. Id.
105. Id.
106. FCMA § 1854(a)(2).
107. 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.
108. Id. at F-12.
109. The Tanner Crab FMP reported a 40 percent increase in the number of new boats entering the U.S. tanner crab fishery. Id. at F-15.
110. 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, and the U.S. is not a signatory, this "optimum utilization" principle is arguably currently binding customary law.
111. FCMA § 1821(h).
112. Maine v. Kreps, 563 F.2d 1043, 1048 (1st Cir. 1977).
113. 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.
114. Id. at 1047. Recruitment failure occurs when a fish stock cannot survive natural mortality fluctuations, even in the absence of fishing.
115. Id. at 1047-48.
116. ATLANTIC HERRING FMP, supra note 8, at 70. The United States withdrew from the ICNAF on December 31, 1976, two months before the Act took effect.
117. 563 F.2d 1043 (1st Cir. 1977).

118. Id. at 1049.
119. Id. at 1048-49.
120. FCMA, § 1802(18)(A).
121. *Maine v. Kreps*, 563 F.2d 1043, 1049-50 (1st Cir. 1977).
122. Id. at 1054-55.
123. See Kittay, Foreign Fishing Quotas and Administrative Discretion Under the 200-Mile Act, 58 B. L. REV. 95 (1978).
124. See text accompanying notes 103-110, supra.
125. *Maine v. Kreps*, 563 F.2d 1043, 1055-56 (1st Cir. 1977).
126. Id. at 1056.
127. FCMA § 1821(d).
128. Id. § 1853(4)(A).
129. 50 C.F.R. § 602.3(c)(8)(ii) (1981).
130. H.R. REP. NO. 1138, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 HOUSE REPORT].
131. Id. at 17.
132. Id. at 17-18.
133. Pub. L. No. 96-561, Title II, pt. C, 94 Stat. 3296 (1980) (codified in scattered sections of 16 U.S.C.).
134. 1980 HOUSE REPORT, supra note 130, at 23.
135. FCMA § 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 130, at 8.
136. FCMA § 1821(d)(1)(A).
137. Id. § 1821(d)(1)(C).
138. Id. § 1821(d)(1)(D).
139. Id.

140. Id. § 1821(d)(4).
141. Id.
142. 126 CONG. REC. H9401 (daily ed. Sept. 23, 1980) (remarks of Rep. Forsythe and Rep. Breaux).
143. Id. at H9402 (remarks of Rep. Forsythe).
144. 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.
145. The "phaseout reduction" formula of H.R. 7039, as reported by the Committee on Merchant Marine and Fisheries, required a mandatory 15 percent 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 the lesser amount of either the OY minus DAH formula or the "phaseout reduction" formula. 1980 HOUSE REPORT, supra note 130, at 8.
146. See id. at 70-72 (dissenting view of Rep. Paul N. McCloskey, Jr.).
147. 126 CONG. REC. H9395 (daily ed. Sept. 23, 1980) (remarks of Rep. Breaux).
148. AFPA, supra note 17, at § 231(a) (amending the Fisheries Conservation and Management Act of 1976, 16 U.S.C. § 1821(e)(1) (1976)); see FCMA § 1821(e)(1)(E)(i)-(vii).
149. Id. § 1821(e)(1)(E)(viii).
150. S. REP. NO. 416, supra note 7, at 26, 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 130, at 33.
154. 126 CONG. REC. H9396 (daily ed. Sept. 23, 1980) (remarks of Rep. Breaux).

155. On July 25, 1984, President Reagan announced a relaxation of these economic sanctions, allowing a directed groundfish fishery for both the U.S.S.R. and Poland. See note 153, supra.
156. Pub. L. No. 97-453, 96 Stat. 2481 (1983) (codified in scattered sections of 16 U.S.C.).
157. NOAA, Office of the Administrator, Memo of Feb. 3, 1983.
158. FCMA § 1821(d)(4).
159. Id. § 1821(e)(1).
160. See MARINE FISH MANAGEMENT Dec., 1981, at 6-7; see also PACIFIC FISHING, Feb., 1981, at 12.
161. FCMA § 1824(b)(1).
162. Id. § 1824(b)(3).
163. Id.
164. Id. § 1824(b)(4).
165. Id. § 1824(b)(6).
166. 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 cited as FCMA OPERATIONS HANDBOOK].
167. Id. at III-5.
168. FCMA § 1824(b)(7).
169. Id. § 1824(b)(7)(A),(C). For the requirements set out in the GIFA, see text accompanying notes 35-50, supra.
170. FCMA § 1824(b)(7)(B).
171. Id. § 1824(b)(7)(E).
172. Id. § 1824(b)(7)(F).
173. FCMA OPERATIONS HANDBOOK, supra note 166, at III-5.
174. FCMA § 1824(b)(10).
175. Id. § 1824(b)(12).

176. Tomlinson & Brown, Joint Ventures with Foreigners as a Method of Exploiting Canadian Fishery Resources Under Extended Fisheries Jurisdiction 5 OCEAN MGMT. 251, 253 (1979).
177. See Kaczinski, Joint Ventures in Fisheries between Distant-Water and Developed Coastal Nations: An Economic View, 5 OCEAN MGMT. 39, 41, 45 (1979).
178. Id.
179. FCMA § 1802(11).
180. Id. § 1821(a)(3).
181. NOAA thereafter published a notification of proposed rulemaking regarding joint ventures in the FCZ. 42 Fed. Reg. 30,875 (1977).
182. 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 cents per hour, while the average U.S. wage for seafood processing in February and March of 1978 was \$4.54 per hour.
183. Fishery Conservation and Management 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.]
184. Id. at 233 (statement of Dr. Walter Pereyra).
185. Id.
186. Public Hearings on Joint Venture Regulations, Mar. 13, 1979 (statement of Dr. Walter Pereyra). See 44 Fed. Reg. 7708 (1979).
187. See National Marine Fisheries Service Proposed Interim Policy, 43 Fed. Reg. 5398 (1978).
188. 43 Fed. Reg. 20,532 (1978).
189. Id.; see also Senate Oversight Hearings, supra note 183, at 16-17 (statement of James P. Walsh, Deputy Administrator, NOAA).
190. 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.

191. Pub. L. No. 95-354, 92 Stat. 519 (1978) (codified in scattered sections of 16 U.S.C.).
192. Id. at § 2 (amending FCMA § 1801(a)(7), (b)(6)).
193. See 1978 HOUSE REPORT, supra note 182, at 6; SEN. REP. NO. 935, 95th Cong., 2d Sess. 5 (1978) [Hereinafter cited as 1978 SENATE REPORT].
194. Id.
195. FCMA, § 1824(b)(6)(B)(ii).
196. Id. § 1824(b)(3).
197. Id. § 1824(b)(4).
198. Id.
199. Id. § 1824(b)(6)(B).
200. Id. § 1853(a)(4)(C) - (a)(5).
201. 1978 SENATE REPORT, supra note 193, at 5.
202. 1978 HOUSE REPORT, supra note 182, at 9; 1978 SENATE REPORT, supra note 193, at 5.
203. See 1978 HOUSE REPORT, supra note 182, at 9.
204. Id. at 10.
205. Id. at 6; 1978 SENATE REPORT, supra note 193, at 5-6.
206. FCMA §§ 1824(b)(6)(B)(ii), 1853(a)(4)(C).
207. 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)).
208. 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).
209. See 1978 HOUSE REPORT, supra note 182, at 9-10.
210. FCMA § 1824(b)(7)(F).
211. Id.
212. 1978 SENATE REPORT, supra note 193, at 4.
213. Id.

214. FCMA § 1801(b)(6).
215. See 1978 SENATE REPORT, supra note 193 at 5; Sullivan, Future is Clouded by Lack of Policy on Foreign Fishing, NAT'L FISHERMAN, Jan. 1982, at 72.
216. Christy, Regulation of International Joint Ventures in the Fishery Conservation Zone, 10 GA. J. INT'L & COMP. L. 85, 98-99 (1980).
217. Id.
218. See supra note 17.
219. See, e.g., FCMA § 1821(e)(1)(A), (B), (E). An example of the "fish and chips" policy is President Reagan's recent decision to allow up to 50,000 metric tons of groundfish to be directly harvested by the U.S.S.R., on the condition that they buy 50,000 tons from U.S. fishermen. The Oregonian, Thursday, July 26, 1984, Section F, p.1.
220. 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.
221. Sabella, supra note 220, at 39.
222. Id.
223. Id. Joint ventures have also been initiated on the Atlantic Coast, though on a smaller scale. See, e.g., Sullivan, supra note 215.
224. 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].
225. Sabella, supra note 220, at 37.
226. Pereyra 1980 Statement, supra note 224, at 404.
227. Id. Dr. Pereyra has noted that Marine Resources Co. has allowed members of the U.S. processing industry to board leased Soviet processing vessels to observe processing techniques that are necessary for a product to be internationally marketable.
228. Christy, supra note 216, at 97 n.81.

229. Chandler, Arctic Trawler's First Voyage Turns Skeptics Into Believers, NAT'L FISHERMAN, Nov. 1980, at 1.
230. Frozen Fish vs. Cold War, Marine Resources Roots for Detente, PAC. FISHING, Apr. 1980, at 41.
231. See supra text accompanying notes 148-153.
232. FCMA § 1821(c)(2)(D).
233. 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].
234. FCMA OPERATIONS HANDBOOK, supra note 166, at III-7.
235. 1980 REPORT, supra note 233, at 38.
236. FCMA OPERATIONS HANDBOOK, supra note 166, at III-7.
237. Id.
238. Id.
239. See 1980 REPORT, supra note 233, at 38; see also 42 Fed. Reg. 17,895 (1977).
240. See Fidell, Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot, 52 WASH. L. REV. 513, 576 (1977).
241. 50 C.F.R. § 611.8(a)(1) (1983).
242. Id. § 611.8(a)(3).
243. Id. § 611.8(a)(4).
244. Id. § 611.8(a)(5).
245. Id. § 611.8(c).
246. Id. § 611.8(b)
247. 1980 REPORT, supra note 233, at 38.
248. American Fisheries Protection: 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).

249. 1979 REPORT, supra note 91. at 29.
250. 1980 REPORT, supra note 233, at 80.
251. 1980 HOUSE REPORT, supra note 130, at 33-34.
252. Id.
253. Id.
254. 1979 REPORT, supra note 91, at 9.
255. 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.).
256. Id. § 236(1) (amending the FCMA § 1821 (i)).
257. Id. § 236(2)(A) (codified at FCMA § 1821(i)(2)(A)).
258. Id. § 236(2)(B)(ii) (codified at FCMA § 1821(i)(2)(B)(ii)).
259. Id. § 236(2)(b)(i) (codified at FCMA § 1821(i)(2)(B)(i)).
260. Id. § 236(3) (codified as FCMA § 1821(i)(4)).
261. Id. § 236(4) (codified at FCMA § 1821(i)(4)).
262. Sullivan, Loophole in Breaux Bill Prolongs Shortchanging of Observer program, NAT'L FISHERMAN, Feb. 1982, at 12.
263. AFPA § 236(2)(C) (codified at FCMA § 1821(i)(2)(C)).
264. Id. § 236(4) (codified at FCMA § 1821(i)(5)).
265. As of February 1982, the Reagan Administration's budget item for observers called for an expenditure of one million dollars, which was enough to keep observation at a level of between 8 and 10 percent. Sullivan, supra note 262, at 12.
266. Pub. L. No. 97-453 (1982).
267. See generally, Ray, Administration of the FCMA, OCEAN LAW MEMO No. 23 (May 1983); and FCMA § 1821(i).
268. FCMA § 1821(i)(6)(C).
269. Id. § 1821(i)(2)(C).

270. Letter from William G. Gordon, Assistant Administrator for Fisheries, Nat'l Marine Fisheries Service (April 24, 1984).
271. FCMA § 1821(c)(2)(D).
272. Id. § 1821(i)(3); see also, H.R. Rep. No. 97-982, 97th Cong. 2d Sess. 15 (1982), which cites the monitoring of sea bird mortality as an example of these expanded functions.
273. FCMA § 1821(c)(2)(D).
274. FCMA § 1821(c)(2)(E).
275. Id.
276. See generally, FCMA § 1824(b)(10).
277. 48 Fed. Reg. 57,494 (Dec. 30, 1983).
278. 50 C.F.R. § 611.22(a)(2) (1983).
279. Id. § 611.22(b) (1983).
280. Id.
281. 46 Fed. Reg. 55,731 (1981).
282. Id.
283. 47 Fed. Reg. 626 (1982).
284. Id.
285. Id.
286. 50 C.F.R. § 611.22(a)(2)(i), (b) (1980).
287. 50 C.F.R. § 611.22(a)(2)(i) (1981).
288. See 50 C.F.R. 611.22(a)(2)(i) (1982); and see 50 C.F.R. 611.22(a)(2)(i) (1983).
289. 46 Fed. Reg. 55,731 (1981).
290. See text accompanying notes 148-153, supra.

END NOTES: Fishery Management
Regional Fisheries Management
Councils and the States

CHAPTER 3

1. See Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1852 (1982) [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 § 1852(b)(2)(B).
4. Id. § 1852(b)(5).
5. Id. § 1852(b)(1).
6. Id. § 1852(a)(7).
7. Id. 1852(a)(8).
8. Id. § 1852(c)(1).
9. Id. § 1852(c)(2).
10. Id. § 1852(h)(1).

11. Originally the eight Councils identified some 80 fisheries for which they proposed to develop FMPs. A recent amendment to the FCMA, codified in § 1852(h)(1), makes clear the former supposition that not all fisheries need regulation. The national standard guidelines, 50 C.F.R. § 602.17(b) (1983), contain a list of the criteria to be used in deciding which fisheries require an FMP.
12. FCMA § 1852(h)(3).
13. Id. § 1852(i).
14. Id. § 1855(e).
15. Id. § 1853(a)
16. Id. § 1852(h)(2)(4).
17. Id. § 1852(g)(2).
18. Id. § 1852(g)(1).
19. Id. § 1852(g)(2).
20. Id. § 1852(f)(6).
21. Id. § 1852(f).
22. U.S. CONST. art. I, § 8, cl. 3.
23. *Manchester v. Massachusetts*, 139 U.S. 240 (1891).
24. Id.
25. See *Skiriotes v. Florida*, 313 U.S. 69 (1941).
26. The basis for such extraterritorial management has been the traditional police power of the states. For states to adequately and effectively control fishing within their boundaries they have found it necessary to extend their reach outside as well. See *Bayside Fish Co. v. Gentry*, 297 U.S. 422 (1936); *Johnson v. Gentry*, 220 Ca. 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).
27. 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).
28. See, e.g., OR. REV. STAT. §§ 506.750, 506.755 (1981); ALASKA ADMIN. CODE, tit. 44, § 44.03.01 (Oct., 1980).
29. U.S. CONST. art. VI, cl. 2.

30. Very rarely, however, 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).
31. See FCMA § 1856(a).
32. Id. § 1856(b).
33. Administrative Procedure Act, 5 U.S.C. § 554 et seq. (1982); FCMA § 1856(b).
34. Preemption under this section has been necessary in several cases. In 1982, Oregon extended the commercial salmon season in spite of the Salmon FMP. See In the matter of Proceedings to Preempt State Management Authority of the State of Oregon, Docket No. 212-084 (Dept. of Comm., May 26, 1982). See also Ray, Administration of the FCMA, OCEAN LAW MEMO NO. 23 (MAY 1983).
- In 1984, Oregon extended the salmon season in violation of the Salmon FMP. This action was preempted on September 21, 1984, twenty-one days after the extension was implemented, and only nine days from the end of the extension period.
- Occasionally, preemption under this section is ineffective because the extension is for such a short period of time that preemption could not be implemented, as in the Alaska salmon fishery in 1983, and in the California salmon troll season in 1984.
35. The FCMA, supra note 1, at § 1856(a) defines state waters as "any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea...", but does not define internal waters. The presumption made here is consistent with international law and the overall scheme of the FCMA.
36. Id. § 1856(b)(2).
37. See FCMA § 1856(a).
38. The mere delegation of authority seldom acts 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). The focus of inquiry in every case is Congressional intent.

39. See OR. REV. STAT. § 508.265 (1981). See also People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980), cert. denied, 449 U.S. 839 (1980). The court did not precisely define "registration," but stated that factors such as citizenship, fishing in adjacent waters, operation from state ports and "legitimate and demonstrable state interest served by the regulation" might provide a basis for the registration required by § 1856 of the FCMA.
40. For decisions upholding state regulation beyond territorial waters, see F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980); State v. Southeastern Fisheries Ass'n, 415 So. 2d 1326 (Fla. 1st DCA 1982); Anderson Seafoods, Inc. v. Graham, 529 F. Supp. 512 (N.D. Fla. 1982). But cf. Tingley v. Allen, 397 So. 2d 1166 (Fla. 3d DCA 1981); State v. F/V Baranof, No. 3K0-81-219 CI (Alaska Super. Ct. Aug. 17, 1982).
41. Letter from Terry Leitzell to Rep. Don Young (Aug., 1980).
42. See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).
43. See Greenberg & Shapiro, Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform, 55 S CAL. L. REV. 641 (1982).
44. See Skiriotes v. Florida, 313 U.S. 69, 77 (1941).
45. See Manchester v. Massachusetts, 139 U.S. 240 (1891).
46. 16 U.S.C. §§ 1451 et seq. (1982).
47. Id. § 1456(c)(1).
48. See, e.g., Florida v. Baldrige, No. TCA 83-7071 (N.D. Fla. complaint filed Mar. 8, 1983); Southeastern Fisheries Assoc., Inc. v. Livings, No. 83-524-Civ. - SMA (S.D. Fla., filed March 3, 1983).
49. NOAA Administrator's Letter No. 37 (Nov. 24, 1982), at 4.
50. 104 S. Ct. 656, 52 U.S.L.W. 4043 (1984) (regarding OCS Lease Sale 53).
51. Id., 52 U.S.L.W. at 4066.

52. Id. at 4068. On this point, the Court reversed the holdings of the Ninth Circuit Court of Appeals in California v. Watt, 683 F.2d 1253 (9th Cir. 1982), and of the district court, 520 F. Supp. 1359 (C. D. Cal. 1981).

53. See also Ray, Administration of the FCMA, OCEAN LAW MEMO NO. 23 (May 1983); Taylor & Rieser, Federal Fisheries and State Coastal Zone Management Consistency, 3 TERRITORIAL SEA NO. 1 (May 1983).

54. Id. at 3-4. Taylor and Rieser suggest three standards for determining when strict conformity or compliance with state coastal program fishery provisions will not be required in order for an FMP to be consistent "to the maximum extent practicable":

1) The legal constraints standard: If full consistency is either (a) prohibited by federal law (15 C.F.R. § 930.32(a)) or (b) will hamper or proscribe the attainment of specific federal legislative policies or objectives (California v. Watt). In the case of an FMP, those constraints would be determined primarily by reference to the requirements of the MFCMA.

2) The factual constraints standard: If the factual conditions prevailing in the area where the federal activity is to take place differ from those within the coastal zone. In the fisheries management context, this would occur where conditions affecting the FCZ fishery were different from those affecting the fishery within the territorial sea.

3) The "effects" standard: If the proposed federal action will have the same effect toward achieving the objectives of the state coastal program as it would if identical with coastal program requirements, it is consistent. Meeting this standard would require the comparison of the enforceable state program policies concerning the affected fishery with the objectives and probable impacts of the relevant FMP provisions.

Id. at 4.

55. 15 C.F.R. § 930.39(c) (1984).

56. 15 C.F.R. § 930.32(a) (1984).

57. See 49 Fed. Reg. 22,825 (June 1, 1984). NOAA published advanced notice of proposed rulemaking, which solicited comments on federal consistency regulations under the CZMA that may need revision.

58. H. R. 4589, S.2324 (98th Cong., 2d Sess.). NOAA will of course revise its regulations further to reflect the amendments if enacted.
59. California v. Watt, 683 F.2d 1253, 1264 (9th Cir. 1982).
60. In a portion of the opinion that was not overturned by Supreme Court review, the court in California v. Watt believed that NOAA regulations implicitly support the court's allocation of responsibility, by requiring the acting federal agency to prepare the consistency determination and then to provide it to the affected state for review. Where the state and the federal agency have a serious disagreement over whether or not the proposed action is consistent with the state's program, the Secretary of Commerce may be requested to mediate the dispute. However, mediation is voluntary and the agency may discontinue the mediation process at any time. Thus, the ultimate discretion in making a consistency determination (subject to judicial review) is placed by the regulations in the acting federal agency.

In the case of an FMP, NOAA, the agency responsible for reviewing the coastal program to make certain that it complied with the requirements of the CZMA, would also be responsible for reviewing the fisheries plan to make certain that it was consistent with the coastal program. This dual role puts NOAA in the position of having the capability, if it chooses, to insure that an FMP has a high degree of consistency with coastal program objectives. See Id.

END NOTES: Management Plans

CHAPTER 4

1. See Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1852 (1982) [hereinafter cited as FCMA]. For a list of current Council members, refer to Appendix A, following Chapter 3.
2. Candidates for appointment to Councils must be "knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest of the fishery resources of the geographical area concerned." Id. § 1852(b)(2)(A).
3. 16 U.S.C. § 1852(b)(2)(B).
4. See 50 C.F.R. § 601.22(e)(1983).
5. FCMA § 1852(h)(1). See National Oceanic and Atmospheric Administration Operational Guidelines -- Fishery Management Plan Process (1983), at 11 [hereinafter cited as Guidelines].
6. See id.
7. For example, the Pacific Council has elected to manage five species of salmon under a single management plan. This integrated approach is much less complex than the task of trying to manage them under separate plans. See Pacific Fishery Management Council, Third Draft: Proposed Framework Plan for Managing the Ocean Salmon Fisheries Off the Coasts of Washington, Oregon and California, Commencing in 1985 (1983).
8. The FMP process must comply with the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321 - 4347 (1982) [hereinafter cited as NEPA]; see 50 C.F.R. § 601.21(b)(1) (1983).

9. See Guidelines, supra note 5, at 14.
10. See 40 C.F.R. § 1501.4(b) (1983); see also Guidelines, supra note 5, at 12.
11. Id. at 12, app. 4c.
12. See Guidelines, supra note 5, at 12-13.
13. Fishery Management Plans must be consistent with the requirements of "any other applicable law." FCMA § 1853(a)(1)(C).
14. Endangered Species Act, 16 U.S.C. § 1531 - 1543 (1982) [hereinafter cited as ESA].
15. See id., § 1536; See also Guidelines, supra note 5, at 26; 50 C.F.R. § 402.04 (1983).
16. See Guidelines, supra note 5, at 9.
17. Marine Mammal Protection Act, 16 U.S.C. §§ 1361 - 1407 (1982) [hereinafter cited as MMPA].
18. Id. See Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 197 (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).
19. If a marine mammal population will be affected, information identifying and quantifying the problem must be included in the EIS. See Guidelines, supra note 5, at 26.
20. Coastal Zone Management Act, 16 U.S.C. §§ 1451 - 1464 (1982) [hereinafter cited as CZMA].
21. Id. § 1456(c)(1). See 50 C.F.R. § 601.21(b)(3) (1983); See also Gordon & Greenburg, The Fishery Management Process, presented at the Second Annual National Fishery Law Symposium (Oct. 21, 1983), at 12.
22. See 15 C.F.R. § 930.36 (1984). On June 1, 1984, NOAA solicited public comment on proposed rulemaking to revise CZMA regulations as a result of the U.S. Supreme Court decision in Department of the Interior v. California, 104 S. Ct. 656, 52 U.S.L.W. 4043 (1984). See 49 Fed. Reg. 22825 (June 1, 1984).
23. NEPA § 4332(G).
24. 40 C.F.R. § 1506.4 (1983).

25. Exec. Order No. 12,191, 46 Fed. Reg. 13,193 (1981). This requires an agency to refrain from publishing its final rule upon request of the Director of OMB. See E.O. 12.291 § 3(f)[2].
26. 5 U.S.C. §§ 601-612, at § 603 (1982).
27. See supra note 25; see also Guidelines, supra note 5, at 15, app. 4c.
28. See 50 C.F.R. § 602.16(c)(2) (1983).
29. See 50 C.F.R. § 602.4 (1983).
30. The codified format regulations were removed: See 49 Fed. Reg. 13,372 (April 4, 1984). See also Addendum to Guidelines, supra note 5, available Summer 1984.
31. See FCMA § 1852(h)(3); 50 C.F.R. § 602.5(a)(5) (1982). The number of hearings will vary from fishery to fishery, depending on the level of public interest and the issues considered.
32. Guidelines, supra note 5, at 18.
33. See Guidelines, supra note 4, at 20-27.
34. The agencies include: Office of Management and Budget (review for compliance with E.O. 12291); the Coast Guard (review of matters with respect to enforcement at sea); the State Department (review of matters with respect to foreign fishing); and the Office of Coastal Zone Management. See FCMA § 1854.
35. For "Event Schedule," see Guidelines, supra note 5, at 28-32.
36. FCMA § 1854(b).
37. Id. § 1851(a).
38. Id. § 1854(a)(1)(A).
39. Id. at § 1854(b)(1).
40. Id. § 1854(b)(2); see Guidelines, supra note 5, at 44.
41. FCMA § 1854(b)(3).
42. Id. § 1854(c)(1)(B).

43. See Administrative Procedure Act, 5 U.S.C. § 553(d) (1982); 40 C.F.R. 1506.10 (1979).
44. See Guidelines, supra note 5, at 33-34.
45. See e.g., Western Pacific Fishery Management Council, Final Environmental Impact Statement and Fishery Management Plan for the Precious Coral Fisheries of the Western Pacific Region (1979), at 10 (relating to permit conditions).
46. See e.g., Gulf of Mexico Fishery Management Council, Fishery Management plan for the Shrimp Fishery of the Gulf of Mexico, United States Waters (1981), at 8-20 (statistical reporting requirements).
47. See Guidelines, supra note 5, at 35.
48. Id. at 36.
49. FCMA § 1855(e).
50. See Guidelines, supra note 5, at 37.
51. FCMA § 1852(h) ; 50 C.F.R. § 602.5 (d) (1983).
52. See Guidelines, supra note 5, at 12, app. 4d at 12.

END NOTES: Enforcement

CHAPTER 5

1. See 50 C.F.R. § 611.2(r)(3)(ii)(iii) (1983) (definition of "fishing").
2. The issue of excessive force was not raised by the defendants in the case of *United States v. Marunaka Maru* NO. 88, 559 F. Supp. 1365 (D. Alaska 1983), despite the fact that the Coast Guard was forced to fire live rounds across the bow of a Japanese high seas gillnetter in order to stop and board her. The foreign vessel was sighted within the fishery conservation zone and was suspected of fishery violations under the FCMA. When the Coast Guard boarding party attempted to inspect the vessel, she refused to stop and attempted to outrun the Coast Guard for 19 hours. Although the court did not directly rule on the issue, it seems that shooting across a belligerent vessel's bow falls within "other lawful authority" as contemplated by Congress in section 1861(b)(1)(C).
3. 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 the 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).
4. 50 C.F.R. § 621.2(b) (1983).
5. The precise regulatory formalities concerning this request, and the conduct of the hearing itself, are detailed at 50 C.F.R. § 621.51-.56 (1983).

6. 96 Stat. 2481, P.L. 97-453, codified in various sections of 16 U.S.C. § 1801 et seq.
7. See Fidell, supra note 3, at 548-49.
8. 9(1) MARINE FISH. MGT. 6 (1983).
9. United States v. Marunaka Maru No. 88, 559 F. Supp. 1365 (D. Alaska 1983).
10. 562 F. Supp. 34 (D. Alaska 1982).
11. 16 U.S.C. §§ 1821, 1857(1)(E) & (H); 50 C.F.R. § 611-6 (1982).
12. 16 U.S.C. §§ 1821, 1857(1)(E) & (H); 50 C.F.R. § 611.7(a)(5) and (8) (1982).
13. 16 U.S.C. § 1857(1)(C); 50 C.F.R. §§ 611.9(e) (1982).
14. 50 C.F.R. § 621.2(b) (1983).
15. 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 reflective of customary international law. See, United Nations, The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea (Official Text) (1983).
16. 559 F. Supp. 1365 (D. Alaska 1983).
17. 50 C.F.R. § 621.51-.56 (1983). See also 50 C.F.R. § 621.2(c).
18. This conclusion is implied from the lack of any such language in FCMA § 1857.
19. United States v. Freed, 401 U.S. 601, 613 n.4 (1971).
20. *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.

21. 282 F.2d 302 (8th Cir. 1960).
22. 536 F.2d 652 (5th Cir. 1976).
23. 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 to mean that the adverb "forcibly" modifies the entire string of verbs which included "assaults, resists, opposes, impedes, intimidates or interferes." *Id.* at 719.
24. 452 F.2d 696 (2d Cir. 1971).
25. 491 F.2d 1231 (1st Cir. 1974).
26. 231 F.2d 232 (5th Cir. 1956).
27. 440 F.2d 1152 (3d Cir. 1971).
28. 509 F.2d 961 (D.C. Cir. 1975).
29. 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 trial. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).
30. *United States v. Odneal*, 565 F.2d 598 (9th Cir. 1977).
31. *United States v. Cortes*, 588 F.2d 106 (5th Cir. 1979).
32. Id. at 110.
33. *United States v. Codera*, 585 F.2d 1252 (5th Cir. 1978).
34. See, e.g., *Jones v. United States*, 362 U.S. 257 (1960).
35. 387 U.S. 523 (1967).
36. 387 U.S. 541 (1967).
37. 397 U.S. 72 (1970).
38. 406 U.S. 311 (1972).
39. 23 Wash. App. 113, 594 P.2d 1361 (1979).
40. *Paladini v. Superior Court*, 173 P. 588 (Cal. 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).

41. 470 F. Supp. 1223 (D. Alaska 1979).
42. *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir. 1984), in which certain domestic tuna boat captains challenged the constitutionality of a regulation promulgated pursuant to the Marine Mammal Protection Act, 16 U.S.C. § 1371. The regulation, 50 C.F.R. § 216.24(f), permitted observers to accompany tuna fishing vessels and collect evidence that could be used, if necessary, in legal actions against the vessels, captains, and owners. The plaintiffs argued that their Fourth Amendment protection from unreasonable searches was violated by the regulation. The court cited *Collonade* and *Biswell* (see notes 37 and 38, *supra*) with approval in holding that the domestic tuna fishery also falls within the "heavily regulated industry" exception to the warrant requirements. The court also stated that the government's intrusion into the captains' Fourth Amendment freedoms was outweighed by the legitimate governmental interest in taking steps to protect the diminishing porpoise population.
43. 103 S. Ct. 2573; 77 L. Ed. 2d 22; 51 U.S.L.W. 4812.
44. Id.
45. 503 F. Supp. 1075 (D. Alaska 1980), aff'd 699 F.2d 989 (1983).
46. 699 F.2d 989, 994 (1983).

