1991 Supplement

to the 1985 Edition of

FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

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Filing Instructions:

This entire 1991 Supplement should be filed in back of the loose-leaf pages of the 1985 Guidebook edition. SEE ORESU-H-85-001

Preface to 1991 Supplement

1990 brought major changes to the area of fisheries law. The source of these changes was Congress. Congress reauthorized and amended the Magnuson Fishery Conservation and Management Act (MFCMA) by passing the Fishery Conservation Amendments (Fishery Amendments). The scope of these amendments, together with the passage of time since the last revised edition of this guidebook, dictate that we undertake the production of an entirely new edition. The new guidebook will appear in 1993. In the meantime, we need to communicate to current guidebook subscribers the 1990 changes. This 1991 supplement covers all the major changes made by the Fishery Amendments to the MFCMA.

In addition, the new guidebook should incorporate developments and information from all eight of the regional fisheries councils. As a preview, we have included in this supplement information from the Gulf of Mexico Council involving the composition of the Gulf Council as well as issues in the Gulf fishery such as bycatch.

Rather than use the sometimes confusing system of inserting pages, this update consists of a supplemental packet. The pages you hold in your hand should be added to the rear of the guidebook. One consequence of this method of updating is the most current information will now be at the rear of the guidebook. Accordingly, <u>it is imperative that the 1991 supplemental packet be checked whenever the guidebook is used</u>.

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Introduction

Chapter 1

III. Overview of the MFCMA (page 8)

The Fishery Amendments included two dramatic changes in U.S. fishery law which are discussed in greater detail below. First, Congress addressed the problem of high seas driftnet fishing by incorporating and expanding the Driftnet Impact Monitoring, Assessment, and Control Act of 1987[1] into the MFCMA. Second, the Fishery Amendments specifically bring highly migratory species of fish, including tuna, under U.S. jurisdiction within the U.S. 200-mile exclusive economic zone (EEZ) effective January 1, 1992.[2]

Foreign Fishing

Chapter 2

IV. TALFF and Its Allocation (page 24)

The Fishery Amendments simplify the determination of the total allowable level of foreign fishing (TALFF) by repealing the "phase-out" equations in favor of setting the TALFF at the portion of the optimum yield, if any, which will not be harvested by domestic vessels.[1] Further, section 204(b)(12) of the MFCMA, which allows for sanctions such as the revocation, suspension, or modification of a permit, is repealed.[2] However, these sanctions

are still available under section 308(g).[3]

V. Joint Ventures (page 30)

A minor amendment to the MFCMA's joint venture provision recognizes the need for multi-state input into a joint venture for a fishery that occurs in two or more states. Under the amendment, a foreign vessel would have to specify which species of fish would be involved in the joint venture in the application to the appropriate state governor.[4] If the fishery occurs in the internal waters of two of more states, or in the EEZ, the Governor must consult with the appropriate Council and Marine Fisheries Commission and consider comments from governors of other states where the fishery occurs prior to granting the application. Further, if the Governor determines that fish processors within the state have the capacity and desire to process all the domestically harvested fish from the species concerned that are landed in that state, the application may not be granted.[5]

VI. Observer Program and Foreign Fishing Fees (page 36)

B. Foreign Fishing Fees (page 40)

The amendments repeal the MFCMA's fee provision and replace it with a provision that mandates that reasonable fees be paid by the owner of a foreign fishing vessel fishing within the U.S. EEZ. The amount of these fees are to be determined by the Secretary of Commerce in consultation with the Secretary of

State. Fees collected shall be deposited in the general fund of the treasury.[6]

VII. Foreign High Seas Driftnet Fisheries (new Guidebook section)

The impact of foreign driftnet fleets fishing the high seas of the North Pacific beyond the U.S. EEZ has been a source of great concern and publicity for the last several years. Japan, Taiwan, and the Republic of Korea all have fleets engaged in this "squid" fishery. As of 1988, there were almost 800 driftnet vessels purportedly targeting on squid in the North Pacific. Each of these vessels utilize driftnets from 7.1 to 17 nautical miles long.[7] The nets are made of plastic webbing, which is not biodegradable. These nets are set at sundown and allowed to float with the current during the night. This method of fishing has a high incidental catch of marine mammals, sea birds, and an undetermined number of U.S.-origin salmon and steelhead.

Japan's driftnet fleets, including the only driftnet fleets authorized to target on salmon, are partially regulated under a trilateral international Convention between Japan, Canada, and the U.S.[8] Nevertheless, in 1988 Japan's salmon driftnet fleet, fishing in accordance with the Convention, was denied a permit under the Marine Mammal Protection Act and has since been prohibited from fishing for salmon within the U.S. EEZ.[9] The Convention does not regulate Japan's squid driftnet fleet or Taiwanese or Republic of Korea's driftnet vessels.

Still, the U.S. has passed laws imposing numerous restraints

on all driftnet fishing vessels.[10] The most comprehensive restraint is the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (Driftnet Amendments), which has been expanded, amended, and incorporated into the MFCMA.[11] The Driftnet Amendments define large-scale driftnet fishing as "a method of fishing in which a gillnet composed of a panel or panels of webbing with a total length of one and one-half miles or more is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing."[12]

The Driftnet Amendments require that the Secretary of Commerce, through the Secretary of State, immediately initiate international negotiations leading to international agreements to implement the Amendments' findings, policy, and provisions towards achieving an international ban on large-scale driftnet fishing.[13] The agreements are to

(1) ensure that all foreign nations that engage in, or allow their vessels to engage in, high seas driftnet fishing are included in such agreements;

(2) require that each high seas driftnet vessel be equipped with satellite transmitters to provide real-time position information accessible to the U.S.;

(3) provide for statistically reliable monitoring of the vessels' harvest through on-board fishery observers;

(4) grant U.S. officials the right to board driftnet vessels on the high seas and inspect for violations;

(5) allow reliable monitoring and documentation of all catch landed or transshipped at sea by driftnet vessels;

(6) impose time and area restrictions to prevent the interception of anadromous species;

(7) require, in so far as feasible, that driftnets be constructed of biodegradable materials;

(8) require that each driftnet be marked at appropriate intervals in a way that conclusively identifies the vessel and flag nation responsible for that driftnet;

(9) minimize the taking of nontarget fish species, marine mammals, sea turtles, seabirds, and endangered species or species protected by international agreements to which the U.S. is a party; and

(10) take steps to ensure that parties to the agreements agree to comply with the spirit of other international agreements and resolutions regarding high seas driftnet fishing.[14]

Congress intends to monitor these negotiations and agreements themselves until all the above provisions are accomplished. To this end, the Secretary of Commerce, after consultation with the Secretary of State and the Secretary responsible for the Coast Guard, must submit reports to Congress annually, beginning January 1, 1991, until all the provisions are met.[15] These reports must

> (1) describe the steps taken to carry out this section [the Driftnet Amendments] . . .;
>
> (2) evaluate the progress of those efforts, the impacts on living marine resources, including available observer data, and specify plans for further action;

(3) identify and evaluate the effectiveness of unilateral and multilateral measures, including sanctions, that are available to encourage nations to agree to and comply with this section, including recommendations for legislation to authorize any additional measures that are needed if those are considered ineffective;

(4) identify, evaluate, and make any recommendations considered necessary to improve the effectiveness of the law, policy and procedures governing enforcement of the exclusive management authority of the United States over anadromous species against fishing vessels engaged in fishing beyond the exclusive economic zone of any nation;

(5) contain a list and description of any new fisheries developed by nations that conduct, or authorize their nations to conduct, large-scale driftnet fishing beyond the exclusive economic zone of any nation; and

(6) contain a list of the nations that conduct, or authorize their nationals to conduct, large-scale driftnet fishing beyond the exclusive economic zone of any nation in a manner that diminishes the effectiveness of or is inconsistent with any international agreement governing large-scale driftnet fishing to which the United States is a party or otherwise subscribes.[16]

U.S. law allows unilateral trade sanctions under the Pelly Amendment to the Fishermen's Protective Act[17] against nations that conduct, or allow their nationals to conduct, fishing operations in a manner that diminishes the effectiveness of an international fishery conservation program.[18] The Driftnet Amendments expand the Pelly Amendment's coverage to include nations described in subsection 6, quoted above,[19] and nations that the Secretary of Commerce determines have failed to enter into and implement adequate driftnet agreements.[20]

Under the Pelly Amendment, the President, after receiving a certification from the Secretary of Commerce, may direct the

Secretary of the Treasury to prohibit the importation of fish and fish products from the offending nation. This prohibition on imports may continue as long as the President deems appropriate and to the extent allowed by the General Agreement on Tariffs and Trade (GATT).[21] Also, the President has 60 days after certification to notify Congress of any action taken or the reasons no action was taken.[22] The possibility of certification under the Pelly Amendment was helpful in negotiating the initial bilateral driftnet agreements.[23]

Fisheries Managers

Chapter 3

The 101st Congress enacted a number of substantial amendments to the MFCMA's Regional Council system, including new law affecting the jurisdictional relationship between the Councils and the states.

II. Composition of the Councils (page 45)

A. Amended Procedures (new Guidebook section)

The MFCMA was amended to correct a perceived lack of "fair apportionment" of the active commercial participants in fisheries under a Council's jurisdiction.[1] The amendments require Council members nominated by state governors to be individuals who "by reason of their occupational or other experience, scientific

expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned."[2] The Secretary has nine months after the passage of the Fishery Conservation Amendments to promulgate regulations for this statutory provision.

In addition, the Secretary must issue annual reports each January 31 on the Secretary's actions taken to ensure that a fair and balanced apportionment of the various fishing interests is being achieved on each Council. These reports must include "a list of fisheries under the jurisdiction of each Council, outline[] for each fishery the type and quantity of fish harvested, fishing and processing methods employed, the number of participants, the duration and range of the fishery, and other distinguishing characteristics."[3] They must also "assess the membership of each Council in terms of the apportionment of the active participants in each such fishery and state the Secretary's plans and schedule for actions to achieve a fair and balanced apportionment on the Council for the active participants in any such fishery."[4]

In light of these requirements, the governors of the constituent states must initially judge potential nominees for seats on the Councils with an eye toward the above qualifications rather than political favors. Governors must also consult with representatives of both commercial and recreational interests and submit a statement explaining how each nominee meets the

statutory qualifications.[5] In addition to a governor's determination, the Secretary must review nominees to assure they meet statutory mandates. If the Secretary finds that a nominee fails to meet the mandates, the Secretary must notify the appropriate governor. That governor may then either select a new nominee or resubmit the rejected nominee with an additional statement clarifying the nominee's qualifications.[6] Finally, no member appointed by the Secretary can serve more than three consecutive terms after January 1, 1986.[7]

B. Composition of the Gulf of Mexico Council (new Guidebook section)

The Gulf of Mexico Fishery Management Council (GMFMC) has 17 voting members and 4 non-voting members. Eleven of the voting members are appointed by the Secretary, or his designee, from a list of qualified individuals submitted by the governor of each applicable constituent state. Each voting member is appointed for three years, while vacancy appointments are made for the remainder of the unexpired term of the vacancy.

Five of the remaining six voting members are the principal state official concerned with marine fishery management, or his designee, in each of the five constituent states, as appointed by the governors of the five states. The final remaining voting member is the Regional Director, Southeast Region, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, for the Council's geographical area, or his designee.

The four non-voting members of the GMFMC are the Regional Director of the United States Fish and Wildlife Service for the Council's geographical area or his designee; the Commander of the Eighth Coast Guard District or his designee; the Executive Director of the Gulf Marine Fisheries Commission or his designee; and one representative of the Department of State as designated by the Secretary of State.

III. Council Responsibilities (page 46)

The major amendment concerning Council responsibilities involves Council input into other federal or state agency action that may affect fishery habitat. A Council "may comment on and make recommendations concerning any activity undertaken, or proposed to be undertaken, by any state or federal agency that, in the view of the Council, may affect the habitat of a fishery resource under its jurisdiction."[8] A Council must comment on proposed agency action that is "likely to substantially affect an anadromous fishery resource under its jurisdiction."[9]

Federal agencies must provide a Council with a detailed written response within 45 days of receiving a Council comment or recommendation on a proposed agency action. This response must include "a description of measures being considered by the agency for mitigating or offsetting the impact of the activity on such habitat."[10]

A Council meeting or portion of a meeting may be closed to the public, provided the Council notifies local newspapers in the

major fishing ports within its region of time and place of the meeting.[11] This notification procedure does not apply to brief closures of a portion of a meeting to discuss personnel or internal administrative matters.

If a Council determines it is appropriate to consider new information from a state or federal agency or a Council advisory body, the Council must afford comparable consideration to any new information offered at the same time by the interested public. Interested parties must have a reasonable opportunity to respond to new data or information prior to final Council action on conservation and management measures.[12] This provision should reinforce the ability of both commercial and recreational fishermen to challenge a Council's decision to close or modify conservation or management measures during a fishing season without public input.

V. The Advisory Panels (page 47)

A. Amended Procedures (new Guidebook section)

Councils are now required to establish and maintain a "fishing industry advisory committee" to "provide information and recommendations on and assist in the development of fishery management plans and amendments to such plans."[13] Appointments to these committees must provide fair representation to commercial fishing interests in the Council's region.

B. Gulf of Mexico Advisory Panels (new Guidebook section)

The GMFMC has established an Advisory Panel for each fishery

management unit identified by the Council. The panels are generally composed of members who are residents of the five-state geographical area. Each panel is selected so as to provide for geographical, commercial, recreational, marketing, or other interests in accordance with functions and purposes of the panel. Members and officers of the Advisory Panel are appointed by the Council for a period of two years.

XI. FMPs and Federal Consistency under the CZMA (page 53)

The 101st Congress reauthorized and made major amendments to the Coastal Zone Management Act (CZMA).[14] Specifically, Congress "amend[ed] the 'federal consistency' provisions to overturn the Supreme Court's decision in Secretary of the Interior v. California . . . to clarify that all federal agency activities, whether in or outside of the coastal zone, are subject to the consistency requirements . . . if they affect natural resources, land uses, or water uses in the coastal zone."[15]

Fishery Management Plans (FMPs) are usually subjected to a CZMA consistency review by NOAA. For example, in 1983 NOAA reviewed 48 FMPs for CZMA consistency, with 3 of those requiring litigation to settle disputes.[16] Still, the courts will likely have to resolve disagreements between the MFCMA's section 306(b) federal preemption provision and the CZMA's consistency requirement for fishery resources managed by an FMP but harvested exclusively beyond the coastal zone.[17]

XII. Council Authority over Highly Migratory Species (new Guidebook section)

Prior to the Fishery Amendments of 1990, the MFCMA excluded highly migratory species of fish from the Councils' conservation and management jurisdiction.[18] Highly migratory species were defined in the MFCMA as "species of tuna which, in the course of their life cycle, spawn and migrate over great distances in the waters of the ocean."[19] This definition was considerably more restrictive than the international definition found in the 1982 United Nations Convention on the Law of the Sea (LOS), which includes tuna, swordfish, oceanic sharks, and other pelagic species.[20]

The LOS view of the management of highly migratory species is that

> [t]he coastal State and other States whose nations fish in the region for . . . highly migratory species . . . shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone [EEZ]. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.[21]

While the U.S. followed the LOS view regarding tuna management, the MFCMA's Councils had regulatory authority over the harvest of non-tuna pelagic species within the U.S. EEZ. Nevertheless, such regulations could not interfere with domestic or foreign opportunities to harvest tuna within the U.S. EEZ.[22]

Because the U.S. did not claim jurisdiction over tuna beyond

its territorial sea, it did not recognize other coastal nations' claims to jurisdiction beyond their territorial seas.[23] Notwithstanding the U.S. position, the vast majority of coastal nations claim jurisdiction over tuna found within their EEZs.[24] In the past, coastal nations, especially island nations in the South Pacific Ocean, would occasionally seize U.S.-flag tuna fishing vessels operating within their EEZs.[25]

The MFCMA addressed this problem by providing that "[i]f the Secretary of State determines that any foreign nation is not allowing fishing vessels of the United States to engage in fishing for highly migratory species in accordance with an applicable international fishery agreement, whether or not such nation is a party thereto . . . he shall certify such determination to the Secretary of the Treasury."[26] The Secretary of the Treasury is then required to take action to prohibit the importation into the U.S. of all fish and fish products from the fishery or, if appropriate, the importation of all fish and fish products from the foreign nation concerned.[27] Additional efforts to assure U.S.-flag tuna fishing vessels from seizure for operating within other nations' EEZs include the Fishermen's Protective Act[28] and the South Pacific Tuna Act.[29]

Regarding the international management of tuna, the U.S. participates in the Inter-American Tropical Tuna Commission (IATTC) for the eastern tropical Pacific Ocean and the International Convention for the Conservation of Atlantic Tuna (ICCAT)[30] for the Atlantic Ocean.[31]

The IATTC was established in 1946. The IATTC scientific staff recommended management measures for eastern Pacific stocks of yellowfin tuna to member nations. This system was effective while the region's tuna fleet was predominantly U.S.-flag vessels. By 1979, however, coastal Latin American nations began to construct their own tuna fleets and expand their coastal jurisdiction to include 200-mile zones. Because of political problems in responding to these changes the IATTC's conservation program is no longer being implemented and coastal nations have restricted fishing access within their EEZs. Despite the failure to implement its conservation program, the IATTC has maintained a very thorough tuna data base for the region.[32]

The ICCAT was established in 1969 to study tuna and billfish stocks and to recommend measures for maintaining the stocks at levels that can support the maximum yield on a sustained basis.[33] There has been much conflict between the domestic and international tuna management and domestic authority over non-tuna pelagic species. In 1985, five councils (the Caribbean, Gulf of Mexico, South Atlantic, Mid-Atlantic, and New England Councils) cooperated in submitting a swordfish FMP to the Secretary of Commerce. The goal of the FMP was to prevent the harvesting of undersized swordfish without restricting the harvesting of tuna. The proposed FMP would have imposed seasonal fishery closures, limited the incidental catch of swordfish by tuna long-liners, and prohibited longline fishing at night during the closures.[34] (Both proposals were rejected by the Secretary.)

The FMP was resubmitted in 1986 but was never implemented.[35]

The 1990 Fishery Amendments have brought tuna under exclusive U.S. fisheries jurisdiction within the U.S. EEZ as of January 1, 1992.[36] Although the U.S. now claims exclusive jurisdiction over highly migratory species within its EEZ, Congress has only mandated authority over these fisheries to the Western Pacific Council.[37] It is believed that the Secretary will eventually implement plans for all highly migratory species to the Atlantic Coast Councils.[38]

The importance of international cooperation in any effective management of highly migratory species, however, is reflected in the Fishery Amendments of 1990 requirement that the Secretaries of State and Commerce re-evaluate existing international fishery agreements.[39] This evaluation is intended to determine whether such agreements adequately provide for "(1) effective fishery management, including collection of necessary information and an enforcement system; (2) access to fishing grounds for U.S. vessels; and (3) sufficient funding."[40] The Secretary of State is required to begin international negotiations to correct any deficiencies noted during the evaluation process.[41]

Although the U.S. now claims exclusive jurisdiction over highly migratory species within the EEZ, Congress granted management authority over these additional fisheries only to the Western Pacific Council.[42] Because of concerns about fair and equitable representation of various fishing interests on some Atlantic Coast Councils, it is believed the Secretary of Commerce

will implement all highly migratory FMPs for those Councils.[43] In an attempt to ensure balanced representation in the management of these species in the Atlantic, one commercial and one recreational fishing representative shall be appointed as U.S. Commissioners to the ICCAT.[44] The Western Pacific Council has simply gained jurisdiction over highly migratory species for its normal FMP process.

North Pacific Fishery Management Council (page 57)

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Walter C. Jaap
Judith C. Lang
Eugene Shinn

Special Groundfish

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Billy Fuls
Gilmore Pellegrin, Jr.
Harriet M. Perry

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Phase III: Public Review and Council Adoption (page 90)

A Council meeting or portion of a meeting may be closed to the public provided that the Council notifies local newspapers in the major fishing ports within its region of the time and place of the meeting.[1] This notification procedure does not apply to brief closures of a portion of a meeting to discuss personnel or internal administrative matters.

If a Council determines it is appropriate to consider new information from a state or federal agency or a Council advisory body, the Council must afford comparable consideration to any new information offered at the same time by members of the interested public. Interested parties must have a reasonable opportunity to respond to new data or information prior to final Council action on conservation and management measures.[2] This provision should reinforce the ability of both commercial and recreational fishermen to challenge a Council's decision to close or modify conservation or management measures during a fishing season without public input. Further, the Councils are now explicitly authorized to hold meetings "at appropriate times and places in any of the constituent States of the Council."[3]

Phase IV: Secretarial Review and Regulation Promulgation (page 92)

The Fishery Amendments of 1990 modified one and added three

provisions with which an FMP or an FMP amendment must be consistent before the FMP and its regulations are effective. The modification is intended to clarify the need for conservation and management measures to prevent overfishing.[4] Specifically, FMPs must "prevent overfishing, and . . . protect, restore, and promote the long-term health and stability of the fishery."[5] Further, FMPs must be consistent not only with the MFCMA's national standards and other applicable laws, but also with "regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits)."[6]

The first new provision requires FMPs to

> consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustments shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery.[7]

Some fisheries have relatively short seasons. Adverse weather and ocean conditions can severely limit fishing opportunities during a short season. Thus participants in a fishery can build some advance flexibility into an FMP to allow a harvest opportunity.

The last two new provisions reflect the political struggle between conservation and management of natural resources and economics. The first of these applies to FMPs or FMP amendments prepared by a Council or by the Secretary of Commerce after

January 1, 1991. This provision mandates that these FMPs or FMP amendments "assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan."[8]

The final new provision is applicable only to FMPs or FMP amendments submitted to or prepared by the Secretary after October 1, 1990. This provision requires that these plans include a fishery impact statement that assesses, specifies, and describes the likely effects of conservation and management measures on the participants in fisheries regulated by the plan and on participants in fisheries conducted within an adjacent Council's jurisdiction. The latter determination is to be made after consultation with the appropriate Council and representatives of that Council's participants.[9]

In addition to these mandatory provisions, the Councils have authority to incorporate numerous discretionary provisions in an FMP or FMP amendment. Consequently, to effectively regulate a fishery an FMP may

(1) require U.S. fishing vessels, fishing boat operators, and U.S. fish processors who receive fish subject to the plan to obtain a permit and pay a fee to the Secretary to participate in the fishery;

(2) limit fishing by designating zones, time periods, and types of fishing vessels or specify types and quantities of fishing gear;

(3) establish specific catch limits of fish based on area,

size, number, weight, sex, incidental catch, total biomass, or other necessary and appropriate factors;

(4) regulate the types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices to facilitate enforcement of the MFCMA;

(5) incorporate relevant fishery conservation and management measures of the coastal states nearest to the fishery insofar as these are consistent with the national standards and the applicable laws;

(6) establish a system to limit access to the fishery to achieve optimum yield;[10]

(7) require fish processors who first receive fish subject to the plan to submit noneconomic data necessary for the conservation and management of the fishery (see the discussion on confidentiality of statistics, below);

(8) require observers to be carried on board U.S. fishing vessels, of suitable size and function, engaged in fishing for species subject to the plan to collect data necessary for conservation and management of the fishery;

(9) assess and specify the effect of the plan's conservation and management measures on the stocks of naturally spawning anadromous fish in the region; and

(10) prescribe other appropriate and necessary measures for the conservation and management of the fishery.[11]

Any statistic submitted to the Secretary under either a required or discretionary provision is confidential as to the

identity or business of any person.[12] The information may be disclosed only to federal and Council employees responsible for FMP development and monitoring, state employees pursuant to an agreement with the Secretary, or when required by court order.[13] While preserving confidentiality, the Secretary may release information in aggregate or summary form if it does not disclose the identity or business of the person who submitted the statistics.[14] Finally, use of information collected by voluntary fishery data collectors while aboard a vessel for conservation and management reasons is restricted for use in civil enforcement or criminal proceedings under the MFCMA, the Marine Mammal Protection Act (MMPA), or the Endangered Species Act (ESA) if the collector is not required by any of these acts or their regulations.[15]

Gulf of Mexico Fishery Management Plans

(new Guidebook topic)

I. Introduction

The Gulf of Mexico Fishery Management Council has implemented seven Fishery Management Plans and 27 amendments to the plans. Three of the plans were done jointly with the South Atlantic Fishery Management Council. Three additional plans that affect fisheries in the Gulf were drawn up by the Secretary of Commerce.

The FMPs regulate the harvest of 28 species of bony fish, 39 species of shark, 2 species of stone crab, 6 species of shrimp, 2 species of lobster, and numerous kinds of coral. Regulations range from specifying population levels that would trigger harvest restrictions in the case of shrimp to the complete prohibition of harvest in the case of red drum.

II. Summary of FMPs

A. Stone Crab Fishery

First implemented in 1979 with four ensuing amendments, this FMP regulates the harvest of two species of stone crab. The management measures apply to the federal waters off the west coast of Florida and the Florida Keys and complement Florida regulations. The FMP sets a season, a minimum claw size, and regulates traps and trapping as well as specifying some area restrictions. Perhaps the most interesting aspect of stone crab management is the requirement to remove a claw and return the crab to the water where it can potentially produce another claw and also live to reproduce.

B. Shrimp Fishery

The shrimp FMP covers six species of shrimp. There are few restrictions except the joint closure of Texas and federal waters (Texas Closure) each year and the establishment of closed areas in the Florida Tortugas Shrimp Sanctuary.

White shrimp taken in federal waters are subject to the minimum size and harvest limits of Louisiana when possessed in

Louisiana waters. A recent amendment defines what would constitute overfishing for several of the species and specifies a two-year assessment period should this occur. A quota is set for royal red shrimp.

C. Spiny Lobster Fishery

Two species of lobster are regulated under this plan which was first established in 1982 with three subsequent amendments. The plan sets a commercial and recreational season as well as a special recreational season. Permits are required for harvesting from federal waters, females with eggs are prohibited, minimum carapace and tail length are specified, and traps not made of wood must have degradable panels. Lobsters cannot be taken with spears, hooks, etc., and the conditions under which live, undersized lobsters may be held for bait are specified.

D. Coastal Migratory Pelagic Resources

This plan, covering seven species, was established in 1983 and has five amendments. The plan primarily regulates king and Spanish mackerel through requiring special permits, specifying a commercial and recreational quota, and placing size and bag limits on both species. This joint plan with the South Atlantic Fishery Management Council also sets boundaries for separating migratory groups. Minimum mesh sizes are specified for gill nets, and purse seines are prohibited for Gulf king mackerel as well as the Gulf and Atlantic group of Spanish mackerel.

Cobia are also regulated through bag and size limits.

This plan was the first to affect recreational and

commercial fishing throughout the Gulf of Mexico. Increases in the quotas since 1988 seem to indicate that the stocks are recovering and that the plan is working.

E. Coral and Coral Reefs

This plan sets the fishing year, a permit requirement, and a yearly quota for a variety of corals. Otherwise, the taking of coral is prohibited except as incidental catch in fisheries where the catch is unsorted. Recreational permits and possession limits are required. The plan also identifies areas of concern where bottom longlines, traps, and bottom trawls are prohibited.

F. Reef Fish Resources

The reef fish plan was initiated in 1984 and has two amendments. The plan identifies 54 species of reef fish as being in the management unit of which 19 are currently regulated. The plan sets a minimum size for 13 of the species and a recreational bag limit for 16 of the species; it prohibits entirely the harvest of jew fish.

Commercial quotas are placed on red snapper, shallow water groupers and deep water groupers with provisions for closure when the quotas are reached.

A commercial permit is required, and applicants must certify that 50 percent of earned income is from commercial fishing. Amendment 4 proposes to place a moratorium on new permits.

A stressed area for reef fisheries is identified in terms of depth contours from Florida to Texas in which the use of fish traps, roller trawls, and power heads is prohibited. Trapping is

regulated by size, number of traps, and mesh size and through the use of degradable fasteners. Longlines and buoy gear are not allowed inside a certain depth contour.

G. Red Drum Fishery

This plan became effective in 1986, and there are two amendments. The plan prohibits the harvest of red drum by commercial and recreational fishing in federal waters. The ability of the plan to restore red drum to the target goal is highly dependent on management measures taken by the Gulf states. Red drum spend the first three years of their lives in state waters before migrating offshore. All the Gulf states have severely restricted both the commercial and recreational harvesting of red drum in response to the federal plan.

III. Bycatch

One of the eight objectives of the Gulf of Mexico Fishery Management Council on shrimp is minimizing bycatch by shrimpers.[16] Bycatch is the incidental catching of nontarget species. The objective of the GMFMC is to reduce bycatch by encouraging research and development of shrimping gear, which will reduce incidental catch without decreasing overall efficiency or increasing the cost of gear.[17] To achieve its objective, the GMFMC has (1) implemented an excluder panel to prevent accidental catch of sea turtles; (2) regulated trawler mesh size to prevent accidental catch of shrimp below a certain size; and (3) developed trawler gear to reduce the incidental

capture of finfish.[18] In addition to emphasizing gear development, other alternatives such as seasonal area closures and shortened "drags" are available to the Council.

The GMFMC has reasoned that gear development and the use of an excluder panel will reduce the waste of not only marine resources but also labor efforts, gear damage, and conflicts with other users. Use of an excluder panel, aside from reducing the incidental catch of sea turtles, will also facilitate compliance with the Endangered Species Act.[19]

The indirect impact of this effort includes the possibility of (1) reducing finfish bycatch; (2) increased competition between shrimp and escaping finfish which occupy ecological niches similar to those of shrimp; (3) a reduction in the amount of food available to scavengers; (4) a reduction in finfish growth rate through stocks not being thinned out; (5) shrimpers being able to shrimp in areas not previously used; (6) stimulating the development of fisheries utilizing escaping finfish; and (7) sustaining the fertility of the area where the bycatch is discarded.[20]

Appendix B-3

Fishery Management Plan Status Report (page 108)

Fish Management Plan	Council Preparing Plan or Amendment	Public NMFS Review of Draft	Plan Submitted for Second Review	Proposed Regulations Issued	Approval/ Disapproval Decision Made	Final Regulations Published	Plan Implemented
Atlantic Billfishes (Implemented 1988) (Amendment/s thru 1991)	Gulf	x	x	x	x	x	x
Stone Crab Fishery (Implemented 1979) (Amendment/s thru 1991)	Gulf	x	x	x	x	x	x
Shrimp Fishery (Implemented 1981) (Amendment thru 1991)	Gulf	x	x	x	x	x	x
Spiny Lobster (Implemented 1982) (3 subsequent amendments)	Gulf	x	x	x	x	x	x
Migratory (Pelagic resources) (Implemented 1983) (5 subsequent amendments)	Gulf	x	x	x	x	x	x
Coral and Coral Reefs (Implemented 1984) (1 subsequent amendment)	Gulf	x	x	x	x	x	x
Reef Fish Resources (Implemented 1984) (2 subsequent amendments)	Gulf	x	x	x	x	x	x
Red Drum Fishery (Implemented 1986) (2 subsequent amendments)	Gulf	x	x	x	x	x	x

Enforcement

Chapter 5

The Fishery Amendments of 1990 made three major changes in the MFCMA's enforcement measures. First, the Amendments prohibit five acts. Second, the Amendments increase the maximum allowable civil fines and criminal penalties. Third, the Amendments allow the Secretary of Commerce to impose permit sanctions.

I. The Overall Scheme (page 111)

A. What Is Illegal under The Act? (page 111)

The first new prohibition implements the driftnet policies discussed earlier in this supplement.[1] It prohibits U.S. fishermen from engaging in large-scale driftnet fishing anywhere and prohibits foreign fishermen from using driftnets in the U.S. EEZ.[2]

The second new prohibition makes it illegal to attempt or to actually steal, damage, or tamper with fishing gear owned by another person or fish contained within the gear.[3]

The third new prohibition makes it illegal to forcibly assault, resist, oppose, impede, intimidate, or interfere with any observer on a vessel under this act.[4] This prohibition fits under the general category of "interference with enforcement," discussed in the original edition of this guidebook.[5] Prior to these amendments, such actions were illegal when directed at officers in the conduct of their searches or inspections. This prohibition extends that protection to observers. The penalty for such actions directed at

observers is the same as if the actions were directed at an officer.[6]

The fourth new prohibition makes it illegal to "strip pollock of its roe and discard the flesh of the pollock."[7]

The fifth and last newly prohibited activity is violation of international fishery agreements. U.S. vessels or their owners may not fish in the waters of a foreign nation in a manner that violates an international fishery agreement between that nation and the U.S.[8]

E. Civil Penalties (page 115)

Prior to the 1990 Fishery Amendments, the maximum fine for a violation of the prohibitions was $25,000. The Amendments upped the maximum fine to $100,000.[9] However, the Secretary of Commerce, in assessing the fine, must still take into account the nature, circumstances, extent, and gravity of the acts committed. With respect to the violator, the Secretary must still take into account the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice requires.

H. Criminal Offenses (page 118)

Prior to the 1990 Fishery Amendments, the maximum criminal penalty for violating the prohibition involving interference with enforcement was $50,000. The maximum fine for such violations has been increased to $100,000.[10] Further, a violation of the new subsection (interference with observers) has been added to that list.[11]

The maximum penalty applicable to foreign fishing without a permit was increased from $100,000 to the new maximum of $200,000.[12]

I. Permit Sanctions (page 118)

Prior to the 1990 amendments, there was no formal provision in the MFCMA to allow permit sanctions as a civil penalty. However, under NMFS regulations the Director of NMFS could revoke, suspend, or modify a permit or even prohibit the issuance of a permit.[13] The amendments provide the Secretary of Commerce with the power to use those sanctions against any vessel or owner who violates any of the prohibitions in section 1857. Additionally, the Secretary can impose permit sanctions for failure to pay any civil penalty or criminal fine,[14] but once the fine is paid the Secretary must reinstate the permit.[15]

Before the Secretary may impose any permit sanctions, he or she must give the violator an opportunity for a hearing on the facts underlying the violation.[16]

ENDNOTES

Chapter 1, Introduction (page 125)

[1] 16 U.S.C.A. § 1822 note §§ 4001-4009 (Supp. 1991).

[2] MFCMA § 1812.

Chapter 2, Foreign Fishing (page 130)

[1] MFCMA § 1821(d).

[2] MFCMA § 1824(b)(12), repealed by Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 106(b), 104 Stat. 4436, 4441 (1990) [hereinafter Fishery Amendments].

[3] S. REP. NO. 414, 101st Cong., 2d Sess. 16 (1990). *See infra* p. 24.

[4] MFCMA § 1856(c). *See Internal Waters Joint Ventures: State Procedures in Need of Stronger Standards*, 4 TERRITORIAL SEA No. 3, at 1 (1984); *see also Alaska Supreme Court Upholds Joint Venture for Sac Roe Herring*, 5 TERRITORIAL SEA No. 3, at 12 (1985) (Alaska State regulation prohibiting foreign "primary processing" in its internal waters violates the commerce clause and is void).

[5] MFCMA § 1856(c)(2).

[6] MFCMA § 1824(b)(10).

[7] U.S. DEPT. OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT AND ECONOMIC IMPACT ANALYSIS ON THE INCIDENTAL TAKE OF DALL'S PORPOISE IN THE JAPANESE SALMON FISHERY (1987); *see also* Johnston, *The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options*, 21 OCEAN DEV. & INT'L L. 1 (1990); Eisenbud, *Problems and Prospects for the Pelagic Driftnet*, 12 B.C. ENVTL. AFF. L. REV. 473 (1985).

[8] International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786.

[9] Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 783 (1989); H.R. REP. NO. 970, 100th Cong., 2d Sess. 21 (1988).

[10] One significant restraint, not discussed in this *Guidebook*, is the U.S. ratification of Annex V to the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships. Marine Plastic Pollution Research and Control Act of 1987, Pub. L. No. 100-220, Title II, 101 Stat. 460 (1987) (codified at 33 U.S.C.A. § 1901 note §§ 2101-2108 (1990)). Among other things Annex V prohibits the disposal of synthetic fishing nets at sea.

[11] 16 U.S.C.A. § 1822 note §§ 4001-4009 (1990), amended and incorporated into MFCMA § 1826.

[12] MFCMA § 1802(16).

[13] MFCMA § 1826(d). An international moratorium on large-scale high seas driftnet fishing by June 30, 1992, is called for by U.N. General Assembly Resolution No. 44/225 (Dec. 22, 1989). *See also* Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 29, 1989, 29 I.L.M. 1449.

[14] MFCMA § 1826(d)(1)-(10).

[15] MFCMA § 1826(e).

[16] *Id.* (1)-(6).

[17] 22 U.S.C. § 1978.

[18] 22 U.S.C. § 1978(a)(1).

[19] MFCMA § 1826(f).

[20] *Id.* (Driftnet Act of 1987 § 4006(b)).

[21] 22 U.S.C. § 1978(a).

[22] *Id.*

[23] *See* Ballweber, *United States Law and Policy Regarding High Seas Driftnets in the North Pacific Ocean*, OCEAN AND COASTAL LAW MEMO No. 34, at 1, 9 (1990).

Chapter 3. Fisheries Managers (page 148)

[1] S. REP. NO. 414, 101st Cong., 2d Sess. 8 (1990); H.R. REP. NO. 393, 101st Cong., 1st Sess. 25 (1989).

[2] MFCMA § 1852(b)(2)(A).

[3] MFCMA § 1852(b)(2)(B)(i).

[4] MFCMA § 1852(b)(2)(B)(ii), (iii).

[5] MFCMA § 1852(b)(2)(C).

[6] *Id.*

[7] MFCMA § 1852(b)(3).

[8] MFCMA § 1852(i)(1)(A).

[9] MFCMA § 1852(i)(1)(B).

[10] MFCMA § 1852(i)(2).

[11] MFCMA § 1852(j)(3)(B).

[12] MFCMA § 1852(j)(6).

[13] MFCMA § 1852(g)(3)(A).

[14] 16 U.S.C.A. §§ 1451-1464, as amended by the Coastal Zone Act Reauthorization Amendments of 1990, included in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 6201-6217, 104 Stat. 1388, 1388-299-1388-319 (1990). See 136 CONG. REC. H12694 (daily ed. Oct. 26, 1990).

[15] 136 CONG. REC. H12694 (daily ed. Oct. 26, 1990).

[16] Eichenberg & Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 ECOLOGY L.Q. 9, 31 (1987).

[17] For additional information on the controversy surrounding the CZMA's consistency provision, see Whitney, Johnson & Perles, *State Implementation of the Coastal Zone Management Consistency Provisions --Ultra Vires or Unconstitutional*, 12 HARV. ENVTL. L. REV. 67 (1988); Archer & Bondareff, *Implementation of the Federal Consistency Doctrine--Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115 (1988); G. COSTELLO, AMENDING

THE FEDERAL CONSISTENCY REQUIREMENT OF THE COASTAL ZONE MANAGEMENT ACT: SELECTED LEGAL ISSUES (Congressional Research Service [Report] 87-842, 1987). Of special interest regarding CZMA consistency and fisheries beyond the coastal zone managed by an FMP is Fitzgerald, *Exxon v. Fischer: Thresher Sharks Protect the Coastal Zone*, 14 B.C. ENVTL. AFF. L. REV. 561 (1987).

[18] MFCMA § 1812, repealed by Fishery Amendments § 103(a).

[19] MFCMA § 1802, amended by Fishery Amendments § 102(a)(14) (emphasis added).

[20] *See* United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Annex I, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261, 1329 [hereinafter LOS].

[21] *Id.*, art. 64.

[22] *See, e.g.*, H.R. REP. NO. 438, 97th Cong., 2d Sess. 12-13 (1982).

[23] S. REP. NO. 414, 101st Cong., 2d Sess. 4 (1990).

[24] *Tuna Management: Hearing Before the National Ocean Policy Study of the Comm. on Commerce, Science & Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Tuna Hearing*] (Council testimonies).

[25] *See id.* at 16. *See* Tsamenyi, *The South Pacific States, the USA and Sovereignty over Highly Migratory Species*, 10 MARINE POL'Y 29 (1986).

[26] MFCMA § 1825(a)(2). Fishery Amendments § 102 amends this section by deleting "highly migratory" and inserting "tuna." This amendment, however, will not take effect until January 1, 1992.

[27] MFCMA § 1825(b).

[28] 22 U.S.C. § 1978 (1988).

[29] 16 U.S.C. § 973 (1988).

[30] May 14, 1966, 20 U.S.T. 2887, T.I.A.S. No. 6767, 673 U.N.T.S. 63 [hereinafter ICCAT] (entered into force Mar. 21, 1969).

[31] *Tuna Hearing*, *supra* note 24, at 59 (testimony of James Joseph).

[32] *Id.*

[33] H.R. REP. NO. 438, 97th Cong., 2d Sess. 60 (1982).

[34] S. REP. NO. 414, 101st Cong., 2d Sess. 4 (1990).

[35] *Id.*

[36] Fishery Amendments § 103.

[37] S. REP. NO. 414, 101st Cong., 2d Sess. 17, 21 (1990); Fishery Amendments § 110(b).

[38] *Oversight of Marine Fisheries Management: Hearings Before the National Ocean Policy Study of the Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 147 (1989) [hereinafter *Oversight Hearings*] (testimony of Robert Jones).

[39] Fishery Amendments § 105.

[40] S. REP. NO. 414, 101st Cong., 2d Sess. 15-16 (1990).

[41] *Id.* at 16; *see also* Fishery Amendments § 105.

[42] S. REP. NO. 414, 101st Cong., 2d Sess. 17, 21 (1990); Fishery Amendments § 110(b).

[43] *Oversight Hearings, supra* note 38, at 147 (testimony of Robert Jones). *See also Conservation and Management of Migratory Fish Species: Hearing before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 109 (1989).

[44] Atlantic Tunas Convention Act of 1975, Pub. L. No. 101-627, Title II, § 201, 104 Stat. 4459 (1990).

[1] MFCMA § 1852(j)(3)(B).

[2] MFCMA § 1852(j)(6).

[3] MFCMA § 1852(e)(3).

[4] S. REP. NO. 414, 101st Cong., 2d Sess. 20 (1990).

[5] MFCMA § 1853(a)(1)(A).

[6] MFCMA § 1853(a)(1)(C).

[7] MFCMA § 1853(a)(6).

[8] MFCMA § 1853(a)(8).

[9] MFCMA § 1853(a)(9).

[10] Prior to implementing any limited entry system, the Council and the Secretary must take into account "(a) present participation in the fishery, (b) historical fishing practices in, and dependence on, the fishery, (c) the economics of the fishery, (d) the capability of fishing vessels used in the fishery to engage in other fisheries, (e) the cultural and social framework relevant to the fishery, and (f) any other considerations." MFCMA § 1853(b)(6)(A)-(F). *See,*

e.g., R. GORTE, E. BUCK, D. SALE & A. GRENFELL, LIMITING ACCESS FOR COMMERCIAL FISH HARVESTING (Congressional Research Service [Report] 85-1151 ENR, 1985); Young, *Fishing by Permit: Restricted Common Property in Practice*, 13 OCEAN DEV. & INT'L L. 121 (1983). For an understanding of how the Courts have generally viewed the constitutional restraints on limited entry schemes, *see generally* Diamond, *Limited Entry*, in PROCEEDINGS, CONFERENCE ON GULF & SOUTH ATLANTIC FISHERIES LAW & POLICY, MARCH 18-20, 1987, NEW ORLEANS, LOUISIANA 222 (1987). *See also, e.g.*, Bozanich v. Reetz, 297 F. Supp. 303 (D.C. 1969); Toomer v. Witsell, 334 U.S. 385 (1948); Brown v. Anderson, 202 F. Supp. 96 (D.C. 1962); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976); Estate of Miner v. Commercial Fisheries Entry Comm'n, 635 P.2d 827 (Alaska 1981).

[11] MFCMA § 1853(b)(1)-(10).

[12] MFCMA § 1853(d).

[13] MFCMA § 1853(d)(1).

[14] *Id.*

[15] MFCMA § 1853(f).

[16] GULF OF MEXICO FISHERY MANAGEMENT COUNCIL, FISHERY MANAGEMENT PLAN FOR THE SHRIMP FISHERY OF THE GULF OF MEXICO, UNITED STATES WATERS 8-18 (1981).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 8-19.

[20] *Id.*

Chapter 5, Enforcement (page 158)

[1] *See supra* pp. 3-7.

[2] MFCMA § 1857(1)(M).

[3] MFCMA § 1857(1)(K).

[4] MFCMA § 1857(1).

[5] J. JACOBSON, D. CONNER & R. TOZER, EDS., FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT 112 (Rev. ed. 1985).

[6] *See id.*

[7] MFCMA § 1857(1)(N).

[8] MFCMA § 1857(5).

[9] MFCMA § 1858(a).

[10] MFCMA § 1859(a).

[11] MFCMA § 1859(b).

[12] MFCMA § 1859(a).

[13] 15 C.F.R. §§ 904.300-.322 (1988).

[14] MFCMA § 1858(g)(1)(C).

[15] MFCMA § 1858(g)(4).

[16] MFCMA § 1858(g)(5).

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Enclosed please find the following replacement pages:

- Table of Contents, pages x-xii
- Chapter 2, pages 15-16; 39-42
- Chapter 3, pages 57-81b
- Chapter 4, page 82
- Chapter 5, pages 115-116
- Endnotes, pages 132-147b; 150-155; 158-159

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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 1986, GIFAs have been concluded with Bulgaria, China, Cuba, Denmark, 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, Iceland, 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]

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 observer program fees, the owner or operator of a foreign fishing vessel must pay other fees related to the cost of administering the FCMA.[274] Since 1977, fees have been assessed annually under administrative schedules.[275] In 1986, Congress amended the FCMA directing the Secretary to impose an incremental higher fee on nations found to violate certain conservation criteria set forth in the amendments.[276]

The FCMA directs the Secretary to charge base fees in an amount related to the proportion of foreign fishing that occurs in the FCZ.[277] A foreign fee target amount is calculated for each year by first determining the ratio of the foreign FCZ catch to the total FCZ and territorial waters catch in the previous year, and applying this ratio to the total FCMA-related expenditures for that same year.[278] This target fee represents the minimum amount the Secretary is expected to recoup in foreign fees.[279] For 1987, NOAA has set the target foreign fishing fee at $40.784 million, based on an estimated 1986 foreign catch ratio of 20.12 percent and 1986 fiscal year FCMA costs of $202.705 million.[280]

NOAA assesses foreign fees against two sources: permit applications and poundage of fish landed.[281] Permit application fees are based solely on administrative costs of processing the applications; therefore, only the poundage fee is collected to meet the target fee. For 1987, NOAA has set the permit application fee at $184.00, increased from $167.00 in 1986. The permit application fee must be paid when the application is submitted.[282]

Poundage fees are determined separately for each fishery as a uniform fraction of the ex-vessel value of the particular species harvested. This fraction is determined by a ratio of the target foreign fee to the value of the estimated foreign catch.[283] For 1987, NOAA has set the uniform fraction at 47.61 percent of the species' ex-vessel value, representing an increase

from 35.6 percent in 1986.[284] The ex-vessel value of a particular species is determined by NOAA based on the value to fishermen in delivering a catch of that species to the first buyer.[285]

Any owner or operator paying these permit application and poundage fees must additionally pay a surcharge.[286] The Assistant Administrator for Fisheries may reduce or waive the surcharge if the Fishing Vessel and Gear Damage Compensation Fund is found to be sufficiently capitalized to pay claims.[287] In the event that the fund becomes depleted, the Assistant Administrator may impose a surcharge as high as 20 percent of the base fees.[288] The Assistant Administrator has waived the surcharge in each of the years 1984, 1985, 1986 and 1987.[289]

In addition to the surcharge, permit application fee and poundage fee, the 1986 FCMA amendments require the Secretary to impose an incremental higher fee if he finds that the foreign nation is either harvesting anadromous fish at unacceptably high levels, or failing to take sufficient action to benefit the conservation and development of United States fisheries.[290]

The amount of the higher fee is determined by applying the ratio of the foreign FCZ catch to total FCZ catch against the total costs of administering the FCMA in that same year.[291] By eliminating the quantity of U.S. harvested fish caught in the U.S. territorial sea from the denominator of the foreign catch ratio, the resulting fee is higher than the usual base fee.

The higher fee will be assessed as an incremental increase over base poundage fees charged for fish harvested during the first quarter of the next fiscal year following notification by the NOAA Administrator.[292] The fee will remain at its higher rate for subsequent quarters until the Administrator notifies the nation that it has taken appropriate corrective action.[293] In 1987, the incremental increase in fees will be 74.54 percent of the total poundage fee charged in each quarter the higher rate is assessed.[294]

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1989 Revisions to

FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT (Rev. ed. 1985)

UPDATE 2

April 1989

Compiled by: Christine Hayes and Alan Rappleyea
with assistance from Randall Baker,
Neil Skinner, and Nancy Farmer

Enclosed please find the following replacement pages:

Preface to 1989 Revised Edition

Table of Contents, pages x-xii

Chapter 1, pages 7-10

Chapter 2, pages 11-12; 15-16

Chapter 3, pages 43-46; 49-50; 53-81b

Chapter 4, pages 85-86; 107-109

Chapter 5, pages 111-114; 117-124

Endnotes, pages 125-131; 134-135; 148-161

Before filing these new replacement pages, please make certain you have received all pages listed.

Filing Instructions

Insert April 1989 replacement pages in appropriate locations in 1985 edition. Discard corresponding 1985 and/or March 1987 pages. Pages have been dated on the lower left corner for clarification.

File this instruction sheet in your Federal Fisheries Management Guidebook for future reference.

Preface to 1989 Revised Edition

Understanding the Magnuson Fishery Conservation and Management Act is up for reauthorization and will potentially be changed dramatically, here are the updates through 1988. We realize that the loose-leaf page inserts may be confusing and we promise a major guidebook revision--soon.

We tried to do as few changes as possible, without being misleading, to keep the cost down. However, we hope that the guidebook is and will continue to be a helpful source of information.

Special thanks to Nancy Farmer for her patience and typing. Also thanks to Randy Baker and Neil Skinner for their assistance.

Jon Jacobson
Christine Hayes
Alan Rappleyea

May 11, 1989

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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.

The Third United Nations Conference on the Law of the Sea eventually did adopt a new treaty in 1982.[17a] This comprehensive agreement endorses out-to-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 refused to sign or ratify the 1982 treaty (because of objections to its provisions on mining the deep seabed) but nevertheless views the non-seabed provisions of the treaty, including those on the EEZ and fisheries, as reflective of existing customary international law.

III. Overview of the FCMA

The FCMA is sometimes referred to as the "200-mile Act," but strictly speaking it did not create a 200-mile zone. First, the fishery conservation zone (FCZ) established by the FCMA was not 200 miles wide, but rather extended 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 established a zone, it was a 197-mile zone.

Second, in the case of continental shelf species and anadromous species, the FCMA's claimed fishery management authority was 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 extended some kinds of regulatory authority beyond 200 miles.

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

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. Subsequent amendments to the Act, however, have provided for an accelerated phase-out of the foreign fleet under certain circumstances.

Other, more recent, amendments to the Act include the 1986 redesignation of the "fishery conservation zone (FCZ) as the "exclusive economic zone" (EEZ) in partial implementation of Pres-

ident Reagan's 1983 Exclusive Economic Zone Proclamation.[17b] This proclamation, consistently with the U.S. view that EEZs are authorized under customary international law, asserted "sovereign rights" of the U.S. over both living and non-living resources out to 200 nautical miles offshore. While there might exist some academic distinction between the FCMA's original claim to exclusive management jurisdiction over fisheries out tot he 200-mile limit and the revised assertion of EEZ "sovereign rights" to living resources in the same area, it is not at all clear that any significant practical distinction exists. At present, the FCMA, as amended, continues to be the foundation for U.S. fisheries management out to the 200-mile boundary.[17c]

(Note: In subsequent chapters of this guidebook, any references to the "Fishery Conservation Zone" or "FCZ" should now be taken to mean "exclusive economic zone" or "EEZ" in accordance with the 1986 amendments to the Act.)

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 were created 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 (now EEZ). 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 EEZ. 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.

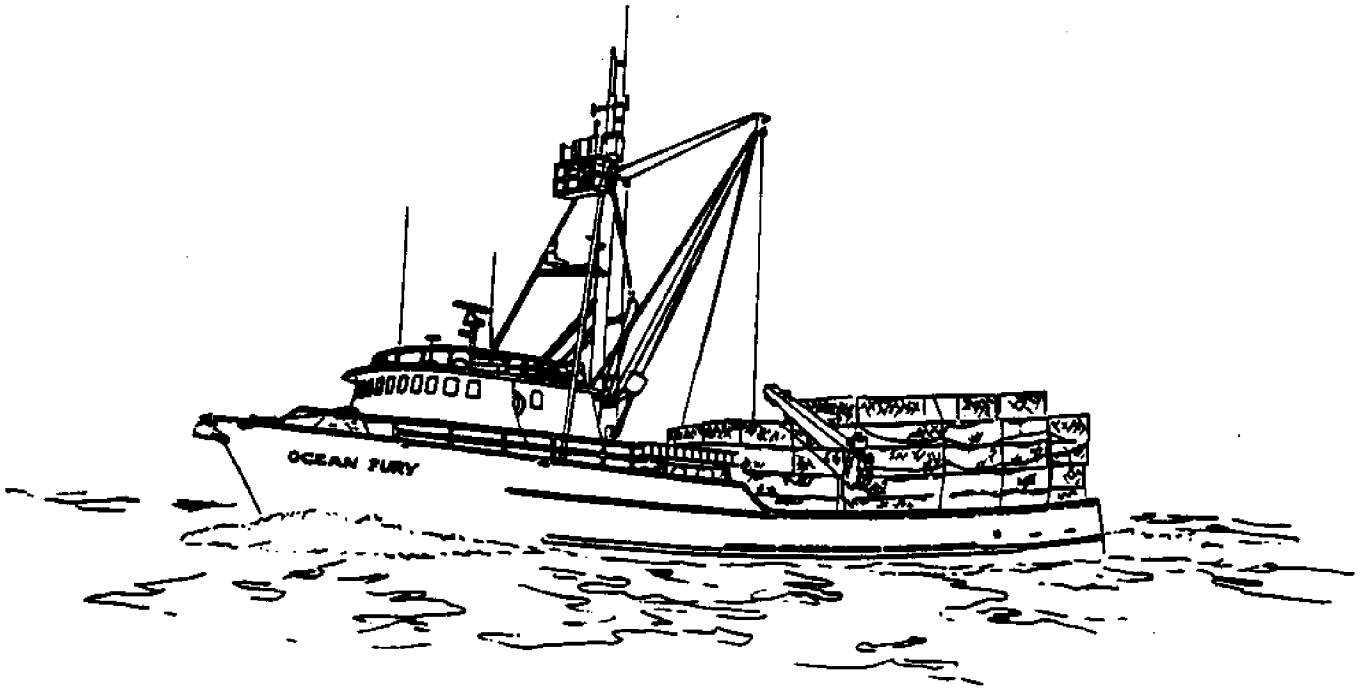
The eight regional management Councils, working in conjunc-

tion with National Marine Fisheries Service, have made substantial progress in implementing the FCMA. As of March 1, 1989 thirty-six fishery management plans and preliminary management plans were in effect and seven 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 bound aries, 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 EEZ, 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.



Foreign Fishing

CHAPTER 2

I. Introduction

The Magnuson Fishery Conservation and Management Act of 1976 (FCMA) has largely reached its goals in the area of foreign fishing.[1] In the past, foreign distant water fleets harvested the vast majority of fish in the Fishery Conservation Zone (FCZ).*[2] One of the FCMA's goals was to change this balance.[2a] The FCMA has succeeded as foreign fishing has been reduced to a fraction of its previous amount.[2b] The process has taken a number of years with the interim step of joint venturing. Joint venturing allowed the use of American catcher vessels and idle foreign processing vessels to harvest underutilized species. This interim step gave

* The area covered by the FCZ has been redesignated as the exclusive economic zone (EEZ). See Chapter One.

the American processors the time they needed to gear up and find markets for the additional harvest. Now, joint venturing is being phased out as American processors have the ability to handle the increased amounts of fish.[25] To understand how the FCMA has succeeded in this area, it is important to look at the congressional purpose in enacting the Act.

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

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

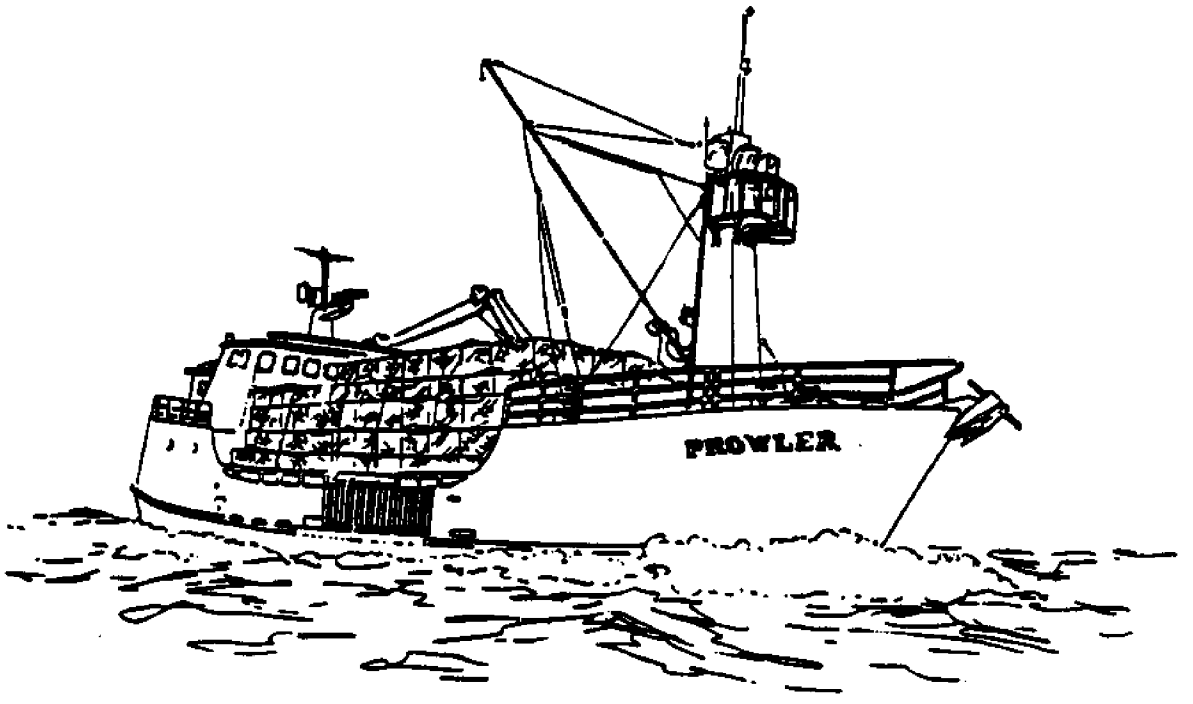
therefore differs in several ways from that required by the Constitution for the adoption of treaties. First, Congress has imposed conditions and guidelines[59] that must be included in the agreements negotiated by the Secretary of State.[60] The President and the State Department are thus purportedly 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 April 1989, GIFAs are in force with the European Economic Community (France, Federal Republic of Germany, Ireland, Italy, Portugal, Spain), Japan, China, Poland, Republic of Korea, Iceland, and the U.S.S.R.[65]

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]



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]

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* The area covered by the FCZ has been redesignated as the exclusive economic zone (EEZ). See Chapter One.

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

Candidates for voting membership are placed on a list by the governors of their state. To the extent practicable, the governors ought to consult with commercial and recreational fishing interests. 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 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. 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.[2/]

The NPFMC has eleven voting members, seven of whom are 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.[5/]

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

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." However, the territorial sea was recently expanded to twelve nautical miles. This expansion was not intended to extend state law jurisdiction.[24a] 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 fish under minimum size within the state's 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

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, especially in light of the recent extension of the territorial sea to twelve nautical miles.[43a/] The following presents a summary of the law of fishery jurisdiction as it stands in early 1989.

Within the FCZ, federal authority is dominant. State regulation is allowed <u>only</u> 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 nonresidents nor places an undue burden on interstate commerce.[45/] Within three miles, 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. <u>Fishery Management Plans and Federal Consistency Under the Coastal Zone Management Act</u>

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[58] in both houses of Congress seeking to amend section 307(c)(1).

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

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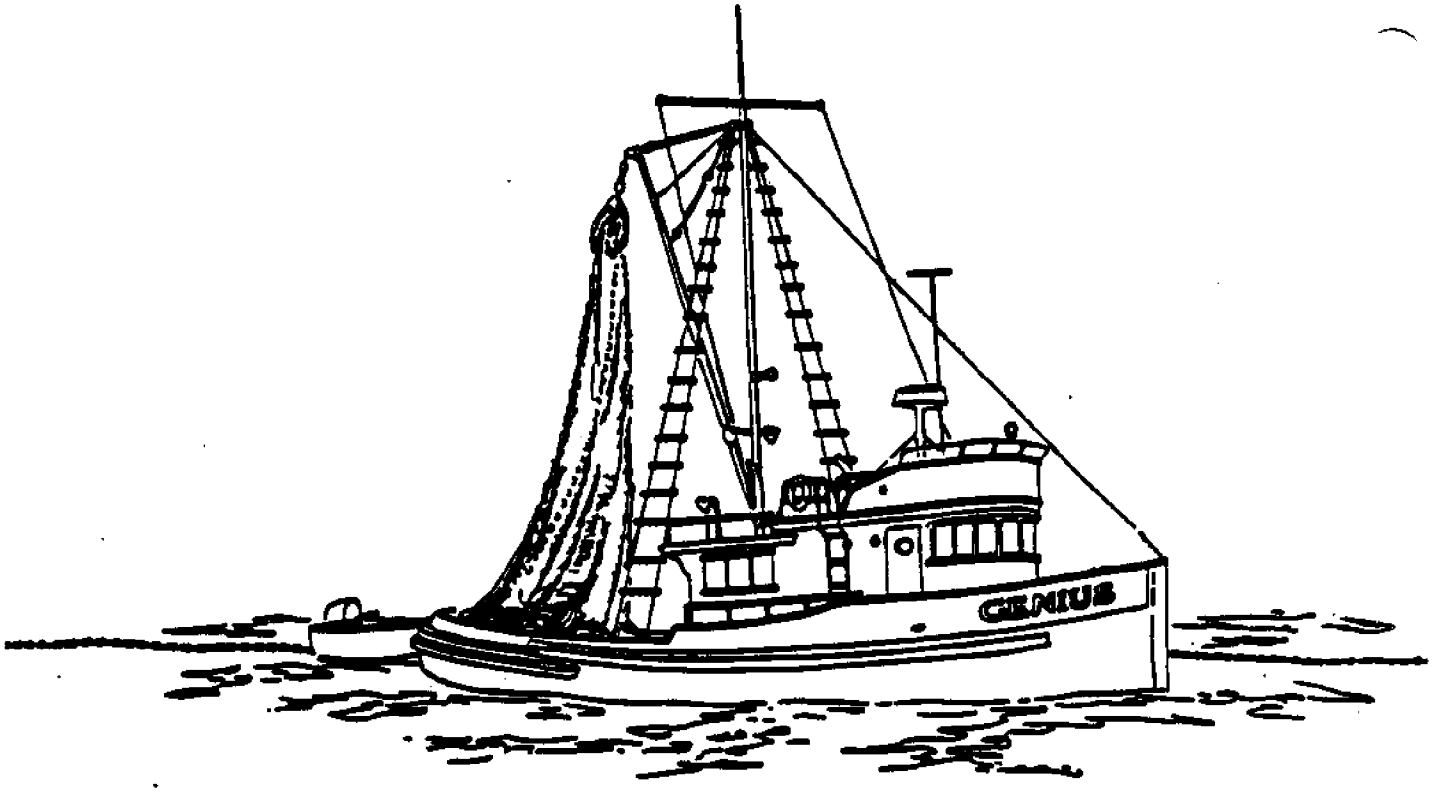

Fishery Management Plans

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.

(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.

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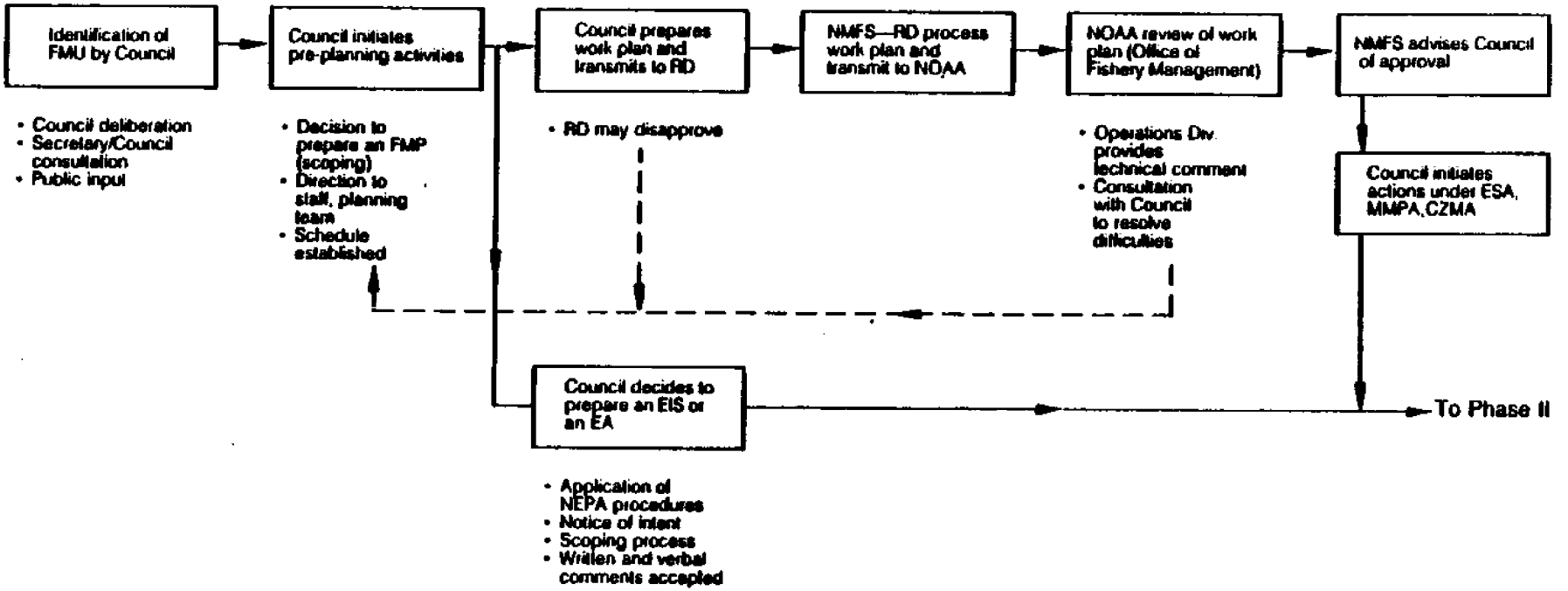
* The area covered by the FCZ has been redesignated as the exclusive economic zone (EEZ). See Chapter One.

PHASE I—PRE-PLANNING



(See end of this chapter for explanation of abbreviations)

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.

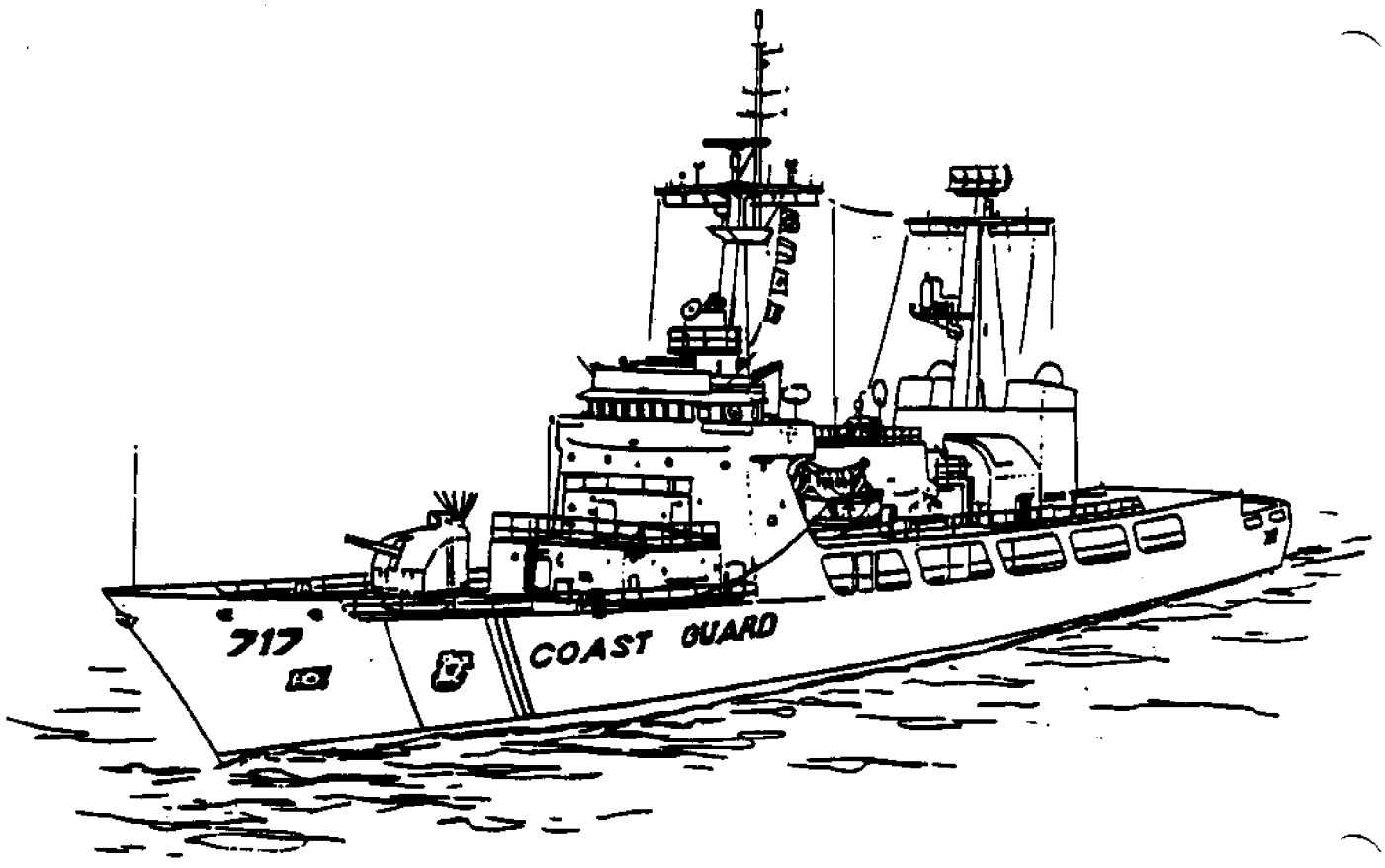
ii. List of public meetings and summary of proceedings.

APPENDIX B-3

Fishery Management Plan Status Report

(As of January 1989)

Fish Management Plan	Council	Prep	Draft Rev	Sec Review	Prop Regs	Decision	Final Regs	Implement
Anchovy Framework Plan (Implemented 1978) (5 Subsequent Amendments)	Pacific	X	X	X	X	X	X	X
Pacific Coast Groundfish Plan (Implemented 1982) (3 Subsequent Amendments)	Pacific	X	X	X	X	X	X	X
WA, OR & CA Salmon Plan (Implemented 1977) (Amended Anually until 1978)	Pacific	X	X	X	X	X	X	X
Framework Salmon Plan (Implemented 1987) (1 Subsequent Amendment)	Pacific	X	X	X	X	X	X	X
Bering Sea Groundfish Plan (Implemented 1982) (8 Subsequent Amendments)	North Pacific	X	X	X	X	X	X	X
Bering/Chuckchi Sea Herring P (Adopted by Council 1983) (Review by Secretary Pending)	North Pacific	X	X	-	-	-	-	-
Gulf of Alaska Groundfish Plan (Implemented 1978) (14 Subsequent Amendments)	North Pacific	X	X	X	X	X	X	X
High Seas Salmon Plan (Implemented 1979) (2 Subsequent Amendments)	North Pacific	X	X	X	X	X	X	X
King Crab Framework Plan (Implemented 1984)	North Pacific	X	X	X	X	X	X	X
Tanner Crab Plan (Implemented 1978)	North Pacific	X	X	X	X	X	X	X
Bering Sea Snails Plan (Implemented 1978) (12 Amendments)	North Pacific	X	X	X	X	X	X	X
Bottomfish & Seamount Gr'dfish (Implemented 1986) (1 Subsequent Amendment)	West. Pacific	X	X	X	X	X	X	X
Precious Corals Plan (Implemented 1983)	West. Pacific	X	X	X	X	X	X	X
West. Pacific Crustaceans Plan (Implenented 1983) (5 Subsequent Amendments)	West. Pacific	X	X	X	X	X	X	X
Pelagic Fishery of W. Pacific Plan (Implemented 1987)	West. Pacific	X	X	X	X	X	X	X



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.

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 FCZ* without a valid permit.

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* The area covered by the FCZ has been redesignated as the exclusive economic zone (EEZ). See Chapter One.

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 exclusive economic 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.[17]

The second category 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(1)(G) 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.

The 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), (H), and (I) 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; or to knowingly and willingly submit to a Council, the Secretary or the Governor of a state false information regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act. Violations of section 1857(1)(D), (E), (F), (H), or (I) 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)(i) 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)(A)(ii), 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)(1)(C) 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.

forfeiture may file 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, [9] and as a consequence waives any further jurisdictional defenses. However, nothing in 1860(d) "may be construed to require the Secretary, except in the Secretary's discretion or pursuant to the order of a court under section 1861(d) of this title, to release on bond any seized fish or other property or the proceeds from a sale thereof." 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

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 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), (H), or (I) 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 and an exception is found in section 1857(1)(I), which states knowingly and willfully submitting false information is a violation of this 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. Colonnade Catering Corp. v. United States[37] and United States v. Biswell[38] held that there was no warrant necessary for inspections in highly regulated industries: Colonnade 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 Colonnade 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 was not needed to justify the initial inspection at sea.[42]

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 Colonnade. 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.

The 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. Kaivo 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 Kaivo 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. The court suggested this in Lovgren v. Bryne,[47] when it stated, "one who is engaged in an industry that is pervasively regulated by the government or that has been historically subject to such close supervision is ordinarily held to be on notice that periodic inspections will occur and, accordingly, has no reasonable expectations of privacy in the areas where he knows those inspections will occur."

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. Thirteen years of success in the implementation of the Act would appear to justify 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. (Note 12 omitted in 1989 revision.)

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 legis lation 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 actfully. 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.

17a. 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).

17b. Proclamation 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983).

17c. An even more recent Presidential Proclamation, issued by President Reagan in December, 1988, extends the U.S.'s territorial sea breadth from three nautical miles to twelve nautical miles, again consistently with current customary law refected in the 1982 treaty. Proclamation 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). This proclamation by its terms does not change existing domestic legislation, including the FCMA. Presumably, then, the FCMA's EEZ remains, as a matter of U.S. law, 197 miles wide, extending from the outer boundary of the coastal states' three-mile jurisdiction to the 200-mile limit.

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

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

END NOTES: Foreign Fishing

CHAPTER 2

1. 16 U.S.C. §§ 1801-1882 (1982) [hereinafter cited as FCMA].

2. The area covered by the FCZ has been redesignated as the Exclusive Economic Zone (EEZ). 16 U.S.C.A. § 1811 (West Supp. 1988).

2a. 16 U.S.C. § 1801(b)(6) (1982).

2b. U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Current Fishery Statistic No. 8700 Fisheries of the United States 1987, 28 (May 1988).

2c. North Pacific Management Council Newsletter No. 5-88 (Dec. 1988). Joint venture harvest is expected to fall from a high of 80% of the groundfish harvested in 1987 to less than 20% in 1989.

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.

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. Phone conversation with Jukka Kolhoner, Assistant Administrator, International Division, National Marine Fisheries Service (April 10, 1989).

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) (1988).

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.

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. However § 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) (1988), contain a list of the criteria to be used in deciding which fisheries require an FMP.

12. FCMA § 1852(h)(3).

13. Id. § 1852(j).

14. Id. § 1855(e).

15. Id. § 1853(a)

16. Id. § 1852(h)(2)(4).

17. Id. § 1852(g)(1).

18. Id.

19. Id. § 1852(g)(2).

20. Id. § 1852(f)(6).

21. Id. § 1852(f)(1).

22. U.S. CONST. art. I, § 8, cl. 3.

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

24. Id.

24a. Territorial Sea of the United States, 24 WEEKLY COMP. PRES. DOC. 1661 (Dec. 27, 1988).

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)(1).

33. Administrative Procedure Act, 5 U.S.C. § 554 et seq. (1982); FCMA § 1856(b)(1).

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)(3).

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); Livings v. Davis, 465 So.2d 507 (Fla. 1985).

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).

43a. Territorial Sea of the United States, 24 WEEKLY COMP. PRES. DOC. 1661 (Dec. 27, 1988).

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. 464 U.S. 312 (1984).

51. Id., at 324.

52. Id. at 330. 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) (1988).

56. 15 C.F.R. § 930.32(a) (1988).

57. In response to Interior v. California, NOAA amended its regulations to exclude OCS oil and gas lease sales from federal consistency review under the CZMA 307(C)(1). However, affected states can still consult with the Department of Interior under 19 OCSLA. In addition, under § 307(c)(3)(B) of the CZMA, states can review consistency of OCS exploration, development and production plans which affect land and water uses in the coastal zone. Federal agencies must continue to review activities other than OCS oil and gas lease sales, in particular, proposed FMPs, on a case-by-case basis to determine whether the activity does directly affect the coastal zone within the meaning of § 307(c)(1), and, if so, must provide a consistency determination. See 15 C.F.R. § 923, 930 (1988).

58. No amendments to § 307(c)(1) of the CZMA have yet been 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)(1988).

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) (1988).

9. See Guidelines, supra note 5, at 14.

10. See 40 C.F.R. § 1501.4(b) (1988); 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. at § 1536; See also Guidelines, supra note 5, at 26; 50 C.F.R. § 402.10-.16 (1988).

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) (1988); 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 (1988). 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 (1988).

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) (1988).

29. See 50 C.F.R. § 602.4 (1988).

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). 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 (1988).

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).

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 (1988) (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 MFCMA. 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. See 50 C.F.R. § 621.2(b) (1988) and 15 C.F.R. § 904.400-.420 (1988).

4a. See 15 C.F.R. § 904.403 (1988).

5. The precise regulatory formalities concerning this request, and the conduct of the hearing itself, are detailed at 15 C.F.R. § 904.200-.273 (1988).

5a. See 15 C.F.R. § 904.100-.108 (1988).

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 (1988).

12. 16 U.S.C. § 1821, 1857(1)(E) & (H); 50 C.F.R. § 611.7(a)(3) and (5) (1988).

13. 16 U.S.C. § 1957(1)(C); 50 C.F.R. § 611.9(f) (1988).

14. 50 C.F.R. § 621.2(b) (1988).

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. 15 C.F.R. § 904.300-.322 (1988).

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. Morissette 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. Cadena, 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 Colonnade 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. 462 U.S. 579 (1983).

44. Id.

45. 503 F. Supp. 1075 (D. Alaska 1980), aff'd 699 F.2d 989 (1983).

46. 699 F.2d 989, 994 (1983).

47. 787 F.2d 857, 865 (3rd Cir. 1986).