



Coastal zone
management
in Louisiana

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LOUISIANA COASTAL LAW

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THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

Beginning next year foreign fishing off the United States coast will come under stringent new regulations. On March 1, 1977, the enforcement provisions of the Fishery Conservation and Management Act (FCMA) will take effect. This new bill creates a fishery conservation zone for the waters within 200 nautical miles of the United States and its territories. Within these waters exclusive fishery management control is vested in the United States. The Act, however, makes no claim of sovereignty over the waters and stresses that management control is not an assertion of sovereignty. Fishing by foreign vessels remains a possibility, but only if certain requirements are met.

There were several reasons for the enactment of the FCMA. Depletion of fish off our coasts has long been a problem chiefly caused by overfishing by some foreign nations. The catch by America in halibut has declined from over 43 million pounds in 1954 to 20 million pounds in 1972, while the ground fish catch has declined from 148 million pounds in 1951 to 35 million pounds twenty years later. Six hundred twenty eight Russian fishing boats were sighted within 200 miles of the Pacific Coast in 1972, according to National Marine Fisheries Service figures. Even with agreements to limit fishing, overfishing has been widespread. For example, the Government believes that the Japanese took seven times as many tanner crabs in the Northeast Bering Sea than the total catch agreed upon for Japan, the U.S.S.R., and the United States in all areas. Faced with such widespread competition, coastal fishermen have put increasing pressure on Congress to combat the depletion of stocks and the ensuing smaller returns for individual fishermen. There has also been some frustration at different levels of government over the failure of the United Nations Law of the Sea Conference to establish an international agreement on fisheries. Even though an international agreement appears unlikely for the present, the FCMA provides that the Act may be amended to conform to the international compact.

WHAT SPECIES ARE COVERED? WHAT RIGHTS ARE CLAIMED?

All fish and plants in the water column within 200 miles of the coastline are covered by the Act, except tuna, a highly migratory species. The exclusion of tuna from the Act's provisions permits tuna fishermen to follow the fish and catch it even within a 200-mile zone established by a foreign nation. The United States does not recognize sovereignty claims by other nations over the tuna, a concession to the tuna industry of the West Coast. A refusal to recognize sovereignty claims to fish is an essential element of the Fishermen's Protective Act, under which the U.S. government agrees to pay the fines of American vessels seized in waters claimed by foreign nations, but viewed as the high seas by the United States. Thus, tuna fishermen can expect the benefits of the Fishermen's Protective Act to continue. Salmon and other anadromous species are also a special case, for authority over them extends beyond the conservation zone throughout their migratory range unless they enter the territorial waters of a foreign state or a recognized fishery conservation zone.

The justification for the extended control over anadromous species is based upon the peculiar nature of the fish's life cycle. Anadromous species live their adult lives in the ocean, but return to freshwater streams to spawn in the stream where they were born. Efficient management of the fish requires that the host nation be able to limit fishing to a point near the mouths of the streams. This yields two benefits. First, by precluding fishing far from the streams' mouths, a uniform harvest from each stream can be assured. Second, individual fish size is increased since the fish are usually largest just before they re-enter the freshwater streams. Another justification for the extended jurisdiction for anadromous species is based on a "vested rights" theory. The United States and Canada spend millions of dollars each year in preserving streams and developing fish hatcheries in the Pacific Northwest for salmon to spawn, and consequently feel they should have "vested rights" in their harvest.

The FCMA asserts "exclusive fishery management authority" by the United States to the fish and plants within the conservation zone. United States fishermen have the right to harvest all the fish they need up to the optimum yield without foreign competition. Qualified foreign fishermen are then given the opportunity to fish for that portion of the optimum yield which American fishermen will not harvest. The United States' claim is exclusive, but only with respect to the authority to manage the fisheries within the conservation zone. The fish and water areas themselves are not subject to this exclusive claim, a fact which the government hopes will deter charges of "creeping territorialism," the result when a nation makes so many claims on adjacent seas that the net result is a claim of sovereignty or territorial waters. An example of this is seen in Latin America where several nations now claim sovereignty over 200 miles of open sea. The United States claims neither sovereignty nor ownership, for it believes that such claims could result in under-utilization of the oceans' resources and the closing off of high seas areas. Thus, while the right to the fisheries is not exclusive, the control of them is, and this control embraces the question of who is to receive the allocation of excess portions in certain fisheries.

HOW MANY FISH CAN BE CAUGHT?

The Act provides for fish harvesting up to the optimum yield. Unlike maximum sustainable yield (the greatest exploitation without diminishing the resources), the determination of optimum yield is somewhat subjective. The Act states that optimum yield is that amount of fish which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities. Optimum yield will be determined on the basis of the fishery's maximum sustainable yield modified by any relevant social, economic, or ecological factor. Note that these criteria can favor different results; a maximization of recreational opportunities could conflict with both economic and ecological factors. The optimum yield figure finally established may largely depend upon the group carrying the most influence on the regional councils (discussed below), e.g., consumers, fishermen, canners, or biologists.

HOW IS THE ACT TO BE ADMINISTERED?

The FCMA established eight regional councils: New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific, and Western Pacific. Louisiana is part of the Gulf Council which is composed of Texas, Louisiana, Mississippi, Alabama, and Florida. The councils will have varying numbers of voting and non-voting members under the control of a regional director. The voting members will include the principal state official with marine fisheries responsibilities, the regional director of the National Marine Fisheries Service, and at least one member from each state chosen by the Secretary of Commerce from lists submitted to him by governors. Non-voting members are to be the regional director of U.S. Fish and Wildlife Service, the commander of the Coast Guard district, the executive director of the Marine Fisheries Commission for the area, and a representative of the State Department. The Act gives rather subjective requirements for members appointed by the Secretary of Commerce--qualified individuals are defined as those knowledgeable or experienced in management, conservation, or harvest of fishery resource--but it is expected that these members will be chosen to reflect a good professional mixture and to represent different interest groups, including consumers. It is estimated that forty to fifty days of work will be required of each council, at least in the initial years. This factor could influence the composition of the councils, as many highly qualified persons may not be able to offer this much of their time.

IMPLEMENTATION OF MANAGEMENT PLANS

Management plans under the FCMA may be initiated either by the Regional Councils or by the Secretary of Commerce, but in either case the plans must be consistent with the certain national standards enumerated in the Act. These standards concern prevention of overfishing, achieving the optimum yield, using the best available scientific information, management of fish throughout their migratory range, treatment of interrelated stocks as units, equal treatment among residents of different states, promotion of efficiency, recognition of the variations and contingencies in fishery resources, and minimization of costs.

If a regional council prepares a plan, it must be submitted to the Secretary of Commerce who is required to review it within sixty days and notify the council in writing of the plan's approval, disapproval, or partial disapproval. Should the Secretary either disapprove or partially disapprove a plan, he must state and explain his objections, suggest improvements, and request that the council make modifications. Part of the Secretary's review is to see that the plan does not conflict with national standards, other provisions of the FCMA, or any other applicable law. The Secretary must consult with the Secretary of Transportation on enforcement provisions (the Coast Guard is under this Department), and with the Secretary of State with respect to foreign fishing.

The Secretary of Commerce is authorized to prepare fishery management plans if the appropriate council either fails to act or fails to amend a plan which the Secretary has partially or completely disapproved. Such a plan is then submitted to the regional council which has 45 days to consider it and recommend changes. The Secretary does not have to abide by any recommendation of the council but he is not authorized to include a provision establishing a system of limited access to the fishery (whether by American or foreign fishers) without the approval of a majority of the present voting members of the affected council.

The states have traditionally controlled the fishery resources within their territorial waters, and there is some concern that state rights are diminished by this legislation. However, the Act states that nothing in it is to be construed as expanding or limiting the jurisdiction of any state within its boundaries. The Act provides that the Secretary of Commerce can regulate any fishery partly within state boundaries but which is predominately located in the conservation zone or beyond it if he finds that the state has acted, or failed to act, in such a way that the fishery management plan in or beyond the conservation zone is substantially and adversely affected. Upon such a finding the Secretary must notify the state and the appropriate regional council that he intends to regulate the affected fishery. But without this finding by the Secretary, the state should be left to regulate the fisheries within its territorial waters. It is important to note that nothing in the Act's history suggests a disregard for state interests.

WHAT ARE THE RIGHTS OF FOREIGN FLEETS?

No foreign fishing can be carried on in the conservation zone without a treaty or agreement or a "governing international fishing agreement." The Secretary of State is required to renegotiate any treaties which are inconsistent with the purposes, policy, or provisions of the FCMA. "Governing international fishing agreements" (GIFA) will be negotiated after the effective date of the Act or after existing agreements expire. For the fleet of a foreign state to fish in the conservation zone, the state must have a GIFA with the United States. A nation having a GIFA acknowledges the exclusive fishery management authority of the United States and agrees to a number of conditions and regulations. For example, the GIFA requires the foreign state to comply with provisions on boarding, searching and inspecting vessels, to accept allocations of allowable levels of foreign fishing and to assure that its permit holders comply with regulations. Congress is given the power to review and disapprove any GIFA in the form of an executive agreement (one that is not a treaty and is not submitted to the Senate for approval) by passing a joint resolution which must be signed by the President. No foreign state will be given a GIFA unless it extends substantially similar benefits to the United States.

Permits for foreign fishing will be granted only after the optimum yield for the particular fishery is determined and only if there exists a portion of the optimum yield which will not be caught by American vessels. Permits are obtained by annual application to the Secretary of State for each vessel wishing to fish in the zone. Applications must be stock specific and give detailed information about the area and season for the fishing as well as the fishing effort to be undertaken. Four criteria are listed in the Act for the allotment of the permits: 1) whether the foreign state has traditionally fished in the fishery; 2) whether the foreign state has contributed to fishery research and the identification of fishery resources; 3) whether the foreign state has cooperated with the United States in conserving and managing fishery resources; and 4) any other considerations which seem appropriate. Even without the last criterion the provisions are quite broad, but with the inclusion of the last open-ended requirement, it is evident that great discretion is granted in the allocation of the permits.

ENFORCEMENT

The provisions of the Act are to be enforced by the Secretary of Commerce and the Secretary of the department in which the Coast Guard is functioning. However, both secretaries are permitted to use the services, personnel, facilities and equipment of any other federal agency, including the Department of Defense. Enforcement may be carried out by arrest, boarding, search, inspection and seizure of the vessels, fish, or other evidence--with or without a warrant. The Coast Guard intends to use ships, planes and satellites to spot violators. It is also seeking more equipment such as the night illumination devise used by the Defense Department in Vietnam to increase its flexibility and effectiveness. The Guard has experimented with it attached to surveillance aircraft while patrolling West Coast fishing areas. Although the Coast Guard does not expect to catch all violators, it believes that active fishing areas which require heavy surveillance will remain the same at least for the present time.

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