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National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

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TO: Mid-Atlantic Fishery Management Council

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SUBJ: Council Authority to Prescribe Conservation and
Management Measures Respecting the Marine
Environment and Fishery Habitats

ISSUE:

Does the Council have the authority to prescribe conservation and management measures to protect or otherwise regulate fishery habitats or the marine environment in general?

CONCLUSION:

No. The Fishery Conservation and Management Act (the Act) was not intended to supplant or compliment in authority those acts of Congress which empower other Federal agencies to control matters which affect the marine environment and fishery habitats. It is limited in scope. A Fishery Management Council may include in a fishery management plan only those conservation and management measures which relate to fishing by foreign and domestic vessels. It may not prescribe conservation and management measures which propose to regulate activities affecting the marine environment or fishery habitats unless such activities come within the purview of the term "fishing" as defined in the Act. A Council must, however, take into account factors relative to the marine environment and fishery habitats as one aspect of determining the present and future condition of and the maximum sustainable yield (MSY) and optimum yield (OY) from a fish stock. A Council may make recommendations to the Secretary that she use her authority or responsibilities under other legislation to identify and mitigate potentially adverse impacts on the marine environment and fishery habitats and to undertake research on areas of concern to the Council. Further, a Council may take an active independent role by submitting comments and participating in other agency's hearings and rulemaking concerning matters relative to the marine environment and fishery habitats to the extent that the Secretary approves the use of Federal funds for such purposes.



DISCUSSION:

The lack of a clear mandate in the Act is one of the most forceful arguments against the proposition that Regional Councils have the authority to prescribe conservation and management measures respecting the marine environment and fishery habitats. The definitions, general language and statements of policy in the Act do not express a specific Congressional intent to create pollution control legislation; it is unreasonable to argue that this authority is implied. The only language clearly concerned with the relationship between pollution and fish stocks is found in section 304(e). This provision enables the Secretary to "initiate and maintain a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of the Act...including biological research concerning the impact of pollution on fish." To infuse Regional Councils with authority to propose measures to control adverse impacts on the marine environment and fishery habitats without a specific manifestation of Congressional intent would usurp the authority granted to other Federal agencies specifically charged with the control of such activities.

The Regional Councils are directed by the Act to "prepare and submit to the Secretary a fishery management plan with respect to each fishery within its geographical area of authority . . . " (302(h)(1)). The management plan may "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." (303(b)(7)) The phrase "conservation and management" refers to "all of the rules, regulations, conditions, methods, or other measures (A) which are required to rebuild, restore, or maintain . . . any fishery resource and the marine environment and (B) which are designed to assure that. . . (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided . . ." (3(2)). Fishery resource means "any fishery, any stock of fish, and species of fish, and habitat of fish." (3(9) Emphasis added.)

Viewing these provisions alone, it could be argued that a Council is empowered to prescribe in a fishery management plan whatever measures, requirements, conditions and restrictions it deems necessary and appropriate to rebuild, restore or maintain the marine environment or habitat of the species covered by the plan. However, a review of the other provisions of the Act and its legislative history leads to a contrary conclusion: A Council, through a fishery management plan, may only propose to regulate fishing by foreign and domestic vessels.

The Act, as originally introduced (H.R. 200 and S. 961), proposed only to regulate foreign fishing. Regulation of domestic fishing was added while these two bills were under consideration. While language of earlier drafts of these bills purported to recognize environmental degradation as a significant factor in the decline of fishery resources and provide authority for its control, the Act, as passed, had retained a singular purpose -- to control fishing. Section 2(b)(1) states:

"It is therefore declared to be the purposes of the Congress in this Act--

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive management authority beyond such zone over such anadromous species and Continental Shelf fishery resources...."
(Emphasis added)

While the foregoing does encompass the marine environment and fishery habitats by declaring that immediate action be taken to conserve and manage the fishery resources off the coast of the United States, the exclusive management authority granted by the Act is only expressly extended to fish, and by implication, to fishing. This is evidenced by section 102 which mandates that

"The United States shall exercise exclusive fishery management authority, in the manner provided for in this Act, over the following:

- (1) All fish within the fishery conservation zone.
- (2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.
- (3) All Continental Shelf fishery resources beyond the fishery conservation zone."

Though paragraph (3) of section 102 does reference "Continental Shelf fishery resources," this term is specifically defined at section 3(4) to mean certain species of Colenterata, Crustacea, Mollusks, and Sponges.

Cogent evidence of the intent of Congress to provide the authority to regulate only fishing appears in section 303 which states, in part:

- (a) Required Provisions. Any fishery management plan which is prepared by any Council . . . shall -
- (1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are -
 - (A) necessary and appropriate for the conservation and management of the fishery;
 - (B) described in this subsection or subsection (b), or both . . . (Emphasis added)

This applies, by virtue of subparagraph (B), as well to any discretionary provision which the Council may wish to include in any fishery management plan as well. Thus, it cannot be argued that, while the mandatory provisions of any fishery management plan can only relate to fishing by foreign and domestic vessels, the Council may incorporate measures relating to the marine environment and fishery habitats as a discretionary provision.

The conclusion that the Act permits only the regulation of fishing through implementation of a fishery management plan is not hastily drawn. The framers of the Act realized the implications that a bill extending unilaterally the claimed jurisdiction of the United States would have in the international community. Recognizing the number of unilateral claims by foreign nations to sovereign jurisdiction over the continental shelf and superadjacent waters precipitated by the Truman Proclamation of 1945 (which claimed United States jurisdiction only over the seabed and subsoil and the resources thereof), the proponents of the bills made it crystal clear that the Act was limited in effect to the regulation of fishing. Section 2(c) declares it to be the policy of Congress in the Act:

- (1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;
- (2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act....

The legislative history of the Act is replete with language reflecting the limited scope of the Act. In a debate on Representative Eckhardt's amendment to strike a policy section from H.R. 200, Representative Leggett spoke in opposition:

"Second, with respect to paragraph No. 8 where we talk about the only thing we are affecting on the high seas is fishing, it is to reaffirm that the 3-mile limit still applies, but anything beyond 3 miles is the high seas, and that the only activity in that area that we intend to relate to is, not oil, not drilling, not submarine cables, not navigation, but the only thing we relate to is fishing and that is the only place for that language." (A Legislative History of the Fishery Conservation and Management Act of 1976, Committee on Commerce, 94th Congress, 2d sess. October 1976, [hereinafter cited as "Legislative History"] p. 944-945.)

In speaking to the definition of the "Fishery Conservation Zone" in S. 961, the Report of the Senate Committee on Commerce noted:

As the concept is used in this act, a fishery conservation zone is a special purpose jurisdictional zone, i.e., a geographic area within which legal competence to control, regulate, and establish rights of access to fish is asserted for the specific purpose of conserving fishery resources. It is not an assertion of territorial jurisdiction, a concept which approaches plenary authority. Consequently, it does not change the status of the waters included within the zone for uses and activities other than fishing. (Legislative History, p. 675)

Senator Taft, speaking in support of an amendment to S. 961 which would have set a later enforcement date to educate the international community on the purposes of the Act, declared:

"There should be a very clear understanding on the part of the international community that this bill applies only to the question of reasonable regulation of fishing and absolutely nothing else." (Legislative History, p. 386)

There can be no doubt that the Act was limited in scope with respect to foreign nations to the regulation of fishing. That the Act was intended to control only fishing by United States citizens is no less clear. To include any claim to control other than fishing in legislation establishing a unilateral claim to limited jurisdiction would have gone squarely against the serious concerns, as noted above, of both proponents and opponents of the Act.

In summary, the Act was intended to regulate only fishing. To the extent that fishing activities may impact on the marine environment or fishery habitats, these activities may be regulated. It is clear that Congress contemplated that only the activities of fishing vessels would be regulated in any fishery conservation zone. This may be gleaned from Section 202(c):

"It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation--

* * * * *

(3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management."

One example of a regulation affecting the marine environment appears at 50 CFR 611.16(a). It prohibits foreign fishermen from disposing of fishing gear and other articles into the fishery conservation zone, except in cases of emergency.

The above should not be interpreted to mean that the Act gives lip service to concerns relating to the marine environment and fishery habitats. Indeed, the Act places a positive duty upon the Council to consider the effects of marine pollution and natural environmental phenomenon which might adversely impact fishery resources. National Standard 6 requires that

"Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches." (Section 301(a)(b))

In addition to direct regulation of fishing, "conservation and management" embraces a broad spectrum of considerations appropriate for inclusion in a fishery management plan. Section 3(2) declares that:

"The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that --

- (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on continuing basis;
- (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and
- (iii) there will be a multiplicity of options available with respect to future uses of these resources." (Emphasis added)

Undoubtedly, this definition covers any measure which is "useful in...maintaining...the marine environment" and "designed to assure that... long-term adverse effects... on the marine environment are avoided." Consequently, the Council may make recommendations in regard to environmental and habitat concerns in addition to those measures which section 303 requires to incorporate into a fishery management plan. These concerns should form part of the basis for such required measures as the Council's assessment and specification of OY and MSY.

The manner in which the Council may express its environmental concerns or recommendations varies. For example, the Council, in a plan, may recommend that the Secretary exercise her authority to review applications for permits issued under the Rivers and Harvors Act, the Federal Water Pollution Control Act, and the Federal Power Act. Through this review, the Secretary could identify activities potentially harmful to the fishery and mitigate adverse effects. Similar recommendations could be made respecting the National Environmental Policy Act and the Secretary's obligation to review environmental impact statements. Further, the Council could identify fishery research needs and request the Secretary to initiate research not only under the authority granted in the Act, but under such legislation as the National Ocean Pollution, Research and Development, Monitoring and Planning Act of 1978.

In addition, the Council may wish to review actively permits and environmental impact statements to the extent afforded to it either as an agency of the Federal Government or a member of the concerned public. Additionally, it might be possible for the Council to participate in public hearings either as a member of the public, or where the law permits, as a party to the proceedings.

Section 302(h)(6) of the Act allows a Council "to conduct any other activities which are required by, or provided for in, this Act or which are necessary and appropriate to the foregoing functions." The Conference Report accompanying the Act interprets this authority as the power to conduct other necessary and appropriate activities, with respect to the management and conservation of the fisheries over which it has authority." (Legislative History, p. 687) This broad language appears to allow a Council to intervene formally in an agency hearing if such intervention is necessary for the conservation of a fishery over which a Council has jurisdiction. However, the extent to which a Council may spend Federal funds in order to participate in other agencies' proceedings is under consideration by the Secretary.

One way for the Council to take an independent and more active role is to monitor the Federal Register to determine the availability of environmental impact statements, scheduling of public hearings, and applications for permits which are of interest to the Council. Another avenue of approach is for the Council to contact various Federal agencies to indicate their interest in commenting on or becoming involved in, to the extent permitted by law, matters before that agency that are of concern to the Council.