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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230
OFFICE OF THE ADMINISTRATOR

January 5, 1981

Mr. Wayne E. Swingle
Gulf of Mexico Fishery Management Council
5401 West Kennedy Boulevard
Lincoln Center, Suite 881
Tampa, Florida 33609

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MID ATLANTIC COUNCIL

Dear Mr. Swingle:

You have requested an opinion from the NOAA General Counsel's Office as to whether the Gulf Council has the authority under the Fishery Conservation and Management Act of 1976 (FCMA), to regulate the discharge of brine into the U.S. Fishery Conservation Zone (FCZ). The discussion paper prepared by your staff concluded that the FCMA permits the Secretary of Commerce and the Councils (through FMPs) to regulate, monitor, or have input into the permitting processes for those activities that have a direct impact on fishery resources. It concluded that the discharge of brine into the FCZ may cause harm to the shrimp and menhaden fisheries, and that the FCMA permits the Council to extend its authority to include regulation of those activities which directly impact the marine environment.

Council concern relating to the effect of man-made and natural substances on both the marine environment and fishery stocks is not new. In August of 1979, our regional office in Gloucester, Massachusetts, sent a memo to the Mid-Atlantic Council concerning the dumping of sludge into the FCZ (attached). The memo concluded that the FCMA is limited in scope and that Regional Fishery Management Councils lack the authority to "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."

The purpose of this letter is to further explain our position and to offer suggestions as to what the Gulf Council can do to assure that its concerns are heard.

In construing the FCMA to include Council regulation of man-made and natural discharges into the FCZ, your paper found such authority in sections 2(b)(1), 2(b)(3), and 2(c)(2) of the Act. Those sections state the purposes and policies of the FCMA. They do not grant any specific authority to anyone and are merely expressions of concern and intent.

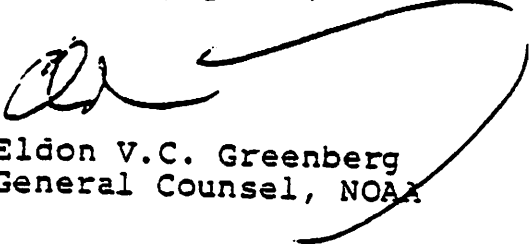
Your paper further cites section 303(c) (proposed regulations that may be submitted by Councils), section 303(b)(7) (necessary and appropriate measures in FMPs), and section 305(e) (emergency regulations). As explained in our memo to the Mid-Atlantic Council, an FMP may only contain measures "applicable to foreign fishing and fishing by vessels of the United States" (section 303(a)(1)). Regulations promulgated under section 305 may only implement measures in FMPs, and have no independent authority. Section 302(h)(6), which you also cite, limits a Council's "other activities" to those "required by, or provided for in, this Act or which are necessary and appropriate to the foregoing functions." Those functions deal solely with the preparation of FMPs and the conduct of fishing activities.

For the foregoing reasons, we conclude that Councils have no authority to regulate activities other than fishing. This does not mean, however, that a Council can do nothing to assure the safety of the marine environment. Please refer to pages 7-8 of the Mid-Atlantic memo for steps the Council may want to take to express its environmental concerns. Specifically, the Council certainly may recommend that the Secretary enter into agreements or attend meetings as your paper suggests on page 8.

I do want to clarify one point on the Council's capacity to enter into litigation. No one has ever given the South Atlantic Council permission to sue the Secretary over the boundary dispute or on any other issue. The attached opinion from the Justice Department verified NOAA's position that the Councils have no authority to bring suit on their own behalf.

I appreciate the Council's concern over the effect of brine discharges on the fisheries in your area. NMFS is confident that the Council and NOAA can work together, within the framework of the FCMA, to protect these fisheries and the habitat upon which they depend. In addition, we will make every effort to keep the Council informed of NMFS-sponsored habitat protection programs.

Sincerely yours,



Eldon V.C. Greenberg
General Counsel, NOAA

cc: Terry Leitzell
Harold Allen
Bob Jones
Ed Swindell
Gary Knight
John Bryson
Bobby O'Barr