



Ocean Law Memo

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THE FISHERY MANAGEMENT AND CONSERVATION ACT OF 1976 (H.R. 200)

The enactment of federal legislation leading toward the creation of a 200-mile fishery conservation zone, which President Ford signed into law on April 13, the resumption in New York of the Third Law of the Sea (LOS) Conference and the development of comprehensive fisheries management plans and regulations make 1976 a pivotal year in the protection and conservation of United States ocean resources.

Fishermen, processors, scientists, and policy planners have long awaited legislative action to reverse the over-fishing and depletion of once-abundant species in U.S. coastal waters. After its effective date of March 1, 1977, the new law would establish exclusive U.S. fishery management authority over all fish within the 200-nautical-mile conservation zone, all anadromous species (such as salmon) throughout their migratory range, except when they are located within another country's territorial sea or fishery conservation zone, and all continental shelf fishery resources (such as clams and crabs). Procedural provisions allow user groups and individuals to participate actively in the domestic planning process.

The Act may or may not come into force under its present terms. It is generally subject to the terms of any comprehensive treaty ratified by the United States and resulting from "any" United Nations Conference on Law of the Sea. The Senate-House conference report accompanying the compromise bill emphasizes the commitment of the U.S. to the LOS conference.

COMPROMISE BETWEEN THE CONGRESS AND THE ADMINISTRATION

Arduous committee deliberations and protracted floor debate in both Houses of the Congress delayed final passage of the extended-jurisdiction bill for several months while proponents of the conservation and management legislation hammered out a compromise with the Administration. The House of Representatives passed its version of the 200-mile fisheries bill (208 to 101) on October 9, 1975. In the Senate, which had enacted similar legislation in the 93rd Congress, sharp opposition developed during the last weeks of the 1975 session. Senate approval of the bill (77-19) on January 28 followed hectic maneuvering and compromise with the Administration on an implementation date acceptable to both the Congress and the President (March 1, 1977). The House bill had provided for July 1, 1976, but spokesmen for the Administration within the State and Defense Departments argued strongly for a delay until July 1, 1977, in deference to continued negotiations at the LOS conference.

Senate opponents of U.S. unilateral action were led by Senator Mike Gravel (D-Alaska), whose arguments against the measure influenced the Foreign Relations Committee to recommend against its passage and the Senate Armed Services Committee to recommend delaying the effective date until January 1, 1977. Opponents of the bills argued

that unilateral action by the U.S. would (1) jeopardize final agreement on a comprehensive LOS treaty, which is expected to include provisions on the breadth of the territorial sea, freedom of passage and navigation through international straits, oceanographic research, pollution control, dispute settlement, and deep seabed mining rights; (2) encourage other nations to retaliate with offshore fisheries restrictions that would seriously damage U.S. distant water fishermen, primarily tuna and shrimp; (3) upset recent progress in bilateral and multilateral agreements with nations having substantial foreign fishing fleets to cut back voluntarily their catch quotas in U.S. coastal waters; and (4) lead to possible confrontation and worsening of relations with countries that might refuse to recognize the declaration of extended jurisdiction. The recent "Cod Wars" between Iceland and the United Kingdom demonstrate the recurring threat of conflicts over rights to fisheries.

When it appeared that Senator Gravel and Republican senators supporting the Administration position could muster enough votes (more than one-third) to sustain a Presidential veto, Senate sponsor Warren Magnuson (D-Washington) recognized that the necessary votes would have to be won at the expense of accepting the later implementation date of July 1, 1977.

HOUSE-SENATE CONFERENCE COMMITTEE COMPROMISE

Though the House and Senate versions of the 200-mile fisheries conservation zone and domestic management provisions agreed on basic principles, they disagreed on the details of the proposed scheme of Regional Fisheries Management Councils and on the regulation of foreign vessels which would be allowed to fish within the 200-mile zone if there is a surplus of a species not harvested by U.S. fishermen. The joint conference report recommended a compromise version which incorporated language and provisions from both the House and Senate bills. Once more the implementation date for the enforcement of 200-mile extended jurisdiction was modified -- this time the effective date was set for March 1, 1977 -- though the councils were scheduled to begin their work almost immediately following the President's approval. Political considerations directly related to the resumption in mid-March of the LOS negotiations reinforced the position of those in the Congress and the Administration who urged a "wait-and-see" attitude. Opponents of U.S. unilateral action tried to convince sponsors of the bill to maintain a low profile and to refrain from any action during the eight-week conference which might be interpreted by other nations as an attempt to pressure the negotiators. With final passage of the compromise bill assured and indications by the President that he would reluctantly accept the modified proposal, those arguing for Congressional patience and deference to the LOS deliberations pointed out that the U.S. had nothing to lose in delaying action and in giving the diplomats one more chance to reach an agreement. Much sentiment favored the avoidance of open disagreement between the Congress and the

President on foreign policy. But for those who had worked for more than two years to pass the extended-jurisdiction legislation and had witnessed apparent deadlock at the LOS sessions, the pleas for delay carried little weight.

House and Senate conferees also resolved differences in the two versions of the measure relating to the judicial review of proposed management programs, Congressional review of foreign fisheries agreements, and the relationship between the federal government and state regulatory authority under the proposed management scheme. The Senate bill originally contained a provision which would have created an independent Fisheries Management Review Board that would hear appeals by individuals adversely affected by actions of the Secretary of Commerce or the regional councils. This recourse to intermediate review was opposed by the fishery lobby, which claimed that it would only increase the cost and delay to those who would eventually demand a hearing before a federal court. The provision for review was, therefore, deleted in the compromise bill.

The House-enacted bill contained detailed procedures directing the Secretary of State to forward to the Congress for review and concurrence all international fishing agreements which would permit foreign nations to fish within the newly-created fishery conservation zone. Although the State Department and Administration adamantly opposed this provision, it was incorporated into the new law.

The House and Senate versions differed on a division of coastal states into the regional groups, and on the number of members and selection procedure for the planning bodies. Disagreement also focused on the authority of the Secretary of Commerce to implement emergency measures and to set standards if regional councils should be unable to agree on a comprehensive management program. The compromise proposal shuffled the state composition of the regional councils, reduced the number of voting members on each council while providing for non-voting members as well, and inserted language which appears to give the Secretary of Commerce broad discretionary authority to intervene if state fishing controls adversely affect regulations designed to protect species throughout the conservation zone. (The Council structure and representation for Oregon is described below.)

The conference report and final revision of the extended-jurisdiction bill were referred to the House and Senate for enactment without floor opposition. The Senate accepted the compromise measure on March 29 and the House on March 30.

SUMMARY OF THE ACT

Under the Act, the outer boundary of the fishery conservation zone would extend seaward 200 nautical miles from the coastline of the U.S., while its inner boundary is a line "coterminous with the seaward boundary of each of the coastal States." This definition reserves to the states the authority to continue regulation of fishing within their boundaries (three miles offshore for Oregon, Washington, California) but only if such measures do not conflict with fishery management plans for protection of species within the entire conservation zone.

The legislation creates U.S. authority to manage all fishing of all species within the 200-mile zone, all anadromous species throughout their migratory range and all continental shelf fishery resources beyond the zone, but does not include authority over fishing of "highly migratory species" such as tuna "which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean."

The national fishery management program established by the Act defines general standards to guide the preparation and implementation of specific management plans by regional councils and the Secretary of Commerce. These standards

recognize the principle of optimum yield for each fishery defined as that amount "which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreation opportunities" and which defines the maximum sustainable yield to reflect relevant economic, social, and ecological considerations. The goals of the standards include reliance upon the best available scientific data, integrated management of fish stock throughout their natural range, nondiscrimination between residents of different states, and coordination to promote the most efficient utilization of resources.

OREGON'S PARTICIPATION ON REGIONAL COUNCILS

Oregon is represented on two of the eight regional fishery management councils: the Pacific council, consisting of California, Idaho, Washington and Oregon and with primary responsibility for management off the coasts of these states; and the North Pacific Council, consisting of Alaska, Washington and Oregon and with particular concern for waters off the coast of Alaska. The Pacific Council would have a total of 13 voting and five non-voting members. The voting representatives would include (1) the principal state official with marine fishery responsibility in each state, or his designee; (2) the regional director of the National Marine Fisheries Service; and (3) eight remaining positions, to be filled by the Secretary of Commerce from lists of qualified individuals submitted by the Governors of the four states. Qualified individuals in this last group are defined as those who are "knowledgeable or experienced with regard to the management, conservation or recreational or commercial harvest of the fishery resources", with at least one such member chosen from each of the four states. It is anticipated that qualified individuals would include, for example, commercial fishermen and seafood consumers.

The five non-voting members of the Pacific Council would represent the U.S. Fish and Wildlife Service, the U.S. Coast Guard, the Executive Director of the Pacific Marine Fisheries Commission, the Department of State, and an individual appointed by the Governor of Alaska.

The North Pacific Council would have 11 voting members -- the representatives of each state marine fisheries agency, the regional director of the NMFS, and seven appointees of the Secretary of Commerce, five of whom to be appointed from Alaska and two of whom to be appointed from Washington.

DUTIES OF THE REGIONAL FISHERY MANAGEMENT COUNCILS

The duties of the regional councils are to "prepare and submit to the Secretary of Commerce a fishery management plan with respect to each fishery within its geographical area of authority" as well as amendments to that plan, as necessary. The councils would also review and comment upon applications by foreign nations to be permitted to fish within their respective conservation zones. The councils are required to "conduct public hearings, at appropriate times, and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation" of the Act.

To assist the regional councils in the evaluation and development of statistical, biological, economic, social and other relevant scientific information, advisory committees and panels are authorized, as necessary, to prepare recommended fishery management plans.

REQUIRED CONTENTS OF FISHERY MANAGEMENT PLANS

Fishery management plans are to be prepared by the regional councils or by the Secretary of Commerce, if necessary, on an interim basis or if a regional council fails to submit a management plan that conforms to national standards.

Plans must contain a detailed analysis of the fishery area, including number and type of vessels, fishing gear generally used, species involved and their location, cost of management, actual and potential revenues, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any.

The management plans must assess and predict the present and future maximum sustainable yields and optimum sustainable yields. This assessment must include a division into optimum yield which U.S. fishing vessels would harvest and the remainder, if any, available to foreign fishermen.

Measures which the councils may recommend for implementation of fishery management plans include the requirement of a permit and fees for any vessel fishing within the conservation zone, limitations or prohibitions upon fishing in designated areas and description of authorized fishing gear, specific limits on the catch of fish, restrictions or prohibitions upon the types and quantities of gear and equipment fishing vessels may carry, establishment of a system of limited access, and other measures as necessary and appropriate.

Designated provisions for limited entry to ensure optimum yield must consider current activity in the fishery, historical fishing practices and dependence upon the fishery, capability of vessels so employed to engage in other fisheries, the cultural and social framework relevant to the fishery, and other relevant conditions.

REVIEW BY SECRETARY OF COMMERCE

The Act authorizes the Secretary of Commerce to review and approve regional fishery management plans to ensure consistency with national standards. If a plan falls short of the requirements and standards imposed by the Secretary, it must be sent back to the regional council which submitted it, with reasons for refusal and suggested modifications. In reviewing the management plans, the Secretary of State and U.S. Coast Guard are to be consulted regarding the impact of proposals upon foreign fishing and enforcement. The Secretary of Commerce may also initiate management plans if a regional council fails to submit a proposal, though such schemes as the Secretary may originate cannot contain a provision establishing a limited entry system without the approval of a majority of the members of the appropriate council. The Secretary of Commerce is responsible for designating fees necessary to compensate for the administrative costs of the permit program and for the coordination of a comprehensive program of fishery research.

Implementation of approved plans and regulations will follow notice and comment procedures and further hearings, if appropriate. Judicial review of the regulations promulgated by the Secretary must accord with the federal Administrative Procedures Act.

EMERGENCY ACTIONS AND ENFORCEMENT

In the event of an emergency affecting a fishery resource, the Secretary of Commerce is authorized to take whatever action seems necessary, including the issuance of fishery regulations for a period of up to 90 days. State jurisdiction is recognized in the Act for regulatory authority over fishing conducted within a state's boundaries. An important exception to state jurisdiction occurs when, after notice and opportunity for a hearing, the Secretary determines that a fishery occurring predominately within the fishery conservation zone for which a management plan has been developed is also subject to state action which "will substantially and adversely affect the carrying out of such fishery management plan". If such interference occurs, the Secretary must notify the state concerned and the appropriate regional council of his intention to regulate the fishery within the boundary of such state until the latter is able to obtain reinstatement of its authority.

Stringent enforcement procedures and heavy civil penalties, criminal sanctions and civil forfeiture are provided. Activities which may subject an individual to such fines and punishment include the use of any fishing vessel after revocation or suspension of a permit, refusal to allow boarding and inspection, interference with any search or inspection aboard a vessel, and shipment, transportation for sale, or custody of any fish taken in violation of the provisions of the Act.

Specifically prohibited acts are set forth as follows: (section 307) "It is unlawful for any person to violate any provision of this legislation or any regulation promulgated under this legislation; to violate any condition or restriction of a permit issued pursuant to this legislation or to fish upon revocation or during the suspension of such a permit; to violate any provision of a governing international fishery agreement entered into pursuant to this legislation; to refuse to permit any authorized officer to board a fishing vessel under such person's control for purposes of carrying out any search or inspection relating to the enforcement of this Act or of any regulation or permit issued under this Act; to use force to assault or otherwise interfere with such an officer who is engaged in such a search or inspection or to resist a lawful arrest for any act prohibited by this subsection; or to ship, purchase, sell, etc. any fish taken or retained in violation of this Act or any regulation or permit issued under this Act." *

Civil penalties to be levied after notice and opportunity for a hearing may not exceed \$25,000 for each violation, but each day of a continuing violation constitutes a separate offense and liability for fine. Criminal offenses are included to protect officials enforcing the Act from physical assault, resistance, intimidation or interference. Anyone who so hinders or threatens an official or resists arrest is liable for fines up to \$50,000 and imprisonment up to six months. The use of a deadly or dangerous weapon by a person convicted of a criminal offense increases the potential fine to \$100,000 and imprisonment for a period up to 10 years.

Seizure and civil forfeiture of any vessel (including its fishing gear, furniture, appurtenances, cargo and stores) are also provided for violations of the Act, regulations or permits.

FOREIGN FISHING PERMITS

The Act provides for a careful scrutiny and review of proposed international fishery agreements and individual applications of foreign countries for permits on behalf of their nationals within the conservation zone. The Secretary of State has major negotiating authority, but he is required to cooperate with the Secretary of Commerce in determining the total allowable level of foreign fishing as well as the allocation among foreign nations competing for limited resources within the U.S. conservation zone. A foreign nation entering into a fishery agreement with the U.S. must submit to U.S. authority, which may include boarding and inspecting any vessel permitted to fish within the conservation zone. The U.S. authorities may make arrests and seizures whenever there exists reasonable cause for belief that a violation of the provisions of the fishery agreement and vessel permit has occurred.

The Act also contains a provision of reciprocity whereby a foreign nation seeking access for its fishermen to U.S. conservation zone waters must extend substantially the same fishing privileges to fishing vessels of the U.S.

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