Ocean and Coastal Law Center · School of Law · University of Oregon · Eugene 97403

Ocean Law Memo

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ADMINISTRATION OF THE FISHERIES CONSERVATION AND MANAGEMENT ACT

In 1976 Congress enacted the Magnuson Fisheries Conservation and Management Act, P.L. 94-265, codified at 16 U.S.C. §§ 1801 et seq. Since its passage there have been several changes, perhaps the most extensive coming in 1980 when the foreign allocation provisions, 16 U.S.C. § 1821, were amended to affirmatively reflect the legislative dedication to the "fish and chips" policy which has become the centerpiece of United States fisheries policy. See 94 Stat. 3275, P.L. 96-561 codified at 16 U.S.C. §§ 1801 et seq. Congress, in 1982, further refined that policy in amendments to various provisions of the MFCMA. See 96 Stat. 2481, P.L. 97-453, to be codified at 16 U.S.C. §§ 1801 et seq. This memo will discuss those amendments, as well as important procedural shifts embodied in the same legislation.

After discussing the 1982 amendments, this memo will examine two important developments in state-federal relations under the MFCMA. The first concerns the relation between the consistency requirements of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(e)(1), and federal fishery management plans (FMPs) under the MFCMA. The other development is the preemption of state fishery regulation in territorial waters by federal authorities under 16 U.S.C. § 1856(b).

I. 1982 MFCMA AMENDMENTS

The initial justification for the MFCMA was to "provide for the conservation and management of important fishery resources found off the coasts of the U.S." More recently, management authority over fishery resources in the fishery conservation zone (FCZ), 16 U.S.C. § 1811, has been used to further the interests of the domestic fishing industry as well as to rationally manage the resource. Active promotion of U.S. fishing industry interests officially began with passage of the American Fisheries Promotion Act, P.L. 96-561 supra. This shift in emphasis from general good management to rational management aimed at maximally benefiting U.S. interests has been termed the "fish and chips" policy. One important aspect of this policy is "using foreign fishing allocations as leverage to advance the development of our industry." Kronmiller, Remarks Before the Fishery Law Symposium 2 (Seattle, WA., Oct. 15, 1982); see e.g., 16 U.S.C. § 1821(d).

In general, the 1982 MFCMA amendments reflect congressional adherence to "fish and chips" policy. Central components of this approach are foreign nation resource allocation provisions and foreign fishing compliance mechanisms. Both of these aspects of the MFCMA were amended in 1982 and will be treated first. Procedural amendments aimed at streamlining the entire MFCMA process will be discussed after fish and chips policy matters. Miscellaneous changes will be noted last.

FOREIGN FISHING

A. Observer Program

There have been various estimates of the extent of foreign wrongdoing under the MFCMA allowed by insufficient observer coverage. Widespread underreporting of foreign catches allegedly has occurred. The low level of foreign vessel observer coverage has been attributed to lack of appropriations, a condition that excuses the Secretary of Commerce (Secretary) from compliance with the 100% coverage requirement of 16 U.S.C. § 1821(i)(1). See 16 U.S.C. § 1821(i)(2)(C). The addition of 16 U.S.C. § 1821(i)(5) in 1980, providing a Foreign Fishing Observer Fund separate from the general revenues, did not solve the appropriations problem.

In 1982 Congress added a new subsection to § 1821(i) which is intended to ensure that 100% observer coverage will be a reality whether observer funds are appropriated or not. See 16 U.S.C. § 1821(i)(6). The Secretary is directed to establish a pool of qualified observers who will be available to foreign

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vessels. Those people will be certified by the Secretary according to qualification criteria to be established. When funding appropriations are insufficient to enable the Secretary to provide each applicant foreign vessel with an observer, individual vessels or their agents will contract with an individual from the observer pool. The vessel will pay the observer directly according to a reasonable fee schedule established pursuant to 16 U.S.C. § 1821(i)(6)(C). Thus, funding shortfalls are removed as a reason "beyond the control of the Secretary," 16 U.S.C. § 1821(i)(2)(C), for failing to ensure full observer coverage of foreign fishing vessels.

The duties that may be performed by an observer at the expense of the foreign fishing vessel are expanded. 16 U.S.C. § 1821(c)(2)(D) now will provide that any necessary data editing and entry costs associated with functions of observers be absorbed by the appropriate vessel. Changes to 16 U.S.C. § 1821(i)(3) expand the range of permissible functions to include experiments not directly related to fisheries, such as "the monitoring of sea bird mortality." H.R. Rep. No. 97-982, 97th Cong., 2d Sess. 15 (1982). Also, any administrative costs associated with monitoring the observer program now will be borne by the foreign vessels. 16 U.S.C. § 1821(c)(2)(D).

B. Foreign Allocations

An examination of the changes in the foreign allocation provisions must begin with a review of the complex mechanisms instituted by the 1980 MFCMA amendments of the American Fisheries Promotion Act, supra. Essentially, those amendments were intended to phase out foreign fishing in the FCZ. Allocation determinations, however, still were to be based on the factors listed in 16 U.S.C. § 1821(e)(1)(A) through (H). Those factors are at the heart of America's fish and chips policy; this is emphasized by new subparagraph 16 U.S.C. § 1821(c)(4)(D): "It is the sense of the Congress that each [governing international fishery agreement (GIFA)] shall include a binding commitment, on the part of such foreign nation and its fishing vessels, to . . . take, or refrain from taking, as appropriate, actions of the kind referred to in subsection (e)(1) in order to receive favorable allocations under such subsection." This "sense" is backed up by new requirements with which the U.S. officials making foreign allocations must comply before releasing fish to a nation for harvest.

Administrative practice prior to the amendments provided that the Secretary of State make an initial determination of each applicant nation's harvest allocation. Releases of the allocation were not made in one lump; only 50% of the allocation by species was released initially. Further releases hinged on continued compliance with the MFCMA, notably 16 U.S.C. § 1821(e)(1)(A) through (H).

Under the amendments, the factors remain unchanged, but are redesignated 16 U.S.C. § 1821(e)(1)(E)(i) through (viii). New provisions at 16 U.S.C. § 1821(e)(1)(B) through (D) require that the Secretary of State initially release 50% of the aggregate alloction to each nation entitled to an allocation. Thus, the administrative practice of a 50% release by species is overruled; the purpose being to allow nations to proceed in toto with the harvest allocation in small fisheries. This seems reasonable, since a 50% holdback of the allocation for a marginal fishery might make such fishery economically unfeasible. Since any remaining allocations for larger operations are thereby reduced by more than 50%, the U.S. retains more leverage in the administration of new 16 U.S.C. § 1821(e)(1)(D)(ii), which provides:

> After the initial release of fishery allocations under subparagraph (c) to a foreign nation, any subsequent release of an allocation for any fishery to such nation shall only be made . . . (ii) if the Secretary of State and the Secretary, after taking into account the size of the allocation for such fishery and the length and timing of the fishing season, determine in writing that such nation is complying with the purposes and intent of this paragraph with respect to such fishery.

Through this addition it is hoped that American officials will more closely monitor compliance with U.S. law.

DOMESTIC FISHERMEN

The 1982 amendments deal also with a specific allocation concern of domestic fishermen attempting to break into the underutilized fisheries. Prior law made provision for mandatory reallocation to foreign fishing vessels portions of the allocation reduction amount, 16 U.S.C. § 1821(d)(1)(D), that would not be harvested by domestic fishermen. 16 U.S.C. § 1821(d)(4) required that the surplus be reallocated in the current year unless: 1) such reallocation would be detrimental to U.S. fisheries development; and 2) the surplus would be available in the following harvest season. If both conditions were met, the fish had to be made available for foreign harvest in the next season.

The mandatory provisions of 16 U.S.C. § 1821(d)(4) are made permissive by the amendments. Domestic fishing interests convinced Congress that one year was not enough time to stabilize the expectations of American fishermen. That is, under prior law, if a surplus was available in year one it would be reallocated in that year to foreign fishermen unless both conditions of 16 U.S.C. § 1821(d)(4) were met. If both conditions were met, the fish would not be available to domestic fishermen in year two because in that case the MFCMA mandated allocation to foreign fishermen in year two. Thus there was no incentive for domestic fishermen to gear up for underutilized species either for year one or in preparation for year two. Under the amendments the Secretary of State presumably will refrain from reallocating surplus reduction factor amount fish unless it can be shown that no detriment to U.S. fishery interests will ensue.

MFCMA PROCEDURES

A. FMP Approval

Procedural delays and conflicts over interagency roles have marred efficient operation of the MFCMA since its inception in 1976. These were a concern to those affected by the MFCMA. The new legislation takes some tentative steps towards resolving these problems.

The role of the fishery management councils in setting domestic fishery policy as well as in policy implementation is strengthened under the amendments. In response to council concerns that fishery management plans (FMPs) submitted for secretarial approval were being disapproved on the basis of secretarial regulations that should not be allowed to restrict regional fishery management, 16 U.S.C. § 1851(b) was amended. It now will read: "The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans." Control of FMP implementation by the councils also should be enhanced by new requirements that proposed regulations be submitted along with a council FMP.

Upon receipt of a council-prepared FMP, the Secretary is directed to immediately commence review of the plan and publish notice of receipt so that interested persons may submit written comments. The comment period lasts 75 days, commencing with the date of receipt by the Secretary. Within 20 days after the close of the comment period, the Secretary may notify the council of approval, disapproval, or partial disapproval. If no action is taken by the Secretary, the plan automatically becomes effective.

This represents a marked shift in the FMP review process. Under prior law the Secretary was directed to review the plan and notify the council of approval or disapproval within 60 days. However, during oversight hearings council members and industry representatives complained that rarely was a council notified of a secretarial decision in such a short time. Without some action, the entire process ground to a halt. Now the FMP process can continue even if the Secretary, for whatever reason, neglects to take timely action.

Another element of the new FMP review process that may be of value to the industry is that the comment period runs concurrently with review by the Secretary, except for the last 20 days during which, hopefully, the Secretary will continue to consider such comments. All comments on a council plan will be received before the Secretary approves or disapproves it. Under the old law, there was no comment period until after secretarial action. Thus, the prior law was a bit like pursing the seine after the fish have sounded. Implementation of regulations parallels the new FMP procedure. The Secretary must promulgate regulations within 110 days of the date on which a council submits a plan.

The foregoing discussion deals with plans that do not meet with secretarial disapproval. However, if the Secretary determines that a plan submitted by a council is not in conformity with the national standards or other applicable law, he must notify the regional council of disapproval. The notice must: 1) be made within the 20 days following close of the 75-day comment period; 2) be in writing; 3) specify the law with which the plan is inconsistent and the nature of the inconsistency; and 4) include recommendations for revisions which would enable the plan to conform to law.

Although a council is not under any time constraints to resubmit an amended plan following secretarial disapproval, the Secretary has a strict time frame in which to act following resubmission. The deadlines in this situation are 30 days after receipt for comments, a further 30 days for action, following which the amended plan becomes effective if no action is taken by the Secretary. If the Secretary disapproves an amended plan, the resubmission process is repeated. In cases where a plan is resubmitted following disapproval, regulations must be promulgated within 75 days of receipt by the Secretary of the plan.

The provisions for secretarial development of an FMP in cases where councils fail to do so are amended. The changes reflect the adoption of shorter time frames for plan development by councils followed by secretarial review. Where the Secretary formulates a plan, he is directed to submit it to the

appropriate council. Within 30 days of such sending, proposed regulations must be published in the Federal Register. A council has 75 days from the time a plan is submitted to it to review and comment on it. After the close of the 75-day period, and after considering council and other views, the Secretary may implement the plan.

B. Emergency Actions

There is a significant change in the emergency action provisions of the MFCMA, 16 U.S.C. § 1855(e). As before, the Secretary may take emergency actions when necessary to conserve or manage a fishery. But under new 16 U.S.C. § 1855(e)(2)(A) a council by unanimous vote can require the Secretary to promulgate emergency regulations. If the council vote on emergency action is not unanimous, the taking of such action is only advisory. Emergency regulations will be allowed to continue in force for up to 180 days, as compared to 90 days under prior law.

MISCELLANEOUS AMENDMENTS

A. Data Collection Programs

New section 1853(e) confers statutory authority on the councils to implement data collection programs to augment the scientific basis for FMP development. The Secretary will retain substantial control over the methodology of data collection, and the information will be subject to confidentiality strictures. The latter element is designed both to protect fishermen and processors from divulging information that is necessarily secret for competitive reasons, and to encourage participation by the industry through assurance of confidentiality.

The councils long have felt that some type of organized research was crucial to effective management. The scientific basis of an FMP is often skimpy at best. Given the mandate in the MFCMA that "the national fishery conservation and management program utilizes, and is based upon, the best scientific information available," 16 U.S.C. § 1801(c)(3), data collection programs seem a welcome addition to the legislation.

B. Minor Procedural Changes

There are several minor procedural modifications that focus on council procedures and members' qualifications. For example, 16 U.S.C. § 1852(i) specifically provides that the Federal Advisory Committee Act, 5 U.S.C. App. 1, shall not apply to councils or any of the panels or committees which operate under them. Instead, separate procedural guidelines are made applicable to those groups by that section.

Similarly, the councils and their subgroups are excused from compliance with the Paperwork Reduction Act, 44 U.S.C. §§ 3051 et seq., the Regulatory Flexibility Act, 5 U.S.C. §§ 3501 et seq., and Executive Order 12291. While these procedural exemptions are not apparent from the language of new 16 U.S.C. § 1855(h), the Conference Report says that "new subsection (h) . . . limits the applicability of [those enactments] to the functions of the Secretary of Commerce under Sections 304 and 305 of the MFCMA." H.R. Rep. No. 97-982, supra, at 21.

The 1982 amendments also add a requirement that candidates for appointment to councils be "knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest of the fishery resources of the geographical area concerned." 16 U.S.C. § 1852(b)(2)(A). Lists of council candidates made up by the governors of council member states are to include the relevant information on such candidates.

There is also new statutory authority for secretarial removal of council members. Upon a two-thirds vote of the concerned council, along with submission of a written statement of reasons for removal, a council may recommend to the Secretary that one of its members be removed. 16 U.S.C. § 1852(b)(5). The Secretary may, but need not, then remove the member.

C. Penalties and Enforcement

New section 1858(e) gives the Secretary power to subpoena witnesses or evidence if it is necessary for the conduct of a civil enforcement hearing under 16 U.S.C. § 1858. For an offender subject to a civil penalty, 16 U.S.C. § 1860 is amended to allow forfeiture of not just the fish taken, but of the fair market value of the fish. This will make forfeiture easier to administer and, thus, a more effective deterrant. On the criminal penalty side the statute will no longer allow imprisonment for the operator of a vessel who violates the terms of a permit or has no permit. 16 U.S.C. § 1859(b) (violations of 16 U.S.C. § 1857(2) now punishable only by a fine not to exceed $100,000).

II. STATE-FEDERAL RELATIONSHIPS

A. Coastal Zone Management Act Consistency

On November 24, 1982, National Oceanic and Atmospheric Administration (NOAA) Administrator John Byrne issued a statement directed to the interrelationship of the MFCMA and the Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq. NOAA Administrator's Letter No. 37, Nov. 24, 1982. His comments were intended to illuminate the extent to which an FMP developed under the MFCMA would be required to meet the consistency

requirements of the CZMA, 16 U.S.C. § 1456(c)(1). That section provides that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." The key terms in the quoted passage are "activities directly affecting" and consistent "to the maximum extent practicable."

Not surprisingly, the Administrator's letter states that "it is clear . . . that most FMPs" are activities that directly affect the coastal zone. NOAA long has held this position. See, e.g., Brewer, FCMA/CZMA Consistency, Memorandum of June 7, 1977. In that memo, Brewer, NOAA general counsel at the time, said that preparation and implementation of FMPs "can be said to 'directly affect the coastal zone' because fisheries constitute one of the key resources of the coastal zone . . . referred to in the CZMA as well as a 'major water use.'" The regulations under both statutes recognize this fact. See 50 C.F.R. § 602.5(a)(7) (1982); see also 15 C.F.R. § 930.33(b) and comment to § 930.33(c).

The Administrator's letter offers some guidelines on what "consistency" requires in various contexts. The letter notes that FMP activities must comport only with "enforceable, mandatory policies of state programs." See 15 C.F.R. § 930.39(c). This initial hurdle to requiring consistency has two components. First, the policy must be a part of the federally approved state coastal management plan. Second, the policy must be binding on state agencies and citizens, and not merely recommendatory. Both criteria must be met before NOAA feels compelled to ensure consistency.

If both tests are satisfied, the affected entity--National Marine Fisheries Service (NMFS), a council, or the Secretary--must prepare a consistency determination. Under NOAA regulations, 15 C.F.R. § 930.39, the determination should include a description of the activity and of the facilities necessary for its conduct, an analysis of coastal zone effects generated by the activity, and comprehensive data and information that will support the consistency statement. The determination must include a "brief statement that the [FMP] will be implemented in a manner consistent to the maximum extent practicable with the state [CZMA Coastal] Program." Administrator's Letter No. 37 at 5.

Just how consistent the FMP must be with any state pronouncements on fishery management policy is not clear. While NOAA regulations specify that a federal activity be "fully consistent with [state programs] unless compliance is prohibited based on the requirements of existing law applicable to the Federal agency's operations," 15 C.F.R. § 930.32(a), it is apparent that federal activities may be less than "fully consistent" in the Administrator's view.

To illustrate, one can use the facts in a pending action filed in the federal district court for the northern district of Florida, Flordia v. Baldridge, No. 83-7071 (N.D. Fla.), to contrast the regulation just cited with the Administrator's interpretation of "fully consistent."

Florida has embodied in its federally approved coastal zone management plan a landing law that prohibits seined mackerel from being delivered within the state. The law meets the first two tests of NOAA's consistency requirements: it is an element in the federally approved state coastal zone plan and it is binding on Florida citizens.

The mackerel FMP for the FCZ off Florida specifically allows seining as a harvest method. Obviously, the FMP is not "fully consistent" with Florida's coastal plan. There would appear to be no prohibition "based on the requirements of existing law" that prevents the council or the Secretary from conforming the FMP to Florida's coastal plan. Furthermore, is it truly "impracticable" to disallow mackerel seining in the FCZ so as to bring the FMP into compliance with state law?

In this situation, the Administrator would find "consistency" where the "net result is that the state's fishery is protected to the same extent under the FMP approach as under the state's approach." Administrator's Letter No. 37 at 8. Assuming that under a law allowing seining the harvest of mackerel would be the same as under a law disallowing seining, there are other relevant considerations unaccounted for in the Administrator's approach.

For example, suppose that Florida wishes to encourage more fishermen to engage in the mackerel fishery. A fishery technique less efficient than seining would allow that without threatening the resource. The price of mackerel caught in a less efficient fishery might be higher, too, a result that Florida may intend. Thus, the state scheme may allow maintenance of a particular coastal atmosphere marked predominantly by small, self-sustaining communities supported by a relatively large number of commercial fishermen. In this view, the FMP fails the consistency requirements of the CZMA with no identifiable benefit to the fishery resource.

Under NOAA regulations consistency is excused where prohibited by existing law. But it is not prohibited in the case of the mackerel FMP; in fact,

Florida's considerations of her coastal environment, both ecological and social, must be in the calculus leading to development of the FMP. See 16 U.S.C. § 1802(18)(B) (optimum yield means maximum sustainable yield modified by relevant economic, social, or ecological factors). Secretary of Commerce Baldridge has declined to mediate this consistency dispute between Florida and NOAA despite the seeming inconsistency of NOAA's position, and Florida has sought a judicial interpretation of CZMA consistency requirements.

An approach to federal consistency requirements similar to that asserted by the Administrator recently was rejected by the Third Circuit Court of Appeals in Cape May Green, Inc. v. Warren, 18 E.R.C. 1553 (3d Cir. 1983). There the federally approved New Jersey coastal management plan had identified specific tracts lying in a floodplain for development. The Environmental Protection Agency (EPA) conditioned the grant of funds for improving a sewage treatment plant in the area on a prohibition of development in the floodplain. Regarding CZMA consistency requirements, the agency had relied on 15 C.F.R. § 930.39(d) (1982) which states: "When Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards."

In overturning the condition imposed by the EPA as arbitrary, the court indicated that the interpretation placed on CZMA consistency requirements by the above regulation may not be acceptable in all cases. Relevant factors had been ignored by the EPA. For example, the concerned municipality had invested a substantial sum in infrastructure development, and the floodplain area development at issue would have been "fill-in" development.

The mackerel FMP's failure to defer to the Florida landing law is somewhat analogous to Cape May Green where EPA's refusal to defer to state and local coastal land use decisions was held arbitrary. The Administrator's recognition that FMP development and implementation must be consistent to the maximum extent practicable with state coastal plans is an important policy statement. At the same time, statements that an FMP is consistent if the resource is protected as well under the FMP as under state law may presume too much.

B. Federal Preemption Under the MFCMA

In May 1982 the first federal preemption of a state fishery regulation occurred under the authority of the MFCMA, 16 U.S.C. § 1856(b). In an expedited administrative hearing, the administrative law judge (ALJ) made the findings required by the MFCMA to allow the Secretary to preempt state authority in the territorial sea. In the Matter of Proceedings to Preempt State Management Authority of the State of Oregon, Docket No. 212-084 (Dep't of Comm., May 26, 1982). The following were the ALJ's MFCMA-mandated findings: 1) an FMP was in place for the salmon fishery off Oregon; 2) the salmon fishing under that plan occurs predominently within or beyond the FCZ (see 47 Fed. Reg. 12, 182, 50 C.F.R. § 619.4 (1983)); and 3) Oregon had taken an action that would substantially and adversely affect (id.) the carrying out of the salmon FMP.

The dispute arose in the context of recreational coho salmon fishing off the Oregon coast. The then newly-adopted FMP for the salmon fishery called for all-species recreational salmon fishing to open May 29, 1982, from Cape Blanco, Oregon, south to the Mexican border. All-species recreational salmon fishing north of Cape Blanco was to open June 12, 1982. Between May 29 and June 12, the FMP provided for a barbless-hook, chinook-only fishery from Leadbetter Point, Washington, to the Canadian border. Traditionally, the recreational salmon fishing season opens Memorial Day weekend in Oregon.

Oregon's coastal communities are heavily dependent on summer tourism for economic support. A major component of that tourism is the recreational salmon fishery. Oregon charterboat operators draw fishing enthusiasts from around the country. Support businesses such as hotels and restaurants derive much of their annual earnings from recreational fishermen. To all such interests, the prospect of losing two weeks of traditional fishing time was met with dismay when the FMP regulations were announced in March 1982. Pacific Fishery Management Council (PFMC) Newsletter, March 29, 1982.

The salmon fishery in Oregon's territorial waters is regulated by the seven-member Oregon Fish and Wildlife Commission (OF&WC). At its April 19, 1982, meeting the newly-adopted salmon FMP was explained to the members by a biologist from the Oregon Department of Fish and Wildlife (ODF&W). ODF&W is the state agency that implements the regulations adopted by OF&WC.

The biologist explained that the recreational coho season opening was being postponed because the expected coho return was at a near-record low. Commissioners expressed concern that the coastal communities would suffer economic loss because of the late opening. It was suggested that a chinook-only fishery between May 29 and June 12 in Oregon's territorial waters north of Cape Blanco might be one means of providing more fishing days to sport fishermen without

endangering the coho stocks.

The commissioners asked the biologist to develop some data that would enable them to ascertain potential impacts on coho stocks under such a proposal. OF&WC was aware that a similar season had been considered and rejected by the PFMC during development of the salmon FMP. Also, a charterboat industry representative at the OF&WC meeting observed that a chinook-only season would be only marginally beneficial to the industry, since charterboat operators had not planned on such a season and were ill-prepared to participate.

The commission considered that there would be some benefits from such a season. Even without full industry participation, there would be some charterboat activity that would generate revenues. Members of the commission also expressed the view that a chinook-only season would be a useful experiment to determine if recreational fishermen could successfully target on chinook in Oregon waters with limited adverse consequences for coho stocks. When the biologist reported to the commission that staff estimates of coho mortality due to a chinook-only season for the fourteen day period were about 1,000 fish, OF&WC decided that the benefits warranted adoption of the season.

There was an almost immediate outcry from the state of Washington. Washington asserted, quite rightly, that the Oregon regulation would disadvantage Washington fishermen. Since sub-area B of the region under the management authority of the PFMC stretches from Cape Blanco to Leadbetter Point, the incidental coho mortality precipitated by the Oregon chinook-only season would be deducted from the coho quota for that area. In effect, Washington fishermen would pay in lost fishing time for Oregon's gain.

Washington's Director of Fisheries requested that the Secretary preempt the Oregon regulation pursuant to his authority under 16 U.S.C. § 1856(b) of the MFCMA. The NMFS Regional Director subsequently informed ODF&W's Director that unless the regulation authorizing the chinook-only fishery in Oregon's territorial waters from May 29 to June 12 were withdrawn, it would be preempted.

Washington's opposition to the season and the threatened federal preemption were made known to the OF&WC at a May 21 meeting. Another vote was taken on the regulation, the commission reaffirming its position by a narrow 4 to 3 margin.

On May 22, the NMFS Assistant Administrator transmitted a Notice of Proceeding to Preempt State Management Authority as required by the regulations implementing 16 U.S.C. § 1856(b), 50 C.F.R. § 619.5(a) (1983), to Oregon's Governor Atiyeh. The Notice outlined an expedited administrative process for the preemption action to which Oregon did not object. Consequently, submissions to the ALJ were due May 25, and a decision was to be handed down on the 26th. Any administrative appeal had to be taken by the next day, and the Secretary's action based on the ALJ decision would be taken on May 28. Following the Secretary's action, proposed preemption regulations would be submitted to the Federal Register for public inspection, with promulgation effective upon publication on May 29. See 16 U.S.C. § 1855(e)(1).

All evidence submitted to the ALJ was documentary. The NOAA Assistant Administrator entered a compelling legal and factual analysis of the situation. Affidavits from two biologists supported his scientific basis for requesting preemption. The Washington Director of Fisheries' request for preemption and a transcript of OF&WC's May 21 meeting made up the remainder of the federal government's case.

The only factual determination that the ALJ was called upon to make was whether Oregon's action "substantially and adversely" affected the carrying out of the existing salmon FMP. Oregon only submitted the transcript of the OF&WC meeting of April 19 and a short, explanatory letter by the Commission's Chairman. Although the state did not actively defend its position, it apparently relied on the ODF&W projection that about 1,000 coho would die as support for the contention that the impact on the carrying out of the FMP would not be substantially adverse.

The question of the level of impact on the FMP which would result under the Oregon regulation was resolved in favor of the federal government. NMFS figures indicated that an incidental coho mortality of approximately 4,800 would result from the two-week recreational chinook-only season. The biologists' affidavits hinted that this number could be higher, since the Columbia River mouth is a nursery area for immature coho.

Just as important to the ALJ's recommended decision and the Secretary's ultimate course, however, was the effect on regional management of Oregon's regulation. The interstate impacts of an Oregon chinook-only fishery played a central role in the preemption decision. This is apparent from three events.

First, the state of Washington petitioned the Secretary to take the preemption action. Washington's request was premised more on the inequality of resource allocation than the coho stock damage. The overall coho quota would have remained the same under Oregon's regulation, but Oregon fishing interests

would have received a benefit at Washington's expense.

Second, the Secretary's preemption did not extend to Oregon's territorial waters south of Cape Falcon. The PFMC earlier had decided that excessive coho wastage would occur south of that point as well as north to Leadbetter Point. Thus, the biological basis for preemption existed, but the political foundation was insufficient; the interests between Cape Blanco and Cape Falcon are predominantly Oregon's.

Third, in a subsequent confrontation over state-federal salmon management authority in August 1982 between NMFS and Oregon, a conscious decision was made by federal authorities not to preempt Oregon's extension of the recreational coho season in her territorial waters. Again, the biological basis for preemption existed, but the effects of the extension were limited almost exclusively to Oregon. Although the federal government found another avenue by which Oregon eventually was brought into conformity with the FMP, the harsh route of preemption under the MFCMA was not taken.

In conclusion, the preemption in Oregon pursuant to 16 U.S.C. § 1856(b) of the MFCMA did not shed much light on the scientific factors that would trigger the federal action. However, it may fairly be said that when a coastal state appears to flaunt the regional management concept of the MFCMA and harm the interests of sister states by favoring short-term economic returns over proper resource management, the federal government may be expected to preempt the state action.

Chuck Ray
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For further information on subjects covered in the Ocean Law Memo, contact Professor Jon Jacobson, Co-director of the Ocean & Coastal Law Center, University of Oregon School of Law, Eugene, Oregon 97403. (503) 686-3845.

Sea Grant College Program
Oregon State University
Corvallis, Oregon 97331