Fisheries Managers: Regional Fishery Management Councils and the States

CHAPTER 3

When the idea of a law to establish a Fishery Conservation Zone (FCZ) began to take shape, its sponsors confronted a unique problem: how to establish a management system that has the benefit of federal financial and manpower resources, the force of federal law, and sensitivity to special local and regional needs. For the new attempt at comprehensive management to succeed, it had to earn the respect and cooperation of the people most directly involved — the fishermen. In addition, any successful management scheme had to be applied to a variety of different and biologically complex fisheries. The interests of consumers and the general public also needed to be considered. When the Magnuson Fishery Conservation and Management Act (FCMA) was passed in 1976, its authors envisioned the solution to these problems in the creation of the regional Fishery Management Council system.
The regional system is an imaginative combination of local and federal expertise. Designed to consider the social and economic needs of fishermen and fishing communities, the biological needs of each species under consideration, and the national and international interests of fishery product consumers, regional Fishery Management Councils are a creative solution to a complex national fisheries management problem.

I. The Regions

The provision of the FCMA that created the regional Councils divided up United States coastal waters in the FCZ according to several criteria. These included patterns of domestic commercial fishing, the range of some fish stocks, administrative convenience, and pre-existing political boundaries. The Act created eight ocean regions, each managed by one of the eight regional Councils in cooperation with administrative agencies of the federal government. The regional Councils are comprised largely of representatives from local communities in states adjacent to the ocean region. In this way the FCMA attempts to place management responsibility in the hands of those who best know the local and regional needs.

The regional Councils and their constituent states are as follows:

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Of special interest in this Guidebook are the Pacific, the North Pacific, and the Western Pacific Fishery Management Councils. (PFMC, NPFMC, and WPFMC respectively).

II. Composition of the Councils

The PFMC is by law made up of thirteen voting members. Eight of the voting members are chosen from a list of local individuals knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest of the fishery resources off Washington, Oregon, and California. Candidates for voting membership are nominated by their peers and placed on a list by the governors of their state. The governors then submit the lists of qualified individuals (not fewer than three for each council vacancy) to the Secretary of Commerce, who makes the selection. The Secretary is required to choose at least one member from each state in the region, but may determine that any nominated individual is not qualified and may ask the appropriate governor for additional justification or for a revised list. A member of any Council may be removed "for cause" by a two-thirds vote of the voting members of the Council and subsequent action of the Secretary. A Council recommendation must be in writing and must set forth reasons for removal. The other five voting members of the PFMC are specified by law. They are the principal state official with marine fishery management responsibility and expertise in each of the four constituent states, and the regional Director of the National Marine Fisheries Service (NMFS) for the geographical area.

The NPFMC has eleven voting members, seven of whom are nominated by their peers and appointed by the Secretary of Commerce in the manner described above. Of these seven, five must be from Alaska and two from Washington. The remaining four members are: the principal state officials with marine fishery management responsibility and expertise from Oregon, Washington, and Alaska; and the Director of the NMFS for Alaska.

The WPFMC has thirteen voting members, eight of whom are Secretarial appointees. (Four of the Secretarial appointees are obligatory members of the Council, one from each state or territory.) Four other members are the principal state or territorial official with marine fishery management responsibility, and the last is the regional Director of NMFS. All other United States possessions or protectorates in the Pacific are placed within the WPFMC's area of authority.
In addition to voting membership, each Council has a specified number of non-voting members who provide additional expertise and coordination when Council decisions affect other state or federal agencies. Non-voting members designated by the FCMA are: (1) the regional Director for the area concerned of the United States Fish and Wildlife Service, or his or her designee; (2) the Commander of the Coast Guard District for the area concerned, or his or her designee; (3) the Director of the Marine Fisheries Commission for the area concerned (if any), or his or her designee; and (4) a representative of the United States Department of State. A special provision of the FCMA creates an additional non-voting position on the PFMC to be filled by an appointee of the Governor of Alaska.

The current members of the PFMC, NPFMC and WPFMC are listed in Appendix A at the end of this Chapter.

III. Council Responsibilities

Each Council has primary responsibility for managing its region's offshore fisheries that require management. Even so, management is designed to be a cooperative effort between the Councils and the Secretary of Commerce. The role of the Secretary will be described in greater detail in the next chapter.

The management of a fishery is normally initiated by the creation of a Fishery Management Plan (FMP). It is a Council's responsibility to identify the fisheries in its jurisdiction that need management, and to gather the best information available on the population biology of the stocks and the social and economic characteristics of those fisheries. When the necessary information is obtained, the Council determines the "optimum yield" for the fishery in question, the extent of domestic harvesting and processing capacity, and any surplus that may be made available to foreign fishermen and processors. The Council must also take extensive public testimony so that all interested persons have an opportunity to be heard during the development of an FMP. The Council may conduct hearings outside of its area of responsibility, with the consent of the Council of primary jurisdiction, to the extent that "the fish in the fishery concerned migrate into, or occur in, that area or if the matters being heard affect fishermen of that area." All meetings of a Council and its subsidiary bodies must be open to the public, unless only internal matters are discussed. Timely public notice must be given, minutes must be kept, and opportunity provided for oral or written comment. The above requirements do not apply in situations where the Council declares an emergency.

This procedure results in the FMP, which includes any regulatory measures that the Council decides is necessary for conservation and management of the fish stocks under consideration. A completed FMP is forwarded to the Secretary of Commerce for review. If the Secretary finds that the FMP is consistent with
certain basic standards specified in the FCMA, the FMP is approved and implemented. If not, it is returned to the Council for revision. (This summary of the FMP process is explained in greater detail in the next chapter, which also contains special information for those who would like to influence the shape or particulars of an FMP.)

In addition to the difficult task of initially preparing an FMP, a Council must monitor and revise the FMP as conditions in the fishery change. This continuing management responsibility covers all aspects of an FMP. The Councils also have various administrative duties, including review and comment on foreign fishing applications and preparation of periodic reports on Council activities.

IV. The Scientific and Statistical Committees

The large amount of complex information necessary for intelligent fishery management requires the cooperative involvement of experts in various fields, such as biology, sociology, economics, and law. In recognition of this, the FCMA provides for the establishment of a Scientific and Statistical Committee (SSC) for each regional Council.

The SSC is under the direction of a Council and does not dilute the management authority of the Council. Instead, it provides a "helping hand" in areas not generally or necessarily in the expertise of Council members. The SSC assists in the development, collection, and evaluation of statistical, biological, economic, social, and other scientific information that may be relevant to the development or revision of an FMP. The decision-making authority itself remains with the Council. Current SSC members for the PFMC, NPFMC and WPFMC are listed in Appendix A.

V. The Advisory Panels

The Councils must create Advisory Panels as necessary or appropriate to assist in carrying out Council functions. These Advisory Panels are created in addition to, not in lieu of, an SSC. Although Advisory Panels have no independent authority, the Councils rely on them extensively in preparing FMPs and amendments.

The panels provide the Councils with additional information and advice from those involved with various aspects of fishing. Panels are usually made up of participants (or their representatives) in various fisheries, commercial and recreational. Panel membership may include consumer and environmental representatives to help balance commercial interests.

No mandatory form exists for Advisory Panels. Consequently they have taken a variety of forms. The PFMC, for example, sets up individual panels for each fishery under management or under
consideration for management. The NPFMC, on the other hand, has only one Advisory Panel to assist it in management of all fisheries for the region.

The panels provide a convenient and effective conduit whereby interested persons may influence Council decisions. Most panel members live in fishing communities; they are accessible to fishermen and others who cannot otherwise find time to travel to Council meetings. And, because they are usually involved in some part of the industry, panel members are often familiar with problems of fishermen and processors. It is wise for industry participants to become acquainted with their representatives on the Advisory Panels to ensure that their opinions are taken into account in the decision-making process. Appendix A contains the names, addresses, and industry affiliations of current Advisory Panel members for the PFMC, NPFMC, and WPFFMC.

VI. Plan Development Teams

The PFMC and NPFMC receive additional assistance in the management plan preparation process from Plan Development Teams (PDT). A PDT is formed for each fishery under consideration for management from a list of nominees submitted by the respective SSC. These nominees are affiliated with state and federal conservation agencies, universities, and private institutions, or are unaffiliated individuals known to possess specific expertise considered helpful for the preparation of an FMP. The Council selects the PDT members, who are responsible for organizing the FMP and its contents in accordance with procedural guidelines.

The Council, with advice from the public, the Advisory Panel, and the SSC, directs the PDT and provides guidance on how the final product, the FMP, is to take shape.

VII. Council Staff

The members of Scientific and Statistical Committees, Advisory Panels, and Plan Development Teams are all appointed by the Council that they serve. A Council may also hire an administrative staff consisting of an executive director and such full- or part-time employees as are necessary. The duties of administrative personnel include maintaining an office and conducting the day-to-day business of the Council. They are a support staff that helps to ensure the smooth operation of the Council. Responsibilities may include budget preparation, financial management, procurement, coordination of planning efforts, acting as liaison between panels, SSCs, and PDTs, maintenance of Council records, correspondence, preparation of required Council reports, and similar administrative activities. The staff also serves as the outlet for information on activities. Any question about the status of FMPs, future meetings, field hearings, or other Council activities can usually be answered by the administrative staff of a Council. For a regular supply of information, interested persons may have their names placed on a mailing list. For more
information on how to contact the administrative staffs of the
PFMC, NPFMC, and WPFMC, see Appendix A.

VIII. Other Assistance

The Councils may also call on the services of federal employees from other agencies. For example, the Councils often need legal advice, which may be provided by National Oceanic and Atmospheric Administration (NOAA) staff attorneys. NMFS may also provide technical assistance and information.

IX. Who Pays the Bill?

The Department of Commerce bears the cost of maintaining the regional Councils. Only the voting members of a Council and the administrative staff are paid directly for their services. Others -- for example, non-voting Council members, legal counsel provided by NOAA, and members of SSCs associated with universities -- receive compensation from their regular employers while on Council-related business. Still others, such as some panel members, may work without any salary at all. The federal government, however, reimburses all Council members, SSC and panel members, and staff for actual expenses (such as travel and hotel accommodations) incurred on Council business.

X. State Jurisdiction Overlap

The FCMA allocates fisheries management jurisdiction between the states and the Federal government. As explained in Chapter 1, the FCMA created a 197 mile wide FCZ, beginning three miles from the coastline. The federal management authority in the FCZ is exercised through the regional council system.

The Constitution of the United States gives the federal government the power to regulate interstate commerce. It has been recognized since 1891 that fishing is properly considered an activity of interstate commerce, and as such is subject to federal regulation. In the absence of federal regulation, states were free to regulate marine fisheries.

States have traditionally exercised exclusive fishery management within their boundaries -- in internal waters and in the three mile "territorial sea." In the past, states also exercised some authority beyond three miles, but the states could directly regulate only its own citizens and vessels licensed by the state. They could indirectly regulate fishing beyond three miles by means of landing laws. A typical landing law prohibits possession of a fish under minimum size within the state's boundaries. Such a law effectively prohibits the sale of an undersized fish, whether or not the fish was caught within state boundaries.

During the early 1970's some states (including Alaska and Oregon), claimed extended fishery jurisdiction beyond three
miles. These states enacted laws and adopted regulations purporting to control fishing as far as two-hundred miles from shore.²⁸/ This direct regulation disregarded a fisherman's citizenship and the vessel's licensing, and was a dramatic expansion of state authority. The FCMA was in part a response to this trend, domestically and internationally, and it altered the federal/state relationship. The question is, to what extent has it been changed?

Under the Constitution's Supremacy Clause,²⁹/ state laws cannot be applied when they are in conflict with federal law. Sometimes this conflict is obvious. More often than not, lawyers will argue that the state law is not "preempted" because it does not conflict with the law or the scheme of exclusive federal regulation.³⁰/ This can be termed the "conflict" element of preemption. Another element is the extent of preemption intended by Congress when it passed the FCMA.

Under normal circumstances, the FCMA makes no claim to preempt the power of the states, nor does it give the states any additional powers. The FCMA provides that "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."³¹/ However, a regional Council (or the Secretary of Commerce) may manage a fishery in state waters when both of the following conditions are fulfilled:

1. When an FMP is in place for a fishery that occurs predominately in the FCZ and
2. A state has taken or failed to take an action that will substantially and adversely affect the implementation of the FMP.³²/

In such a situation and under strict procedural safeguards,³³/ the Secretary of Commerce may preempt state management within three miles, but not in "internal" waters.³⁴/ Internal waters include those waters landward of the boundary from which the territorial sea is measured; that is, internal bays, rivers, streams and lakes.³⁵/ This preemption must cease if the reasons for preempting no longer exist.³⁶/

Confusion arises with this provision, section 1856(a), of the FCMA:

"No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State."³⁷/

By enacting this provision, Congress did not intend to totally preempt traditional state jurisdiction. On its face, the FCMA
does prohibit direct or indirect regulation of non-citizens and out-of-state vessels beyond three miles. It clearly anticipates a shared jurisdiction over the FCZ, as long as state regulation only affects citizens and state-registered vessels. This scheme of shared jurisdiction serves to complicate fisheries management. It would seem that "state control only" or "federal control only" would be the easiest scheme to administer. A hybrid raises questions of interpretation -- usually settled in agency adjudications or in court.

One question of interpretation arises when a regional Council has not yet promulgated an FMP. Does a state enjoy the same regulatory authority over the FCZ that it had before the FCMA, or does section 1856(a) limit that authority to citizens and state-registered vessels? States have continued to apply their pre-FCMA regulations to fisheries for which there is no FMP. This continued regulation has not been challenged by the federal government.

In this case, a state has three arguments in its favor. The first is that the "agency preemption" section discussed above only applies when an FMP is in place. This would imply that the preemption procedure is unavailable when there is no FMP. The state would argue that Congress did not provide for such a procedure because it did not intend to preempt unless an FMP was in place.

Secondly, in other areas of administrative law, courts have decided that when an agency is delegated the power to regulate, but has not exercised that power, states are free to continue their otherwise proper regulation.191 The state would argue that federal power has not been exercised, and because there was no "federal law" in place, there is no conflict and no preemption.

This would be an appealing argument were it not for the clear language of section 1856(a). As the federal attorney would argue, "If the Congress intended this section to apply only when an FMP was in place, they would have used those words." Undoubtedly, "[n]o State may directly or indirectly regulate" means what it says, and goes beyond mere delegation of authority that still needs to be exercised.

The third argument is that there is no valid reason to prohibit states from managing a fish stock that is otherwise unmanaged, that such prohibition is contrary to the conservation and management purposes of the FCMA, and that section 1856(a) should be interpreted to apply only when an FMP is in place. In fact, this argument is probably the explanation for the lack of a federal challenge. Any decision to challenge state regulations would suggest jurisdictional turf battles rather than the best interests of fisheries conservation and management.

A second question of interpretation arises when an FMP is in effect, and the FCMA's preemption provision clearly applies.
When this is true, states may regulate only citizens and state-registered vessels in the FCZ. Two legal issues present themselves. First, what constitutes "registration under the laws" of a state? And secondly, what regulation of state-registered vessels will "substantially and adversely affect the implementation of the FMP?"

Neither the FCMA nor its legislative history provide any convincing clue to the meaning of the registration phrase, and no federal court has decided a case involving its meaning. Until it is clarified, it seems that states may define registration as they see fit. The states of Oregon and California expanded their definition of "registered" to include any vessel fishing pursuant to a state fishing license. Alaska and Washington continue to apply broad regulatory powers, suggesting that both states define registration in much the same way.

Assuming that these definitions are valid, regulations that are applied to state-registered vessels won't be upheld if the FMP is adversely affected. Certainly, if the state regulation is less protective of the fishery resource, more protective of coastal economies, or otherwise directly in conflict with the FMP, the language of the FCMA and subsequent practice almost guarantees a finding of preemption. The sense of the FCMA was summarized by Terry Leitzell, then Director of NMFS:

"[The FCMA] leaves management of fishing in territorial waters generally to the individual states, and recognizes State interest in management of the FCZ by providing for state participation on the Regional Councils.... FMPs developed for the FCZ jointly by the several States...address in a unified manner regional concerns...[and] would be of little value were each State, acting independently, to regulate fishing...in the FCZ in a manner contrary to such management plans."

What if a state regulation does not substantially differ from its federal counterpart? This is the situation contemplated by the FCMA, and is normally the case. When regulations agree with each other, no conflict exists and the state regulations remain valid and in effect.

The third possibility is when the state regulation is more protective of the fishery resource -- for example, shorter seasons or lower quotas. Must the regulation fall because it differs from the FMP? Attorneys answer "it depends." If the purpose of the "less protective" federal regulation would be frustrated by the state regulation, then it would probably be preempted. For example, suppose that a federal rule is aimed at exploiting a large supply of small shrimp that might otherwise be
lost to natural predators. A state rule that restricts fishing to larger shrimp would defeat the purpose of the federal rule. On the other hand, suppose that a federal rule permits only a limited harvest of small shrimp in order to protect the growth and reproduction of the fishery. Then, arguably, a state regulation that imposes even lower quotas does not conflict with the purpose of the federal rule. Even though the particulars may differ, the end is better served.

Many legal issues pertaining to federal/state relationships remain unresolved, and will be answered by subsequent practice, clarifying legislation or court interpretation. The law is in a state of flux and is subject to rapid change. The following presents a summary of the law of fishery jurisdiction as it stands in late 1984.

Within the FCZ, federal authority is dominant. State regulation is allowed only when: (1) there is no conflict with any federal statute, FMP or regulation; and (2) the vessels affected are "registered" under the law of the state; and (3) the state can sufficiently justify its regulation of fishing in the FCZ; and (4) the state regulation neither discriminates against non-residents nor places an undue burden on interstate commerce. Within the territorial sea, state jurisdiction and authority is preserved except under the conditions specified in section 1856(b) of the FCMA (the agency preemption section). Accordingly, state regulation will be preempted only when: (1) there is an approved FMP governing the fishery in question; and (2) the fishery is located predominately in the FCZ; and (3) the state regulation substantially and adversely interferes with implementation of the FMP.

XI. **Fishery Management Plans and Federal Consistency Under the Coastal Zone Management Act**

The Coastal Zone Management Act of 1972 (CZMA) presents related jurisdictional problems between the states and the federal government. The problems under the CZMA are conceptually the opposite of those under the preemption doctrine. Section 307(c)(1) of the CZMA requires that every federal agency "conducting or supporting activities directly affecting the coastal zone" shall "to the maximum extent practicable, [be] consistent with approved state [coastal zone] management programs." Some states have asserted that this provision requires regional Councils to act consistently with state fishing laws in drawing up an FMP.

The statutory language raises three important questions regarding the interaction between the FCMA and the CZMA: (1) Do FMPs "directly affect" the coastal zone? (2) What are the legal requirements of "consistent to the maximum extent practicable?" (3) Who determines what is consistent? Each of these questions is discussed in turn.

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53
The National Oceanic and Atmospheric Administration administers both the FCMA and the CZMA. In 1982 NOAA Administrator John Byrne suggested that FMPs "directly affect" the coastal zone when "the fishery resource to be managed by the FMP [also] is found in state waters, the fish caught under the FMP are landed in the state, and there are other effects on the natural resources of the coastal zone."⁴⁹/

Byrne's suggestion that FMPs might directly affect the coastal zone must be evaluated, however, in light of the recent Supreme Court decision in Department of Interior v. California.⁵⁰/ In refusing to extend the CZMA section 307(c)(1) consistency requirements to cover Outer Continental Shelf (OCS) lease sales, the Court considered the legislative history of the CZMA and noted that "every time it faced the issue in debate, Congress deliberately and systematically insisted that no part of the CZMA was to extend beyond the 3-mile territorial limit."⁵¹/ Furthermore, the Court construed the "directly affecting" language narrowly, finding that it was "aimed [solely] at activities conducted by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act."⁵²/ Although the Court's opinion is expressly limited to federal activities associated with an OCS oil and gas lease sale, it nevertheless seems to suggest that under certain circumstances FMPs will not "directly affect" the coastal zone so as to trigger the consistency provisions of section 307(c)(1) of the CZMA.⁵³/

The second major consistency issue is deciding when an FMP is consistent "to the maximum extent practicable" with a state's Coastal Zone Management Program (CZMP).⁵⁴/ The statute does not define this phrase; therefore, it will be defined by federal agencies, state law, and when the issue is litigated, by the courts.

NOAA's CZMA regulations only require consistency with "the enforceable, mandatory policies of the [state coastal] management program."⁵⁵/ Provisions that are in the nature of recommendations or goals only need to be given "adequate consideration." Usually, CZMPs contain general statements about fishery management, if they mention it at all. Only a few CZMPs contain detailed provisions or specific policies. Consequently, it is often a simple matter for NOAA and the regional Councils to give a CZMP "adequate consideration," and to demonstrate that the FMP furthers the state's policies.

Some states, however, utilize a "network" approach to coastal zone management that relies heavily on existing coastal-related regulations (including fishing regulations) and specific policy statements and incorporates both into the CZMP. It is sometimes difficult to determine which laws have been incorporated into the CZMP and consequently which laws should be considered in making a consistency review of an FMP. Moreover, there is little guidance to be found within either the FCMA or
CZMA implementing regulations to aid in a determination of how consistency requirements are to be met.

Implementing regulations do, however, suggest that the consistency requirement was intended to be a significant limitation on agency discretion. One effect has been to compel federal agencies "whenever legally permissible, to consider state [coastal] management programs as supplemental requirements to be adhered to ....".56/

As a result of the decision in Department of Interior v. California, NOAA has undertaken a comprehensive review of consistency standards found in its regulations.57/ In addition, legislation has been introduced in both houses of Congress seeking to amend section 307(c)(1).58/

Although neither the CZMA nor the FCMA is explicit regarding who determines whether federal action is consistent with the state program, such authority has been held to reside in the executive branch of the federal government.59/ That is, the appropriate federal agency will determine whether its action is consistent with a state's CZMP, subject to judicial review.60/

The interaction between FMPs promulgated by the regional Councils under the provisions of the FCMA, and state fishing laws and regulations incorporated in state coastal zone management programs under the provisions of the CZMA has been a source of debate for several years. Important questions have arisen concerning the application of consistency requirements in section 307(c)(1) of the CZMA to FMPs. The full implications of the consistency requirements remain to be worked out. The regional Councils can facilitate a clearer understanding of the requirements by developing an adequate record of their consistency determinations and by making logical decisions supported by that record. In order for a consistency determination to survive judicial review, Councils should clearly state the statutory basis for determining that an FMP either is, or is not, consistent with state law and regulations. In addition, a Council must be specific in explaining its decisions on the relationship between federal and state law.

Even so, careful attention to proper procedure by the regional Councils may not be enough. Final decisions on pending cases, a clearer articulation of regulations by NOAA, and perhaps even a statutory amendment may be necessary to achieve a workable application of the overlapping provisions of the FCMA and CZMA.