TOWARD MORE COOPERATIVE FISHERIES MANAGEMENT: UPDATING STATE AND FEDERAL JURISDICTIONAL ISSUES

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I. INTRODUCTION

In the regulation of commercial fisheries, jurisdictional boundaries have traditionally been the divider between state coastal and territorial management efforts and federal waters management efforts. However, those boundaries are becoming increasingly artificial and forced as biological research continues to blur distinctions between coastal, territorial, and federal water fisheries and ecosystems. As a

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result, the politically created jurisdictional boundaries confuse, and often confound, the biology-based management of the resources.

There is a trend in public policy and the marine sciences toward examining policy problems in terms of their entire organic setting by seeking out relationships between entities in order to formulate a more complete picture of the issue. In addition, there is evidence, for example, the collapse of the Northeast Cod fishery in 1993-94, that the conservation measures of the Magnuson Fisheries Conservation and Management Act (FCMA) have routinely been overwhelmed by more immediate management and utilization concerns. However, the development of federal/state cooperative management of inter-jurisdictional fisheries, i.e., fisheries that occur in both state and federal waters as well as the coastal habitat upon which they depend, has been slow in coming. Federal fishing management and state fishery management will have to coordinate management efforts to effectively address these issues before more fisheries are decimated. There are precedents for cooperative fisheries management in agreements between states whose jurisdictions contain migrating stocks. State fishery managers should be searching for clarification of the state's place in federal fishery management, and federal fishery managers will need to seek a place in state fishery management. With the reauthorization of FCMA once again before Congress in 1996, now is the time to seek clarification of the best ways to divide management authority to benefit the resource.

This Article discusses: (1) the present federal regulatory scheme and its provisions for state sovereignty; (2) judicial interpretations and constitutional considerations of federal and state jurisdictional fishery conflicts and whether there is authority, statutory or judicial, for the federal government to assume regulatory control over state fisheries if a state regulation or omission in some way interferes with federal fishery regulatory intents; and (3) the development of more cooperative management schemes, based in existing federal legislation, between the States and the federal government to address the full biological and economic realities of managing a mobile natural resource.

The congressional intent expressed in the FCMA is for the conservation of United States fisheries to occur simultaneously with controlled utilization of those same fisheries resources. However, experience shows that this intent has not been followed, as evidenced by the fact that in 1991 managed fish stocks were more seriously depleted

than they were in 1976, when the FCMA was enacted. Of the 236 fish species recently reviewed by the National Marine Fisheries Service of the United States Department of Commerce National Oceanic and Atmospheric Administration, 67 are currently at biological and/or economic risk.[1] The question arises: What are the causes of these serious stock depletions? Is the decimation of our domestic fisheries resource due only to increased fishing effort by a growing domestic fleet, or is it the result of a combination of factors such as increased fishing efforts, natural fishery stock cycles, global weather changes, increased ocean pollution, and the destruction of fishery nursery stock and habitat? Developing knowledge of the resources shows that fish stocks are affected by complex environmental pressure combinations. Increasing environmental pressures on fishery habitats appear to drastically decrease fish populations even before they become eligible, as determined by size and weight, for state or federal commercial fishery management. "The maintenance of sufficient fish stocks depends directly on the integrity of these ecosystems."[2] A great deal of fishery habitat is contained in state waters, while much of the resulting commercial catch is captured in federal waters. The artificial separation of the fishery by jurisdictional boundaries in order to facilitate management decisions does little to further modern fishery management goals to conserve and manage the resource. Clarification of jurisdictions in fishery management will help to create more cooperative and effective fisheries management so that 20 years from 1996, the stocks managed for commercial utilization will be able to provide for the needs of both the fishing industry and the consumer. As the world population increases, fish and other aquatic matter will become an increasingly important food source. We, as common holders of fisheries, an important world resource, can no longer approach fisheries management in a piecemeal fashion.

The first section of this Article explains congressional intent, the purposes of modern commercial fisheries management, and their relation to state fisheries management. The second section explains how this relationship has been interpreted by the courts. The third and final section describes some promising legislation that exists to promote

1. COMMITTEE ON FISHERIES, OCEAN STUDIES BOARD, COMMISSION ON GEOSCIENCES, ENVIRONMENT, AND RESOURCES, NATIONAL RESEARCH COUNCIL, IMPROVING THE MANAGEMENT OF U.S. MARINE FISHERIES 1 (1994).

2. *Id.* at 27.

cooperative fisheries management and proposes some new approaches to increase the usefulness of cooperative state/federal fisheries management.

II. BACKGROUND ON THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT AND ITS PROVISIONS FOR STATE SOVEREIGNTY

Federal fishery regulations are promulgated under the Magnuson Fishery Conservation and Management Act (herein referred to as the Act or the FCMA),[3] and apply to fisheries in federal waters. The Act established the Fishery Conservation Zone (FCZ), out to 200 miles from shore, and established exclusive management authority for the United States over all living resources within this zone.[4] In 1983, the United States extended this jurisdiction to all living and nonliving resources by Executive Order and changed the name of the zone to the Exclusive Economic Zone (EEZ).[5]

The FCMA was enacted in 1976 to provide for the "conservation and management" of commercially important fishery resources located off the coast of the United States.[6] The Act was originally thought of as a new beginning in cooperative management "to enable the States, the fishing industry, consumer, and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such [fishery management] plans."[7] The Act was also intended to create federal fisheries management while taking "into account the social and economic needs of the States."[8] It is clear that the drafters of the FCMA realized they were regulating not just fish or a fishery, but also people, communities, and families whose lifestyle depends upon the continued existence of the resource.

"Conservation and management" of fisheries resources, as used in the FCMA, is a very broad term and, therefore, open to many interpretations. It

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3. 16 U.S.C. §§ 1801-1882 (1988 & Supp. 1945).
4. 16 U.S.C. § 1811 (1988).
5. 48 Fed. Reg. 10,605 (1983). This action was codified in the FCMA which explains that the United States claims, and will exercise sovereign rights and exclusive fishery management authority over all fish within the exclusive economic zone. 16 U.S.C. § 1811 (1985).
6. 16 U.S.C. § 1801 (1985).
7. 16 U.S.C. § 1801(b)(5) (Supp. 1995).
8. *Id.*

> refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, and maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that—(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis; (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and (iii) there will be a multiplicity of options available with respect to future uses of these resources.[9]

This broad characterization of the phrase makes it susceptible to a variety of powerful interpretations in many of the current fisheries controversies where jurisdictional boundaries, political power and autonomy, and revenue are at stake. Therefore, the current use of the phrase is left to the interpretation of each stakeholder in the resource management for his/her own purposes.

Congress clearly acknowledged that the original passage of the FCMA was in response to a crisis in fisheries due to "increased fishing pressure and . . . the inadequacy of fishery conservation and management practices and controls."[10] However, in 1976 all the blame for stock depletion was put on foreign fishing fleets which were generally larger and more modern than the U.S. fishing fleets and, therefore, were having a heavier impact on domestic fisheries resources than the domestic fleets.[11] These foreign fleets were able to fish close to U.S. shores because at the time the nation's sovereign boundaries extended only twelve miles out to sea, in accordance with international convention at that time. With the foreign boogie-man to blame, the congressional hearings on the FCMA are filled with nationalistic rhetoric and great concern for the United States' sovereign rights to fish, as well as concern for other natural resources, in the newly claimed Fisheries Conservation Zone (FCZ) extending 200 miles out to sea.[12] As a result of the enactment of the FCMA, foreign fishing in near U.S. waters decreased

9. 16 U.S.C. § 1802(2) (1988).
10. 16 U.S.C. § 1801(a)(2) (1988).
11. 16 U.S.C. § 1801 (1988).
12. *Hearing Report on the Authorization of the Magnuson Fisheries Conservation and Management Act*, 97th Cong., 2d Sess. (1975).

drastically.[13] However, because the FCMA debates concentrated on the threat of foreign fishing interests, there was little regard at that time for potential inter-jurisdictional fishery management conflicts between the states, or between the states and the new federal fishery management regime being created. Therefore, the development of federal/state cooperative management of interjurisdictional fisheries has been slow in coming.

While it is true that as a result of the FCMA the foreign user of U.S. fisheries resources is no longer a threat, now commercial fishing stock depletions are a serious domestic problem. At the time of the passage of the FMCA, Congress stated two findings that are especially relevant to the issues facing fisheries management today: First, that fisheries resources must be placed under management before they become overfished and, second, that a national fisheries management program is necessary. It is that national program, meant to assure the renewability of our fishery resources, that presently needs clarification and redirection in the manner discussed below.

The regulatory scheme mandated by Congress under the FCMA combines the efforts and experience of all groups to be affected by fisheries management. It was thought that including members of the fisheries industries, scientists, and state and federal policy makers in the formulation process would ensure "that those who knew most about the fisheries [would be] involved in designing sound fishery management practices."[14] The FCMA "establish[ed] Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such [fishery management] plans"[15] created with the participation of "the States, the fishing industry, consumer and environmental organizations, and other interested persons."[16] From its inception, then, the FCMA intended for there to be State input into federal fishery management plans (FMPs). In addition, there are required public hearings to allow public input into potential fishery management plans.[17]

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13. *Oversight Report on the Magnuson Fishery Conservation and Management Act of 1976*, 97th Cong., 1st Sess. (1974).

14. 16 U.S.C. § 1852(b)(1) (1988).

15. 16 U.S.C.A. § 1801(b)(5) (Supp. 1995).

16. *Id.*

17. 16 U.S.C. § 1852(j) (1988).

The eight Regional Fishery Management Councils are responsible for preparing, monitoring, and revising management plans for all fisheries within the EEZ.[18] All FMPs "shall contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are . . . necessary and appropriate for the conservation and management of the fishery"[19] and "consistent with the national standards, the other provisions of this chapter . . . and any other applicable law."[20] The national standards referred to are very important guidelines created by Congress to guide the Councils in their fisheries decision-making processes to assure that FMPs are not bereft of direct congressional intent. There are seven national standards for FMPs:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States' fishing industry; (2) Conservation and management measures shall be based upon the best scientific information available; (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination; (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges; (5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose; (6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches; (7) Conservation and management measures

18. 16 U.S.C. § 1852(a) (1988).
19. 16 U.S.C.A. § 1853 (a)(1)(C) (Supp. 1995).
20. *Id.*

> shall, where practicable, minimize costs and avoid unnecessary duplication.[21]

Responsibility for reviewing and approving fishery management plans prepared by the Regional Councils to assure their compliance with the national standards and other relevant laws falls to the Secretary of Commerce.[22] At this point of review, the Secretary of Commerce is authorized to accept and implement, partially accept, or reject fishery management plans based upon their compliance with the national standards as stated above.[23] The Secretary, through the National Oceanic and Atmospheric Administration (NOAA), is also responsible for the promulgation of the federal regulations necessary to implement the FMPs.[24] All regulations promulgated must not be found to be arbitrary and capricious and must follow the guidelines established by the National Standards in the FCMA, as noted *supra*.[25]

In addition to working with Council-derived FMPs and amendments to those FMPs, the Secretary of Commerce has limited authority to take "emergency actions."[26] The Secretary may promulgate emergency regulations to implement a fishery management plan or to amend an FMP if it is found that a fishery management "emergency" exists.[27] It is unclear exactly what Congress intended "emergency" to mean in these situations. However, an emergency regulation may address the success or failure of the economic viability or biology of a fishery resource. For instance, the Gulf of Mexico Fishery Management Council implemented an emergency rule which reopened the red snapper fishery for additional catch above the optimum yield when the quota had been fulfilled in only fifty-three days. "This rule was implemented to alleviate economic and social upheavals that occurred as a result of the 1992 red snapper commercial quota being rapidly filled."[28] Therefore, emergency action can supersede biology-based decisions on the basis of pure economics. The emergency regulations may remain in effect up to

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21. 16 U.S.C. § 1851(a)(1)-(7) (1988).
22. 16 U.S.C. § 1853(c) (1988).
23. 16 U.S.C. § 1854(a)(1)(A) (Supp. 1995).
24. 16 U.S.C. § 1853 (1988).
25. 16 U.S.C. §§ 1851(b), 1854 (1988).
26. 16 U.S.C. § 1855(c) (Supp. 1995).
27. 16 U.S.C. §§ 1855(c)(1), 1855(c)(2) (Supp. 1995).
28. GULF OF MEXICO FISHERY MANAGEMENT COUNCIL. AN AMENDMENT 6 TO THE GULF OF MEXICO REEF FISH FISHERY MANAGEMENT PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO 3 (1993).

90 days, with the approval of the affected fishery management council, and may also be expanded, again with the council's approval.[29] The emergency power may be used where the regulations created by a Council are found to be arbitrary and capricious at an administrative hearing.

Each state regulates its own territorial commercial fisheries (and tends to like this arrangement). These regulations are done in a variety of ways, by a variety of state entities. Any networking between states on fishery management issues must be carefully done to match the responsible agencies and parties with one another. State fishery regulations are promulgated by each state and apply to fisheries that occur in the state's internal and coastal waters and territorial sea, out to the boundary between the territorial sea and federal waters. The boundary is set at three miles from the low tide line for all states except Florida and Texas where it is three leagues, or nine miles, from the low tide line.[30] Often the laws and regulations promulgated by the states mimic FCMA "conservation and manage" language, although there is no requirement that they do so.[31] From the territorial sea boundary out to the 200-mile mark, the federal government exercises jurisdiction over federal fisheries. In this manner, fishery regulations are divided and defined by the jurisdiction they cover, not by the fishery they purport to manage.

In some limited circumstances, the FCMA allows the Secretary of Commerce to assume regulatory control over a fishery within state waters, though never in a state's internal waters.[32] The language of the Act begins by maintaining the states' jurisdictional autonomy: "Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of

29. 16 U.S.C. § 1855(e)(3)(B) (1988).

30. *See* Submerged Lands Act, ch. 65, Title II, § 3, 67 Stat. 30 (1953) codified at 43 U.S.C. § 1301-1315 (1988). This Act solidified a state's sovereign rights to these resources in the coastal and territorial sea area. *Id.* § 1311 (a).

31. For instance, in North Carolina the commercial fisheries are managed by the North Carolina Department of Environment, Health and Natural Resources, Division of Marine Fisheries. The regulations are found in Title 15A of the North Carolina Administrative Code. Each fishery has its own set of regulations and standards designed "to carry out, in part, the duty of the Division of Marine Fisheries to maintain, preserve, protect, and develop all the marine and estuarine resources of the State. N.C. ADMIN. CODE tit. 15A, r. 3H.0002 (Nov. 1989)."

32. 16 U.S.C. § 1856(b) (Supp. 1995).

any state within its boundaries."[33] However, section (b) outlines the exception:

> (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that—(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominantly within the exclusive economic zone and beyond such zone; and (B) any State has taken any action, or omitted to take any action, the results of which will *substantially and adversely* affect the carrying out of such fishery management plan; the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan . . . (4) For purposes of this subsection—(B) the phrase "internal waters of a State" means all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.[34]

It appears from the language above that if there were state regulations "substantially interfering" with the "conservation and management" of federally regulated fishery under the FCMA, there would be grounds for federal preemption of whatever that state's action, or omission, might be. Note that the type of state action or omission is not specified. Rather, the FCMA states only that if such a finding of "substantial interference" is determined, then the Secretary has the authority to regulate the affected fishery within the state's territorial waters in a manner consistent with FMCA National Standard-based fishery management plans.

The National Oceanic and Atmospheric Administration has created guidelines for a further understanding of this section of the FCMA contained in the Code of Federal Regulations (CFR). These guidelines clarify the meaning of key terms used in section 1856 making it possible to attempt to ascertain when section 1856 would be applicable to a particular state/federal fishery management dispute.

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33. 16 U.S.C. § 1856(a)(1) (1988).
34. 16 U.S.C. §§ 1856(b), 1856 (c)(4)(B) (1988 & Supp. 1995) (emphasis added).

> *Predominately* means, with respect to fishing in a fishery, that more fishing on a stock or stocks of fish covered by the fishery management plan occurs, or would occur in the absence of regulations, within or beyond the EEZ than occurs in the aggregate within the boundaries of all States off the coasts of which the fishery is conducted.
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> *State action or omission* that affects a fishery covered by a fishery management plan includes a State's statutes, conservation and management regulations, judicial decision, policies, and enforcement practices, or the lack thereof.
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> *Substantially (affects)* means, with respect to whether a State's action or omission will substantially affect the carrying out of a fishery management plan (FMP) for a fishery, that those effects are important or material, or considerable in degree. The effects of a State's action or omission for purposes of this definition include effects upon (1) The achievement of the FMP's goals or objectives for the fishery; (2) The achievement of optimum yield from the fishery on a continuing basis; (3) The attainment of the national standards for fishery conservation and management [as noted above] . . . and compliance with other applicable law; or (4) The enforcement of regulations implementing the FMP.[35]

In addition, the regulations state that factual findings for federal preemption in a situation such as is described in section 1856 can be determined by the substantiality of relevant effects on the EEZ fishery as evidenced by the "magnitude of such actual or potential effects" which are determined to be relevant.[36] Relevancy can be determined by examining

> various factors, including but not limited to, the proportion of the fishery (stock or stocks of fish and fishing for such stocks) that is subject to the effects of a particular State's action or omission, the characteristics and status (including migratory pattern and biological condition) of the stock or stocks of fish in the fishery, and

35. 50 C.F.R. § 619.3 (1994).
36. 50 C.F.R. § 619.4(c) (1994).

> the similarity or dissimilarity between the goals, objectives, or policies of the State's action or omission and the management goals or objectives specified in the FMP for the fishery or between the State and federal conservation and management measures of the fishery.[37]

The language of section 1856 indicates a congressional intent to fully occupy the field of federal fisheries regulation. In addition, it shows a determination to preempt conflicting state regulations in federally regulated fisheries. In relation to state-regulated fisheries in state waters, this language indicates that Congress intended the FCMA to interfere only in those state actions that in some manner affected a federal fishery. However, the level of interference necessary to warrant a preemptive action, even with NOAA regulatory clarifications, is unclear. The courts have attempted to clarify the application of section 1856 by interpreting the FCMA in light of particular facts.

III. JUDICIAL INTERPRETATIONS OF FCMA SECTION 1856 AND CONSTITUTIONAL CONSIDERATIONS OF FEDERAL AND STATE JURISDICTIONAL FISHERY CONFLICTS

Is there authority, statutory or judicial, for the federal government to assume regulatory control over state fisheries if a state regulation or omission in some way interferes with federal fishery regulatory intents? Section 1856 appears to indicate that there is. The FCMA specifically states that "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."[38] In *Anderson Seafoods, Inc. v. Graham*[39] the court stated, "Congress's reservation of state authority to regulate fishing [where it does not interfere with federal fisheries activities] indicates it did not intend complete preemption [by the FCMA]."[40]

There are some clearly delineated separations of federal/state fisheries regulatory powers. Except for some specific areas described in the Act, "a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that

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37. 50 C.F.R. § 619.4(2)(c) (1994).
38. 16 U.S.C. § 1856 (a)(1) (1988).
39. 529 F. Supp. 512 (1982).
40. *Id.* at 514; *see* People v. Weeren, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980).

State."[41] Although states can still regulate their state-registered vessels in federal waters, that is merely an extension of jurisdiction over the person and the vessel as a person. The language in the FCMA, which is a codification of the 1941 *Skiriotes v. Florida*[42] decision, implies that there is to be no jurisdictional overlap between actual state and federal *fishery* regulatory actions. In fact, in the 20 years since the Magnuson Act was passed, a biological and economic reality has developed in which marine fishery regulatory actions are "a shared jurisdictional effort. The states have an important role to play and have had an important role the play in management of fishery resources for many, many years; they were around before the Federal Government got involved in fisheries management."[43] Through section I of the FCMA, Congress acknowledged this need for cooperative management, and the Act was designed to help develop it.[44]

Section 1856 of the FCMA provides a built-in preemption of a state's fishery regulatory scheme, and perhaps any other regulatory scheme, that substantially interferes with a federally regulated EEZ commercial fishery. An explanation of the preservation of this authority was attempted in congressional hearings concerning the authorization of the Act:

> Under United States law, the biological resources within the territorial sea of the United States (i.e., out to 3 miles) are the management responsibility of the adjacent several States of the Union. Whatever regulation of both fishermen and fish harvest, what occurs in this area is as

41. 16 U.S.C. § 1856 (a)(3) (1988).

42. 313 U.S. 69 (1941). *See also* State v. Hayes, 603 A.2d 869 (Me. 1992) (citing State v. Lauriat, 561 A.2d 496 (Me. 1989) (holding that states can regulate fishing vessels registered in their states outside territorial waters as reserved in the letter of the FCMA)).

43. *Hearing on the Reauthorization of the Magnuson Fishery Conservation and Management Act*, 103rd Cong., 2d Sess., 28 (1995) (quoting Larry Simpson, Director, Gulf States Marine Fisheries Committee).

44. *See* 16 U.S.C. § 1801 (b)(5) (Supp. 1995) in which Congress established Regional Fishery Management Councils to prepare fishery management plans "under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States." *See also* 16 U.S.C. § 1854(f) (Supp. 1995).

> deemed necessary and appropriate by each concerned State.[45]

However, this statement does little to clarify *why* a state was allowed to maintain autonomy over state fisheries resources while other natural resources located wholly within a state's boundaries, such as coal, were taken over by federal regulation. The basis for this preservation of powers may be found in the Submerged Lands Act which clearly codified jurisdiction over natural resources in the territorial sea as under the autonomy of the states.[46] However, in the interests of the country's health and economic good, the FCMA could have claimed the natural resource of the fisheries for all citizens, coastal and noncoastal, and therefore specifically preempted state fisheries regulations. As with many natural resources in the United States, the pursuit of fisheries stock contributes economic and nutritional benefits to the Nation as a whole.[47] The issue of why federal assumption of states' fisheries was not initially done may be a simple federalism problem. Or perhaps the answer lies in the fact that when the passage of the FCMA was being debated, there was more concern for the United States' jurisdiction over fisheries at risk of depredation by foreign fleets, and less interest in American fleets. Therefore, the preservation of the states' sovereignty may have been merely a conveniently overlooked aspect of the Act. Or perhaps the answer is more complex and lies in our national maritime history, which is in itself a fascinating subject, but would be addressed in a paper of its own. Suffice it to say that there is now an artificial jurisdictional boundary that divides fishery stocks and makes regulation based upon the biology of those fisheries difficult if not impossible.

Although the idea of this jurisdictionally based preemptive strike was born in the FCMA, the application of preemption clauses is accomplished in the courts. The courts' interpretation of that jurisdictional boundary appears to be entirely dependent upon the letter of the FCMA. "Even judges and commentators ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary when the centrifugal, isolating or hostile forces of localism are manifested in state

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45. H.R. REP. NO. 445, 94th Cong., 2d Sess., at 29 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 602.

46. 43 U.S.C. § 1311(a) (1988).

47. 16 U.S.C. § 1801 (1988).

legislation."[48] In light of the recognized importance of the resource to the country as a whole, it is remarkable that the federal regulatory scheme created to manage and conserve the resource maintains states' autonomy over that same resource in state waters at all.

In *State v. F/V Baranof*,[49] the court found that the FCMA did not preempt a state regulation of king crab in the FCZ because no federally created FMPs existed for king crab at the time the state regulation was promulgated.[50] Since the court found that the federal FMP incorporated all the state's regulations, preemption would actually frustrate the cooperative purposes of the FCMA.[51] Yet, how does a court determine supremacy when a state tries to regulate in an area previously occupied by a federally promulgated FMP? In *Southeastern Fisheries Ass'n, Inc. v. Chiles*,[52] the State of Florida attempted to apply Florida landing regulations to the harvest of Spanish mackerel that occurred outside Florida territorial waters. Although the court remanded the case for additional factual findings, it gives a very clear synopsis of how preemption works in fisheries cases brought under the FCMA.[53]

> There are several ways in which Congress can preempt state regulation in a given area. The question of preemption requires an examination of congressional intent, most easily ascertained when Congress explicitly defines the extent to which federal law preempts state law. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S. Ct. 1145, 1150, 99 L.Ed.2d 316 (1988). Absent explicit statutory language, however, courts may infer congressional intent to occupy a given field to the exclusion of state law "where the pervasiveness of the

48. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-1, at 401 (2d ed. 1988) (quoting Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 220 (1957).

49. 677 P.2d 1245 (Alaska 1984), *cert. denied*, 469 U.S. 823 (1984).

50. *Id.* at 1251.

51. *Id.* at 1250.

52. 979 F.2d 1504 (11th Cir. 1992).

53. *Id.* at 1509. Landing laws are those state regulations that govern the "landing," or unloading and, usually, sale and/or processing, of catch. There has been some controversy as to the validity of these state laws when they apply to federal waters fisheries. However, it is generally now accepted that preemption will occur only where the state landing law is determined to be in conflict with a federal regulation. *See* Livings v. Davis, 465 So. 2d 507 (Fla. 1985) (upholding Florida landing law because it did not specifically conflict with a federal fishery regulation and therefore there were no grounds for preemption under the FCMA).

> federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.'" *Id.* at 299-300, 108 S. Ct. at 1150 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). If such intent cannot be implied because the congressional scheme has not entirely displaced state regulation in a particular field, state law is nevertheless preempted when it actually conflicts with federal law. *Id.* 485 U.S. at 300, 108 S. Ct. at 1150. A conflict will be found when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L.Ed. 2d 248 (1963), or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L.Ed.2d 443 (1984).[54]

The court went on to note that it was clear from the language in the FCMA that the federal government intended to fully "occupy the field of fishery management within the EEZ."[55] From this argument the result would appear to be that the Florida landing law could not be applied to Spanish mackerel fished in the EEZ if Spanish mackerel were managed under a federal FMP. Thus, difficulties in determining whether a particular Spanish mackerel was caught in federal waters or in state waters become administrative enforcement issues and are no longer jurisdictional conflict issues.

Clearly the FCMA intended to leave some state fishery regulatory autonomy intact.[56] In *Davrod Corp. v. Coates*,[57] the court held that the FCMA, as amended in 1983, did specifically exempt certain areas around

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54. 979 F.2d at 1509.

55. *Id.*; *see also* 16 U.S.C. §§ 1801(b)(4)-(5), (c)(3) (1988 & Supp. 1995); 16 U.S.C. § 1811 (a) (Supp. 1995).

56. *See* State v. Sterling, 448 A.2d 785, 787 (R.I. 1982) (holding that a state can enforce her fishery regulations extraterritorially in the interest of preserving a nearby fishery if that "regulation [is] consistent with applicable federal laws"). *See also* United States v. Alaska, 422 U.S. 184, 198-99 (1975).

57. 971 F.2d 778 (1st Cir. 1992).

Nantucket Sound from federal regulation and therefore, no federal preemption of state regulations applied in that area.[58] In this case, the court was able to resolve the jurisdictional conflict by a very careful, strict reading of the FCMA as written. This case, however, brings up the interesting issue of other approaches to supremacy in fisheries regulations—the Commerce Clause. What if there were a state commercial fishery whose regulatory scheme, or lack of one, directly affected the biological, and therefore economic, successes of a federal commercial fishery? Some would say this was a user conflict. However, that is not the case due to jurisdictional questions raised by the separation of territorial waters and federal waters for fisheries management.

Case Study One: Supremacy of Federal Fishing Regulations Through the Commerce Clause—It may get the job done, but it isn't very cooperative.

Preemption is a constitutional power possessed by Congress to regulate, partially or wholly, a state's actions or the actions of the citizens within that state. Preemption involves direct congressional regulation of a states' political actions, powers and, in some instances, its citizens. These forms of congressional regulatory action were feared by the anti-federalists. Preemption can consist of Congress taking over an area of regulation entirely, for example, setting a national speed limit. Or Congress may simply set national standards within a regulatory area and leave it to the states to come up with compliant regulations, which often occurs in the environmental field.

Davrod has an excellent description of how a preemption argument under the Commerce Clause would be determined in a fishery issue. The court begins by noting that "[w]here Congress has not acted directly, nothing in the Commerce Clause explicitly prohibits the states from regulating interstate commerce."[59] Nevertheless, the courts have developed the dormant commerce clause doctrine, one aspect of which holds that state statutes found to be an incidental burden on interstate trade are still in violation of the Commerce Clause.[60] One test for this is the determination of whether "the burdens . . . on interstate trade are clearly excessive in relation to the putative local benefits."[61] In *Davrod*

58. *Id.* at 785-87.
59. *Id.* at 787.
60. Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970).
61. Maine v. Taylor, 477 U.S. 131, 138 (1986).

the court found that a 90-foot limit on processing boat size was not "clearly excessive in relation to the putative local benefits" and therefore the argument that the limit created a commerce clause supremacy situation failed.[62] However, the argument was raised, and may be raised again in other attempts to regulate fishery-related issues inside the territorial sea from the point of view of protecting and encouraging an EEZ fishery.

For instance, suppose there were a commercial EEZ fishery, such as pink shrimp dependent upon state territorial waters for a nursery area. Then, what if there were a state commercial fishery whose regulatory scheme, or lack of one, directly affected the biological, and therefore economic, successes of that federal commercial fishery? Some would say this was simply a user conflict to be decided by the Council, although the Council does not have jurisdiction over state fisheries. So, how could this be resolved? The jurisdictional questions raised by the separation of territorial waters jurisdiction and federal waters jurisdiction in fisheries management make this a difficult situation. Suppose the federal regulatory action, or reaction, was a preemption of that state's fishery. This would eliminate the conflict between the state fishery and the federal fishery and perhaps also eliminate the danger that the state fishery would destroy the biological health and economic success of the EEZ fishery. The fact that the Act states that a state fishery can be taken over by the federal government regulators if the state regulations—or lack thereof—interfere with a predominantly federally fished fishery could be grounds for the federal government to take over state fisheries, or impose federal habitat regulations on fisheries within the territorial seas. If states do not start taking care of their fisheries habitats, then the federal government will have to take over their fisheries in order to protect the federal fisheries. The preemption of state power by federal actions is justified by the courts by pointing to other constitutional congressional powers such as those under the Commerce Clause. While federal courts have upheld many preemptive strikes by the federal government, they must always be careful not to address political power struggles between the states and the federal government, but rather only regulatory ones. The purpose of federal preemption would be to eliminate state practices which threatened the health and success of the EEZ fishery, for instance, by removing too many juveniles from the stock before they arrived in EEZ waters. This is

62. Davrod Corp. v. Coates, 971 F.2d 778, 790 (1st Cir. 1982).

actually an old argument between commercial shrimpers in territorial waters and commercial shrimpers in the EEZ in the Gulf of Mexico. Of course, to create a case such as the one described above, the fields of biology and economics would have to be referred to in order to show (1) an actual relation between the fisheries and/or the EEZ fisheries and state waters habitat and (2) a clearly excessive effect on interstate commerce in relation to the local fisheries benefits.[63] The basis of the argument would be that management of the EEZ fishery for future use is inextricably tied to the present preservation of the state's territorial sea and coastal habitat, which is at the mercy of the state's fishery. In the next case study, however, the court preempts the state regulation in order to support a management decision favoring current fisheries use over future use fisheries preservation.

Case Study Two: *Southeastern Fisheries Association, Inc. v. Mosbacher.*

Regulations over the red drum fishery were the subject of dispute in *Southeastern Fisheries Ass'n, Inc. v. Mosbacher.*[64] "Paul Prudhomme, the famous Louisiana Cajun chef, catapulted his 'blackened redfish' recipe into a nationwide culinary craze in 1983 .... The red drum (redfish) problem [of the conservation and allocation of a valuable and threatened species] reached beyond pure management science to encompass interagency jurisdictional conflict, overlapping government regulation, and self interested politics."[65] Before the 1983 food craze, red drum had largely been a recreational fish caught in Louisiana internal waters.[66] However, by 1984, "commercial fishing effort quickly shifted from gill nets, targeting inshore juvenile stock, toward purse seine technology in the offshore EEZ that targeted the larger, five to twenty-five-year-old breeder stock."[67] Although there was a known, delicate, biological relationship between the red drum juvenile and breeder stocks, the Gulf of Mexico Fisheries Management Council did not create an FMP for the fishery, despite a request to that effect from the Secretary of

63. The author makes no claim as to whether a case such as the one described would be successful or even useful in terms of the pink shrimp industry.

64. 773 F. Supp. 435 (D.C. Cir. 1991).

65. Trellis Green, *The Use of Economics in Federal and State Fishery Allocation Decisions: Case of the Gulf Red Drum*, *in* AMERICAN FISH AND WILDLIFE POLICY: THE HUMAN DIMENSION 136 (William R. Mangun ed., 1992).

66. *Id.* at 137.

67. *Id.*

Commerce.[68] "Believing that the Gulf Council had abdicated its regional conservation obligation in 1986, the Secretary of Commerce exercised federal authority under section 304(c) [sic] of the Magnuson Act by imposing an emergency closure of the Gulf EEZ red drum fishery (U.S. Department of Commerce 1986)."[69] In order to facilitate the Gulf Council's development of a permanent FMP for the red drum fishery, the State-Federal Cooperative Program for Red Drum Research in the Gulf of Mexico (SFCPRDR) was established as a research arm of the universities and the States to aid in the analysis of the relevant issues.[70] The Red Drum Scientific Assessment Group (RDSAG) was a committee charged by the Gulf Council to make FMP recommendations from the collected data sets. Four recommendations were made and all four were formalized into part of the red drum FMP.[71] The second recommendation is most important for this paper:

> state and federal jurisdictions were found to be intertwined for conservation policy. Biologically, this is because 30 percent of juvenile stocks must escape from state waters to join breeder stocks in the EEZ in order to attain a 20 percent SSR [spawning stock biomass per recruit]. This stock adjustment would involve indeterminate time lags.[72]

By 1988, when the recommendations had been adopted by the Gulf Council in an FMP, "most Gulf states had implemented or were considering cooperative conservation measures."[73]

In 1986, an association of commercial fishermen, canning operators, processors, as well as other interested parties filed suit against the Secretary of Commerce, Administrator of the National Oceanic and Atmospheric Administration (NOAA), the Assistant Administrator for Fisheries of NOAA, and the Director of the National Marine Fisheries Service (NMFS), in their official capacities.[74] The complaint had three counts, of which two are relevant here: "the defendants failure to supersede state laws (1) in the adoption of the implementing regulations

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68. *Id.*
69. *Id.* at 139.
70. *Id.*
71. Green, *supra* note 66, at 139-40.
72. *Id.* at 139.
73. *Id.* at 140.
74. Southeastern Fisheries Ass'n, Inc. v. Mosbacher, 773 F. Supp. at 439.

for Amendment One to the [red drum] FMP; . . . and (3) [in] the closure of the directed commercial red drum fishery [in the EEZ]."[75] The suppression issue relates to the fact that the FMP did not address the undirected red drum fishery, resulting in allowable undirected or incidental red-drum catch that could not be landed in the four (of five) Gulf States that had prohibited or restricted the landing or possession or sale of red drum. In effect, the state laws were in direct conflict with the FMP.[76] The language the court uses in addressing this subject and the subject of the red drum fishery closure is worth reading in its entirety for its relevance to the development of cooperative fisheries management in the United States.

> The issue of defendant's failure to supersede state law in promulgating the implementing regulations goes to the Agency's interpretation of the MFCA [same as FCMA], a question of law .... Giving proper deference to the Agency, the Court must determine "whether the agency's [interpretation] is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). The MFCA does not expressly preempt state regulation of the fishery. However, preemption will be implied if there is an actual conflict between state and federal law, such that dual compliance is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18, 10 L.Ed.2d. 248 (1963), or would thwart the objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L.Ed.2d 443 (1984). It is clear that federal regulation, no less than federal statutes, may have a preemptive effect. *Fidelity Federal Saving & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Indeed, the Agency's own guidelines interpreting National Standard 3 of the MFCA provide that "[f]ederal regulations supersede any conflicting State regulation of EEZ fishing." 50 C.F.R. § 602, Appendix A, Standard 3 (1990).

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75. *Id.*
76. *Id.* at 440.

> The Court finds that defendant's failure to supersede state law with respect to the indirect red drum fishery was arbitrary and an abuse of Agency discretion. Under the MFCA, the federal government has exclusive management authority over fisheries in the EEZ. 16 U.S.C.A. § 1811(a). Consistent with this tenet, "a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that state." 16 U.S.C.A. § 1856(a)(3).
>
> Defendants' red drum regulations provide for a 100,000-pound quota for the indirect red drum fishery. However, they also provide that commercial fishermen landing red drum from an indirect fishery must comply with state landing and possession laws. Because at least four of the five Gulf states prohibit or restrict the landing, possession, or sale of redfish, these state laws conflict with the federally imposed quota. Defendants, in effect, have told commercial fishermen that they may catch the fish, but that they may not land them. This makes no sense, and creates a conflict that is impermissible under the MFCA. Defendants' and intervenors' arguments to the contrary are wholly unpersuasive.
>
> In adopting the Secretarial FMP, defendants themselves stated that "state laws and regulations which prohibit the landing, sale or interstate commerce of red drum harvested commercially outside State waters are in conflict with measures in the FMP." In accordance with that conclusion, defendants expressly superseded conflicting state laws in the Secretarial FMP. Less than a year later, the Secretary approved the Amendment of the FMP and issued the implementing regulations, reversing his position and expressly choosing not to supersede state landing laws.
>
> While a reversal of position in and of itself would not necessarily be considered arbitrary, defendants must provide a reasoned analysis supporting the changes. See *Motor Vehicle Mfrs.,* 463 U.S. at 42, 103 S. Ct. at 2866. However, Amendment One simply provides that suppression "would adversely impact the cooperative

> state/federal approach to restoration/maintenance of the stock proposed under this amendment" and then discusses the costs of enforcement. Likewise, the explanation defendants now provide is that the reversal on the suppression issue reflects a new policy of cooperative management between the states and the federal government. Certainly cooperation between state and federal government is permissible, as well as desirable, as long as the management schemes do not conflict and the objectives of the MFCA are accomplished. However, defendants emphasize the state-federal cooperation as if it were an end, indeed the most important end, unto itself. In so doing, they appear to have overlooked the fact that under the MFCA, effective fishery conservation and management, according to national standards, is the goal. If that can be accomplished through cooperative federal and state initiatives, a court would not interfere with the Secretary's scheme. However, in this case, the Secretary has allowed continued enforcement of state laws, which he has in the past acknowledged to be in conflict with federal regulations that he has promulgated. The court, too, finds that a conflict exists and concluded, therefore, that the state laws cannot coexist in the federal scheme.
>
> Additionally, the regulations require compliance with state laws, even if a vessel is not registered in the state where the catch is landed. Thus, the regulations go beyond what is authorized by the MFCA. See 16 U.S.C.A. § 1856(a)(3) . . . .
>
> Finally, plaintiffs argue that defendants' closure of the directed commercial red drum fishery in the EEZ pending a 20% escapement of juvenile fish from inshore waters is contrary to the National Standards and without a rational basis. Because commercial harvesting of redfish in the EEZ developed so suddenly and so rapidly, the Gulf Council and the Secretary were forced to make rapid decisions about the stock, based, unfortunately, on imperfect information. "However, the Magnuson Act does not force the Secretary and Councils to sit idly by, powerless to conserve and manage a fishery resource,

> simply because they are somewhat uncertain about the accuracy of relevant information." *National Fisheries Institute, Inc. v. Mosbacher*, 732 F. Supp. 210, 220 (D.D.C. 1990). . . . Again, after a full review of the administrative record and, in light of all the arguments raised by plaintiffs, the Court concludes that the decision of the Secretary is based upon relevant considerations and is supported by the record.
>
> For all the above reasons, it is appropriate to enter summary judgment in favor of plaintiffs and against defendants and defendant-intervenors as to suppression, and against plaintiffs . . . as to . . . the closure of the directed redfish fishery.[77]

In effect, the court warns us that cooperative management is a good idea, but only so long as it follows the intents and purposes of the supreme laws occupying the area concerned, in this case, the FCMA. It is also interesting to point out that the court might have approached the conflict from another angle. The court might have resolved the conflict by forcibly disallowing the FMP's incidental quota, which would have also brought the FMP into line with the state regulations. That would have truly been a cooperative effort since such a decision such would have appeared to accommodate the apparent state wish not to permit trade in incidentally caught red drum. However, the court followed the reasoning that the FCMA required encouragement of commercial fisheries and, therefore, chose to support the economically popular position of allowing the landing and sale of the incidentally caught redfish, as opposed to demanding the fish population's conservation for future fisheries. This action by the court provides a synopsis of the application of the FCMA that has led to so many fisheries being closed due to over utilization—the choice being made for management to use today what might have been managed for conservation measures to use tomorrow.

However, in *Southeastern Fisheries Ass'n, Inc. v. Mosbacher,* the court did uphold the closure of the fishery to allow for the escapement of enough stock to, presumably, breed another generation for catch. Consider, however, the value of the juvenile fish as a future breeder. The juvenile redfish in state waters will itself grow to be a commercially viable catch, and will spawn along the way, producing more potentially

77. *Id.* at 440-42 (footnotes omitted).

viable catch. Without the juvenile, there will be no future commercially viable catch. Therefore, the preservation of the juvenile and the juvenile's habitat becomes important to the success of the EEZ fishery, where most of the commercially viable adults are caught. In this manner, the state regulations affecting the juvenile red drum and its habitat actually affect the intents and purposes of the red drum FMP under the FCMA. Thus, these regulations would also be open to suppression under section 1856 of the FCMA. However, the Secretary is only empowered to make emergency fisheries regulations.[78] The next section of this Article discusses how other federal statutes could be used in conjunction with the FCMA to create a broader, more biologically complete management and conservation regimen for the nation's fisheries. But what if the area to be superseded is not a state fishery? For instance, if states do not start taking care of their fisheries habitat, then the federal government will have to take over their fisheries in order to protect the federal fisheries. The preemption of federal power over the states could be hung, by these courts, on other constitutional congressional power hooks such as the Commerce Clause. While federal courts have upheld many preemptive strikes by the federal government against state powers, the courts must be careful not to address political power struggles between the states and the federal government, but rather only regulatory ones. Some case studies of current concern to fisheries managers, including the spotted seatrout, mullet, and menhaden, may simply turn out to be management administrative problems concerning the collection of adequate data or the development of effective enforcement schemes. However, these management problems can become insurmountable when the solutions are hampered by jurisdictional conflicts and power struggles. When the issue of cooperative state/federal management is fully addressed, these management administrative problems will also be solved.[79]

IV. THE DEVELOPMENT OF MORE COOPERATIVE MANAGEMENT SCHEMES BETWEEN THE STATES AND THE FEDERAL GOVERNMENT

78. *See* 16 U.S.C. § 1854 (1988).

79. The author realizes that this is a cursory reference to these fisheries that span jurisdictions. While the idea of this paper is to present the big picture of jurisdictional conflicts in fisheries management, each one of these fisheries mentioned, and others not mentioned, need to be addressed point by point, biologically and economically, in order to resolve their specific jurisdictional management problems.

TO ADDRESS THE FULL BIOLOGICAL AND ECONOMIC REALITIES OF MANAGING A MOBILE NATURAL RESOURCE.

Is there authority for the federal government to assume regulatory control over other aspects of state regulation that could directly affect federally regulated fisheries if a state regulation or omission in some way interferes with those federal fishery regulatory intents and/or effects? What if there were a state fishery regulation, or lack thereof, that decimated nursery areas for a fishery that occurred predominately in the EEZ: could not the Magnuson Act be interpreted to mean that the federal regulatory agencies, through preemptive acts by the Secretary of Commerce, could assume jurisdiction over the protection of those fisheries in state waters and manage them in a manner more consistent with the conservation ideals of the Magnuson Act? As the law now stands, the answer to those questions might be yes or it might be no, depending upon the interpretation of how a state needs to interfere with the federal FMP's intents in order to be preempted under the FCMA. Every year, biologists are collecting more and more information that maps the relationships between the health of our coastal areas and the fisheries that reside in them. Because of this, these sorts of issues involving the interactions of fisheries regulations with other forms of conservation and management regimens will become more prevalent. Clarification of the conservation and management regimens between the states and the federal government, and how we as a nation will approach these issues, is essential. Some people refer to this as "managed biodiversity."[80]

A. Implemented State/State and State/Federal Cooperative Fisheries Management Legislation

There are clear precedents for cooperative fisheries management born of the realization that migratory fish need to be managed across multiple jurisdictions. Some of these cooperative efforts have concentrated on creating, with the federal government's direction and blessing, management networks and agreements between states whose coastal regions are host to a common, economically valuable fishery

80. For a further discussion, see NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS, (Lawrence J. MacDonnell & Sarah F. Botes eds., 1994).

resource.[81] Other cooperative efforts have taken into account the fact that fish who do not know the difference between North Carolina and Virginia waters may also not know the difference between state and federal EEZ waters. These acts have created cooperative fishery management efforts among the states and between the states and the federal government.[82] The Atlantic Coastal Fisheries Cooperative Management Act states that its purpose "is to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources."[83] This Act gives a face lift to an older, federally created fishery management tool that predates the FCMA.[84] The Atlantic States Marine Fisheries Commission (ASMFC) is one of three state marine fisheries commissions (the other two being the Gulf States Marine Fisheries Commission and the Pacific States Marine Fisheries Commission) whose interstate compacts were approved by Congress.[85] The ASMFC has been in existence since 1942. The role of the federal government in the Atlantic Coastal Fisheries Cooperative Management Act process is one of

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81. *See* Interjurisdictional Fisheries Act, 16 U.S.C. §§ 4101-4107 (1988 & Supp. 1995): "The purposes of this title are (1) to promote and encourage State activities in support of the management of interjurisdictional fishery resources; and (2) to promote and encourage management of interjurisdictional fishery resources throughout their range[;]."

82. *See* The Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613, §§ 1 to 9, 98 Stat. 3187 (1984). Congress found that "no single government entity has full management authority throughout the range of the Atlantic striped bass, the harvesting and conservation of these fish have been subject to diverse, inconsistent, and intermittent State regulation that has been detrimental to the long-term maintenance of stocks of the species and to the interests of fishermen and the Nation as a whole," *id.* § 2(a)(3), and provided for the "support and encourage[ment of] the development, implementation, and enforcement of effective interstate action regarding the conservation and management of the Atlantic striped bass." *Id.* § b. Simultaneously, section 1851 of the FCMA provides for EEZ management of the resource consistent with the national standards and "appropriate to (1) ensure the effectiveness of State regulations . . .; and (2) achieve conservation and management goals for the Atlantic striped bass resource." *See also* The Weakfish Conservation Act (amending Atlantic Stripped Bass Act). *See also* New England Groundfish, Title IX, P.L. 102-567 (1992) (giving authority through FCMA to the Department of Commerce to create agreements with the New England Fishery Management Council state representatives transferring to the States responsibility for enforcing the groundfish management plan). *See also* the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101-5108 (Supp. 1995).

83. 16 U.S.C. §§ 5101 (b) (Supp. 1995).

84. 16 U.S.C. § 5101 (a)(4). "The responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission." *Id*.

85. An Act creating the Atlantic States Marine Fisheries Commission, Pub. L. No. 77-539, 56 Stat. 267 (1942); Act creating the Pacific States Marine Fisheries Commission, Pub. L. No. 80-232, 61 Stat. 419 (1947); Act creating the Gulf States Marine Fisheries Commission, Pub. L. No. 81-66, 63 Stat. 70 (1949).

technical and financial support.[86] While this Act provides federal support for the development of interstate cooperative management acts, the regulations apply to fish that are migratory from state territorial waters to state territorial waters, i.e., coastal resources.[87] Therefore, within the management of EEZ fisheries, the federal government still maintains its supremacy.[88] The federal acts noted above that condone and promote cooperative fishery management are federal mandates to the states. They provide incentives in the form of grant money to the states to develop the networks and collect the data that are needed in the creation of cooperative management acts.[89] Although the Atlantic Coastal Fisheries Cooperative Management Act defines "coastal fishery resource" as "any fishery, any species of fish, or any stock of fish that moves among, or is broadly distributed across, waters under the jurisdiction of two or more States or waters under the jurisdiction of one or more States and the exclusive economic zone,"[90] the federal government is not required to use suggestions from the Commission in developing EEZ management plans.[91] In fact, for management plans created cooperatively between the States that would apply in EEZ waters, "the Commission shall consult with appropriate Councils to determine areas where such coastal fishery management plans may complement Council fishery management

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86. "It is the responsibility of the Federal Government to support such cooperative interstate management of coastal fishery resources." 16 U.S.C. § 5101(a)(4) (Supp. 1995); *see also* 16 U.S.C. §§ 5103(a), 5107 (Supp. 1995).

87. 16 U.S.C. § 5101 (Supp. 1995).

88. 16 U.S.C. § 5103(b)(1) (Supp. 1995).

> *In the absence of* an approved and implemented fishery management plan under the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), and after consultation with the appropriate Councils, the Secretary may implement regulations to govern fishing in the exclusive economic zone that are—(A) necessary to support the effective implementation of a coastal fishery management plan; and (B) consistent with the national standard set forth in section 301 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1851). The regulations may include measures recommended by the Commission to the Secretary that are necessary to support the provisions of the coastal fishery management plan.

Id.

89. It is interesting to ask, though beyond the scope of this paper: Why does federal sanction appear to be necessary for these cooperative management acts that really only affect state water fisheries, and make no overtures toward managing EEZ fisheries? Is there some federalism or U.S. constitutional problem with state compacts?

90. 16 U.S.C. § 5102(2) (Supp. 1995).

91. 16 U.S.C. § 5103(b)(1) (Supp. 1995). "The regulations *may* include measures recommended by the Commission to the Secretary . . . ." *Id.* (emphasis added).

plans."[92] In effect, then, the cooperative plan must come into compliance with the federal plan and there is no requirement that the federal FMP meet any state-set standards of fisheries management. Once again, the federal fishery management scheme is supreme, even while putatively in support of cooperative management efforts. Although the acts condone state cooperative actions, they do not require that cooperative efforts be created in federal/state fishery management frontiers.

B. Developing More Effective Federal/State Cooperative Management Regimens—Using the Coastal Zone Management Act as a Pattern

Methods to encourage state/federal cooperative fisheries management need to be explored, developed, and adopted if the resource is to survive as a useful national resource.

> The five past decades have seen tremendous change in our fisheries. The great foreign invasion of the 1960's left our fishery resources devastated far beyond previous experience. And yet, today, it is commonly acknowledged that our domestic commercial fishing industry is capable of the depredation of our fisheries resource with even more power and efficiency than the foreign factory fleets ever could. Our understanding of fishery resources has been improved, particularly our appreciation of the dynamics of the ecosystems of which fish are a vital part. And yet this knowledge has in too many instances been only a chronicle of species decline. Our management structures have evolved, with a substantial federal regulatory role, for the past decade and a half. And yet today virtually every significant finfish species on the Atlantic coast is under stress or severely depleted.[93]

This testimony delivered by the executive director of the ASMFC to Congress during hearings on the Interjurisdictional Fisheries Management and the Weakfish Conservation Act of 1991 summarizes

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92. 16 U.S.C. § 5104(a) (Supp. 1995).

93. *Problems in Interjurisdictional Fisheries Conservation*: *Hearing on H.R. 2588 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 56 (1991) (statement of John Dunnigan, Executive Director, Atlantic States Marine Fisheries Comm.).

many of the problems in fisheries management that can be addressed by a system of required cooperative management between the federal government and the states. Many people involved in local fisheries management feel bludgeoned by federal fisheries managers, or if they are federal managers, they feel that they are bombarded by pressures from the commercial industry, recreational interests, and the scientific community. The resource, with its many users and intensities of use, is ripe for the creation of these types of pressures and user conflicts. However, one of the basic problems with fisheries management that may be one of the causes for confusion and concern is the fact that often fisheries management plans are fragmented by jurisdictional concerns. In relation to the mobility of the resource this fragmentation leads to poor management. A resolution to this situation was what the cooperative management acts discussed above were supposed to address. However, the Acts failed to resolve those issues by forming management regimens that parallel the biology of the resource. As a result, there is a continued separation between the federal managers and the state managers detrimental to cross-jurisdictional fisheries management.

One reason for the lack of federal/state cooperative fisheries management may be that many fear that a state/federal cooperative fisheries management plan may translate into actual federal control of the States' fisheries regulations within their territorial seas. However, there is precedent in federal legislation for cooperative federal/state environmental management of a natural resource while still maintaining the sanctity of State territorial control. That precedent can be found in the Coastal Zone Management Act (CZMA).[94]

The Coastal Zone Management Act was passed in order to clarify and streamline the management and development of United States coastal areas which were recognized as an important economic and environmental asset to the country.[95]

> By the 1960's, the rapid growth of coastal uses and conflicts threatened to overwhelm the capabilities of state and local governments to manage development effectively and to resolve conflicts. The unclear division of federal, state, and local authority over some coastal lands, water and other resources and the lack of

94. 16 U.S.C. §§ 1451-1464 (1988 & Supp. 1945).
95. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 155 (2d ed. 1994).

> coordination between federal, state, and local agencies made planning and implementation of efficient, balanced, orderly coastal resources development difficult.[96]

An analogy can be drawn to the current state of fisheries regulation. There is clear evidence that the current system of fishery regulation has not been adequately protecting the natural resource.[97] The system of regulation needs to mirror the biological system of the fisheries it attempts to regulate, since regulations are already supposed to be based upon the biological characteristics of the resource. Congress recognized in creating the CZMA that coastal management had traditionally been within the sovereign activities of the states.[98] The CZMA is proof that Congress already recognizes the difficulties, both economic and political, inherent in federal attempts to manage natural resources traditionally managed by the states. This is also true for the regulation of coastal fisheries. However, the guidelines for the CZMA "balance public and private uses of the coasts and local, state, and federal interests."[99] The CZMA, though a voluntary federal system with incentives, being primarily a grant-in-aid statute, has had its premises overwhelmingly adopted by the states.[100] The CZMA provides flexible management choices[101] within certain guidelines. "[T]he 1980 amendments highlighted Congress' concern that coastal states incorporate the national interest in the development and implementation of their CZMAs."[102] The CZMA provided incentives to the states in the form of grants aimed at the development and administration of coastal management programs, although those monies have continually been decreasing.[103] However, the federal consistency clause, which creates a check system assuring that federal efforts at regulating activities that directly or indirectly affect the state's coastal zone are in compliance with the state coastal zone management objective, appears to provide the greatest incentive to the states for participation.[104]

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96. *Id.*

97. *See* text accompanying note 1, *supra*.

98. KALO ET AL., *supra* note 96, at 156.

99. *Id.*

100. *Id.* Approximately 94% of the United States coast is managed under coastal management plans approved under the CZMA.

101. 16 U.S.C. § 1455 (Supp. 1995).

102. KALO ET AL., *supra* note 96, at 179.

103. *Id.* at 180.

104. *Id.*

> The consistency requirement was originally placed in CZMA to provide an incentive to the states to develop their own coastal zone management plans. If a state developed an approved plan, that state received some assurance that its coastal policy choices would not be readily overturned by federal officials with a differing philosophy of coastal development.[105]

This system would be a good blueprint for the creation of a state/federal cooperative fisheries management effort. The CZMA shows that in the process states will not lose their rights or powers over their coastal fisheries. In fact, implementing such a plan would increase the effectiveness of state and federal fishery management plans by integrating all biological data on the regulated species and therefore, as noted above, managing them more in accordance with their natural cycles from coastal habitat to federal waters and back.

The cooperative management process would incorporate the CZMA's and the FCMA's policies and purposes as well as national standards. For instance, the fisheries cooperative plan would have as its policy and purpose statement language from each Act:

> The Congress finds and declares that it is the national policy—
>
> (1) to preserve, protect, develop, manage and conserve the economically and environmentally valuable natural resources of our nations fisheries;
>
> (2) to encourage and assist the states to effectively exercise their responsibilities in the coastal zone through the development and implementation of management programs to achieve the most protection and utilization possible of fisheries habitat in direct cooperation and conjunction with federal efforts to protect and utilize fisheries habitat in federal waters;
>
> (3) to base conservation and management measures on the best scientific information available, giving full consideration to ecological values to the extent practicable, protection of natural resources, fish and wildlife and their habitat; and

105. *Id.* at 185.

> (4) to manage a population of fish as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
>
> (5) to have, as a goal, comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal fishery management agencies; and
>
> (6) to ensure that conservation and management measures shall, where proactive, minimize costs and avoid unnecessary duplication.

All of this language is taken directly from the CZMA national policies[106] and the FCMA national standards,[107] which indicates that the congressional intent to enter into this type of arrangement is present. The states, having adopted the CZMA, appear to be willing to work under this type of arrangement as well with, of course, incentives. The fishery stocks that presently traverse state and federal waters in their life cycle are most at risk in the piecemeal fisheries management system that presently exists. It is the type of cooperative fisheries management system outlined above that is needed to protect our coastally dependent, federally fished stocks from decimation. The processes of the CZMA should be paired with federal fishery regulatory efforts to account for the biological realities of many valuable fisheries resources. This type of management partnership would work for fisheries that are caught in the EEZ and covered by a federal FMP, but that are also dependent upon the coastal areas for part of their life cycle. The FCMA can be adapted, through the CZMA cooperative processes, to mandate habitat protection.

V. CONCLUSIONS

The federal government, through the FCMA, has clearly occupied the field of fisheries regulation in the EEZ. However, this is not entirely to the exclusion of the states' fishery regulatory actions. The courts appear to interpret federal/state relations in the EEZ in terms of allowing state regulation of EEZ fisheries as long as state regulation does not conflict with federal regulation of that fishery. In the situation where

106. 16 U.S.C. § 1452(2)(A)-(J) (Supp. 1995).
107. 16 U.S.C. § 1851(a)(2),(3),(7) (1988).

there is no federal regulation of a fishery, states may regulate that fishery in the EEZ as long as that state regulation, again, does not interfere with the general federal plans for EEZ fisheries—i.e., conservation and management for the nation's economic health as per the FCMA National Standards.

The FCMA specifically maintains a state's rights to regulate fisheries within the territorial waters. States may do this without federal interference. However, a new interpretation of the FCMA would allow federal fishery concerns to reach inside state waters where those inside water fisheries are related to the health and well-being of the EEZ, federally regulated fishery. The danger is the potential for overstepping federalism-created boundaries in the pursuit of biologically and economically significant management of the natural resource. In the case of a state fishery that burdens an EEZ juvenile stock, or one that has been shown to be detrimental to the nursery habitat of an EEZ-regulated stock, a better approach would be the creation of a cooperative, conservation/management-based fisheries management agreement that enables the stocks to be managed in a manner that more closely reflects their biological reality, as well as is presently known. There is precedent for this type of fisheries management in state/state, federally condoned, fishery management agreements, as well as federal legislation language in federal regulatory schemes such as the FCMA and the CZMA. Because there is this precedent, there is a real possibility for amending existing legislation to create a more cooperative tone. However, the new development presented here is a joint and cooperative approach to the management of a fishery from its pre-commercially valuable stage to its commercially valuable stage. This includes joint habitat regulation and conservation and nursery protection through state coastal regulations as well as federal regulations that assure that enough breeder stock will make it back to the in-state spawning grounds. Fisheries policy and managers must keep pace with scientific developments to maintain the standards under which Congress has mandated, in the FCMA, the conservation and management of our natural resource fisheries. Incorporating this information will maintain the biological, and thus the economic viability of the resource. A policy approach such as this would bring fisheries management up to date with the information that fisheries biologists and marine ecologists have known for a long time—fish do not recognize political boundaries, only biological ones, no matter the language or the spirit of the jurisdictional authority set by law. These

efforts will be very important in order to allow fisheries management techniques to evolve into a more community oriented system.