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STATE MANAGEMENT OF MARINE FISHERIES
AFTER THE FISHERY CONSERVATION AND
MANAGEMENT ACT OF 1976 AND DOUGLAS v. SEA-
COAST PRODUCTS, INC.

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Two recent events portend significant changes in the management
of marine fisheries by the United States: the passage of the Fishery
Conservation and Management Act of 1976 (FCMA)\(^1\) and the
Supreme Court's decision in *Douglas v. Seacoast Products, Inc.*\(^2\) Con-
gress passed the FCMA to conserve and regulate fishery resources
found off the coasts of the United States. The Act established a 197
mile exclusive fisheries conservation zone\(^3\) contiguous to the three-
mile territorial sea. It also created eight Regional Fisheries Manage-
ment Councils responsible for preparing and implementing fishery
management plans for all fisheries within their jurisdictions.\(^4\) The
FCMA, which has been noted and discussed,\(^5\) is an attempt by Con-
gress to benefit the domestic fishing industry. The Act advances this
goal by establishing a framework within which the federal govern-
ment may secure control over foreign fishing vessels in American
waters, promote the conservation of fishery resources, and induce the
replenishment of fishery stocks that have been depleted by over-
exploitation.\(^6\) The effect of the FCMA upon state regulation of marine

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exclusive fishery management authority over all fish within the conservation zone
except for highly migratory species. Also under the United States' control are
anadromous species throughout their range and all fishery resources of the con-
tinental shelf. *Id.* § 102, 16 U.S.C.A. § 1812.
4. *Id.* §§ 302(a), (h), 16 U.S.C.A. §§ 1852(a), (h).
5. See, *e.g.*, Comment, *The Effects of the 200-Mile United States Fishing
Zone, 37 La. L. Rev. 852 (1977)*; Comment, *The Fishery Conservation and
Zone, 12 Tex. Int'l L.J. 331 (1977).*
Cong., 1st Sess. 1 (1975).*
fisheries, however, was largely overlooked by Congress. Until now, the states have enjoyed relative autonomy in developing their own management plans.

As the FCMA will alter state management of marine fisheries, *Douglas v. Seacoast Products, Inc.* similarly will restrict state marine fishery laws in other respects. The Supreme Court held in *Douglas* that two Virginia statutes discriminating against nonresident and alien fishermen were preempted by federal statutes governing the enrollment and licensing of foreign vessels. Thus a state may not deny federally licensed ships the right to fish unless the denial is based upon reasonable conservation and environmental measures applied equally to all fishermen.

This Article will explore the effect of these two developments on state management of marine fisheries. First, traditional limitations on state regulation, including *Douglas*, are examined to provide a legal background against which the FCMA will operate. Second, the FCMA is discussed in detail to demonstrate its comprehensive nature. Finally, the Article considers specific impacts and changes likely to occur in the management of marine fisheries by a typical coastal state, North Carolina.

I. THE LEGAL AND CONSTITUTIONAL FRAMEWORK FOR STATE CONTROL OF MARINE FISHERIES

A. *State Jurisdiction Over Fisheries Within Territorial Waters*

In analyzing the law of fisheries management one initially must determine the sources and extent of state jurisdiction and control over marine fisheries. States historically have asserted claims of control over fisheries located both within and without territorial waters. Prior to 1900, the United States Supreme Court recognized that the states, as sovereign representatives of the people, possessed an ownership interest in fish and wildlife located within their territories.
Subsequently, in *Missouri v. Holland* the Court limited the state ownership doctrine to include only wildlife reduced to actual possession by skillful capture, noting that the claim to title in migratory creatures rested upon a "slender reed."

In 1948 the Supreme Court discarded the concept of "ownership" and described the doctrine as a "fiction," which was utilized to express the states' power to preserve and regulate the exploitation of their natural resources. This power to regulate fishes in territorial waters, the Court stated, was always subject to paramount powers retained by the federal government. The theory of state ownership surfaced in 1953, however, with the passage of the Submerged Lands Act, which vested in the states "title to and ownership of . . . natural resources" within their navigable waters and the lands beneath them. Included in this statutory grant was the "right and power to manage, administer, lease, develop, and use" the natural resources, which were defined to include fish, shrimp, oysters, and other marine animal and plant life. Subject to the paramount powers of the federal government, the Submerged Lands Act confirmed the ownership interest of the states in the marine resources found within their territorial waters.

Despite this statutory grant the Supreme Court in *Douglas* denied that the states acquired a true ownership interest; rather, they possessed merely a power of administration and control over marine resources within their territorial jurisdiction. Whether the state's gable waters was paramount to a right of private ownership traceable to a grant by royal charter to the Duke of York).

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12. Justice Holmes stated: "Wild birds are not in the possession of anyone and possession is the beginning of ownership." *Id.* at 434. See also *Douglas v. Seacoast Prods., Inc.*, 97 S. Ct. 1740, 1751 (1977).
13. 252 U.S. at 434.
15. *Id.*
17. *Id.* § 3(a), 43 U.S.C. § 1311(a).
18. *Id.* The Act reserved to the federal government all powers it previously held for "the constitutional purposes of commerce, navigation, national defense, and international affairs." *Id.* § 6(a), 43 U.S.C. § 1314(a). See *United States v. Rands*, 389 U.S. 121, 127 (1967).
21. 97 S. Ct. 1740, 1751 (1977). Justices Rehnquist and Powell, although concurring in the judgment, dissented from that part of the Court’s opinion interpret-
interest is described as one of ownership or the power to regulate and control, however, Douglas confirmed the right of states to apply "reasonable, non-discriminatory conservation and environmental protection measures" to coastal fishing within their territory, which generally includes the offshore waters three nautical miles from the "coastline."  

B. Extraterritorial State Jurisdiction

In addition to the ownership theory empowering states to manage fisheries within their territorial waters, two legal doctrines establishing the authority of coastal states to regulate and manage marine fisheries located beyond their territorial waters have been recognized. The first doctrine arose from state regulations collectively known as "landing laws." Under such regulations, states may exercise control over fish caught beyond the three mile limit that subsequently are brought within their territorial waters. In the principal case of Bay-

ing the Submerged Lands Act. They agreed that the states do not own marine resources within their territorial limits in the traditional property right sense, but the two Justices asserted that the states have a "substantial proprietary interest" or "common ownership" right in fish and game within their boundaries. Id. at 1753. This state right, in their view, predated the Submerged Lands Act, which did not alter the "pre-existing powers of the States over fish" because the primary grant of the Act did not extend to any interest over free-swimming fish. Id. at 1754. The dissent thus emphasized that the common law, rather than a federal grant of authority under the Submerged Lands Act, was the true source of state control over fishing resources. Because this interest existed independently of federal authorization, the states possessed broad powers over fishery resources which could be overridden only when those rights were exercised in clear violation of a constitutional provision or in direct conflict with federal law. Id. at 1754. The Supreme Court Justices therefore disagreed over the precise origin of the doctrine of state control, and the ownership theory may surface in some form in the future.

22. Id. at 1748.


24. Generally, landing laws prohibit the possession, sale, or transportation of fish or game within a state if such possession, sale, or transportation violates state law. The prohibition extends to all fish because it is impossible to distinguish between fish caught within or without state territorial waters, and any limitation on the prohibition would render its enforcement ineffective. See notes 27-30 infra & accompanying text.
side Fish Co. v. Gentry [25] the Supreme Court upheld as a valid exercise of the state's police power a California landing law, regulating the processing of sardines, that applied equally to all of those fish regardless of where they were caught.[26] The purpose of the regulation was to prevent a depletion of the local fish supply, and jurisdiction to control the sardines brought into the state was necessary to prevent evasion of this local policy.[27] Because any impact on commerce was incidental and beyond the purposes of the legislation, the Court rejected the argument that the landing law placed an improper burden on interstate commerce.[28] Consequently, justified by conservation enforcement considerations, the states could prohibit possession of fish taken outside their territorial waters[29] and require a permit for any fishing vessel operating within state waters even though its catch may have come from operations conducted wholly outside the state.[30]

The second basis for extraterritorial regulation of marine fisheries is derived from the right of a state to control the conduct of its citizens on the high seas. The Supreme Court relied on this rationale in Skiriotes v. Florida[31] to affirm the conviction of a Florida resident who had used gear prohibited under Florida law to harvest sponges outside the territorial limit of the state.[32] The Court upheld the regulation as a valid exercise of the state's police power over one of its citi-

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26. Id. at 426.
27. Id. The purpose of the statute was to conserve as a food source fish found within state waters. Because sardines are a migratory fish and because those taken from waters within the state's jurisdiction are indistinguishable from those taken without, the state was justified in effectuating its policy by applying the statute to sardines brought within its boundaries. Id.
28. Id.
29. E.g., State v. Richardson, 285 A.2d 842, 846 (Me. 1972) (statute prohibiting the possession of lobster, regardless of the source of possession, on a boat rigged for otter or beam trawling bears a rational relationship to the proper maintenance of the lobster fishery in Maine's coastal waters).
30. E.g., Frach v. Schoettler, 46 Wash. 2d 281, ——, 280 P.2d 1038, 1042-43 (1955) (statute that requires persons to obtain a permit for operating commercial fishing vessels used for catching salmon in off-shore waters and transporting them in and through state waters for delivery within the state is valid as an exercise of the state's power to regulate its salmon industry for conservation purposes); Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. 2d 56, ——, 130 P.2d 256, 260 (1942) (statute requiring a permit for fishing vessels operating within state waters, although delivering their catch outside the state and regardless of where the fishing occurs, is valid as an exercise of the police power to "protect and conserve the state's fisheries from possible depletion and waste by virtue of uncontrolled taking of fish from the waters of the state to points beyond its jurisdiction").
31. 313 U.S. 69 (1941).
32. Id. at 79.
zens, which was permissible in the absence of any conflict with federal law.\footnote{33}

Recently, a series of cases arising in Alaska explored a new basis for state extraterritorial jurisdiction over marine fisheries.\footnote{34} The controversies involved regulations to control crab fishing in the Bering Sea Shellfish Area, which extends hundreds of miles west of Alaska's shoreline.\footnote{35} The regulations provided for the closing of the crab fishing area each year after 23,000,000 pounds of crab had been taken\footnote{36} and made it unlawful to possess, transport, buy, or sell additional crabs "taken in any waters seaward of that officially designated as the territorial waters of Alaska."\footnote{37} In \textit{Hjelle v. Brooks}\footnote{38} crab fishermen from the state of Washington obtained a preliminary injunction in the United States District Court for the District of Alaska against the enforcement of these regulations on the ground that they unconstitutionally burdened interstate commerce.\footnote{39} Because the state purported to exercise direct control over crabs in the entire Bering Sea Shellfish

\footnote{33. \textit{Id.} at 75. The Court held that criminal statutes \textquote{dealing with acts that are directly injurious to the government, and capable of perpetration without regard to particular locality} are applicable to United States citizens even if they are on the high seas or within a foreign country. \textit{Id.} at 73-74. Furthermore, with respect to matters in which the state has a legitimate interest and no conflict exists with federal laws, the state possesses a sovereign authority over the conduct of its citizens upon the high seas analogous to the authority of the United States in like circumstances. \textit{Id.} at 77. For other cases applying the \textit{Skiriotes} rationale, see Felton v. Hodges, 374 F.2d 337, 339 (5th Cir.), \textit{cert. denied}, 389 U.S. 971 (1967) (Florida has sufficient interest in crawfish, which move freely in and out of its territorial waters, to justify subjecting its citizens to conservation regulations concerning the taking of crawfish outside its territorial waters); People v. For-tich, 14 Cal. App. 3d Supp. 6, 14, 92 Cal. Rptr. 481, 487 (Super. Ct. 1970) (dictum) (although defendants were illegally taking fish within the state's territorial waters, the court noted that the state also would have the authority to prosecute the defendants if their illegal acts had been committed beyond the three-mile limit).


35. ALAS. COMMERCIAL FISHING REG. § 5 AAC 07.100 (1973).

36. \textit{Id.} at § 5 AAC 07.760.

37. \textit{Id.} at § 5 AAC 36.040.

38. 377 F. Supp. 480 (D. Alas. 1974), \textit{vacated}, 424 F. Supp. 595 (D. Alas. 1976). The decision in the second \textit{Hjelle} case came after the federal plaintiffs voluntarily requested a stay of proceedings to allow the disposition of state criminal proceedings and a decision by the Alaska Supreme Court on the federal claims challenging the regulations' constitutionality. The consequence of this abstention by stipulation was to prevent relitigation of the plaintiffs' claims on the merits.

Area, the court rejected Alaska's contention that the regulations were necessary to conserve crab fishing within the state.⁴⁰ Although the landing law cases permit a state to regulate extraterritorial conduct to facilitate conservation of a resource clearly within the state, the court distinguished Hjelle from those cases on its facts.⁴¹ Because of the direct extraterritorial effect of the regulations and the absence of a showing that their purpose was to facilitate conservation enforcement within state waters, the court concluded that the plaintiffs were likely to prevail on the merits and issued the preliminary injunction.⁴²

Following the Hjelle decision the Alaska Board of Fish and Game repealed the objectionable regulations and issued emergency measures.⁴³ These provisions established a series of crab fishing closures for designated "statistical areas," each of which consisted of a "registration" area of waters within state jurisdiction and an adjacent seaward "biological influence zone."⁴⁴ In State v. Bundrant⁴⁵ the Alaska Supreme Court reviewed the convictions of several crab fishermen charged with violating these new regulations. The defendants were of two categories: those charged with illegal possession within the three mile limit of crabs taken on the high seas and those charged with prohibited extraterritorial activities within closed areas located sixteen to sixty miles off the Alaskan coast. Only one of the defendants was an Alaskan resident.⁴⁶

In holding that both categories of defendants were properly charged and subject to state regulation,⁴⁷ the Alaska Supreme Court repudiated the analysis of Hjelle⁴⁸ and departed from the well-established limits on state power to exercise extraterritorial jurisdiction. The court refused to adopt a restrictive interpretation of the landing law cases, which would have required the demonstration of an enforcement problem within state territorial waters as a prerequisite for expanded state jurisdiction;⁴⁹ instead, the court stated that the

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⁴⁰ Id. at 441.
⁴¹ Id. at 440-41.
⁴² Id. at 441.
⁴³ See note 34 supra.
⁴⁴ ALAs. COMMERCIAL FISHING REG. § 5 AAC 34.005.
⁴⁶ Id. at 535-36.
⁴⁷ Id.
⁴⁸ Id. at 556.
⁴⁹ See id. at 552-53.
⁵⁰ Id. at 553. The court concluded that the decisions in the landing law cases were justified primarily on the basis of resource conservation and that, although an enforcement problem existed in most of the cases, the decisions did not require that such a problem be present. Id.
test was whether the regulations bore a "reasonable relationship to the purpose sought to be achieved." 51 Thus the issue was whether extra-territorial control was necessary on ecological grounds for the conservation of fishery resources that existed partially within state waters. Applying this doctrine, the court concluded that because crabs are migratory creatures, moving beyond the state's territorial boundaries at various times during the year, Alaska's regulation of activity on the high seas was necessary to conserve the crabs existing within its waters and thus clearly within the state's police power.52

The court in Bundrant also extended the Skiriotes concept of the power of a state to regulate the conduct of its citizens on the high seas. Citing precedents from domestic and international law,53 the court broadened this principle into a general concept of "objective territorial" jurisdiction whereby a state may control the activities of noncitizens outside its jurisdiction when those activities have detrimental effects on a fishery within state waters.54 The impact of this concept is to allow direct state enforcement against noncitizens on the high seas.55

Although Bundrant held that a unilateral assertion by Alaska over fishery resources located beyond its territorial waters was not preempted by any paramount federal law,56 this result can no longer obtain because the FCMA declares the exclusive fishery management authority of the United States within the 197 mile fishery conservation

51. Id.
52. Id. at 554. The Alaska Supreme Court also has applied this doctrine to uphold extraterritorial regulation of the state's scallop fishery. State v. Sieminski, 556 P.2d 929, 933-34 (Alas. 1976).
53. 546 P.2d at 555 n.105.
54. Id. at 555. The concept of objective territorial jurisdiction is based on the "general proposition that acts done outside a jurisdiction which produce detrimental effects inside it justify a state in punishing [the one] who caused the harm as if he had been present at the place of [harm]." Id.
55. Id. at 555-56. The court reasoned that the restriction of a state's ability to enforce its fishery regulations, especially those governing migratory species of fish, with respect to nonresidents would lead to a deliberate frustration of the state's legitimate conservation objectives and strip the state of an effective means of regulation. Id. at 555. Therefore, by broadening the concept of "citizen" to include all American nationals, the state could enforce its regulations against citizens of other states on the high seas when necessary to protect its own fishery resources. Id. at 555-56.
56. Id. at 546-46. The court interpreted the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331-1334 (1964 & Supp. 1977), as limited in scope to inorganic resources such as minerals and oil in the outer shelf's subsoil and seabed. The court thus determined that the Act did not affect the organic marine life resources found in the outer shelf. Id. at 546-47. See Outer Continental Shelf Lands Act, § 3, 43 U.S.C. § 1332 (1970).
zone and further prohibits a state from directly or indirectly regulating fishing outside its boundaries with the exception of state-registered vessels. Moreover, the court’s analysis in Bundrant is highly questionable. By recognizing the “nationality” principle of international law, Skiriotes allows states to assert extraterritorial jurisdiction over their citizens. Bundrant, however, transforms this principle into “objective territorial” jurisdiction, which focuses on the effect within the state of activities outside its territory. The application of this rule is dubious: the court did not discuss whether the harmful effect within the state was both direct and substantial, as is required by section 18 of the Restatement of Foreign Relations, upon which the court relied as authority.

A more difficult question is whether Congress intended through the FCMA to preempt even the well-established bases of state extraterritorial jurisdiction. The Act provides a saving clause for state jurisdiction but restricts its exercise to within state boundaries and prohibits direct or indirect regulation beyond such areas. By its literal terms, therefore, the Act appears to prohibit state extraterritorial regulation based on either landing law or state citizen jurisdiction, except with respect to state-registered vessels. The legislative history of the FCMA is curiously silent on this issue, although a debate between Senators Stevens and Gravel suggests a legislative intent to restrict the exercise of state control. Regardless, implementation of the FCMA will make state extraterritorial control less significant because the Act contemplates the formation of unified management plans promulgated by the states and Regional Councils for those species of fish that are

58. Id. § 306(a), 16 U.S.C.A. § 1856(a).
59. See 313 U.S. at 77.
60. See note 54 supra & accompanying text.
61. 546 P.2d at 555 n.105; RESTATEMENT OF FOREIGN RELATIONS § 18 (1965).
62. FCMA, § 306(a), 16 U.S.C.A. § 1856(a) (Supp. 1977). This section provides that nothing in the Act “shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.” Id. In addition, § 1856(b) provides that if a state takes any action substantially or adversely affecting the implementation of a fishery management plan the Secretary of Commerce may assume responsibility for the regulation of any fishery until the state proves to the Secretary’s satisfaction that the need for federal regulation no longer prevails. Id. § 306(b), 16 U.S.C.A. § 1856(b).
found both within and without the three mile limit and the coordina-
tion of fishery regulations at the Council level.64 Landing laws will be
unnecessary as enforcement devices because federal authorities will
enforce fishery regulations, using the facilities and personnel of the
states on an as-needed basis.65 Similarly, the implementation of a na-
tional fishery management program obviates the need for state citizen
extraterritorial jurisdiction.

C. Limits on State Jurisdiction

Even within the three mile limit, the Constitution and applicable
federal law restrict state control over marine fisheries. In Toomer v.
Witsell 66 the Supreme Court held that a South Carolina statute re-
quiring nonresidents to pay a $2,500 license fee and residents only $25
was a violation of the privileges and immunities clause of the Con-
stitution.67 Interpreting the clause as a guarantee of the right of
nonresidents to engage in commercial fishing within a state on an
equal basis with citizens of that state, the Court stated that a dis-
parity in the treatment of nonresidents is justifiable only when a
substantial reason exists for the discrimination beyond the mere fact
that the nonresidents are citizens of another state; furthermore, if
such reason exists, the degree of discrimination must bear a close
relation to the state’s purpose.68 The Court rejected as unsubstantiated
by the record arguments that the discriminatory fees were necessary
to maintain conservation and to recover costs of enforcement.69

Toomer also overturned a South Carolina statute that required all
owners of shrimp boats fishing within the state’s territorial waters
to unload their catch at a South Carolina port.70 Because the statute’s
purpose was to divert business to South Carolina that otherwise would
have gone to other states, it created a burden on interstate commerce,

64. See NOAA Guidance for Regional Fishery Management Councils, 42 Fed.
Reg. 34,449, 34,459 (1977) (to be codified in 50 C.F.R. § 602.2(d)(2)) [herein-
after cited as NOAA Guidance].
67. Id. at 395.
68. Id. at 396-97. The Court also rejected the state ownership theory as a justi-
fication for discrimination against nonresidents, id. at 402, and distinguished
McCready v. Virginia, 94 U.S. 391 (1876), which upheld a Virginia statute pro-
hibiting nonresidents from planting oysters in the tidal waters of the Ware
River. The Court restricted McCready to inland waters and non-free swimming
fish. 334 U.S. at 401.
69. 334 U.S. at 397-99.
70. Id. at 406.
which contravened the commerce clause of the United States Constitution.\textsuperscript{71}

The equal protection clause of the fourteenth amendment also has been used as the basis for declaring state fisheries regulation unconstitutional. In \textit{Takahashi v. Fish and Game Commission}\textsuperscript{72} the Supreme Court held that a California statute barring the issuance of commercial fishing licenses to “persons ineligible for citizenship” was directed towards resident Japanese aliens and therefore created an impermissible classification.\textsuperscript{73} The concept of equal protection guarantees resident aliens the same right to earn a livelihood as is enjoyed by all citizens.\textsuperscript{74}

In the recent \textit{Douglas} decision, the Supreme Court announced another limitation on state regulation of marine fisheries. The Court relied on a preemption rather than a constitutional ground to invalidate two Virginia statutes\textsuperscript{75} restricting the issuance of commercial fishing licenses to United States citizens and prohibiting nonresidents from catching menhaden in the Virginia portion of Chesapeake Bay.\textsuperscript{76} The Virginia laws were challenged by Seacoast Products, Inc., which was a Delaware corporation qualified to do business in Virginia and a subsidiary of a British corporation owned primarily by alien stockholders. Seacoast Products’ fishing vessels were enrolled and licensed as United States flag ships under the federal enrollment and licensing laws.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} at 404-06. Although a statute that levied a tax on shrimp was upheld as a local measure and therefore not burdensome on interstate commerce, the Court rejected the argument that the landing statute was valid because it facilitated collection of the tax. \textit{Id.} at 394-95.
\item \textsuperscript{72} 334 U.S. 410 (1948).
\item \textsuperscript{73} \textit{Id.} at 420. The Court declared that state laws imposing discriminatory burdens on the entrance or residence of aliens lawfully admitted into the United States conflict with the federal government’s exclusive power to regulate immigration. \textit{Id.} at 418-19. The practical effect of denying an alien the equal opportunity to earn a livelihood was tantamount to denying him entrance and residence. \textit{Id.} at 416. The Court also rejected the state’s contention that its statute was necessary to protect its “special public interest” in conserving its fishing resources for its own citizens. \textit{Id.} at 420-21.
\item \textsuperscript{74} \textit{Id.} at 419-20.
\item \textsuperscript{75} The statutes prohibited nonresidents of Virginia from catching menhaden in Virginia’s portion of the Chesapeake Bay, VA. \textsc{Code Ann.} § 28.1-60 (Supp. 1976), and prevented noncitizens, regardless of residence, from obtaining commercial fishing licenses for any fish taken in Virginia waters. \textit{Id.} § 28.1-81.1 (Supp. 1976).
\item \textsuperscript{76} 97 S. Ct. at 1745.
\item \textsuperscript{77} The enrollment and licensing laws are codified at 46 U.S.C. §§ 11-351 (1970). The purpose of enrollment is to indicate the national character of a vessel and to enable it to secure a license, which regulates the ship’s use and prevents the commission of fraud on the revenue laws of the United States. Ships that
Relying on *Gibbons v. Ogden*, the Supreme Court held that the enrollment and licensing of a vessel under federal law created an implicit authority to perform the activity for which the ship was licensed. Because Seacoast Products' vessels had been licensed for fishing, they had been granted the "right to fish in Virginia waters on the same terms as Virginia residents." The discriminatory Virginia laws were in direct conflict with federal law and thus invalid under the supremacy clause of the Constitution. A state therefore could subject enrolled or licensed fishing vessels only to reasonable conservation and environmental restrictions that were equally applicable to state residents.

The decision in *Douglas* may be criticized because it does not invalidate discrimination against all nonresidents, but only against those with federally documented vessels. Certain categories of ships, most importantly those of less than five net tons, are exempt from the enrollment and licensing laws. Thus, at least under the *Douglas* theory, states still could ban nonresident owners of smaller vessels from fishing within their waters.

II. THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

The purpose of the FCMA is to establish the comprehensive management and conservation of fishery resources found off the coasts of the United States. This broad aim is implemented through the declaration of a federal fishery conservation zone contiguous to and extend-
ing 197 nautical miles from the geographical limit of state territorial waters. All fishery resources found within this zone, with the exception of the highly migratory species of tuna, are subject to the exclusive management of the United States; moreover, this management authority extends beyond the zone when necessary to control the continental shelf and anadromous fishery resources.

Under the Act Congress created eight Regional Fishery Management Councils to control the fishery conservation zone. A state's voting representative on its respective Council is the principal marine fishery management official from that state. Other Council members entitled to vote are the regional directors of the National Marine Fisheries Service and a designated number of persons appointed by the Secretary of Commerce from a group of qualified individuals selected by the governors of each region's constituent states. Each Council's primary duty is to promulgate a fishery management plan for every management unit in its respective fishery. The plans are subject to review by the Secretary of Commerce for approval, disapproval, or partial disapproval. If any Council fails either to prepare or to modify a plan in an appropriate fashion, then the Secretary may prepare a suitable plan.

Each plan must meet seven national standards that are set forth in the FCMA. The most important of these requires that conservation and management measures prevent overfishing while achieving the optimal yield from each fishery on a continuing basis. The procedure for finding the optimal yield (OY) begins with the biological determination of the maximum sustainable yield (MSY), which is the largest average annual catch or yield in terms of weight of fish caught that can be taken continuously from a fishery stock. To fix the OY, the MSY is reduced by appropriate amounts, which are attributable

86. Id. §§ 3(14), 103, §§ 1802(14), 1813.
87. Id. §§ 102-103, §§ 1812-1813. See note 3 supra & accompanying text.
88. FCMA, § 302, 16 U.S.C.A. § 1852 (Supp. 1977). The several Regional Councils include: the New England Council, the Mid-Atlantic Council, the South Atlantic Council, the Caribbean Council, the Gulf Council, the Pacific Council, the North Pacific Council, and the Western Pacific Council. Id.
89. Id. § 302(b) (1), 16 U.S.C.A. § 1852(b) (1).
90. A management unit is defined as "[a]ny species, stock or group of species or stocks of fish that is geographically or ecologically interrelated or is affected as a group by fishing practices, that is capable of being managed as a unit on a rational and timely basis." NOAA Guidance, supra note 64, at 34,458.
92. Id. § 304(c), 16 U.S.C.A. § 1854(c).
93. Id. § 301(a) (1), 16 U.S.C.A. § 1851(a) (1).
94. Id. § 3(18), 16 U.S.C.A. § 1802(18).
to such additional factors as the value of the resource for purposes other than for harvesting, the importance of the quality of recreational fishing, the pertinent social and economic conditions, the need for fishery products, and the present and future condition of the habitat. The remaining national standards require that the plans be based on the best scientific information available, provide for the management of stocks as a unit throughout their range, avoid discrimination between residents of different states, promote the efficient utilization of resources, allow for flexibility in management, minimize costs, and avoid unnecessary duplication. Furthermore, management plans must include the following provisions: measures necessary for the conservation and management of the fishery, a description of the fishery and the present fishing levels and interests involved, a specific list of pertinent data and statistics to be submitted to the Secretary, information concerning the present and future MSY and OY, and a calculation of the potential harvest of fishing vessels of the United States and the surplus available for foreign fishing. The principal discretionary provisions in the management plans include the various permit requirements that are applicable to all who use the fishery, which establish seasonal and area limits and may restrict the use of certain equipment and the size and quantity of the catch. The plan also may establish a system of limiting access to the fishery to achieve OY.

Fishing by foreigners is strictly limited under the FCMA. The Act prohibits foreign fishing within the fishery conservation zone and for anadromous species beyond the zone unless an international fishery agreement existed prior to passage of the Act or a governing international fishery agreement is promulgated pursuant to the FCMA, reciprocity exists between the foreign nation and the United States with respect to fishing privileges, and the foreign vessel has a valid permit to engage in such fishing. The Act limits the total amount

95. NOAA Guidance, supra note 64, at 34,458.
96. Id.
97. Standard 3 as set forth in § 301(a) (3), 16 U.S.C.A. § 1851(a) (3) (Supp. 1977), also provides that interrelated stocks of fish be managed as either a single unit or in close coordination.
98. Standard 5 as set forth in § 301(a) (5), 16 U.S.C.A. § 1851(a) (5), although encouraging efficiency, cautions against making economic allocation the sole purpose of a conservation measure.
99. Id. § 301(a) (2)-(7), 16 U.S.C.A. § 1851(a) (2)-(7).
100. Id. § 303(a), 16 U.S.C.A. § 1853(a).
101. Id. § 303(b), 16 U.S.C.A. § 1853(b).
102. Id. § 303(b) (6), 16 U.S.C.A. § 1853(b) (6).
103. Id. § 201(a)-(c), (f), 16 U.S.C.A. § 1821(a)-(c), (f).
of foreign fishing to that portion of the OY of each fishery not caught by American ships. The Secretary of State, in cooperation with the Secretary of Commerce, allocates this amount among the various nations according to their traditional fishing patterns, their past cooperation and contribution to fishery research and enforcement, and any other appropriate criteria. As the Secretary of State receives applications for foreign fishing permits, he publishes them in the Federal Register and circulates them for comment by the Secretary of Commerce, the appropriate Councils, the Secretary of the department in which the Coast Guard is operating, and the designated committees of the House of Representatives and the Senate. After reviewing the comments and recommendations, the Secretary of Commerce may approve or disapprove an application with conditions or restrictions.

Although the Federal Fisheries Conservation Zone is defined to exclude state territorial waters and the FCMA contains a saving clause leaving the states competent to exercise jurisdiction within their boundaries, the Act has a potential extraterritorial impact on state authority which would be upheld under the preemption doctrine. The principal source of extraterritorial impact is the third national standard for fishery conservation and management plans, which directs that individual stocks of fish be managed as a unit throughout their range. Obviously, adequate management of any stock located in both the federal and state zones of authority is impossible if the state enforces regulations differing substantially from those of its Regional Council. Because the FCMA grants the Secretary of Commerce the ultimate power over the promulgation of management plans, there exists a legal mechanism by which the federal

104. Id. § 201(d), 16 U.S.C.A. § 1821(d).
105. Id. § 201(e), 16 U.S.C.A. § 1821(e).
106. Id. § 204(b) (4), 16 U.S.C.A. § 1824(b) (4).
107. See id. § 204(b) (5)-(9), 16 U.S.C.A. § 1824(b) (5)-(9).
110. Preemption would be effected under the commerce clause of the United States Constitution. This is the basis of the holding in Douglas, in which the Court determined that Congress could conclude that the taking of fish in state waters affects interstate commerce and invoked the commerce clause to uphold the federal government's right to regulate that activity. 97 S. Ct. at 1760. This analysis in Douglas would support the validity of a comprehensive federal program instituted under the FCMA.
111. FCMA, § 301 (a) (3), 16 U.S.C.A. § 1851(a) (3) (Supp. 1977); NOAA Guidance, supra note 64, at 34,458-59. See note 97 supra & accompanying text.
112. See generally FCMA, § 304(a)-(f), 16 U.S.C.A. § 1854(a)-(f) (Supp. 1977).
government may compel a state to conform its management practices with federal standards, at least with respect to stocks ranging both inside and outside the three mile limit. This federal authority can be enforced, if necessary, through the override provision of the FCMA, which permits the Secretary, after he has found that a state is frustrating the implementation of a fishery management plan, to oversee the regulation of the applicable fishery within the boundaries of that state according to the provisions of the plan. Furthermore, recently adopted guidelines for the third national standard require the Council to consider the interrelationship of species and habitat in management plans and to address the impact of pollution and the effects of wetland and estuarine degradation upon fish units. These guidelines may provide a basis for federal involvement in wetland regulation beyond that authority already exercised by the Corps of Engineers under section 10 of the Rivers and Harbors Act of 1899 and by both the Corps and the Environmental Protection Agency under the Federal Water Pollution Control Act.

Despite this potential preemptive federal authority, many mechanisms for state involvement were included in the FCMA. The states are represented among the Regional Council members; thus the management plans undoubtedly will reflect state interests. In fact, the Act specifically directs that each Council reflect the "expertise and interest" of its constituent states, within their respective ocean areas. Another provision of the FCMA allows the incorporation of state conservation and management measures into particular plans on a discretionary basis.

Two additional possible state inputs into Regional Council planning activities are noteworthy. The procedures of the National Environ-

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113. Id. § 306(b) (1), 16 U.S.C.A. § 1856(b) (1). The provision requires that the Secretary grant notice and the opportunity for a hearing before he takes action. The state may regain its authority over a fishery by applying to the Secretary for a reinstatement. If the reasons for which regulation was assumed no longer prevail, then the Secretary must approve the state's application. Id. § 306(b) (2), 16 U.S.C.A. § 1856(b) (2).
114. NOAA Guidance, supra note 64, at 34,459.
115. Id.
118. See text accompanying notes 88-89 supra.
120. Id. § 303(b) (5), 16 U.S.C.A. § 1853(b) (5). This clause provides that a fishery conservation and management plan, consistent with the national standards and other applicable law, may "consider . . . the relevant fishery conservation and management measures of the coastal States nearest to the fishery." Id.
mental Policy Act of 1969 (NEPA)\textsuperscript{121} are applicable to the Regional Councils' actions.\textsuperscript{122} Compliance with NEPA, which requires preparation of a detailed environmental impact statement for any "major federal action significantly affecting the quality of the human environment," \textsuperscript{123} will be necessary prior to the promulgation of most management plans. Through this process the states, as well as other interested parties, will have an opportunity to comment on the fishery management plans.\textsuperscript{124} Moreover, the Coastal Zone Management Act of 1972 \textsuperscript{125} requires that federal agency actions directly affecting the coastal zone be consistent, to the maximum feasible extent, with the coastal zone management programs of the states.\textsuperscript{126} Thus, the Councils will need to coordinate their actions with those of the state agencies involved in coastal planning.\textsuperscript{127}

III. AN ANALYSIS OF THE MARINE FISHING LAWS OF A TYPICAL COASTAL STATE: NORTH CAROLINA

To highlight the imminent changes in state management of marine fisheries as a result of recent developments, it is useful to focus on the laws and regulations of a particular coastal state. Although North Carolina has not been in the forefront of pioneering legislative developments, it has given serious attention to marine fishery regulation for many years;\textsuperscript{128} thus it is a good choice for such an exercise.

A. An Overview of North Carolina Fisheries Law

Marine fishing is an important industry in North Carolina. Commercial landings in 1976 totaled almost $27.4 million,\textsuperscript{129} and recreational fishing is a key factor in the multimillion dollar coastal tourist industry. The major commercially-valued species of fish in North Carolina are shrimp, blue crabs, hard clams, oysters, sea scallops,

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\textsuperscript{121} NEPA, § 102, 42 U.S.C. § 4332 (1970).
\textsuperscript{122} NOAA Guidance, supra note 4, at 34,453.
\textsuperscript{123} NEPA, § 102(2) (c), 42 U.S.C. § 4332(2) (c) (1970).
\textsuperscript{124} Id.
\textsuperscript{126} Id. § 307(c) (1), 16 U.S.C.A. § 1456(c) (1). See also id. § 307(a), 16 U.S.C.A. § 1456(a).
\textsuperscript{127} NOAA Guidance, supra note 64, at 34,453.
striped bass, flounder, croaker, spot, gray trout, and menhaden.\textsuperscript{130}

Authority over the marine and estuarine resources of North Carolina is vested in a Marine Fisheries Commission whose fifteen members are appointed by the Governor.\textsuperscript{131} The Commission is responsible for establishing policy and promulgating rules and regulations. A Commercial and Sports Fisheries Advisory Committee makes recommendations on fisheries policy to the Secretary of Natural and Economic Resources.\textsuperscript{132}

Geographically, North Carolina law asserts jurisdiction over a zone extending 200 miles from the coastline,\textsuperscript{133} but as a practical matter, the state has never attempted to regulate the area beyond the three mile limit.\textsuperscript{134} This extensive claim of jurisdiction, probably invalid when enacted, now is preempted by the FCMA. As do most coastal states, North Carolina has exercised extraterritorial jurisdiction through the enforcement of several landing laws prohibiting possession within North Carolina territory of any fish in violation of the size and seasonal limitations.\textsuperscript{135}

Presently, North Carolina regards its marine fisheries as a common property resource\textsuperscript{136} and grants open access to all fishery users.

\textsuperscript{130} Id.

\textsuperscript{131} N.C. GEN. STAT. 143B-287 (1977 N.C. Adv. Legis. Serv., C. 512, Pamphlet No. 9). To ensure representation of particular interests, this provision directs the Governor to select one person actively connected with and having experience in each of the following fields: commercial fishing, wildlife or sport fishing, marine ecology, coastal land development, and seafood processing and distribution. The Governor also appoints ten at-large members, seven of whom must be coastal area residents.

\textsuperscript{132} Id. § 143B-325.1 (1977 N.C. Adv. Legis. Serv., C. 512, Pamphlet No. 9). The primary duties of this committee are: to study all matters and activities connected with the conservation of marine and estuarine resources and make recommendations to the Secretary of Natural and Economic Resources; to act as a liaison group between sports and commercial fishermen and other groups concerned with the "beneficial utilization" of the state's marine and estuarine resources; to consider and advise the Secretary on certain matters which he refers to it; and to originate its own studies on various matters within its scope of interest. N.C. GEN. STAT. § 143B-325 (Supp. 3C 1975). The committee is composed of three sports fishermen, three commercial fishermen, and three professional scientists who have backgrounds relevant to the conservation of marine and estuarine resources. These members are selected by the Governor. Id. § 143B-326.

\textsuperscript{133} N.C. GEN. STAT. § 113-134.1 (1975).

\textsuperscript{134} Interview with Edward G. McCoy, Director of the North Carolina Division of Marine Fisheries, in Morehead City, North Carolina (Aug. 11, 1977) [hereinafter cited as McCoy Interview].

\textsuperscript{135} N.C. FISHING REG. FOR COASTAL WATERS §§ .1104, .1201 (1977) (calico scallops, lobster).

\textsuperscript{136} By statute, the marine and estuarine resources "belong to the people of the State as a whole." The Department of Natural and Economic Resources and the
The state has not employed the concept of limited entry, which has been used in a few states for economic and conservation purposes. The Marine Fisheries Commission has broad discretion in promulgating appropriate measures to manage the fishery resources. Commonly, the regulations imposed on fishermen using the principal state fisheries establish gear restrictions, area and seasonal limits, methods of taking, and fish size and amount limitations.

Additional regulation of the fisheries in North Carolina is achieved through various license, permit, and lease requirements for certain categories of users of the resource. Licenses must be purchased in a

Wildlife Resources Commission are accountable for these resources. N.C. Gen. Stat. § 113-131 (1975).

Limited entry restricts access to the fishery resource to maximize the catch in relation to the fishing effort employed. This is accomplished by integrating economic data with biological data, thereby developing programs that prevent depletion and waste. In seeking to utilize efficiently both the natural and industrial resources, the limited entry system differs from traditional fishery management, which attempts to maintain the maximum sustainable yield. See note 138 infra.

Alaska and Washington have the most comprehensive state limited entry systems. The purpose of a limited entry system, as set forth by the Alaska legislature, is “to promote the conservation and the sustained yield management of Alaska’s fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the common fisheries in the public interest and without unjust discrimination.” Alaska Stat. § 16.43.010 (1973). In Alaska, a state commission determines the maximum number of entry permits available and allocates them among fishermen on the bases of economic dependency and past participation in the fishery. The permits are freely transferable and may be purchased by the commission to reduce participation to an optimal level. Id. §§ 16.43.010–380. Limited entry licensing provisions are in effect for the herring and salmon fisheries in Washington. To obtain a herring permit, individuals must prove that they have held a prior commercial fishing license and actually caught herring during the years 1971–73, as documented by a landing ticket. If the number of permits must be reduced, those vessels with the shortest history of landings are eliminated. Entry permits for ships in the salmon fishery are limited to those vessels that previously have held gear and area licenses and actually caught salmon during the years 1970–74. The licenses are transferable, and provisions exist to relieve economic hardship under certain circumstances. These provisions are directed specifically towards the charter industry. Wash. Rev. Code Ann. §§ 75.28.390–485 (Supp. 1977). California, 14 Cal. Fish and Game Comm’n Reg. § 163 (1974), Michigan, Mich. Stat. Ann. § 303.1(b) (1977), and Ohio, Ohio Rev. Code Ann. § 1533.342 (Supp. 1977), also have delegated authority to their fishery departments to establish limited entry programs.

See N.C. Gen. Stat. § 143B-286 (1977 N.C. Adv. Legis. Serv., C. 512, Pamphlet No. 9). State management controls have been described as inadequate to protect fisheries resources. See North Carolina Marine Science Councils, North Carolina’s Coastal Resources 6-17 to 6-21 (Dec. 15, 1972).
number of circumstances. First, vessels engaged in commercial fishing, which is defined in terms of using commercial fishing equipment or fishing for the purpose of selling the catch, are required to obtain a commercial fishing license.\textsuperscript{140} This license requirement applies to ships engaging in commercial fishing outside the state's waters when the primary situs of those vessels is in North Carolina.\textsuperscript{141} Although one of the primary purposes of licensing is to generate revenue, the fees for residents are nominal, ranging from $1.00 for boats without motors to seventy-five cents per foot for vessels over twenty-six feet in length.\textsuperscript{142} Nonresidents of North Carolina, however, must pay $200 for each ship licensed, regardless of its length.\textsuperscript{143} Significantly, recreational and sports fishermen who do not use commercial gear are free from any licensing requirements.\textsuperscript{144}

Second, all persons taking oysters or clams from state waters for commercial purposes also must obtain a license.\textsuperscript{145} This license costs $1.00 and is restricted to state residents.\textsuperscript{146} Third, persons who market fish commercially, with the exception of commercial fishermen, must purchase a fish dealer's license.\textsuperscript{147} The primary purpose of this license is to facilitate the collection of North Carolina's tax on fish sales and to gather sale statistics.\textsuperscript{148} Apparently, there is widespread evasion of this tax, which currently generates only $28,000 per year; as a result, fish sale statistics generally are unreliable.\textsuperscript{149} Fourth, all commercial fishermen who land in the state for the purpose of selling fish are required to obtain a license.\textsuperscript{150}

Various kinds of gear, such as butterfly nets used for taking shrimp and hydraulic dredges used for collecting hard clams, may be operated validly only with a permit.\textsuperscript{151} Moreover, the Marine Fisheries Commission requires a permit for the dredging or filling of wetland

\textsuperscript{140} N.C. GEN. STAT. § 113-152(a) (1) (1975).
\textsuperscript{141} Id. § 113-152(a) (2).
\textsuperscript{142} See id. § 113-152(c) (1)-(4).
\textsuperscript{143} Id. § 113-152(c) (5) (1977 N.C. Adv. Legis. Serv., C. 999, Pamphlet No. 11, Part II). According to Mr. McCoy, this provision primarily is an attempt to discourage South Carolina vessels from fishing in North Carolina's waters. Virginia residents routinely are denied licenses on the ground that Virginia discriminates similarly against North Carolina fishermen. McCoy Interview, \textit{supra} note 134.
\textsuperscript{144} See N.C. GEN. STAT. §§ 113-151 to -156 (1975).
\textsuperscript{145} Id. § 113-154(a).
\textsuperscript{146} Id. § 113-154(c).
\textsuperscript{147} Id. § 113-156.
\textsuperscript{148} McCoy Interview, \textit{supra} note 134.
\textsuperscript{149} Id.
\textsuperscript{150} N.C. GEN. STAT. § 113-155 (1975).
\textsuperscript{151} N.C. FISHING REG. FOR COASTAL WATERS §§ .0202-03 (1977).
Finally, to promote the commercial cultivation of oysters and clams, the Commission leases to state residents portions of the public seabeds underlying the coastal fishing waters that do not already contain natural oyster or clam beds.  

B. The Potential Impact of Federal Fisheries Management on North Carolina Law

Using present North Carolina fishery law as an illustration, one may predict some of the changes in state marine fishery management that are likely to result from the recently intensified federal involvement. The impact of the FCMA on the states is not totally in the negative direction of erosion of state power; in fact, the federal program presents the states with new opportunities that, if taken, will lead to an increased state role and enormous economic and social benefits for a state's fishing and coastal communities.

Probably the major impact of the FCMA upon North Carolina's fishery management will be a sharp curtailment of the freedom of action enjoyed by the Marine Fisheries Commission, which traditionally has exercised virtually unlimited discretion in substantive management matters. Except with respect to fisheries that are wholly within state waters, the Commission, under the threat of federal override, will be compelled to follow the lead of the Regional Councils when promulgating its management regulations. Because the full-time staff of each Regional Council will be extremely limited, the major new influence in state management policy will be the National Marine Fisheries Service (NMFS) in the Department of Commerce. This agency has a superior data collection capability and possesses more information concerning the biological and ecological factors of fishery resources than does any individual state agency.  

In addition to coordinating seasonal, equipment, and other management restrictions with the Council's plan, the state may be required to change the quality of its fishery program. NMFS and other federal agencies will have a significant influence, and states will have to comply with federal regulations if they wish to continue to manage their fisheries.  

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153. Id. § 113-202(a) (1975).
154. See notes 112-13 supra & accompanying text.
155. See NOAA Guidance, supra note 64, at 34,454. Each Council shall have a minimum administrative staff consisting of an executive director, an administrative officer, and a secretary. The number of additional staff will vary according to the workload and available resources but is not to exceed seven employees. Id.
156. Interview with Ted Rice, Regional Director of the National Marine Fisheries Service, in Morehead City, North Carolina (July 19, 1977) [hereinafter cited as Rice Interview].
authorities probably will encourage the comprehensive management of each fishery and may promote the adoption of limited entry programs, which would curtail access to fisheries by restricting the availability of licenses, establishing quotas, and imposing high entry fees to discourage all but the most economically efficient operations.\textsuperscript{157} Although the concept of limited entry raises many controversial political, economic, and constitutional issues,\textsuperscript{158} the Councils possess the discretionary power under the FCMA to adopt such a management program, and as the need to conserve fishing resources increases, the elements of the limited entry management alternative undoubtedly will receive increasing attention.

\textsuperscript{157} H. KNIGHT \& J. LAMBERT, LEGAL ASPECTS OF LIMITED ENTRY FOR COMMERCIAL MARINE FISHERIES 3 (N.M.F.S. \& La. St. U., Negotiated Research Contract No. 03-4-042-28, Oct. 15, 1975). For additional discussion of limited entry programs see notes 137-38 supra.

\textsuperscript{158} For a discussion of the economics and constitutional issues of limited entry management see H. KNIGHT \& J. LAMBERT, supra note 157, at 9; Groseclose & Boone, \textit{An Examination of Limited Entry as a Method of Allocating Commercial Fishing Rights}, 6 U.C.L.A.-ALAS. L. REV. 201 (1977); Note, \textit{Legal Dimensions of Entry Fishery Management}, 17 WM. \& MARY L. REV. 757 (1976). See also Isakson v. Rickey, 550 P.2d 359 (Alas. 1976), in which the court held that a provision restricting applications for entry permits to fishermen who had gear licenses before a specific cut-off date did not have a fair and substantial relation to the purpose of the Alaska limited entry act. The purpose of the cut-off date was to terminate a rush to buy gear. This contradicted the purpose of the limited entry law, which was to allow access to the fishery based on a number of factors other than past participation. The decision merely overturned the cut-off date; the limited entry management system survived. The constitutionality of a limited entry system under North Carolina law has been questioned. See H. KNIGHT \& T. JACKSON, LEGAL IMPEDIMENTS TO THE USE OF INTERSTATE AGREEMENTS IN COORDINATED FISHERIES MANAGEMENT PROGRAMS: STATES IN THE N.M.F.S. SOUTHEAST REGION 73-74 (N.M.F.S. \& La. St. U., Contract No. 03-3-042-28, Sept. 28, 1973). Knight and Jackson rely on \textit{In Re Certificate of Need for Ashton Park Hospital, Inc.}, 282 N.C. 543, 193 S.E.2d 729 (1973), in which the Supreme Court of North Carolina held that a statute requiring a certificate of need for the construction of a hospital constituted a deprivation of liberty without due process of law and violated the equal protection clause of the North Carolina Constitution. Id. at 551, 193 S.E.2d at 735. Quoting from \textit{Roller v. Allen}, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957), the court stated: "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." 282 N.C. at 550, 193 S.E.2d at 735. Because a reasonable relation did not exist between the denial of the right to work and the promotion of public health, the court held the statute invalid. \textit{Id}. This reasoning probably would not apply to invalidate a limited entry system in North Carolina, however, if the entry permits can be transferred freely and therefore preclude no one from working.
Even if a limited entry system is not implemented, North Carolina must employ a more comprehensive system of regulation. Because no license requirement exists for recreational and sports fishermen, little data has been collected concerning the number of such fishermen or the species and amount of their catches.\textsuperscript{159} This lack of information prevents a fair allocation of the fishery resource between recreational fishermen and other user groups, and as a result, conflict has been increasing between sport and commercial fishermen.\textsuperscript{160} Also, the federal authorities may compel North Carolina to integrate the regulation of its marshland and wetland resources\textsuperscript{161} with its fisheries management program and to establish a more adequate plan for controlling coastal pollution.\textsuperscript{162}

A more serious problem with North Carolina's fishery management system, however, is its discrimination against nonresidents. Twenty-nine years after the Supreme Court's decision in \textit{Toomer v. Witsell}, North Carolina still maintains a system of discriminatory licensing procedures similar to the practices invalidated in \textit{Toomer}.\textsuperscript{163} This discrimination demonstrates the ineffectiveness of the various multi-state marine fisheries commissions\textsuperscript{165} created by interstate compact

\textsuperscript{159} McCoy Interview, \textit{supra} note 134; Rice Interview, \textit{supra} note 156.
\textsuperscript{160} McCoy Interview, \textit{supra} note 134. Another source of conflict between sports and commercial fishermen in North Carolina are the nominal fees charged for commercial fishing licenses, which encourage sportsmen to purchase commercial fishing licenses and to use commercial fishing gear, even though they may use the fishery only a few times a season. \textit{Id}. One solution to this problem is to increase the cost of commercial fishing licenses so that only efficient producers will be able to use commercial gear to exploit the fishery.

\textsuperscript{161} See text accompanying notes 115-17 \textit{supra}. North Carolina regulates the dredging and filling of marshlands, wetlands, and navigable waters. N.C. GEN. STAT. §§ 113-229 to -230 (1975). Additionally, under the state's coastal zone management program, wetlands and marshlands are "areas of environmental concerns," \textit{id}. § 113A-113 (1975), and development within them is subject to a state permit. \textit{id}. § 113A-118 (1975).

\textsuperscript{162} More than one-third of North Carolina's estuarine and coastal waters are closed to commercial shellfishing because of pollution, and the number of closings is increasing. McCoy Interview, \textit{supra} note 134.

\textsuperscript{163} 334 U.S. 345 (1947).

\textsuperscript{164} Compare text accompanying notes 66-69 \textit{supra} with notes 142-43, 145-46 \textit{supra} & accompanying text. The Supreme Court noted in \textit{Douglas} that many states enforce discriminatory fishing laws; it cited Maryland, Massachusetts, and New York as examples. 97 S. Ct. at 1752.

\textsuperscript{165} Several commissions created by interstate compact among particular regional groups of states have been approved by Congress. These include: the Gulf States Marine Fisheries Commission, ch. 66, 63 Stat. 70 (1949); the Atlantic States Marine Fisheries Commission, ch. 283, 56 Stat. 267 (1942), as amended, ch. 768, 64 Stat. 467 (1950); and the Pacific Marine Fisheries Commission, ch. 316, 61 Stat. 419 (1947). North Carolina is a member of the Atlantic States
to secure the enactment of uniform fishery laws. 166

Under the Supreme Court's standards, North Carolina's discriminatory practices are unconstitutional. According to Douglas, the state cannot deny vessels documented under the enrollment and licensing laws the right to use its fisheries. Moreover, under the broader standard of Toomer, the blanket denial of commercial fishing licenses to Virginians and the discriminatory license fee charged to South Carolinians violate the privileges and immunities clause unless such practices can be justified by a substantial state interest other than the fact that those who are the objects of the discrimination are residents of another state. 167 Thus even discrimination against non-documented vessels can be proscribed under the Supreme Court's holding in Toomer. Furthermore, the provision in North Carolina's law limiting commercial clam and oyster licenses to residents can apply validly to inland waters only under the doctrine in McCready v. Virginia, 168 as modified by the Court in Toomer. 169 Finally, the fourth national standard under the FCMA, 170 which prohibits discrimination between residents of different states, provides an additional legal basis to overturn North Carolina's discriminatory practices. Thus the new federal standards will force North Carolina's fishermen to share the state's


166. The purpose of the compacts is to promote a more desirable utilization of fisheries through the development of a joint program that prevents waste and protects the resource. The commissions may make recommendations to the member states to coordinate fishery regulation, but they have no direct management authority. Because the compacts are only agreements to consult, they have been ineffective in providing a framework for coordination and uniformity among state fishery management programs. H. KNIGHT & T. JACKSON, supra note 158, at 63. The Supreme Court in Toomer recognized that the Atlantic States Marine Fisheries Commission's duties were mainly advisory and therefore had little effect on the South Atlantic shrimp fishery. 334 U.S. at 388 n.5.

167. 334 U.S. at 396-97. See note 68 supra & accompanying text. For a discussion of North Carolina's discriminatory enforcement of its commercial licensing laws among residents of different states see note 143 supra.

168. 94 U.S. at 391 (1876).

169. 334 U.S. at 401. For a discussion of McCready, as limited by Toomer, see note 68 supra.

170. FCMA, § 301(a)(4), 16 U.S.C.A. § 1851(a)(4) (Supp. 1977). This section provides:

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.
fishery with nonresidents, but the new requirements also will grant North Carolina residents access to the resources of other states.

The most beneficial result of federal fishery management upon the states will be an opening of new frontiers for their marine fishery management programs. The provision under the FCMA restricting foreign fishing within the 200 mile limit to that portion of the OY in excess of domestic fishing capability is an invitation to the states to encourage their fishermen's utilization of the resource. Furthermore, the determination of OY and the other national standards for fishery management plans prepared by the Regional Councils rests upon the application of biological, statistical, sociological, and economic knowledge and information; therefore, the effectiveness of a state's attempts to influence Council decisions will be limited only by its ability to gather and inject such data into the decision-making process.

Presently, most states' programs are deficient in their ability to increase domestic capability and gather informational data. Although North Carolina operates a fishermen's economic development program that provides advisory services to fishermen, the state has not given the program sufficient priority. For example, the state's marketing and fish processing facilities never have been able to accommodate the entire commercial catch; consequently, some fish caught by the state's fishermen must be shipped elsewhere for processing and distribution. To improve the capability of its fishermen a state must increase its financial assistance, its technical advisory services, and its marketing and business education programs for fishermen. In short, states must establish a comprehensive framework promoting the development of their commercial fishing industries.

Similarly, a widespread lack of knowledge concerning data pertinent to the states's fisheries exists among the states. For example, catch statistics are largely incomplete. In addition, fish sales are reported

171. Id. §§ 201(d), 303(a)(4), 16 U.S.C.A. §§ 1821(d), 1853(a)(4).
173. N.C. GEN. STAT. § 113.-315.18 (1977 N.C. Adv. Legis. Serv., C. 356, Pamphlet No. 7). The Secretary of Natural and Economic Resources is authorized to provide services to promote the economic development of fishermen. These include: a business management service to promote better business management practices and techniques and better use of credit; counseling services to assist fishermen in meeting federal and State environmental, safety, and health requirements; and an improved water transportation system to accommodate commercial and sport fishing craft safely and efficiently and to provide access to and from fishing grounds. Id.
174. NORTH CAROLINA MARINE SCIENCE COUNCILS, supra note 139, at 6-22.
175. Rice Interview, supra note 156.
only in connection with tax payments and thus are unreliable.\textsuperscript{176} Very little biological information exists with respect to the relationship between fish stocks and changing environmental conditions.\textsuperscript{177} Sociological data concerning the coastal communities is almost nonexistent.\textsuperscript{178} This knowledge is a necessary component of an effective state management program, and serious efforts to obtain it must be a part of future plans. The federal government's entry into the field of fishery management may provide the new legal authority and financial resources that are necessary for a comprehensive study and resolution of these problems.

**CONCLUSION**

The Fishery Management Conservation Act of 1976 and the recent United States Supreme Court decision in *Douglas v. Seacoast Products, Inc.* present the states with both new problems and opportunities in the operation of their marine fishery management program. These developments on the federal level will compel revolutionary changes in state fishery management. Because of increased federal involvement, the states must limit severely the freedom of action previously enjoyed by state authorities in this field and upgrade the quality of their present management plans to conform with the plans of their respective Regional Councils. In addition, the recent federal activity reaffirms the judicial pronouncement that the states may not validly attempt to reserve their fisheries exclusively for the benefit of their own citizens. In contrast with these limitations upon state activity, however, the new fisheries management concepts provide the states with an unprecedented opportunity to develop their own fishing industries. To take maximum advantage of these benefits the states should not hesitate to revise comprehensively their laws and programs relating to the management of marine fisheries.

\textsuperscript{176} See notes 148-49 *supra* & accompanying text.
\textsuperscript{177} McCoy Interview, *supra* note 134; Rice Interview, *supra* note 156.
\textsuperscript{178} Rice Interview, *supra* note 156; OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 172.