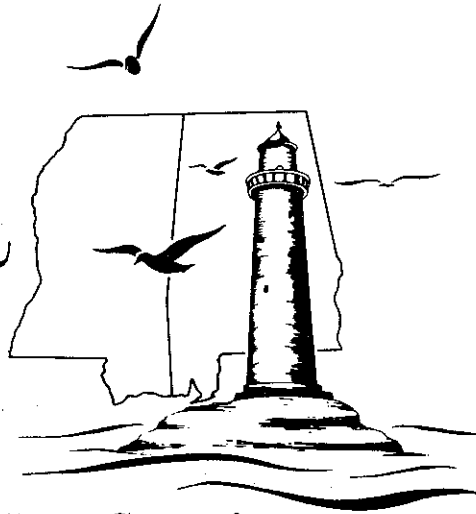


# WATER LOG



A Legal Reporter of the  
Mississippi-Alabama Sea Grant Consortium

## Mandatory Seafood Inspection: Do We Need It?

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Vol. 9, No. 4, October - December 1989  
Mississippi-Alabama Sea Grant Legal Program

## **WATER LOG**

The WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

This publication was prepared with financial assistance from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Sea Grant (under Grant Number NA89AA-D-SG016), the State of Mississippi, and the University of Mississippi Law Center.

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**MASGP-89-016-4**

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## Preface

The first portion of this issue of WATER LOG is devoted to the debate over pending mandatory federal seafood inspection legislation. In the past several years, there has been growing concern by consumers regarding the safety of the nation's seafood products. Unlike beef and poultry, there is no mandatory inspection program for seafood. To rectify this situation, seven bills have been introduced in the 101st Congress that call for the mandatory inspection of seafood.

We have invited three distinguished contributors to comment on the desirability of mandatory inspection. Brian Perkins is a seafood technologist with the Alabama Sea Grant Advisory Service and has worked with the Alabama seafood industry on health and safety related matters for many years. Mr. Perkins will introduce the subject by presenting a summary and analysis of each of the legislative proposals pending in Congress. This will be followed by an article from Ellen Haas, Executive Director of Public Voice for Food and Health Policy, a consumers' rights organization based in Washington, D.C. Ms. Haas believes that public concern regarding the safety of American seafood is justified and that mandatory seafood inspection is the best way to remedy the situation. Our final contribution is from Chris Nelson, who is Director of Research and Development at Bon Secour Fisheries, Inc., a shrimp and oyster processing plant. Mr. Nelson contends that the concern over the safety of seafood is overstated and suggests methods to improve the existing inspection system instead of adopting a mandatory scheme.

We hope that a discussion from opposing points of view will provide our readers with a better understanding of the strengths and weaknesses of proposed mandatory seafood inspection programs. From all indications, it will likely prove to be one of the more divisive issues facing Congress this year.

## An Overview of Proposed Federal Seafood Inspection Legislation

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*Brian E. Perkins*

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### INTRODUCTION

Recent media publicity about the public health significance

of illnesses related to consumption of seafood have prompted many individual consumers and consumers' rights groups to call for the mandatory inspection of seafood in a manner similar to that currently used for inspecting red meat and poultry. The prospect of such inspection has created widely differing opinions among both the U.S. consuming public and the domestic seafood industry.

Some individual consumers and consumer groups contend that public health is at stake if something is not done to improve upon current seafood inspection initiatives. Other consumers feel that while improved inspection may be warranted, it also may cause seafood to be priced out of their reach. Additionally, a third group believes the current level of seafood inspection and the degree of protection it affords consumers is adequate.

Opinions within the seafood industry also run the gamut. One segment of the industry believes that the only way to bolster public confidence in the wholesomeness of seafood is by processing under the watchful eye of a stringent inspection program. Another industry segment believes that current levels of inspection would be sufficient if existing laws were enforced. Finally, a third group contends that costs associated with an additional mandatory inspection program may force them out of business.

This wide variety of seafood consumer and industry assertions, contentions, and fears resulted in the introduction of no less than seven seafood inspection bills in 1989 during the first session of the 101st Congress of the United States. This article will provide a summary and accompanying analysis of each of these bills. Following the article at *Table I* is a summary of the discussion. It should be helpful in making point by point comparisons among the seven bills.

### DISCUSSION

**H.R. 1387** - Rep. Dorgan (D-N.D.). This Act, entitled the "Mandatory Fish Inspection Act of 1989," was the first seafood inspection bill entered in the first session of the 101st Congress, and was dated March 14, 1989.

This short (1-1/2 page) bill proposes, "[t]o provide for the inspection of all commercial seafood destined for human consumption in the United States." The U.S. Department of Agriculture is designated as the lead inspecting agency. No appropriation is proposed.

H.R. 1387 directs the Secretary of Agriculture to initiate a mandatory program "for the comprehensive and statistically representative inspection of the commercial processing of all freshwater and saltwater fish, shellfish, and their products, used for human consumption." The bill further states that "[t]he mandatory program should be

similar, to the extent practical, to the currently effective system for the inspection of commercially processed meat and poultry." H.R. 1387 ends at that point. No definitions or standards are included, and no inspection program features are presented.

The brevity and lack of specificity of H.R. 1387 appear to give the Secretary of Agriculture great latitude in designing a seafood inspection program. The only limitation imposed in the bill is a reference to "the commercial processing" of seafood. This would appear to limit the Secretary of Agriculture to promulgating rules and regulations concerning seafood processing, and would apparently exclude seafood harvesting and aquaculture.

**H.R. 2511** - Rep. Studds (D-Mass.). Titled the "Consumer Seafood Safety Act of 1989," H.R. 2511 directs "the President to develop a comprehensive safety program to ensure the quality and wholesomeness of all fish products intended for human consumption in the United States." The bill authorizes an appropriation of \$90 million for each of the fiscal years 1990, 1991, 1992, and 1993.

The Act requires that the program be "designed in consultation with the National Marine Fisheries Service, other appropriate Federal agencies, and representatives of the seafood industry and national consumer organizations." However, no single agency is identified to take the lead role in managing the inspection program.

The five basic features of the seafood safety program established pursuant to H.R. 2511 are:

1. mandatory inspection;
2. federal standards;
3. enforcement and monitoring;
4. research; and,
5. education.

H.R. 2511 stipulates that inspection cover each fish product in accordance with the Hazard Analysis Critical Control Point (HACCP) method (defined as "the system of food inspection described and endorsed by the National Research Council in the article entitled 'An Evaluation of the Role of Microbiological Criteria for Foods and Food Ingredients,' as published in May, 1985 by the National Academy Press....").

The Act further requires that inspection occur according to procedures which are designed specifically for each fish product, and which take into account recommendations made by the National Marine Fisheries Service (NMFS) resulting from its Model Seafood Surveillance Project (MSSP). Inspection would encompass harvesting, processing, storing, transportation, and marketing of each fish product. H.R. 2511 also calls for the establishment of federal standards for "maintaining sanitary conditions and good har-

vesting and manufacturing practices on fishing vessels and in processing plants...." Furthermore, the legislation requires development of "minimum standards for wholesomeness, grading, packaging, and labeling of seafood, including the use of designated common names for various fish products [plus] standards for acceptable levels of contaminants in fish products."

Several methods for enforcing the program are provided by H.R. 2511. Among them are powers of product detention and embargo, and the use of enforcement officers empowered to enter any seafood processing facility to conduct inspections, take product samples, and access records. The Act also establishes federal fish product and seafood-related consumer health risk monitoring systems to document fish product origin and processing history, and to provide data on the number, causes, and location of seafood-related illnesses. A sampling, reporting, and recordkeeping program would be established to regulate contaminant levels in fish products and ensure effective tracing of contamination sources.

Seafood safety research priorities are established by the bill, including biological and chemical contaminant test methodologies. The bill further calls for the establishment of national seafood safety education programs, including national and regional seafood safety centers which will "conduct, support, and foster research, investigation, experimentation, education, and training in seafood safety-related areas." H.R. 2511 indicates that it will be consistent, to the degree practicable, with existing federal and state seafood safety programs, that it will not supersede any fish product promotion program established and operated under existing state or federal law, and that pursuant to its authority, the President will encourage mutual acceptance of foreign seafood standards and inspection practices.

Inspection according to the HACCP method, as stipulated by H.R. 2511, would mean that only certain critical points in the processing of each type of fish or the manufacture of each type of fish product would be inspected, as opposed to "carcass by carcass" inspection. Critical control points (points of inspection) for each fish or fish product would be based on the results of NMFS' Model Seafood Surveillance Project (nearly complete as of this writing).

Many of the standards which H.R. 2511 would establish already exist. Package labeling requirements and processing plant good manufacturing practices (GMPs), which are universally applicable to all foods and food processing facilities regardless of type, are part of Title 21 of the Code of Federal Regulations, promulgated under the authority of the Federal Food, Drug, and Cosmetic (FD&C) Act. They are currently used by Food and Drug Administration investigators to note compliance with the FD&C Act.

Minimum standards for wholesomeness and grading of fish and fish products are found in Title 50 of the Code of Federal Regulations. They are currently used by NMFS' National Seafood Inspection Laboratory personnel to note compliance with its voluntary seafood inspection initiative.

While common names for hundreds of fish and fish products were established through a cooperative FDA/NMFS project, and have been made available to the industry for use on a voluntary basis, their use has not been required. FDA also established acceptable levels of contaminants in fish and fish products some years ago, but they likewise have not been enacted into law.

Formalized, universally agreed upon, or mandatory GMPs and standardized sanitary conditions for U.S. fishing vessels are not currently required. However, proponents of vessel inspection propose that either Food and Agriculture Organization of the United Nations (FAO) guidelines, European Economic Community (EEC) regulations, or Canadian fishing vessel certification requirements (or a combination) be used as the basis for developing U.S. fishing vessel sanitation and GMP regulations.

**H.R. 3155** - Rep. Dingell (D-Mich.). This bill, named the "Fish and Fish Products Safety Act of 1989," proposes "[t]o amend the Federal Food, Drug, and Cosmetic Act to improve and expand the inspection and labeling of fish and fish products...." H.R. 3155 designates the U.S. Food and Drug Administration as the lead inspecting agency. No appropriation is proposed. The seven basic features of the Act are:

1. standards for fish and fish products;
2. registration;
3. inspection;
4. service agreements;
5. public awareness;
6. research and demonstration projects; and,
7. cooperation with the Centers for Disease Control.

H.R. 3155 calls for the Secretary of Health and Human Services to contract with the National Academy of Sciences (NAS) to identify the chemical and microbiological contaminants, parasites, and toxins most often found in fish and fish products and which are most likely to render those fish or fish products unsafe for human consumption. Based on the NAS findings, the Secretary will promulgate regulations which establish standards for those contaminants, parasites, and toxins. Fish and fish products will be deemed to be unsafe for human consumption if the established standards are not met. In the case of fish or fish products for which standards do not exist, they may be deemed unsafe for consumption if any contaminant, parasite, or toxin may render the fish or fish product unsafe. Fish

or fish products harvested from a "fish adulteration area" shall also be deemed to be unsafe for human consumption.

H.R. 3155 proposes that standards for sanitation and quality control for the processing of fish and fish products and the facilities in which the processing operations are housed shall be prescribed by regulations. The final standard which H.R. 3155 proposes concerns the conditions under which the label of any fish or fish product may display an official mark, indicating that the fish or fish product was processed in accordance with the terms of the Act. These conditions may be prescribed by the Secretary of Health and Human Services by promulgation of regulations after consultation with the Secretary of Commerce.

H.R. 3155 is the first House seafood inspection bill which proposes that all seafood processors and importers register with the Secretary of Health and Human Services. Processors and importers will be required to maintain accurate "product movement" records, and notify the Secretary of any changes. Each registrant may be assigned a registration number.

H.R. 3155 calls for the conduct of "periodic announced and unannounced inspections of facilities in which fish or fish products are processed to determine if the facilities meet the requirements prescribed [by the Act]." It also stipulates that facilities in which imported fish and fish products are processed will be inspected with the same frequency as facilities which process other fish and fish products. Regulations pertaining to inspection include requirements for sampling of fish and fish products by the processor to note compliance with the Act. A system to trace contaminated fish and fish products will also be required. Additionally, processors would be required to provide for training and certification of employees in fish and fish product sanitation and quality control.

The Secretary may use, on a reimbursable or other basis, the personnel, services, and facilities of other federal and state agencies in conducting registrations, inspections, and monitoring. To this end, the Act allows the Secretary to authorize payment of up to fifty percent of the cost of state agencies in performing such services.

H.R. 3155 establishes "a comprehensive public awareness program on the proper handling and preparation of fish and fish products." The Act also states the Secretary may conduct research and demonstration projects to assist with the implementation of the Act, including improved methods of sanitation and quality control, and monitoring and inspection of fish and fish products. The Secretary may also fund projects to develop methods for determining and detecting the presence and the sources of contamination of fish and fish products with harmful chemical and microbiological contaminants, parasites, and toxins. The research

and demonstration projects may be conducted directly or through grants and contracts with public or nonprofit private entities or individuals.

The final feature of H.R. 3155 calls upon the Secretary to establish an active surveillance system in cooperation with the Centers for Disease Control (CDC), which provides an accurate estimate of the frequency of human disease caused by consumption of fish and fish products. The estimate will be based on a representative portion of the population of the United States.

The specificity of Representative Dingell's "Fish and Fish Products Safety Act of 1989" is in large part the result of its attempt to supplement the FD&C Act with additional language which is specific to the processing of fish and fish products. The FDA operates the National Shellfish Sanitation Program (NSSP), which includes standards for acceptable microbiological levels in shellfish. FDA developed standards for acceptable limits of contaminants in other fish and fish products years ago. With few exceptions, they have neither been enacted into law nor promulgated as regulations. They are, on occasion, used to enforce one section of the FD&C Act, which allows the FDA to take action against fish and fish products, or fish and fish product processing operations, when it is perceived that a threat to public health is imminent.

Labeling requirements for all foods, including fish and fish products, currently exist under Title 21 of the Code of Federal Regulations. The establishment of an official mark denoting compliance with H.R. 3155's amendments to the FD&C Act is the only change in labeling requirements which H.R. 3155 would generate.

A system for registering processors of shellfish and shellfish products entered into interstate commerce already exists as part of the NSSP. Registration and reporting by all other fish and fish product processors and importers would impose a new requirement.

The type of inspection which H.R. 3155 requires does not appear to differ from the type currently employed by the FDA to inspect fish and fish product processing. However, the stipulation that imports would be inspected with the same frequency as other products is new. (Currently, imports are not routinely inspected. Rather, imports may be sampled based on the past history of a specific kind of fish, fish product, foreign processor, country of origin, or domestic importer.) Requirements that processors themselves sample fish and fish products to note compliance with the Act is novel. Currently, FDA can only suggest that it is a good idea for processors to take routine samples of their own products. A regulation which requires processors to sample their products and report the results of those sample determinations seems suspect, and hints at a violation of a processor's rights to protection from self incrimination.

The requirement that processors devise a system to trace contaminated fish and fish products is also new. Currently, the FDA can only suggest that a processor have such a system in force.

The requirement that processors be responsible for the training of their employees is already required by the good manufacturing practices (GMPs) of Title 21 of the Code of Federal Regulations. However, seafood processing employee certification is unique to H.R. 3155. Since the employee certification procedure would have to be implemented in regulations to be promulgated by the Secretary, seafood processing employee certification criteria and methods are at present unclear. (Currently, FDA requires employee certification in other food industries, such as low-acid canned foods.)

Service agreements between the FDA and state health agencies have existed for years. Likewise, research by the FDA into fish and fish product safety has been conducted for many years. FDA's use of public and private entities or individuals as research subcontractors in other food commodity areas is not new. However, the use of subcontractors to conduct FDA-sponsored research on fish and fish product safety would be an innovation. H.R. 3155 makes no specific reference to regulating fishing vessels. However, the Act defines processing as, "handling, storing, preparing, including heading, gutting, or changing into a different market form, producing, manufacturing, preserving, packing, transporting, or holding." A number of those unit operations are routinely carried out aboard fishing vessels. Therefore, it is unclear whether H.R. 3155 proposes to regulate fishing vessels.

**H.R. 3481 - Rep. Glickman (D-Kan.).** This is the second bill entered into this year's session with the short title "Consumer Seafood Safety Act of 1989." It is dated October 17, 1989, and proposes "[t]o develop a comprehensive safety program in order to protect the public health and to ensure the wholesomeness of all fish products intended for human consumption in the United States." The bill authorizes \$75 million for each of the fiscal years 1990, 1991, 1992, and 1993. The Act identifies the U.S. Department of Agriculture as the lead agency for purposes of managing the inspection program.

The six purposes of H.R. 3481 are:

1. mandatory inspection and certification of fish and fishery products;
2. establishment and enforcement of safety standards for fish and fishery products;
3. proper labeling and packaging of fish and fishery products;
4. employee protection;
5. research; and,

6. consumer education.

The Act stipulates that the Secretary of Agriculture shall appoint inspectors to make unannounced and random inspections of all facilities and vessels where fish and fishery products are processed for interstate commerce. The inspections will be conducted "with such frequency and manner as provided in rules and regulations by the Secretary...."

The inspection program will be designed for each stage of processing of fish and fishery products to detect adulterated fish and fish products, to ensure that sanitation standards and GMPs are met by all establishments and vessels, and "to identify the stage of processing in which the adulterated fish and fishery products became adulterated or were not removed from the human food process." The program proposes the use of extensive sampling for microbiological and chemical contaminants. The inspection program will be designed to take into account such factors as:

1. the degree of susceptibility of fishery products to contamination or other potential for affecting public health;
2. the history of compliance with inspection requirements under the Act; and,
3. the production volume and operational complexity of the establishment or vessel.

H.R. 3481 proposes establishment of regulations which would require establishments and vessels to prepare and maintain records of their activities pertaining to food safety and sanitation. The records would be made available for public inspection, and for authorized representatives of the Secretary of Agriculture to examine and make copies.

Foreign vessels and establishments which prepare fish and fishery products for importation into the United States would be inspected at least annually, according to regulations promulgated by the Secretary. Foreign vessels and establishments would be inspected to ascertain whether they meet the bill's requirement that the foreign country's systems of inspection and certification are at least equal to the systems established by H.R. 3481 for domestic vessels and establishments.

Official certificates will be issued for all establishments and vessels which provide proof of the existence of approved sanitation and storage facilities, and implementation of an approved quality assurance program. Regulations will be established for identifying and marking fish and fishery products with a stamp which denotes that the fish or fishery products were processed at officially approved establishments or vessels.

H.R. 3481 calls for the Secretary of Health and Human Services to contract with NAS to identify the contaminants, parasites, and toxins which are most likely to be found in fish and fish products, and which are most likely

to render them unsafe for human consumption. Based on those findings, the Secretary of Health and Human Services shall issue regulations which establish standards for those chemical and microbiological contaminants, parasites, and toxins.

The Act also makes provisions for the issuance by the Secretary of Agriculture of regulations which describe standards for the conditions under which fish and fishery products capable of use as human food shall be stored or otherwise handled. These standards apply to any person "engaged in the business of buying, selling, freezing, storing, or transporting, in or for interstate commerce, or importing, such articles."

The Secretary may direct that any labeling or packaging, or any official mark be withheld if he has reason to believe that such labeling or packaging in use or proposed for use is false or misleading with respect to any article.

This Act protects employees from discharge or discrimination with respect to the employee's compensation, terms, conditions, or privileges of employment because he assisted or in any way participated in carrying out the provisions of the Act.

H.R. 3481 calls on the Secretary of Agriculture to establish priorities for fish and fish products safety research in consultation with other federal agencies and the states. Appropriate federal agencies shall conduct research regarding those priorities.

The Act concludes by calling upon the Secretary to design and implement a national program for fish and fish product safety education in consultation with other federal agencies and the states. The program includes designation of regional and national fish and fish product safety centers, which will be expected to conduct, support, and foster research, investigation, experimentation, education, and training in fish and fish products safety-related areas.

The frequency with which inspections will be carried out under H.R. 3481 ("unannounced and random") is no different than the inspection frequency currently employed by the FDA. The stipulation that "records shall be made available for public inspection" may violate processors', fishermen's, and importers' rights of privacy. The requirement that quality assurance programs would have to be approved before vessels and establishments could be certified is novel. The use of official stamps would likewise be new to the seafood industry.

It is interesting that the Secretary of Agriculture would call upon the Secretary of Health and Human Services to contract with NAS to conduct research, and later promulgate regulations concerning standards for contaminants, parasites, and toxins. Currently, shellfish harvesting is managed by the NSSP, under which chemical, microbio-

logical, and other standards already exist. Labeling requirements already exist under Title 21 of the Code of Federal Regulations. With the exception of adding a "compliance stamp" to fish and fishery products, H.R. 3481 does not propose to do anything differently than the FDA already does.

H.R. 3481 is the first seafood safety bill entered that includes a "whistle-blower" protection clause to protect employees attempting to carry out the provisions of the Act from employer reprisals.

Finally, the national seafood product safety program which H.R. 3481 proposes to establish is nearly identical to the program proposed by H.R. 2511.

**H.R. 3508** - Rep. De LaGarza (D-Tex.). This Act's short title is the "Federal Inspection for Seafood Healthfulness Act of 1989." It proposes "[t]o expand the inspection by the Secretary of Agriculture of the Nation's food supply to ensure the safety and wholesomeness of the Nation's supply of fish, shellfish, and other marine and freshwater aquatic food." H.R. 3508 intends to satisfy these goals by amending the Agricultural Marketing Act of 1946. It designates the U.S. Department of Agriculture as the lead agency in carrying out its seafood safety program, and authorizes "such sums as are necessary to carry out this subtitle to remain available without fiscal year limitation."

The Act requires the Secretary of Agriculture to develop and administer a comprehensive and efficient inspection program to protect the public from seafood and seafood products which are adulterated or misbranded. The program should take into consideration the special characteristics of seafood and seafood products, and the processing thereof. The program should also be based on a comprehensive assessment of seafood, seafood products, and their processing that identifies and assesses severity of risks and hazards. Critical control points would be established, and monitoring procedures would be implemented to assure that critical control points are under control. Periodic registration and inspection of establishments and vessels would be conducted at such points, with such frequency, and in such manner as deemed necessary by the Secretary of Agriculture. The intent is to assure that the processing of seafood and seafood products complies with the standards established by the Act.

The Secretary shall prescribe regulations establishing:

1. vessel and establishment GMPs;
2. seafood and seafood product wholesomeness, nomenclature, quantity, package, and labeling standards;

3. inspection procedures; and,
4. standards for monitoring, classifying, and controlling seafood production areas.

H.R. 3508 exempts "non-processing" fishing vessels from inspection and registration. Vessels which harvest or commercially prepare seafood or seafood products by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling will be exempted so long as scientific analyses of products from such vessels do not indicate the necessity of including any particular type or class of vessel in the inspection program.

All establishments and vessels must be registered under the program. Registration will be denied if the establishment is deemed to be unfit for the purposes of processing seafood and seafood products.

All seafood and seafood product labeling and packaging must be reviewed and approved to note compliance with the standards established by the Act. Owners and operators of vessels and establishments will be required to mark each package of seafood or seafood product at the time the package leaves the establishment or vessel. Package markings shall include appropriate registration numbers, and an official mark which signifies the seafood's or seafood product's compliance with the terms of the Act.

Owners and operators of all registered vessels and establishments will be required to maintain accurate records regarding:

1. the receipt, delivery, sale, movement, or disposition of seafood or seafood products;
2. matters related to the adulteration or misbranding of seafood or seafood products, including the geographic area or fishery from which such seafood was harvested; and,
3. other activities relating to food safety and sanitation.

Owners and operators of registered vessels and establishments must, upon request, permit the Secretary access to and copies of any such records, and make such reports to the Secretary as he may require. Inspectors may enter any part of any registered vessel or establishment at any time of day or night, without regard to whether the vessel or establishment is being operated. They may inspect all seafood and seafood products, packages, labeling, conditions, equipment, and required records. Inspectors may sample any seafood or seafood products, and may detain any seafood or seafood products that are adulterated or misbranded. They may also condemn any seafood or seafood products according to the rules and regulations promulgated under the Act. The Secretary is required to provide the owner or operator of the vessel or establishment a report in writing describing the results of the inspection.



The Act directs the Secretary of Agriculture and the Secretary of Commerce to cooperatively establish and maintain a system for the sampling and testing of seafood and seafood products. The purpose of such a system would be to identify and designate geographic areas from which significant quantities of seafood or seafood products not in compliance with the Act are harvested.

Imported seafoods must meet several criteria before their entry into the United States will be allowed. They must comply with domestic seafood product standards, may not be adulterated or misbranded, and must be identified as imports. Compliance would be ensured through random inspection and sampling of imports. Foreign seafood inspection programs would be reviewed by the Secretary, and may be issued a certificate if the foreign inspection program is at least equal to the program established by the Act. Under H.R. 3508 no foreign seafood will be allowed into the United States that does not have a valid, current certificate. Foreign certificates and seafood product compliance will be periodically reviewed for compliance by the Secretary. H.R. 3508 likewise establishes procedures for the inspection and certification of seafood and seafood products intended for export.

The Act encourages states to establish equivalent seafood inspection programs. Consequently, states may be provided advisory and technical assistance for planning and developing their programs. States may also be granted fifty percent of the costs of operating their equivalent programs. While states may not be prevented from establishing requirements or taking any other action which is consistent with the Act, and may exercise concurrent jurisdiction over seafood and seafood products with the Secretary, states are precluded from imposing requirements which are in addition to or different from the terms of the Act. The Secretary would periodically review state programs for compliance with the terms of this Act.

The following are exempted from the terms of H.R. 3508 (in addition to non-processing fishing vessels):

1. seafood or seafood products intended exclusively for the use of the harvester or grower, owner, employees, or nonpaying guests;
2. operations of types traditionally or usually conducted at retail stores or restaurants;
3. products for which the Secretary determines that inspection would be impractical;
4. any seafood or seafood product, other than fish or shellfish, that the Secretary determines will have no adverse effect on protecting the consuming public from adulterated or misbranded seafood and seafood products;
5. any vessel processing seafood or seafood products solely for shipment to foreign countries; and,

6. seafood or seafood products acquired in foreign countries and brought into the United States for personal consumption by the owner.

This Act protects employees from discharge or discrimination with respect to the employee's compensation, terms, conditions, or privileges of employment because he assisted or in any way participated in carrying out the provisions of this Act.

One of the final requirements of the Act calls on the Secretary to develop and implement a national program for seafood and seafood products safety education in consultation with other federal agencies and the states.

Generally speaking, this Act does not propose to provide for the inspection of seafood in a manner that is significantly different from the manner in which seafood is already inspected by the FDA. H.R. 3508 merely proposes to place authority for seafood inspection within the U.S. Department of Agriculture. Major differences between H.R. 3508 and current seafood inspection initiatives include:

1. establishment of standards for nomenclature and quantity;
2. establishment and use of official marks;
3. vessel and establishment registration;
4. empowering inspectors to enter vessels and establishments at any time of day or night without regard to whether they are operating (possible violation of owners', operators', or importers' rights to privacy);
5. the manner in which foreign seafood safety programs are certified (compliance currently noted through spot checks of seafood and seafood products based on FDA's experience with a specific kind of seafood, seafood product, foreign processor, country of origin, or domestic importer); and,
6. establishment of a national seafood and seafood product safety education program.

**S. 1245** - Sen. Mitchell (D-Maine). Entitled the "Federal Fish Inspection Act," this Act seeks to amend the Federal Meat Inspection Act by expanding the meat inspection programs of the United States to include a comprehensive inspection program for fish products. S. 1245 designates the U.S. Department of Agriculture as the lead inspecting agency. The Act authorizes appropriations "for each fiscal year such sums as are necessary to carry out this title." The six basic features of the Act are:

1. standards for processing, safety, wholesomeness, packaging, and labeling;
2. inspection;
3. enforcement;
4. research;

5. education; and,
6. interagency cooperation.

The Secretary of Agriculture will be required to issue such regulations as are necessary to establish standards for maintaining sanitary conditions and good processing, storage, and handling practices. Standards governing the safety and wholesomeness of meat from fish and fish products will be established. The packaging and labeling of fish products, including the use of common names, will be regulated.

The inspection program will likewise be established in the form of regulations promulgated by the Secretary. The Act calls for the inspection program to include the processing, storage, and handling of meat from fish and fish products. The program will also provide for the registration and inspection of facilities and vessels that process fish products.

S. 1245 requires the identification of geographic areas producing fish and fish products that exceed the standards established by this Act. In addition, the program would provide for the inspection of imported and domestic fish products on an equal basis.

The Act calls for the development of a comprehensive system of monitoring and surveillance to assure compliance. The compliance system would provide for appointment and training of inspection officers. It would also contain reporting and recordkeeping requirements to assist the Secretary in locating sources of contaminated fish and fish products. The enforcement program would be conducted according to the HACCP method.

S. 1245 calls for the Secretary to conduct and support research. Methodology for biological and chemical contaminants would be tested. Additionally, techniques and procedures for inspecting fish and fish products would be examined. Finally, research into sanitation practices for the processing, transportation, and storage of fish and fish products would be conducted.

The Act requires that the inspection program be developed and carried out in consultation with other appropriate federal agencies that have developed expertise in areas covered in this title to avoid duplication of federal and state efforts. S. 1245 also proposes to minimize disruption to the seafood industry in the course of ensuring the safety and wholesomeness of fish and fishery products. States would be provided with technical, advisory, and financial assistance. Such assistance would be provided to encourage the states to establish and maintain equivalent fish product inspection programs.

Regarding imports, S. 1245 states, "[t]he Secretary shall ensure that arrangements with foreign nations are established to ensure, to the extent practicable, mutual acceptance of standards and inspection programs for fish

products."

Senator Mitchell's "Federal Fish Inspection Act" is very nearly identical to Representative Studds' "Consumer Seafood Safety Act of 1989" (H.R. 2511). Both bills base their monitoring schemes on the HACCP method. However, S. 1245 does not base its inspection program on the recommendations of NMFS' Model Seafood Surveillance Project (MSSP). S. 1245 also calls for development of various standards. Most of the standards that the Act proposes to establish already exist elsewhere (previously discussed in analysis of H.R. 2511). The arrangements which S. 1245 proposes to make with foreign nations is identical to the arrangements called for by H.R. 2511.

Nevertheless, several distinct differences do exist between certain aspects of the two Acts. S. 1245 provides for inspection of processing aboard vessels and in land-based establishments. However, harvesting vessels are not specifically included in S. 1245, but they are in H.R. 2511. Additionally, while H.R. 2511 merely precludes preemption of state seafood inspection laws, S. 1245 specifically attempts to encourage states to establish equivalent seafood inspection programs.

S. 1983 - Sen. Leahy (D-Vt.). This is the third seafood inspection bill entered during the first session of the 101st Congress with the short title, "Consumer Seafood Safety Act of 1989." S. 1983 proposes to amend the Food Security Act of 1985 by expanding the Secretary of Agriculture's inspection duties to include overseeing the Nation's supply of fish, shellfish, and other marine food. The bill authorizes an appropriation of \$75 million for each of the fiscal years 1990, 1991, 1992, and 1993.

The Act would place authority for administering the seafood safety program within the U.S. Department of Agriculture. The seven basic features of the seafood safety program established pursuant to S. 1983 are:

1. mandatory inspection and certification;
2. fish and fish product safety standards;
3. evaluation and monitoring of fish and fish product safety and consumer health risks;
4. consumer education;
5. proper labeling and packaging;
6. employee protection; and,
7. research.

The Act stipulates that the Secretary shall appoint personnel to inspect each establishment or vessel where fish or fish products are processed for interstate commerce. The inspections will be conducted "with such frequency and manner as provided in rules and regulations issued by the Secretary...."

The inspection program will detect adulterated fish

and fish products, ensure that standards for sanitation and other good processing, storage, and handling practices are met by all establishments and vessels, and "identify the stage of processing in which the adulterated fish and fish products became adulterated or were not removed from the human food process." The program proposes extensive sampling for chemical and microbiological contaminants. The program will be designed to take into account such factors as:

1. probability of fish products being susceptible to contamination or other potential for impact on public health;
2. record of compliance with inspection requirements under the Act; and,
3. the volume of production and the complexity of operations of an establishment or vessel.

S. 1983 proposes establishment of regulations which would require preparation and maintenance of records of all activities pertaining to food safety and sanitation. The records would be made available for public inspection and for authorized representatives of the Secretary of Agriculture to examine and make copies.

Foreign vessels and establishments which prepare fish and fish products for importation into the United States would be inspected at least annually by the Secretary pursuant to S. 1983. Inspections would be performed to establish that the foreign country's system of inspection and certification are at least equal to the systems established by S. 1983 for domestic vessels and establishments.

Official certificates would be issued for all establishments and vessels which provide proof of existence of approved sanitation and storage facilities, and implementation of an approved quality assurance program. Regulations will be established for identifying and marking fish and fishery products with an official stamp which denotes that the fish or fishery products were processed at establishments or on vessels for which an official certificate was in effect at the time of processing.

The Secretary may direct that any labeling or packaging, or any official mark may be withheld if he has reason to believe that such labeling or packaging in use or proposed for use is false or misleading with respect to any article.

The Act calls for the Secretary to contract with NAS to identify the contaminants, parasites, or toxins which are most likely to be found in fish and fish products, and which are most likely to render them unsafe for human consumption. Based on those findings, the Secretary shall issue regulations which establish standards for those contaminants, parasites, and toxins.

The Secretary shall also issue regulations which prescribe standards for the conditions under which fish and fish products capable of use as human food shall be stored or otherwise handled. These standards shall apply to any

person "engaged in the business of buying, selling, freezing, storing, or transporting, in or for interstate commerce, or importing, such articles."

This Act protects employees from discharge or discrimination with respect to the employee's compensation, terms, conditions, or privileges of employment because he assisted or in any way participated in carrying out the provisions of this Act. S. 1983 calls on the Secretary of Agriculture to establish priorities for fish and fish product safety research in consultation with other federal agencies and the states. Appropriate federal agencies shall conduct research regarding those priorities.

Finally, the Act calls upon the Secretary to design and implement a national fish and fish product safety program in consultation with other federal agencies and the states. The program includes designation of regional and national fish and fish product safety centers, which will be expected to conduct, support, and foster research, investigation, experimentation, education, and training in fish and fish products safety-related areas.

Senator Leahy's "Consumer Seafood Safety Act of 1989" is nearly identical to Representative Glickman's "Consumer Seafood Safety Act of 1989" (H.R. 3481). So much so that the analysis of H.R. 3481 is applicable to S. 1983 with only one exception: where H.R. 3481 calls for the Secretary of Health and Human Services to contract with NAS to conduct research, S. 1983 calls for the Secretary of Agriculture to do so.

## CONCLUSION

More than half of the seven inspection bills discussed above state that their purpose is to ensure the wholesomeness and safety of all fish and fishery products in the United States, and to maximize the health benefits of consuming fish and fish products. To this end the proposed safety programs offer a wide range of standards and requirements, designed to enhance the public's confidence in these products and to protect the seafood market. The final form of enacted seafood inspection legislation remains to be seen; however, it is hoped that the foregoing discussion will give all those interested a preview of what Congress may ultimately have in store for those involved at all levels of the seafood industry.

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Table 1. AN OVERVIEW OF PROPOSED FEDERAL SEAFOOD INSPECTION LEGISLATION

BILL NUMBER	PRIMARY SPONSOR	SHORT TITLE	DESIGNATED INSPECTING AGENCY	PROPOSED APPROPRIATION	FEATURES OF PROPOSED INSPECTION PROGRAMS	PROPOSED STANDARDS TO BE ESTABLISHED	OTHER FEATURES TO BE ESTABLISHED
H.R.1387	Rep. Douglas, North Dakota	"Mandatory Fish Inspection Act of 1989"	USDA	Not proposed	A mandatory program for comprehensive and statistically representative inspection of commercial processing of all freshwater and saltwater fish, shellfish, and their products in a manner similar to the current inspection system for commercially processed meat and poultry.	<ul style="list-style-type: none"> <li>None proposed</li> </ul>	<ul style="list-style-type: none"> <li>None included</li> </ul>
H.R.2511	Rep. Studds, Massachusetts	"Consumer Seafood Safety Act of 1989"	Not designated	\$90 Million for each of fiscal years 1990, 1991, 1992, and 1993.	Directs the President to develop a mandatory inspection program based on HACCP method using procedures designed specifically for each fish product. Takes into account recommendations of NMFS Model Seafood Surveillance Project. Encompasses harvesting, processing, storing, transporting, and marketing of all domestic and imported marine and freshwater fish and seafood products intended for human consumption, whether from wild or cultured sources.	<ul style="list-style-type: none"> <li>Vessel and processing plant sanitary conditions and good harvesting and manufacturing practices.</li> <li>Wholesomeness.</li> <li>Grading.</li> <li>Packaging.</li> <li>Labeling, including fish product common names.</li> <li>Contaminant levels.</li> </ul>	<ul style="list-style-type: none"> <li>Federal fish product monitoring systems to provide records on fish products, including product origin, transportation, and processing history.</li> <li>Federal seafood-related illness monitoring.</li> <li>Practices for seafood safety research.</li> <li>Seafood safety education programs.</li> </ul>
H.R.3155	Rep. Dingell, Michigan	"Fish and Fish Products Safety Act of 1989"	FDA	Not proposed	Amends the Federal Food, Drug, and Cosmetic Act to improve and expand existing fish and fish product inspection and labeling regulations. Current fish and fish product inspection and labeling regulations will be augmented with specific sanitation and quality control standards for fish and fish product processing procedures and facilities.	<ul style="list-style-type: none"> <li>Sanitation and quality control for processing of fish and fish products and for facilities engaged in processing of fish and fish products.</li> <li>Chemical and microbiological contaminants, parasites, and toxins.</li> <li>Labeling.</li> </ul>	<ul style="list-style-type: none"> <li>Official mark.</li> <li>Public awareness program.</li> <li>Research programs.</li> <li>Demonstration programs.</li> <li>Surveillance system to estimate frequency of human disease caused by seafood.</li> </ul>
H.R.3481	Rep. Glickman, Kansas	"Consumer Seafood Safety Act of 1989"	USDA	\$75 Million for each of fiscal years 1990, 1991, 1992, and 1993.	A comprehensive, mandatory inspection and certification program, applied to all establishments and vessels, which prescribes standards of processing of fish and fish products. Inspection will be conducted with such frequency and manner as provided in rules and regulations issued by the Secretary of Agriculture.	<ul style="list-style-type: none"> <li>Vessel and establishment sanitation program encompassing processing, storage, and handling.</li> <li>Fish and fishery products.</li> <li>Packaging.</li> <li>Labeling.</li> <li>Food safety and sanitation records.</li> </ul>	<ul style="list-style-type: none"> <li>Official stamp.</li> <li>Program for evaluating and monitoring product safety &amp; consumer health risks.</li> <li>Consumer education programs.</li> <li>Priorities for fish and fish products safety research.</li> <li>"Whistle-blower" protection.</li> </ul>
H.R.3508	Rep. De La Garza, Texas	"Federal Inspection for Seafood Healthfulness Act of 1989"	USDA	"...such sums as are necessary...without fiscal year limitation"	Amends the Agricultural Marketing Act of 1946 by adding a mandatory inspection and certification program based on HACCP method. Applied to the establishments engaged in commercial processing of seafood and seafood products, including the aquacultural operations. Non-processing vessels and aquaculture operations are exempted. Inspection will be conducted in such manner and with such frequency as the Secretary of Agriculture deems necessary.	<ul style="list-style-type: none"> <li>Seafood and seafood products.</li> <li>Processing.</li> <li>Wholesomeness.</li> <li>Nomenclature; Quantity; Packaging; Labeling.</li> <li>Monitoring, classification, and control of seafood processing and sanitation records.</li> </ul>	<ul style="list-style-type: none"> <li>Official mark.</li> <li>Monitoring procedures.</li> <li>Seafood and seafood products safety education program</li> <li>"Whistle-blower" protection.</li> </ul>
S.1245	Sen. Mitchell, Maine	"Federal Fish Inspection Act"	USDA	"...for each fiscal year such sums as are necessary..."	Amends the Federal Meat Inspection Act to expand meat inspection programs by establishing a comprehensive inspection program based on the HACCP method. Provides for the registration and inspection of facilities and vessels that process, store, and handle meat from wild and cultured fish and fish products. The Secretary of Agriculture shall issue such regulations as are necessary to carry out this title.	<ul style="list-style-type: none"> <li>Sanitary conditions and good processing, storage, and handling practices.</li> <li>Safety and wholesomeness of meat from fish and fish products.</li> <li>Packaging and labeling of fish products, including the use of common names.</li> <li>Recordkeeping.</li> </ul>	<ul style="list-style-type: none"> <li>Research for biological and chemical testing methods.</li> <li>Research on techniques for inspecting fish and fish products.</li> <li>Research on sanitation practices for processing, transportation, and storage of fish and fish products.</li> <li>Support education programs to increase public awareness.</li> </ul>
S.1283	Sen. Leahy, Vermont	"Consumer Seafood Safety Act of 1989"	USDA	\$75 Million for each of fiscal years 1990, 1991, 1992, and 1993.	Amends the Food Security Act of 1985 by establishing an inspection and certification program for all establishments and vessels where fish or fish products are processed for interstate commerce. Inspection will be pursuant to a program established by the Secretary of Agriculture that ensures standards for sanitation and other good processing, storage, and handling practices are met by all establishments and vessels. Inspection will be conducted with such frequency and manner as provided in rules and regulations issued by the Secretary of Agriculture.	<ul style="list-style-type: none"> <li>Sanitation and other good processing, storage, and handling practices for each stage of the processing of fish and fish products.</li> <li>Safety of fish and fish products.</li> <li>Chemical and microbiological and contaminants, parasites, and toxins.</li> <li>Packaging; Labeling.</li> <li>Recordkeeping.</li> </ul>	<ul style="list-style-type: none"> <li>Official stamp.</li> <li>Priorities for fish and fish products safety research.</li> <li>Risk products safety education.</li> <li>National and regional fish and fish products safety campaigns.</li> <li>"Whistle-blower" protection.</li> </ul>

# American Consumers Deserve Safe Seafood

Ellen Haas

## INTRODUCTION

Americans are the victims of cruel deception. Heeding the advice of health experts, many consumers have eagerly turned to fish as a source of low-fat protein and beneficial fish oil. But now the truth has surfaced: consuming this presumably healthy food actually increases risk from food poisoning and chemical contamination. Why? Because unlike other industrial countries such as Canada, Iceland, Japan, Denmark, and Norway, the United States has no comprehensive seafood inspection system. The health of American fish consumers is in serious jeopardy for several reasons. Most fish harvested from U.S. waters are hunted from the wild - from waters with great potential to be polluted. Additionally, fish products deteriorate rapidly even when given proper refrigeration. Consequently, increasing numbers of consumers are justifiably worried about the safety record of fish. In fact, after skyrocketing earlier in the past decade, U.S. fish consumption dropped two percent in 1988.

## UNINSPECTED SEAFOOD POSES DANGEROUS HEALTH THREATS

According to the Centers for Disease Control, about 5,000 reports of food poisoning in the United States were traceable to seafood from 1978 through 1984. This total represents one to five percent of all actual illnesses caused by seafood. Compared with the numbers of illnesses caused by other animal flesh foods, the risk of sickness from eating seafood is unacceptably high.

The figures in **TABLE I** represent the percentage of foodborne outbreaks from animal flesh foods for the years 1985 and 1986. These figures take on added significance because Americans consume over four times as much beef and three times as much poultry as seafood. This means that the risk of a food poisoning outbreak from eating seafood is actually twenty-five times greater from seafood than it is for beef, sixteen times greater than for poultry, and sixteen times greater than for pork.

Molluscan shellfish (oysters, clams, and mussels) consumption is of particular concern for Americans. Mollusks harvested from contaminated waters frequently carry bacteria, viruses, or toxic chemicals. Furthermore, improper handling at harvesting or processing can exacerbate the problem. Often at the end of a long food chain, these

**Table I**  
Percent of Foodborne Outbreaks from  
Animal Flesh Foods\*

Food Source	1985 %	1986 %
Beef	12.0	9.5
Pork	9.8	11.9
Poultry	9.8	13.1
Other Meat	9.8	8.3
Fish and Shellfish	58.7	57.1

\*only foodborne outbreaks where food source is known are included in this table.

Source: Centers For Disease Control based on most recently available data.

creatures accumulate and concentrate large amounts of pesticides, industrial chemicals, and toxic materials. Adding to the risks, shellfish are commonly eaten raw, so any benefits achievable through cooking are lost.

According to statistics from the Food and Drug Administration (FDA), approximately 1 in 250 people who eat raw shellfish will become ill. This estimate represents only acute sickness; there is no way to measure the impact of contaminated shellfish on serious long-term illness. Cholera, hepatitis, gastroenteritis, septicemia and salmonellosis are among the illnesses that can result from eating contaminated shellfish.

Certainly shellfish harvested from Gulf Coast waters can threaten public health. Current research suggests that the bacterial *Vibrio vulnificus* is endemic along the Gulf of Mexico. *Vibrio vulnificus* infection results in chills, fever and/or prostration. During the summer of 1987, three people died from oysters contaminated with the bacteria. The State of Florida receives reports of five or six deaths caused by *Vibrio vulnificus* infection each year. A study conducted in 1985 and 1986 of commercial handling practice for Gulf Coast oysters revealed the presence of bacteriological contamination (*Vibrio vulnificus*, *Vibrio parahaemolyticus*, and *Aeromonas hydrophila*) in each of six sampled lots. The contamination was found to increase up to four times by the time the oysters reached the processing plant. Improper temperature control during the transport of oysters resulted in increases in potential pathogens, according to the study.

## WHO'S RESPONSIBILITY IS FISH INSPECTION?

Currently, FDA has responsibility for inspecting seafood in interstate commerce, but its surveillance is at best sporadic and far too limited. FDA admits that each year it inspects only 25 to 35 percent of the 4,000 seafood processors, packers, shippers and warehouses in the United States. Seafood plants are normally inspected only once every two or three years, and several plants have *never* been inspected.

Molluscan shellfish -- which FDA agrees is the seafood presenting the most pressing public health concern -- is regulated by the National Shellfish Sanitation Program (NSSP). The program, operated jointly by the states, the shellfish industry, and the FDA, is voluntary and lacks any effective enforcement provisions. In 1987, FDA reported that programs in four of the five top shellfish-producing states were out of compliance with agency safety guidelines. FDA has made vague statements about the improvement of the negligent states, but it refuses to make public the substantiating information.

Fortunately, Congress has decided that the time is right to fill this gap in public health protection. Senate Majority Leader George Mitchell (D-Maine) has provided important leadership by introducing "The Federal Fish Inspection Act," intended as a starting point for developing a more detailed proposal. Meanwhile, Rep. John Dingell's (D-Mich.), House Energy and Commerce Committee has completed work on a strong comprehensive bill, the first to be reported out of committee. A total of eight bills are now pending in Congress.

Unfortunately, much of the discussion over which seafood safety proposal is best has focused on which federal agency should handle it. FDA, the United States Department of Agriculture (U.S.D.A.) (which handles meat and poultry inspection), and the Commerce Department (which offers processors inspection services for a fee) all want to be in charge of this important food safety program. However, Congress should not allow the enactment of fundamental and sorely-needed changes in federal regulation of seafood safety to be determined, or worse, jeopardized by a turf battle.

The best plan would use the strengths of each agency. The legislation that achieves this most effectively is "The Consumer Seafood Safety Act," introduced by Sen. Patrick Leahy (D-Vt.), Chairman of the Senate Agriculture Committee. Leahy's bill, introduced by Rep. Dan Glickman (D-Kan.) in the House, would place authority for carrying out the inspection of fish products and processors in USDA, while giving FDA authority to set limits on toxins and chemical contaminants permitted in fish. This follows closely the pattern of the U.S. federal meat and poultry

inspection program -- the other program which oversees animal flesh foods. In addition, the Commerce Department would continue to monitor shell fish harvesting waters to assure they are not contaminated.

## GUIDELINES FOR A STRONG PROGRAM

Seafood inspection legislation is supported on Capitol Hill by consumers, industry, and government alike. However, there are differing opinions as to what form the inspection program should take. It is essential that the program be driven by consumer health needs; and that it not simply be a seafood promotion effort designed to convince consumers that their seafood is indeed safe.

Any serious system must address public health risks by setting strict food safety and sanitation standards and must be sufficiently detailed, leaving no room for misinterpretation by the federal agencies changed with carrying it out. Also, it must be comprehensive, including at a minimum:

1. federal certification of fishing vessels, processing plants and distributors, based on strict requirements for sanitation, storage and handling;
2. federal limits on chemical and microbiological toxin levels;
3. development of effective testing methods for toxic contamination;
4. requirements for industry recordkeeping, including a system by which contaminated fish and shellfish can be traced to their source;
5. increased federal inspection activity, including unannounced, unrestricted inspections;
6. increased inspection of imported products, which make up sixty percent of the seafood consumed in the United States;
7. "whistleblower" protection for industry employees; and,
8. criminal and civil penalties for violations, including fines and suspensions of federal certification.

Congress must also provide adequate funding from general revenues. Creating an industry-funded inspection program, as some have suggested would raise questions about the program's objectivity. It is an idea which Congress has repeatedly and wisely rejected for our mandatory meat and poultry inspection programs.

American consumers need protection from the health risks associated with eating fish and shellfish, and they need it immediately. Congress has recognized what it must do; now it must be sure to act with conviction. Weak legislation will plague not just the health of today's consumers, but future generations as well.

*Ellen Haas is executive director of Public Voice for Food and Health Policy. Public Voice, along with a national coalition of 36 consumer, environmental, and health organizations, has called for a comprehensive, well-integrated, mandatory federal seafood inspection program. Public Voice is a national research, education, and advocacy organization that promotes the citizen's interest in public and private decision-making on food and health issues. The views expressed herein are those of the author and do not necessarily represent the opinions of the editors or the Mississippi-Alabama Sea Grant Consortium. □*

## **A Grass Roots, Industry Perspective of the Seafood Inspection Issue**

*Chris Nelson*

### **INTRODUCTION**

There is no intention in the following discussion to comment on specific provisions of pending fish and seafood inspection legislation. Rather, these comments will be broad-based, reflecting an industry perspective of the evolution and true nature of the issue, and how the issue can be addressed through future legislation or regulation to the maximum benefit of both the consumer and the industry.

### **BACKGROUND**

During the late 1970s the domestic consumption of beef was declining to all time lows and the subsequent void in the muscle protein market was being filled primarily with poultry. People associated with the seafood industry began asking, "Why is seafood not increasing in popularity as well?" Price was certainly one reason. While seafood prices rose steadily, improvements in poultry production and processing held prices of chicken relatively low. In addition, Americans had historically enjoyed a readily available supply of chicken and red meat, and thus were accustomed to the preparation of these meats. Seafood was unfamiliar and relatively more difficult to prepare. Only in the past thirty years had refrigeration made it possible for Americans to enjoy widespread exposure to seafood. Although price and availability were plausible reasons for the position of seafood in the muscle protein market, many people postulated that a lack of consumer confidence in safety and quality were the primary factors holding down seafood consumption. It was thought that consumer confi-

dence could be ensured through a mandatory federal seafood inspection program.

However, during the mid-1980s, fish and seafood experienced explosive growth in popularity. From 1982 to 1986 seafood consumption rose almost twenty percent. People were ostensibly becoming better acquainted with the great taste and extraordinary variety of fish and seafood. Also, new findings were published regarding the health benefits associated with certain fatty acids in seafood. By 1987, the consumption of fish and seafood had reached 15.4 pounds per capita. This represented an increase of over twenty-five percent in only five years!

Many people in the seafood industry believe that seafood's meteoric rise in popularity caused the red meat and poultry industry to feel that their traditional markets were being threatened. In 1984 Congressman Dorgan, who represents an important cattle farming region, introduced the first of many subsequent bills calling for a mandatory seafood inspection program similar to that in place for beef and poultry.

In November 1986, a Washington, D.C.-based public interest group issued a report asserting that fish and seafood present an inordinate health risk to consumers simply because seafood is not inspected in the same manner as beef or poultry. The report and subsequent claims made by the group are based on questionable interpretations of illness data and sensational risk estimates.

Media coverage spawned by this report and increasing concerns regarding ocean pollution fueled consumer fears of an unsafe seafood supply. In spite of Food and Drug Administration (FDA) and Government Accounting Office (GAO) findings which affirm the overall safety of the domestic seafood supply, Congress has introduced numerous pieces of legislation to address what has become more of a public perception problem than a genuine food safety issue.

### **A GRASS ROOTS PERSPECTIVE**

The outrageous claims of tremendous risks associated with seafood consumption would have us believe that consumers are lying dead in the streets. These risk estimates are scandalously overblown. Common sense and careful scrutiny of Centers for Disease Control illness data testify to this. Moreover, there is mandatory inspection of seafood products and processing plants. For example, at Bon Secour Fisheries, the seafood plant is subject to frequent, unannounced inspections by any one of a host of federal or state agencies. The plant's handling of molluscan shellfish products is carefully monitored by the Alabama Department of Public Health (ADPH). On a quarterly basis, ADPH conducts unannounced inspections of Bon Secour Fisheries' shellfish processing operation and physical plant, and takes samples

of its product for bacteriological examination. These inspections are performed as part of the National Shellfish Sanitation Program (NSSP), a cooperative agreement between the states and the FDA. The NSSP has been extremely effective in reducing the incidence of molluscan shellfish-borne disease since 1926. As its part of the cooperative program, FDA makes annual unannounced visits to the plant to certify the integrity of the state program. The FDA also performs less frequent inspections of the entire plant. On a semiannual basis, the ADPH also inspects and certifies the sanitation of all plant operations. In addition, Bon Secour Fisheries participates in the National Marine Fisheries Service Voluntary Inspection Program, which entails weekly inspections for plant sanitation, product quality, and employee hygiene. Obviously, those who claim that there is no inspection of seafood are not very familiar with the industry or its regulations.

From an industry standpoint it is unbelievable that attacks on the safety of seafood products continue even as federal officials and federal agencies make statements to the contrary. As Dr. Frank Young, M.D., Ph.D., Commissioner of the U. S. Food and Drug Administration, stated when he testified before Congress on June 5, 1989 and October 17, 1989: "on a per weight-consumed basis, fish is by far the safest source of muscle protein available." Dr. Young further indicated that illness data compiled by the Centers for Disease Control actually show that seafood-borne illness outbreaks and cases are decreasing relative to seafood consumption.

In August 1988 the GAO published its findings on the status of seafood safety in America. The report provides a thorough overview of both the extent of the seafood safety problem and the steps needed to address the issue.

From a review of Centers for Disease Control illness data the GAO found that "most of the seafood-borne illnesses were associated with three species groups." See *Seafood Safety - Seriousness of Problems and Efforts to Protect Consumers*, United States General Accounting Office at 3 (August 1988). Three species groups, out of the hundreds of species of fish and seafood available for consumption, were found to be the source of an overwhelming majority of seafood-borne illness. These three groups were ciguatoxic finfish, scombrototoxic finfish, and raw molluscan shellfish. Because of the species of finfish associated with ciguatoxin and scombrototoxin, most of the reported cases of these illnesses are from tropical and subtropical areas only (South Florida, Hawaii, Puerto Rico, Virgin Islands, Guam). Therefore, the vast majority of seafood related illnesses are limited both in area of occurrence and in species of concern.

The GAO concluded that "there does not appear to be a compelling case at this time for implementing a comprehensive, mandatory federal seafood inspection program

similar to inspections used for meat and poultry." The bases of this conclusion were that (1) illness data did not indicate a widespread seafood safety problem; (2) although limited, current state and federal monitoring and assessment activities are adequate to address seafood safety concerns; and (3) the problems identified are not of the type that would be solved by a mandatory inspection program. *Id.* at 5.

Thus, neither the FDA nor Congress's investigative arm can find any evidence of widespread problems with the safety of American's seafood supply. Yet the facts are being overlooked, or worse, slanted to create a more titillating story in the nationwide news media. By influencing consumer attitudes to be negative toward fish and seafood, the media and special interest groups may be forcing Congress and industry to adopt more extensive, more restrictive, and tremendously more expensive measures than are necessary.

## RECOMMENDATIONS AND CAVEATS

Any changes made to the current system of seafood inspection should have as their primary objective the benefit of the consumer. Given the limited nature of the problems found by the GAO and the current federal budgetary climate, changes proposed by legislation should be limited to those which will have the greatest public health impact (in Washingtonese, "the most bang for the buck"). A responsible start would be to focus existing programs on those three species groups highlighted by the GAO report. This would mitigate the possibility of an unnecessary waste of precious tax dollars on programs which are nice but not necessary.

### Existing Programs

To meet the needs of an expanding industry and the growing demand for its products, coordination and modernization of existing local, state, and federal programs should be attempted. The current system of local and state participation and state-federal cooperative programs for seafood inspection are entirely appropriate and necessary to meet the needs of such a diverse industry. One large federal program for chicken or beef may work well for those industries as only a few animal species are involved and processing techniques are relatively standardized nationwide. Such is not the case in the seafood industry. For example, the crab industry is an entirely different enterprise in Florida than it is in the Pacific Northwest. A reasonable goal of expanded federal involvement is better coordination of the existing programs, coupled with modest appropriations of matching funds for state programs. The Department of Agriculture would probably be best suited for administering a plan of this description, due to their experience with large inspection programs for other products.

Industry will continue to support work to update



inspection techniques which will provide more efficient and effective plant and product inspections. The National Marine Fisheries Service, in cooperation with industry, is developing the Model Seafood Surveillance Program (MSSP) based on the state-of-the-art Hazard Analysis at Critical Control Point (HACCP) concept of food inspection. HACCP (pronounced "hassup") concepts could be gradually phased into the current seafood inspection routines of federal and state agencies. A HACCP-based inspection program would make obsolete the continuous inspection techniques already shown to be inadequate in controlling microbial contamination problems such as *Salmonella* in chicken. The MSSP is yet to be adequately tested and evaluated for cost and regulatory effectiveness. Unfortunately, current media pressure and special interest group scare tactics may result in a political and economic climate which will discourage the careful completion of scientific and technical work needed to develop a workable model. Worse yet, although HACCP has been endorsed by the National Academy of Sciences, continued exaggeration of the limited seafood safety concerns may, through legislation, force the seafood industry to use antiquated and wholly inappropriate inspection techniques such as those currently employed for meat and poultry.

### Imports

Increased monitoring of the safety of imported seafood products should be included in any changes to our current system. Imported seafood makes up over fifty-six percent of the supply. Import inspection should focus on species groups in which imports have recently taken an overwhelming proportion of the market (e.g. shrimp: seventy-five percent imported - up from fifty-seven percent; scallops: ninety-six percent imported - up from sixty-three percent in 1979). See *Fisheries of the United States*, National Marine Fisheries Service (May 1989). Monitoring and control of sanitation at overseas seafood processing plants should also be included. Again, the Department of Agriculture is the agency best suited to direct such a program as it already has an overseas contingent of meat packing plant inspectors.

### Molluscan Shellfish

Molluscan shellfish-related illnesses account for roughly half of all seafood-borne illness cases. Although this sector is already highly regulated through the NSSP, the incidence of illness could be reduced by providing for federal assistance to state shellfish control agencies and stiffer penalties for illegal shellfish harvesting. Additionally, federal funding is needed for a National Shellfish Sanitation Indicator Study to develop better methods for classifying shellfish growing waters.

To attack the root of the shellfish sanitation problem, more attention should be focused on the environment from which oysters, clams, and mussels are harvested. To this end, more stringent laws controlling the discharge of raw or minimally treated sewage into coastal waters are needed. With the U.S. population currently migrating to the nation's coastline, a growing coastal population will only continue to increase the pressure on sewage treatment. Municipalities, as well as rural areas, must be required to tow the line on clean water. No amount of regulation or inspection can circumvent problems presented by a polluted coastal environment.

### Education

A primary overall focus of any legislation to reduce health risks associated with seafood consumption should be the education of industry members and end users in time and temperature considerations for product handling. Practically every problem associated with seafood safety, from harvest to consumption, can be corrected through careful monitoring and control of the temperature of the product and how long it stays at that temperature. Continuous inspection of a process line cannot overcome poor time/temperature control at a food service establishment or in the home. Conversely, the finest restaurant can do little to salvage a product that has been mishandled at harvest or during processing.

### CONCLUSION

Congress should limit its actions to those that will have some tangible impact on public health, otherwise industry, as well as the consumer/taxpayer, will be forced to pay for another bureaucratic behemoth of questionable value. Both industry and the consumer should demand responsible legislative actions on this issue, firmly based on demonstrable need and not on emotions generated by special interest groups and the evening news.

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# Mitigation Standards for Wetlands: EPA and the Corps Revise Their Memorandum of Agreement

## INTRODUCTION

On December 14, 1989 the United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) announced a memorandum of agreement (MOA) which outlined mitigation standards to be used by the agencies in issuing permits for wetland development activities under Section 404 of the Clean Water Act (CWA) 33 U.S.C. §1344 (1982). *See Memorandum of Agreement Concerning the Determination of Mitigation Under the Clean Water Act 404(6)(1) Guidelines*, 54 Fed. Reg. 51319(1989)(proposed December 14, 1989). The MOA provided guidelines to Corps and EPA personnel for use in reviewing applications for use permits in wetland areas. The guidelines were chosen to facilitate achievement of the Bush administration's goal of "no net loss" of value and function of existing wetlands by avoiding adverse impacts to the areas whenever possible and offsetting adverse impacts which are unavoidable. Three types of standards were named: avoidance; minimization of impact when avoidance is not possible; and compensatory mitigation, which is used when the other standards are not feasible.

After the original MOA was announced a number of groups voiced concerns over the potential impact of the mitigation standards. The original MOA was adopted without a public input period because it was considered an interpretive rule and general statement of policy. As indicated by the memorandum, rules and policy statements such as the MOA are usually exempt from traditional notice and comment requirements. 54 Fed. Reg. 51319 (1989) (proposed December 14, 1989).

The Corps and EPA issued a revised MOA that became effective February 7, 1990. The decision by the agencies to allow a comment period between the announcement of the MOA in December and the February enactment of the revision came after President Bush became aware of the enormous response to the mitigation standards from entities outside of the Corps and EPA. The revision intends to clarify misunderstandings which developed concerning the application of the standards.

## DISCUSSION

The original MOA created concern that mitigation requirements for all wetland development would result in excessive prohibitions on development possibilities. Certain groups felt that wetland areas would become off limits to any type of development - including ordinary improvements on personal property. The lack of definitions and explanations of procedural requirements within the original MOA was recognized and corrected in the revised version. For example, the term "practicable" mitigation efforts was used throughout the original MOA without being defined. The revision includes a footnote that encompasses the definition of "practicable" named in Section 404 of the CWA. The term is defined as "a means available and capable of being done after taking into consideration cost, existing technology and logistics in light of the overall project purposes."

The existence of areas with unique characteristics that may make mitigation attempts totally impracticable was also recognized within the revised MOA. An explanatory footnote indicates that certain areas with high concentrations of wetlands may create situations that are impossible to duplicate through mitigation efforts. Unique hydrological conditions such as those in the North Slope area of Alaska are beyond present technological capabilities to duplicate or maintain during development. According to the EPA, the naming of a specific area was not intended to set apart Alaska as an area destined to receive special treatment. Rather, this area of wetlands was named as an example of the types of challenges the Corps and EPA personnel should be sensitive to in applying the mitigation criteria.

As indicated within the revision, the contents of the original MOA remain intact and the revised MOA does not change the "substantive requirements of the CWA Section 404 Guidelines." The revision does not attempt to define "no net loss" as a policy standard or set any specific methods that Corps and EPA personnel will use to attempt to reach the no net loss goal.

To reconcile the no net loss policy for wetland protection with land use and development considerations, an Interagency Wetlands Task Force was created by the President's Domestic Policy Council. The Task Force will conduct nationwide public hearings to determine public concerns and identify special geographic considerations that need recognition. The Task Force is also charged with the responsibility of defining "no net loss" and determining a feasible means of achieving this goal without ignoring the needs of developers and land owners.

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## CONCLUSION

Whether President Bush's promise of no net loss of wetlands will survive as a feasible achievement is unclear at the present time. The revised MOA used by agency personnel in evaluating use permits on wetlands contains no concrete criteria for evaluation as well as no definition of "no net loss." The MOA calls for a case-by-case analysis approach to procedures used in granting use permits. Indeed, the creation of a Task Force to "study and define" no net loss indicates a level of uncertainty about the policy. The MOA is merely a procedural tool used by Corps and EPA personnel and was not intended to be a policy guideline to define an approach to the no net loss issue. While the Task Force gathers information concerning wetlands, permits will be issued on an ongoing basis through use of the revised MOA guidelines. The culmination of the struggle to consolidate preservation and fair development and use standards is yet to occur as all interested parties anxiously await the final outcome of the battle. □

*Helen Hancock*

## Legislative Update: The Ocean and Coastal Environment

### INTRODUCTION

On January 23, 1990 the second session of the 101st Congress convened and already promises to be important for the environment. Substantial amendments to the Clean Air Act, and the introduction of a bill to raise the EPA to Cabinet level status have received a great deal of public attention. However, a number of other bills dealing with a wide range of important ocean and coastal issues have also been introduced.

The following is a summary of some of the marine-related legislation that may eventually cross the desk of President Bush; the list below is merely illustrative of the total volume of bills now pending in Congress dealing with the ocean and coastal environment. In total, there are some nine bills dealing with the coast, ocean, and Great Lakes, more than eighteen bills pertaining to offshore oil and gas leasing, and an array of bills dealing with other related environmental issues. The status of these bills is current as of February 22, 1990.

**H.R. 543** - Rep. Panetta (D-Cal.). This bill amends the Coastal Zone Management Act of 1972. H.R. 543 requires

federal agencies that conduct or support any activity that directly affects the coastal zone to comply with state management programs if those programs are not inconsistent with federal law. This bill was referred to the Committee on Merchant Marine and Fisheries and to the Subcommittee on Oceanography. No further action has been taken.

**H.R. 1004** - Rep. Davis (R-Mich.). This bill also amends the Coastal Zone Management Act of 1972. The amendment authorizes grants to coastal states to control and prevent damage caused by chronic coastal erosion and flooding; it also provides for implementing approved state coastal erosion and flood control programs. H.R. 1004 was also referred to the Committee on Merchant Marine and Fisheries and to the Subcommittee on Oceanography, and again no action has been taken.

**H.R. 1387** - Rep. Dorgan (D-N.D.). This bill is entitled the Mandatory Fish Inspection Act of 1989. For discussion of this legislation and other bills dealing with seafood inspection, see Brian Perkins' article in this issue.

**H.R. 1465** - Rep. Jones (D-N.C.). The Oil Pollution Act of 1989 seeks to establish a limitation on liability for damages that result from oil pollution and will provide a fund for compensation. The bill deals with such current issues as the removal of oil from Prince William Sound and oil tanker requirements. H.R. 1465 also seeks to address future problems by establishing an interagency coordinating committee on oil pollution and a research and development program. The bill has passed the House of Representatives and is currently in conference with Senate bill S.686.

**H.R. 2061** - Rep. Studds (D-Mass.). The bill entitled the Fishery Conservation Amendments of 1989 passed the House on February 6, 1990 and is now before the Senate Commerce Committee. This bill will authorize appropriations to carry on the Magnuson Fishery Conservation Act through fiscal year 1992. H.R. 2061 also includes a number of amendments to the Magnuson Fishery Conservation Act. For example, the amendments direct that the effect of fishing on immature fish be considered and encourages development of measures to avoid unnecessary waste of fish. Also, H.R. 2061 directs that an international agreement be reached that bans drift net fishing on the high seas and that the United States support international efforts to achieve such a ban. The President is also directed to seek agreements with other countries for the protection of the sea turtle. These are but a few of the provisions contained in this important bill.

**H.R. 2242** - Rep. Manton (D-N.Y.). Individuals applying for seamen's licenses or renewals of their license will have their criminal records reviewed by the Coast Guard if H.R. 2242 is enacted. There has been no action on this bill since it was referred to the Committee on Merchant Marine and Fisheries and the Subcommittee on Oceanography.

**H.R. 2647** - Rep. Studds (D-Mass.). The Coastal Defense Initiative of 1989 is designed to provide for the protection and preservation of the coastal and Great Lakes environment. Because of the concentration of growth in the coastal and Great Lakes regions these areas are facing an increasing threat to their long-term integrity. This bill seeks to protect these areas by encouraging cooperation between local, state, and federal government and by strengthening standards of enforcement and through improved monitoring and planning. H.R. 2647 was referred to the Committee on Merchant Marine and Fisheries and the Committee on Public Works and Transportation. No action has been taken in these committees. Hearings were held before the Subcommittee on Fisheries and the Subcommittee on Oceanography.

**H.R. 2840** - Rep. Studds (D-Mass.). The Coastal Barrier Improvement Act of 1989 reauthorizes the Coastal Barrier Resources Act and establishes the Coastal Barrier Resources System, which will consist of undeveloped coastal barriers located on the coast of the United States and will be identified on maps entitled "Coastal Barrier Resource System." These maps are to be prepared and submitted by the Secretary of the Interior. H.R. 2840 also makes financial assistance available to the system for certain projects, such as study, management, and enhancement of fish and wildlife resources and habitats and scientific research. Also included is a non-structural project for shoreline stabilization that is designed to mimic, enhance, or restore a national stabilization system. The bill was referred to the Committee on Merchant Marine and Fisheries. Joint hearings have been held by the Subcommittee on Fisheries and Subcommittee on Oceanography. No further action has been taken on this bill.

**H.R. 3456** - Rep. Carper (D-Del.). The National Flood and Erosion Insurance and Mitigation Act of 1989 revises the National Flood Insurance Program and encourages communities to mitigate potential flood damages and to limit unwise development in flood areas. H.R. 3456 will also make the National Flood Insurance Program more sensitive to the environment by promoting preservation of wetlands, clean water, and coastal barriers, all of which are adversely

affected by coastal development. The bill remains in the Committee on Banking, Finance and Urban Affairs and in the Subcommittee on Policy Research; no further action has been taken.

**S. 1178** - Sen. Michell (D-Maine). Marine and coastal waters support an enormous amount of commercial and recreational fisheries. These resources are valued at over \$12 billion dollars a year. There is a growing threat to the marine and coastal waters from discharges from storm drains and sewer overflows and other point source and non-point source pollution. The Marine Protection Act of 1989 will authorize studies and will assess the conditions of this environment and will regulate permits that control discharge of wastewater. The bill will also institute a long-term program for monitoring discharges.

Referred to Committee on the Environment and Public Works; hearings have been held before the Subcommittee on Environmental Protection and Subcommittee on Superfund Ocean and Water Protection.

**S. 1179** - Sen. Lautenberg (D-N.J.). COAST is an acronym for the Comprehensive Ocean Assessment and Strategy Act of 1989. Many areas of the marine environment have been degraded by numerous sources such as waste disposal, agricultural runoff, freshwater diversions and inadequately controlled development. This bill seeks to establish a comprehensive marine pollution restoration program and will amend the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act. Senate bill 1179 was referred to the Committee on the Environment and joint hearings were held before the Subcommittee on Environmental Protection and the Subcommittee on Superfund Ocean and Water Protection. No further action has been taken.

**S. 1189** - Sen. Kerry (D-Mass.) This bill entitled the Coastal Zone Improvement Act of 1989 brings attention to the value of the Great Lakes and the ocean and coastal environment; it also emphasizes the environmental stress being put on these areas. This Act will amend the Coastal Zone Management Act of 1972 by requiring state coastal zone management facilities to prepare and submit plans for the improvement of water quality in their coastal zone. The plans must first be approved by the Secretary of Commerce. No action has been taken on S. 1189 since it was referred to the Committee on the Environment and joint hearings were held before the Subcommittee on Superfund Ocean and Water Protection and the Subcommittee on Environmental Protection.

**S. 2006** - Sen. Roth (R-Del.) and Sen. Glenn (D-Ohio). Introduced the day Congress reconvened, S. 2006 is one of the most significant environmental bills pending in Congress; if not the most important. The Department of the Environment Act of 1990 would raise the Environmental Protection Agency to cabinet level status.

## CONCLUSION

Based upon the number and quality of bills currently pending before Congress, it appears that the ocean and coastal environment may receive the political attention it deserves. The final disposition of many of these bills will be reported in future issues of WATER LOG. □

David Whaley

For information about a bill call:

Senate- (202) 224-2971

House- (202) 225-1772

or write:

Senate Documents

Hart Senate Office Building B-04

Washington, D.C. 20510

House Documents Room

U.S. House of Representatives

Washington, D.C. 20515

## Bateman v. Gardner

*716 F. Supp. 595 (S.D. Fla. 1989)*

*Florida statute prohibiting Florida fisherman from shrimping area where federal government allowed it found to be unconstitutional*

## INTRODUCTION

This case arose as the result of an controversy concerning waters surrounding the Dry Tortugas, an area off of the Florida Keys in the Gulf of Mexico. The State of Florida and the federal government both enacted statutes and regulations to manage fishing and preserve the unique sea life in these waters. Specifically, the federal government prohibited shrimp fishing in an area of federal waters known as the "Tortugas Shrimp Sanctuary." Under Florida law, Florida shrimpers were also prohibited from fishing in an area lying outside state territorial waters, beyond the boundaries of the

federally-created sanctuary. Conflict between the state and federal requirements created confusion. As a result, a Florida shrimp fisherman brought suit attacking the constitutionality of the state statute that prohibited Florida fishermen from shrimping in the area where the federal government allowed the activity. The suit alleged unfair discrimination and violation of the equal protection clause of the United States Constitution. The U.S. District Court for the Southern District of Florida held that the state law did violate the equal protection clause because it restricted only Florida shrimpers and not shrimpers from other states from fishing federal waters. The court further held that federal regulations promulgated under the Magnuson Fishery Conservation and Management Act preempted Florida from enacting a prohibition against shrimping where federal regulations allowed it.

## DISCUSSION

In 1976, Congress passed the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* The Act granted to the federal government exclusive fishery management authority within the exclusive economic zone (EEZ) (a zone extending from the outer boundary of each state's territorial waters to a point two-hundred miles offshore). Section 1856(a)(3) of this Act prohibits states from the direct or indirect regulation of any fishing vessel outside its territorial waters "unless the vessel is registered under the law of that state."

Prior to the passage of the Magnuson Act, states had the authority to regulate state registered vessels and state citizens while they fished in waters outside the state's boundaries in what is now the EEZ, pursuant to a line of Supreme Court cases. *See Skiriotes v. Florida*, 313 U.S. 69 (1941). By virtue of this authority, in 1957 the Florida Legislature passed Fla. Stat. Ann. § 370.51 to conserve the supply of shrimp. The legislation designated the waters surrounding the Dry Tortugas, known as the "Tortugas Shrimp Beds" as an area where shrimp trawling was prohibited. A large portion of the restricted area lay beyond Florida's territorial limit.

In 1981, the Secretary of Commerce implemented the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, 50 C.F.R. Part 658. In an effort to protect shrimp nursery beds, the plan set aside an area in the Gulf EEZ near the Dry Tortugas as an area closed to all shrimp fishermen. The area, named the "Tortugas Shrimp Sanctuary" is completely outside Florida's territorial limit.

The federally created "Tortugas Shrimp Sanctuary" and the state "Tortugas Shrimp Beds" overlap considerably. However, a portion of the state created beds, located beyond

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Florida's territorial limit and within the EEZ, is not included within the boundaries of the federal shrimp sanctuary. It is in this area, where federal law permits shrimping, but Florida law prohibits its fishermen from so doing, that is in dispute and caused fisherman Bateman to bring his suit.

The court found the fisherman's claims to be meritorious, and held that the Florida statute was unconstitutional for two reasons. First, the court held that the statute violated the equal protection clause of the United States Constitution. The equal protection clause prohibits any state from acting in such a manner as to discriminate against the citizens of another state or its own citizens. While such discrimination may be permitted if it can be shown that it furthers a legitimate state interest, the court found that prohibiting floridian shrimpers from fishing waters where others were allowed served no such interest, and thus was a violation of the equal protection clause.

Pursuant to the supremacy clause of the Constitution "the laws of the United States, including both federal statutes and federal regulations properly promulgated pursuant to statutory authorization, take precedence over state laws." *Bateman* at 597. It is this principle, known as preemption, that the court invoked to find a second reason why the state statute was unconstitutional. Preemption of a state law by federal law can occur in a number of ways, one of which is because there is conflict between state law and federal law that makes it impossible to comply with both. Preemption also operates when the state law stands as an obstacle to the accomplishment of congressional purposes.

In this case, preemption occurred in both of these manners. Under federal law, the Florida shrimpers may fish the disputed area; under state law they may not. Consequently, compliance with both laws was impossible. Moreover, one purpose behind the Magnuson legislation is to promote domestic commercial fishing. Operation of the Florida statute stood as an obstacle to the accomplishment of this purpose by preventing Florida fishermen from participation in commercial fishing in the area. As a result, according to preemption principles, the conflict must be resolved in favor of the federal law.

## CONCLUSION

Where Congress has taken steps in an area, any acts by state authority must not conflict with federal goals. The Magnuson Act gives states authority to regulate fishing by state residents or state registered vessels in waters beyond their territorial limit. However, in this case the Florida legislation sought to regulate an area in a manner that conflicted with federal regulation. Consequently, by virtue of the suprem-

acy clause of the United States Constitution, conflict between the state and federal law had to be resolved in favor of the federal law. Furthermore, the court found that enforcement of the state law resulted in a violation of the equal protection clause of the Constitution, because only Florida fishermen were restricted from fishing in the federal area. Therefore, the State of Florida was enjoined from enforcing the statute in a manner that violated the equal protection clause or conflicted with applicable federal regulation. □

Al Earls

## LAGNIAPPE

### *A Little Something Extra*

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The Marine Law Institute of the University of Maine School of Law announces the release of its new publication, the *Territorial Sea Journal*. The journal is a continuation of the Institute's quarterly newsletter, the *Territorial Sea*, in an expanded law journal format. It will explore a wide range of legal developments dealing with the management of ocean and coastal resources. Those interested in subscribing to the *Territorial Sea Journal* should contact: TSJ Editors Alison Reiser and Tim Eichenberg, The Marine Law Institute, 246 Deering Avenue, Portland, Maine, 04102; telephone (207) 780-4474.

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An Alabama federal district court upheld the constitutionality of an Alabama law banning disposal of hazardous wastes generated in other states - including Mississippi - on January 12, 1990. *National Solid Waste Management Assoc. and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*, No. 89-G-1722-W, slip op. (N.D. Ala., Jan. 12, 1990) involved the validity of legislation, known as the Holley Bill, that was passed by the Alabama Legislature in 1989. The law prohibits Alabama hazardous waste treatment or disposal facilities from accepting hazardous wastes from states which (1) prohibit treatment, disposal, or storage within their own borders, or (2) fail to meet the requirement under CERCLA (Comprehensive Environmental Response, Compensation and Liability Act, commonly referred to as Superfund) that calls for states to provide a capacity assurance plan to the Environmental Protection Agency (EPA). The plan must assure that the

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state is able to treat and dispose of hazardous wastes through either in-state facilities or by entering into interstate agreements for out-of-state disposal.

Mississippi meets neither of the requirements of the Holley Bill. Consequently, Alabama may continue to refuse Mississippi's hazardous waste until it is in compliance with of Alabama law or the district court ruling is overturned on appeal. For a complete discussion of this case and the issues surrounding it, look for an article in upcoming WATER LOG.

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"America's Sea--A National Resource at Risk," is the title of the upcoming conference on the status of the Gulf of Mexico. Sponsored by the Environmental Protection Agency's Gulf of Mexico Program, the conference will be held at the Clarion Hotel in New Orleans, LA, December 2-5, 1990. For more information call 1-800-726-GULF.

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Once again the Coast Guard has changed the deadline for the installation of EBIRBS (emergency position-indicating radio beacons). According to original federal regulations, uninspected fishing boats, processing vessels, and tenders that carried approved Class A EBIRBS before October 3, 1988, would not be required to install a new 406-MHz (Category 1) EBIRB before August 17, 1994. However, NASA (National Aeronautics and Space Administration) tests have indicated that signals from many of the Class A models cannot be picked up by orbiting satellites. Consequently, vessels that carried Class A EBIRBS before October 3, 1988, must replace them with 406-MHz units by August 1, 1991. Boats that did not comply with the October 1988 deadline must install the new device by May 17, 1990. For a detailed discussion on EBIRBS, see Whitrock, *The Commercial Fishing Industry Vessel Safety Act: A Closer Look*, Vol.9, No.1, WATER LOG 1989.