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# LOUISIANA COASTAL LAW



## The Gulf of Mexico Shrimp Management Plan

In 1976, the U.S. Congress passed the Fishery Conservation and Management Act (FCMA), PL 94-465 (see LCL #23) which established a comprehensive management scheme for fish species off the U.S. coast. The FCMA extended U.S. fisheries jurisdiction out to 200 nautical miles from the coast by establishing a Fishery Conservation Zone (FCZ), which is the area seaward of the states' territorial waters extending out to 200 nautical miles from the coast. The United States government exercises exclusive fishery management authority over all fish within the FCZ. Title II of the Act regulates foreign fishing within the FCZ and encourages the implementation and enforcement of international fisheries agreements governing foreign fishing in the FCZ. Title III of the Act provides for the development of a National Fisheries Management Program and the creation of 8 Regional Fisheries Management Councils to carry out this Program by developing Fishery Management Plans (FMPs) - which must be approved and implemented by the U.S. Secretary of Commerce - for each fishery within their respective geographical areas of authority. FMPs and regulations adopted to implement the FMPs must be consistent with 7 national standards for fishing conservation and management set forth in the FCMA, Sec.301:

- (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.
- (2) Conservation and management measures shall be based upon the best scientific information available.
- (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

The regional fishery management council for the Gulf of Mexico is the Gulf of Mexico Fishery Management Council, which is responsible for developing FMPs for the FCZ off the states of Alabama, Florida, Mississippi, Louisiana and Texas. In accordance with its responsibility to prepare FMPs, the Gulf Council prepared an FMP for the shrimp fishery of the Gulf of Mexico and submitted it to the Secretary of Commerce in January, 1980.

The FMP for the shrimp fishery of the Gulf, hereinafter referred to as the "Shrimp Plan", developed by the Gulf Council establishes management measures for the shrimp resources in the FCZ of the Gulf.

The species addressed by the Shrimp Plan are <sup>brown shrimp</sup> white shrimp, <sup>pink shrimp</sup> rock shrimp, and seabobs, (known in Louisiana as "six barbes"). Economic, ecological, and sociological factors were taken into consideration in the development of the Shrimp Plan.

The primary problem addressed in the Shrimp Plan is the harvest of shrimp well below optimal size and value. The main thrust of the Plan is to encourage the harvest of larger and more valuable shrimp through closures of certain areas of the Gulf to shrimping. Among the 12 management measures included in the Shrimp Plan is the cooperative permanent closure of the Tortugas Shrimp Sanctuary by the state of Florida and the U.S. Department of Commerce to protect small pink shrimp until they have reached a specified size. The Plan also recommends that all the Gulf states consider establishing shrimp sanctuaries in important shrimp nursery areas that are under their sole jurisdiction to protect shrimp within these areas until they have reached an optimum size for harvest by the user groups dependent upon them.

The most controversial management measure in the Shrimp Plan is Management Measure 2, the "Texas Closure". This measure which has generated much controversy in Louisiana reads as follows:

Measure 2: Establish a cooperative closure of the territorial sea of Texas and the adjacent U.S. FCZ with the state of Texas and the U.S. Department of Commerce during the time when a substantial portion of the brown shrimp in these waters weigh less than a count of 65 tails to the pound (39 heads or shrimp to a pound).

[Note: Each Gulf state has established a minimum legal size for shrimp caught in the state's waters or shrimp landed in the state, including shrimp caught in the FCZ and landed in the state. These size limits expressed as so many shrimp to the pound, reflect the requirements of the respective shrimp industries of the individual Gulf states. The minimum size limit in Texas is 39 whole shrimp to the pound].

The thrust of Management Measure 2, which has become known as the "Texas Closure" is that it requires the U.S. Department of Commerce to close the FCZ off Texas to shrimping at a time corresponding to Texas' Closure of its territorial sea. Texas

traditionally closes its territorial sea to shrimping for a 45 day period (June 1 to July 15), when brown shrimp in its territorial sea generally are smaller than 39 whole shrimp to the pound. The opening or closing date for the state closure can be adjusted by as much as 15 days to allow for an earlier, later, or longer closure due to climate variation, but it can't be longer than 60 days nor shorter than 45 days. Measure 2 calls Texas to continue its annual closure and to eliminate its count restriction on shrimp.

According to the Shrimp Plan, Management Measure 2 is a "trial measure" which will enhance an existing shrimp management regime in Texas' territorial sea. The Texas Closure is designed to manage and conserve the shrimp resources in the FCZ off Texas efficiently while increasing the yield of shrimp. Ideally, the closure will protect the shrimp until they reach a more commercially valuable size. Elimination of Texas count restriction on shrimp will allow all shrimp caught in the Gulf of Texas to be landed there and thus reduce shrimp discard. These two provisions are expected to lead to a more efficient shrimp catch off Texas and a high catch per unit effort (CPUE). The measure will also facilitate effective enforcement of both the territorial sea closure by the state of Texas and the FCZ closure.

Despite all of the presumed benefits that the Texas closure is expected to reap, Louisiana officials maintain that the Gulf Council and the Secretary of Commerce failed to consider adequately the side effects of closing the shrimp season off the Texas coast. They argue that a major side effect of the plan will be a displacement effect as Texas fishermen migrate into Louisiana's state waters and into the FCZ off the Louisiana coast, thus increasing the fishing pressure on shrimp resources off Louisiana.

Essentially, the Louisiana officials feel that the Texas Closure will penalize Louisiana shrimpers even though they discard less of their shrimp catch than shrimpers off Texas since, unlike Texas freezing, Louisiana has a shrimp canning industry which utilizes smaller shrimp. (Louisiana has a count restriction of 68 whole shrimp to the pound). There is also the feeling that Louisiana shrimpers will be penalized by a closure in the FCZ

that is being implemented, because the state of Texas cannot adequately enforce its shrimp count laws.

The Louisiana members of the Gulf Fishery Management Council actively attempted to delete Management Measure 2 from the Shrimp Plan as it went through the administrative approval process. They made essentially three arguments for deleting the Measure from the Shrimp Plan: (1) the success of the Measure depended in part, on prospective action by the Texas Legislature to repeal its shrimp count law; (2) the Measure was based on older data; and most importantly (3) the Measure is not consistent with the national standards set forth in the FCMA. (see p.1)

At the Gulf Council level, the Louisiana members adamantly opposed the adoption of the Measure. During the January 8, 1980 council meeting in Brownsville, Texas, at which the council approved the Gulf Shrimp Management Plan for submission to the Secretary of Commerce for review; the Louisiana members of the Council moved for approval of the Shrimp Plan for submission to the Secretary with the deletion of Management Measure 2. After much debate, this motion failed 8 to 7. They then moved to delay implementation of Measure 2 until the time that Texas repealed its shrimp count law, a potential stumbling block to implementation of the Plan, a topic that will be more fully discussed later. This amendment was also defeated. The Louisiana delegation attempted once more to affect Measure 2 by limiting the "Texas Closure" to the southern half of the FCZ off Texas, rather than the entire FCZ off of Texas. This motion was defeated also. The Louisiana members then voted against the motion to approve the Shrimp Plan for submission to the Secretary because Measure 2 still remained intact within the Shrimp Plan.

Once the Shrimp Plan was submitted to the Secretary for review, the Louisiana Council members submitted two minority reports to the Secretary outlining their opposition to the "Texas Closure". Louisiana U.S. Representative Breaux, Chairman of the fisheries subcommittee of the House Committee on Merchant Marine and Fisheries and Livingston, member of the Merchant Marine and Fisheries Committee, and Governor Treen all voiced their displeasure with the "Texas Closure" to the Secretary.

The Secretary, through the Assistant Administrator for Fisheries of the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) approved the Shrimp Plan on May 29, 1980. However, in his letter of approval to the Gulf Council, the Assistant to the Administrator encouraged the Council to reconsider prior to its effective date the effects the "Texas Closure" might have. He also suggested that, as the Council monitored implementation of the "Texas Closure" in 1980 and received new information it could consider other management alternatives.

At the August 1980 meeting of the Gulf Council, William "Corky" Perret, Federal Aid Coordinator of Louisiana's Department of Wildlife and Fisheries, presented new data to the Council and moved to amend the Plan by deleting Measure 2. Public opposition to Measure 2 was voiced at the meeting. "Tee John" Mialjevich, a Delcambre shrimper and leading spokesman for Louisiana's shrimpers as well as the American Shrimp Cannery and Processors expressed concern that the Texas Closure would result in discrimination and harm to the shrimp industry and consumers. Mr. Perret's motion failed by a 9-7 margin. Thus, as things now stand, the Texas Closure will go into effect on June 1, of this year (or whenever Texas begins its territorial closure).

The U.S. Department of Commerce, through the NOAA in its public notice of approval of the Shrimp Plan and publication of proposed rules for implementing the Plan (see the Federal Register, Vol. 45, No. 218, November 7, 1980, Part III) noted that, because of concern about the potential impact of the "Texas Closure" on Louisiana shrimpers, the [Gulf] Council will evaluate further the effect of the Texas Closure on fishermen from all states and consider whether any alternatives such as extending the area of the FCZ closure, would prevent undue adverse impact." To implement the evaluation, baseline studies of the 1980 Texas Closure and 1981 cooperative closure of FCZ and Texas waters are to be made to assist the Council. If appropriate, the Gulf Shrimp Plan will then be amended prior to the 1982 season.

Secretarial approval of the Shrimp Plan with Management Measure 2 included, limits the options now available to Louisiana shrimpers and officials for attacking the Measure. At this point, it would appear

that the only feasible options available for dealing with Measure 2 are either to accept implementation of the Shrimp Plan and Measure 2 beginning in June, 1981 and work to have the Measure deleted from the Shrimp Plan before the 1982 season, or to challenge the regulations implementing the Shrimp Plan (and Measure 2) in court as provided in Section 305 (d) of the FCMA. This section provides for judicial review of final regulations promulgated by the Secretary implementing an FMP and provides that such regulations can be set aside only if the regulations are found to be:

- a) arbitrary, capricious, an abuse of the Secretary's discretion in promulgating FMP regulations or otherwise not in accordance with law;
- b) contrary to constitutional right, power, privilege, or immunity;
- c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- d) adopted without observance of the procedure required by law.

(Note Section 305 (d) of the FCMA removes the power of a court that is reviewing FMP regulations to enjoin the implementation of the regulations pending completion of its review.

Such a legal challenge by Louisiana would be based on the 3 arguments made by the Louisiana delegates at the Council level and in their minority report to the Secretary. This challenge would focus on the following areas: 1) the plan is predicated on the actions of a separate body, which has yet to act, 2) the plan is not based on the latest data, and most importantly 3) the plan does not meet the national standards required by the Fishery Conservation Management Act.

#### SUCCESS PREDICATED UPON ACTION BY THE TEXAS LEGISLATURE

An essential element of Measure 2 is the waiver of the Texas count restriction after the coinciding closure of state and federal fishing waters. One of the major assumptions of the economic model used to evaluate the possible increase in size and value of shrimp resulting from Measure 2 was the elimination of the count restriction. By prohibiting fishing during the closure, it was argued that the shrimp would attain commercially valuable size. The removal of the count restriction would enable all shrimp to be landed and do away with the

wasteful procedures of the past, namely the discard of medium to smaller sized shrimp. Consequently, the success of the "Texas Closure" is tied to actions that must be made by a body separate from the council, the Texas Legislature. As of December, Texas had not amended its law regarding count restriction.

Since Texas' shrimp industry is based upon harvesting large shrimp, there may be opposition to changing the count restriction. Without elimination of the Texas count law, experts feel that there would be no valid means of ascertaining whether the shrimp plan proved beneficial or not, as there would be no information on the effect of the closure on count size (nor on the increase in harvest).

#### ECONOMIC ASSUMPTIONS UNDERLYING MEASURE 2 CHANGE

The second means of attack focuses on the fact that the measure was based upon scientific and economic data accumulated only through 1976. Since the Shrimp Plan was developed, there have been recent significant changes in the shrimp industry which have had widespread impacts on economic and social areas. Two major changes stand out above the rest. First, the number of fishing vessels has increased dramatically since 1976. Secondly, according to National Marine Fishery Service (NMFS) figures, the market for smaller shrimp has proven to be stronger than the market for large shrimp over the past few years.

With respect to the increase in vessels, in Louisiana alone, the number of shrimp vessels 45 feet and larger increased 41% over the course of 3 years, 1976-79. The number of out-of-state vessels fishing off the Louisiana coast has also increased. In 1976, Louisiana sold 1477 non-resident shrimp trawl and vessel licenses. By 1978, the number of licenses had increased to 2,238. Corresponding growth has also occurred in Texas. Between the years 1976-79, the number of shrimp vessels over 54' increased 19%. Couple these figures with the fact that Mexico has closed its territorial waters to all American vessels, and it is likely that vessels formerly fishing in Mexican waters will expend the fuel to travel and fish in the Federal Coastal Zone off of Louisiana. Increased fuel expenditures will increase the cost of harvesting shrimp and affect consumer

demand as the added costs will be passed on to the consumer.

The shrimp market structure has developed in response to various factors such as supply costs, shrimp availability and consumer demand. As the goal of Management Measure 2 is to harvest larger shrimp with a higher economic value, the consumer will absorb the higher prices for the produce. Furthermore, Measure 2 fails to consider the market variations. Historically, temporary market gluts in Louisiana have caused price decreases and the wasteful discard of shrimp at dockside. A downturn in shrimp prices occurred late in the summer of 1979 and continued into mid May of 1980. During this period of falling prices, the large shrimp fell in price more than the small shrimp, indicating that the market for smaller shrimp was stronger. This fact changes the cost-benefit analysis of Measure 2 as it increases the value of small shrimp lost, and decreases the value of larger shrimp caught. Therefore, critics contend that implementation of Measure 2 will do more economic harm than good.

#### MEASURE 2 FAILS TO MEET NATIONAL STANDARDS

The strongest argument that Louisiana and opponents of the "Texas Closure" can make is that it is not consistent with the national standards for fishery conservation and management set out in the FCMA. The standards of the act appear previously on page 1.

Opponents to the "Texas Closure" maintain that Measure 2 conflicts with Sec. 301 (a) (1). They agree that standard #1 reflects a concern for overfishing and endeavors to achieve an optimum yield for the fishery. As the Louisiana delegation pointed out in the minority report, the term "optimum", with respect to the yield from a fishery means the amount of fish--

- (A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities,
- (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.

Consequently, in light of the definition of "optimum yield", the anticipated effects of Management Measure 2 would

fail to meet standard #1 for the following reasons.

As previously stated, there has been an increase over the past several years in the number of fishing vessels off of the Louisiana coast in the FCZ. In 1979, Mexico closed its territorial seas to American fishermen. Additionally, the current high mortgage and interest rates make it hard for a fisherman to keep his vessel idle during the 45-60 day closure. These two factors combined will prompt even more vessels to travel to the federal waters off of the Louisiana coast and result in increased competition for the available shrimp.

The increase in vessels creates a great possibility for over fishing shrimp resources. Among other things, the shrimp population will be dispersed more quickly, resulting in a lower CPUE (catch per unit effort). With an increase in supply, the potential for market gluts arises and it is likely that the discard of by catch will increase. One further effect can be expected. An increase in the number of vessels and corresponding increase in distance traveled to reach fishing grounds will place a strain on ice and fuel supplies. The net result of all of these factors will be to increase the cost of supplying shrimp, the passing on of these costs to the consumer, and probable over-fishing in the FCZ.

The FCMA definition of optimum yield mandates that social factors must also be considered in the implementation of Management Measure 2. Opponents to the "Closure" point out that the adoption will disrupt Louisiana's traditional fishery, a fishery which is geared to smaller sized shrimp. Public opposition to the closure is strong as the Louisiana Shrimp Association, the Louisiana Fish Federation, and Concerned Shrimpers Association and the American Shrimp Cannery and Processors have all gone on the record opposing Measure 2.

The "Texas Closure" may also be challenged on the grounds that it does not meet the second national standard requiring the plan to be based upon the best scientific information possible. The scientific soundness of the plan is questioned because it will be difficult to analyze the results. The plan provides for a two fold change as it closes Texas and Federal waters and waives the count restriction on shrimp taken. Economists point out that no true measure or study can be made, as the dual changes make it extremely difficult to ascertain

which change would account for the increase in the optimum yield.

Measure 2 failed to include shrimp migration as a variable in projecting an increase in the optimum yield. Studies by the Texas Parks and Wildlife Department and the National Marine Fisheries Service (NMFS) document the migration of shrimp into Mexican waters. See Gulf Streamer, (Vol. 1, No. 3, Dec. 1979). A certain percentage of shrimp will make this migratory trek, which will decrease the available shrimp and in turn adversely affect the validity of the study.

Finally, with regard to Section 301 (a) (5) of the FCMA, the promotion of efficiency in the utilization of the fishery is not met. The artificial distortion of the market leads to a relocation of vessels off of the Louisiana coast. Overfishing, potential shrimp surpluses and increased discard of other species will be undesirable side effects of this plan. Dispersed shrimp resources and additional fuel costs will lead to a lower CPUE and higher supply costs.

The Plan also presents enforcement problems. At the August 6th meeting of the Gulf Council, Admiral Yost of the Coast Guard stated that the FCZ is a large area to patrol, he went on to say that the Coast Guard viewed the enforcement of the Shrimp Plan with less priority than their Search and Rescue program. Additionally, there

are potential constitutional problems with the searches necessary for the proper enforcement of the GSMP. The fact that fishermen could be trawling for other species in the FCZ makes the enforcement of the "Texas Closure" extremely difficult. Consequently, in terms of enforcement, due to the priority of other Coast Guard programs and inherent complications, the plan can not be efficiently enforced.

Although Measure 2 serves to stir up interstate rivalries, in the long run, it may be in the best interests of Louisiana's fishermen to support the Gulf Council's plan. The regional council's main asset is that it represents local input and control in fishery management areas. Serious challenges to the council may prompt Federal authorities to preempt the regional council's power and place it in the hands of authorities in Washington. Therefore, it may be wiser to support the FMP, thereby keeping power at local levels, and count on the Louisiana delegation to the Gulf Council to use their voting power to effectively represent our state's commercial fishermen.

#### COMING UP IN THE LCL

The next issue of the LCL will focus on the Treen Administration's proposal for management alternatives in the Atchafalaya Basin. The article will explore the historical factors behind the compromise plan as well as the plan itself.

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