


MEMORANDUM

TO: Council, AP, and SSC Members

FROM: Clarence G. Pautzke 
Executive Director

DATE: September 20, 1989

SUBJECT: Salmon Fishery Management Plan

ACTION REQUIRED

Approve Salmon FMP for Secretarial review.

BACKGROUND

During June 1988 the Council reviewed a preliminary version of the salmon FMP and requested the Salmon Plan Team to revise the plan to conform with the Pacific Salmon Treaty and management of the salmon fisheries in State waters by the State of Alaska. The Council also asked the team to revise the definitions of MSY and OY, consider ways of streamlining the process of issuing changes to the regulations during the season (including a radio broadcast option for notifying the fleet), and include a discussion of an extension of the plan to cover the EEZ west of 175° East longitude. The draft plan included these revisions, an Environmental Assessment/Regulatory Impact Review, and a section on salmon habitat. The package, collectively, makes up Amendment 3 to the plan.

At its April 1989 meeting, the Council approved for public review the draft salmon FMP. The public comment period extended from April 24 to September 1. The Council requested a long public comment period in order to give salmon fishermen ample opportunity to review the document.

The current salmon plan provides for Council oversight and Federal regulation of salmon fisheries within the EEZ (primarily the troll fishery of Southeast Alaska) with minimal routine involvement. One option in the draft plan allows annual harvest levels to be set in accordance with Pacific Salmon Commission and Alaska Board of Fisheries actions and for seasons and inseason regulations to be issued by the Alaska Department of Fish and Game. The other option maintains the status quo, which calls for annual Council action on harvest levels and for seasonal and inseason Federal regulations to echo those set by the State of Alaska.

The Council needs to examine several issues that remain unresolved and select which option is preferred:

A. Management Regime

This plan amendment provides two major options for management: (1) defer regulations to the State of Alaska, or (2) retain status quo with Council and NOAA Fisheries management in the EEZ under Federal regulations.

If the Council chooses the status quo, active Federal management would continue. NOAA Fisheries would continue to coordinate with the State in opening and closing the EEZ to salmon fishing so as to conform with State regulations. However, under this situation a more rapid method of informing fishermen about current regulations is required. Three options for accomplishing this need to be considered:

1. News release and radio message notification to fishermen
2. Recorded telephone messages which announce changes to regulations
3. Provide notices of regulation changes to agents representing fishermen rather than to fishermen directly.

One of these methods or a feasible alternative is required in order to inform fishermen of regulation changes more expeditiously. Under the current federal system, notices of changes cannot be made in a timely manner because a Federal Register notice is required before a regulation change becomes effective, a time-consuming procedure.

If, on the other hand, the Council chooses to defer salmon management to the State, then the State of Alaska would manage the salmon fisheries in both State waters and in the EEZ as a unit, which was the Council's original intent.

Note that under the option of deferring management to the State, the Council and NOAA Fisheries could take a management action regarding the salmon fishery in the EEZ by publishing a notice in the Federal Register if an action by the State of Alaska was contrary to Council objectives, Federal law, or the Pacific Salmon Treaty. In addition, a member of the public (including fishermen) could use the appeals process given in the plan. In many ways this option would establish a cooperative partnership with the state that is very similar to the Bering Sea/Aleutian Islands Crab FMP.

B. Extend Jurisdiction West of 175° East Longitude

The Council's salmon plan currently excludes from its jurisdiction the area of the EEZ west of 175° East longitude. Salmon fisheries in this region have traditionally been managed by the International North Pacific Fisheries Commission (INPFC), and extension of Council jurisdiction to this area must consider current INPFC management activities. Currently, it is legal for the Japanese mothership fleet to fish in this area under INPFC regulations, but in 1988 and 1989 Japan was not allowed to conduct its INPFC-approved salmon fishing activities there because of a U.S. Supreme Court ruling denying Japan a marine mammal take permit. It is unclear what Japan's intentions for continued fishing might be in the EEZ west of 175° East longitude. There are indications Japan is phasing out its mothership fleet, in which case Japan may no longer have an interest in salmon in this area.

Regardless, the Council needs to consider which option is most appropriate:

1. Status quo - do not extend Council jurisdiction past 175° East.
2. Extend jurisdiction west of 175° East now.
3. Provide for automatic extension of jurisdiction west of 175° East if INPFC is dissolved.

Under INPFC, Japan has agreed to phase down its salmon fishing activities in the North Pacific Ocean by 1994, at which time the fishery will continue at a fixed level. Some of this fishing would be in the U.S. EEZ in exchange for the Japanese abstaining from fishing for salmon in International waters east of 175° East longitude where North American salmon are relatively more abundant. Because a 1988 Federal Court order prevented the Japanese from obtaining a permit for "taking" marine mammals in the U.S. EEZ, Japan has given indications that it might withdraw from the INPFC. Options 2 and 3 would allow the Council to fill the management void left if INPFC should dissolve.

The difference between Options 2 and 3 is the manner in which the Council would take over salmon management west of 175°. Under Option 3, the Council would take over management in that area only upon dissolution of INPFC. No further Council action would be required to amend the plan. Option 2 calls for immediate Council oversight; however, as long as INPFC remains in force the Council would necessarily defer EEZ salmon management to the INPFC forum since an international treaty would take precedence over a Council action taken under Magnuson Act provisions. The Council may wish to send a message of support for INPFC by choosing Option 3; in so doing, the Council affirms the value of the INPFC process and the negotiated phase down of Japanese salmon fishing in the North Pacific, but at the same time expresses its interest in managing salmon in all areas of the U.S. EEZ should INPFC dissolve.

C. Annual Management Cycle

Depending on its involvement in management, the Council may need to establish an annual cycle for reviewing proposed plan or regulation changes. The Council may want to request the Salmon Plan Team to prepare a management cycle discussion paper for Council review and implementation at its December meeting. The Plan Team intends to meet next month to review any Council suggestions for the salmon management cycle. They could use any guidance the Council cares to give, for example, on whether to call for proposals each year or every other year. The team will also determine which existing scientific documents could be pulled together each year to meet Secretarial requirements for an annual Stock Assessment and Fishery Evaluation (SAFE) report.

D. Public Comments on the Draft Revised Salmon Plan

Public comments received are attached to this memo as item D-1(a). In general, commenters were concerned about (a) deferral of regulatory authority to Alaska without a clear definition of the Federal role, (b) changes in the number of lines a troller may use in the EEZ, and (c) increased eligibility for limited entry permits. In contrast, other commenters supported amending the plan to defer regulatory authority to the State because it would simplify the fishermen's understanding of the regulations. Also, they supported the use of radio broadcasts and recorded telephone messages to announce inseason changes to the regulations. One commenter suggested the Council immediately extend jurisdiction west of 175° East longitude and urged

Council support for bilateral negotiations with the U.S.S.R. on an improved international management regime for North Pacific salmon stock protection.

If the Council approves the revised salmon plan (i.e., Amendment 3) it will be forwarded, along with any changes requested by the Council, to the Secretary of Commerce for review and approval; if this review process proceeds smoothly, the plan could be implemented before the 1990 salmon season. The Pacific Salmon Commission will set quotas for 1990 in February or March of 1990, and the Alaska Board of Fisheries, similarly, will consider any regulation changes for the 1990 troll fishery shortly after the Salmon Commission meeting.

30 1989

August 25, 1989

John P. Petersen

I have a admendment to your admendment to: defer regulation of the Salmon Fisheries to the State of Alaska, and regulation of EZZ.

With your adopting State regulations, does this mean Power Trollers ~~to~~ Six Lines in Federal waters will be reduced to four lines? My admendment is: To allow Hand Trollers four lines in Federal waters for the same number of years Power Troll were allowed the two additional lines, after which Hand Trollers number of lines would go back to two lines as already in State waters.

This equal number of lines and years will have occurred for both Types of Permits.

In Volume 2 of 4 Draft of the Revised "Fishery Management Plan for the Salmon Fisheries" in the EEZ off the coast of Alaska, prepared by the Salmon Plan Team and the staff of NPFMC + AR, NMFS April 1989. On page 47 the Regional Director issued two Federal permits. These two permit holders are only allowed fishing Federal waters only? or do they also hold ADF+G Troll Permit? I was more curious as to ~~to~~ how to why such permits were needed, ^(A bit strong) seeing how NPFMC mirrors ADF+G

Thanks for ~~the~~

J.M. Erie

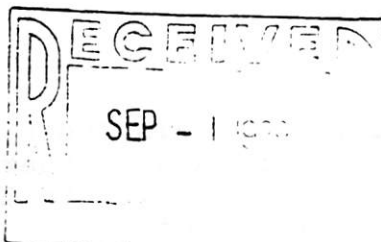
W. M. Erie

P.O. Box 333

W. Yakutat, Ak. 99689-0333



Alaska
Trollers
Association
130 Seward St., No. 213
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(907) 586-9400



August 30, 1989

North Pacific Fisheries Management Council
PO Box 103136
Anchorage, AK 99510

Dear Sirs:

As the only commercial salmon fishing fleet that fishes in the western area of the Exclusive Economic Zone (EEZ) off Alaska's coast, the troll fleet is dependent on the continuity of the management system for this area and views, with critical concern, any proposed changes to that system. Correspondingly our Logbook Program depicts the importance of the EEZ to trollers; for the years 1978 - 1988 fishermen participating in the Logbook Program (average of 100 for these years) spent, on average, 24% of their hours in the EEZ. Therefore, our organization, which represents over 350 permit holders is submitting the following comments on the third amendment of the "Fishery Management Plan for the High-Seas Salmon off the Coast of Alaska" (Plan).

It continues to be our position that, in all but extreme cases, federal regulation of the troll fishery should mirror regulations by the state of Alaska. No intervention by federal agencies should occur unless the North Pacific Fishery Management Council (Council) determines that Alaska Board of Fisheries management actions are inconsistent with the Pacific Salmon Treaty, and/or the national standards of the Magnuson Act. Therefore, the Council should adopt a framework Plan which delegates management authority of the salmon fishery in the EEZ to the state of Alaska, and amend any data used in such a Plan with the best available.

There are several reasons why we feel this way: 1) as a party to the Pacific Salmon Treaty the troll fishery is, and will continue to be, regulated to achieve internationally recognized goals with regard to chinook harvests; 2) the Alaska Board of fisheries regulates the harvest of all other species of salmon for optimum yield, making federal regulation redundant; 3) lack of federal involvement will reduce the strain on already over burdened federal agency resources; 4) as businessmen, trollers require a basis upon which rational and sound business decisions can be made, layer upon layer of governmental regulation cause confusion and inefficiency, thereby further increasing demands on the resource.

The US/Canada Pacific Salmon Treaty, an international agreement, governs all aspects of harvesting chinook salmon in Southeast Alaska. Through this international treaty the troll fishery has, and will undoubtedly continue to be, regulated to achieve resource management

goals recognized by all parties (including federal regulatory bodies) to the treaty. Similarly, the Alaska Board of Fisheries manages the other species of salmon harvested in the EEZ consistent with the management and conservation objectives contained in the Magnuson Act. Hence, it is redundant to increase federal regulatory authority in management of the salmon fishery in the EEZ.

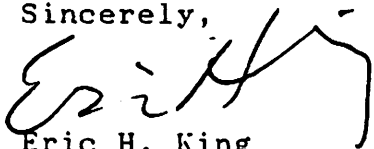
Recognizing the potential for superfluous regulation, the Council should not be too closely involved with the day-to-day or year-to-year management of the salmon fishery in the EEZ. We do recognize, however, that some regulatory authority must be maintained by the Council in order to: prohibit fishermen without valid state limited entry permits from fishing in the EEZ, other than those who have qualified under federal limited entry regulations (see below); prohibit fishing with nets in the EEZ, except as presently allowed in three fisheries; and prohibit the development of any new salmon fisheries in EEZ.

Businessmen require a basis upon which rational decisions can be made, increasing the number of regulations inhibits this process. The average troller spends most of his time readying his boat and gear for participation in the several fisheries it requires in order to stay in business these days. Little time or energy is left to spend sifting through increasing mounds of paper in an effort to understand current regulations. Any amendment to the plan should simplify both fishermen's task of understanding the regulations and the notification process used by managers to convey regulatory measures to the fleet. We would suggest that any notification system adopted by regulatory agencies continue the present use of radio announcements following regularly scheduled marine weather forecasts and also incorporate a recorded phone message that fishermen can call in order to be informed of the most recent regulations.

Although federal regulations pertaining to limited entry are not up for review at this time we feel that a brief comment is in order. Under the present regulations fishermen denied a state limited entry permit or emergency transfer have the opportunity to apply for and receive only the federal portion of the permit. We find this troubling and wonder at its potential outcome since one of the objectives of the Plan is to control the expansion of effort in federal waters.

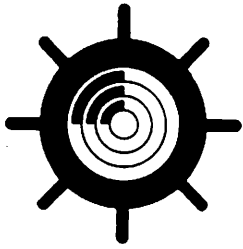
Your consideration of our comments is greatly appreciated and if you have any questions or comments please don't hesitate to contact us.

Sincerely,



Eric H. King
Logbook Coordinator

cc: Commissioner Don Collinsworth, ADF&G
Dr. Aven Anderson, NOAA/NMFS



NPFVOA

COMMENTS FROM THE NORTH PACIFIC FISHING VESSEL OWNERS' ASSOCIATION ON THE DRAFT FISHERY MANAGEMENT PLAN FOR THE SALMON FISHERIES IN THE EEZ OFF THE COAST OF ALASKA

Submitted to: Mr. Steven Pennoyer, Director, Alaska Region, National Marine Fisheries Service, P.O. Box 021668, Juneau, AK 99802-1668.

The following comments address the proposed amendment to the Fishery Management Plan for the Salmon Fisheries in the EEZ off the Coast of Alaska. The comments are submitted by the North Pacific Fishing Vessel Owners' Association (NPFVOA, the Association), Seattle, Washington.

NPFVOA favors amending the FMP to immediately extend its jurisdiction over the EEZ west of 175 east longitude if the International North Pacific Fisheries Commission (INPFC) is dissolved¹. The NPFVOA, however, is opposed to the deferment of the regulation of salmon fisheries in the EEZ to the State of Alaska. While the NPFVOA recognizes the State of Alaska's expertise in managing the salmon fisheries within its territorial waters, the Association is concerned about the potential implications of a broad delegation of management responsibility in the EEZ to the State of Alaska. This concern arises for the following reasons:

****It is clear that Federal oversight will be minimal. The NPFVOA recently supported the FMP for the commercial king and tanner crab fisheries of the Bering Sea/Aleutian Islands region. Like the proposed amendment to the salmon FMP, the crab FMP delegated management authority to the State of Alaska. Unlike the present draft salmon amendment, however, the crab FMP did so only after carefully delineating those measures which are fixed in the FMP (requiring a plan amendment to change), those which are frameworked, and those which are neither fixed nor frameworked. Before the NPFVOA could support deferment of salmon management in the EEZ to the State of Alaska, it would require a clearer delineation of the Federal oversight role than is present in the proposed salmon FMP amendment. A salmon FMP structured along the lines of the recent BS/AI crab FMP may be appropriate;**

¹ Alternative 3, Discussion of the Need for and the Issues of the Revision (Third Amendment) of the Fishery Management Plan for the High-Seas Salmon Off the Coast of Alaska, page 19.

- **Over one-fourth of the fishermen participating in the power troll fishery are not residents of the State of Alaska. These fishermen may face allocative and other forms of regulatory discrimination outside of the intent of the Magnuson Fisheries Conservation and Management Act if subject to a FMP with little real Federal oversight. Delays and costs faced by these fishermen should it be necessary for them to appeal discriminatory regulations will be unnecessarily burdensome;**

- **Salmon management in the EEZ is an issue with increasing international implications. Should the INPFC dissolve, extensive changes in the dynamics of Japanese fisheries operations in the North Pacific are possible. Potential factors which might affect these dynamics are best controlled at the Federal level. Transfer of salmon management in the EEZ to the State of Alaska and the likely low level of Federal involvement in the fishery following this transfer, would, however, provide the State of Alaska with the *de facto* control of one very important factor (salmon management in the EEZ west of 175 east longitude). Such control should be avoided.**

As an alternative to the broad deferment of salmon management in the EEZ to the State of Alaska, the NPFVOA favors a combination of variations one (use of radio messages and news releases) and three (notify fishing industry agents) to the status quo system². Authorizing these two variations as means of notifying fishermen of regulatory changes would expedite the distribution of such information without delegating EEZ salmon management to Alaska.

² Ibid, pages 27-29.

Salmon Plan Comments
Also

May 31, 1989

Non-Kuskokwim Fisheries Task Force

Box 267

Bethel, AK 99559

Mr Steve Davis

North Pacific Fisheries Management Council

P.O. Box 103136; FAX (907)-271-2817

Anch AK 99510

Dear Steve,

Enclosed are the comments of the YKFTF on Amendment package 18/13 to the
GOA/BS/AI FMP, and the Revised FMP for High Seas Salmon Off the Coast
of Alaska. [Begins on p. 6]

5.0 Trawl Closure near Walrus Islands and Cape Pierce

The YKFTF supports Alternative 3 (5.2.4) as its preferred choice
for conservation of male walrus haul out areas.

Our group has within its membership coastal users of Pacific Walrus.
Communications with Bristol Bay residents and the Eskimo Walrus Commission
have been constant. All users agree that the number of migrating cows
with calves and pups on ice floes has remained steady. Concern has been
expressed by our older hunters with the increasing number of young bulls recently.
It was through EWC hearings and Task Force that these hunters then
learned of trawl activities in haul out areas. These hunters oppose
trawl activities. Where bulls are now being seen are marginal habitat.
Elders expect a crash in population soon, and are fearful that
primary habitat will be "used up" when bull walrus will most
need it during period of population stress. Walrus comprise a
significant portion of diet of eleven of our villages, and is of

the data base that is supported from foreign fleet activities. Though not expert, we do not believe that the time, area and harvest targets are identical. We would support modification of the variance once a minimal limit of 20% fleet coverage (DAP) occurs to test this hypothesis.

IV Revising High Seas Salmon Fishing

As a follow up to comments made to the NPFMC and the AIP prior to the submit of this proposal to public review, the YKFTF, the discussion in issue one (S.1.1) fails to recognize the changing circumstances of international fisheries. The historic concern that Japan, having left the IANPFC would move into the Gulf and fish salmon stocks of North American origin is once again repeated. This thesis precludes the UNCLOS III article 66, and passage of the US Magnuson Act. Title thirteen of the Act requires the appropriate Secretary to enforce the parent state claim to its salmon even beyond 200nm. The discussion fails to discuss the history of Oriental Oguno fleets already fishing the Gulf of Alaska with the IANPFC still in effect and the Duffnet Act of 1987, responses to these illegal fisheries. The YKFTF believes that the document as written does not clearly examine the state of high seas salmon jurisdiction, interception, enforcement, or alternatives

The Soviet Union in 3 short years has done more to terminate Japan's defense of its directed high seas salmon fisheries than 38 years of U.S. efforts through the INPFC, yet the opportunities available through the U.S.-USSR bi-lateral discussions for termination of all directed fishery, and a new super-INPFC to ban and enforce all illegal high seas salmon take are not given adequate treatment in the text.

Once Japan's directed fisheries fall, Japan's defense of its squid fleets as a high seas freedom will be subject to domestic attack from its own nationals in the mariculture, aquaculture, and salmon importing sectors for its illegal take of North American and USSR salmon at sea. These landings of salmon by squid fleets disrupt the Japanese markets, and give support for Korean + ROC transfer of intercepts Japanese aquaculture stock back to Japan and foreign markets.

The real question for the Council is whether it wishes to add to the chorus of U.S. industry supporting termination of the INPFC, supporting the new Pacific part of salmon natal states, and holding Japan responsible in trade relations for its continued support of the illegal take of salmon by its Nationals, and the squid fleets of the ROK and ROC.

To this end, the YKFTF proposes that Council extend its jurisdiction over salmon immediately to the entire U.S. EEZ, that it move to represent the interests of the U.S. Pacific salmon fisheries at all discussions with the USSR on the North Pacific Ocean and its marginal Bering Sea, and that the Council support certification and the embargo of fisheries product from Oriental fishing states that fail to comply with the Duffnutt Act of 1987 by July 2, 1989.

The suggestion of the YKFTF is that the salmon issue requires a second public review, one based on a more thorough document that updates both the information base, and proposed alternatives.

Thank you for considering our suggestions

in peace

Shirley Ann Director

STEVE COWPER, GOVERNOR

COMMERCIAL FISHERIES ENTRY COMMISSION

P.O. BOX KB
JUNEAU, ALASKA 99811-0302
PHONE: (907) 465-4081

September 1, 1989

Aven Anderson
Fisheries Biologist
National Marine Fisheries Service
P.O. Box 21668
Juneau, AK 99802

RE: COMMENTS ON HIGH SEAS SALMON FMP REGULATIONS

Dear Mr. Anderson:

Thank you for meeting with us last week and answering our questions on the High Seas Salmon Management Plan. We understand that the draft FMP was not intended to result in an increase of the number of troll operations in the EEZ. As we mentioned, we think that the current draft regulations would pose just such a threat, and could undermine the current limited entry program for the troll fishery. Our suggestions, outlined below, should reduce those risks.

Foremost of our concerns is the language in the regulations that pertains to eligibility for Federal troll permits, specifically Sec. (b)(1)(i) and (ii). As currently written, the regulations can potentially create a large class of applicants who will be eligible for the permits. It is our understanding that the special provisions for Federal troll permits were created to address a small group of trollers who were not allowed to apply for State limited entry permits because they had never held an Alaska troll gear license and had never fished in State territorial waters. At the time the High Seas Salmon FMP was originally drafted, it was believed that it would be fair to make special provisions for these fishermen. The trollers, although excluded from State waters, were allowed to continue to do what they had been doing for a number of years: that is, continue trolling only in the EEZ. However, it appears that the current draft of the regulations makes eligible many more people than intended.

The primary problems we see with the proposed regulations are as follows:

1. Section (b)(1)(i) would allow eligibility to anyone who, during the years 1975, 1976, or 1977, "assisted in commercial trolling..." As "assisted" is undefined in the regulations, it can be interpreted to mean almost anything that applies to a trolling operation, and it would seem to almost certainly include crewmen who trolled during those years. Section (b)(2)(iv) specifies that, to be eligible, the applicant must "... submit State fish tickets or other equivalent documents showing the actual landing of salmon you harvested in the management area with trolling gear during any one of the years: 1975, 1976, or 1977." As there is no definition of "harvested", this section, combined with (b)(1)(i), would appear to allow crewmen (who "harvested" salmon) to present fish tickets (whether or not their name was on the ticket as the person who had the permit and made the landing) and become eligible for a Federal troll permit.
2. The inclusion of the word "disposed" in Section (b)(1)(ii)(B) may create problems as well. During the three years of eligibility, there were a considerable number of power trollers and hand trollers who fished with State of Alaska interim-use permits in the EEZ. Many of those interim-use permit holders were eventually denied permanent permits as their individual cases were adjudicated over the years. It is arguable that interim-use permit holders who were later denied permanent permits never "disposed" of their permits (Sec. (b)(1)(ii)(B)) and therefore would also be eligible to apply for a Federal troll permit. We have no estimates of the number of crewmen and interim-use permit holders who fished in the EEZ during the years in question, but we understand that the effect of issuing them permits was not intended to be part of the management plan.

Your current regulations have been in place for a decade and have apparently been working well. We recommend that you disturb them as little as possible. The only real need to disturb the existing regulations, as we understand it, is to provide for hand trollers as well as power trollers. To that end, we recommend that Sections (b)(1)(i) and (ii) be amended to read as follows:

(1) Eligibility.

(i) Except as provided in paragraph (b)(1)(ii) of this section, any person is eligible for a permit described in paragraph (a)(1)(iii) of this section if that person, acting as captain of the vessel, during any one of the calendar years 1975, 1976, or 1977:

- (A) Operated a fishing vessel in the management area;
- (B) Engaged in commercial fishing for salmon in the management area;
- (C) Caught salmon in the management area using hand troll or power troll gear; and
- (D) Landed such salmon.

(ii) The following persons are not eligible:

- (A) Persons described in paragraphs (a)(1)(i) or (a)(1)(ii) of this section;
- (B) Persons who once held but transferred away a State of Alaska hand troll or power troll permanent entry or interim-use permit;
- (C) Persons already holding a permit under this paragraph (b); and
- (D) Persons whose only participation in commercial troll fishing for salmon in the management area during 1975, 1976, or 1977 was as a crewman or in any capacity other than captain of the vessel.

The other major problem we have with the regulations concerns the procedures for transferring permits. We have always been opposed to any procedure that would allow the authority to fish in the EEZ to be severed from the Alaska permit from which it springs. Over our objections, the original Federal regulations created a situation in which severance could occur. They did this by providing that the authority to fish in the EEZ could be severed from the State of Alaska permit and could be transferred to another person if the State of Alaska refused to allow a fisherman to transfer his State permit. Our objections were set forth in a letter dated August 14, 1979, the contents of which are incorporated herein and a copy of which is attached hereto.

Admittedly, the dangers and problems we forecast in 1979 have not come to pass. Nevertheless, they carry the same degree of potentiality today as they did then. Perhaps the fleet has not yet discovered this loophole that would allow two permits to be created out of one.

In any event, the recently proposed changes in the FMP are designed to give greater control over this fishery to the State of Alaska. The time is ripe for eliminating the transfer procedures that allow for severance. This could be accomplished by amending the regulations so that they make no mention whatsoever of any means by which Federal authority could be severed from a State permit and that they provide that the Federal authority that arises from a State permit remains with that permit at all times. In the spirit of partnership envisioned by the Fishery Conservation and Management Act of 1976 and for those reasons stated in the attached letter, Alaska's rulings on requested transfers should be the final word.

You could do away with the severance provisions by amending your regulations to read essentially as follows:

(c) Transfer of authority to fish for salmon in the management area.

(1) Holders of State of Alaska hand troll and power troll entry permits.

(i) The authority of any person described in paragraph (a)(1)(i) of this section to engage in commercial fishing for salmon using hand troll or power troll gear in the management area shall expire upon the permanent or emergency transfer of that person's State of Alaska hand troll or power troll permanent entry permit to another and shall be transferred to the new holder of that permit for as long as allowed by Alaska law.

(ii) The authority of any person described in paragraph (a)(1)(ii) of this section to engage in commercial fishing for salmon using hand troll or power troll gear in the management area shall expire upon the emergency transfer of that person's State of Alaska hand troll or power troll permit to another and shall be transferred to the new holder of that permit for as long as allowed by Alaska law.

(2) Holders of Federal Permits Issued by the Regional Director.

(i) A Federal permit issued by the Regional Director under paragraph (b)(2) of this section may only be transferred on an emergency basis for the remainder of the calendar year unless terminated earlier by the original holder or by the Regional Director.

(ii) A holder of a Federal permit issued by the Regional Director under paragraph (b)(2) of this section may apply for an emergency transfer by submitting an application with the Regional Director demonstrating that sickness, injury or other unavoidable hardship prevents the permit holder from participating in the fishery and that the proposed transferee in the fishery has the ability to participate actively in the fishery and has access to troll gear necessary for such participation.

If you decide to keep those procedures that allow for severance, however, we have some proposals for your consideration that should help protect the fishery. Currently, all an applicant has to do is to apply for a transfer through the State of Alaska, have it denied, and then prove only that:

1. He had the ability to participate actively in the fishery at the time he applied for the transfer.
2. He has access to troll gear necessary for participation in the fishery.
3. The State of Alaska has not instituted proceedings to revoke the permit on the ground that it was fraudulently obtained.
4. The proposed transfer is not a lease.

All of the foregoing are relatively easy to prove, and as a result, a severance of the State permit and authority to fish in the EEZ would be easy to obtain. Some very significant factors have been overlooked, and we feel that an applicant should also be required to prove to the Regional Director that:

1. The parties to the requested transfer completed all forms and supplied all requested information to the State of Alaska. As it now stands, an Alaska permit holder who wanted to sever the Federal authority in order to get two vessels fishing could simply ensure that the State would deny a requested transfer by refusing to complete all forms, by refusing to

supply a doctor's statement, etc. This loophole must be closed.

2. The requested transfer is not prohibited by law. Alaska statutes and regulations forbid the transfer of permits in some circumstances. They can't be transferred as part of a lease, retained right of repossession, or other encumbrance. They can't be transferred without court approval if the holder is facing charges of illegal fishing or theft of fishing gear. They can't be transferred until the transferee reaches the age of sixteen. The Federal authority should not be severed from the State permit in such situations.
3. The State of Alaska acted arbitrarily in denying the requested transfer. This is the most important provision that should be added. Since the Federal authority arises out of the Alaska permit, shouldn't it remain tied to that permit in all but the most egregious circumstances, such as an arbitrary denial of a transfer? After all, the Federal authority only comes into being when the State permit is issued, and it evaporates when the State permit is revoked. If the State can cause the Federal authority to totally disappear, what's the harm in merely restricting it a bit by making it subject to the same rulings as the State permit?
4. The applicant has exhausted all administrative remedies available to him through the State of Alaska. This, too, is a very important provision. Every party to a transfer has the right to request an administrative hearing before an Alaska Commercial Fisheries Entry Commission hearing officer to contest a denial. Such hearings are conducted and decided very expeditiously (it's not uncommon for them to be conducted and resolved the same day that the transfer was denied). By requiring an applicant to exhaust State remedies, the Regional Director would (a) avoid those cases decided favorably to the applicant by the hearing officer, (b) have a developed record at his disposal, and (c) have the benefit of a hearing officer's legal research and reasoning.
5. The holder of the State permit will not fish that permit for the rest of the year (emergency transfers only). If the holder of the State permit continues to fish, where's the emergency? A provision such as this is necessary to shut down those who may desire to exploit the severance procedures in order to get

two vessels fishing. As a corollary to this provision, we feel that you should also adopt a provision that causes the Federal authority to automatically expire and to revert to the State permit holder if he resumes fishing with troll gear in State or Federal waters after obtaining a severance through the Regional Director.

If you adopt our proposals, your regulations could be amended to read essentially as follows:

(c) Transfer of authority to fish for salmon in the management area.

(1) Holders of State of Alaska hand troll and power troll permanent entry permits.

(i) The authority of any person described in paragraph (a)(1)(i) of this section to engage in commercial fishing for salmon using hand troll or power troll gear in the management area shall expire upon the transfer of that person's State of Alaska hand troll or power troll permanent entry permit to another and shall be transferred to the new holder of that permit.

(ii) Any person to whom transfer of a State of Alaska hand troll or power troll permanent entry permit is denied by the State of Alaska may apply, with the written consent of the current holder of that permit, to the Regional Director for transfer to the applicant of the current holder's authority to engage in commercial fishing for salmon using troll gear in the management area. The Regional Director shall approve the transfer if it is determined that at the time the application for transfer of the permit was filed with the State of Alaska the applicant had the ability to participate actively in the fishery and had access to troll gear necessary for participation in the fishery; that the parties to the transfer completed all forms and supplied all requested information necessary for the State of Alaska to process the application; that the requested transfer is not prohibited by law; that the State of Alaska has not instituted proceedings to revoke the permit; that the proposed transfer of the permit is not a lease; that the State of Alaska acted arbitrarily in denying the requested transfer; that the applicant has exhausted all administrative remedies available to him through the State of Alaska to contest the denial of the transfer; that the applicant still has the ability to participate actively in the fishery and still has access to troll gear necessary for participation in the fishery; and that the applicant has furnished all required documentation

and information requested by the Regional Director. The application shall be filed with the Regional Director within thirty days of the denial by the State of Alaska of transfer of the permit. The application shall include all documents and other evidence submitted to the State of Alaska in support of the proposed transfer of the permit and a copy of the State of Alaska's decision denying the transfer of the permit. The Regional Director may request additional information from the applicant or from the State of Alaska to assist in the consideration of the application. Upon approval of the application by the Regional Director, the authority of the permit holder to engage in commercial fishing for salmon in the management area using power troll gear shall expire, and that authority shall be transferred to the applicant.

(2) Other permits. Except as provided in paragraph (c)(3) of this section, the authority of any person described in paragraph (a)(1)(ii), (a)(1)(iii), or (a)(3) of this section to fish for salmon in the management area may not be transferred to any other person. Except for emergency transfers, the authority to engage in commercial fishing for salmon which was transferred under paragraph (c)(1)(ii) of this section may not be transferred to any other person except the current holder of the State of Alaska hand troll or power troll permanent entry permit from which that authority was originally derived. That authority may be transferred to the current holder of that permit upon receipt of written notification of the transfer by the Regional Director, from which time the transferee under paragraph (c)(1)(ii) of this section shall no longer be authorized to engage in commercial fishing for salmon using troll gear in the management area.

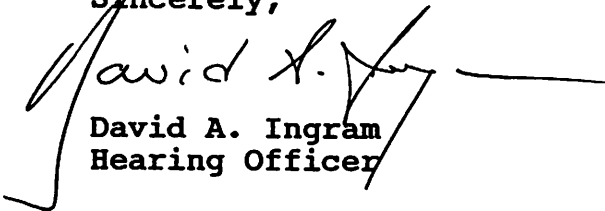
(3) Emergency transfers--authority to use troll gear. The authority of any person described in paragraph (a)(1) of this section to engage in commercial fishing for salmon using troll gear in the management area may be transferred to another for a period not lasting beyond the end of the calendar year of the transfer when sickness, injury, or other unavoidable hardship prevents the holder of that authority from engaging in such fishing. In the case of a State of Alaska permit, such a transfer shall take effect automatically upon approval by the State of Alaska of an emergency transfer of a State of Alaska hand troll or power troll entry permit, in accordance with the terms of the permit transfer. Any person to whom emergency transfer of a State of Alaska power troll or hand troll entry permit is denied by the State of Alaska may apply, with the written consent of

the current holder of that permit, to the Regional Director for transfer to the applicant of the current holder's authority to engage in commercial fishing for salmon using troll gear in the management area for a period not lasting beyond the calendar year of the proposed transfer. The Regional Director shall approve the transfer if he determines that sickness, injury, or other unavoidable hardship prevents the current permit holder from engaging in such fishing; that at the time the application for transfer of the permit was filed with the State of Alaska the applicant had the ability to participate actively in the fishery and had access to troll gear necessary for participation in the fishery; that the applicant completed all forms and supplied all requested information necessary for the State of Alaska to process the application; that the requested transfer is not prohibited by law; that the State of Alaska has not instituted proceedings to revoke the permit; that the proposed transfer of the permit is not a lease; that the State of Alaska acted arbitrarily in denying the requested transfer; that the applicant has exhausted all administrative remedies available to him through the State of Alaska to contest the denial of the transfer; that the holder of the State of Alaska permit will not fish with that permit for the duration of the transfer; that the applicant still has the ability to participate actively in the fishery and still has access to troll gear necessary for participation in the fishery; and that the applicant has furnished all required documentation and information requested by the Regional Director. The application shall be filed with the Regional Director within thirty days of the denial by the State of Alaska of emergency transfer of the permit. The application shall include all documents and other evidence submitted to the State of Alaska in support of the proposed emergency transfer of the permit and a copy of the State of Alaska's decision denying the emergency transfer of the permit. The Regional Director may request additional information from the applicant or from the State of Alaska to assist in the consideration of the application. Upon approval of the application by the Regional Director, the authority of the permit holder to engage in commercial fishing for salmon using power troll gear in the management area shall expire for the period of the emergency transfer and that authority shall be transferred to the applicant for that period. An approved transfer shall expire automatically and the authority to engage in commercial fishing for salmon in the management area using troll gear shall immediately revert to the holder of the State of Alaska permit if the holder resumes fishing with troll gear in State or Federal waters. In the case of an application for

transfer of a Federal permit previously issued by the Regional Director, the Regional Director shall approve the transfer if he determines that sickness, injury, or other unavoidable hardship prevents the current permit holder from engaging in such fishing and that the applicant has access to troll gear necessary for participation in the fishery.

Thank you for the opportunity to submit these comments. If you have any questions for us, please contact me or Kurt Iverson at 586-3456.

Sincerely,



David A. Ingram
Hearing Officer

DAI/slt

August 14, 1979

Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
Washington, D. C. 20235

RE: Interim Emergency Regulations, Fishery
Management Plan for High Seas Salmon
Fishery, Federal Register, May 18, 1979

Dear Sir:

Pursuant to the notice contained in the Federal Register of May 18, 1979, this Commission was prepared to submit comments on the interim emergency regulations by the July 18, 1979, deadline; however, in preparation for doing so, members of this Commission met with Mr. Mike Stanley of the NOAA legal staff on July 13, 1979, to gain a better understanding of the intent behind the regulations and preclude unnecessary comment, if possible. At that meeting Mr. Stanley advised us that the comment period had been extended until August 22, 1979. Relying on that advice, we have not forwarded these comments to you earlier.

We have reviewed the interim emergency regulations regarding the Fishery Management Plan for the High Seas Salmon Fishery off the Coast of Alaska East of 175° East Longitude and offer the following comments, emphasizing in particular sections 674.4(c) and (d), which concern permanent and emergency transfer of permits and which we perceive to present a clear and present danger to the management of these fishery stocks.

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SECTION 674.4(c) AND ITS IMMEDIATE DANGER TO THE FISHERY:

Section 674.4(c) does the following:

- (1) governs all transfers of authorization to power troll in Fishery Conservation Zone (FCZ) waters other than emergency transfers;
- (2) transfers authorization to power troll in FCZ waters automatically to the transferee who receives an Alaska permanent entry permit that existed on May 15, 1979;
- (3) allows a person to whom transfer of an Alaska permanent entry permit is denied to acquire authorization to power troll in FCZ waters from the Regional Director upon: (a) a timely request for transfer and (b) a showing of "ability to participate actively in the fishery at the time the transfer application was filed with the State".

It is the last provision listed above that presents a clear and present danger to the management of the fishery stocks because it provides for the severance of "authority" to power troll in FCZ waters from the Alaska permanent entry permit from which such "authority" springs. Severance under any circumstances is detrimental, as will be discussed later herein; however, severance under these interim emergency regulations has created a situation in which anyone can acquire authorization to power troll in FCZ waters and destroys the limited access scheme for the FCZ set forth in the Fishery Management Plan (FMP).

The problem arises because the interim emergency regulations define "person" at Section 674.2 as including corporations, partnerships, associations, and other entities in addition to natural persons, whereas under applicable Alaska law, Alaska Statutes 16.43.380(5), "person" is defined as a natural person only and does not include any other entities. Thus, corporations, partnerships, associations, etc., can hold authority to power troll in FCZ waters even though they cannot hold an Alaska permit. Consequently, it appears that any person who wants authorization to power troll in FCZ waters need only attempt to have an Alaska entry permit transferred in the name of his partnership, association, etc., which would be automatically denied as contrary to law, and then timely apply for transfer of authorization to the Regional Director under Section 674.4(c)(1)(ii), who "shall approve" the transfer if the requisite ability to participate is found.

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The ease and speed with which a partnership, association, etc., can spring into being are obvious, as is the ease with which such entities' "ability to participate actively in the fishery" can be demonstrated. These factors, coupled with growing problems encountered by West Coast fishermen, especially in light of the U.S. Supreme Court's recent decision upholding Indian treaty rights regarding fishing stocks, lend credence to the findings in support of the emergency nature of these regulations: "It is necessary to take immediate action to prevent an increase in fishing effort on these salmon stocks, some of which are at low levels of abundance. Of particular concern is the potential for increased fishing effort on these stocks that could occur if vessels affected by the severe restrictions in the salmon fishery off the coasts of Washington, Oregon and California shifted their effort to the FCZ off Southeast Alaska" (see the "Harvest Restrictions" section of the regulations).

We find nothing in the interim emergency regulations which would prohibit someone from forming a partnership, association, etc., and undertaking the process described above in obtaining authorization to power troll in FCZ waters. On the contrary, it appears as though any "person" who is denied a transfer by this Commission is entitled to seek and get a transfer through the Regional Director.

ADDITIONAL ARGUMENTS AGAINST SEVERANCE:

In addition to the dangers posed by transfer of authorization to power troll in FCZ waters to entities other than natural persons, other persuasive arguments support a policy of non-severance and termination of Section 674.4(c)(1)(ii). They are:

- (1) severance is contrary to the findings relating to the limited access scheme set forth in the FMP (see Paragraphs 8.3.1.3(1), (3) and (4) of the FMP where it states that a limited access system for the FCZ is "necessary to maintain present levels of effort and catch"; that a plan "without a limited access system will in all probability result in increased effort by fishermen excluded from the Alaska limited entry program and adversely affected by recent court decisions relating to other fisheries"; and that lack of a limited access system for the FCZ would be "too disruptive of present social and economic structure");
- (2) severance is contrary to stated goals of the FMP (see the general comment on Paragraph 8.3.1.3 of the FMP where it states that limited access in the FCZ is important for "stabilizing effort in that fishery"; see the comments under the Limited Entry Moratorium

section in the interim emergency regulations where it states that limited access in the FCZ "is intended to incorporate gradually all fishing permits into a unified system, while recognizing established fishing presence in the management area" and that the "maximum number would be exceeded only to the extent necessary to ensure that no eligible person who has been dependent on this fishery would be precluded from harvesting salmon");

- (3) severance would lead to extremely difficult and costly enforcement measures due to woefully inadequate enforcement capabilities that presently exist (see Paragraph 8.3.1.3(4) of the FMP where it states that the lack of a limited access system for the FCZ would be "too costly to administer and enforce");
- (4) severance would lead to administrative difficulties with increased potential for administrative error on the part of this Commission and the Regional Director because very close monitoring of the status of severed authorization would be necessary, calling for timely notification to one another of actions regarding severed authorizations, separate listings of severed and non-severed authorizations, notification of authorization status to prospective transferees, etc., all of which could lead to administrative error, erroneously issued authorizations, and further increase in effort on these fishery stocks;
- (5) severance would cause difficulties for those fishermen involved in transfers of Alaska entry permits from which FCZ authorization has been severed because sales contracts are normally executed and completed without this Commission's involvement or knowledge and the transferor may well, innocently or by design, represent to the transferee that the permit he is buying carries FCZ authorization with it, resulting in lawsuits, charges of criminal fraud, etc.;
- (6) severance ignores the special federal-state relationship and cooperation (the "partnership") envisioned by Congress in enacting the Fisheries Conservation and Management Act of 1976 and the North Pacific Fishery Management Council in developing the FMP; constitutes a diminishment of the jurisdiction and authority of the State of Alaska within its boundaries; and is contrary to Section 306 of the Fishery Conservation and Management Act of 1976.

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Although all of the arguments against severance set forth above are valid and, we submit, persuasive, the arguments contained in item (6) are of paramount concern to the State of Alaska and this Commission.

Both the Congress of the United States and the North Pacific Fishery Management Council envisioned a "partnership" relationship between the federal government and the State of Alaska regarding the management of this fishery (see "A Legislative History of the Fishery Conservation and Management Act of 1976" at page 671 and the FMP at Appendix 8.3.1.3). A partnership generally involves, at the least, honoring one another's actions when done in the name of the partnership and reaching agreement in advance on any major decisions affecting the partnership. In this regard, it has been agreed that each "partner," the State of Alaska and the United States, may issue fishing permits for their respective areas of authority even though the fishery is viewed as a unit, with 950 being the target maximum number of permits for the entire fishery. Section 674.4(c)(1)(ii), however, gives rise to autonomous federal action following review of a state decision. In essence, then, the "partnership" has been transformed into a "corporation" with the federal government holding 51% of the voting stock.

The characterization of the relationship, however, is not nearly as important as the effect that Section 674.4(c)(1)(ii), has on state jurisdiction and authority. Because of the creation of severed authorization to fish, the State of Alaska's jurisdiction and authority within its boundaries are diminished, contrary to Section 306 of the Fishery Conservation and Management Act of 1976, which reads as follows:

Sec. 306. State jurisdiction

(a) In General. - Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception. - (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that:

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and

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(B) any State has taken any action, or omitted to take action, the results of which will substantially and adversely affect the carrying out of such fishery management plan,

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

DIMINISHMENT OF ALASKA'S JURISDICTION AND AUTHORITY WITHIN ITS BOUNDARIES:

In analyzing how Section 674.4(c) (1) (ii) causes a diminishment of Alaska's jurisdiction and authority within its boundaries, it must be remembered that this fishery is predominantly conducted within Alaska waters and is primarily an Alaska, not FCZ, fishery. Common practice by the power troll fleet is to fish predominantly within Alaska waters, making only occasional sweeps into FCZ waters, and catch data indicates that fewer than 15% of the fleet fished in FCZ waters in 1978. Recognizing that the Alaska limited entry system and the 950 maximum number for this fishery grew out of Alaska's management of this fishery as a unit (considering fishing activity in both Alaska and what are now FCZ waters), the North Pacific Fishery Management Council in the FMP adopted the Alaska limited entry program and the 950 maximum number for this fishery. The creation of federal permits for the FCZ based upon past exclusive participation in FCZ waters is intended to add perhaps only six more units of gear to the fishery (see Paragraph 8.3.1.3 and Appendix 8.3.1.3 of the FMP).

Also, particular attention must be paid to the following language in the FMP:

"Any person who currently holds a valid State of Alaska Commercial Fisheries Entry Commission (CFEC) Power Troll Permit may fish in the FCZ off Alaska. This permit retains its original status relating to all of the restrictions and conditions placed on the permit and the bearer by the CFEC" (emphasis supplied, see paragraph 8.3.1.3 of the FMP).

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At first blush, it may appear that severance causes no diminishment of Alaska's jurisdiction or authority because it is still the sole authority in regard to permits issued and transfers made for power trolling within Alaska waters; however, upon closer inspection, it is apparent that the diminishment of jurisdiction and authority is both real and substantial. It is composed of the following elements:

- (1) The fiction that an Alaska permit carries with it a separate and severable right to power troll in the FCZ

As in the case of the newly-created federal permits issued by the Regional Director, Alaska permanent entry permits and interim-use permits grant the permit holder a use privilege. These permits do not give rise to property rights, and the use privilege may be modified or revoked by the state without compensation (see AS 16.43.150(e)). These permits were created by the State of Alaska for the use of permit holders in Alaska waters only since that is the extent of Alaska's jurisdiction and authority.

Because the Fishery Management Plan allows the holders of Alaska permits to fish in the FCZ, the interim emergency regulations have been drafted to allow such fishing; however, through a semantic twist, the allowance of fishing has become an "authorization" to fish which in turn has given rise to a separate and severable "authority" to fish that did not exist previously and cannot be carved out of a state use privilege. Further, not only does Section 674.4(c)(1)(ii) provide that the newly-created "authority" can be severed from the parent permit, when read in conjunction with Sections 674.4(c)(1)(ii)(C) and (D) it is apparent that it also creates an entirely new entity which need not be rejoined with its parent and which cannot be revoked or modified by the State of Alaska.

In other words, Section 674.4(c)(1)(ii) makes a use privilege created by and totally within the jurisdiction and authority of the State of Alaska essentially "give birth" to a separate entity beyond the State's jurisdiction and authority. This act of creating a separate federal right out of what Alaska created as a single use privilege is a diminishment of Alaska's jurisdiction and authority over its issued permits, which constitutes diminishment of Alaska's jurisdiction and authority within its boundaries. The diminishment of jurisdiction and authority is highlighted by the fact that it only occurs when Alaska attempts to exercise its jurisdiction and authority over its permits by denying requested transfers. Not only does Section 674.4(c)(1)(ii) effect a contrary result (by allowing a transfer), but it effects an even worse result (by putting another unit of gear in the fishery). This tends to create a chilling effect on Alaska's exercise of jurisdiction and authority (perhaps leading to approval of transfers that should be denied in order to avoid the entry of another unit of gear in the fishery).

Also, it is clear that the FMP does not envision either the creation of a federal "authority" out of a parent Alaska permit or the severance of any rights held by an Alaska permit holder. The FMP states that an Alaska permit holder "may" fish in the FCZ and that an Alaska permit used in this fishery "retains its original status relating to all of the restrictions and conditions placed on the permit and the bearer by the CFEC." Nowhere does the FMP speak of severing Alaska Permits. Consequently, not only does severance depend upon the fiction that a federal right springs from a state use privilege, but it is also contrary to the clear language and intent of the FMP.

(2) Loss of control over this fishery by the State of Alaska

"Control" is the very essence of jurisdiction and authority. Likewise, "control" is the very essence of any limited access system. Due to Section 674.4(c) (1) (ii) and the severability of authorization to fish, the State of Alaska's ability to control this fishery within its own boundaries is diminished. This is illustrated by: (1) the abandonment of the concept of this fishery as a unit; (2) the abandonment of the commitment to a maximum number of 950 permits; and (3) the abandonment of the commitment to economic effectiveness of permits.

Severance abandons the concept of this fishery as a unit as it was conceived and developed by the State of Alaska and adopted in the FMP. Whereas it was anticipated that federally-issued permits would be few, less than 1% of the total in the fishery, which would have a negligible effect on the concept of the unit, severance bifurcates the fishery, changing it into two separate and distinguishable entities. Consequently, Alaska's control over the fishery is diminished by half. Instead of controlling more than 99% of the permits, for this fishery, Alaska now controls less than 50%, and even though Alaska controls 100% of the permits for fishing in Alaska waters, they are only one-half as important to the fishery.

The commitment to a maximum number of 950 permits for this fishery is also abandoned when severance of fishing authorization exists. Alaska has had the ability to control the number of permits issued for this fishery, and except for the half-dozen or so federal permits anticipated, it is clear that the FMP envisioned that Alaska would retain prime control over the maximum number of 950. Severance, however, pays no heed to this maximum number and carries with it the potential for doubling the participating units of gear. Alaska's loss of control over this maximum number of 950 is clearly seen when in denying a requested transfer, an act clearly within its jurisdiction and authority, a new, separate unit of gear may be added to the fleet by the Regional Director.

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Severance also causes the diminishment of Alaska's jurisdiction and authority within its boundaries by causing Alaska to lose control over the economic effectiveness of its permits. The Alaska limited entry system was conceived to protect the economic return of permit holders as well as to protect the fishery stocks. The FMP recognizes and adopts this legitimate goal for its limited access system for this fishery (see Appendix 8.3.1.3 of the FMP), and even the interim emergency regulations state that the maximum number of 950 permits "would be exceeded only to the extent necessary to ensure that no eligible person who has been dependent on this fishery would be precluded from harvesting salmon" (see the Limited Entry Moratorium section of the regulations). Severance, however, abandons the commitment to economic effectiveness and puts additional units of gear in the FCZ waters (operated by new, i.e., previously non-dependent fishermen), where they can intercept the salmon before they reach Alaska and other west coast waters, causing Alaska permit holders who are unable to go into FCZ waters (the holders of severed permits) to be unable to compete effectively and to suffer economic loss. Consequently, it is apparent that severance also causes Alaska to lose control over the economic effectiveness of its permits.

ABSENCE OF ALASKA REGULATION OF FCZ FISHING ACTIVITY:

In our meeting with Mr. Stanley, he advised us that the decision to include Section 674.4(c)(1)(ii) in the interim emergency regulations was made because it was determined that Section 306 of the Fishery Conservation and Management Act of 1976 required Federal overview of Alaska's denials of transfer in order to avoid the prohibition that "No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." It is the position of this Commission that: (1) Alaska is not directly or indirectly regulating fishing outside its boundaries; and (2) if Alaska's actions can be construed as directly or indirectly regulating fishing outside its boundaries, such regulation is not prohibited by Section 306 because it involves only vessels that are registered under the laws of Alaska.

In denying a requested transfer, Alaska clearly is not directly or indirectly regulating fishing in this fishery outside its boundaries. Since Alaska's jurisdiction and authority extends only to its waters, the use privilege that Alaska grants to its permit holders extends only to use within Alaska waters. As has been set forth earlier herein, the fact that the FMP allows Alaska permit holders to power troll in the FCZ does not give rise to a

separate and severable "right" to fish in the FCZ, as that "right" is a fictitious creation of the interim emergency regulations that has no basis in law and is contrary to the expressed intent of the FMP. Consequently, when Alaska exercises its jurisdiction and authority over permits it has issued by denying a transfer, its actions go only to regulating fishing within its boundaries, and any interpretation of Alaska's actions as in any way regulating fishing outside its boundaries hinges on the fiction that a state use privilege carries with it a separate and severable federal "right."

But even if Alaska's actions in denying a requested transfer of a state permit can legitimately be construed as regulation of fishing beyond state boundaries, such regulation is not proscribed by Section 306 because any vessel used by an Alaska permit holder in the Alaska power troll fishery is registered under the laws of the State of Alaska. In fact, it is unlawful to employ a fishing vessel in Alaska waters unless it is registered under the laws of this state (see AS 16.05.475). Since Alaska's act of denying a requested transfer retains a power troll permit for use by an Alaska-registered vessel and refuses transfer of the permit from such vessel, Alaska's act is properly viewed as regulation of the Alaska-registered vessel, not the vessel of the proposed transferee (but which may be an Alaska-registered vessel also).

PRACTICAL PROBLEMS SURROUNDING SEVERANCE:

While the comments set forth previously herein have dealt primarily with arguments against severance, the following comments explain the transfer procedures of this Commission and point out various practical and procedural problems that can be anticipated should Section 674.4(c)(1)(ii) not be terminated.

As a practical matter, few permanent transfers are denied by this Commission when transfer is requested from one natural person to another. As noted previously, however, all requested transfers to entities other than natural persons are denied, and, although no such cases have thus far occurred, all requested transfers to a person whose right to hold a permit has been suspended by the courts would also be denied. In ruling on a requested transfer of a permanent entry permit, this Commission examines the following:

- (1) procedural matters, including whether or not a Notice of Intent to Transfer Entry Permit has been on file for the required 60 days and whether or not all forms are fully and correctly completed;
- (2) eligibility of proposed transferee, including whether or not the proposed transferee is a natural person and whether or not he already holds an entry permit for the fishery;

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- (3) ability of proposed transferee to actively participate in the fishery, including the age of the proposed transferee;
- (4) access of the proposed transferee to appropriate gear for the fishery;
- (5) fraud involved in the issuance of the entry permit to the transferor;
- (6) fraud in the proposed transfer.

The last two items listed above are especially significant since Alaska law does not allow this Commission to revoke entry permits issued in circumstances involving fraud once they are transferred to a bona fide purchaser and does not allow entry permits to be leased. Consequently, requests for transfer involving suspected fraud or leasing are given a hard look before the transfer is allowed. In the majority of cases, however, where no suspicions arise, the transfer is completed without difficulty. Very few requests have been denied on the grounds that the proposed transferee has not demonstrated ability to actively participate in the fishery, and those cases involved proposed transfers to children or to adults who admitted lack of ability.

In regard to emergency transfers, however, this Commission frequently denies requests. In ruling on a requested emergency transfer of a permanent entry or interim-use permit, the following factors are examined:

- (1) procedural matters, including whether or not the Request for Emergency Transfer of Permit form is fully and correctly completed and whether or not the transferor's permit card and supporting documentation are enclosed;
- (2) eligibility of proposed transferee, including whether or not the proposed transferee is a natural person and whether or not he already holds an entry permit for the fishery;
- (3) basis of request, which must be one of the following categories:
 - (a) illness
 - (b) disability
 - (c) death
 - (d) required military or government service
 - (e) recognized unavoidable hardship;

- (4) ability of proposed transferee to actively participate in the fishery, including the age of the proposed transferee;
- (5) fraud in the proposed transfer.

As in the case of requests for permanent transfer, very few requests for emergency transfer have been denied by this Commission on the grounds that the proposed transferee has not demonstrated ability to actively participate in the fishery. These denials also involved children or admitted inability. Very frequently, however, in perhaps as many as 50% of the requests for emergency transfer, the requests are denied on the grounds that the reason advanced by the permit holder in support of the transfer is not recognized as constituting "unavoidable hardship." In enacting AS 16.43.180, the Alaska Legislature intended that only "hardship" that was truly "unavoidable" be recognized as grounds for an emergency transfer, in part to prevent leasing of permits as proscribed by AS 16.43.150 (g)(1). Many of the requests for emergency transfer are denied on the grounds that the hardship alleged is not "unavoidable" in nature because they are simply economic decisions to pursue occupations other than fishing.

As written, Section 674.4(c)(1)(ii) requires that the Regional Director "shall approve" a severance of authorization to fish in FCZ waters only upon: (a) timely application for same by the proposed transferee; and (b) demonstration of the proposed transferee's ability to participate actively in the fishery at the time the transfer request was filed with the State of Alaska. Other than those problems with severance delineated earlier herein, Section 674.4(c)(1)(ii) as written can be expected to lead to various practical and procedural difficulties requiring resolution, such as:

- (a) Must, or should, the proposed transferor be put on notice that the proposed transferee is attempting a severance through the Regional Director?
- (b) Must, or should, the proposed transferor be made a party to the transfer proceedings brought by the proposed transferee through the Regional Director?
- (c) Must, or should, the proposed transferor be given the opportunity to oppose any transfer to the proposed transferee by the Regional Director?

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- (d) Must, or should, the proposed transferor be required to specifically consent to any transfer to the proposed transferee by the Regional Director?
- (e) Does the proposed transferor have the right to block the transfer to the proposed transferee by the Regional Director, and if so, how may this be done (through the Regional Director, through this Commission, or by other means)?
- (f) What happens if the proposed transferor withdraws his request for transfer made to this Commission prior to the time that the Regional Director approves a transfer to the proposed transferee?

Regarding the questions raised above, it must be remembered that severance would cheapen the value of the transferor's permit (as well as all other permits in this fishery) and that the transferor can be expected to oppose any severance unless he is a party to an attempted fraud or it is otherwise in his interest to have his permit severed. As written, Section 674.4(c)(1)(ii) allows the transferee to obtain a transfer through the Regional Director without the knowledge or participation of the Alaska permit holder. These questions, it is submitted, must be resolved, as must the following:

- (g) Will a proposed transferee who has been denied by this Commission on grounds other than ability to actively participate be able to get a transfer through the Regional Director simply by demonstrating such "ability to participate actively?"
- (h) What consideration, if any, will be given by the Regional Director of the evidence developed by this Commission which mitigates against approval of the requested transfer and which was relied upon by this Commission in denying the transfer?
- (i) What consideration, if any, will be given by the Regional Director to the question of whether or not this Commission acted arbitrarily or capriciously in denying the requested transfer?
- (j) What consideration, if any, will be given by the Regional Director to the question of whether or not the proposed transferee has exhausted his administrative remedies available to him under Alaska law prior to applying for transfer through the Regional Director?

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- (k) Must, or should, the State of Alaska be put on notice, given an opportunity to oppose, or be made a party to the transfer proceedings initiated before the Regional Director by a proposed transferee denied transfer by this Commission?

Regarding the last questions set forth above, it is noted that neither Section 674.4(c)(1)(ii) nor any other section of the interim emergency regulations answers these questions and that, as written, the regulations allow the proposed transferee to obtain a transfer through the Regional Director without the knowledge or participation of the State of Alaska or the proposed transferor and in total disregard of the reason this Commission denied the transfer, the evidence relied upon by this Commission, the question of whether or not this Commission acted arbitrarily or capriciously, and the question of whether or not the proposed transferee has exhausted state remedies.

While it cannot be expected to present much of a practical problem, it is noted that Section 674.4(c)(1)(ii) as written could lead to unwarranted transfers in that it only requires a demonstration by the proposed transferee that he had "the ability to participate actively in the fishery at the time the transfer application was filed with the State (emphasis supplied)". Consequently, a person who had such ability at the time a transfer request was filed with this Commission, may not have same when he applies for transfer through the Regional Director, and yet, Section 674.4(c)(1)(ii) seems to require that the Regional Director must still approve the transfer.

SECTION 674.4(d) AND SEVERANCE IN EMERGENCY TRANSFER SITUATIONS:

Turning briefly to comments regarding Section 674.4(d), please note that the comments herein regarding severance following denial by this Commission of requests for emergency transfers are included because Mr. Stanley advised us during our meeting that it is the intent behind Section 674.4(c)(1)(ii) that the Regional Director may approve both permanent and emergency transfers following state denial. He further advised us that the intent of the interim emergency regulations was to require all Alaska permit holders to seek such emergency transfer through this Commission prior to attempting to obtain such approval through the Regional Director. On this last point, we note that the interim emergency regulations are silent as to any requirement that an emergency transfer be first attempted through this Commission and that the provisions of Section 674.4(d) seem to provide precisely the contrary, that a fisherman holding any kind of permit for this fishery may go directly to the Regional Director to obtain an emergency transfer. Whichever is the case, whether the fisherman must go through this Commission first or whether he may go directly to the Regional Director, severance by emergency transfer is detrimental to this fishery, and the arguments presented earlier herein against a policy of severance apply to emergency transfers as well.

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CONCLUSION OF COMMENTS REGARDING SEVERANCE:

Concluding our comments on the transfer sections of the interim emergency regulations, we submit that Section 674.4(c)(1)(ii) is ill-conceived, is a clear and present danger to this fishery, and is a diminishment of the State of Alaska's jurisdiction and authority within its boundaries. We request that it be promptly terminated and that no transfer regulations be promulgated which would affect a severance of fishing authorization.

COMMENTS ON OTHER SECTIONS IN THE INTERIM EMERGENCY REGULATIONS:

We would also like to comment upon the following sections in the interim emergency regulations:

(1) Section 674.2

The definition of "person" as including entities other than natural persons is not only inconsistent with Alaska law, which will no doubt lead to confusion on the part of the public and consequent difficulties for the administering agencies, but is at the very heart of the problem with the greatest potential for increased fishing effort in this fishery as explained earlier herein. We request that "person" be redefined as natural persons only.

(2) Sections 674.4(a)(1)(i) and (ii)

These provisions designate those persons who "held" valid State of Alaska power troll permanent entry and interim-use permits on May 15, 1979 as the "only" persons who are authorized to power troll in FCZ waters except those persons who are issued permits by the Regional Director under Section 674.4(b). There are two problems with the wording of these provisions:

- (1) some individuals will obtain and have obtained one of these Alaska permits after May 15, 1979;
- (2) some persons who held one of these Alaska permits on May 15, 1979 have transferred their permit away, others will do so, and others may have their permits revoked.

Consequently, under a strict interpretation of the regulations as written, some fishermen who do or will deserve to fish in FCZ waters will not be able to do so and others who will not deserve to fish will be

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entitled to do so. We request that these provisions be rewritten to allow those persons to power troll in FCZ waters who "hold" either a valid Alaska permanent entry permit or interim-use permit.

Mr. Stanley expressed to us in our meeting that these sections were drafted with the understanding that the number of permits issued by this Commission was stabilized and that no new permits were to be issued past May 15, 1979. This is incorrect since various persons whose applications are still in the administrative process or in the courts on appeal may still acquire a permit, and others may be revoked by this Commission or by the courts. No firm date can be ascertained for final stabilization of Alaska permits for this fishery.

(3) Section 674.4(b) (1) (ii) (B)

This provision declares that among those persons ineligible to power troll in FCZ waters are "persons who have ever held a State of Alaska power troll permit under this paragraph (b) as a result of having fished under such State permit." We did not understand the intent behind this provision but guessed that it was aimed at excluding from the FCZ those persons who no longer hold an Alaska permit they once held. Mr. Stanley confirmed that this, in fact, is the intent. Since the language used is vague and uncertain, we request that it be changed to read: "persons who once held but no longer hold a State of Alaska power troll permanent entry permit."

(4) Sections 674.4(c) (2) and 674.4(d) (1)

The current placement of these two provisions in the regulations, we believe, gives rise to confusion. Section 674.4(c) (2) provides that authorization to power troll in FCZ waters arising from (a) holding a valid Alaska interim-use permit on May 15, 1979, and (b) holding a valid permit issued by the Regional Director may not be transferred, leading the reader of the interim emergency regulations to believe that only that authorization that arises from holding a valid Alaska permanent entry permit on May 15, 1979 may be transferred. However, the very next provision in the regulations, Section 674.4(d) (1), states that authorization arising

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under paragraph (a), which includes three types of authorization (that arising from holding an Alaska permanent entry permit, an Alaska interim-use permit, and a permit issued by the Regional Director) may be the subject of an emergency transfer on a temporary basis. In other words, the first section says that authorization arising from holding an Alaska interim-use permit cannot be transferred, and the second says that it can be transferred temporarily on an emergency basis.

We recognize that the provisions under Section 674.4(c) govern all transfers other than emergency transfers and that, therefore, Section 674.4(c)(2) speaks only to the fact that Alaska interim-use permits may not be permanently transferred; however, the placement of that provision immediately preceding Section 674.4(d)(1) may well cause difficulties and misunderstanding on the part of a fisherman reader, and we suggest that it be placed elsewhere to avoid confusion.

Also, while discussing Alaska's emergency transfers with Mr. Stanley, we advised him of another aspect of Alaska's procedures that should perhaps be covered in your regulations: the fact that Alaska allows a transferee fisherman to fish under the authority of a carbon copy of an emergency transfer request form once that form is mailed to this Commission and until such time as the transfer is either approved (and his own emergency card is prepared and furnished him) or denied (and he is advised to stop fishing). The policy behind allowing him to fish under the carbon copy is simply to accommodate the needs of the fishermen since short openings, vast distances, and slow mail service all work against the fishermen. If we demanded that the request forms actually be received and acted upon and the emergency card actually be in the hands of the transferee before he began fishing, some seasons would be effectively completed by the time the transferee was allowed to fish. We request that the interim emergency regulations be drafted to allow proposed transferees who are fishing under authority of the carbon copy of the emergency transfer request form to power troll in the FCZ as well as Alaska waters.

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(5) Section 674.4(d)(4)

This provision states that the normal emergency transfer provisions of 674.4(d)(2) and (3) do not apply to Alaska power troll permits if Alaska has authorized an emergency transfer and the Regional Director is so notified in writing. We read this as meaning that the transferee fisherman has the burden of notifying the Regional Director in writing of an emergency transfer approved by the State of Alaska. In order to ensure the validity of such transfer, we request that this provision be expanded to include the necessity for confirmation of the approved transfer by this Commission prior to the time the fisherman is authorized to forego the normal procedures. An alternative approach would be to require the transferee fisherman to furnish to the Regional Director a photocopy of his newly-acquired permit card issued by this Commission or other documentation (letter, etc.) originating from this Commission that evidences a valid emergency transfer.

CONCLUSION:

Generally, all of the problems raised herein can be resolved by terminating Section 674.4(c)(1)(ii) and simply providing in the regulations that except for those persons holding federal permits for the FCZ the only persons who may power troll in FCZ waters are "those persons who are authorized by the State of Alaska to power troll in Alaska waters."

This Commission has been encouraged by our dealings with representatives of the North Pacific Fishery Management Council and NOAA, and we look forward to working with them and you in the future regarding the management of this fishery. Hopefully, our comments made herein have given you an understanding of our view of the problems that arise because of severance. We believe that this fishery must be managed as a unit as much as possible and that severance is detrimental to that goal. In light of the vast distance over which the power troll fleet operates, the limited enforcement capabilities that exist to monitor the fleet, the recent restrictions on West Coast fishermen, the high prices being paid for salmon and Alaska entry permits, and the new technology now entering this already sophisticated fleet, management of this fishery requires tight regulations and procedures that do not invite fraud and that close all potential avenues for frustrating management goals. Judicial attacks on these regulations may reasonably be anticipated since this Commission is currently the defendant in approximately 160 appeals in the Alaska courts brought by fishermen seeking entry permits for our various fisheries.

**Assistant Administrator
for Fisheries**

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During our discussions with representatives of the North Pacific Fishery Management Council and NOAA, we have considered the possibility of executing a memorandum of agreement under which this Commission would undertake the federal-state management of this fishery so far as delegation is permitted. We look forward to working on this matter and feel confident that such an agreement would best satisfy the needs of this fishery.

**By Direction of the
COMMERCIAL FISHERIES ENTRY COMMISSION**

**David A. Ingram
Commissioner**

DAI:nlg

cc: North Pacific Fishery Management Council

**Mr. Mike Stanley
National Marine Fisheries Service**