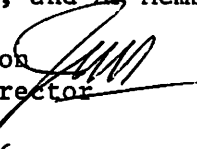


MEMORANDUM

TO: Council, SSC, and AP Members

FROM: Jim H. Branson 
Executive Director

DATE: June 17, 1986

SUBJECT: Tanner Crab Fishery Management Plan

ACTION REQUIRED

Review status of suspension of federal regulations and alternatives for future Council/Federal management. Provide guidance to the plan team if necessary.

BACKGROUND

In March the Council voted to suspend Tanner crab regulations until further notice following a review of continuing problems with federal Tanner crab management. The decision was in response to concerns that the Tanner crab FMP no longer provides the operational authority to effectively manage the fishery. NMFS should be able to give a status report on the regulations.

A plan team discussion paper exploring alternatives for future Council/federal management was sent to you on June 13.

The alternatives discussed were:

A. Alternative 1. No FMP

- Option 1. Withdraw and terminate the FMP.
- Option 2. A joint statement of principles without an FMP.

B. Alternative 2. An FMP that delegates management responsibility to the state.

C. Alternative 3. Amend the FMP

- Option 1. Complete revision of the FMP.
- Option 2. Selective revision to remove procedural problems.

The team had also prepared a draft joint statement of principles and it is included with your material as item D-2(a). The Council may wish to present the joint statement to the Alaska Board of Fisheries as either a temporary or long-term management agreement. Following the review of the discussion paper and its alternatives, the Council should either: (1) send the document out for public comment, or (2) select a preferred alternative and provide guidance to the plan team as to plan amendments and scheduling.

DRAFT
JOINT STATEMENT OF PRINCIPLES
BETWEEN
NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC)
ANCHORAGE, ALASKA
AND
ALASKA BOARD OF FISHERIES (BOF)
JUNEAU, ALASKA
ON
MANAGEMENT OF DOMESTIC TANNER CRAB FISHERIES
OFF ALASKA

Recognizing that NPFMC has a legal responsibility for reviewing and recommending to the Secretary of Commerce measures for the conservation and management of the fisheries of the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska, with particular emphasis on the consistency of those measures with the National Standards of the Magnuson Fishery Conservation and Management Act (Magnuson Act); and

Recognizing that State and Federal governmental agencies are limited in fiscal resources, and that the optimal use of these monies for North Pacific fisheries management, research, and enforcement occurs through a clear definition of agency roles and division of responsibilities, thus avoiding unnecessary duplication; and

Recognizing that the State of Alaska has for more than two decades exercised effective control over domestic crab fisheries both within and without its territorial waters. The State system centers around BOF for policy and regulations. BOF's regulatory system provides for extensive public input; is sufficiently structured to insure annual revisions; is flexible enough to accommodate resource and resource utilization "emergencies"; and is understood and familiar to the users of North Pacific fisheries resources. Further, there exists a substantial investment by the State in facilities, communications and information systems, vessels and other equipment, coupled with a cadre of experienced personnel capable of carrying out extensive management, research, and enforcement programs to monitor the conduct of the fisheries and the status of the resources.

Therefore, NPFMC and BOF enter into this Joint Statement of Principles, defining the roles of both organizations, in order to achieve the most effective and efficient management of domestic Tanner crab fisheries off Alaska.

I. Applicable Fisheries

This Joint Statement of Principles applies only to the domestic fishery for Tanner crab (all members of genera Chionoecetes) in the Bering Sea, Western Aleutians, Eastern Aleutians, South Peninsula Chignik, Kodiak, Cook Inlet, Prince William Sound, Yakutat-Southeast areas, also known as State of Alaska Tanner crab Statistical Areas J, H, E, and A. This fishery is hereinafter referred to as "the fishery."

II. Duration of Agreement

Recognizing that NPFMC is currently reevaluating the need for a Fishery Management Plan (FMP) for the fishery, this agreement shall remain in effect until that FMP is revised by the Secretary of Commerce. At that time the agreement shall be reviewed by both NPFMC and the BOF and revised as necessary and as they may agree so that it will conform with the then existing situation.

III. NPFMC and BOF Shall Undertake the Following Activities:

1. NPFMC and BOF shall develop a framework to govern management of the fishery, prescribing objectives, standards, and measures found to be necessary for the fishery's effective management. These objectives, standards, and measures are consistent with the national standards of the Magnuson Act and with the laws of the State of Alaska; and do not discriminate between residents and non-residents of the State of Alaska.
2. Tanner crab management measures shall be implemented through regulations adopted by BOF in accordance with the laws of the State of Alaska, which shall be consistent with the objectives, standards, and measures prescribed in the framework. Before taking final action on any regulatory proposal governing the fishery, BOF shall make proposals and related information readily available in written form to all persons interested in the fishery for a period of at least thirty (30) days; shall afford all such persons the opportunity to submit written and oral comments to BOF on the proposed regulation during that period; and shall, upon the request of NPFMC, meet with NPFMC or its representatives to discuss the proposed regulation. Before any BOF regulation governing the fishery goes into effect, BOF shall issue a written explanation of the regulation. The preceding provisions of this paragraph shall not apply to emergency regulations.
3. NPFMC and BOF shall meet jointly at least once every calendar year to consider management of the fishery and discuss the need for amendment of the framework or any regulations governing the fishery. NPFMC and BOF or their designated representatives shall also meet jointly to consider management of the fishery at the request of either NPFMC or BOF. All persons and agencies interested in the fishery shall have the opportunity to submit written and oral comments and reports on management of the fishery to NPFMC and BOF at these meetings. In preparation for the mandatory annual joint meeting provided for in the first sentence of this paragraph, representatives of NPFMC and BOF shall hold a public hearing in the State of Washington when necessary at which all persons and agencies interested in the fishery shall be afforded the same opportunity to comment on management of the fishery that they would have at the meeting itself.
4. The Alaska Department of Fish and Game (ADF&G) shall have primary responsibility for developing the information upon which regulations governing the fishery are to be based, and for implementing these regulations through monitoring of the fishery and development of inseason management measures. NPFMC and BOF shall encourage ADF&G, in carrying out this responsibility, to consult actively with the National Marine Fisheries Service and the fishery management agencies of other states, in order to prevent duplication of research and management effort and to make optimum use of the resources available for management of the fishery.

E. NPFMC and BOF shall resolve conflicts on the framework and implementing regulations through all appropriate means.

Approved:

For the North Pacific Fishery
Management Council

For the Alaska Board of
Fisheries

James O. Campbell, Chairman

Ron Jolin, Chairman

Date

Date

DISCUSSION PAPER OF LONG-TERM ALTERNATIVES
FOR TANNER CRAB MANAGEMENT

Prepared for the Council by the Tanner Crab Plan Team
June 1986

I. INTRODUCTION

Prior to 1964 the harvest of Tanner crab Chionoecetes sp. was primarily incidental to the Alaskan king crab fishery. As bilateral agreements between the United States and foreign nations placed restrictions on the foreign king crab harvest, foreign interest and effort shifted to Tanner crab. Management of the foreign Tanner crab fishery off Alaska began in 1969 as a result of additional bilateral agreements. It was also in 1969 that the first conservation and management regulations were employed in the domestic Tanner crab fishery. The State of Alaska, through the Alaska Board of Fisheries (Board) and the Alaska Department of Fish and Game (ADF&G), established seasons, required registration, and extended emergency regulatory authority, mainly to control the rapidly expanding domestic fishery. State regulations have been modified to some degree each year since 1969 to reflect changing conditions in the fisheries throughout the state.

In March 1977 the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA) became effective, extending U.S. jurisdiction over offshore fisheries within 200 miles of its coast. Later that year a Preliminary Management Plan was implemented for the foreign Tanner crab fishery, soon followed by the North Pacific Fishery Management Council's (Council) Fishery Management Plan for Tanner crab which was applicable to both the foreign and domestic fishery in federal waters.

The three major objectives of the Tanner crab FMP are: (1) minimize fluctuations in stock abundance due to harvest by maintaining the full reproductive potential of the Tanner crab stocks; (2) insofar as possible, prevent industry overcapitalization and minimize economic distress due to extreme fluctuations in harvest based on naturally fluctuating stock abundance; and (3) integrate management of Tanner crab stocks with those of other fisheries to maximize economic returns and minimize adverse impact on other stocks.

The FMP has been amended nine times. The amendments accomplished the following:

- | | |
|-------------|---|
| Amendment 1 | Increased OY for Kodiak. |
| Amendment 2 | Extended the area in which fishing for Tanner crab by foreigners was permitted in the Bering Sea. |
| Amendment 3 | Extended the FMP through October 31, 1979. |
| Amendment 4 | Extended the FMP through October 31, 1980. |

- Amendment 5 Reduced the Bering Sea bairdi OY and DAH and increased the Bering Sea opilio OY and DAH. Reduced TALFF and restricted area open to foreign fishing. Eliminated expiration date for the plan.
- Amendment 6 Modified registration areas, registration requirement, seasons and gear descriptions.
- Amendment 7 Established new OYs and reduced TALFF to zero.
- Amendment 8 Removed pot limits in Cook Inlet and Southeastern areas. Eliminated a 72-hour preseason pot storage provision. Established a minimum biological size limit for opilio. Prohibited side-loading pots in Yakutat and revised season dates.
- Amendment 9 Established a framework procedure for setting seasons using rule-related notices. Updated MSY and ABC values for all areas.

Despite these nine amendments, the plan is still out of date. Most of the descriptive sections of the plan are from the original FMP with much of the supporting data only current through 1976. The fishery and crab stocks have changed substantially in the nine years that have past since the Council adopted the Tanner crab FMP. There are also several inconsistencies between state and federal regulations, such as different coordinates for area boundaries, that make enforcement of Tanner crab regulations difficult.

Even more critical are the major procedural problems that exist which have created obstacles to cooperative federal-state management of the fishery. In certain instances the FMP's failure to provide for timely federal coordination with the State's management activities may have resulted in overfishing in violation of national standard 1. Alaska NOAA General Counsel also believes that the present FMP may violate national standards 2, 5, 6, and 7 as well as other applicable law (see Travers memo, Attachment 1). In response to the concerns that the Tanner crab FMP no longer provides the operational authority to effectively manage the fishery, the Council voted in March 1986 to suspend federal Tanner crab regulations until a discussion of long-term alternatives could be developed. In the interim, State of Alaska Tanner crab regulations would govern Tanner crab fishing by all fishermen registered by the State until such time as new federal regulations are promulgated.

II. LIST OF MANAGEMENT ALTERNATIVES

A. Alternative 1. No FMP

Option 1. Withdraw and terminate the FMP.

Option 2. A joint statement of principles without an FMP.

B. Alternative 2. An FMP that delegates management responsibility to the state.

C. Alternative 3. Amend the FMP

Option 1. Complete revision of FMP.

Option 2. Selective revision to remove procedural problems.

III. DISCUSSION OF MANAGEMENT ALTERNATIVES

A. Alternative 1. No FMP

Under the no FMP alternative, the Council must consider whether the Tanner crab fishery is still in need of federal management and determine the costs and benefits of having the State of Alaska manage the fishery. Some guidance may be obtained by looking at what the plan was originally trying to achieve besides the objectives previously listed. The FMP states that its underlying intention is to preserve, to the extent possible, the State of Alaska's system for managing Tanner crab. The original provisions of the FMP along with its implementing regulations were for the most part a restatement of the 1977-78 State of Alaska Tanner crab regulations. The FMP has been amended to keep federal regulations consistent with state regulations as the state continues to take the lead in management of this fishery. However, several inconsistencies exist, primarily as a result of recent changes in state regulations. Management problems have occurred because of these inconsistencies and the overall inflexibility of the inseason management (field order) authority contained in the Tanner crab FMP and regulations. The field order authority is not flexible enough to allow NMFS to adjust quickly to inseason changes.

Given these problems an argument could be made that the management system for Tanner crab would be more efficient under state regulation without federal involvement. Some fishermen believe that a federal FMP is not necessary because it causes confusion. With an FMP, two sets of regulations are published, one state, and one federal. Often the regulations are in conflict with one another. Secondly, with all fishermen registered under the laws of the state, a federal FMP complicates management since the entire fleet must abide by state regulations. However, other fishermen believe that a federal FMP is necessary to ensure that state management is not in violation of the Magnuson Act standards and other federal law. This argument was recently weakened by an amendment to the Magnuson Act that now authorizes the Council and NOAA to adopt emergency regulations even for fisheries for which there is no FMP. Therefore, even in the absence of an FMP, if the state adopted a regulation that violated federal law, the Council and NOAA could effectively nullify it by emergency regulation.

Option 1. Withdraw and terminate the FMP.

Under this option the Council and NOAA would not have any direct review authority over the Board actions. It would, in effect, end the Council's direct involvement in Tanner crab management. Termination of the FMP could result in potential increased litigation costs for the industry, since the Council would no longer be available as the forum for resolving disputes. It

would be difficult to quantify this cost. Having only one set of regulations (state) would reduce management costs and benefit industry by eliminating confusion. This benefit would also be difficult to quantify. The federal government does expend a substantial amount of money each year conducting population surveys in the Bering Sea. These surveys would most likely continue for the present time, even in the absence of an FMP, because it is conducted in conjunction with the Bering Sea king crab and groundfish survey. The NMFS currently spends about \$50,000 a year enforcing Tanner crab regulations. In addition the Coast Guard spends about \$250,000 (aircraft--fuel costs only) a year aiding in enforcement of the Tanner crab regulations. Federal enforcement would probably be reduced to only enforcing the prohibited species status of Tanner crab under the groundfish FMPs. The Council should consider what effect a reduction of enforcement in federal waters might have on the stocks if the state is unable to increase its enforcement capabilities.

Option 2. A Joint Statement of Principles without an FMP.

In October 1981, the Council and Board formally adopted a Joint Statement of Principles on the Management of domestic king crab fisheries in the Bering Sea/Aleutian Islands area. This agreement was drafted by a Council ad hoc workgroup and was revised by both the Council and the Board. This Joint Statement of Principles has been used to manage the king crab resources in the Bering Sea and Aleutian Islands for more than four years.

The plan team has developed a draft Joint Statement of Principles for the Tanner crab fishery for Council consideration (Attachment 2).

The text of this joint statement is based on the Joint Statement of Principles for the BS/AI King Crab Fishery. This type of flexible management is designed to avoid duplication of effort by clearly defining agency roles. It outlines the procedures to be used by both the Board and the Council. For example, after reviewing Board action, should the Council find that a given regulation can be expected to attain the objectives of a "management framework" (adopted by the Board and Council), they would conclude the resource and fishery as in no need of further management by the Council for that year. This management framework could take the form of a joint statement of principles or a specially developed plan. If, however, the Council is unable to make such a determination, they would need to work with the Board to attempt to rectify the problem. Failing that, the Council and NOAA would need to adopt emergency regulations and or begin implementation of an FMP since under the joint statement they would not have final review authority over Board decisions.

B. Alternative 2. An FMP that delegates management responsibility to the state.

In November 1984, NOAA issued a final rule to implement a fishery management plan for the king crab fishery of the Bering Sea and Aleutian Islands area. This FMP incorporated two new approaches to the development of a fishery management regime. First it is a "framework" FMP designed to allow long-term management of the fishery without having to undergo frequent amendment. The other unique aspect of this plan is that it was intended to delegate management authority to the State of Alaska. It was hoped that after this form of management was tested, a similar approach could be applied to the Tanner crab

fishery, therefore rewriting the Tanner crab FMP was postponed. However, while the king crab FMP has been approved, it is not operational because no implementing regulations have been approved by NMFS. Until regulations are developed and accepted by both NMFS and the State of Alaska, formal delegation of management authority has been delayed.

Recent NMFS decisions on frameworked measures suggest that stricter federal review and approval processes for new regulations and inseason management measures are being required which were not envisioned for the king crab FMP. For this and other reasons, the state may decide against accepting the delegation. Therefore, the alternative of minimizing federal bureaucracy by delegating management responsibility to the state may not be viable at this time.

C. Alternative 3. Amend the FMP.

There are two major problems with federal regulations that would require a plan amendment to alleviate. The first is that the OY section that was updated in Amendment 9 is already outdated due to biological changes in the Tanner crab stocks. For example, the OY for C. bairdi in the Bering Sea is 5 million to 28.5 million pounds. However, the catch has not exceeded 5 million pounds since 1983. There was no directed fishery for C. bairdi in the Bering Sea during 1986 due to the extremely depressed stock condition. This range clearly needs to be updated since fishermen and resource managers look for guidance to the published OY values, and could make decisions based on outdated information. This is even more likely now that the State of Alaska no longer publishes a harvest forecast in its regulations.

The second major problem concerns inseason management (field order) authority. The criteria contained in the FMP and its implementing regulations limit the authority of the Regional Director of the NMFS to adjust season dates to a narrow set of conditions. Specifically, the field order authority allows the Regional Director to adjust season dates only after determining that the following criteria have been met: (1) the condition of the Tanner crab stocks within the given management area is substantially different from the condition anticipated at the beginning of the fishing season; and (2) such differences reasonably support the need for inseason conservation measures to protect the Tanner crab stocks. This narrow requirement combined with OYs set using information which at the time of the fishery is no longer current, creates a situation where the fishery cannot legally be closed when the appropriate number of crab are taken. Thus, to prevent overfishing, the Secretary must have the inseason authority to adjust season opening and closing dates based on all relevant information including current stock assessment and effort estimates.

For the same reason NMFS may not allow extension of a season if a Tanner crab stock should prove more abundant than was anticipated before the beginning of the fishing season. This inflexibility in the federal regulatory system has been present since the beginning of the FMP.

The Council attempted to correct the procedural problems in Amendment 9. However, the portion that was designed to broaden the Regional Director's field order authority to include both preseason survey and socioeconomic

information was disapproved by NMFS because it was apparently too broad to qualify for the categorical exemption from the requirements of Executive Order 12291 by the Office of Management and Budget (OMB).

In addition to the restriction on the criteria that can be used to make inseason adjustments, the time required for NMFS Regional Office preparation and review of field orders (normally two days) and Washington D.C. office review (normally four days) in some instances creates a problem because declining stock abundance and high effort are causing increasingly short Tanner crab seasons. The inflexibility of the federal regulations was recently brought to a focus in 1985 when the Eastside Section of the Kodiak District was not effectively closed until 24 hours after the announced closing date. With no domestic observers on vessels to monitor inseason catch, ADF&G relies heavily on estimated catch per effort data collected from vessels landing their catch. In the Eastside Section fishery, the first few landings suggested that with more than 100 vessels operating, the entire quota may have already been reached. For this reason, both ADF&G and NMFS announced an area closure using field orders. By the time the fishery had closed, the overharvest had occurred. The 24-hour delay in the federal closure contributed to some of the overharvest.

For 1986, NMFS has been more successful in filing timely field orders. The record this year was better than in 1985 with only 2 out of 12 field orders being published late compared to 9 out of 18. The inflexibility of federal inseason management has also resulted in underharvest in some areas such as the Northeast Section of the Kodiak District because the system often requires decisions to be made as much as 5-6 days in advance of their effective date. In this particular instance, weather conditions changed after the closure was announced and the projected guideline harvest was not reached.

Option 1. Complete revision of FMP.

This option would require an extensive rewrite which would include frameworking many of the management measures to eliminate the procedural problems that have been experienced with the current plan, updating the life history and descriptive sections, and resolving numerous inconsistencies with state regulations. Such an extensive revision of the plan would require at least one year to draft.

Because the MFCMA stipulates a 140-day FMP/amendment approval and implementation process, the Council's formal submission of an amended or new FMP must be received by the NMFS Washington Office by June 1, 1987 if the Council intends to have it operational by November 1, 1987. It is doubtful that this time schedule could be met by the plan team unless other support could be obtained for drafting the documents.

Option 2. Selective revision to eliminate procedural problems.

Under this option, the OY and inseason management measure sections of the FMP would be amended. The OY revision could take two forms: a revision to just the OY ranges currently specified; or frameworking the measure so harvest levels can be adjusted in a timely manner without requiring formal amendment. With such a framework, the NMFS would announce, prior to the beginning of a season, a harvest forecast or OY based on the most recent information avail-

able. As long as the annual harvest guidelines fell within the broad OY range contained in the FMP, no plan amendments would be necessary. Amendment 9 presented the ABC values as numerical ranges, as opposed to point estimates to provide flexibility in the OYs without requiring an annual plan amendment. However, the range in the OY values adopted was not wide enough to take into account the unexpected severe decline in the population level of most crab stocks.

Selection of this option would also revise the inseason field order authority to give the Regional Director more flexibility. He should be allowed to use the most current information available and to take into consideration other factors besides conservation such as socioeconomic conditions. Specifically, he should be empowered to close seasons when harvest guidelines are reached or extend seasons when stocks prove stronger than originally anticipated, in addition to existing authority to close when stocks prove to be weaker than expected.

The NMFS Alaska Regional Office offers for Council consideration the following draft proposed revision to the federal Tanner crab regulations governing inseason adjustments at 671.27: (b) as follows:

(b) Adjustment of Harvest Levels and Seasons.

(1) General. The harvest levels and season opening and closing dates specified under the provisions of the FMP may be found to require adjustment in light of any relevant information. Under such circumstances, the Secretary following consultation with the ADF&G and if possible, with the Council, would be authorized to adjust, by notice: (1) season opening and closing dates after specification under 50 CFR 671.26(a) and before the season opens or during the season; and (2) current harvest levels at any time. The Secretary would be authorized to make these adjustments by registration area, district, subdistrict, or section, or any portion thereof which he finds to be appropriate to meet the goals and objectives described in the FMP.

(2) Determinations. Any adjustment of harvest levels within the optimum yields shall be based on a determination by the Secretary, following consultation with ADF&G and if possible the Council, that adjustment is necessary for the conservation and management of Tanner crab stocks. Adjustment of season opening and closing dates shall be based on consideration by the Secretary of all current relevant information concerning the status of the Tanner and/or king crab stocks including but not limited to, current ABCs and annual harvest guidelines estimated by the NMFS or the ADF&G. The Secretary may also adjust season opening and closing dates based on any relevant obtained information related to factors listed at 671.27(b)(3).

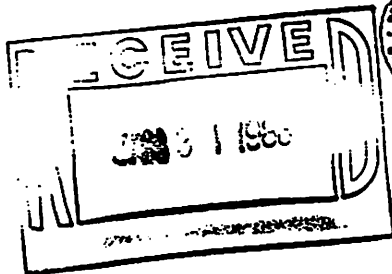
(3) Information. Information which relates to one or more of the following factors may be considered in adjusting season opening and closing dates:

(A) The effect or potential effect of overall fishing effort in the fishery on local crab stocks including other species of crab such as king crab.

(B) Catch-per-unit of effort and rate of harvest.

- (C) Relative abundance of Tanner crab.
- (D) Proportion of immature or softshell Tanner crab being handled.
- (E) Proportion of dead or dying crab that are discarded as deadloss.
- (F) Other factors that could effect present or future status of stocks.
- (G) Meat recovery rate (ratio of recoverable meat to total body weight) considered optimal relative to conservation and management of the resource (relating volume and value of catch to value of final product).
- (H) Enforcement and management costs that would accrue to management agencies relative to benefits to the fishing industry.

This proposed rewording of inseason management would give the Regional Director broader authority but the amount of time required for the review process would also have to be shortened for a coordinated state-federal management system to work properly. The federal government relies heavily on the state for day to day management including performing tank inspections, port sampling and interviewing, and collecting and editing fish tickets. The federal management system also depends on the expertise of the state area management biologists, and the state crab surveys for helping to determine the status of the stocks. At present, the state shellfish management program has an operating budget of about \$2.5 million, most of which is spent on crab management. The Council should take this into consideration when determining its future role in Tanner crab management.



UNITED STATES DEPARTMENT OF COMMERCE
 National Oceanic and Atmospheric Administration
 Office of General Counsel
 P.O. Box 1668
 Juneau, Alaska 99802
 Telephone (907) 586-7414
 January 31, 1986

TO: DGC - Jim Brennan
 GCF - Jay Johnson
 F/AKR - Bob McVey
 NPFMC - Jim Branson

FROM: GCAK - Pat Travers *Pat*

SUBJECT: Recommendation that Implementation of the Alaska Tanner Crab FMP be Suspended Promptly by Emergency Regulation, and that Proceedings for the FMP's Permanent Revocation be Commenced

INTRODUCTION

We are each aware of the many difficulties that have arisen over the past several years in the management of the Alaska Tanner crab fishery under the Fishery Management Plan for the Commercial Tanner Crab Fishery Off the Coast of Alaska (FMP or plan). Attempts to remedy these problems through limited changes to the FMP and its implementing regulations, 50 CFR Part 671, have repeatedly failed to reconcile the desires and capabilities of the North Pacific Fishery Management Council and NOAA for management of the fishery with the requirements of the Magnuson Act and other Federal law. The purpose of this memorandum is to suggest that continued implementation of the FMP is therefore not only undesirable, but indeed may be inconsistent with NOAA's legal obligations.

The following discussion first provides some information about the background of the FMP. It then presents the reasons that continued implementation of the FMP would probably violate the Magnuson Act and other Federal law. Finally, it suggests the procedures, first, for the prompt suspension by emergency regulation of the plan's implementation and, second, for its permanent revocation.

BACKGROUND

The FMP was adopted by the Council in September 1977, and was approved by NOAA in May 1978. It was one of the very first plans implemented under the Magnuson Act, and bears the features characteristic of the plans of that period. Optimum yield is specified rigidly as fixed ranges of the amounts of Tanner crab



that may be taken in specified areas each year. Season opening and closing dates are similarly specified for each area. Because they are so specifically prescribed in the FMP, these areas and the OYs and season dates that are assigned to them can be changed in the long term only by amendment to the FMP. This is understandable, because the concept of "frameworking" these items so that they could be changed without plan amendments was developed by NOAA long after the FMP's initial implementation, after the complexity of the plan amendment process came to be appreciated fully. In an attempt to provide some flexibility on these matters, the FMP and its implementing regulations included provision for season date changes by so-called "field orders" when it was found in the course of the season that previous stock estimates were too high. It is the narrowness with which this "field order" provision was drafted that has caused most of the difficulties with the FMP's implementation, as will be discussed below. Other provisions prescribed in great detail reporting requirements, gear limitations, and area registration procedures, some of which were intended to reduce the competitive advantages of large vessels capable of fishing over great distances.

For all of its agonizing detail, the text of the FMP is quite frank in stating that its underlying intention is to preserve, to the extent possible, the State of Alaska's system for Tanner crab management as it might exist at any particular time. The original provisions of the FMP and its implementing regulations were for the most part a restatement of the 1977-78 Alaska Tanner crab regulations. Most of the nine amendments to the FMP have had as their sole purpose the conformance of the plan to annual changes in the State requirements. Throughout the period of its implementation, the solid consensus of a majority of the Council and of the NMFS Alaska Region staff has been that the State of Alaska Tanner crab management system is superb, and that interference with it in any but the rarest circumstances is to be avoided by NOAA. Alaska's management jurisdiction over all vessels participating in the fishery has never been successfully challenged. Neither the NMFS Alaska Region nor the Council has developed any significant capability of its own to evaluate State Tanner crab management actions independently, and both agencies have always appeared to be quite content with this situation. This leads to the question why the FMP was implemented in the first place. There appear to have been three main reasons, each of which has since been undercut by events.

The first of these was the then widespread belief, now considered to have been erroneous and specifically repudiated in an amendment to the Magnuson Act, that the Act required implementation of a plan for every fishery taking place in

the FCZ, whether or not that fishery was adequately conserved and managed by other means. The second was the desire of the Council to expedite the elimination of foreign vessels from the fishery. This was accomplished by Amendment 7 to the FMP in 1983. Without affirmative action by NOAA to reintroduce foreign Tanner crab fishing through a preliminary management plan, such fishing would continue to be excluded even without the FMP.

The third reason was strong political pressure for an FMP from non-Alaskan participants in the fishery who desired a means of checking State discrimination against them that they alleged to have taken place in the past. This continues to be a major consideration in deciding what to do about the FMP. Amendments to the Magnuson Act have, however, greatly weakened the force of this argument. At the time the FMP was first implemented, neither the Council nor NOAA had authority to take any management action for a domestic fishery in the FCZ, even in an emergency situation, unless an FMP had first been approved for that fishery. Thus, it was necessary to implement the FMP in order to secure for these agencies an opportunity at all to intervene in the Tanner crab fishery's management. The Magnuson Act now, however, authorizes the Council and NOAA to adopt emergency regulations even for fisheries for which FMPs have not been implemented. Thus, if the State were, in fact, to adopt a regulation that discriminated on the basis of State residence, or otherwise violated the Act's requirements, the Council and NOAA could effectively nullify it by emergency regulation for at least the first year even in the FMP's absence. Combined with the threat to reinstate an FMP, such action would in all likelihood convince the State to modify the offending action. State measures that plainly violate the Magnuson Act, especially the ban on discrimination on the basis of State residence, will also frequently violate other Federal and State constitutional and statutory requirements. This provides a basis for permanent judicial reversal of such measures whether or not an FMP has been implemented. The Alaska courts, for example, have recently cast into doubt the permissibility under State law of the "exclusive registration areas" that have been a major concern of the non-Alaskan participants in the Tanner crab fishery.

The abundance of Tanner crab resources off Alaska has steadily declined during the period of the FMP's implementation. In the Bering Sea, for example, the 1978 abundance estimate for harvestable male crab was 45.6 million crab, already less than half of the 1977 estimate of 92.1 million crab. The 1985 estimate was 4.4 million crab, and the estimate has not exceeded 10 million crab since 1982. The FMP does not reflect this drastic reduction in Tanner crab abundance, which it was

originally intended to help prevent. The OY specifications, in particular, reflect much higher abundance than has actually occurred in several years.

INCONSISTENCY OF THE FMP WITH THE MAGNUSON ACT AND OTHER FEDERAL LAW

The circumstances just described have, during the FMP's implementation, caused a number of problems in the management of the Tanner crab fishery. As a result of these problems, the fishery's management has consistently failed to conform to the requirements of the Magnuson Act, especially the national standards of §301, and has also violated other Federal statutes, not to mention the FMP's own implementing regulations.

The most common variety of these problems results from the combination of a number of the circumstances described above. The abundance of Tanner crab has been changing greatly from year to year, generally downward. State of Alaska management officials must therefore usually wait until fishing in an area has begun before knowing how much Tanner crab can be caught in that area during the current year, and how long the season should be. As was noted above, the OYs and season dates prescribed in the FMP and its implementing regulations are quite rigid, and no longer reflect the condition of the resource. In the absence of the FMP, the State closure notices that do reflect that condition would apply to all vessels in the EEZ that are registered under the laws of the State of Alaska. All vessels participating in the fishery are so registered. Neither NOAA nor the Council have any basis for questioning the merit of the State's closure decisions, and both in fact have great confidence in them. Nevertheless, because of the specific nature of the FMP's OY and season prescriptions, the State closures may not apply in the FCZ to any vessel unless ratified by NOAA through amendment of the FMP, through promulgation of an emergency regulation, or through issuance of a "field order". Of these three procedures, only the last can generally be carried out in the short time available between the State closure decision and the point at which harm to the affected Tanner crab stocks will occur. Unfortunately, the field order authority as narrowly drafted authorizes action to close the season only when the condition of the affected stock is substantially different from that anticipated at the beginning of the fishing year, currently November 1. In many instances, the State managers will have made a preliminary estimate of the stock's abundance by that date that is then vindicated by the information provided in the course of the fishery. When this highly desirable situation

occurs, a field order ratifying the State closure decision is not authorized by the FMP and its implementing regulations, because the stock's condition is not different from that previously anticipated. Thus, the fishery must be allowed to continue in the EEZ until either an FMP amendment or emergency regulation can be implemented, or until the resulting overfishing of the stock causes its condition in fact to differ from that which was previously correctly anticipated. Alternatively, field orders ratifying State closures have been issued in contravention of the field order authority. Because such field orders are unlawful, no violations of them may be penalized, and they are subject to judicial reversal. Attempts to change the field order authority have failed, because complete resolution of the problem just described would require that the NMFS Alaska Regional Director be vested with almost complete discretion to open and close Tanner crab seasons. While such broad discretion would be lawful, it is inconsistent with current NOAA and DOC policy.

The situation just described violates the Magnuson Act in a number of different ways. It violates national standard 1 of Magnuson Act §301 by failing to prevent overfishing. It violates national standard 2 by causing conservation and management not to be based on what is conceded to be the best scientific information available. It violates national standards 5, 6, and 7 by failing where practicable to promote efficiency in the utilization of fishery resources; failing to account for variations and contingencies in fisheries; and failing where practicable to minimize costs and avoid unnecessary duplication. In light of current NOAA and DOC policy against delegation of discretionary season closure authority to the regional level, it is plain that implementation of the FMP in anything like its current form will inevitably suffer from these legal defects.

Another kind of problem arises when State managers determine that the opening of a Tanner crab season in an area should be advanced. This is usually done in response to an economic consideration, such as unexpected availability of processing or harvesting capacity due to the sudden termination of other fisheries. The FMP's field order authority allows action only to protect Tanner crab stocks. It does not permit season changes based on social or economic considerations, even where, as here, there is no biological reason for adhering to the original season opening date, and doing so will cause severe economic harm to participants in the fishery. Neither would it permit extension of a season if a Tanner crab stock should prove during the fishery to be in better condition than was previously anticipated. Once again, a remedy for this situation under the FMP would require that the Regional Director

be granted management discretion far broader than is currently sanctioned by NOAA and DOC policy. The FMP's implementation thus violates national standards 2, 5, 6, and 7 in this respect as well.

The very structure of the FMP and the volatility of Tanner crab stock conditions appear to ensure that the plan will violate Magnuson Act requirements. The rigid specification of MSY and OY in terms of particular annual quantities of Tanner crab that can be changed only by FMP amendment practically guarantees that the FMP will consistently violate national standards 2 and 6, as well as the requirement of Magnuson Act §303(a)(3) that a plan specify MSY and OY. At the same time, the fluctuating nature of Tanner crab stocks and the sparse information available about Tanner crab biology make highly unlikely the development of standards for "frameworking" these and other provisions of the FMP.

The problems just described also raise questions under Federal law other than the Magnuson Act. They may, for example, render actions under the FMP vulnerable under the arbitrary and capricious standard of judicial review prescribed in the Administrative Procedure Act. They would also seem to call into question the conformity of the FMP with the substantive provisions of Executive Order 12291.

For all of the above reasons, I recommend strongly that NOAA and the Council promptly terminate implementation of the FMP. I think it unlikely that an FMP that would satisfy both the policies of the Council, NOAA, and DOC and the requirements of the Magnuson Act and other Federal law will be developed in the near future. Even if an effort to do this is undertaken, the current unlawful situation in the management of this fishery should be ended at once by revocation of the FMP for the interim.

PROCEDURES FOR TERMINATING IMPLEMENTATION OF THE FMP

The implementation of the FMP could be terminated by NOAA immediately for a period of 90 days by emergency regulation under Magnuson Act §305(e). The Council's concurrence would be necessary for extending this regulation for another 90-day period. Permanent revocation of the FMP would seem to require first that NOAA request the Council to take such action, preferably at the same time the Council is requested to concur in the emergency regulation. If the Council declined to do

this, NOAA would have authority to revoke the FMP unilaterally under Magnuson Act §304(c).

... In considering this matter, the Council will naturally be concerned whether revocation of the FMP will diminish its role in management of the Tanner crab fishery. As was noted above, the Council has generally been content in the past to rely on the judgment of State management agencies for this fishery, reserving the right to intervene in cases of plain conflict with the Magnuson Act or Council policy. Because of the expanded emergency regulation authority of Magnuson Act §305(e), also described above, the Council and NOAA now have the authority to take such action even in the absence of an FMP. It will be important to reassure the Council that its role in management of the fishery under this authority will be meaningful before it decides what to do about the plan.

Please let me know if you need any more information in order to evaluate this proposal.

DRAFT
 JOINT STATEMENT OF PRINCIPLES
 BETWEEN
 NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC)
 ANCHORAGE, ALASKA
 AND
 ALASKA BOARD OF FISHERIES (BOF)
 JUNEAU, ALASKA
 ON
 MANAGEMENT OF DOMESTIC TANNER CRAB FISHERIES
 OFF ALASKA

Recognizing that NPFMC has a legal responsibility for reviewing and recommending to the Secretary of Commerce measures for the conservation and management of the fisheries of the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska, with particular emphasis on the consistency of those measures with the National Standards of the Magnuson Fishery Conservation and Management Act (Magnuson Act); and

Recognizing that State and Federal governmental agencies are limited in fiscal resources, and that the optimal use of these monies for North Pacific fisheries management, research, and enforcement occurs through a clear definition of agency roles and division of responsibilities, thus avoiding unnecessary duplication; and

Recognizing that the State of Alaska has for more than two decades exercised effective control over domestic crab fisheries both within and without its territorial waters. The State system centers around BOF for policy and regulations. BOF's regulatory system provides for extensive public input; is sufficiently structured to insure annual revisions; is flexible enough to accommodate resource and resource utilization "emergencies"; and is understood and familiar to the users of North Pacific fisheries resources. Further, there exists a substantial investment by the State in facilities, communications and information systems, vessels and other equipment, coupled with a cadre of experienced personnel capable of carrying out extensive management, research, and enforcement programs to monitor the conduct of the fisheries and the status of the resources.

Therefore, NPFMC and BOF enter into this Joint Statement of Principles, defining the roles of both organizations, in order to achieve the most effective and efficient management of domestic Tanner crab fisheries off Alaska.

I. Applicable Fisheries

This Joint Statement of Principles applies only to the domestic fishery for Tanner crab (all members of genera Chionoecetes) in the Bering Sea, Western Aleutians, Eastern Aleutians, South Peninsula Chignik, Kodiak, Cook Inlet, Prince William Sound, Yakutat-Southeast areas, also known as State of Alaska Tanner crab Statistical Areas J, H, E, and A. This fishery is hereinafter referred to as "the fishery."

II. Duration of Agreement

Recognizing that NPFMC is currently reevaluating the need for a Fishery Management Plan (FMP) for the fishery, this agreement shall remain in effect until that FMP is revised by the Secretary of Commerce. At that time the agreement shall be reviewed by both NPFMC and the BOF and revised as necessary and as they may agree so that it will conform with the then existing situation.

III. NPFMC and BOF Shall Undertake the Following Activities:

1. NPFMC and BOF shall develop a framework to govern management of the fishery, prescribing objectives, standards, and measures found to be necessary for the fishery's effective management. These objectives, standards, and measures are consistent with the national standards of the Magnuson Act and with the laws of the State of Alaska; and do not discriminate between residents and non-residents of the State of Alaska.
2. Tanner crab management measures shall be implemented through regulations adopted by BOF in accordance with the laws of the State of Alaska, which shall be consistent with the objectives, standards, and measures prescribed in the framework. Before taking final action on any regulatory proposal governing the fishery, BOF shall make proposals and related information readily available in written form to all persons interested in the fishery for a period of at least thirty (30) days; shall afford all such persons the opportunity to submit written and oral comments to BOF on the proposed regulation during that period; and shall, upon the request of NPFMC, meet with NPFMC or its representatives to discuss the proposed regulation. Before any BOF regulation governing the fishery goes into effect, BOF shall issue a written explanation of the regulation. The preceding provisions of this paragraph shall not apply to emergency regulations.
3. NPFMC and BOF shall meet jointly at least once every calendar year to consider management of the fishery and discuss the need for amendment of the framework or any regulations governing the fishery. NPFMC and BOF or their designated representatives shall also meet jointly to consider management of the fishery at the request of either NPFMC or BOF. All persons and agencies interested in the fishery shall have the opportunity to submit written and oral comments and reports on management of the fishery to NPFMC and BOF at these meetings. In preparation for the mandatory annual joint meeting provided for in the first sentence of this paragraph, representatives of NPFMC and BOF shall hold a public hearing in the State of Washington when necessary at which all persons and agencies interested in the fishery shall be afforded the same opportunity to comment on management of the fishery that they would have at the meeting itself.
4. The Alaska Department of Fish and Game (ADF&G) shall have primary responsibility for developing the information upon which regulations governing the fishery are to be based, and for implementing these regulations through monitoring of the fishery and development of inseason management measures. NPFMC and BOF shall encourage ADF&G, in carrying out this responsibility, to consult actively with the National Marine Fisheries Service and the fishery management agencies of other states, in order to prevent duplication of research and management effort and to make optimum use of the resources available for management of the fishery.

E. NPFMC and BOF shall resolve conflicts on the framework and implementing regulations through all appropriate means.

Approved:

For the North Pacific Fishery
Management Council

For the Alaska Board of
Fisheries

James O. Campbell, Chairman

Ron Jolin, Chairman

Date

Date