


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke 
Executive Director

DATE: December 30, 1994

SUBJECT: Scallop Management

ESTIMATED TIME 3 HOURS

ACTION REQUIRED

Review proposed rule to implement scallop FMP and vessel moratorium. Clarify intent on several issues and recommend changes as necessary.

BACKGROUND

In April, the Council adopted a Federal fishery management plan for the scallop fishery in the Gulf of Alaska (GOA) and Bering Sea/Aleutian Islands (BSAI) areas. The plan covers all scallop species and the fishery will be managed by cooperative agreement between State and Federal agencies. Federal management authority will encompass permit requirements, Federal observer requirements, limited access, and bycatch limits in the Bering Sea. The State will retain authority over legal gear, minimum size limits, reporting requirements, guideline harvest levels, in-season adjustments, districts and sections, seasons, State observer requirements, registration areas, bycatch limits in the GOA and Aleutian Islands areas, efficiency limits, and other necessary management measures consistent with the FMP. It is the Council's intent that these measures would apply to all vessels fishing in Federal waters. Authority over closed waters will be shared by both agencies. Optimum Yield will range from zero to 1.8 million pounds of shucked scallop meats.

The Council also approved a three-year moratorium on the entry of new vessels for all scallop species. To qualify under the moratorium, vessels must have made at least one landing in 1991 or 1992 or 1993, or must have made landings in four years during the period January 1, 1980 to January 20, 1993. A total of 18 vessels qualify under these criteria. It was the Council's intent that permits will be issued to the owner of each vessel at the time of qualifying. If two owners qualify for a single vessel, the most recent owner qualifies, such that each vessel generates only one license. Vessels that made landings from Cook Inlet only would receive permits for that area only, and no crossovers between Cook Inlet and other areas will be allowed unless a vessel qualifies for both areas. The Council-approved moratorium elements are listed in Table 1. A Control Date of April 24, 1994 was set as a possible cutoff date for IFQ history or licenses in areas outside Cook Inlet, in anticipation of a future rationalization program for this fishery.

The NMFS is in the process of drafting the proposed rule to implement the scallop FMP and moratorium. Several issues have surfaced that need clarification from the Council. The following list is a summary of the issues and NMFS recommendations detailed in a letter dated November 30, 1994 (Item D-1(a)):

Issue 1: Bycatch limits in the Bering Sea (category 1)

Recommendation: set bycatch limit of 17,000 king crab (all species) and 260,000 Tanner crab (all species), which are set out under 1994 ADF&G regulations.

Issue 2: Closed Waters (shared authority)

Recommendation: Establish EEZ closed waters based on existing closures under state regulations.

Issue 3: Vessel Permit requirements

Recommendation: Require all participating vessels to obtain an annual federal fisheries permit.

Issue 4: Federal observer coverage requirements

Recommendation: Amend Research Plan to include the scallop fishery.

Issue 5: Moratorium qualification criteria

Recommendation: issue permits to current owner of vessel.

Issue 6: Effective date of moratorium

Recommendation: January 1, 1996.

Issue 7: Agency responsibility for research costs

Recommendation: Council needs to find out if State has expectation of financial support for scallop research and resource surveys.

NMFS staff will be available to discuss these issues.

The AP addressed these scallop issues in December. The following is excerpted from the December AP minutes.

The AP recommends to the Council that the scallop FMP include the following crab bycatch limits:

<i>Bering Sea king crab (all species)</i>	<i>500 crab</i>
<i>Bering Sea Tanner crab (all species)</i>	<i>260,000 crab</i>

Motion passes 13/2. The AP did not have current data available at the time to set rates above. The low recommendation on king crab is a reflection of public testimony on what was taken in 1994. The AP recommends that the Council include the scallop fishery in the research plan. Motion passes with no opposition. The AP concurs with recommendation 3 (Vessel Permit requirements) on page 2 of the letter dated November 30, 1994 from NMFS to the Council. Motion passes with no opposition. The AP reaffirms the Council's previous action on qualifying years.

Table 1. Scallop fishery moratorium elements adopted by the Council.

Qualifying Criteria: Vessels must have participated (made at least one landing) in 1991 or 1992 or 1993, or must have participated for at least four years between January 1, 1980 and January 20, 1993. Vessels that were in the "pipeline" to fish for Alaskan scallops (i.e., under construction, being refitted, relocated, etc.) but had not made a required landing, would not qualify under the moratorium.

Length of Moratorium: The moratorium will remain in effect until the Council rescinds or replaces; not to exceed 3 years from date of implementation, but Council may extend for two years if a permanent limited access program is imminent.

Crossovers: Crossovers to other fisheries (groundfish, crab, or halibut) during the moratorium will not be allowed, except for vessels that were qualified under both the scallop and groundfish moratoria.

Reconstruction: Vessels may be reconstructed during the moratorium. If physical reconstruction started on or after January 20, 1993, the new size is restricted to a 20% increase in vessel length. Only one upgrade is allowed.

Replacement: Qualifying vessels can be replaced with non-qualifying vessels as often as desired so long as the replaced vessel leaves the fishery or bumps another qualifying vessel out in the case of multiple transactions. Vessel size can be increased as many times as desired, but is restricted to a 20% maximum increase in original qualifying vessel length. For vessels lost or destroyed before or during the moratorium, qualifying vessels can be replaced with non-qualifying vessels subject to a 20% maximum increase in vessel length. Replaced vessels cannot be salvaged and come back into the fishery.

Exemptions: Vessels 26 feet or less in the GOA and vessels 32 feet or less in the BSAI are exempted from the moratorium only if they use gear other than dredges or trawls (hence, diving would be allowed from these vessels).

Appeals: The appeals procedures will be similar to those for the sablefish and halibut IFQ program. It would be a two-tier process allowing appeal of an initial administrative determination to the appellate officer, and appeal of the appellate officer's decision to the NMFS Regional Director.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

AGENDA D-1(a)
JANUARY 1995

November 30, 1994

Richard B. Lauber
Chairman, North Pacific Fishery
Management Council
P.O. Box 103136
Anchorage, Alaska 99510

Dear Rick,

At its December 1994 meeting, the North Pacific Fishery Management Council (Council) is scheduled to clarify issues raised during the preparation of the proposed rule to implement the Fishery Management Plan for the Scallop Fishery off Alaska (the FMP). We have prepared a draft proposed rule (enclosed) that addresses the "Category 1" management measures that the Council wished to include under Federal authority. These include vessel permit requirements, Federal observer requirements, bycatch limits in the Bering Sea, and limited access. Authority over closed waters would be shared by NMFS and the State of Alaska. All remaining management measures (Category 2 measures) would be deferred to the State of Alaska.

The attached proposed rule provides a basis for discussion on six different issues that require either concurrence or clarification by the Council on Category 1 management measures. These issues are presented below in the order they appear in the proposed rule, but the most crucial issue is discussed under item 5, moratorium qualification criteria. A final issue is raised under item 7 that requires Council clarification on its intent for the annual scallop SAFE document and assumptions for management agency obligations that may be required to carry out scallop resource assessments.

1. Bycatch limits in the Bering Sea. The Council recommended that bycatch limits in the Bering Sea be established as a Category 1 measure, i.e., under Federal authority. However, the Council also will need to recommend specific bycatch limits for king and Tanner crab if its intent is to establish these limits in the FMP. Any change to crab bycatch limits would require an FMP amendment. Crab bycatch limits need not be specified in Federal regulations as long as the authority to specify, monitor, and enforce the bycatch limits is deferred to the State.



Recommendation for Council Action: We recommend that the the FMP clearly establish a Bering Sea king crab (all species) bycatch limit of 17,000 crab and a Bering Sea Tanner crab (all species) bycatch limit of 260,000 crab. These limits currently are set out in the Alaska Department of Fish and Game's (ADF&G's) draft Fishery Management Plan for Commercial Scallop Fisheries in Alaska.

2. Closed waters. The Council recommended that authority over closed waters be shared by NMFS and the State of Alaska. This shared authority would require that closed waters be identified in the FMP and that any change to closed areas would require an FMP amendment. Similar to bycatch limits, closed areas in Federal waters need not be specified in Federal regulations as long as the authority to specify, monitor, and enforce the closed areas is deferred to the State.

Recommendation for Council action: We recommend that the FMP be clarified to clearly establish closed areas in Federal waters as they currently exist under Alaska State regulations. As a follow-up action, the Council may wish to note that areas closed to nonpelagic trawl gear to protect crab habitat (e.g. the Pribilof Islands closure or statistical areas 512 and 516 in Zone 1 of the Bering Sea) may also be considered in the future for closure to fishing for scallops with dredge gear if scallop fishing effort in these areas is sufficiently high to pose a concern.

3. Vessel Permit requirements (§ 673.4). The proposed rule would require the owner of a vessel participating in the scallop fishery in Federal waters to obtain an annual fisheries permit from NMFS. During the period of time the proposed vessel moratorium is effective, qualified catcher vessels and catch/processor vessels would be issued a single permit for the duration of the moratorium.

Recommendation for Council Action: We recommend the Council concur in the proposed Federal regulations requiring owners of all vessels participating in the scallop fishery (including tender vessels, support vessels and mothership processor vessels) to obtain an annual Federal fisheries permit to fish for scallops in Federal waters. This provision would provide information on the number of vessels participating in harvesting, processing or support operations.

4. Federal observer coverage requirements (§ 673.10). The Council should clarify whether it intends observer coverage requirements for the scallop fishery in Federal waters to fall under the North Pacific Fishery Research Plan (Research Plan). If that is the intent, Research Plan fees would be assessed against the exvessel value of scallops harvested in Federal waters, and the Regional Director would implement observer

coverage requirements for the scallop fishery in consultation with the Council and the Commissioner of ADF&G during the annual Research Plan specification process. The Regional Director also would implement any in-season changes to observer coverage in Federal waters, in consultation with the Commissioner.

This action would require an amendment to the Research Plan, thus triggering a requirement for public hearings in Alaska, Washington, and Oregon during the public comment period on the proposed rule.

Recommendation for Council action: We recommend that the Research Plan be amended to include the scallop fishery. Observer coverage requirements in State waters would continue to be governed by the State. Ideally, State and Federal observer coverage requirements would be consistent.

5. Moratorium Qualification Criteria (§ 673.23). The Council recommended a three-year moratorium on the entry of new vessels into the Alaska scallop fishery. To qualify under the moratorium, vessels must have made at least one landing in 1991 1992 or 1993 or must have made landings in four years during the period January 1, 1980 through December 31, 1992. The Council also recommended that the permit for a qualified vessel be issued to the most recent owner of a qualified vessel during the period of time it made qualified landings, even though that person may no longer own the vessel.

Issuance of vessel permits to persons who no longer own the vessel or no longer are participants in the scallop fishery creates several concerns. The legitimacy and magnitude of these concerns and the potential impact on the current qualified vessel fleet cannot be ascertained until the history of ownership of each qualifying vessel is examined. The Council will need to undertake this exercise if it wishes to pursue this course of action. Several examples of the complications created by the Council's proposed action that would need to be addressed follow:

(a) A person who owned a vessel during the period of time it made qualifying landings later sold the vessel and died. The current owner of the qualified vessel wishes to use the vessel to participate in the scallop fishery, but is not eligible to apply for a permit because he did not own the vessel when it made qualifying landings. As a result, the qualifying vessel would not be permitted to fish during the moratorium.

(b) A vessel was owned by a partnership comprised of two or more persons during the period of time it made qualifying landings and the vessel later was sold and the qualifying owners no longer participate in the fishery. How does NMFS

issue vessel permits to the two or more people who no longer own the vessel in a manner that only generates one permit? Can these people build a new boat equal to or less than the maximum LOA of the qualifying vessel and reenter the fishery? If so, the result is that the original qualifying vessel could not be used by its current owner to fish for scallops during the moratorium.

(c) A vessel was owned by a person when it made qualifying landings during the 12-year qualification period of 1980 - 1992. The boat was sold in 1990 and a second owner made a single landing of scallops during the second qualification period of 1991 - 1993 and then sold the vessel to a third owner in 1992. The third and current owner made landings of scallops in 1994. Under this scenario, the current owner could not use his qualified vessel to fish for scallops because he did not use the vessel to make a qualified landing. Although two different persons owned the vessel during different qualifying periods when the vessel was used to make qualifying landings, only the most recent owner who made a single landing of scallops would receive a vessel permit that he could sale or use to build a new vessel to enter the fishery.

(d) A corporation owned a vessel and leased the vessel to a fishermen who made qualifying landings during the period 1980 - 1992. The corporation sold the vessel in 1992 and dissolved. The vessel operator who actually made the qualified landings of scallops would not be eligible to receive a permit because he was not the owner. The current owner of the qualified vessel could not use the vessel to fish for scallops because he was not the owner during the qualification period.

Based on the above examples, the Council's recommended design of qualifying criteria moves the moratorium away from a simple vessel moratorium to a moratorium on a person's access to fishing rights based on the potentially tangled history of ownership of a qualified vessel. If the Council wishes to pursue this approach, adequate analyses must be developed to assess the potential effects and to better ascertain the number of historical vessel owners who would be eligible to obtain a vessel to fish for scallops during the moratorium period.

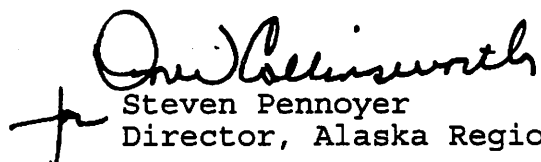
Recommendation for Council Action. From the perspective of simplicity, implementation concerns, and the Council's desire to implement the moratorium as quickly as possible, NMFS recommends that permits be issued to the current owner of a qualifying vessel. This approach has been assessed in the current analyses prepared on the moratorium and is set out in the draft proposed rule.

6. Effective Date of the moratorium. Pending approval of the FMP and the three-year scallop vessel moratorium, we recommend that the effective date of the moratorium be January 1, 1996 through - December 31, 1999. Although a final rule implementing the FMP hopefully could be published in the Federal Register by mid summer, 1995, a January 1, 1996, effective date for the moratorium would provide NMFS sufficient time to develop a database on qualifying vessels, distribute and review permit applications, and issue Federal fishing permits to qualified vessel owners in time for the 1996 fishing year.

7. Council assumptions for agency responsibility for research and resource survey costs. Under the proposed FMP, an annual scallop SAFE document would be required. This document would present the best information available on the status of the scallop resource as reflected in the annual management report by ADF&G. The draft FMP repeatedly notes the scarcity of information about the scallop resource that would directly affect the quality and precision of biological information on the status of stocks that would be needed to support a Federally-sponsored management system. Input from the State of Alaska is needed on whether it can/cannot provide the personnel/financial support for such a management effort. The estimated cost of a "good comprehensive survey" is \$540,000 (page 64 of the FMP). For a similar management effort delegated to the State of Alaska under the crab FMP, the State asked for NMFS' direct financial support as a condition to accepting the delegation of management authority from NMFS. Given this record of State expectation of financial support and the current NMFS funding problems, the Council should discover if any such conditions are involved or implied as part the State acceptance of delegation of authority under the scallop FMP.

The FMP will need to be revised to clarify these and minor technical issues before it is submitted to NMFS for review and approval. We request Council input on whether it wishes to review the revised FMP before it is submitted for Secretarial review.

Sincerely,


Steven Pennoyer
Director, Alaska Region

Enclosure

**DRAFT REGULATIONS TO IMPLEMENT THE FISHERY MANAGEMENT PLAN FOR
THE SCALLOP FISHERY OFF ALASKA**

For the reasons set out in the preamble, a new 50 CFR part 673 is proposed to be added and parts 676 and 677 are proposed to be amended as follows:

1. A new part 673 is added to chapter VI of 50 CFR to read as follows:

PART 673--SCALLOP FISHERY OFF ALASKA

Subpart A--General Provisions

Sec.

- 673.1 Purpose and scope
- 673.2 Definitions
- 673.3 Relation to other laws
- 673.4 Permits
- 673.5 Reserved
- 673.6 Reserved
- 673.7 Prohibitions
- 673.8 Facilitation of enforcement
- 673.9 Penalties
- 678.10 Observer requirements

Subpart B - Management measures

Sec.

- 673.20 General limitations
- 673.21 Commercial and personal use fishing for scallops
- 673.22 Reserved
- 673.23 Moratorium on Entry

Figures--Part 673.

Figure 1--Federal Fisheries Permit

Figure 2--

Authority: 16 U.S.C. 1801 et seq.

Subpart A--General Provisions

§ 673.1 Purpose and scope.

(a) The purpose of this part is to implement the Fishery Management Plan for the Scallop Fishery in the Gulf of Alaska and the Bering Sea and Aleutian Islands management area. The FMP was developed by the North Pacific Fishery Management Council under the Magnuson Act.

(b) Regulations in Subpart A govern commercial fishing for scallops in the Gulf of Alaska and the Bering Sea and Aleutian Islands management area.

(c) Except as provided under this part, State of Alaska regulations set out under Chapter 38 of the Alaska Administrative Code are not preempted for vessels regulated under this part fishing for scallops in Federal waters off Alaska and which are registered under the laws of the State.

§ 675.2 Definitions

In addition to the definitions in the Magnuson Act and in 50 CFR parts 620, 672, 675, 676, and 677, the terms in 50 CFR part 673 have the following meanings:

ADF&G means the Alaska Department of Fish and Game.

Bering Sea and Aleutian Islands management area is defined at § 675.2.

Bering Sea means the Bering Sea subarea as defined at § 675.2.

Catcher/processor vessel is defined at § 672.2.

Catcher vessel is defined at § 672.2.

Commercial fishing means fishing for scallops for sale or barter.

Dive gear means any type of hard hat or skin diving equipment.

Gulf of Alaska (GOA) is defined at § 672.2.

King crab means any Paralithodes species or Lithodes species.

Scallop(s) means any scallop species in the GOA or BSAI.

Scallop dredge means a dredge-type device designed specifically for and capable of taking scallops by being towed along the ocean floor.

Tanner crab means Chionoecetes species or hybrids of these speices.

§ 673.3 Relation to other laws.

(a) The relation of this part to other laws is set forth in § 620.3 of this chapter and paragraphs (b) through (f) of this section.

(b) Domestic fishing for groundfish. Regulations governing the conservation and management of Alaska groundfish in Federal waters are set out at parts 620, 672, and 675 of this chapter.

(c) Limited access. Regulations governing access to commercial fishery resources are set out at part 676 of this chapter.

(d) North Pacific Fisheries Research Plan. Regulations implementing the North Pacific Fisheries Research Plan are set out at part 677 of this chapter.

(e) Marine mammals. Regulations governing exemption permits and the recordkeeping and reporting of the incidental take of marine mammals are set out at parts 216.24 and 229 of this chapter.

(f) This part 673 will be administered in close coordination with ADF&G's administration for the State of

Alaska's regulations governing the scallop fishery off Alaska. Fishing for scallops by vessels registered under the laws of the State of Alaska will be subject to Alaska State management authority.

§ 673.4 Permits

§ 672.4 Fisheries Permits.

(a) General. No vessel of the United States may fish for scallops in the GOA or in the BSAI without first obtaining a fisheries permit issued under this part. Fisheries permits are issued without charge.

(b) Federal Fisheries Permit; Federal Processor Permit Application (Form 1 of this part)--(1) Request for application and permit. An application (Form 1 of this part) for a fisheries permit required under paragraph (a) of this section may be requested from:

National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802
FAX number: 907-586-7465.

(2) Completed application. The fisheries permit required under paragraph (a) of this section may be obtained by submitting a written permit application (see Form 1 of this part) to the address given in paragraph (b)(1) of this section. The owner of a vessel must answer each question on the permit application in the manner required in instructions for the permit application set forth in Form 1 of this part.

(3) Application deficiency. Upon receipt of an incomplete or improperly completed fisheries permit application, the Regional Director will notify the applicant of the deficiency in the permit application. If the applicant fails to correct the deficiency, the permit will not be issued. No permit will be issued to an applicant until a complete application is submitted.

(c) Fisheries Permit issuance. Except as provided in § 673.24 of this part and in Subpart D of 15 CFR part 904, upon receipt of a properly completed permit application, the Regional Director will issue a fisheries permit required by paragraph (a) of this section.

(d) Vessel operations category. (1) A fisheries permit issued under § 672.4(c) will authorize a vessel to conduct operations as follows:

- (i) Catcher Vessel;
- (ii) Catcher/Processor;
- (iii) Mothership;
- (iv) Tender Vessel; or
- (v) Support vessel.

(2) A vessel may be issued a fisheries permit as a support vessel or as any combination of the other four categories (Catcher Vessel, Catcher/Processor, Mothership, Tender Vessel). A vessel permitted as a Catcher Vessel, Catcher/Processor, Mothership, or Tender Vessel may also conduct all operations

authorized for a support vessel.

(e) Amended Permit. (1) The operator or owner who has applied for and received a fisheries permit under this section must notify the Regional Director, in writing, of any change in the information provided under paragraph (b) of this section within 10 days of the date of that change.

(2) An application for an amended permit must be made on the permit application (see Form 1 of this part).

(3) Fisheries Permit. If the application is for an amended fisheries permit required under paragraph (a) of this section and designates a change or addition of a vessel operations category, the amended permit must be on board the vessel before the new type of operations begins.

(f) Duration--(1) Fisheries Permit. Except as provided in paragraph (f)(2) of this section, a fisheries permit will continue in full force and effect through December 31 of the year for which it was issued or until it is revoked, suspended, or modified under part 621 (Civil Procedures) of this chapter or until it is surrendered.

(2) Applicable through December 31, 1999. A fisheries permit issued to the owner of a catcher vessel or a catcher/processor vessel will continue in full force and effect through December 31, 1999, or until it is revoked, suspended, or modified under part 621 (Civil Procedures) or subpart B of part 673 or until it is surrendered.

(3) A fisheries permit is deemed surrendered when the original permit is submitted to and received by NMFS Enforcement Office in Juneau.

(g) Alteration. No person shall alter, erase, or mutilate any fisheries permit issued under paragraph (a) of this section. Any fisheries permit that has been intentionally altered, erased, or mutilated shall be invalid.

(h) Transfer. Fisheries permits issued under paragraph (a) of this section are not transferable or assignable and shall be valid only for the vessel for which it is issued.

(i) Inspection--(1) Fisheries Permit. Any original fisheries permit issued under paragraph (a) of this section must be carried on board the vessel whenever the vessel is fishing. Photocopied or faxed copies are not considered originals.

(2) The permit shall be presented for inspection upon request of any authorized officer.

(j) Sanctions. Procedures governing permit sanctions and denials are found at Subpart D of 15 CFR part 904.

§ 673.5 [reserved]

§ 673.6 [Reserved]

§ 673.7 Prohibitions.

(a) In addition to the general prohibitions specified in § 620.7 of this chapter, it is unlawful for any person to:

- (1) Submit false or inaccurate information on a vessel permit application; or
 - (2) Fish for scallops in Federal waters off Alaska with a vessels which does not have on board a valid permit issued under this part; or
 - (3) Violate any other provision of this part.
- (b) Effective from January 1, 1996 through December 31, 1999, it is unlawful for a person to:
- (1) Engage in fishing for scallops in Federal waters except to the extent authorized by § 673.24 of this part;
 - (2) Harvest scallops with a vessel that has a LOA greater than the maximum LOA that is listed on the vessel permit; or
 - (3) Harvest scallops with a vessel that has received an unauthorized transfer of a vessel permit.

673.8 Facilitation of enforcement.

See § 620.8 of this chapter

§ 673.9 Penalties.

See § 620.9 of this chapter

§ 678.10 Observer requirements.

Observer requirements for the scallop fishery of the GOA and BSAI are contained in part 677 of this chapter.

Subpart B - Management measures

§ 673.20 General limitations.

(a) The management measures specified in § 673.21 of this part shall apply to all fishing for scallops in the GOA and BSAI by vessels registered under laws of the State of Alaska.

(b) The management measures specified in §§ 673.2 and 673.23 of this part shall apply to all commercial fishing for scallops in the GOA and BSAI.

§ 673.21 Commercial and personal use fishing for scallops.

(a) For State of Alaska statutes and regulations governing commercial fishing, see Alaska Statutes, title 16--Fish and Game; title 5 of the Alaska Administrative code, chapters 1-39.

(b) For State of Alaska Regulations specifically governing the scallop fishery, see 5 Alaska Administrative Code 38.

(c) For State of Alaska statutes and regulations governing sport and personal use scallop fishing other than subsistence fishing, see Alaska Statutes, title 16--Fish and Game; 5 Administrative Code [Insert regulatory reference].

(d) For State of Alaska statutes and regulations governing

subsistence fishing, see Alaska Statutes, title 16--Fish and Game; 5 Alaska Administrative Codes [Insert regulatory reference].

§ 673.22 Reserved.

§ 673.23 Moratorium on Vessel Entry Applicable from January 1, 1996, through December 31, 1999.

(a) General. (1) Regulations set out under this section implement the scallop moratorium program developed by the North Pacific Fishery Management Council and approved by the Secretary of Commerce. The moratorium is implemented through the issuance of Federal vessel permits for regulating participation in the commercial fisheries for scallops in the GOA and BSAI.

(2) Definitions for purposes of this section.

(i) Cook Inlet means that portion of the exclusive economic zone of the Gulf of Alaska east of 148 degrees 50 minutes West longitude and north of 58 degrees 52 minutes North latitude.

(ii) Eligible vessel means a vessel that has moratorium qualification and has an LOA that is less than or equal to the maximum LOA [as listed on the vessel permit.]

(iii) Harvest or harvesting means any activity, other than scientific research conducted by a scientific research vessel, that involves the catching or taking of scallops, the attempted catching or taking of scallops, or any other activity that can reasonably be expected to result in the catching or taking of scallops.

(iv) Legal landing means any amount of scallop that was harvested and landed in compliance with State and Federal regulations in existence at the time of the landing...

(v) Letter of authorization means a letter from NMFS to a vessel owner authorizing a vessel to make a legal landing of scallops during the moratorium pending an initial written decision by NMFS on a vessel permit application or pending a final written decision by the Regional Director on an appeal.

(vi) LOA means length overall as defined at § 672.2.

(vii) Lost or destroyed vessel means a vessel that has been sunk at sea or been destroyed by fire or other type of physical damage and is listed on the U.S. Coast Guard Report of Marine Casualty, form 2692.

(viii) Maximum LOA means a length overall assigned by NMFS for each original qualifying vessel that represents the greatest LOA to which a vessel may increase and continue to participate in the scallop fishery during the moratorium. The maximum LOA is 1.2 times the original qualifying length.

(ix) Moratorium qualification means the privilege of a vessel to fish for scallops during the moratorium if the vessel made a qualifying landing. Moratorium qualification may be transferred to another vessel.

(x) Original qualifying length means the historical LOA of an original qualifying vessel on or prior to January 20, 1993.

(xi) Original qualifying vessel means a U.S. vessel that made a qualifying landing.

(xii) Qualifying landing means the legal landing of any amount of scallops during (1) 1991, 1992 or 1993, or (2) any four calendar years during the period from January 1, 1980 through December 31, 1992.

(xiii) Vessel reconstruction means an adjustment in the LOA of a vessel. Vessel reconstruction begins and ends with the start and completion of the physical modification of the vessel.

(3) Moratorium areas. The following two moratorium areas are established: (1) The GOA except Cook Inlet and the BSAI; and (2) Cook Inlet.

(b) Issuance of vessel permits.

(1) Applicability. Except for the exemptions to the vessel moratorium listed in paragraph (f) of this section, the moratorium applies to all catcher vessels and catcher/processor vessels that apply for a fisheries permit under § 673.4 of this part.

(2) Eligibility Criteria. (i) In order for a vessel owner to receive a vessel permit under § 673.4 of this part during the moratorium, the vessel must have made a qualifying landing, and the maximum LOA for the vessel must be greater than or equal to the LOA of the vessel.

(ii) Separate vessel permits are required to fish for scallops in each of the moratorium areas listed under paragraph (a)(3) of this section.

(3) Permit issuance procedure.

(i) A vessel owner who intends to harvest scallops from either or both of the moratorium areas listed under paragraph (a)(3) of this section must apply for and be issued a separate vessel permit for each moratorium area from NMFS. An application for a vessel permit can be obtained from NMFS, P.O. Box 21668 Juneau, Alaska 99802-1668, FAX number 907-586-7465. A vessel permit to harvest scallops in a moratorium area will be issued to the current owner of the vessel that made a qualifying landing of scallops harvested from the moratorium area if:

(A) The vessel owner submits a complete vessel permit application to NMFS as required by § 673.4;

(B) The vessel owner submits the following documentation that establishes the vessel's LOA dated on or before January 20, 1993:

(1) A vessel survey report;

(2) A vessel stability report; or

(3) A naval architect's drawing of the vessel.

(C) The vessel has made a qualifying landing of scallops harvested from the moratorium area or submits a complete moratorium qualification transfer application under paragraph (c) of this section with the vessel permit application; and

(D) The LOA of the vessel, which is specified on the permit application, does not exceed the maximum LOA for that vessel. If the vessel reconstruction provisions at paragraph (d) of this section apply, a vessel owner also should submit a complete

vessel reconstruction application with the vessel permit application. All permits issued by NMFS will list the maximum LOA applicable for that vessel and for any vessel to which the moratorium qualification is transferred.

(ii) If NMFS determines that the vessel is not an eligible vessel, the vessel owner will be notified in writing by NMFS that a vessel permit will not be issued and the reasons therefor. If NMFS denies an application for a vessel permit, the applicant may appeal the initial decision within 45 days of issuance of the denial in accordance with the appeal procedures set forth at § 676.25 of this chapter.

(c) Transfer of moratorium qualification. Moratorium qualification for a moratorium area listed under paragraph (a) (3) of this section may be transferred from a vessel to another vessel. The maximum LOA for the vessel must be transferred with the moratorium qualification. The transfer of moratorium qualification will be authorized by NMFS under the following conditions:

(1) The owner of the qualified vessel must submit a written application to NMFS for the transfer of moratorium qualification that contains the following information:

(i) Names, addresses, and telephone numbers of all persons taking part in the transfer;

(ii) Vessel names, U.S. Coast Guard identification numbers of any vessels taking part in the transfer, and the LOA of all vessels taking part in the transfer;

(iii) A notarized copy of the contract for the transfer of the moratorium qualification with signatures and dates of signature of all persons taking part in the transfer.

(2) The owner of the vessel transferring moratorium qualification must surrender to NMFS the valid permit to harvest scallops for the remainder of the moratorium and the vessel must not be used to harvest any scallops for the remainder of the moratorium unless the vessel subsequently receives moratorium qualification from another vessel.

(3) NMFS must give written approval to a person that has received the transfer of moratorium qualification before the transfer will be authorized.

(d) Adjustment to maximum LOA through reconstruction. The maximum LOA for a vessel may be adjusted through vessel reconstruction under the following conditions:

(1) If vessel reconstruction was completed before January 20, 1993, the LOA of the reconstructed vessel will be the new original qualifying length for the vessel, from which a new maximum LOA will be calculated for the reconstructed vessel.

(2) If vessel reconstruction began on or before January 20, 1993, but was not completed by that date, the LOA resulting from the reconstruction is the new maximum LOA and no further adjustment in maximum LOA is permitted for the duration of the moratorium.

(3) If vessel reconstruction was started after January 20, 1993, the maximum LOA is restricted to 1.2 times the

original qualifying length.

(4) NMFS must give written approval to the vessel owner of an adjustment in the maximum LOA due to vessel reconstruction. A vessel owner must receive written approval and a Federal fisheries permit under § 673.4 of this part with the new maximum LOA prior to harvesting scallops. In order to adjust the maximum LOA for a vessel, the vessel owner must submit to NMFS an application for adjustment of the maximum LOA that includes the following information:

- (i) Name and address of vessel owner(s);
- (ii) Vessel name and U.S. Coast Guard vessel identification number;
- (iii) Written contracts or written agreements with the boat yard or shipyard concerning the vessel reconstruction;
- (iv) An affidavit signed by the vessel owner(s) and the owner/manager of the company performing the vessel reconstruction that states the beginning and ending dates of reconstruction; and
- (v) An affidavit signed by the vessel owner that lists the new LOA of the vessel.

(e) Lost or destroyed vessel. (1) General. A lost or destroyed vessel may transfer its moratorium qualification or be salvaged under the following conditions:

(i) Transfer of the Moratorium Qualification of a Lost or Destroyed Vessel. An eligible vessel that is lost or destroyed prior to or during the effective period of the moratorium may transfer its moratorium qualification to another vessel as specified in paragraph (c) of this section.

(ii) Salvage of a Lost or Destroyed Vessel. An eligible vessel that was lost or destroyed prior to or during the effective period of the moratorium may be salvaged and remain an eligible vessel only if its moratorium qualification has not been transferred to another vessel.

(iii) Application. (A) A vessel owner must submit an application to NMFS for transfer of moratorium qualification from a lost or destroyed vessel or for the salvage of a lost or destroyed vessel. NMFS must give written approval before any such transfer of moratorium qualification or salvage prior to harvesting moratorium species.

(B) The application for the transfer of moratorium qualification from a vessel that was lost or destroyed prior to or during the effective period of the moratorium must include a copy of the U.S. Coast Guard form 2692, Report of Marine Casualty, and a completed application for the transfer of moratorium qualification as specified in paragraph (c) of this section.

(f) Exemptions. The following vessels are not subject to the moratorium and may continue to fish during the moratorium in accordance with parts 673 and 677.

(1) A vessel other than a catcher vessel or catcher/processor vessel.

(2) A catcher vessel or catcher/processor vessel that harvests scallops in the GOA and does not exceed 26 feet (7.9

meters) LOA and is used to fish with dive gear.

(3) A catcher vessel or catcher processor vessel that harvests scallops in the BSAI and does not exceed 32 feet (9.8 meters) LOA and is used to fish with dive gear.

(h) Appeals. A vessel owner may file a notice of appeal with the Regional Director within 45 days of the issuance of an initial decision by NMFS that a scallop vessel permit will not be issued. The process for appealing an initial decision by NMFS is set out at part 676.25 of this chapter.

PART 676--LIMITED ACCESS MANAGEMENT OF FEDERAL FISHERIES IN AND OFF OF ALASKA.

2. The authority citation for 50 CFR part 676 continues to read as follows:

Authority: 16 U.S.C. 773 et seq. and 1801 et seq.

3. In § 676.25, paragraph (a) is amended to read as follows:

§ 676.25 Determinations and appeals.

(a) General. This section describes the procedure for appealing initial administrative determinations and appellate officers decisions made under this part and part 673.23 of this chapter.

* * * * *

NORTH PACIFIC FISHERIES RESEARCH PLAN

4. The authority citation for 50 CFR part 677 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

5. In § 677.1 paragraph (b) is amended to read as follows:
§ 677.1 Purpose and scope.

* * * * *

(b) Regulations in this part govern elements of the Research Plan for the following fisheries under the Council's authority: Bering Sea and Aleutian Islands management area groundfish, Gulf of Alaska groundfish, Bering Sea and Aleutian Islands area king and Tanner crab in the exclusive economic zone; Scallops in the exclusive economic zone off Alaska, and halibut from convention waters off Alaska.

6. In § 677.2, the definition of the term Research Plan fisheries and Round weight or round-weight equivalent are revised and new a definition for Shucked scallop meat is added in alphabetical order to read as follows:

§ 677.2 Definitions.

* * * * *

Research Plan fisheries means the following fisheries: Bering Sea and Aleutian Islands management area groundfish, Gulf of Alaska groundfish, Bering Sea and Aleutian Islands area king and Tanner crab, Scallop fishery in Federal waters off Alaska, and halibut from convention waters off Alaska.

* * * * *

Round weight or round-weight equivalent means:

* * * * *

(4) For scallops harvested in the GOA or BSAI management area-- weight of retained catch of shucked scallop meat.

* * * * *

Shucked scallop meat means [refer to State of Alaska definition if one is specified].

7. In § 677.4, paragraph (a) is revised to read as follows:

§ 677.4 Permits.

(a) General. In addition to the permit and licensing requirements at § 301.3 of this title and 672.4, 673.4, 675.4, and 676.13 of this chapter, all processors of fish from Research Plan fisheries must have a Federal Processor Permit issued by the Regional Director under this section. Such permits shall be issued without charge.

* * * * *

8. In § 677.10, paragraphs (b) (1) (iii), (b) (1) (iv) and (b) (2) (iii) are revised to read as follows:

§ 677.10 General requirements.

* * * * *

(b) * * *

(1) * * *

(iii) Requirements for vessel operators harvesting or processing Bering Sea and Aleutian Islands area king and Tanner crab or Alaska scallops. An operator of a vessel subject to this part must carry one or more NMFS-certified observers or ADF&G employees on board the vessel whenever fishing or processing operations are conducted, if the operator is required to do so by the Regional Director under paragraph (b) (2) of this section.

(iv) Requirements for managers of shoreside processing facilities receiving Bering Sea and Aleutian Islands area king and Tanner crab and Alaska scallops. A manager of a shoreside processing facility that processes scallops or king or Tanner crab received from vessels regulated under this part must have one or more NMFS-certified observers, or ADF&G employees, present at the facility whenever king or Tanner crab is received or processed, if the manager is required to do so by the Regional Director under paragraph (b) (2) of this section.

(2) * * *

(iii) The Regional Director will consult with the

Commissioner of ADF&G prior to making inseason changes in observer coverage level for the crab or scallop observer programs.

* * * * *

9. In § 677.11, paragraph (a)(4) is revised to read as follows:

§ 677.11 Annual Research Plan specifications.

(a) * * *

(4) Observer coverage. For the period January 1, 1995, through December 31, 1995, observer coverage levels in Research Plan fisheries will be as required by § 677.10(a). After December 31, 1995, the level of observer coverage will be determined annually by NMFS, after consultation with the Council and the State of Alaska, and may vary by fishery and vessel or processor size, depending upon the objectives to be met for the groundfish, halibut, scallop, and king and Tanner crab fisheries. The Regional Director may change observer coverage inseason pursuant to § 677.10(b)(2)(ii).

* * * * *

10. Section 677.12 is revised to read as follows:

§ 677.12 Compliance.

The operator of any fishing vessel subject to this part, and the manager of any shoreside processing facility that receives groundfish, halibut, scallops, or king and Tanner crab from vessels subject to this part, must comply with the requirements of this part. The owner of any fishing vessel subject to this part, or any shoreside processing facility that received groundfish, halibut, scallops, or king and Tanner crab from vessels subject to this part, must ensure that the operator or manager complies with the requirements of this part and is liable, either individually or jointly and severally, for compliance with the requirements of this part.

AGENDA D-1
JANUARY 1995
SUPPLEMENTAL

ALASKA SHRIMP PRODUCTS, INC.
P.O. Box 91578
Anchorage, Alaska 99509
Phone: (907) 349-0678
Fax: (907) 349-0030

December 16, 1994

Mr. Rick Lauber
NP Fishery Management Council
POB 103136
Anchorage, AK 99510

Dear Mr. Lauber:

My name is Charles F. Volkheimer. As the representative of the fishing vessel, Captain Joe, in addition to being an Inupiaqk Native, born and raised in Nome, I must express my outrage at the unfairness of the proposed moratorium.

The scallop moratorium is a good idea only if it protects the interests of Alaska and its people. Optimally, it will be a first step in securing Alaskan fishing interests in the scallops fishery. The next step, however, must be to ensure that Alaskans and Alaskan-owned companies and boats participate.

Due to financial difficulties we experienced in 1993, the fishing vessel, Captain Joe, is being excluded from the moratorium. We have one year's experience and, under this moratorium, we are excluded from entry into this fishery. It is public knowledge there is another boat, the Wayward Wind, owned by a Mr. Max Hulse, included in this fishery. Like us, the Wayward Wind has only one year in the scallop fishery. In my opinion, it is unconscionable to allow one vessel with the same fishery experience to participate and exclude the other.

To compound the injustice outlined herein, the majority of vessels included in the moratorium are owned by "big money" East Coast companies. By not including Alaskan vessels in this moratorium you are denying an earnest, capable Alaskan-owned and operated company the right to generate and invest revenues from this Alaskan resource forever.

In closing, let me reiterate my commitment to utilizing Alaska's natural resources for the benefit of Alaskans. We must keep this money in Alaska where it belongs - not on the East Coast.

Sincerely,

Charles F. Volkheimer
Chief Financial Officer

North Pacific Fishery Management Council

Richard B. Lauber, Chairman
Clarence G. Pautzke, Executive Director

605 West 4th Avenue
Anchorage, Alaska 99501



Mailing Address: P.O. Box 103136
Anchorage, Alaska 99510

Telephone: (907) 271-2809
FAX: (907) 271-2817

December 27, 1994

Mr. Charles F. Volkheimer
Alaska Shrimp Products, Inc.
P.O. Box 91578
Anchorage, Alaska 99509

Dear Mr. Volkheimer:

Thank you for apprising us of your concerns regarding the scallop vessel moratorium in a letter dated December 16, 1994. Your letter indicates that you believe your vessel (the F/V Captain Joe) was unfairly excluded under the proposed moratorium for this fishery. Your rationale appears to be the following: (1) Alaskan residents, such as yourself, should have a preferred access to this fishery, and (2) another vessel which you think has only one year of participation will qualify. I will address each of these concerns separately.

First, we cannot implement federal fishery conservation and management measures if they discriminate between residents of different states. Doing so would violate national standard #4 of the Magnuson Fishery Conservation and Management Act (MFCMA), the legislation that defines the fishery management program for all fisheries in United States waters. Standard #4 further states that if it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. This standard prohibits us from giving residents of Alaska preferred access to fishery resources within federal waters (3-200 miles).

Second, there are numerous other vessels besides the Captain Joe that will not qualify under the proposed moratorium. To qualify under the moratorium adopted by the Council in April 1994, vessels must have made at least one landing in 1991 or 1992 or 1993, or must have made landings in the four years during the period January 1, 1980 to January 20, 1993. The vessel that you identify as a one year participant had actually participated at least four years during the 1980 to 1993 period, based on available data, and therefore would be expected to qualify on that basis. The Captain Joe, on the other hand, did not make landings in the qualifying years according to available data, and would not qualify under the proposed moratorium.

I will distribute your letter to Council members to inform them of your concerns. Also, there will be opportunity to comment to the Council in January, when they address the scallop fishery management plan and moratorium issues. Comments also can be made to the Secretary of Commerce during the comment period, which will be announced in the Federal Register along with the proposed rule. Please also note that the Council has approved an appeals process as an element of the scallop moratorium.

Sincerely,


Clarence Pautzke
Executive Director

MULLAVEY, PROUT, GRENLEY, FOE & LAWLESS

LAW OFFICES

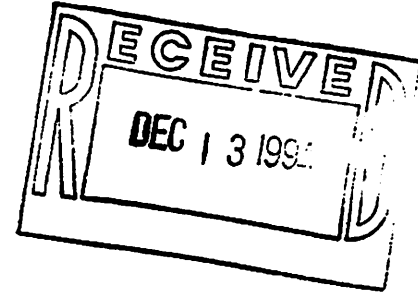
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHARLES N. MULLAVEY
*RICHARD L. PROUT, P.C.
**HENRY W. GRENLEY
ALAN K. FOE, P.S.
GREGORY J. LAWLESS
KATHLEEN A. ALLEN
JANINE A. LAWLESS
JOSEPH L. ROCKNE
KRISTA S. MIRHOSEINI

December 8, 1994

P.O. BOX 70567
2401 N.W. SIXTY-FIFTH
SEATTLE, WASHINGTON 98107
(206) 789-2511
FAX: (206) 789-4484

Richard B. Lauber, Chairman
NORTH PACIFIC FISHERY MANAGEMENT COUNCIL
P.O. Box 103136
Anchorage, AK 99510



RE: F/V EMERALD SEA;
SCALLOP VESSEL MORATORIUM

Dear Mr. Lauber:

We write on behalf of our client, MAR PACIFICO, INC., the current owner of fishing vessel EMERALD SEA, formerly the SMARAGD. Unjustly and arbitrarily, or perhaps inadvertently, the EMERALD SEA is not included in the Council's proposed list of Qualifying Vessels under the Scallop Vessel Moratorium. Therefore, the purpose of this letter is to advise the Council of the factual and legal circumstances entitling the EMERALD SEA to be classified as a "qualifying" vessel under the proposed Scallop Vessel Moratorium, Section 673.23 (hereinafter "Moratorium"), and to respectfully request that the Council take whatever action necessary to classify the EMERALD SEA as a qualifying vessel under the Moratorium.

I. The History of the EMERALD SEA in the Alaska Scallop Fishery.

The EMERALD SEA was designed by John Gilbert and built on the East Coast for the East Coast Scallop Fisheries in 1966. The vessel first came to Alaska in 1968 and participated in the Scallop fishery almost yearly until 1976. During this period of time, the EMERALD SEA was one of only a few vessels engaged seriously in the Alaskan Scallop Fisheries.

The vessel was purchased in 1980 by New England Fish Company (Alaska Food Company Incorporated). As you are most certainly aware, New England Fish Company filed for bankruptcy shortly thereafter and many of its assets were sold or otherwise dispersed. Our clients have attempted to procure fish tickets from the period that the vessel was under New England Fish Company's control, but as of this date, have been unable to do so.

The Smaragd Partnership purchased the vessel in 1983. Our clients suspect that like nearly every other catcher vessel of significant size in the Alaskan Fishery, the EMERALD SEA participated in the much more lucrative joint venture Pollock fishery in Alaskan waters from 1980 to 1988.

The vessel was bought in 1988 by the North Pacific Trawl Fisheries

Richard B. Lauber, Chairman
December 9, 1994
Page 2

Anchorage Alaska Partnership. In 1989 and 1990, the vessel again participated in the Alaska Scallop Fishery. Unfortunately, in July of 1990, the engine room of the EMERALD SEA flooded. The then owners of the vessel did not repair the damage caused by the engine room flooding. As a result, the vessel sat in Kodiak inactive until it was repossessed by the financing institution in February of 1991.

The financing institution purchased the vessel at the Marshal's Sale and the current owner purchased the EMERALD SEA from the bank in January of 1992. As it turned out, the purchase of the vessel was bank financed and as a condition of the financing, the bank would not allow the vessel to proceed to the fishing grounds without sufficient cash flow to bring the vessel up to acceptable commercial fishing standards. The current owner of the vessel therefore was required to divert funds from their other fishing operations to prepare the vessel for the Alaskan Scallop Fisheries. This took considerable time. At the time of purchase, the current vessel owner purchased the vessel with the full intent that the vessel would, and was eligible to, participate in the Alaskan Scallop Fishery. As a result of the bank's conditions for the vessel's participation in the Alaskan fisheries, the vessel was forced to remain inactive during 1992 and 1993. The current owner wants the vessel to again participate in the Alaska Scallop fishery. However, to do so the owner wishes to establish that the EMERALD SEA is a qualifying vessel under the Moratorium.

II. Proposed Scallop Vessel Moratorium.

The Council first alludes to a potential Moratorium in its January 26, 1993, North Pacific Fisheries Management Council (hereinafter "Council") Newsletter. At that time, a control date of January 20, 1993, was set to notice the fishing industry that a Moratorium for this fishery "may be implemented". The Newsletter continued: "fishermen and/or vessels not participating in the Fishery by that date may not be guaranteed future access to the Fishery". The Scallop Management Plan and proposed Moratorium continued in the "may be" stage until more than a year later when it was adopted at the April 1994 Council Meeting.

Interestingly, at the September 1993 Meeting, according to the October 5, 1993, Newsletter, the Council was still analyzing two "preferred Moratorium options". Under one of the proposed alternative "preferred Moratorium options", "vessels must have participated (made landings) in either 1991 or 1992, or must have participated for at least four years between 1980 and 1993". On the other hand, the second alternative option would qualify "any vessel which made landings in either 1990, 1991, 1992 or 1993 through July 31".

The Council did not finally approve the qualifying criterion under the Moratorium until April 1994 at which time it accepted neither of the two previously mentioned alternatives, but rather a hybrid of both, deleting landings made in 1990 from the list of qualifying criterion.

Apparently at that time, the Council also recommended that the Permit for a qualified vessel be issued to the most recent owner of a qualified vessel during the period of time it made qualified landings, even though that person may no longer own the vessel.

III. F/V EMERALD SEA Entitled to be Classified as a Qualifying Vessel under the Moratorium.

If the EMERALD SEA, in fact, made Scallop landings between 1980 and 1988, they may satisfy the proposed qualifying criterion. However, because the current owner suspects that the vessel was engaged in the Pollock J-V Fishery during that period of time, it wishes to proceed for qualification of the EMERALD SEA as a qualifying vessel under the proposed Moratorium as if no Scallop deliveries were made during that period. The reasons to qualify the F/V EMERALD SEA are both legally and factually compelling.

A. **Pioneer Vessel.**

The EMERALD SEA was one of the pioneer vessels in the North Pacific Scallop Fisheries. The vessel operated in the Scallop Fisheries for at least eight (8) years between the years 1968 and 1976. It may, in fact, have operated in the Scallop Fisheries from 1976 to 1980.

B. **Long Perseverance in Scallop Fishery.**

During that period of time, and subsequently up to the present, the Alaska Scallop Fisheries have been littered with failed and bankrupt Scallop Fisheries operations. While other Scallop vessels tried and failed, this vessel succeeded and/or, at least, persevered for many years. Taking into account the economic difficulties historically experienced in the Scallop Fishery, it is fully understandable that upon the rise of the Pollock J-V Fishery many Scallop, Crab and other Alaskan fishing vessels of significant size converted over to the J-V Pollock Fishery.

C. **Arbitrary Selection of 1980 Cut-Off Date.**

Due to the relative short notice in preparing this request, we do not have access to the number of vessels that participated in the Alaska Scallop Fishery for the years 1980 through 1988. However, we suspect and would suggest to you that the number of vessels that participated on a significant scale for four (4) years in the Alaska Scallop Fisheries from 1980 to 1988 are few and far between. It is, therefore, obvious that the Council neglected its common sense and regulatory obligation to those pre-1980 pioneer participants in the Alaska Scallop Fishery in proposing that the four (4) year participation in the Scallop Fishery run from the 1980, instead of including pre-1980 scallop industry vessels that are still available to participate in the fishery. Accordingly, we assert that the 1980 cut-off date was determined

arbitrarily and without concern for those that had participated fully in the Fishery for the years prior.

D. Vessel Still Available to the Fishery.

Furthermore, this is not a situation where a vessel that had participated in the Fishery in the years prior to 1980 had sunk or was sold and retired with its rights transferred to another vessel that now seeks qualifying status. This is the same vessel that pioneered the fishery. This vessel was designed and built for the Scallop fishery and participated fully in the Alaska Scallop Fishery. Additionally, the current owner purchased the vessel, prior to any discussion of a Moratorium, in reliance upon its eligibility to participate in the Alaska Scallop Fishery.

E. Moratorium Adopted After Qualifying Cut-Off Date.

As stated previously, the vessel owner was unable to have the EMERALD SEA participate in the Alaska Scallop Fishery in 1992 and 1993, because the bank would not finance the reconditioning of the vessel and required that it be performed solely out of the vessel owner's cash flow from its other fisheries' operations. Nonetheless, during those years there was no proposed Moratorium. The most information that the vessel owner could be charged with at that time was that the Council had stated that there "may be" a Moratorium. We need not discuss with you the folly of attempting to make business decisions upon the plans of government agencies that "may be" implemented in the future. However, when the Council finally metamorphosed the proposed Moratorium from the "may be" phase to the current proposed Moratorium it was already past the cut-off date for vessel qualification.

F. 1989 and 1990 Arbitrarily Deleted and/or Excluded from Qualifying Criteria.

The current proposed Moratorium qualifying criterion did not arise from either of the two qualifying criterion options set forth at the September 1993 Council Meeting. Had the second option been elected, landings made in 1990 would have been considered "qualifying" criterion. The EMERALD SEA made landings in both 1989 and 1990. In other words, had the Council implemented the second "preferred option", the year 1990 would have been included in the criterion and the EMERALD SEA would without dispute be a "qualifying" vessel under the Moratorium. The justifications for deleting 1990 from the second proposed alternative or for that matter not including the year 1989 in any qualifying criterion are unknown, but we suspect are without solid procedural, factual or legal foundation. Excluding deliveries made in 1989 and 1990 in the qualifying criteria smells of impropriety and a conspiracy to include some specific late arriving participants in the fishery while arbitrarily excluding "qualification" from the EMERALD SEA.

Richard B. Lauber, Chairman
December 9, 1994
Page 5

IV. Scallop Permit Allocation Regulations.

The Council proposed Scallop Permit Regulations that would issue Scallop Permits to the owners of qualifying Scallop vessels during the most recent time the vessels made qualifying deliveries.

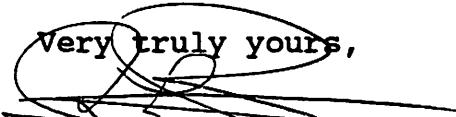
We fully concur with the comments of Mr. Steven Pennoyer, Director of National Marine Fisheries Service, Alaska Region, in his draft letter to Mr. Richard B. Lauber regarding the Council's proposed action at its December 1994 Meeting. As Mr. Pennoyer states, "issuance of vessel permits to persons who no longer own the vessel or no longer are participants in the Scallop Fishery creates several concerns". We agree that the proposed permit allocation creates undue and unreasonable complications, and agree with Mr. Pennoyer that the "recommended design of qualifying criteria moves the Moratorium away from a simple vessel Moratorium to a Moratorium on a person's access to fishing rights based on the potentially tangled history of ownership of a qualified vessel".

Finally, we fully agree with Mr. Pennoyer's recommendation that "from the perspective of simplicity, implementation concerns, and the Council's desire to implement the Moratorium as quickly as possible, National Marine Fisheries Service recommends that the permits be issued to the current owner of a qualifying vessel".

IV. Conclusion.

The EMERALD SEA is a pioneer vessel in the Alaskan Scallop fishery. It was designed as and continues to be a Scallop vessel. It has delivered only Scallops since 1989. We suggest that during the period 1968 to present the EMERALD SEA made more significant Scallop deliveries than most of the vessels otherwise "qualifying" under the proposed Moratorium. Moreover, the current vessel owner purchased the vessel in reliance on and with the full expectation the vessel was and would remain eligible for participation in the Alaska Scallop Fishery. Unfortunately, due to circumstances beyond its control, on both the economic and regulatory level, their opportunity to participate in this Fishery is unjustly in jeopardy. Therefore, based on the factual and legal arguments above, we respectfully request that the Council, to avoid arbitrary and manifest injustice, through whatever means available to it, include the EMERALD SEA as a qualified vessel under the proposed Moratorium.

Very truly yours,


Richard L. Prout

TW/kfs

cc: Mr. Steven Pennoyer, NMFS, Regional Director
fax #907 586-7131

North Pacific Fishery Management Council

Richard B. Lauber, Chairman
Clarence G. Pautzke, Executive Director

605 West 4th Avenue
Anchorage, Alaska 99501



Mailing Address: P.O. Box 103136
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Telephone: (907) 271-2809
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December 13, 1994

Richard L. Prout
Mullavey, Prout, Grenley, Foe & Lawless
P.O. Box 70567
2401 N.W. Sixty-Fifth
Seattle, WA 98107

Dear Mr. Prout:

Thank you for apprising us of your concerns regarding the scallop vessel moratorium in a letter dated December 8, 1994. The Council was scheduled to address the scallop FMP and moratorium issues at its December meeting, but did not due to time constraints. They plan to address these issues in January.

Your letter indicates that you believe the F/V *Emerald Sea* should be classified as a qualifying vessel under the moratorium. Based on the qualifying criteria specified under the moratorium language the Council adopted, and the data we have available, the *Emerald Sea* would not qualify. To qualify under the moratorium adopted by the Council, vessels must have made at least one landing in 1991 or 1992 or 1993, or must have made landings in four years during the period January 1, 1980 to January 20, 1993. According to the State's database, the *Emerald Sea* is not among the vessels that meet these criteria. You state in your letter that the *Emerald Sea* made landings in 1989 and 1990, neither of which were qualifying years. Also, it was the Council's intent that permits will be issued to the owner of each vessel at the time of qualifying. You state that the vessel was sold in 1992; consequently, even if the vessel did qualify, the permit would go to the vessel owner *at the time of qualifying*. Your clients would not receive a permit under the language adopted by the Council.

I will distribute your letter to Council members to inform them of your concerns. You are welcome to provide additional comment for Council consideration in January. Comments can also be made to the Secretary of Commerce during the comment period, which will be announced in the *Federal Register* along with the proposed rule. You should also note that the Council has approved an appeals process as an element of the scallop moratorium.

Sincerely,


Clarence Pautzke
Executive Director



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
 P.O. Box 21668

Juneau, Alaska 99802-1668

Agenda D-1 Supplemental
 Tab IV(B) Supplemental
 January 1995

January 9, 1995

Mr. Richard B. Lauber
 Chairman, North Pacific Fishery
 Management Council
 P.O. Box 103136
 Anchorage, Alaska 99510

Dear Rick,

The Fishery Management Plan for the Scallop Fishery off Alaska was scheduled for North Pacific Fishery Management Council discussion at its December 1994 meeting. This agenda item was dropped for lack of time and is rescheduled for the Council's January meeting. We had submitted a letter dated November 30, 1994 (attached) that provided a basis for discussion on issues that require either concurrence or clarification by the Council so that staff may proceed to finalize the FMP and associated documents necessary for its implementation. Although our letter questioned the qualification criteria adopted by the Council for the proposed scallop vessel moratorium, subsequent discussions with current participants in the scallop have alleviated our concerns. We believe the Council's direction on the design of the qualifying criteria are clear and need no further clarification to proceed with rulemaking.

On January 4, 1995, NMFS, ADF&G, and Council staff met to review the draft FMP as well as some issues raised in our November 30 letter. The following discussion presents those issues that still require Council concurrence or clarification and associated staff recommendations. The Council must provide guidance to staff so that revisions to the FMP and associated documentation may proceed in as timely manner as possible.

Issue 1. Crab bycatch limits in the Bering Sea.

Background - The Council recommended that bycatch limits established for the scallop fishery in the Bering Sea be specified in the FMP as a Category 1 management measure. The current Bering Sea bycatch limits established for this fishery under the States's draft management plan are 17,000 king crab (all species) and 260,000 Tanner crab (all species). If Bering Sea bycatch limits are to be implemented as a Category 1 measure, the Council must make recommendations on what these limits should be so they may be included in the FMP.



Recommendation - We recommend that Bering Sea crab bycatch limits be frameworked in the FMP based on a specified percentage of the annual estimated population abundance. As an option, the Council may wish to recommend a fixed upper limit. Staff from ADF&G will be prepared to present options for specified percentages based on current and projected bycatch needs of the fishery.

Issue 2. Observer Coverage.

Background - The Council recommended that Federal observer requirements be implemented as a Category 1 measure, but that the State be authorized to continue to regulate its own requirements for observer coverage as a Category 2 management measure.

The Council should clarify whether it intends observer coverage requirements for the scallop fishery in Federal waters to fall under the North Pacific Fishery Research Plan (Research Plan). If that is the intent, Research Plan fees would be assessed against the exvessel value of scallops harvested in Federal waters, and the Regional Director would implement observer coverage requirements for the scallop fishery in consultation with the Council and the Commissioner of ADF&G during the annual Research Plan specification process. The Regional Director also would implement any in-season changes to observer coverage in Federal waters, in consultation with the Commissioner.

This action would require an amendment to the Research Plan, thus triggering a requirement for public hearings in Alaska, Washington, and Oregon during the public comment period on the proposed rule.

Recommendation - We recommend that the Research Plan be amended to include the scallop fishery. Ideally, State and Federal observer coverage requirements would be consistent. However, the Council's recommendation to categorize observer coverage requirements as both a Category 1 and 2 measure means that the State could impose additional observer coverage requirements for scallop vessels in Federal waters if observer coverage under the Research Plan did not meet the management needs of the State.

Issue 3. Closed waters

Background - The Council recommended that authority over closed waters be shared by NMFS and the State of Alaska (i.e., closed waters would be established as both a Category 1 and Category 2 measure). This shared authority would require that closed waters be identified in the FMP and that any change to closed areas would require an FMP amendment.

Recommendation - We recommend that the FMP be clarified to clearly establish closed areas in Federal waters as they currently exist under Alaska State regulations. Furthermore, the

FMP should clarify that the State's authority to implement in-season closure actions in Federal waters to manage either Category 1 or 2 measures (e.g., bycatch limits, guideline harvest levels, or hot-spot closures to reduce crab bycatch rates) would continue to be deferred to the State.

The Council may wish to consider whether areas closed to nonpelagic trawl gear to protect crab habitat (e.g. the Pribilof Islands closure or statistical areas 512 and 516 in Zone 1 of the Bering Sea) should also be closed to fishing for scallops with dredge gear. If the Council recommends that these additional closures be established under the FMP, it also should recommend to the State of Alaska that similar closures be implemented in adjacent State waters.

Issue 4: Establishment of a Scallop Interim Action Committee (SIAC) and process for appeal of a State management decision.

Background - The FMP for the Commercial King and Tanner Crab Fisheries in the Bering Sea and Aleutian Islands requires that a Crab Interaction Committee be established for the purpose of providing oversight of the FMP and to provide for Council review of management measures and other relevant matters. The crab FMP also establishes a procedure for Council and NMFS review of State management actions and an appeal process in the event a State management action is challenged as being inconsistent with the FMP, the Magnuson Act, or other applicable law. Similar provisions should be included in the Scallop FMP.

Recommendation - We recommend that the scallop FMP authorize the establishment of a Scallop Interaction Committee (SIAC) and that the SIAC be comprised of the Regional Director, NMFS, and the Commissioner, ADF&G or their designees. The oversight and review authority of the SIAC should be similar to that specified for the Crab Interaction Committee in Chapter 2 of the crab FMP (Attachment 2).

We further recommend that the Scallop FMP establish a procedure for Council and NMFS participation in State of Alaska preseason management actions and NMFS review to determine consistency of State regulations with the FMP, the Magnuson Act and other applicable law (Chapter 9 of the crab FMP, see Attachment 3 to this letter). Similarly, a procedure should be established for appeal to the Secretary of Commerce to set aside an in-season action of the State that is argued to be inconsistent with the FMP, the Magnuson Act, or other applicable law (Chapter 10 of the crab FMP, see Attachment 4 to this letter).

The FMP for the commercial scallop fishery off Alaska will need to be revised to clarify or address the above issues before it is submitted to the Secretary of Commerce for review and approval. We request the Council to inform staff whether it wishes to review the revised FMP before it is submitted for Secretarial review.

Sincerely,



Steven Pennoyer,
Director, Alaska Region

Attachments

ATTACHMENT 1.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

November 30, 1994

Richard B. Lauber
Chairman, North Pacific Fishery
Management Council
P.O. Box 103136
Anchorage, Alaska 99510

Dear Rick,

At its December 1994 meeting, the North Pacific Fishery Management Council (Council) is scheduled to clarify issues raised during the preparation of the proposed rule to implement the Fishery Management Plan for the Scallop Fishery off Alaska (the FMP). We have prepared a draft proposed rule (enclosed) that addresses the "Category 1" management measures that the Council wished to include under Federal authority. These include vessel permit requirements, Federal observer requirements, bycatch limits in the Bering Sea, and limited access. Authority over closed waters would be shared by NMFS and the State of Alaska. All remaining management measures (Category 2 measures) would be deferred to the State of Alaska.

The attached proposed rule provides a basis for discussion on six different issues that require either concurrence or clarification by the Council on Category 1 management measures. These issues are presented below in the order they appear in the proposed rule, but the most crucial issue is discussed under item 5, moratorium qualification criteria. A final issue is raised under item 7 that requires Council clarification on its intent for the annual scallop SAFE document and assumptions for management agency obligations that may be required to carry out scallop resource assessments.

1. Bycatch limits in the Bering Sea. The Council recommended that bycatch limits in the Bering Sea be established as a Category 1 measure, i.e., under Federal authority. However, the Council also will need to recommend specific bycatch limits for king and Tanner crab if its intent is to establish these limits in the FMP. Any change to crab bycatch limits would require an FMP amendment. Crab bycatch limits need not be specified in Federal regulations as long as the authority to specify, monitor, and enforce the bycatch limits is deferred to the State.



Recommendation for Council Action: We recommend that the the FMP clearly establish a Bering Sea king crab (all species) bycatch limit of 17,000 crab and a Bering Sea Tanner crab (all species) bycatch limit of 260,000 crab. These limits currently are set out in the Alaska Department of Fish and Game's (ADF&G's) draft Fishery Management Plan for Commercial Scallop Fisheries in Alaska.

2. Closed waters. The Council recommended that authority over closed waters be shared by NMFS and the State of Alaska. This shared authority would require that closed waters be identified in the FMP and that any change to closed areas would require an FMP amendment. Similar to bycatch limits, closed areas in Federal waters need not be specified in Federal regulations as long as the authority to specify, monitor, and enforce the closed areas is deferred to the State.

Recommendation for Council action: We recommend that the FMP be clarified to clearly establish closed areas in Federal waters as they currently exist under Alaska State regulations. As a follow-up action, the Council may wish to note that areas closed to nonpelagic trawl gear to protect crab habitat (e.g. the Pribilof Islands closure or statistical areas 512 and 516 in Zone 1 of the Bering Sea) may also be considered in the future for closure to fishing for scallops with dredge gear if scallop fishing effort in these areas is sufficiently high to pose a concern.

3. Vessel Permit requirements (§ 673.4). The proposed rule would require the owner of a vessel participating in the scallop fishery in Federal waters to obtain an annual fisheries permit from NMFS. During the period of time the proposed vessel moratorium is effective, qualified catcher vessels and catch/processor vessels would be issued a single permit for the duration of the moratorium.

Recommendation for Council Action: We recommend the Council concur in the proposed Federal regulations requiring owners of all vessels participating in the scallop fishery (including tender vessels, support vessels and mothership processor vessels) to obtain an annual Federal fisheries permit to fish for scallops in Federal waters. This provision would provide information on the number of vessels participating in harvesting, processing or support operations.

4. Federal observer coverage requirements (§ 673.10). The Council should clarify whether it intends observer coverage requirements for the scallop fishery in Federal waters to fall under the North Pacific Fishery Research Plan (Research Plan). If that is the intent, Research Plan fees would be assessed against the exvessel value of scallops harvested in Federal waters, and the Regional Director would implement observer

coverage requirements for the scallop fishery in consultation with the Council and the Commissioner of ADF&G during the annual Research Plan specification process. The Regional Director also would implement any in-season changes to observer coverage in Federal waters, in consultation with the Commissioner.

This action would require an amendment to the Research Plan, thus triggering a requirement for public hearings in Alaska, Washington, and Oregon during the public comment period on the proposed rule.

Recommendation for Council action: We recommend that the Research Plan be amended to include the scallop fishery. Observer coverage requirements in State waters would continue to be governed by the State. Ideally, State and Federal observer coverage requirements would be consistent.

5. Moratorium Qualification Criteria (§ 673.23). The Council recommended a three-year moratorium on the entry of new vessels into the Alaska scallop fishery. To qualify under the moratorium, vessels must have made at least one landing in 1991 1992 or 1993 or must have made landings in four years during the period January 1, 1980 through December 31, 1992. The Council also recommended that the permit for a qualified vessel be issued to the most recent owner of a qualified vessel during the period of time it made qualified landings, even though that person may no longer own the vessel.

Issuance of vessel permits to persons who no longer own the vessel or no longer are participants in the scallop fishery creates several concerns. The legitimacy and magnitude of these concerns and the potential impact on the current qualified vessel fleet cannot be ascertained until the history of ownership of each qualifying vessel is examined. The Council will need to undertake this exercise if it wishes to pursue this course of action. Several examples of the complications created by the Council's proposed action that would need to be addressed follow:

(a) A person who owned a vessel during the period of time it made qualifying landings later sold the vessel and died. The current owner of the qualified vessel ~~wishes to use the vessel to participate in the scallop fishery, but is not~~ eligible to apply for a permit because he did not own the vessel when it made qualifying landings. As a result, the qualifying vessel would not be permitted to fish during the moratorium.

(b) A vessel was owned by a partnership comprised of two or more persons during the period of time it made qualifying landings and the vessel later was sold and the qualifying owners no longer participate in the fishery. How does NMFS

issue vessel permits to the two or more people who no longer own the vessel in a manner that only generates one permit? Can these people build a new boat equal to or less than the maximum LOA of the qualifying vessel and reenter the fishery? If so, the result is that the original qualifying vessel could not be used by its current owner to fish for scallops during the moratorium.

(c) A vessel was owned by a person when it made qualifying landings during the 12-year qualification period of 1980 - 1992. The boat was sold in 1990 and a second owner made a single landing of scallops during the second qualification period of 1991 - 1993 and then sold the vessel to a third owner in 1992. The third and current owner made landings of scallops in 1994. Under this scenario, the current owner could not use his qualified vessel to fish for scallops because he did not use the vessel to make a qualified landing. Although two different persons owned the vessel during different qualifying periods when the vessel was used to make qualifying landings, only the most recent owner who made a single landing of scallops would receive a vessel permit that he could sale or use to build a new vessel to enter the fishery.

(d) A corporation owned a vessel and leased the vessel to a fishermen who made qualifying landings during the period 1980 - 1992. The corporation sold the vessel in 1992 and dissolved. The vessel operator who actually made the qualified landings of scallops would not be eligible to receive a permit because he was not the owner. The current owner of the qualified vessel could not use the vessel to fish for scallops because he was not the owner during the qualification period.

Based on the above examples, the Council's recommended design of qualifying criteria moves the moratorium away from a simple vessel moratorium to a moratorium on a person's access to fishing rights based on the potentially tangled history of ownership of a qualified vessel. If the Council wishes to pursue this approach, adequate analyses must be developed to assess the potential effects and to better ascertain the number of historical vessel owners who would be eligible to obtain a vessel to fish for scallops during the moratorium period.

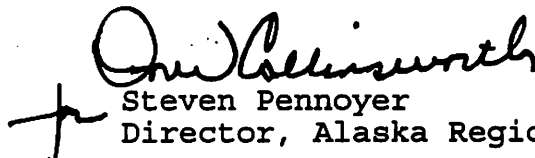
Recommendation for Council Action. From the perspective of simplicity, implementation concerns, and the Council's desire to implement the moratorium as quickly as possible, NMFS recommends that permits be issued to the current owner of a qualifying vessel. This approach has been assessed in the current analyses prepared on the moratorium and is set out in the draft proposed rule.

6. Effective Date of the moratorium. Pending approval of the FMP and the three-year scallop vessel moratorium, we recommend that the effective date of the moratorium be January 1, 1996 through - December 31, 1999. Although a final rule implementing the FMP hopefully could be published in the Federal Register by mid summer, 1995, a January 1, 1996, effective date for the moratorium would provide NMFS sufficient time to develop a database on qualifying vessels, distribute and review permit applications, and issue Federal fishing permits to qualified vessel owners in time for the 1996 fishing year.

7. Council assumptions for agency responsibility for research and resource survey costs. Under the proposed FMP, an annual scallop SAFE document would be required. This document would present the best information available on the status of the scallop resource as reflected in the annual management report by ADF&G. The draft FMP repeatedly notes the scarcity of information about the scallop resource that would directly affect the quality and precision of biological information on the status of stocks that would be needed to support a Federally-sponsored management system. Input from the State of Alaska is needed on whether it can/cannot provide the personnel/financial support for such a management effort. The estimated cost of a "good comprehensive survey" is \$540,000 (page 64 of the FMP). For a similar management effort delegated to the State of Alaska under the crab FMP, the State asked for NMFS' direct financial support as a condition to accepting the delegation of management authority from NMFS. Given this record of State expectation of financial support and the current NMFS funding problems, the Council should discover if any such conditions are involved or implied as part the State acceptance of delegation of authority under the scallop FMP.

The FMP will need to be revised to clarify these and minor technical issues before it is submitted to NMFS for review and approval. We request Council input on whether it wishes to review the revised FMP before it is submitted for Secretarial review.

Sincerely,


Steven Penoyer
Director, Alaska Region

Enclosure

ATTACHMENT 2 - Excerpt from Chapter 2 of the FMP for the Commercial King and Tanner Crab Fisheries in the Bering Sea and Aleutian Islands that addresses requirements for the establishment of a Crab Interim Action Committee .

2.0 PROCEDURES FOR FMP IMPLEMENTATION

(Excerpt from page 2-8)

7. A Crab Interim Action Committee (CIAC) shall be established by the Council for the purpose of providing oversight of this FMP and to provide for Council review of management measures and other relevant matters. The CIAC shall be composed of the following members:

Regional Director, NMFS, or his designee
Commissioner, ADF&G, or his designee
Director, Washington State Department of
Fisheries, or his designee

There are three types of review the CIAC may engage in:

A. Category 1--Appeals of a Preseason Management Decision

In accordance with Chapter 9 of the FMP, any appeal of a preseason management decision which is rejected by the Board and subsequently appealed to the Secretary will be reviewed by the CIAC prior to the appeal being reviewed by the Secretary. The CIAC will have no authority to grant or reject the appeal, but shall comment upon the appeal for the benefit of the Secretary.

B. Category 2--Appeals of an In-season Management Decision

In accordance with Chapter 10 of the FMP, the Secretary will, to the extent possible when reviewing any appeal of an in-season management decision, communicate with the CIAC in advance of making his decision whether to grant or reject the appeal in order to solicit the CIAC's comments on the management decision at issue.

C. Category 3--Other

This category includes preseason management measures, in-season adjustments, and other matters relative to this FMP which fishery participants believe warrant Council action or attention, and which fall outside the Council's normal schedule for reviewing the FMP. The

CIAC will not review any management decision or action which is concurrently being reviewed through the appeals process as outlined in Chapters 9 and 10. Such requests for review shall clearly identify the management measures to be reviewed and shall contain a concise statement of the reason(s) for the request.

The CIAC shall function similarly to the Council's "Interim Action Committee." The CIAC shall consider each request for review to determine whether the management measure(s) or other relevant matter(s) is consistent with this FMP (including compliance with framework criteria), the Magnuson Act, and other Federal law. Following its review, the CIAC will comment on the appeal in the case of Category 1 and 2 reviews; may determine no action is necessary on the Category 3 request; or, for any of the Categories, recommend the issue to the Council for full Council consideration. In all cases, the CIAC shall issue its findings in writing.

ATTACHMENT 3 - Chapter 9 from the Crab FMP.**9.0 PROCEDURE FOR COUNCIL/SECRETARY OF COMMERCE PARTICIPATION IN STATE OF ALASKA PRESEASON FISHERIES ACTIONS AND NMFS REVIEW TO DETERMINE CONSISTENCY OF THE REGULATIONS WITH THE FMP, MAGNUSON ACT, AND OTHER APPLICABLE FEDERAL LAW****9.1 Prior to the Board Meeting.**

Commencing on the date the Secretary approves this FMP, and until the next regularly scheduled Board meeting concerning crab regulations, any member of the public may appeal any existing regulation to the State¹ and, if unsuccessful, to the Secretary, and any Alaska Statute to the Secretary, in accordance with the procedure set forth below. Secretarial review is limited to whether the challenged statute or regulation is consistent with the FMP, the Magnuson Act, and other applicable Federal law.

9.2 At the Board Meeting.

Before the meeting of the Board (the Board meeting presently takes place every other year in March or April), the public has an opportunity to petition the State for new regulations or repeal of existing regulations. Copies of all proposals will be available to the public and to NMFS and the Council. Representatives of NMFS, NOAA's Office of General Counsel, and the Council will meet with the State and will participate in the State's discussions and deliberations for the purpose of assisting the State in determining the extent to which proposed management measures fall within the scope of the FMP, the Magnuson Act, and other applicable Federal Law. However, these representatives will not vote on the various management measures.

9.3 After the Board Meeting.

After the meeting, the procedure for review of the resulting crab regulations follows two paths:

First, under the State Administrative Procedure Act (described in Appendix C) an interested person may petition the Board for the adoption or repeal of a regulation. A member of the public who objects to a crab regulation must first appeal through this procedure and must receive an adverse ruling which will be reviewed by the CIAC prior to the appeal being reviewed by the Secretary. The CIAC will have no authority to grant or reject the appeal, but shall comment upon the appeal for the

¹ Current Board policy limits petitions to the subject of conservation emergencies.

benefit of the Secretary. An appeal to the Board is not limited to a challenge that the proposed regulation is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law. The Secretary will, however, consider only challenges to regulations alleging that the new regulations ARE INCONSISTENT WITH THE FMP, THE MAGNUSON ACT, OR OTHER APPLICABLE FEDERAL LAW. The Secretary will not respond to comments that merely object to a regulation or state that an alternate regulation is better unless the interested person ties the objection to the appropriate standard of review. This will allow the Secretary to disregard frivolous comments and to encourage interested persons to participate fully in the State procedures before seeking Secretarial intervention. Nothing in this FMP is intended to limit any opportunity under the State Administrative Procedure Act for an interested person to seek judicial review of regulations.

The second path of review will be a Secretarial review of the measures adopted by the Board. During this review, the Secretary will review any measure adopted by the Board for consistency with the FMP, the Magnuson Act, and other applicable Federal law. The Secretary will also consider comments submitted by the Council on any measure adopted by the State during the 20 days after the end of the Board meeting. The Secretary may hold an informal hearing, if time permits, to gather further information concerning the regulations under review. The Secretary will consider only comments on WHETHER THE NEW REGULATIONS ARE CONSISTENT WITH THE FMP, THE MAGNUSON ACT AND OTHER APPLICABLE FEDERAL LAW.

If, as a result of its own review, or its review of comments received, or as a result of an appeal of an adverse decision in the State appeal process, the Secretary makes a preliminary determination that a regulation is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law, then the Secretary will:

1. publish in the Federal Register a proposed rule that is consistent with the FMP, the Magnuson Act, and other applicable Federal law, together with the reasons for the rule, and request comments for 30 days, and
2. provide actual notice of the proposed rule to the Council and the Commissioner of ADF&G. The State will have 20 days to request an informal hearing.

If, after reviewing public comments and any information obtained in an informal hearing, the Secretary decides that the State regulations in question are consistent with the FMP, the Magnuson Act, and other applicable Federal law, the Secretary will publish in the Federal Register a withdrawal of the proposed rule, and so notify the State and the Council.

If the State withdraws the regulation or states that it will not implement the regulation in question, the Secretary will publish in the Federal Register a withdrawal of the proposed rule. The State may choose to withdraw its rule as a result of its own appeals procedure or because of the review procedure set up under this FMP.

If, after reviewing public comments and any information obtained in an informal hearing, the Secretary decides that the regulations in question are inconsistent with the FMP, the Magnuson Act, or other applicable Federal law, the Secretary will publish in the Federal Register a final rule that supersedes the State regulation in the EEZ. Such rules are Federal regulations, which will comply with Federal rulemaking procedures and be enforced as Federal law.

If preseason changes are made at a Board meeting which takes place later in the year than anticipated here, or if there is not time to follow the procedure described in this chapter so that any final Federal rule that may be necessary can be effected in a timely fashion, the Secretary will notify the Council and the Commissioner of ADF&G that he will use an expedited review procedure, possibly including deletion of the requirement for initial appeal to the State, and explain what the procedure is. In the expedited review, the Secretary will provide for comment by the Council (or a committee of the Council) and the Commissioner of ADF&G if at all possible. However, if necessary, the Secretary can immediately publish in the Federal Register an interim final rule that supersedes in the EEZ any State regulation that the Secretary finds is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law, and ask for comments on the interim final rule.

ATTACHMENT 4 - Chapter 10 from the Crab FMP**10.0 PROCEDURE FOR APPEAL TO THE SECRETARY OF COMMERCE TO SET ASIDE AN IN-SEASON ACTION OF THE STATE**

For the purposes of this section, an in-season appeal is an appeal of any action by the State, other than an action taken by the State that NMFS had already reviewed in the process described above. It includes an appeal of an action of the Board, of the ADF&G, or of the State legislature. The in-season appeal process is limited similarly to the preseason review process, in that THE SECRETARY WILL ONLY CONSIDER APPEALS THAT THE STATE REGULATION IS INCONSISTENT WITH THE FMP, THE MAGNUSON ACT, OR OTHER APPLICABLE FEDERAL LAW. For example, where State in-season, discretionary action is alleged to violate a Magnuson Act National Standard, a management measure fixed in the FMP, or fails to follow the criteria set forth in the FMP for a decision under a frameworked management measure, an appeal to the Secretary would be appropriate. The Secretary will not consider appeals that merely state that the appellant does not like the regulation or prefers another. The latter argument is to be presented to the State.

If a person believes that an in-season action of the State is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law, the person must, within 10 days of the issuance of the in-season action, submit to the Secretary in writing a description of the action in question and the reasons that it is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law. The Secretary will immediately provide a copy of the appeal to the CIAC and the Commissioner of ADF&G. The Secretary will, to the extent possible when reviewing any appeal of an in-season management decision, communicate with the CIAC in advance of making his decision whether to grant or reject the appeal in order to solicit the CIAC's and the Commissioner's comments on the management decision at issue. If time permits, he will allow them 5 days for comment on the appeal. If the Secretary determines that there is not sufficient time available for this review, he will seek comments by telephone from the Commissioner of ADF&G and from the Council.

State crab regulations grant certain rights to appeal in-season area closures. An interested person may wish to pursue State appeal procedures along with the procedure described here.

If, after review of the appeal and any comments from the Commissioner of ADF&G and the Council, the Secretary determines that the challenged action is consistent with the FMP, the Magnuson Act, and other applicable Federal law, he will so notify the appellant, the Commissioner of ADF&G, and the Council.

If, after review of the appeal and any comments of the Commissioner of ADF&G and the Council, the Secretary finds that

the in-season action is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law, and that for good cause he must immediately issue Federal regulations that supersede State regulations in the EEZ, he will publish in the Federal Register the necessary final Federal rule and request comments on the rule.

If, after review of the appeal and the comments of the Commissioner of ADF&G and the Council, the Secretary makes a preliminary determination that the action is inconsistent with the FMP, the Magnuson Act, or other applicable Federal law, but that Federal regulations that supersede the State regulation in the EEZ need not be implemented immediately, he will follow the procedure for preseason actions (see Chapter 9). That is, he will publish a proposed rule in the Federal Register and request comment, provide the State with an opportunity for an informal adjudicatory hearing, and either withdraw the proposed rule or publish a final rule that supersedes the State rule in the EEZ. This would be a Federal action and would comply with Federal rulemaking procedures.

LES N. MULLAVEY
 *RICHARD L. PROUT, P.C.
 **HENRY W. GRENLEY
 ALAN K. FOE, P.S.
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January 11, 1995

Richard B. Lauber, Chairman
 NORTH PACIFIC FISHERY MANAGEMENT COUNCIL
 P.O. Box 103136
 Anchorage, AK 99510

RE: F/V EMERALD SEA;
 SCALLOP VESSEL MORATORIUM

Dear Mr. Lauber:

We write on behalf of our client, MAR PACIFICO, INC., the current owner of fishing vessel EMERALD SEA, formerly the SMARAGD. The purpose of this letter is to provide some of the reasons why the proposed criteria for the Scallop Moratorium should be modified (1) to include the EMERALD SEA as a qualifying vessel ("qualifying vessel criterium" herein) and (2) to provide that any permit for which the EMERALD SEA may qualify be issued to the current vessel owner ("qualifying owner criterium" herein).

We, additionally, respectfully provide a list of alternative qualifying criteria that would allow the EMERALD SEA to be deemed a qualifying vessel and/or the current vessel owners. We provide these alternatives with the awareness that the Council wishes to limit the number of issued permits and that, on the other hand, the Counsel has access to the vessel catch information necessary to structure qualifying vessel and owner criteria to include the EMERALD SEA in the Scallop moratorium.

I. WHY EMERALD SEA IS ENTITLED TO QUALIFYING VESSEL STATUS.

A. Historical Participation in Scallop Fishery.

The EMERALD SEA was designed by John Gilbert and built on the East Coast for the East Coast Scallop Fisheries in 1966. The vessel first came to Alaska in 1968 and participated in the Scallop fishery almost yearly until 1976. During this period of time, the EMERALD SEA was one of only a few vessels that persevered and engaged seriously in the Alaskan Scallop Fisheries.

The vessel was bought in 1988 by the North Pacific Trawl Fisheries Anchorage Alaska Partnership. In 1989 and 1990, the vessel again participated in the Alaska Scallop Fishery. Unfortunately, in July of 1990, the engine room of the EMERALD SEA flooded. The then owners of the vessel did not repair the damage caused by the engine room flooding. As a result, the vessel sat in Kodiak inactive until the owner filed Bankruptcy and the vessel was repossessed by the financing institution in February of 1991.

The financing institution purchased the vessel at the Marshal's Sale and the current owner purchased the EMERALD SEA from the bank in January of 1992. The current owner purchased the vessel to engage in the Scallop fishery. The vessel was advertised as a Scalloper and its past participation in the fishery was a significant factor in its decision to expend \$175,000.00 on the vessel. It was and remains incomprehensible to our client that a vessel with such a long and substantial involvement in the Scallop fishery might somehow be denied access under any Moratorium criteria.

We understand that the Scallop Moratorium concept was initially proposed to prevent the overdevelopment of the fishery, namely, by disallowing entry into the fishery to present East Coast scallopers. The EMERALD SEA is not a present East Coast scalloper contemplating new entry into the Alaska Scallop fishery. It is an Alaskan scalloper. We respectfully submit that any qualifying criteria that exclude the EMERALD SEA from eligibility are unjust and arbitrary.

B. Present Criteria Not in Two Proposed Options.

Interestingly, at the September 1993 Meeting, according to the October 5, 1993, Newsletter, the Council was still analyzing two "preferred Moratorium options". Under one of the proposed alternative "preferred Moratorium options", "vessels must have participated (made landings) in either 1991 or 1992, or must have participated for at least four years between 1980 and 1993". On the other hand, the second alternative option would qualify "any vessel which made landings in either 1990, 1991, 1992 or 1993 through July 31".

The Council did not finally approve the qualifying criteria under the Moratorium until April 1994 at which time it accepted neither of the two previously mentioned alternatives, but rather a hybrid of both, deleting landings made in 1990 from the list of qualifying criterion, and extending the 1993 cut-off date.

The EMERALD SEA would have qualified under the proposal that included 1990. According to the Council staff, including 1990 in the qualifying vessel criteria would increase the total eligible vessels by four vessels. On the other hand, the Council extended the 1993 deadline, thereby including four additional eligible vessels.

Apparently, the Council's reason for doing this was that the four additional vessels were Cook Inlet only vessels. Our client does not take exception to the inclusion of the four additional Cook Inlet vessels; but question whether (1) the biological impact of four vessels in Cook Inlet on the Cook Inlet stocks would not be greater than the impact of four additional 1990 vessels on the Scallop stocks in the rest of Alaska.

Furthermore, if the Council is concerned about the biological impact of the four 1990 vessels on the fishery they can limit eligibility to only to those 1990 vessels with significant prior (1968-1993) catch history.

Our client also is concerned that the Council's 1980 cut-off date was selected without due consideration of historical participation in the fishery. The requirement of four years of landings from 1980 through 1993 appears arbitrary. First, as a result of the second criterium for one delivery in 1991-1993, the effective period to qualify under the first criterium is 1980-1990. In other words, to qualify an earlier vessel had to fish four out of a possible ten years; considerably a greater burden than the single delivery requirement for 1991. Furthermore, the Council fails to consider the number of historical deliveries. We would respectfully submit that a vessel that makes numerous deliveries in 1989 and 1990, or years of deliveries during 1968-1976, is more entitled to a permit than a vessel that makes one delivery in 1991 or 1992. This is especially true in the case of the EMERALD SEA. The engine room had flooded. The owners were in Bankruptcy. The bank had foreclosed and purchased the vessel at the Marshal's sale. It could not have been fished during 1991 and 1992.

According to Council staff information, only one vessel qualifies under the four-year catch criterium. In other words, the proposed criteria give the impression that the Council perhaps afforded undue weight to new participants in the fishery.

II. WHY QUALIFYING OWNER CRITERIUM SHOULD BE CHANGED.

We have been advised by responsible personnel that the Council originally intended to issue the Scallop permits to the current owner of the vessel. Apparently at its April 1994 meeting, the Council changed its mind and proposed that the permit for a qualifying vessel be issued to the most recent owner of a qualifying vessel during the period of time it made qualifying landings, even though that person may no longer own the vessel or be currently involved in commercial fisheries.

This criterium was adopted upon the request of a prior scallop vessel owner that had sold his vessel and had not made qualifying deliveries with his new vessel. Of the approximately 19 qualifying vessels, in all but one the owner during the time of the last qualifying delivery is also the current owner. The only exception, was the person on whose request the original proposal

was changed. However, in changing the proposal to the current proposal, the Council excluded one vessel that would have been eligible prior to the change. If the EMERALD SEA is deemed a qualifying vessel, the proposed change would also affect our client's right to receive a permit.

Our client does not wish to dispute whether the vessel owner benefiting by the proposed change is entitled to receive a permit. Its concern is that the proposal be modified to allow a permit claimant to argue its right to a permit on the basis of its current ownership of the vessel. Practically speaking, even if the Council issued permits to both the current owner and the last "qualifying" owner, and the EMERALD SEA was included, the total number of permits issued would increase by three. However, if the permit is issued to only those currently owning a commercial fishing vessel, the Council would avoid the unfair windfall to those no longer in any commercial fishery.

Basically, our client wishes the Council to adopt whatever proposal regarding qualifying ownership as it deems fairly deals with those ready and able to participate in the fishery. Specifically, the Council must give tit for tat. If the proposal is changed to include a particular case, it should act responsibly and fairly to make sure that the change so implemented does not negatively impact another permit claimant.

III. ALTERNATIVES TO QUALIFYING VESSEL CRITERIA.

Tempered by the caveat that the Council has the access to the data to most efficiently draft proposals to include the EMERALD SEA as a qualifying vessel and its current owners as qualifying owners, we respectfully submit the following alternatives to the proposed criteria:

1. Allow for permit claimant to receive permit under special circumstances, taking into account historical (1968-1993) participation in the Scallop fishery (greater than 6 years and/or more than a specific number of landings) and legal proceedings;
2. Include the year 1990 as originally proposed;
3. Include the year 1990, providing vessel had significant prior catch history;
4. Participation for a specific number (for example, 6 years) of years from 1968-1993;
5. Deliveries in two years from 1989 to 1993;
6. Special exception for EMERALD SEA;

7. The Council has access to the relevant data, it may propose whatever criteria it deems appropriate as long as the EMERALD SEA and its current owners are issued a permit.

8. Issue permit to either current vessel owner or last qualifying owner, whichever is still participating in the North Pacific commercial fisheries, and to both if both are still participating.

9. Issue permit to both; and

10. Issue permit to current vessel owner, allowing the last qualifying owner to appeal for an additional permit on the basis of current participation in the Scallop fishery.

CONCLUSION.

The EMERALD SEA is a pioneer vessel in the Alaskan Scallop fishery. It was designed as and continues to be a Scallop vessel. It has delivered only Scallops since 1989. We suggest that during the period 1968 to present the EMERALD SEA made more significant Scallop deliveries than most of the vessels otherwise "qualifying" under the proposed Moratorium. Moreover, the current vessel owner purchased the vessel in reliance on and with the full expectation the vessel was and would remain eligible for participation in the Alaska Scallop Fishery. Manifest injustice would occur in the event the Council fails to, through whatever means available to it, include the EMERALD SEA as a qualified vessel and its current owners as qualifying owners under the proposed Moratorium.

Very truly yours,



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TW/kfs

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