

Executive Director's Report

New Council Members

We welcome back Council members Wally Pereyra and Robin Samuelson for three more fast-paced years. The staff looks forward to working with you both over the coming years. Also, we want to officially welcome CAPT Vince O'Shea, USCG. He takes over where CAPT Anderson left off. Vince has lots of experience up here already, knows the issues, and will hit the decks running. Welcome aboard.

Nominations to AP/SSC

Just a reminder that we will be calling for nominations to the AP and SSC following this meeting. The Council will review nominations in December for one-year terms for each committee. The Pacific Northwest Crab Industry Advisory Committee does not come up again until next year because they are on two-year terms.

Council Chairmen's Meeting

The Council Chairmen met in San Diego, July 9-11. Chairman Lauber and Vice-Chairman Pereyra both attended along with several staff members. It was a very good meeting and we had a chance to air concerns with Rollie Schmitten and others on NMFS and NOAA GC staff. At the meeting, we reviewed pending changes to the Magnuson Act and heard reports from Larry Snead on international activities and from RADM Norman Saunders on Coast Guard activities.

I think that one of the most significant actions at the meeting was that Rollie Schmitten made a personal commitment to strengthen NMFS' partnership with the councils as stewards of the nation's marine fisheries. He said that he would stop further processing of the fishery management plan withdrawals until he could consult with the councils involved, and, after the meeting, he provided out of NMFS' budget, about \$2.2 million to the councils' budgets to see them through October, November and December this year, in order to shift our budget from the federal fiscal year to a calendar year basis. This should help us avoid the instability that accompanied last year's budget battles that closed down various federal agencies for periods of time and kept us on the edge of our seats over whether or not a council meeting would take place as scheduled. To further enhance communication with the councils, Rollie proposed to meet more often with council chairmen during the year, and will partially reimburse such travel as required. Chairman Lauber attended the first of those meetings in Washington, D.C. on September 5th.

Salmon Plan Withdrawal Update

The saga of the proposed salmon plan withdrawal continues. Upon our request, Jay Johnson, NOAA GC, provided for the Council Chairmen's meeting in July, a legal opinion on the Secretary's authority to withdraw a plan (item B-1(a)). He basically concluded that the Secretary could do so if there was something illegal about the plan, and under other circumstances. The Council Chairmen agreed that they would seek an independent legal opinion. Then Rollie Schmitten, to his credit, offered to cease and desist on the plan withdrawals and work the proposals back through the individual Councils. Chairman Lauber, Steve Pennoyer and I had a teleconference with Rollie on August 29 and indicated that there were still several issues outstanding on withdrawing our salmon plan, such as whether it was needed to set harvest levels and control the fishery if the Pacific Salmon Treaty were to be abrogated, and how ESA consultations would be carried out between the state and the federal government if the ability to consult under section 7 were removed by withdrawal of the plan.

We indicated that we would be willing to bring it before the Council in February 1997, hopefully with some of the issues more fleshed out by NMFS, then go to public review in March, and have a final decision by April. That

means that the State could manage the fishery as they do now under Section 7 consultation for the 1997 fishery, and if the Council decided to let the plan go, the State would have considerable lead time to prepare management and ESA consultation for the 1998 fishery. Rollie indicated that he had wanted to make a decision on the whole issue by mid-September, but we have not heard any further on his decision. If the manager's amendments go through to the Magnuson Act and become law, the Secretary will not be able to withdraw a plan without a three-quarters vote by the Council. So we are in a wait and see mode on this issue. I will keep you posted.

Industry Supports Research

Item B-1(b) is a letter from Paul MacGregor describing how the industry contributed to charter the F/V Great Pacific to conduct cooperative research with NMFS in the Gulf of Alaska this summer. This is a real bright spot in industry cooperation in supporting research and is highly commendable. A list of contributors to the research is appended to the letter. Good work!

Joint Meeting with Board of Fisheries

ADF&G is proposing that we hold our annual meeting with the Alaska Board of Fisheries on February 4, 1997 when we meet in Anchorage. Item B-1(c) is a draft agenda. Unless there are concerns with that particular date, I will go ahead with arranging the meeting and have an update for you in December.

Protection of Seabirds

NMFS has written to us about seabird interactions with North Pacific fisheries. In their letter under item B-1(d) they explain that a main area of concern is with the take of short-tailed albatross by longliners. NMFS would like to work with vessel operators to voluntarily work toward reducing seabird takes so that new regulations are not needed. They are seeking any information that is available from industry and resource managers on how to reduce the likelihood of incidental takes. Key contact person in NMFS is Andrew Grossman at (907) 586-7358.

Washington State vs CDQs

On September 4, 1996 Judge William Dwyer of the United States District Court for the Western District of Washington denied the State of Washington's motion for a temporary restraining order or a preliminary injunction. The State of Washington filed a lawsuit on August 20, 1996 alleging that the Secretary of Commerce was violating Section 210 of the U.S. Department of Commerce and Related Agencies Appropriations Act of 1996 (Act). Section 210 of the Act states that "(n)one of the funds appropriated under this Act or any other Act may be used to develop new fishery management plans, amendments, or regulations which create new individual fishing quota" On June 17, 1996 NOAA/NMFS published in the Federal Register an interpretive rule that excluded Community Development Quotas (CDQs) from the term "individual fishing quota" under Section 210. Pursuant to that interpretation, NOAA/NMFS has continued work on a proposed multispecies CDQ program recommended by the North Pacific Fishery Management Council in June 1995. The State of Washington sought a declaratory judgment, a preliminary injunction and a temporary restraining order to prohibit NOAA/NMFS from working on the proposed rule for the multispecies CDQ program for the remainder of fiscal year 1996 (through September 30, 1996).

Magnuson Act Update

Item B-1(e) is a comparison of H.R. 39, S. 39, and manager's amendments to the Magnuson Act, prepared by the NMFS Office of Legislative Affairs. The latest I have heard is that the amendments will come up in the Senate by the end of September or early October, according to a news article quoting Trent Lott. Under staff tasking, D-4, I will describe a few chores our Council will have as a result of the revisions proposed in S. 39.

December Council Meeting and 20th Anniversary Celebration

Our December meeting will be at the Anchorage Hilton Hotel the week of December 9. The Council will likely start on Wednesday, December 11, the AP and SSC on Monday, December 9. I imagine the Council meeting will go at least through Sunday, but will have a better idea of the scope of the agenda after this September meeting.

Here's another reminder that we will be celebrating twenty years of conservation and management under the Magnuson Act on the evening of December 11 at the Anchorage Hilton Hotel. It will be a mega-event with dinner, prominent speakers, and a fine orchestra. I will be sending out a bulletin in October to the whole council family, all ex-council members, and the public to determine how many want to attend the dinner. It will be a memorable night, and I hope it will be well attended.

Meeting Schedule for 1997 and 1998

Remember in your planning that the first meeting in 1997 is in early February, not in mid-January as in the past. This will definitely give us more time to prepare for the meeting, and it provides a good separation between the December, February, and April meetings. The annual schedules for 1997 through 1999 are as follows. Note that we have a problem with Sitka in June 1998. We have had a request to substitute Unalaska for that meeting. Any comments?

Meeting Schedules - 1997-99


	February Week of/ Location	April Week of/ Location	June Week of/ Location	September Week of/ Location	December Week of/ Location
1997	3/Anchorage	14/Anchorage	16/Kodiak	22/Seattle	8/Anchorage
1998	2/Anchorage	20/Anchorage	15/Sitka	21/Seattle	7/Anchorage
1999	1/Anchorage	19/Anchorage	14/Kodiak	20/Seattle	6/Anchorage

alaska?
how much to cancel Hilton for Feb mtgs?



July 8, 1996

MEMORANDUM FOR: Rolland A. Schmitten
Assistant Administrator for Fisheries

FROM: Jay S. Johnson 
Deputy General Counsel

SUBJECT: Legal Opinion regarding the Secretary's
Authority to Withdraw Approval of
Unnecessary Fishery Management Plans

Questions Presented:

- (1) If the Secretary of Commerce concludes that a previously approved fishery management plan (FMP) is no longer necessary for the conservation and management of a fishery, may the Secretary act to rescind the FMP and its implementing regulations?
- (2) What obligation does the Secretary have to involve the cognizant Regional Fishery Management Council in making the decision to rescind an FMP?

Answers:

- (1) Yes; the Secretary has the obligation periodically to review all Federal regulations issued by the Department of Commerce. Upon determining that a particular FMP is no longer necessary for the conservation and management of a fishery, the Secretary has three options for rescinding an FMP. Failure to rescind a Magnuson Act regulation that is no longer necessary could place the Secretary in violation of national standard seven.
- (2) Depending upon the circumstances, the Secretary can (a) instruct the appropriate Council to prepare an amendment rescinding the FMP; (b) prepare, and submit to the appropriate Council for consideration and comment, a Secretarial amendment rescinding the FMP; or, (c) publish a proposed rule advising the appropriate Council and the general public that approval of the FMP and its implementing regulations is being withdrawn; following a brief comment period, a final rule would be published to remove the regulations from the Code of Federal Regulations (CFR).



Background: As part of the President's regulatory reform initiative¹, the National Marine Fisheries Service (NMFS) identified six FMPs and their implementing regulations as candidates for elimination. Federal regulation of those fisheries is arguably no longer necessary because individual states or the Atlantic States Marine Fisheries Commission could adequately provide necessary conservation and management for the six fisheries.²

There are three possible statutory sources of authority for the Secretary to rescind an FMP if it is determined unnecessary -- a request to the appropriate Council to prepare an amendment rescinding the FMP, a Secretarial amendment, or a Secretarial decision to withdraw approval of an FMP. Although all three processes would involve the Councils to varying degrees, some Councils have questioned the Secretary's authority to withdraw approval of an FMP without either Council concurrence or acquiescence. The following analysis of the Magnuson Act, its legislative history, and other applicable law, responds to the Councils' concern.

1. Statutory Text

The following statutory provisions assign to the Councils and the Secretary of Commerce a continuing duty to ensure that all FMPs meet the seven national standards for fishery conservation and management set out in Section 301 of the Magnuson Act, 16 U.S.C. 1851. The words highlighted in boldface type suggest that Congress expected the Councils and the Secretary to regulate only

¹On March 4, 1995, President Clinton directed the heads of all Federal agencies "to conduct a page-by-page review of all agency regulations and to eliminate or revise those that are outdated or otherwise in need of reform." In the review process, the agencies were required to answer a number of questions, including the following: "Is this regulation obsolete?" And, "Could the States or local governments do the job, making Federal regulation unnecessary?"

²The six FMPs identified as potentially unnecessary cover the following fisheries: salmon off Alaska, anchovy off California, lobster in the northeast, bluefish along the Atlantic coast, stone crab off Florida, and spiny lobster off Florida. The authority of the Atlantic States Marine Fisheries Commission has been significantly expanded by recent legislation, the Atlantic Coastal Migratory Fishery Management Act, 16 U.S.C. 5101 et seq., which requires coastal states to implement interstate fishery management plans adopted by the Commission and authorizes the Secretary of Commerce to adopt complementary regulations for the exclusive economic zone.

when necessary and to consider state management programs in making that determination.

a. Congressional Policy

It is further declared to be the policy of Congress . . . to assure that the national fishery conservation and management program . . . **promotes efficiency; draws upon . . . State . . . capabilities** in carrying out research, administration, management, and enforcement; and is workable and effective; [section 2(c)(3); 16 U.S.C. 1801(c)(3)].

b. National Standards

Any fishery management plan prepared, and any regulation promulgated to implement any such plan . . . shall be consistent with the following national standards for fishery conservation and management:

. . .

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

. . .

(7) Conservation and management measures shall, where practicable, **minimize costs and avoid unnecessary duplication**. [Section 301(5), (7); 16 U.S.C. 1851(6), (7).]

c. Functions of the Regional Councils

Each Council shall . . . prepare and submit to the Secretary a fishery management plan with respect to each fishery within its geographical area of authority **that requires conservation and management** and, from time to time, such amendments to each plan as are necessary. [Section 302(h); 16 U.S.C. 1852(h)].

d. Contents of Fishery Management Plans

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery shall -- (1) contain the conservation and management measures . . . which are -- (A) **necessary and appropriate for the conservation and management of the fishery . . .** and, (C) **consistent with the national standards**, the other provisions of this Act, and any other applicable law;

e. Implementation of Fishery Management Plans

The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act. The Secretary may promulgate such regulations, in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this Act. [Section 305(g); 16 U.S.C. 1855(g)]

The . . . Regulatory Flexibility Act . . . and Executive Order 12291 . . . shall be complied with within the time limitations specified . . . as they apply to the functions of the Secretary under such provisions.

f. Preservation of State Regulatory Authority

[A] state may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State. [Section 306(a)(3); 16 U.S.C. 1856(a)(3)].

g. Relevant provisions of the Regulatory Flexibility Act

Please send me a copy of review period

(a) Within 180 days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small agencies . . . The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded. . . The plan shall provide for the review of all such agency rules . . . within ten years.

(b) In reviewing rules . . . the agency shall consider the following factors -- (1) the continued need for the rule; . . . (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules. . .

2. Secretarial Guidance on Unnecessary Federal Regulations

The Magnuson Act also directs the Secretary to issue guidelines for interpretation of the Act's seven national standards. First published in 1983, the current guidelines appear in Chapter 6, Title 50, Code of Federal Regulations (CFR). The following sections are relevant to the issue of the Councils' and the Secretary's duty to avoid unnecessary or duplicative Federal

regulations.

Necessity of Federal management--

(1) General. The principle that not every fishery needs regulation is implicit in this standard. The Act does not require Councils to prepare FMPs for each and every fishery -- only for those where regulation would serve some useful purpose and where the present or future benefits of regulation would justify the costs. . . . In some cases, the FMP preparation process itself, even if it does not culminate in a document approved by the Secretary, can be useful in supplying a basis for management by one or more coastal States.

(2) Criteria. In deciding whether a fishery needs management through regulations implementing an FMP, the following general factors should be considered, among others:

. . .

(iii) The extent to which the fishery could be or is already adequately managed by States, by State/Federal programs, by Federal regulations pursuant to FMPs or international commissions, or by industry self-regulation, consistent with the policies and standards of the Act.
[50 CFR 602.17]

. . .

NOAA believes that the requirements of E.O. 12291 and other regulatory reform legislation quite appropriately focus attention on the threshold question of the actual need for management through regulations. Even when a Council believes there is an advantage to managing a fishery, growing public concern over excessive Federal regulation of private activities and over the need to reduce the cost of government emphasizes the responsibility to ensure that FMPs are developed only for those fisheries where the need for Federal regulation can be clearly demonstrated. . . .
[50 CFR 602, appendix]

3. Legislative History

The following discussion cites passages from A Legislative History of the Fishery Conservation and Management Act of 1976 (LH)³ that bear on the issue of what fisheries would be regulated by the Federal government and what functions would be

³Published by the National Ocean Policy Study, Committee on Commerce, United States Senate, October, 1976.

performed by the Councils and by the Secretary of Commerce.

As introduced, January 15, 1975, H.R. 200 did not provide for Regional Councils. It merely asserted U.S. fishery management authority and provided authority for the Secretary to issue necessary regulations. [LH 1163]

As reported, August 20, 1975, H.R. 200 provided for seven Councils. Section 302 of the bill provided that "the Secretary shall manage all fisheries . . . in accordance with a management plan prepared pursuant to section 304 for such fishery." [LH 1060]

Congressman Leggett:

Mr. Chairman, the highlights of this bill -- which would regulate all species of fish, except highly migratory species . . . -- are as follows: . . . Creation of seven regional marine fisheries councils to assist the Secretary of Commerce in developing regional management plans and regulations. [LH 838]

We believe that ultimate authority must rest in the Federal Government. . . The initiative for management plans will come from the regional councils on which adequate State representation has been provided. . . they are the bodies expected to develop the management plan. Only if they fail to do so . . . can the Secretary of Commerce then act without the concurrence of the Council concerned. [LH 843-844]

Mr. Shields expressed concern . . . that the ultimate authority rests with the Secretary . . . or that the Secretary could veto a Council's plan without some authority to override the Secretary's veto. . . The committee was well aware of the concerns expressed by Mr. Shields. . . However, after much deliberation, it was determined by the committee that the only workable solution was to have the final say-so over any matter lie with the Federal Agency concerned with such matters. However, . . . the committee intends for the Secretary of Commerce to make every effort to see that whenever possible the views of the States or the Councils are honored. [LH 845-846]

Congressman Ruppe:

The councils, . . with expert advice and assistance from the Secretary of Commerce acting through the National Marine Fisheries Service, will develop management plans as needed on a species-by-species basis. [LH 899]

Congressman Studds:

[The] bill also establishes a structure of regional fisheries management councils charged with responsibility for adopting conservation and management plans for each depleted or threatened species of fish. [(LH 907]

During floor debate several amendments to H.R. 200 were offered, one of which would have altered the balance of authority between the Secretary and the Councils "to require that management plans must have the consent of the regional councils before implementation." This amendment was rejected after the following remarks by Congressman Treen:

The Secretary of Commerce is the czar under the fisheries management program of this bill, because under section 305(d), the Secretary of Commerce may disapprove plans brought in by the Regional Fisheries Councils. [LH 997]

Congressman O'Neill:

The seven regional councils to be established under this legislation will, under the supervision of the Secretary of Commerce, promulgate management plans to conserve and protect fisheries. [LH 1010]

House Report 94-455, on H.R. 200, as adopted.

The Committee would like to make it clear that the final decision as to whether a plan is needed or whether a plan will enter into force and effect rests with the Secretary.

As introduced, March 5, 1975, S. 961 authorized the Secretary of Commerce to promulgate regulations necessary to implement the broad purposes of the bill. The bill also established a single Fisheries Management Council composed of three cabinet secretaries and eight Presidential appointees, all subject to Senate confirmation. Constitutionally, this body would have been entirely Federal, similar to the Federal Energy Regulatory Commission.

As reported, September 25, 1975, S. 961 established seven regional councils and authorized them to prepare fishery management plans and submit them to the Secretary for approval. The Secretary's powers were limited to review of the councils' plans for consistency with the national standards and applicable law. If a plan were determined to be consistent, the Secretary was directed to publish proposed and final regulations. Under this version of S.961, however, there was a higher authority -- a National Fishery Management Review Board which could resolve not only disputes between the Secretary and the Councils but also could resolve grievances of persons adversely affected by any

Secretarial regulatory action or permit decision. Although the Review Board did not survive the legislative process, some of the floor statements in the Senate as to the relative powers of the Councils and the Secretary may have been influenced by the authority they assumed the Review Board would exercise to step in, if necessary, to protect fishermen from excessive regulation.

Senator Stevens:

I want to set up a mechanism by which the people of the region affected can select those whom they think are capable of managing their fisheries. . . Those managers will comprise the regional council. . . I want to emphasize, as far as I am concerned, we are not talking about an economic matter. We are talking about a limit on the taking of those species when it is necessary from a biological point of view for their protection. We are talking only about conservation and the protection of the species involved.
[LH 368]

Senator Magnuson:

The bill creates semi-independent regional fishery management councils to draw up management plans and to recommend regulations for the management of fisheries within their regions. Recommended management regulations are sent to the Secretary of Commerce for his evaluation. If these management measures are consistent with the specific management standards contained within the Act, then the Secretary must promulgate them. [LH 454]

The following colloquy between Senator Stevens and Senator Gravel refers to the balance of authority between the Councils and the Secretary. [LH 492-495]

Senator Gravel:

Just for my own edification, on decisions between the Secretary and the council, which is more binding? Is the council an autonomous group that can go out and make decisions or do they make decisions and then recommend them to the Secretary?

Senator Stevens:

They recommend regulations. They become Federal regulations by virtue of approval by the Secretary and promulgation.

Senator Gravel:

What I am trying to drive at is can the council -- suppose there is a disagreement between the council and the

Secretary. Whose views would prevail?

Senator Stevens:

Well, that would depend on the circumstances and, as a practical matter, the Secretary would not have to promulgate them if he disagreed with them, but there would be a potential for review by the Fisheries Management Review Board if there was a dispute.

Senate Report 94-515, on S. 961, as adopted:

Seven Regional Management Fishery Councils would be established and empowered to recommend management plans and regulations to the Secretary of Commerce. The Secretary of Commerce is authorized to regulate fisheries within the expanded U.S. jurisdiction to "prevent overfishing, rebuild overfished stocks, and insure conservation." [LH 571]

Conference Committee:

The two bills underwent considerable modification in conference and the conference committee report mostly either restates the resulting statute or even misstates the statute. For example, the conference committee summary states that FMPs would be prepared and implemented "with respect to any fish over which the United States exercises exclusive fishery management authority" [LH 73] whereas the actual text of the statute provides discretion to both the Councils and the Secretary to determine whether a fishery "requires conservation and management" before either must develop an FMP and implementing regulations.

On the issue of concern to Senator Gravel, the bill that emerged from conference maintained the Secretary as the final authority, by dropping the Fisheries Management Review Board, leaving judicial review as the only method for challenging a Secretarial decision to approve or disapprove a Council recommendation. [See Joint Explanatory Statement of the Committee of Conference, LH 91.] On the other hand, the Secretary's powers of oversight were to be limited, as in the Senate bill, by strict reference to the national standards and other applicable law. In other words, while the Secretary would hold final authority to approve or disapprove Council FMPs, that authority would be used solely to prevent a violation of Federal law.

4. Past Agency Practice

Since the passage of the Magnuson Act in 1976, there have been numerous instances in which the Councils have abstained from recommending Federal regulations for various fisheries, in part, because existing State or interstate regulatory programs were

believed to provide adequate conservation and management of those particular fisheries. Along the east coast, the fishery for northern shrimp is regulated by the Atlantic States Marine Fisheries Commission, an interstate compact. Many other species are regulated only by the coastal states. On the west coast, Dungeness crab, shark and swordfish are regulated by the coastal states. Thus, the Federal practice of deferring management of some fisheries to State or interstate agencies is well recognized.⁴

There is also one instance of Secretarial withdrawal of approval of a Council-prepared FMP. The fishery management plan for Atlantic herring was prepared by the New England Council and approved by the Secretary of Commerce in 1978. After a few seasons, however, it became apparent that one of the assumptions underlying the Secretary's approval was invalid. The State of Maine had refused to adopt complementary regulations for its portion of the fishery. Since the fishery was predominately conducted within state boundaries, the Secretary lacked the authority to apply Federal regulations within state boundaries. Under these circumstances, the Secretary chose to notify the Council and the general public that approval of the FMP would be withdrawn. A proposed rule to repeal the FMP's implementing regulations was published followed by a final rule removing the regulations from the CFR.

5. Judicial Guidance

Although there are no cases directly addressing the Secretary's obligation or authority to rescind an FMP once it has been determined to be unnecessary, several cases support the conclusion that the Secretary, rather than the Councils, is the final authority when it comes to fishery regulations.

⁴Although it is relevant to final agency action to rescind any of the six candidate FMPs or their implementing regulations, it is not the purpose of this memorandum to revisit the issue of whether particular states have sufficient authority to regulate fisheries conducted in whole or in part beyond their borders, when not in conflict with Federal law or regulations. NOAA supports the authority of each state to regulate vessels registered under state law as provided in Section 306(c) of the Magnuson Act, 16 U.S.C. 1856(c), and the two leading Supreme Court cases which recognized state extraterritorial authority over fishing on the basis of state citizenship, Skiriotes v. Florida 313 U.S. 69 (1941), or the landing of fish within the state, Bayside Fish Flour Co. v. Gentry, 297 U.S. 423 (1936).

In Washington Trollers Assn. v. Kreps⁵, the plaintiffs sought to challenge the Secretary's approval of the Pacific Council's salmon FMP on several grounds. The court held that FMP approval was not reviewable by the courts until final agency regulations were issued by the Secretary.

In Alaska Factory Trawler Assn. v. Baldrige⁶, the plaintiffs had sought to overturn the Secretary's approval of a controversial amendment to the North Pacific Council's groundfish FMP based upon alleged irregularities in the Council's decision-making processes. The court sustained the Secretary.

If the Secretary has followed the appropriate rulemaking procedures and has established a rational basis for his action in promulgating regulations based on the submitted amendment, procedural challenges for irregularities at the Council level will not provide a justification for invalidating the regulations.

In Conservation Law Foundation v. Franklin⁷, plaintiffs charged that the Secretary had exceeded her authority by entering into a consent decree that set a deadline for the New England Council to submit a revised amendment 4 to their multispecies FMP. The consent decree specified that a Secretarial amendment would be issued and implemented if the Council did not submit its own revised amendment by a specified time. The court upheld the Secretary.

Our reading of the statute gives proper deference to the Secretary, who under the Magnuson Act, is ultimately charged with preventing overfishing as mandated by National Standard One. The Councils serve the Secretary by presenting FMPs. The Magnuson Act also unequivocally vests the Secretary with the discretion to determine whether a Council's progress on conservation and management is reasonable.

5. Procedural Requirements

As indicated above, there are at least three methods by which an FMP and its implementing regulations could be eliminated -- by Council amendment, by Secretarial amendment, or by Secretarial action to withdraw approval of an FMP.

⁵466 F.Supp. 309, 312 (W.D. Wash. 1979), remanded on other grounds, 645 F.2d 684 (9th Cir. 1981).

⁶831 F.2d 1456 (9th Cir. 1987).

⁷No. 92-2029, 5th Cir. 1993, an unreported decision.

The Councils do not question their authority, on their own initiative or at the request of the Secretary, to prepare an amendment to an FMP that would amend it out of existence. Such an amendment would be submitted to the Secretary, like any amendment, published for public comment, and reviewed against the national standards and other applicable laws. There is no prescribed period for how much time the Council could take in submitting such an amendment, although the court in Conservation Law Foundation held that the Secretary had discretion to determine the length of time that would be reasonable under the circumstances.

The Councils also do not appear to question the Secretary's authority to issue a Secretarial FMP to eliminate an FMP if the cognizant Council has failed to respond to a request by the Secretary in a reasonable period of time. Under the Act, the Secretary is required to submit a proposed amendment to the Council, together with proposed regulations, and to publish a notice stating that public comments will be accepted for 75 days, prior to actually implementing the amendment and withdrawing the regulations from the CFR.

The Councils do question the Secretary's authority to act in the absence of Council involvement by withdrawing approval and rescinding the implementing regulations. A brief, draft legal analysis prepared by a NOAA regional attorney in 1981 concluded that the Secretary could withdraw approval of the Atlantic herring FMP based upon an administrative determination that the Secretary's approval decision had been based on erroneous information. The regional attorney, however, suggested that an FMP amendment might be required if the basis for rescinding an FMP was changed circumstances; he did not reference the Secretary's broad powers under section 305(g). A copy of this legal analysis is appended to this memorandum.

Section 305(g) provides discretionary authority to the Secretary to promulgate regulations to "carry out any other provision of this Act." 16 U.S.C. 1855. Use of this authority would be governed by the Administrative Procedure Act's usual notice and comment rulemaking procedures, which require publication of a proposed rule, solicitation of public comments, and final action. Under policies of the current Administration, the comment period for informal rulemakings, unless otherwise specified by statute, should be at least 60 days.

In the case of the six FMPs that are candidates for elimination, the agency has already informed the Councils of its intent to eliminate these FMPs and proposed rules to repeal the regulations were published in March, over 90 days ago. Thus, even though the Secretary chose to act under section 305(g) instead of section 304(c), the time that has been available for the Councils to comment on the Secretary's proposed actions has exceeded the

statutory minimum periods for both procedures.

Conclusions

When the statute, the legislative history, the Secretary's guidelines, the Regulatory Flexibility Act and the prior practice of the Councils and the Secretary are read together, there is no doubt that the Magnuson Act directs the Secretary of Commerce to approve FMPs and to issue regulations only when Federal regulations are required to conserve and manage a fishery. The Act directs the Secretary to promote efficiency, minimize costs and avoid unnecessary duplication. Moreover, the Act directs the Secretary to comply with the standards of the Regulatory Flexibility Act when approving FMPs and issuing regulations under the Magnuson Act.

While these statutory standards and specific Congressional instructions to avoid unnecessary or duplicative Federal regulation are initially applicable at the time when an FMP or amendment is forwarded by a Council for Secretarial review, all of the statutory mandates are phrased in the present or future tense; this strongly suggests a continuing authority for the Secretary to address potential violations of statutory standards at any time. Moreover, the Regulatory Flexibility Act explicitly directs the Secretary to periodically review all Departmental regulations that affect small entities and to eliminate those that are no longer necessary and those that overlap, duplicate, or conflict with state regulatory programs.

In the present situation, the Councils and the public have received as much procedural notice of the Secretary's intended course of action, under Section 305(g), as they would have received with a Secretarial amendment, under Section 304(c). Given the breadth of the authority in Section 305(g), there is little likelihood that a reviewing court would overturn a Secretarial decision to withdraw approval of an FMP based upon a sound administrative record that Federal regulations were unnecessary because one or more states or the Atlantic States Marine Fisheries Commission can provide for the conservation and management of the fisheries concerned.

NORTH PACIFIC FISHERIES RESEARCH FOUNDATION

July 16, 1996

Mr. Steven Pennoyer
Regional Director, Alaska Region
National Marine Fisheries Service
Post Office Box 21668
Juneau, Alaska 99802

SENT VIA FAX

Re: Ocean-Carrying Capacity Survey in the Gulf of
Alaska

Dear Steve:

We are pleased to report that the North Pacific Fisheries Research Foundation received adequate contributions to cover the costs necessary to charter the F/V GREAT PACIFIC to conduct a cooperative research program with NMFS in the Gulf of Alaska this summer. Vince Curry (PSPA), Brent Paine (UCB), and I (AFTA) all executed the Vessel Charter Agreement last Friday (July 12) and the research cruise is scheduled to begin early this week. This exercise was made possible by contributions received from a broad-based cross section of the fishing industry. You indicated several weeks ago that you would like to see a list of the contributors, we are pleased to enclose such a list.

We would also like to take this opportunity to compliment the National Marine Fisheries Service for the efforts of the agency's scientific staff in helping to put together this joint research project. Your personnel were cooperative and a pleasure to work with at every point along the way. On behalf of the folks at PSPA, UCB, and AFTA, we hope that the research programs this summer are a great success.

Sincerely yours,



Paul MacGregor

PM:kal

Enclosures

cc: Mr. Brent Paine
Mr. Vincent Curry
Mr. Clarence Pautzke

NORTH PACIFIC FISHERIES RESEARCH FOUNDATION
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D R A F T

Agenda

**Joint Meeting of the
Alaska Board of Fisheries
and the
North Pacific Fisheries Management Council**

**Tuesday, February 4, 1997
Anchorage Westward Hilton
Anchorage, Alaska**

- 1. Bering Sea/Aleutian Islands King and Tanner Crab Management**
 - A. 1996/97 BSAI Crab fishery season updates and stock status**
 - B. Revisions to the BSAI King and Tanner Crab FMP**
 - C. BOF Category 2 Management Measure Proposals**
 - 1) Reduction of the Bristol Bay red king crab size limit**
 - 2) Pot limits for the Adak red and brown king crab fisheries**
- 2. Other Subjects**
 - A. Scallops**
 - 1) FMP Update**
 - 2) Magnuson Act Update**
 - 3) 1996/97 Fishery Updates**
 - B. Gulf of Alaska Groundfish Bycatch Caps for Crab or New Area Closures**
 - C. 1996 Council Crab Action.**
 - 1) BSAI Areas Closed to Protect Crab and Crab Habitat**
 - 2) Implications to State Management from the Council Groundfish and Crab License Limitation Program**
 - c) BSAI Crab Community Development Quota Regulations to Manage allocations**
 - D. State of Alaska Groundfish Regulations**



UNITED STATES DEPARTMENT OF COMMERCE AGENDA B-1(d) E
National Oceanic and Atmospheric Administration SEPTEMBER 1996
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

September 3, 1996



Mr. Clarence G. Pautzke, Executive Director
North Pacific Fishery Management Council
605 West 4th Avenue
Anchorage, Alaska 99501-2252

RE: Seabird Takes in Longline
Fisheries

Dear Mr. Pautzke:

The National Marine Fisheries Service (NMFS) has been working with the U.S. Fish and Wildlife Service (USFWS) over the last few years in an effort to reduce the incidental take of marine bird species in the North Pacific Groundfish Fisheries. We have effectively used information from our observer program to better ascertain the impacts of these fisheries on seabirds. Typically, seabirds are attracted to baited longlines as they are deployed. Seabirds remove bait before it sinks, but are often hooked in the process.

The short-tailed albatross, an endangered species, forages within the Gulf of Alaska and the Bering Sea. Interactions with this species have increased over recent years, and in 1995, two short-tailed albatrosses were confirmed taken in the IFQ sablefish fishery. This take exceeded our allowable incidental take as specified in the 1995 terms and conditions of our Endangered Species Act Section 7 consultation with the USFWS. The annual observed take of other species of seabirds numbers in the thousands (1989-1993 summary enclosed). The circumstances under which most of these seabirds were taken suggest that takes could be significantly reduced. Many vessel operators report that they have never taken seabirds on longline gear, others take birds routinely.

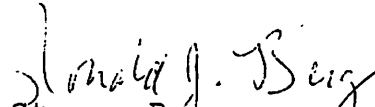
There is a growing interest in this issue by several non-governmental organizations. Some are providing us with technical information from other world fisheries which could reduce takes. Others are seeking regulatory standards to reduce seabird losses. At present, NMFS and USFWS are seeking a reduction in take in cooperation with vessel owners and operators, without pursuit of additional regulations. If measures are taken to reduce bait loss to birds, more hooks will catch fish instead of birds,



benefitting both fishermen and seabirds. In the South Pacific, seabird evasion efforts have decreased bait loss by 70 to 90 percent.

NMFS issues periodic news releases to inform industry of seabird entanglement concerns and provide recommendations for reducing the likelihood of incidental takes. NMFS solicits information and opinions from industry and resource managers on this issue. Our staff contact for seabird issues is Andrew Grossman, Protected Resources Management Division, (907) 586-7358.

Sincerely,

For

Steven Pennoyer
Director, Alaska Region

Enclosure

cc: K. Wohl, E. Robinson-Wilson, USFWS-RO, Anchorage
A. Rappoport, USFWS-ES, Anchorage
P. Gould, NBS, Anchorage
R. Berg, FM
P. Smith, RAM

Observed and estimated take of seabirds in Alaskan and North Pacific West Coast groundfish fisheries, 1989 - 1993. Estimated take is based on simple extrapolation of observed takes to total effort, as measured by portion of total groundfish catch monitored by observers. These estimates are correct only if seabird take is related to catch and constant across fishing times and areas within each region and fishery. All birds in observer samples 1989-1992 were recorded as unidentified bird.

Fishery	Year	Seabird Species	Observed Takes	Observed Effort (Days & metric tons)	Take Rate (/day)	Coverage (% of catch monitored)	Total Estimated Take (variance)	Coeff. Variation
Bering Sea Joint Venture Trawl	1989		0	4,739 d 301,057 mt	0.0000	56.4	0	
Bering Sea Joint Venture Trawl	1990		0	1,375 d 57,018 mt	0.0000	42.7	0	
West Coast Joint Venture Pacific Whiting Trawl	1989		0	2,196 d 134,753 mt	0.0000	66.0	0	
West Coast Joint Venture Pacific Whiting Trawl	1990		0	1,724 d 106,433 mt	0.0000	61.9	0	
Bering Sea Groundfish Longline	1989	Unidentified bird	6	70 d 1,236 mt	0.0857	Not Available	Not Available	
Bering Sea Groundfish Longline	1990	Unidentified bird	3,315	2,687 d 44,531 mt	1.2337	64.8	5,114	
Bering Sea Groundfish Longline	1991	Unidentified bird	9,942	3,979 d 70,358 mt	2.4986	72.4	13,740	
Bering Sea Groundfish Longline	1992	Unidentified bird	2,555	5,323 d 99,325 mt	0.4800	79.8	3,200	

Fishery	Year	Seabird Species	Observed Takes	Observed Effort (Days & metric tons)	Take Rate (/day)	Coverage (% of catch monitored)	Total Estimated Take (variance)	Coeff. Variation
ering Sea Groundfish Longline	1993	<u>Total</u>	5,372	3,943 d 69,761 mt	1.3624	77.3	6,951	
		Unidentified bird	1,203		0.3051		1,556	
		Unidentified albatross	187		0.0474		242	
		Laysan albatross	380		0.0964		492	
		Black-footed albatross	8		0.0020		10	
		Unidentified shearwater/petrel	57		0.0145		74	
		Northern fulmar	2,951		0.7484		3,819	
		Unidentified gull	572		0.1451		740	
		Black-legged kittiwake	3		0.0008		4	
		Unidentified guillemot	5		0.0013		6	
		Unidentified murre	3		0.0008		4	
		Unidentified auklet/murrelet	3		0.0008		4	
Gulf of Alaska Groundfish Longline	1989		0	8 d 43 mt	0.0000	Not Available	0	
Gulf of Alaska Groundfish Longline	1990	Unidentified bird	39	946 d 5,903 mt	0.0412	12.5	313	

Fishery	Year	Seabird Species	Observed Takes	Observed Effort	Take Rate (/day)	Coverage (% of catch monitored)	Total Estimated Take (variance)	Coeff. Variation
				(Days & metric tons)				
Gulf of Alaska Groundfish Longline	1991	Unidentified bird	143	742 d 4,408 mt	0.1927	13.5	1,060	
Gulf of Alaska Groundfish Longline	1992	Unidentified bird	273	1,035 d 9,711 mt	0.2638	21.6	1,265	
Gulf of Alaska Groundfish Longline	1993	<u>Total</u>	824	981 d 10,433 mt	0.8583	27.2	3,033	
		Unidentified bird	75		0.0765		276	
		Unidentified albatross	3		0.0031		11	
		Laysan albatross	113		0.1152		416	
		Black-footed albatross	21		0.0214		77	
		Unidentified shearwater/petrel	35		0.0357		129	
		Northern fulmar	549		0.5596		2,021	
		Unidentified gull	26		0.0265		96	
		Black-legged kittiwake	2		0.0020		7	
Bering Sea Groundfish Pot	1990		0	176 d 545 mt	0.0000	64.0	0	
Bering Sea Groundfish Pot	1991	Unidentified bird	8	405 d 3,015 mt	0.0198	43.4	18	
Bering Sea Groundfish Pot	1992	Unidentified bird	10	1157 d 6,198 mt	0.0086	42.9	23	
Bering Sea Groundfish Pot	1993		0	165 d 1,257 mt	0.0000	58.3	0	

Label	Year	Seabird Species	Observed Takes	Observed Effort (Days & metric tons)	Take Rate (/day)	Coverage (% of catch monitored)	Total Estimated Take (variance)	Coeff. Variation
ulf of Alaska roundfish Pot	1990		0	177 d 708 mt	0.0000	2.9	0	
ulf of Alaska roundfish Pot	1991		0	219 d 981 mt	0.0000	9.1	0	
ulf of Alaska roundfish Pot	1992		0	285 d 1,141 mt	0.0000	11.2	0	
ulf of Alaska roundfish Pot	1993		0	133 d 949 mt	0.0000	9.6	0	
ering Sea roundfish Trawl	1989	Unidentified bird	15	1,298 d 118,819 mt	0.0116	9.7	155	
ering Sea roundfish Trawl	1990	Unidentified bird	689	11,425 d 1,127,794 mt	0.0603	68.8	1,002	
ering Sea roundfish Trawl	1991	Unidentified bird	1,514	13,238 d 1,004,290 mt	0.1144	49.0	3,092	
ering Sea roundfish Trawl	1992	Unidentified bird	19	12,243 d 1,088,077 mt	0.0016	58.6	32	
ering Sea roundfish Trawl	1993	<u>Total</u>	161	10,174 d 1,105,158 mt	0.0158	61.6	261	
		Unidentified bird	35		0.0034		57	
		Unidentified procellariiformes	2		0.0002		3	
		Unidentified shearwater/petrel	84		0.0083		137	
		Unidentified murrelet/auklet	39		0.0038		64	
ulf of Alaska roundfish Trawl	1989		0	127 d 7,319 mt	0.0000	4.9	0	
ulf of Alaska roundfish Ti	1990		0	743 d ,563 mt	0.0000	45.4	0	

Fishery	Year	Seabird Species	Observed Takes	Observed Effort (Days & metric tons)	Take Rate (/day)	Coverage (% of catch monitored)	Total Estimated Take (variance)	Coeff. Variation
Gulf of Alaska Groundfish Trawl	1991		0	2,438 d 80,191 mt	0.0000	34.5	0	
Gulf of Alaska Groundfish Trawl	1992		0	2,288 d 85,407 mt	0.0000	37.4	0	
Gulf of Alaska Groundfish Trawl	1993	Unidentified shearwater/petrel	24	2,110 d 78,084 mt	0.0114	36.7	65	
West Coast Pacific Whiting Trawl	1990		0	35 d 1,958 mt	0.0000	41.5	0	
West Coast Pacific Whiting Trawl	1991	Unidentified bird	1	746 d 100,805 mt	0.0013	50.7	2	
West Coast Pacific Whiting Trawl	1992		0	678 d 101,750 mt	0.0000	65.6	0	
West Coast Pacific Whiting Trawl	1993		0	329 d 62,171 mt	0.0000	62.4	0	

----- DRAFT -----

COMPARISON OF MAJOR PROVISIONS

**REAUTHORIZATION OF THE
MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT**

ADMINISTRATION BILL, H.R. 39, AND S. 39

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NOT AN OFFICIAL DOCUMENT

August 1996

OVERFISHING AND REBUILDING DEPLETED STOCKS

ADMINISTRATION BILL (FOR COMPARISON - NOT REINTRODUCED)

- National standard 1 - "Rebuild depleted stocks" to requirement to prevent overfishing
- Adds to definition of OY to ensure rebuilding of depleted stocks to MSY levels
- Annual reports to Councils on overfished stocks; Council has 1 year to prepare an amendment to rebuild stocks, otherwise the Secretary prepares one

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Defines overfishing: Improves 602 guidelines definition - level or rate of fishing mortality that jeopardizes ability of stock to produce MSY on continuing basis
- Defines rebuilding program: measures necessary to restore ability of stock to produce MSY on a continuing basis
- FMP shall include measurable/objective determination of what constitutes overfishing and a rebuilding program if fishery is overfished, rebuilding period shall be as short as possible not exceeding 10 years unless the biology of the stock warrants a longer period; Secretarial review after 3 years and then annually
- 18 months after enactment, Council shall submit amendments to each existing FMP to comply with new FMP requirements for overfishing determination
- If Secretary determines overfishing occurring must notify Council and request action
- Council has 1 year to prepare an amendment to stop overfishing and establish a rebuilding program or the Secretary must prepare the amendment
- If overfishing is occurring under a Secretarial plan, Secretary must prepare an amendment
- If a Federal agency causes a decline in stock below MSY, Secretary must notify agency and recommend steps to reverse decline
- Defines Optimum yield for overfished fisheries as providing for rebuilding to a level consistent with producing MSY
- Defines total allowable catch: the total amount of fish in a fishery that may be harvested in a fishing season, established in accordance with the FMP for the fishery

- Requires submission of a "Fishery Impact Statement" to interested states and the Congress for use by states to assist persons applying for loans or economic relief

**S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT
MANAGER'S AMENDMENT**

- Adds to definition of OY that it is an amount of fish that provides for rebuilding to level consistent with producing MSY
- Defines overfishing: "rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce MSY on a continuing basis"
- FMP shall "specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished...and, in the case of a fishery which the Council or Secretary has determined is overfished, or is approaching an overfished condition, contain conservation and management measures to rebuild the fishery"
- Secretary reports annually to the Councils on the status of fisheries that are overfished or approaching overfishing
- Council has 1 year to prepare an amendment to stop overfishing and to rebuild stocks; if Council fails, Secretary prepares the amendment within 9 months
- Rebuilding period should be as short as possible, but not more than 10 years except for cases where biology of the stock dictates otherwise
- Secretary, at the request of a Council, may implement interim measures to reduce overfishing

FISHERY HABITAT**ADMINISTRATION BILL (FOR COMPARISON - NOT REINTRODUCED)**

- Adds an expansive definition of essential fish habitat
- Requires Councils to submit to the Secretary an annual list of all essential fish habitats for all FMPs in effect

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Defines essential fishery habitat as waters necessary for spawning, breeding, or growth to maturity
- Each FMP shall describe essential fishery habitat and measures necessary to minimize adverse impacts caused by fishing
- Requires Secretary to establish guidelines to assist councils in describing essential fish habitats and establish a schedule for amendment of FMP within 18 months
- Council shall notify Secretary and may make recommendations to State or Federal agency on any activity that may have detrimental effect on essential fishery habitat
- Secretary, in consultation with Secretary of Interior, identifies essential habitat for each fishery, based on description in FMP
- If Secretary receives information regarding Federal actions that may destroy or adversely modify habitat, Secretary comments and makes recommendations to that agency
- Within 15 days, Federal agency must respond to Council or Secretary, describing measures considered to avoid, mitigate or offset impacts and explaining if recommendations not followed

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- Defines essential fish habitat as "waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity"
- FMPs shall "describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary, minimize where practicable adverse effects on

such habitat caused by fishing, and identify other actions which should be considered to encourage the conservation and enhancement of such habitat”

- Secretary develops guidelines within 6 months
- Councils may comment/make recommendations on any Federal/state action that may adversely affect habitat (mandatory for anadromous fishery habitat)
- Within 30 days, Federal agency must respond to Council and Secretary, describing measures considered to avoid, mitigate, or offset impacts and explaining if recommendation not followed

BYCATCH, DISCARDS, AND WASTE**ADMINISTRATION BILL (FOR COMPARISON - NOT REINTRODUCED)**

- National standard 8: Management measures shall, to extent practicable, minimize incidental catch of non-target resources that results in unnecessary waste

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Defines bycatch as fish harvested but not sold or kept for personal use, including economic and regulatory discards
- National standard 8: Measures shall, to extent practicable, minimize bycatch
- New provision of FMP: mandatory reporting of amount and species of bycatch
- FMPs must minimize bycatch "to the maximum extent practicable"
- Discretionary provision: assess effect FMP measures will have on stocks of fish in ecosystem that are not part of fishery
- Defines economic discards: fish that are the target of a fishery, but are not retained because of undesirable size, sex, or quality, or other economic reasons
- Defines regulatory discards: fish caught in a fishery which fishermen are required by regulation to discard whenever caught, or are required to retain but not sell
- Incidental Harvest Research- Secretary must develop a program within 12 months to (1) develop devices or other changes to minimize incidental mortality of nontarget species in shrimp trawls to extent practicable from mortality level on date of enactment of 1990 Amendments; (2) evaluate ecological impacts and benefits and costs of such devices; and (3) assess whether practicable to utilize unavoidable bycatch.
- Secretary must study the contribution of bycatch to charity organizations by fishermen

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- Defines bycatch as "fish which are harvested by a fishing vessel but which are not sold or kept for personal use and includes economic and regulatory discards, but does not include fish caught and released alive that are the target species of commercial and recreational fishing under recognized scientific tagging or catch and release programs"

- Defines economic discards as “fish which are the target of a fishery, but which are not retained by a fishing vessel because they are of undesirable size, sex, or quality, or for other economic reasons”
- Defines regulatory discards as “fish caught in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell”
- New National Standard 9: “Conservation and management measures shall, to the extent practicable, minimize bycatch and the mortality of bycatch which cannot be avoided”
- FMPs shall “(1) assess the amount and type of bycatch occurring in the fishery, and, to the extent practicable and in the following priority, include conservation and management measures to - (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided; and (2) assess the amount and type of fish caught during recreational fishing, and to the extent practicable, include conservation and management measures to minimize the mortality of fish caught and released that are the target species of recreational fishing, under catch and release programs”
- FMPs may include “conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch”
- North Pacific program: North Pacific Council may recommend a system of fees (not to exceed 1% of the annual ex-vessel value of the target species) to provide incentives to reduce bycatch and bycatch rates (fees would be used for costs associated with bycatch reduction); Council may recommend measures that provide allocations of regulatory discards to individual vessels as an incentive to reduce bycatch (allocations would be nontransferable); and Council shall submit by June 1, 1999, a report on the advisability of requiring the full retention and full utilization by U.S. processors of economic discards

Bycatch reduction agreements -

- Requires the Secretary of State, in cooperation with the Secretary, to seek necessary and appropriate international agreements to establish standards and measures for bycatch reduction that are comparable to the standards and measures applicable to U.S. fishermen
- The Secretary submits an annual report, beginning 1/97, describing actions taken
- Use import prohibitions if the Secretary of State has been unable, within a reasonable period of time, to conclude an international agreement

CONFLICT OF INTEREST

ADMINISTRATION BILL (FOR COMPARISON - NOT REINTRODUCED)

- Council member who has a financial interest significantly affected by a decision may not vote, or participate in deliberations except as a member of the public
- Upon request or on own initiative, RD makes a determination whether individual has a disqualifying interest
- RD may authorize participation if the need for individual's participation outweighs the potential conflict of interest
- If Council makes decision before AA review, ruling may not be treated as cause for invalidation of decision

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Secretary must remove any appointed Council member, if member violates the financial disclosure or recusal provisions (without 2/3 Council vote)
- Deletes executive director of a Council from financial disclosure rules
- Secretary establishes rules, in consultation with Councils, for prohibiting member from voting on matter in which financial interest would be significantly affected
- "Significantly affected" defined as: "personal financial interest which would augmented by voting on the matter and which would only be shared by a minority of other persons within the same industry sector or gear group"
- Member must recuse him/herself if participation is prohibited by rules established by the Secretary
- Any member may request NOAA/GC to determine whether voting by any member would violate recusal rules
- No vote may be held before a determination is made
- No appeal or reconsideration process

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT

MANAGER'S AMENDMENT

- Deletes executive director of a Council from financial disclosure rules
- Member may not vote if decision would have a significant and predictable effect on member's financial interest (a "substantially disproportionate benefit to the financial interest relative to other participants in the same gear type or sector of the fishery")
- "Designated official" is a person with expertise in Federal conflict-of-interest requirements, designated by Secretary in consultation with the council
- Determinations may be appealed to Secretary (10 days to appeal; 30 days to review)
- Council votes not reconsidered after appeal
- Secretary issues guidelines on recusals within one year

FEEES**ADMINISTRATION BILL (FOR COMPARISON - NOT REINTRODUCED)**

- Secretary may establish fees for permits issued
- Secretary may establish fees to pay for the cost of management
- Secretary must establish fees not to exceed 3% annually of the value of fish under individual harvest shares
- Secretary must establish fees not to exceed 1% of the ex-vessel value of all fish at point of first sale within the U.S.

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Allows the collection of fees associated with ITQs:
 - 1% initial fee on value of fish to be harvested
 - 4% fee per year on value of fish to be harvested
- Fees are an offsetting collection available to Secretary for administering and implementing Magnuson Act with respect to that fishery
- Secretary may not assess or collect fees for 5 years on ITQ programs established before enactment

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- Retains existing language on permit fees
- Secretary may enter into cooperative agreement with State under state permit program and may agree that all or part of fees collected accrue to State
- Secretary shall collect a fee from IFQ or CDQ holders of:
 - 3% of the ex-vessel value of fish harvested or processed under an quota
 - 1% of value of fish authorized under an initial issuance or transfer of quota
- Fees are offsetting collection
- Fees are used only in the region where collected

- Surf clam and wreckfish ITQ holders exempt until January 1, 2000
- Up to 25% of fees collected may be used to guarantee payment of principal for the purchase of new quota by small vessel fishermen or entry level fishermen, such a program for the North Pacific that would be recommended by the Council by January 1, 1997

LIMITED ACCESS PROGRAMS

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Sets guidelines for establishing limited access systems
- Individual quotas shall be considered a grant and may be revoked or limited by Secretary or the Council; if revoked or limited it shall not confer any right of compensation to the holder
- Individual quotas, except for those implemented before enactment, expire within 7 years and are either renewed, reallocated, or reissued
- Allows individual quotas to be held by fishing vessel owners, fishermen, crew members, processors, or other persons specified by the council
- A Federal agency can not hold or reallocate quota (other than Secretary of Commerce)
- May require a portion of the annual harvest to go to entry level fishermen, small vessel owners, or crew members
- Shall provide for: fair and equitable allocation, adequate enforcement, monitoring transfers, prevention of excessive shares
- Calls for the establishment of a lein registry program
- Any system established after enactment shall not allow shares to be sold, transferred, or leased; prohibits a person from holding a share unless that person participates in the fishery; requires shares to revert to the Secretary for reallocation if not fished 3 of 5 years
- Within 6 months of enactment of the Fishery Conservation and Management Amendments, the Secretary shall establish a review panel to evaluate fishing management plans in effect to limited access programs
- Within 1 year after recommendation from the review panel the Secretary shall issue regulations which establish requirements for establishing an individual quota system
- Secretary may not approve any covered quota system plan and no plan shall take effect before regulations are issued

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT

MANAGER'S AMENDMENT

- Defines IFQ as "a Federal permit under a limited access system to harvest a quantity of fish that may be expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person. The term does not include "community development quotas"
- Moratorium on approval or implementation of new IFQ programs, other than for HMS, until October 1, 2000
- Repeals the red snapper ITQ program (for the length of the moratorium)
- Councils may submit and the Secretary may approve amendments to the North Pacific halibut and sablefish, South Atlantic wreckfish, or Mid-Atlantic surf clam and ocean (including mahogany) quahog IFQs
- IFQs shall be considered a permit, may be revoked or limited at any time, shall not confer any right of compensation if revoked or limited, and shall not create any right, title, or interest in or to any fish before the fish is harvested
- National Academy of Sciences required to complete a comprehensive report on IFQ programs by October 1, 1998, including the establishment of east and west coast review groups and public hearings
- Secretary required to establish a central registry system for limited access permits 6 months after passage

FISHING CAPACITY REDUCTION PROGRAMS

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Secretary may conduct a Fishing Capacity Reduction Program if FMP is in effect that includes limited access and the program is necessary for rebuilding or requested by Council
- Secretary shall seek to permanently reduce maximum effective fishing capacity at the least cost and in the shortest time period through removal of vessels and permits from fishery; establish criteria for determining vessels and permits eligible to participate in program; establish procedures for determining amount of payments; and identify sources of funding for program
- Secretary shall establish an annual fee on holders of Federal fishing permits
- Fee may not exceed 5% of the value of the fish harvested under the permit each year and will be deposited into the Fisheries Conservation and Restoration Fund, which also may include S/K transfer amounts. Fund is not used to pay Administrative overhead.
- Fee in effect no more than 15 years
- Advisory panel is appointed by the Secretary

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- Secretary to work with regional authorities, States, and fishery dependent communities to develop a sustainable development strategy for overfished fishery
- Disaster assistance to States and fishery dependent communities
- New title III amending Merchant Marine Act for refinancing vessels in fisheries affected by stock recovery efforts
- Secretary may develop buy-out program for vessels and permits necessary for overfished fishery recovery effort

COMMERCIAL, RECREATIONAL, AND CHARTER FISHING

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- No provisions

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- Defines commercial fishing as "fishing in which the fish harvested, either in whole or in part, enter commerce or are intended to enter commerce through sale, barter, or trade"
- Defines recreational fishing as "fishing exclusively for sport or pleasure"
- Defines charter fishing as "fishing from a vessel carrying a passenger for hire (as defined in section 2101(21a) of title 46 U.S. Code) engaged in recreational fishing"
- FMPs shall "to the extent that the allocation or assignment of fishery privileges among U.S. fishermen becomes necessary, reflect the relative traditional participation of each of the commercial fishing, recreational fishing, and charter fishing sectors"
- FMPs may "establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the ... sale of fish, including, consistent with any safety and quality requirements and any applicable State law, the sale of fish caught during charter fishing"

COMMUNITY DEVELOPMENT QUOTAS

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Bering Sea Community Development Quota Program - Establishes a community development quota program which would allocate catch in Bering Sea Fishery to Western Alaska communities and establishes eligibility criteria

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

North Pacific -

- Requires a National Academy of Sciences report on the performance and effectiveness of North Pacific and Western Pacific Council CDQ programs, including the extent to which the programs developed ongoing commercial fishing and resulted in employment opportunities, by October 1, 1998
- Prior to October 1, 2001, the North Pacific Council may not submit any FMP, amendment, or regulation that allocates to the western Alaska CDQ program a percentage of the TAC that had not been recommended prior to October 1, 1995
- The Secretary shall phase-in the percentage for North Pacific CDQs -- 3.5% in 1998; 5% in 1999; 7.5% in 2000; and after Sept. 30, 2001, the Council may submit a different percentage

Western Pacific -

- Council may recommend and the Secretary may establish a Western Pacific CDQ program

FISHING COMMUNITIES

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Adds to the definition of OY: amount of fish “which provides employment opportunities and economic benefits through the sustained participation of local community-based fleets and the coastal communities which those fleets support”

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER’S AMENDMENT

- Defines fishing community as “a community which is substantially dependent or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators and crew and U.S. fish processors that are based in such community”
- New National Standard 8: “Conservation and management measures shall to the extent practicable and consistent with the prevention of overfishing take into account the importance of fishery resources to fishing communities in order (A) to provide for the sustained participation of such communities, and (B) to minimize adverse economic impacts on such communities” [Note: This is a revision of the text that appears in the August 8 version of S. 39.]

FOREIGN FISHING AND INTERNATIONAL FISHERY AGREEMENTS

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- Transshipment - Provides the Secretary with authority to issue permit for foreign vessel solely for purpose of transporting fish products, includes procedures and authority to assess fees to recover costs of issuing permit
- Atlantic Mackerel and Herring - Specifies no foreign allocation for fisheries without an FMP; Secretary may not approve an application for foreign fishing of Atlantic Mackerel or Herring unless the appropriate Council has recommended approval
- Change GIFA automatic approval to 120 days (from 60 calendar days of continuous session of Congress)

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- Transshipment - Provides Secretary with authority to issue permit for foreign vessel solely for purpose of transporting fish products, whether or not GIFA exists, and includes procedures and authority to assess fees to recover costs of issuing permit
- Requires the Secretary to issue transshipment permits to Canadian vessels to transport Atlantic herring harvested by U.S. fishermen in the EEZ, or with the concurrence of the State of Maine, within Maine state waters
- Change GIFA automatic approval to 120 days (from 60 calendar days of continuous session of Congress)
- Pacific Insular Areas -
 - Authorizes the Secretary of State to enter into 3-year agreements with foreign countries to authorize foreign fishing within the EEZ of Pacific Insular Areas
 - Agreements shall include provisions for an observer program, quantity of fish that may be harvested, fees, data collection, reporting systems, monitoring, and enforcement
 - Authorizes fees, in excess of administrative costs, which are transferred to the Insular Areas for conservation and management uses
- North Pacific Council required to submit a report on "institutional structure in Russia pertaining to stock assessment, management, and enforcement for fishery harvests in the

Bering Sea, and recommendations for improving coordination between the U.S. and Russia for managing and conserving Bering Sea fishery resources”

STATE JURISDICTION

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

- State of Alaska may enforce its laws/ regulations in EEZ if there is no FMP and there is a legitimate state interest in the fishery
- FMPs cannot be removed and placed under state management without unanimous consent (except for RD) of council

S. 39 - SUSTAINABLE FISHERIES ACT, AS AMENDED BY THE DRAFT MANAGER'S AMENDMENT

- State may regulate its registered vessels in the EEZ if (1) there is no FMP; (2) State law is consistent with FMP and applicable Federal regulations
- State may regulate non-registered vessels in the EEZ if State law is consistent with FMP delegating management to State (with process for determining and correcting inconsistencies); authority doesn't apply to new FMP delegating management to State, unless 3/4 Council approval
- Alaska may regulate non-registered vessels in the EEZ off Alaska in fisheries for which no FMP was in place 8/1/96, until an FMP is implemented
- Washington, Oregon, and California may regulate non-registered vessels in the EEZ for invertebrate species for which there is no FMP, with many conditions attached, until October 1, 1999

OTHER SIGNIFICANT PROVISIONS

ADMINISTRATION BILL (FOR COMPARISON - NOT REINTRODUCED)

1. **Atlantic Highly Migratory Species**
 - Deletes requirement to provide reasonable opportunity to take an internationally established quota for HMS
 - Allows U.S. to adopt unilaterally a quota less than that recommended by ICCAT
2. **National Data Collection Program** - Provides Secretary with authority to establish by regulation a nation-wide mandatory data collection program
3. **Extension of Emergency Rule Authority**
 - After initial 90-day period, resource/management emergency rule may be extended for 270 days, if opportunity for comment and Council preparing an FMP amendment
 - Public health emergency rules may remain in effect until the circumstances that created the emergency no longer exist
4. **Council Seats** - Adds one seat to Pacific Council, chosen by Secretary of Interior from Indian Tribe with Federally recognized fishing rights
5. **FMP/Regulatory Process** - Streamlines process by stripping FMPs of management measures

H.R. 39 - FISHERY CONSERVATION AND MANAGEMENT AMENDMENTS, AS PASSED THE HOUSE OCT. 18, 1995

1. **Atlantic Highly Migratory Species**
 - Plan development team for each HMS species to advise the Secretary; each PDT has at least 7 members from ATCA advisory committee or working groups; participates in "all aspects" of FMP development; FACA does not apply
 - Allows harvest of a fishing mortality level as well as allocations and quotas
2. **Emergency Rule Authority**
 - After initial 180-day period, resource/management emergency rule may be extended for 180 days, if opportunity for comment
 - Public health emergency rules may remain in effect until the circumstances that created the emergency no longer exist
3. **Council Members**
 - Adds North Carolina to the Mid-Atlantic Council, increasing number of members to 21.
 - Reduces compensation to GS-15 rate as of 1/1/95
 - Restricts compensation to members appointed under 302(b)(2) who are not government

employees

4. **Council Transaction of Business**
 - Council member may add agenda item by submitting request signed by 2 or more members 21 days before meeting
 - At the request of any voting member, Council shall hold a roll call vote on any matter before Council
5. **Contents of Fishery Management Plans**
 - Discretionary provision: measures may reserve a portion of total allowable catch for use of fishery dependent communities
 - Discretionary provision: specify gear types allowed to be used in a fishery and process for evaluating new gear technology
 - Discretionary provision: Reserve portion of ABC for scientific research
6. **Regulatory Amendments**
 - 15 to 45 day comment period for "covered implementing regulations"
 - Secretary must publish final rule by 75th day after receipt, or decline to publish the final rule with reasons why not published
7. **Observers** - Observer may not bring civil action against vessel or vessel owner for illness, injury or death, except for owner's willful misconduct
8. **Pacific Region Stock Assessment** - Secretary to establish within 120 days a Pacific Region Stock Assessment Review Group; within 180 days of establishment of the group develop a 3 year research plan to assess status of Pacific Stocks; private vessels to conduct stock surveys; cost offset by providing processors a portion of TAC reserved for research
9. **Ability to Pay Provisions**
10. **Gulf of Mexico**
 - Secretary shall develop and implement a systematic program for assessment and annual report to the public of the status of the fisheries in Gulf
 - Program shall have a peer-review panel consisting of internal and external experts; may not exclude peer reviewers because of potential interest in the outcome if interest is disclosed to the Secretary; provide an opportunity to become part of the peer panel by soliciting nominations through the Federal Register; ensure all opinions/ comments are available to the public
 - Secretary shall develop a plan for the Gulf to collect, assess, and report statistics concerning fisheries
 - Plan must provide fish managers and public with accurate information about harvests and fishing effort and avoid duplications; minimize the amount of paperwork and regulatory burdens on the fishermen and fish buyers; minimize costs to Federal agencies
 - Secretary must ensure all people impacted by the plan are actively involved in the

- development of the plan
 - No later than 9 months after the Fishery Conservation and Management Amendments, the Secretary must publish a notice of the proposed plan
 - No later than 1 year after enactment the Secretary must submit the final plan to the Committee on Resources
- 11. Gulf of Mexico Red Snapper Stock Management Study**
- Secretary of Commerce must evaluate stock assessment methods of Red Snapper and the effectiveness of FMP
 - Study must assess all alternatives which could provide a more balanced and practical approach to managing the Red Snapper Fishery
 - Secretary must involve the community and recreational fishermen in the collection of data and information
 - Study must be completed within 1 year after enactment of this Act
 - Limited immunity for individuals providing creditable information

S. 39 - SUSTAINABLE FISHERIES ACT

- 1. National Standards**
- National Standard 5: "consider" instead of "promote" efficiency
 - New National Standard 10: "Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea"
- 2. Council Seats -**
- Adds one seat to the Pacific Council for representative of Indian Tribe with Federally recognized fishing rights
 - Adds North Carolina to the Mid-Atlantic Council and changes the total number of members to 21 (from 19)
 - Modifies the definition of full term: "Any term in which an individual was appointed to replace a member who left office during the term shall not be counted in determining the number of consecutive terms served by that Council member"
- 3. Highly Migratory Species**
- Establishes advisory panel for Secretary's management of HMS
 - FMP must minimize disadvantage to U.S. fishermen from foreign competition; U.S. vessels must have opportunity to harvest international quota or "fishing mortality level"
- 4. FMP/Regulatory Process**
- Councils may use negotiation panel, including a facilitator, to develop management measures
 - FMP approval/disapproval 30 days after 60-day comment period (no automatic approval)
 - Same schedule for regulations submitted with FMP or after FMP implementation (publish proposed rule in 15 days, 15- to 60-day comment period, publish final rule 30 days after period ends)

- Emergency rules 180/180 same as Administration bill, public health emergency in effect until problem resolved
- Secretary may, pursuant to guidelines by Council, close or restrict a fishery to prevent overfishing or reduce bycatch

5. New Fisheries and Gear

- Councils must list existing fisheries and allowable gear for proposed and final publication by Secretary; no new fisheries or technology allowed after final list is published without notice to Councils or Secretary
- Secretary may issue emergency rule prohibiting new gear or new fishery

6. Repeal of FMPs - The Secretary can repeal a fishery management plan only if the Council approves the repeal by a three-quarters vote (provision does not apply to the American Lobster Plan)

7. Miscellaneous

- Must propose commercial fishing vessel registration system
- Conclude research on effect of shrimp trawling on other species and on technology to reduce bycatch
- Requires that 15 % of appropriations in each year be used for enforcement