U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P. O. Box 1668, Juneau, Alaska 99802

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Appendix J

May 23, 1977

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Dear Jim,

This letter is in response to the Council Chairman's request at the April meeting that the NOAA Office of General Counsel provide an analysis of the legal questions surrounding the Korea Marine Industry Development Corporation (KMIDC) contract proposal regarding pollock in the Gulf of Alaska.

BACKGROUND: KIMDC is proposing to contract with U.S. fishermen for the delivery of pollock caught by U.S. vessels to Korean processing vessels in the Fishery Conservation zone (FCZ). Contract discussions orginally centered around a figure of 130,000 metric tons of pollock to be processed in 1977 pursuant to the contract, although more recent discussions indicate a figure nearer 30,000 - 40,000 mt.

The Preliminary Management Plan for the Gulf of Alaska Trawl Fishery established an MSY range for pollock in the Gulf of Alaska of 168,000 - 338,000 metric tons, and an optimum yield (or TAC) of 150,000 metric tons, which is 10.7% below the minimum estimate of MSY (page 71). The plan states that the conservative figure for OY is due to the "provisional nature of the survey data, a lack of biological data from which critical population parameters can be determined and the imprecise procedure used to estimate potential yield." On the basis of an estimated U.S. capacity of 1,000 metric tons for pollock, the plan establishes the total allowable level of foreign fishing (TALFF) for pollock in the Gulf of Alaska at 149,000 metric tons (page 74).

Based upon the TALFF of 149,000 metric tons, the Department of State allocated 35,000 metric tons of pollock in the Gulf of Alaska to the Republic of Korea for 1977. The ROK was subsequently issued 11 permits for stern trawling vessels, authorizing them to engage in fishing in the Gulf of Alaska trawl fishery during the period of March 1, 1977 to December 31, 1977.

The ROK subsequently submitted permit applications for six additional vessels (three processing and three transport) to be used solely for the purposes of the proposed arrangement with U.S. fishermen. The North Pacific Council, at its April meeting, recommended to the Secretary of Commerce that these permit applications be disapproved.

ISSUES:

1. Must a foreign-flag processing vessel have a permit in order to process fish within the 200-mile zone?

Answer: Yes. The Act and regulations provide that all "foreign fishing vessels" must have permits issued in accordance with the Act in order to "engage in fishing" within the zone. The Act and regulations define the term "foreign fishing vessel" to include foreign processing vessels; and "fishing" is defined in the regulations as including "processing or refrigerating fish or fish products."

Section 204(a) of the Act (16 USC § 1924 (a)) provides:

> "(a) In General. -- After February 28, 1976, no foreign fishing vessel shall engage in fishing within the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone, unless such vessel has on board a valid permit issued under this section for such vessel." (emphasis added)

Section 3(10) and (11) of the Act (16 USC 1802 (10) and (11)) defines the terms "fishing vessel" and "fishing" as follows:

> "(10) The term "fishing" means--
> (A) the catching, taking, or harvesting of fish;
> (B) the attempted catching, taking, or harvesting of fish;
> (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
> (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).
>
> Such term does not include any scientific research activity which is conducted by a scientific research vessel.

(11) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for--

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation or processing." (emphasis added)

Regulations issued by the National Marine Fisheries Service (50 CFR 611) pursuant to sections 201(g) (which authorizes the issuance of regulations to implement preliminary management plans) and 305 (g) (which authorizes issuance of general regulations to implement the Act), clarify these statutory definitions as they pertain to the regulation of foreign fishing under the Act. These regulations, which entered into effect on March 1, 1977, have the full force and effect of law. They provide, in pertinent part, as follows:

"(n) Fishing means:
(1) Any activity other than scientific research which does, which is intended to, or which reasonably can be expected to result in the removal of fish from the sea; or
(2) Any operations at sea other than scientific research which are in support of, or in preparation for any activity described in subparagraph (1), including but not limited to:
...; Processing or refrigerating fish or fish products;
(o) Fishing vessel means any boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for fishing, except for a scientific research vessel." (50 CFR 611.Z(n))

2. Do fish caught by U.S. vessels in the FCZ and sold to foreign-flag processing vessels in the FCZ count against that country's allocation?

Answer: No, it is U.S. catch.

Fundamental to the conclusion that foreign processing vessels must have permits, is the interpretation of the definition of "fishing" to include processing, transporting, and other support activities. However, this interpretation of the term "fishing" appears to present a technical problem when

applied to section 201(d) of the Act which provides for the determination of the foreign surplus. That section provides:

> (d) Total Allowable Level of Foreign Fishing. - The total allowable level of foreign fishing, if any, with respect to any fishery subject to the exclusive fishery management authority of the United States, shall be that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States, as determined in accordance with the provisions of this Act.

Substituting the definition of "fishing" into this provision would appear to support the argument that foreign processing should count against a particular country's allocation.

While this might arguably make sense in a situtation like the KMIDC contract, where the fish are caught by U.S. vessels and processed by foreign vessels, it would be an unreasonable concept to apply to the more common situation where a foreign country does both the catching and processing. It would result in counting such fish against that country's quota twice, or even three times if that country also transports the processed fish out of the FCZ. This does not appear to have been the intent of the Congress.

Futhermore, section 201(d) provides that the TALFF is that portion of the OY that ". . . will not be harvested by vessels of the United States". This indicates that it is the harvesting, or initial removal from the sea, that determines whether it is U.S. or foreign catch.

3. If a permit is approved, what control does the U.S. have over the amount of fish processed by such foreign processing vessels?

Answer: Conditions and restrictions placed upon the permit in accordance with the Act can restrict the amount of fish processed by such vessels. Permits already issued do not contain such restrictions. The Act provides that the Councils can recommend appropriate conditions and restrictions to the Secretary.

Sec. 204(b)(7) of the Act provides that after approving a foreign permit application, the Secretary of Commerce must:

> "Establish conditions and restrictions which shall be included in each permit issued pursuant to any application approved. . . and which must be complied with by the owner or operator of the fishing vessel for which the permit is issued. . ."

That such conditions and restrictions are in addition to any management plan and regulations implementing such plan, is made clear by the remainder of Sec. 204(b)(7) which sets forth the required conditions and restrictions which are to be attached to a permit:

> "Such conditions and restrictions shall include the following:
>
> > (A) All of the requirements of any applicable fishery management plan, or preliminary fishery management plan, and the regulations promulagated to implement any such plan.
> > (D) Any other condition and restriction related to fishery conservation and management which the Secretary prescribes as necessary and appropriate."

Furthermore, violation of any of the conditions and restrictions is a civil offense as provided in Sec. 307(1)(A), which provides that is unlawful for any person to "violate any provision of this Act or any regulation or permit. . ." issued pursuant to the Act.

At the present time, none of the permits issued to foreign vessels contain any conditions and restrictions which would limit the number of fish processed by a particular vessel, as long as the overall quota for that country is not exceeded. The permits also do not address whether a processing vessel is to receive fish from U.S. or foreign catcher vessels. The permits that have been issued simply authorize vessels to engage in the particular fishery during a specified time and in a certain area. Therefore, these permits do not prohibit a foreign processing vessel from processing fish received from U.S. vessels, even though the application for that permit did not indicate contemplated processing of U.S. caught fish.

It could be argued that such a vessel must obtain an amendment to its permit if it wishes to engage in activity substantially different from that indicated in its permit application. Such a requirement would be based upon the theory that the permit was issued on the basis of the information contained in the application, and that general compliance with the contemplated activity specified in the application is an implied condition on the permit. To conclude otherwise might invite the submission of misleading applications in the future, and would result in a serious diminution of control over vessels currently holding permits.

However, the position of the NOAA Office of General Counsel is that if a vessel currently holds a permit to engage in a particular fishery, its permit would not prevent it from,

receiving fish from U.S. vessels for processing even though the permit was not approved by the Secretary for such activity. Conditions and restrictions can be added to these permits, in accordance with the recommendations of the Councils, but due process requirements necessitate following a procedure which will allow notice and opportunity for public comment before adding any additional restrictions to a permit. This would probably involve a 45-60 day period before such restrictions would take effect. By June 1st, NOAA will publish procedures and criteria for adding conditions and restrictions to permits that have already been issued.

In the future, this problem would best be dealt with by attaching sufficient conditions and restrictions to the permit when it is issued. Although the Secretary of Commerce has the primary responsibility for specifying such conditions, the Act authorizes the Council to recommend to the Secretary appropriate conditions and restrictions on any permit (section 204(b)(5)).

4. Does Sec. 611.10(b) of the Foreign Fishing Regulations issued by the National Marine Fisheries Service prevent the issuance of permits to the six KMIDC vessels?

Answer: No. This section of the regulations alone would not prevent issuance of permits authorizing KMIDC vessels to process pollock through December 31, 1977 in the Gulf of Alaska.

Sec. 611.10(b) of the Foreign Fishing Regulations provides as follows:

> "(b) fisheries support operations by foreign vessels within the Fishery Conservation Zone are allowed only in those areas and during those times in which vessels of the same foreign country are authorized to conduct directed fisheries . . ." (50 CFR 611.10(b))."

This provision of the regulations was issued pursuant to authority vested in the Secretary of Commerce (delegated to NOAA and NMFS) by Sections 305(g) and 201(g) of the Act.

In regard to pollock in the Gulf of Alaska, the Republic of South Korea has been allocated 35,000 metric tons to be taken between March 1, and December 31, 1977. (42 Federal Register 12176). Furthermore, vessels of the Republic of South Korea have been issued 11 permits to engage in the Gulf of Alaska trawl fishery throughout the Gulf of Alaska during the period of March 1, 1977 through December 31, 1977.

Conclusion: Since vessels of the ROK are authorized to conduct directed fisheries for pollock in the Gulf of Alaska during the period of March 1 - December 31, 1977, Sec. 611.10(b) of the Foreign Fishing Regulations is not an impediment to approving permits authorizing the KMIDC processing vessels to engage in processing of pollock in the Gulf of Alaska (area) through December 31, 1977 (time).

5. Can the Secretary amend preliminary management plans and the interim regulations implementing them?

Answer: Yes.

If foreign nations take the full 149,000 mt of pollock allocated to them, and the U.S. catch anticipated by the plan does reach 1,000 mt, the OY for pollock in the Gulf of Alaska will be exceeded by the additional pollock caught by U.S. vessels as a result of the KMIDC proposal. The question then arises as to whether the preliminary plan can be amended.

Section 201(g) of the Fishery Conservation and Management Act (FCMA) provides, in part:

> "Each preliminary fishery management plan shall be in effect with respect to foreign fishing for which permits have been issued until a fishery management plan is prepared and implemented, pursuant to Title III, with respect to such fishery."

It has been suggested that this provision deprives the Secretary of Commerce of power to amend PMP's. However, rules of statutory construction and the principles of administrative law, as well as this Act itself, indicate that the Secretary does have the power to amend such plans.

The point of the quoted passage from section 201(g) is to establish what a PMP is preliminary to: namely, preparation and implementation of a Fishery Management Plan (FMP). The The Conference Committee (which orginated the PMP concept in lieu of other short-term management mechanisms contained in the House version of H.R. 200) emphasized in its report that section 101(g) sets the expiration of a PMP as the time an FMP for the fishery goes into effect (H.R. Rep. No. 94-948, p. 45). There is nothing in the words of the statute or in legislative history to suggest that the PMP, which undeniably will be superseded by an FMP, must remain static throughout its duration.

In fact, authority to amend a PMP is a necessary concomitant to the authority to adopt PMP's. An administrative agency has "every power which is indispensable to the powers expressly

granted". 2 AM. Jur. 2nd. Administrative Law S44. The Secretary must have the power to amend PMP's in order to carry out the purposes of the FCMA. Section 201(g) was an accommodations of two major legislative goals: the desire "to permit foreign fishing" to continue in the FCZ after March 1, and the need for "immediate action to conserve and manage the fishery resources" of the Fishery Conservation Zone until the Councils could prepare (and the Secretary implement) FMP's (see sections 2 (c) (4) and 2(b) (11)).

Recognizing the uncertainty involved in managing fisheries, to perform her duties of protecting the resources from overfishing and reserving the appropriate amount of fish for domestic harvest (section 201(g) (1) and (4)), the Secretary must continually review her original determinations of optimum yields and Total Allowable Levels of Foreign Fishing TALFF) for the PMP fisheries. Denial of the power to amend a PMP in response to new information or changed circumstances would thwart the Secretary in fulfilling her responsibilities under the Act.

Furthermore, an interpretation that the Secretary can amend PMP's is in line with administrative law cases, which in essence hold that agencies may modify their "legislative" rules and regulations whether or not specifically authorized by statute to do so. 2 Am Jr. 2nd Administrative Law S310; American Trucking Ass'ns, Inc. v. Atchison, T.& S.F. Ry., 385 F. 2nd 629 (D.C. Cir. 1967), cert. denied. 390 U.S. 945 (1968).

Conclusion: The Secretary has the authority to amend a PMP or the regulations implementing it whenever new information or changed circumstances require.

Sincerely,

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NOAA