



*Agenda #
May 1978*

4

Alaska Packers Association, Inc.

A Subsidiary of  Del Monte Corporation

The Commons Suite C-115 • 1200 112th Ave. N.E.
(206) 455-1745 • P.O. Box 3326, Bellevue, WA 98009

File 300

April 21, 1978

Mr. J. H. Bronson
North Pacific Fishery Management Council
P. O. Box 3136DT
Anchorage, Alaska 99510

Dear Jim:

Enclosed

- (a) Comments by the National Food Processors Association to NMFS regarding proposed interim policy under the Fisheries Conservation and Management Act of 1976 relating to purchases of fish by foreign fishing vessels from fishing vessels of the United States.
- (b) Copy of letter from Peter D. Trooboff to Mr. T. Leitzell.
- (c) Preliminary Memorandum of Law by National Food Processors Association on: Authority of N.O.A.A. to issue proposed Interim Policy on purchases of fish by foreign fishing vessels from fishing vessels of the United States.

Request you review and forward copies to the Council members.

Sincerely,
Alaska Packers Assn., Inc.

Ray Lewis
(ed)
Ray P. Lewis
Manager,
Fisheries Relations

RPL:dmc
Enclosures



RPL
GRLS
TIEL

COVINGTON & BURLING

888 SIXTEENTH STREET, N. W.

WASHINGTON, D. C. 20006

TELEPHONE (202) 452-6000

WRITER'S DIRECT DIAL NUMBER

452-6098

NEWELL W. ELLISON
JOHN G. LAYLON
H. THOMAS AUSTERN
FONTAINE C. BRADLEY
EDWARD BURLING, JR.
COUNSEL

JOHN SHEERMAN COO
OF COUNSEL

TW/ 710 922-0005
TELEF. 04-593
CABLE: COVLING

HOWARD C. WESTWOOD
JOHN T. SAPIENZA
JAMES H. MCGLOTHLIN
ERNEST W. JENNES
STANLEY L. TEMKO
DON V. HARRIS, JR.
WILLIAM STANLEY, JR.
WEAVER W. DUNNAN
EDWIN M. ZIMMERMAN
JEFFREY A. ACKERMAN
HENRY M. SAILER
JOHN M. SCHAFER
ALFRED H. MOSES
JOHN LEWIS ELLICOTT
PAUL H. DUKE
PHILIP R. STANBURY
CHARLES A. MILLER
RICHARD A. BRADY
ROBERT C. O'MALLEY
EUGENE I. LAMBERT
MARK A. WEISS
HARRIS WEINSTEIN
JOHN B. DENNISTON
PETER J. HICKLES
MICHAEL BOUDIN
BINGHAM B. LEVERICH
ALLAN J. TORO
VIRGINIA G. WATKIN
RICHARD D. COPAKEN
CHARLES LISTER
PETER D. TROODOFF
WESLEY S. WILLIAMS, JR.
DORIS D. BLAZEK
WILLIAM D. IVERSON
S. WILLIAM LIVINGSTON, JR.
JOHN H. VINE

CHARLES A. HORSKY
W. GREGORY HOPPER, JR.
DANIEL M. GIBBON
HARRY L. SHIFFERMAN
EDWIN S. COHEN
JAMES C. MCKAY
JOHN W. DOUGLAS
HAMILTON CAROTHERS
J. RANDOLPH WILSON
ROBERT S. OWEN
EDGAR S. CZAPKA, JR.
WILLIAM H. ALLEN
DAVID B. ISHILL
JOHN H. JONES, JR.
H. EDWARD HERRINGFORD, JR.
BRUCE W. ANDERSON
L. GAGNETT
JOHN S. KELCH
PETER BARTON HUTT
HERBERT BYM
JOHN VAUNDERSTAR
NEWMAN T. HALVORSON, JR.
HARVEY M. APPLEBAUM
MICHAEL S. HORNE
JOHNATHAN D. BLAKE
CHARLES E. BUFFON
ROBERT N. SAYLER
E. EDWARD HUNCE
DAVID H. BROWN
PAUL J. TAGLIAMUE
ANDREW W. SINGER
DAVID H. HICKMAN
RUSSELL H. CARPENTER, JR.
NICHOLAS W. FELLS
THEODORE L. GARRETT
DANA T. ACKERLY
COLEMAN S. HICKS

April 14, 1978

HAND DELIVERY

Mr. Terry Leitzell
Acting Administrator for Fisheries
National Oceanic and Atmospheric
Administration
Washington, D.C. 20235

Dear Terry:

In the past day or two it has come to our attention that it might be useful to provide your agency on behalf of our client, the National Food Processors Association, with a memorandum summarizing NOAA's legal authority to issue the Proposed Interim Policy on joint business arrangements (43 Fed. Reg. 5398).

We have prepared the enclosed Preliminary Memorandum of Law summarizing such legal authority. This Memorandum has been prepared on an expedited basis and necessarily does not contain the detailed analysis that we would wish to prepare if NOAA's authority to promulgate the Proposed Interim Policy were to become a significant issue requiring further study by your agency.

In this connection I would note that the announcement of the Proposed Interim Policy did not invite comments on issues of law and that a number of points discussed in the Memorandum have been regarded as settled for some length of time by NFPA members. Accordingly, we would respectfully urge that, if the legal question does require further study, NFPA and other interested parties be given an opportunity to address

Mr. Terry Leitzell
April 14, 1978
Page Two

the relevant questions in greater detail on the basis of your identification of the specific points that your agency believes are important.

We would, of course, be prepared to meet with you or your legal counsel to discuss the Memorandum if that would be helpful.

Sincerely yours,

Peter D. Trooboff

ak
Enclosure

cc: HAND DELIVERY - Eldon V.C. Greenberg, Esq. (with enclosure)

April 14, 1978

PRELIMINARY MEMORANDUM OF LAW

National Food Processors Association

Authority of NOAA to Issue Proposed Interim
Policy on Purchases of Fish by Foreign Fishing
Vessels from Fishing Vessels of the United States

This Preliminary Memorandum of Law outlines the grounds supporting the conclusion that the National Oceanic and Atmospheric Administration (NOAA) has statutory authority under the Fishery Conservation and Management Act of 1976 (FCMA), 16 U.S.C. §§ 1801 et seq., to issue the Proposed Interim Policy published for comment on February 8, 1978, with those substantive and procedural changes that the National Food Processors Association (NFPA) has proposed. ^{*/}

In view of the expedited basis on which the Memorandum has been prepared, it does not attempt to furnish detailed legal analysis on each ground supporting NOAA's statutory authority. Instead, the Memorandum attempts to summarize the pertinent arguments and to respond specifically to those arguments that have been advanced challenging such authority.

* * *

*/ 43 Fed. Reg. 5398. Comments by the National Food Processors Association on the Proposed Interim Policy were filed with the National Marine Fisheries Service on February 23, 1978. NFPA wishes to note that the announcement of the Proposed Interim Policy did not invite comment on NOAA's legal authority to issue the Interim Policy nor indicate that NOAA had identified any legal issue relating to such Policy that required comment. Both the announcement of the NOAA public hearings on joint business arrangements (42 Fed. Reg. 30875) and of the Proposed Interim Policy took the position that NOAA had repeatedly confirmed to interested parties -- i.e., that NOAA had authority to proceed with formulation and implementation of a policy governing NOAA's granting of permits to foreign fishing vessels to purchase fish from U.S. fishermen in the FCZ.

I. The FCMA Requires Foreign Fishing Vessels to Secure Permits to Purchase Fish from United States Fishermen.

Under Section 204(a) of the FCMA, "no foreign fishing vessel shall engage in fishing within the fishery conservation zone . . . unless such vessel has on board a valid permit issued under this section for such vessel." The procedures for processing applications for such permits are set forth in the remaining subparts of Section 204. Importantly, Section 204(b)(7) authorizes the Secretary to establish conditions and restrictions on such permits including "[a]ny other condition and restriction related to fishery conservation and management which the Secretary prescribes as necessary and appropriate."

Section 204 makes clear that the permit requirement applies to foreign fishing vessels. The permit is issued for "fishing" by "such vessel." Thus, the critical question is whether a vessel documented or registered by a foreign nation and engaged in processing of fish is a foreign fishing vessel for purposes of Section 204. The FCMA strongly supports an affirmative response.

The legal analysis on this point is straightforward. Section 3(11) defines "fishing vessel" as a vessel "which is used for, equipped to be used for, or of a type which is normally used for . . . fishing, or . . . aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to . . . processing." Thus, processing by a foreign vessel is among the

activities by such a vessel which requires authorization by permit under Section 204.

Further support for this conclusion results from study of the definition of "foreign fishing" and "fishing" under the FCMA. Section 3(12) of the FCMA defines "foreign fishing" as "fishing by a vessel other than a vessel of the United States." The FCMA provides that "fishing" includes "any operations at sea in support of, or in preparation for" the catching, taking or harvesting of fish. NFPA is aware of no legislative history to the FCMA to support the view that processing of fish is outside this broad definition of "fishing." A contrary conclusion would rest on the totally inconsistent position that a fishing vessel includes vessels engaged in processing (Section 3(11)) but that "fishing" does not include processing. When these provisions of the FCMA are read together in light of the legislative history discussed below, it is quite clear that a foreign vessel carrying on processing is engaged in fishing and is, therefore, a foreign fishing vessel subject to the Section 204 permit requirements.

NFPA is aware of only one effort to construe the FCMA to reach a conclusion contrary to that outlined above. In its Comments on the Proposed Interim Policy, the National Federation of Fishermen (NFF) maintains that "foreign flag support operations are not 'foreign fishing' within the meaning of the FCMA."^{*/} In making its argument, NFF concedes that in view of the definition

^{*/} See NFF Comments of February 23, 1978, at 5.

of "fishing" in the FCMA "it is understandable that one could conclude that a foreign vessel purchasing fish from American catcher boats within the FCZ is engaged in fishing and must therefore have a valid permit." Further, NFF acknowledges that "fishing vessel" as defined in Section 3(11)(B) includes, in NFF's words, "the processing of fish."

The gravamen of the NFF argument seems to be that, notwithstanding the foregoing, the FCMA intended "foreign fishing" to mean only that fishing which was carried out by a foreign vessel pursuant to an allocation to the vessel's flag nation pursuant to Section 201(c). In other words, the term "foreign fishing" was intended to have a narrow construction focused exclusively on certain foreign harvesting rights, despite the inclusion of processing in the definition of "fishing" and "fishing vessel." If this were the case, NFF argues, then Section 204 permits are needed only for harvesting by foreign fishing vessels -- not for processing.

NFF does not point to a single congressional report or to any other legislative history to support its interpretation of the FCMA. That is hardly surprising, for there is no basis for construing the legislation as NFF suggests. If Congress had intended "foreign fishing" to have the narrow meaning that NFF seeks, surely Congress would have defined "fishing" and "fishing vessel" less broadly than in the present statute. For example, NFF does not explain why Congress chose to include

Section 204(a) as a distinct provision requiring permits for foreign fishing vessels if the only instances in which such permits were to be granted were those for harvesting subject to allocations under Section 201. Nor does NFF address the strong inference, created by the mechanism for issuing permits, that a Congress which was well-versed on the significant detrimental consequences of the operations of foreign factory processing vessels in the FCZ sought in Section 204(a) to require permits for any operations by such vessels in the FCZ. Nowhere did Congress articulate the desire to distinguish between harvesting pursuant to a TALF and obtaining fish in the FCZ by other means such as purchases from U.S. fishermen. In short, the NFF argument would require ignoring the plain language of the FCMA and persuasive policy grounds for Congress' legislating contrary to the NFF approach.

II. Congress Intended for the FCMA to be Implemented to Benefit All Segments of the Domestic Fishing Industry Including Seafood Processors.

When examined carefully, the legal arguments of opponents of the Proposed Interim Policy rest on essentially one major premise -- viz., Congress enacted the FCMA exclusively for the purpose of enhancing the condition of domestic fishermen.^{*/} Supporters of this position assert that the statute was not intended to be interpreted to benefit seafood processors. Further, they attempt to rely on the legislative history of the FCMA to show that Congress expressly placed the interests of seafood processors beyond the purview of the legislation.

A careful analysis of the FCMA and its legislative history shows that Congress intended the statute to benefit the entire U.S. fishing industry -- fishermen, processors, producers of packaging, transporters, and those working in other fish-related industries. At the time of the enactment of the FCMA, Congress had before it substantial economic information of the potential benefit to the entire United States economy of fish caught within the fishery conservation zone.

We will review briefly what data the Congress relied upon in enacting the 1976 legislation and what the FCMA provides

^{*/} See, e.g., Comments by NFF, supra, at 2 ("Congress enacted the FCMA for the purpose of conserving our fishery resources and to enhance the conditions of domestic fishermen . . .")

to take account of the interests of the entire United States fishing industry.

A. Balance-of-Payments Considerations. During the Senate debate on the FCMA, Senator Beale pointed out that the United States at that time imported over 64 percent of its fish product needs and that the United States "balance-of-trade deficit in fishery products alone amounted to nearly \$1.5 billion [in 1974]."^{*/} He emphasized that domestic consumption of fish products had more than doubled between 1948 and 1973 but that "landings by U.S. fishermen have remained virtually constant through that 25-year period." Echoing this same theme in the House debates, Congressman Breaux said that "it seems we should look seriously at the advantages of domestic-caught and processed seafood products over imported products if the domestic-processed products could be available."^{**/}

B. Potential Economic Benefits of Domestic Processing. Senator Beale pointed to the substantial economic benefits to the domestic economy of replacing fishery products imports with "domestic production." He estimated that with this displacement

*/ Senate Committee on Commerce, A Legislative History of the Fishery Conservation and Management Act of 1976, 94th Cong., 2d Sess., at 261 (1976) (hereinafter "Legislative History") (Senate debates, Jan. 28, 1976).

**/ Legislative History at 880 (House debates, Oct. 9, 1975). It is worth stressing that this point was first raised by the principal sponsor of the bill, Senator Magnuson, in a report prepared at his request. Id. at 163.

through domestic production "the U.S. economy would be bolstered by nearly \$3 billion and 200,000 man-years in U.S. employment would result."^{*/} Pointing to this same consideration, Senator Weicker estimated that the legislation would result in a three-fold increase in domestic fish caught from the Northwest Atlantic areas. He stated that this increased catch "could generate revenues totalling \$750 million for the New England area alone." Personal income would represent \$296 million of this amount. That income "would create new jobs in New England for ship-builders, fishermen, processors, suppliers and retailers."^{**/}

C. Fear of Captive United States Market. Congress not only saw the benefits of the FCMA increased domestic production, it also understood the danger of failing to encourage such production. During the debates, Representative Burke asked his colleagues to consider the results of reliance on foreign fish and fish products. He warned that the "price the American consumer would have to pay for these items would skyrocket." Congressman Burke counseled his colleagues to support the pending legislation to avoid the danger of creating the United States "as a captive market" and to prevent forcing the dollar "to shoulder the burden of another price-gouging foreign supplier."^{***/}

^{*/} Legislative History at 261 (Senate debates, Jan. 28, 1976).

^{**/} Id.

^{***/} Legislative History at 922 (House debates, Oct. 9, 1975).

D. Repeated References in Legislative History to Assisting U.S. Fishing Industry. In the House Committee on Merchant Marine and Fisheries Report on H.R. 200, predecessor to the FCMA, the Committee said that it had:

"made every effort to see that all segments of the U.S. fishing industry were protected"^{*/}

The same theme had appeared earlier in the report of the Senate Committee on Armed Services on another predecessor bill (S. 961) which the Committee said "seeks to protect the U.S. coastal fishing industry"^{**/} The Armed Services Committee noted that the Senate Commerce Committee documented not only the plight of U.S. coastal fishery stocks but also "the economic pressures on the U.S. coastal fishing industry." This reference, and others like it, plainly show that Congress intended to benefit the many diverse interests of the domestic fishing industry.

E. Express Statutory Provision. Even the most ardent supporters of the position that the FCMA benefits only fishermen concede that the statute contains findings and purposes which direct it beyond the narrow interests of fishermen alone. These congressional statements cannot be ignored and, properly understood, they clearly demonstrate the Congress' intent to have the

^{*/} Legislative History at 1074 (Report of the Committee on Merchant Marine and Fisheries on H.R. 200, H.R. Rep. No. 94-445, 94th Cong., 1st Sess. (1975)).

^{**/} Legislative History at 569-71 (Report of the Committee on Armed Services on S. 961, S. Rep. No. 94-515, 94th Cong., 1st Sess. (1975)).

statute implemented for the benefit of the entire fishing industry, including processors.

Section 2(a)(7) of the FCMA contains the following finding by Congress:

"(7) A national program for the development of fisheries which are underutilized or not utilized by United States fishermen, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby."

This finding speaks not only of the underutilization of fisheries by United States fishermen but also, most importantly, of the necessity to benefit our citizens through the employment, food supply and revenues which utilization would generate. Congress refers specifically to the very species that are a principal subject of the Proposed Interim Policy -- bottom fish off Alaska. There can be little doubt that Congress meant this reference to bottom fish to be read in the context of the broad economic interests which would be benefited by the exploitation of these species.

Congress did not stop with this finding on the subject of bottom fish. Rather, Congress included as a purpose of the FCMA in Section 2(b)(6) encouragement of "the development of fisheries which are currently underutilized or not utilized by the United States fishermen, including bottom fish off Alaska." This developmental goal must be read in the context of the

previously noted finding of the benefits to the entire economy that would result from exploitation of underutilized or not utilized species.^{*/}

Other references in the Act reflect the intent of the Congress that the fisheries resources be captured for the benefit of the nation, e.g., "to assure that the national fishery conservation and management program . . . involves, and is responsive to the needs of, interested and affected States and citizens . . ."^{**/} Taken together, these provisions of the Act lead ineluctably to the conclusion that the Act was meant to benefit more than fishermen alone and, in fact, includes seafood processors among its beneficiaries.

^{*/} In order to avoid the plain implication of this finding and purpose, one commentator has sought to make a technical argument that Congress intended these benefits to be directed only to fishermen and not to processors. Stated briefly, it is asserted that an earlier version of the purpose contained the words "process fishery resources" which were eliminated in the final version of the purpose quoted above. Hence, it is said, "Congress specifically deleted the word 'process' from its final enactment of this provision." The asserted reason for this deletion is that Congress "[a]pparently [was] anticipating possible conflicts between processors and fishermen . . ." Comments of Scott E. Stafne, Feb. 21, 1978.

This technical argument has no support in the legislative history. First, Congress deleted references to "domestic capability to harvest" from the purpose in question as well as the phrase "and process fishery resources." Yet there is no suggestion that the purpose fails to benefit the harvesting interests, i.e., U.S. fishermen. Second, none of the relevant congressional reports gives any significance to revision of the text of the purpose as proposed or even intimates that the revision was intended somehow to diminish the thrust of the initial proposal in favor of both harvesting and processing rights. Finally, the revision can be read as an attempt to broaden the coverage of the purpose to include all interests that would benefit from the development of underutilized or not utilized fisheries, including not only fishermen and processors but also packagers, transporters and the consumer.

^{**/} FCMA, Section 2(c)(3).

III. Congress Authorized NOAA to Specify the Requirements for Granting and the Criteria for Determining Whether to Grant Permits for Foreign Vessels to Purchase Fish from U.S. Fishermen.

As we have seen, Congress intended the FCMA to benefit the entire U.S. fishing industry. Accordingly, NFPA believes that the legislation confers authority on NOAA to specify those considerations relevant to determining whether the requested permits will adversely affect various segments of that industry. Further, as the agency charged with implementing the FCMA, NOAA has authority to conclude that the developmental policies of that legislation can be achieved only if domestic seafood processors are given an opportunity to purchase certain species from U.S. fishermen before foreign processing vessels are permitted to purchase those species.

Congress viewed the FCMA as establishing the basic framework for revitalizing the United States fishing industry. NOAA was given the responsibility to originate specific programs to implement this important purpose of the legislation. Under the Department of Commerce's statutory charter, the Department has the "province and duty . . . to foster, promote and develop . . . the fishery industries . . . of the United States"^{*/}

The FCMA gives the Secretary certain powers to utilize in carrying out these duties. Specifically, Section 204 gives the Secretary authority to issue permits to foreign fishing

^{*/} 15 U.S.C. § 1512.

vessels and, hence, the authority to deny such permits in appropriate cases. (See Section 204(b)(6) of the FCMA.) The authority to deny must include the power to set the grounds upon which the Secretary will refuse to issue permits.

Section 204(b)(7) authorizes the Secretary in broad terms to establish conditions and restrictions related to fishery conservation and management in permits issued to foreign fishing vessels. Such conditions or restrictions surely would include a limitation on the amount of fish which a foreign processing vessel operating in the FCZ may purchase from U.S. fishermen. A limitation on such purchases could be necessary for a variety of reasons, such as danger of the catch by U.S. fishermen exceeding the optimum yield, as well as the importance of the resource for developing domestic processing capacity. The Secretary can only determine whether to impose such a limitation and, if so, what the limitation should be by establishing criteria for passing upon permit applications. The Proposed Interim Policy articulates those factors relevant to the exercise of the Secretary's discretion in deciding whether to grant a requested permit and, if so, subject to what conditions or restrictions.

In the summer of 1977, NOAA conducted extensive public hearings pursuant to a published notice to determine the effect of various policies applicable to joint business arrangements. At those hearings NOAA received considerable testimony to the effect that the domestic processing industry required an assured

supply of underutilized or not utilized species for the development of such species by the U.S. fishing industry to occur. The priority for the domestic processing industry adopted in the Proposed Interim Policy responds to the important need which domestic processors identified during the hearings. Thus, the Proposed Interim Policy implements the very developmental duties that, as previously noted, the Congress conferred on NOAA.

It is important to emphasize that the Proposed Interim Policy does not in any sense foreordain that foreign processing vessels will be denied permits to purchase fish from U.S. fishermen. In each instance, the applicant for a permit will, of course, have the burden of demonstrating, among other points, its capability and intent to process the fish in question, as well as the capability and intent of the U.S. fishermen to harvest such fish. But domestic processors will also have a heavy responsibility to demonstrate facts supporting their position. Any domestic processors opposing granting of a permit will have to come forward with specific details showing their capability and intent to process. In addition, the domestic processors opposing applications would need to address the other criteria set forth in the Interim Policy in order to demonstrate the reasons for denying the permit in the light of the FCMA's purposes. All of this information would be set before the appropriate Regional Council pursuant to Section 204(b) (5). The

Councils' consideration of the relevant facts and criteria would be reflected in the position that the Councils provide to the Secretary. Then, and only then, would the Secretary determine how to exercise her discretion on the permit applications.

In short, the Proposed Interim Policy is hardly an outright preference to domestic processors. Rather, the processors' intentions and capabilities are treated as among the critical factors to be assessed in deciding whether to grant a permit. NOAA's decision to include that factor -- and to make it decisive -- results from the substantial evidence that the agency received in the course of its 1977 summer hearings and subsequently. As we have seen, there is ample statutory authority for NOAA to reach the judgment that development of the domestic fishing industry in underutilized or not utilized species requires formulating the Interim Policy in this fashion.

An additional point should be emphasized. The Policy proposed by NOAA is interim -- not final. For the present, NOAA would be concluding that during the 1978 fishing season permits should be granted only if the stated conditions are satisfied and only after the specified considerations are weighed. Based on experience with that Interim Policy, NOAA should be free to decide that some or all of the conditions or considerations should not be included in the policy for subsequent fishing seasons. In effect, NOAA would be saying that the 1977 hearings showed a need to formulate the policy for the 1978 fishing season

to make domestic processing capability and intent critical in deciding whether to grant permits. As the Proposed Interim Policy provides, the decision on permit applications in 1978 would not be a precedent for subsequent years.

In conclusion, we note that the Departments of Treasury and State have filed comments on the Proposed Interim Policy. Neither Department has raised any substantial ground for changing the Interim Policy as proposed.

The Department of State argues that the Proposed Interim Policy raises "serious questions regarding international trade" and constitutes a kind of U.S. export control. As to the former point, we would point out that NOAA presumably considered this issue in the light of an equally significant policy consideration mandated by Congress -- the importance to the United States of developing domestic processing capacity in underutilized or not utilized species. In the absence of a more persuasive and specific reasoning by the Department of State than its comments provide, we can see no basis for revising the Interim Policy on the ground of international trade considerations.

As for the issue of whether the Proposed Interim Policy contains an impermissible export control, we refer to the significant evidence that Korea, Japan and the Soviet Union prohibit or substantially restrict the importation of processed bottom fish from the United States. (See undated "Analysis" of

KMIDC Counsel submitted to the North Pacific Regional Council ("Korea (as well as Japan and the Soviet Union and many other nations) have restrictions against the importation of fish products in order to maximize the development of their nascent fishing industries."))^{*/} It is difficult to see how there can be a U.S. export control on a product whose importation is prohibited by the very nations seeking to purchase the species in question from U.S. fishermen. In addition, one commentator who opposes the Proposed Interim Policy and supports the KMIDC proposal has stated that the Korean processed fish would be sold into the United States market -- not exported abroad. (Comments of Capt. R. Barry Fisher, February 14, 1978, at 2.) In these circumstances, it is unclear to see where there is an export control of the kind referred to by the Department of State.

In the letter to NOAA of February 23, 1978, the Deputy Assistant Secretary of the Treasury argues that there are no grounds based on conservation or management to support the Proposed Interim Policy.^{**/} Their position overlooks the absence at present of final management plans for the bottom fish which would be the subject of the proposed joint business arrangements.

^{*/} In these circumstances, a NOAA Interim Policy to benefit the nascent bottom fish processing industry would seem particularly appropriate.

^{**/} This same contention is made on behalf of Davenny-KMIDC in the letter of Boasberg, Hewes, Finkelstein & Klores dated February 17, 1978 at 2-5; see also NFF Comments, supra, at 5.

Under the applicable preliminary management plan, there are no specified limits on the amount of such species that can be harvested by American fishermen. Hence, the demand for such species by foreign processing vessels has the potential of having a significant impact on their fishery stock. Even the Department of State letter of February 23, 1978, opposing the Proposed Interim Policy, concedes the "potential threat to the species resulting from over fishing by United States vessels. . . ."

* / The Treasury Department letter completely ignores the substantial evidence presented at the NMFS public hearings on joint business arrangements that a significant danger of overfishing of species taken as by-catch exists under the proposals for such arrangements. See NFPA Submission of September 2, 1977 at 10-13. Indeed, both the Departments of State and Treasury chose to take no public position on joint business arrangements until long after the NMFS public hearings were concluded in the summer of 1977. Neither Department mentions nor seems to regard as important the thousands of pages of testimony by private persons on the proposed arrangements at the NMFS hearings.

February 23, 1978

Before the
National Marine Fisheries Service
United States Department of Commerce

In the Matter of)
)
Proposed Interim Policy Under)
the Fishery Conservation and)
Management Act of 1976 Relating)
to Purchases of Fish by Foreign)
Fishing Vessels from Fishing)
Vessels of the United States)

Comments by the
National Food Processors Association

OF COUNSEL:

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6098

Before the
National Marine Fisheries Service
United States Department of Commerce

TABLE OF CONTENTS

SECTION I	5
Substantive Provisions of the Interim Policy	5
A. Conditions for Granting Permits	5
B. Relationship of Considerations to Conditions for Granting Permits	8
C. Additional Considerations	10
D. Clarification of Conditions and Considerations	10
(1) Conditions	10
(2) Considerations	12
E. Organization of Considerations	14
SECTION II	15
Procedural Provisions of the Interim Policy	15
A. Need for Including Procedure in the Interim Policy	15
B. Applications	16
(1) Deadline for Filing	16
(2) Timing of Regional Council Review	16
(3) Contents of Permit Applications	17
C. Role of the Regional Councils	19
D. Procedure for Comment on Final Decision by the Secretary	20
E. Inclusion on the Public Record of all Comments Submitted With Respect to Per- mit Applications	21

February 23, 1978

Before the
National Marine Fisheries Service
United States Department of Commerce

In the Matter of)
)
Proposed Interim Policy Under)
the Fishery Conservation and)
Management Act of 1976 Relating)
to Purchases of Fish by Foreign)
Fishing Vessels from Fishing)
Vessels of the United States)

Comments by the
National Food Processors Association

On February 8, 1978, the National Marine Fisheries Service ("NMFS") of the National Oceanic and Atmospheric Administration published for comment a proposed interim policy (the "Proposed Interim Policy") governing the purchase of fish by foreign fishing vessels from fishing vessels of the United States within the fishery conservation zone ("FCZ") (43 Fed. Reg. 5398). In response to this invitation, the National Food Processors Association ("NFPA," formerly the National Cannery Association) is submitting these Comments.

NFPA respectfully urges that certain substantive and procedural revisions be made in the Proposed Interim Policy in order to achieve the purposes of the Fishery Conservation and Management Act of 1976^{*/} and to ensure proper implementation of the policy that NMFS proposes to adopt. Accordingly, Section I of these Comments contains NFPA's recommendations with respect to the substance of the Proposed Interim Policy. Section II includes NFPA's recommendations concerning the procedure to be followed in the policy's implementation. Appendix A is a revision of the Interim Policy which incorporate the substantive and procedural changes supported by these Comments.

In order to assist the NMFS' evaluation of NFPA's Comments, we wish to summarize here the overall rationale and direction of these Comments. We understand that the Proposed Interim Policy provides that applicants for permits to authorize foreign fishing vessels to purchase fish from vessels of the United States have the burden of satisfying certain stated conditions. As indicated in Section I, NFPA believes that these conditions should more specifically require satisfaction of the fishery conservation and management requirements and

*/ 16 U.S.C. §§ 1801 et seq. (Supp. 1977) [hereinafter cited as "FCMA" or the "1976 Act"].

the developmental goals of the FCMA. NFPA also recommends that the Interim Policy expressly require the Secretary of Commerce to take into account each of the various considerations that are set forth in the February 8 proposal. In addition, NFPA proposes that certain additional considerations be included and certain of those proposed by NMFS be clarified.

With respect to NFPA's Comments on procedural points, Section II urges that the Proposed Interim Policy be amended to specify the procedure that NMFS will follow in implementing the policy. NMFA believes that the terms of this procedure will be decisive to achieving the objectives of the Proposed Interim Policy and to ensuring its fair and proper implementation. Among the key points that we propose for inclusion in this procedure are the following:

- a requirement that all applications by foreign nations for permits for foreign fishing vessels to purchase a particular species during the 1978 fishing season be filed by a specified date (60 days after the Interim Policy goes into effect) in order to ensure consideration at one time of the full impact on the optimum yield and of other relevant considerations;

- a requirement that all applications for permits (and any amendments) be published in the Federal Register 30 days prior to transmission of the application (or amendment) to the concerned Regional Fishery Management Councils in order to give the public an opportunity to prepare presentations to the Councils during their subsequent 45-day evaluation period;

-- a requirement that all applications for permits be required to state in detail the grounds for concluding that the conditions for granting a permit are satisfied and to state those facts known to the applicant concerning the considerations which the applicant believes are relevant to a decision on the application;

-- a statement of the role of the Regional Councils in reviewing permit applications including a requirement that the Councils address in writing the Councils' position as to whether the applicant has satisfied each of the conditions for granting a permit and the Councils' view of each of the considerations relevant to the Councils' position on the applications (including those addressed by the applicant and any interested persons);

-- a provision establishing a procedure under which the Secretary will publish (or, at least, consider publishing) and will hold (or, at least, consider holding) a public hearing prior to taking action on a permit application contrary to the position adopted by any Regional Council; and

-- a requirement that there be included on the public record all comments that NMFS (or any NMFS official or employee) receives on any permit application from any interested person including any corporation, trade association, foreign government, or any other department or agency of the federal government.

SECTION I

Substantive Provisions of the Interim Policy

A. Conditions for Granting Permits

Under the Proposed Interim Policy, the Secretary will issue a permit only if three conditions are satisfied:

"(1) the optimum yield for the fishery will not be exceeded; (2) the capability and intent of the U.S. fishing industry to harvest fish to be sold or delivered exceeds the capability and intent of the U.S. industry to process such fish; and (3) the relevant foreign vessel has the capability and intent to process such fish."

NFPA submits that these three conditions do not adequately implement the purposes of the 1976 Act. These purposes include not only:

"(1) . . . immediate action to conserve and manage the fishery resources found off the coasts of the United States . . .;" */

but also promotion of

". . . domestic commercial . . . fishing under sound conservation and management principles;" **/

*/ Id. § 1801(b)(1).

**/ Id. § 1801(b)(3).

and encouragement of

". . . the development of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska." */

As NMFS has acknowledged, the Secretary is responsible for ensuring that these conservation and management requirements and developmental goals of the Act are carried out. ^{**/} The Interim Policy which NMFS finally adopts should expressly embody these criteria. Otherwise, there can be no assurance that permits will be issued only after a showing that the conservation and management requirements and the developmental goals of the 1976 Act are satisfied.

At present, the Proposed Interim Policy includes only some of these requirements and goals among the conditions

*/ Id. § 1801(b)(6).

**/ NMFS stated in its "Advance Notice of Proposed Rulemaking" on this subject

"The Act imposes upon the Secretary the primary responsibility of protecting the fishery resources under U.S. management authority. As a related duty, the Secretary must take appropriate steps to promote the domestic commercial and recreational fisheries. Only after these primary responsibilities are met, may surplus fish be made available to foreign nations." 42 Fed. Reg. at 30876 (June 17, 1977).

for granting permits.^{*/} Moreover, the Proposed Interim Policy refers to some of these requirements and goals as "considerations" which the Secretary may take into account in passing upon applications for permits.

NFPA submits that the Proposed Interim Policy should be modified to include the following among the conditions for granting a permit for purchases by foreign fishing vessels of fish from United States harvesting vessels:

- (4) the application meets the conservation and management requirements of the FCMA and other applicable laws;
- (5) favorable action on the application will promote the development of a segment of the domestic fishing industry without adversely affecting the economic well-being or development of any other segment

^{*/} The first condition proposed by NMFS concerning optimum yield of the directed fishery constitutes only one of several conservation and management concerns under the FCMA. Additional concerns would include the effects of foreign fishing on the optimum yield of the by-catch species, the maintenance of catch statistics, and the possibility of gear conflicts.

The second and third conditions proposed by NMFS involve an inquiry into the "capability and intent" of United States fishermen and harvesters, and foreign applicants. However, it is not clear how "capability and intent" relates to promotion and development of the United States fishing industry particularly when "capability and intent" has no developed meaning under the FCMA. If these last two conditions were interpreted as allowing benefits to be granted to one segment of the industry even though another segment might be harmed thereby, the FCMA's purpose of promoting the development of the United States fishing industry could be substantially frustrated.

of such industry; and

- (6) favorable action on the application will encourage the development of fisheries that are currently underutilized or not utilized.

In addition, NFPA recommends that the first condition be expanded to require a finding that granting the application will not cause the optimum yield to be exceeded for any species taken incidentally. Witnesses in the NMFS public hearings demonstrated conclusively that there is a risk that the optimum yield will be exceeded for certain species taken incidentally as well as for the directed fishery. This risk results from the high value of such by-catch and a level of fishing for the by-catch species which approaches the optimum yield. Thus, the condition should read:

- (1) the optimum yield for the directed fishery involved and any species to be taken incidentally in harvesting such fishery will not be exceeded.

B. Relationship of Considerations to Conditions for Granting Permits

The Proposed Interim Policy states that

"In implementing the policy the Secretary of Commerce may also take into consideration one or more of the following in evaluating a proposal . . ."

Many of the eleven "considerations" set out in the successive portion of the policy relate to conservation and management or developmental concerns. Yet, nothing in the

Proposed Interim Policy compels the Secretary to accord these considerations any weight in evaluating permit applications.

NFPA believes that each of these considerations should play a critical role in determining whether the requirements of the FCMA are carried out. A negative assessment with respect to one or more of the considerations may well require that a permit application be denied. Accordingly, NFPA urges that the policy make clear that the Secretary will take each of these considerations into account in determining whether the conditions for approval of requested permits have been satisfied. The introduction to the considerations should thus be rewritten to state:

In determining whether an application for a permit satisfies the foregoing conditions, the Secretary will take into consideration each of the following:

C. Additional Considerations

Based on the testimony presented to NMFS during the public hearings which led to the Proposed Interim Policy, NFPA believes that three additional considerations should be included among those the Secretary will consider. Evaluation of these considerations is essential to a complete assessment of the conservation and management implications of a permit application. The additional considerations are:

-- effect of granting the permit application on the optimum yield of any species caught incidentally to the species for which the permit is requested;

-- steps being taken by the United States harvesting vessel to minimize its incidental catch; and

-- effect of granting the permit on the ability to gather and maintain accurate and complete catch statistics on the directed fishery and any species caught incidentally.

D. Clarification of Conditions and Considerations

(1) Conditions. NFPA believes that some clarification of the conditions would assist in implementation of the Proposed Interim Policy. We do not believe that these points change the substance of the Proposed Interim Policy.

First, capability and intent to harvest or process should be assessed with respect to the year or season during which the applicant proposes to harvest or purchase fish, rather than being determined as of the time the application is made. Only by considering the year or season as a whole can the

capability of domestic processors and the impact of the requested permit on the optimum yield be fairly evaluated. This could be accomplished by a definition along the lines set forth below.^{*/}

Second, although the Proposed Interim Policy refers to the capability and intent of the foreign vessel "to process" fish, an earlier part of the policy refers only to applications for permits to "purchase or receive" fish. The Policy should indicate that it applies to purchase or receipt for processing or for any other purpose such as transport, refrigeration or storage. This could be clarified by inclusion of a definition along the lines set forth below.^{**/}

Third, the Policy should make clear that the term "fish" refers only to those species currently underutilized or not utilized by the United States fishing industry. This Interim Policy should not permit unjustified and disruptive foreign entry into processing of species for which there is plainly adequate domestic processing capacity. Nor should this Interim Policy imply that the United States is considering authorization of such foreign entry. Accordingly, NMFS should publish a list for the 1978 fishing season specifying those limited

^{*/} "Capability and intent" will mean both the willingness and the ability to harvest or process fish, as the case may be, within the current fishing year or season.

^{**/} "Purchase or receive" will mean any delivery of fish for the purpose of processing such fish or any other purpose such as transport, refrigeration or storage.

species for which permits will be entertained. NFPA has taken the position that certain species are fully utilized and, hence, could not and should not be subject to the Proposed Interim Policy.^{*/} The proposal for a determination for 1978 would eliminate the time and expense which would be devoted to preparing and evaluating applications for which permits should clearly not be granted. This approach could be carried out by including a definition of "fish" along the lines set forth below.^{**/}

(2) Considerations. NFPA believes that certain of the considerations could be clarified to reflect more accurately their intent. Specifically, the second consideration might be

^{*/} See p. 28 of NFPA [NCA] Submission to NMFS dated September 2, 1977, which specifies the following as species for which there is "capability and intent of the U.S. industry to process" the entire catch of United States harvesting vessels:

All species of salmon, crab (King, Tanner, Red, Blue and Dungeness), herring, menhaden, shrimp, lobster, clams, oysters, scallops, halibut, Pacific Ocean perch, true cod and black cod, haddock, red fish, flounder, smelt, cusk, fluke, swordfish, butterfish, and bass.

^{**/} "Fish" will mean those species of fish regulated by the FCMA that the Secretary finds to be underutilized or not utilized within the meaning of the FCMA. For the 1978 fishing season, the Secretary has determined that the following species are underutilized or not utilized:

modified to provide an antecedent for "such" in "such fish" and to eliminate the redundant "or species" since the definition of "stock of fish" in the FCMA includes "species."^{*/} In addition, the sixth consideration might be expanded to refer to the relevant consideration of variety and quality.^{**/} Most importantly, the eighth consideration should make clear that it refers to whether the nation seeking a permit prohibits (or restricts) the importation of the same species when processed and exported from the United States. At its October 4-6, 1978 meeting in Washington, the MAFAC Subcommittee on Joint Ventures specifically included this point in its recommendations concerning the restrictions on granting permits for foreign vessels to purchase fish from United States fishermen. The consideration should express this unambiguously.^{***/} Finally, the ninth consideration is vague and, hence, it is difficult to know precisely what factors would be assessed in reaching a judgment

*/ 16 U.S.C. § 1802(22). The revised consideration could read:

Potential for gear conflicts between vessels of the United States harvesting fish for delivery to a foreign fishing vessel and such U.S. vessels harvesting other stocks of fish.

**/ As revised, this might read:

Impact on the U.S. consumer including availability of additional varieties and improved quality of fish.

***/ The consideration could be reworded as follows:

Whether the nation requesting the permit imposes any prohibition (or restriction) on the importation of United States processed fish of the species to be harvested as a directed fishery and purchased or received by the foreign vessel.

about it. It should be amplified by referring to specific foreign policy or fisheries issues or, alternatively, combined with one of the other considerations if there is an overlap.

E. Organization of Considerations

NMFS may want to consider grouping the considerations into three categories. This organization would assist applicants in preparing the information required in support of a permit application. It would also serve to focus the comments of the public and the Regional Councils on the issues raised by a permit application. The three categories would be:

- (a) Conservation and Management Effects
- (b) Economic and Developmental Impact
 - (i) on the species being fished
 - (ii) on any segment of the fishing industry
- (c) Other Considerations

NFPA has attached a proposed revision of the considerations which reflects this organization.^{*/} It will be noted that this revision includes some elaboration of the introductory language to clarify the specific factors which are to be assessed in evaluating the considerations.

^{*/} See Appendix A, Section II(B).

SECTION II

Procedural Provisions of the Interim Policy

A. Need for Including Procedure in the Interim Policy

NFPA believes that any Interim Policy that lacks a precise procedure governing the evaluation of permit applications cannot be implemented in a principled fashion. In order to assess the merits of an application, the Secretary must be assured that the applicant will provide all the information at its disposal which it believes to be relevant to its application, that interested parties will have an opportunity to make their views known and to provide additional relevant information, and that the Regional Councils will exercise their proper role in reviewing permit applications.

The Proposed Interim Policy is silent with respect to these. For this reason, NFPA proposes in this section inclusion in the Interim Policy of a procedural framework for obtaining the information necessary to evaluate permit applications and ensuring appropriate assessment of such information in reaching a final decision.*

*/ This framework is intended to be consistent with Section 204 of the FCMA, 16 U.S.C. § 1824, but addresses the particular procedural points raised by adoption of the Interim Policy. Draft text for each of the procedural points proposed in this Section II appears in Appendix A, Section III, to these Comments.

B. Applications

(1) Deadline for Filing. NFPA believes that proper implementation of the Interim Policy will require consideration at one time of all applications by foreign nations for foreign vessels to purchase a particular species from United States harvesting vessels. Otherwise it will not be practical to assess the requested permit's effect on the optimum yield for the directed fishery in question or any species caught incidentally or to evaluate fully the other relevant considerations. NFPA proposes that NMFS specify that all applications for 1978 permits be filed not later than 60 days after publication of the final Interim Policy.

(2) Timing of Regional Council Review. NFPA strongly recommends that the policy provide that notice of applications for permits will be published in the Federal Register not later than 30 days prior to transmittal to the Regional Councils. The 45-day period for evaluation of applications by the Regional Councils provided under the FCMA^{*/} would begin at the end of this 30-day period. Advance publication will ensure that persons wishing to exercise their right under the FCMA to comment on applications will have sufficient notice of any application to enable them to make meaningful use of this right.^{**/}

^{*/} FCMA § 204(b)(5), 16 U.S.C. § 1824(b)(5).

^{**/} In this regard, it should be noted that the original Soviet applications for the Sulak and the Tikhvin, 43 Fed. Reg. 1909 (January 12, 1978), were published in Washington in the Federal Register on the same day that they were presented for discussion to a Regional Council. Adoption of the proposed procedure would prevent this failure of adequate notice to interested parties from recurring.

In addition, the policy should provide that the notice requirement and period for Council review will begin running anew upon any amendment of an application for a permit. The reasons for treating the amended application as a new application are, again, to avoid unfair surprise and to allow interested persons meaningful exercise of their right to be heard.

(3) Contents of Permit Applications. NFPA believes that in order to ensure evaluation of the merits of an application, each applicant should be required to state in detail the applicant's grounds for concluding that the conditions for granting a permit are satisfied and to state those facts known to the applicant concerning those considerations which the applicant believes are relevant to a decision on the application.^{*/} Thus, applicants should be required to state which harvesting vessels of the United States are prepared to sell the species in question to foreign vessels in order to permit verification of the capability and intent of the fishermen. Such information cannot, as has been suggested, be regarded as

^{*/} The Secretary has the authority under FCMA § 204(b)(3), 16 U.S.C. § 1824(b)(3), to require applicants to include in their applications in addition to the requirements of that subsection, "any other pertinent information and material."

confidential when a foreign nation is representing that there are United States fishermen prepared to enter into such sales arrangements and when official United States governmental action is being sought on the basis of that representation.

Applicants should also be required to provide information relating to the disposition of any fish purchased under a permit, including species fished as a directed fishery and species taken as incidental catch. This information is necessary because it will heavily influence the judgments to be reached on the various considerations affecting the Secretary's decision on a permit application. In addition, this data is essential to determining whether the offloading requirements of the Nicholson Act, 46 U.S.C. § 251 (1970), will be satisfied.

An applicant would be expected to set forth reasons in support of its conclusions that the permit should be granted. Upon the publication of the application in the Federal Register, the public would be in a position to prepare appropriate comments on the information and arguments advanced by the applicant. As indicated in Appendix A, Section III(A)(3), the procedural requirements should make clear that the applicant must include in its application all information and material to be relied upon in support of granting the permit, and that in presenting an application before a Regional Council, the applicant may rely upon only that information that was so filed and published. Otherwise, the comments prepared by interested persons

may not be directed towards the relevant issues.

C. Role of the Regional Councils

NFPA believes that the Interim Policy should set forth in a manner consistent with the FCMA but in greater detail the procedure to be followed by the Regional Councils in evaluating a permit application.^{*/} Specifically, the policy should provide that the Regional Councils will comment in writing as to whether an applicant has satisfied each of the conditions for granting a permit and will discuss in detail each of the considerations relevant to the Council's position on the permit, including all factors addressed by the applicant or by interested persons. These requirements will ensure that an adequate record is prepared on the Council's action, that a consistent standard of evaluation is applied by the Councils, and, finally, that the Secretary receives

*/ The FCMA provides in § 204(b)(5), 16 U.S.C. § 1824(b)(5) that:

"Action by council -- After receipt of an application transmitted under paragraph (4)(B), each appropriate Council shall prepare and submit to the Secretary such written comments on the application as it deems appropriate. Such comments shall be submitted within 45 days after the date on which the application is received by the Council and may include recommendations with respect to approval of the application and, if approval is recommended, with respect to appropriate

(Footnote continued)

an appropriately reasoned and documented position from the Councils.^{*/}

D. Procedure for Comment on Final Decision by the Secretary

NFPA urges that the policy provide that the Secretary will publish (or, at least, consider publishing) for public comment a proposed decision before taking final action on a permit application contrary to the position of a Regional Council. In addition, NFPA believes that the Secretary should hold (or, at least consider holding) a public hearing prior to approving such a permit.

NFPA submits that the FCMA contemplates that the Regional Councils have the expertise to assess whether a permit application satisfies the specified conservation and management requirements and developmental goals of the Act. Significant domestic economic interests will be affected by every decision to grant or deny a permit application. The public hearings

(Footnote continued)

conditions and restrictions thereon. Any interested person may submit comments to such Council with respect to any such application. The Council shall consider any such comments in formulating its submission to the Secretary." (Emphasis added.)

^{*/} Preparation of the Council's position and supporting comments will often require the assistance of legal counsel acting for and on instruction of the Council.

leading to the Proposed Interim Policy contain repeated expressions of the importance to United States processors of the issues raised by applications to allow foreign vessels to purchase fish from United States fishermen. The record contains equally strong assertions of this same point by advocates of joint business arrangements.

In these circumstances, NFPA believes the Secretary should provide an opportunity for public comment and should personally hear the arguments for and against a permit application before rejecting a Regional Council's position. The Secretary could publish a proposed decision and could hold such hearings reasonably expeditiously in view of the preparation that all interested parties would have previously completed on the issues presented a permit application.

E. Inclusion on the Public Record of All Comments Submitted With Respect to Permit Applications

NFPA submits the NMFS should adopt as part of its Interim Policy a provision which will require disclosure on the public record of all oral or written communications to the Secretary, NOAA (or any official or employee of the Department of Commerce) concerning the merits of any permit applications received from sources outside the agency, including any applicant; any interested individual, legal entity or trade association; any foreign government; or any other United States department or agency. Section III(D) of Appendix A

proposes the terms for such a requirement.

NFPA believes that inclusion of such a provision is highly appropriate and necessary in view of the recent Home Box Office decision^{*/} and other recent developments with respect to ex parte communications with governmental officials during informal rulemaking proceedings. In Home Box Office, the Court of Appeals for the District of Columbia justified its proscription of undisclosed ex parte contacts on the grounds that an adversarial decision-making process requires full disclosure of relevant facts as do fundamental notions of fairness^{**/} and that a complete record is necessary when subsequent judicial review may ensue.

A later decision, somewhat critical of the Home Box Office opinion, indicates nonetheless that restrictions on ex parte contacts are needed in cases involving "competing claims to a valuable privilege."^{***/} Moreover, the court in Action for Children's Television stresses the same factors that underlie the Home Box Office decision -- the need for a meaningful opportunity to participate, fundamental fairness and the

^{*/} Home Box Office v. FCC, No. 75-1280, Slip op. (D.C. Cir. March 27, 1977); cert. denied, 46 U.S.L.W. 3190 (1977).

^{**/} Brief reference to the opinion of the Court of Appeals is appropriate here: The "ready availability of private contacts saps the efficacy of the public proceedings." Secrecy is inconsistent "with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision-making on the merits which undergirds all of our administrative law." Slip op. at 94.

^{***/} Action for Children's Television v. FCC, No. 74-2006, Slip op. at 36-37 (D.C. Cir. July 1, 1977).

importance of a full, reviewable record. ^{*/}

Permit applications for foreign vessels will plainly involve "competing claims to a valuable privilege." ^{**/} Even if permit applications were deemed not to involve such claims, the rationale underlying a proscription against contacts exists here. Undisclosed ex parte contacts with the Department of Commerce concerning the merits of pending applications will result in the creation of a defective record, ^{***/} will deprive interested persons of their opportunity to comment on all potentially relevant aspects of an application,

*/ Id. at 21-26.

**/ The granting of a permit has the effect of limiting the availability of fish to other foreign or United States interests that might also wish to make purchases. A similar situation was presented in Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), which involved the allocation of television channels among various communities. The court in Sangamon found that such allocation involved "conflicting private claims to a valuable privilege." 269 F.2d at 224. This, of course, is the standard later adopted by the court in the ACT case.

***/ In reviewing the comments and position of a Regional Council concerning an application under the Interim Policy, the Secretary of Commerce will frequently be making a final disposition of the issues raised by the application. As with a court reviewing an administrative record, it will be critical that the Secretary have a complete and accurate record of all the significant facts and arguments considered by Regional Councils in passing upon an application. By the same token, the possibility of judicial review of the Secretary's decision makes it necessary that the record of that decision be complete and accurate as well.

and will inject an element of unfairness and advantage into a procedure designed to function on the merits. The need for disclosure will be great regardless of whether the particular contact is made by a private person (e.g., an affected fisherman or processor) or a public body (e.g., a foreign government or the U.S. Department of State).

The Administrative Conference has recommended that agencies experiment with procedures

"designed to disclose oral communications from outside the agency of significant information or arguments respecting the merits of proposed rules, made to agency personnel participating in the decisions on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances."*/

NFPA therefore suggests that NOAA adopt the policy of disclosure of all ex parte communications made to it with respect to pending applications for permits, regardless of their source, ^{**/} by placing all such communications on the public record.

*/ Administrative Conference of the United States, Recommendation No. 77-3 (to § 305.77-3, Ex Parte Communications in Informal Rulemaking Proceedings), 42 Fed. Reg. 54253 (Oct. 5, 1977).

**/ When a governmental official is commenting on the merits of a proposed application, disclosure is necessary to ensure that the views of all interested parties are known to those who may be affected by action taken on the basis of these views. This is not inconsistent with Home Box Office, whose proscrip-

As a related and final matter, NFPA recommends that all oral or written comments to NMFS from any person outside the Department of Commerce with respect to the Proposed Interim Policy be placed on the public record. Such comments will be highly relevant to understanding the provisions of the final Interim Policy and to formulating a policy for years subsequent to 1978.

NATIONAL FOOD PROCESSORS ASSOCIATION

(footnote continued)

tion applied to discussions "with any interested private party, or an attorney or agent for such party" Slip op. at 97-98, citing Executive Order No. 11920, § 4, at 1041 (emphasis added). The ACT case appears to focus less on the source of the ex parte communication than on its effect on the ultimate decision. ACT, supra page 22, slip op. at, e.g., 36.

APPENDIX A

NFPA Proposed Revision of Interim Policy

Purchases by Foreign Fishing
Vessels of Fish from United States Harvesting Vessels
(50 C.F.R. Part 611)

I. Interim Policy for 1978

The Secretary of Commerce shall encourage the development of all segments of the United States fishing industry consistent with the purposes of the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq. (the Act) and other applicable laws. As one interim means of carrying out this objective, the Secretary may approve on a case-by-case basis applications for permits authorizing foreign fishing vessels to carry out specified fishery support operations (50 C.F.R. § 611.10

by purchasing or receiving during the 1978 fishing season species of a directed fishery from United States harvesting vessels within the Fishery Conservation Zone (FCZ). Unless specifically requested by an applicant and authorized by the Secretary, any species caught incidentally by such a United States harvesting vessel will be prohibited species (50 C.F.R. § 611.13) and may not be purchased or received by foreign fishing vessels. Any permits granted will contain appropriate conditions and restrictions.

Standards for approval of applications for such permits under this Interim Policy are set forth in Section II. The procedure for applying for such approval and for processing such applications is set forth in Section III.

All applications for a permit for any fishery under this Interim Policy will be filed with the Department of State not later than 60 days after publication of the final Interim Policy for 1978, i.e. . . . Decisions with respect to applications for permits for the 1978 fishing season will have no precedential effect on any applications for permits for subsequent years under any interim or final policy of the Secretary.

II. Standards for Approval

(A) Conditions. Permits will be approved only when the Secretary is satisfied that:

- (1) the optimum yield for the directed fishery involved and any species to be taken incidentally in harvesting such fishery will not be exceeded;
- (2) the capability and intent of the United States fishing industry to harvest fish to be sold or delivered exceeds the capability and intent of the United States industry to process such fish;
- (3) the relevant foreign vessel has the capability and intent to process such fish;
- (4) the application meets the conservation and management requirements of the FCMA and other applicable laws;
- (5) favorable action on the application will promote the development of a segment of the United States fishing industry without adversely affecting the economic well-being or development of any other segment of such industry; and
- (6) favorable action on the application will encourage the development of fisheries that are currently underutilized or not utilized.

For purposes of the foregoing, the following terms shall be defined as indicated:

- (1) "Fish" will mean those species of fish regulated by the FCMA that the Secretary finds to be underutilized or not utilized within the meaning of the FCMA. For the 1978 fishing season, the Secretary has determined that the following species are underutilized or not utilized: _____
_____.
- (2) "Purchase or receive" will mean any delivery of fish for the purpose of processing such fish or any other purpose such as transport, refrigeration or storage.
- (3) "Capability and intent" will mean both the willingness and the ability to harvest or process fish, as the case may be, within the current fishing year or season.

(B) Considerations. In determining whether an application for a permit satisfies the foregoing conditions, the Secretary will take into consideration each of the following:

- (1) Conservation and Management Effects
 - (a) Effect of granting the permit application on the optimum yield of
 - (i) the species harvested as a directed fishery; and
 - (ii) any species taken incidentally to the fishing of a directed fishery.
 - (b) Steps being taken by the vessel of the United States to minimize its incidental catch.
 - (c) Potential for gear conflicts between vessels of the United States harvesting fish for delivery to a foreign fishing vessel and such U.S. vessels harvesting other stocks of fish.

- (d) Effect of granting the permit on the ability to gather and maintain accurate and complete catch statistics on the directed fishery and any species caught incidentally.

(2) Economic and Developmental Impact

- (a) Impact of granting the permit on the economics of any species fished under a foreign fishing permit, including
 - (i) impact on exvessel, wholesale or retail prices;
 - (ii) impact on the U.S. consumer including availability of additional varieties and improved quality of fish; and
 - (iii) impact on the degree of market control possessed by U.S. or foreign processors.
- (b) Impact on the economic well-being or development of any segment of the U.S. fishing industry including potential for expansion of U.S. fleets and for construction of new domestic processing capacity for underutilized or not utilized species.
- (c) Whether the nation requesting the permit imposes any prohibition (or restriction) on the importation of United States processed fish of the species to be harvested as a directed fishery and purchased or received by the foreign vessel.

(3) Other Considerations

Overall U.S. foreign policy guidelines with respect to the nation seeking such permit and relevant fisheries or trade issues.

III. Procedure for Filing and Processing Permit Applications

A. Applications.

(1) Deadline for Filing. All applications for permits under this Interim Policy shall be filed with the Department of State by not later than ^{*/}.

(2) Timing of Publication and Consideration of Applications. An application for a permit under this Interim Policy will be published in the Federal Register not later than 30 days prior to the transmission of such application to a Regional Council. At the conclusion of such 30-day period, the Department of State will transmit the application to the interested Regional Council(s). The 45-day period for Regional Council consideration of a permit application pursuant to Section 204(b)(5) of the FCMA will commence upon receipt of such official copy of the application. No Regional Council will consider an application until the Council has received the application transmitted by the Department of State.

(3) Contents of Applications. In addition to the information required under Section 204(b)(3) of the FCMA, each applicant for a permit under this Interim Policy will state in detail:

^{*/} Date to be 60 days after publication of a final Interim Policy in order to allow time for foreign nations to prepare the information necessary for inclusion in an application for a permit.

- (a) the applicant's grounds for concluding that the conditions for granting a permit in Section II(A) are satisfied (including the names of any vessels of the United States which the applicant believes have the capability and intent to deliver fish to the foreign fishing vessel);
- (b) any facts known to the applicant concerning those considerations enumerated in Section II(B) which the applicant believes are relevant to the application (including information relating to the disposition to be made of the directed fishery by the foreign fishing vessel and of any species caught incidentally by the vessel of the United States);
- (c) the applicant's reasons for concluding that any consideration is not relevant to determining final action on the application.

An application will include all information and material upon which the applicant will rely in support of the requested permit. In presenting its application before a Regional Council, an applicant may rely upon only the information and material which was filed as its application with the Department of State and published in the Federal Register.

Any amendment of an application or submission of additional information or material in support of a permit application will be published in the Federal Register. The 45-day period for consideration by the Regional Council(s) of the relevant application, as amended or supplemented, will begin 30 days after the date of such publication.

B. Regional Council Review.

Any Regional Council which considers and takes a position on an application for a permit under this Interim Policy shall state in detail in writing:

- (1) its grounds for concluding whether the applicant has satisfied the conditions for granting the permit;
- (2) its conclusions with respect to each of the considerations that the applicant, the Council or any interested third party believes is relevant to determining final action on the application; and
- (3) its position on whether the requested permit should be granted and what conditions, if any, should be included in the permit if it were granted.

C. Procedure for Comment on Final Decision by the Secretary.

Before taking final action on a permit application contrary to the position of a Regional Council, the Secretary

- (1) [will publish] [will consider publishing] for public comment a proposed decision and the reasons therefor; and
- (2) [will hold] [will consider holding] a public hearing upon the receipt of a request for such hearing by any segment of the fishing industry that believes that it would be adversely affected by such action.

D. Public Record for Comments on Permit Applications.

(1) Written Communications. NMFS will maintain for public inspection in a separately designated file a copy of any written communication concerning the merits of a permit

application that the Secretary, NOAA, or any official or employee of the Department of Commerce receives from any interested party (an "Interested Party") including any applicant; any individual, legal entity or trade association; any foreign government (or agency or instrumentality thereof) or any official or representative of such a government, agency or instrumentality; or any other department or agency of the United States government (or an official or employee thereof).

(2) Oral Communications. Every official or employee of the Department of Commerce who receives from any Interested Party any oral communication concerning the merits of a permit application will promptly prepare a complete and accurate summary of the contents of such communication and promptly place such summary in the file for public inspection.