# PROPOSED AMENDMENTS TO MFCMA

Section 302. Regional Fishery Management Councils

(a)(1) through (6) and (8) (parenthetical expression)

(at least one of whom shall be appointed [from] to an obligatory seat for each state from a list of individuals submitted by that state)

Comments: It does not appear that NMFS will be responsive to Council comment suggesting the current 601 regulations language providing for obligatory seats be retained. Therefore, this amendment language is proposed to apply to all Councils except NPFMC which already has five obligatory Alaskan seats and two obligatory Washington seats. The current language of these sections applies the appointment procedures of section (b)(2) which provide for lists submitted by the Governors, qualifications, etc. The intent of the proposed language is to retain the obligatory seat for which only the Governor of that state may submit nominees. The legislative record supports an obligatory seat since Senate version of MFCMA made all appointed seats obligatory (i.e., three for each state including fishery director). Without an obligatory designation all seats become at-large seats, and a person serving on behalf of a state could be nominated by a Governor of an adjoining state.



Section 304. Actions by the Secretary

(a)
(1) After the Secretary receives a Fishery Management Plan, or amendment to a plan, or a regulatory amendment authorized under the provisions of a plan, which was prepared by a Council -

Comments: The proposed added language would require review and approval of a regulatory amendment in the same time period as a FMP or amendment. Supposedly, regulatory amendments can be processed and implemented faster than this time period, but this has not occurred in many instances. One Gulf Council regulatory amendment, recently implemented, required almost three years for implementation. NMFS has encouraged the Councils to include framework measures within their FMP to allow modifying measures without having to amend the FMP. Many such framework measures are implemented by regulatory amendment. Unfortunately, because there is no mandatory time-frame for review and approval, the amendments are relegated to a secondary status and are not processed expeditiously, thereby creating significant management problems. The inclusion of regulatory amendments in section 304 in no way prevents NMFS from processing and approving them more rapidly than FMPs, if they chose to.

Language underlined is new; language in brackets is deleted.

AGENDA ITEM 6c

(f) Miscellaneous Duties

(1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may:

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

[No] A jointly prepared plan or amendment [may be] submitted to the Secretary [unless it is] must be approved by a majority of the combined total voting members, present and voting, of [each] all of the Councils concerned.

Comments: This modification of subsection (f)(1) is proposed as a solution to the impasse that has existed for years in the development and implementation of FMPs prepared jointly by more than two Councils. A prime example of the problem is the FMP for Atlantic Billfish, which was started in 1978 and would have been implemented in 1982 if such language existed. This FMP has recently been submitted for implementation, but required 10 years of development because of disagreement between Councils on its provisions.

AGENDA ITEM 6d

(d) ESTABLISHMENT OF FEES.--The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1). The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits, except for systems limiting access to a fishery, as provided for in section 303 (b)(6), where level of fees may be set to collect economic rent.

Comments: Many FMPs are being amended to create limited access systems the end result of which is the creation of more cost-effective and thus profitable fishing operations for those entities remaining in the fishery. As these operations become profitable, they should be charged economic rent for being granted exclusive access to the common property resource. The term "economic rent" used in the proposed amendment language connotes the fees as set by the Secretary will be at a level which taps the profit.

Language underlined is new; language in brackets is deleted.

# SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL
# PROPOSED MFCMA AMENDMENT ON JOINT COUNCIL FMP DEVELOPMENT

## SEC. 304 ACTION BY THE SECRETARY

### (f) MISCELLANEOUS DUTIES

CURRENT LANGUAGE IN THE MFCMA

(1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of the Councils concerned.

RECOMMENDED LANGUAGE FOR AMENDMENT OF THE MFCMA

*(1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary shall require* may *that a plan or amendment for the fishery be prepared jointly by the concerned Councils. The Secretary shall designate which Councils will participate in the joint plan development and name one of the Councils so designated to serve as Administrative lead in developing the plan or any amendment.*

*No jointly prepared plan or amendment shall be submitted to the Secretary unless it is approved by a majority of all voting members of the designated Councils, present and voting collectively as one body.*

*(A) The appropriate Regional Director(s) involved in preparing a joint plan shall have one vote in the joint voting process.*

(Below are two options to deal with a State that is represented on two Councils)

OPTION 1: *(B) When a state is represented on two Councils involved in preparing a joint plan, all Council members from that state shall be allowed to vote in the joint voting process.*

OPTION 2: *(B) When a state is represented on two Councils involved in preparing a joint plan, the number of votes that a state may cast in the joint voting process shall not exceed the greatest number of Council members representing that state on any one Council.*

## BENEFITS OF THE PROPOSED AMENDMENT

1. The joint Council FMP and amendment development process will be more efficient, timely and equitable.

2. Every Council member's vote would carry equal weight (even if he/she we in the minority on their own Council). Approved plans and amendments will represent the true majority position.

3. There would be no stalemates in the FMP development process because of one Council holding out.

4. Conservation of the resources will be enhanced as "unfavorable" management compromises will not be necessary to move plans and amendments forward.

5. Input into the decision making process is more likely to remain within the MFCMA process precluding the "political route".

## RATIONALE FOR AMENDING THE JOINT VOTING PROCEDURES

The current process for developing management plans for fisheries that extend beyond the geographical area of authority of any one Council has proven to be unnecessarily burdensome, exceptionally slow, costly and in cases where one Council is designated to develop the plan, inequitable. Reaching agreement on management measures for a fishery when two Councils acting separately and independent of each other must concur by

majority vote, is difficult. When more than two Councils are involved, it becomes close to impossible to reach agreement in an acceptable period of time (the Billfish FMP is a good example - joint five Council plan took 12 years to complete).

The Magnuson Act established a regional system of management because of the differing attitudes and approaches to fisheries management in various regions of the United States. This system has worked very well in accomplishing its purpose. But the very reason regional management was established works against joint Council plan development the way it is currently mandated in the Act. The different approaches to fisheries management that exist from region to region assure that there will be disagreement as to how the resource is to be managed under a joint Council plan. This disagreement in its self is good in that it stimulates debate and allows for a wide range of options to be presented and considered. Where the current system breaks down is in providing a mechanism whereby these differences can be resolved in an acceptable time frame that will provide for conservation of the resource.

Under the present system, if the Secretary designates a single Council to prepare a plan that also concerns other Councils, the other concerned Councils may have some input, but they have no vote in the final plan or amendment submitted to the Secretary by the designated Council. If the Secretary requires that the plan or amendment be prepared jointly by the Councils concerned, there is no way to insure the Councils will ever reach consensus and a plan or amendment developed. Currently, each Council votes independently as a separate body on the management options that are being considered. In a multi-Council plan the potential exists for a situation where Councils (a) and (b) approve the plan unanimously but Council (c) disapproves the plan by a vote of 9 to 8. In this case, one Council by not accepting the management options the other two Councils (the majority) have approved, can hold up the development of a multi-Council plan forever. In the mean time, the resource in question continues to decline.

Amending the Act as proposed would not compromise the regional management concept. The change would improve the concept as it relates to joint development by insuring that joint plans are developed in a timely, cost effective manner and that the plan reflects the wishes of the majority of all Council members on the Councils developing the plan. The proposed approach to joint plan develop would work as follows:

The Secretary would designate which Councils participate in the joint FMP

process based on a Council's expression of interest to participate and criteria in the Secretary's Uniform Standards (these would have to be developed). Procedures presently followed relative to interactions between Councils involved in joint plan development would remain the same. However, management measures to be included in the plan and subsequently the plan its self would be approved by a majority of all voting members of the designated Councils, present and voting collectively as one body. As an example, Councils (a), (b) and (c) are voting on approval of an FMP for submission to the Secretary; Council (a) votes 10 to 5 for approval, Council (b) votes 11 to 6 for disapproval and Council (c) votes 9 to 4 for approval. The plan would be approved by a majority vote of 25 to 20 and submitted to the Secretary. The Councils could conduct the voting at a joint meeting of all three Councils or they could vote at separate Council meetings and the votes would be tallied after each Council had met and voted.

ECONOMIC RENT AND USER FEES

At the suggestion of the Gulf of Mexico Fishery Management Council, the Council chairmen are to consider amending Section 304(d) of the Magnuson Fishery Conservation and Management Act (MFCMA) to read as follows:

> (d) ESTABLISHMENT OF FEES. - The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to Section 303(b)(1). The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this section shall not exceed the administrative costs incurred in issuing the permits, except for systems limiting access to a fishery, as provided for in Section 303(b)(6), where the level of fees may be set to collect economic rent.
>
> Explanation: Many FMPs are being amended to create limited access systems, the end result of which is the creation of more cost effective and thus profitable fishing operations for those who remain in the fishery. As these operations become profitable they should be charged economic rent for being granted exclusive access to the common property resource. The term "economic rent" used in the proposed amendment language denotes the fees as set by the Secretary will be at a level which taps the profit.

Currently, Section 304(d) limits any fees charged U.S. fishermen to the administrative costs of issuing permits or licenses. While at least one author is of the opinion that the MFCMA may be interpreted to allow the collection of economic rent[1/], the predominant view is that Section 304(d) prohibits any type of domestic user fee for fisheries resources.[2/]

Following is a brief discussion of recent fisheries user fee programs proposed by either Congress or the Councils. This section is provided to aid the Council chairmen in their deliberations on amending Section 304(d).

Since the passage of the MFCMA there have been intermittent efforts to impose user fees on U.S. fishermen. The most recent user fee legislation is H.R. 3341, "The Fisheries Research Funding Act of 1987" introduced by Representative Don Young on September 23, 1987. The bill proposes a schedule of fees on both commercial harvesting and processing vessels operating in the

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1/ See Burke, "Recapture of Economic Rent Under the FCMA: Sections 303-304 on Permits and Fees", 52 Washington Law Review 681, (1977).

2/ See Bell, "Worldwide Economic Aspects of Extended Fishery Jurisdiction Management", in Economic Impacts of Extended Fisheries Jurisdiction 3, (L. Anderson ed., 1977).

EEZ and also requires a fishing license for recreational fishing in the Zone. The fee schedule is as follows:

| | | |
|---|---|---|
| Harvesting vessel | - | $45.00 per vessel annually |
| Processing vessel | - | $2.00 per ton of fish purchased by the vessel for processing within the EEZ. |
| Recreational fishing license | - | $15 annually for anyone 16 years of age or older. |

The fees are to be collected by the Secretary of Commerce and deposited into the Fisheries Research Fund. The fees are to be distributed annually as follows:

1. 25% to the Regional Fishery Councils.
2. 10% to the Pacific Marine Fisheries Commission.
3. 10% to the Atlantic States Marine Fisheries Commission.
4. 5% to the Gulf States Marine Fisheries Commission.
5. 50% to NMFS.

The Council distribution is to be prorated based on the amount the fees collected from commercial harvesters and processors within the respective Council jurisdictions; however, no Council may receive less than 5% of the amount available to all Councils. Failure to pay fees charged to commercial harvesters and processors is punishable by a fine not to exceed $25,000 per violation and may lead to the one-year suspension of harvesting or processing privileges. Recreational fishing in the EEZ without a license is subject to a $100 fine.

During the 1985-86 MFCMA reauthorization cycle, it was proposed in House and Senate legislation to lift the fee ceiling in Section 304(d) to allow the creation of Compensation Funds in connection with the imposition of limited entry in a fishery. H.R. 1533, as amended by the House Subcommittee on Fisheries and Wildlife Conservation and the Environment on May 2, 1985 and S. 747, as introduced by Senator Lautenberg on March 26, 1985, proposed to create dedicated funds to compensate fishermen for loss or reduction in livelihood attributable to limited entry and, also to fund vessel conversions, buy back, or other fleet reduction programs. The compensation programs were to have been financed by levies against domestic fishermen.

While the Council chairmen supported the compensation programs, they disfavored a provision in the House bill that required a referendum and approval of the plan by two-thirds of the fishermen participating in the relative fishery. Of course, the fisheries bill that finally passed Congress in 1986 containing the MFCMA reauthorization, S. 991, contained neither the House nor the Senate compensation program.

As an alternative to the compensation programs the North Pacific Fishery Management Council proposed that Section 304(d) be amended to read, either:

1. "(d) . . . The level of fees charged under this subsection shall (not exceed the administrative)* be at least in an amount equal to the** costs incurred in issuing the permits;" or,

2. "(d) . . . The level of fees charged under this subsection shall (not exceed the administrative costs incurred in issuing the permits)* be at least in an amount equal to the total costs of carrying out the provisions of this Act including, but not limited to, fishery conservation, management, and enforcement, fisheries research, and the costs of any observers placed on domestic fishing vessels pursuant to 303(b)(8).**"

The Council chose not to pursue this proposal, but joined with the other Councils in supporting the compensation program approach instead.

In discussing amendments to Section 304(d) for the next reauthorization cycle, the Council chairmen should consider whether to restrict user fees to a limited entry context, to allow user fees in other specific instances or to take a generic approach to the matter. Consideration should also be given to the question of whether to create a dedicated fishery management and research fund to consist of user fees levied against U.S. fishermen.

*Language to be deleted.
**New language underlined.

DRAFT

The Honorable Jack Brooks
Chairman
Committee on Government Operations
Room 2157
Rayburn House Office Building
Washington, DC 20515

Dear Representative Brooks:

We are writing to you, since your committee has oversight over the Paperwork Reduction Act (PRA), to point out a problem that we feel will eventually jeopardize our ability to manage the fishery resources of this nation. As you are aware, the PRA data collection budget of each agency is reduced annually. We, as businessmen, fully support the reduction of federal paperwork associated with operating businesses in the private sector. However, we are concerned that in the near future the budget for fisheries in NOAA will be reduced to the level that we are precluded from obtaining the information from persons harvesting or processing fish from the exclusive economic zone (EEZ) that is necessary for management of these federal fishery resources.

The trend for our data needs under the Magnuson Act, is exactly opposite the data collection reductions under the PRA. As more fisheries are managed or as fisheries become fully utilized or overexploited, our need for more and better data increases. Therefore, in the long term, we will be faced with very serious difficulties in not only obtaining the additional data we need but also in just maintaining the current level of data collection, since under the PRA a data collection activity is approved for only three years.

We, in carrying out our management responsibilities under the Magnuson Act, have limited our data collection requirements to the minimum necessary for good management to reduce unnecessary burdens on the participants in the fisheries. We do, however, feel

that persons utilizing this common property resource under federal management do have an obligation to provide data on the fisheries in return for their use of these resources.

We bring this problem to your attention before the PRA has impacted our ability to obtain these management data to allow your committee opportunity to consider a course of action that will allow us to continue to provide for proper management of our fishery resources. We, by copy of this letter, are alerting the committees with oversight over the Magnuson Act of this problem.

Best regards.

Sincerely,

John M. Green
Chairman
Gulf Council

Edwin A. Joseph
Chairman
South Atlantic Council

David V. D. Borden
Chairman
New England Council

Robert L. Martin
Chairman
Mid-Atlantic Council

Stephen A. Monsanto
Chairman
Caribbean Council

Robert C. Fletcher
Chairman
Pacific Council

James O. Campbell
Chairman
North Pacific Council

William W. Paty
Chairman
Western Pacific Council

JMG:WES:mjw

cc: The Honorable Walter Jones
The Honorable Gerry Studds
William Evans

AGENDA ITEM 6e

DRAFT

The Honorable John Glenn
Chairman
Committee on Government Affairs
Room 340
Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Glenn:

We are writing to you, since your committee has oversight over the Paperwork Reduction Act (PRA), to point out a problem that we feel will eventually jeopardize our ability to manage the fishery resources of this nation. As you are aware, the PRA data collection budget of each agency is reduced annually. We, as businessmen, fully support the reduction of federal paperwork associated with operating businesses in the private sector. However, we are concerned that in the near future the budget for fisheries in NOAA will be reduced to the level that we are precluded from obtaining the information from persons harvesting or processing fish from the exclusive economic zone (EEZ) that is necessary for management of these federal fishery resources.

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Chairman
North Pacific Council

William W. Paty
Chairman
Western Pacific Council

JMG:WES:mjw

cc: The Honorable Ernest Hollings
William Evans

**NEW ENGLAND FISHERY MANAGEMENT COUNCIL**
SUNTAUG OFFICE PARK, 5 BROADWAY (ROUTE 1)
SAUGUS, MASSACHUSETTS 01906
SAUGUS 617-231-0422 FTS 8-223-3822

February 19, 1988

The Honorable John Kerry
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

Dear Senator Kerry:

I refer to your letter of January 20 regarding Tuna. This Council and virtually all segments of the New England fishing industry have always opposed the United States juridical position on the highly migratory tunas and their exclusion from U.S management authority.

Our Council has voted several times to recommend inclusion of all tunas under the Magnuson Act and submitted testimony advocating such action as long ago as 1981. In 1986 when the NOAA Fishery Management Study recommended the repeal of the tunas exemption, our Council sent a letter to Dr. Calio, the Administrator of NOAA, endorsing the recommendation and urging the administration to pursue that course.

The exclusion of highly migratory tunas adversely affects the ability of the Management Councils set up by the Magnuson Act to effectively manage other fishery resources for which they hold responsibility. Tuna longlining by foreign vessels results in uncontrolled kills of swordfish and billfish even though there is no retention of those species and despite efforts to reduce such incidental mortality. That will continue to be the case until tunas within the U.S. EEZ are brought under the control and management authority of the Councils. The same difficulties will apply in the case of pelagic sharks which will also be the subject of a management effort in the near future.

The enclosed copy of an article by Susan O'Malley Wade, published in March 1986, is an extremely cogent explanation of how the United States arrived at our national juridical position. It provides a compelling argument for inclusion of <u>all</u> species under the Magnuson Act and I urge your careful review of that argument.

We do not disagree entirely with Senator Breaux's view, expressed in his comments introducing S.1989, that tuna cannot be effectively conserved or managed on a unilateral basis. We are convinced, however, that each coastal state is entitled to exercise full management jurisdiction over all fish while they are in the EEZ of such state.

Organizations such as the International Commission for the Conservation of Atlantic Tunas (ICCAT) will remain useful and necessary. The cooperative sharing of research and of data collected by individual nations, and the coordination of national management programs clearly requires international efforts in an organized context. In fact, in the Atlantic area, ICCAT activities should be expanded to deal more adequately with swordfish, billfish and sharks.

The Fishery Management Councils established by the Magnuson Act have the responsibility for preparation of all fishery management plans. They should therefore play a formal role, by having Council members serve as official members of the United States delegation, in all U.S. participation in ICCAT and similar organizations. This should be mandated by the same legislative change that brings tunas in our EEZ under U.S. jurisdiction.

Harvesters allowed to fish under permits by coastal states (in our case under the Magnuson Act or pursuant to acts such as the Atlantic Tunas Conservation Act and the proposed South Pacific Tuna Act of 1987 implementing international treaties) must be required to submit catch and effort data to the licensing authority and/or the flag state of the vessel. The provision in section 12 (b) of S.1989 relating to information provided to the Secretary being kept confidential and not released except by court order is unacceptable.

Present rules including sections 302 (j) (4) and 303 (d) of the Magnuson Act allow for NMFS and Council access to confidential fisheries data on a need to know basis. Other federal laws provide assurances of security for industry's commercial and financial interests by imposing fines and jail sentences on those who improperly disclose confidential information. There is, therefore, no necessity for the language in section 12 (b) and it should be modified to reflect the provisions already contained in the Magnuson Act relating to confidential information.

Except for this objection to section 12 (b) our Council has no objection to S.1989 being voted into law. We were not asked to comment on the treaty itself but we would not have objected to it either. Although it is a mulitilateral treaty, it is essentially a recognition of coastal state rights and authority over migratory tuna and is a step toward the position we support for full U.S. jurisdiction over all tunas in our EEZ.

You ask whether changes may be in the offing in the U.S. tuna industry that might alter the position taken by the Department of State on highly migratory species. We cannot answer that question but we hope that, having taken the first step toward acknowledging coastal states jurisdiction, the Department may recognize both the logic and the desirability of bringing all tunas under the Magnuson Act in the context of international coordination we have outlined. Regardless of the Department's position, there seems to be no

valid reason to exclude tunas from management under the Magnuson Act any longer and very strong reasons why the U.S. position should be changed legislatively.

We look forward to your support and assistance in correcting this situation. We are preparing a draft of the changes in the Act that would accomplish the goal that I hope we share. If we may be of help in any way we stand ready to do so.

Sincerely,

David V. D. Borden
Chairman by DGM

Enclosure: Wade Article

DGM/2051C

DRAFT

Suggested Changes to the

MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

(new language underlined)

Section 2 (a) FINDINGS

2 (a) (1)
Note that in Sec. 2 (a) (1) "The highly migratory species of the high seas" are included among those resources which constitute valuable and renewable natural resources.

Section 2 (b) PURPOSES
2 (b) (1) delete: "except highly migratory species"

2 (b) (2) delete existing section and insert new section:
"to support and participate in international fishery agreements for research, data collection, and coordination of national management programs for highly migratory species."

Section 3 DEFINITIONS

3 (6) insert a new defintion:
"The term "Concerned Council" means a Council that is solely or, pusuant to section 304 (f) (1) (B), jointly responsible for preparation of a fishery management plan or that has expressed to the Secretary an interest in a fishery that occurs in its area of jurisdiction."

Then, renumber the present 3(6) and all subsequent definitions.

3 (14) delete existing section and insert new section:
"The term highly migratory species means species of tuna and other pelagic fishes including swordfish, billfish and sharks , which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean that extend beyond the exclusive economic zone or fishery conservation zone of a single nation.

Section 101 - U.S. RIGHTS AND AUTHORITY, etc.

101 (a) - delete: "Except as provided in section 102"

102 delete all of section 102.

Section 202 INTERNATIONAL AGREEMENTS

202 (a) (4)
"shall, upon the request of and in cooperation with the Secretary and any concerned Council, initiate, etc."

202 (a) (4) (B)
"which provide for the conservation and management of anadromous species and for research, data collection and coordination of national management programs for highly migratory species, and"

202 (e) (2) NON RECOGNITION
Delete existing section and insert new section:

"fails to recognize and accept that appropriate treaties or international fishery agreements, are necessary for research, data collection and coordination of national management programs for highly migratory species, whether or not such nation is party to any such agreement; or"

Section 205 IMPORT PROHIBITIONS

205 (a) (2) delete existing section then, renumber (3) and (4) as (2) and (3).

205 (d) (1) - This section now becomes un-necessary and should be deleted.

Section 302 COUNCILS

302 (h) (6) Renumber this subsection as (7) and insert a new (6):
"designate a member, or members, to participate in preparations for U.S. attendance at meetings of international organizations established by treaty or by international fishery agreement for the purpose of research, data collection and coordination of national management programs for highly migratory species, and to serve as a member of the United States delegation at each such meeting.

Note: it may be necessary to amend the implementing legislation for ICATT, IATTC, and other treaties.

Section 304 ACTION BY THE SECRETARY

304 (f) (2) Renumber the existing subsection as 304 (f) (3) and insert the following new language: In the case of management plans for highly migratory species, the Secretary shall require that such plans be prepared jointly by the concerned Councils.

Section 405 ATLANTIC TUNAS CONSERVATION ACT AMENDMENT

Section (a) no change needed here, but the ATC Act may need to be amended (as well as other similar acts) to make it consistent with MFCMA inclusion of highly migratory species under U.S. management authority and with Council responsibilities for management plans for highly migratory species.

DGM.2050C

July 26, 1988

WESTERN
PACIFIC
REGIONAL
FISHERY
MANAGEMENT
COUNCIL

**Assumptions Regarding Tuna that Shaped Congress's**

**Decision to Exclude Tuna from Jurisdiction**

**Under the MFCMA**

These assumptions, explicitly or implicitly stated, are the foundation of Linda Hudgin's report.

1. Congress believed that there were few economically valuable tuna resources within 200 miles of U.S. coastlines.

   a). no wide spread or large scale domestic nearshore fisheries for tuna existed (less than 1 percent of domestic production came from the U.S. FCZ);

   b). tuna, for the canned tuna industry, was the largest U.S. food fishery in both volume and value, and 97 percent was caught in waters off foreign shores;

   c). due to the lack of nearshore domestic tuna fisheries, information on tuna stocks within the EEZ was meager, and the potential for tuna fisheries was not understood;

   d). all the industry information presented to Congress came from the canned tuna industry, because no U.S. fisheries for fresh tuna existed at that time;

2. Prevailing scientific opinion was that tunas were highly migratory.

3. In view of the perceived highly migratory nature of tunas, international management was the best strategy for conserving and exploiting tuna resources.

4. By incorporating the highly migratory feature and cooperative international management into one overall tuna policy, the U.S. could maintain open access for the distant water tuna fleet to fish within EEZs of other nations.

5. That tuna and billfish, such as marlin and swordfish, which would be included under the MFCMA, could be managed separately.

6. Excluding tuna from the MFCMA would not have any negative domestic impacts or create any new negative international impacts.

   a). Internationally. The U.S. would take a lead role in structuring and formalizing world tuna policy.

   b). Domestically. Congress never anticipated the explosive development and expansion of domestic tuna fisheries, and the impact that excluding tuna would have on resource management and allocation.

**Circumstances have changed dramatically since the passage of the MFCMA.** Most assumptions relied upon by Congress in formulating U.S. tuna policy have not held up. Here is an overview of how things have changed, and why tuna should be included within the MFCMA.

1. **There are significant tuna resources within the U.S. EEZ.** Domestic fisheries for fresh tuna have developed and expanded at a tremendous rate in the past 10 years.

   At least 8,000 commercial boats and thousands of more recreational boats now participate in coastal tuna fisheries for yellowfin, bigeye, albacore and bluefin.

   Aggregate commercial catches of tuna by coastal fishermen for 1982-86 are valued at $500 million, and recreational expenditures may exceed $200 million annually. Tens of thousands of people take part in domestic tuna fisheries of one kind or another.

2. **Scientific evidence from tuna tagging studies shows that some <u>tuna stocks may not be highly migratory</u>.** Hilborn and Sibert (1988) reevaluated the same South Pacific Skipjack Tagging Program results that were used as evidence of tunas highly migratory nature. Some individuals did travel great distances, but 85 percent of the skipjack recovered were recaptured very close to the source of tagging (less than 300 miles). Other tagging studies in the eastern Atlantic and the eastern tropical Pacific indicate that yellowfin move <u>even less than skipjack</u> (Cayre et al. 1974; Schaefer et al. 1959).

3. **International Management of Tunas.** The international management approach has fallen far short of its goals for several reasons:

   a). <u>too many fisheries are not covered</u> or don't occur within areas where international management is focused;

(Coastal U.S. tuna fisheries are largely free of any reporting requirements or management restrictions-with the exception of bluefin tuna which is managed by the ICCAT);

b). nations that are not members of international management organizations harvest stocks that those groups attempt to manage, but fail to recognize prescribed management schemes or quotas;

c). political differences among members of international commissions greatly compromise management policies;

4. **U.S. tuna policy failed at maintaining open access for the the U.S. distant water tuna fleet to the EEZs of foreign nations.**

Since the mid 80's many U.S. boats have purchased fishing licenses from countries like Papua New Guinea, and the Federated States of Micronesia, Marshall Islands, etc.

In mid-June President Reagan signed the implementing legislation for the **South Pacific Regional Fisheries Treaty - a fishing access agreement** between the U.S. and 15 Pacific Island countries. The U.S. has agreed to pay $12 million a year for 5 years ($60 million total) for tuna fishing rights within the EEZs of those nations.

5. **Existing evidence shows that tuna and billfish CAN NOT be managed separately.**

Billfish and other pelagic species are caught by the same gear and methods used for tuna: purse seining, longlining, trolling, or handlining. Attempts to manage domestic fishing for billfish and other pelagic fishes harvested incidental to tunas have been repeatedly compromised because of U.S. tuna policy.

A version of the Pelagics FMP for the Western Pacific Region closed specific areas to foreign longline fishing. **NOAA rejected it because it conflicted with U.S. tuna policy.**

A Swordfish FMP was prepared by 5 Councils in an attempt to curtail overfishing of swordfish stocks along the entire East coast, Gulf coast, and Caribbean region. It included restrictions on longline fishing at night to protect undersized swordfish. Both foreign and domestic tuna longline fishermen protested. The Japanese filed a lawsuit which claimed that any prohibition on night longline sets was an unreasonable infringement on tuna fishing activities. **NOAA rejected the FMP because it contained measures counter to U.S. tuna policy.**

The same 5 Regional Councils attempted to amend a Pelagic Species Preliminary Management Plan to include broader seasonal/area closures to foreign longline fishing. **Efforts repeatedly got tangled in the issues of U.S. tuna policy because rational management of billfish stocks conflicted with foreign tuna fishing practices.**

6. **Excluding tuna from the FCMA has produced negative impacts, both domestically and internationally.**

a). **Internationally.** The rest of the world disregarded the U.S.'s lead in formulating jurisdictional policies on highly migratory species. Presently, all countries of the world **EXCEPT** the U.S. and Japan recognize the claims of coastal states to tuna resources within their waters, and Japan doesn't enforce it's policy.

Common international behavior becomes international law. Coastal states regulation of tuna has become standard international practice.

The U.S. has acquiesced to international pressure, and acted contrary to its own tuna policy by negotiating a fishing access agreement (South Pacific Regional Fisheries Treaty).

b). **Domestically.** Since the MFCMA was passed, domestic fisheries for tuna have developed and grown at a tremendous pace. Tuna resources within the U.S. waters were found to be substantial, and now thousands of fishermen and boats depend on the tuna stocks within our waters for livelihood and recreation.

Domestically based commercial fishermen harvest skipjack, yellowfin, albacore, bigeye, and bluefin for the fresh fish market, which is **completely separate** from the canned tuna market serviced by purse seine vessels.

Because of the MFCMA exemption of tuna, the Councils can not initiate programs to assess tuna resources, manage coastal tuna fisheries, or collect data on catches of tuna. This is in direct contrast to the tenets of the MFCMA, managing fishery resources within the EEZ for the maximum benefit to society.

7. The exclusion of tuna has:

a). prevented management of rapidly growing domestic fisheries for tuna, the only fishery resource within U.S. waters where no management is authorized;

b). seriously compromised attempts to manage other fisheries such as marlin and swordfish that are annually worth hundreds of millions of dollars to the U.S. economy;

**Even the NOAA Fishery Management Study (1986) commissioned by the NOAA Administrator stated** that "the U.S. policy on the management of highly migratory species - as reflected in the management exclusion in the MFCMA - has had unintended and severe resource management and political repercussions."

The 1986 report recommended to NOAA that:

a). **ALL** fishing activities within the FCZ should be subject to the jurisdiction of the Councils.

b). **Section 103 and elsewhere in the Act where "highly migratory species" are excluded from U.S. management controls should be repealed.**

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# AN OVERVIEW OF THE U.S. TUNA POLICY

**Q.** What makes tuna different under the MFCMA?

**A.** Tuna are excluded from U.S. jurisdiction under the MFCMA because they are defined in a special category: "highly migratory species". The United States then argues that highly migratory species are not the property of any coastal nation. The United States also argues that under Article 64 of the Law of the Sea Convention, coastal states must work with distant-water nations to manage the resource cooperatively (e.g. through regional management organizations). An additional condition is that the United States must become a member of any such regional management organization before the U.S. will recognize the tuna management authority of the regional organization. The definition of highly migratory species which includes only tuna is not consistent with Law of the Sea language which also includes marlin, swordfish and many other pelagic species as highly migratory, in addition to the tunas.

**Q.** Why was this exception made?

**A.** It is widely held that just as protection of the coastal fisheries from foreign fishing was the motivation behind passage of the MFCMA, protection of the U.S. distant-water tuna fleet and U.S. tuna canning industry in terms of procurring tuna supplies was the reason for exclusion of tuna. The distant-water fleet has strong lobby representation in Congress in the American Tunaboat Association and the processing sector is represented by an equally strong lobby in Congress. In 1976 there was little documentation of coastal fisheries for tuna in the U.S. EEZ. At that time, the U.S. tuna purse seine fleet was the largest in the world and predominantly fished in the eastern tropical Pacific, along the Pacific coasts of central and south America.

**Q.** Why should the policy be re-examined at this time?

**A.** Because conditions in international canned tuna markets as well as domestic fresh tuna markets have changed dramatically in the last 10 years. There is also doubt in many quarters that the policy failed to accomplish its goal, and in the process, has hurt the U.S. in foreign relations.

**Q.** Is anyone utilizing the coastal tuna resources in the U.S. EEZ?

A. Yes. Thousands of commercial, recreational and subsistence fishermen catch over 35 million pounds of tuna in the U.S. EEZ valued at over 35 million dollars and consumed in the U.S.

Q. How large is the distant-water fleet?

A. The U.S. distant-water fleet, historically based in San Diego but now also based in the Pacific, consists of about 90 purse seine vessels and about 10 baitboats. Total employment on these vessels is about 2,000 persons.

Q. How large is the tuna processing sector in the United States?

A. The processing sector consists of six firms with 8 plants, 7 in American Samoa and Puerto Rico and one in California. The largest three processors accounted for 81 percent of the market in 1985. Total employment in all plants is around 11,000 persons (7,000 in Puerto Rico; 3,500 in American Samoa; and 500 in California).

Q. Where do the processors buy their tuna?

A. U.S. processors traditionally bought tuna under contracts with U.S. flag of registry vessels. With the international restructuring of the industry, the processors now import about 50 percent of their raw tuna to supplement domestic catches. The processors also buy on the world market at prices that have fallen considerably since the late 1970s. The processors also distribute large amounts of tuna canned in Thailand and relabeled for distribution in the United States. By 1985, 57 percent of all canned tuna in the U.S. was being imported from Thailand where labor costs are considerably cheaper according to processor sources.

Since 1980, the leading consuming nations of tuna have remained the same (United States and Japan). Several developing countries have entered with new fleets to fish for tuna worldwide (Mexico, Philippines, Korea). The harvesting of tuna is increasingly being done by these countries putting cost pressures on the U.S. fleet. There has been considerable attrition in the U.S. distant-water fleet. Several countries (Philippines and Thailand) have become major processors of canned tuna. Only one small tuna cannery remains open on the mainland U.S. The most current U.S. processing is being done in American Samoa and in Puerto Rico.

Q. If the U.S. does not recognize coastal states' claims over tuna, then the distant-water fleet has explicit government support to violate foreign laws and fish illegally in foreign zones. How does this government support operate?

A. Under U.S. law, economic sanctions in the form of import prohibitions against any fish or fish products are levied against any country seizing a U.S. fishing vessel. Under the Fishermen's Protection Act, vessels pay an insurance premium against this type of seizure. The current rate is $38.00 per gross registered ton per annum. If a vessel is seized a claim can be made to the State Department (which recently took over management of the Fishermen's Guaranty Fund) for reimbursement of actual costs and certain

consequential losses incurred by vessel owners. From 1977 to 1983 approximately $6.7 million in claims had been paid (not all related to tuna incidents). Premiums for the same period were about $6.1 million.

Q. How many times have there been international conflicts over U.S. tuna policy?

A. Since 1975, there have been 13 incidents in which tuna or tuna products have been embargoed for various lengths of time from the following countries: Spain (8 years); Peru (5 years); Canada (1 year); Costa Rica (2 years); Senegal (2 years); Congo (2 years); Peru (3 years); Mexico (6 years); Equador (2.5 years); Papua New Guinea (one month); USSR (since 1983); Solomon Islands (8 months).

Q. What are the implications of these embargoes?

A. Almost all the countries embargoed are friendly to the United States. The embargoes have generated enormous ill-will in several parts of the world over long periods of time. The embargoes have in many cases imposed unnecessary hardship on developing countries which rely on tuna to provide development rvenues.

Q. How would inclusion of tuna in the MFCMA affect the distant-water fleet?

A. Inclusion of tuna would not reduce in any way the area currently accessible to the U.S. purse seine fleet. It would require them to pay access fees to foreign countries, if necessary. The fleet is already paying these fees under the recently negotiated treaty with 14 Pacific island countries.

Q. How would inclusion of tuna in the MFCMA affect the processing sector of the industry?

A. Very little at this point. The processors are buying tuna on the spot market. There is no reason to believe that foreign countries cannot supply a high quality reliable source of raw tuna canning material in the future.

Q. How would inclusion of tuna in the MFCMA affect the resource conservation of tunas?

A. It would enhance the ability of U.S. biologists and economists to assess the well-being of both tuna stocks and the U.S. domestic distant-water fleet. The current situation puts U.S. researchers in the most difficult research position of having to rely on the goodwill and data collection of international organizations. Conservation requires having a vested interest in a resource and cooperation with others regarding transboundary resources like tuna.

Q. What will happen to international organizations such as IATTC (Inter American Tropical Tuna Commission), ICCAT (International Commission for Conservation of Atlantic Tunas), and the FFA (South Pacific Forum Fishing Agency)?

A. There is no evidence that any of these organizations will succeed or fail dependent on U.S. tuna policy. In fact, the case could be easily made that U.S. tuna policy in actuality has weakened IATTC, in particular, by politicizing an otherwise apolitical organization. All affected countries are equally committed to the long run preservation of the tuna resource. A new organization among Latin American countries is currently forming to manage tunas, the Tuna Organization of the Eastern Pacific. A condition of membership in this organization is recognition that coastal states have the right to regulate all species in their zones. The United States is excluded from these negotiations. The United States is leading another initiative to form the Eastern Pacific Ocean Tuna Fishing Agreement (ETOTFA). So far, Panama, Costa Rica, and Honduras have signed and ratified the agreement with the United States. Other countries are said to be studying the agreement.

Q. What exactly are the legal arguments for or against inclusion of tuna in the U.S. EEZ?

A. One argument holds that there is an international customary law -- one that evolves and which is eventually followed by all nations. Opponents of current U.S. tuna policy say that coastal ownership of tuna resources has become "customary international law". In fact, the U.S. now stands alone in the international community holding to current policy. The second argument that is put forward in favor of current tuna policy holds the U.S. law is consistent with Law of the Sea language supporting cooperation among coastal Nations for conservation of migratory species. There are no valid legal arguments against the inclusion of tuna in the U.S. EEZ.

Q. Is the whole distant-water fleet in support of current tuna policy?

A. No. Those that oppose current policy recognize that their long run business interests are best served by minimal government intervention and subsidies. They are willing to compete in international tuna markets, harvesting and selling in the new competitive environment. They do not seek to continue government subsidies to their industry in the form of protection.

# Tuna Treaty Milestone In PNG

In June, in Port Moresby, Papua New Guinea, the United States ambassador Everett Bierman deposited his country's instrument of ratification for the South Pacific tuna treaty. The ceremony was simple but significant, because with the deposition of the U.S. instrument, the treaty took effect.

The ceremony, at Papua New Guinea's impressive parliament house, was witnessed by the Prime Minister, the Hon. Paias Wingti, flanked by his ministers, heads of government departments and the country's diplomatic corp. The South Pacific Forum Fisheries Agency's deputy director, Dr. David Doulman and Transform Aqorau, legal officer for Solomon Islands' Ministry of Foreign Affairs, were present at the ceremony representing the South Pacific parties to the treaty.

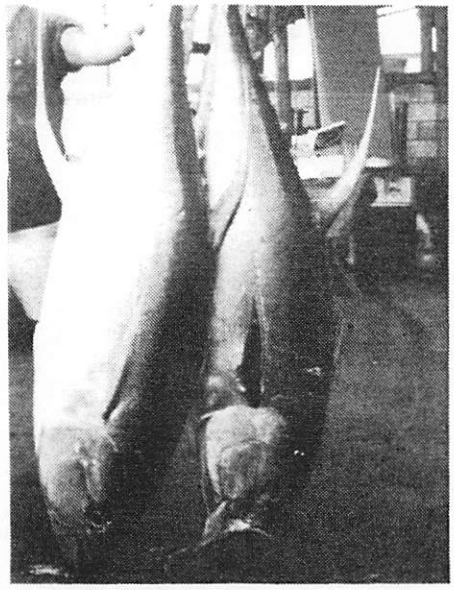
The ceremony took place in Port Moresby because Papua New Guinea is depository for the treaty. Fifteen South Pacific countries have signed the treaty, while 12 have completed their respective ratification processes. The remaining three South Pacific countries that have signed the treaty, but which have not yet ratified, are expected to do so shortly.

Speaking at the ceremony, Bierman said that the treaty's entry into force represented the beginning of a new era in cooperation between the United States and the South Pacific countries in the area of fisheries and fisheries development. He went on to say that the treaty would give U.S. fishermen access to one of the world's richest fishing grounds. Bierman reiterated that the United States looked forward to close and friendly relations with the peoples of the South Pacific. At a press conference after the ceremony he indicated that the United States would certainly wish to extend the treaty after it expires in 1993.

■ **Wrong:** Dr. Doulman said that many commentators had been skeptical that the United States and South Pacific countries could conclude a fisheries treaty. However, he said that the skeptics had been proved wrong. He added that the treaty had been borne out of conflict, but South Pacific countries were hopeful that such conflict would not reoccur in the future. Dr Doulman said that the treaty represented international cooperation and understanding in a real and practical way.

Papua New Guinea's Minister for Fisheries and Marine Resources, the Hon. Thomas Negints accepted the U.S. instrument of ratification from the U.S. ambassador. In accepting the instrument from the ambassador, Negints said that the United States had shown its genuine commitment to the South Pacific by making the treaty a reality. He added that the treaty should foster closer ties between the United States and the countries of the South Pacific. In doing so, the United States recognized the sovereign rights of South Pacific countries over their fisheries resources.

Under the provisions of the treaty U.S. industry and government will pay a total of $60 million over 5 years. Most of the revenue will be divided among the South Pacific countries on the basis of where the fish are caught. There is likely to be a disproportionate share of revenue going to a small member of South Pacific countries. This is largely because of the distribution



**U.S. to pay $60 million**

of tuna resources throughout the region and the distribution of fishing effort. Technical cooperation provided by U.S. industry will be aimed at providing South Pacific countries with ways and means to strengthen and expand their commercial fisheries undertakings. Each year the countries will notify the United States of the type of technical cooperation needed.

In addition, the U.S. government has major responsibilities under the treaty with respect to controlling and monitoring the activities of its previously undisciplined and bucaneering purse seine fleet. Significantly, the treaty incorporates Law of the Sea language. Most of the South Pacific have signed the Law of the Sea Convention, but the United States has not. However, this does not affect the South Pacific teraty in any way.

Negotiations for the treaty started in late 1984 following the seizure of the U.S. purse seine vessel, Jeanette Diana, for illegal fishing in Solomon Islands exclusive economic zone. The negotiations were at times bitter and stormy, especially in the early rounds when the American Tunaboat Association played an influential role. The negotiations took 10 rounds and 2 years to complete. The treaty was signed in Port Moresby in February 1987.

■ **Involved:** The Solomon Island-based, South Pacific Forum Fisheries Agency, will administer the treaty on behalf of its member countries. Barerei Onorio, former chief fisheries officer in Kiribati, has been appointed to the agency to handle administrative tasks associated with the treaty. He was closely associated with the negotiation of the treaty and has been involved with the U.S. purse seine fleet for a number of years.

The Forum Fisheries Agency has already issued licenses to a large number of the purse seine fleet. These licences will be effective for 1-year. Under the terms of the treaty the South Pacific countries will place observers on board selected vessels to check vessel operations and catch reporting. These obsevers have wide ranging powers and responsibilities under the treaty. All observers have had specialized training and most are experienced fisheries and surveillance officers from South Pacific countries.

While the treaty's entry into force was welcomed generally throughout the South Pacific, the parliamentary opposition in Papua New Guinea called on the government to withdraw from the treaty. The opposition described the treaty as a 'rip-off' by the United States rather than gainful economic cooperation. However, the opposition's criticism of the treaty appeared to be politically motivated and not based on a comprehensive understanding of the treaty's provisions and benefits.

Following the Port Moresby ceremony, Papua New Guinea's Prime Minister issued a press statement concerning the treaty's entry into force. He said that treaty represented a historic milestone in relations between South Pacific countries and the United States.

As a result of the tuna treaty entering into force and the recognition by the United States of the South Pacific countries sovereignty over their tuna resources, it is likely that increasing pressure will come from American Samoa, Guam and the Marianas for the United States to formally exert jurisdiction over its tuna resources. While Federated States of Micronesia, the Marshall Islands and Palau derive significant amounts of revenue each year from distant-water tuna fishermen, the neighboring U.S. territories miss out because of the non-recognition by the United States of coastal state sovereignty over tuna stocks. ■