

M E M O R A N D U M

TO: Council, SSC and AP Members  
FROM: Jim H. Branson  
Executive Director  
DATE: March 22, 1985  
SUBJECT: MFCMA Reauthorization

ACTION REQUIRED

Informational report on Council Chairmen's meeting and latest proposed amendments.

BACKGROUND

The Chairmen's meeting was held in Hawaii February 25-27. A draft House proposal was reviewed and a consensus position was developed by the Council Chairmen on as many issues as possible (C-2(a)). Item C-2(b) explains the issues where our Council diverges from the Chairmen's consensus. Item C-2(c) further explains the Council's positions to Congressman Breau and the House Subcommittee overseeing the reauthorization process. We have copies available of the recently submitted House Bill 1533. Ron Miller should be calling in with the latest news on the reauthorization.

# WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL

1164 BISHOP STREET - ROOM 1405  
HONOLULU, HAWAII 96813  
TELEPHONE (808) 523-1368  
FTS 546-8923

February 27, 1985

Honorable John Breaux  
Chairman  
Subcommittee on Fisheries  
and Wildlife Conservation  
and the Environment  
House of Representatives  
Washington, D.C.

Honorable Don Young  
Ranking Minority Member  
Subcommittee on Fisheries  
and Wildlife Conservation  
and the Environment  
House of Representatives  
Washington, D.C.

Gentlemen:

The eight Fishery Management Councils have met together in response to your request for suggestions regarding amendments to, and reauthorization of, the Fishery Conservation and Management Act. We have reviewed the draft bill prepared by your subcommittee staff and a draft list of NOAA proposals for amendments. These proposed amendments have been discussed with NOAA and NMFS officials and there are some areas of agreement between the Councils and the Governments. Each of the Council Chairmen will take the consensus positions enumerated below back to his Council for review and approval, and all prior comments provided by individual Councils have been taken into consideration.

We urge that our views be incorporated into the next draft of your subcommittee bill. We will of course be represented at your hearing on March 26 to respond to any questions the subcommittee may have concerning the amendments we are recommending.

You will note that the Councils agree with a number of the changes proposed by your draft bill, disagrees with others, and proposes several changes not contained in your draft bill. We have not cast our amendments in legislative language, but

rather have marked up a copy of the Act reflecting the changes proposed by the draft bills. Our mark up shows deletions proposed, language changes and new sections that we propose be included in the Act. We are not wedded to our specific language but we are strong and unanimous in our desire for the effective changes we propose.

- We concur in conforming the FCZ references to the EEZ Proclamation.
- We propose a qualification of the exclusion of highly migratory species (Section 102).
- We oppose the proposed date certain for phasing out foreign fishing and over-the-side joint ventures, and the proposed language in 201(e)(3) regarding bilateral agreements.
- We support conditioning of permits for appropriate reasons other than solely conservation and management and we support partial approval of permit applications where circumstances warrant.
- We are unanimously and adamantly opposed to the elimination of the Caribbean and Western Pacific Councils and to the consolidation of any of the existing Councils at the present time.
- We are equally opposed to the changes proposed in the draft bill regarding Council membership and the criteria for appointment of members.
- We request a change in 302(b) that will allow the Secretary to adjust the term of appointment to make the number of expiring terms each year more nearly equal over the three year appointment cycle.
- We are unanimous in our opposition to the elimination of compensation for appointed voting members.
- We oppose the changes proposed for Section 302(e) relating to transaction of business.
- We recommend changes in Section 302(f) to clarify the Councils' independence in

determining their own staff requirements and the level of support services desired from the Secretary.

- We oppose the language of the draft bill for Section 302(i)(2) relating to conflict of interest and we propose instead that language from the NOAA/General Counsel on this subject be utilized.
- We concur in the changes proposed by the draft bill for Section 302(i)(3) relating to closed meetings and for Section 302(i)(4) relating to procedures for the use of confidential data.
- We propose changes for Section 303(b) relating to discretionary provisions of management plans, that will allow a requirement for permits for persons fishing in the EEZ; that will allow establishment of a dislocation compensation program, if a limited access system is established by a FMP, and; that will allow inclusion of information relating to habitat and to the potential effects of habitat changes on a fishery.
- We oppose the change proposed for Section 303(d) relating to confidentiality.
- We support the new Section 303(f) proposed, that will define and describe Dislocation Compensation Programs.
- We concur that Section 304(a) should be amended to define "receipt date" but propose language slightly different from that contained in the draft bill.
- We are opposed to the deletion of Section 304(c)(3) which would allow the Secretary to develop limited access systems in a Secretarial plan without approval by the appropriate Councils.
- We recommend changing Section 305(e)(2)(A) to eliminate the present requirement that the Regional Director must vote, along with all other voting members, to request emergency action before the Secretary is compelled to take such action.

- We propose inclusion of a new Section 305(i) that would exempt fishery management plans from the provisions of NEPA.
- We oppose deletion of the word "predominantly" in Section 306(b)(1)(A).
- We also oppose the change proposed by the bill for Section 306(c)(1) relating to internal waters processing.
- We are opposed to the new Section 308(f) proposed by the bill relating to maritime liens.
- Similarly, we are opposed to the proposed new Section 308(g) on disposition of penalties.
- Although we are not offering any proposals at this time, the Councils are concerned about the level and effectiveness of enforcement of fisheries regulations under the Act and will address this subject at a later date.
- We recommend that Section 401 be deleted in its entirety as redundant and unnecessary.
- Finally, we recommend proposed new Section 406(12) be changed by deleting the words "to exceed" and inserting in lieu thereof the words "less than" and reducing the reauthorization period by one year (i.e., through 1989 only).

The positions taken by the eight Councils have been discussed at length and were not hastily nor casually arrived at. Although the changes we recommend may not resolve all the perceived problems in the implementation of the Act or the operation of the Council systems, we believe they will correct serious deficiencies in the Act as it now exists and facilitate more efficient and effective management of our marine resources.

The Councils are committed to continuing coordination with both the Congress and the Federal Government in our task of managing the nation's fisheries.

Jose L. Campos  
Jose Luis Campos, Chairman  
Caribbean FMC

Robert L. Martin  
Robert L. Martin, Chairman  
Mid-Atlantic FMC

James O. Campbell  
James O. Campbell, Chairman  
North Pacific FMC

Melvin Daniels  
Melvin Daniels, Chairman  
South Atlantic FMC

John M. Green  
John M. Green, Chairman  
Gulf of Mexico FMC

Alan D. Guimond  
Alan D. Guimond, Chairman  
New England FMC

James A. Crutchfield  
James A. Crutchfield, Chairman  
Pacific FMC

Wadsworth Y.H. Yee  
Wadsworth Y.H. Yee, Chairman  
Western Pacific FMC

# North Pacific Fishery Management Council

James O. Campbell, Chairman  
Jim H. Branson, Executive Director

411 West 4th Avenue  
Anchorage, Alaska 99510



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

Telephone: (907) 274-4563  
FTS 271-4064

March 14, 1985

Douglas Marshall, Executive Director  
New England Fishery Management Council  
Suntaug Office Park, 5 Broadway (Route 1)  
Saugas, Massachusetts 01906

Dear Doug:

With three exceptions, the North Pacific Fishery Management Council supports the MFCMA reauthorization recommendations formulated by the Council Chairmen at the Hilo meeting, February 25-27. Our Council was impressed by the cohesiveness displayed by such a diverse group in considering the entire spectrum of fishery policy. Listed on the attached sheet are the NPFMC's positions on a date-certain end to foreign fishing and over-the-side joint ventures, voting by NMFS Regional Directors on emergency regulations, and the role of observers on domestic fishing vessels. They differ in form from the consensus recommendations drafted in Hilo, but may reflect the general concept of the relevant chairmen's recommendation.

Unfortunately, neither Jim Branson nor I will be able to attend the meeting in Washington, D.C. on March 25 or the Subcommittee hearing on the 26th; however, Council staff member Ron Miller will be in attendance and can explain the Council's position on any reauthorization issue.

I want to express our Council's appreciation for the lead role you have taken in the reauthorization process. You are providing an invaluable service to the other Regional Councils.

Best regards,

*Jim Branson*

*for*

James O. Campbell  
Chairman

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL'S RECOMMENDATIONS  
THAT DIFFER FROM THE CHAIRMEN'S RECOMMENDATIONS

1. Date-Certain End to Foreign Fishing and Over-the-side Joint Ventures

The NPFMC supports the concept of a date-certain end to foreign directed fishing and over-the-side joint ventures but believes the schedule proposed by the House staff may not work on a national basis. The language of the MFMCA should, instead, be strengthened to allow each Council to adopt foreign fishing and over-the-side joint venture phase-out schedules for each species it manages.

2. Voting by NMFS Regional Directors on Emergency Regulations

The practice of Regional Directors abstaining from a vote on, or voting against, a proposed emergency regulation in order to preserve the Secretary of Commerce's options is a problem that must be addressed, but not in the manner suggested in Hilo. The problem stems from the inability of those not considered officers of the U.S. to promulgate federal regulations. Currently, if a Council passes an emergency regulation by a unanimous vote, the Secretary must implement that regulation. The Council has, therefore, promulgated the regulation. In order to be considered officers of the U.S., Council members would have to be appointed by the President. [See Art. II, §2, Cl. 2 of the U.S. Constitution (the Appointments Clause)]

3. Observers on Domestic Vessels

The MFMCA should clearly state that Councils have the discretion to require observers on any domestic fishing vessel in the FCZ. This is necessary to protect data sources and to ensure that U.S. catcher/processors are not evading fishing regulations. The Chairmen's recommendation that observers on domestic vessels not be involved in enforcement activities may prove to be impossible to mandate by statute and could possibly be unconstitutional: an observer may be subpoenaed by either party to testify at an enforcement proceeding regardless of the language in the MFCMA and failure to do so may subject the observer to a contempt of court citation. If an observer who is able to support the defendant's case in an enforcement proceeding is prevented from doing so by the MFCMA the defendant would be able to challenge the relevant provision of the Act as being an unconstitutional denial of his rights to due process.



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Jim H. Branson, Executive Director

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Anchorage, Alaska 99510



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

Telephone: (907) 274-4563  
FTS 271-4064

March 20, 1985

The Honorable John B. Breaux  
Chairman, House Subcommittee on Fisheries  
and Wildlife Conservation and the Environment  
Washington, DC 20515

Dear Congressman Breaux:

The North Pacific Fishery Management Council (NPFMC) appreciates the opportunity to submit written views regarding the reauthorization of the Magnuson Fishery Conservation and Management Act (MFCMA). We will confine our comments to fishery management issues not addressed in the consensus recommendations supported by all Regional Councils and presented at your Subcommittee hearing on March 26.

The NPFMC is deeply concerned that there still appears to be a reluctance within the Executive Branch to recognize Congress' intended roles for the Regional Councils and NMFS despite strong statements of this intent made throughout the eight years the MFCMA has been in effect. Congress has clearly stated on several occasions that the Regional Councils are to manage fisheries in the FCZ; and yet we see a Federal District Court judge in Hoopa Valley Tribe vs. Baldrige admonishing the Department of Commerce for treating the Pacific Council, "like a junior partner responsible for preparing 'recommendations'" (Order at p. 31) when the Councils are rightfully responsible for promulgating fishery management plans.

Congress has stated that the Secretary of Commerce cannot disapprove an FMP or amendment for policy reasons and must limit his review to determining whether the FMP or amendment is consistent with the National Standards, the provisions of the MFCMA, and other applicable law; and yet, the Assistant Administrator has stated, "If the analyses submitted by the Council are complete, unbiased, and well reasoned, and if there is a reasonable consensus among the groups that are most directly affected by the Council's recommendation, the Council's recommendation will prevail in most cases." (January 13, 1984 letter from Bill Gordon to Mark Lundsten, President, Deep Sea Fishermen's Union, emphasis added.) We also see the NMFS Regional Office basing review decisions upon "policy and advice" from the NMFS Central Office. (October 18, 1984 letter from Robert McVey, NMFS Director-Alaska Region, to the NPFMC.)

Further in this regard, NMFS has expanded their own review authority beyond the limits set by the MFCMA (and even beyond that described in NOAA Circular 83-87) to include the ability to "conditionally approve" an FMP or amendment. (October 18, 1984 letter from Robert McVey to the NPFMC.) Conditional approval implies that NMFS approval is subject to negotiation if Regional or Central Office personnel object to an FMP or amendment on grounds other than those specified in Section 304(e)(1)(A) of the MFCMA.

Our Council has on several occasions had regulatory proposals disapproved for seemingly arbitrary reasons after intense lobbying of NMFS Central Office personnel by those who pled their case against the proposal before the Council and did not succeed. An example of this is the fishery development zone the Council wanted to create in a fishery-rich area north of the Aleutian Islands. Only domestic vessels would have been allowed to fish in that zone. The purpose of the proposal was to increase the U.S. harvest of underutilized species in the FCZ: a major goal of the MFCMA. After the Council submitted the proposal to NMFS, the Central Office was lobbied by representatives of foreign fleets. The proposal was disapproved. One of the reasons given was that exclusion of foreign fishermen from the FDZ was against the National Standards of the MFCMA and that the Council violated the Regulatory Flexibility Act and Executive Order 12291 by not considering the negative economic impacts the proposal would have on foreign fishing fleets. (December 8, 1983 letter from Bill Gordon to the NPFMC). Consideration of the economic effect on other nations is not required by any legislation or Executive Order governing Council analyses or the review process.

Our Council is not given the opportunity to rebut the claims made by those who lobby the Central Office. In fact, we have been cautioned that we should not send representatives to Washington to discuss a proposal with Central Office staff. We have been told that such, "(d)elegations to Washington to educate the Central bureaucracy are generally not useful" and that such trips would be, "seen as a lobbying effort". (April 24, 1984 memorandum from Roland Finch to Robert McVey)

Our Council does not know whether the problems mentioned above could be resolved by MFCMA amendments or whether they are systemic in the bureaucracy. We do know they are evidence of a view of the Regional Council role that differs substantially from Congress' intent behind the creation of the Council system. The NPFMC respectfully requests the Subcommittee to consider their views on these matters and, also, to consider the following proposed amendments to the MFCMA. Some of the proposals are regional in nature and all are in addition to, but not in conflict with, the consensus recommendations presented by the Regional Councils.

A. FOREIGN FISHING

1. Foreign Allocations - Amend Section 201(e)(1)(E) to require the Secretary of State, when releasing allocations, to consider whether a foreign nation is harvesting salmon on the high seas.

If a foreign country is intercepting salmon of U.S. origin on the high seas and, thereby, adversely impacting U.S. fishermen, allocations of fish in the U.S. FCZ to that nation should be reduced or eliminated. To do otherwise would give the appearance of rewarding those who threaten the livelihoods of U.S. fishermen.

2. Certification - Amend Section 201(e)(2)(A) to allow Secretarial certification of the existence of foreign trade barriers to the import of U.S. fish products.

Restrictions should be placed on the import of foreign fish products into the U.S. if those products are from fish harvested in the U.S. FCZ and the foreign nation has barriers to the import of U.S. fishery products. This provision should not become effective until January 1, 1987 to provide advance notice and an opportunity for foreign countries to reevaluate their import policies.

3. Joint Venture Allocations and Permit Restrictions - Expand Section 204(b)(7)(E) to state that allocations may be made to an individual joint venture operation and tonnage limits may be stated in the permit conditions for bycatches and prohibited species.

There is some dispute within the NOAA General Counsel's office over whether the MFCMA allows special conditions to be listed as permit restrictions for joint venture operations. While NMFS has previously established such permit restrictions, NOAA General Counsel is now of the opinion that the MFCMA must be amended to clearly authorize this practice.

Council attempts to review and grade joint venture proposals in order to elicit the best possible arrangement for the U.S. industry are negated if restrictions and special conditions cannot be applied to individual joint ventures. The current General Counsel position places all joint ventures on equal footing to compete for the entire JVP; a situation to the advantage of neither the joint venture partners nor the United States.

B. COUNCIL FUNDING

1. Direct Appropriations - Amend Sections 302 and 406 to provide direct appropriations for Regional Councils.

Funding the Regional Councils through the Department of Commerce was an appropriate way to reduce the administrative costs of the MFCMA; however, the approach the Department has taken in recent years toward the Councils' budgets actually has threatened the existence of the Councils as fishery management entities. While the Department has, over the past few years, proposed cutting their overall budgets by 10% and NMFS budgets by 35%-40%, they have proposed reducing the Council budgets by 55%-60%. Fortunately for the Councils, Congress has reversed those cuts but we are again faced with similar proposals for FY 86.

These proposed budget reductions are evidence that the Councils have no advocate for adequate funding within the Department, but the Councils are provided no meaningful role in drafting the fisheries budget. The Councils are not even allowed to review the budget documents until they have been released to the public; consequently, they are often placed in the absurd situation of being requested by NMFS to comment on a budget initiative they haven't seen.

Another major problem that would be removed by direct appropriations is the bureaucratic maze through which Councils must maneuver before appropriated funds are dispersed to them. Currently, Regional Council budget requests are reviewed by NMFS Regions, NMFS Central Office, NOAA, OMB, and the Department of Commerce's Financial Assistance Review Board. This process has caused Councils to delay payment of bills and staff salaries.

C. EMERGENCY ACTIONS

1. Emergency Regulation - Amend Section 305(e)(2)(B) to include a date by which the Secretary of Commerce must state whether an emergency regulation will be enacted.

If the Councils pass an emergency regulation by only a majority vote, the Secretary of Commerce, in considering implementation, should be required to give great weight to the Council's decision and should also, within 15 days of that decision, indicate whether he intends to implement the regulation. If the Secretary decides against implementation, a detailed explanation for the legal reasons for that decision must be presented to the appropriate Council within 15 days of the Council vote.

Currently, the Secretary has no deadline by which he must respond to a Council request for implementation of an emergency regulation. Councils have been placed in a situation of waiting for over a month after a vote on an emergency regulation to find out whether it will be enacted. Because of the dynamic nature of commercial fishing, a fishery is often completed within a month and the emergency the proposal was intended to address will have negatively impacted U.S. fishermen.

D. STATE JURISDICTION

1. Intrusion Areas - Amend Section 306(a)(2)(C) to allow management by the State of Alaska for crab in the federal intrusion areas of Southeast Alaska and for all species in the intrusion areas of Cook Inlet.

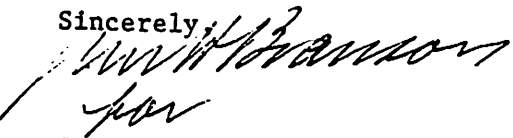
There is no apparent need for federal fisheries management in these intrusion areas in Alaska because there is no foreign fishing presence, the vessels fishing the areas are predominantly registered to the State of Alaska, and the fisheries in each general area are conducted throughout state and federal waters in the intrusion areas. State management over all species in the intrusions would provide for uniform regulations in all areas inside the "surflines" in Southeast Alaska and inside Cook Inlet. The State of Alaska has more than adequate regulatory mechanisms and enforcement capability to assume the management responsibility and remove the need for expending federal resources in managing these areas. The MFCMA was amended last year to delegate management authority to the state in the federal intrusion areas of Southeast Alaska for all species other than crab.

2. Classification of Internal Waters Joint Venture Catches - Amend Section 306(c) to state that catches delivered to foreign processors in state internal waters (internal waters joint ventures) are to be classified and recorded as joint venture processing (JVP).

Internal waters joint ventures catches are now classified as domestic processing (DAP). As such, they enjoy a priority over all FCZ joint ventures and rank equally with U.S. shoreside processing even though the fish is processed on a foreign ship. The Councils are charged with determining the amounts that will be needed for JVP and DAP [Section 302(h)(5)] and the MFCMA gives DAP requirements priority over JVP operations. The present situation actually gives control in determining final JVP amounts to the states to the detriment of uniform management of groundfish in the FCZ.

Again, we thank you for the opportunity to present these comments to the Subcommittee. Our Council and staff are available to work with the Subcommittee to ensure the Regional Council system functions as it was intended.

Sincerely,



James O. Campbell  
Chairman



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Washington, D. C. 20230

**THE DEPUTY ADMINISTRATOR**

**MAR 11 1985**

Mr. Wadsworth Y. H. Yee  
Chairman, Western Pacific Fishery  
Management Council  
1164 Bishop Street, Room 1405  
Honolulu, Hawaii 96813

Dear Wads,

I appreciated the opportunity to meet with the Council Chairmen in Hilo recently and believe we had a useful exchange of ideas. In order to ensure we are on common ground, this letter states my understanding of our agreement on the subject of reauthorization.

1. No changes should be made in the structure of the Council system and the relative authorities and responsibilities of the Councils and the Secretary under the Magnuson Fishery Conservation and Management Act until we have had a chance to analyze the costs, needs, and benefits of alternative arrangements.
2. We will set up a small work group, initially composed of Dick Roe, Bob Martin, and John Green, to develop a statement of work and a list of potential contractors to pursue the investigation. Their first meeting will be in Washington, D.C., on March 24, 1985.
3. Until we have completed our joint study, I will only recommend changes in Section 302 of the Act that resolve the uneven expiration of members' terms and address the issue of conflict of interest.
4. I will seek to limit the 1985 reauthorization of the Act to 2 years, so that the recommendations of the work group can be considered during a 1987 reauthorization. I enclose copies of my letters to Representatives Breaux and Young in which I make this suggestion.

Please advise me if you concur with my understanding.



I am concerned with some of the changes the Chairmen recommended in their letter of February 27, 1985, to Representatives Breaux and Young. I refer to the changes proposed on the pages marked 5, 14 [Sec. 201(e)(1)(A) and Sec. 201(e)(1)(D)(iii)], 15, 23, 24 [Sec. 204(b)(6)(A)], 33, 34 [Sec. 302 (h)(1)], and 37 in the enclosure to the letter. It is inconsistent with my understanding of our agreement for the Department or the Councils to support legislative changes that would alter the relative roles or responsibilities of either party until the study is completed. I request that the Councils reconsider these recommendations, at least for the 1985 reauthorization. Also, I miss in the enclosure to the Chairmen's letter suggested language in two areas: (1) how to expedite the phase-out of foreign fishing without the rigidity entailed by specified dates, and (2) how to clarify a Governor's authority over foreign fish processing. If the Chairmen have some ideas in this regard, I would like very much to hear them before the March 26 hearing.

I enjoyed our meeting and believe together we have embarked on a practical course to improve the fishery management process. Bill Gordon and I will be looking forward to the outcome.

Sincerely,

  
Anthony Calio

Enclosures



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

THE DEPUTY ADMINISTRATOR

March 8, 1985

Honorable John Breaux  
Chairman, Subcommittee on Fisheries and  
Wildlife Conservation and the Environment  
Committee on Merchant Marine and Fisheries  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

You recently asked for our views on reauthorization of the Magnuson Fishery Conservation and Management Act. In order to obtain a sound basis for my recommendations, I met with the chairmen of the Regional Fishery Management Councils and their staffs to discuss the issues.


I explained that my objective in reviewing changes was to support the Administration's goal of reducing the cost of fishery management and the burden of Federal regulation. I agreed with them that we had, at present, insufficient evidence for recommending changes in the composition and number of Councils, and that it would be premature to make judgments on these questions until we had collected all the facts and carefully examined the alternatives.

We agreed to form a small joint working group to examine the effectiveness of the present fishery management process, the costs involved, the procedures that are or could be used, and the respective roles of the Councils and the involved Federal entities. This group has been named and the study is to be completed within a year. After an opportunity for public review, we will be in a position to make well-founded recommendations to the Subcommittee for needed changes in fishery management arrangements in the Act.

I recommend that the Act be reauthorized only for two years, so that the results of our analysis of operational and budget needs can be presented to the Subcommittee in 1986-87. In keeping with this approach, I recommend that no changes be considered to the Council structure, functions, and compensation of Council members. I recommend, also, that no other changes be considered in the Act that alter the roles and authorities of the Secretary or the Councils in the fishery management process until we have had a chance for the working group to complete its task.

The Department will be sending you a proposed bill that identifies our positions on other issues we believe should be considered.

Sincerely,

  
Anthony J. Calio







UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

THE DEPUTY ADMINISTRATOR

March 8, 1985

Honorable Don Young  
Ranking Minority Member  
Subcommittee on Fisheries and Wildlife  
Conservation and the Environment  
Committee on Merchant Marine and Fisheries  
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