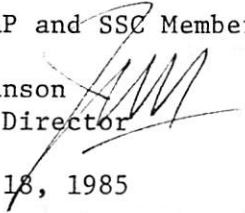


M E M O R A N D U M

TO: Council, AP and SSC Members

FROM: Jim H. Branson
Executive Director 

DATE: September 18, 1985

SUBJECT: Joint Venture Policy

ACTION REQUIRED

1. Determine how to handle conditions and restrictions on permits.
2. Determine if JVP allocations should be made by company.
3. Approve policy for joint venture review.

BACKGROUND

Last Year's Permit Review. Last September the Council approved an interim joint venture policy which was used in reviewing permits for 1985. Table 1 summarizes eight major provisions of the policy, which combined enabled the Council to selectively allocate groundfish tonnages to companies based on how much they helped develop the U.S. groundfish industry. Shortly before the review meeting NOAA-GC concluded that JVP could be allocated among companies only if demand exceeded supply, and that the criteria in the policy could be used to deny or condition a permit only if they were put in an FMP or adopted by the Secretary of Commerce through rulemaking as additional standards for permit issuance.

As noted in Table 1, the Council did not allocate any target species, even Atka mackerel which was in short supply, but did recommend placing bycatch limits in permits for fully DAP species such as Gulf of Alaska POP and sablefish and Bering Sea/Aleutians sablefish. NMFS never implemented this recommendation because of technical problems with monitoring bycatch rates, etc. Therefore the 1985 fishery was from a common pool for all species. The Council did, however, use the policy criteria to recommend permit conditions such as that Taiwan must mitigate the salmon interception problem and one company had to establish a letter of credit because of past payment problems. In general NMFS followed up on the Council's recommendations before issuing permits.

Policy Discussions of the Permit Review Committee. This past May the Committee met and then sent out for public review a comprehensive document on the types of conditions and restrictions that might be placed in joint venture permits, the use of nation and company-level or pooled-JVP allocations, and several procedural changes to the Interim Policy. On August 14 at Alyeska the Committee reviewed public comments and the policy in light of the latest legal advice which was that:

1. The advice of last year still held;
2. OMB must approve all mandatory or voluntary information requests made to joint ventures;
3. The Council is purely advisory when recommending conditions and restrictions on permits and therefore has considerable latitude in recommending industry-oriented permit conditions. However, to ensure NOAA follows the recommendations the Council's criteria and procedure must be in the FMPs;
4. To implement Council recommendations NOAA must develop additional procedural safeguards; and
5. The Magnuson Act does not authorize NOAA to restrict permits to resolve business disputes between foreign and U.S. business partners.

Consequently the Committee recommended the following:

1. The Council should continue to recommend whatever conditions and restrictions it deems appropriate as they are purely advisory;
2. NMFS should develop formal procedures and criteria for reviewing permits that dovetail with the Council's;
3. Council procedures and criteria should be incorporated in the FMPs;
4. Policy criteria should be used on a nation-by-nation basis only and comments should be voluntary on how criteria are met by each nation;
5. Joint ventures should fish from a pool; and
6. The Committee's proposed policy should be adopted by the Council as a basis for permit review this December.

The redrafted policy is under Item C-3(a) and is summarized in Table 1. A summary of the public comments available to the Permit Committee for their discussion at Alyeska is under Item C-3(b).

NOAA General Counsel Reverses Opinion. We received word on September 10 that NOAA General Counsel has reversed its earlier opinion about the kinds of restrictions or conditions that could be put on joint venture permits. Their formal written legal opinion will be provided when available. They now believe that individual permits can be conditioned with amounts of target catch and bycatch, area or time restrictions if warranted, and conditions that

are oriented to industry problems in addition to conservation and management. It appears that the Council's criteria for judging applicants and previous Council direction on permit conditions are valid and can be used in the future. However, we will need to maintain careful records of all review proceedings so the testimony and evidence can be considered by NMFS when reviewing Council recommendations.

ACTIONS REQUIRED

1. Conditions and Restrictions. Being purely advisory, the Council apparently now has carte blanche in recommending permit conditions and restrictions, even those with an industry orientation. Examples from the past are:

(1) Relate inseason permit renewal to satisfactory joint venture performance in the early part of the year to ensure goals are met.

(2) Relate permit approval or renewal to purchases of U.S.-processed products.

(3) Require guarantees of financial responsibility by the foreign partner to ensure payments for fishing services.

(4) Delay permit issuance until non-litigated disputes are settled satisfactorily.

(5) Relate the issuance of permits to establishment of import quotas for U.S.-harvested or processed product and/or market destination of joint venture products.

The Council has had a pretty high batting average for NMFS following through on these types of recommendations. To assure the highest possibility this will continue, the Council could add the criteria and review procedure to the groundfish FMPs and/or request NMFS/NOAA to formally establish similar criteria and procedures through federal rulemaking. Neither could probably be implemented for this year's review. While that procedure is not strictly necessary it will make it easier for NMFS to follow Council recommendations.

2. Allocations of Target and Bycatch Species. NOAA GC now holds that the Council can place species limits in permits using the policy criteria to differentiate between companies, even if JVP supply exceeds demand. The question is whether you want to or not. Here are some of the arguments pro and con:

Arguments for Allocations by Company

- Additional benefits can be obtained by awarding more fish to those ventures most willing to enhance U.S. industry.
- Allows for better planning of operations with reasonable assurances of reaching harvest goals.
- Lengthens season, encourages a more orderly fishery, and decreases congestion on the grounds.

- Individual permit bycatch restrictions would eliminate the problem of one joint venture closing down all others when the joint venture quota of U.S.-fully utilized species is taken in a management area.

Arguments Against Allocations by Company

- Foreign partner gains too much control over joint venture arrangements (only true if allocation is given to foreign partner).
- Smacks of resource shares.
- Potential for perceived or actual discrimination among U.S. fishermen.
- May reduce accountability of foreign nation for action of its companies.

Arguments For Nation by Nation

- Consistency with TALFF allocations which are nation-by-nation.
- Easier to hold foreign nation more accountable for actions and performance of all its companies.
- Potentially less discriminatory between U.S. fishermen.
- Potential for easier management and monitoring.

Arguments for the Pool System

- Open access does not inherently discriminate among the fishermen.
- Joint ventures are domestic operations and if allocations are made, they somehow should be made to the U.S. side, not to the foreign side.

Arguments Against the Pool System

- May result in short seasons, intensive competition for resources.
- Allows largest or most dominant participants the greatest share of the resource.

Public comments received this summer regarding JVP allocations were generally against company limits and for fishing from a pool. Two reasons were usually cited for this preference: (1) the foreign partner would have too much power, and (2) the scheme would be too complicated and require too much time and analysis for the Permit Review Committee and Council to handle fairly. Both arguments have merit though the first may have resulted from a communications problem wherein the Council was thinking of the U.S. partner or fishermen and industry was interpreting "company" to mean the foreign partner.

If the Council determines that limits on target and bycatch species in permits are desirable a system should be developed that establishes fair procedures and puts control in the hands of the U.S. partner or fishermen. You can probably set limits without them, and will undoubtedly have to for 1986, but you should start developing them now for use in 1987.

3. Joint Venture Policy. With the reversal in NOAA-GC's opinion, the Council has the option of adopting the Committee's proposed policy [Item C-3(a)] or retaining the old Interim Policy [Item C-3(c)]. Both have merits, as noted in Table 1, though the latter is company-oriented while the

former compares nations. The Council will need much more definitive review procedures if the criteria is to be used to differentially allocate target and bycatch species by company. If the criteria are going to be used to just recommend conditions and restrictions, but not allocate tonnages, the present policy procedures probably are adequate. In either case, OMB will need to approve any questionnaires we send to the joint venture operators or foreign agents. Above all, the Council needs to adopt some policy on which to base the upcoming permit review in December.

Table 1. Comparison of joint venture review policies and Council actions in 1985.

<u>Interim Policy for 1985</u>	<u>What Actually Happened</u>	<u>Proposed Policy for 1986</u>
1. One-to-one ratio of JV to TALFF most desirable at earliest possible date.	Japan: 0.5/1 ROK: 0.7/1 POL: 1.4/1 USSR: 12.2/1	1:1 ratio most desirable at this time.
2. Applications must be received two weeks (Nov. 16) before meeting and published in <u>FR</u> by Friday preceding meeting (Nov. 30).	Most were on time. Council postponed review of tardy applications from Japan, Poland, Iceland, Portugal, and West Germany.	Same as last year - new dates will be Nov. 22 and Dec. 6. Council will meet Dec. 9-13.
3. Answers required to company and nation-level questions.	All responded.	Invites voluntary comments. Will still need OMB approval.
4. Sixteen criteria used to trim company allocations when species demand exceeds supply.	Criteria were used very generally to review permits and recommend conditions but not to make company allocations.	Reduced to 14 criteria for comparison of nations and recommending permit conditions. NMFS requested to give justification if recommendations not accepted.
5. Place limits on target and bycatch species in permits.	Recommended pooled-JVP for all target species with no limits in permits. Recommended company-level limits on DAP/O-JVP species such as GOA POP and sablefish and BSA sablefish.	Use pooled-JVP for target and bycatch species.
6. Limit harvest to 50% of permitted maximum until progress is judged satisfactory.	Not used.	No inseason checkpoints.
7. NMFS may approve inseason requests for TALFF species; Council reviews any request for O-TALFF species.	Everyone fished until JVP gone.	Everyone can fish until JVP gone.
8. Interim Action Committee can review permits between meetings.	Permit Review Committee was used.	Use Permit Review Committee.

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

DRAFT INTERIM POLICY

on

Joint Ventures and Allocations

General Policy. The North Pacific Fishery Management Council is responsible by law for assuring the conservation of fishery stocks off Alaska and fostering the development of the United States fishery for those stocks currently underutilized by this country, though they may be fully exploited by other nations. The Magnuson Fishery Conservation and Management Act allows the Council to equitably allocate harvest privileges, and the Council intends to use these allocations to increase American participation in underutilized fisheries consistent with the Act.

The Council believes it is in the greatest national interest for the resource to be harvested, processed, and marketed by U.S. industry. However, until the domestic industry can harvest, process, and market the available groundfish resource, the Council will allow joint ventures between Americans and foreigners that will increase U.S. participation in the utilization of these resources. Joint ventures generally are considered to be operations in which U.S. fishermen deliver raw fish to foreign processors at sea. Other forms of joint ventures are possible and will be appraised on their individual merits as they are formulated.

The Council will continue to give highest priority to target operations that are wholly American, and joint ventures will only be considered for groundfish species not harvested and processed totally by U.S. industry.

The Council intends that any country to whom a direct allocation is given must also be engaged in "over-the-side" joint ventures or the purchase of U.S. produced products. A relationship of at least a one-to-one ratio for joint venture fishing to foreign directed fishing is most desirable at this time. As fully-U.S. harvested and processed fisheries expand, TALFF and then JVP will be decreased toward the total elimination of foreign fishing and processing.

Joint Venture Permit Review Procedure. The Council will hold its review each December of all prospective joint ventures for the coming year. This will coincide with the Council making its final recommendations on apportioning available groundfish yields to Domestic Annual Processing (DAP: totally U.S. harvested and processed), Joint Venture Processing (JVP: U.S. harvested and foreign processed), and Total Allowable Level of Foreign Fishing (TALFF: foreign harvested).

The Council must receive all permit applications for joint ventures at least two weeks before the week of the Council meeting. Applications must be complete and have been published in the Federal Register by Friday preceding Council meeting week. Review of applications not meeting these deadlines will be postponed until the next scheduled meeting of the Council. If necessary, the Council may request the Permit Review Committee to consider applications between regular Council meetings.

All interested persons are invited to submit written and oral comments to the Council and its Permit Review Committee on all matters relevant to proposed joint ventures, including the extent to which various foreign nations meet the criteria listed in Table 1.

Joint ventures are expected to estimate their groundfish harvest needs as accurately as possible and to specify their needs by Council management area (e.g. Bering Sea, Aleutians, Western Gulf, etc.). The Council will compare these requests in aggregate with NMFS projections of JVP derived from industry surveys and will closely monitor attainment of joint venture goals during the season.

The Council's recommendations on approvability of permit requests and on permit conditions and restrictions will be forwarded to NMFS. The Council requests that NMFS respond in writing concerning final disposition of the Council's recommendations, with reasons for disapproval should that occur.

Basis for Recommendations. Groundfish operations which are legitimately wholly domestic in the harvesting and processing of our fishery resources and do not involve foreign flag vessels, fall under the Council's definition of DAP and therefore will not need permits. They will be given first priority in groundfish apportionments. Second priority is granted to operations involving foreign processing vessels and U.S. harvesters and other sectors of the U.S. industry.

The Council will use the criteria in Table 1 to appraise a country's joint venture requests relative to other nations and make its recommendations to NMFS. Other factors not listed may be considered also. The Council intends to give preference to those nations whose operations clearly evidence maximum U.S. industry involvement in all phases of the operation and which give strongest support to the development of the domestic industry for underutilized species.

Internal Waters Joint Venture Review

The Council requests the opportunity to review all internal waters joint venture requests. Depending on the nature of the specific application, the Council may meet formally in whole or in Committee to comment further. The Council staff may provide technical comments. The Governor of Alaska is requested to appoint the Chairman of the Council's Permit Review Committee as a standing member of the State's Foreign Processing Advisory Committee.

Table 1. Criteria for the review of joint venture requests*

-
1. Level of U.S. industry involvement in all phases of nation's joint operations (harvesting, processing, marketing, or others)
 2. Enhancement of U.S. employment at sea and ashore
 3. Transfer of capital through investment in U.S. industry.
 4. Technology transfer.
 5. Achievement of joint venture goals during previous seasons.
 6. Proof of financial responsibility by foreign partner.
 7. Compatibility of joint operation with other U.S. fisheries and incidental species (i.e. gear conflicts, ground preemption, bycatch of U.S. fully-utilized species, etc.).
 8. Economic contribution of nation's joint ventures to U.S. harvesting, processing, and support industries.
 9. Purchase of U.S. processed product, especially underutilized species.
 10. Compliance with U.S. laws, international treaties, and regulations.
 11. Existence of trade barriers to U.S. fish products and efforts to remove them.
 12. Ratios of country's total joint venture request and purchase of U.S.-processed product to total direct fishing request.
 13. Reporting of fishery and market information beyond that required by law.
 14. Foreign participation in fisheries research off Alaska.
-

*No priorities implied.

SUMMARY OF COMMENTS

I. Conditions and Restrictions on Permits

Ad Hoc Industry Workgroup on Joint Venture Policy: Use FMP process thus guaranteeing public review and judicial recourse. Must be able to remove conditions quickly when no longer needed. Opposed to using restrictions strictly to protect or enhance U.S. industry, to expanding government interference in the market place, and to placing stricter requirements on one operation than another. Should not use conservation and management to justify closures to foreign processing around shorebased processors. Permits should be issued and reviewed annually.

Alaska Contact: Act does not provide for conditioning permits solely to protect or enhance industry. Use FMP process to guarantee public participation. Do not intervene in private business affairs.

Alaskan Joint Venture Fisheries: Questions legality of Council restricting, joint venture fishing through the foreign vessel permit process. Many of the suggested restrictions, both for conservation/management and to help industry, clash with development objectives of MFCMA and development should not necessarily take second seat. Against setting precise processing limits on companies because circumstances change and limits may be too rigid for business planning. Issue annual permits and do not link joint venture processing with commitments to purchase U.S. processed product. Use court system, not permits, to settle disputes. Does support not allowing a foreign company to commit to joint venture amounts and then direct fish it through a national allocation.

Profish International: Endorses Ad Hoc Industry Workgroup comments.

NPFVOA: Clear up all legal issues concerning Council's ability to condition permits and set parameters within which the Council must operate in their annual permit review.

Aleutian Marine Development Corporation: Supports conservation/management restrictions but not to protect industry.

Alaska Factory Trawlers Assn.: Supports permit conditions for conservation/management and to strengthen U.S. position in developing underutilized groundfish and other fisheries. Supports restrictions that protect U.S. processor's access to highest quality fish and best markets. Recommends that bycatch limits be specified as percentage of catch on board the vessels. Supports all industry-related conditions and particularly those related to purchase of processed product and trade barriers. Supports most effective means of withdrawing fishing privileges for noncompliance by permittee.

PSPA: Recommends full use of restrictive conditions to enhance U.S. processor's position. Place high importance on restrictions relating to trade barriers and commitments to purchase U.S. processed product. Reevaluate permits as often as necessary to assure compliance.

International Ocean Opportunities Unlimited: Restricting permits for industry-related reasons is permissible if it enhances U.S. development.

Japan Deep Sea Trawlers/Hokuten Trawlers: Inappropriate to impose restrictions not authorized in FMP. Need full public input and hearing for permit holder. Argues against many of the conservation/management-related conditions as well as those related to industry. Permits should be effective for full year.

Korean Industry: Establish time/area restrictions through FMP process only. Could accept incidental and target catch provisions in permits but all other suggested restrictions are best resolved through other available avenues. Supports annual review of permits. A sanction on joint venture permits does not automatically lead to a sanction on directed permits.

II. Joint Venture Allocations to Companies

Ad Hoc Industry Workgroup: Opposed to company allocations but is debating nation versus pool versus developing a more domestically-oriented arrangement.

Alaska Contact: Allocations to foreign nations or companies and vessels are unworkable and inappropriate.

Alaskan Joint Venture Fisheries: Company allocations most objectionable of all of the Council's proposals. Use pool system with season when demand exceeds supply.

Profish International: Against foreign company joint venture or foreign nation allocations of JVP. Use pool system or go with more domestically-oriented allocation scheme if allocation is deemed necessary.

Aleutian Marine Development Corporation: Favors pool system.

Alaska Factory Trawlers: Favors pool system.

PSPA: Allocate so as to create least amount of management burden.

International Ocean Opportunities Unlimited: Consider allocations to U.S.-foreign partnership rather than foreign company.

Japanese Fishing Industry: When demand exceeds supply, allocate nation by nation.

III. Guidelines for Implementing Policy

Ad Hoc Industry Workgroup: Existing criteria and information requested of the joint venture operations are too numerous, complicated, redundant and difficult to quantify and apply in a fair and objective manner to the many different joint venture partners of the U.S. industry. The criteria and appraisal process must be tailored to the allocation/non-allocation scheme chosen.

Alaska Contact: Criteria are complicated, somewhat redundant, and often difficult to quantify and apply equitably among U.S. participants. Valid criteria for Council review include achievement of joint venture goals in previous seasons, compliance with U.S. laws and treaties, and compatibility with U.S. fisheries and incidental species. Other criteria are generally outside Council purview. Supports Interim Action Committee concept and NMFS responding concerning final disposition of Council recommendations. Inappropriate to have Committee Chairman on FPAC.

Alaskan Joint Venture Fisheries: Criteria are too vague and broad to select among companies for allocations. Using criteria would require confidential information from each company provided on a voluntary basis and the process of evaluation would still be clouded with arbitrary and political decision-making. Company level questions and criteria are extremely general. Need hearing process and constitutional safeguards. Greatly disturbed with having to reveal confidential data.

Profish International: Orient questions and criteria to satisfaction of U.S. partner and fishermen that the foreign partner will be reliable and to conservation/management-related aspects. Criteria and questionnaires proposed are so numerous and complicated that impartial appraisal and objective application to the various proposals seem incomprehensible.

Aleutian Marine Development Corporation: Generally, opposed to Council becoming involved in facets of industry that deal with matters other than fishery management and conservation.

Alaska Factory Trawlers: Favors items A, D, E. Object to item C allowing for emergency action. Suggests changing criterion 8 to include impact on efficiency of wholly-U.S. operations.

PSPA: Favors items A, D, E, the criteria and accompanying questions. Suggests some modifications in pages 1-2 of policy language. Permits should be reviewed at regular meetings.

International Ocean Opportunities Unlimited: Provisions for implementing the interim policy are reasonable. Suggests some word changes in criteria and questionnaire.

Japanese Fishing Industry: Should incorporate policy into FMPs and implement with formal regulations. Council does not have authority to request confidential information if not in FMP provisions. Allowing any sector of the U.S. fishing industry to use the Council to punish foreign competitors raises

serious antitrust issues. Detailed information on requested tonnages by half-year by management area cannot be supplied in advance. Inappropriate for Council to become involved in private industry matters.

Korean Fishing Industry: Opposes permitting on half-year basis. Not being able to review permits between meetings will mean lost opportunities for U.S. fishermen. Mid-November is too early to provide adequate planning information. Suggests that much of the information sought in questionnaire is confidential and that asking question #11 will "chill" competition.

October 1, 1984

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

INTERIM POLICY

on

Joint Ventures and Allocations*

General Policy. The North Pacific Fishery Management Council is responsible by law for assuring the conservation of fishery stocks off Alaska and fostering the development of the United States fishery for those stocks currently underutilized by this country, though they may be fully exploited by other nations. The Magnuson Fishery Conservation and Management Act allows the Council to equitably allocate harvest privileges, and the Council intends to use these allocations to increase American participation in underutilized fisheries consistent with the Act.

The Council believes it is in the greatest national interest for the resource to be harvested, processed, and marketed by U.S. industry. However, until the domestic industry can harvest, process, and market the available groundfish resource, the Council will encourage joint ventures between Americans and foreigners that will increase U.S. participation in the utilization of these resources. Joint ventures generally are considered to be operations in which U.S. fishermen deliver raw fish to foreign processors at sea. Ownership of the finished product may be foreign or U.S. Other forms of joint ventures are possible and will be appraised on their individual merits as they are formulated.

The Council will continue to give highest priority to target operations that are wholly American, and joint ventures will only be considered for groundfish species not harvested and processed totally by U.S. industry.

The Council intends that any country to whom a direct allocation is given must also be engaged in "over-the-side" joint ventures or the purchase of U.S. produced products. A relationship of a one-to-one ratio for joint venture

*Approved by the Council in September 1984.

fishing to foreign directed fishing at the earliest possible date is most desirable at this time. After this ratio is achieved, TALFF will be put on a sliding scale toward total elimination of foreign fishing as American industry (harvesting/processing/marketing) comes on line.

Joint Venture Permit Review Procedure. The Council will hold its review each December of all prospective joint ventures for the coming year. This will coincide with the Council making its final recommendations on apportioning available groundfish yields to Domestic Annual Processing (DAP: totally U.S. harvested and processed), Joint Venture Processing (JVP: U.S. harvested and foreign processed), and Total Allowable Level of Foreign Fishing (TALFF: foreign harvested).

The Council expects to receive all permit applications for foreign vessels to operate in joint ventures at least two weeks before the week of the Council meeting. Applications are expected to be complete and to have been published in the Federal Register by Friday preceding Council meeting week. In no case will the Council consider applications published later than Monday of the meeting week.

In addition to the information required on the NMFS permit application form, each applicant is requested to describe in writing how their operation meets the criteria listed in Table 1. In cases of shortages of desired species, the Council will use this information to rank individual joint ventures and to formulate Council recommendations.

Applications for joint operations submitted subsequent to the December meeting will be reviewed and recommended for approval or denial based upon the merits of the proposed operation compared to previously approved or denied applications and the availability of resources to be allocated.

Each applicant is encouraged to present oral testimony before the Council's Permit Review Committee, which will meet during Council week. The Council will review permits and committee recommendations during its meeting.

Joint ventures are expected to make realistic requests for allocations that lie within their capability to perform. The Council will compare these

requests in aggregate with NMFS projections of JVP derived from industry surveys and will closely monitor attainment of joint venture goals during the season.

Permit Review Criteria. Groundfish operations which are legitimately wholly domestic in the harvesting and processing of our fishery resources and do not involve foreign flag vessels, fall under the Council's definition of DAP and therefore will not need permits. They will be given first priority in groundfish apportionments.

Second priority is granted to operations involving foreign processing vessels and U.S. harvesters and other sectors of the U.S. industry. The Council intends to give preference to those joint venture operations or nations which clearly evidence maximum U.S. industry involvement in all phases of the operation and which give strongest support to the development of the domestic industry for underutilized species.

The Council will use the criteria in Table 1 to appraise joint operation requests relative to each other and make its recommendations to NMFS. Other factors not listed may be considered also. The relative ordering of joint operations using these criteria will become especially important when biologically available yield is insufficient to meet all DAP and JVP demands. In those cases, the operations of lowest merit relative to the others will be in the highest risk of not receiving recommended approval or approval at requested levels.

For each approved joint venture operation, the Council shall recommend a maximum amount of fish that may be received by the foreign vessels of that joint venture operation. It is intended that this amount be incorporated in the permits of those foreign vessels, subject to subsequent augmentation by the Regional Director under the following paragraph. Each permit should provide that a maximum of 50% of the amount stated in that permit may be received until the Regional Director, after consultation with the Council or the Interim Action Committee and the U.S. joint venture partner, determines that the venture is proceeding satisfactorily.

The Council considers tonnages by species requested on foreign permit applications to be firm targets. Any requests for in-season augmentation may be acted on by the Regional Director if TALFF remains. However, the Council will review all requested augmentations for species with no TALFF. The Council may appoint an Interim Action Committee to review requests for augmentations and new joint ventures if they must be acted on outside a regularly scheduled Council meeting.

Table 1. Criteria for the review of joint venture requests and allocations*

-
- Purchase of finished or semi-finished U.S. product, especially underutilized species
 - Efforts to lower or remove trade barriers.
 - Level of U.S. industry involvement in all phases of joint operation (harvesting, processing, marketing)
 - Ratio of country's total joint venture request to total anticipated direct fishing allocation.
 - Enhancement of U.S. employment at sea and ashore
 - Destination and final marketing of products and competition with U.S. products
 - Achievement of joint operation requests and past participation in purchasing, processing and harvesting groundfish from off Alaska.
 - Proof of financial responsibility by foreign partner.
 - Transfer of capital and investment to U.S. infrastructure.
 - Compatibility of joint operation with other U.S. fisheries and incidental species (i.e. gear conflicts, ground preemption, environmental degradation, bycatch of highly valued species totally utilized by U.S. industry, etc.)
 - Partnership relations, ease of dispute settlement.
 - Foreign participation in fisheries research off Alaska.
 - Technology transfer.
 - Reporting of fishery and market information beyond that required by law.
 - Potential net economic contributions of the joint venture to the U.S. fishing industry.
 - Compliance with U.S. laws and treaties.
-

*No priorities meant or implied.

September 18, 1985

Mr. Jim H. Branson
Executive Director
North Pacific Fishery Management Council
P. O. Box 103136
Anchorage, Alaska 99510

Re: Joint Venture Allocations

Dear Jim:

We, the undersigned, are adamantly opposed to the allocation of JVP on a company-by-company basis. We believe that the proposals under consideration for such an allocation system would involve the Council and NMFS entirely too much in the private business affairs of the individual joint ventures. We are unaware of any segment of the domestic fishing industry which supports a company-by-company allocation system.

As an experimental measure for 1986, we support allocation of JVP by nation where demand exceeds supply for any species. Such an allocation system would permit both foreign and domestic joint venture partners to schedule their operations throughout the year so as to maximize their efficiency and profitability. This would benefit both large and small joint venture operations, but especially the smaller operations which might not be able to compete effectively under a "common pool" system. Allocation of JVP by nation should provide more diverse markets and better prices for U.S. fishermen than would be available under the "common pool" approach. Further, allocation by nation should ensure that each joint venture operation will have sufficient bycatch to conduct its operations. Allocation by nation should be tried in 1986 and re-evaluated next year at this time.

ALYESKA OCEAN, INC.

by Jeff Marchick, Pres.

M. H. Stevens

F/V BARBARA LEE F/V EMERALD SEA

Sam S. Holt, Pres.
Alaska Contact, Ltd.

Northem Deep Sea Fisheries, Inc.
by Pete Bleck, Pres.

[Signature]
WESTWARD TRAWLERS, INC

Thom Smith
NORTH PACIFIC FISHING
VESSEL OWNERS' ASSOC.

[Signature]
North Pacific Fisheries Inc

United States Department of Commerce
Nat'l Oceanic & Atmospheric Admin.
Office of General Counsel
P.O. Box 1668
Juneau, Alaska 99802
Telephone (907) 586-7414

September 24, 1985

TO: NPFMC Members and Staff
NPFMC Permit Review Committee

FROM: GCAK - Pat Travers

SUBJECT: Revised Advice of the NOAA Office of General Counsel on Foreign and
Joint Venture Permit Conditions and Restrictions

Introduction

In a previous memo to you of August 11, 1985, and in discussions at the last Permit Review Committee meeting, I provided preliminary advice concerning the authority of the Council to recommend, and of NOAA to implement, conditions and restrictions on foreign and joint venture permits under Magnuson Act Section 204(b)(5) and (7). This advice was based on a draft memo that had been prepared by our Washington, D.C. staff, and which I had been directed to use as an interim basis for advice on this matter. Since the Permit Committee's last meeting, Robert McManus, the NOAA General Counsel has carefully reviewed the draft memo, and believes it was unnecessarily restrictive of the Secretary's authority. He believes that, in the absence of a clearer basis in the statute and its legislative history for concluding that the Secretary of Commerce lacks the authority to allocate JVP on the basis of commercial considerations, he would defend a policy decision to do so. He also believes, however - and will so recommend to the Acting Administrator - that NOAA should articulate the standards it will use in choosing among competing JVP permit applications, noting that there may be a number of criteria which NOAA may wish to avoid as the bases for such divisions.

The purpose of this memo is to summarize the changes in my previous advice, based upon the conclusions of the NOAA General Counsel. In the course of this discussion, I will also highlight the areas in which my previous advice has not changed.

Issues Concerning the Role of the Council

The General Counsel's conclusions do not affect my previous advice on the procedures and standards to which the Council is subject in making recommendations for permit conditions and restrictions under Magnuson Act Section 204(b)(5). This advice appears at pages 3 and 4 of the August 11 memo, a copy of which is attached. Because its role in this matter is purely advisory, the Council is subject to almost no restrictions in this respect. To the extent, however, that the Council's procedures for giving permit applicants and their U.S. partners an opportunity to be heard conform to the more stringent requirements that apply to NOAA, it is more likely that NOAA can use a record of the Council's proceedings as a basis for its own decisions

on the Council's recommendations. For this reason, the Council may wish to consider keeping a more detailed record of the testimony it receives on permit applications and of its own and the Committee's deliberations on those applications.

The General Counsel reaffirmed my previous advice that the Council's proposed request for information from foreign and joint venture permit applicants and their partners would be subject to OMB approval under the Paperwork Reduction Act of 1980. I understand that the Council and NMFS Alaska Region staffs are consulting about the means of obtaining this approval.

Issues Concerning the Role of NOAA

The main respect in which my previous advice has changed concerns the substantive limits on the authority of NOAA under Magnuson Act Section 204(b)(7) to impose conditions and restrictions, including allocations of JVP, on foreign and joint venture permits in response to Council recommendations. This was dealt with at page 2 of the August 11 memo.

The previous advice was that JVP may never be allocated among individual joint ventures when it is sufficiently great to meet all joint venture demands for the year in question. Where there was insufficient JVP to meet the demand, it might be allocated among individual joint ventures based on the individual commercial merits of those ventures only in accordance with the standards and procedures that had been established by regulation. JVP allocations based on factors relevant to all vessels from a particular nation, and applied equally to all ventures involving that nation, could be imposed without an underlying regulation, but again only when there was insufficient JVP to go around.

The advice in the preceding paragraph has now been changed. Noting that there is no longer a statutory requirement that the Secretary of State allocate all available TALFF, the General Counsel finds no legal basis for stating that all JVP applications must be granted without restriction whenever their aggregate poundage is less than JVP. He has also concluded that JVP allocations, as well as a variety of other permit conditions and restrictions, may be imposed under the authority of Section 204(b)(7), without the need for an underlying regulation, even if they are based on factors relevant to only some of the vessels from a particular nation. He believes that a published NOAA guideline concerning its policy on the imposition of such allocations, conditions, and restrictions might make it easier as a procedural matter to respond to recommendations of the Council, but he does not consider this to be strictly required by law.

The General Counsel declined to specify the precise procedural requirements that NOAA might have to meet in imposing the types of allocations, conditions, and restrictions discussed above. This matter was dealt with at page 3 of the August 11 memo. The "sliding scale" of procedural protections mentioned in that memo requires a case-by-case analysis of the standards being applied and the interests at stake in a particular permit application, the ultimate goal being to accord fundamental fairness to applicants and to other interested parties. The General Counsel, therefore, considers it in the interests of neither the Council nor NOAA to offer abstract advice in the absence of a particular factual situation.

The General Counsel did not accept the argument, described at page 3 of the August 11 memo, that permit conditions and restrictions applicable to all foreign and joint venture fisheries, including those related to conservation, must first be adopted by plan amendment and implementing regulation. This was viewed as an unnecessary and perhaps undesirable procedural requirement.

I am sorry for the inconvenience that this change in advice has caused you and the interested members of the industry, and assure you that it is the result of the most serious deliberation. Please call upon me at any time this week if you have any questions or comments about this advice.

cc: Jim Brennan
Jay Johnson
Bill Robinson



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 1668
Juneau, Alaska 99802
Telephone (907) 586-7414

August 11, 1985

TO: NPFMC Permit Review Committee

FROM: GCAK - Pat Travers *Pat*

SUBJECT: Legal Issues Raised by Comments on the Council's
Proposed Policies and Procedures for Foreign and
Joint Venture Permit Application Review

INTRODUCTION

Background

In a mailing of May 28, 1985, the Council requested public and agency comment on certain proposals concerning the policies and procedures to be followed by the Council in its review of foreign and joint venture permit applications under Magnuson Act §204(b)(5). The Council has now received comments on the mailing, and these will be considered by the Council's Permit Review Committee at its meeting of August 14-16, 1985. To assist the Committee in its deliberations, this memorandum discusses briefly the legal issues that have been raised by the comments. This discussion supplements my attached memorandum of July 19, 1985, on the mailing itself. Most of the issues discussed here will be the subject of much more detailed legal analysis after the Committee's meeting, when its recommendations will be studied by the NOAA Office of General Counsel in preparation for their final consideration by the Council.

Respective roles of the Council and NOAA

Many of the comments demonstrated some confusion over the respective roles of the Council and NOAA in the foreign permitting process under the Magnuson Act. The Council's function in this process is purely advisory. NOAA has the exclusive authority for the final permitting decision, and has full discretion either to accept or to reject the Council's advice. This contrasts with the fishery management plan approval and amendment process, in which NOAA must accept a Council decision unless it is contrary to law.

Because their respective roles in the process are so different, the legal requirements to which the Council and NOAA are each subject in considering foreign permit applications



also differ significantly. Many of the comments deal with legal issues that are raised by NOAA's responsibilities, while other comments raise issues that are more relevant to the role of the Council. Each of these two broad groups of issues will now be discussed in turn.

ISSUES CONCERNING THE ROLE OF NOAA

Previous legal advice

At the Council's meeting of December 1984, I transmitted to the Council the NOAA General Counsel's conclusions concerning NOAA's authority to allocate JVP among individual joint venture operations. Several comments either endorsed or questioned that advice. The advice was as follows: JVP may never be allocated among individual joint ventures when it is sufficiently great to meet all joint venture demands for the year in question. When there is insufficient JVP to meet the demand, it may be allocated among individual joint ventures based on their perceived comparative commercial advantages only in accordance with standards and procedures that have been established by regulation. NOAA thus may not impose such allocations solely under the authority to condition and restrict permits of Magnuson Act §204(b)(7).

I had hoped that the detailed legal analysis of the NOAA Assistant General Counsel for Fisheries upon which this advice is based would be available for the Committee's meeting this week. Unfortunately, while the advice itself is firm, some details of its analytical basis are still being worked out in Washington. I anticipate that the detailed analysis will be available before the Council must make its decision on the Committee's recommendations.

Procedural requirements for permit issuance

A few comments suggested that NOAA's denial, conditioning, and limitation of foreign and joint venture permits under the criteria proposed by the Council would require more elaborate procedural safeguards than NOAA has offered applicants for such permits in the past. According to these comments, such additional procedures would be required by the Fifth Amendment of the United States Constitution and by the Administrative Procedure Act.

These comments are basically correct. In fact, the ultimate limitation on the successful use of the standards and procedures proposed by the Council could be NOAA's lack of the time and resources for the additional procedures that it would have to follow to consider them in making its final permit decisions. Exactly what these procedures would be, however, is a matter

that requires further analysis. It is by no means clear that they would include the opportunity for a formal evidentiary hearing before an administrative law judge, as is suggested in some of the comments. Current judicial authority on the due process requirements of the Constitution provides for a "sliding scale" of procedural requirements that vary with the nature of the standards being applied and the kind and magnitude of the interests at stake. NOAA might thus have some flexibility in choosing the procedures to use in implementing standards like those proposed by the Council. The extent to which the agency is currently equipped to carry out procedures even minimally more complex and time-consuming than those it has used in the past is, however, open to question.

Procedural requirements--rulemaking versus permitting

Some comments argued that any permit conditions and limitations that would be broadly applicable to foreign and joint venture fisheries under the Council's proposals would first have to be adopted by plan amendment and regulation. As was noted above, the NOAA General Counsel has endorsed this position with respect to permit conditions and limitations based on the perceived comparative commercial benefits of different joint ventures. The argument may also have some merit with respect to other types of permit conditions and limitations, such as those related to conservation. Once again, this matter will be studied for the Council in preparation for its final action on the Committee's recommendations.

Permit conditions to force business dispute resolution

Some comments endorsed, and others protested, the proposal to condition joint venture and foreign fishing permits on resolution of business disputes between permit applicants and their American joint venture partners. As I advised at the Council's December meeting, there is no authority under Magnuson Act §204(b)(7) for conditioning a permit on this basis.

ISSUES CONCERNING THE ROLE OF THE COUNCIL

Procedural requirements

Some comments suggested that the Council itself is held by the Constitution and the Administrative Procedure Act to certain procedures in its review of foreign permit applications. Such comments are not well founded. Because the Council's role is advisory, it has much more freedom than

does NOAA in choosing the standards and procedures that it will follow in this process. It is upon NOAA that the obligations of the Fifth Amendment and the APA ultimately rest. Of course, the more closely the Council's procedures conform to these obligations, and the more carefully the record of the Council's deliberations is compiled, the more NOAA will lawfully be able to rely upon the Council's process as the basis for its final permit decisions.

Conflict of interest and antitrust questions

A number of comments alleged that Council and Committee members who are engaged in the United States fish processing industry violate Federal conflict of interest and antitrust laws by participating in the foreign and joint venture permit review process, and by requesting the proposed types of information from permit applicants.

The Department of Commerce General Counsel's opinion of December 23, 1983, clarifies that the participation of these members in the process does not in itself violate 18 U.S.C. §208, the Federal conflict of interest statute that would most likely apply. I am happy to advise any of the members concerning the limits they should observe in their participation to assure that this and other Federal conflict of interest standards are satisfied.

I am not competent to advise the members about the extent to which certain of their activities in the permit review process may subject them to liability under the antitrust laws. I understand that the members concerned each retain private counsel to advise them on antitrust matters, and I suggest that they be consulted about the antitrust effects of participation in the permit review process. I can, however, assist by providing the members' antitrust counsel with information about the authority and status of the members under the Magnuson Act and a number of other laws.

Paperwork Reduction Act

As noted in my attached memo of July 19, the Council's proposed request for information from foreign and joint venture permit applicants and their partners would be subject to OMB approval under the Paperwork Reduction Act of 1980.

I cannot attend the Committee's meeting this week, but will be at the immediately preceding Council meeting. If you have any questions about this memo or other matters raised by the Council's proposal or the comments on it, I will be happy to discuss it at your convenience during the Council meeting.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 1668
Juneau, Alaska 99802
Telephone (907) 586-7414
July 19, 1985

TO: NPFMC Members and staff

FROM: GCAK - Pat Travers *Pat*

SUBJECT: Policies and Procedures for Council Review of Joint Venture
and Foreign Fishing Permit Applications

I have reviewed the materials in the Council's public review package of May 28, 1985, concerning Council review of joint venture and foreign fishing permit applications.

As you may recall, at the Council's December meeting, I forwarded certain advice of the NOAA Office of General Counsel that inhibited full implementation of the Council's existing policies and procedures on this subject. I have been informed that that advice still is the official position of the NOAA General Counsel. The advice is as follows: Allocations of JVP among particular joint ventures that are based upon the perceived comparative economic benefits of those ventures may be imposed on other than a country-wide basis only as specifically provided for by regulation. Such allocations may never be imposed for species the JVP of which is greater than the total demand of proposed joint ventures for the year in question.

I had hoped by this time to be able to provide you with the detailed analysis, drafted by the staff of the NOAA Assistant General Counsel for Fisheries, upon which this advice was based. Unfortunately, the details of this analysis are still being worked out within the Office. While the issues remaining to be resolved would apparently not affect the advice set forth above, I have been told that they are significant enough that the analysis cannot be issued at this time.

There is one additional legal consideration of which the Council should be aware in deciding how to handle the joint venture and foreign permit applications for this coming year. To the extent that the Council decides to request information about the proposed ventures, either in writing or through oral testimony, from their sponsors, it will probably be considered to "conduct or sponsor the collection of information" for purposes of the Paperwork Reduction Act of 1980. In light of this, the Council should obtain the approval of the Office of Management and Budget for this information request fairly promptly. To the extent that the Council has not yet decided precisely what kinds of information it will be requesting of permit applicants, it should include in its application for OMB approval the broad categories of information that are likely to be requested. I have attached a copy of Standard Form 83, the vehicle for



obtaining OMB approval of an information request. Ron Berg of the NMFS Alaska Region staff, can advise on the preparation of this form, and also has a contact at NMFS Headquarters who performs the actual legwork in getting proposed information requests through the system. I understand that this is one part of our process that works reasonably well, and that the important thing is to get it in motion as far as advance as possible.

Please let me know if you have any other questions about the Council's role in permit review under the Magnuson Act, or if additional legal issues are raised in the public comments on the Council's mailing.

cc: Bob McVey
Bill Robinson
Jim Brennan
Jay Johnson

Attachment