

M E M O R A N D U M

TO: Council, SSC, and AP members

FROM: Jim H. Branson
Executive Director

DATE: December 4, 1986

SUBJECT: Halibut Regulatory Proposals

ACTION REQUIRED

Information only.

BACKGROUND

The Council has been requested by fishermen from the Pribilofs and Atka to adopt exclusive area registration in the halibut fisheries around their respective islands (Attachment A). Additionally, fishermen from Dillingham have petitioned the International Pacific Halibut Commission (IPHC) to open a portion of the halibut nursery grounds in Bristol Bay for a commercial halibut fishery (Attachment B).

Under the Halibut Convention and the Northern Pacific Halibut Act of 1982 (Halibut Act), the Council may adopt regulations in addition to those implemented by the IPHC. Article I, paragraph 2 of the 1979 protocol (30 U.S.T. 4067; T.I.A.S. 9448) reads in part, "It is understood that nothing contained in this Convention shall prohibit either party from establishing additional regulations applicable to its own nationals and fishing vessels, and to fishing vessels licensed by that party, governing the taking of halibut which are more restrictive than those adopted by the IPHC." The Halibut Act states, "The Regional Fishery Management Council, having authority for the geographic area concerned may develop regulations governing the United States' portion of convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with, the regulations adopted by the Commission." Section 5(c), P.L. 97-176.

As detailed in a December 4, 1983 memorandum to the Council from Pat Travers (Attachment C), Section 5(c) of the Halibut Act grants the Council authority to implement exclusive area registration in the North Pacific Halibut Fishery. The area registration proposal for Atka is contingent upon the IPHC creating a new administrative area--4F. The Commission will consider this proposal, as well as the Bristol Bay proposal, at its annual meeting January 26-29, 1987.

The Pribilof proposal is for an exclusive registration area around the two islands, but within IPHC administrative area 4C. No registration area boundaries have been detailed in the proposal. The proposal also does not address the need for a separate quota within the exclusive area. Exclusive registration will not guarantee the Pribilovians better access to halibut stocks if they still fish from the same quota as those who fish in area 4C outside the registration area.

Since the IPHC will not act on the Atka or Bristol Bay proposal until after the January Council meeting, the first opportunity the Council will have for action on those proposals will be at the March 16-20, 1987 meeting.

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The fishermen from both the Pribilof Islands and Atka have separately approached the International Pacific Halibut Commission in past years for a number of different regulatory changes. The Commission has been responsive to our requests and we are hoping that this will continue when our Association approaches them in January with a number of new regulatory changes.

To begin with, Atka fishermen plan to request the formation of a new regulatory area, Area 4F. Presently, these fishermen are part of Area 4B. As you will recall from last year's opening, the fishermen in Area 4A caught well over their quota and therefore both 4A and 4B were closed, leaving the catch for Area 4B at only 300,000 pounds. This total catch is well below the 1.7 million pounds that was originally intended for Area 4B.

The newly formed Area 4F would include all waters in the Bering Sea and the Gulf of Alaska north of latitude 151 degrees 00'00"N., south of latitude 153 degrees 00'00"N., east of longitude 177 degrees 00'00"W., and west of longitude 172 degrees 00'00"W. This would create a fishery for the local small boat fleet of Atka and would not disturb the larger operations fishing further off shore in Area 4B. We are requesting a catch limit of 400,000 pounds for Area 4F, which will be caught during a "day on/day off" period of time beginning June 1st, until the entire quota is caught.

*Approx
60 x 150 miles*

Since the majority of the larger vessels operate further off shore, we would like to request from the Council an exclusive registration area for Area 4F. The halibut fishery is the main source of income for the Atka fishermen and at this point, they are in danger of losing the resources expended in developing the local fleet and processing equipment. The Council does have the authority, through the North Pacific Halibut Act of 1982, to limit access and we hope that all economic factors described above will be taken into consideration when making a decision on this. The area covered by Area 4F is very minimal and would not cause significant amounts of economic loss to the very mobile and efficient larger boats that cover several fishing areas during a season.

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Since the formation of Area 4C for the Pribilof Islands, the situation has improved for the local small boat fleet from St. Paul and St. George. However, more needs to be done. When the Aleutian Pribilof Fishermen's Association approaches the International Pacific Halibut Commission in January, we intend to propose a number of new regulatory changes for Area 4C.

To begin with, the capability of a few large vessels to take well over half of the quota within a couple of openings leaves the local vessels with less than enough halibut to break even. We are proposing to the Commission, an increased quota of 1,000,000 pounds for next season. But, what is most needed is an exclusive registration area around the Pribilof Islands within Area 4C.

The Association intends to propose gear restrictions for the entire Area 4C, but if an exclusive registration area were approved, then maybe these restrictions would not be fully necessary. The Pribilof Island residents rely on this fishery for a main source of income and have been working diligently to develop their local fleet and processing facilities. To have their entire season's quota caught within a couple of openings by a few large vessels can be devastating to the local economy of the Islands.

In proposing these two exclusive registration areas, we are not attempting to close out any of the "outside fleet." We are merely trying to develop an economic base for our communities. This economic base is dependent on access to a viable halibut fishery. If necessary, we would be happy to meet with Council members or staff before the meeting in December, for purposes of discussing these proposals.

Thank you for your consideration of our requests, and we look forward to your response.

Sincerely,



Mike Zacharof, Chairman
Aleutian Pribilof Fishermen's
Association

enclosure

cc: Representative Don Young
Senator Ted Stevens
Senator Frank Murkowski
John Kirkland
Dr. Anthony J. Calio, NOAA

HALIBUT MEETING ON ALTERNATIVES FOR SMALL BOAT FISHERMEN FROM
THE ALEUTIAN/PRIBILOF AREAS

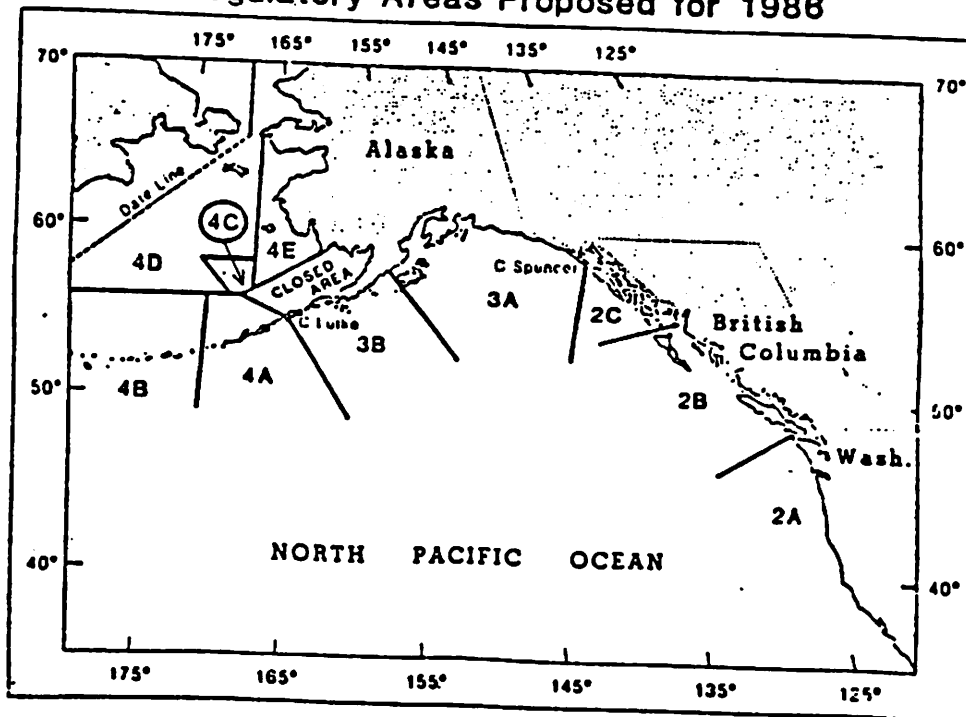
PEOPLE ATTENDING:

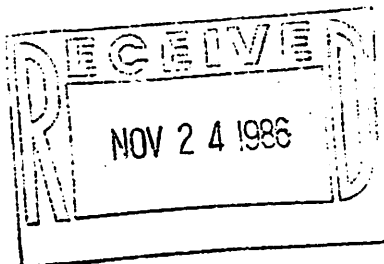
Mel Monsen, Bering Sea Fishermen's Association
Iliodor Philemonof, Tanaq Corp. (St. George)
Henry Mitchell, Bering Sea Fishermen's Association
Max Lestenkof Sr., St. Paul fisherman
Mark Snigaroff, Atka Fishermen's Association
Adrian Melovidov Sr., St. Paul
Mike Zacharof, Central Bering Sea Fishermen's Association
Flore Lekanof Sr., Tanaq Corp. (St. George)
Anna Philemonof, Tanaq Corp. (St. George)
Ron Miller, North Pacific Fisheries Management Council
Marie Matsuno Nash, Senator Stevens' Office
Perfenia Pletnikoff Jr., Pribilofs
Ben Lopez, Aleutian/Pribilof Island Association
B. J. O'Connor, St. George Island
Senator Fred Zharoff
Max Malavansky, St. George Mayor
John Philemonof, St. George Island
Jeff Kashevarof, St. George Island
Andronik Kashevarof Jr., St. George Island
Rich Wilson, St. George City Manager
Ronald Snigaroff, Atka Fishermen's Association
Michael Snigaroff, Atka Fishermen's Association
Ron Philemonoff, TDX Corporation
Victor Mercurief, TDX Corporation
Dimitri Philemonof, Aleutian/Pribilof Island Association
Lee Goodman, Bering Sea Fishermen's Association
Sarah S. Mercurief, Tanaq Corporation (St. George)
Betty L. Mercurief, Tanaq Corporation (St. George)
Anthony B. Mercurief, Tanaq Corporation
Mark Mercurief, Tanaq Corporation
Agafangel Mercurief, Tanaq Corporation
Lamar Cotten, Southwest Alaska Municipal Conference
Bret Coburn, Tanaq Corporation
Gilbert Kashevarof, St. George Island

Organized by:

Representative Adelheid Herrmann
Melanie Ludvick, Staff

Regulatory Areas Proposed for 1986





Andy Golia
Box 663
Dillingham, AK 99576

ACTION	ROUTE TO	INITIAL
November 17, 1986	Exec. Dir.	B
	Deputy Dir.	
	Admin. Off.	
	Exec. Sec.	
	Staff Asst. 1	
	Staff Asst. 2	
	Staff Asst. 3	
	Economist	
	Sec. Bkkr.	
	Sec./Typist	

Dr. Donald A. McCaughran, Director
International Pacific Halibut Commission
P. O. Box 95009
Seattle, WA 98145-2009

Dear Dr. McCaughran:

On October 28, 1986, a number of local commercial fishermen met in Dillingham, Alaska to discuss the possible introduction of a small-boat, near-shore, commercial longline halibut fishery in the Bristol Bay area.

The meeting was held by the fishermen because they feel strongly that there is a growing need to diversify and examine the possible development of an alternative commercial fishery in the local area, such as a halibut fishery.

As you may be aware, the Bristol Bay nearshore area now has two commercial fisheries - salmon and herring. Both fisheries play an important role on the economic base of many Bristol Bay communities. The fishermen who attended the meeting were deeply concerned about the future profitability of salmon and herring because the future outlook does not appear very promising.

In recent years, the local salmon fishery has experienced a failure of returning stocks to its largest producing river system - the Kvichak River. Such a collapse in the Kvichak River has resulted in a much more competitive fishery in the other river systems of Bristol Bay, which is having an adverse impact on the livelihood of the fishermen.

Furthermore, local management biologists forecast another weak salmon return for the Kvichak River in the upcoming 1987 season.

Another important reason why the fishermen feel they must diversify is because the future outlook of the local herring fishery looks even worse. In the last several years, the fishery has experienced a severe lack of younger age class herring stocks. If no recruitment shows up in the 1987 and 1988 returns, the management biologists expect a declining biomass.

Although the Togiak herring fishery has grown to become the State's largest herring fishery, the biologists expect a large reduction in its harvest level for 1987, and further reductions or zero harvests commencing in 1988.

The dismal situation in these fisheries has provided the in-

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centive for the fishermen to meet and examine the possible establishment of a small-boat, near-shore halibut fishery in Bristol Bay. They realize that diversification into other fisheries is the key to their survival.

Therefore, the fishermen concluded at their meeting to recommend the following criteria for a new small-boat, near-shore halibut fishery in Bristol Bay:

AREA:

The new regulatory area will be considered 4G, and will extend from Cape Newenham, adjacent to the AREA 4F, and shall encompass the area 20 miles offshore along the coast to north of Cape Seniavin (see attached map).

FISHING PERIODS:

The new regulatory area will be allowed two fishing periods per year - one commencing June 1 and ending June 15, and the other commencing August 1 and ending August 31, of each year.

CATCH LIMITS:

The new regulatory area will have a total catch limit of 500,000 pounds of halibut each year, of which 250,000 pounds will be limited for harvest during each fishing period.

Additionally, the fishermen at the meeting unanimously agreed that the new regulatory area can be kept small-scale by imposing the following restrictions:

1. Exclusive registration shall be established for the new regulatory area.
2. Vessel length in the new regulatory area shall be restricted to 32' in length or less. A 32' boat limit has been imposed on the Bristol Bay salmon fishery for years.
3. Each participating vessel in the new regulatory area shall be allowed a maximum annual harvest of 10,000 pounds of halibut. A 5,000 pound per boat limit shall be allowed in the first opening, and a 5,000 pound per boat limit in the second opening. This is a familiar concept in the Bristol Bay salmon fishery where canneries have customarily imposed limits on fishermen during the fishing season.

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4. During the first year of the fishery, a maximum of four skates per participating vessel shall be imposed in the new regulatory area. This restriction can be adjusted after the first year, considering the production level of each participating vessel.

5. The same type of landing requirement as proposed by the Aleutian Pribilof Fishermen's Association in AREA 4C shall be applied to the second opening of the new regulatory area, requiring vessel clearance and hold inspection at Dutch Harbor before each opening in Bristol Bay for all vessels not landing their total annual catch in Bristol Bay.

The fishermen realize that the Bristol Bay area has been closed to fishing since 1967 because the area has been determined to be nursery waters for halibut. However, the fishermen believe that the proposed small-boat, near-shore, halibut fishery provides the necessary guidelines to keep the fishing effort small-scale, and will have no adverse long-term impact on the halibut stocks in this area.


It is respectfully requested that this letter be considered a formal request to the Halibut Commission to be considered at their annual meeting in January, 1987. In addition, we would like to schedule a private meeting with the Commissioners at their convenience during the meeting.

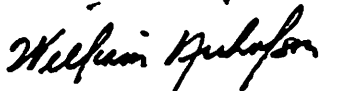
We would also like to participate with any of the Conference Board meetings of the Halibut Commission during that time, and request that a copy of this letter be sent to all the Conference board members from your office as soon as possible.

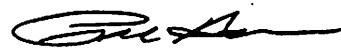
We sincerely hope that the Halibut Commission will give careful and favorable consideration to allow local Bristol Bay fishermen to diversify and maximize benefits from the abundant halibut resource, as it has done for so many other Pacific halibut fishermen.

If your office, or any of your Commissioners have any questions regarding this proposal, please contact Andy Golia at (907) 842-5307, or William Nicholson at (907) 842-5648, or you may write us by sending the letter to Andy Golia, P. O. Box 663, Dillingham, Alaska 99576.

Sincerely yours,


Andy Golia
Dillingham


William Nicholson
Dillingham


Paul Hansen
Naknek

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International Pacific Halibut Commission
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Dan O'Hara
Naknek

Gusty Chythlook
Aleknagik

Robert Heyano
Dillingham

Joe McGill
Dillingham

Tom Hoseth
Twin Hills

Harvey Samuelson, Sr.
Dillingham

cc Governor Bill Sheffield
Governor-elect Steve Cowper
Rep. Adelheid Herrmann
Sen. Fred Zharoff
Sen. Ted Stevens
Sen. Frank Murkowski
Congressman Don Young
Bering Sea Fishermen's Association
Jim Branson, Exec. Director, NPFMC
City of Dillingham
Bristol Bay Borough
Bristol Bay Native Corporation
Bristol Bay Native Association
United Fishermen of Alaska



TO: F/AKR - Robert W. McVey
NPFMC Members and Staff

FROM: GCAK - Patrick J. Travers

Pat

SUBJECT: Council Authority to Adopt Exclusive Registration Areas and Vessel Size Limits Under Section 5(c) of the Halibut Act in Order to Provide Special Protection to Developing Halibut Fisheries by Rural Alaskans.

December 4, 1983

INTRODUCTION

The question has arisen whether and under what limitations the North Pacific Fishery Management Council (Council) may develop regulations under §5(c) of the Northern Pacific Halibut Act of 1982, Pub. L. 97-176, 97 Stat. 78, 79-80, 16 U.S.C. §§773 et seq., 773c(c) (Halibut Act or Act), having as their primary purpose the economic protection of developing halibut fisheries carried out by rural coastal residents of Alaska, without at the same time developing a more general limited access scheme for the Alaska halibut fishery. The proposed protective measures would include, but not necessarily be limited to, exclusive registration areas and vessel size limitations that would, as a practical matter, exclude from certain parts of the fishery all persons except the rural residents of the immediately adjacent coastal areas.

I have concluded that the Council may develop such measures under the general regulation development authority conferred upon it by §5(c) of the Halibut Act. The protective effect of such measures would not necessarily have to be limited to rural coastal residents of areas along the Bering Sea north of 56° North latitude, but could be extended to rural coastal residents of any part of Alaska and, in fact, to any areas covered by the Act. The measures would not have to be incidental to a more general limited access system for the Alaska halibut fishery. The adverse effect of these measures would have to fall equally upon similarly situated Alaskan and non-Alaskan nonresidents of the specially protected areas. The measures would also have to be fair and equitable to all affected fishermen; be based upon rights and obligations in existing Federal law; be reasonably calculated to promote conservation; and be carried out in such manner that no person or other entity acquired an excessive share of halibut fishing privileges. To the extent that exclusive registration areas and vessel



size limits are limited access regulations, they would have to be consistent with the criteria set forth in Magnuson Act §303(b)(6). These requirements might be relaxed to some degree if the measures came within the final proviso of §5(c), discussed below. The measures adopted by the Council could not be implemented unless they were approved by NOAA. They could be stricter than similar regulations of the International Pacific Halibut Commission (Commission or IPHC), as long as they did not frustrate any purpose of the Commission as expressed in the IPHC regulations.

BACKGROUND

Section 5(c) of the Halibut Act, 16 U.S.C. §773c(c), provides as follows:

The Regional Fishery Management Council having authority for the geographic area concerned may develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with regulations adopted by the Commission. Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different States, and shall be consistent with the limited entry criteria set forth in section 303(b)(6) of the Magnuson Fishery Conservation and Management Act. If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges: Provided, That the Regional Council may provide for the rural coastal villages of Alaska the opportunity to establish a commercial halibut fishery in areas in the Bering Sea to the north of 56 degrees north latitude during a 3 year development period.

This provision was enacted at a time when it was widely expected that development of a halibut limited entry system by the Council was imminent. The final proviso was added at the behest of persons residing in the Pribilof Islands and Nelson Island area of the central Bering Sea coast. These persons pointed out that they had recently undertaken small-scale commercial halibut fisheries that promised to relieve the pervasive economic distress in those areas, but which would be wiped out under the limited entry proposals then under consideration. In response to this, the

proviso specifically authorizes the Council and NOAA to make special provision for this region in any halibut limited entry system that they might adopt in order to prevent this result.

It appears from the legislative history of the Act that the members of Congress who were responsible for the proviso thought that it would require the Council and NOAA to exempt the northern Bering Sea region from any limited entry system for at least three years. Indeed, early versions of the proviso seem to have been so drafted. As enacted, however, the proviso clearly gives the Council and NOAA discretion to adopt a halibut limited entry system without including such an exemption. In light of the plain language of the proviso, any expression of legislative intent to the contrary would be so clearly mistaken as to have no legal effect.

This leads to the question whether the proviso adds anything to the authority that the Council and NOAA would have in its absence to adopt a halibut limited entry system with special provisions for the northern Bering Sea region. There is nothing in the other provisions of §5(c) of the Act that would prohibit such action by the Council and NOAA, as long as that action was consistent with the requirements prescribed by those provisions. Subject to those same requirements, similar exemptions would appear to be permissible for other regions of Alaska (or even of Washington, Oregon, and California, in the case of action developed by the Pacific Fishery Management Council). The proviso, however, is not qualified by the same requirements that apply to action under the other provisions of §5(c). Its sole effect, therefore, appears to be to allow the Council and NOAA to exempt the northern Bering Sea region for up to three years from any halibut limited entry system that they might adopt, even if such an exemption would not otherwise meet the requirements of the other provisions of §5(c).

In any event, the better view seems to be that the proviso comes into play only when the Council and NOAA are engaged in the development and implementation of a halibut limited access system. While this conclusion is disputable, it will be assumed for purposes of the following discussion.

In light of the OMB and NOAA rejection of the Council's proposed moratorium on entry into the Alaska commercial halibut fishery, and the expression of strong opposition to any limited access system for that fishery by certain segments of the affected public, such a system may not be implemented under §5(c) of the Halibut Act in the immediate future. At the same time, the residents of the Pribilofs and Nelson Island have now asked the Council and NOAA to take immediate action under §5(c), not linked to any general halibut limited access system, to reserve the halibut fishing grounds in their areas for their own developing halibut fisheries. Based on their experience during 1983, they fear

that, in the absence of such special protection, their fisheries will be preempted by large vessels based in other areas that can easily catch the relatively small halibut quota for the Pribilof/Nelson Island area within a few days. The latter area has been designated as IPHC regulatory area 4C. Discussion of ways in which the Council and NOAA might fulfill the Pribilof/Nelson Island request for protection has focused on two main alternatives. The first would be the designation of Area 4C as an exclusive registration area. Under this proposal, no vessel could fish for halibut in Area 4C unless it had previously been registered for that area with NOAA; and no vessel registered for Area 4C could fish for halibut in any other IPHC regulatory area. This alternative assumes that no owner of a large vessel based outside the coast of Area 4C would forego the opportunity to fish the large quotas of other IPHC areas in return for the chance to take the relatively small Area 4C quota. Since Area 4C is inaccessible to small vessels from other areas, the practical effect of its designation as an exclusive registration area would be to reserve it to halibut fishermen from the Pribilofs and Nelson Island.

The second major alternative response to the Pribilof/Nelson Island request for protection is the establishment of a vessel size limit for Area 4C. Under this proposal, no vessel above a specified size could fish for halibut in that area. The size limit would be so small as to exclude any vessels that could take the Area 4C quota in a short time, and most vessels that could travel safely to Area 4C from other areas. Once again, the practical effect of the measure would be to reserve halibut fishing in Area 4C to residents of the Pribilofs and Nelson Island.

Thus, the Pribilof/Nelson Island request raises the legal question stated in the Introduction: whether and to what extent the Council may develop and NOAA implement regulations under §5(c) of the Halibut Act, having the encouragement of economic opportunities for developing rural Alaskan halibut fisheries as their main purpose, without at the same time adopting a more general limited access system for the Alaska halibut fishery.

ANALYSIS

Protective regulations like those envisioned in the Pribilof/Nelson Island request plainly fall within the authority granted the Council and NOAA by §5(c), provided those measures comply with the requirements of that section. This is true whether or not the protective measures are themselves regarded as "limited access regulations", a matter that is open to dispute and will not be resolved here. Limited access regulations are mentioned in §5(c) as only one kind of the "regulations

governing the United States portion of Convention waters" that the Council and NOAA are authorized to adopt. Section 5(c) cannot reasonably be read to authorize only limited access regulations. The issue whether or not the protective measures proposed in the Pribilof/Nelson Island request are limited access regulations is material only to a determination of which requirements of §5(c) they must satisfy. If they are not limited access regulations, they arguably are not subject to the limited entry criteria of Magnuson Act §303(b)(6), which §5(c) of the Halibut Act incorporates by reference, or, as was noted above, to the final proviso of §5(c). They would, however, be subject to all other requirements of §5(c). If the proposed measures are limited access regulations, then they are subject to Magnuson Act §303(b)(6) and the other requirements of §5(c), but may be excused from most of those requirements to the extent they come within the final proviso of §5(c). The full panoply of §5(c)'s requirements would plainly apply to them if they were treated as limited access regulations but did not come within the terms of the proviso (to the extent, for example, that they were not limited to a period of three years, or affected areas south of 56° North latitude). For purposes of the following discussion, therefore, the "worst case" assumption will be made that the proposed protective measures are limited access regulations, and do not benefit from whatever exemption the proviso might offer from otherwise applicable requirements of §5(c).

Permissible measures designed to provide development opportunity for particular segments of the Alaska halibut fishery are not limited to those adopted in conjunction with a more general limited access system for that fishery. Section 5(c) sets forth a variety of relatively detailed requirements with which such measures must comply. Under established rules of statutory construction, the express enumeration of these requirements precludes the implication of other requirements having the same general nature. This construction of the text of §5(c) is too plain to be controverted by evidence of the specific circumstances that led to §5(c)'s enactment. If Congress had intended the contrary construction of this provision, it would have included express language to that effect in the text itself.

For the same reason, and as was stated above, §5(c) cannot reasonably be interpreted to authorize economic protective regulations only for the Bering Sea region north of 56° North latitude. As long as they met all the other requirements of §5(c), such measures could be adopted for any part of United States Convention waters, even those lying off states other than Alaska. Of course, such measures could not benefit from the proviso's probable relaxation of §5(c)'s other requirements to the extent those measures applied to areas other than the Bering Sea north of 56° North latitude.

The measures envisioned in the Pribilof/Nelson Island request must not be "in conflict with regulations adopted by the Commission." The fact that the measures were of the same kind as and stricter than IPHC regulations would not, in my opinion, automatically cause them to be "in conflict with" those regulations for purposes of this requirement. The Halibut Convention itself, at Article I(2), specifically provides for domestic regulations that are "more restrictive than", but necessarily consistent with, IPHC regulations. The experience of the Council and NOAA under the Magnuson Act is instructive in this respect. It is well established under that Act that a State regulation purporting to govern fishing in the FCZ will not be considered to conflict with Federal regulations solely because the State regulation is more restrictive than the Federal regulations. Instead, a case-by-case determination will be made as to whether, under all the relevant circumstances, implementation of the more restrictive State regulation would frustrate the purpose that the Council and NOAA intended to be served by the Federal regulations. There is nothing to suggest that a similar approach should not be used in determining whether a regulation under §5(c) conflicts with an IPHC regulation.

The proposed measures under §5(c) also may not "discriminate between residents of different States". The persons benefited by the measures proposed in Pribilof/Nelson Island request would, of necessity, all be residents of the State of Alaska. It might, therefore, be argued that the proposed measures would run afoul of this requirement because no residents of States other than Alaska would be benefited. In construing the identical requirement of Magnuson Act §301(a)(4), NOAA has consistently rejected this argument. For example, in evaluating king and Tanner crab FMPs that provide for exclusive registration areas benefiting the Alaskan communities adjacent to certain fishing areas, we have opined that such provisions do not "discriminate between residents of different States" as long as their adverse effect falls equally on similarly situated Alaskans and non-Alaskans. This is generally the case, because it is just as inconvenient for Alaska residents who own large vessels to register for the exclusive areas as it is for large vessel owners living in other States. Agency practice has thus established that it is the incidence of the burden, and not the benefit, of a fishery management measure that must be evaluated in determining whether it discriminates between residents of different States for purposes of the Magnuson Act. This interpretation would apply equally to the identical provision of the Halibut Act. Thus, the measures proposed in the Pribilof/Nelson Island request would not "discriminate between residents of different States" for purposes of §5(c) as long as their adverse effect fell equally upon similarly situated Alaskan and non-Alaskan nonresidents of the economically protected areas.

The proposed measures would plainly "allocate or assign halibut fishing privileges among various United States fishermen". They must therefore be

fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges....

The proposed measures would not necessarily violate these requirements. They would, in particular, not seem to involve any necessary violation of "rights and obligations in existing Federal law," and they could in fact promote the purposes of such Federal statutes as the Alaska Native Claims Settlement Act and the Fur Seal Act Amendments of 1983. The requirement that the measures "promote conservation" has been interpreted by NOAA to refer to "conservation" in the sense of "wise use", and not to focus exclusively on the biological condition of fish stocks. 50 CFR §602.14(c)(3)(ii).

Assuming that the proposed measures are limited access regulations, they must be consistent with the limited entry criteria of Magnuson Act §303(b)(6), which provides that the Council and NOAA may

establish a system for limiting access to the fishery in order to achieve optimum yield, if, in developing such system, the Council and the Secretary take into account--

- (A) present participation in the fishery,
- (B) historical fishing practices in, and dependence on the fishery,
- (C) the economics of the fishery,
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries,
- (E) the cultural and social framework relevant to the fishery, and
- (F) any other relevant considerations....

Once again, there appears to be no necessary reason that measures like those proposed would run afoul of these criteria. It is particularly important to emphasize that factors (A) through (F) need only be "take[n] into account" by the Council and NOAA in the developing of limited access regulations. These factors are to be balanced, and no one of them is conclusive. As long as the regulations reflect a rational balancing of the factors, the fact that one of them, such as present participation in the fishery, was given a low priority will not render the regulations invalid.

In light of the dangers of overfishing that are posed by the large current halibut harvesting capacity, it would be difficult to refute the claim that any halibut limited access regulations were developed "in order to achieve optimum yield".

In addition to all the preceding requirements, the proposed measures would have to be approved by NOAA, and would therefore have to meet all the requirements of other Federal law for agency rulemaking.

Related to the preceding discussion is the question whether the Commission, if it so desired, could adopt regulations of its own implementing the measures proposed by the Pribilof/Nelson Island request. Such authority, if it existed, would derive from Article III(3)(a), (e), and (f) of the Halibut Convention, providing as follows:

For the purpose of developing the stocks of halibut of the Northern Pacific Ocean and Bering Sea to levels which will permit the optimum yield from that fishery, and of maintaining the stocks at those levels, the Commission, with the approval of the Parties and consistent with the Annex to this Convention, may...:

(a) divide the Convention waters into areas;

* * *

(e) fix the size and character of halibut fishing appliances to be used in any area;

(f) make such regulations for the licensing of vessels and for the collection of statistics on the catch of halibut as it shall find necessary to determine the condition and trend of the halibut fishery and to carry out the other provisions of this Convention....

A rather strong argument can be and has been made that the requirement that Commission action be for the purpose of developing and maintaining halibut stock levels so as to permit attainment of the optimum yield limits the Commission to measures based on the biological condition of halibut stocks, and forbids it to adopt measures having social or economic purposes. Such an argument would have been obviated if the provision quoted above had authorized the Commission to take action "for the purpose of attaining the optimum yield". This is because the commonly accepted concept of optimum yield from fishery incorporates social and economic, as well as biological, concerns. Article III(3), however, by limiting the Commission to development and maintenance of halibut stocks so as to permit the optimum yield, might well be interpreted to require the Commission to leave the social and economic management of the halibut fishery to others. I understand that Canadian government attorneys adhere quite

firmly to this interpretation. While the United States does not yet appear to have reached an official position on this matter, the limited interpretation of the Commission's authority is a reasonable one, and cannot be disregarded.

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