MEMORANDUM

TO: Council, AP and SSC Members

FROM: Clarence G. Pautzke
Executive Director

DATE: June 15, 1990

SUBJECT: Future Management Planning

ACTION REQUIRED

Consider approval of notice of moratorium for all fisheries under the Council's purview. Receive Fishery Planning Committee recommendations.

BACKGROUND

In January the Council received several requests to consider developing an industry-wide moratorium for its groundfish fisheries. The Advisory Panel further recommended that a moratorium be considered that would apply to all fisheries under its jurisdiction. In April the Council reviewed an industry proposal and after hearing public testimony and recommendations from the Advisory Panel, decided to move forward to develop a moratorium. The Council instructed staff to prepare a Federal Register notice that would alert the public of the Council's intent to consider a moratorium over the next year. A control date of January 19, 1990 has been suggested as well as a pipeline definition. The moratorium amendments to each of the FMPs could be implemented as early as January 1, 1992 and expire on December 31, 1996, or earlier if terminated by Council action.

On May 25, the Fishery Planning Committee (FPC) met to review a draft moratorium notice. A summary report of their meeting is provided as item C-5(a)(1). The FPC made several revisions and the improved notice is provided as item C-(a)(2). The Committee briefly discussed the concept of applying the moratorium to all fisheries, to a single fishery, or some part thereof as later determined by the Council. This issue is highlighted by the FPC for full Council consideration as to whether it be included in the notice. The Committee also recommends the addition of two NEPA scoping sessions in Seattle and Kodiak during the summer. The FPC's recommended work schedule is provided as item C-5(a)(3).

At the request of the FPC, copies of the draft moratorium notice were mailed to the public on June 14 to aid industry review and comment at this meeting. Should the Council choose to continue with the development of a moratorium, it should approve the Federal Register notice at this meeting.

Since the last meeting we have received several letters from the industry on the moratorium and they are provided as item C-5(a)(4-6). Two letters request exemptions for freezer-longline vessels from the moratorium and one letter recommends use of a future control date rather than January 19, 1990. Also provided for your information is a copy of the Mid-Atlantic Council's June 7, 1990 Federal Register notice which announces a control date for its summer flounder, scup, and black sea bass fishery (item C-5(a)(7).

Summary Report
Fishery Planning Committee
May 25, 1990

Alaska Fisheries Science Center
Seattle, Washington

I. INTRODUCTION

The meeting was convened at 8:35 a.m. by Chairman Joe Blum. Other members in attendance were Rick Lauber, Bob Alverson, Larry Cotter, Ron Hegge, and John Peterson. Support staff in attendance were Clarence Pautzke and Steve Davis, NPFMC; Jay Ginter, Lew Queirolo, Steve Freese, and Jim Balsiger, NMFS; and Craig O'Connor, NOAA-GC. There were also over 60 members of the public in attendance.

II. MORATORIUM

The FPC reviewed the draft Federal Register notice prepared by staff on the moratorium. The FPC made revisions to text listed under the section heading "The Problem" and "The proposed and possible alternative actions". Specifically, the changes addressed concerns with the term "overcapitalized", and the need to expand the pipeline definition to include those vessels in the process of sale or conversion at the time of the control date. Staff was directed to draft language and make other technical revisions as necessary to incorporate the FPC's recommendations.

The Committee briefly discussed the concept of applying the moratorium to all fisheries or some part thereof as later determined by the Council. The FPC highlighted this issue as one that should be addressed by the full Council as to whether it be included in the notice. The Committee also reviewed the Council's intended moratorium work schedule and recommended the addition of two NEPA scoping sessions in Seattle and Kodiak (with teleconferences) during the summer.

III. INSHORE/OFFSHORE ALLOCATION

The FPC received an update on the progress of the analytical team on the analysis. It was noted that with the generous contribution by industry to the Pacific States Marine Fisheries Commission, work can begin on the social impact analysis (SIA). Several members requested a review of the SIA outline and a better understanding of what information the analysis would provide to the Council. This issue was placed on the agenda of the next FPC meeting.

An update on the biological and economic analysis was also provided. Work is proceeding in developing the biological database and economic models. Concerns were expressed by both members of the analytical team and the committee over the inherent delays associated with the need to obtain NMFS, NOAA, and OMB approval of the industry economic survey. The delays might require rescheduling the amendment package deadline from December 1990 to April 1991. Chairman Blum volunteered to discuss this matter with the Alaska Regional Director and will provide further direction to staff on behalf of the committee as necessary.

The FPC received a copy of the Council's most recent statement of the community development quota concept and have scheduled discussion of this topic as it applies to inshore/offshore during its next meeting.

Several points of concern were raised to the FPC by members of the public.

- Some members questioned the need to include Pacific cod in the inshore/offshore analysis given that there is no current allocation problem with this fishery.

- Some members raised the issue of floating processing capacity (e.g., mothership or catcher/processor declaring its intent to participate as an "inshore" operator as defined by the Council). The fact that current committee rules would allow this mobile capacity to move anywhere in the Gulf of Alaska or Bering Sea/Aleutians, or the fact that it can transfer from inshore or offshore from year to year doesn't address the Council's stated preemption problem.

- Some members raised the issue of placing historical JV catches with the inshore category. They suggest limiting the focus of the analysis to the historical DAP sector only and should JV catches be incorporated, that it is more appropriate for them to be added to the offshore category.

The FPC has tentatively scheduled to meet next in Juneau, July 18-19.

IV. ADJOURNMENT

The Chairman adjourned the meeting at 2:40 p.m.

Billing Code: 3510-22

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

DRAFT

[Docket No.]

RIN

Groundfish and Crab Fisheries of the Bering Sea and Aleutian Islands Area, Groundfish Fisheries of the Gulf of Alaska, and Pacific Halibut Fisheries off the State of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce

ACTION: Notice of intent to limit access to the groundfish, king crab, Tanner crab and halibut fisheries off Alaska, to prepare a supplemental environmental impact statement (SEIS), and request for scoping comments.

SUMMARY: The North Pacific Fishery Management Council (Council) announces its intention to develop fishery management plan (FMP) and regulatory amendments that, if approved by the Secretary of Commerce (Secretary), would prohibit fishing vessels not already fishing in the fisheries governed by the FMPs and the Pacific halibut fishery as of January 19, 1990, from entering those fisheries for a period of four years. In addition, NOAA announces its intention to prepare, in cooperation with the Council, a SEIS to assess the potential effects on the human environment of this interim moratorium on new entry into the fisheries. If such amendments to the FMPs are approved by the Secretary, implementation of the moratorium is expected no sooner than January 1992. At that time, fishing vessels that entered the fisheries after January 19, 1990 may not be allowed to continue operating in those fisheries.

Finally, NOAA announces a public scoping process for determining the scope of issues to be addressed and for identifying the significant issues relating to limiting access to a public fishery resource, with few exceptions, only to those vessesls who are current participants in the fisheries. The intended effect of this notice is to alert the interested public of the Council's fishery management intentions, to the commencement of a scoping process, and to provide for public participation. This action is necessary to comply with Federal environmental documentation requirements.

DATE: Scoping comments are invited until September 28, 1990, when the scoping process will end at the scheduled conclusion of the September Council meeting. The Council's Fishery Planning Committee will meet during this period (see "scoping process" below for dates, times and locations of meetings) to discuss the problem this moratorium in intended to resolve and suggest alternative solutions. Interested persons may comment during those meetings on the scope of issues to be analyzed in the SEIS. Other scoping meetings will be held as specified below (see "scoping process").

ADDRESS: Send scoping comments to Steven Pennoyer, Director, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802-1668. Information also may be requested from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510 or telephone 907-271-2809.

FOR FURTHER INFORMATION CONTACT: Steven K. Davis, Deputy Director, North Pacific Fishery Management Council, telephone: 907-271-2809, or Jay J. C. Ginter, Fishery Management Biologist, Alaska Region, NMFS, telephone: 907-586-7229.

SUPPLEMENTARY INFORMATION: The commercial harvest of groundfish in the U.S. exclusive economic zone of the Gulf of Alaska and the Bering Sea and Aleutian Islands area is governed by Federal regulations at 50 CFR 611.92 and 611.93, and 50 CFR parts 672 and 675, which implement the Gulf of Alaska groundfish FMP and the Bering Sea/Aleutian Islands groundfish FMP, respectively. The commercial harvest of king and Tanner crabs in the Bering Sea and Aleutian Islands area is governed by State of Alaska regulations at Title 16, Chapters 34 and 35, which implement the Bering Sea/Aleutian Islands crab FMP. The harvest of Pacific halibut in all waters off Alaska by U.S. fishermen is governed by Federal regulations at 50 CFR part 301, which implement rules developed by the International Pacific Halibut Commission (IPHC).

The groundfish and crab FMPs and their accompanying environmental impact statements (EISs) were developed by the Council and approved by the Secretary under authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act, Pub. L. 94-265). The Council also has authority under the Northern Pacific Halibut Act of 1982 (Pub. L. 97-176) to develop regulations governing the catch of Pacific halibut in U.S. waters which are in addition to, but not in conflict with, regulations developed by the IPHC. This includes authority to allocate halibut fishing opportunity among U.S. fishermen should such allocation be necessary.

Under the National Environmental Policy Act of 1969 (NEPA) and NOAA policy, a fishery management regulatory action which significantly affects the human environment requires the preparation of an EIS or SEIS. This notice of intent to prepare an SEIS complies with NEPA implementing regulations at 40 CFR 1508.22. In addition, this notice announces a scoping process pursuant to 40 CFR 1501.7 and 1508.25.

The Problem: Domestic harvesting and processing capacity in the groundfish, crab, and halibut fisheries off Alaska currently exceeds the amount necessary to harvest the annual total allowable catch of most species of groundfish, halibut and crabs under Council jurisdiction. Further, the Council has determined that the continued entry of fishing effort into these fisheries will only add to harvesting and processing capacity and that continued entry exacerbates current fishery management difficulties or causes new problems.

Fishery managers have found that excess capacity may lead to allocation conflicts, gear conflicts, excessive bycatch of non-target species, high grading or discard of lower valued but potentially useful fish products, poor handling of catch, insufficient attention to safety, and economic instability from boom-and-bust harvest cycles. In recent years, the Council has noted some or all of these problems in every fishery under its jurisdiction.

Although the Council continues to develop non-limited access regulations in an attempt to address these problems, the Council also is considering a change in the open-access nature of fisheries as a more comprehensive solution. At this time, the Council has not determined the best way to control or restrict access to commercial fishery resources in the long term. However, the Council has tentatively determined that a moratorium on new entry into the fisheries may be necessary in the short term to curtail the increase in fishing capacity and permit the Council time to address management problems.

Therefore, the public is hereby notified that the Council intends to develop FMP and regulatory amendments that would prohibit fishing vessels from entering the groundfish and crab fisheries governed by the FMPs and the Pacific halibut fishery off Alaska, for a period of four years if such vessels are not already fishing in those fisheries as of January 19, 1990. In addition, the public is notified that the NMFS, in cooperation with the Council, intends to prepare an SEIS on the potential effects of amending the two groundfish FMPs, the crab FMP, and the halibut fishery regulations to implement such a moratorium on entry into the specified fisheries and other reasonable alternatives, including the no action alternative.

The proposed and possible alternative actions: The proposed action is to amend the FMPs and the Pacific halibut fishery regulations. These amendments would provide the Secretary authority to limit, for a period of no longer than four years from the effective date of the authority, future commercial fishing opportunities for species under the purview by these FMPs and regulations to fishing vessels that have participated in the specified fisheries on or before January 19, 1990.

For purposes of this limitation, the term "fishing vessel" has the same meaning as defined in the Magnuson Act; that is, "...any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for (A) fishing, or (B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing."

Some exceptions to the limitation on entry into the specified fisheries are being considered and may be provided. These include but are not limited to:

(a) any vessel less than 40 feet, length overall;

(b) any vessel that had a keel laid on or before January 19, 1990 with the primary intent of participating in a fishery under the Council's jurisdiction, and that reported catch or processed product in the groundfish, crab or halibut fisheries under Council jurisdiction on or before July 1, 1991;

(c) any vessel that was built prior to January 19, 1990 and was in the process of sale or conversion, with the primary intent of operating in a fishery under the Council's jurisdiction, and that reported catch or processed product in the groundfish, crab, or halibut fisheries under Council's jurisdiction on or before July 1, 1991; or

(d) any vessel participating in any program designed to foster development of disadvantaged communities.

Other exceptions may be provided to allow replacement or conversion of qualified fishing vessels. Examples of possible exceptions include:

(a) a vessel that is lost at sea or totally destroyed may be replaced with a vessel of similar harvesting and/or processing capacity; and/or

(b) a vessel that qualifies under the moratorium may be modified to increase its capacity or length by no more than 20% during the life of the moratorium.

Alternatives to this action include, but are not limited to:

(1) status quo or no change in the FMPs and regulations; or

(2) other forms of limited access management such as license limitation or individual fishing quotas, in conjunction with or in lieu of a moratorium on new entry.

Scoping process: All persons affected by or otherwise interested in a decision by the Council and the Secretary to amend the groundfish and crab FMPs and the Pacific halibut regulations to provide for an interim moratorium on entry into these fisheries are invited to participate in determining the scope of significant issues to be analyzed in the SEIS. Participation includes submission of written comments to the above address or attendance at public scoping meetings.

Scoping consists of the range of actions, alternatives, and impacts to be considered in the SEIS. Actions include those which may be closely related, cumulative, or similar. Alternatives include the no-action alternative, other reasonable courses of action, and mitigation measures. Impacts may be direct, indirect and cumulative. The scoping process also will identify and eliminate from detailed study issues which are not significant or which have been covered in prior environmental reviews.

This scoping process begins with publication of this notice and will end on September 28, 1990, at the conclusion of the September Council meeting. Public scoping meetings are also scheduled for August 23 in Seattle, Washington and August 31 in Kodiak, Alaska.

SEIS preparation and decision-making schedule: The Council has adopted a tentative schedule for amendment and SEIS preparation, review, and approval. Under this schedule, analysis and drafting of the SEIS would occur during the six-month period beginning October 1990 through March 1991. The draft SEIS would be initially reviewed by the Council at its meeting of April 22-26, 1991. The Council would decide at this meeting whether more work on the draft SEIS was necessary or if it was acceptable for public review. If approved for public review, a notice of its availability would be filed with the Federal Register and a 45-day NEPA public review period would occur from May 10, 1991 through June 24, 1991. At its meeting of June 24-28, 1991, the Council would decide whether to recommend the moratorium amendments to the Secretary. Oral and written comments may be submitted to the Council at its June meeting prior to its decision. If the Council's decision is affirmative, the SEIS would be submitted, with the amendment recommendation and other rule-making documents to the Secretary for review and approval/disapproval.

Under the Magnuson Act, Secretarial review and approval/disapproval is completed in 95 days from the date of receipt of the Council's amendment recommendation. The Secretarial review process includes concurrent public comment periods of 60 and 45 days on the amendment and proposed rule, respectively. If approved by the Secretary under this schedule, a final rule implementing the moratorium on entry into the fisheries would be effective in January, 1992.

Dated:

[Insert name and title of responsible official]

Moratorium Amendment Work Schedule
as revised by the Fishery Planning Committee
May 25, 1990

1990

April 24-27	Council approves moratorium request Council adopts work schedule
May 25	FPC reviews draft moratorium language and Federal Register notice
June 4	Send draft notice for informal public review.
June 25-29	Council approves notice of moratorium for Federal Register
July 30	Moratorium notice published in Federal Register
August 23	FPC holds NEPA scoping session (Seattle)
August 24	FPC reviews moratorium discussion paper
August 31	Council holds a NEPA scoping session (Kodiak w/teleconference)
Sept. 25-29	Council reviews discussion paper and finalizes options for moratorium; directs staff to prepare amendment package

1991

April 23-26	Council approves moratorium package for public review
June 25-28	Council considers approval of moratorium amendments

1992

January 1	Implement moratorium for four years

NOTE: Fishery Planning Committee meetings will be scheduled as necessary.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box - 21109
Juneau, Alaska 99802-1109
Telephone (907) 586-7414

August 6, 1990

MEMORANDUM FOR: North Pacific Fishery Management Council

FROM: GCAK - Jonathan Pollard

SUBJECT: Control Dates and Moratorium

At its April, 1990 meeting, the Council directed its staff to prepare a Federal Register notice expressing its intent to consider a moratorium on all further entry into the fisheries under its jurisdiction. The Council also indicated its intent to adopt January 19, 1990, as the control date[1] for participation in these fisheries should the Council develop, and the Secretary of Commerce approve and implement, a moratorium on new entry. At its June, 1990 meeting, the Council accepted public testimony on the moratorium issue but did not take action on this issue because of time constraints. After receiving preliminary legal advice from NOAA General Counsel, the Council postponed action on the control date until its August meeting.

The Council has received much public comment that publication of the proposed January 19 control date in the Federal Register without prior public notice and opportunity for comment violates the substantive and procedural standards of the Magnuson

[1] The term "control date" will be used in this memorandum instead of the misleading "cut-off date." As explained further below, the typical control date has no binding effect at the time of announcement and cannot cut access to the fishery.

Act, the Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA). The purpose of this memorandum is to provide the Council with written legal guidance concerning the role of control dates in the development of limited access regimes[2] under the Magnuson Fishery Conservation and Management Act (Magnuson Act). In particular, this memorandum will discuss the differences in purpose and effect between publication of control dates and implementation of limited access regimes.

Control Dates:

Councils have often published control dates in the Federal Register to mark the beginning of deliberations to develop a limited access regime for a fishery.[3] In the past, these dates have been published, without prior notice and opportunity for comment under the APA, for the primary purpose of providing prospective notice to potential entrants that if a vessel or person has not yet participated in the fishery by the control date, that person or vessel will not be assured of future participation in the fishery if a limited access system is eventually implemented. The

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[2] "Limited entry or (limited access) is a management technique that attempts to limit units of effort in a fishery, usually for the purpose of reducing economic waste, improving net economic return to the fishermen, or capturing economic rent for the benefit of the taxpayer or the consumer. Common forms of limited access are licensing of vessels, gear, or fishermen to reduce the number of units of effort, and dividing the total allowable catch into fishermen's quotas (a stock certificate program)." Guidelines for Fishery Management Plans, 50 C.F.R. § 602.15(c)(1), 54 Fed. Reg. 30839 (July 24, 1989). A moratorium such as the one under Council consideration is a limited entry system.

[3] At the present time, there are 9 published control dates. Several recent examples can be found at 55 FR 23265, June 7, 1990 (summer flounder); 54 FR 46755, Nov. 7, 1989 (reef fish); 54 FR 42318, Oct. 16, 1989 (shark).

Federal Register notices typically identify the fishery as a candidate for limited access and state that the control date may become relevant in determining historical participation in, and dependence on, the fishery, thereby notifying potential entrants of the risk of trying to establish a history of participation while the Council deliberates. The publication of a control date may also reduce the risk of a successful "takings" claim against the government if the implementation of a limited access system reduces the value of the claimants' vessels or fishing gear.[4] Conversely, the publication of a control date and the announcement of qualifying criteria under that date will encourage persons who tentatively "qualify" to continue investments in the fisheries in reliance on the announcement, perhaps developing a greater history of dependence on those fisheries.

Because the primary purpose of a control date is to provide advance notice to potential entrants of the risk of entering the fishery after that date, control dates are by necessity prospective. Consequently, in order to fulfill the primary purpose of providing prospective notice to potential participants, the control date may not be a date preceding the date of announcement; rather, the control date must be contemporaneous with the date of announcement or a date in the future.

In addition, the more specific the language, the better

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[4] The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. U.S. CONST. amend. V.

the public can judge whether to commence new fishery projects or continue with ongoing investments. Although vagueness is not a fatal legal flaw, more specificity will allow the interested public to better evaluate the risks and make informed judgments as to how to proceed with proposed or ongoing projects and transactions.

On the other hand, the final announcement of a control date and qualifying criteria, either specific or vague, doubtless will encourage persons or vessels that tentatively qualified under the control date to continue participating in the fisheries, perhaps building a new or greater history of participation in and dependence on those fisheries. Notwithstanding its non-binding nature, a control date announcement will encourage further participation by those who are included within its protection with the result that it will be extremely difficult to exclude or devalue the participation of those who continued participation in reliance on the announcement. The Council should carefully consider this consequence in determining whether to announce a control date or to approach the issue in some other manner.

The Council has heard public testimony that the publication of a control date in the Federal Register without prior public notice and opportunity for comment violates the substantive and procedural standards of the Magnuson Act, the APA, and the National Environmental Policy Act (NEPA). However, NOAA General Counsel has consistently advised NMFS and the regional fishery management councils that the control dates are merely advisory and have no legal force and effect at the time of publication.

Consequently, NOAA's view has been that the publication of a control date does not require compliance with the APA notice and comment procedure for substantive rulemaking.[5] Indeed, each notice of a control date published in the Federal Register has stated that the date is not binding in any future limited access system and would not prevent use of a different date, or some other criterion, for determining access to the fishery.

However, an argument has been made that a control date is a substantive rule because of its *substantial impact* on the public, particularly on fishing vessel owners and shipyards that have made investments with the intention of entering the fishery. This argument has been advanced by industry representatives constructing or converting vessels for the fisheries off Alaska. These industry representatives argue that the publication of a control date will have a significant adverse impact on their ongoing investment projects, and that either the APA or principles of fairness require compliance with APA rulemaking procedures.

If the publication of a control date is a substantive rulemaking, it must comply with APA rulemaking procedures.[6] As

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[5] The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4).

[6] Subject to specific exceptions, the APA requires that the formulation, amendment or repeal of a "rule" requires (1) advance publication in the Federal Register of the proposed rule or its substance; (2) opportunity for public participation through submission of written comments, with or without oral presentation; and (3) publication of the final rule in the Federal Register, incorporating a concise general statement of its basis and purpose, thirty days before its effective date. 5 U.S.C. § 553. However, advance publication and opportunity for public comment are unnecessary for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," or when the agency determines that these requirements are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). Failure

stated above, NOAA consistently has taken the position that the publication of a non-binding control date is not subject to APA rulemaking requirements because it is an announcement of possible intent only. Unfortunately, the caselaw on whether a particular agency pronouncement is subject to APA notice and comment provisions solely because of its substantial public impact is confused and contradictory. The following cases illustrate the judicial confusion on this issue. Some courts have concluded that agency interpretive rules having substantial impact require notice and comment rulemaking. National Motor Freight Traffic Association v. U.S., 268 F. Supp. 90 (D.D.C. 1967), *aff'd* 393 U.S. 18 (1968); Pharmaceutical Manufacturing Association v. Finch, 307 F. Supp. 858 (D. Del. 1970). Other courts have expressly rejected a "substantial impact" test for determining whether notice and comment rulemaking is required. Energy Reserves Group, Inc. v. D.O.E., 589 F.2d 1082 (TECA. 1978), *citing* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). In determining that the announcement of agency policy in a "press release" was not subject to notice and comment rulemaking despite its public impact, one court stated that the press release "did not involve a rule which the public is required to obey," but was intended as "a general statement of policy to guide the public in future planning." The court stressed that the press release "did not operate in and of

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to comply with required APA rulemaking requirements results in invalidation of a challenged rule. Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

itself to deny any rights to the petitioners." Airport Commission v. CAB, 300 F.2d 185, 188 (4th Cir. 1962).

Notwithstanding the somewhat contradictory judicial precedent, NOAA sees no reason to change its opinion that the publication of a non-binding control date does not require compliance with the APA notice and comment procedure for substantive rulemaking. However, given the alleged substantial economic impacts of a control date in the fisheries off Alaska, the Council may wish to reduce the risk of judicial intervention by considering alternate approaches to the draft notice under consideration.[7]

Options:

First, the Council simply may wish to publish a notice in the Federal Register[8] announcing the Council's intent to proceed with the development of a limited access amendment for certain fisheries off Alaska, and specifically noting that some participants may be excluded from the fisheries in order to achieve the optimum yield. No control date would be announced. The Council would then begin to prepare an FMP amendment limiting

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[7] The alternatives that follow are not exhaustive. Obviously, the Council has a multiplicity of options depending upon its goals.

[8] Each of the following alternatives includes the publication of a notice in the Federal Register. However, publication in the Federal Register is not required by law for those alternatives that do not result in a binding rule. Consequently, the Council could simply adopt a resolution announcing its intent under each of the non-binding alternatives without forwarding that announcement to the Office of the Federal register for publication. Although this approach would reduce the likelihood of judicial intervention, the unpublished resolution would affect only persons who had actual and timely knowledge of its terms. On the other hand, under the Federal Register Act, 42 U.S.C. §§ 1501-1511, members of the public are deemed to have knowledge of material published in the Federal Register, whether or not they have actual notice of that material.

access to the fishery. This approach would not necessarily deter speculative entry into the fisheries.

Second, the Council may wish to publish a notice of some future control date in the Federal Register, accept written public comment on that proposal, then publish a final notice in the Federal Register, incorporating a concise statement of basis and purpose and responses to comments received. Although this procedure does not result in a binding rule, it complies with the notice and comment provisions of the APA, involves the public in the decision, and results in a record of public participation and consideration of impacts.

Third, the Council can recommend immediate publication in the Federal Register of a notice announcing a non-binding control date and tentative eligibility criteria. This alternative essentially is the current Council proposal. If the Council chooses this alternative, it can reduce the risk of judicial intervention by stating the need for this action at this time and including a clear statement that the date is advisory and has no independent binding force or effect upon the agency or the public.

Finally, the Council may wish to develop a binding control date and eligibility criteria in a way that would deter speculative entry while the Council develops its limited access system. Although the legal authority is not altogether clear, a possible way to accomplish this is to request the Secretary use his rulemaking authority in section 305(g). That provision states that

> [t]he Secretary may promulgate such regulations, in accordance with [the APA], as

> may be necessary to discharge such responsibility [to carry out any FMP or amendment] or to carry out any other provision of this Act.

The Council would ask the Secretary to promulgate a rule establishing an eligibility date and criteria. The rule would have no present prohibitory effect (would not keep anyone from participating in the fishery), but would inform the public what the eligibility requirements of a future limited entry system will be.[9]

Although publication of a non-binding control date may discourage speculative entry pending implementation of a limited access system, a Secretarial rule under section 305(g) would specify a date by which the vessel must have satisfied binding eligibility criteria, or by which binding commitments to construct or reconstruct a vessel must have been made, to qualify the vessel for fishing privileges under the eventual limited access system. After the rule is promulgated, the Council could then develop the type of system and formula for allocation, while the number of eligible participants remains fixed.[10]

Rulemaking under section 305(g) must comply with the substantive and procedural requirements of the Magnuson Act and

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[9] Analogies for this sort of rule are found in sections 201(h), 303(e), 304(c), and 305(e). Under these provisions, the Secretary is authorized to issue rules (a) governing foreign fishing in advance of an approved FMP; (b) collecting data to determine whether an FMP is needed; (c) implementing a Secretarial FMP or amendment if the Council has not prepared one; and (d) addressing an emergency, whether or not an FMP exists for the fishery. In each case, the Secretary's independent rulemaking fills the gap created by the lengthy process of preparing and implementing a Council FMP or amendment.

[10] Of course, this Secretarial rule under section 305(g) would not forever prohibit the Council or the Secretary from changing the eligibility criteria or control date by subsequent rulemaking.

other applicable law, including review for consistency with the Magnuson Act national standards, section 303(b)(6), NEPA and the APA. Ideally, this alternative would result in binding eligibility criteria, protecting the interests of present participants and eliminating those who might otherwise have developed a history of participation after the Council begins developing a limited access amendment. However, new entry into a fishery might be unnecessarily constrained if the Council does not ultimately adopt a limited access system. In order to ensure that this interim measure did not become permanent, the rule should include an expiration date, allowing sufficient time for the Council to develop, and the Secretary to implement, a limited access amendment.

In any of the above alternatives, the Council may wish to state its intent with greater specificity than does the draft under consideration. For example, the draft notice states that a vessel must have "entered" the relevant fisheries off Alaska in order to qualify, at least tentatively, for continued participation in those fisheries in any future limited access management regime. This statement is vague. The interested public cannot know whether the term "entered" means landing a fish, processing a fish, obtaining a fisheries permit, or some other act. Neither is it clear that "entering" one fishery under the Council's jurisdiction by the control date also tentatively qualifies the vessel for later participation in a different fishery if limited access is implemented. Similarly, the draft is ambiguous concerning "the

fisheries under the Council's jurisdiction." Any fishery in the EEZ off Alaska is a candidate for Federal regulation if such Federal conservation and management is necessary. The Council may wish to express its intent with greater precision.

The draft only vaguely addresses the concept of vessels "in the pipeline." The Council also may wish to define "pipeline" more specifically to allow the public to judge whether to continue with ongoing vessel construction or conversion. The Council may choose to address the problem of vessels under construction or conversion by publishing one date and specific eligibility criteria for existing vessels, and a different date in the future and specific eligibility criteria for those vessels under construction or conversion at the date of publication.

Application of a Control Date in a Future Limited Access System:

Section 303(b)(6) of the MFCMA provides that any fishery management plan (FMP) 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.

Some members of the public have suggested that sections 303(b)(6)(A) and (B) prohibit any limited access system that excludes fishermen who have developed a history of participation as of the date the system is approved by the Secretary. However, section 303(b)(6) only requires that the listed factors be "taken into account" in the development of a limited access system. The provision does not require that each of the listed factors be accommodated by that system if the Council and the Secretary reasonably find that other factors should be given preeminent weight. This conclusion is reinforced by the probability that accommodation of some of the five enumerated factors would require that others of those factors not be accommodated. In addition, Congress itself seems to have recognized the limited role of these listed factors by giving equal status to "any other relevant considerations." In so doing, Congress gave the Council and the Secretary discretion to override any of the five listed factors when justified. The administrative record need only reflect that each of the listed factors had been adequately taken into account by the Council and the Secretary.

Consequently, sections 303(b)(6)(A) and (B) do not prohibit exclusion of some participants from a fishery <u>if</u> the administrative record developed for the limited access FMP amendment demonstrates why the exclusion is necessary to achieve the optimum yield from the fishery and assesses the effects of the exclusion in light of the first two listed factors, reasonably concluding that they were outweighed by other relevant

considerations. Of course, the administrative record must also demonstrate compliance with other applicable law, including the Magnuson Act national standards at section 301(a) and the APA.

Sections 306(b)(6)(A) and (B) probably prohibit a limited access system that categorically ignored participation in the fishery during the period between the publication of the control date and that system's implementation without evidence in the administrative record that the effects of that categorical exclusion had been assessed during the system's development. It is quite possible that the outright exclusion of some participants would be difficult to justify in any particular instance depending upon the social and economic impacts of that exclusion.

The Council also has received public testimony and written comments suggesting that a limited access system that devalued or completely discounted the participation and dependence of persons entering the fishery after the control date would constitute unlawful retroactive rulemaking. Most of these commenters cite the same recent Supreme Court case in support of their arguments. In Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), the Secretary of Health and Human Services promulgated regulations in 1984 limiting reimbursement of Medicare costs, and then applied those regulations retroactively to recoup disbursements made to hospitals as far back as 1981. The Court invalidated the Secretary's rule, holding that Congress had not expressly authorized retroactive rulemaking in the Medicare Act. The Court stated that administrative agencies cannot promulgate

regulations having retroactive effect unless Congress has expressly authorized retroactivity.

Bowen stands for the proposition that retroactive rulemaking is not favored in the law. However, a limited access amendment that assigned less weight to participation in the fishery after the control date, or even eliminated some or all of those recent participants, would assign fishing privileges from the date of implementation and would have legal consequences for the future only. Unlike the regulations reviewed in Bowen, which applied a cost limit schedule to hospital services rendered up to three years before the regulations were promulgated, such a limited access amendment would be applied only prospectively to distribute fishing privileges after the date of implementation. Consequently, implementation of the limited access amendment would not constitute retroactive rulemaking.

cc: DGC
GCF
NOAA GC Regional Offices

final 8/9 1:30 PM 2nd

Billing Code: 3510-22

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No.]

RIN

Groundfish and Crab Fisheries of the Bering Sea and Aleutian Islands Area, Groundfish Fisheries of the Gulf of Alaska, and Pacific Halibut Fisheries off the State of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce

ACTION: Notice of control date for entry into the groundfish, crab and halibut fisheries off Alaska.

SUMMARY: This notice announces that any fishing vessel entering the groundfish, crab, or halibut fisheries that currently are under the jurisdiction of the North Pacific Fishery Management Council (Council) after [date of publication in the FR] 10 days after will not be assured of future access to those fisheries if a moratorium in those fisheries is developed and implemented.

Due consideration, however, will be given to those vessels under construction, reconstruction, or under contract for

construction, reconstruction or purchase, for the purpose of participating in the subject fisheries, as of [date of 10 days after publication in the FR], provided that those vessels have harvested and/or processed fish in the subject fisheries by January 15, 1992.

Due consideration will also be given to those vessels that: (1) had been under written contract for construction or reconstruction or purchase prior to [date of publication in the FR] if the contract was terminated due to the proposed January 19, 1990 control date; or (2) if there had been an option to purchase, and/or a contracted purchase that was cancelled due to the proposed January 19, 1990 control date, provided that the vessel is under contract for construction, reconstruction or purchase for the purpose of participating in the subject fisheries, as of [date of 1/1/91 publication in the FR] and those vessels have harvested and/or processed fish in the subject fisheries by January 15, 1992.

FOR FURTHER INFORMATION CONTACT: Steven K. Davis, Deputy Director, North Pacific Fishery Management Council, telephone: 907-271-2809, or Jay J. C. Ginter, Fishery Management Biologist, Alaska Region, NMFS, telephone: 907-586-7229.

SUPPLEMENTARY INFORMATION: The commercial harvest of groundfish in the U.S. exclusive economic zone of the Gulf of Alaska and the Bering Sea and Aleutian Islands area is governed by Federal

regulations at 50 CFR 611.92 and 611.93, and 50 CFR parts 672 and 675, which implement the Gulf of Alaska groundfish fishery management plan (FMP) and the Bering Sea/Aleutian Islands groundfish FMP, respectively. The commercial harvest of king and Tanner crabs in the Bering Sea and Aleutian Islands area is governed by State of Alaska regulations at Title 16, Chapters 34 and 35, which implement the Bering Sea/Aleutian Islands crab FMP. The harvest of Pacific halibut in all waters off Alaska by U.S. fishermen is governed by Federal regulations at 50 CFR part 301, which implement rules developed by the International Pacific Halibut Commission.

The groundfish and crab FMPs and their accompanying environmental impact statements (EISs) were developed by the Council and approved by the Secretary under authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act, Pub. L. 94-265). The Council also has authority under the Northern Pacific Halibut Act of 1982 (Pub. L. 97-176) to develop regulations governing the catch of Pacific halibut in U.S. waters which are in addition to, but not in conflict with, regulations developed by the IPHC. This includes authority to allocate halibut fishing opportunity among U.S. fishermen should such allocation be necessary.

The Problem

Domestic harvesting and processing capacity in the groundfish, crab, and halibut fisheries off Alaska currently exceeds the amount necessary to harvest the annual total allowable catch of most species of groundfish, halibut and crabs under Council jurisdiction. Further, the Council has determined that the continued entry of fishing effort into these fisheries will only add to harvesting and processing capacity and that continued entry exacerbates current fishery management difficulties or causes new problems.

Fishery managers have found that excess capacity may lead to allocation conflicts, gear conflicts, excessive bycatch of non-target species, high grading or discard of lower valued but potentially useful fish products, poor handling of catch, insufficient attention to safety, and economic instability from boom-and-bust harvest cycles. In recent years, the Council has noted some or all of these problems in every fishery under its jurisdiction.

Although the Council continues to develop open access regulations in an attempt to address these problems, the Council also is considering a change in the open-access nature of fisheries as a more comprehensive solution. At this time, the Council has not determined the best way to control or restrict access to commercial fishery resources in the long term. However, the Council has tentatively determined that a moratorium

on new entry into the fisheries may be necessary for an interim period to curtail the increase in fishing capacity and permit the Council time to develop and assess the potential effects of alternative long-term solutions to the identified management problems. The Council is aware that such a moratorium will not resolve the fundamental problem of excess capacity in the fisheries. Instead, the purpose of the moratorium, if approved, would be to prevent continued growth in fishing capacity, while the Council assesses alternative limited access and open access management measures (incl but not limited to) to address the overcapacity problem, and to achieve the optimum yield from the fisheries. As currently contemplated by the Council, this moratorium would apply for a period of four years from its effective date or less if rescinded by direct Council action.

The Council intends, in making this announcement, to discourage speculative entry into the groundfish, crab and halibut fisheries off Alaska while potential access control management regimes are discussed by the Council, analyzed and developed. If the Council recommends, and the Secretary approves, a moratorium on entry or other access control management regime, some fishermen who do not currently fish in these fisheries, and never have done so, may decide to enter the fishery for the sole purpose of establishing a record of making commercial landings from these fisheries. Such a record generally is considered indicative of economic dependency on the

fishery. On this basis the fishermen may claim access to a fishery that otherwise would be limited to traditional participants. New entrants may have to buy fishing rights from an existing participant. Hence, initial access or allocation of a fishing right at little or no cost may result in a windfall gain when selling an access right to a new entrant. This speculation often is responsible for a rapid increase in fishing effort in fisheries already fully or over developed with harvesting capacity when controlled access management begins to be considered. The original problems prompting such consideration then become exacerbated.

To help distinguish *bona fide,* established fishermen from the speculative entrants to a fishery, a management authority may set a control date before discussions and planning of controlled access management begin. Fishermen are notified that entering the fishery after that date will not necessarily assure them of future access to the fishery on grounds of previous participation. Other qualifying criteria may also be required for future access.

<u>This notice announces that any fishing vessel entering the groundfish, crab, or halibut fisheries that currently are under the jurisdiction of the Council after [date of publication in the FR] will not be assured of future access to those fisheries if a moratorium in those fisheries is developed and implemented.</u>

10 days after

Due consideration, however, will be given to those vessels under construction, reconstruction, or under contract for construction, reconstruction or purchase, for the purpose of participating in the subject fisheries, as of [date of 10 days after publication in the FR], provided that those vessels have harvested and/or processed fish in the subject fisheries by January 15, 1992.

Due consideration will also be given to those vessels that: (1) had been under written contract for construction or reconstruction or purchase prior to [date of 10 days after publication in the FR] if the contract was terminated due to the proposed January 19, 1990 control date; or (2) if there had been an option to purchase ~~a~~ for a contract to purchase that was cancelled due to the proposed January 19, 1990 control date, provided that the vessel is under contract for construction, reconstruction or purchase for the purpose of participating in the subject fisheries, as of [date of 1/1/91 publication in the FR] and those vessels have harvested and/or processed fish in the subject fisheries by January 15, 1992.

This action does not commit the Council or the NMFS to develop any particular management regime or any specific criteria for determining future access to these fisheries. If a limited access system is implemented, fishermen are not guaranteed future participation in these fisheries regardless of their date of

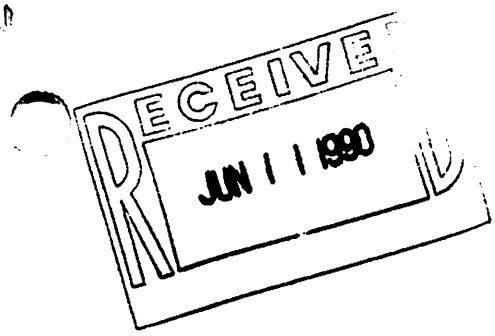
entry or their intensity of participation before or after the control date. The Council may choose a different control date or it may choose a limited access regime that does not make use of such a date. The Council may choose to give variably weighted consideration to fishermen in the fishery before and after the control date. The Council may choose also to take no further action to control access to the fishery. However, any action taken by the Council to control access to these fishery resources will be taken pursuant to the requirements for FMP development established under the Magnuson Act and other applicable law.

Dated:

[Insert name and title of responsible official]

J. Ginter, 8-8-90, MORAT-7.FRN
Revised 8-9-90

AGENDA C-5(a)(4)
JUNE 1990



Douglas R. Pohl
2442 N.W. Market Street Box 30
Seattle, WA 98107

June 11, 1990

Dr. Don Collinsworth, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue Suite 306
Anchorage, Alaska 99501

RE: Moratorium - Fixed Gear Catcher-Freezer Vessels

Dear Dr. Collinsworth:

I am a U.S. Coast Guard licensed master and have participated in the North Pacific fisheries for over 20 years. I have provided for my family by working long hours at sea harvesting and processing fish. I had a dream to own my own boat some day. Well, last year I located the boat and entered into an arrangement to buy the boat after this fishing season. I was planning to concentrate my fishing effort on Pacific cod with pots. I am concerned about the adverse impact the proposed moratorium will have on my plans - I hope that you will exclude fixed gear fishing boats that fish for Pacific cod from the proposed moratorium.

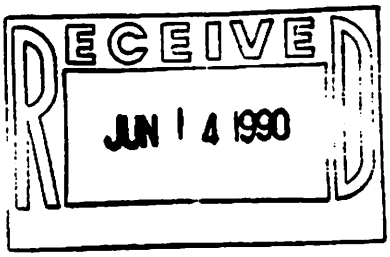
I have been advised that there is a huge biological surplus of Pacific cod in the Bering Sea. Because of bycatch problems, it does not appear that the trawl fishermen will be able to continue with this fishery. That will leave the harvest up to fixed gear fishermen like myself. Fixed gear fishermen should not be included in the proposed moratorium. At this time there are very few such fixed gear operators capable of fishing in the remote parts of the Bering Sea. It just doesn't make sense to place a blanket moratorium on the fisheries at this time. The proposed moratorium is an excessively broad moratorium. There are to many factors and details that have not been taken into account. Persons that derive their livelihood from the fisheries should not be restricted in their life pursuit regarding the North Pacific fisheries.

Achievement of optimum yields remains a primary goal of the Magnuson Act. Without fixed gear operators capable of fishing in remote areas, we will not be able to take advantage of our underutilized Pacific cod resources. Please exclude fixed gear vessels that harvest underutilized resources from the proposed moratorium.

Thank you,

Douglas R. Pohl

Douglas R. Pohl



Mr. Jim Beaton
Yukon Queen Fisheries
4215 21st Ave. N.
Seattle, WA 98119
June 15, 1990

Dr. Don collinsworth, Chairman
North Pacific Fishery Management Council
Anchorage, AK

RE: Moratorium/Freezer-Longliners

Dear Dr. Collinsworth:

Yukon Queen Fisheries owns and operates a freezer-longliner which concentrates its fishing effort on Pacific cod in the Bering Sea. My company would like to acquire another vessel, and I am concerned about the adverse impact which the proposed moratorium on vesssel construction will have on our plans - I hope that you will exclude freezer-longliners form the proposed moratorium.

The attached letter from Arctic Vessel Management, dated April 21, 1990, points out that there is a huge biological surplus of Pacific cod in the Bering Sea. Because of bycatch problems, it does not appear that the trawl fishermen will be able to continue with this fishery in 1990. That will leave the harvest up to fixed gear operators. At this time there are very few such operators capable of fishing in the remote parts of the Bering Sea where we prosecute our fishery. It just doesn't make sense to place a moratorium on the construction of freezer-longliners at this time.

Achievement of optimum yields remains a primary goal of the Magnuson Act. Without additional freezer-longliners capable of fishing in remote areas, it does not appear that we will be able to take advantage of our underutilized Pacific cod resources. Please exclude freezer-longliners from the proposed moratorium.

Thank You,

Jim Beaton Gen. Mgr.

Jim Beaton
Yukon Queen Fisheries

RECEIVED
JUN 11 1990

June 5, 1990

Mr. Clarence Pautzke
Executive Director
North Pacific Fishery Management Council
P.O. Box 103136
Anchorage, Alaska 99510

Dear Mr. Pautzke:

I am writing to express my concern about the back dating of the proposed January 19, 1990 moratorium. I am also concerned with the legalities of approving the retroactive date of January 19, 1990 at the April meeting, when the date was voted on in January, but was not publically announced until after that April meeting. Many fishermen were in the Bering Sea when this happened.

Since the Council must be aware of the staggering costs involved in new construction and conversions, you must also be aware of the countless hours of planning it takes to precipitate such plans. If a person had intentions of building or converting a fishing vessel, this moratorium would postpone plans and hamper business operations.

I would appreciate your making my views available to other members of the Council and staff members.

Sincerely,

Jan Kristiansen
Vidar Warness

Jan Kristiansen, F/V Confidence
Vidar Warness, F/V Polar Sea

and physiology, and major threats to survival. The committee recognizes the need to improve the data bases for each of those categories, to establish long-term surveys of sea turtle populations at sea and on land, and to initiate experimental programs to increase population sizes.

Conclusions and Recommendations

Conclusions

1. Combined annual counts of nests and nesting females indicate that nesting sea turtles continue to experience population declines in most of the United States. Declines of Kemp's ridley on the nesting beaches in Mexico and of loggerheads on South Carolina and Georgia nesting beaches are especially clear.

2. Natural mortality factors—such as predation, parasitism, diseases and environmental changes—are largely unquantified, so their respective impacts on sea turtle populations remain unclear.

3. Sea turtles can be killed by several human activities, including the effects of beach manipulation on eggs and hatchlings and several phenomena that affect juveniles and adults at sea: collisions with boats, entrapment in fishing nets and other gear, dredging, oil-rig removal, power plant entrainment, ingestion of plastics and toxic substances, and incidental capture on shrimp trawls.

4. The incidental capture of sea turtles in shrimp trawls was identified by this committee as the major cause of mortality associated with human activities; it kills more sea turtles than all other human activities combined.

5. Shrimping can be compatible with the conservation of sea turtles if adequate controls are placed on trawling activities, especially the mandatory use of turtle excluder devices (TEDs) at most places at most times of the year.

6. The increased use of conservation measures on a worldwide basis would help to conserve sea turtles.

Recommendations

1. Trawl-related mortality must be reduced to conserve sea turtle populations, especially loggerheads and Kemp's ridleys. The best method currently available (short of preventing trawling) is the use of TEDs. Therefore, although the waters off northern Florida, Georgia, South Carolina, Louisiana, Mississippi, Alabama, and Texas are most critical, the committee recommends the use of TEDs in bottom trawls at most places and most times of the year from Cape Hatteras to the Texas-Mexico border. At the few places and times where TEDs might be ineffective (e.g., where there is a great deal of debris), alternative conservation measures for shrimp trawling might include a tow-time regulation under specific controls, and area and time closures. Available data suggest that limiting tow times to 40 minutes in summer and 60 minutes in winter would yield sea turtle survival rates that approximate those required for approval of a new TED design. Restrictions could be relaxed where turtles are and historically have been rare.

2. Conservation and recovery measures for all sea turtle species that occur in U.S. territorial waters should include protection of nesting habitats, eggs, and animals of all sizes. Of special concern are the nesting beaches of Kemp's ridleys in Mexico and of loggerheads between Melbourne Beach and Hutchinson Island in Florida. Undeveloped beach property between Melbourne Beach and Wabasso Beach, Florida, in the Archie Carr National Wildlife Refuge proposed by the U.S. Fish and Wildlife Service, should be protected. Lands are available for purchase, and action should be taken now.

3. Incidental deaths associated with other human activities—such as other fisheries and abandoned fishing gear, dredging, and oil-rig removal—should also be addressed and reduced.

4. Headstarting should be maintained as a research tool, but it cannot substitute for other essential conservation measures.

5. Research on sea turtles should include improvement of the data base on survivorship, fecundity, mortality at all stages; distribution and movements; effects of ingesting plastics and petroleum particles; parasitism, and disease, and other pathological conditions; and physiology of sea turtles, especially their resistance to prolonged submergence and their recovery from comatose condition. Carefully designed and implemented long-term surveys of sea turtle populations, both on land and in the sea, will be crucial to their survival. The cumulative effects of human activities on nesting beaches should be quantified relative to the total available nesting areas, because the loss of nesting beaches through development or alteration could extirpate local populations.

6. Efforts to improve TED technology and explore other methods to conserve sea turtles should be continued, including research on the effectiveness of regulations.

Subsequent Actions

The agency plans to carefully evaluate the National Academy of Sciences report, the public comments received on the report's findings, and all other relevant information before preparing recommendations for submission to Congress. Based on consultations with interested and affected parties, the agency may propose changes to its current sea turtle protection program.

Dated: June 1, 1990.

James E. Douglas, Jr.,

Deputy Assistant Administrator for Fisheries.

[FR Doc. 90-13154 Filed 6-6-90; 8:45 am]

BILLING CODE 3510-22-M

[Docket No. 900523-0123]

Summer Flounder Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of control date for entry into the fishery for summer flounder, scup, and black sea bass.

SUMMARY: This notice announces that anyone entering the summer flounder, scup, and black sea bass fishery after January 28, 1990, (control date) will not be assured of future access to the summer flounder, scup, and black sea bass resources if a management regime is developed and implemented that limits the number of participants in the fishery. This announcement is necessary for public awareness of a potential eligibility criterion for access to the summer flounder, scup, and black sea bass resources. This announcement does not prevent any other date for eligibility in the fishery or another method of controlling fishing effort from being proposed and implemented. The intended effect of this announcement is to discourage new entry into the fishery based on speculation while discussions continue on whether and how access to the summer flounder, scup, and black sea bass resources should be controlled.

FOR FURTHER INFORMATION CONTACT: John C. Bryson (Executive Director, Mid-Atlantic Fishery Management Council), 302-674-2331; or Kathi Rodrigues (Resources Policy Analyst, Northeast Region, NMFS), 508-281-9324.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Summer Flounder Fishery (FMP) was developed by the Mid-Atlantic Fishery Management Council (Council) and implemented through regulations published on November 3, 1988 (53 FR 39475). The FMP established a minimum size for summer flounder and a

mechanism for increasing the minimum size if trends in fishing mortality so indicate, requires that permitted vessels comply with the stricter of FMP or state minimum size limits, prohibits retention of summer flounder by foreign fishermen, and requires annually renewable vessel permits. Despite these measures, the best available scientific evidence indicates that the summer flounder resource is currently overfished.

The Council's efforts to develop more effective measures for summer flounder have been frustrated by the mixed-species nature of the fishery. Both scup and black sea bass, which are overexploited and fully exploited, respectively, are harvested in conjunction with summer flounder. Consequently, the Council has undertaken development of Amendment 1 to the FMP, which is expected to, among other measures, add scup and black sea bass to the management unit.

On January 25, 1990, the Council's Demersal Species Committee (Committee) discussed problems in the fishery with its industry advisors and interested members of the public. In a subsequent meeting on January 26, 1990, the Committee, with several members of the public in attendance, considered and discussed issues raised during the advisory meeting of the previous day. During this meeting, the Committee voted to recommend to the Council January 26, 1990, as a control date for entry of vessels into the fishery for the species assemblage currently considered for Amendment 1. At its regular meeting on February 28—March 1, 1990, the full Council passed a motion to establish January 26, 1990, as a control date.

Status of the Resources

Summer Flounder

The current rate of fishing mortality of summer flounder is estimated to be double the rate that would produce the maximum yield per recruit. Thus, gains in long-term yield from the summer flounder fishery and increases in stock size could be realized by significantly reducing fishing mortality from current levels. At present, as a direct result of high rates of fishing mortality, both commercial and recreational catches of summer flounder are comprised primarily of age 0–2 fish. Individuals of this species have been known to live up to 20 years, yet older, larger fish are now infrequent in the landings. This indicates a severely compressed age composition, which poses substantial risks to recruitment as older, more fecund spawning adults are too rapidly removed from the population.

Scup

Commercial scup landings have declined substantially since the peak landings recorded in 1981; landings in 1988 decreased to 27 percent below the average annual landings for the period 1979–1988, and were the lowest for any year during that 10-year period. In addition, catch per unit effort (CPUE) values for scup caught by otter trawlers in southern New England decreased by almost 40 percent. Since 1982, dramatic declines in scup landings and CPUE have also been measures for the North Carolina winter trawl fishery.

Abundance indices from NMFS trawl surveys, and surveys conducted by the States of Massachusetts, Rhode Island, and Connecticut indicate that recent adult biomass levels are low. Current estimates of fishing mortality also indicate that exploitation of scup is excessive.

Black Sea Bass

Recent information on the population dynamics of black sea bass in the Mid-Atlantic Bight is lacking. However, studies conducted in the mid-1970s concluded that black sea bass were being overharvested in the Mid-Atlantic area. These studies also indicate that, although black sea bass are fully recruited to the trap and trawl fisheries by ages 2 and 3, respectively, the optimum age for harvest based on yield per recruit analysis is 6 years. Consequently, black sea bass appear to be fully exploited at present.

Status of the Fishery

The Mid-Atlantic mixed-species trawl fishery, which relies principally on summer flounder, scup, and black sea bass, also harvests significant quantities of species important to the southern New England trawl fishery. These two fisheries tend to overlap in the Southern New England/Mid-Atlantic Bight area due to stock migrations.

Generally, fishing activity follows the species' migrations. Although the majority of landings are taken by otter trawls, summer flounder, scup, and black sea bass are landed by many other types of fishing gear: Midwater trawls, pots and traps, gillnets, pound nets and hand lines. At any particular time, fishermen may target a single species with certain gear, but significant bycatch of other species usually occurs in conjunction with the targeted species, depending on the fishing technique.

The occurrence of summer flounder, scup, and black sea bass, and other species, in commercial catches of the Mid-Atlantic and Southern New England regions complicates the identification of appropriate and effective management strategies. Close coordination of regulatory measures is therefore necessary to manage this species assemblage. Controlling effort or entry into the fishery is an option the Council intends to consider.

Nearly all the major groundfish fisheries in New England (haddock, yellowtail flounder, redfish, cod, etc.) operate on stocks that are severely depleted. Declines have also been noted in South Atlantic and Gulf of Mexico fishery resources. Consequently, it is probable that increasing effort will be directed towards the Southern New England/Mid-Atlantic species of summer flounder, scup, and black sea bass, exacerbating current problems of high exploitation. These stocks also support important recreational fisheries that account for a significant proportion of total landings. In addition, as summer flounder resources continue to decline, more effort will be directed towards the somewhat more abundant black sea bass. Because of the potential for an increased number of entrants into the fishery, increases in effort by present participants, as well as technological advances that have increased the efficiency of gear, there is a need to examine reductions in effort.

Intent and Possible Future Action

The Council will address these problems in Amendment 1 to the FMP. The Council's intent in making this announcement is to discourage speculative entry into the summer flounder, scup, or black sea bass fishery while potential management regimes to control access into the fishery are discussed and possibly developed by the Council. The control date will help to distinguish *bona fide*, established fishermen from speculative entrants to the fishery. Although fishermen are hereby notified that entering the fishery after the control date will not assure them of future access to the summer flounder, scup, or black sea bass fishery on the grounds of previous participation, other qualifying criteria also may be applied for entry.

This announcement hereby establishes January 26, 1990, for potential use in determining historical or traditional participation in the summer flounder, scup, or black sea bass fishery. The action does not commit the Council to develop any particular management regime or any specific criteria for determining entry to the summer flounder, scup, or black sea bass fishery. Fishermen are not guaranteed future participation in the summer flounder, scup, or black sea bass fishery,

regardless of their date of entry or intensity of participation in the fishery before or after the control date.

The Council may choose a different control date, or it may choose a management regime that does not make use of such a date. The Council may choose to give variably weighted consideration to fishermen in the fishery before and after the control date. The Council may choose also to take no further action to control entry or access to the fishery. Any action by the Council will be taken pursuant to the requirements for FMP development established under the Magnuson Fishery Conservation and Management Act.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: June 1, 1990.

William W. Fox, Jr.,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 90-13240 Filed 6-6-90; 8:45 am]

BILLING CODE 3510-22-M

Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Groundfish Limited Entry Amendment Drafting and Oversight Committees will hold a public meeting on June 19–20, 1990, at the Pacific Council's chamber, room 449, Metro Building, 2000 SW First Avenue, Portland, OR. The Committees will begin the meeting on June 19 at 8 a.m., and will adjourn on June 20 by 3 p.m.

The Committees will discuss their recommendation on permit qualification requirements for vessels participating in the underutilized species fisheries, review the draft limited entry amendment to the groundfish fishery management plan, and review their July 1990 report to the Council on a buy-back program, vessels under construction, and a definition of longline gear. The meeting is open to the public.

For more information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, 2000 SW First Avenue, Portland, OR 97201; *telephone* (503) 326-6352.

Dated: June 4, 1990.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 90-13241 Filed 6-6-90; 8:45 am]

BILLING CODE 3510-22-M

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Anchovy Advisory Subpanel and Plan Development Team will hold a public meeting on June 22, 1990, starting at 1:30 p.m., at the National Marine Fisheries Service, Southwest Regional Office, 300 South Ferry Street, Terminal Island, CA. The agenda includes a review of last season's fishery, the 1990 spawning biomass estimate, and the proposed quotas for the 1990–1991 fishery.

For more information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, 2000 SW First Avenue, Portland, OR 97201; *telephone* (503) 326-6352.

Dated: June 4, 1990.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 90-13242 Filed 6-6-90; 8:45 am]

BILLING CODE 3510-22-M

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Groundfish Management Team (GMT) will hold a public meeting on June 12, 1990, at the Mark O. Hatfield Marine Science Center, Marine Science Drive, room NAL 136, Newport, OR. The GMT will begin its meeting at 1 p.m., on June 12 and will adjourn at 4:30 p.m., on June 14.

The GMT will review the progress of the 1990 groundfish fisheries and make preliminary projections of the annual harvest for major species. The GMT also will review West Coast groundfish fishery plan amendments regarding limited entry and discuss proposed standards to prevent overfishing. The GMT will report on yellowtail rockfish stock assessment, discuss revision of the sport bag limit for lingcod in California and the season opening date for the nontrawl (primarily longline and trap) fishery for sablefish in 1991.

The GMT will prepare its recommendations to the Pacific Council on west coast groundfish fisheries management for the July 11–12, 1990, Council Meeting in Portland.

For more information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, 2000 SW. First Avenue, Portland, OR 97201; telephone: (503) 326-6352.

Dated: June 1, 1990.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 90-13158 Filed 6-6-90; 8:45 am]

BILLING CODE 3510-22-M

Endangered Species; Application for Permit; Dr. Michael K. Saiki, U.S. Fish and Wildlife Service

Notice is hereby given that the Applicant has applied in due form for a Permit to take endangered species as authorized by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) and the National Marine Fisheries Service regulations governing endangered fish and wildlife permits (50 CFR Part 217–222).

1. *Applicant*:

Dr. Michael K. Saiki, U.S. Fish and Wildlife Service, National Fisheries Contaminant Research Center, Field Research Station—Dixon, 6924 Tremont Road, Dixon, California 95620.

2. *Type of Permit*: Scientific Research.

3. *Name and Number of Species:* Winter-run chinook salmon (*Oncorhynchus tshawytscha*), 2,000 juveniles.

4. *Type of Take*: The applicant proposes to take up to 2,000 juvenile winter-run chinook salmon during the course of research on contaminant threats to juvenile chinook by acidmine wastes from the Spring Creek drainage in the Upper Sacramento River. The investigation includes a study of heavy metals and other trace elements that have accumulated in the salmon. In order to conduct the study, the investigators plan to collect about 2,000 juvenile salmon primarily from the fall and late-fall runs. However, the collection schedule is such that juvenile winter-run salmon could also occur at sampling sites.

5. *Location and Duration of Activity*: Sacramento River, California at 4 locations in Shasta and Tehama counties from June 1, 1990 to May 31, 1991.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S. Department of Commerce, 1335 East West Highway, room 7324, Silver Spring, Maryland 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a

TESTIMONY OF MORRIS C. HANSEN BEFORE THE NPFMC
JUNE 30, 1990, ANCHORAGE, ALASKA

RE: THE PROPOSED MORATORIUM

My name is Morris Hansen. I was born in Chignik Alaska and attended high school in Kodiak during the late 1940s. Although my home is in Ballard, I have been a fisherman in Alaska all my life. Although I am on the Board of the Alaska Crab Coalition, the views I wish to express are my own.

I am here to comment on the proposed moratorium.

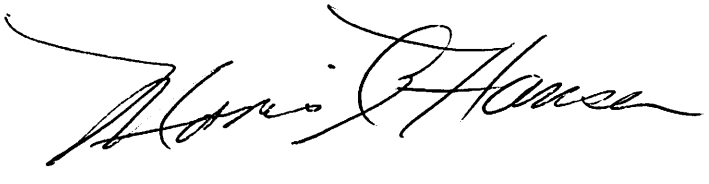
I have been a crab fisherman since the early 1960s and until this March when I lost the Alaskan Monarch in the ice off St. Paul Island, I was a major partner in two crab boats. I am now involved in just the one boat and planning to replace the lost one with a new boat. At this time I am in the final phase of placing an order to intitiate the construction of the boat. However, I have a dilemna in terms of the effects of the proposed moratorium curtailing the amount of expansion I might be allowed of either my existing 95'vessel, or the replacement of the lost one.

My short term business plans, included plans to lengthen my boat, to make it a safer and more competitive working platform. Thus I am planning to build a 120 foot new vessel.

I would hope that the Council as it moves ahead in the scoping process and the amendment process next year with the moratorium, that it will allow for some flexibility in terms of the varying vessel modification needs in different fisheries.

I am also opposed to the retroactive date of the moratorium. There were a lot of crab fishermen, like myself that were fishing in the Bering Sea at the time the Council made the retroactive announcement and we have not had an opportunity to comment on it.

In conclusion, I would also like to say that I don't feel the moratorium is going to assist us in terms of conservation or overcapitalization. As structured, the language is going to allow any existing fishing vessels to come into the fisheries until July first, 1991. I assume that includes East Coast fishing vessels, of which there are thousands that can potentially avail theselves of this opportunity. Many of these vessels could come up to Alaska, on speculation of qualifying their vessels for a permit.



The Rights Issue in the Northwest Fisheries
(Including a Rebuttal to the AFTA Letter, May 4, Attached)

First of all, who is American High Seas Fisheries Association? We are twenty seven, U.S. built, owned and operated catcher vessels in the 85 to 150 foot category, who have been catching bottom fish in the Bering Sea and Gulf of Alaska since 1979. We are a non-profit trade association of fishing vessels who have three main planks to our membership policy.

1. To promote responsible behavior by the members toward the fish resource.

2. To promote true Americanization.

3. To promote the maximum freedom of the U.S. Fisherman to sell his or her catch into the market of choice.

The Rights Issue:

The groundfish fisheries in the U.S. FCZ of Alaska are over subscribed at the harvesting level. The calls on pollock for example exceed what is available by two to three times.

Various forms of limited entry are under consideration. It is clear that the law provides for a transition from open access to limited entry in such a case. Section 303(b)(6) of the MFCMA provides the recipe.

In 1978 patriotic U.S. fishermen agreed that to the extent U.S. processors could receive their catches they would provide them with first option to those catches. However, traditional U.S. fishermen, in supporting the Processor Preference amendment to the MFCMA, did not agree to have their rights of access to fish submerged, usurped and abrogated; their catch histories absorbed and to being disenfranchised by new integrated factory trawlers. Further, those same patriotic U.S. fishermen recognized that replacing foreign fishermen in the fisheries under U.S. jurisdiction was an indication of part of the commercial potential presented by enactment of the MFCMA in 1976. However, "Americanization" has proved to be a meaningless term of convenience which has been used wrongly and unjustly to perpetrate the greatest American fish resource grab of the century.

This resource grab has been occurring behind the legal fiction called the Processor Preference, and its implementation behind the veil of confidentiality. Together with the effects of the AntiReflagging Act and Jones Act, factory trawlers are about to disenfranchise the truly traditional American fishermen, the shoreplants to whom they deliver and the communities from which they are drawn.

If there is such a thing as natural justice, then both the Congress and the Councils ought to recognize this situation in the allocation formula as we transit from open access to limited entry.

What we are talking about here and what is at stake are the rights to catch the over two million metric ton, harvestable, total annual allowable catch of bottom fish in the Bering Sea and Gulf of Alaska.

Getting back to the rights issue, it has been clear to us for at least two years that in terms of the balance between amount of effort and capacity at the harvesting level vis a vis the allowable catch, that we've been in an over subscribed situation for some time now. In that situation under Section 303(b)(6) of the Magnuson Fisheries Conservation and Management Act the Councils have the discretion to institute a limited entry program to redress that imbalance or to preserve a balance once it has been reached. Perhaps with the exception of the surf clam fishery in the mid-Atlantic which on March 20, instituted an individual transferable quota system, all fisheries of the U.S. have been mismanaged, period. In fact almost without exception the equation has been allowed to become imbalanced with the result of overfishing and decimation of the commercial fishery.

When that happens you end up with a classic textbook example of more and more effort coming into the fishery eroding the position of those already in it. People go bankrupt and you end up, if your not very careful, with a resource being overfished. We have both those situations happening right now in the Northern Fishery. To date the total allowable catch has been monitored on the basis of reported processed product. This does not account for anything that is dumped or wasted for whatever reason. Therefore from a catch reporting point of view, we have not and are not getting an accurate handle on the withdrawals of species managed under the OY in the various fisheries management plans. A year ago in testimony to the North Pacific Council we said that by 1990 at the harvesting level the ground fish fishery would be oversubscribed by two and a half to three times. That situation we have now arrived at. In December of 1988, we challenged the Council to have the courage and the spine to institute a moratorium on new effort entry. We said that if they would institute a moratorium at that stage we would be probably

around about at the balancing point and we would be able to exist in a live and let live situation. The council did not act. We are now in an overloaded situation with both the resource potentially threatened and certainly fisherman fishing that resource having their position threatened. I will expand upon that threat now as follows.

Under a system of natural justice, which is what I think we exist under here in the United States, when one transits from an open access situation to a limited entry situation in fisheries, or in terrestrial situations, allocation and the granting of preferential user rights occurs. Let me give an example. If in the early part of the colonization of America you were a squatter on open range or federal lands and the decision was made to privatize those lands, invariably those people who have a demonstrable commitment to and dependence upon the land are afforded preferential user rights by the granting of quasi or outright ownership rights to the land that they have domesticated or farmed, put fences up, put a house on and stocked. In recognition of being afforded such preferential user or quasi ownership rights, those people invariably are expected to participate in the social system of the day by contributing to that system in the form of taxes and rentals or royalties on the land that they have occupied and are using and are deriving a livelihood from. In a fisheries situation there is no difference. When we transit from the Olympic Open Access system that we have now to some form of limited entry one would expect in the allocation process that prior users with a demonstrable commitment to and dependence upon the resource would have that "C and D" recognized and be afforded preferential user rights to the resource based on that commitment and dependence. In a fisheries sense that commitment and dependence is expressed in terms of historic and present catches, amount of investment of various forms in the fishery over time. This becomes the basis of allocation and if the system desires, the granting of preferential user rights to the resource in question.

In fact, at the time of it's passage in 1976 of the MFCMA this very situation was foreseen both at the national level by our senators and congressmen on Capital Hill and at the international level within the context of the Law of the Sea deliberations that were going on at the time. The forward thinking nature of our lawmakers is encapsuled in Section 303(b)(6) of the MFCMA. What it instructs the Councils to do in a situation when they transit from an open access to a limited entry system, with regards to allocation is that they recognize in some form or another the historic catches and present participation in the fishery along with several other socio-economic criteria upon which allocation should be based.

The Act governs fishermen and fishing. In 1978 the Processor

Preference Amendment was passed. What that did was to recognize that at that time we lacked adequate processing capacity to take what our harvesters were able to catch, especially in the North Pacific. In order to promote the "Americanization" of what was now fish under our jurisdiction the amendment instituted a three tier allocation system. First to domestic annual processing (DAP), second to joint venture processing (JVP) and third, if there was any surplus, to total allowable level of foreign directed fishing (TALFF). The amendment was implemented though a capacity and intent survey which occurred several times a year and was run by National Marine Fisheries wherein domestic annual processing requests were made to the agency behind the veil of confidentially. To the extent that they asked, they got whatever they wanted. Whatever was surplus to DAP needs was allocated to the so called joint venture processing (JVP) mode. In this mode, U.S. catcher vessels, harvesters, were able to catch fish and sell them over the side to foreign processors that were licensed to come in and receive such surplus fish to domestic annual processing. Through this means it was anticipated that the fishery would be Americanized. In fact what was anticipated was that this would enable a rapid expansion of shoreside facilities to which our harvesters would then deliver their fish. In fact various loop holes were found in the laws which enabled U.S. businesses to take U.S. bottoms or portions thereof overseas, convert and rebuild them into factory trawlers, which they have done, and bring them back into the fishery to qualify both as U.S. Bottoms and as USDAP operators. In 1987 the Anti-Reflagging Act was passed. Between thirty and forty rights to convert and rebuild foreign catching and processing capacity were grandfathered in under that act. The legislative history is clear that this was never intended. What we were short of was processing capacity not harvesting capacity. All this does is allow integrated catching and harvesting capacity to come in and to the extent that they qualify under the DAP survey they get fish. To the extent that U.S. fisherman don't have a domestic processor to deliver his fish to, he gets tied up to the dock. This has been happening for the last ten years. Furthermore, the DAP requests have been overbloated. They've asked for far more than what they've used. At the end of the year we harvesters would get the surplus allocated to JVP and would have to go fishing in the worst possible weather. Vessels were lost and lives were lost. And behind this veil of confidentiality the DAP operators were never held to account. For all the time that I have been with American High Seas I have brought to the notice of the authorities the situation with regards to the Anti-Reflagging Act, its effect on the so called Americanization process. But more importantly the effect on the rights of U.S. wholly built, owned and operated harvesting vessels. The traditional U.S. fisherman.

Around Thanksgiving of 1989 an influential staffer in the

senate, who was intimately involved in the Anti-Reflagging Act proceedings, said to me "Doug, I now realize what you've been on about with regard to these forty grandfathered vessels." He said the situation is even worse than you'd imagine because many U.S. vessels that weren't grandfathered have been taken out of the country to be drawn and quartered, cut and pasted and brought back into the fishery as DAP factory trawlers. In his words the situation is "an incredible mess which has been been created by the congress largely through special interest deals. I don't know what we are going to do about it."

So back to the rights issue. What's the situation? Well under an Olympic system theoretically, nobody has any greater right than anybody else, but everyone has an equal right to go and take as big a share as he or she can catch of the total allowable catch of any species. However, once we get out of balance in terms of what I've said above, we should transit from open access to a limited entry situation of one or another form. In that situation as I've explained, one should use the recipe of Section 303(b)(6). And in our view what we have said consistently is first impose a moratorium on new effort entry as a precursor to consideration of the various forms of limited entry, license limitation on through ITQs. They all represent a form of limited entry and they should all trigger the Section 303(b)(6) provisions.

In around July 1989, both to the congress within the context of the oversight hearings for the MFCMA and to the North Pacific Council, American High Seas requested a transition quota for its members. I will explain what it was we were asking for. We recognized that because of the various inter-related situations like the Processor preference combined with the Anti-Reflagging Act combined with the interpretations by the Coast Guard of the Jones Act we were approaching a far more rapid so called Americanization of the fishery than anybody had hither to thought. In 1989 we recognized we were at the margin of joint ventures. However, over eighty percent of the members of American High Seas had already secured contracts to deliver to DAP shoreside plants. These contracts were to kick in once expansions planned for those shoreside facilities became operational. So what we were saying to the Congress and to the Council was that we had already chosen to take the DAH catch histories represented by our catch records in the JVP mode; we had already decided to take them to shore and fish to shoreside domestic processing operations. We were noticing the industry, the Congress and the Council of our intentions to fulfill delivery contracts to domestic processors.

However, at the same time we operated a very successful intelligence system on Domestic Annual Processing. We had computer programs in which every unit operator in the fishery was

included. We kept a close watch on the incoming effort of new factory trawlers and processors, their efficiency, downtime and you name it. Through this close monitoring of DAP and because there was no accountability of DAP in an open sense, by the agency, we had to operate our own program on DAP. And through this means we were able to counter the assessments of DAP by National Marine Fisheries and obtain releases of fish to JVP at the end of the year. We were able to accurately predict how over subscribed the fishery was likely to become. It was also because of our knowledge in this regard that we noticed the Congress and the Council process of our intent to take what amounted to our long standing commitment and dependence; take that commitment and dependence as expressed or illustrated by our prior catch histories, and deliver to shoreside domestic processors.

In requesting a transition quota for 1989, what we were doing was asking the managers and the Congress and the Council to recognize that in good faith we were becoming part of the DAP operation, but that, that would not happen until midway through or late 1990. But that if we were to be shut down in favor of requests by new factory trawlers coming into the fishery in 1989 and then expected to deliver to the shoreside markets, which we had contracted to do so with, that in the ensuing year we would fall out of the fishery. We would go bankrupt because we had to live, had to make payments on our vessels, etc. So, we were asking to be granted all or part of our prior catch history in 1989 to be taken in a joint venture mode, for pollock largely. Of course no one wanted to accede to this request it seemed. But I must say that every Congress person that we spoke to was sympathetic and said, Oh yes we realize we've done a terrible thing in the Anti-Reflagging Act and we certainly will not let you small traditional U.S. fishermen sink because of the invidious situation that we have created. Don't worry, we will help you, we will make sure that you are OK. Well what have they done? They have sat on their behinds and done nothing, in fact as they do so more and more catch effort has come into the fishery per kind favor of the special interest deals.

Anyway back to the rights issue. So we have a situation were the fish stocks are over-subscribed by about two and a half to three times at the harvesting level. We have along with that, the management body considering both imposing a moratorium on new effort entry as well as considering various forms of limited entry as an umbrella regime to replace the present open access system. When you transit from open access to limited entry you are faced with allocation. And along with the question of allocation comes the question "Upon what basis do we allocate". It is entirely predictable, in fact it was predicted and foreseen two years ago, by some of us, that while it suited them the new entrants would oppose any form of moratorium. This is

understandable because they obviously wanted access to the fishery and they wanted to develop a catch history. What was also predicted and foreseen by us was the notion that these new entrants felt they had JVP allocations to gobble up. The very subtle nuance that they have overlooked is that what U.S. harvesters caught in the JVP mode could also be expressed as what was caught at the DAH or Domestic Annual Harvesting level. Now on one hand, the law says that we are all equal in an open access system, at the harvesting or DAH level. That's where catch histories count. Allocation must be pitched at the harvesting catch level. Furthermore, the Processor Preference and its three tiered allocation system constrained American harvesters in their catching operations at the DAH level. It is arguable that their catches should be given more weight or scaled up due to the fact that they were operating under an artificial or fictional legal constraint called the Processor Preference. Further, what was also predicted was that when it suited them these new entrants, the new large unit operator entrants called Integrated Factory trawlers or catcher processors; would call for a moratorium which they now have. They began opposing the moratorium a year ago and now they support it. When it suits them they will want their catch histories, which they have stolen from U.S. fishermen, recognized. Well it turns out that it now suits them. They have transited in their attitude in a very short time from being open access, "let the chips fall as they may" people, to people who are now calling on the Council and the Congress to allocate based on a snap shot of present participation in the fishery. Well of course this doesn't fool anybody. What this does is, it discounts one hundred percent the catch histories of American traditional harvesters when they were operating in the joint venture mode; it discounts their histories to zero. And on the other hand it recognizes at the one hundred percent level the recent catches and participation of these new entrants.

The recent overtures of the factory trawlers to Congress during the mark up of the Senate MFCMA bill of May 22, along with their May 4, 1990 letter to the chairman of the North Pacific Council, reiterating what they said into the record during the Councils April meeting, reveals quite clearly what their strategy is. Their strategy is to clearly push any action on this allocation issue into the future, at which time they figure they will have gobbled up the catch histories of all the U.S. traditional fishermen and be able to hold those catches up as the basis of a snap shot allocation, as they call it, to themselves. Their letter of May 4 to the Council chairman, in my opinion, is the most arrogant, piece of greed and avarice that I think I've ever seen. It clearly flies in the face of any system based on natural justice. And predictably is totally self serving to the processor side of the interest that they represent. Its interesting that they use the coined word "Americanization " of the fishery and attribute that to the Magnuson Act as being a

major goal of that act. This of course is patently incorrect. The term "Americanize the northwestern fisheries" was a cutsie term coined by the likes of Bob Morgan (Oceantrawl and current President of AFTA) in the early
eighties, who used to run around Congress talking about the "phasing in" of the American industry especially in the northwest. Its also very interesting that the same individual was one of the bellcows in the travesty of justice that has occurred with regard to the Anti-Reflagging Act and Jones Act conversions and rebuilds in that he was one of the first American mules to cut a hunk of 4x2 out of the keel of an American boat and start building factory trawler floating fantasies around it and calling them American fishing boats. If I'm not mistaken the goal of the Magnuson Act was to recognize the renewability of the fisheries resource as something that if it was husbanded correctly could provide benefits to the U.S. fishermen, U.S. fishing industry and the nation in the long term. In my humble opinion allowing a flood of effort in the form of foreign controlled converted and rebuilt factory trawlers into the U.S. fishery; many of which are funded at one hundred and twenty percent, constructed in foreign yards with foreign subsidies, are allowed: to enter into the U.S. and escape the customs net, the IRS net, contravene immigration regulations and be controlled by foreigners behind American corporate fronts; is not in the best interests of U.S. fisherman, the fishing industry or the nation. Especially to the extent that they have been allowed to overcapitalize the fishery so that the allowable harvest is oversubscribed and the resource and traditional U.S. fishermen are jeopardized.

Lets get down to tin tacks. The AFTA overtures to Congress and the Council are couched in terms of processing jargon. "DAP", Domestic Annual Processing, "JVP", Joint Venture Processing. This is a group which asked Congress to change the national standard number four to include allocation to processors in the allocation formula. What these factory trawlers are asking the nation to accept is that allocations be made to processors and that DAH catches made in conjunction with joint venture processing be completely discounted. Further they are asking us to accept a complete discounting of domestic annual harvesting. In other words, to completely disregard the catching phase of the fishery. What is important to note is that JVP was just that. Fish caught by domestic U.S. fully owned, operated and built vessels that delivered their fish to foreign processors. Just like logs that are milled and shipped to foreign processors, we as U.S. fisherman expected for quite some time, to be delivering to over the side foreign processors for the basic reason that U.S. processing capacity did not exist to take our fish from us. Furthermore, the entry into the fishery of rebuilt and converted so called U.S. vessels whether they were allowed to do this through the grandfather provisions of the

Anti-Reflagging Act or outside them, as many have done, did not and never has provided a stable market for U.S. fisherman. Quite clearly this new highly mobile catching and processing effort catches its own fish and with no arms length transaction at all, processes that fish in many cases ready for consumption in the super market. They do not provide markets for U.S. fisherman. They tie us up under the fiction called the Processor Preference. They push us out of the fishery.

In fact I would argue that the catch made by U.S. fisherman, when they were delivering over the side, by virtue of the three tiered allocation provisions of the Processor Preference, were in fact grossly constrained, and therefore need to be scaled up in the recognition of catch histories, for the purpose of an allocation base.

The law, as I've had it interpretated to me, says that we are all equal at the DAH level. In other words, we've all got an equal right to catch the fish under the open access system whether we are able to process it on the same vessel or whether we have to deliver it over the side at sea to a foreign or U.S. vessel or to shore to a shorebased processor. Nobody has said and I'll be very surprised if they do, that catches made in a JVP mode have less merit in the eyes of the law than a catch made and delivered to somewhere else. The point is that these fishermen are U.S. fishermen. They are fishing with wholly U.S. built, owned and operated fishing vessels at the DAH level whether they are fishing to shore in a JVP or a DAP or whatever mode. In fact if American fisherman over the ten years from 1979 to 1989 had chosen to go to sea and catch fish and dump it so long as they recorded it, that would have been perfectly legitimate. Furthermore they could have counted that as their catch history. However the traditional U.S. fishermen is not a waster and that kind of behavior would have gone against his very grain.

Before I forget it, I take exception to the use of the term "Americanization" as a term that AFTA is applying to themselves. Purely because it means so many different things to so many different people. It has no meaning in the context that they are using it in, especially in the light of the fact that many of their members are constituted from these grandfathered converted and rebuilt vessels. Paddy's Pig is more American than some of those trawlers. And while we are on the subject of the Processor Preference let's talk about the freedom of the American fisherman to sell to his market of choice. What the Processor Preference did was in its implementation it constrained the ability of the American fisherman to sell his fish into his market of choice, and this constraint was applied by only permitting a certain amount fish to be taken over the side by the foreign processors, in a JVP mode. But at the same time a completely "foreign U.S. factory trawler", one that was either grandfathered or

constructed under the interpretation of the Jones Act could come into the fishery, put up its hand for whatever amount it wanted in the DAP survey and without question it received that allocation. And at the same time these overbloated, overinflated requests of the likes of these operators caused American fisherman to be tied to the dock while these foreign controlled operations had free access and still have free access to the common property of the American people. So you will understand when I refer to the Processor Preference as a legal fiction behind which the freedom of true American fishermen was completely constrained while another group waltzed merrily into the common property, and gobbled it up. It is clearly a restraint of trade by one sector over another within the U.S. fishery. Perhaps the original motives behind it had some merit. What in fact happened was a perversion of that intent. And the result of that perversion is what we are looking at and trying to deal with today. I'm talking about the combined effect of the implementation of the Processor Preference, the DAP survey, the veil of confidentiality of statics, and the subsequent effects of the 1987 Anti-Reflaging Act and the thirty or forty catcher/processor vessels that were grandfathered under that, as well as the loosey-goosey interpretation of conversions and re-builds under the Jones Act.

This letter of Larkins & AFTA is "one for the books" to be sure. What they are attempting to do is turn the whole system on its head. They are asking that DAP be recognized as the pre-eminent sector which should receive allocation credit. Let me say up front that the act does not even control processing. It controls fishing. There would be no DAP or JVP without DAH. Domestic Annual Harvesting comes first. Although there may be other forms of commitment and dependence that could be recognized, Domestic Annual Harvesting- "catch history" -I would suggest is the first base, from which to start the allocation process. I would have thought the catcher/processors would realize that they couldn't exist without first catching a fish and therefore have a component of DAH to their own operations. Furthermore I would like to add that we have no truck with legitimate, fully owned, operated and built American factory trawlers who behave responsibly toward the resource, operating out there. Second of all we have no problem with American fisherman who want to replace an existing effort or umbrella their catch history with either an integrated catcher/processor or deliver to an off shore processing facility. What we do have truck with is this unbridled influx of new integrated catching and processing effort that is coming into the fishery and gobbling up our catch history in a way that will result in our complete displacement from the U.S. fishery. And that is clearly the strategy of the so called Alaska Factory Trawlers. In large measure, a snapshot allocation would cede a large portion of the U.S. common property fish resource into foreign hands.

AFTA continues... "For them to now receive DAP allocation credit.... at the expense of DAP at sea processors, which would be the case if the Councils arbitrary decision to assign eighty percent of JVP catch history to the "shore side" sector would be grossly unfair". We take exception to this statement. We're not asking for DAP allocation credit. We are only DAP to the extent that we have a market recognized as DAP. We are first and foremost and were, will and continue to be American Harvesters at the DAH level, which is where the allocation ought to be pitched. Further, we were DAH before most of the present factory trawler fleet were a glint in their creators minds.

We take further exception to the reference to the inshore/offshore analysis as being the property of the North Pacific Fisheries Management Council staff. That analysis which among other things analyzes catch history from 1979 to 1989, includes both the so called "arbitrary and capricious" eighty/twenty split of JVP catch histories on shore and off shore, and the requested snap shot of the 1989 DAP fishery as requested by AFTA. The letter is couched in terms as if this was a new request. The point is, 1989 is already included in the analysis. So lets get that straight. Now to the contention by AFTA that the eighty/twenty split is arbitrary and capricious. Again this statement is absolute hogwash. For almost two years at numerous Council meetings this association recognized the rapidity at which the fishery was being so called "Americanized". In recognition of that fact we called for a moratorium in December 1988. We requested that our catch histories be recognized. We also noticed both the Congress and the Council of our intent to take our catch histories in two different directions. We announced that over eighty percent of our membership had secured contracts to deliver to shoreside facilities when expansions to those facilities became operational in late 1990 or 1991. The balance of the membership we announced had secured or intended to deliver their catches to off shore or floating processors of one description or another. This again was in line with our belief that the American fisherman should have the freedom to market his fish where he chose. Or more realistically where it was possible to deliver fish. In that vein we requested both the Council and the Congress to accord us the consideration of a transitional quota for 1990. This was in recognition that we were in transition from the JVP mode to the DAP mode, but that it wasn't going to happen for a year. Naturally, we have payments to make on our vessels, we have lives to live, families to support and we did not relish the possibility of being tied up to the dock because of what was happening under the so called Processor Preference and the so called Americanization and the so called Anti-Reflagging provisions. We asked that if not all of our catch histories at least some form or some level or some extent be recognized and

that we be given a quota that we would fish in the joint venture mode in recognition that we were transiting between JVP and DAP. We did this because we knew how rapidly this so called DAP was coming on line, and that by 1990 the resource would be over subscribed by two and one half or three times as stated above. We were not accorded this request. However, the point is that we put everybody on notice as to our aspirations and as to our intent of playing the game fairly. We on numerous occasions made this request to the Council and the Congress, both verbally, on the record, and before the House and Senate Committees with aegis over fishery matters, in the context of the reauthorization of the Magnuson Fisheries Conservation and Management Act. So the underlying point of making these comments is to illustrate that the decision of the Council to include in it's analysis the eighty/twenty split of some level of JVP catch histories between the years 1979 and 1989 is not at all arbitrary or capricious.

Finally the statement in the letter that the catches that we are talking about, the JVP catches, because the catches were delivered to off shore processors that one hundred percent of that catch history should be allocated to the off shore category. It defies a reaction. I want to call it disgusting but it's not a good enough word. Let me come back to our long-standing position, which is probably idealistic because it subscribes to the free market notion that price should be what determines whether fish is delivered on shore or off shore. More importantly, as already stated, we promote the freedom of the American fisherman to deliver his catches to his market of choice. Of course one has to recognize that Domestic Annual Harvesting is the first step in the chain of passing the commons into private hands and that having done so, having possessed the fish, fisherman ought to have that freedom to take his fish wherever he chooses. What AFTA suggests here is a complete denial of that freedom. Probably more accurately what they are suggesting is that, that entire catch history be usurped and gobbled by the "PACMAN" that they are and it should be attributed to their sector meaning "Them", the royal we, as in factory trawlers.

Douglas B. Gordon
Executive Director
American High Seas
Fisheries Association
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ALASKA FACTORY TRAWLER ASSOCIATION
4039 21ST AVE. WEST. SUITE 400
SEATTLE, WASHINGTON 98199
(206) 285-5139
TELEFAX 206-285-1841
TELEX 5106012568, ALASKA TRAWL SEA

May 4, 1990

Dr. Donald W. Collinsworth, Chairman
North Pacific Fishery Management Council
P.O. Box 103136
Anchorage, AK 99510

RE: Onshore/Offshore

Dear Don:

This letter is to provide a written record of my verbal testimony before the North Pacific Fishery Management Council during its April meeting. It addresses the need for another alternative to be analyzed and considered by the Council as it deals with the question of allocation.

This alternative is a "snapshot" of the 1989 DAP fishery, as opposed to the staff alternative which would also include the JVP fishery. The reason for considering this alternative is simple -- a major goal of the Magnuson Act is to "Americanize" the fisheries of the EEZ. Those fisheries will only be Americanized when the entire OY is allocated to the statuatory first priority fishery, DAP. In fact, allocation between sectors of the DAP fishery would only be contemplated when TALFF and JVP operations have been completely displaced by DAP. The past performance of those two sectors had no bearing on DAP development and, thus, has no bearing on allocations between DAP elements.

Further, participants in JVP fisheries were on notice from the time of passage of the "Processor Preference" amendment (which first permitted over-the-side j-v's) that they were in a transitory operation with no long-term future. For them to now receive DAP allocation credit -- at the expense of DAP at-sea processors (which would be the case if the Council's arbitrary decision to assign 80 percent of the JVP catch history to the "shoreside" sector) would be grossly unfair.

Our final point with regard to allocating the JVP catch history 80:20 onshore:offshore -- aside from the capriciousness of

the concept, one must remember that JVP catches were all utilized by at-sea processors. Therefore, if there is to be allocation between DAP elements, and if JVP histories are to be considered in doing so, unless one wants to act in an entirely arbitrary manner, those JVP catches should be assigned 100 percent to the offshore sector.

Sincerely,

H.A. Larkins
Executive Director

cc: Council members

AGENDA C-5(a)
JUNE 1990
SUPPLEMENTAL

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EMILY W. STREETT
GLENN P. HARRIS
GEOFFREY S. SWANSON
LAURIE L. CRICK*

*NOT ADMITTED IN D.C.

June 21, 1990

Don W. Collinsworth, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue
Anchorage, Alaska 99501

Dear Mr. Collinsworth:

We are writing on behalf of Mr. Agust Gudjonsson with regard to the proposed Federal Register notice under consideration by the Council relating to imposition of a moratorium for North Pacific fisheries. We believe that any action to notice an intent to establish a retroactive moratorium with respect to these fisheries violates the Magnuson Act and is improper as a matter of law.

The Council considered a similar moratorium at its meeting in April 1989 and heard considerable public testimony on the issue. We and others testified at that time about the legal issues involved in establishing a moratorium, particularly a retroactive moratorium. There was considerable dialogue on the legality of a retroactive moratorium, and appeared to be recognition on the part of most Council members that the economic impact of a retroactive moratorium would be such as to make it difficult to justify. For both legal and policy reasons, the Council voted against further consideration of a moratorium as part of the development of fishery management plans. Several Council members even went so far as to say that they would never again support consideration of a moratorium as a fishery management tool.

It was therefore of some surprise when the Council at its April 1990 meeting, without any public notice that a particular moratorium eligibility date was under review, decided to move forward with publishing a Federal Register notice indicating the Council's intent to consider a moratorium for all fisheries under the Council's jurisdiction. Based upon the draft Federal Register notice that has been circulated, we continue to have grave concerns regarding the legality the proposed Council action. The notice itself makes clear that the Council intends to establish a moratorium retroactive to January 19, 1990.

DYER, ELLIS, JOSEPH & MILLS

Even if the notice were amended to state that the Council is only considering such action, legal and policy problems would continue to exist. Any notice by the Council of intent to impose a moratorium, other than a prospective one, will have a substantial negative impact on existing vessel construction projects, including ones already under contract. Even a mere notice of intent to consider a retroactive moratorium, because of its impact, must be fully justified in accordance with the requirements of the Magnuson Act. We can see no evidence of such justification.

As we and others testified at the April 1989 Council meeting, the only sure way for the Council to impose a moratorium or limited entry system is to set a future date when the qualification criteria is that only vessels actively engaged in the fishery would qualify. Such a system, including the date, would have to be fully justified legally, procedurally, scientifically and environmentally in accordance with the Magnuson Act. Had the Council acted as we and others recommended in April 1989 by establishing a future cutoff date, such as January 1, 1991, this problam would not now be facing the Council. But it is not equitable and is of highly questionable legality to panalize people who went forward with projects understanding that the Council had rejected a moratorium as a management tool.

We urge the Council to reject the proposed Federal Register notice.

Sincerely,

James B. Ellis

MEMORANDUM

Re: North Pacific Fishery Management Council Proposed Moratorium to Limit New Entrants into the Fisheries

Date: June 20, 1990

INTRODUCTION

At its April 1990 meeting, the North Pacific Fishery Management Council took steps towards imposing a moratorium that would prohibit new entrants into the fisheries. Even though details of the moratorium are yet to be developed, the Council has indicated in a draft Federal Register notice, to be approved at its June 1990 meeting, that it intends to adopt January 19, 1990 as the date by which would-be entrants must have met the eligibility criteria to avoid being precluded from the fisheries. The Council's action suffers from three serious flaws that will legally impair the imposition of a moratorium that, as here, bases eligibility on a retroactive date: (1) the Council's consideration of a specific eligibility date was not properly noticed; (2) the adoption of an eligibility date had regulatory impact without observance of the statutorily-mandated process for development of regulations; and (3) a regulation, even one that is properly noticed and adopted after observance of the proper procedures, must be prospective in nature -- it cannot be given retroactive effect. In addition, a moratorium that retroactively curtails a business plan upon which substantial investment has been based may well be viewed by the courts as a governmental taking that requires compensation under the Fifth Amendment.

DISCUSSION

In the newsletter reporting the results of its April 1990 meeting, the Council states that it "moved forward to develop" a moratorium that would prevent entry into the fisheries by vessels that as of January 19, 1990 were not already either participating in the fisheries or "in the pipeline."[1] The Council's adoption of a specific eligibility date is unlawful because of its failure to follow the regulatory procedures that require public notice and an opportunity for comment. These procedural safeguards are not just legal niceties. Instead, they are designed to prevent administrative actions with a regulatory effect from occurring before the affected parties have an adequate opportunity to comment on and respond to the proposed actions. In this case, the Council's discussion and effective adoption of a retroactive eligibility date (with a concomitant chilling effect on financial resources) took place without providing fair notice to interested parties.

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[1] North Pacific Management Council Newsletter, May 8, 1990, at 2.

Actions that in fact have a regulatory effect are unlawful unless the procedural safeguards prescribed by law for substantive regulations have been observed. Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 417-18 (1942); cf. Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 36-45 (D.C. Cir. 1974). Those safeguards were not observed by the Council prior to its indicating an intent to use a January 1990 eligibility date. The Council has inverted the regulatory process by first specifying an eligibility date and then proceeding to notify the public that a moratorium is under consideration.[2] The Federal Register notice the Council has drafted to announce its intent to limit access to the fisheries claims the moratorium plan is only a proposed action and that the Council is only now considering a change in the current open-access policy.[3] Selection of the January 1990 date, however, is a step in the implementation, not the development, of a limited access regime.[4] The Council cannot properly adopt an eligibility date, at least a date that is retrospective and which thus has immediate regulatory effect, without first adopting a limited access regime. And it cannot adopt a limited access regime without complying with the substantive standards and procedural safeguards prescribed in the Magnuson Fishery Conservation and Management Act (MFCMA), 16 U.S.C. §§ 1801 et seq., the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq., and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.

Under the MFCMA, the Council is directed to "allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans." 16 U.S.C.

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[2] The Council Newsletter, May 8, 1990 at 2, appearing after the April meeting stated that "[t]he Council instructed the staff to prepare a Federal Register notice that the Council is proceeding to develop a moratorium for all entry into all fisheries . . . [i]t is the Council's intent that the effective date of the moratorium shall be January 19, 1990 . . . [i]ncluded in this notice will be a definition of vessels in the pipeline."

[3] The draft notice announces the Council's "intention to develop fishery management plan (FMP) and regulatory amendments." See Fed. Reg. draft notice for June 1990 meeting at 1 (emphasis added). In describing the need to limit access to the fisheries, the notice indicates "the Council also is considering a change in the open access nature of fisheries," but that it has only "tentatively" been determined that a moratorium "may be necessary." Fed. Reg. draft notice at 2 (emphasis added).

[4] The Council's Committee on the Future of Groundfish recognized that declaring a possible cut-off date for vessel access is an "essential step" in the successful implementation of a limited entry system. The Future of Groundfish, FOG Committee Report to the Council, 15-16 (June 1988).

§ 1852(h)(3) (emphasis added). The Council failed to provide that opportunity prior to its de facto implementation of the limited access measure in April. The notice of the April 24-27 Council meeting (55 Fed. Reg. 13304 (April 10, 1990)) made no mention of consideration or adoption of a specific date -- not to mention a date prior to both the notice and the meeting -- for determining eligibility to enter the fishery.[5] The lack of notice is particularly misleading when the Council has previously declared that implementation of limited access controls would not occur before either January 1991 or 1992. See 54 Fed. Reg. 7814.

The Council has also failed to comply with the procedures prescribed for the environmental assessment process. The required notice of scoping for the potential amendment to the Alaska FMPs was issued on February 23, 1989. 54 Fed. Reg. 7814. That notice made no reference to adoption of an eligibility date for a moratorium. More importantly, the notice states that any amendment to the groundfish FMP is not expected to be implemented before January 1, 1992, a statement clearly at odds with the Council's announcement of a January 1990 cutoff date in April 1990. A prospective amendment date has little meaning when measures to implement changes to the FMP have already taken place. The scoping process, which is to be initiated at the earliest stages of an agency's consideration of a new proposal, is designed to assist in "determin[ing] the scope . . . and the significant issues to be analyzed in depth in the environmental impact statement." 40 C.F.R. § 1501.7(a)(2). The Council's selection of a cutoff date that is prior to the timetable announced in the scoping notice recasts a critical issue in the limited access debate and is certainly inconsistent with the intended purpose of the scoping process.[6]

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[5] The notice for the April meeting stated the Council "will review recommendations from the Fishery Planning Committee on a moratorium, cut-off date, and 'pipeline' definition." 55 Fed. Reg. 13304 (1990).

Although adoption of a January 19, 1990 cutoff date apparently first came under consideration during the January 1990 Council meeting, see Council Newsletter, February 1990, at 2, neither the January meeting notice, 54 Fed. Reg. 53171 (1989), nor a notice, 55 Fed. Reg. 6815 (1990), that appeared subsequent to the January meeting, but prior to the April meeting notice, made any mention of a specific retrospective moratorium date.

[6] The Council's draft Federal Register notice states that there is to be "a public scoping process for determining the scope of issues to be addressed and for identifying issues relating to limiting access to a public fishery resource." Fed. Reg. draft notice at 1. The process would seem, however, to be an empty exercise and the issues moot if the cutoff date for a vessel's eligibility under the moratorium is already a fait accompli.

The Council's action completely ignores the requirements for providing notice and comment before adopting regulations. The APA directs that the agency shall "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). This process, which must be followed before changes to the rules governing the fisheries can be adopted, does not even begin until the proposed changes are published by the Secretary of Commerce. The Council has no authority to take steps that effectively implement a limited access regime before such a management plan has even been proposed to the Secretary of Commerce by the Council.

As an implementation measure, a cutoff date should not be adopted until all parameters of the moratorium have been reviewed. Public comment by interested parties will not be ensured until the Council has published the criteria for determining which vessels will be deemed to be "in the pipeline." By adopting one implementation measure while allowing others to remain undefined, potential fishery participants are left not knowing whether they are adversely affected by the lone measure so far adopted, that is, the cutoff date.

The Council has also failed to consider the national standards for fishery management plans prescribed in section 301 of the MFCMA, as explained and interpreted in 50 C.F.R. part 602, especially National Standards 4 and 5 which have special relevance for all aspects of a limited access regime. It is not at all evident, for instance, that the Council's proposed eligibility date will comply with the requirement that allocation systems be fair and equitable to all fishermen and assure that no single entity acquires an excessive share of the fishery.[7]

The apparent preference of the Council for using past events as a sole criteria for assessing eligibility is unsound as a matter of administrative law. The Supreme Court, in Bowen v. Georgetown University Hospital, 488 U.S. 204, (1988), held that, absent express statutory authority, an agency may not issue regulations having a retroactive effect. The MFCMA does not grant such authority. Thus neither the Council nor the Secretary of Commerce can retroactively impose a limited access regime. As Justice Scalia made clear in his concurring opinion in Bowen v. Georgetown, regu-

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[7] The equitableness of the moratorium as proposed, with its retroactive effective date, is of particular concern since as of its April 1990 meeting the Council had yet to arrive at a definition of vessels "in the pipeline." The restrictive effect of the moratorium cannot be fully ascertained until the breadth of the pipeline definition is determined. Even the Federal Register draft notice fails to give an all-inclusive definition of vessels that will be considered eligible as of the January 1990 cutoff date. See Fed. Reg. draft notice at 3.

lations must have "legal consequences only for the future," they cannot "alter[] the past legal consequences of past actions." Even a regulation that is not retroactive may be unlawful if it "makes worthless substantial past investment incurred in reliance upon the prior rule." 102 L. Ed. 2d at 505-06. Thus any criteria used for assessing eligibility, although they may include consideration of past events, must not frustrate legitimate business plans backed by substantial investments made before the effective date of the regulations by which the criteria are adopted.

A further legal impediment to the Council's adoption of a retroactively effective moratorium date is that such action could arguably be construed as a Fifth Amendment taking that requires just compensation. The Supreme Court has recognized that the concept of property may embody the "fruition of a number of expectancies" and if those expectancies are deemed "sufficiently important," the government cannot take without compensation. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979). Governmental regulation that interferes with "'reasonable investment-backed expectations'" may be deemed to be a compensable taking. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984)(quoting Prune Yard Shopping Center v. Robbins, 447 U.S. 74, 83 (1980)).

The Council must avoid upsetting the legitimate business plans not only of current fishery participants but also of those who have expended substantial amounts in anticipation of entering the fishery. A company that entered the fishery with one vessel on a marginal basis with the expectation of becoming profitable with the addition of more vessels over time may with a retroactive moratorium date be foreclosed altogether from achieving profitability. An entity that has made a substantial investment toward implementing a specific business plan for participation in the fishery should be allowed to complete its implementation of that business plan.

CONCLUSION

A moratorium can be properly implemented only if interested persons are given a full and fair opportunity to participate in each step of the regulatory process. All aspects of any proposed limited access regime must be fully exposed to public scrutiny through the normal regulatory process, and it must be implemented in a manner that will not unfairly frustrate business plans and projects backed by substantial investment. It most assuredly cannot be initiated by a sudden and arbitrary adoption of a past date for use in assessing eligibility to participate in the fishery.

June 19, 1990

North Pacific Fishery Management Council
PO Box 103136
Anchorage, Alaska 99510

Dear Council Members,

Today I received a copy, dated June 11, 1990, of your draft public notice to alert the fishing industry of the Council's intent to consider a moratorium on entry into the fisheries under it's jurisdiction.

As summertime is a very busy time for myself and most all other fishermen who will be affected by an action of such gravity, I do not feel that adequate time has been provided for the public to consider and prepare comment before the Council's June 25 meeting. This proposed moratorium will affect a very wide scope of fishermen in this industry, and deserves the utmost scrutiny, public input and consideration, before any steps are taken.

I appreciate the Council's provision for some sort of "scoping" process, but I would suggest that you are placing the "cart before the horse" — scoping activity should take place before the Council determines that it intends to place a moratorium on entry into its fisheries — & this would ensure that the public has

indeed been made adequately aware of the Council's concerns, and would provide the opportunity for comment that it now appears is being pre-empted by the fishermen's need to make a living at this time of year. As many fishermen find it difficult or even impossible to attend, or even be aware of the actions at, Council meetings, it is vital that the Council be agressive in its attempts to solicit information from the public and keep the public informed.

In reading your "notice of intent" here, I am concerned with just what the Council has identified as "problems".

I feel that the decision regarding entry into a fishery should be left as a business decision for the individual fisherman — it is not a function of any governmental body to attempt to provide for, or guarantee, any fisherman's success as a business — especially at the expense of another fisherman's rights to try to stay viable. The answer to the so-called "economic stability" of "boom + bust" harvest cycles is diversity — and diversity is the thing first and most impaired by moratoriums and limited entry systems in general. It should be pointed out that a moratorium IS a limited entry system, and once such a move is made, a return to open access is very unlikely. That's why it is vital

and imperitive that this moratorium action be directed with all the same high degree of scrutiny etc that any final decision on limiting access would be expected to be given. The concept of a moratorium as a "STOP-GAP" to provide "Time for consideration" is a bunch of crap.

Returning to the concern regarding "boom and bust" harvest cycles: "Boom and bust" cycles are a product of the elements that the council has the least control over in its management of fisheries — the abundance of the species, and the market conditions. While management may attempt to retain viable stocks by its setting of Total Allowable Catch (TAC) levels, etc, it can not affect the climactic and biological events that will have the greatest impacts on the abundance of fishery resources, and it can't control US dollar strength vs foreign currency, or market demands, or other concerns that affect the PRICE that fishermen are paid. The Council can, however, affect a fisherman's business "overhead", by providing that he pay through the nose for the right to make a living, and reduce his options in the process.

I urge the council to leave the fisheries open access, and at least provide for more expressive public notice and input solicitation before making

Any decision on this matter whatsoever.

I apologize for not typing this, and for it's disjointed quality, but I just don't have time to do a better job right now.

Thank you for considering my comments.

Sincerely,

David Shrader
DAVID SHRADER
412 WILLOW ST
KODIAK, ALASKA
99615
907 486 5819

PS Catcher/Processors are a genuine threat to conservation efforts by management — I agree they should be put out of business, but the direction the council is now heading will in fact ultimately GIVE them the entire industry. -D

Billing Code: 3510-22

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No.]

RIN

Groundfish and Crab Fisheries of the Bering Sea and Aleutian Islands Area, Groundfish Fisheries of the Gulf of Alaska, and Pacific Halibut Fisheries off the State of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce

ACTION: Notice of control date for entry into the groundfish, crab and halibut fisheries off Alaska.

SUMMARY: This notice announces that any fishing vessel entering the groundfish, crab or halibut fisheries that currently are under the management jurisdiction of the North Pacific Fishery Management Council (Council) after the control dates specified in this notice will not be assured of future access to those fisheries if a management regime is developed and implemented that limits the number of vessels participating in those fisheries. This announcement is necessary for public awareness of potential eligibility criteria for determining historical

dependence and present participation in and future access to the groundfish, crab and halibut fisheries. This announcement does not prevent any other date for eligibility in the fishery or another method of controlling fishing effort from being proposed and implemented. The intended effect of this announcement is to notify potential entrants of the risks of speculative entry into these fisheries while the Council continues discussions on whether and how access to these fisheries should be controlled.

FOR FURTHER INFORMATION CONTACT: Steven K. Davis, Deputy Director, North Pacific Fishery Management Council, telephone: 907-271-2809, or Jay J. C. Ginter, Fishery Management Biologist, Alaska Region, NMFS, telephone: 907-586-7229.

SUPPLEMENTARY INFORMATION: The commercial harvest of groundfish in the U.S. exclusive economic zone of the Gulf of Alaska and the Bering Sea and Aleutian Islands area is governed by Federal regulations at 50 CFR 611.92 and 611.93, and 50 CFR parts 672 and 675, which implement the Gulf of Alaska groundfish fishery management plan (FMP) and the Bering Sea/Aleutian Islands groundfish FMP, respectively. The commercial harvest of king and Tanner crabs in the Bering Sea and Aleutian Islands area is governed by State of Alaska regulations at Title 16, Chapters 34 and 35, which implement the Bering Sea/Aleutian Islands crab FMP. The harvest of Pacific halibut in all waters off Alaska by U.S. fishermen is governed by Federal regulations at 50 CFR part 301,

which implement rules developed by the International Pacific Halibut Commission.

The groundfish and crab FMPs and their accompanying environmental impact statements (EISs) were developed by the Council and approved by the Secretary under authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act, Pub. L. 94-265). The Council also has authority under the Northern Pacific Halibut Act of 1982 (Pub. L. 97-176) to develop regulations governing the catch of Pacific halibut in U.S. waters which are in addition to, but not in conflict with, regulations developed by the IPHC. This includes authority to allocate halibut fishing opportunity among U.S. fishermen should such allocation be necessary.

The Problem

Domestic harvesting and processing capacity in the groundfish, crab, and halibut fisheries off Alaska currently exceeds the amount necessary to harvest the annual total allowable catch of most species of groundfish, halibut and crabs under Council jurisdiction. Further, the Council has determined that the continued entry of fishing effort into these fisheries will only add to harvesting and processing capacity and that continued entry exacerbates current fishery management difficulties or causes new problems.

Fishery managers have found that excess capacity may lead to allocation conflicts, gear conflicts, excessive bycatch of non-target species, high grading or discard of lower valued but potentially useful fish products, poor handling of catch, insufficient attention to safety, and economic instability from boom-and-bust harvest cycles. In recent years, the Council has noted some or all of these problems in every fishery under its jurisdiction.

Although the Council continues to develop open access regulations in an attempt to address these problems, the Council also is considering a change in the open-access nature of fisheries as a more comprehensive solution. At this time, the Council has not determined the best way to control or restrict access to commercial fishery resources in the long term. However, the Council has tentatively determined that a moratorium on new entry into the fisheries may be necessary for an interim period to curtail the increase in fishing capacity and permit the Council time to develop and assess the potential effects of alternative long-term solutions to the identified management problems. The Council is aware that such a moratorium will not resolve the fundamental problem of excess capacity in the fisheries. Instead, the purpose of the moratorium, if approved, would be to prevent continued growth in fishing capacity, while the Council assesses alternative limited access and open access

management measures to address the overcapacity problem, and to achieve the optimum yield from the fisheries. As currently contemplated by the Council, this moratorium would apply for a period of four years from its effective date or less if rescinded by direct Council action.

The Council intends, in making this announcement, to discourage speculative entry into the groundfish, crab and halibut fisheries off Alaska while potential access control management regimes are discussed by the Council, analyzed and developed. If the Council recommends, and the Secretary approves, a moratorium on entry or other access control management regime, some fishermen who do not currently fish in these fisheries, and never have done so, may decide to enter the fishery for the sole purpose of establishing a record of making commercial landings from these fisheries. Such a record generally is considered indicative of economic dependency on the fishery. On this basis the fishermen may claim access to a fishery that otherwise would be limited to traditional participants. New entrants may have to buy fishing rights from an existing participant. Hence, initial access or allocation of a fishing right at little or no cost may result in a windfall gain when selling an access right to a new entrant. This speculation often is responsible for a rapid increase in fishing effort in fisheries already fully or over developed with harvesting capacity when controlled access management begins to

be considered. The original problems prompting such consideration then become exacerbated.

To help distinguish bona fide, established fishermen from the speculative entrants to a fishery, a management authority may set a control date before discussions and planning of controlled access management begin. Fishermen are notified that entering the fishery after that date will not necessarily assure them of future access to the fishery on grounds of previous participation. Other qualifying criteria may also be required for future access.

This announcement establishes two control dates for potentially determining historical dependence on, and present participation in, the Alaska groundfish, crab and halibut fisheries for two vessel categories: (1) existing vessels; and (2) vessels under construction or reconstruction.

The control date for existing vessels, other than those whose construction or reconstruction for the purpose of participating in the subject fisheries was completed on or after April 15, 1990, is August 9, 1990. To qualify as an existing vessel in the subject fisheries the vessel must have documented evidence of harvesting or processing by August 9, 1990.

A vessel whose construction or reconstruction for the

purpose of participating in the subject fisheries was completed on or after April 15, 1990 would be eligible only if:

(1) it was under construction or reconstruction or under definite written contract for construction or reconstruction by August 9, 1990;

(2) it is documented for the subject fisheries and delivered to its owner; and

(3) it has documented evidence of harvesting or processing in the subject fisheries by January 15, 1992.

The use of the April 15, 1990 date in conjunction with "construction or reconstruction" is intended to include within the control date vessels that were constructed or reconstructed for the subject fisheries and delivered prior to August 9, 1990, but do not have documented evidence of harvesting or processing in the subject fisheries by August 9, 1990.

Nothing in this notice is intended to prohibit a vessel from adding a fish meal plant or other equipment necessary to enable it to more fully utilize the fish it harvests and/or processes.

This action does not commit the Council or the NMFS to develop any particular management regime or any specific criteria for determining future access to these fisheries. If a limited access system is implemented, fishermen are not guaranteed future participation in these fisheries regardless of their date of

entry or their intensity of participation before or after the control date. The Council may choose a different control date or it may choose a limited access regime that does not make use of such a date. The Council may choose to give variably weighted consideration to fishermen in the fishery before and after the control date. The Council may choose also to take no further action to control access to the fishery. However, any action taken by the Council to control access to these fishery resources will be taken pursuant to the requirements for FMP development established under the Magnuson Act and other applicable law.

Dated:

[Insert name and title of responsible official]

J. Ginter, 8-8-90, MORAT-7.FRN
Revised 8-9-90