AGENDA D-1
April 1981

M E M O R A N D U M

TO: Council

FROM: Jim H. Branson
Executive Director

DATE: April 17, 1981

SUBJECT: Amendments to the Magnuson Fishery Conservation and Management Act (MFCMA).

ACTION REQUIRED

Formulate proposed amendments to MFCMA.

BACKGROUND

Representatives of the eight regional fishery management councils will meet in June to discuss possible amendments to FCMA. Our Council must review its position on various proposed amendments and indicate where emphasis should be placed in these upcoming inter-council meetings. Below is a brief history of past Council concerns, a review of our batting average vis a vis the Breaux Bill, and a summary of new amendments proposed by the New England Fishery Management Council.

Past Considerations

The Council's FCMA Amendments Workgroup met last August. To aid review, a table (Item a) had been prepared indicating the Council's concerns expressed at five previous oversight hearings.

Minutes of the workgroup meeting (Item b) indicate a continuing concern for the following:

1. exempt FCMA from NEPA, E.O. 12044, APA, and FACA;
2. no action by Secretary of Commerce within review period of 60 days allows automatic plan approval;
3. increase observer coverage to at least 20%;
4. redefine OY as range rather than point;
5. increase period for emergency regulations from 45/45 to 90/90 days;
6. allow Council review of allocations
7. expand permit sanctions on foreign fishing;
8. verify non-federal status of Council staff;

9. study relationship of MFCMA to MMPA, CZMA, ESA, the Nickleson and Marine Sanctuaries Acts;
10. increase funds for NMFS research and data acquisition; and
11. thoroughly reexamine national standards, especially the regional director's authority to make field closures for other than biological reasons.

Present Situation - The Breaux Bill

The Breaux Bill or American Fisheries Promotion Act (Item c) amended the MFCMA last December. The seven major amendments included:

1. ensure OY determinations promote development of underutilized or unutilized fisheries (Section 2.b.6);
2. alternative method for calculating TALFF (Section 201.d);
3. TALFF allocations by Secretaries of State and Commerce based on tariffs, trade, enforcement, domestic food needs, technology transfer and gear conflict, traditional participation in the fishery, and research (Section 201.e.1);
4. foreign fishing fees structured to cover a portion of total costs of administering the act, in direct proportion to the share of the total harvest taken by foreigners (Section 204.b);
5. all non-voting Council members may now be reimbursed for actual expenses (Section 302.b);
6. publish in Federal Register, Notice of Availability rather than FMP or amendment (Section 305.a.2.A); and
7. ensure full observer coverage with surcharge to cover cost (Section 201).

Comparing these amendments with the list of Council concerns shows we had a rather poor batting average with the Breaux Bill. In fact, we only succeeded in improving observer coverage. This leaves an open field for suggestions on ways to amend the Act to improve fisheries management here in Alaska and on the other coasts.

Future Steps in Amending MFCMA

Keeping in mind the Council's past concerns and recent amendments to the Act, we now need to determine what further changes should be proposed and what the Council's position should be on amendments proposed by other Councils. Our Council's wishes must be known before we meet with representatives of the other Councils in Chicago in early June and again at the Chairmans meeting in Homer in late June.

The New England Council has been particularly active in formulating proposed amendments to MFCMA. A letter (Item d) from their chairman expresses their desire to get on with amending MFCMA, but only after the Councils come to unanimous agreement on the proposed changes. A summary of the New England Council proposals (Item e) is presented as a basis for our discussions.

Item 1 is a worksheet for amendments suggested by our Council. Heading the list is an amendment suggested by Ron Skoog that would bring foreign processing operations in state and internal waters under the auspices of MFCMA.

August 20, 1980

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April 1981

Dates of Hearings

REQUESTED FCMA CHANGES or CLAIRIFICATION by NPFMC

		6-21-78 Lokken	3-07-79 Branson	6-07-79 Branson	7-10-79 Tillion	10-11-79 Tillion
1.	Exemption of FCMA from NEPA, EO 12044, APA, and FACA.		X	X	X	X
2.	Limit SOC review period to 60 days or less with "no action" meaning approval.	X	X	X	X	X
3.	Increase observer coverage to at least 20%.		X	X	X	X
4.	Redefine OY as range rather than point.			X	X	X
5.	Increase period covered by emergency regulations from 45/45 to 90/90 days.				X	X
6.	Clarify status of "licensed" versus "registered" vessels.			X		
7.	Is search warrant required for boardings; clarify authority of U.S. enforcement officials to routinely board foreign and U.S. fishing vessels.			X	X	
8.	Allow Council review of allocations.	X		X	X	X
9.	Allow FMP and proposed regulations to be processed together and require conformity of NMFS regulations to provisions of FMP.			X	X	
10.	Expand permit sanctions on foreign fishing violators.			X	X	X
11.	Redefine baseline for FCZ.			X		
12.	Remove limit on license fees for U.S. fishermen.			X		
13.	Allow NPFMC to conduct public hearings outside Alaska.			X	X	
14.	Request voting membership of Alaska on PFMC.			X	X	X
15.	Verification of non-Federal status of Council staff.			X	X	X
16.	Compensation for some SSC members.			X	X	X
17.	Study relationship of FCMA with MMPA, CZMA, ESA, Nickelson, ~~Maine~~ Sanctuaries.			X	X	X
18.	Additional funds for data and NMFS staff.		X	X	X	X
19.	Improve selection process for Council membership.				X	X

*In Breaux Bill

SUMMARY OF THE FCMA AMENDMENTS WORKGROUP MEETING

August 28, 1980

The FCMA Amendments Workgroup met on Thursday, August 28, 1980, in the Conference Room of the North Pacific Fishery Management Council. Attending the meeting were Clem Tillion, Harold Lokken, Guy Thornburgh, Sig Jaeger, Robert McVey, Rick Lauber, Donald Bevan, Bart Eaton, John Harville, Jim Campbell, Bob Mace, Jeff Stephen, Patrick Travers, Jim Branson and NPFMC staff.

A summary of the Council's requests for changes to the FCMA had been sent to members of the workgroup prior to this meeting. This summary was used as a basis for discussion of the different changes which have been proposed by the Council through the last five oversight hearings. This list is attached for reference.

The group agreed that as a beginning step they should identify the areas most needing change. Chairman Tillion stressed the need for modification to the legislation that no action by the Secretary of Commerce within 60 days makes approval and implementation of a plan or an amendment automatic.

With regard to the exemption of the FCMA from NEPA, EO 12044, APA, and FACA, it was agreed that the FCMA should be made the controlling legislation. Jim Branson stated that an analysis of what an FMP will do to the environment and the economic assessment should be included in the fishery management plan in order to save the extra time and labor involved in preparing separate documents.

Dr. Harville said he feels Congress did not intend for the problems caused by the legislation to be there. He suggested that items 1 through 5, i.e., (1) exemption from NEPA, EO 12044, APA and FACA; (2) limitation of SoC review period to 60 days or less with no action meaning approval; (3) increased observer coverage to at least 20% -- from dedicated funds; (4) redefining OY as a range rather than point; (5) increase period covered by emergency regulations from 45/45 to 90/90 days, are the most urgent necessary changes in his estimation. Also termed as critical areas by Dr. Harville were #17, the need to study the relationship of FCMA with MMPA, CZMA, ESA, Nickelson, and Maine Sanctuaries, and #18, the need for additional funds for NMFS research staff and data.

With regard to the need for clarification of the status of "licensed" versus "registered" vessels, Pat Travers said that NOAA's current position is that a state can enforce its own laws for vessels registered in that state, except when they (state laws) are inconsistent with the FCMA. The presence of an FMP would not limit a state's ability to regulate its vessels. Chairman Tillion explained that in Alaska, when a vessel purchases a "license" it is technically "registered" to fish in Alaska. The group agreed that research was needed to clarify this terminology.

With regard to (15), verification of non-Federal status of Council staff and (16) compensation for some SSC members, the group agreed that it was necessary to reaffirm the Council's position that the staff is not Federal. Caution was urged, however, to clarify this legislatively only if passage were guaranteed.

It was suggested and agreed by the group that #7, regarding the requirement for a search warrant for boardings, be deleted from consideration since the courts have ruled on this point.

On the question of allowing the Council to review allocations, it was agreed that the Council should recommend a consultation relationship with the Secretary in these determinations. Jim Branson suggested that in the case of repeated violations, rather than revoking a foreign vessel's permit, their nation's allocation for the next year should be diminished by the amount of fish which were over-taken. Mr. McVey agreed that this method would be helpful in enforcement, since the foreign nation would be assisting in the enforcement picture in order to protect their allocations.

Regarding #9, allowing the FMP and the proposed regulations to be processed together and requiring conformity of NMFS regulations to the FMP, it was suggested that the regulations are really what fishermen are interested in, not the FMP itself.

Pat Travers suggested that the Council may wish to specify clarification that a permit sanction may be imposed prior to a full public hearing in order to encourage expeditious handling of the trial in the instance of foreign fishing violations (#10).

Regarding removal of the limit on license fees for U.S. fishermen, Mr. Lokken raised the question that, after the phase-out of foreign fishing, where will the money to cover the administrative costs come from? Bart Eaton responded that he would prefer to take some viable alternatives to

Washington rather than just opening the question to them. Chairman Tillion endorsed use of the percentage of catch method. Jim Branson pointed out that the resource is the property of the taxpayer, not of the user group. It was agreed that the Executive Director should draft a flexible, but tight document for review of the workgroup, including this question in the draft legislation.

A 20th suggestion was added to the list, that being a thorough examination of the National Standards, specifically regarding the Regional Director's authority to close an area to protect U.S. fishermen from gear conflicts for other than resource reasons. It was suggested that the processor preference amendment is in conflict with National Standard #5. The question was raised whether to change the National Standard or the processor preference section of the Act. Discussion followed on the various interpretations of the processor preference amendment. Mr. Jaeger suggested that additional distinction is necessary between floating and shore-based processors. This question was further addressed by the J/V Closure Criteria Workgroup.

Mr. Mace brought up three other subjects: (1) tuna; (2) the possibility of a separate Council for California: and (3) the relationship of the Marine Mammals Act to the FCMA. Chairman Tillion responded that with regard to tuna, it makes sense that each nation should harvest tuna as it comes through that section of the world. The FCMA says that a resource should be managed by the area in which it exists. Mr. Lokken asked if the Council should protest the formation of a separate Council for California, since that would water down the funds which we have to use.

With regard to the Marine Mammals Act, Jim Branson asked if the group wished to talk about redrafting amendments to the MMA. Dr. Bevan suggested

that it should receive some careful study. Guy Thornburgh stated that the Fish and Game Department will be developing a possible amendment to the Marine Mammals Act. They have hired a D.C. attorney to help them with this.

lieu thereof "(1) Except as provided in paragraph (2), no"; and

(ii) by adding at the end thereof the following:

"(2) In applying paragraph (1) with respect to commitments to guarantee, and the guarantee of, obligations for fishing vessels and fishery facilities used for underutilized fisheries, the Secretary of Commerce may apply an economic soundness test that is less stringent than that which has been traditionally applied to obligation guarantees under this paragraph.

"(3) No commitment to guarantee, or guarantee of an obligation may be made by the Secretary of Commerce under this title for the purchase of a used fishing vessel or used fishery facility unless—

"(A) the vessel or facility will be reconstructed or reconditioned in the United States and will contribute to the development of the United States fishing industry; or

"(B) the vessel or facility will be used in the harvesting of fish from, or for a purpose described in section 1101(k) with respect to, an underutilized fishery."; and

(D) in subsection (g)—

(i) by inserting "(1)" immediately after "(g)"; and

(ii) by adding at the end thereof the following new paragraph:

"(2) The Secretary of Commerce shall establish within the Fund the following subfunds:

"(A) The standard fishery subfund which shall contain all moneys received for, and incident to, the guarantee of obligations with respect to fishing vessels and fishery facilities to which the economic soundness criteria set forth in section 1104(d)(1) apply.

"(B) The underutilized fishery subfund which shall contain all moneys received for, and incident to, the guarantee of obligations with respect to fishing vessels and fishery facilities to which the economic soundness criteria set forth in section 1104(d)(2) apply.

"(C) The general subfund which shall contain all moneys received for, and incident to, the guarantee of obligations for vessels other than fishing vessels.".

(4) The first sentence of section 1105(d) is amended by inserting immediately before the period at the end thereof the following: ", and shall be paid from the appropriate subfund required to be established under section 1104(g)(2)".

SEC. 221. LOANS UNDER THE FISH AND WILDLIFE ACT OF 1956.

(a) LOAN AUTHORITY UNTIL OCTOBER 1, 1982.—During the period beginning on the date of the enactment of this title and ending at the close of September 30, 1982, the Secretary of Commerce (hereinafter in this section referred to as the "Secretary") may make loans from the fisheries loan fund established under subsection (e) of section 4 of the Fish and Wildlife Act of 1956 (16 U.S.C. 742c) only for the purposes set forth in subsections (b) and (c) of this section. Except to the extent that they are inconsistent with, or contrary to, this section, the provisions of such section 4 shall apply with respect to loans made for such purposes.

(b) LOANS TO AVOID DEFAULT ON OBLIGATION COVERING FISHING VESSELS.—(1) The Secretary may make loans for the purpose of assisting obligors to avoid default on obligations that are issued with respect to the construction, reconstruction, reconditioning or purchase of fishing vessels and that—

(A) are guaranteed by the United States under title XI of the Merchant Marine Act, 1936 (46 U.S.C. 1271-1280, relating to Federal ship mortgage insurance); or

(B) are not guaranteed under such title XI, but the fishing vessels concerned meet the use and documentation requirements, and the obligors meet the citizenship requirements, that would apply if the obligations were guaranteed under that title.

(2)(A) Within the 30-day period beginning on the date of the enactment of this title in the case of fiscal year 1981, and before the beginning of fiscal year 1982, the Secretary shall estimate the number, and the aggregate amount, of loans described in paragraph (1)(A) for which application will likely be made during each of such fiscal years and shall reserve that amount in the fisheries loan fund for the purpose of making such loans during such year (or if such amount is larger than the fund balance; the Secretary shall reserve the whole fund for such purpose).

(B) If any moneys are available in the fisheries loan fund for each such fiscal year after subparagraph (A) is complied with for that year, the Secretary shall use such moneys for the purpose of making loans described in paragraph (1)(B) during that year.

(C) At an appropriate time during each of fiscal years 1981 and 1982, the Secretary shall compare the actual loan experience during that year with the estimate made for that year under subparagraph (A) and if the Secretary determines, on the basis of such comparison, that the demand for loans described in paragraph (1)(A) will be less than estimated, the Secretary shall, for the fiscal year concerned, apply moneys reserved for such loans for the purpose of making loans described in paragraph (1)(B) and, to the extent not utilized for loans described in paragraph (1)(B), for the purpose of making loans under subsection (c).

(3) The Secretary may make loans under this subsection only to owners or operators who, in the judgment of the Secretary, have substantial experience and proven ability in the management and financing of fishing operations, and only if (A) loans for the purpose described in paragraph (1) are not otherwise available at reasonable rates which permit continued operation, and (B) the loans are likely to result in the financial viability of the fishing operations of the owners or operators. Each such loan shall be subject to such terms and conditions as the Secretary deems necessary or appropriate to protect the interests of the United States and to carry out the purpose of this subsection. In establishing such terms and conditions, the Secretary shall take into account, among such other factors he deems pertinent, the extent to which the obligations concerned have been retired, and the overall financial condition of the obligors. The interest rate on loans made under the authority of this subsection shall not exceed that rate determined by the Secretary to be sufficient to cover the costs incurred in processing and servicing of such loans.

(c) LOANS TO COVER OPERATING LOSSES.—(1) If the Secretary determines that moneys will be available in such fisheries loan fund for fiscal year 1981, or 1982, or both, after loans under subsection (b) are provided for for that year, the Secretary may make loans for the purpose of assisting owners and operators of fishing vessels to cover vessel operating expenses in cases where an owner or operator incurs, or may incur, a net operating loss within such fiscal year.

(2) Each loan made by the Secretary under this subsection shall be subject to such terms and conditions as the Secretary deems necessary or appropriate to protect the interests of the United States and to carry out the purposes of this subsection. The Secretary may make loans under this subsection only to owners or operators who, in the judgment of the Secretary, have substantial experience and proven ability in the management and financing of fishing operations, and only if (A) loans for the purpose described in paragraph (1) are not otherwise available at reasonable rates which permit continued operation, and (B) the loans are likely to result in the financial viability of the fishing operations of the owners or operators. The interest rate on loans made under this subsection shall be the rate prevailing for loans made under the Emergency Agricultural Credit Act of 1978 (7 U.S.C. preceding 1961 note).

PART C—AMENDMENTS TO THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

Subpart I—Foreign Fishing, in Fisheries Subject to the Exclusive Fishery Management Authority of the United States

SEC. 230. FOREIGN FISHING.

Section 201(d) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1821(d)) is amended to read as follows:

"(d) TOTAL ALLOWABLE LEVEL OF FOREIGN FISHING.—(1) As used in this subsection—

"(A) The term 'base harvest' means, with respect to any United States fishery, the total allowable level of foreign fishing during the 1979 harvesting season.

"(B) The term 'harvesting season' means the period established under this Act by the Secretary during which foreign fishing is permitted within a United States fishery. For purposes of this subsection, a harvesting season is designated by the calendar year in which the last day of the harvesting season occurs, regardless whether fishing is not permitted on that day due to emergency or other closure of the fishery.

"(C) The term 'calculation factor' means, with respect to each United States fishery, 15 percent of the base harvest.

"(D) The term 'reduction factor amount' means, with respect to each United States fishery, for any harvesting season after the 1980 harvesting season—

"(i) an amount equal to 15 percent of the base harvest for that fishery, if, in addition to the level of harvest by vessels of the United States in the designated preceding harvesting season for the fishery, such vessels harvest, in one or more harvesting seasons, not less than 75 percent of the calculation factor;

"(ii) an amount equal to 10 percent of the base harvest for the fishery, if, in addition to the level of harvest by vessels of the United States in the designated preceding harvesting season for the fishery, such vessels harvest, in one or more harvesting seasons, not less than 50 percent, but less than 75 percent, of the calculation factor; or

"(iii) an amount equal to 5 percent of the base harvest for the fishery, if, in addition to the level of harvest by vessels of the United States in the designated previous harvesting season for the fishery, such vessels harvest, in one or more harvesting seasons, not less than 25 percent, but less than 50 percent, of the calculation factor.

For purposes of this paragraph, the term 'designated preceding harvest season' means—

"(I) until a reduction factor is first achieved under this paragraph with respect to the fishery concerned, the 1979 harvesting season, and

"(II) after such amount is first achieved, the most recent harvesting season in which a reduction factor amount was achieved.

"(E) The term 'annual fishing level' for any United States fishery during any harvesting season after the 1980 harvesting season is the base harvest for the fishery reduced by—

"(i) an amount equal to the reduction factor amount for that harvesting season; and

"(ii) an amount equal to the increased level of harvest by vessels of the United

States over the level achieved by such vessels in the 1979 harvesting season for the fishery.

"(F) The term 'United States fishery' means any fishery subject to the exclusive fishery management authority of the United States.

"(2) The total allowable level of foreign fishing, if any, with respect to any United States fishery for each harvesting season after the 1980 harvesting season shall be—

"(A) the level representing that portion of the optimum yield of such fishery that will not be harvested by vessels of the United States as determined in accordance with the provisions of this Act (other than those relating to the determination of annual fishing levels), or

"(B) the annual fishing level determined pursuant to paragraph (3) for the harvesting season.

"(3) For each United States fishery, the appropriate fishery management council, on a timely basis, may determine and certify to the Secretary of State and the Secretary the annual fishing level for that fishery for each harvesting season after the 1980 harvesting season.

"(4) If with respect to any harvesting season for any United States fishery for which the total allowable level of foreign fishing is determined under paragraph (2)(B), the Secretary, in consultation with the Secretary of State, approves the determination by any appropriate fishery management council that any portion of the optimum yield for that harvesting season will not be harvested by vessels of the United States, the Secretary of State, in accordance with subsection (e), shall allocate such portion for use during that harvesting season by foreign fishing vessels; except that if—

"(A) the making available of such portion (or any part thereof) during that harvesting season is determined to be detrimental to the development of the United States fishing industry; and

"(B) such portion or part will be available for harvest in the immediately succeeding harvesting season, as determined on the basis of the best available scientific information; then such portion or part shall be allocated for use by foreign fishing vessels in such succeeding harvesting season. The determinations required to be made under subparagraphs (A) and (B) of the preceding sentence shall be made by the Secretary in consultation with the Secretary of State and on the basis of any recommendation of any appropriate fishery management council."

SEC. 231. ALLOCATION OF ALLOWABLE LEVELS OF FOREIGN FISHING.

(a) AMENDMENTS.—The last sentence of section 201(e)(1) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1821(e)(1)) is amended to read as follows: "All such determinations shall be made by the Secretary of State and the Secretary on the basis of—

"(A) whether, and to what extent, such nations impose tariff barriers or nontariff barriers on the importation, or otherwise restrict the market access, of United States fish or fishery products;

"(B) whether, and to what extent, such nations are cooperating with the United States in the advancement of existing and new opportunities for fisheries trade, particulary through the purchase of fish or fishery products from United States processors or from United States fishermen;

"(C) whether, and to what extent, such nations and the fishing fleets of such nations have cooperated with the United States in the enforcement of United States fishing regulations;

"(D) whether, and to what extent, such nations require the fish harvested from the fishery conservation zone for their domestic consumption;

"(E) whether, and to what extent, such nations otherwise contribute to, or foster the growth of, a sound and economic United States fishing industry, including minimizing gear conflicts with fishing operations of United States fishermen, and transferring harvesting or processing technology which will benefit the United States fishing industry;

"(F) whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing in such fishery;

"(G) whether, and to what extent, such nations are cooperating with the United States in, and making substantial contributions to fishery research and the identification of fishery resources; and

"(H) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.".

(b) TAKING EFFECT OF AMENDMENTS.—The amendments made by subsection (a) shall apply with respect to the 1981 harvesting season and harvesting seasons thereafter (as defined in section 201(d)(1) of the Fishery Conservation and Management Act of 1976, as amended by section 301).

SEC. 232. PERMIT FEES.

(a) INTERIM FEES.—(1) Effective with respect to permits issued under section 204(b) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1824(b)(10)) for 1981, paragraph (10) of such section is amended by striking out the last sentence thereof and inserting in lieu thereof the following: "Such fees shall be formulated so as to ensure that the receipts resulting from the payment of the fees under this paragraph for permits issued for 1981 are not less than an amount equal to 7 percent of the ex vessel value of the total harvest by foreign fishing vessels in the fishery conservation zone during 1979. The fees collected by the Secretary under this paragraph for permits issued for 1981 shall be transferred to the fisheries loan fund established under section 4 of the Fish and Wildlife Act of 1956 (16 U.S.C. 742c) and used for the purpose of making loans therefrom, but only to the extent and in amounts provided for in advance in appropriation Acts.".

(b) PERMANENT FEES.—Effective with respect to permits issued under section 204(b) of such Act of 1976 after 1981, paragraph (10) of such section is amended to read as follows—

"(10) FEES.—Fees shall be paid to the Secretary by the owner or operator of any foreign fishing vessel for which a permit is issued pursuant to this subsection. The Secretary, in consultation with the Secretary of State, shall establish a schedule of such fees which shall apply nondiscriminatorily to each foreign nation. The fees imposed under this paragraph shall be at least in an amount sufficient to return to the United States an amount which bears to the total cost of carrying out the provisions of this Act (including, but not limited to, fishery conservation and management, fisheries research, administration, and enforcement, but excluding costs for observers covered by surcharges under section 201(1)(4)) during each fiscal year the same ratio as the aggregate quantity of fish harvested by foreign fishing vessels within the fishery conservation zone during the preceding year bears to the aggregate quantity of fish harvested by both foreign and domestic fishing vessels within such zone and the territorial waters of the United States during such preceding year. The amount collected by the Secretary under this paragraph shall be transferred to the fisheries loan fund established under section 4 of the Fish and Wildlife Act of 1956 (16 U.S.C. 742c) for so long as such fund exists and used for the purpose of making loans therefrom, but only to the extent and in amounts provided for in advance in appropriation Acts.".

SEC. 233. FISHERY DEVELOPMENT OBJECTIVES.

Section 2(b)(6) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801(b)(6)) is amended by inserting immediately before the period at the end thereof the following: ", and to that end, to ensure that optimum yield determinations promote such development".

SEC. 234. FISHERY MANAGEMENT COUNCIL TRAVEL FUNDS.

The second sentence of section 302(d) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1852(d)) is amended by striking out the period and inserting in lieu thereof the following: ", and other non-voting members may be reimbursed for actual expenses.".

SEC. 235. NOTICE OF AVAILABILITY OF MANAGEMENT PLANS.

Section 305(a) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1855(a)) is amended by inserting "a notice of availability of" immediately after "Federal Register (A)".

Subpart 2—Full Observer Coverage Program

SEC. 236. ESTABLISHMENT OF FULL OBSERVER COVERAGE PROGRAM.

Section 201 of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1821) is amended by adding at the end thereof the following new subsection:

"(l) FULL OBSERVER COVERAGE PROGRAM.—(1) Except as provided in paragraph (2), the Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the fishery conservation zone.

"(2) The requirement in paragraph (1) that a United States observer be placed aboard each foreign fishing vessel may be waived by the Secretary if he finds that—

"(A) in a situation where a fleet of harvesting vessels transfers its catch taken within the fishery conservation zone to another vessel, aboard which is a United States observer, the stationing of United States observers on only a portion of the harvesting vessel fleet will provide a representative sampling of the by-catch of the fleet that is sufficient for purposes of determining whether the requirements of the applicable management plans for the by-catch species are being complied with;

"(B) with respect to any foreign fishing vessel while it is engaged in fishing within the fishery conservation zone—

"(i) the time during which the vessel engages in such fishing will be of such short duration that the placing of a United States observer aboard the vessel would be impractical, or

"(ii) the facilities of the vessel for the quartering of a United States observer, or for the carrying out of observer functions, are so inadequate or unsafe that the health or safety of an observer would be jeopardized; or

"(C) for reasons beyond the control of the Secretary, an observer is not available.

"(3) United States observers, while aboard foreign fishing vessels, shall carry out such scientific and other functions as the Secretary deems necessary or appropriate to carry out the purposes of this Act.

"(4) In addition to any fee imposed under section 204(b)(10) of this Act and section 10(e) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1980(e)) with respect to foreign fishing for any year after 1980, the Secretary shall impose, with respect to each foreign fishing vessel for which a permit is issued under such section 204, a surcharge in an amount sufficient to cover all the costs of providing a United States observer abroad that vessel. The failure to pay any surcharge imposed under this paragraph shall be treated by the Secretary as a failure to pay

the permit fee for such vessel under section 204(b)(10). All surcharges collected by the Secretary under this paragraph shall be deposited in the Foreign Fishing Observer Fund established by paragraph (5).

"(5) There is established in the Treasury of the United States the Foreign Fishing Observer Fund. The Fund shall be available to the Secretary as a revolving fund for the purpose of carrying out this subsection. The Fund shall consist of the surcharges deposited into it as required under paragraph (4). All payments made by the Secretary to carry out this subsection shall be paid from the Fund, only to the extent and in the amounts provided for in advance in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of this subsection shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.".

SEC. 237. EFFECTIVE DATE.

The amendment made by section 236 shall take effect October 1, 1981, and shall apply with respect to permits issued under section 204 of the Fishery Conservation and Management Act of 1976 after December 31, 1981.

SEC. 238. SHORT TITLE.

(a) Effective 15 days after the date of enactment of this title, section 1 of the Fishery Conservation and Management Act of 1976 (16 U.S.C 1601) is amended to read as follows: "That this Act may be cited as the Magnuson Fishery Conservation and Management Act.".

(b) Effective 15 days after the date of enactment of this title, all references to the Fishery Conservation and Management Act of 1976 shall be redesignated as references to the Magnuson Fishery Conservation and Management Act.

PART D—MISCELLANEOUS PROVISIONS

SEC. 240. APPLICATIONS AND FILINGS FOR COMPENSATION FOR CERTAIN FISHING VESSEL AND GEAR DAMAGE.

(a) IN GENERAL.—If—

(1) any owner or operator of a fishing vessel who suffered, after September 17, 1978, and before the date of the enactment of this title damage to, or loss or destruction of, such vessel or fishing gear used with such vessel, but did not apply for compensation therefor under section 10 of the Fishermen's Protective Act of 1967 (22 U.S.C. 1980) within the 60-day period prescribed in subsection (c)(1) of such section; or

(2) any commercial fisherman who suffered, after September 17, 1978, and before the date of the enactment of this title, damages compensable under title IV of the Outer Continental Shelf Lands Act of 1978 (43 U.S.C. 1841 et seq.), but who did not timely file a claim therefor within the 60-day period prescribed in section 405(a) of such Act;

such owner or operator may make application for compensation with respect to such damage, loss or destruction under such section 10, and such commercial fisherman may file a claim for compensation for such damages under such title IV, to the Secretary of Commerce, within the 60-day period beginning on the date of the enactment of this title.

(b) SPECIAL PROVISIONS.—(1) Notwithstanding any other provision of law—

(A) any application or filing timely made under subsection (a) shall be treated by the Secretary of Commerce as an application timely made under such section 10(c)(1), or as a filing timely made under such section 405(a), as the case may be, with respect to the damage, loss, or destruction claimed; and

(B) any claim for fishing gear loss that was pending on June 1, 1980, before the United States-Union of Soviet Socialist Republics Fisheries Claims Board or the American-Spanish Fisheries Board shall be treated by the Secretary of Commerce as a timely application made, on the date of the enactment of this title under such section 10(c)(1) for compensation for such loss.

(2) Section 403(c)(2)(A) of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1843(c)(2)(A)) is amended by striking out the semicolon at the end thereof and inserting in lieu thereof "and the party admits responsibility;".

SEC. 241. AMENDMENTS TO FISHERMEN'S PROTECTIVE ACT OF 1967.

Section 10 of the Fishermen's Protective Act of 1967 (22 U.S.C. 1980) is amended as follows:

(1) Subsection (a) is amended by adding at the end thereof the following:

"(4) The term "resulting economic loss" means the gross income, as estimated by the Secretary, that a fishing vessel owner or operator who is eligible for compensation under this section for damage to, loss of, or destruction of, a fishing vessel or the fishing gear used with such vessel will lose by reason of not being able to engage in fishing, or having to reduce his fishing effort, during the period before the vessel or gear, or both, are repaired or replaced and available for use.".

(2) Subsection (b) is amended—

(A) by inserting "and for any resulting economic loss", immediately after ", or both," in the matter preceding paragraph (1); and

(B) by striking out paragraph (2)(B) and inserting in lieu thereof the following:

"(B) is attributable to any other vessel, whether or not such vessel is a vessel of the United States.

For purposes of subparagraph (B), there shall be a rebuttable presumption that any damage, loss, or destruction of fishing gear is attributable to another vessel.".

(3) Subsection (c) is amended by inserting "and resulting economic loss" immediately after "destruction" in the matter appearing immediately before paragraph (1).

(4) Subsection (d) is amended—

(A) by inserting ", and resulting economic loss," immediately after destruction in paragraph (1); and

Mr. JACKSON. Mr. President, in May of this year, I stood before the Senate to express my sincere gratitude to Senator MAGNUSON for his skillful efforts to formulate legislation that comprehensively addressed the problems brought to the fisheries of the Pacific Northwest by a series of Federal court decisions. The Senate passed this bill which I was pleased to help develop and to cosponsor. The House of Representatives has passed a significantly different bill and it is Senator MAGNUSON's perseverance that brings this compromise before us for a vote. It is a compromise that meets the requirements of our resource and that meets the concerns of our House colleagues.

We have worked very hard with local management agencies to develop a mechanism that will ensure the best coordination between Federal, State, and tribal jurisdictions. This management system will allow us to enhance the salmon and steelhead stocks so that all the fishermen in the Northwest and in Washington State will have a sufficiently increased harvest. As a result, the bill is supported by virtually all the users in my State—by the sportsmen, by the non-Indian commercial fishermen, by the tribal fishermen. This is the first time a consensus in the region has been truly achieved regarding this bill. It is a tremendous step toward resolving our resource problems and toward bringing the various managers of the fishery together in a comprehensive, coordinated management system.

In 1974, a Federal district court interpreted the treaties with the Indian tribes in western Washington to allow them up to one-half of our salmon and steelhead resources. As a result, our non-Indian commercial and sport fisheries were faced with a severe cutback in its available harvest. The problem of declining harvest shares has been compounded by the destruction of the habitat, fisheries mismanagement and other factors. This legislation will help us resolve these difficulties.

First, as I stated, the bill establishes a commission of knowledgeable individuals who must, within a limited time, develop a plan for the proper management of our resources.

Second, with this plan approved, the management structure must develop a program to enhance our decimated stocks of salmon and steelhead to ensure that all the users of our resource benefit from the investment.

Third, while we are building up our salmon and steelhead stocks, we will be bringing our non-Indian commercial fisheries to a manageable size through a fleet adjustment program. Only then can we restore economic viability to the commercial fisheries.

Mr. President, we have a good bill before us. It is because of the diligent work of Senator MAGNUSON, I am proud to join him in support of the measure and urge my colleagues to vote for its passage.

Mr. HOLLINGS. Mr. President, I support S. 2163, and believe that a good compromise has been worked out on this bill between the House and the Senate. On May 5 when the Senate first acted on this piece of legislation, I rose to address some of the jurisdictional issues that affected the Department of the Interior and the Department of Commerce. The current compromise upholds this thinking. Unfortunately, too much time is wasted in Washington in internecine warfare and bureaucratic entanglements over jurisdiction. This has been the case here.

Under the Fishery Conservation and Management Act, the so-called 200-mile bill, fisheries management is specifically the job of the National Oceanic and Atmospheric Administration within the Department of Commerce. It is not the job of the Fish and Wildlife Service, or any other office in the Department of Interior. This bill adheres to that concept, and clarifies the responsibilities between the two departments. Under this legislation, the Fish and Wildlife Service will approve title II enhancement plans. The National Marine Fisheries Service in NOAA is responsible for fishery management and the buy-back provisions. In addition, Commerce will have to agree on the parts of the enhancement plans that have the most important management implications. This is in keeping with what has been established, and is working, under the 200-mile bill.

This should solve some of the problems that have continued to occur in the Pacific Northwest between Interior

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

December 23, 1980

Mr. Clement Tillion
Chairman, North Pacific Fishery
Management Council
c/o Fishermen and Boat Charters
Halibut Cove, Alaska 99603

Dear Clem,

Our Council recently established an ad hoc Policy Review Committee to examine in detail a number of issues that have been previously discussed in Congressional oversight hearings and, more recently, at the Chairmen and Executive Directors' meeting in San Juan. These include NEPA, E.O. 12044, FACA, compensation of SSC members, confidentiality of data, and the respective roles of the Councils and the National Marine Fisheries Service in the plan development and approval process.

We believe that the time is ripe to propose substantial amendments to the FCMA that will clarify many issues which, whether deliberately or unavoidably, have become befogged. Our initial contacts with congressional staff indicate a willingness on the part of Members to see these issues addressed early in the new session of Congress.

In reviewing the testimony and other past records of comments by the various Councils, it is clear to me that there are large areas of agreement on what the problems are -- and perhaps on what the solutions might be as well. It seems absolutely essential to me that, to be most effective in our efforts, the Councils must present a unanimous position on whatever we put forward.

Our Policy Review Committee will address each issue by a review of whatever relevant background materials are available, a draft of specific amendment language to correct the perceived problem and a discussion and revision of the draft amendment language. I am asking Doug Marshall to forward to your Executive Director, the packages of background materials as they are assembled. This will save your Council staff the trouble of doing the same work needlessly. If your review of the materials shows we have overlooked or omitted an important element or document I would ask that Jim call Doug and let him know as quickly possible.

Once our draft amendments are revised and suitable to be seen outside our own house so-to-speak, we will share them with all the Councils. We would then like to have them discussed by a group representing all eight Councils. The appropriate makeup would probably be the Executive Directors, and either the Chairmen or one Council member selected by each Chairman to speak on behalf of his Council.

That meeting might take a couple of working days (or perhaps only one) and I would hope that all the Councils would then give a blanket endorsement to the entire package and support it actively with their various Congressional representatives.

Please let me know whether your Council is willing to join in this task. We are prepared to do a large part of the necessary work and I believe much of the initial exchange of views and suggestions can be done by mail and by phone. We look forward to your participation and assistance in this project for our mutual benefit.

Sincerely,

Doug Marshall

for: Robert A. Jones
Chairman

RAJ/DGM/p

NEW ENGLAND COUNCIL ACTIVITIES

In a series of policy reviews beginning in December 1980, the New England Fishery Management Council has compiled and distributed to the other Councils reference materials on problem areas needing discussion and solution: (1) SSC compensation; (2) FACA applicability; (3) confidentiality of data and Council access; (4) E.O. 12291; (5) Regulatory Flexibility Act; (6) NEPA; (7) Council and Secretarial roles under MFCMA; and (8) joint plan preparation and lead council designation.

The New England Council has drafted amendments covering the first six topics above (Items f-k). These proposals are summarized below.

SSC Compensation (Item f)

Section 302(g)(1) would be amended so that a Council may compensate non-government SSC members at the GS-18 rate.

FACA Applicability (Item g)

Section 302 would be amended by adding a new subsection (i) which would release Councils from FACA but transfer certain FACA requirements to MFCMA. The Council would not need a charter but would still be required to hold open meetings, give timely notice of meetings, insure public opportunity to testify, make reports publicly available, and maintain meeting minutes.

Confidentiality of Data (Item h)

Section 303(d) would be amended to require the Secretary to furnish raw data to the Councils, and the Councils would be required to take appropriate steps to assure that the confidentiality of statistics is preserved. Raw data, but not aggregated data, would be exempted from the Freedom of Information Act and could be released only by court order. Section 311(b) would have a new subsection (4) disallowing any authorization to seize logbooks and similar records.

E.O. 12291 (Item i)

Section 303 would be amended to not allow the Secretary to classify any plan, amendment or set of regulations as major rules under E.O. 12291. FMP's and amendments would require descriptions of major alternative solutions to problems and require that the Council choose a preferred option. A description of potential costs and adverse effects would be required also.

Regulatory Flexibility Act (Item j)

Section 302 would be amended so that Councils are not agencies for the purpose of the RFA, and no regulatory flexibilty analysis would be required for FMP's, amendments or regulations.

NEPA (Item k)

Section 302 would be amended so that FMP's, amendments or regulations shall not constitute major federal actions significantly affecting the quality of the human environment for the purposes of NEPA.

Proposed FCMA Amendment Relating to Compensation of Scientific and Statistical Committee Members

The Fishery Conservation and Management Act ("FCMA") provides that members of the scientific and statistical committees established in accordance with Sec. 302(g)(1) of FCMA shall be paid for "actual expenses" [Sec. 302(f)(7)(d)], but it provides for no other compensation. Many council members believe that this is a mistake because in most instances members of the S & S Committee are not compensated by any other organization for time spent on committee duties. Therefore, participation on the S & S Committee constitutes a financial burden or loss of vacation time to many of them. In the interest of equitability and to enable the councils to obtain and retain the best available talent and expertise on the S & S Committees, this Council recommends that the FCMA should be amended to provide for the compensation of S & S Committee members at the same rate as council members.

To accomplish this the Council proposes the following amendment:

( ) Section 302(g)(1) of the Magnuson Act is amended by adding the following sentence:

"The members of each scientific and statistical committee, who are not employed by the Federal Government or any state or local government may at the discretion of the Councils receive compensation at the daily rate for GS-18 of the General Schedule for attendance at duly called meetings of such committee or for performance of such other duties as may be specifically prescribed by the Councils from time to time."

Because the various councils utilize their S & S Committees differently, the matter of compensating members for attending meetings should be elective rather than mandatory. For example, it appears from testimony presented during oversight hearings on the FCMA held by the House Subcommittee on Fisheries that some councils convene meetings of their S & S Committees with greater frequency than others. Ben Hardesty testified on July 12, 1979 that to date the South Atlantic Council "has placed limited demands on its Scientific and Statistical Committee," while Mr. Mehos who represented the Gulf Council spoke of "the ever increasing workload" of that council's S & S Committee. According to its Executive Director, Douglas Marshall, the New England Council's S & S Committee is required to meet eleven times a year, and in addition, one or more S & S Committee members are usually requested to attend meetings of the Council or its Committees.

Questions have arisen from time to time as to what constitutes employment by a state or local government. By way of illustration it has not always been clear whether a scientist employed by a state supported institution was or was not eligible to be compensated. In practice such questions are determined on a case by case basis and usually depend upon the terms of the individual's employment contract. Because of the wide variety of individual circumstances and because the councils have demonstrated an ability to deal with such questions on an ad hoc basis, it was felt unnecessary and probably counter productive to attempt to address them by legislative amendment.

PROPOSED FCMA AMENDMENT RELATING TO FACA

The following is a draft of an amendment to the Fishery Conservation and Management Act of 1976 (FCMA) to be submitted to the House Subcommittee on Fisheries and Wildlife Conservation and the Environment for adoption. The purpose of the amendment is to incorporate with FCMA those features of the Federal Advisory Committee Act, 5 USC App. I (hereinafter referred to as "FACA") which the Council feels appropriate and necessary and to free the councils, the scientific and statistical committees and advisory panels from the need to comply with those provisions of FACA which, in the opinion of the Council, are inappropriate, redundant, wasteful or unduly burdensome. The Council proposes the following amendment:

( ) Section 302 of the Fishery Conservation and Management Act of 1976 (16 USC 1852) is amended by adding the following subsection 302(i):

"(i) PROCEDURES - The primary function of the Councils is to develop fishery management policy for their respective regions. The Councils are not advisory committees and the provisions of the Federal Advisory Committee Act (5 USC App. I) shall not apply to the Councils or the scientific and statistical committees established under section 302(g)(1), or any advisory panel established under section 302(g)(2). In order to assure public participation in its activities, each Council shall adopt the following procedures:

(1) Each Council shall establish its own procedures with respect to the purposes, duties and composition of its

subcommittees, scientific and statistical committee and its advisory panels.

(2) Each Council meeting and each meeting of any scientific and statistical committee and each advisory panel shall be open to the public, except as provided in subsection 8.

(3) Timely notice of each meeting of a Council shall be published in the Federal Register except that Councils may meet without such notice in the event that the chairman and the vice chairman, or in the absence of one of them, the executive director determines that an emergency exists. If such a determination is made, the public shall be given at least 15 days notice by publication in the newspapers of the major ports of the Council's region and by such other means as are prescribed under subsection (4).

(4) Each Council shall prescribe practices and procedures for other types of public notice to insure that all interested persons are notified of each Council meeting and each meeting of a standing subcommittee of the Council, the scientific and statistical committee or an advisory panel.

(5) Interested persons shall be permitted to attend, appear before or file statements with the Council, any standing subcommittee, the scientific and statistical committee or any advisory panel of the Council, except as provided in subsection 8.

(6) Subject to section 552(b) of Title 5 and guidelines concerning the confidentiality of data prescribed by the Secretary or by the Councils under section 303(d), the records, reports, transcript minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available

to or prepared for or by each Council shall be available for public inspection and copying at a single location in the offices of the Council.

(7) Detailed minutes of each meeting of each Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council.

(8) Subsections (2) and (5) of this section shall not apply to any portion of a Council meeting that is closed to the public in accordance with this subsection. Subject to receipt of the objections thereto in writing by the Secretary stating the reasons for such objections, a Council may close all or any portion of a meeting to the public upon 15 days notice to the Secretary. Such notice shall be in writing and shall set forth the time and place of the meeting and the reason for closure. The Secretary may not object to any meeting closed to the public on the grounds that such meeting will deal with one or more matters listed in section 552(b) of Title 5 United States Code."

General Comment and Section-by-Section Review:

The purpose of the amendment as a whole is to remove the councils and their subcommittees from some of the more burdensome and inappropriate requirements of FACA. However, the amendment was prepared under the assumption that Congress will want some assurance that the councils will live up to the "sunshine" aspects of FACA, including notice to interested persons, public attendance and participation and access to transcripts, minutes, agenda, studies, reports and the like. On the other hand, a major objective

of FACA was to assert a measure of control over the proliferation of advisory committees established by the Executive branch of the government; whereas the councils were created by Act of Congress with powers and limitations written into the statute.

Moreover, the language of FACA makes it clear that it was contemplated that there might be advisory committees (or committees in some respects like advisory committees) that would not be subject to FACA. For example, section 4(a) of FACA states:

> "The provisions of this Act or of any rule, order or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise." (Emphasis added.) In addition, in the opening section dealing with findings and purposes it is stated that, "The function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency or officer involved." Section 9 goes on to state the same principle more forcefully. It provides that, "unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or and officer of the Federal Government." (Emphasis added.) It has been pointed out many times that section 302 of FCMA endows the councils with responsibilities that go beyond mere advisory status.

Section 1. The councils have been in operation since 1976, and their functions and procedures are fixed and well understood. Requiring them to file charters serves no useful purpose. Nor is it considered appropriate or necessary for Council procedures with respect to the governance of subcommittees, S & S committees and advisory panels to be dictated by the Secretary. The purpose of requiring advisory committees to file a charter that expires after a stated period of time is to serve as a periodic reminder to agencies to review the desirability of continuing the existence of advisory committees. Since the councils were created by statute and will continue to exist until such statute is amended or repealed, that function is not served by FACA's charter requirement. Requiring charters of the councils, their S & S committees and advisory panels, in fact serves no useful purpose and constitutes in the aggregate a significant waste of staff time. It is also a restraint of sorts on the councils' ability to create and dissolve committees as needs dictate.

Section 2. This section provides that meetings of the council, the S & S committee and the advisory panels shall be open to the public.

Section 3. This section requires that notice of the meetings of the councils -- but not meetings of the S & S committees or of the advisory panels -- shall be published in the Federal Register. The reason for incorporating this FACA requirement is that publication in the Federal Register is presumably good and sufficient notice for all purposes precluding any claim based upon failure to give adequate notice. As the function of the S & S committee and the advisory panels is merely to advise the Council,

however, failure to receive notice and to attend and participate in their meetings will not result in losing the opportunity to be heard on any subject that reaches the Council for action; therefore, there is no basis for creating or recognizing a public right of notice to such meetings. Moreover, the requirement that advisory panels publish notice of meetings in the Federal Register has proved in practice to constitute a significant impediment to obtaining the input of interested persons.

As stated by William G. Gordon, Deputy Assistant Administrator of the National Marine Fisheries Service, in his testimony during oversign hearings on the Fisheries Conservation and Management Act held by the House Subcommittee on July 10, 1979, "compliance with FACA advance-notice requirements may prevent the councils from getting advice from its advisory groups within the 45-day period allowed by the FCMA." In such cases the FACA-related advance-notice requirements could work to preclude, rather than enhance, useful public participation.

This section would also authorize emergency meetings of the councils held on fifteen days notice without publication in the Federal Register.

Section 4. The purpose of this section is to authorize the councils to develop the most appropriate means of notifying interested persons of meetings of advisory panels, etc. The language is borrowed from section 302(f)(6) of FCMA, and the underlying rationale is that the councils are in a better position to decide what is most appropriate for their respective regions than the Secretary is.

Section 5. This section incorporates FACA section 10(a)(3) and reflects the current practice of the Council.

Section 6. This section incorporates section 10(b) of FACA with the addition of a caveat concerning "confidentiality" of certain data and is intended to reflect the current practice of the councils.

Section 7. This section incorporates section 10(c) of FACA except for the requirement that the chairman certify the accuracy of all minutes. The omission is justified on the grounds that in practice minutes of a council's meetings are approved by vote of the council.

Section 8. This section is intended to cut away the 60-day notice requirements involved in setting up a closed meeting by permitting the councils to hold a closed meeting upon 15 days written notice to the Secretary. The Secretary may within 15 days refuse to allow a council to hold a closed meeting for any purpose other than to discuss matters listed in section 5 USC 552(b).

The councils must meet from time to time to discuss proprietary information, administrative and personal matters and internal policies. In practice some councils have evaded the notice requirement pertaining to such meetings by filing pro forma notice periodically. However, many council members are frustrated by their inability to call a closed meeting promptly to deal with matters that should not be discussed publicly.

The proposed amendment also deliberately omits subsections (e) and (f) of FACA section 10 from incorporation. Subsection 10(e) requires the presence of a designated federal officer at all meetings of advisory committees. Subsection 10(f) requires the prior approval of a federal officer to both the call and the agenda of an advisory committee. Both these provisions appear inconsistent with the councils' status in that they grant a measure of control over, or potential restraint upon, council initiative. It is well settled that the power to give authorization to an activity implies the power to withhold such authorization. By contrast the entire thrust of sections 302 and 303 is to require the councils to act vigorously to initiate, monitor and amend fishery management programs. There is no language in FCMA which can be construed to indicate that Congress intended to inhibit the councils from meeting as frequently as needed or to limit the scope of their deliberations. To the contrary, section 303 can and should be interpreted as a directive to the councils to consider all matters relevant to a fishery management plan. The language is broadly inclusive rather than narrowly exclusive as is the language of section 302(h).

NEFMC

Draft: 2/10/81

Proposed FCMA Amendment Relating to Confidentiality of Data

The following is intended as a draft of an amendment to the Fishery Conservation and Management Act of 1976 (FCMA). Such an amendment would resolve certain questions concerning who should have access to raw data -- as opposed to so-called "aggregated data" -- submitted to the councils or to the Secretary by fishermen, processors and other interested persons.

The controlling section of the FCMA is section 303(d) which states:

> "(d) CONFIDENTIALITY OF STATISTICS -- Any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) shall be confidential and shall not be disclosed except when required under court order. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics."

The Council proposes the following amendment:

( ) by striking out subsection 303(d) and substituting the following:

> "(d) CONFIDENTIALITY OF STATISTICS -- Any statistics submitted to the Councils by any person with a written request that such statistics be regarded as confidential and any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) or any other data gathering program related to

> fishery management shall not be disclosed, except when required by court order. Each Council shall establish its own procedures to preserve such confidentiality with respect to such confidential data submitted to it; such procedures shall be designed to establish (i) the need of any Council member or employee for access to such statistics and (ii) that no conflict of interest will result from the disclosure of such statistics to such Council member or employee. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of statistics submitted to him, except that the Secretary must disclose such statistics to the Council or Councils responsible for, or having a demonstrable interest in, the plan pursuant to which they were obtained or any plan to which they are relevant. The Secretary or any Council may release or make public any statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics."

In operation, problems occur when either council employees or members of the Council request access to raw data. Many council members believe that council staff should have access to raw data, but opinion is divided as to whether council members should have equal access, because this creates the possibility that a council member could use such data in his personal business to the detriment of the person supplying it. Just the perception that this could happen is damaging to the Councils' credibility, and tends to make the data submitted to the Secretary and to the Councils less valuable.

Some councils are beginning to find confidential data voluntarily submitted by interested persons of increasing importance to their understanding of the dynamics of certain fisheries. It is important in order to encourage the flow of such voluntary data to take every practical step to protect its confidentiality. In addition, the Secretary has from time to time refused to disclose raw data collected over a period of time prior to the enactment of the FCMA -- even though the relevance and importance of such data to the formulation of a management plan is obvious.

On the other hand, raw data is of no conceivable use to most council members in their individual capacities as state employees, conservationists or even fishermen and processors as the case may be. Therefore, denying access to all council members to all raw data may be unnecessary and counter-productive. The middle ground would be to permit the councils to establish their own procedure designed to deny access to council members having a clear conflict of interest. Presumably such procedure would involve a two-part test establishing first "a need to know" for council members requesting access to such data and secondly a determination that no conflict or potential conflict exists.

According to a memorandum dated June 13, 1977 prepared for Robert F. Scott, Acting Assistant Director for Scientific and Technical Services by Robert G. Hayes, Staff Attorney, NOAA General Council's Office, in which Hayes reviewed the Freedom of Information Act, the Federal Reports Act (44 USC 3501 et seq.) and other pertinent statutes, all such "statues can be construed to allow for the disclosure of non-aggregated fishery data to the councils." Moreover, according to Hayes, "The Councils are an integral part of the process of developing these plans. As such, it could be argued that without the data, the

Councils may in some instances be severely limited in the performance of their function. This is a result which Congress could not have intended given the overrriding policy of the FCMA. Therefore, the policy of the Act, that the plans will be based on the best scientific evidence available, implicitly authorizes disclosure of the information when necessary to allow a Council to prepare or assess an FMP."

The intended result of the suggested amendment is to require the Secretary to make raw data available to the councils while requiring the councils to take appropriate steps to assure that the confidentiality of such statistics is preserved. At the same time, the amended provision is meant to exempt raw data, but not aggregated data, from the Freedom of Information Act. Raw data is intended to be treated either under 552(b)(3) as specifically exempted by this amendment or as trade secrets under 552(b)(4).

Current practice with respect to statistics submitted under a plan is governed by regulations promulgated by NOAA as Interim Final Regulations in 1979 (See 50 CFR Part 603.5) which restrict the disclosure of confidential statistics to NOAA and NMFS personnel, apparently reflecting a concern that "the integrity of the statistical collection process" would be threatened by "unavoidable appearance of a conflict of interest that disclosure of raw statistics directly to the Council will create" (memorandum of William G. Gordon to Terry Leitzell dated March 7, 1978).

The question of whether in reality the use by other agencies of such data can be controlled by statute is troublesome. The disclosure of confidential

statistics is supposedly prohibited by law. In fact it is a criminal act for a federal employee to disclose "in any manner or to any extent not authorized by law any information coming to him in the course of his employment ... or by reason of any ... report ... filed with (his) department ... which information concerns or relates to the trade secrets, processes, operations ... confidential statistical data, amount or source of any income, profits, losses or expenditures of any person ..." The intent of the amendment is to declare statistical data submitted either to the Secretary pursuant to an FMP or the councils as confidential statistical data protected by the statute quoted hereinabove. But the amendment relates only to statistical information in the hands of the Secretary or the councils and therefore would not appear to cover logbooks or other records still in the possession of the person compiling them. For this reason the Council deems it desirable to specifically protect logbooks and other records by amending Sec. 311(b) as follows:

( ) by adding the following subsection to Sec. 311(b).

> "(4) Nothing herein shall authorize the seizure of any logbooks or other records maintained or compiled in compliance with any requirement under Sec. 303(a)(5) of this Act on forms provided by the Secretary or the use of such logbooks or other records as evidence in any proceeding hereunder. All such forms shall prominently display the following legend: "the information submitted herein shall be treated as confidential under Sec. 303(d) of the Fishery Conservation and Management Act of 1976 and any unauthorized disclosure thereof shall be made pursuant to the penalties of the Federal Reports Act (44 USC 3501) and the Privacy Act (18 USC 1905)."

2/17/81

Proposed Amendment to the Magnuson Act Relating to Executive Order 12291

The following is intended as a draft of an amendment to the Magnuson Fishery Conservation Act (the "Magnuson Act") which would have the effect of relieving the fishery management councils of compliance with regulations implementing Executive Order 12291 entitled "Federal Regulations."

To accomplish this the Council proposes the following amendments to section 303 of the Magnuson Act:

( ) by adding the following subsection 303(a)(5) and (6):

"(5) contain a description of the major alternative ways of dealing with the problems considered; specify the alternative or alternatives preferred by the Council and the reason for choosing them over the others; and

(6) contain a description of the potential costs of the fishery management plan, including any adverse effects upon the participants in the fishery to which such plan relates that cannot be quantified in monetary terms, and the identification of those likely to bear the costs."

( ) by adding the following subsection 303( ).

"( ) FEDERAL REGULATION - The Secretary shall not classify any fishery management plans or any amendment to any fishery management plan or any regulations promulgated to implement such plans or amendments as a "major rule" for the purposes of Executive Order 12291."

Rationale

The councils are policy-making bodies that recommend regulatory measures for the purpose of carrying out a specific management strategy. Fishery management plans (FMPs) relate to certain activities defined in terms of a given fishery resource and therefore affect only a segment of the fishing industry. By contrast, Executive Order 12291 was aimed at regulations expected to have major economic consequences for the general economy, for individual industries, geographic regions or levels of government. It contains the following guidance as to the type of regulations which should be considered "major rules": "(a) any regulation that is likely to result in an annual effect on the economy of $100 million or more; (b) a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions; or significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets."

Few fisheries have an economic value of $100 million, and because fishermen and vessels move more or less freely from one fishery to another, no fishery should be considered an individual industry. Under the provisions of the Magnuson Act, management plans are prepared by regional management councils. Representatives of the indultry, federal agencies and the states likely to be affected by regulations implementing the plan sit on the councils and participate in the preparation of the plans. Advisory panels composed of industry members (dealers, processors and fishermen) usually play a vital role in contributing to a council's understanding of the scope and the dynamics of a given fishery and in suggesting appropriate management strategies. Finally,

council meetings are open to the public with interested persons allowed the opportunity to participate freely in council deliberations; and public meetings in principal port cities and towns likely to be affected by the plan are held at one more stage of the plan development process. Thus, there is in effect a significant degree of self-regulation involved in the fishery management plan development process which makes it a unique form of rule-making.

Representatives of state and federal agencies, interest groups and the general public debate alternative management strategies and negotiate the distribution of the burden of the preferred option. The Department of Commerce represented by the Regional Director of the National Marine Fisheries Service is present and participates in every step of the plan development process. Much of the economic and biological material upon which a plan is based is developed and provided by the Department of Commerce through the staffs of the NMFS Regional Director or the NMFS Regional Center. To require that decisions arrived at by this process by reviewed at higher levels of government pursuant to E.O. 12291 after a draft plan has been prepared is redundant, time consuming and unlikely to yield any meaningful benefit. To the contrary, as was emphasized by industry representatives at the time that the Magnuson Act was drafted, in order to be effective, any management system must be responsive to the changing circumstances of the fisheries. Each delay in the implementation process diminishes the effectiveness of the fishery management councils.

The council system, a unique experiment in participatory regulation, was devised to provide flexibility and responsiveness in fishery management. This element of self regulation or participatory policy-making distinguishes the

plan development process mandated by the Magnuson Act from any other form of federal rule-making to which E.O. 12291 is directed. Under this procedure the implicit objectives of E.O. 12291 relating to assuring that there is a need for regulation, participation and comment by government agencies and the public, consideration of alternatives, and anticipation of compliance costs and other burdens on the public are fully met.

The council's' experience with the plan development process under the Magnuson Act has been that it has become attenuated and inflexible as a result of additional requirements imposed under other statutes. Compliance with E.O. 12291 if it is interpreted to mean that management plans or amendments of management plans are "major rules" which must be submitted to the Director of the Office of Management of the Budget could add 200 days to the already protracted compliance procedures devised by the Department of Commerce thereby further reducing the ability of the councils to carry out their mandated tasks.

NEFMC

Draft 3/31/81

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Proposed FCMA Amendment to Magnuson Act Relating to the Regulatory Flexibility Act

The following is intended as a draft of an amendment to the Magnuson Fishery Conservation and Management Act (the "Magnuson Act") which would exempt activities of the regional fishery management councils from the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq., PL 96-354).

To accomplish this, the Council proposes the following amendment to section 302 of the Magnuson Act.

( ) by adding the following subsection 302(i)

"(i) REGULATORY FLEXIBILITY ANALYSIS - The Councils are not "agencies" for the purpose of the Regulatory Flexibility Act (5 U.S.C. 601), and a regulatory flexibility analysis shall not be required in connection with the preparation of a fishery management plan, the preparation of any amendment to a fishery management plan or the issuance of regulations implementing any management plan or any amendment to a fishery management plan."

Rationale

The regional fishery management councils created by the Magnuson Act are unique among federal policy-making bodies. They are comprised of representatives of state and federal regulatory agencies and representatives of principal interest groups that participate in the regulated activity. In effect, the impact of any regulatory policy expressed in the form of a fishery management plan is negotiated in the councils in public sessions by, on the one hand, the federal agencies involved in promulgating and enforcing the

regulations implementing such policy and, on the other, state and industry factions that will have to live with such regulations. The cost and enforceability of regulations are regularly debated in public session with all interested parties offering alternative measures which are given due consideration.

There is no foreseeable benefit to be derived by imposing a replication of this procedure at levels of government far removed from any immediate familiarity with the realities of the fishing industry or the resources upon which it depends. To the contrary, to the extent that compliance with the procedures developed to carry out the purpose of the Regulatory Flexibility Act - whatever form they ultimately take - will require more delays, and unproductive man hours of staff time. The plan development process, which is central to the effectiveness of the Magnuson Act, will be impaired and made less responsive to the needs of the fishing industry and the overriding and critical need to preserve the long-term productivity of fishery resources.

It is doubtful that the Congress had the councils in mind when it enacted the Regulatory Flexibility Act. According to the findings and purposes section of the Regulatory Flexibility Act the principal purpose of the Act was to free small businesses from the burden of compliance with regulatory schemes "designed for application to large scale entities." Such is not the case under the Magnuson Act.

While it is true that both fishing and fish processing operations tend to be small businesses, it is also true that very few large operations participate in any given fishery. Therefore, a situation is unlikely to occur under the Magnuson Act where a regulation designed for a "large scale entity" is applied to a small business resulting in an inequitable burden of

compliance. Nevertheless, it is nearly inevitable that the purpose of the Regulatory Flexibility Act will be interpreted by the federal bureaucracy to necessitate the analysis of all regulations for their impact upon small business. It is the position of this Council that because the participants in a fishery proposed for regulation under the Magnuson Act are afforded ample opportunity to participate in the development of the fishery management plan for that fishery from the outset such an analysis is unnecessary and inappropriate.

For these reasons the Council recommends that language be added to the Magnuson Act clearly removing the plan development process from the purview of the Regulatory Flexibility Act.

NEFMC

Draft 3/31/81

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Proposed Amendment to the Magnuson Act Relating to the National Environmental Policy Act

The following is intended as a discussion paper with respect to an amendment of the Magnuson Fishery Conservation and Management Act (the "Magnuson Act") for the purpose of clarifying the interaction of the Magnuson Act and The National Environmental Policy Act (42 U.S.C. 4341, as amended, hereinafter referred to as "NEPA"). Such an amendment would address problems created by the manner in which the NEPA process impacts upon the fishery management plan development process.

The Committee proposes the following amendment to section 302 of the Magnuson Act:

( ) by adding the following subsection 302(i):

> "(i) Subject to the provisions of section 313, neither the preparation of a fishery management plan, or any amendment to a fishery management plan or the issuance of regulations implementing a fishery management plan or any amendment to a fishery management plan shall constitute a "major federal action significantly affecting the quality of the human environment for the purposes of the National Environmental Policy Act (45 U.S.C. 4341)."

Rationale

Compliance with public hearing and other provisions of NEPA is a principal source of delays in the fishery management plan development process developed by the Department of Commerce, despite the fact that in many respects the statutory requirements of the Magnuson Act concerning fishery management plan

contents and development replicate the requirements of NEPA.. Specifically, in order to determine the optimum yield of a fishery, the councils must analyze its social and economic parameters as well as the ecological and biological aspects of the fishery resource which sustains it. Such an analysis forces the councils to consider in depth the socio-economic impacts of the plan upon resource users as well as the biological, or environmental, implications with respect to the resource. Moreover, the national standards set forth in Section 301(a) of the Magnuson Act require that plans avoid irreversible or long-term adverse effects to the resource and that resources be managed to provide the greatest overall benefit to the Nation on a continuing basis. Such analysis and determinations are made in open, public meetings with freely allowed criticism and comment by interested members of the general public. Alternative policies and management strategies are suggested by the public at council meetings and local hearings pursuant to the mandate of the Magnuson Act. The Council itself is comprised of members representing a broad spectrum of interest groups including commercial and recreational fishermen, conservationists and others as well as representatives of state and federal agencies charged with state, national and international fisheries regulation.

Taken together with the ample provision for public participation in the plan development process, the national standards make the Magnuson Act the functional equivalent of NEPA to the extent that further steps to comply with NEPA in the normal situation adds nothing in terms of protection to the human environment or the sound management of the resource. On the other hand, regulations requiring additional public hearings, comment periods, scoping meetings and the like draw out the time required to complete the preparation

of a fishery management plan to the point where the effectiveness of the management process is substantially impaired.

It has been the experience of the councils that the Environmental Protection Agency rarely comments upon the contents of fishery management plans. Because they usually contain badly needed conservation measures, fishery management plans have been found to enhance the environment rather than to threaten adverse impacts of any kind. Fishing technology and methodology are evolving very quickly in response to economic pressures with the result that when new gear is concentrated on any given fishery, stocks may be depleted very quickly. To be effective, the councils must be able to respond quickly to changing circumstances. Delays in implementing and modifying management measures imposed as a result of the necessity to comply with the provisions of NEPA and other federal statutes and orders impair the effectiveness of the councils and often result in poor management, harmful to both the human and the physical environment.

NEFMC

Draft 3/31/81

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WORKSHEET FOR NPFMC PROPOSED AMENDMENTS

1. Amend MFCMA so that it has authority over foreign processing operations (buying of raw fish, etc.) within state waters including internal waters. (suggested by Ron Skoog)

APR 21 1981

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

OFFICE OF THE ADMINISTRATOR

ACTION	ROUTE TO	INITIAL
	Exec. Dir.	
	Admin. Off.	
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	Staff Asst. 2	OA/C3x5:CEH
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	Sec./Bkkr.	
	Sec./Typist	

GULF OF MEXICO FISHERY MANAGEMENT COUNCIL
RECEIVED
APR 1 1981

Mr. Bobby G. O'Barr
Gulf of Mexico Fishery
Management Council
Lincoln Center, Suite 881
5401 W. Kennedy Boulevard
Tampa, Florida 33609

Dear Mr. O'Barr:

This is in response to your letter of March 9, 1981, to the Honorable Malcolm Baldrige, Secretary of Commerce, regarding the depiction of territorial sea limits on NOAA's National Ocean Survey nautical charts and the management authority of fisheries in Breton, Chandeleur, and Mississippi Sounds. The limits are shown on our charts as set forth by the Ad Hoc Committee on Delimitation of the United States Coastline and in conjunction with the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

The territorial sea and contiguous zone limits currently shown on National Ocean Survey nautical charts are shown in accordance with the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and approved by the Baseline Committee. Implementation of the Convention has been through the Ad Hoc Committee on Delimitation of the United States Coastline (more commonly referred to as the Baseline Committee). This Committee was established to provide an interagency forum to discuss and make decisions on all questions and issues relating to the delimitation of the coastline of the United States. Decisions by the Committee are considered final unless changed by a higher authority; i.e., the U.S. Congress or the Supreme Court. Represented on the Committee are those agencies of the Federal Government most directly concerned with implementation of United States policy with respect to the coastline: the Departments of Commerce, Interior, Justice, State, and Transportation.

Jurisdiction of the waters of Breton, Chandeleur, and Mississippi Sounds is currently in litigation [U.S. vs. Louisiana (Mississippi-Alabama Boundary Cases)]. The

jurisdictional situation in Louisiana, however, is being handled differently than that of Mississippi and Alabama, as noted on the enclosed copy taken from Notice to Mariners No. 1, 1981.

Mr. Donald Carr, the attorney at the Department of Justice who is handling the case, can be reached on 202-633-2750.

Sincerely,

James P. Walsh
Acting Administrator

Enclosure

cc:
Honorable William French Smith
Attorney General of the United States
Honorable Fob James
Governor of Alabama
Honorable David Treen
Governor of Louisiana
Honorable William Winter
Governor of Mississippi
Honorable Charles Graddick
Attorney General of Alabama
Honorable William J. Guste, Jr.
Attorney General of Louisiana
Honorable Bill Allian
Attorney General of Mississippi

(47) TERRITORIAL SEA BOUNDARY OFF COAST OF LOUISIANA.

The lines indicating the seaward boundary of the territorial sea on charts depicting waters off the coast of Louisiana do not necessarily coincide with the limit of the State's jurisdiction under the Submerged Lands Act, including fisheries regulation.

Notably, on Charts No. 11363 and 11373 the indicated line of the territorial sea is not the limit of the State's jurisdiction. In the area of Chandeleur and Breton Sounds, Louisiana's jurisdiction, including fisheries regulation, extends to all waters on its side of the Louisiana-Mississippi boundary and landward of a line beginning approximately at the center of Ship Island to the northernmost point on the Chandeleur Islands, following the low water line along the seaward shore of those islands, then to Grande Gosier Island, Breton Island, and finally to the mainland at Main Pass; and also all waters on the Louisiana side of the Mississippi-Louisiana boundary and within a belt 3 geographical miles seaward of the lines just described.

Charts 11351, 22nd Ed 1/20/80
11356, 20th Ed 1/26/80
11357, 20th Ed 1/19/80
11358, 29th Ed 8/9/80
11361,, 43rd Ed 8/9/80
11363, 20th Ed 1/12/80
11371, 22nd Ed 4/19/80
11373, 25th Ed 6/28/80

Supersedes N.M. 1(47)80)

(NOS, Rockville, MD; RS6265/80)

Magnuson Fishery Conservation and Management Act: Current Policy Issues

Peter A. Friedmann, Counsel
Committee on Commerce, Science and Transportation
United States Senate
Senator Bob Packwood, Chairman

Background Discussion Paper
for
Ocean and Coastal Law Symposium
University of Oregon School of Law
Eugene, Oregon
April 11, 1981

The Magnuson Fishery Conservation and Management Act (MFCMA) has come to be recognized as a much more complex and administratively difficult system than originally believed. A number of current policy options are identified and some advantages and disadvantages of each of them are discussed below.

Reduction or complete elimination of foreign fishing from the U.S. FCZ

The commonly discussed scenario of first the elimination from U.S. waters of foreign harvesters and then the cessation of all joint ventures until only a domestic fishery survives merits serious consideration. Essentially this is an economic question -- can the U.S. afford to fully utilize all the fisheries resources which have previously been harvested by other nations? This would require U.S. development of offshore processors for species such as hake and pollock where rapid product quality decline does not permit onshore processing. Different fisheries would require individual appraisal if we are to identify where greater benefits -- to the U.S. fishing industry, to the achievement of management goals for the FCZ, to the U.S. consumer, and to the U.S. economy in general -- might be derived from allowing a continued foreign harvest. The U.S. industry may be good at catching most species but, for others, it lacks expertise in processing and marketing. If the U.S. industry decides to move into these new fisheries, Congress might anticipate legislation to

make available additional sources of Federal assistance. The substantial subsidization of the U.S. fishing industry through the development financing required to achieve this goal may be politically difficult partly because such expenditures may not be readily perceived as a national priority. Joint ventures may be a promising long-term solution to this problem. These joint ventures could also help perpetuate one of the sources of lower-cost foreign imports which keep U.S. consumer prices from rising faster. In addition, the U.S. maintains an additional "tie" to nations fishing within our FCZ that could strengthen grounds for mutually beneficially action in spheres beyond fisheries.

For some species such as tanner crab, elimination of the foreign harvest in our FCZ will benefit U.S. harvesters since our domestic industry has the harvesting capacity and technology to utilize more of the resource. Foreign markets will readily accept any of the product which cannot be sold domestically, since other nations (primarily Japan) have few alternative sources for satisfying their demand for tanner crab. In this case, the cessation of a foreign harvest will expand a foreign export market for the U.S. catch.

Finally, any policy for managing foreign harvest will be complicated by the questions of incidental harvest or by-catch. Due to the behavior of fish and the interaction between certain fisheries, elimination of foreign allocations of one species could jeopardize large fisheries which take such restricted species incidentally as by-catch. For example, a restriction on the foreign allocation of butterfish off the East Coast might interfere with a continued efficient foreign harvest of squid since the butterfish is often taken incidental to squid.

The American Fisheries Promotion Act (AFPA) recently amended the MFCMA to link fishery export trade benefits or technology exchange to any U.S. decision to grant foreign fisheries allocations. This approach may prove self-defeating for fisheries -- and especially where a foreign presence provides benefits -- since nations may well avoid full cooperation where such actions might hasten their ouster from U.S. waters. Alternatively, agreements might be considered for fisheries data exchange, enforcement assistance, and research support in the U.S. zone which would provide benefits as well as reduce the necessity for NMFS expenditures in this area. A case could then be argued for restoration of budget items for fishing industry assistance and development funding if research and enforcement costs could be reduced in this manner.

Additional benefits could be obtained if such services could be received in lieu of permit fees. This might be a productive area to consider for amendment of the MFCMA. There exists a fair probability that the appropriation required in the AFPA, before collected foreign permit fees could be used for domestic fisheries loans, will most likely not be attainable in the current economic (budgetary) climate. If so, these foreign permit fee receipts will revert to the general fund and not directly benefit the fishing industry. If agreements for enforcement assistance, research, and data exchange (with provisions for U.S. scientists, agents, or observers to monitor) can be negotiated in lieu of permit fees, not only would such exchanges benefit the fishing industry directly, but perhaps a substantial portion of current appropriations to the NMFS for stock surveys and habitat research might be redirected to industry assistance in these times of economic stress.

Some sources counsel that foreign fisheries allocation decisions be removed entirely from the political realm. They would make these choices purely on economic criteria and possibly conduct auctions to determine to whom the allocations would go (to the nation willing to pay the most). This option forecloses some of the non-monetary exchange benefits suggested above, but might be tried experimentally in one or more selected fisheries.

The U.S. might well consider the relative merits of a much more selective policy in the allocation of foreign access to U.S. fisheries resources. Although a complete exclusion of foreign harvesters from the U.S. zone could stimulate some export markets for U.S. harvest and speed the biological recovery of certain FCZ fishery stocks, foreign access could be managed individually for selected fisheries so as to achieve benefits of comparable value to the U.S. industry. Such new benefits might be gained as Governing International Fisheries Agreements (GIFA's) are renegotiated and as revisions to the permit fee structure are considered which, if effected, would release some NMFS resources to focus more on industry assistance and development.

Foreign Fishing and the Law of the Sea

Can the United States wholly exclude foreign nationals from fishing within a United States exclusive economic zone (EEZ) without violating the Draft Convention on the Law of the Sea? (Informal Text) (Sept. 2, 1980).

It appears that where the United States has not developed the capacity to harvest the entire allowable catch, a total exclusion of foreign nationals from the EEZ could raise a serious question of compatibility with the proposed Treaty regime. In such a case, the Draft Convention mandates that

"the coastal State...shall, through agreements or other arrangements...give other States Access to the surplus of the allowable catch....[Art. 62 (2)]. Elsewhere, the Draft Convention provides that land-locked States and States with special geographical characteristics "shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region ...." [Arts. 69(1) and 70(1)].

The access rights of foreign nationals seem somewhat less clear, however, where a coastal State, such as the United States, approaches a point of being able to harvest the entire allowable catch. In such a situation, the Draft Convention requires coastal State cooperation through equitable arrangments to allow for participation in EEZ fisheries by land-locked States and States having special geographical characteristics [Arts. 69(3) and 70(4)]. But in further specifying that such participation is "as may be appropriate in the circumstances and on terms satisfactory to all parties" [Arts. 69(3) and 70(4)], the Draft Convention seems to dilute the force of the cooperative obligation of the coastal State.

The special consideration accorded by the Draft Convention to land-locked States and States having special geographic characteristics, in a situation where the coastal State approaches a point of harvesting the entire allowable catch, does not seem expressly to extend to other types of States. Presumably, access by these "other" States would be in accordance with existing bilateral agreements.

Optimum yield and the requirements for socio-economic data

It is questionable if increased socio-economic data would significantly improve or change the management of any U.S. fisheries. Once

the biological status of a fisheries stock is determined, many of the subsequent "socio-economic" decisions are "ad hoced" to conform to what is politic for any given region. This does not mean necessarily that bad decisions result, but it does produce decisions which often cannot be completely justified by existing factual data.

When carried too far, the collection and manipulation of data which do not directly affect policy decisions can become wasteful of resources and contribute to the growth of bureaucracy. A good case can be made for a closer look at the efficiency of the Fishery Management Plan (FMP) process and at NMFS appropriations for the type of research and data collection efforts sought in support of the MFCMA.

Marine recreational fisheries within the MFCMA

Marine recreational fisheries have not been a serious concern in the development of almost all Regional Fishery Management Council (RFMC) FMP's. In fact, it has been alleged that there is inadequate RFMC consideration of recreational fisheries management when commercial representation so completely dominates all the councils. Councils have, critics assert, tended to shrug off testimony from recreational advocates.

Marine recreational fisheries is one area where better socio-economic data could contribute significantly to improved or enlightened management. The economic value of marine recreational fishing is substantial and has been repeatedly underrated in comparison to commercial fishing. A 1975 survey disclosed that saltwater anglers spent almost $3.5 billion on marine recreational fishing that year. 1/ In this same

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1/ U.S. Fish and Wildlife Service. 1975 national survey of hunting, fishing and wildlife-associated recreation. Washington, 1977. p. 31.

year, the landed value of the entire U.S. commercial catch was $971 million. 2/

Clearly, such a valuable resource should be wisely managed and conserved with vigor comparable to that expended on our commercial fisheries.

Regulatory enforcement for domestic and foreign harvesters

There is a good case for some flexibility in the practical definition of what constitutes adequate enforcement, especially in the face of economic and budgetary constraints. The U.S. observer program on foreign vessels may be worth its current cost, but 100 percent coverage (as called for in the AFPA) is of questionable cost-effectiveness.

A potential exists for negotiation (under an MFCMA amendment provided for in the AFPA) for foreign assistance in conducting enforcement among foreign fleets in U.S. waters. This could be particularly effective where activities are concentrated, such as in the Bering Sea. Such a program might include foreign enforcement vessels with a small contingent of U.S. agents or observers. Other options might include such cost-effective means as stationing U.S. observers at foreign ports where harvest from the U.S. FCZ is off-loaded, as well as more extensive use of observation satellites to monitor foreign ship locations and movements in U.S. waters.

2/ National Marine Fisheries Service. Fisheries of the United States, 1975. Washington, 1976. p. 13.

Regional Fishery Management Council relationship to NMFS

Fishery Management Plans (FMP's) have rapidly evolved until now they are extremely long and complex -- their intent is good but the effort now focused on coping with the mechanics of the FMP process are significant. Related to this, there has been little prioritization by RFMC's of scarce resources through selective decisions of which FMP's to develop. The 300-day NEPA cycle has evoked notable reportage of personal and professional frustration at all levels of industry and management for what are generally perceived to be small gains. The relative weight of these benefits causes serious question as to whether the animosity toward the Federal bureaucracy of most connected with the RFMC's and the fishing industry is too high a price. A reassessment may be timely here.

The FMP process could well benefit from a reassessment and a possible waiver of the National Environmental Policy Act (NEPA) and Administrative Procedures Act (APA) as they apply to the MFCMA might be considered. 3/ Since the MFCMA is primarily a conservation mechanism, consideration might be given to giving a blanket waiver from NEPA and APA to all fishery management plans which remain to be developed as well as to periodic FMP amendments. This could be accomplished either administratively within the Department of Commerce (NMFS) or legislatively (perhaps when the MFCMA is considered for reauthorization). This would smooth the process of FMP development remarkably and allow flexibility

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3/ A NMFS memorandum, entitled "Increasing flexibility in fishery management under the Magnuson Fishery Conservation and Management Act", on this subject is attached as Appendix A.

to move quickly with plan amendments when the resource requires. This is one area where a more cost-effective budgeting of time and personnel resources could result in a large savings. The resources released upon such action could be more productively directed to assist the further development of the industry. Those who might argue for the retention of NEPA and APA procedures would cite the guarantee of enhanced opportunities for representatives of the fishing industry and other interested parties to comment on FMP's and the additional check which the NEPA procedures allow concerning the environmental soundness of all actions contemplated.

Increasingly viable for consideration is the option of decreasing or eliminating the Federal role in marine fisheries management and returning much of this responsibility to the States. In light of the draft Law of the Sea (LOS) Treaty provision for extension of territorial sea jurisdiction to 12 miles (and possible U.S. unilateral action in this area without a LOS Treaty), individual states might have ample justification for assuming the management of all fisheries within 12 miles of their coasts. With the major exception of the Bering Sea shelf fisheries, almost all U.S. domestic fisheries are conducted within 12 miles of our coasts. Thus, with an extension of state fisheries jurisdiction to 12 miles, the Federal role in domestic fisheries management would shrink dramatically.

An extension of this scenario might give RFMC's a role in the coordination of management in offshore areas with inshore state regimes. However, states (controlling the majority of the resource) could essentially direct management policy. Councils might, in turn, delegate

responsibility to the individual States for implementation of FMP's in offshore areas. Thus, we could be on the verge of a major reshuffling of fishery management roles and responsibilities.

The case against such a retreat from Federal authority centers on the positive power of continued Federal coordination of fisheries management in waters offshore of states which often compete and conflict in management philosophy and practice.

Discrimination by a Regional Fishery Management Council

Allegations have been made that fishermen from the States of Oregon and Washington are being excluded from lucrative fishery areas by virtue of access restrictions imposed by the North Pacific Fishery Management Council. Constitutionally, such allegations, if proved to be discriminatory and arbitrary, might be deemed a denial of equal protection of the law, cognizable under the Due Process Clause of the Fifth Amendment, Bolling v. Sharpe, 347 U.S. 497 (1954). It would not seem necessary, however, to address the allegations in constitutional terms, inasmuch as the FCMA itself, in establishing the various regional fishery management councils, mandates nondiscriminatory treatment of residents of different States. Thus, section 301 (a)(4) of the Act provides that --

> Any fishery management plan prepared and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:
>
> . . .
>
> (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. 16 U.S.C. 1851(a)(4) (1976).

Economics and the recovery of management costs from permit fees

U.S. permit fees for foreign harvesters are generally recognized as lower than those charged by many other nations for access to their zones. The NMFS acknowledges that a thorough study of this subject has not been made to accurately define the range of permit charges levied by other nations. This issue is complicated by the wide variety of fee systems in force and the considerable difficulty in establishing values for services or in-kind exchanges which are part of some fee agreements (for example, training in fisheries technology given to nationals of some African nations in exchange for Soviet access to, and harvest from, their zones of extended jurisdiction). If someone were to conduct such a study, we might better be able to determine to what extent increased fees could be imposed without pricing a nation out of our waters (and thus recovering no revenue to partially pay for management costs). Currently, the U.S. has some leverage for increased fee collection since it generally costs less in permit fees to fish in U.S. waters than in those of many other nations.

The total cost of U.S. management of fisheries resources in the FCZ has been estimated to range between $130 and $150 million per year. 4/ The U.S. anticipates anywhere from $24 to possibly $27 million in collected permit and poundage fees for calendar year 1981. 5/ Thus, from 16 to 21 percent of the costs of FCZ management may be recovered this year from foreign fees. Fee receipts (reconciled for refunds made) have risen steadily since 1977, when approximately $7 million was collected, through 1980 when an estimated $12 to 14 million was received (calculated to remain after all refunds have been processed). 6/ The major increase in 1981 is attributable, in part, to the revised fee structure prescribed by the AFPA. The NMFS has calculated the preliminary foreign share of management costs at approximately 40 percent. 7/

The fee revisions directed by the AFPA have caused considerable concern within the foreign fishing industry. In the first instance, there have been strenuous objections to the provisions which would place the collected permit fee receipts in the Fisheries Loan Fund for use in assisting the U.S. fishing industry. Foreign critics point out that this kind of assistance is one of the forms of subsidy which the U.S. industry has repeatedly decried wherever it was found to exist in competing nations. Moreover, they resent being forced to provide this

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4/ Denton R. Moore, Chief, Permits and Regulations Division, National Marine Fisheries Service.

5/ John Kelly, Permits and Regulations Division, National Marine Fisheries Service.

6/ Ibid.

7/ Denton R. Moore, Chief, Permits and Regulations Division, as above.

subsidy in a rather direct form. Perhaps fears over this potential subsidy are excessive however, as it appears unlikely that the required appropriation to place the collected permit fees in the Fisheries Loan Fund can be achieved under the present budgetary constraints.

Secondly, foreign nations claim that the increased permit fees required beyond 1981 so as to fully reimburse the U.S. for the calculated foreign share of MFCMA expenses (an amendment to the MFCMA provided for in Sec. 232(b) of the AFPA) will be so burdensome on the foreign industry that it will not be able to continue harvesting this resource. Although the U.S. fee structure may be lower than other nations, it is argued that the U.S. must take into account the increased travel distance for many foreign fleets to U.S. waters and the escalating expenses of sufficient fuel to fish distant waters.

It is questionable whether increased fees will actually begin to force nations out of U.S. waters. If a decreasing foreign harvest were to result, the foreign share of management costs would plummet reflecting the sharing formula set forth in the AFPA. Subsequently, fees would be reduced (again according to the AFPA criteria) and foreign harvest could again increase. The simple exclusion of foreign harvesters without a concommitant increase in domestic U.S. catch might be contrary to the principles of full utilization of living marine resources as outlined in the MFCMA and as suggested under the draft Law of the Sea Treaty. Also, it might well deny the U.S. many of the benefits suggested earlier in this presentation. Which nations might be most vulnerable to economic pressures forcing exclusion from our FCZ would depend on variable factors -- Western European nations most likely will be the first to find it uneconomic to fish under higher permit fees. On the other hand, ability

to make the allowances necessary to pay higher fees could be greater for either the Asian nations highly dependent upon marine resources -- Japan, Taiwan, and S. Korea or for the "planned economy" states of Eastern Europe -- including the Soviet Union (if allocations are once again extended).

Whichever the scenario, the nations facing the higher fees will certainly voice their displeasure. The degree and countermeasures content of this protest and its focus could lead to a number of U.S. responses, not the least of which might be amendment of the MFCMA to revise the philosophy of permit fees and their purpose. An optional arrangement allowing service (research and enforcement) in lieu of permit fees (as suggested earlier in this paper) might be beneficial both to the U.S. and to foreign harvesters.

Whatever the near-future action on the foreign fee structure, a longer-range question also faces Congress and the U.S. fishing industry. Even if a total phase-out of foreign fishing should occur, the U.S. industry would not welcome the possibility that the policy of users paying for management costs will result in the eventual imposition of user fees (permit fees?) on the U.S. industry. Following on the heels of the announced revisions of policy whereby the Coast Guard anticipates levying more user fees, this would not seem an unfounded fear.