

North Pacific Fishery Management Council

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Agenda Item #17

J. Branson

2nd Draft

May 21, 1979

REPORT

COUNCIL WORKGROUP ON FCMA CHANGES

May 14, 1979

The North Pacific Fishery Management Council Working Group to develop recommendations to the Council on needed changes in the Fishery Conservation and Management Act of 1976 met at the Northwest and Alaska Fisheries Center May 14th. The members of the working group were:

John Harville	Don Collinsworth	Don Bevan
Jim Crutchfield	Doug Smith	Commander Busick
Jim Brooks	George Utermohle	Jim Branson

The meeting was chaired by John Harville.

The members of the working group nominated possible changes, compiling a comprehensive list of 27 items. The items were then considered individually, combined where possible, and arranged in four categories.

Category I - Changes to the Act or to administrative procedures deriving from the Act considered urgent, needing action as soon as possible.

(8 items)

Category II - Changes to the Act or administrative procedures deriving from the Act considered important but not necessarily needing immediate action. (6 items)

Category III - Changes that may be desirable or requiring Council discussion. (5 items)

Category IV - Items that should be deferred for further study. (6 items)

It was apparent, after studying the proposals, that not all would have to be accomplished through the amendment process. Much could be done administratively, depending upon the interpretation of the Act as now written. However, even some of those that might be solved by administrative action may require a further declaration of congressional intent by amendment to ensure action.

CATEGORY I - Amendments or Administrative Action Considered Urgent

1. Boarding authority

Language should be included in the Act to make crystal clear the authority of U.S. enforcement officials to routinely board foreign and U.S. fishing vessels to ensure their compliance with FCMA regulations. The right to routine boardings can probably be covered for foreign ships by including the provision in their permits. Acceptance of the permit would indicate their agreement to allow boardings. The situation is not as straight-forward for boardings of U.S. ships and will probably require a change in the Act. An amendment to cover all boardings, both foreign and U.S., would appear to be the most positive way of handling this problem.

A Court ruling on the TSUDA MARU case is expected momentarily which may resolve the question of foreign boardings. Defense Counsel for the TSUDA MARU is maintaining that warrantless searches are illegal. The question has been argued before the Court and we should have a ruling soon. If the Court rules that, in fact, the boarding and search of the TSUDA MARU was illegal, immediate permit revisions will be necessary for all foreign permits until the Act can be amended.

2. Coordination between the Fishery Conservation and Management Act and other Federal legislation and administrative procedures

The working group considered the interrelationship of the FCMA with other Federal law in three categories; having varying degrees of urgency and different methods of solution. Two of the categories are considered urgent by the working group, both may take amendment of the Act or other Federal law.

a. Relief for the fishery management plan development process from the requirements of the Environmental Protection Act, Federal Advisory Committee Act, Administrative Procedures Act and Executive Order 12044

At least partial relief is needed from these requirements now imposed on fishery management plan development. The fishery management plans themselves are essentially environmental assessments and meet most of the requirements of an EIS. Inordinate delays in plan implementation and amendments derive from Executive Order 12044, the Administrative Procedures Act and the Federal Advisory Committee Act. The worst is EO 12044. A good argument can be made that EO 12044 was not meant to apply to natural resource regulation that has to be implemented and revised in the time frame required by an

active fishery. The working group could not decide whether a change to the Act itself was necessary to gain relief from the various requirements superimposed upon it, but did feel that the problem should be brought to the attention of the Oversight Committee. The group recognized that E.O. 12044 was not a result of legislation and Congress probably has no way of influencing its application to FMP's, but did feel it should be identified as a major delay in FMP and FMP amendment implementation.

b. Clarification of other Federal legislation relating to fisheries

Clarification of various Federal laws and regulations having to do with the fishing industry such as the Jones Act, the Nicholson Act, tariffs on fishery products, fishing and processing equipment, quotas and trade barriers. The working group feels that a thorough study of this body of law and regulation, perhaps by a Library of Congress team, would be very beneficial for all of those involved in the fishing industry. At the moment there is a great deal of confusion on what can and cannot be done with foreign built ships, etc. Such a study would identify many of the regulatory impediments to fishery development.

3. Allow the North Pacific Council to hold public hearings outside of Alaska

The Act specifies that the Council shall meet in the geographical area concerned and may conduct public hearings --- in appropriate locations of the geographical area concerned. For the North Pacific Council that has been interpreted to mean only in Alaska. We have held our hearings in Seattle as hearings on draft environmental impact statements. That will probably serve for initial FMP's, but since most amendments are expected to be developed and promulgated

without an additional environmental impact statement, the EIS procedure will not continue to serve. An amendment to the Act or at least a change in the interpretation of the Act is needed for public hearings outside of Alaska on amendments or revisions to management plans. Since a large part of the fishing industry in Alaska is Seattle based and can most easily be reached there, it is important that the Council be able to hold hearings outside of Alaska.

4. Status of Council Staff

The argument over the status of Council staffs persists. There is still a strong likelihood that NOAA will insist that Council staffs be Civil Service, very much against the desire of all of the Councils. It may require congressional action to ensure that Council staff remains non-Federal.

5. Secretarial review period for FMP's and amendments

Most of the delay in management plan implementation has been in the Secretarial review process. None of the North Pacific Council's plans have finished review within the 60 days specified in the Act, most have taken twice that long or longer. The salmon plan, as an example, took five months.

Several time intervals are set in the Act for various Council actions. The Council is expected to meet those time constraints and does. The working group feels that we should expect the Secretary to do the same. An amendment to the Act would be desirable to specify what happens if no action has been taken by the Secretary on an FMP at the end of 60 days.

6. Ensure a viable observer program

The working group feels that a strong observer program is absolutely necessary and that it must be adequately funded. Observer coverage off Alaska has not been adequate, it was only 3% on the landbased trawler fleet from Japan in 1978. Even including the coverage of the mothership fleets overall coverage fell well below the desired 20% needed to give adequate cross checks on the catch of the entire foreign fishery.

Observer costs are reimbursed by the country whose ships they are on. However, that money goes directly to the general fund and the observer program itself is line item funded in the regular NMFS budget. The observer budget for 1980 for the Northwest and Alaska has been reduced by \$107,000. Some way of ensuring adequate funding for this program must be ensured. The working group did not make any recommendation on whether this should be done through earmarked monies from foreign fees or reimbursed observer costs, but calls to the attention of the Council that to use this method, i.e., earmarked funds, would require a change in the Act.

7. Increased Federal funding for research and management functions performed by the States in support of FMP's.

Effective implementation of fishery management plans will require long term stock assessments, continuing assessments of socio-economic and environmental relationships, and expanded data collection and interpretation capabilities. These requirements are in addition to and separate from shorter range Council responsibilities for development and periodic updating of fishery management plans.

Because the states have responsibilities and experience in these processes within state waters, and because National Standard 3 requires management of stocks as units throughout their range, the state must participate in these programs on the extended basis mandated by the FCMA in cooperation with responsible federal agencies. Explicit procedures are required to provide the federal funding necessary to assist the state to meet these much expanded long term management and data collection responsibilities, either through management re-organization in federal Grant-in-aid funding (e.g., P.L. 88-309), via the state/federal fishery management program, or other means.

8. Emergency regulations by the Secretary

Currently the Act allows the Secretary to promulgate emergency regulations only for conservation reasons. Since OY is based on social and economic measures, as well as resource requirements it seems logical that emergency regulations could and should be promulgated for those reasons also.

The Act provides for two 45-day periods of emergency regulations, a total of 90 days. The plan amendment process will take approximately 120 days, those two time periods should be brought into conformity. Emergency regulations should cover a problem long enough to allow amendment of the plan. The Act should be amended to allow emergency regulations for a longer period or the plan amendment process must be shortened. Shortening the amendment process hinges on relief from the various Acts and Executive Orders addressed in Item 2.

CATEGORY II - Items of Importance but of Lesser Urgency than Category I

1. Permit review and allocation procedure

Except in the case of joint venture permit applications Council recommendations on applications have been largely meaningless. When the North Pacific Council has recommended disapproval of permits it has usually been because the Council objected to the allocation given to the country rather than to the ships themselves.

The working group feels that the Council should have some input into the allocation process, at least the right to review and comment on preliminary allocations.

The working group feels that the State Department ignored the Fishery Conservation and Management Act when they allocated substantial quantities of fish to Mexico who has no prior history of fishing in the area. That allocation was made at the expense of countries who have fished off Alaska and have contributed toward research in this area. The Mexican allocation precluded opportunities for a viable fishery for those nations with a long history of fishing in the Gulf.

2. Coordination of the FCMA with other Federal acts affecting similar resources

There are a number of Federal acts that affect the Fishery Conservation and Management Act by influencing areas or species covered by fishery management plans. Examples are the Marine Mammal Act, the Endangered Species Act, the Marine Sanctuary Act and Coastal Zone Legislation. If ecosystem management is to be possible, coordinated control of the manipulatable portions of the system is necessary. The working group feels that the Council should start pursuing tighter coordination of these acts with better definitions of management authority to the various entities involved.

3. Sanctions against foreign fishing permits

Discussion of this subject is needed to develop a method of extending sanctions against those ships that violate the FCMA. Sanctions against individual permits would probably not be very useful since the allocation originally given to a ship that lost its permit would simply be reallocated to other ships of the same nation. The working group feels that a better method would be to reduce the allocation to that country by a given amount based on the seriousness and scope of the violation. That may be a far more effective punitive measure than suspension of a single vessel permit.

4. Remove the limit on license fees for U.S. fishermen

Several types of limited entry programs can be developed based on access fees or 'share' purchases. The current FCMA provision allowing only administrative costs to be recovered for permits for U.S. fishermen severely limits the options available for developing limited access programs.

The present limitation also prohibits any recovery of economic rent from a fishery.

5. Compensation for certain SSC members

The working group recommends that the Council consider an amendment to the FCMA allowing SSC members to be paid on the same basis as Council members. Non-agency SSC members, such as those from universities or private business, devote as much time to Council business as Council members, often at great sacrifice to their personal businesses. If they are not supported by their employer on Council business, as state and federal members are, the working group feels they should be paid on the same scale as Council members.

Since the SSC is mandated by the Act the basis for compensation of its members seems strong.

6. The State of Alaska has requested a voting membership on the Pacific Council

The working group sees no reason why the Council could not support that request.

CATEGORY III - Items for Council Consideration and Review

1. Include tuna in FCMA

We have received a request from Congressman McCloskey to support an amendment to include tuna under the management authority of the FCMA. The working group recommends that the Council not take a position on this issue.

2. Development of OY as an average and not necessarily as a number

The working group recommends that the Council defer this subject and continue working with the Pacific Council in the development of a flexible OY concept for all management plans.

3. Redefinition of the Fishery Conservation Zone

The working group discussed the problem of small high seas areas in what have always been considered internal waters, particularly in Southeastern Alaska, where some straits and sounds well inside the Alexander Archipelago are currently defined by State Department geographers as high seas. The group suggests that the Council defer discussion of this subject as an FCMA amendment until after discussion of May agenda item 12 "Conflicts Between State and Federal Regulations."

4. Processor Preference Amendment to the FCMA

The working group discussed the consideration of price in the allocation of resources between joint ventures and shore based processors but developed no recommendation. Clarification of congressional intent on this point in the 'processor preference' amendment is needed.

5. Synchronization of permit year/plan year/allocation year

Reserve section, material expected from Crutchfield

CATEGORY IV - Subjects Discussed but Deferred for Later Consideration

1. Development of regulations supporting FMP's and timing of regulations and FMP drafts.
2. Delegation of plan review to NMFS regions.
3. FCMA waiver for wholly domestic fisheries.
4. Excessive restrictions on limited entry programs in the Act.
5. Clarify the Customs Appeal procedures in the civil forfeiture proceedings on foreign vessels.
6. Clarification of "registered" under the laws of the State.

ADDENDUM:

Since the working group met, NMFS (Brooks, White, et al) has suggested another amendment topic for Council discussion.

The FCMA requires all violations (except assault on officers, etc.) to be handled through administrative adjudication. Because of the delays inherent in this process, particularly in serious violations where negotiation, hearings, and perhaps eventual trial are possible, a tremendous backlog of cases is already building. They propose the Act should be amended to allow the option of using criminal procedure in more serious violations.

Agenda #17
MAY 1979

PACIFIC FISHERY MANAGEMENT COUNCIL

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EXECUTIVE DIRECTOR

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FILE	ACT	INFO	ROUTE TO	INIT

May 16, 1979

Mr. Terry L. Leitzell
Assistant Administrator for Fisheries
National Marine Fisheries Service
Washington, D.C. 20235

cc: Council (50)

Dear Terry:

During its recent meeting in North Bend, the Pacific Council went on record as being in unanimous support of giving Alaska a vote on our Council. The rationale for this recommendation was expressed by several Council members as follows: (1) the States of Oregon and Washington have voting privileges on the North Pacific Council; (2) some management decisions made by our Council have an affect on Alaskan fisheries; and (3) the four other states represented on our Council have voting privileges.

We will address this issue in our testimony at the June Congressional oversight hearings.

Sincerely,



Lorry M. Nakatsu
Executive Director

cc Council members
Jim Branson, NPFMC ✓

kjs

Comments on O.Y.

At the request of the Council, the Scientific and Statistical Committee has reviewed the opinion of the General Counsel's office of NOAA regarding optimum yield. We urge that the Council not take issue with nor endorse the views expressed in the General Counsel's memorandum, because they do not provide the Council or the Management Teams with useful understanding of the role of OY in the fishery management process. The confusion over OY in our view, reflects a misunderstanding of the underlying biological processes that are involved in management and their relationship to those objectives associated with economic, sociological, or ecological goals. This lack of understanding has led to some rather confusing interpretations of the applications of OY under the Fishery Conservation and Management Act. It is the latter that needs clarification.

Inasmuch as Drs. Bevan and Alverson both played roles in the discussions that led to the incorporation of optimum yield into the FCMA, they have attempted to reconstruct some of the original thinking which led to the incorporation of OY into the Act. In addition, in order to provide some clarification and guidance, both to the Council and to the Management Teams, the SSC has (1) considered the qualitative and quantitative dimensions of OY as implied in the Act and (2), related and demonstrated the application of OY to historical management techniques. We urge the Pacific Council explore with NOAA and other Councils the utility of OY as conceived in the following discussion.

Optimum Yield as a Management Concept

OY began to emerge as a management concept at least a decade prior to the passage of the FCMA. The desirability of moving away from maximum sustainable yield as a single management objective was debated hotly in the literature

by the economists in the mid-60s and debated extensively in various international forums since that time. The economists found fault with MSY because it failed to accommodate economic principles in the management process. MSY as a management goal subsequently was attacked on the basis that single species models were inadequate to describe the processes ongoing in an ecosystem and, finally, that management for biological concepts only precluded consideration of important social, economic, political, and ecological concerns.

In order to encourage a more holistic management process, concepts of maximum economic yield, optimum sustainable population, and ultimately optimum yield evolved. A large number of people dealing with the drafting of the FCMA endorsed the concept of having a management process which would allow deviations from allowable biological yields. Hence, the introduction of the term "optimum yield." OY within the context of FCMA, was defined as "the amount of fish"

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery as modified by any relevant economic, social, or ecological factor."

There are several important implications of the introduction of OY as a management concept.

1. It was intended to provide for greater flexibility in achieving a variety of management goals.
2. It was described as a deviation from the MSY which, in itself, is an average value of the expected maximum yield that can be achieved under a specified conservation strategy over time.
3. The concept of OY was not introduced to require management of fishery resources based solely on quotas.

Quantitative and Qualitative Dimensions of OY

It is important to note that the deviation from MSY, which is an average long-term value, to OY explicitly implies that OY itself must be perceived as an average yield or amount based on achieving specific economic, sociological, or ecological objectives over time. The root of our present dilemma arises from the fact that we have been attempting to consider OY as a specific numerical annual yield and as such we have trapped ourselves with the same problem as the manager attempting to achieve MSY by fixing annual yields that are equal to long-term average goals. The underlying problem results from the fact that the allowable biological catch from year-to-year must be varied to achieve MSY in terms of changes of stock sizes which are the product of natural variation and are not predictable by the application of static population models. Hence, OY should be considered or conceived in a similar fashion to MSY as a long-term yield goal. Year-to-year management strategies should be designed to approach that goal over time. Hence, specific management strategies for each year must be based on the allowable biological catch for that year modified by any relevant short term economic, sociological objective associated with long term management goals. We have clearly established in the development of management plans that an annual allowable biological catch (ABC) must be defined. This value is established as a basis of achieving long-term biological potential of the stock--that is, MSY.

In a similar way, the only reasonable approach to OY is to establish total allowable catch (TAC) values which should be specified by either qualitative amounts or as a numerical figure. This proposal would result in parallel concepts between MSY, OY, and allowable biological catch and TAC.

Consideration of OY in Establishing Total Allowable Level of Foreign Fishing

The optimum yield concept has also been clouded by its use in establishing

Total Allowable Level of Foreign Fishing (TALFF). Under the FCMA, the TALFF value must be established by subtracting U.S. capacity (DAH) from OY. Unfortunately, this ends up with the implication that OY, on a yearly basis, must be established as a fixed numerical value. Hence, for any fishery where there is likely to be a TALFF, it necessitates generating a numerical value from which U.S. capacity can be subtracted. This, in our view, has led to the perception that OY must be a fixed annual numerical quota and subsequently has led management teams to restrict their consideration of management objectives to quota management techniques which in many instances may not represent the best management techniques.

Application of OY in the Management Process

In those instances where fisheries are managed on the basis of a numerical quota the application of OY and the development of management plans is relatively more easily conceived and understood. Similarly, it fits into the procedure identified for establishing TALFF. It does not, however, accommodate management strategies not based on a quota system. In many fisheries, for example, the best strategy might be to establish yields on the size limit, mesh limitation, sex limitation, etc. Classic examples are the management of crab fisheries where management procedures frequently identified a target sex as well as a minimum size. In such fisheries, protection of the reproductive capability of the stocks is achieved through complete protection of females and an adequate number of reproductive males. Beyond these limits it may be desirable to harvest all of the remaining crab that is economically possible. In such fishery it is not feasible to identify the expected annual catches even though the long-term yield potential (MSY) can be estimated. The MSY value, however, is of little or no value in the year-to-year management process. The optimum yield may be of some use in terms of defining a strategy

associated with an economic, sociological, or ecological objective but attaining that objective can only be achieved by an effective year-to-year management strategy. Thus in the case of crab fisheries, the OY, which is a long-term average, can be estimated as a numerical value but the annual management strategy may well be to harvest all the crabs possible over 6-1/4 inches. The TAC, e.g., becomes all the crabs in 1979 over 6-1/4" that are actually harvested by the fleet. Its numerical value will not be known until the season is completed. Similar management strategies must be available for application in other fisheries. A trawl fishery, for example, might well set for a management goal an annual harvest amount of all of the English sole which can be taken with 4-1/2" stretch mesh web. Then MSY and OY values, both of which are long term average estimates, can be generated. The specific annual event requires definition of a TAC in a qualitative sense, which is described by the mesh limitation. Under this interpretation of OY the TAC or annual objective can take on the character of a numerical value or a descriptive management process which leads to a harvest amount. The TAC values should ultimately culminate in achieving the management plan OY goal.

Finally, some direction needs to be proposed to NOAA regarding the precision in estimating stock sizes and in undertaking the management process. Since we have interpreted OY as a long-term average goal, the yearly TAC values may clearly exceed or be substantially less than the long-term OY value. If TAC values cannot be greater than OY, we are guaranteed in not attaining OY over a period of time, since the sum of the deviations will result in the average catch being less than OY. In addition the yearly values must be considered as the best estimate of the strategy which will ultimately lead to OY. The estimate of yield for a fixed year will not be precise, and the capacity that controls

that yield may be even less precise. It must be recognized in the management process that it is not possible to achieve a high degree of precision in fixing annual catches and in controlling the harvest levels. Therefore, the management process must allow for adjustments on a year-to-year basis. If the TAC value is not attained in one year, a management strategy should be available to adjust in following years so that over the long run the optimum yield goal is achieved.

Summary

In summary, the SSC is of the opinion that OY as expressed in Sec. 3, Definitions, and Sec. 201 (d) of the FCMA requires the Council to identify an OY as a deviation from MSY and which is in itself an average long-term management goal. As such, specific annual management objectives require an estimate of the annual ABC which will lead to MSY and an annual TAC which will lead to OY. It is our view that the legislation recognizes the need for annual estimates that vary from longer-term goals (see Sec. 303(a)(4)) by requiring that a management plan assess and specify the capacity and the extent to which vessels of the U.S. on an annual basis will harvest the OY specified in Sec. (3) and the portions of such OY which on an annual basis will not be harvested by U.S. fishing vessels and can be made available to foreign fishing.

Note there is no requirement to establish annual values for MSY or OY. The ABC is calculated to determine the annual biological yield which will lead to MSY and the TAC as the harvest level which will culminate in OY. TALFF must be determined annually according to changing biological, economic, sociological, and ecological events which determine TAC and DAH. Hence, the expected TALFF for any one year will be TAC minus DAH. The average of TAC's should lead to OY.

In this sense, the long-term OY is achieved by adjusting to short-term events which are considered for the TAC set for each year. We perceive the following scenario:

1. Establish MSY.
2. Determine sociological, economic, and ecological goals and OY.
3. Each year establish ABC (based on a specific method of calculating the yield contained in the plan) in order to adjust for biological variation.
4. Each year establish TAC (based on specific criteria contained in the plan) to account for any deviation required from ABC to achieve sociological, economic, and ecological goals.
5. Each year compute DAH by applying the methodology set in the plan.
6. If $DAH=OY$ do not allow foreign fishing even though in some years TAC will exceed OY.
7. If TALFF is allowed, calculate annual values through TAC minus DAH.

As such, MSY and OY would remain in the Plan as the generic level biological potential and management yield goal, respectively. ABC and TAC would be estimated annually (based on a specific method or criteria) but within or between season changes in TAC would not require plan change if they are adjustments consistent with the stated method and/or the OY goal. That is, new data on status of stocks might sharply increase or decrease ABC and hence TAC, but such changes would be consistent within the OY goal.

We encourage a further exploration and reading of the FCMA considering this perception of MSY and OY, the problems confronting managers resulting from

biological variation and the influence of variation on TALFF. Note we do not believe that MSY and OY must be determined annually but only that specific methods and criteria be laid down in the plan for calculating annual ABC and TAC which will result in achieving MSY/OY.