U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P. O. Box 1668, Juneau, Alaska 99802

AGENDA ITEM 18.

Date : April 14, 1977

Reply to Attn. of: FAK/RCN

To : Robert J. Ayers, Acting Assistant Director
Office of Fiheries Management, F3

From : Harry L. Rietze
Director, Alaska Region

Subject: Fishery Conservation and Management Act Amendments

This is in response to your memorandum dated April 4 regarding the subject which we received April 8. To meet your deadline, we must reply by telecopier and have, therefore, limited our explanations. A confirmation copy with explanatory materials will follow by mail.

Council input was impossible because of the deadline imposed. The Executive Director of the NPFMC was contacted and indicated the subject would be included in the agenda for the next Council meeting April 27-28.

Our suggestions follow:

Sec. 3(10)(D)--Expand definition of "fishing" to include processing. Will make the term more compatible with the definition of "fishing vessel" and will clarify requirement for permit by foreign processing vessel handling U.S. catches.

Sec. 3(18)--Certain of our Alaskan constituency consider that the OY definition requires that market competition faced by the U.S. from, specifically, tanner crab taken by the Japanese in our zone, is an economic factor that must be used to reduce OY, ideally to the level of the U.S. catch and thus eliminate the foreign fishing. Taken to extreme, this approach leads readily to an argument to exclude Japan and the Soviets from the Bering Sea pollock fishery in order to increase market possibilities for a beginning U.S. pollock fishery. We do not have specific language changes to offer in this regard, but clarificiation of the intended import of market competition in adjusting OY would certainly prove very helpful in upcoming NOAA/NMFS review of Council management plans.

Sec. 3(18)(A)--Revise second line to read "... production and to the region's economy and to the well-being of its fish resources and ..."

APR 15 1977

Appendix P.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

303 K STREET – SUITE 105
ANCHORAGE 99501

April 26, 1977

Mr. Charles H. Meacham
Director
International Fisheries &
External Affairs
Office of the Governor
Pouch A
Juneau, Alaska 99811

Dear Mr. Meacham:

This is in response to your request for the views of this department respecting several questions relating to the Fishery Conservation and Management Act of 1976.

I

You have indicated that several arrangements between Alaskan and foreign business entities are under consideration. These ventures would likely involve the harvesting of fisheries resources within the fishery conservation zone adjacent to Alaska by US fishing vessels with subsequent delivery to a foreign vessel within the zone as part of a commercial transaction. Fisheries products would thus enter foreign markets absent any contact with processing or distributing facilities located on US soil. Foreign vessels entering the zone might be used strictly for transportation of harvested fish to foreign ports; on the other hand, they might also perform

some processing functions as well.

The questions you have presented for review are as follows:

(1) Would a foreign vessel used for transportation and/or processing as described above require a permit in order to accept delivery of fish within the fishery conservation zone?

(2) Would fisheries resources accepted by a foreign vessel within the fishery conservation zone for transportation and/or processing as described above be deducted from the allocation assigned to the nation which was parent to the vessel?

(3) Assuming it is relevant in order to dispose of (1) and (2), what activities constitute "transportation" and "processing" under the Fishery Conservation and Management Act of 1976 (hereafter FCMA)?

In responding to questions (1) and (2), it will be assumed that the foreign vessel is engaged in "transportation" or "processing" within the meaning of those terms as employed in the FCMA.

(1) Permits

The necessity of obtaining a permit hinges on §204(a), which provides that no foreign fishing vessel may engage in "fishing"

valid permit. The definition of "fishing" is found in §3(10):

> (10) The term fishing means-
> (A) the catching, taking, or harvesting of fish;
> (B) the attempted catching, taking, or harvesting of fish;
> (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
> (D) any operations at sea in support of, or in preparation for, any activity described in sub-paragraphs (A) through (C). [Emphasis added]

Standing alone, it might be reasonable to argue that the underscored language would include transportation and processing as support or preparatory activities. However, the immediately suceeding definition demonstrates that this was not the intent of the drafters:

> (11) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for-
> (A) fishing; or
> (B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing. [Emphasis added]

This definition employs the term of art "fishing", but separates it with the conjunction "or" from activities constituting "transportation" and "processing". Consequently, "transportation" and "processing" are not "fishing" within the meaning of the FCMA;

the zone unless the vessel is also engaged in activities which amount to "fishing" as defined in §3(10).

Our recollection of the deliberations on the FCMA reinforces this conclusion. The relatively wide scope of the definition of fishing (expressly including attempts, preparatory and support activities) was to insure that illegal fishing (the taking of the resource) could be successfully proscribed and prosecuted even if the offending vessel were not actually caught with fish (hence attempts and preparatory activities) or an accomplice was involved (i.e., support activities). Unequivocal regulation of actions amounting only to processing or transportation would not further this objective.

(2) Allocations

The definition of "fishing" in §3(10) also provides the answer to your question (2). If fisheries resources are harvested by US fishing vessels and subsequently delivered to a foreign vessel within the fishery conservation zone for transportation and/or processing, that volume of fish would not be deducted from the allocation of the country which was home to the vessel. §201(d-e) provide the mechanism for determining the total allowable foreign effort and the allocation of that effort among particular countries. In both cases, the operative phrase is "foreign fishing", which is defined in §3(12) as "fishing by a vessel other than a vessel

used in the FCMA does not include transportation and processing. Consequently, calculations of deductions from allocations are to be based on activities amounting to "fishing" only. Otherwise, in a situation where a foreign vessel transported or processed fish taken by US vessels, it would be possible to deduct the same load of fish from both the US and the foreign allocation because both the US and foreign vessels would have been legally "fishing" for that load.

This interpretation is consistent with several of the express policies and purposes of the FCMA. Given the recognized contemporary conditions regarding international trade and commercial relations involving fisheries resources, the Congress was certainly aware that promotion of domestic commercial fishing [cf. §2(b)(3)] and development of underutilized fisheries resources [cf. §2(b)(6)] would necessarily involve the likelihood of arrangements between US and foreign firms to develop necessary markets for some species. If fish harvested by US vessels and sold to foreign vessels for marketing abroad were deducted from a foreign allocation, there would be no reason for foreign enterprises to utilize US vessels in place of their own.

(3) Definitions of Transportation and Processing

The foregoing answers to questions (1) and (2) presume that there

would be no disagreement as to what activities constitute "processing" and "transportation". It is conceivable that the meaning of these terms is sufficiently well understood within the fishing community to necessitate no clarification. We suspect, however, that some phases of transportation or processing would be considered by a number of persons as amounting to "support" activities within the meaning of the definition of "fishing" and that no clear dividing line exists between fishing support activities on the one hand and transportation and/or processing on the other. Our examination of the legislative history, although not exhaustive, reveals nothing which would resolve the question. If there is, in fact, a definitional problem of this nature, the FCMA offers two potential remedies:

a. It is arguable that §305(g) would authorize the Secretary to promulgate regulations making specific definitions which are ambiguous or insufficiently explicit to allow implementation of the Act provided the regulations are fully consistent with the intent and language of the Act. If this avenue were pursued, regulations further defining "fishing" should recognize that the definition of "fishing" was intended as an enforcement tool and not as an instrument to permit regulation of fish processing and commercial shipping.

legitimately incorporate limitations or specifications regarding "fishing vessels" for enforcement or other purposes. As mentioned, "fishing vessels" include those used for transportation and/or processing. Under this authority, a Council or the Secretary (depending on who initiated the plan) could formulate an appropriate dividing line. This approach would be more flexible than that in (a) since different systems could be developed to respond to conditions and enforcement problems in particular fisheries.

II

Second, you have pointed out that management plans may, after identifying optimum yield and total allowable catch, assess US harvesting capacity in numerical terms and thereafter assign any surplus to foreign fishing effort. Your question is whether US harvesting capacity, expressed in a management plan as a volume of fish, operates as a ceiling on US effort in that fishery during the time that management plan is in effect.

A. Intent of the Act

One of the foremost purposes of the Act, repeated often in its provisions, is to insure a continuous supply of valuable fisheries resources and to prevent overfishing. §2(a)(2), §2(a)(3), §2(a)(4), §2(a)(5), §2(a)(6), §2(b)(4), §3(2), §3(18), §301(a).

In most instances, unless the plan states otherwise, it would probably be assumed that any increase in harvesting over the combined US/foreign ceilings would jeopardize the applicable resource. If economic or social factors were used to establish the ceiling, fishing beyond that level would be assumed to contravene the objectives of the management plan to the same extent as if biological considerations were controlling. In any event, the terms of the management plan itself would indicate the purpose of any volume figure made applicable to US fishing effort.

The FCMA does not specifically address the question of what is to happen if the Council or the Secretary errs in assessing US harvesting capacity, as in the case where an estimate has been implemented in a management plan, that level has been taken by US vessels, and they are standing by prepared to take more. [§303(a)(4) deals expressly with the assessment.] It is clear, however, that the assessment is supposed to give US fishermen the benefit of the doubt when the figures are calculated:

> The conference committee intends that, in determining whether U.S. fishermen "will not" harvest an optimum yield, the Councils are to give consideration to both the desire and capacity of U.S. fishermen to harvest such yield. [Conf. Rep. 94-711, Section-By-Section Discussion under §201.]

In addition, §301(h)(4) obligates the Councils to review

"on a continuing basis, and revise as appropriate" the assessment. The Secretary's emergency powers under §305(e) include amendment of existing management plans and regulations (although such amendments would have to meet the national standards). In summary, unless someone could successfully challenge an assessment implemented in a management plan as being inconsistent with the provisions of the Act, the terms of the management plan with respect to any ceiling or "allocation" to US fishermen would control. Avenues are available, however, for amendment of the management plans.

B. Mechanics

In terms of the actual impact of a ceiling or allocation respecting US fishing effort on the fishermen themselves, the implementing regulations rather than the managment plans are what matter. §307 of the FCMA prohibits any person from violating any regulation or from possessing fish in violation of any regulation; no such prohibition is expressed respecting violations of management plans. Therefore, while the implementing regulations presumably reflect the terms of the management plans, the regulations would specify when seasons or areas close or US fishing effort is otherwise legally terminated.

Regulations, of course, are also subject to amendment. Such amendments may be accomplished by emergency action in the manner

described in §305(e).

Should you have any further questions regarding the matters discussed in this letter, please contact the undersigned.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: [signature]
Jeff Haynes
Assistant Attorney General

Sec. 3(18)(B)--Change last line to read "...relevant regional economic ..."

Sec. 305(e)--Revise to allow emergency regulations to remain in effect for total of 145 days. This period is required to avoid a lapse of regulation during time needed to revise a PMP in event of major actions requiring full public hearing and NEPA processes.

Sec. 306(a)--Consider clarifying to indicate that licensed to fish is included in the term "registered" as appears in the fifth line. This question was explored at some length by Kim White and, no doubt, others of the GC office.

The OIL office of the 17th Coast Guard District suggests this section might be expanded to include the persons aboard and not limited solely to the vessel. There could be a problem about State jurisdiction over its residents operating on a vessel not registered in that State.

Sec. 307(2)(A)--From discussions at the U.S.-Canada negotiations in Los Angeles during January, we understand that it was not the intent of the Conference Committee to exclude recreational fishing by Canadian vessels from State waters. Such fishing is traditional, at least in Alaskan and Pacific Northwest waters. We recommend that wording of this section be appropriately revised.

Sec. 310(a)--Revise to clarify the non-mandatory aspects of the forfeiture of "... all such fish ..." designated in the seventh line. Margaret Frailey of GCF prepared an opinion dated February 22 on this question.

cc:
Kodiak w/inc
Branson w/inc
OIL w/inc
Simon w/inc
Simpson w/inc

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Washington, D.C. 20235

Date : April 4, 1977

Reply to Attn. of: F31/JC

To : See Distribution List*

From : Robert J. Ayers, Acting Assistant Director
Office of Fisheries Management, F3

Subject: Fishery Conservation and Management Act Amendments

Now that we have had nearly a year's experience in dealing with the Fishery Conservation and Management Act, I would like to solicit from each of you any suggested amendments you may consider desirable to improve the Act. Would you please cite the part of the Act that needs to be changed, deleted or expanded along with an explanation of the reason(s) for the change. Point out any pros and cons you may think of. Suggested wording of amendments would be most welcome. Regional Directors are urged to secure the input of the Councils into this effort.

Appropriate NMFS/NOAA personnel will be working with Congressional staffers to collectively develop a course of action to secure appropriate amendments to the Act. I will need your input on this important task by April 15, 1977.

Distribution List*

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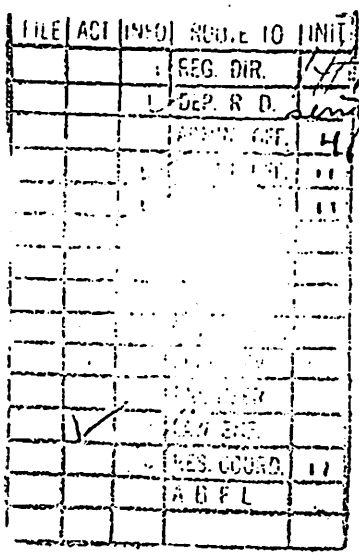

Appendix H.

f.6 = P.L. 94-265

May 9, 1977

Mr. Robert J. Ayres
Acting Assistant Director
Office of Fisheries Management, F3
National Marine Fisheries Service, NOAA
3300 Whitehaven Street, Page Bldg. 2
Washington, D.C. 20235

Dear Mr. Ayres:

The North Pacific Council at its April 27-28 meeting, discussed the question of amendments to the Fishery Conservation and Management Act as requested in your memorandum of April 4, 1977. They have asked me to respond in light of those discussions.

The Council recognizes that there are questions on interpretation of some sections of the Act and that policy, based on those interpretations, is still developing. They do not feel that we have worked with the Act for a long enough period to offer substantive recommendations for changes at this time. Although the law was passed in April of 1976 the Councils, of course, were not established until October. The North Pacific Council feels that the period that began March 1st is really the crucial stage of the Act as it relates to the regulation of foreign fisheries and the development of Council management plans.

Rather than open the Act to comprehensive changes at this date, the North Pacific Council much prefers to work with it as is until they have more experience and are able to identify more positively its weaknesses and the need for revision. They do intend to continue their review of the Act as they develop management plans and gain more experience in Council operations, but at this time the North Pacific Council does not wish to make any recommendations for change. They feel that there is some possible negative effect if the Act were to be too hastily opened for amendment and revised.

Thank you for your request for comments from the Council and we will keep you advised of our thinking on the basic Act and will suggest amendments when we feel they are required.

Sincerely,

Jim H. Branson
Executive Director

cc: All Council Chairmen at Council Offices
H. Rietze
NOAA
Sen. Stevens
Sen. Gravel
Cong. Young

JHB:in