MEMORANDUM

TO: Council, AP, and SSC Members

FROM: Clarence G. Pautzke
Executive Director

DATE: April 18, 1991

SUBJECT: Sablefish Management

ACTION REQUIRED

Approve limited access alternatives and analysis for public review.

BACKGROUND

The original SEIS for sablefish limited entry alternatives (November 16, 1989) included analyses of status quo, annual fishing allotments (AFAs), license limitation, and individual fishing quotas (IFQs). In January of 1990, the Council adopted a position that the status quo was unacceptable and that AFAs and license limitation alternatives were unsuitable to address the 10 major problems in the fishery as identified by the Council. At that time the Council requested staff to prepare a supplemental analysis which would concentrate on the status quo versus IFQs. This was prepared and released for public review on May 23, 1990, with a final decision by the Council scheduled for the June 1990 meeting.

With the Council unable to reach a final decision on this issue in June (and at the subsequent August 1990 meeting), a sablefish IFQ motion was tabled and eventually taken off of the table at the December 1990 meeting. At that time the Council referred the tabled motion, along with another proposal from Mark Lundsten, to the Fishery Planning Committee (FPC) for further development. At the January 1991 meeting, a third alternative IFQ program was proposed by Clem Tillion and Ron Hegge. This alternative, which incorporates a possible 20% set aside quota, was included by the Council in the list of alternatives to be analyzed in a revised Supplement to the SEIS. It is this Supplement, dated April 15, 1991, which is before the Council today. The full list of alternatives covered by this Supplement is shown here as Item C-3(a).

The purpose of this revised Supplement is to incorporate data from the 1990 fishery into the analysis as well as to analyze the potential effects of the alternatives added since the tabled IFQ motion. The new alternatives include the addition of 1990 as both a potential qualifying year and as a year to include in calculation of Quota Shares (QS). The previous Supplement, dated May 23, 1990, only covered options through 1989 and utilized data only through the 1989 fishery. The revised analysis also covers additional options for vessel class designations, should the Council elect to include vessel class restrictions with an IFQ program for sablefish.

Included in the current list of alternatives is the option for a 'set aside' quota, outside of the IFQ program, which would not exceed 20% of the fixed gear TAC for any management area. This set aside could be used for an open access fishery, a bycatch account for other directed fisheries, for community development quota, or some combination of the above. This would be determined by regulatory amendment process prior to implementation of the program. Any changes to this set aside quota would have to occur through subsequent regulatory amendment.

The alternatives for the IFQ program, as shown in Item C-3(a), are depicted as four separate "packages", with possible suboptions for each: Alternative 2.1, Alternative 2.2, Alternative 2.3, and Alternative 2.4. However, the Council expressed the desire to be able to combine elements from any of the alternatives when structuring the final program; therefore, this revised Supplement attempts to analyze the range of possible effects resulting from various combinations of the provisions of each of the listed alternatives. This Supplement does not constitute a stand alone document in terms of analysis, but rather, it is the most recent iteration of the overall analyses for sablefish limited entry.

Item C-3(b) is the Executive Summary from the revised Supplement.

TABLE 1.3. ALTERNATIVE IFQ SYSTEMS FOR MANAGEMENT OF SABLEFISH FIXED GEAR FISHERIES OFF ALASKA

ALTERNATIVE 1 - is the status quo (open access).

ALTERNATIVES 2.1 through 2.4 - are variations of individual fishing quota (IFQ) systems being considered by the North Pacific Fishery Management Council

<table>
<tr><th>Provisions</th><th>ALTERNATIVE 2.1</th><th>ALTERNATIVE 2.2</th><th>ALTERNATIVE 2.3</th><th>ALTERNATIVE 2.4</th></tr>
<tr><td>Gear and Areas</td><td colspan="4">Fixed gear (pot and longline) sablefish fisheries in six sablefish management areas: Southeast Outside/East Yakutat, West Yakutat, Central Gulf, Western Gulf, Bering Sea, and Aleutian Islands.</td></tr>
<tr><td>Shares and Quotas</td><td colspan="4">Quota shares (QS) are a percentage of the fixed gear Total Allowable Catch (TAC) for a specific management area. An Individual Fishing Quota (IFQ) is the weight equivalent of the QS. It is also area specific. It will vary annually with changes in the fixed gear TAC for an area.</td></tr>
<tr><td>Initial Assignment of Quota Shares</td><td colspan="4">Tentative schedule: After the application and appeals process in 1992, QS will be assigned for use in 1993. IFQs to be issued yearly to QS owners.

Initial QS recipients will be owners or leaseholders of vessels that made fixed gear landings of sablefish during the qualifying period. They must be non-foreign, but otherwise are 'Persons' as defined by the Magnuson Act: any individual who is a U.S. citizen, any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State but being owned and controlled by a majority of U.S. citizens), and any Federal, State, or local government or governmental entity. Initial assignment would go to:

ALTERNATIVE 2:

Option 1: Vessel owner(s) only
Option 2: Owner except when lease exists.
Option 3: Unspecified split between owner and leaseholder.

ALTERNATIVES 3 - 5:

Only one option: Vessel owner(s) unless qualified lease exists (bareboat charter). Qualified leaseholder would receive credit for landings.</td></tr>
<tr><td>Qualifying Period</td><td colspan="4">To qualify for QS in an area, a 'Person' (owner or leaseholder) must have made fixed gear landings of sablefish in the area in at least one year during:</td></tr>
<tr><td></td><td>ALTERNATIVE 2:

1984 - 1989</td><td>ALTERNATIVE 3:

1987 - 1989</td><td>ALTERNATIVE 4:

1984 - 1990</td><td>ALTERNATIVE 5:

Option 1: 1984 - 1990
Option 2: 1988 - 1990</td></tr>
</table>

Provisions	ALTERNATIVE 2.1	ALTERNATIVE 2.2	ALTERNATIVE 2.3	ALTERNATIVE 2.4
Initial QS Amount	Initial QS is based on the sum of a 'Person's' recorded fish tickets, by area, for all vessels each 'Person' owned or held by lease for the combination of years below. This individual qualifying poundage would be divided by the total of all individuals' qualifying amounts in an area to obtain the QS in terms of a percentage of the fixed gear TAC for that area. Years with no landings would be counted as zero.			
	Total of 6 years - 1984-1989	Option 1: all 6 years - 1984-1989 Option 2: 5 of 6 years - 1984-1989 Option 3: 4 of 6 years - 1984-1989	Best 5 of 7 years: 1984 - 1990	Option 1: same as alternative 4. Option 2: single best year from 1988 - 1990.
Emphasis on Recent Landings	Landings will be adjusted upward incrementally by 1%, 3%, or 10% each year from 1984-1989 when calculating initial QS.	No weighting of more recent landings.		
Vessel Category Designations	Option 1. NO vessel categories. Option 2. Vessel categories as follows: 1. Less than 50' length overall. 2. 50' to 100' length overall. 3. Over 100' length overall.	Vessel categories as follows: 1. Less than 50' length overall. 2. 50' to 75' length overall. 3. Over 75' length overall. 4. All freezer boats regardless of size.	Vessel categories as follows: 1. Catcher vessels. 2. Freezer vessels. Landings calculated for each category. No size limitations for vessels. Catcher vessel fish cannot be frozen aboard vessel using IFQs. Freezer boat fish may be delivered fresh or frozen.	Option 1: NO vessel categories. Option 2: Vessel categories of: (a) Less than 60' length overall. (b) 60' and greater.
	Each 'Person' would receive QS for the vessel category of their most recent landings within the qualifying period. If, in their most recent qualifying year, they owned or leased 2 or more vessels that landed sablefish, then their allocation would be for the category of their largest vessel.			
Duration of Quota Share Program	Harvest privileges may be subject to periodic change, including revocation, in accordance with appropriate management procedures as defined in the Magnuson Act. Ending the program would not constitute 'taking' and QS/IFQ owners would not be compensated.			
	Option 1: No specified ending date. Option 2: Effective into perpetuity. Option 3: Effective for specified period (e.g. 5 or 10 years)	No specified ending date. The privileges are good for an indefinite period.		

Provisions	ALTERNATIVE 2.1	ALTERNATIVE 2.2	ALTERNATIVE 2.3	ALTERNATIVE 2.4
Calculating IFQ Poundages	IFQ poundage is obtained by multiplying the QS percentage times the fixed gear TAC for an area. Fixed gear TAC is a percentage of overall sablefish TAC. The fixed gear percentage varies by area: Eastern Gulf: 95% of area's total TAC Western//Central Gulf: 80% Bering Sea: 50% Aleutian Islands: 75%			Same as Alternatives 2-4, except that 20% is subtracted off the fixed gear TAC for each area and assigned to the open access fishery described elsewhere in this table.
Transfer of QS/IFQs	* QS may be sold, and after two years, leased. * IFQs may be sold after two years. * Any 'Person' may control IFQs. Proof of citizenship or majority ownership and control may be required.	* QS may be sold, but not leased. * IFQs cannot be sold. * Any 'Person' may purchase QS but, must own or be on board vessel using the QS/IFQs as crew or operator.	* Freezer boat QS/IFQs: Fully saleable to any 'Person' (U.S. individual, partnership, corp., etc.). Leasable, but recipient must own vessel using IFQs or be on board as crew or operator. * Catcher Vessel QS/IFQs: Initial recipients can be 'Persons' and do not have to be on the vessel or sign the fish ticket to use the IFQs. Subsequent users must be (or designate within 90 days) a U.S. citizen as owner of the QS who must be on board the vessel using the IFQs and sign the fish ticket, unless an allowable lease exists. Then, the leaseholder must be a U.S. citizen and must be aboard and sign the fish ticket. No more than 50% of any person's IFQs may be leased except in cases of illness, injury, or emergency to be defined by NMFS.	* QS/IFQs fully saleable, and: Option 1: leasable Any 'Person' may control IFQs. Proof of citizenship or majority ownership and control may be required. Option 2: non-leasable Any 'Person' may purchase QS, but must own the vessel the QS/IFQs will be used on, or must be on board the vessel using the QS/IFQs as crew or operator.

Provisions	ALTERNATIVE 2.1	ALTERNATIVE 2.2	ALTERNATIVE 2.3	ALTERNATIVE 2.4
Limitation on Holdings (own/control)	3% of TAC available to fixed gear off Alaska	2% limit of overall fixed gear TAC but, initial recipients of more than 2% may continue to own or control the excess, but not more.	3% limit, otherwise same as Alternative 3.	Same as Alternative 3. No more than 2% can be used on one vessel. Suboption under this alternative for a 1% cap on ownership.
General Provisions	* NMFS must approve QS/IFQ transfers based on findings of eligibility criteria before fishing commences. * Persons must control IFQs for amount to be caught before a trip begins. * QS and IFQs are specific to management areas and vessel categories (if used). * Hook-and-line or pot caught sablefish cannot be landed without IFQs except in open access fishery under Alternative 5. In Alternative 5, all catch would be counted against either IFQs or open access TAC, whichever is appropriate. * IFQs are not valid for sablefish caught by pot gear in the Gulf of Alaska, or by trawl gear anywhere.			
Discards	No provisions for discards		IFQ users cannot discard legal sized sablefish	Discards permitted but count to TAC or IFQ. Any LL fishery that takes sablefish must control IFQs.
Open Access	No open access fishery			Up to 20% of TAC may be set aside for community quota, bycatch, or open access as described below.
Coastal Community Considerations	8% cap on total use by disadvantaged communities. Also limitations by area. Details of concept are in Attachment 1.	Same as Alternative 2 except limited to Port Graham and westward, and only the Governor of Alaska can recommend. communities. See Attachment 2.	3% cap on use of any area's fixed gear TAC for disadvantaged communities such as Atka or Pribilofs.	* Each area's fixed gear TAC divided ?% IFQ and ?% open access. * IFQ holder for any area would not be permitted to fish any area's open access fishery except as noted. * Open access fishery managed by exclusive registration area (existing sablefish areas). * 4th quarter open access clean-up fishery open to any person or vessel if they do not own/control unused IFQs. Exclusive areas rescinded.

Provisions	ALTERNATIVE 2.1	ALTERNATIVE 2.2	ALTERNATIVE 2.3	ALTERNATIVE 2.4
Administration	* NMFS Alaska Regional Office would administer the program (Alternative 2 allowed this to be contracted to the State of Alaska). * Settlement of appeals disputes during the initial assignment process will be based on fact. Unsubstantiated testimony will not be considered. Leaseholders would have to come to the Appeals Board with verifiable ('certified' was used in Alternative 2) records and agreement of the owner of record of the vessel. Initial appeals would be heard by an Appeals Board composed of government employees rather than industry members. Subsequent appeals would go to NMFS Alaska Regional Director followed by appeals to Secretary of Commerce and then the court system. * Appeals could be brought forth based on the following criteria:			
	1. Errors in fish ticket information. 2. Documented leaseholder qualification. 3. Total vessel loss due to sinking, burning,or shipwreck, possibly with landings adjusted for the year of occurence. 4. Problems caused by Exxon oil spill.	1. Errors in records. 2. Documented leaseholder qualification.	Same as Alternative 3.	Same as Alternative 3.
Unloading Provisions	No provisions.			* All first point of sale purchasers of sablefish (processed or un-processed) would be required to obtain a purchaser's license from NMFS. * Vessels may unload sablefish (processed or unprocessed) only in areas designated by NMFS. Prior notification of such offloading may be required by NMFS.
Program Financing	* It is the Council's intent to find a way to finance the IFQ program without redirecting costs, possibly including a cost recovery program from QS/IFQ owners.			

Assistance for Economically Disadvantaged Fishing Communities Under the Sablefish Management Plan

TABLE 1.3a

(As approved in concept by the Council for further review)

In order to ensure that longline fishing vessels associated with eligible communities within the geographic jurisdiction of the Council, as designated, have reasonable access to and opportunity to develop substantial commercial fisheries under the authority of the Council, the Secretary may approve community development quotas in accordance with the following provisions.

1. A Governor is authorized to recommend to the Secretary that a community be designated as an eligible economically disadvantaged fishing community. To be eligible, a community must meet all of the following conditions:

   (a) be located on the coastline at a site accessible to commercial fishing vessels and the sablefish fishing grounds;
   (b) be unlikely to be able to attract and develop economic activity other than commercial fishing that would be provide a substantial source of employment;
   (c) have culturally and traditionally engaged in and depended upon fishing in the waters off its coast;
   (d) have not previously developed harvesting or processing capability sufficient to support substantial participation in the commercial groundfish fisheries because of a lack of sufficient funds for investment in harvesting or processing equipment; and
   (e) have developed a fishery development plan approved by the Governor of the requesting State the includes arrangements to: (1) acquire or contract with U.S. fishing vessels and U.S. processing plants for the development of commercial sablefish fishing based primarily in the community or region; (2) provide employment of persons in the community and otherwise contribute to the economic development and improvement of the community as a whole; and (3) provide sufficient financing to implement the plan successfully.

2. Each Governor shall develop such recommendations in consultation with the North Pacific Fishery Management Council.

3. Each Governor shall forward any such recommendations to the Secretary, following consultation with the Council. Upon receipt of such recommendations, the Secretary may designate a community as an eligible economically disadvantaged fishing community if:

   (a) the community meets the criteria set forth in (1) above; and
   (b) the Secretary finds that the State has reasonable assurances that sufficient financing and other arrangements will be available to implement the plan successfully.

4. Not more than a total of 8% of the fixed gear total allowable catch of sablefish each year, determined on a management area basis, may be utilized in aggregate by designated eligible economically disadvantaged communities. No community may be designated as an eligible economically disadvantaged community for more that 10 consecutive or nonconsecutive years. Apportionment of Area IFQ to communities would not be greater than:

Bering Sea	10% of Area TAC	Central Gulf	5% of Area TAC
Aleutian Islands	10% of Area TAC	W. Yakutat	1% of Area TAC
Western Gulf	10% of Area TAC	E. Yak./S.E. Outside	1% of Area TAC

NOTE: When the motion to adopt the community concept failed in June 1990, it had been amended as follows:

1. Delete "within the geographic jurisdiction of the Council" in the first paragraph.
2. Delete first sentence of paragraph 4.
3. Reduce caps for Bering Sea, Aleutians and Western Gulf from 10% to 5%.

Assistance for Economically Disadvantaged Fishing Communities Under the Sablefish Management Plan

In order to ensure that longline fishing vessels associated with eligible communities ~~within the jurisdiction of the Council~~, as designated, have reasonable access to and opportunity to develop substantial commercial fisheries under the authority of the Council, the Secretary may approve community development quotas in accordance with the following provisions.

1. ~~A~~ THE Governor OF ALASKA is authorized to recommend to the Secretary that a community be designated as an eligible economically disadvantaged fishing community. To be eligible, a community must meet all of the following conditions:

   (a) Be located on the coastline WEST OF A LINE IMMEDIATELY TO THE EAST OF PORT GRAHAM AND ENGLISH BAY at a site accessible to commercial fishing vessels and the sablefish fishing grounds;

   (b) No change

   (c) No change

   (d) No change

   (e) Have developed a fishery development plan approved by the Governor of ~~the requesting state~~ ALASKA that . . .

2. ~~Each~~ THE Governor OF ALASKA . . .

3. ~~Each~~ THE Governor OF ALASKA . . .

4. No change

EXECUTIVE SUMMARY

The sablefish fishery off Alaska has evolved rapidly over the last few years from a fishery dominated by foreign harvesters to one which is utilized fully by domestic fishermen and processors. In the Gulf of Alaska, it is the most important groundfish fishery, both in numbers of participants and exvessel revenues. There are much smaller sablefish fisheries in the Bering Sea and Aleutian Islands areas. Development of the fishery has been accompanied by gear allocation conflicts, significant increases in fishing effort, and many other concerns on the part of participants and managers.

Two alternatives are being considered for the management of the longline and pot sablefish fishery in the EEZ off Alaska. They are: (1) continue to use open access management without amending the existing fishery regulations (status quo) and (2) implement an individual fishing quota (IFQ) management program. Four alternative IFQ programs, three of which have several options, are being considered by the Council. This document analyzes the status quo and IFQ alternatives and presents a regulatory impact review (RIR). This is a revised supplement to the sablefish draft supplemental environmental impact statement/regulatory impact review dated November 16, 1989. It replaces the supplement dated May 23, 1990.

A continuation of the status quo (open access) probably would require additional management measures in the future. These measures might include gear restrictions, time/area closures, and trip limits. None of these measures would be instituted by this amendment but would require future amendments to the fishery management plans. With Alternative 1, the regulations will stay the same but the fishery will change. As fishing pressure continues to increase, enforcement and administrative costs will increase and harvesting costs will also increase. It is anticipated that all excess profits would eventually be dissipated because the status quo would continue to allow free and open access to anyone wishing to harvest sablefish. Eventually, the status quo would lead to management problems that can only be resolved by implementing more restrictive fishery regulations.

The IFQ alternative would give ongoing harvesting privileges in the form of quota shares (QSs) to individual vessel owners and, perhaps, lease holders based on past participation in the fixed gear sablefish fishery. These quota shares would be management area specific. On an annual basis, each person who owns quota shares for an area would receive an individual fishing quota (IFQ) corresponding to the percentage of the total quota shares for the area he owns. These IFQs would permit fishermen to harvest a specified amount of sablefish for that year. Several possible options include the use of vessel size categories, limitations on the transferability of QSs and IFQs, and community allocations. The use of IFQs would allow fishermen, rather than managers to adjust fishing effort.

As compared to the status quo, the implementation of an IFQ program would tend to increase the benefits derived from the sablefish resources off Alaska and change the distribution of these benefits. IFQs could provide increased benefits to consumers in the United States and elsewhere. The change in management programs would increase reporting, administrative, and enforcement costs.

The use of an IFQ program would change the nature of the fishery; it would tend to reduce the premium on speed and increase that on efficiency and product quality. This would increase the employment opportunities for some, perhaps those who are more experienced, and decrease the employment opportunities for others. The total number of fishermen participating in the fishery would be expected to decrease. However, the duration of employment for many of those who remain in the fishery would increase. The total number of vessels in the fishery would also be reduced. Vessels would leave the fishery as a result of free choice on the part of their owners rather than as a result of effort controls that are overly restrictive. Fishermen will sell their harvest privileges if, and only if, they believe they can make more income doing something other than sablefish fishing for the next several years.

Joint harvesting and processing profits should increase under any of the four IFQ alternatives being considered. This would be the result of each vessel being able to fish in a way that decreases fishing costs and increases sablefish prices and a shift of the sablefish harvest from less efficient to more efficient vessels. It was estimated that a shift of the sablefish harvest from less efficient to more efficient vessels alone in 1989 could have increased profits by almost $7 million. Additional benefits could arise due to anticipated revenue increases resulting from increased consistency of sablefish quality and from decreases in harvesting costs as all vessels switch to more cost effective methods.

Summary of Critical Points

1. An IFQ program can provide a mechanism for allocating the fixed gear apportionments of the sablefish TACs to those who will use the apportionment most productively if willingness to pay for IFQs reflects expected productivity.

2. There will be winners and losers with an IFQ program.

3. Most any fisherman would prefer the flexibility that IFQs offer if they did not have to pay for them. This suggests that as a group those who are given QSs and those who use IFQs to land sablefish will benefit from an IFQ program.

4. Something of value is being given to those who receive the QSs. The concern about the size of the gifts can be addressed without decreasing the net benefits of the program. A cost recovery program would do that. However, limitations on transferability typically will decrease both the size of the gifts and the net benefits of the program.

5. If a sufficient number of restrictions are placed on transferability (i.e., on letting the market work), the probability that the program will produce positive net benefits will be quite small.

6. There will be costs and benefits associated with the program. There is a limited ability to identify and measure all the effects of an IFQ program and to find a common measure of the various types of effects.

AGENDA C-3
APRIL 1991
SUPPLEMENTAL

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

APR 10 1991

Honorable Fred F. Zharoff
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Senator Zharoff:

Thank you for your letter to Secretary Mosbacher regarding the North Pacific Fishery Management Council's (Council) discussion of individual fishing quotas (IFQ) for the Alaska fisheries.

Your concern about the unmet need for full social impact assessments for the IFQ proposals for the sablefish, halibut, and other fisheries is well taken. The Council was able to fund a social impact assessment of the onshore/offshore processing issue because industry provided funds to the Pacific States Marine Fisheries Commission (Commission) for such a study. The National Marine Fisheries Service was able to match these monies, and the Council and Commission went ahead with the joint study. Given the Administration's commitment to reducing the budget deficit, similar studies for the sablefish and halibut fishery can only be carried out if industry, or other interested parties, joins with government to meet the need.

The fisheries of the Gulf of Alaska are, as you described, dynamic and versatile. The fishermen have developed the fisheries to such an extent, however, that they have reached the limits of allowable biological catch. Fishing effort must be checked through IFQs or some other allocation measure if the continuation of existing fisheries is envisioned; the open access "fishing derby" mode of operations will lead to increasing restrictions on seasons and fishing areas in order to prevent overfishing. If the Council chooses to continue open access, in all likelihood the example of the halibut fishery will extend to all Alaska fisheries--short seasons, some as long as six hours, and loss of economic benefits to fishermen and consumers alike.

Sincerely,

[illegible]

William W. Fox, Jr.

cc: ES, LA, GC, EXSEC, TC, BAS, OGC, OLIA, OBL, DFH DKS, GCF, F/CU(2), F/CM(2), F/CM1
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THE ASSISTANT ADMINISTRATOR
FOR FISHERIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SEA WATCH INTERNATIONAL, et al.,
Plaintiffs,
v.
ROBERT A. MOSBACHER,
Defendant.

Civil Action No. 90-1616 (MB)

JAMES PEARSON, et al.,
Plaintiffs,
v.
ROBERT A. MOSBACHER, et al.,
Defendants.

Civil Action No. 90-1626 (MB)

MEMORANDUM OPINION

Plaintiffs filed these actions on July 13, 1990, seeking judicial review of administrative actions taken by defendant Bryson in his capacity as Executive Director of the Mid-Atlantic Regional Fishery Management Council and approved by defendant Mosbacher, the Secretary of Commerce ("the Secretary"), under the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1802-1882 ("the Magnuson Act" or "the Act"). The cases were consolidated on October 17, 1990, and the parties filed cross-motions for summary judgment. In addition, defendants have moved to dismiss both cases on timeliness grounds. Oral argument was heard on March 11, 1991. For the reasons stated below, the Court denies defendants' motion to dismiss, but grants summary judgment for the defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SEA WATCH INTERNATIONAL, et al.,

Plaintiffs,

v.

ROBERT A. MOSBACHER,

Defendant.

Civil Action No. ~~90-1616~~ (MB)

FILED

APR 9 1991

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES PEARSON, et al.,

Plaintiffs,

v.

ROBERT A. MOSBACHER, et al.,

Defendants.

Civil Action No. 90-1626 (MB)

ORDER

Upon consideration of the parties' cross-motions for summary judgment, the opposition and reply memoranda thereto, and the other pleadings and papers filed in these cases, and for the reasons set forth in the Court's Memorandum Opinion of this date, it is hereby

ORDERED, that defendants' motions to dismiss and to strike are DENIED, and defendants' motion for summary judgment is GRANTED. Plaintiffs' motions for summary judgment are DENIED. Accordingly, judgment is hereby entered in favor of defendants, and these cases are dismissed.

IT IS SO ORDERED.

DATED: 4/8/91

MICHAEL BOUDIN
United States District Judge

I. THE FACTS

In 1976, Congress passed the Magnuson Act, which created eight Regional Fishery Management Councils and gave them authority to regulate fishery resources found in federal waters off the coasts of the United States. 16 U.S.C. §§ 1852(a)(1)-(8). The Councils develop, administer, and revise fishery management plans ("FMPs") that regulate fishing for the species in the Councils' respective geographical areas. 16 U.S.C. § 1852(h)(1). When adopting FMPs or FMP amendments, the Councils must follow certain procedures set forth by the Act, 16 U.S.C. § 1852(j), and also must comply with express provisions governing the content of FMPs, 16 U.S.C. § 1853. Additionally, they must ensure that the FMPs are consistent with seven National Standards ("the Standards") enumerated by the Act. 16 U.S.C. § 1851. Once a Council adopts an FMP or amendment, it is submitted along with proposed implementing regulations to the Secretary of Commerce for review. 16 U.S.C. § 1853(c). The Secretary reviews the FMP or amendment for consistency with the Standards, the Act, and other applicable law. 16 U.S.C. § 1854. If the Secretary approves the FMP or amendment, the Secretary then promulgates the regulations. 16 U.S.C. § 1855(c).

In 1977, the Mid-Atlantic Regional Fishery Management Council ("the Council") began to regulate the surf clam and ocean quahog fisheries. The original FMP for these fisheries has been amended several times. In 1979, the surf clam fishery was divided into the Mid-Atlantic and New England surf clam fisheries. The Mid-Atlantic

plans. [illegible]

by a moratorium on the entry of new vessels, coupled with a system of permits restricted to 184 vessels with a history of surf clam fishing in the region. The permits were tied to the individual vessels for which they were issued, and could only be transferred together with those vessels. The vessels could not be replaced unless they sank, were destroyed by fire or otherwise left the fishery involuntarily. Thus, only vessels originally awarded permits could fish in the Mid-Atlantic surf clam fishery, a scheme which remained unchanged from 1977 to 1990. Additionally, access to the fishery was controlled by "effort restrictions" limiting the number of hours each vessel could fish. There were, however, no limitations on the quantity of surf clams that could be harvested on a fishing trip.

The New England surf clam fishery was less restricted, with no permit system, and effort restrictions imposed only if a certain percentage of the annual aggregate catch quota was harvested. This fishery was further divided into two sub-areas, and separate quotas and quarterly sub-quotas were established for each. Finally, the quahog fishery essentially went unrestricted, except for the annual aggregate quota. Access to the fishery was unlimited, and effort

restrictions were imposed only briefly in 1984. While the FMP authorized quarterly quotas, these quotas were never established. The annual aggregate quotas were set at levels above those actually reached, and the fishery thus was never closed.

In 1988, the Council proposed Amendment 8 to the Fishery Management Plan for Surf Clams and Ocean Quahogs ("Amendment 8"). This Amendment was the culmination of several years of work by the Council, and reflected numerous concerns about the viability of existing regulations, the migration of vessels from the surf clam fishery to the less-regulated quahog fishery, and the resultant increase in the quahog harvest. Amendment 8 was approved by the Secretary and implemented by regulations published in the Federal Register on June 14, 1990. The regulations became effective on September 30, 1990. Amendment 8 brought the three fisheries under a single limited access scheme built around individual transferable quotas ("ITQs"), which are transferable permits to fish for a fixed percentage of the annual aggregate catch quota for the species and area. Thus, although the annual quota for all fishermen may vary from year to year depending on the Council's determination of an optimum yield, the holder of, e.g., a 5% ITQ would be entitled to catch up to 5% of that quota.

For each of the fisheries, ITQs were allocated on the basis of vessel fishing history, although the data used to calculate that history and the weight assigned to it varied between the fisheries. For example, in the Mid-Atlantic surf clam fishery, eighty percent of the ITQ was derived by averaging vessel catch history from 1979

to 1988, with the last four years counted twice, and the lowest two years deleted. The other twenty percent was based upon the vessel's dimensions, as a proxy for the owner's capital investment. The results were divided by the total for all vessels in the fleet, producing an ITQ expressed as a percentage of the annual quota.[1]

After Amendment 8 went into effect, two groups of fishermen and seafood processing companies brought these actions, alleging serious economic harm from the ITQ assignments. Their most salient arguments are, first, that the ITQ system exceeded the defendants' statutory authority and, second, that the decision to limit access to the quahog fishery was unsupported by the administrative record. In each case, there are additional arguments that the challenged action also violated the National Standards or the other applicable provisions of the Magnuson Act.

II. DISCUSSION

A. TIMELINESS

The first issue to be resolved is the defendants' motion to dismiss on the ground that these suits were untimely. The Court concludes that the complaints were filed within the limitations period provided by the Magnuson Act.

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[1]In the New England surf clam and the ocean quahog fisheries, the ITQ was the average of a vessel's catch history for every year between 1979 and 1988 that the vessel actually participated in the fishery, excluding the lowest year for vessels that participated for more than one year. These calculations were then divided by the total for all vessels to obtain a percentage figure.

The Magnuson Act states that regulations promulgated by the Secretary under the Act are subject to judicial review "if a petition for such review is filed within 30 days after the date on which the regulations are promulgated." 16 U.S.C. § 1855(d). The present dispute turns on the meaning of the word "promulgated" for purposes of determining whether the plaintiffs' petitions are time-barred by this section of the Act. Defendants assert that the regulations were promulgated on June 8, 1990, the date they were filed with the Office of the Federal Register. Plaintiffs claim promulgation occurred on June 14, 1990, when the regulations were actually published in the Federal Register. It is undisputed that the petitions for review were filed on July 13, 1990, thirty-five days after the regulations were filed, but twenty-nine days after their publication.

Courts construing this section "have almost universally agreed that the thirty day limit commences at the time the regulations are published." Kramer v. Mosbacher, 878 F.2d 134, 137 (4th Cir. 1989); Midwater Trawlers Coop. v. Mosbacher, 727 F. Supp. 12, 15 (D.D.C. 1989). It is true that none of these courts squarely addressed the fine distinction between publication and filing urged by defendants in this case. Rather, they have held that various attempts to equate "promulgation" with much later dates, such as implementation or amendment of the regulations, were barred by the statute.[2]

[2] E.g., Kramer, 878 F.2d at 137 (challenge to implementation of regulations barred where publication occurred more than thirty days prior); National Food Processors Ass'n v. Klutznick, 507 F. Supp. 76, 78 (D.D.C. 1981) (where regulations were published more than (continued...)

Nevertheless, it appears to be the case that wherever a court has calculated the limitations period under the Act, it has used the publication date as its starting point.[3] This usage is in accord with the accepted meaning of "promulgate" as "[t]o publish; to announce officially; to make public as important or obligatory."[4]

Even if this common usage had not previously been adopted by courts considering the issue under the Magnuson Act, sound policy reasons would dictate choosing the publication date, not the filing date, as the relevant date for calculating the limitations period under Section 1855(d). Publication in the Federal Register is the occurrence by which the world at large is given notice of the Secretary's decision. Such a visible formal event is highly desirable in the context of limitation of actions, in order to have a single recognizable date from which to calculate the running of the statute of limitations. The filing of the regulations at the office of the Federal Register is a formal event, but one far less visible and far less easily monitored by parties potentially affected by the regulations.

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[2](...continued)
thirty days prior to suit, plaintiffs' challenge was limited to that portion of the regulations affected by more recent amendment).

[3]The sole exception cited to the Court is Islamorada Charter Boat Ass'n v. Verity, 676 F. Supp. 244, 246 (S.D. Fla. 1988), where the court used the (post-publication) date on which the regulations were implemented by the Secretary.

[4]Black's Law Dictionary 1214 (6th ed. 1990). See also National Grain & Feed Ass'n v. OSHA, 845 F.2d 345, 346 (D.C. Cir. 1988) (absent agency definition of "promulgation," plain language of applicable statute and ordinary usage of the term controlled).

Defendants cite language in the Federal Register Act to the effect that "publication" and "promulgation" are separate events, and claim the latter should be equated with the date of filing. See 44 U.S.C. § 1507. That same statute, however, also juxtaposes "promulgation" and the "filing of a document" with the Office of the Federal Register, weakening this semantic argument. On the whole, the Federal Register Act appears simply to use the word "promulgated" as a synonym for official adoption, a meaning that defendants themselves do not ascribe to the same term when used in the Magnuson Act as the trigger date for judicial review. In this latter context, it makes most sense to read "promulgation" as the date of publication in the Federal Register, regardless of when particular parties may be claimed to have received actual or constructive notice.[5] Accordingly, the Court holds that these regulations were promulgated on the date they were published in the Federal Register, and plaintiffs' petitions thus were filed within the time provided by Section 1855(d).[6]

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[5]For this reason, the Court also rejects the defendants' alternative argument that under the Federal Register Act, filing with the Office of the Federal Register provides constructive notice to persons subject to or affected by the document. The question in this case is not "notice" to any specific party; it is determining a single recognizable event from which the time for initiating judicial review may be calculated.

[6]Defendants also cite American Petroleum Institute v. Costle, 609 F.2d 20 (D.C. Cir. 1979), which defined the term "promulgation" under the Clean Air Act as the date a rule is filed. However, the court in American Petroleum was not dealing with the limitations provision of the Clean Air Act, but with the different question of the last possible date on which the agency could add information to the administrative docket. Id. at 22-24.

B. THE MERITS

In their cross-motions for summary judgment, the parties have made numerous arguments in briefs and replies totalling more than 200 pages. In the discussion that follows, the Court has addressed only those arguments that appear most significant to the parties' claims. The other arguments not specifically addressed in this opinion have been reviewed and considered, but deemed not to affect the ultimate result.

1. The ITQ System

"Property Rights" Claim. Plaintiffs argue that implementation of the ITQ system for the three fisheries exceeds the Council's and the Secretary's statutory authority, and should therefore be set aside under Section 706(2)(C) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), as incorporated into the Magnuson Act by 16 U.S.C. § 1855(d). Where Congress has spoken with precision on an issue, its determination resolves the matter; where the issue is less clearly determined by the statute, an agency interpretation ordinarily is upheld if it represents a reasonable construction of the statute. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). The gist of plaintiffs' claim on this point is that an ITQ system "amount[s] to privatization of the surf clam and quahog resource," and that such a "transfer of private ownership interests in a fishery" is both unauthorized by the

Magnuson Act and in conflict with an express prohibition on the assessment of fees in excess of costs.[7] See 16 U.S.C. § 1854(d).

The difficulty with plaintiffs' argument is that Congress did authorize the creation of quotas. The Act expressly authorizes the Council and the Secretary to impose permit requirements and to establish limited access systems. 16 U.S.C. §§ 1853(b)(1), (6). The legislative history of this section refers specifically to the possibility of dividing "the total allowable catch into shares or quotas which are then distributed among the fishermen." S. Rep. No. 416, 94th Cong., 1st Sess. (1975), reprinted in Legislative History of the Fishery Conservation and Management Act of 1976, at 691-92 (1976). Even without this legislative history, the language of the section broadly embraces the possibility of quotas. Nothing in its terms, and nothing else in the Magnuson Act cited to this Court, precludes making quotas transferable. Indeed, transferable permits were precisely the method utilized in the Mid-Atlantic surf clam fishery prior to adoption of Amendment 8, although transfer was linked to sale of the vessel.[8] The present ITQ system differs only in degree from the system of aggregate quotas and transferable

[7]Memorandum of Plaintiffs Pearson, et al. in Support of Motion for Partial Summary Judgment [hereinafter Pearson mem.] at 12, 27.

[8]Defendants assert that under the previous system, sale of a vessel in the Mid-Atlantic surf clam fishery commanded a premium of anywhere from $50,000 to $150,000 over and above the value of the vessel itself. While plaintiffs' statement of material facts in dispute questions the Council's estimates of the value of that premium, it does not dispute its existence. It is thus unsurprising that the surf clam and quahog ITQs also sell at a premium.

permits previously in use and unchallenged by plaintiffs, and the interests created by it fall short of actual full-scale ownership.

The quota under the prior system indeed was derived somewhat differently, being expressed in terms of a given number of hours fishing rather than a percentage of the aggregate catch. However, plaintiffs fail to explain why this difference is significant.[9] The new quotas do not become permanent possessions of those who hold them, any more than landing rights at slot-constrained airports become the property of airlines, or radio frequencies become the property of broadcasters. These interests remain subject to the control of the federal government which, in the exercise of its regulatory authority, can alter and revise such schemes, just as the Council and the Secretary have done in this instance.[10] An arrangement of this kind is not such a drastic

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[9]Although plaintiffs argue that the ITQ system grants those fishermen who hold ITQs the right to "leave their share of fish in the sea" and exclude other fishermen from it, it is hard to see why this should alter the outcome. For the most part, the ITQ owners have ample incentive to use their rights to the fullest extent. If the Council and the Secretary determine that the quotas are not being used, nothing prevents them from altering the present regime to allow distribution and use of any unused quotas.

[10]Plaintiffs have selected excerpts from statements made during the administrative proceedings in which defendants themselves have applied the term "property right" or similar labels to the ITQs. See Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment at 9-10. When examined in full, most of these quotations indicate that the property analogy was employed with an appropriate qualification. E.g., AR 1759 ("Amendment 8 implies that [ITQs] are property in that they are "owned" and can be sold, similar to a share of stock, at least so long as the management scheme creating the rights is in place") (emphasis added). Further, the Council's mere expressions of hope that the Amendment 8 regime would provide a lasting solution do not in themselves exclude the possibility of later re-evaluation and revision of the regulations.

departure from ordinary regulation, nor is it so akin to the sale of government property, that the Court must require a more precise expression of congressional intent to uphold it.

There is even less to be said about plaintiffs' claim that the ITQ plan violates the prohibition on assessment of fees in excess of costs found in 16 U.S.C. § 1854(d).[11] Plaintiffs complain that, because the ITQs are transferable, one fishermen must pay another for an ITQ. The statutory limitation on fees in excess of costs seemingly is designed to prevent the government from using quotas as a revenue-raising measure. That purpose is in no way frustrated by ITQ payments between fishermen. Certainly the payments are a barrier to a fisherman who wants to fish but does not possess an ITQ, but an even greater barrier would be provided by quotas that were not transferable at any price. Neither regime involves the agency in raising revenues in excess of costs.

National Standard 4. Plaintiffs contend that the ITQ system is contrary to National Standard 4, which reads in its entirety:

> (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

[11] Section 1854(d) reads in pertinent part: "The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title . . . . The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits."

particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a)(4). Plaintiffs claim the system contravenes subsection (A) of this Standard by treating similarly situated fishermen unequally; by rewarding violators of prior regulations; and by discriminating against owners of smaller fishing fleets. These results are said to be arbitrary and capricious or an abuse of discretion under 16 U.S.C. § 1855(d) and 5 U.S.C. § 706(2)(A).

The argument that the ITQ system treats similarly situated fishermen unequally begins with the fact that ITQ assignments were calculated from vessel catch histories rather than individual catch histories. Thus, plaintiffs assert, the assignments ignored the high rate of vessel turnover in the industry, excluding individuals with a substantial catch history who recently sold a vessel, and awarding a "windfall" to individuals with little or no history who recently purchased a vessel. They claim this result is inherently unfair and inequitable under subsection (A) of Standard 4.

However, National Standard 4 does not require that allocations of quotas to fishermen be made by calculating the exact historical catch of each fisherman on an individual basis. In fact, previous regulation of the Mid-Atlantic surf clam fishery also was based on vessel data, insofar as moratorium permits were awarded to vessels with a history of participation in the surf clam fishery, and were transferable only along with those vessels. The record supports defendants' claim that vessel catch data, used as a surrogate for individual catch history, was the only accurate data available.

AR 225, 227, 958. The high rate of vessel turnover only serves to underscore the difficulty of obtaining data organized by individual owner. The decision not to do so reflects not mere administrative convenience, but a consistent and reasonable regulatory scheme.

Plaintiffs argue the ITQ system violates National Standard 4 because it rewards fishermen who violated previous regulations in the Mid-Atlantic surf clam fishery by fishing longer than allowed. Since allocations were based on past catch history, and a cheater's history necessarily would reflect larger catches, plaintiffs claim that the new system is unfair and inequitable to those fishermen who complied with the effort restrictions. The defendants assert that since a majority of the participants in the fishery cheated to some degree, it is impossible to determine which vessels were involved in the violations. They note that any unfairness is offset by the fact that twenty percent of the Mid-Atlantic surf clam ITQs were based on vessel size, not catch history.

The record demonstrates that the Council and the Secretary considered this problem, and addressed it in the preamble to the final regulations. AR 1779. The Act itself aims at taking some account of catch histories when allocating limited access rights. 16 U.S.C. § 1853(b)(6)(B). It is not clear how adjustments could be made to eliminate the effect of previous violations, many of which, it is fair to suppose, were never detected, and others of which have already been punished.[12] Plaintiffs have failed to

[12]Plaintiffs themselves admit that "[d]efendants are correct when they claim that there is no way to correct this unfortunate (continued...)

demonstrate that this use of past histories is irrational, or that it violates the Magnuson Act.

Plaintiffs next contend that the ITQ system violates National Standard 4 because it is intended to drive a particular group of individuals, the single vessel and small fleet owners, out of the fisheries. Since Amendment 8 permits owners to catch their entire ITQ with a few vessels, the argument runs, it will result in lower average costs to the owners of large fleets, and provide them with an unfair competitive advantage. Moreover, it is alleged, small fishermen lack the capital to purchase sufficient ITQs to operate their vessels at full capacity, and ultimately will be driven out of business. It is quite possible that scale economies and transferability of ITQs will produce some consolidation. It is also possible that small fishermen enjoy advantages of their own, and nothing prevents coalitions of small owners from pooling their allocations to obtain efficiencies. Moreover, single vessel or small fleet owners may happen to have substantial allocations depending upon their history. Even where a fisherman with a small allocation decides to exit, transferability of the ITQ provides at

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[12](...continued)
result, since 'it is impossible to determine the degree to which any one vessel was involved in violations.'" Pearson mem. at 35. They thus acknowledge, no less than defendants, that there is no practical way to adjust for previous violations. However, while they conclude that this practical impossibility "is exactly why it is inappropriate and illegal to implement an allocation scheme that inevitably rewards past violators at the expense of honest fishermen," id. at 35-36, the Secretary and the Council simply concluded that this defect could not be remedied within an otherwise valid scheme. Under the circumstances, the court does not find this decision irrational.

least some compensation. There is nothing intentionally invidious or inherently unfair in the plan adopted by the Council and the Secretary. "Inherent in an allocation is the advantaging of one group to the detriment of another." 50 C.F.R. § 602.14(c)(3)(i).

2. Limitation of Access to the Quahog Fishery

Aside from the general challenges to the ITQ system described above, plaintiffs make several specific challenges to the decision to limit access to the ocean quahog fishery by bringing it under the same regulatory scheme as the two surf clam fisheries. They argue that the decision lacks support in the administrative record; that it does not comply with the Act's express requirements for a limited access management scheme; and that it violates applicable National Standards. The Court will address each claim in turn.

The Administrative Record. Plaintiffs contend that the decision to include ocean quahogs in the ITQ system lacks support in the administrative record and was arbitrary and capricious. Such claims are reviewed under a standard of deference. National Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 219 (D.D.C. 1990). While the Court indeed must ensure that the Secretary's decision was rational, it "'is not empowered to substitute its judgment for that of the agency.'" Id. at 223 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)). Under this standard, the Court concludes that the Secretary's decision, though based on conflicting, even speculative, evidence about trends

affecting the ocean quahog resource in the future, nonetheless had a rational basis, and was not arbitrary or capricious.

In brief, plaintiffs' argument is that any regulation of the resource is responding to a "problem that does not exist."[13] They dispute the Council's claim of an upward trend in the ocean quahog harvest data, and its prediction that the same "overcapitalization" that required restriction of access to the surf clam fisheries eventually will occur in this fishery. They cite the lower market demand for quahogs, and the undisputed fact that the annual quahog catch quota has never been reached. They correctly assert that the Council and the Secretary may not reason by analogy from the surf clam resource to the quahog resource, but must have an independent rational basis for the decision. Motor Vehicle Mfrs. Ass'n v. EPA, 768 F.2d 385 (D.C. Cir. 1985), cert. denied, 474 U.S. 1082 (1986).

However, the administrative record shows that the Council's Scientific and Statistical Committee recommended the inclusion of quahogs in a comprehensive fishery management plan for several years prior to adoption of Amendment 8, AR 65, 197, 1805, and that the Council considered other alternatives, AR 496-97, 502-03. The ultimate decision to adopt this recommendation was based on several related grounds, including the fact that surf clams and quahogs had become substitute goods for certain uses, AR 65, 388; that existing surf clam restrictions had already resulted in movement of vessels from that fishery into the quahog fishery, AR 197, 1805; and that

[13] City of Chicago v. Federal Power Comm'n, 458 F.2d 731, 742 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).

the potential for further migration to and increased catches in the quahog fishery would be heightened by placing the surf clam fishery under the ITQ system while leaving the quahog fishery unregulated, AR 399, 1692. The Council coupled these long-term concerns with evidence of a recent increase in the quahog harvest. AR 1886.[14]

In sum, the threat to the ocean quahog resource is reflected in the need for the existing annual quotas. An increase in this threat is posed by the diversion of ships from the surf clam to the quahog fishery as surf clam restrictions tighten. Both regulators and fishermen have an interest in having ground rules established before any problem matures. Contrary to plaintiffs' arguments, the Act does not mandate any finding of necessity before fishery access can be limited. The accompanying regulations state that "[i]n an unutilized or underutilized fishery, [limited access] may be used to reduce the chance that [overfishing or overcapitalization] will adversely affect the fishery in the future." 50 C.F.R. § 602.15(c). The issue thus turns on predictions about the future in an area of technical and scientific expertise, where special deference is due to regulatory agencies. Building & Constr. Trades Dep't v. Brock, 838 F.2d 1258, 1266 (D.C. Cir. 1988). Although plaintiffs' attack

[14]In interpreting a table of quahog landings between 1979 and 1987, defendants stress that the number of quahogs caught rose from 2.9 million bushels in 1981 to 4.7 million bushels in 1987, an increase of over 60%. Plaintiffs note that even the latter figure is more than a million bushels lower than the annual quota of 6 million bushels, which has never been caught. However, given that harvests were consistently in the 3 to 4 million bushel range while quotas ranged from 4 to 6 million, the Court cannot say that the Council's concern was unwarranted. For purposes of judicial review, the important point is that it was rational for the Council and the Secretary to consider the evidence of a possible trend.

on this determination is by no means a frivolous one, the Court holds that the Council and the Secretary did have a rational basis for their action.

16 U.S.C. § 1853(b)(6). The Magnuson Act expressly provides that the Council and the Secretary may

> establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account--(A) present participation in the fishery, (B) historical fishing practices in, and dependence on, the fishery, (C) the economics of the fishery, (D) the capability of fishing vessels used in the fishery to engage in other fisheries, (E) the cultural and social framework relevant to the fishery, and (F) any other relevant considerations.

16 U.S.C. § 1853(b)(6). Plaintiffs contend that the decision to limit access to the ocean quahog fishery violated subsections (A) and (B) of this provision by failing to take adequate account of both present and past participation in the fishery. With regard to the former point, they assert that the Secretary's failure to give extra weight to recent quahog catch data, to use catch data from 1989 or 1990, or to take account of vessel size, mean that the ITQ allocations were not adequately based on "present participation in the fishery." On the latter point, they reiterate their argument that "historical fishing practices" would have been better reflected by individual catch histories rather than vessel catch histories, and assert that their investment in new vessels should have been given weight as evidence of "dependence on the fishery."

Moreover, they argue that there is no evidence that the limited access scheme is necessary "in order to achieve optimum yield."

Here again, the administrative record indicates that the Council considered precisely these objections en route to making its decision. AR 1779-80; 1850-53. The very language of Section 1853(b)(6) indicates that its enumerated factors must be balanced against each other and against "any other relevant considerations." As long as the Council and the Secretary took these factors into account, the Court may not second-guess the accuracy of the balance struck. The choice of cut-off dates and weighting formulas thus was not arbitrary and capricious or an abuse of discretion. Last, the Court has addressed the arguments about vessel catch histories and the asserted "necessity" requirement earlier in this opinion. See SUPRA at 12-14, 18.

The National Standards. Plaintiffs argue that Amendment 8 creates incentives for consolidation of the quahog fishery, and has in fact resulted in consolidation, contrary to National Standard 4 and its prohibition of "excessive shares."[15] They allege that two fishermen now hold ITQs totalling forty percent of the annual catch quota for ocean quahogs, and that fragmentation of the remaining

[15] 16 U.S.C. § 1851(a)(4)(C). Plaintiffs also argue that National Standard 4 requires a showing of necessity before allocations of fishing rights can be made, and claim that there is no such showing as to the ocean quahog fishery. The latter assertion has been addressed above, while the "necessity" argument again is countered by reference to the regulations accompanying the Act, which state that allocations may be made "if such measures are necessary or helpful in furthering legitimate objectives." 50 C.F.R. § 602.14(c) (emphasis added).

shares will necessarily result in further consolidation, as holders of smaller shares sell their interest. This figure does give pause, although the raw number may not be economically significant.[16] The defendants have acknowledged that increased efficiency due to consolidation was one of the explicit objectives of Amendment 8. However, the Act contains no definition of "excessive shares," and the Secretary's judgment of what is excessive in this context deserves weight, especially where the regulations can be changed without permission of the ITQ holders. The record reflects that the Council and the Secretary considered the problem, and addressed it by providing for an annual review of industry concentration, with the possibility of referral to the Department of Justice. AR 1779.

The Court also rejects the contention that the Council's and the Secretary's decision to limit access to the quahog fishery was in violation of National Standard 5, which states that "[c]onservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." 16 U.S.C. § 1851(a)(5). Plaintiffs urge that the inclusion of quahogs in the limited access scheme of Amendment 8 was motivated solely by economic reasoning. The Court finds, however, that the conservation concerns cited by the Council and the Secretary were integral to their inclusion of quahogs in the

[16]Even if the raw number measured a true economic market -- which is by no means clear -- a judgment of undue concentration could not be based on the mere existence of such a share possessed by the two largest participants.

limited access scheme. The record demonstrates a clear concern that the exit of vessels from the surf clam fishery could place a strain on the quahog resource when those vessels then entered the quahog fishery, as they already had begun to do under the prior regulations. Where the Secretary considered and relied upon such noneconomic objectives when reviewing and promulgating regulations, there is no violation of National Standard 5. See Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456, 1465 (9th Cir. 1987).[17]

Finally, the plaintiffs argue that the limited access scheme violates National Standard 7, which states that "[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7). However, it is settled law that "in making a decision on the practicability of a fishery management amendment, the Secretary does not have to conduct a formal cost/benefit analysis of the measure." Alaska Factory Trawler Ass'n, 831 F.2d at 1465; see National Fisheries, 732 F. Supp. at 222. Here, there is ample evidence in the record that the Council considered the costs and benefits of including quahogs in the ITQ system at several points in the administrative process. E.g., AR 405, 496, 502, 1152-72.

For all the reasons detailed above, the Court finds that the Secretary's decision to limit access to the ocean quahog fishery

[17]Defendants also cite the administrative and enforcement ease associated with promulgating the same management scheme for the two fisheries, and at the same time. This concern standing alone does not exempt the scheme from the requirements of National Standard 5. However, when taken together with record evidence that similar conservation problems might exist in the two fisheries, it provides additional support for the Secretary's decision.

was not arbitrary and capricious or an abuse of discretion within the meaning of the Magnuson Act.

C. SUPPLEMENTATION OF THE RECORD

Plaintiffs attached several affidavits of fishermen and a 1990 fishery report produced by the Council as exhibits to their motions for partial summary judgment. Defendants have moved to strike these materials on the ground that this Court's review is limited to the administrative record certified by the Council. See Florida Power & Light v. Lorion, 470 U.S. 729, 743-44 (1985). Citing exceptions to this rule, plaintiffs argue, first, that the material in the affidavits was wrongfully excluded from the certified record; and second, that the report shows the eventual falsity of predictions on which the Secretary relied when promulgating the regulations.

This dispute does not affect the outcome in this case. As to the affidavits, the pleadings leave unclear the extent to which the information contained in them was before the Council, and thus properly part of the record under review. However, it appears that at least vessel catch histories and estimated ITQ allocations were considered by the Council. To that extent, consideration of the proffered affidavits is proper for the limited purpose of proving that Amendment 8 has had a general impact on fishermen, if this was ever in doubt. However, the principal thrust of these affidavits is to show the adverse impact of Amendment 8 on certain plaintiffs. Since the record shows that the Secretary considered the prospect that some fishermen -- if not this particular group of fishermen

-- could be adversely affected, the affidavits fail to undercut the Court's central finding that the Council and the Secretary had a rational basis for adopting Amendment 8. Thus, even treating the affidavits as part of the record, the result remains unchanged.

The Court also agrees that the 1990 Council report is properly considered under the rule of Amoco Oil Co. v. EPA, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974), which held that information subsequent to an agency decision may be considered if it "bears directly upon the plausibility of certain predictions made . . . in promulgating the [r]egulations." However, while the proffered evidence may be relevant to the Council's predictions, it is insufficient to alter the Court's decision. Plaintiffs cite the report as proof "that defendants erroneously predicted that the quahog resource was in danger of being overfished." Plaintiffs' Opposition to Motion to Strike at 9. This claim rests on an observation in the report that the "DeLury method" for estimating the size of the quahog resource shows that ocean quahog biomass "may possibly be about double" the estimate produced by another method. Plaintiffs' Exhibit B at 7. However, this alternative estimate derived by the DeLury method is on its face highly qualified, and it apparently did not affect the Council's decision, contained in the very same report, to keep the

1991 aggregate quahog catch quota in line with earlier quotas.[18] The 1990 fishery report thus does not affect the Court's decision.

D. OTHER CLAIMS

In their complaint, plaintiffs in No. 90-1616 made a separate claim that the regulations as promulgated would require submission of proprietary data in contravention of the Act. In addition, both sets of plaintiffs challenged the provisions dealing with shucking of surf clams and quahogs at sea. These claims were not addressed in plaintiffs' summary judgment motion, which is styled as a motion for partial summary judgment, or in any of plaintiffs' subsequent memoranda. However, at oral argument, counsel for the plaintiffs abandoned these claims. Accordingly, they will not be addressed by the Court, but will be dismissed along with the other claims.

III. CONCLUSION

In accordance with this Memorandum Opinion, an Order will be entered granting the defendants' motion for summary judgment and dismissing this case.

DATED: 4/8/91

MICHAEL BOUDIN
United States District Judge

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[18] Plaintiffs' Exhibit B at 12. Indeed, the report notes that "there are several potential biases inherent in the DeLury method, that may produce inflated population size estimates." Id. at 7. Plaintiffs also cite the Council's estimate of the 1990 quahog catch, which shows a short-term decrease in the catch. Id. at 12. The Court gives no weight to this data, which does not affect the continued possibility of a long-term increase. See supra note 14.

AGENDA C-3
APRIL 1991
SUPPLEMENTAL

RECEIVED
APR 10 1991
I.P.H.C.

Douglas Glessing
Box 191
Angoon, AK 99820

Dear Sirs

I want to take a few moments of your time to express myself on your proposed I.F.Q's for the halibut fisheries.

I agree that changes are in order. Bye-catch is out of control, safety is in need of improvement and we need a better product.

I.F.Q's based on production, other than a fair share based on type of license, a, B, C etcetera, will be subject to a great legal battle. The Alaska Legal Services would stand to take you on for all the harmed parties and others from other states stand to join them also. This is a public reasource & if you weight quotas in ways that give it to the more capitalized "fishermen. who by their size, have been able to capitalize the reasource, will be patently unfair & subject to suit. Make it fair by license type, equal to all holders of type or you will end up in the courts. Of this I can guarantee you. Why set your self up for a fight? Divide equally or fight!!

We have seen where two or three permit holders fish one boat. Where is the discussion on their "quotas."

Not happy with what I hear.

Captain
Douglas Glessing

THE NORTH PACIFIC FISHERIES PROTECTION ASSOCIATION

"FIGHTING FOR THE FREEDOM FOR YOU AND YOUR CHILDREN TO FISH THE NORTH PACIFIC."

MEDIA ADVISORY

APRIL 15, 1991

For further information: Laura Cooper (206) 781-0336

Laura Cooper of Seattle, Washington, speaking for an organization which was established to protect the rights of all people involved in the fisheries of the North Pacific to have fair access to the common fisheries resources announced a major campaign today. Cooper's group is opposed to the attempt by a small band of bankers and boat owners to appropriate to themselves the public resource of the North pacific fisheries by means of a so-called "individual fishing quota" system for the longline fishery.

"The immediate threat is to the halibut and the black cod or sablefish fishery," said Cooper, "but if we allow these species to be stolen from the public, rockfish, whiting and even salmon may well be next." Cooper also pointed out that an appropriation of this fishery by a small group of vessel owners is likely to spread to the Pacific Coast, Gulf of Mexico, and Atlantic Coast fisheries if it isn't stopped here and now. If this proposal is adopted it will set a national precedent for all fisheries.

The North Pacific Fisheries Management Council is the immediate target of Cooper's group. That Council is planning to give away the exclusive right to harvest sablefish in the North Pacific Ocean off the coast of Alaska to a very small group of people who will then own the right to catch those fish forever. The public will receive <u>nothing</u> for these exclusive fishing rights. The elite group who will receive the exclusive fishing rights will make millions, if not tens or hundreds of millions from the use and transfer of ownership of those rights.

Members of Cooper's organization include crew members and skippers who have fished halibut for years and fished for blackcod almost since the American fishery began off Sitka, Ketchikan and the Aleutian Islands in Alaska more than ten years ago. These fishermen will receive nothing from the plan proposed by fishing vessel owners and their associated monied interests. "We think that is a violation of the Magnuson Act." Cooper said. "And," she added, "if it isn't a violation of the Act, it should be."

"We are not necessarily opposed to the setting of individual fishing quotas" said Rodger Davies,a Seattle fisherman, "but we are opposed to giving those quotas away to a few wealthy people and then forcing anyone who ever wants to get into the fishery in the future to buy the quotas from them. Its just not fair. Those fish belong to everyone." Davies and Cooper pointed out that if the quotas are going to be sold rather than made available free to owners and workers alike, the law should, but does not, allow the quotas to be auctioned off by some federal fishery agency every year or every few years to get the most value for American citizens who own the common resources and to allow new entrants access to the fishery at a fair price.

Cooper's group is working with a growing coalition of individuals and organizations to inform the public and their state and federal legislators of the imminent danger posed by the proposed actions of the North Pacific Fisheries Management Council when it meets on April 21st in Kodiak, Alaska.

One skipper who is working with the NPFPA, Peter A. Soileau, has taken his concerns personally to the Director of the National Marine Fisheries Service in Washington D.C. and to the North Pacific Fisheries Management Council. In expressing his frustration with the proposed system, Soileau,

who was a crewmember for years, argues that "These guys bought fishing b[illegible]s, not the fishery. But the entire fishery is what the boat owners are going to get if this rip-off isn't stopped, and they are not going to have to pay one darn cent for it." Soileau has submitted a proposal which he says would at least allow the crew members to get a piece of the free allocation of fishing quotas if the Council insists on making the IFQ's transferable. His proposal, which he has submitted to the NPFMC for consideration, would allow some limited access to the fishery by a person who did not own a boat or boat share but was a crew member. Participation in the fishery as a crew member or skipper would entitle a fisherman to a share of the quota under Soileau's proposal. It would then be possible for that crew member or skipper to fish his or her share, aggregate the share with a boat owner or to aggregate with other crew members and buy or lease their own boat. As the system is now proposed by the Council, Soileau says that: "If I can ever save up enough money for a boat, I'm going to have to pay tens or even hundreds of thousands of dollars to these guys who got the fishery for free, just for the right to go fishing. Its a system designed to lock us and our kids out forever."

Other longline fishermen have expressed concern that the new program may spell the end to the directed Halibut fishery within a very short time. As one halibut fisherman from Ballard pointed out: "The trawlers took more halibut in the so-called 'incidental take' last year than we did in the directed fishery. Who is going to get those IFQs? You can bet it won't be the small boat fisherman or crew member. Its going to be the guys with all the money--the partnerships with all the ex-politicians and bankers and big catcher-processors. This thing is a bunch of b....."

Cooper also explained that this is not just an economic issue, bu[illegible]n environmental and public policy concern as well. David Allison, an Ala[illegible]an Attorney working on environmental, fisheries and marine issues in Alaska and the Pacific Northwest, is working with NPFPA. Allison said that the NPFMC IFQ proposal does not appear to be driven by consideration of the ecosystem impacts resulting from fishery management alternatives but by the same kind of economic special interest that has led to the speculative disasters in other natural resource programs like the British Columbia forest industry. "Eliminate the transferability of the IFQs" said Allison, "and the Council could design a management program using IFQs to benefit the ecosystem, including the fishing and processing community, and provide a benefit to the public as well." Allison suggested allocation of IFQs based upon a series of qualifying factors including, among others, past participation in the fishery as an owner, skipper or crew member and traditional reliance on the fishery for food or commerce by the community of which the applicant is a member. The financial pressure to provide a continually increased harvest could be substantially reduced by eliminating the transferability and consequent speculative increase in the prices paid for the IFQs. "Taking the pressure for constantly increased harvest levels off the fishery managers takes the pressures off the stocks and allows the stocks to be managed as an integral part of the ecosystem rather than as a short term economic resource."

Cooper pointed out that action by the public <u>now</u> is essential if the proposed decisions are to be stopped between now and the Council meeting later this month. "We might be able to do something to stop it in Congress, or perhaps during the comment period in the month after it is passed by [illegible]e Council, but once the decision is made by the North Pacific Manage[illegible]t Council, It will be very difficult to get the decision reversed. The time to protect our rights and the rights of our children to fish the North Pacific is now."

Alaska Longline Fishermen's Association
IFQ POSITION

APRIL 10, 1991

INITIAL ASSIGNMENT OF QUOTA SHARES

*Vessel owner(s) unless qualified lease exists (bareboat charter). Qualified leaseholder would receive credit for landings.

QUALIFYING PERIOD

*To qualify for QS in an area, a "person" (owner or leaseholder) must have made fixed gear landings of sablefish in the area in at least one year during 1984-1990.

INITIAL QS AMOUNT:

* Best 5 of 7 years, 1984-1990.
*Option: Best 3 of 7 years, 1984-1990.

EMPHASIS ON RECENT LANDINGS

No weighting of more recent landings.

VESSEL CATEGORY DESIGNATIONS:

1. Catcher vessels
    a. Over 60 feet
    b. 60 feet and under
2. Freezer longline vessels

Landings calculated for each category. Catcher vessel fish cannot be frozen aboard vessel using IFQs. Freezer longliner fish may be delivered fresh or frozen.

Option: Same as above except *vessel size class only in SEO/EY area*

DURATION OF QUOTA SHARES PROGRAM:

*No specified ending date.

CALCULATING IFQ POUNDAGE:

*IFQ poundage obtained by multiplying the QS percentage times the fixed gear TAC for an area. NO OPEN ACCESS SEGMENT IN GULF.

TRANSFER OF QS/IFQs:

*QS fully saleable

*Catcher vessels: IFQ holder must be on board vessel during harvesting operation

Option: same as above except **west of 140 degrees West Longitude** in catcher vessel category 50% of any person's IFQs may be leased to a U.S. citizen who must be on board and sign the fish ticket.

Note: no position has yet been taken by ALFA members concerning transfer/leasing of freezer longline IFQs.

LIMITATIONS ON HOLDINGS (OWN/CONTROL).

*No more than 1% of fixed gear TAC **by area** may be owned/controlled by any person (or individual), or used on one vessel. However, initial recipients of more than 1% may continue to own or control the excess, but no more.

COASTAL COMMUNITY CONSIDERATION

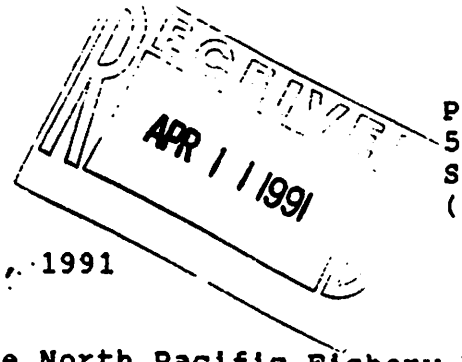
*No coastal community considerations in Gulf. Coastal community consideration in Bering Sea may be appropriate.

UNLOADING

*All first point of sale purchases of sablefish (processed or unprocessed) would be required to obtain a purchaser's license from NMFS.
Vessels may unload sablefish (processed or unprocessed) only in areas designated by NMFS. Prior notification of such off-loading may be required.

PROGRAM FINANCING

*Assessment of QS/IFQ holders.



Peter A. Soileau
511 N.W. 62nd St.
Seattle, WA. 98107
(206) 781-0130

April 8, 1991

TO: The North Pacific Fishery Management Council

RE: Individual Fishing Quotas for the Longline Fishery - Equitable Options

Several weeks ago I sent an IFQ proposal, "Initial Assignment of Quota Share", to the Council members which outlined an equitable method of dividing up and alloting the available quota to all members of the fleet, and also proposed the formation of a "Quota Share Council" to distribute available quota throughout the fleet or to new applicants to the fishery.

I wish to state once again how strongly I, and many other North Pacific fishermen, feel about the IFQ issue, and urge the Council not to adopt a plan that gives the wealth of this fishery solely to the owners of fishing boats who happened to be harvesting fish for the last few years. If the currently proposed plans are implemented, these few individuals will be able to will the rights to this national asset to their children and grandchildren, or sell out and become instantly wealthy. These people bought fishing boats, they did not buy a fishery. Fishing is a national resource, and, therefore, is owned by all of us. One alternative option to the proposed plans is to auction off the shares for the initial distribution, and possibly conduct an auction every few years, as is done in other industries that harvest national resources. This gives all the "owners" i.e. any American citizen, equal access to this public resource, as it should be in an open free enterprise system. I am told that the Magnuson act would have to be amended to accomplish this.

If it is necessary to privatize the fishery in order to save it, and if amending the Magnuson act is not possible, or the Council members do not like the idea of a "Quota Share Council" whose job it would be to distribute access of the harvest to the users, then the best and the most equitable option is outlined in section #3 of my proposal: "Initial Assignment of Quota Share". It states that each licensed participant in the fishery would get his share of the quota; essentially the idea was to assign 30% (rather than 100%) to the vessel owner, and divide the remaining quota among skippers and crewmen, based upon their documented participation in this fishery. Once this is done, the individual share could be traded like any other asset, with appropriate caps on ownership of shares and other provisions.

The decision of the Council is going to set a national prescedent for all fisheries. Again, I urge you to consider the magnitude of the ramifications of proceding with what has already been proposed and vote for a more equitable alternative.