

EXECUTIVE DIRECTOR'S REPORT

Since the last meeting the staff has been working on various environmental assessments and analyses of Council proposals as well as analyzing the disapproval of the Fisheries Development Zone amendment by NMFS-Washington. Travel has been limited to trips to Seattle for two prohibited species meetings by myself and for U.S.-Canada negotiations by Jim Glock. Harold Lokken, John Winther and Don Bevan also worked at the U.S.-Canada negotiations and Harold Lokken was in Anchorage for the International Pacific Halibut Commission meeting as Council representative.

We've received two drafts of the Department of Commerce legal opinion on the Council conflict of interest problem. We have not received the finished copy and had been asked to withhold distribution until that arrived, but I see that it has been circulated by the Pacific Council and is available through Senator Stevens' office. We are including that draft in your additional written material. It is still a draft and therefore may be changed. Generally, however, it gives the Council members a great deal of freedom under the Conflict of Interest Act and exempts Advisory Panel members from the Act completely.

I would like to recommend a special Council meeting with a single agenda item, Council policy, planning and procedures. This seems to be the best way to approach the subjects of how the Council conducts its business, its relationship with NMFS, and policy development in other areas of Council activity. I would like to suggest April 25 and 26 in Anchorage and leave the question of whether the SSC and Advisory Panel are needed for the meeting up to the Council.

I'd like to mention several changes needed in the agenda. The SSC will not have had an opportunity to review the RFP for herring research in the Bering Sea and I recommend postponing a Council decision on that research funding proposal to the March meeting. The research, as I understand it, would be conducted from January through March and that would still give us time to send an RFP out for bid and do the necessary planning for the contract prior to next January.

We need to discuss two more problems with sablefish that are not in your material in the book. First is the problem with the Fisheries Conservation Zone cul-de-sacs in Chatham Straits and Frederick Sound as they affect the "inside/outside" sablefish fishery in Southeast. Second is the request we have received from several members of the industry to establish a minimum size limit for sablefish. Both of those items can be considered under agenda item D-4.

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The Halibut Commission has established seasons and areas that accomplish the objectives the Council was striving for with agenda item C-2(b) "Special Provisions for local development in the Bering Sea." Area 4C, which encompasses the Pribilofs, opens May 21 and will be open one day, closed one day until August 2, when it will remain open until August 10 to allow outside boats to help catch what quota, if any, may be left at that time. If any quota remains after this 8-day opening, the fishery will resume on a 1 day on/1 day off basis until the quota is caught or October 31. Non-local boats will be required to clear at Unalaska between openings. Quota is 400,000 lbs., same as last year. A new area with a 50,000 lb. quota, 4E, has been created encompassing Nelson and Nunivak Islands. It opens May 21 on a 2 days on, one day off basis. Non-local vessels must clear in Unalaska between openings. As in Area 4C, there will be an opening August 2-10 if any 4E quota is left; if any quota remains after this opening, the fishery goes back to 2 days on/1 day off until October 31 (when all commercial halibut fishing everywhere ends).

Those regulations, reached through agreement of the fishermen's Conference Board, eliminate the need for the Council to consider any further measures to enhance the opportunities of the residents of the communities of western Alaska north of 56°N latitude to engage in the halibut fishery. There is a request from Atka under that agenda item they have asked the Council to consider. It came in late so cannot be considered at this meeting. Other than bringing that to your attention, I recommend we drop item C-2(b) from the agenda.

We can also drop item C-3(a) -- Norway has withdrawn its joint venture permit.

The International Pacific Halibut Commission has scheduled their 1985 meeting for January 28-31 in Vancouver, British Columbia. If at all possible we should try to schedule our business so it does not conflict with that meeting. Since we generally have a joint meeting with the Board of Fisheries in January, we should talk to them to see if we can come to agreement on timing for 1985.

I asked Natural Resources Consultants to give me an estimate of what they would charge to estimate the most likely U.S. fleet mix required to harvest the groundfish OY off Alaska; the numbers of vessels and the days effort required in that mix, and then assess the number of boats currently available to harvest groundfish and their potential catch; identify the "difference", that is the additional vessels above those now available that would be required to harvest the OY.

I've asked Natural Resources Consultants for the proposal because they have most of the required information on hand from work they have done on other projects. It is something we would have difficulty doing in-house because we do not have access to much of that information, nor could we get it without considerable time and expense.

I think we need this kind of information for planning Council action on groundfish management. I don't know how much construction, if any, will be needed to bring the American fleet to a size capable of harvesting the entire groundfish OY, but it is definitely something the Council should know, and it may be closer than we think. In the letter under agenda item B-1(a), Natural

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Resources Consultants estimates they can do the job for under \$3,000. We have adequate funds in the budget for consultants to handle that. I would like your approval for them to go ahead with the job.

Commissioner Collinsworth asked the staff to gather all the material we had available on sablefish, particularly relating to the catch by trawlers, both joint venture and foreign, for the Council. Most of that has been prepared, we will finish collating it and get it to you at or before the March Council meeting.

You have probably seen in the papers that the fisheries sanctions against Poland have been lifted. There is a good possibility we will be receiving permit applications from them for a directed and joint venture fishery by the March meeting.

I have been told that Ed Wolfe has been confirmed as Kronmiller's successor in the Department of State.

The agreement with Portugal to sell them cod and allow them to conduct a directed fishery for codfish should have been settled last week. I hope that we will have word at this meeting from Bill Gordon or Bob Hayes on its successful conclusion.

The permit applications from the seven trawlers involved with the NIKKO MARU in a underlogging violation last year that were recommended for disapproval by the Council were not issued by NMFS. However, the company got a temporary restraining order so that they could continue fishing until a preliminary hearing could be held to determine if there was enough evidence to be able to withhold the permits. That hearing was conducted January 7-13, and I have not heard, to this date, the final decision. I assume that the boats are still fishing.

There has been a change in the deadline for the nominations by the Governors for nominees for Council appointments. It was May 15 and has been changed to March 15 in order to "provide more time for screening so that the announcement of appointments can be made 45 days ahead of the end of the term" (Council terms end August 10).

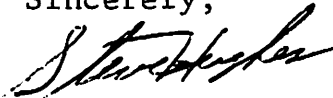
And last, I would like to point out that this is Admiral Knapp's last Council meeting as a member. While we are losing him to the Council, we have fortunately gained him as a Alaskan and a member of the Administration, our new Commissioner of Transportation. All his new ships are blue and gold, instead of the white and black he has become accustomed to. I would like to thank the Admiral personally for all the help he has given me as Chairman of the Finance Committee and the Permit Review Committee. I am going to miss him very much.

Mr. Jim Branson
January 20, 1984
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25 copies of the document, would not exceed \$3,000. The soonest we could begin would be late February. We could complete our study and mail copies of our report within an 8 to 10 day timeframe.

It was good to talk to you. We appreciate your providing us this opportunity to be of service.

Sincerely,



Steven E. Hughes
Partner

Status of Fishery Management Plans

1. Salmon FMP

The Council and Board will meet jointly to discuss salmon management for 1984.

2. Herring FMP

The Council will review an RFP for offshore herring research.

The FMP was given final approval by the Council in September 1983 to go to Secretarial review. The package is now being prepared for forwarding for review.

3. King Crab FMP

Though no formal action is required by the Council at this meeting, they will review king crab research and set the date for a public hearing in Seattle. The FMP and supporting documents were readopted by the Council in September 1983 and forwarded on October 25 to commence fast-track Secretarial review. The start of the review clock has been delayed due to concerns over the permit section.

4. Tanner Crab FMP

Though no formal action is required by the Council at this meeting, the Council will review Council/Board working procedures.

Amendment 9 which will update ABC/OYs with numerical ranges, framework seasons, revise the in-season adjustment section, and add a new section on pre-season adjustments, was approved by the Council in July. The amendment package was forwarded on December 21. NMFS Central Office notified the Region on January 19, 1984 that their initial review indicated the amendment package was not structurally complete.

5. Gulf of Alaska Groundfish FMP

The Council will consider revising sablefish by-catch restrictions on joint venture trawl operations from the current 1.5%. The Council will also reconsider the restriction placed on the use of bottom trawls in the foreign pollock fishery at the December Council meeting.

Amendment 13, which combines the Western and Central areas for pollock management, sets its OY at 400,000 mt, and restricts the foreign use of bottom trawls for pollock, was approved by the Council in December and is being prepared for Secretarial review. The bottom trawl restriction will be reviewed by the Council at this meeting.

Amendment 12, which would ban pots in the Southeast sablefish fishery, is being prepared for submission to Secretarial review.

6. Bering Sea/Aleutian Islands Groundfish FMP

The Council will review NMFS' disapproval of the FDZ (Amendment 6) and consider resubmitting the proposal for Secretarial review. The Council will also consider the prohibited species catch problem by trawlers in the Bristol Bay Pot Sanctuary.

Amendment 9 establishing field order authority for conservation closures, was approved in July for public review. Final Council action will come in March.

Amendment 8 setting salmon PSC limits for 1984 and 1985 was approved by the Council in May 1983 and will be implemented through a rule-related notice. The proposed rule was published in the Federal Register on October 7 with comments due by November 4.

Amendment 6 creating the Fishery Development Zone was disapproved by the Secretary of Commerce on December 8, 1983. The reasons for this disapproval will be discussed by the Council at this meeting. The Council may resubmit the amendment for Secretarial review.

Amendment 1 on managing groundfish as a complex was implemented on January 1, 1984.



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MEMORANDUM FOR: Irving P. Margulies
Acting General Counsel

FROM: Marilyn G. Wagner *Marilyn G. Wagner*
Assistant General Counsel
for Administration

SUBJECT: Applicability of 18 U.S.C. § 208 to Regional
Fishery Management Council Members, and
Advisory Panel Members

This memorandum discusses the application of one of the Federal conflict-of-interest statutes, 18 U.S.C. § 208, to those members of the Regional Fishery Management Councils and the Councils' advisory panels who are actively engaged in the commercial and recreational fishing industries. Section 208 prohibits Government employees from participating in certain matters in which they have a financial interest. This section 208 issue has recently materialized in a suit in which actions of the North Pacific Council have been challenged on conflict-of-interest grounds. See Weekly v. Baldrige (sic), No. A 83-283 (D. Alaska filed June 1, 1983). Prompted by this litigation, NOAA's Office of General Counsel has asked us to review the issue, and if authorized by section 208's waiver provision, to prepare a regulation which would partially exempt Council public members and advisory panel members from section 208's scope.

The starting point of our analysis of section 208's application to the Council members is the consensus reached several years ago by NOAA's Office of General Counsel, the Office of Legal Counsel (OLC) at the Department of Justice, and the Office of Government Ethics (OGE) at the Office of Personnel Management, that Council members who are not regular employees of the Federal Government are special Government employees, and are therefore generally subject to the conflict-of-interest statutes. While the NOAA opinion touched on the narrow section 208 issue, neither the OLC nor the OGE opinion addressed it, and the issue has not been conclusively resolved to date. On considering it, we have determined that, although Council members are in general subject to the conflict-of-interest laws, the Magnuson Fishery Conservation and Management Act created a limited, implied exemption from section 208 for Council members from the fishing industry. This exemption

allows them to participate in a range of Council activities from which section 208 might otherwise preclude their participation.

We have also reviewed the applicability of section 208 to members of the Councils' advisory panels, and have determined that they, unlike Council members, are not special Government employees. Advisory panels are statutorily-prescribed bodies, whose members are supposed to represent the interests of specific sectors of the fishing industry. Advisory panel members receive no compensation for their services. Our position that they are not special Government employees for purposes of the conflict-of-interest statutes is consistent with the written views of OLC and OGE on the question.

Section 208(b)(2) authorizes a waiver of the prohibition of section 208(a) by regulation for remote or inconsequential financial interests. Because we have concluded that the statute establishing the Councils impliedly created a limited exemption from section 208 for Council members drawn from the fishing industry, and furthermore, that advisory panel members are not subject to the conflict-of-interest statutes applicable to Federal employees, we consider a section 208(b) waiver unnecessary. We have therefore not resolved the question whether the kinds of financial interests possessed by Council members drawn from the fishing industry could properly be deemed remote or inconsequential within the statutory meaning.

I. APPLICATION OF 18 U.S.C. § 208 TO REGIONAL FISHERY MANAGEMENT COUNCIL PUBLIC MEMBERS

A. BACKGROUND

Neither the statute which created the Regional Councils, nor its legislative history, explicitly addresses the problem raised under the conflict-of-interest statutes by membership on the Councils of persons from the fishing industry. Nevertheless, both the statute and the legislative history indicate that persons actively engaged in the fishing industry were expected to be among those appointed to the Councils, and to serve on the Councils while retaining their fishing industry ties. Since the Councils were established, industry members have predominated among public members. Furthermore, Congress has explicitly indicated in its oversight role that industry members should serve on the Councils.

The Magnuson Fishery Conservation and Management Act (MFCMA), 16 U.S.C. §§ 1801-1882, established eight Regional Fishery Management Councils, whose principal statutory function is to develop a management plan for each fishery within their respective geographic areas. The membership of each Council consists of a statutorily-prescribed mixture of Federal and state officials, and private individuals appointed by the Secretary of Commerce (public members). The public members constitute a majority of the voting members of each Council. See 16 U.S.C. § 1852(a).

The MFCMA mandates that the public members be appointed by the Secretary of Commerce from a list of qualified individuals submitted by the governor of each Council's constituent states. 16 U.S.C. § 1852(b)(2)(B). Qualified individuals are persons "knowledgeable or experienced with regard to the management, conservation, recreation or commercial harvest of the fishery resources of the geographical area concerned." 16 U.S.C. § 1852(b)(2)(A). Council members serve on an intermittent basis, and receive compensation for their services at a GS-18 rate. See 16 U.S.C. 1852(d).

The House-passed version of the MFCMA provided for two categories of public members of the Councils. The first group was to consist of six persons having knowledge and experience in commercial or recreational fishing, and two persons representing the public interest. The former were to represent recreational and commercial fishing interests. S. 961, the Senate bill, adopted a different approach, authorizing the governors of each state entitled to membership on a Council to submit a list of qualified individuals. A qualified individual was defined as one knowledgeable and capable of making sound judgments in the public interest with respect to the management and conservation of fishery resources. The Senate felt that designation of a representative from each narrow interest group within the fishing industry would make the Councils unwieldy, and decided that the President and governors should exercise their judgments to achieve a balanced membership. The Senate nevertheless indicated its presumption that industry representatives would be among those eligible to serve on the Councils. See Senate Committee on Commerce, A Legislative History of the Fishery Conservation and Management Act of 1976 688, 116-17 (Comm. Print 1976).

The compromise between the Houses of Congress on panel membership shows that the Congress intended that members of the fishing industry would serve on the Councils. By statutory definition, only those who are "knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishing resources of the geographical area concerned" are qualified for appointment to the Councils. 16 U.S.C. § 1852(b)(2)(A). It is apparent from the inclusion of experience as a qualification that industry members were expected to serve on the Councils. Cf. G. Pontecorvo, "Fishery Management and the General Welfare: Implications of the New Structure," 52 Wash. L. Rev. 641, 653 (1977).

Most of the appointees to the Councils since the passage of MFCMA in 1976 have been drawn from the fishing industry. See, e.g., House of Representatives, Oversight Report on the Magnuson Fishery Conservation and Management Act of 1976, H.R. Rep. No. 438, 97th Cong., 2d Sess. 29 (1982) (Table I). The House oversight report shows the House Committee on Merchant Marine and Fisheries' expectation that fishing industry representatives will be appointed to the Regional Councils. Id. at 28.

As noted above, the principal statutory function of the Councils is the development of fishery management plans for the fisheries within each Council's area of concern. A fishery is "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics." 16 U.S.C. § 1802(7)(A). Management plans must satisfy broad statutory guidelines. 16 U.S.C. § 1852. Furthermore, they must be submitted to the Secretary of Commerce for review. The Secretary ultimately determines whether the proposed plans comply with the national standards, being authorized to approve, disapprove, or partially disapprove them. 16 U.S.C. § 1854(a).

In addition to developing fishery management plans, the Regional Councils have several other statutory functions. They provide comments to the Secretary of Commerce on applications for foreign fishing permits. They also comment on fishery management plans prepared by the Secretary when the Secretary is authorized to prepare them. They conduct an ongoing review of the optimum sustainable yield and the total allowable level of foreign fishing for each fishery. See 16 U.S.C. § 1852(h).

The Civil Service Commission attempted the first formal resolution of the legal status of Council members in 1976. It concluded that Congress intended the Councils' public members to act in a representative capacity, and therefore, that public members were not subject to the conflict-of-interest statutes. The following year NOAA's Office of General Counsel took the contrary position. In Opinion 70, it concluded that members of the Councils who are not regular employees of the Federal Government are special Government employees, and are therefore subject to the conflict-of-interest statutes. Both the Office of Legal Counsel (OLC) and the Office of Government Ethics (OGE) reviewed Opinion 70 in the context of responding to NOAA's question whether the public financial disclosure requirements and post-employment restrictions of the Ethics in Government Act were applicable to members, advisors, and administrative employees of the Councils. In written responses, both OLC and OGE agreed with Opinion 70's conclusion that Council members were special Government employees for purposes of the conflict-of-interest statutes. However, neither agency was presented with, or specifically considered, the applicability of section 208 to Council members.

Opinion 70, on the other hand, did address the section 208 issue. It pointed to a number of Council functions and activities which might cause difficulty under section 208. However, it further indicated that any section 208 problems could be resolved through the issuance by the Secretary of a statutory waiver by general regulation. Notwithstanding these conclusions in Opinion 70, no section 208(b)(2) waiver has been executed.

B. DISCUSSION

Section 208 prohibits Federal Government employees, including special Government employees, from participating personally and substantially in particular matters in which they have a financial interest. Under certain circumstances, participation in Council functions by members actively engaged in the fishing industry - would apparently violate this prohibition. A person's involvement in a matter at other than the final decisional level can be violative of section 208, as long as the involvement is personal and substantial. See 2 Op. Off. Legal Counsel 151, 154-55 (1978). Thus, the fact that Council actions are subject to Secretarial review does not remove them from the scope of section 208.

A fisher for the stock of a given fishery, or a processor of that stock, would apparently violate section 208 by participating in the development of, or voting on, a Council's management plan for that fishery. The financial interest of those individuals would also apparently cause them to violate section 208 by, for example, commenting on the application of a foreign vessel to fish in the fishery, or participating in the preparation of regulations implementing a fishery management plan. Whether industry members who fished commercially or recreationally for, or processed the stock of, a different fishery from the one under Council consideration would apparently violate section 208 by their involvement, would have to be determined on an ad hoc basis. The existence of a financial interest on the part of these other members in the fishery would depend on market factors, for example, whether the stock they fished was a competing product.

Section 208's prohibition thus conflicts with the provision of the MFCMA that those actively engaged in the fishing industry can serve on the Regional Councils, and with Congress' expectation that they do so. Congress could not have expected industry members to sever their industry ties for part-time service on the Councils. Furthermore, recusal is not a feasible way of handling the problem because Council functions would be impaired by the large numbers of recusals necessary to avoid section 208 problems. Moreover it is not clear that the conflict could be satisfactorily resolved by using either of section 208's statutory waiver provisions, as earlier suggested by NOAA in Opinion 70.

The first, section 208(b)(1), authorizes a waiver for a particular person if the employee's appointing official makes a written determination that the financial interest in question is not so substantial as to be deemed likely to affect the integrity of the employee's services. A section 208(b)(1) waiver is problematic because it is difficult to maintain that a person engaged in the fishing industry has an insubstantial financial interest in an absolute sense. Section 208(b)(2) authorizes an exemption from section 208's coverage if, by general rule or regulation, the financial interest involved has been excepted as being too remote or too inconsequential to affect the integrity of the employees' services. However, it is difficult to argue that

the interests of all appointees from the fishing industry are either remote or insubstantial within the statutory meaning. Furthermore, section (b)(2) waivers do not exempt particular persons or offices, but identify in advance certain financial interests as being too remote or too inconsequential to affect the integrity of government officers' or employees' services. B. Manning, Federal Conflict of Interest Law 132 (1964). (The Department of Commerce presently has a section 208(b)(2) waiver in effect. See 15 C.F.R. 0.735-13(d). It would not cover the financial interests in question here.)

This unresolved conflict between section 208 and the MFCMA compels the conclusion that the MFCMA created a limited, implied exemption from section 208. When a statute conflicts with a prior enactment, the courts may find an implied exemption to the latter in the subsequent enactment. Cf. United States v. United States Gypsum Co., 438 U.S. 422 (1978). Such an exemption can be implied if necessary to effectuate the statutory scheme, to the extent necessary to achieve that result. The exemption which we suggest is implied in the MFCMA meets those two criteria. The exemption applies only to Council public members drawn from the fishing industry, and would extend to the Councils' substantive activities, including consideration of or voting on a management plan or comment on a management plan or foreign fishing application. It does not extend to administrative matters such as the issuance of Council contracts or the hiring of personnel because that scope is not necessary to effectuate the purposes of the MFCMA.

II. WHETHER ADVISORY PANEL MEMBERS ARE SUBJECT TO THE CONFLICT OF INTEREST LAWS, INCLUDING 18 U.S.C. § 208

The MFCMA directs the Regional Councils to appoint advisory panels to assist them in carrying out their functions under the Act. The advisory panels are given no statutory authority. See 16 U.S.C. § 1852(g)(2). The Federal Government pays the expenses of advisory panel members, but they receive no compensation for their services. See 16 U.S.C. § 1852(f)(7)(D). The legislative history of the MFCMA indicates that members of advisory panels are to represent the narrow interests of members of the fishing industry. See, e.g., S. Rep. No. 416, 94th Cong., 1st Sess. 690-91 (1975). To our knowledge, there is no dispute about the representative nature of advisory panels. However, the issue whether these factors make advisory panel members special Government employees for purposes of the conflict-of-interest laws, although it has been addressed, has not decisively been resolved.

In its Opinion 70, NOAA's Office of General Counsel concluded that Council advisors, including advisory panel members, are special Government employees, and thus subject to the conflict-of-interest statutes. NOAA specifically asked both OLC and OGE for their concurrence in this view, in the same letter in which it requested their opinions on the legal status of Council public members. OLC expressed its disagreement with NOAA's view obliquely, stating

that the determination whether Council advisors, including advisory panel members, are special Government employees would have to be made on a person-by-person basis under the principles set out in Federal Personnel Manual (FPM), Ch. 735, App. C. OGE, as noted in Part I of this memorandum, agreed that Council public members were special Government employees, but omitted any mention of the advisors in the written response. We interpret this as tacit disagreement with Opinion 70's conclusion about the latter.

The term employee is not defined in the conflict-of-interest laws. However, Appendix C to Chapter 735 of the FPM, referenced in the OLC opinion, provides guidelines for determining whether members of advisory committees are employees for purposes of those statutes. These guidelines were issued in the exercise of expressly delegated presidential authority. See Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965). Under the FPM guidelines, a person who appears before a Government body to present the views of a nongovernmental organization or group is not a Government employee, and not subject to the conflict-of-interest statutes. The payment by the Government of travel expenses and a per diem allowance does not make the recipient an employee. Furthermore, lack of compensation is an indicium that a person is serving as an interest group representative. Advisory panel members clearly are not, under these guidelines, special Government employees for purposes of the conflict-of-interest statutes.