MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director

DATE: April 14, 1992

SUBJECT: International Fisheries

ACTION REQUIRED

(a) Report on regulations proposed to monitor influx of fish products originating in the Russian EEZ.

(b) NOAA-GC report on Sen. Stevens' proposal to restrict U.S. operations if affiliated with foreign operations in the Donut Hole. Take action as appropriate.

(c) Status report on establishing permit conditions disallowing U.S. vessels from fishing in the Donut.

BACKGROUND

Monitoring the influx of fish products from the Russian EEZ

In January, the Council heard concerns from industry over the influx of halibut and other fisheries products from the Russian EEZ. U.S. vessels are legally operating in the Russian territorial waters and returning their catch to U.S. ports. U.S. regulations would prohibit such catches in U.S. waters, but do not restrict the current practice. NMFS advised it was developing regulations to monitor landings. They would include check-in/check-out procedures, reporting requirements, and requiring returning vessels to offload prior to fishing in the U.S. EEZ. The regulations would pertain not only to halibut, but also to landings of other species.

The Council wrote to the Secretary encouraging her to approve regulations as quickly as possible, by emergency action if necessary. Item C-5(a) is a response from NMFS reporting progress on those regulations. A final rule should be published soon under the Foreign Affairs exemption.

In related action, NMFS also is developing rules that will require vessels that have fished beyond our EEZ to offload prohibited species such as crab, halibut, salmon and herring before fishing in the U.S. EEZ. Another rule will make it illegal to land halibut under 32 inches, regardless of origin.

Restrictions on U.S. operations affiliated with foreign operators in the Donut Hole

Last September the Council asked NOAA General Counsel to investigate the legal issues involved in developing regulations and permit conditions that would prohibit any vessel or processing facility from participating in fisheries under the Council's jurisdiction if they were affiliated with foreign operations in the Donut Hole.

In January, NOAA-GC gave a preliminary opinion that the Secretary could implement such regulations, however, they would be difficult to enforce because there is little information on foreign investment, and therefore, enforcement could be a problem. She suggested that the Council would not need to take further action other than asking the Secretary to proceed with such regulations. A final opinion should be ready for Council consideration at this meeting.

Permit Restrictions on U.S. Vessels in the Donut Hole

In December the Council approved proposed regulations drafted by NOAA GC that will require any vessel owner or operator who applies for a federal groundfish permit to agree that the vessel will not be used to fish in the Donut during the fishing year. The Council requested the Secretary to expedite these permit restrictions to be effective early in 1992.

In January NMFS reported that regulations were in process to modify federal fishing permits that would make it illegal to fish in the Donut by federally permitted vessels. It would also be illegal for any vessel fishing in the Donut without a permit to have pollock on board while in the U.S. EEZ. NMFS will report progress on these regulations.

AGENDA C-5(a)
APRIL 1992

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 02 1992

Richard B. Lauber, Chairman
North Pacific Fishery
Management Council
605 West 4th Avenue
Anchorage, Alaska 99501

APR 07 1992

Dear Mr. Chairman:

Thank you for your letter to Secretary Franklin regarding the monitoring of fish caught by U.S. fishermen in the Russian Economic Zone (EZ) and landed in ports of the United States.

We also are concerned that a situation now exists that could foster illegal fishing. Some of the suggested methods proposed by the North Pacific Fishery Management Council to monitor the entry of fish caught in the Russian EZ into U.S. ports will be incorporated in amendments to 50 CFR 299, U.S. Nationals Fishing in Russian Waters. The implementation of these amendments is a high priority and we will work to publish them as soon as possible. We intend to amend the regulations by requiring:

- o catch reports from U.S. fishermen,
- o check-in and check-out notifications,
- o maintenance of logbooks that will include records of the processed product,
- o identification of intended ports of landing in the United States, and
- o submission of copies of applications and permits to the National Marine Fisheries Service.

The United States may place certain requirements or restrictions on fish harvested seaward of its Exclusive Economic Zone (EEZ) if the entry of such fish would affect the conservation of resources under U.S. management. Since we do not have information on the interactions of halibut and groundfish stocks in the EEZ with those in the Russian EZ, we cannot definitively say what the conservation effects are, if any, on U.S. stocks. By promulgating the amended regulations, we will establish the mechanism for determining how much and what species of fish are being taken out of the Russian EZ by U.S. fishermen, and also acquiring information on the interactions, if any, between the EEZ stocks and the Russian stocks.

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES

We are also evaluating the need for additional measures, including requiring undersized halibut caught in the Russian EZ to be off-loaded prior to beginning fishing operations in the EEZ.

Sincerely,

Michael F. Gillman

(for) William W. Fox, Jr.

AGENDA C-5
SUPPLEMENTAL

United States Department of State

Bureau of Oceans and International
Environmental and Scientific Affairs

Washington, D.C. 20520

DATE: April 17, 1992

RAPIFAX TRANSMISSION 2 PAGE(S) TO FOLLOW

TO: NPFMC - Clarence Pautzke; PFMC - Larry Six

TELEPHONE: _____ FAX NUMBER: 907 271 2817
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FROM: GEORGE HERRFURTH - Office of Fisheries Affairs

TELEPHONE: (202) 647-2009 FAX NUMBER: (202) 647-1106

SUBJECT: Fourth Central Bering Sea Fisheries Conference

Here is the "Joint Press Release" issued at the conclusion of the "Fourth Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea" that was held at the Department of State, April 13-15.

Please call me if you have questions/comments. Regards.

P.S.- Ambassador David Colson served as head of the U.S. delegation to the Conference, which also included NPFMC members Rick Lauber and Henry Mitchell.

JOINT PRESS RELEASE

Delegations from the People's Republic of China, Japan, the Republic of Korea, Poland, the Russian Federation, and the United States of America met at the "Fourth Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea", held April 13-15, 1992, in Washington, D.C., to discuss issues pertaining to the living marine resources of the high seas area of the central Bering Sea (the area), especially the pollock resource. Three previous conferences were held on this issue (in Washington, D.C., February 19-21, 1991, and November 18-20, 1991; and in Tokyo, July 31-August 2, 1991).

The delegations expressed concern about the continued decline of the pollock resource in the area and noted substantial catch declines from the peak of more than 1.4 million metric tons in 1989. The reported total catch for pollock in the area in 1991 was approximately 293,000 metric tons. All delegations reiterated the view expressed at the previous conference that such decline necessitated strong and urgent measures to conserve the pollock resource. They also confirmed the understanding reached at the Third Conference that "catch levels and fishing effort should be substantially reduced in 1992."

The United States delegation indicated that the U.S. has taken drastic conservation measures in its Exclusive Economic Zone (EEZ) in 1992 because of the depressed status of the pollock stock. Such action included prohibition of a directed fishery for this stock in the Bogoslof Island area in the U.S. EEZ, and steps aimed at prohibiting U.S. fishing vessels from operating in the central Bering Sea. The U.S. delegation stated that it expects that the directed fishery on the Aleutian Basin pollock stock in the U.S. EEZ would remain closed in 1993.

The Russian delegation noted that the Russian Federation had substantially reduced its fishing effort in its Economic Zone (EZ) for the purpose of conserving the pollock resource. In addition, the Russian Federation is considering taking conservation actions in its EZ on the Aleutian Basin pollock stock similar to those undertaken by the United States. The Russian delegation noted the Russian Federation's willingness to take such measures in its EZ and to prohibit Russian fishing vessels from operating in the area is contingent upon the willingness of others to cease fishing in the area.

Taking into account the significant decline in its pollock catch, the Japanese delegation noted that Japan would closely monitor its fishery during the second quarter of 1992 through daily vessel reports. It noted that its authorities would

consider further conservation measures, including additional reductions in its catch and effort level in the area in 1993, if in its view the stock condition so warranted.

The delegations from the People's Republic of China, Japan, the Republic of Korea, and Poland expressed continued opposition to any proposed moratorium or suspension of fishing.

The Japanese delegation informed the conference participants that Japan was taking voluntary actions to decrease fleet size by nearly 50 percent during 1992, and noted that the overall catch quota for Japanese fishing vessels would not exceed 120,000 metric tons in 1992. The Korean delegation noted that its fleet size would decrease from 41 to 31 vessels in 1992, and indicated that Korea is considering the establishment of a catch limit for pollock in 1992 which may not exceed the level of the 1991 catch. The Chinese and Polish delegations informed the conference participants that they will further voluntarily reduce their fishing effort 20 percent counting in fishing days compared to 1991 and that they are prepared for further reductions should the state of the resource deteriorate further. The Polish delegation also noted that the 1992 pollock catch by Polish vessels will not exceed the 1991 level. The Chinese delegation noted that its reduction in catch would correspond to its reduction in fishing effort of 20 percent.

The U.S. and Russian delegations reiterated their calls for all countries to agree to a suspension of pollock fishing (moratorium) in the central Bering Sea due to the extremely depressed condition of the pollock resource. Both delegations stressed that information reviewed at the Fourth Conference makes the need even more urgent for such action, and also expressed disappointment about the slow rate of progress on this issue to date as well as the interim measures taken.

The delegations approved the arrangements for implementing an observer program for the area recommended by the central Bering Sea Pollock Fisheries Observer Program Workshop that met in Seattle, Washington, February 26-28, 1992.

The delegations reviewed a composite negotiating text outlining a long term conservation regime for the area that had been produced at a drafting group of experts meeting, in Washington, D.C., on January 28-29, 1992. The delegations established a working group to continue efforts to produce a final negotiating text. However, further efforts will be required.

Due to the urgent nature of the problem, the delegations agreed that they would meet again at a Fifth Conference to be hosted by the Russian Federation and tentatively scheduled to begin on August 12, 1992, in Petropavlosk-Kamchatskiy, Kamchatka.

UNITED STATES DEPARTMENT OF COMMERCE
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AGENDA C-5(b)
Supplemental

DATE: April 20, 1992

MEMORANDUM FOR: North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman
Alaska Regional Counsel
Alaska

FROM: Robert Babson RB
Attorney
GCAK

SUBJECT: Application of Fisheries Regulations to Foreign Parent and Subsidiary Corporations

INTRODUCTION

The North Pacific Fishery Management Council has recently passed a resolution which provides that:

> regulations be adopted and permit conditions be implemented that would prohibit any vessel or processing facility from participating in any fishery under the Council's jurisdiction if any such vessel or processing facility is owned in whole or in part by any corporation, partnership or person that also directly or indirectly owns, leases, or charters in whole or in part a vessel that engages in the harvesting, processing, or purchasing of fish taken from the international waters of the Bering Sea. The term "participating in any fishery" includes delivery of fish by a harvesting or tending vessel to a floating or shore-based processing facility and receipt of fish by a floating or shore-based processing facility. (Emphasis added).

Under this proposal, the Council would condition the right to participate in the harvest of groundfish in the Exclusive Economic Zone of the United States (EEZ) off the coast of Alaska, or the right to process such groundfish, upon whether or not the applicant: (1) owns vessels that fish in the "Doughnut Hole" (DH); or (2) owns, or is owned by another entity, foreign or domestic, that owns, directly or through affiliates, vessels that participate in the DH fishery.

In order to fully understand how the proposed regulation will apply, the following examples may be of some assistance. In each

In order to fully understand how the proposed regulation will apply, the following examples may be of some assistance. In each example, US Corp, a domestic corporation, owns Vessel 1, a United States documented vessel, which is permitted to participate in the groundfish fishery in the EEZ in Alaska. Given the language emphasized above, the proposed regulation would require that Vessel 1's groundfish permit be terminated in each example:

> Example 1: US Corp is a domestic corporation which is owned by United States citizens. US Corp owns two United States documented vessels: Vessel 1 fishes in the EEZ, Vessel 2 fishes in the DH.
>
> Example 2: Same as Example 1, except that US Corp is owned by US Parent, a domestic corporation owned by United States citizens. Vessel 2 is owned by US Parent.
>
> Example 3: US Corp is a domestic corporation which is owned by Foreign Parent, a foreign corporation. US Corp owns Vessel 1; Foreign Parent owns Vessel 2 (foreign-flagged), which fishes in the DH.
>
> Example 4: Same as Example 3, except that Vessel 2 is owned by Foreign Affiliate, a foreign corporation owned by Foreign Parent.

In addition, the proposed regulation would deny the right to receive fish harvested in the EEZ in Alaska to shore-based processing facilities in the following situation:

> Example 5: Shoreside Corp, a domestic corporation, owns a shore-based processing facility in Alaska which receives fish caught in the EEZ off Alaska. Shoreside Corp is owned by Foreign Parent, a foreign corporation. Foreign Parent, either in its own name, or through a foreign affiliate, owns a foreign documented vessel which fishes in the DH.

SUMMARY

The legal issue presented by the proposed regulation is whether the Secretary can deny a federal groundfish permit to a vessel or shore-based processing facility because its owner's corporate affiliates, either foreign or domestic, own, charter, or lease vessels which participate in the DH fishery. After review of the applicable provisions of the Magnuson Act, as well as the obligations of the United States under applicable treaty and customary international law, we are of the opinion that the Council's proposed action can be legally implemented. The matter is not completely free from doubt, however, and the proposal's defensibility may well depend upon the scope of the regulation. In particular, the relationship between the domestic corporation

seeking a groundfish permit and its corporate affiliate (for whose activities in the DH it is being held responsible), may well be determinative. The more direct that relationship, as measured by the percentage of ownership and/or control of the corporations in question, the more legally defensible the program will be; the more indirect and attenuated, the less defensible.

Finally, given the federal government's almost complete lack of information on these corporate relationships, especially relationships involving foreign corporations, it must be pointed out that the program will be difficult to enforce.

DISCUSSION

I. MAGNUSON ACT

In-so-far as compliance of the Council's proposal with the provisions of the Magnuson Act is concerned, the controlling case is National Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. 210 (D.D.C. 1990) (hereinafter "NFI"). Under the ruling in NFI, a measure applied to persons and entities within and subject to United States jurisdiction is not invalid merely because it has the effect of regulating their activities in international waters, so long as the measure is necessary to achieve statutorily permissible conservation and management objectives. The court held that it is not an impermissible extraterritorial application of United States law simply because of such extraterritorial effects.

The Council, based upon sound scientific evidence, is proposing to place conditions on harvesting within the EEZ that are intended to indirectly affect harvesting outside the EEZ of stocks that the Council has determined are the same or interdependent. So long as adverse effects of the DH fishery can be shown upon the fishery/marine resources of the EEZ, the Council's proposal should be legally defensible. The court's holding in NFI with respect to the question of extraterritorial application of United States law is applicable to the Council's proposal as well, in that the proposal will apply only to United States vessels fishing within the EEZ.

Another basis for the court's holding in NFI was the "territorial effects doctrine", as interpreted in Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984). In Laker (an antitrust case), the court held that "[i]t has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results inside its territory." Regulation under the "territorial effects doctrine" may not be unreasonable. According to the Restatement (Third) of Foreign Relations Law (hereinafter "Restatement"), indicia of reasonableness which seem applicable to the Council's proposed action are:

> The extent to which the [regulated] activity...has substantial, direct and foreseeable effect within the territory;

Here, the impact of overfishing in the DH on the overall health of the stock and on its abundance and availability within the EEZ apparently has been scientifically established.

> The connection between the regulating state and the person principally responsible for the regulated activity;

Here, the person principally responsible for the regulated activity is the corporate parent, subsidiary, or affiliate of the person seeking a groundfish permit.

> The character of the activity being regulated and the importance of regulation to the regulating state;

Clearly, a strong case can be made for the importance of regulating DH harvesting activities. See Restatement, Section 403(2).

II. TREATY OBLIGATIONS

The primary legal concern under applicable treaty will be the issue of "national treatment." National treatment is generally defined as "treatment accorded within the national territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." Department of State, Treaty of Friendship, Commerce and Navigation, Standard Draft (Analysis and Background), Department of State Publication (1981), Part 1 at 42.

Thus, to the extent foreign-owned or -controlled entities are affected by the proposed regulation in a manner or to a degree different than their U.S. counterparts, they may assert that the regulation constitutes a denial of "national treatment." In order for such a challenge to be successful: 1) there must be a treaty or other agreement in effect that in fact accords national treatment under the circumstances; 2) the regulation must have a discriminatory effect; and 3) the discriminatory effect must be deliberate and without other valid basis.

The United States presently has Treaties of Friendship, Commerce, and Navigation (FCN) with two countries, Japan and Korea, which grant national treatment to the citizens of each party. A third FCN with Poland, with similar national treatment requirements, has been signed but not yet ratified by the Senate. Each of these FCN's, however, contains an exception to the requirement for national treatment relating to "national fisheries" (Japan and Korea) or "national resources" (Poland). The Department of State

has interpreted the applicability of the "national fisheries" exception contained in these FCN's as being synonymous with "fisheries jurisdiction." Thus, the requirement that the parties afford national treatment to the citizens of the other party doing business in their country does not apply to the host state's management of its fisheries. In the context of the Council's proposed regulation, the "national fisheries" exceptions to the "national treatment" requirements contained in these FCN's clearly applies to the activities of vessels within the EEZ. In addition, given Congress' recent inclusion of shore-based processing facilities under the permitting authority of the Magnuson Act, it seems probable that the "national fisheries" exception is applicable to such shore-based facilities as well. The net effect of all this is that we do not believe that foreign entities, whether involved with domestic corporations owning vessels or shore-based processing facilities, will be able to successfully raise a "national treatment" objection to the Council's proposed regulation.

III. CUSTOMARY INTERNATIONAL LAW

The exclusive right of the United States, under international law, to regulate fishing activities within the EEZ is well-settled. The United Nations Convention on the Law of the Sea (the "Convention"), U.N. Pub. No. E.83.V.5 (1983), represents the consensus view of customary international law as it has evolved on the question of exclusive economic zones and clearly recognizes the principal of exclusive fisheries jurisdiction within such zones.[1] The provisions of the Convention, which provide the basis for the current U.S. program conducted pursuant to the Magnuson Act, suggest that, within its EEZ, the United States is required, based upon the best available scientific evidence, to determine and achieve maximum sustainable yields of living marine resources, and is permitted to regulate the harvesting of these stocks in a way that supports local industry, reflects the interdependency of some stocks,[2] and discriminates absolutely against non-U.S. interests.

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[1] The United States voted against approval of the Convention, primarily because of concerns regarding the text's treatment of deep sea-bed mining issues. However, "...by express or tacit agreement accompanied by consistent practice, the Unites States, and states generally, have accepted the substantive provisions of the Convention...as statements of customary law binding them apart from the Convention." Restatement, Part V, Introductory Note at 5.

[2] In particular, Article 61.3 of the Convention permits the coastal state to take into account the "interdependence of stocks." This is significant because, to the extent Bering Sea pollock inside and outside the EEZ are biologically differentiable yet

Finally, a brief comment seems in order concerning the unlikely possibility that the Council's proposed regulation could be held to constitute an expropriatory act under international law. If the Council's proposal has the effect of substantially denying an existing foreign enterprise the opportunity to make a profit, particularly if it does so in a discriminatory manner, the regulation could be held to be expropriatory, in which case compensation would be required. See Restatement, Section 712 Reporters' Notes 5 and 6.

IV. PRACTICAL CONSIDERATIONS

One question which will undoubtedly arise in any Court's review of the Council's regulation will concern the extent to which a corporation may be held responsible for the activities of its affiliates. Or, alternatively, the extent to which the activities of those corporate affiliates may be indirectly regulated through the regulated entity. This is especially relevant when the corporate affiliate is a foreign corporation engaged in activities in international waters. The first issue that must be addressed is whether or not the Council will require that the foreign corporate affiliate "control" (or be controlled by) the regulated entity (i.e., the domestic corporation seeking a permit to fish in the EEZ). We believe that to require such "control" before denial of a groundfish permit to a domestic corporation based upon the activities of its parent corporation or its affiliates will make the proposed regulatory scheme much more legally defensible.

Assuming that such corporate control will be required leads directly to the question of what "control" means. For purposes of the Anti-Reflagging Act, Congress determined that one of the indicia of "control" is majority ownership (more than 50%) of the voting stock of the corporation. We are informed that under certain Department of Commerce export regulations, "control," although also defined in terms of percentage of ownership of stock, is defined at some level less than 50%.

Finally, the above discussion of the ownership of corporate stock leads directly to the primary problem with the Council's proposal, which is not necessarily legal, but rather, practical. At present, the government's only source of information regarding the ownership makeup of the domestic corporations presently engaging in harvesting groundfish in the EEZ in Alaska, or processing same, will be the corporations themselves. Information about their

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interdependent, this provision of the Convention provides a basis under international law for regulating the taking of one stock in order to achieve maximum sustainable yield with respect to the other.

corporate parents and their affiliates, especially if such parent corporations are foreign, is non-existent. The inevitable result of this situation is that the program, as proposed by the Council, will be difficult to enforce.

cc: F/AK - Steven Pennoyer
DCG - Jay S. Johnson
EN5 - David C. Flannagan
GCF - Margaret F. Hayes