

M E M O R A N D U M

TO: Council, SSC and AP Members

FROM: Jim H. Branson *Clam*  
Executive Director

DATE: January 31, 1985

SUBJECT: MFCMA Amendment Proposals

The Magnuson Fishery Conservation and Management Act is scheduled for reauthorization by Congress this year. This Council and the Chairmen of all the Councils have been working on proposals for amendments to the Magnuson Act for several months. A distillation of those discussions is contained in Attachment A, a January 7 memo from Ron Miller to the Chairman.

Additional information garnered during the Chairmen's meeting in Washington the week before last is contained in Agenda item B-1(a).

The Chairmen will meet February 25-27 in Hilo, Hawaii to complete the Council-wide development of recommendations for reauthorization. To prepare for that meeting, Chairman Campbell expects to appoint a workgroup of Council members to meet next week, if possible, to develop a Council position that can be used at the Chairmen's meeting. Another workgroup meeting will be necessary after the Chairmen's meeting to develop a final position to present at the first of the reauthorization hearings, which will be held March 26 in Washington, by the House Subcommittee on Fisheries and Wildlife.

Other materials that will be of use in this week's discussions are Attachment B, a letter from Lee Weddig, the Executive Vice President of the National Fisheries Institute, outlining his concerns with the Council system, and a letter and proposed amendment to the Act regarding habitat information from Rudolph A. Rosen of the National Wildlife Federation (Attachment C).

M E M O R A N D U M

TO: Jim Campbell  
Jim Branson

FROM: Ron Miller

DATE: January 7, 1985

SUBJECT: MFCMA Amendment Proposals

A. Following is a list of proposals the Council may wish to consider when drafting recommended amendments to the MFCMA reauthorization hearings to be held in the next few months.

1. Amend §306(a)(2)(C) to allow delegation of authority for crab management in the federal intrusion areas of Southeast Alaska to the State of Alaska to provide for more uniform regulation of all species in those areas.

The Act has already been amended to delegate management authority to the state in the federal intrusion areas of Southeast Alaska for all other species.

2. Amend §§302 and 406 to provide direct appropriations for Councils rather than funding through the Dept. of Commerce.

While the Department of Commerce has been cutting their budget 10% and the NMFS budget 35%-40%, they've been trying to cut the Council budgets by 55%-60%. Congress has reversed those cuts for the last three years but we can expect similar proposals for FY86. We have reason to believe the Councils would do better dealing directly with Congress for their funding and, of course, it would remove some of the NMFS control now exerted on the Councils. Funds can be identified for Council funding beyond usual tax revenues. Interest on foreign receipts, which now go to the vessel loan guarantee program, should be about \$10 million this year, as an example.

3. Amend §§201 and 204 to allow more direct participation by the Regional Councils in the process of approving allocations and permits for foreign fishing fleets.

The Councils now have relatively little input into allocation process. We are frequently asked for recommendations by the Department of State but we have little or no input into the Department of Commerce as they develop recommendations for allocations through their "Allocations Board." While the Councils cannot expect to have the final word on allocations, they should have at least as much input into the process as Department of State and Department of Commerce. They are closer to the scene of action and much of their dealing with fisheries in their areas

is with other nations interested in harvesting those resources. Council permit reviews, policies for joint ventures, and many fishery regulations are not effective if they cannot have some assurance that their recommendations will be heard in the allocation process.

4. Remove the provision of §304(d) that fees charged domestic fishermen shall not exceed the administrative costs of issuing fishing permits.

The Act now limits fees charged to U.S. fishermen to amounts not exceeding the administrative costs of issuing the fishing permits, usually only a few dollars. That limitation restricts the Council's ability to consider many methods of limiting access, reimbursement for observer programs, or other management measures that are either under consideration or will have to be considered in the future.

5. Amend §303 to provide for placing observers on board domestic fishing vessels.

The Act probably contains enough authority to allow putting observers on U.S. vessels as it is now written. It is felt that explicit language would be helpful if an observer program is actually developed.

6. Exempt Council members, Advisory Panel members and Scientific and Statistical Committee members from the federal conflict of interest statute, 18 USC §208.

We have a Department of Commerce legal opinion that says Council members, AP members, and SSC members are exempt from the federal conflict of interest statute for all intents and purposes. Specific language in the Act would eliminate any question about their status.

7. Amend §304 to provide that Secretarial review of FMPs or amendments begins on the day an FMP or amendment is delivered to the NMFS Central Office by registered or certified mail.

Some method is needed to stop NMFS from "frontloading" the system of plan review. Since the Act has been amended to restrict Secretarial review to 95 days, there have been attempts to hold Council submissions for extended periods of time before review Day 1 is acknowledged. This amendment would provide that the day a complete set of documents arrives at the NMFS Central Office by registered mail is the day review begins. Contents of the documents would not be pre-reviewed to hold the whole process hostage, although ample opportunity for NMFS input into the drafting process would be available to them during the time the Council was doing it.

8. Amend §303 to provide Council staff access to confidential fishery data.

Some Council staff members need access to raw data for certain types of analysis and modeling. They should have access to that material from NMFS on the same regulatory standards as NMFS staff, i.e., the material is kept in a secure situation and the staff members sign a statement agreeing to maintain the confidentiality of any information they receive.

B. Following is a list of reauthorization proposals suggested by other Councils.

1. Segregate the Secretarial review of FMPs and amendments from outside lobbying.
2. Clarify the intent of the MFCMA that the Regional Fishery Management Councils are not subordinate to the National Marine Fisheries Service for policy purposes and that the Councils are to manage the Nation's commercial fisheries.
3. Provide for Council participation in the processes of other federal agencies that may impact upon Council fishery management plans.
4. Limit the Secretary of Commerce's review authority to either approval or disapproval of an FMP or amendment.
5. Provide for more efficient data collection and research programs.
6. Remove restrictive and time-consuming federal agency review and compliance requirements from the FMP process.
7. Use MFCMA fines and forfeitures to create a Fishery Conservation and Management Fund.
8. Grant sole enforcement authority over domestic fishing vessels to the National Marine Fisheries Service.
9. Change the status of NMFS Regional Directors from voting to non-voting members of the Regional Councils on all issues or to non-voting members on emergency regulation votes only.
10. Include highly migratory species on the East and Gulf Coasts of the U.S. under the exclusive management authority of the U.S.

C. Proposals that have not been discussed with North Pacific Council or any other Councils.

1. Expand Section 204(b)(7)(E) to make it clear that joint venture allocations can be made by operation and specific amounts can be specified in the permit conditions.

NOAA General Counsel has opined that the Act does not allow special conditions, such as limits on the amounts that can be received, to be made as permit restrictions. He avers that a change in the Act or special provisions in the appropriate FMP are necessary before it can be done. While this is contrary to previous practice by NMFS and to the beliefs of some NOAA Counsel staff, as long as they control the permit process (or until they change their minds again) that's the way it will be.

Council attempts to review and grade joint venture proposals in order to elicit the best possible deals for the U.S. are negated if restrictions and special conditions can't be applied to individual joint ventures. The current ruling puts all joint ventures on equal footing to compete for the entire JVP. A situation to the advantage of neither the joint venture partners or the United States.

2. Amend Section 306(c) to provide that catches delivered to foreign processors in state internal waters (internal waters joint ventures) be classed and recorded as joint venture processing (JVP).

Internal waters joint ventures are now treated as domestic processing (DAP) for recordkeeping. As such they enjoy a priority over all FCZ joint ventures and rank equally with U.S. shoreside processing. The Councils are charged with determining the amounts that will be needed for JVP & DAP [Section 302(h)(5)] and the Act gives DAP requirements priority over JVP operations. The present situation gives control of final JVP amounts to the states to the detriment of uniform management of groundfish in the FCZ.

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October 31, 1984

Mr. John Peterson  
Ocean Beauty - Washington Fish & Oyster Co.  
P.O. Box C-7039  
Seattle, WA 98107

Dear John,

My sincere apologies for the delay in responding to your letter on the management councils. The delay was lengthened by loss of one draft between the writer and the transcriber, so we'll have at it again.

My off-the-cuff questioning of the appropriateness of the council form of management originates from concerns in several areas.

1-Authority

It appears as if the Councils are neither fish nor fowl in that they have responsibility to regulate, but are in a position of having to get agreement from the Secretary of Commerce (in reality, NMFS) before any regulation can be issued. This would suggest that the Councils are really advisory bodies. If that's the case, then the structure seems to be a duplication of effort because the Councils themselves operate through advisory panels. Now a case may be made that Secretarial approval is for the most part a rubberstamp. Supposedly, Secretarial intervention is only to make certain Council recommendations conform to national standards. Nonetheless, it seems to me that Council actions are influenced greatly by NMFS both in input and in approval.

My concern then is: are the councils actually managing, or just a tool of NMFS. If the latter, why go through the motions? I suspect that in actual practice, some councils indeed are controlled by NMFS, whereas others are independent.

2 -Precise Decisions with Imprecise Information

We talked about this at Tucson. I'm struck with what appears to be a desire to reach precise management decisions when stark dynamics by nature is an imprecise science. If time, this perhaps is less a fault of the council system than of the overall approach to fisheries management. I can understand that one must use the best data available, but I don't see why more management

plans can't define optimum yield as that "amount of fish over a certain size which is harvested and provided by the U.S. industry." Perhaps the law does not allow such an approach and my grouching is really sour grapes at inability to get Congress and Administration to act more favorably on matters which appear clearly to be most beneficial to the overall industry. This gripe may really be a sense that hard nose seat of the pants economics are not being factored into the decisions as much as they might be.

### 3 - Ritualistic Approach

The amount of paper involved in development of a management plan is staggering. Again, the condition may be a problem originating with the law itself and the desire of the administrators to protect themselves from legal action. Perhaps, the step-by-step analysis of all factors affecting a decision is very important but I wonder if anyone really reads and considers all of the information mandatorily presented in a plan.

### 4 - Council Makeup

This was discussed at Tucson. The North Pacific Council may be unique in its makeup. Most of the others now have a clear imbalance in favor of non-commercial interests. This is particularly bad when one considers that the recreational fishery is mainly within three miles which does not come under council jurisdiction. The Council appointment process has been politicized beyond good taste. There are concerns over basic qualifications in some areas. I know we are a democracy in which politics offers the means for the voice of the people to be expressed, yet one can hope that fish management could be bi-partisan.

In reviewing these comments, I wonder whether my observation about the Council approach is legitimate since I don't have an answer to your question as to what alternate exists. The councils have been in operation about eight years. Are the fisheries better managed than if NMFS region offices working with advisory committees had done the job directly? I don't know. Maybethe Councils should provide the review rather than having NMFS be the reviewing element.

I'm sure your experience on the Council will provide an insight I lack. I'd welcome your observations at an appropriate time.

Sincerely,



Lee Weddig  
Executive Vice President



# NATIONAL WILDLIFE FEDERATION

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## Proposed Amendments (Revised) to the Fishery Conservation and Management Act

1. Regional Fishery Management Councils should address habitat needed for production of a fishery and where appropriate its food-base or other essential resources in Fishery Management Plans. This change simply would codify the National Marine Fisheries Services (NMFS), habitat policy adopted 25 November 1983.
  - a. In their Fishery Management Plans, the Regional Councils should identify and discuss to the extent possible for the fishery, and where appropriate its food-base, 1) current and probable future habitat conditions, 2) life requirements and habitat important to production, and 3) measures or actions to conserve, restore, or enhance habitat essential to production (an example of such an identification and discussion of habitat is included in the August 1984 draft "Striped Bass Fishery Management Plan" jointly written by the Mid-Atlantic, New England and South Atlantic Fishery Management Councils).
  - b. Incomplete information on habitat in a Fishery Management Plan due to data unavailability or uncertainty of analysis should not constitute a criterion for disapproval by the Secretary of a Fishery Management Plan.
  - c. The NMFS should have responsibility to provide Councils all information on habitat needed for inclusion in Fishery Management Plans. Such responsibility should include, but not be limited to, providing research, survey work, cooperating with other Federal agencies and the States in gathering information, data compilation and analysis, and initial draft documents. Council staff should serve, at a maximum, as the liaison between the NMFS habitat programs and the Council, and as final reviewers of habitat information to ensure, at a minimum, consistency in format of habitat information in Fishery Management Plans (the NMFS habitat policy identifies the role of NMFS in providing the Councils information to fulfill habitat requirements of Fishery Management Plans).



- d. The NMFS should be responsive to the Council's needs for further data collection or analysis to address habitat needs for fisheries, especially where adequate data are unavailable. (Fulfillment of this requirement could result in redirection of existing habitat research and assessment programs to ensure that such programs more closely fit fishery management needs.)
  - e. Regional Council requests to the Secretary of Commerce and other Federal officials for information on habitat needed for fishery management plans should be responded to by the individuals to whom the request was made within a set and reasonable period. And, where such requests can not be met within the period, the Secretary and other Federal officials should provide the Council an explanation of the reasons why the request can not be met, or provide a time table, which should include a description of tasks, for addressing the request.
2. The effect of Federal activities on federally approved Fishery Management Plans should be considered and mitigated in an affirmative manner by the Federal agency carrying out, funding, or authorizing the activity.
- a. Where it is determined that a proposed Federal action or activity would impact adversely a fishery under Federal management, then the Federal agency proposing the activity should be required to mitigate the effects of that activity to protect the fishery.
  - b. The Secretary of Commerce (Administrator of the Act) should be empowered to ensure that all Federal agencies follow the requirements of paragraph a (above), and where a Federal agency refuses to mitigate its activities to protect federally managed fisheries from significant harm, the Secretary should have authority to condition the Federal agency's actions to ensure protection of the federally managed fishery.
  - c. The NMFS should be responsible for reviewing activities of Federal agencies that would affect habitat of fisheries under Federal management (already an ongoing NMFS activity), such review should not be a responsibility of Regional Councils.
  - d. If a Regional Council wishes to comment on a Federal activity that would affect a fishery managed by the Council, then any recommendations made by the Council to the Secretary of Commerce and other Federal officials should be responded to by those individuals within a set and reasonable period. And, where such

recommendations are not followed, a detailed explanation of the reasons why such recommendations were not followed should be provided to the Council by the Secretary or other Federal official to whom the recommendations were made.

3. The citizen's right to file suit and recover attorney fees under the Act should be clarified.

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### Background

The NMFS adopted a Habitat Conservation Policy on 25 November 1983. The policy provides a framework for a realistic national program to conserve fishery habitat. And, fishery habitat is the ultimate bottom line on our nation's \$5 billion commercial and recreational marine fishery harvest.

The new Habitat Conservation Policy commits the NMFS to develop and enhance its habitat activities. Included among strategies for implementing the policy is establishing a strong habitat conservation partnership between NMFS and the Regional Fishery Management Councils. Specifically, the policy requires NMFS to "direct its habitat conservation activities to assist the agency in (1) meeting its resource management, conservation, protection, or development responsibilities contained in the Magnuson Fishery Conservation and Management Act ... and (2) carrying out its responsibilities to the U.S. commercial and marine recreational fishing industry, including fishermen and the states pursuant to programs carried out under other authorities."

Emphasized in the policy are the opportunities that exist through the FCMA for addressing fishery resource habitat that supports production of fisheries under Federal management. The policy states the following:

"At a minimum, Fishery Management Plans should include identification and descriptions of habitat requirements and habitats of the stock(s) comprising the management unit; assessment of the condition of these habitats, to the extent possible, as they relate to the continued abundance and distribution of the species; identification, where possible, of causes of pollution and habitat degradation; description of programs to protect, restore, preserve and enhance the habitat of stock(s) from destruction or degradation; and, where appropriate, proposal of measures intended to preserve, protect, and restore habitat determined to be necessary for the life functions of the stock(s)."

Why Amend FCMA?

The FCMA does not provide adequate guidance to the NMFS and the Regional Councils on the question of addressing habitat requirements for U.S. fisheries. Indeed, the FCMA provides for a complex of allocation schemes or ways to split whatever resources are available among users. But, the Act virtually is silent on the issue of maintaining or increasing the availability of the resources through attention to fish-producing habitat. It is clear that fishery productivity -- and hence catch -- is directly affected by habitat quantity and quality. Effective fishery management requires effective habitat maintenance and management.

But the Regional Councils' authority to address habitat in Federal fishery management planning must be granted by Congress for it to have meaning. The opinions and recommendations of individual citizens now have as much significance as do the opinions and recommendations of the Councils regarding Federal agency activities affecting habitat required for fisheries under the Councils' own management authority. Only Congress can ensure that Federal fisheries management is taken into account in the activities of Federal agencies.

Who will pay?

The proposed legislation simply provides Congressional approval and specific guidance to ensure the already approved habitat policy gets implemented. Work will be done primarily by the NMFS's Habitat Research Program which presently is funded at \$8.965 million, and the Habitat Conservation Program funded at \$5.720 million. In addition, the recently approved Fiscal Year 1985 budget for NMFS provides an additional \$1 million for evaluating habitat resources, and 1985 totals for habitat programs include enhancements over 1984 funding of \$0.84 million for conservation and \$0.5 million for research. These budget enhancements, plus possible redirection of some habitat work to better address fishery management needs of FCMA, will help to implement the habitat policy. But all NMFS programs are responsible for implementing the mandates of the policy. Therefore, additional resources for implementation could come from programs throughout the agency.

Would Regional Councils be burdened by excessive work or expense?

Some added work and thus expense is inevitable but should be insignificant because the proposed amendments place the burden on NMFS for nearly all habitat work for inclusion in Fishery Management Plans. The NMFS would be responsible for all habitat research and survey work, compilation and analysis of data, and production of draft documents. Council members

and staff would be responsible for including this habitat information in Fishery Management Plans and for providing review in the normal course of plan development and amendment.

Would the proposed amendments delay implementing Fishery Management Plans?

No! The proposal recognizes that information on habitat is inadequate or lacking for some fisheries. Incomplete information on habitat because of inadequate data should not be a reason for Secretarial disapproval or delay of a Fishery Management Plan. However where more information is needed, the NMFS would be directed to fill data gaps identified for fisheries under Federal management. Plans could be updated as needed.

What about fisheries already managed by approved Federal Fishery Management Plans?

The NMFS would be responsible for providing the Councils appropriate information on habitat for all fisheries under Federal management or proposed for such management. The process may take years, but should begin with fisheries for which Plans presently are being developed. Habitat information can be added to approved Fishery Management Plans as available through the normal Plan amendment process.

Why require Federal agencies to consider the effects of their activities on fisheries under Federal management?

Many Federal activities affect fisheries habitat. Occasionally such activities potentially can have significant adverse effects on the production of fisheries managed by the Federal government. Our proposal would ensure that Federal actions do not jeopardize fisheries under Federal management. We are arguing for good government: effective management of fisheries requires effective habitat management, and for the Federal Government, at a minimum, that means one Federal agency should not be engaged in an activity that would undo the activities of another Federal agency.

How would the proposal affect Federal agencies?

The proposal would not create new Federal programs, add to ongoing Federal or State programs, or change rules for requiring Federal permits for activities. For example, the number of Federal actions on permits for development in coastal and offshore areas would not change because of the proposed amendments. Under the proposal, all Federal agencies conducting activities that affect fisheries habitat would have an affirmative duty to assess habitat information in Fishery Management Plans and other relevant data to determine whether

their activities or actions would significantly affect a federally managed fishery. Where potential affects are noted, the Federal development or permitting agency would be obligated to mitigate for those affects in any actions taken. The Secretary of Commerce would be empowered to ensure that all Federal agencies adequately account for federally managed fisheries in any actions determined to have a potentially adverse affect on such fisheries.

Would the proposal affect state programs?

No! The proposal only requires Federal agencies to take federally managed fisheries into account in Federal activities. No State programs or rights of States to comment on Federal activities would be affected.

Why clarify the citizen's right to seek enforcement of FCMA?

Private citizens, organizations, and others already can file suit against the government for non-enforcement of FCMA under provisions of the Administrative Procedure Act. However, the right of the individual is not clearly defined in that Act and citizens may first have to prove to the court a significant "interest" before being allowed to actually bring suit. In addition, recovery of attorney and other fees may not be granted under the Administrative Procedure Act. We suggest amending FCMA to provide citizens "automatic standing" or interest in ensuring enforcement of FCMA and also specify the court's discretionary privileges in granting recovery of fees. We do not propose a means to impede plan development or implementation. Once a plan is implemented citizens have a right to ensure provisions of the law are carried out properly.