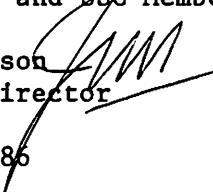


M E M O R A N D U M

TO: Council, AP and SSC Members

FROM: Jim H. Branson   
Executive Director

DATE: June 19, 1986

SUBJECT: Funding of Commercial Research Charters

ACTION REQUIRED

Information only.

BACKGROUND

Council staff and NOAA General Counsel/Alaska have been researching the question of whether harvest proceeds may be used to support research charters by U.S. fishing vessels. Given the likelihood that current foreign research cruises may soon be terminated and the fact that federal fishery research monies have been reduced, the Council must search for alternative methods to fund needed fisheries research. Sale of catch by private domestic commercial vessel under a research contract may be one of those methods. Attachment A is a memorandum from General Counsel/Northwest on this issue. Pat Travers, General Counsel/Alaska, will brief the Council on this matter in Kodiak.



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
 Office of General Counsel, GCNW  
 7600 Sand Point Way N.E., BIN C15700  
 Seattle, Washington 98115  
 (206) 526-6075; FTS 392-6075

March 7, 1986

MEMORANDUM FOR: F/NWC - Ben F. Jones *[Handwritten signature]*  
 FROM: GCNW - Douglas M. Ancona *[Handwritten initials MHB]*  
 GCNW - Michael H. Bancroft *[Handwritten initials MHB]*  
 SUBJECT: Sale of Catch by "Contract" Research Vessels  
 REF: Draft Solicitation No. WASC-86-00086

BACKGROUND

The Resource Assessment and Conservation Engineering Division of the Northwest and Alaska Fisheries Center (NWAFC) has requisitioned the chartering of two private commercial trawlers for a groundfish resource assessment in the Aleutian Islands for 45 days in the period May 1 - August 15, 1986. The WASC Procurement Division has submitted a draft solicitation, No. WASC-86-00086, to GCNW for legal review. The proposed charter provides that the contractor (vessel owner) may keep the catch (except prohibited species) remaining after the scientific evaluation and retention of samples by the NOAA scientific party. The contractor could then sell this residual catch to defray a part of the survey costs. This arrangement is intended to lower the cost of the charters to NOAA, and is a departure from past WASC vessel charters, in which the residual catch was dumped at sea.

In discussions with NWAFC concerning this contract, two other research charter ideas surfaced. In one, NWAFC proposes opening competition for the above charter contract to U.S. joint venture catcher vessels, which would sell and transfer their residual catch to a foreign processing vessel at sea. However, because foreign joint venture processors operating in the groundfish fishery in the Aleutian Islands are subject to small bycatch quotas on several species, NWAFC indicates that it would be desirable if the foreign processing vessels were exempted from the joint venture bycatch restrictions and allowed to keep the bycatch species. This would help make the joint venture option economically more attractive. Second, NWAFC believes the need may arise to employ the sale-of-catch device to conduct a charter sablefish assessment in the Gulf of Alaska which would involve longline fishing by domestic vessels during closed seasons and subsequent sale of the catch.



In discussions of the terms of the proposed contract, GCNW advised NWAFC and WASC that if the contractor's catch were harvested and disposed of consistent with applicable commercial fishing regulations, i.e., if the catch could be lawfully taken, retained, and sold absent the NOAA participation and research operation, then retention and sale of the catch by the contractor would be proper. In such a case, the contractor would be commercially fishing for itself and merely allowing for the onboard presence of the scientific party, NOAA's constraints on where to fish, and NOAA's evaluation and sampling of the catch. This approach would present no legal problem so long as the contract required adherence to the regulations imposed upon other vessels participating in the fishery such as obtaining a permit, discarding prohibited species, and observing quota closures.

NWAFC's two additional proposals pose the question of the propriety of NOAA's chartering a private vessel for scientific research under a contract which allows sale of fish by the contractor or other practices such as retention of bycatch species by foreign processing vessels, which sale or retention would be unlawful if done by vessels not operating under the contract. These proposals raise issues of both contract law and fisheries law and policy, which are particularly important due to the likelihood that they may become more prevalent in response to recent federal budget deficit reduction legislation.

## DISCUSSION

### A. AUGMENTATION OF APPROPRIATIONS - THE CONTRACT LAW PROBLEM

Under the "augmentation of appropriations" doctrine, the Government may not use the proceeds of its statutorily mandated operations to finance those or other operations, unless such a revolving fund procedure is specifically authorized by statute. In general, operations must be paid for only by appropriated funds, and receipts must be deposited in the Treasury as miscellaneous receipts. 53 Comp. Gen. 872 (1974); 35 Comp. Gen. 113 (1955); 31 U.S.C. § 3302(b). Similarly prohibited is the exchange of Government property for other property or Government needs. 27 Comp. Gen. 117 (1947); 16 Comp. Gen. 241 (1936); 40 U.S.C. § 485(a).

The augmentation rule would be violated if under the terms of the contract, the contractor conducts research for and under the direction of NOAA for a contract price plus the proceeds of the catch. In such a case the catch would be government property and its transfer to the contractor in partial compensation for services rendered would violate the augmentation rule because the catch represents something of value the proceeds of which must be

deposited in miscellaneous receipts. <sup>1/</sup> If, on the other hand, the contract provides that the contractor's activities, including sale of the catch, are on his own behalf with NOAA paying under the contract (only with appropriated funds) for fishing services, access to the vessel, use of part of the catch for research purposes, and room and board, the augmentation doctrine would not be violated as no money or property other than appropriated funds will have changed hands. Under such a "mutually beneficial arrangement," there would be no augmentation. 63 Comp. Gen. 459, 461 (1984). However, in either case, the contracted activity must fall within the scope of the scientific research exception contained in the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. §§ 1801, 1802(10), as discussed below. This status is necessary to exempt the contract vessel from regulations which would otherwise apply to commercial vessels operating in the fishery. This has not been a problem in prior research contracts because the contractor's activities were non-commercial (e.g., the catch could not be sold) and did not violate regulations applicable to other commercial vessels participating in the fishery.

**B. THE MAGNUSON ACT SCIENTIFIC RESEARCH  
EXCEPTION - THE FISHERIES LAW PROBLEM**

For purposes of the Magnuson Act:

(10) The term "fishing" means --

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, and activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

16 U.S.C. § 1802(10) (emphasis added).

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<sup>1/</sup> Former NWAFC contracts with private vessel owners provided that fish harvested under the contract became the property of the United States. If subsequent sale of the fish by the contractor had been allowed, the augmentation rule would have been violated.

Even if the proposals under consideration survive the augmentation prohibition, they must also fall within the scientific research exception to the Magnuson Act in order to be exempt from federal regulations generally applicable to all other United States vessels participating in the fishery unless the federal fishery management plan covering the fishery provides some special exemption from regulations for commercial fishing vessels which would allow the conduct of privately conducted, carefully controlled "experimental" fishing otherwise prohibited by the regulations. See, e.g., 50 C.F.R. § 663.10 (regulations implementing the Pacific Coast Groundfish Fishery Management Plan).

The subject of private vessels on contract to NOAA as scientific research vessels was alluded to in the Administrator's concurrence in the General Counsel's memorandum on Scientific Research Fishing, dated December 17, 1985 (copy attached). This memorandum followed the bringing of enforcement cases against NOAA scientists and a private contractor for retention of prohibited species (salmon) for personal consumption during and after a "research" cruise. The contractor was fined and paid a monetary penalty; the scientists received written warnings and letters of reprimand. Future treatment of such breaches of regulations and NWAF policy was addressed by a series of options presented in the memorandum. Option 2 of the memorandum, which was not adopted, would have denied contract vessels the status of "scientific research vessels" by regulatory clarification. Consideration of such a proscriptive regulation should not be read to imply that without it, contract vessels can or should be categorized as scientific research vessels. To our knowledge, no legal research has ever been done to support such a conclusion. Furthermore, the memorandum does not suggest that contract vessels by the terms of their contracts can or should be exempted from otherwise applicable regulations.

The primary legal question which remains unanswered is whether a United States commercial fishing vessel operating in a fishery covered by a fishery management plan, which vessel is under contract to catch fish to be used for scientific experiments, is engaged in "fishing" as that term is defined by the Magnuson Act when the vessel sells or otherwise disposes of the catch and retains the proceeds and when the harvest is inconsistent with regulations applicable to commercial fishing vessels participating in the fishery. <sup>2/</sup> The answer to this question raises a number of legal and policy considerations:

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<sup>2/</sup> Under certain conditions, existing NMFS policy in the Northwest and Southwest regions might construe such activity to qualify as "scientific research." See, memo Kruse to Aron, Barrett, Fullerton, dated 12/07/84, with attachment (copy attached).

1. If contract vessels qualify as scientific research vessels, what are the dangers of abuse of the research exception by mixing research with the contractor's quasi-commercial activities and sale;
2. Is there an apparent conflict of interest between NMFS' research program and the contractor's interest in the size, composition, and value of the catch;
3. Are potentially unacceptable enforcement problems created by introducing into the marketplace research catch which would not be legal, but for the contract vessel research exception;
4. Whether contract vessel access to a fishery for research purposes is a form of limited entry to a fishery, the right of access to which is granted to the lowest bidder[s]; and
5. Whether there is or should be a biological concern over not counting the catch against applicable quotas.

#### CONCLUSION

We believe the primary legal question is of national significance and is inappropriate to address solely on a regional basis. Accordingly, at your request we are prepared to refer the question to the NOAA General Counsel for prompt resolution. Until the scope of application of the research exception of the Magnuson Act is defined, solicitation and subsequent procurement of "scientific" fishing services from a private United States contractor vessel should be discouraged unless conducted consistent with regulations applicable to all similarly situated United States vessels engaged in commercial fishing in the fishery. Contract documents should be drawn to avoid conflict with the augmentation rule as indicated in this memorandum. Similarly, foreign joint venture processors participating in the operation cannot be excused by the contract document from regulations and permit restrictions applicable in the fishery unless and until such regulations or permit restrictions are modified.

You may also wish to consider addressing the subject from the perspective of "experimental" fishing rather than "scientific research." Experimental fishing provisions of the Pacific Coast Groundfish Plan are attached for your information.

Att.: As noted.

cc: F/NWC2 - Gary Stauffer  
 RAS/WC3 - Bob Henderson  
 DOC/AGC - Jerry Walz  
 GC - Dan McGovern  
 GCF - Jay Johnson  
 GCAK - Pat Travers

GC File Nos. 502-05.7  
 502-10.2(2)



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE

Northwest Region  
7600 Sand Point Way NE  
BIN C15700, Bldg. 1  
Seattle, Washington 98115

DEC 7 1984

F/NWR3:1501-20-010 rja

TO: F/NWC - William Aron  
F/SWC - I. Barrett  
F/SWR - E. C. Fullerton

FROM: F/NWR - T. E. Kruse

SUBJECT: Criteria for Defining Scientific Research

We have finalized the subject criteria after incorporating the comments received in response to our August 2, 1984 memo to you, same subject. A copy of the final criteria is attached.

We intend to notify the Pacific Council that we will be referring to these criteria when evaluating proposals for experimental fishing or issuing acknowledgments of domestic scientific research under the Pacific Coast Groundfish or Salmon FMP's.

We appreciate your cooperation and assistance.

*Harvey M. Stutchings*  
T. E. Kruse

Attachment

cc: F/1  
F/11  
F/12  
GCF  
F/S  
F/S1  
GCNW  
U.S. Coast Guard  
PFMC

DEC 10 1984



301.370

## CRITERIA FOR DEFINING SCIENTIFIC RESEARCH

The provision in the Magnuson Act which excludes scientific research from the definition of "fishing" covered by the Act contemplates activities that may result in or require the harvest of fish for scientific research purposes. Criteria to identify activities which qualify as scientific research under the exclusion include:

1. Scientific research which includes fishing must have as its primary objective, purpose or product the acquisition of data, information or knowledge. To determine whether an activity meets this first criterion, each scientific research proposal must be submitted in writing and demonstrate that:
  - a. The problem is researchable and will result in new information.
  - b. Application of existing knowledge alone is not sufficient to solve the problem.
  - c. Facts/data/samples will be collected, and analyzed in a scientifically acceptable manner and the results formally prepared and distributed.
  - d. Recognized scientific experts, organizations, or institutions with expertise in the field or subject matter area are sponsoring or are otherwise affiliated with the research.
  - e. Peer review of data, analyses, and conclusions will be involved.
2. Any fish taken under such scientific research exclusion may be sold only to offset the actual cost of such research but no financial profits will accrue from the fish harvested under the proposal. Before fish taken under a scientific research exclusion may be sold to offset the cost of such research, it must be demonstrated that this income is secondary or incidental to the primary goal of acquiring data, information or knowledge to solve a problem.



(a) **General.** The Secretary may authorize, for limited experimental purposes, the direct or incidental harvest of groundfish managed by the Pacific Coast Groundfish Plan which would otherwise be prohibited by this part. No experimental fishing may be conducted unless authorized by an experimental fishing permit (EFP) issued by the Secretary in accordance with the criteria and procedures specified in this section. EFPs will be issued without charge.

(b) **Application.** An applicant for an EFP shall submit to the Regional Director at least 60 days before the desired effective date of the EFP a written application including, but not limited to, the following information:

- (1) The date of the application;
- (2) The applicant's name, mailing address, and telephone number;
- (3) A statement of the purposes and goals of the experiment for which an EFP is needed, including a general description of the arrangements for disposition of all species harvested under the EFP;
- (4) A statement of whether the proposed experimental fishing has broader significance than the applicant's individual goals;
- (5) For each vessel to be covered by the EFP:
  - (i) Vessel name;
  - (ii) Name, address, and telephone number of owner and master;
  - (iii) U.S. Coast Guard documentation, State license, or registration number;
  - (iv) Home port;
  - (v) Length of vessel;
  - (vi) Net tonnage; and
  - (vii) Gross tonnage.
- (6) A description of the species (directed and incidental) to be harvested under the EFP and the amount(s) of such harvest necessary to conduct the experiment;
- (7) For each vessel covered by the EFP, the approximate time(s) and place(s) fishing will take place, and the type, size, and amount of gear to be used; and
- (8) The signature of the applicant.

The Secretary may request from an applicant additional information necessary to make the determinations required under this section. An applicant will be notified of an incomplete application within 10 working days of receipt of the application. An incomplete application will not be considered until corrected in writing.

(Approval by Office of Management and Budget not required, under 44 U.S.C. 3506 (c)(5)).

(c) **Issuance.**

- (1) If an application contains all of the required information, the Secretary will publish a notice of receipt of the application in the FEDERAL REGISTER with a brief description of the proposal, and will give interested persons an opportunity to comment. The Secretary will also forward copies of the application to the Pacific Fishery Management Council, the U.S. Coast Guard, and the fishery management agencies of Oregon, Washington, California, and Idaho, accompanied by the following information:
  - (i) The current utilization of domestic annual harvesting and processing capacity (including existing experimental harvesting, if any) of the directed and incidental species for which an EFP is being requested;
  - (ii) A citation of the regulation or regulations which, without the EFP, would prohibit the proposed activity; and
  - (iii) Biological information relevant to the proposal.
- (2) At a Pacific Fishery Management Council meeting following receipt of a complete application, the Secretary will consult with the Pacific Fishery

Management Council and the Directors of the State fishery management agencies concerning the permit application. The applicant will be notified in advance of the meeting at which the application will be considered, and invited to appear in support of the application if the applicant desires.

(3) Within 5 working days after the consultation in paragraph (c)(2) of this section, or as soon as practicable thereafter, the Secretary shall notify the applicant in writing of the decision to grant or deny the EFP, and, if denied, the reasons for the denial. Grounds for denial of an EFP include, but are not limited to, the following:

- (i) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his or her application; or
- (ii) According to the best scientific information available, the harvest to be conducted under the permit would detrimentally affect any species of fish in a significant way; or
- (iii) Issuance of the EFP would inequitably allocate fishing privileges among domestic fishermen or would have economic allocation as its sole purpose; or
- (iv) Activities to be conducted under the EFP would be inconsistent with the intent of this section or the management objectives of the Pacific Coast Groundfish Plan; or
- (v) The applicant has failed to demonstrate a valid justification for the permit; or
- (vi) The activity proposed under the EFP would create a significant enforcement problem.

(4) The decision of the Secretary to grant or deny an EFP is final and unappealable. If the permit is granted, the Secretary will publish a notice in the FEDERAL REGISTER describing the experimental fishing to be conducted under the EFP. The Secretary may attach terms and conditions to the EFP consistent with the purpose of the experiment including, but not limited to:

- (i) The maximum amount of each species which can be harvested and landed during the term of the EFP, including trip limits, where appropriate;
- (ii) The number, sizes, names, and identification numbers of the vessels authorized to conduct fishing activities under the EFP;
- (iii) The time(s) and place(s) where experimental fishing may be conducted;
- (iv) The type, size, and amount of gear which may be used by each vessel operated under the EFP;
- (v) The condition that observers be carried aboard vessels operated under an EFP;
- (vi) Data reporting requirements; and
- (vii) Such other conditions as may be necessary to assure compliance with the purposes of the EFP consistent with the objectives of the Pacific Coast Groundfish Plan.

(d) **Duration.** Unless otherwise specified in the EFP or a superseding notice or regulation, an EFP is effective for no longer than one year unless revoked, suspended, or modified. EFPs may be renewed following the application procedures in this section.

(e) **Alteration.** Any permit that has been altered, erased, or mutilated is invalid.

(f) **Transfer.** EFPs issued under this part are not transferable or assignable. An EFP is valid only for the vessel(s) for which it is issued.

(g) **Inspection.** Any EFP issued under this part must be carried aboard the vessel(s) for which it was issued. The EFP must be presented for inspection upon request of any authorized officer.

(h) **Sanctions.** Failure of the holder of an EFP to comply with the terms and conditions of an EFP, a notice issued under Subpart B of this part, any other applicable provision of this part, the Magnuson Act, or any other regulation promulgated thereunder, shall be grounds for revocation, suspension, or modification of the EFP with respect to all persons and vessels conducting activities under the EFP. Any action taken to revoke, suspend, or modify an EFP will be governed by 15 CFR Part 904 Subpart D, or 50 CFR Part 671.