



U.S. DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
OFFICE OF GENERAL COUNSEL  
P. O. Box 1668, Juneau, Alaska 99802

10

Date : June 13, 1977

Reply to Attn. of:

To : Dr. Dayton L. Alverson, Chairman  
Scientific & Statistical Committee, NPFMC

From : James K. White  
Alaska Regional Counsel, NOAA

Subject: Comments on Draft Management Plans for the Gulf of Alaska Groundfish  
Fishery and the Alaska Tanner Crab Fishery

This memorandum offers my preliminary comments on the two draft management plans presented to the North Pacific Council at its May meeting. I hope these comments will be of use to your committee at its mid-June meeting in Juneau. Incidentally, I will be in Juneau during that meeting and will be available to offer any assistance you may request.

By way of a general comment applicable to both plans, it must be kept in mind that the Act places responsibility and jurisdiction over Fishery Conservation Zone resources in the Councils and the Secretary of Commerce. There is no provision in the Act that would allow the Council or the Secretary to turn their respective statutory duties over to a State.

Both of these plans (especially the tanner crab plan) include improper delegations of Council and/or Secretarial authority to the State of Alaska. For example, both plans require U.S. fishermen to obtain permits from the State in order to engage in the fishery in the zone. This is contrary to Section 303(b)(1) of the Act which provides that a fishery management plan may:

"require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the Fishery Conservation Zone, or for anadromous species or continental shelf fishery resources beyond such zone ;...."(emphasis added).

I assume that one purpose of the current permit provisions of the plans is to combine the Federal and State licenses so that only one license would have to be obtained by U.S. fishermen engaging in a particular fishery. While this appears to be a desirable objective, the Act requires that the Secretary be the issuing authority as to those permits pertaining to the FCZ. It appears reasonable that, if the plan is to require permits for U.S. vessels in the FCZ, there should be two permit actions: (1) A Federal permit required of all U.S. vessels in order to fish in the FCZ; and (2) a State permit which the State may require of all vessels in order to fish in State waters.

In spite of all of this, it still would appear to be possible for the State of Alaska and the Secretary to agree to a joint procedure for the issuance of

con't...

the permits, and possibly even a single permit form can be used, so that a U.S. fisherman would need only to endure a single application and issuance process to obtain these permits. Such an arrangement could be established by agreement, and implemented by regulations issued by the two parties. The plan itself need only establish the requirement for a Federal permit.

Additional examples of improper delegations of authority are included in the comments below.

#### DRAFT TANNER CRAB MANAGEMENT PLAN

1. Federal Adoption of State Regulations: Section 8.3.1 of the plan (p.73), sets forth the management measures regarding domestic fishing for tanner crab. This section simply states that the plan adopts by reference the State of Alaska regulations pertaining to the tanner crab fishery. Incorporation of all of these State regulations appears to be contrary to the Act.

The distinction between a management plan and the regulations implementing the plan are important, since the Council has the primary responsibility for preparing the plans and the Secretary of Commerce has the responsibility for implementing those plans by regulation. Just as the Act does not allow a Council to delegate to a State the responsibility of adopting a plan, so too does the Act prohibit the Secretary of Commerce from delegating to a State her responsibility to implement a plan. In my view, incorporating the State regulations into the draft tanner crab plan as currently proposed would result in an improper delegation of the Secretary's statutory duties under the FCMA.

This is not to say that some of the State's statutory and regulatory provisions cannot be incorporated into the plan. In fact, Section 303(b)(5) of the Act specifically authorizes the Council to incorporate in its management plan, "...any relevant fishery conservation and management measures of the coastal states nearest to the fishery". But, the same section includes the condition that State provisions so incorporated in the plan must be "...consistent with the national standards, the other provisions of this Act, and any other applicable law..." (emphasis added). Incorporation of all of the State's regulations referred to in the plan would appear to be contrary to the Act since many of those regulations as currently written are: (1) inconsistent with the national standards; or (2) inconsistent with other provisions of the Act.

Futhermore, many of the regulations that might not be inconsistent with the Act appear to be unnecessary under a Federal program of regulation in the zone. It must be kept in mind that once a plan is in place there will exist clear jurisdiction over all vessels in the zone for the first time, and therefore those complexities of the current Alaskan system that are due to an attempt to assert such jurisdiction may no longer be necessary.

In particular, I note the following areas:

con't...

1. State Regulations that Appear to be Inconsistent with the National Standards:

A. Exclusive Registration Areas - in reference to the State's exclusive registration area concept, the draft plan states (p.79) that: "In general, exclusive Tanner crab registration areas are smaller geographically than the nonexclusive areas, and are fished largely by local fleets. The two nonexclusive areas are very large areas with developing fisheries or contain sub-areas yet to be fully exploited. Exclusive status for an area does tend to preserve the area for local exploitation and probably acts to discourage the rapid entry of more efficient vessels. The recent expansion in Tanner crab fisheries is directed, through the nonexclusive provision to areas that can generally sustain further exploration."

This appears to violate national standards #4 ("Conservation and management measures shall not discriminate between residents of different States) if the group of more efficient vessels is made up primarily of out of state vessels); and #5 (Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources...").

B. Pot Limits - 5AAC 35.125 (p.272), the Alaska regulation placing limits on the number of pots used by vessels, appears to be inconsistent with national standard #5 (promote efficiency), and possibly #4 (discrimination between residents of different States) if the limitation primarily impacts out of State vessels.

2. State Regulations that Appear to be Inconsistent with Other Provisions of the Act:

A. State License - requiring a vessel to obtain a license from the State in order to fish in the FCZ violates Section 303(b)(1) which only authorizes the plan to require that such permits be obtained from the Secretary.

B. Reporting of Statistics - requiring that such information be submitted to the State is contrary to Section 303(a)(5) of the Act which states that every management plan is required to:

"specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species and numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, and number of hauls." (emphasis added).

Also, Section 303(d), entitled "Confidentiality of Statistics", states that:

"any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) shall be confidential and shall not be disclosed except when required under court order. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality.

"except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics."

These subsections of the Act require that statistics submitted by U.S. fishermen must be submitted to the Secretary of Commerce, and that the Secretary has the responsibility for assuring the confidentiality of those statistics. It would violate this responsibility on the part of the Secretary to allow statistics on U.S. fishing to be submitted directly to the State of Alaska.

C. Role of the Commissioner - generally, the role of the Commissioner of the Alaska Department of Fish and Game set forth in the State regulations would, if included in the plan, be contrary to §305(g) of the Act which states that "the Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act." The Act contains no provision that would authorize the Secretary of Commerce to turn that responsibility over to a State. (Section 311 does authorize the Secretary to utilize the facilities and personnel of a State agency, on a contract basis, for enforcement purposes.)

D. Emergency provision - Section 305(e) of the Act contains the provision for emergency actions available to the Secretary of Commerce. Again, the Act does not allow the plan to delegate this statutory responsibility to any State, as provided in 5 AAC 35.035(b) (p.266).

Conclusion: Incorporation by reference of all of the State of Alaska's tanner crab fishing regulations would be inappropriate. While some of the current State regulations would simply be unnecessary as Federal regulations, others appear to be inconsistent with the Act. If the Council wishes generally to adopt the State's regulatory program into the plan, it must be done selectively on a section-by-section basis, making changes as necessary to comply with the Act.

#### DRAFT OF ALASKA GROUND FISH PLAN

1. Permit Requirement: Section 8.7.1 (p.284) of the draft plan, dealing with domestic permit requirements, provides that:

"All U.S. fishing vessels operating in that part of the Gulf of Alaska groundfish fishery which is under Council jurisdiction must have a State of Alaska vessel license."

As noted above, this is contrary to Section 303(b)(1) of the Act.

2. Permit Fees: I assume that the plan does not require or authorize permit fees to be paid by U.S. fishermen, since Section 8.7.1 makes no reference to fees. The question of fees should be dealt with specifically rather than by negative inference.

con't...

3. Reporting Requirements: Section 8.5.1 (p.279) which deals with domestic reporting requirements, states that "fishery statistics, including value of the catch, shall be reported to the State of Alaska within seven days of the date of landing...". This is contrary to Section 303(a)(5) of the Act, which mandates that management plans require such information be supplied to the Secretary, who has the duty to assure the confidentiality of such statistics.
  
4. Marine Mammals as Prohibited Species: Marine mammals should be stricken from the list of prohibited species contained in Section 8.3.2.1 (C)(p.266) of the draft plan. The FCMA specifically excludes marine mammals from its jurisdiction, and therefore there is no authority for listing it as a prohibited species here. Regulation of marine mammals is pursuant to the Marine Mammal Protection Act, not the FCMA. The MMPA does prohibit taking of marine mammals within 200 miles of our coast except under certain limited conditions and then only after obtaining a permit from the Secretary of Commerce. Any commercial fishing operation must obtain such a permit in order to incidentally take marine mammals. At the current time, such a permit must be obtained separately from an FCMA permit.
  
5. Federal Laws and Policies: Section 8.3.3.2 (p.275) is confusing in its reference to Federal statutes and international agreements, some of which are not pertinent to the FCMA and this management plan. The Fish and Wildlife Coordination Act of 1958, the Federal Water Pollution Control Act Amendments of 1972, the Submerged Lands Act of 1953, and the Marine Protection, Research and Sanctuaries Act of 1972 do not appear to be particularly relevant to this plan. Nor does the Interim Convention of the Conservation of North Pacific Fur Seals, which deals with a species of animal not subject to the jurisdiction of the FCMA.

Also, the third paragraph on p.285, dealing with the Department of Interior's authority over the Metlakatlan and Karluk Indian reservations, is not necessary since the Act requires only that a plan assess and consider any existing Indian treaty fishing rights. The two Indian reservations mentioned do not involve treaty fishing rights in the FCZ. The plan should simply state that there are no Indian treaty fishing rights for groundfish in the FCZ in the Gulf of Alaska.

6. Prohibited Species for U.S. Fishermen: Section 8.3.1.1(C) (p.262) is not sufficiently clear in simply declaring that species are prohibited "in accordance with existing State and Federal statutes." This section should either specify those species that are prohibited for U.S. fishermen, or state that all species are prohibited unless specified otherwise in this plan.

7. Fisheries and Stocks Involved: the SSC might want to consider deleting Section 8.2(p.258), entitled "Area, Fisheries, and Stocks Involved", replacing it with a definition of "Gulf of Alaska Groundfish Fishery" in the definitions section of the plan (Section 2.2., p.3), since this section is in fact defining the "fishery". Since the "Operational Definitions" section currently includes only those concepts and terms which apply to all Council plans, it may be necessary to add a new subsection defining terms used in this plan. In any event, the following changes should be made in Section 8.3: 1) in 8.3(B)(2), p.258, delete "legally engaged in trolling for salmon" and insert in lieu thereof the following: "fishing in accordance with the U.S.-Canada Reciprocal Fisheries Agreement signed February 4, 1977"; and 2) in 8.3(B)(3), p.258, strike the period at the end of the sentence and add the following: "or preliminary fishery management plans".

JKW/mo

cc: Jim H. Branson  
Harry Reitze  
Bob Simon  
Jeff Haynes ( State AG's office)  
Bill Brewer/Jim Brennan (GC)  
Brooks Bowen (GCF)