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October 9, 1979

Mid-Atlantic Fishery Management Council
Room 2115, Federal Building
Dover, Delaware 19901

ATTENTION: Ms. Nancy Goell,
Chairlady, Environmental Committee

Dear Nancy:

You have requested an opinion as to whether Fishery Management Councils have authority to regulate and/or control forms of fishery habitat degradation such as water pollution. We have previously received a letter memorandum from Joel G. MacDonald, Esq., NOAA staff attorney, on an aspect of the same subject. Mr. MacDonald concluded that no such authority exists and that Management Councils are limited to taking "an active independent role by submitting comments and participating in other agency's hearings**" in regard to such matters as pollution control or abatement. Indeed, the role envisioned by Mr. MacDonald does not appear to be any different from that which any citizen might play.

In arriving at his determination, Mr. MacDonald has stressed, inter alia, statements made by members of the Congress that the function of the Fishery Conservation and Management Act of 1976 is the "reasonable regulation of fishing and absolutely nothing else." This statement and others similar to it were made against a background of debate in which the sagacity of a unilateral extension of fishery jurisdiction was questioned. Those opposed to this action saw it as an excuse for foreign nations to extend their territorial jurisdiction and to interfere with such traditional rights of the high seas as free passage. It was to assuage such fears that the proponents of the bill

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unequivocally stated it only related to "the specific purpose of conserving fishery resources" and not to the assertion of any other authority in the FCZ. However, terms such as "conserving fishery resources" are broad and do not appear to preclude environmental measures undertaken by Councils in furtherance of this purpose. In addition, as will be hereinafter seen, much other language seems to contemplate that such authority does, indeed, rest in the Councils.

It must be recognized, at the outset, that nowhere in the FCMA is an express provision either granting or denying the Council's power to take environmental steps such as pollution abatement in order to carry out the purposes of the statute, including the purpose (§2[b][1]) "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States**." However, there is significant language bearing upon the question in the statute, in the legislative hearings and in other authorities.

The importance of environmental data in the formulation of fishery management plans is stressed by these authorities. If Councils played no role in environmental matters effecting the fisheries, then there would appear to be little or no reason why they should become involved with information of this sort. For example, §2(b)(5) of the FCMA sets forth as one of the purposes of the legislation, the establishment of Management Councils which will prepare management plans after receiving input from, among others, "environmental organizations." As a matter of fact, it has been stated that:

"**The Secretary of Commerce, who appoints the voting members of the Councils from lists of potential members submitted by the Governors of the States in each region, has been asked to seek an amendment to the Fishery Conservation and Management Act which would require that environmental interests be represented on the councils." Establishing a

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200 Mile Fisheries Zone, Office of Technological Assessment, Congress of the United States, p. 63 (1977).

In defining "conservation and management" §3(2) of the FCMA broadly states that it refers to "all of the ***methods, and other measures which are required to rebuild, restore or maintain**any fishery resource and which are designed to assure that**irreversible or long term adverse effects on fishery resources and the marine environment are avoided."(Underscoring added). Such terminology seems clearly of sufficient breath to include measures designed to prevent marine degradation. Similarly, among the specific powers vested in the Councils by the FCMA is the authority to "conduct any other activities which are**necessary and appropriate to the foregoing functions."§302(h)(6). Also appropriate is §303(b)(7) which sets forth the discretionary provisions that may be included in a fishery management plan. This section permits the Council to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."

In order to assist the Councils in their managerial roles, the Secretary of Commerce under §304(e) is directed to maintain a fishery research program covering various biological areas including "the impact of pollution on fish." This mandatory research program has been described as being "supportive of the National fishery management program." Legislative History of the Fishery Conservation and Management Act of 1976, Report of Senate Committee on Commerce, §961, p.694 (1976). The program undoubtedly results from the awareness on the part of the drafters of the statute of the acute problem posed by marine pollution. As stated by Congressman Robert J. Lagomarsino during the Congressional debates:

"The coastal waters of the world are the last great resource of this planet. They harbor 95 percent of all life

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in the sea. They have an enormous capacity for production when conditions are right. But when conditions are wrong, it is a desert. Man has only recently had the capacity to deplete this resource. It is being depleted in two ways - through pollution, and through overfishing.

"What the opponents of this bill are really saying is that we should allow this destruction to continue unabated until such time in the future as all nations are able to agree on a solution. What I am saying is that we cannot wait. **Pass this bill and save the most promising food resource on this planet." Ibid, p.897.

Official agencies have expressed themselves as believing that the FCMA can be an instrument through which water quality can be improved. Thus, the Congressional Office of Technological Assessment stated that:

"The Fishery Conservation and Management Act of 1976 could be a stimulus for comprehensive stock enhancement programs which would improve many of the U.S. fisheries.

"**Poor water quality can have a detrimental effect on the size of the stock either through a marked increase in mortality or sublethal effects such as stunted growth. Programs of pollution abatement will assist in stock enhancement." Establishing a 200 Mile Fisheries Zone, Office of Technological Assessment, Congress of the United States, p.96 (1977).

Another oft cited reason given for the view espoused by Mr. MacDonald is that to endow Councils with authority in the field of environmental protection would create a conflict with other governmental agencies such as the Environmental Protection Agency. Congress was aware that the Council Mechanism was unique and that its role vis a vis other agencies would of necessity have to be spelled out in the future. Its Office of Technological Assessment expressed the situation thusly:

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"The general responsibilities of the Councils are clear, but their relationship to the future operation of already existing Federal agencies is not so clear." Ibid, p.63.

I submit that the delegation in the FCMA of broad conservation authority to the Councils under very general standards; the statute's emphasis on environmental matters; and Congress' awareness that it had not limited the Council's roles in regard to other Federal agencies that have similar authority support a conclusion that the Council does have power to take affirmative steps in regard to environmental degradation that adversely effects the fisheries.

I trust this is the information you requested.

Sincerely yours,


WILLIAM M. FEINBERG

WMF:hh