

M E M O R A N D U M

TO: Council, SSC and AP Members
FROM: Jim H. Branson
Executive Director
DATE: May 19, 1983
SUBJECT: Moratorium Appeal Procedure

ACTION REQUIRED

Review proposed addendum to the moratorium language adopted on April 1, 1983 providing an appeal procedure and make final recommendations to the Secretary of Commerce.

BACKGROUND

During the week of May 9-13, the Council staff was informed by the NMFS Regional Office that Bill Gordon, Assistant Administrator for Fisheries, was of the opinion the moratorium as approved by the Council on April 1, 1983 would not receive Department of Commerce approval unless a hearing or appeal procedure was specifically provided for. The basics of such a mechanism are as follows:

Any fisherman denied eligibility status or facing documented hardship because of the moratorium may appeal to the NMFS Regional Director for qualified individual or qualified vessel status. Any fisherman denied status by the Regional Director may then appeal to the Assistant Administrator for Fisheries for a review of the denial. This review may be based upon either new or additional information which might change the initial decision or a demonstration of significant and unusual hardship resulting from the denial. At the time the fisherman appeals to the Assistant Administrator, he would have an option of requesting a hearing before an administrative law judge. The decision of the Assistant Administrator would be the final decision of the Department of Commerce.

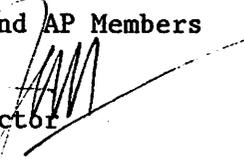
After this issue was raised by the Assistant Administrator, NOAA General Counsel for Alaska, Patrick Travers and Thorn Smith, acting at the request of NMFS Regional Director, Robert McVey, drafted an addition to the rule as adopted by the Council [herein included as agenda item C-3(a)] that would provide for an appeal process but only within the guidelines of the eligibility criteria set out in the final rule implementing the halibut moratorium. This appeal language as drafted provides no consideration for hardship but does allow individuals to submit additional evidence regarding the qualification criteria specified in the rule as adopted. Because this additional

language does not expand upon the criteria for the moratorium as approved by the Council, no formal Council adoption would be required. If, however, a procedure were to be implemented that considered hardship cases, the Council would have to formally adopt the amending language. Such an appeal process was considered at the March meeting and not made part of the rule as adopted. See relevant transcript included herein as item C-3(b).

The Council should note that under any appeal procedure, fishermen who had availed themselves of the procedure would be allowed to fish in the halibut fishery pending a final determination of their eligibility.

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NMFS PROPOSAL FOR APPEALS/EXCEPTIONS
PROVISION OF HALIBUT MORATORIUM REGULATION

May 25, 1983

(4) A person not authorized by this part to harvest and sell halibut or to operate a vessel of a certain net tonnage may petition the Regional Director for a special exemption from this moratorium. Each petitioner must state, in writing, and under oath or affirmation, his past participation in the commercial halibut fishery, the factual circumstances which prevented him from meeting the criteria in paragraph (a) of this section, his present investment in a commercial halibut fishing vessel and gear, and the financial loss that he will directly incur if denied the personal opportunity to both harvest and sell halibut or to operate a non-qualified vessel during the moratorium. The Regional Director may grant the petition and issue a special exemption if he is satisfied that the petitioner is not a new entrant to the commercial halibut fishery, is not intending to significantly increase his present investment in either vessel or gear, and is likely to suffer serious and immediate financial loss if denied the personal opportunity to both harvest and sell halibut or to operate a non-qualified vessel during the moratorium. A written decision will be issued and provided to the petitioner and the North Pacific Fishery Management Council. A petition may be granted on an interim basis; the decision of the Regional Director will be the final decision of the Department of Commerce.

For purposes of determining historical participation or dependence on the commercial halibut fishery in any subsequent limited entry system, the grant or denial of a petition for special exemption and any harvest and sale of halibut or use of a non-qualified vessel thereby authorized will be disregarded.

Definition: "Serious financial loss" means a reduction of 25% of gross personal income as defined by the Federal Internal Revenue Service.

To: GCAK - Pat Travers/Thorn Smith

From: GCF - Jay S. Johnson

Subject: Appeals, Second Version

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For purposes of determining historical participation or dependence on the commercial halibut fishery in any subsequent limited entry system, the grant or denial of a petition for special exemption and any harvest and sale of halibut or use of a non-qualified vessel thereby authorized will be disregarded.

Optional Definition: "Serious financial loss" means a likely reduction in personal after-tax income of at least \$2000 or 25% of gross personal income as defined by the Federal Internal Revenue Service.

DRAFT: 5/13/83

(f) Determinations, appeals, and hearings.

(1) Any person may request the Director, Alaska Region, National Marine Fisheries Service (Regional Director), to determine any of the following matters:

(A) Whether that person meets the criteria for participation set forth in paragraph (a) of this section;

(B) Whether any vessel meets the criteria for participation set forth in paragraph (a) of this section;

(C) Whether that person comes within the exceptions set forth in paragraph (b) of this section.

Any request under this paragraph (f)(1) shall be in writing, shall include all relevant facts and documentation, and shall be addressed to the Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802. A determination by the Regional Director under this paragraph shall be in writing, shall state the reasons therefor, and shall advise the person who requested the determination of the rights provided in this paragraph (f).

(2) No later than thirty days after receipt of a determination under paragraph (f)(1) of this section by the person who requested that determination, that person may appeal the determination to the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (Assistant Administrator). Appeals under this paragraph (f)(2) shall be in writing, shall set forth the reasons why the appellant believes the Regional Director's determination was in error, shall include any supporting facts or documentation, and shall be addressed to the Assistant Administrator, National Marine Fisheries Service, Room 400, Page 2 Building, 3300 Whitehaven

Street, N.W., Washington, D.C. 20235. At the time the appeal is filed with the Assistant Administrator, the appellant may request a hearing with respect to any disputed issue of material fact. Failure to request a hearing at this time shall constitute a waiver of the hearing. If a request for a hearing is filed, the Assistant Administrator shall order a hearing if he determines that a hearing is necessary to resolve material issues of adjudicative fact and shall so notify the appellant. A hearing may be denied where it is apparent that the appeal raises no genuine issue of material adjudicative fact. If the Assistant Administrator orders a hearing, he shall refer the appeal to the Office of Administrative Law Judges, U.S. Department of Commerce, for a hearing in accordance with 5 U.S.C. §554. Following the hearing, the Administrative Law Judge shall promptly furnish the Assistant Administrator with a recommended decision. As soon as practicable after considering the matters raised in the appeal, and the recommended decision of the Administrative Law Judge in the event a hearing is held under this paragraph (f)(2), the Assistant Administrator shall issue a written final decision, including findings of fact and conclusions of law.

Transcription of a portion of the halibut discussion during the March 1983 Council meeting, beginning on Thursday, March 31, at approximately 2:20 p.m.

TILLION: (re: transferability) Well, you're well aware of my opinion; I feel that if you allow free transferability you'll build in rights that, when it comes time to look at an entry program and you look at those that have participate in the fishery, you'll have a very difficult time screening those that have had no history of participation but have happened to have bought a boat. This is something that hours were spent talking about; I believe Mark Lundsten had quite a talk from the Halibut Fishermen's Union group about this and the feeling was that the transferability, while necessary in some cases, should be kept very narrow for the moratorium so that you do not foreclose options. I believe, Don, you had that issue when you had the SSC, didn't you? And so, this isn't something that hasn't been gone over a great deal. I lean to no transferability at all, that a death means the end of the right to fish; others have not bought that and have expanded it quite a bit beyond that. Each expansion forecloses options that we have in the future. I believe that that was your statement, too, that the broader the transferability the less options the Council has in the future.

ROSENBERG: Yes sir, Mr. Chairman. The SSC did consider that free transferability would restrict the options that the Council would have at a later date.

CAMPBELL(?): But, Mr. Chairman, you also suggested there be some kind of a an option or some way to handle these hardship cases in your recommendations.

ROSENBERG: Within our recommendations, we felt that that would be a review board type procedure; somebody would have to determine . . . which we've not established in this . . .

SPECKING: Mr. Chairman, it appears to me that the language as now proposed is going to raise a whole multitude of questions . . . Following up with what was stated about the potential for the need of a review board, who's going to resolve those various issues without a mechanism. I find no room here for any mechanism to resolve the kinds of disputes that are going to arise.

TILLION: Patrick?

TRAVERS: Mr. Chairman, the primary administrative mechanism that will be relied on to implement this program would really be the civil penalty system that's established under the Halibut Act. As I understand it, what the enforcement agencies would plan to do would be to keep track of who is fishing and landing halibut during the season and then, after the season was over, compare the information that they gathered during the season with the information that they already have concerning the people who participated during the base period and the vessels over five net tons that were used during the base period. They would then compare that to the information they gathered during the season and if it turned out that people who apparently had not participated during the base period had participated, say during 1983, then a civil penalty proceeding would be begun against them. We might make an initial investigation to determine whether or substitution had been made, depending on what kind of substitution provision is carried out. But, all of these factual questions--whether someone is a resident, whether somebody really

was sick or retired--would ultimately, if the fisherman wanted to carry it that far, would be determined through an administrative hearing of the type that we already have. That's a system that we already have in place and that has proven to be pretty effective so far under the Halibut Act. We haven't had much in the way of hearings, we'd probably have more under this provision, but at least that's all set up. NOAA does have an administrative law judge who hears these cases.

LOKKEN: Mr. Chairman, may I ask Pat this? I come to you on the first of June and say, "I want to go out and fish halibut. Here are the circumstances and I'm not sure whether I'm eligible or not." Who then determines whether I can go or I can't. I can't afford to go out and fish and then find out afterwards it's illegal.

TRAVERS: As I understand it, there have been some discussions about ways in which people might be warned at the beginning of the moratorium if it were to come into effect. I understand there have been discussions about a mass mailing to everybody on the Council's mailing list that would set out in plain language who would qualify and who wouldn't and perhaps give a phone number that they could call to get advice as to whether they qualify or not. So, I guess that's just something that would have to be arranged. The formal way that a final decision would be made, that would be mostly through the civil penalty . . .

TILLION: All right. The thing I think that Mr. Specking was asking for is you apply for a license and are turned down; who do you appeal to. I think that's basically what . . .

SPECKING: Mr. Chairman, what I'm trying to get an opinion on is, who is going to resolve or determine the transferability question that arises has died, when someone is physically incapable, sick, or whatever, who's going to make those decisions?

TRAVERS: Do you want me to answer that based on the way the draft is right now?

SEVERAL: Yes.

TRAVERS: The way that would be resolved would be as I described. If somebody died or felt that they were too sick to continue in the fishery or for one of the other reasons given didn't feel they could go in, they would sign a piece of paper designating a particular person to be their substitute. If they died, their closest relative would fill it out. The designated substitute would have to have that piece of paper on his person during the time that he was fishing for halibut. There isn't any provision for notification of the administering agencies in here because that would have put us under the Paperwork Reduction Act which would have undoubtedly further delayed any rule that the Council might want to come up with. So, what would probably happen is it would be a good idea for somebody, if they designated a substitute to let NOAA or the Coast Guard know and if they didn't, what would probably happen is that in the process of matching up the people who had fished during the base period with people who were detected to have fished during 1983, the people who are substitutes might not show up as having fished during the base period. So, in our initial investigation of whether to begin a civil penalty

proceeding against them, that's one of the first things we would check up on, whether there was a valid substitution. If it looked like there were fraudulent grounds for the substitution or that there was forgery or something like that, there are provisions in the regulation as drafted to make that an offense and that would be a ground for an assessment of an additional civil penalty to the one that the person would get for having fished without being qualified.

UNIDENTIFIED: (Campbell?) Mr. Chairman, I don't think we're so interested in knowing how we're going to go after the other guy; we're interested in how that guy is going to get some help under these things.

TILLION: Basically, the person that was turned down, you say, "no, that transfer's not allowed--who says that; is that the Halibut . . .

TRAVERS: OK, there would be nobody who would judge everyone who wants to participate in the fishery and determine whether they're going to participate or not. Because we're not establishing a new license system. I understand that the State of Alaska, in the issuance of its own interim-use permits, is trying to figure for itself who would qualify under this. I suppose that that is something that the Council need not necessarily object to, but that would not be a definitive decision as whether that person as qualified or not. There's not going to be any initial decision by us before the season as to whether somebody is qualified or not, at least not a formal one. The most we could do would be to have an informal consultation with people who thought they were qualified but had some doubt about it and we certainly would try to give them as definitive information as we could, but we're looking at after-the-fact enforcement of this thing. I think that that's something we just can't get around. We don't have the resources to do it otherwise.

BRANSON: Can I kind of recap, Mr. Chairman, as I see what Pat is saying? Immediately when this thing goes we'll send out a notice to all of the purchasers of halibut licenses from the State of Alaska and through the Halibut Commission and say, whether or not you've got a license, these are the requirements you have to have to be able to fish legally in 1983, laying down whatever the moratorium contains, and then saying if you have any questions about this, contact Pat Travers or Ron Miller, or whoever is designated. They'll immediately contact them and they will render a judgment saying, based on what you've told me it doesn't sound like you're qualified. So then the guy either fishes or he doesn't fish. If he doesn't fish, there's no problem; if he goes fishing, then we start the civil proceedings to determine whether or not he truly was qualified and whether he was right or whether Pat was right. Is that what you're saying?

TRAVERS: That's basically it.

SPECKING (?): Mr. Chairman, you know it's been my experience that no one ever wants to make that kind of determination. So, that Pat Travers or whoever it is that phone call or letter comes to, simply isn't going to make a call on it. They're going to try to pass 'em off on somebody else. And that's the reason why we have boards and commissions. It's (unintelligible) to me that you don't have the resources. Maybe we don't have the resources to get into halibut . . .

TRIVERS: Mr. Chairman, we have done this in a few other cases, not directly related to limited entry. You know at one time when the State law on allowing vessels inside internal waters had been invalidated people were calling up to try to get determinations of where internal waters were so that they could bring foreign vessels in and we had a fairly regular system for giving these advisory opinions as to whether someone was qualified. One other thing I might add is that I am the person responsible for assessing civil penalties off Alaska. I mean, if I advise somebody that they're qualified I'm not going turn around a start a civil penalty proceeding against them. That is one area where I have the final decision and I can assure them they can rely on that.

TILLION: The problem is when you advise they're not qualified. Now, I believe this has already happened in the surf clam fishery back East and this is identical to the way that one was set up and has been in existence for how many years? Four or five years and it's worked . . .

PETERSEN: Mr. Chairman, it seems to me that if there were some thoughts as to how this was to be handled on down the line we should have had some written material on it and not just try to guess what's going to happen from one minute to the next. I think that there's some information here that we're perhaps not getting.

TILLION: They've had the surf clam fishery; it was set up identical to this.

TRIVERS: I don't know what more information I could give on how it would work. It would be the process that Jim and I have described. As far as whether we are going to actually be giving these advisory opinions or not, we're planning on it; that's all I can say. There are three of us in the General Counsel's office and in the Council office Ron will be available and NMFS might have one or two people to do it, I mean I don't see that as being a major problem. It really isn't a situation where we're just going to stay mum and let people take the risk.

SPECKING: Thank you, I think I understand you dissertation.

STEPHAN: Pat, isn't it a fact, though, that if we were not trying to limit participation in this thing, which some are wanting to do, is simply allow vessels to be transferred during the moratorium; now we're only trying to implement a moratorium rather than try to implement a limited entry at the same time, we wouldn't even be need to be talking about a board of equalization or something like that, or some hearing board. We wouldn't even need, because the problem wouldn't be there.

TRIVERS: That would be true, certainly not for the people . . .
.(unintelligible).

TILLION: In that case, if someone died, they'd be out. Suits me just fine.

UNIDENTIFIED: They could transfer.

TILLION: No, no. As soon as you transfer, you have it. You're either in or you're out under the first system we had. You have fished halibut or you haven't. If you haven't fished halibut, you don't fish halibut. That's the very simple one. That one doesn't require much at all; you just look it up,

if that person doesn't have a license, he doesn't fish. This one, we decided that was a little too harsh and that's why you've gotten into this one. I mean this one's pretty mild as far as I'm concerned. I'd be perfectly happy to go with the "either you're in or you're out."

KNAPP: Mr. Chairman, on the question of enforcability and enforcement, Pat, do I understand that we're going to be just doing an after-the-fact enforcement, there won't be some kind of data bank that, if this thing goes through, the people have some kind of documentation so that we can do it at sea and not . . .

TRAVERS: We hadn't been planning on having that type of documentation. It would be extremely difficult, as I understand it, to do that between the time the moratorium would be likely to go into effect.

KNAPP: Because it occurs to me that if we don't have some kind of before-the-fact or active enforcement during the season and depend on a post-season enforcement analysis, the thing probably isn't worth the powder to blow it to hell.

TILLION: You'll know what licensed boats are out there. The problem will be whether the crew has a document or not. In 90% of the cases that wouldn't be too difficult, but the big thing that the Coast Guard will have is that it will know which boats are legally out there. They will take longer. This has dragged on for so long, that the actual mechanism to point out whether all of the crew is, you know, whether every skipper is absolutely legal, will be difficult. But you from the Coast Guard will know immediately whether boat is a licensed vessel out of the halibut . . .

KNAPP: One other comment, Mr. Chairman. It's separate, but related. It occurs to me that when we discussed this moratorium, the whole thrust, the sole thrust, was to stop people from coming in in anticipation of a limited entry scheme and that is what's expressed in the Notice of Proposed Rulemaking and so on and so forth and given that situation I wonder if what is proposed here, especially with respect to limitations on what kind of boat you can build or what kind of regulation you put on your boats would stand any kind of test of consistency with the original Notice of Proposed Rulemaking. It occurs to me that this thing didn't start out to limit effort. It started out as I stated before. And, if you want to then, during the moratorium, limit effort we can do it on the basis of seasons or quotas or whatever.

TILLION: You can't limit effort with quotas. You only limit time. That's the failure of that system. This went out and it was added to it at the Council meetings that you also consider limiting vessels. If you want to limit effort, and I believe, Harold, you could explain this better than I, you have to address both people and the vessel or you have not limited effort. This limiting on the vessel isn't my idea, it's those that want to limit effort because otherwise the effort would go on up and so, yes, this is a compromise, but it actually does tighten the effort down a great deal tighter than the original suggestion. But it's a little more complicated doing it.

KNAPP(?): It also counters a thrust toward giving your fleet higher productivity and getting out of the cottage industry where you're limited down to your very limited expansion.

TILLION: Yes, but it's only during the moratorium. We'd better address the actual problem of limited entry or we're not going to deliver a quality product to the consumer. This moratorium will not solve the problem. This moratorium will just hold us to a single group that we have to solve the problem instead of the whole wide world.

ALVERSON: Mr. Chairman, on page 1, item B(2), I think that on the fourth line you should add, after (a)(1)(B)(i), the words, "or B(iv)." As you have it currently worded you allow someone who had a boat larger than 5 net tons who had bought something, say in November, to keep that boat, but you haven't accommodated the guy that had under 5 net ton and bought a 12-ton. He should be accommodated also, so if you add "or B(iv)" in there he'll be accommodated.

TRAVERS: Where should that be added?

ALVERSON: Right after (a)(1)(B)(i) on the very last line of page one.

TRAVERS: O.K.

ALVERSON READ THE TOTAL SENTENCE.

COLLINSWORTH: Mr. Chairman, what is the administrative process now should the Council adopt this moratorium.

TRAVERS: If the Council were to adopt this, it would be incorporated in a draft Notice of Final Rulemaking together with, I believe, the final Regulatory Impact Review and an Action Memorandum prepared out here in the Region and those would be sent back to Washington, DC for ultimate approval by the NOAA Administrator with participation by the Office of Management and Budget which would have to clear the regulatory analysis and if the NOAA Administrator decided to approve it, then that final Rulemaking Notice would be published in the Federal Register. After the final notice is published normally there would be a 30-day period before the regulation actually went into effect. If, adhering to that 30-day requirement would cause the regulation to come into effect after the beginning of the halibut season, June 15, then we would probably have grounds for shortening it by whatever period was necessary in order to put it into effect by the beginning of the season. I think that as far as notifying people that it was likely to come into effect, that could take place as soon as it was published.

COLLINSWORTH: One more question. Have the changes that we've made now, changing from December to March and the last change that Bob Alverson put in there, does that solve the problems of Stan Reddenkof and this other gentlemen who are in the processing of buying and selling and changing gear--all those problems.

LOKKEN: They can call Pat!

TILLION: If they've done it by today, yes.

TRAVERS: I believe one of the gentlemen who was up here said he hadn't signed the papers yet so he might have a problem.

TILLION: He had better sign the papers today. But anybody that's bought a boat. . .

COLLINSWORTH: I mean, we had two people who seem to be in the legitimate process of acquiring or upgrading or buying new vessels which in part our own limited entry law encourages that kind of activity and . . .

TILLION: One is clearly going to qualify; the other one, unless he has signed the papers by today, would be stuck with a vessel not over 10% larger than the one which he lost. If you change that, it means anybody with a skiff can be hired by anybody with a crabber and put 'em into the halibut fishery. So, you've got two tough decisions. It's either open-ended for anybody to shop around to find some kid that's delivered a few halibut with a skiff, take him on his boat and it's a legal boat, or you close the whole. And, you've got your choice which way you want to go. I'm not uptight about it.

COLLINSWORTH: I guess I have another question. I have to apologize to the rest of the Council, but this is becoming a more convoluted exercise than I had anticipated. I'd like to ask a question of Bob (Alverson); I missed part of your testimony, I came in a little after it started, Bob, could you fill in for me, please, this is the AP's recommendation. I guess you've been working with groups who are also not on the AP. I'd like to know what the vote was on this proposal and how many people were attending the meeting and what groups are supporting and what groups are not supporting this.

ALVERSON: Mr. Chairman, we took two votes in the AP, one in regard to a moratorium in general and that passed, 10 to 6, and then we had a delegated subcommittee that met with a number of industry groups that came up with this dual-system moratorium and that was approved by the AP, 9 to 2. And, the members of industry present were the Seattle Union, Seattle Vessel owners, HPC representative, at least he was a member of HPC, Sitka with ALFA, Eric Jordan, I think a ATA member was present. Had a telegram from Petersburg Vessel Owners and Union supporting a moratorium on the vessel; also had input from the Homer group that Mark Lundsten has already read in. Those were the ones that were actually present. I would imagine that you would have to say that in general even though Kodiak wasn't there they're opposed to a moratorium as well as these people here that testified.

TILLION: The Homer testimony was interesting because the bulk of those who testified were against, but when they held the vote of all those present, it was 22 for and 7 against. It's just that most of those who testify . . .

ALVERSON: There was also a representative from the Southeast Alaska Regional Council that was there and in favor of it and also a gentleman from Angoon.

(mumbling in the background)

COLLINSWORTH: Is that correct--UFA voted 10 to 2 in favor of it?

ALVERSON: I only know that from what people have told me; I haven't seen anything published on it.

TILLION: We have a telegram.

COLLINSWORTH: And that is on this option?

ALVERSON: No, I think UFA voted in terms of the principle of a moratorium. They didn't vote on any specific program.

(member of audience speaking here but no in front of microphone.)

COLLINSWORTH: Mr. Chairman, I would like to pursue a little bit again these people that may be in the process of . . . Stan Reddenkof, do these changes that were made now solve your problem? I mean, there was a change that talked about the date and when you had to acquire a vessel and also a change in term of purchasing a new vessel. Do these solve your problem? You sold your boat and your buying a new one? Oh, you sunk your boat.

REDDENKOF: (barely audible) No, I sunk my boat. You know, it's a hardship case. I think it's as much a hardship case as somebody being killed.

COLLINSWORTH: But, does this solve his problem?

TILLION: No.

ALVERSON: To replace his vessel within 10%.

TILLION: But it doesn't allow him to go . . . In other words, his problem is the fact that he'd like to be able to range as far as California, buy a larger boat that maybe hasn't fished halibut. If this goes through, he's stuck. He can go 10% larger than he has now, buy it anywhere, or he can buy any size vessel that's fished halibut, basically, with his qualification.

REDDENKOF: (barely audible) If I have to buy a vessel that fished halibut, I might have to wait till Jack Crowley or someone else to die.

TILLION: Yea, or else you're stuck within 10% of what you have.

COLLINSWORTH: I guess, you know. I've got a 20-ft boat now and I'm in the process of buying a 24-footer but I haven't been home to sign the papers. So I have to call my wife tonight and tell her we can only have a 22-footer.

BRANSON: They're under 5 net ton; you don't qualify. . .

COLLINSWORTH: I don't mean for fishing, it's the principle that I'm talking about. And that's the same kind of situation I see at least a couple of people in here.

CAMPBELL (?): Don, you're so right and this is only one case because he happens to be here. There's got to be a lot more out there.

TILLION: I'm not even arguing that. Balanced against that is the argument that all of the halibut fishermen's associations have brought up anybody with any size vessel has to find anybody that fished halibut even if they only delivered four fish and can take them onto a big vessel and gear up and you will under those circumstances have major gear increases. If you want to close that door you will have this other problem. It's just a case of which way you want to go. Now the bulk of the people in the industry facing a 5 to

10 to 13-day season are interested in slowing down the amount gear. I am perfectly happy to stick to the old, "if you fished halibut, you're in; if you haven't, you're out. You don't have any transfers. That wasn't what the majority came up with; that wasn't what the AP and SSC came up with; this system is one that's designed to cause as little hardship as possible but still shut that door, so go one way or the other.

UNIDENTIFIED: Mr. Chairman, one question. I understand that the vessel will have had to have fished halibut earlier. Now, doesn't that preclude or shatter that argument that a crabber or somebody can come along and say, hey, you fished halibut, hire on.

TILLION: Not if you change this to allow upgrading. Because then, I ran my skiff on to a rock and knocked off one of the planks and so I don't have a vessel that obviously was wrecked; I wreck a skiff every so often. But I've been pulling halibut last year, I caught four fish and several of them were over 50 lbs; I'm in. You've got a 120 ft. boat that's never fished halibut before; it's desperate for it. It says, hey old man why don't you ride along as cook; we'll pay you a full share and we'll use your license and you're in. And that's what this was designed to stop. And, if you close that door so that I can't go on the 120-footer, then you cause this other heartburn. You have to decide which will be better for the industry and it's one of those calls that isn't really a comfortable call. If you want to truly stop effort during the moratorium, then you've got to put in a certain amount of brutality and if you don't stop effort, just people, you've got to expect a substantial increase this year and next year and the year after.

COLLINSWORTH: Mr. Chairman, I certainly understand that any time you implement a moratorium or a limited entry program or, in fact, make a hard decision on chinook quotas that it's going to impact people. I just feel that there may be a few people right now at the margin that simply because they've been dealing in good faith with issues of life that they've had to deal with, I mean Stan sinks his boat, that's tough in the first place. But just because he's done that, I have a little bit of a problem seeing that he ought to be penalized some way. I'm not sure that out of 6,000 people that there may be 3% or so that have some kind of a complication that hasn't been presented to us today that's is going to adversely impact them in a way that may not be just and I would feel more comfortable if we had some kind of a administrative procedure to evaluate these issues. I understand the Paperwork Reduction Act and all of that kind of stuff, but if you have some kind of a administrative authority to look at . . . there may be estates that are being dealt with now, maybe you have some hardship cases of some kind; clearly the State of Alaska has had to, in order to implement the State's limited entry program, has a commission that has quasi-judicial powers to deal with the issues of hardship and other equity considerations. I feel a little uncomfortable not having some kind of an administrative procedure to allow this to happen once we implement this because I know there are going to be people who have problems and that's an awful lot of people calling Pat. I don't necessarily want to create a problem if the majority of this Council goes with this to get it in place and have it become effective and have it move forward, but on the other hand, I have kind of a queasy feeling about some of these administrative things. We've only started to explore a few of them with Pat and I think one of the gentlemen who testified asked some questions of Pat about the number of permits that might be held, and so on and so forth and those kinds of questions haven't been dealt with either.

TILLION: Bob first, and then we'll have Pat come out with those answers.

ALVERSON: I'd like to point out in regards to the gentleman that lost his vessel that if he had not lost his vessel he'd be stuck with what he had and everyone else who hasn't sunk their vessel is stuck with what they have. At least under the provision that we've come forward with he can replace his vessel within 10 net tons and anybody in the fish business knows how tons can be manipulated so I imagine he's going to be able to accommodate his problem fairly easily. The other issue is if you make an exception for him to go out carte blanche and purchase it, you're going multiply him times maybe a hundred for everyone who's going to go out and covertly and say well, I've got to upgrade, in which case you'll probably lose a lot of support for this program.

COLLINSWORTH: Maybe Pat can answer some of those questions now.

TRAVERS: There were six questions that were asked by the gentleman who testified (Peter Allan, Kodiak).

The first is whether the system as proposed in the draft would provide a windfall for a fisherman who was on the verge of retiring anyway. I guess the response is that the draft as it currently is would limit the extent to which that permit right could be transferred through the substitution measure which would allow a substitute to use the right of the original person, but there would be limits on the extent to which it could be transferred beyond the original substitute.

The second question is what system we would use to determine if the vessel were eligible to fish. As it currently is, the only vessels that would be limited would be vessels over 5 net ton and I've been informed that the IPHC has extensive information on those vessels which it does not have on the vessels under 5 nt. As I understand it we have a very reliable set of information as to which vessels were actually used during the base period.

The third questions is one that Dr. Collinsworth raised; whether there's an appeal for persons who might be excluded unlawfully or inequitably. The whole drafting of this alternative as well as the alternative that appeared in the Notice of Proposed Rulemaking was intended to minimize the range of issues on which this type of appeal might be necessary, in great contrast with the State limited entry system. An attempt was made to minimize the discretion that the agency would have in the implementation of this system. Basically, as much as was tied down in the regulations as possible. I think that the overriding consideration in the guidance that I was given in drafting this was to try to make sure that we didn't have to come up with a whole new administrative system that would require new personnel and new funds that just aren't going to be available to the fisheries service or other federal agencies in the foreseeable future and so we did quite a bit of analysis in the way in which that possibility could be minimized and what all the cases say is that what you should do is lay out, as specifically as possible, in the regulation who will be in and who will be out--make sure that all your equitable considerations are factored into that and then once that's in place, don't give the agency much discretion to allow exceptions. Once you start doing that, then you start coming under obligations to have full-fledged administrative hearings. So, I guess the response is that we hope that the regulation eliminated situations in which an appeal-type mechanism the way the State has it would be unnecessary.

He asked whether there were any mechanisms to prevent big operators from hiring members of the pool of 6500 or so people who would qualify under the draft. There is no provision for that. As I understand it, that wasn't viewed as being a major threat, at least during the period of the moratorium, so that it would be possible for people who qualify under the moratorium to be employees of some larger operation as long as they were on the vessel they would be . . .

TILLION: They would have to already own the boats, wouldn't they Patrick?

TRAVERS: Well, in the draft it only refers to the use of the vessels. We didn't tie it to ownership, so that would be a correct observation on the draft as it is right now.

Then the final question was will the comments that were made at the hearing today and in the public hearings that we had before be considered in Washington, DC when it's reviewed by the NOAA Central Office, and they will be. They're being summarized by Ron Miller and I assume that copies of the original comments will go back as well if they wish to follow up on the summaries. So, they will be considered and I believe that all the points that were made here have also been made at other times so I think the comments will be considered there.

LOKKEN: Did that take care of the questions that you raised, Don? Do you have any more questions in other words?

COLLINSWORTH: Not right now, Mr. Chairman. I appreciate Pat's comments. They certainly answered my questions; I don't know if they satisfied my concern, but he answered my questions.

LOKKEN: If you're through on that end, I'd like to back up a little bit here. I'm unhappy with the Pribilof Island part here and when Pat comes back with the draft, I presume then there will be little chance to change any parts of it, so I would like just to make sure that the . . . (continued discussion of this section).

3:15 p.m. (following the discussion on the Pribilof Islands)

BRANSON: I would just like to reiterate, Mr. Chairman, that the original purpose of the moratorium was to put a lid on new entrants into the halibut fishery and I wonder if it's really worth the convolutions we're going through trying to put a limitation on effort for this short period of the moratorium, this three years, to hold a fishery from going under five days in Southeast and under 13 days in the Central Gulf. It isn't going to reduce effort. It probably isn't even going to freeze effort. It will simply slow the expansion of effort somewhat. Certainly, a simple moratorium on entrants into the fishery based on those who only fished and no other requirement, or legally delivered fish between 1978 and 1982, eliminates an awful lot of the judgment calls that we've been agonizing over the last several days.

TILLION: I understand what you're saying, but if Mr. Lokken will go along with that vote, I'll follow him, but other than that, what do you do?

LOKKEN: Well, what he's saying is that he wants the moratorium on individuals only and individual, and you said that several times, could take his skiff and transfer it into a 120-ft crab vessel and that to me establishes a tremendous bureaucracy that does absolutely nothing and I'm agin' it.

BRANSON: I don't see how a season can get much shorter than five days.

UNIDENTIFIED: (Campbell?) Well, and aren't we talking about a moratorium where those things probably will occur. We're not talking about a limited entry program. When you start talking about those things, Harold, you're talking a limited entry program. I want a moratorium, but it's got to be very simple and very clean and I think if we had some time, maybe another 30 days, we probably could work something up. But we're in this time crunch and when we get in those we make a lot of mistakes, we also don't have the finances available, so not having any person that . . . and I certainly don't want to tell a fisherman to call our attorney, you know, and get an opinion from him. Pat, I just think attorneys are not the people to handle these things. That's our job or some hearing board that we appoint, not you. So we find ourselves in a real position here with something I just can't support.

(Break)

TILLION: It's going to take us a while to get any typing done, so we thought we take up some other items, . . .

(halibut was not taken up again until the next morning, Friday, April 1)

LOKKEN: (Re troll gear)

TRAVERS: (Re residents of 56°N)

CAMPBELL: Moved to adopt changes proposed by Travers; carried

CAMPBELL: Mr. Chairman, as I understand it now, under the provisions of this moratorium you are able to transfer, sell, etc. within the class. Is that correct?

TILLION: The widows can reach outside the class.

CAMPBELL: Could I then ask, would it be possible, I think the thing still bothers me that. . . can we somehow be made aware by. . . I don't want to get into any substantial reporting system, but I would like to know what problems are occurring, what complaints are occurring and somewhere, if we could have given to us perhaps at our meetings or something like that, a recap of those complaints or problems so we can see if there's a pattern or one particular thing that perhaps we missed or something we should be looking at.

TILLION: I consider that a very reasonable request. In fact, I would think that it would be something that should be done automatically with any bookkeeping. Gentlemen, your pleasure.

COLLINSWORTH: Along the same line as Jim, I was thinking about that this morning myself. We are entering into a rather a new program if we adopt this that we haven't dealt with before. It can serve, I think, as something of a

case study that not only this Council but other Councils may want to be able to observe. So that if we did have some means of tracking the effect of what we're doing. We are anticipating that we'll have a certain impact. Being able to look at where we're at now and where we are a year or two from now and be able to evaluate if we actually got where we thought we were going I think it would be useful. And I would suggest that perhaps in a year, if we adopt this, at this time next year for example we might hold an oversight type look at the moratorium to see if, in fact, it needs to be modified and if we're getting where we want to go.

TILLION: We'll do that automatically, I don't think that . . .

LOKKEN: Well, we know it's automatic, but our constituents may not, so I think if it passes a motion ought to be made to do the things that Jim and Don suggests. I think there excellent suggestions and we ought to have it on the record so people know we have done that officially and not just informally.

TILLION: Is that the unanimous consensus of the the Council? I think we can just direct our Executive Director to do it. You will be kept up on the issue as it progresses and we might not wait for one year, we might have it before that.

COLLINSWORTH: I might suggest to the University of Alaska this might make a good master's thesis for a graduate student to take a look at this process; it's a real timely issue that the University might be interested in.

LOKKEN: I move that the Council approve the moratorium as revised here by the motions this morning.

TILLION: Do I hear a second?

SPECKING: I'll second.

TILLION: It's been moved and seconded that Draft I, 3/31/83, Dual Moratorium Option, be adopted. Would you care for a roll call or is the voice vote satisfactory.

TILLION: All those in favor signify by saying aye. Oppose: (Petersen and Stephan oppose). Demmert not in attendance.

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May 26, 1983

NOAA Addressee

Dear :

The North Pacific Fishery Management Council reviewed the NMFS proposal for an appeals/exceptions provision of the halibut moratorium regulation at its meeting of May 25, 1983. The Council rejected the NMFS proposal by a vote of 8 to 2 with one member abstaining.

The Council acknowledged the NMFS concerns that people not be inequitably excluded from the halibut fishery under the moratorium and that a procedure exist by which people can appeal an initial determination that they do not meet the moratorium standards. The Council majority believes that these concerns are addressed adequately in the moratorium as it was adopted by the Council on April 1, 1983. The concern that people be excluded from the fishery only on grounds that are fair and equitable is accomodated by the specific exemptions that have been included in the moratorium as adopted. The concerns that the public have access to an appeal procedure for determinations of ineligibility under the moratorium is addressed by the fact that the civil penalties provision of the Northern Pacific Halibut Act of 1982 provide for exactly such a procedure. Under this procedure, persons who believe that they are eligible to participate under the moratorium will not be subject to a prior restraint from doing so. If their participation results in enforcement action against them, they will be able to make their cases informally to NOAA Regional staff before assessment of civil penalties. Where a penalty is assessed by NOAA Regional staff, the respondent can obtain a formal trial-type hearing on the validity on his or her claim before an administrative law judge. Informal advice from NOAA Regional staff concerning the eligibility of included people and vessels under the moratorium can also be obtained before actual participation in the fishery.

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Reliance on the civil penalty process as the appeal procedure under the moratorium has the following advantages:

1. It permits reliance on existing administrative structures, thereby precluding the expense of setting up new adjudicatory institutions;
2. It permits greater informality and flexibility than would an appeal procedure of the kind recommended by NMFS due to the flexibility allowed to NOAA in its exercise of prosecutorial discretion;
3. It tends to promote self-exclusion of persons who clearly would not qualify under the moratorium, since they would be very likely to incur penalties as a result of the civil penalty process.

The Council majority rejected the NMFS hardship appeals provision for several reasons.

The proposal as submitted for Council consideration might not withstand judicial scrutiny because it provides no formal hearing process after the Regional Director has made a decision adverse to a fisherman's interest. Also, there are no standards by which hardship is to be adjudged other than a seemingly arbitrary definition.

The NMFS proposal attempts to categorically discount participation during the term of the moratorium from consideration for qualification under any future limited entry system the Council may adopt. This action is clearly contrary to the mandate of Section 303(b)(6)(A) of the Magnuson Fishery Conservation and Management Act (incorporated into the Halibut Act by reference) that present participation in the fishery be taken into account when a system of access limitation is established.

The NMFS appeals/exceptions provision allowing for exemptions from the moratorium eligibility criteria, if included in the proposed rule, would constitute an admission that the moratorium itself is not fair and equitable. Assertions to the contrary were made in the supporting documentation for the

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proposed rule. This inconsistency would place the proposed rule in direct contravention with the fairness and equity standard of Section 5(c) of the Halibut Act.

The NMFS hardship appeal provision is viewed by the majority of the Council as contrary to the sole purpose of the moratorium, which is the prevention of an influx of new entrants into the fishery who hope to gain some future limited entry right. If this objective is not met, those speculative entrants would have to be removed from the fishery in order to establish an effective access limitation system in the future. The Council is seeking to prevent this economic dislocation by the moratorium. This failing, the moratorium will not meet a primary requirement of Section 5(c) of the Halibut Act that any allocation or assignment of fishing privileges among United States fishermen be necessary.

Those in NMFS who support the appeals provision have stated that there would be no great "rush" of applicants for exemptions. Based upon the State of Alaska experience with its limited entry system, the majority of the Council believes otherwise. The State limited entry system grants fishery access pending a final determination of a case and approximately one in fifteen applicants have been included in the formal adjudicative process. Because fishermen in this area have prior experience with hardship appeals processes through the State system, they are fully aware of all the benefits associated with getting their case included in such an adjudicative process. Considering the potential pool of applicants for moratorium exemption (all those who are not allowed into the fishery under the specific moratorium criteria), the class of appellant/participants could be in the thousands. Again, the majority of the Council believes that an appeal provision that would allow this is contrary to the purpose of the moratorium.

The hardship appeals process would actually allow new entrants into the fishery during the term of the moratorium. Under this provision, fishermen must be allowed into the halibut fishery pending a final determination of their exemption request. This constitutionally guaranteed access would provide a substantial incentive for frivolous or fraudulent appeals and would

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allow an influx of new participants into the fishery during the three-year moratorium. This class of interim participants would suffer economic dislocation if removed from the fishery by some future permanent limited entry system.

The majority of the Council is also of the opinion that the NMFS proposal was submitted for consideration not because the moratorium was vulnerable to statutory or constitutional challenge, but because the inclusion of the proposal would expedite the review process within the NMFS/NOAA Central offices. This attempt to substitute an agency decision for a Council management decision solely for policy reasons is viewed as a matter of grave concern by the Council, and could be considered as contrary to the management process delineated in the Magnuson Fishery Conservation and Management Act. An agency action such as this could set a dangerous precedent where fisheries are not managed by a Regional Council that has fully considered the merits of a particular plan, but by the predispositions of agency employees.

The Council is also concerned about the lack of direct communication from NMFS/NOAA reviewers and the failure by those individuals to timely notify the Council of their concerns regarding an appeal process. The Council was not fully informed of agency insistence on a hardship appeal procedure until the week of May 9-13, although the proposed rule was initially forwarded by the Council early in November 1982 and the Council adopted the proposed rule on April 1, 1983.

The Council is deeply concerned by the recent decision to classify in the moratorium proposal as a "major rule" within the meaning of the term in Executive Order 12291. In an Action Memorandum drafted on November 10, 1982, NMFS Central Office initially determined the proposed rule was not a major rule because it would not result in:

1. an annual effect on the economy of \$100 million or more;
2. a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; or

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3. significant adverse effect on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.^{1/}

In a memorandum from NMFS Central Office dated May 20, 1982 it was concluded, however, that the proposed rule should be a major rule because it would have significant adverse effects on the fishery. No evidence was offered to support this conclusion.

During the conference call between the Council and NMFS Central staff on May 25, 1983, it was revealed that the reason for the major rule determination was that the Council may implement a permanent limited entry system some time in the future. EO 12291 Section 2(e) was cited as support for this position; however, the Council is of the opinion that Section 2 is a "General Requirements" section that must be followed by all agencies when promulgating or reviewing any rule - major or nonmajor - and does not set out the characteristics of a major rule. That definition is provided in Section 1(b). By NMFS Central office's own admission in the November 10, 1982 Action Memorandum and its apparent abandonment of any attempt to associate the proposed rule with significant adverse effects, the proposed rule does not fall within the major rule definition. For this reason, the majority of the Council believes that the major rule determination was made solely for reasons personal to NMFS Central office and not because the proposed rule fell within the scope of the major rule provisions of EO 12291.

The Council hopes that its intent regarding the form of the moratorium is clear after this reaffirmation of our initial vote on the proposed rule. The Council believes that the action on the moratorium at the March meeting was sufficient because a proposed rule was adopted that is fair and equitable, can withstand legal challenge, does not cause significant adverse effects in the fishery and is reflective of the wishes of the majority of the halibut fishing industry.

^{1/} This conclusion was supported by a thorough economic analysis contained in both the RIA/Initial RFA and the RIA/Final RFA prepared by NMFS Alaska Region.

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The Council also hopes that its concerns over the manner in which the proposed rule has been treated since Council adoption are given full consideration. If the regional council system is to operate as intended, it is essential that Council fishery management decisions be judged on their merits. To this end, close communications between NMFS Central Office and the Councils are essential.

Sincerely,

Clement V. Tillion
Chairman